

## 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.

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## FIRST CIRCUIT

***In re Price*, 685 F.3d 1 (1st Cir. 2012)**

**QUESTION:** Whether a private cause of action is created pursuant to a mutual legal assistance treaty (MLAT) and 18 U.S.C. § 3512, a statute governing foreign requests for assistance in criminal investigations and prosecutions. *Id.* at 9.

**ANALYSIS:** The court discussed the history and purpose of an MLAT, and explained the generally accepted view holds that a treaty does not create a private cause of action in domestic courts. *Id.* at 10–11. “Express language in a treaty creating private rights can overcome this presumption,” but the court pointed out that this type of express language was absent in the MLAT. *Id.* at 11. Finally, the court discussed the propriety of a district court exercising discretion under 18 U.S.C. § 3512 in deciding not to quash a subpoena. *Id.* at 14–15.

**CONCLUSION:** The 1st Circuit held that an MLAT does not create a private cause of action in domestic courts absent express language in the treaty to that effect, and that, under 18 U.S.C. § 3512, a district court did not abuse its discretion in denying relief based on a balancing of the interests involved. *Id.*

***In re Puffer*, 674 F.3d 78 (1st Cir. 2012)**

**QUESTION:** Whether “fee-only” plans in Chapter 13 bankruptcy cases are per se proffered in bad faith. *Id.* at 79.

**ANALYSIS:** The court pointed out that the “good faith” requirement for filing a Chapter 13 plan is derived directly from the Bankruptcy Code, 11 U.S.C. § 1325(a)(3). *Id.* at 81. The court noted that there is no precise definition for the term “good faith.” *Id.* Next, the court referred to a prior decision in which it measured “good faith” by applying a totality of the circumstances test. *Id.* at 81–82. The court reasoned that a totality of the circumstances test should be “implied equally to inquiries under 11 U.S.C. § 1325,” in determining “good faith” for purposes of confirming a Chapter 13 plan. *Id.* at 82. The court cautioned against filing “fee-only” plans in Chapter 13 bankruptcy cases, but stated that “good faith” is an equitable concept, and, as such, it is “particularly insusceptible to per se rules.” *Id.* at 82.

**CONCLUSION:** The 1st Circuit held that “fee-only” plans in Chapter 13 bankruptcy cases are not per se proffered in bad faith. *Id.* at 80.

***Palmquist v. Shinseki*, 689 F.3d 66 (1st Cir. 2012)**

**QUESTION:** Whether the Rehabilitation Act of 1973 entitles a plaintiff to relief when “retaliation for his complaints about disability discrimination is a motivating factor in, but not the but-for cause of, an adverse employment action.” *Id.* at \*1.

**ANALYSIS:** The court held that “the Rehabilitation Act borrows the causation standard from the Americans with Disabilities Act of 1990 (ADA)” and applied that same standard in the case at bar. *Id.* at \*18. The court also considered whether Title VII of the Civil Rights Act of 1964 provided any guidance on how to resolve the present issue. *Id.* at \*13-14. The court reasoned that the ADA’s but-for causation standard controls whether a defendant may be held liable for retaliation and stated, “[w]here, as here, that standard has not been satisfied, the Rehabilitation Act dictates that Title VII’s mixed-motive remedies do not pertain.” *Id.* at \*28.

**CONCLUSION:** The 1st Circuit held that the Rehabilitation Act of 1973 does not “entitle a plaintiff to relief when retaliation for his complaints about disability discrimination is a motivating factor in, but not the but-for cause of, an adverse employment action.” *Id.* at \*1.

***United States v. Cortés-Cabán*, 691 F.3d 1 (1st Cir. 2012)**

**QUESTION:** Whether “a conspiracy by law enforcement officers to plant controlled substances on victims in order to fabricate criminal cases . . . entail[s] the specific intent to distribute within the meaning of [21 U.S.C.] § 841(a)(1).” *Id.* at 16.

**ANALYSIS:** The court first noted that “distribute” is “defined broadly under § 841(a)(1),” and that the “defendants’ acts of transferring the drugs amongst each other and to the victims constitutes an intent to distribute the drugs under § 841(a)(1).” *Id.* at 18. The court further stressed that “[t]here is no language anywhere in the statute which supports defendants’ argument of non-coverage.” *Id.* The court emphasized that Congress made a “deliberate choice not to restrict § 841.” *Id.* at 19. Moreover, the court explained that “[t]he underlying goal of the distribution is, under the plain language of the statute, irrelevant to the question of whether there was a ‘distribution.’” *Id.* Looking at congressional intent, the court observed that “Congress was well aware of the question of legitimate handling of drugs, for it carved out exceptions, but those exceptions do not include the activities in which these defendants engaged.” *Id.*

**CONCLUSION:** The court held that “both the language and the intent of § 841(a)(1) is such that it applies” to a “conspiracy by law

enforcement officers to plant controlled substances on victims in order to fabricate criminal cases . . . .” *Id.* at 23, 16.

***United States v. Kearney*, 672 F.3d 81 (1st Cir. 2012)**

**QUESTION:** Whether an order to pay restitution under 18 U.S.C. § 2259 to a victim of child pornography satisfied the requisite statutory requirements. *Id.* at 91.

**ANALYSIS:** The court addressed whether “Congress was careful to specify some definitions of recoverable losses [in § 2259] where it had not done so in other restitution statutes.” *Id.* at 92. The court then examined § 2259 and addressed three specific sub-issues raised by the restitution claim: “(1) the requirements for an individual to be considered a ‘victim’ within the meaning of § 2259 (c); (2) the causation requirement applicable to determining which costs incurred by the victim [in § 2259(b)(3)] are compensable; (3) . . . whether the district court made a reasonable determination of [the restitution amount].” *Id.* at 93 (internal quotation marks omitted).

**CONCLUSION:** The 1st Circuit held that the restitution awarded to the victim of child pornography met the statutory requirements of § 2259. *Id.* at 101.

SECOND CIRCUIT

***Adams v. Holder*, 692 F.3d 91 (2d Cir. 2012)**

**QUESTION ONE:** Whether the five-year time limitation of 8 U.S.C. § 1256(a), a statute governing the rescission of the adjustment status of an alien and its effect upon naturalization, applies to aliens “who acquired lawful permanent resident status through consular processing rather than an action of the Attorney General.” *Id.* at 96.

**ANALYSIS:** The court analyzed the text, structure, and legislative history of § 1256(a) and concluded that Congress’ reference to a five-year time period “after the status of a person has otherwise been adjusted” only “refers to a change in the existing immigration status of an alien already in the United States.” *Id.* at 97. This phrase does not apply to consular proceedings, the court reasoned, because they create a status relationship with the country as opposed to adjusting an already existing status, as is required by § 1256(a). *Id.* The court explained that the Attorney General has the power to adjust or revoke the status of an alien already in the country, whereas the Department of State and the Secretary of State bear the power to grant or revoke an immigrant visa

through consular proceedings that take place outside of the country. *Id.* at 98–99. The court found support for this interpretation in the text, structure, and legislative history of § 1256(a). *Id.* at 99–100.

**CONCLUSION:** The 2nd Circuit held that when Congress, under § 1256(a), “authorized the Attorney General, for a period up to five years, to rescind an alien’s adjustment of status, it was authorizing rescission only of a prior decision by the Attorney General to change the status of an alien already in the United States to that of a lawful permanent resident,” and did not intend for the five-year limitation to apply to a status granted through consular proceedings. *Id.* at 101.

**QUESTION TWO:** Whether the five-year time limitation of 8 U.S.C.A. § 1256(a) applies “not only to the Attorney General’s power of rescission, but also to his power of removal.” *Id.* at \*10–11.

**ANALYSIS:** The court analyzed the language of § 1256(a) and noted that it specifically authorized the Attorney General to “rescind the adjusted status, and nothing more,” but does not indicate that subsequent actions are subject to a time limitation or make any mention of removal. *Id.* at 96. The court reasoned that merely because rescission is a lesser consequence than removal, it does not imply that Congress intended to impose the five-year limitation on removal as well. *Id.* at 104–05. Furthermore, the court stated that narrowly interpreting the scope of the time limitation did not effectively eliminate the limitation, and pointed out that since the consequences of rescission are less severe than removal, “the Attorney General need not afford the same procedural safeguards to an alien facing rescission as must be provided to an alien facing removal.” *Id.* at 105. Finally, the court explained that this interpretation was proper under a *Chevron* analysis, and that the rule of lenity did not apply since there was enough evidence in the text, structure, and legislative history of § 1256(a) to support such an interpretation. *Id.* at 107.

**CONCLUSION:** The 2nd Circuit held that § 1256(a)’s five-year limitations period does not apply to removal orders. *Id.* at 101.

***Brault v. SSA*, 683 F.3d 443 (2d Cir. 2012)**

**QUESTION:** Whether an Administrative Law Judge (ALJ) is required to expressly state his reasons for accepting a vocational expert’s challenged testimony. *Id.* at 443.

**ANALYSIS:** The court reasoned that “[a]n ALJ does not have to state on the record every reason justifying a decision.” *Id.* at 448. The court referenced the 8th Circuit’s finding that “[a]lthough required to develop the record fully and fairly, an ALJ is not required to discuss every piece of evidence submitted.” *Id.* (internal citations and quotation

marks omitted) The court further noted that “[a]n ALJ’s failure to cite specific evidence does not indicate that such evidence was not considered.” *Id.* (internal quotation marks omitted).

**CONCLUSION:** The 2nd Circuit held that assuming the ALJ considered the objection to the vocational expert’s testimony, “[t]here is no requirement that the ALJ discuss his specific analysis of it.” *Id.* at 448.

***Cage v. Commissioner of Social Security*, No. 09-4530-cv, 2012 U.S. App. LEXIS 17371 (2d Cir. Aug. 17, 2012)**

**QUESTION:** Who bears the burden of proof with respect to whether the claimant’s drug addiction or alcoholism (DAA) was a contributing factor material to the determination of disability in an application for Supplemental Security Income benefits? *Id.* at 123.

**ANALYSIS:** The court recognized that the Contract with America Advancement Act (CAAA) amended the Social Security Act (SAA) to provide that “an individual shall not be considered disabled if alcoholism or drug addiction would be a contributing factor material to the Commissioner’s determination that the individual is disabled.” *Id.* (internal quotation marks omitted). While “the CAAA does not specify who bears the burden of proof on DAA materiality . . . all of the other circuit courts that have considered this question have held that the claimant bears the burden of proving that her DAA is not material to the determination that she is disabled.” *Id.* The court proffered four reasons supporting the “weight of the authority that claimants bear the burden of proving DAA immateriality.” *Id.* First, the amended definition of “disabled” excluded conditions materially caused by DAA. *Id.* at 123–24. Second, a claimant was “better positioned than the SSA to offer proof as to the relevance of any DAA to . . . [his or her] disability determinations because facts relevant to those determinations ordinarily would be in . . . [his or her] possession.” *Id.* at 124. Third, the court pointed out that “holding claimants to this burden accords with the Congressional purpose in enacting the CAA.” *Id.* Finally, the court found that long-standing precedents from other circuits counseled in favor of placing the burden on the claimant. *Id.* at 124–25.

**CONCLUSION:** The Second Circuit concluded “that claimants bear the burden of proving DAA immateriality.” *Id.* at 123.

***Higgins v. Holder*, 677 F.3d 97 (2d Cir. 2012)**

**QUESTION:** Whether witness tampering is an “offense relating to the obstruction of justice” under 8 U.S.C. § 1101(a)(43)(S), as it is interpreted by the Board of Immigration Appeals (BIA). *Id.* at 100.

**ANALYSIS:** The court first noted that “[t]he [Immigration and Nationality Act (INA)] defines the term ‘aggravated felony’ to include . . . ‘an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year.’” *Id.* at 100 (internal citation omitted). The court also noted that the BIA interpreted obstruction of justice offenses as those “interfere[ing] with the proceedings of a tribunal or requir[ing] an intent to harm or retaliate against others who cooperate in the process of justice or might otherwise so cooperate.” *Id.* at 101. The court reasoned that although there was a circuit split over how much deference to give to the BIA’s interpretation, it adopted the BIA’s broader “categorical approach that looks to the elements of the penal statute rather than the particulars of the alien’s conduct,” since witness tampering fell within even the most restrictive view articulated by the 3rd Circuit. *Id.* at 104. The court, accordingly, posited that a conviction of witness tampering required an actus reus of “induc[ing] or attempt[ing] to induce a witness to testify falsely . . . [or] withhold testimony,” and a mens rea of “belie[f] that an official proceeding is pending or about to be instituted.” *Id.* at 104.

**CONCLUSION:** The 2nd Circuit held that witness tampering constituted “an offense relating to obstruction of justice, since it . . . included as elements both (1) the actus reus of an active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice, and (2) the mens rea of a specific intent to interfere with the process of justice.” *Id.* at 102 (internal citation and quotation marks omitted).

***Fabrikant v. French*, 691 F.3d 193 (2d Cir. 2012)**

**QUESTION:** “[W]hether a private animal-rescue organization and its employees and agents act under color of state law for purposes of 42 U.S.C. § 1983 when they perform surgery on seized pets against the owner’s wishes or without the owner’s knowledge.” *Id.* at \*27.

**ANALYSIS:** The court first noted that “[b]ecause the United States Constitution regulates only the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish that the challenged conduct constitutes state action.” *Id.* at \*29–30 (internal citation omitted). “[S]tate action requires both an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, and that the party charged with the deprivation must be a person who may fairly be said to be a state actor.” *Id.* at \*30 (internal citation and quotation marks omitted). Specifically, “there must be such a close nexus between the



[s]tate and the challenged action that the state is *responsible* for the specific conduct of which the plaintiff complains.” *Id.* at \*31 (internal citation and quotation marks omitted). The test the court adopted to determine “whether a private entity acts under color of state law for purposes of § 1983 [began] by identifying the specific conduct of which the plaintiff complains, rather than the general characteristics of the entity.” *Id.* at \*32 (internal citation and quotation marks omitted). The court determined that “[t]he spaying and neutering of the dogs, like the search and arrest, constituted state action because they were part of the state function of animal control delegated to the SPCA by state law.” *Id.* at \*34. “[W]hen the SPCA, operating under the delegated animal-control authority provided by New York’s Agriculture and Markets Law, seizes animals from their owners and then sterilizes them, it acts under color of state law because it performs an exclusively public function that has been delegated to it by the state.” *Id.* at \*42.

**CONCLUSION:** The 2nd Circuit held that private animal-rescue organizations, such as the SPCA, that are delegated the authority to perform animal control by a municipality “are state actors for purposes of § 1983 when they perform surgery on animals in their care while those animals are being kept from their owners by the authority of the state, following searches and seizures carried out by the agencies pursuant to warrants.” *Id.* at \*45.

***Guamanrrigra v. Holder*, 670 F.3d 404 (2d Cir. 2012)**

**QUESTION ONE:** “[W]hether the notice requirements of Immigration and Nationality Act (“INA”) § 239(a)(1), 8 U.S.C. § 1229(a)(1), are satisfied by service of a Notice to Appear that indicates that the date and time of the hearing will be set in the future, followed by service of a separate notice specifying the precise date and time of the hearing . . . .” *Id.* at 405.

**ANALYSIS:** The court stated that aliens may establish their eligibility for adjustment of status and cancellation of removal if they can demonstrate that they were physically present in the United States for a continuous period of ten years immediately prior to the date of the application. *Id.* at 409. The 2nd Circuit adopted the rationale of the 7th circuit, which “held that the notice requirements of § 239(a)(1) may be satisfied by a combination of documents that, jointly, provide the specific notice required by the statute.” *Id.* at 409-10.

**CONCLUSION:** The 2nd Circuit held that “service of a Notice to Appear that (alone or in combination with a subsequent notice) provides the notice required by § 239(a)(1)” satisfied the notice requirement of INA § 239(a)(1). *Id.* at 410.



**QUESTION TWO:** Whether notice under the Immigration and Nationality Act (“INA”) § 239(a)(1), 8 U.S.C. § 1229(a)(1) “triggers the ‘stop-time rule’ of INA § 240A(d)(1)(A), 8 U.S.C. § 1229b(d)(1)(A), notwithstanding any defect in service of subsequent notices of change in the time or place of the hearing under INA § 239(a)(2), 8 U.S.C. § 1229(a)(2).” *Id.* at 405.

**ANALYSIS:** The court had previously decided that “service of a Notice to Appear that (alone or in combination with a subsequent notice) provides the notice required by § 239(a)(1).” *Id.* at 410. The court stated that the stop-time rule “specifies that the time of accrual of physical presence ‘shall be deemed to end . . . when the alien is served with a notice to appear.’” *Id.*

**CONCLUSION:** The 2nd Circuit held “that the stop-time rule is triggered upon service of a Notice to Appear that (alone or in combination with a subsequent notice) provides the notice required by § 239(a)(1), notwithstanding any imperfections in the service of subsequent notices of changes in the time or place of a hearing under § 239(a)(2).” *Id.*

***In re Coudert Bros. LLP*, 673 F.3d 180 (2d Cir. 2012)**

**QUESTION:** Whether, in considering a tort claim against a debtor in bankruptcy, the choice of law rules of the state in which the bankruptcy proceeding is taking place should apply or whether the choice of law rules of the state in which the complaint was filed, where that filing precedes the bankruptcy petition, should govern. *Id.* at 190.

**ANALYSIS:** The court analyzed Supreme Court and 2nd Circuit precedent regarding the requirement that the bankruptcy forum’s choice of law rules govern, which it held was intended to prevent forum shopping. *Id.* at 188–89. The Second Circuit then distinguished those cases from the present case based on the fact that the plaintiff had commenced the litigation prior to the debtor’s bankruptcy petition, and thus, “did not choose to litigate in [the forum state].” *Id.* at 190. The court reasoned that “it would be fundamentally unfair to allow [the debtor’s] bankruptcy, coming as it did in the midst of the [tort] action, to deprive [the plaintiff] of the state-law advantages adhering to the exercise of its venue privilege.” *Id.* The court further noted that “[t]o hold otherwise would be to allow the defendant [debtor] to use a device of federal law (the bankruptcy code) to choose the forum and accompanying choice of law—a practice forbidden by [Supreme Court precedent],” and also would “lead to the ironic result that [the forum state’s] anti-forum shopping [statute] would be applied to defeat the

claim of a party that did not shop for [the state] as a forum. *Id.* at 190–91.

**CONCLUSION:** The 2nd Circuit held that the choice of law rules of the state where the underlying prepetition claim was filed should be applied in a federal bankruptcy proceeding. *Id.* at 182.

***Ramos v. Baldor Specialty Foods, Inc.*, 687 F.3d 554 (2d Cir. 2012)**

**QUESTION:** Whether under the Fair Labor Standards Act (FLSA), and for purposes of determining whether an employee is eligible for an executive exemption from the FLSA’s overtime-pay protections, “a [work] unit can have ‘a permanent status and a continuing function’ when it is functionally identical to other [work] units, when it works the same shift as other units, and when it operates in the same physical space as other units.” *Id.* at 561.

**ANALYSIS:** The court first recognized that the illustrative list of subdivisions provided by the Department of Labor was not intended to restrict the categorization of work units to just those “that perform distinct tasks or are otherwise distinguishable by some ‘specific standard,’” because that requirement is not stated in the regulatory text. *Id.* at 562. The court observed that neither the Department of Labor nor any other circuit had adopted such a construction of the regulation. *Id.* The court then cited case law from various jurisdictions indicating that no court had construed a uniqueness determination to the exemption. *Id.* at 562–63. Recognizing a trend in the case law, the court stated that “[w]hile operating in different locations, working different shifts, or performing distinct functions from other teams are certainly factors that *can* support the conclusion that a team of employees constitutes a customarily recognized department or subdivision,” it had not found any case “that goes so far as to *require* one of those specific types of distinguishability as a matter of law.” *Id.* at 563. The court added that neither the Department’s interpretations nor the scant legislative history of the FLSA’s executive exemption support such a reading.” *Id.*

**CONCLUSION:** The 2nd Circuit held that the second element of the executive exemption to the FLSA overtime-pay rule, 29 C.F.R. § 541.100(a)(2), does not require that units within the workplace have uniqueness of functionality, location, or time. *Id.* at 564.

***Reynolds v. Barrett*, 685 F.3d 193 (2d Cir. 2012)**

**QUESTION:** “Whether recourse to the pattern-or-practice evidentiary framework is appropriate in a suit against individual state officials brought pursuant to 42 U.S.C. § 1983 for intentional discrimination.” *Id.* at 197.

**ANALYSIS:** The court first noted that equal protection claims brought under 42 U.S.C. § 1983 must evidence discriminatory intent and cannot be based solely on facially neutral policies with disproportionate adverse impact on minorities. *Id.* at 201. Next, the court determined that, although “Title VII’s core substantive standards are also applicable to employment discrimination in violation of the Equal Protection Clause,” Title VII’s pattern-or-practice burden-shifting framework could not be applied in analyzing discrimination claims brought against individual state officials pursuant to § 1983. *Id.* at 202. The court reasoned that “the pattern-or-practice framework is ill-suited in identifying which individual defendants engaged in purposeful discrimination” because “[s]tatistics proffered during the ‘liability phase’ of a pattern-or-practice suit purport to demonstrate that a pattern of discrimination exists at an entity. *Id.* at 204. The court further reasoned that statistics showing entity-level discrimination are insufficient to establish that a particular individual defendant engaged in intentional discrimination. *Id.* Finally, the court noted that using the “pattern-or-practice framework in the Equal Protection context would substantially circumvent the petitioner’s obligation to raise a prima facie inference of individual discriminatory intent.” *Id.*

**CONCLUSION:** The 2nd Circuit held that the pattern-or-practice evidentiary framework was not appropriate to establish liability in a suit against individual defendants. *Id.* at 205.

***United States v. Esso*, 684 F.3d 347 (2d Cir. 2012)**

**QUESTION:** Whether a defendant is denied the constitutional right to a fair trial where a “district court allow[s] the jury to take home the copy of the indictment that ha[s] already been provided for use in the jury room.” *Id.* at 350.

**ANALYSIS:** The 2nd Circuit acknowledged that “the jury system is meant to involve decision making as a collective, deliberative process.” *Id.* at 351. The court, however, rejected “the argument that permitting the jury to take the indictment home was in error merely because it might lead jurors to form ideas about the case by themselves.” *Id.* (internal quotation marks omitted). “Such private deliberations . . . may in fact enable jurors to participate more thoughtfully in the collective process of reaching a verdict.” *Id.* On the other hand, the court expressed its “doubts about the wisdom of the practice,” because “[s]ending trial materials home with jurors increases the chance of exposing the jury to outside influences” and of “overemphasiz[ing] its significance, since it is a one-sided presentation of the prosecution’s view of the case.” *Id.* at 351–52. Since the district court provided “clear and emphatic limiting

instructions,” however, the 2nd Circuit did not find that this practice constituted trial error. *Id.* at 352. This decision is “consistent with cases allowing jurors to take home copies of jury instructions,” and with the notion that trial judges should be accorded “great discretion . . . to manage their own courtrooms.” *Id.* at 352–53, 354.

**CONCLUSION:** The 2nd Circuit held that “so long as jury deliberations have begun and appropriate cautionary instructions are provided, permitting the jury to take the indictment home overnight does not deprive a defendant of a fair trial.” *Id.* at 350–51.

***Viacom International, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012)**

**QUESTION:** Whether the common law willful blindness doctrine applies in the Digital Millennium Copyright Act (DMCA) context. *Id.* at 34–35.

**ANALYSIS:** The court previously held in the trademark infringement context that “[w]hen [a service provider] has reason to suspect that users of its service are infringing a protected mark, it may not shield itself from learning of the particular infringing transactions by looking the other way.” *Id.* at 35 (internal quotations marks omitted). The court reasoned that, “[b]ecause the statute does not speak directly to the willful blindness doctrine, § 512(m) limits—but does not abrogate—the doctrine.” *Id.* (internal quotation marks omitted). Since the willful blindness doctrine is not abrogated by § 512, a fact finder must determine “whether the defendant made a deliberate effort to avoid guilty knowledge . . .” in the DMCA context. *Id.* (internal quotation marks omitted).

**CONCLUSION:** The 2nd Circuit held that “the willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA.” *Id.*

### THIRD CIRCUIT

***Estate of Kensinger v. URL Pharma, Inc.*, 674 F.3d 131 (3d Cir. 2012)**

**QUESTION:** Whether, after a plan administrator distributes a deceased participant’s Employee Retirement Income Security Act (ERISA) governed 401(k) funds to the designated beneficiary, the estate of the decedent can sue the designated beneficiary to recover the funds when the designated beneficiary has previously waived her right to those funds pursuant to a divorce decree. *Id.* at 132.

**ANALYSIS:** The 3rd Circuit noted that the Supreme Court, considering a “virtually identical” case, held that a plan administrator correctly fulfills its statutory duty by paying the benefits to the ex-wife in accordance with plan documents. *Id.* at 133. The Supreme Court has remained silent on whether an estate can sue the ex-wife to recover the distributed benefits. *Id.* at 133–34. The 3rd Circuit stated that several state appellate courts have permitted a decedent’s estate to bring a post-distribution suit against the decedent’s ex-wife to enforce her waiver and found that the same applied in the instant case. *Id.* at 137–39.

**CONCLUSION:** The 3rd Circuit held that the decedent’s estate can sue the decedent’s ex-wife to enforce a waiver made pursuant to a divorce decree and thereby can recover the disputed ERISA governed 401(k) funds. *Id.* at 132.

***United States v. Richards*, 674 F.3d 215 (3d Cir. 2012)**

**QUESTION:** Whether an application of a sentencing enhancement by a district court under § 2C1.2(b)(3) should be reviewed under an abuse of discretion, clear error, or *de novo* standard of review. *Id.* at 218.

**ANALYSIS:** The court first established that “a more deferential standard of review is appropriate where . . . [it considers] a district court’s application of the Guidelines to a specific set of facts . . .” *Id.* at 219. The court declined to apply *de novo* review and stated that the abuse of discretion test “does not fit as well with the inquiry . . .” *Id.* at 223 (internal quotation marks omitted). According to the court, “[c]lear error review is appropriate when the legal issue decided by the district court is, in essence, a factual question.” *Id.* at 220. The court explained that the “factual nature of the determination favors the trial court’s experience and first-hand observation of testimony and other evidence.” *Id.* (internal quotation marks omitted).

**CONCLUSION:** The 3rd Circuit held that “the clearly erroneous standard is appropriate when reviewing a district court’s determination that the enhancement under § 2C1.2(b)(3) applies based on the facts presented.” *Id.* at 216.

***United States v. Williams*, 675 F.3d 275 (3d Cir. 2012)**

**QUESTION:** Whether 18 U.S.C. § 3583(e)(3), “which governs the modification and revocation of supervised release following imprisonment,” is subject to the aggregate limit of subsection § 3583(h), which “concerns the term of supervised release that may be imposed following a term of post-revocation imprisonment.” *Id.* at 278.

**ANALYSIS:** The court first considered the Appellant’s interpretation of § 3583, “that, since the authorized term of supervised release is

reduced by the amount of prison time a defendant served for previous release violations, the maximum term of post-revocation imprisonment under subsection (e)(3) is likewise progressively reduced.” *Id.* at 279. The court rejected this interpretation and reasoned that subsection (e) “unambiguously sets the maximum prison sentence by reference to the length of supervised release statutorily authorized for the conviction offense, not for the length of supervised release authorized after a revocation imprisonment.” *Id.* The court rejected the argument that the language “term of supervised release authorized by statute” contained in subsection (e)(3), “itself imposes an aggregate limit on post-revocation imprisonment.” *Id.* The court explained that “[s]ubsection (e)(3) refers to the *term of supervised release authorized by statute for the offense that resulted in such term of supervised release.*” *Id.* (internal quotation marks omitted).

**CONCLUSION:** The 3rd Circuit held that “subsection (e)(3) is not subject to the aggregate limit of subsection (h)” because “[s]ubsection (e)(3) clearly fixes the term of post-revocation imprisonment according to the former, and gives no indication that the aggregate limit of supervised release time under subsection (h) applies as well to the term of imprisonment that may be imposed when supervised release is revoked.” *Id.*

#### FOURTH CIRCUIT

##### ***In re Maharaj*, 681 F.3d 558 (4th Cir. 2012)**

**QUESTION:** “[W]hether, in light of the 2005 amendment to the Bankruptcy Code, 11 U.S.C. § 101 *et. seq.* (“the Code”), codified by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Pub. L. No. 109-8, 11 Stat. 23 (2005), the absolute priority rule continues to apply to individual debtors in possession proceeding under Chapter 11.” *Id.* at 560.

**ANALYSIS:** The 4th Circuit noted that after the 2005 amendments, bankruptcy courts have split on whether Congress intended the abrogation of the absolute priority rule. *Id.* at 563. The court explained that such courts either adopted the “broad view,” that Congress intended abrogation, or the “narrow view,” that Congress did not intend such a sweeping change to Chapter 11. *Id.* The court reasoned that the language of the BAPCPA amendment is too ambiguous to simply apply its plain meaning. Instead, the court looked at the specific and broader context within which Congress enacted the statute, reasoning that BAPCA § 1115, which amended § 1129(b)(2)(B)(ii) of the Code,

“add[ed] to the property of the estate of an individual post-petition acquired property and earnings[, and] [w]ithout a corresponding change to § 1129(b)(2)(B)(ii), individual debtors could no longer retain post-petition acquired property and earnings if they wished to ‘cram down’ a plan.” *Id.* at 569–70. The court further reasoned that, particularly in light of the Supreme Court’s strong disfavoring of implied repeal in the bankruptcy context, “if Congress had intended to abrogate such a well-established rule of bankruptcy jurisprudence, it could have done so in a far less convoluted manner.” *Id.* at 570–71. The court also posited that there is no indication in the BAPCPA’s legislative history that suggests Congress intended to repeal the absolute priority rule. *Id.* at 572.

**CONCLUSION:** The 4th Circuit held “that the absolute priority rule as it applies to individual debtors in Chapter 11 has not been abrogated by the BAPCPA.” *Id.* at 574.

***Johnson v. Zimmer*, 686 F.3d 224 (4th Cir. 2012)**

**QUESTION:** How the “household” size of a debtor seeking bankruptcy relief is to be calculated under Chapter 13, in light of the 2005 Amendments to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (“the Code”), codified by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (2005). *Id.* at 225.

**ANALYSIS:** The court first noted that the term “household” is not defined under the Bankruptcy Code. *Id.* at 231. The court determined that the dictionary definition of the term household does not resolve the matter because it has “multiple definitions of varying scope and consequence.” *Id.* at 232. The court next analyzed the term in light of words surrounding it in 11 U.S.C. § 1325(b)(3) and determined that reading “household” in context with the other terms in the Code does not resolve the uncertainty because different terms are used around the term in cross-referenced Code provisions. *Id.* at 233. The court rejected the “heads-on-beds” approach since it allows debtors to “broadly define their ‘households’ so as to include individuals who have no actual financial impact on the debtor’s expenses.” *Id.* at 236. Additionally, the court rejected an income tax dependent method as underinclusive. *Id.* at 239. Finally, the court determined that using an “economic unit” approach, which examines the economic interdependence of individuals to determine whether someone is an economic part of a household, is correct because it is consistent with § 1325(b), the BAPCPA and the Code as a whole. *Id.* at 237–38. The court reasoned that “Congress’ intent will most often be best implemented through a definition of



‘household’ that is based on whether individuals operate as a single economic unit and are financially interdependent.” *Id.* at 242.

**CONCLUSION:** The 4th Circuit held that the economic unit approach is appropriate to determine a debtor’s household size. *Id.*

***United States v. Lawson*, 677 F.3d 629 (4th Cir. 2012)**

**QUESTION:** “[W]hether [a] juror’s use of Wikipedia create[s] a rebuttable presumption of prejudice.” *Id.* at 641.

**ANALYSIS:** The court first noted that, in *Remmer v. United States*, 347 U.S. 227 (1954), the Supreme Court found a rebuttable presumption of prejudice arising in third party unauthorized communications with a juror during the course of a trial. *Id.* at 641. *Remmer*, however, did not “resolve the question whether the presumption is applicable in cases involving a juror’s unauthorized use of Wikipedia.” *Id.* at 644. Initially, the court recognized that unauthorized third party contact has a different nature “than a juror’s unauthorized use of a dictionary during jury deliberations.” *Id.* After further examining the application of *Remmer* in the 4th Circuit, the court observed that in both situations, “a defendant’s Sixth Amendment right to a fair trial is at issue,” thus threatening “the sanctity of the jury and its deliberations” beyond the court’s ability to control. *Id.* at 646.

**CONCLUSION:** The 4th Circuit held that the presumption as applied in *Remmer* “is applicable when a juror uses a dictionary or similar resource to research the definition of a material word or term at issue in a pending case.” *Id.* at 645.

***United States v. Dinkins*, 691 F.3d 358 (4th Cir. 2012)**

**QUESTION:** Whether “a defendant in a criminal case may be tried by an anonymous jury.” *Id.* at \*23.

**ANALYSIS:** The court determined that the decision to empanel an anonymous jury is subject to review for abuse of discretion. *Id.* at \*28. The court noted that, pursuant to 18 U.S.C. § 3432, a district court should base its decision on a preponderance of the evidence standard to avoid appellate review for abuse of discretion. *Id.* at \*35. The court also noted that a district court must take “reasonable precautions” to protect defendants’ rights. *Id.* at \*48.

**CONCLUSION:** The 6th Circuit held that a district court may empanel an anonymous jury. *Id.* at \*78.

***United States v. Powell*, 680 F.3d 350 (4th Cir. 2012)**

**QUESTION:** Whether the government “describing a defendant as a ‘liar’ is *per se* improper.” *Id.* at 358.

**ANALYSIS:** The court stated that while the 4th Circuit had not determined this issue, several other circuits have addressed it. *Id.* The 9th Circuit permitted such a description of a defendant when the evidence provided reasonable inferences, and the 7th Circuit found “no undue prejudice from labeling ‘the teller of [a] falsity a liar.’” *Id.* The 8th Circuit allowed the description so long as the prosecutor argued about the evidence. *Id.* The 2nd Circuit permitted the government’s remarks about a defendant so long as they were “not excessive or inflammatory.” *Id.*

**CONCLUSION:** The 4th Circuit joined the 2nd, 7th, 8th, and 9th Circuits in holding that it is not improper for the government to describe a defendant as a “liar.” *Id.*

#### FIFTH CIRCUIT

***Chilton v. Moser (In re Chilton), 674 F.3d 486 (5th Cir. 2012)***

**QUESTION:** Whether an inherited Individual Retirement Account (IRA) satisfies the requirements under 11 U.S.C. § 522(d)(12) of the Bankruptcy Code, and is exempt from the bankruptcy estate. *Id.* at 488.

**ANALYSIS:** The Court first addressed whether inherited IRAs are “retirement funds” under § 522(d)(12) since the phrase is not defined in the Bankruptcy Code. *Id.* The 5th Circuit noted that most courts have concluded that inherited IRAs are “retirement funds” as “the statute does not explicitly limit ‘retirement funds’ to retirement funds that belong to the debtor.” *Id.* at 489. The court also noted that other courts “have reasoned that ‘retirement funds’ can include the funds that others had originally set aside for their retirement, as with inherited IRAs.” *Id.* The court next addressed whether the funds in an inherited IRA are “in a fund or account that is exempt from taxation” under the Internal Revenue Code of 1986. *Id.* The court observed that other courts have reasoned that inherited IRAs are exempt from taxation under 26 U.S.C. § 408(e), which exempts “any individual retirement account” from taxation. *Id.* at 490. Lastly, the court recognized that “the definition of individual retirement accounts in the Internal Revenue Code encompasses inherited IRAs.” *Id.* (internal quotation marks omitted).

**CONCLUSION:** The 5th Circuit held that inherited IRAs are “retirement funds” and are exempt from taxation, satisfying the two requirements of § 522(d)(12). *Id.*

***Little v. Shell Exploration & Production Co.*, 690 F.3d 282 (5th Cir. 2012)**

**QUESTION ONE:** Whether the False Claims Act's (FCA), 31 U.S.C. § 3730 (2006), "'public disclosure bar' is an impediment" to qui tam actions." *Id.* at 284 (internal quotation marks omitted).

**ANALYSIS:** The court reasoned that, if there was a public disclosure, then "whether the relator was an original source for the information" becomes an important consideration. *Id.* at 294. When determining whether a relator is the original source, the court must consider whether a relator had "'direct and independent knowledge' of the allegations underlying his complaint, and also [had] 'voluntarily provided the information to the Government.'" *Id.* (quoting § 3730(e)(4)). The 5th Circuit reasoned that "the fact that a relator was employed specifically to disclose fraud is sufficient to render his disclosures nonvoluntary." *Id.* (internal quotation marks omitted).

**CONCLUSION:** The 5th Circuit held that, if there is a public disclosure, then a qui tam action is barred because "relators cannot be the original source." *Id.*

**QUESTION TWO:** Whether a federal employee is the "person under the [FCA] such that he may maintain a qui tam action." *Id.* at 283.

**ANALYSIS:** The court noted that under the text of the FCA, "'[a] person' may bring suit, suggesting that any person may do so." *Id.* at 286 (quoting § 3730(b)(1)). The court also noted that "the Supreme Court embraced a presumption that the statutory term extends to persons politic and incorporate, as to natural persons whatsoever." *Id.* at 286–87 (internal quotation marks omitted). The 5th Circuit also reasoned that "a person can have two legal identities, one official and one individual." *Id.* at 288.

**CONCLUSION:** The 5th Circuit held that a federal employee is a "person" under the FCA. *Id.* at 289.

***Nino v. Holder*, 690 F.3d 691 (5th Cir. 2012)**

**QUESTION:** Whether an alien's petition for cancellation of removal is eligible for consideration pursuant to 8 U.S.C. § 1229b(b)(1)(C) where the crime precipitating the deportation occurred more than five years after the admission into the United States. *Id.* at 696.

**ANALYSIS:** The court first noted that "[t]he Attorney General may cancel the removal of an alien who is deportable if the alien, among other requirements, 'has not been convicted of an offense under section 1227(a)(2) of [title 8].'" *Id.* (quoting § 1229b(b)(1)(C)). According to the court, the parties "dispute[d] whether 'under' in Section

1229b(b)(1)(C) references only the crime or refers also to the requirement it be committed within five years after admission.” *Id.* The court explained that the defendant’s interpretation of “under,” which was derived from a D.C. Circuit case interpreting another statute, was erroneous. *Id.* at 697. The court determined that “it is not possible to be convicted under the referenced immigration statute as it only refers to categories of offenses that are criminalized by other statutes.” *Id.*

**CONCLUSION:** The 5th Circuit held that for purposes of determining whether an alien is ineligible for cancellation of removal, “it does not matter when the offense occurred in relation to the alien’s admission.” *Id.* at 697–98.

***United States v. Asencio-Perdomo*, 674 F.3d 444 (5th Cir. 2012)**

**QUESTION:** Whether the definition of aggravated felony in 8 U.S.C. § 1101(a)(43) “refers to an offense’s statutory minimum term of imprisonment or the actual sentence imposed on a particular defendant.” *Id.* at 446.

**ANALYSIS:** The court cited the statute as defining “aggravated felony . . . [as] a theft offense . . . for which the term of imprisonment [*sic*] at least one year.” *Id.* The court cited another section of the statute, which defines “term of imprisonment” as “the period of incarceration or confinement ordered by a court” rather than the possible minimum or maximum prison sentence available upon conviction. *Id.* at 446–47. The court reasoned that while it may be “superficial[ly] plausible” to exempt from the definition of “aggravated felony” offenses which provide for a minimum prison sentence of less than a year, it “reads this language straightforwardly.” *Id.*

**CONCLUSION:** The 5th Circuit held that a plain reading of the statute demonstrates that the phrase “term of imprisonment . . . refers to the actual sentence imposed.” *Id.*

***United States v. Pruett*, 681 F.3d 232 (5th Cir. 2012)**

**QUESTION:** Whether criminal penalties for “negligent violations” of permit conditions imposed by 33 U.S.C.A. § 1319(c)(1)(A) are sustainable only with proof of gross negligence or if ordinary negligence is sufficient to maintain convictions. *Id.* at 241–42.

**ANALYSIS:** The court reasoned that courts applying criminal laws must start their analysis with the language of the statute. *Id.* at 242. The court noted that the statute “refers explicitly to ‘negligent’ violations.” *Id.* The court opined that negligence is an unambiguous concept that indicated a failure to act like a reasonably prudent person in similar situations. *Id.* The court therefore found that the statute’s plain and

unambiguous language indicated an intent to impose liability based on ordinary negligence. *Id.* The court further noted that it found no “contrary intentions in the statute’s legislative history.” *Id.* Finally, the court concluded that a decision holding that ordinary negligence is sufficient was consistent with its interpretation of other criminal statutes requiring “negligence.” *Id.* at 242–43.

**CONCLUSION:** The 5th Circuit held that the government need only prove ordinary negligence to support convictions for misdemeanor “negligent violations” under 33 U.S.C.A. § 1319(c)(1)(A). *Id.* at 242.

***United States v. Solis*, 675 F.3d 795 (5th Cir. 2012)**

**QUESTION:** Whether U.S. Sentencing Guidelines Manual § 4A1.31, amended by 18 U.S.C. app. C, Amend 651 (Amendment 651), “which requires that downward departures in criminal history are not to be considered when evaluating safety valve eligibility,” is a substantive change or a clarifying amendment to the 2002 Edition of the U.S. Sentencing Guidelines Manual. *Id.* at 797.

**ANALYSIS:** The 5th Circuit noted that, pursuant to U.S. Sentencing Guidelines Manual § 1B1.11(b)(2), “courts are required to consider subsequent amendments ‘to the extent that such amendments are clarifying rather than substantive changes.’” *Id.* at 797. The court observed that most of the cases interpreting this provision have addressed instances of post-sentencing amendments to the guidelines. *Id.* at 797–98. The court explained that Amendment 651 “made substantial textual revisions” to the sentencing guidelines. *Id.* at 799. The court noted that “[t]he Sentencing Commission did expressly state that Amendment 651 is a clarifying amendment, and Amendment 651 is not listed in the U.S.S.G. § 1B1.10(c) as being retroactively applicable.” *Id.* The 5th Circuit noted there is generally requires that there be “an express acknowledgement that the amendment is clarifying,” which Amendment 651 lacked. *Id.*

**CONCLUSION:** The 5th Circuit held that Amendment 651 is not a clarifying amendment. *Id.* at 799–800.

SIXTH CIRCUIT

***Doe v. Salvation Army in United States*, 685 F.3d 564 (6th Cir. 2012)**

**QUESTION:** Whether religious organizations can be “principally engaged” in “social services” under § 504 of the Rehabilitation Act or whether religious organizations must be excluded. *Id.* at 565.

**ANALYSIS:** The 6th Circuit employed “a three-step framework to interpret the scope of the statute: first, a natural reading of the full text; second, the common-law meaning of the statutory terms; and finally, consideration of the statutory and legislative history for guidance.” *Id.* at 569. The court first determined that “a natural reading of the statute does not explicitly include or exclude religious organizations” and the services that private entities must provide to qualify “do not appear implicitly to exclude religious organizations . . .” *Id.* at 570. The court then looked at the *Black’s Law Dictionary* definition of “social services,” which states that it is an “activity designed to promote social well-being.” *Id.* The court stated that “the provision of social services may be a form of religious worship, but that makes it no less the provision of social services.” *Id.* at 570–71. The court then analyzed the meaning of the phrase “principally engaged,” which it stated had been interpreted in other statutory contexts as “referring to the primary activities of a business, excluding only incidental activities.” *Id.* at 571. The court determined that a corporation of any kind, religious or not, can be principally engaged in providing social services if it primarily takes part in matters promoting social well being. *Id.* The court stated that there was “virtually nothing” in the statutory and legislative history “that suggests that Congress intended to exclude *all* religious organizations from § 504. *Id.* Additionally, the court pointed out that other statutes provide express exceptions for religious organizations. *Id.*

**CONCLUSION:** The 6th Circuit held that religious organizations could be principally engaged in social services within the meaning of § 504 of the Rehabilitation Act. *Id.*

***Ellington v. City of East Cleveland*, 689 F.3d 549 (6th Cir. 2012)**

**QUESTION:** Whether the “legislative employee” exclusion to the Fair Labor Standards Act (FLSA) operates to exempt a city council deputy clerk from the Act’s minimum wage and overtime provisions. *Id.* at 552.

**ANALYSIS:** The court noted that “individuals who work for a state or a political subdivision thereof are not employees under the Act if they . . . fall within one of the enumerated exclusions established by Congress.” *Id.* at 553. The court reasoned that individuals “employed by the legislative branch or body of a political subdivision” are excluded from coverage. *Id.* The court further reasoned that an employment relationship sufficient to render the city an “employer” within the meaning of the FLSA exists where the city council has “substantial authority to hire and fire” a deputy clerk, where the city counsel “tirelessly work[s] to ensure that he [i]s compensated for his services,”

and its members directly assign the clerk jobs that directly correspond to council's activities. *Id.* at 555.

**CONCLUSION:** The 6th Circuit held that, where the city council has "substantial involvement" in the clerk's employment, a deputy clerk for a city council falls under the "legislative employee" exception to the FLSA and thus, is not entitled to minimum wages and overtime pay under the FLSA. *Id.* at 556.

***Kroll v. White Lake Ambulance Authority*, 691 F.3d 809 (6th Cir. 2012)**

**QUESTION:** Whether employer-ordered psychological counseling constitutes a "medical examination" under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(d)(4)(A). *Id.* at 814.

**ANALYSIS:** The court first observed that § 12112(d)(4)(A) of the ADA "prohibits employers from requiring a medical examination or making inquiries of an employee as to whether such an employee is an individual with a disability unless such examination or inquiry is shown to be job related and consistent with business necessity." *Id.* at 815 (internal quotation marks omitted). Noting that "[t]he ADA's legislative history provides little insight into the intended meaning or scope of the term 'medical examination,'" the court looked to the Equal Employment Opportunity Commission's (EEOC) published Enforcement Guidance to "clarify the terms of 12112(d)(4)." *Id.* at 815–16. The court reviewed the seven factors that the EEOC provides for determining whether a test or procedure qualifies under the statute, noting that the third factor, "whether the psychological counseling was designed to reveal a mental-health impairment," constitutes "arguably the most critical [factor] in the analysis." *Id.* at 816–20.

**CONCLUSION:** Having provided the relevant test for determining whether psychological counseling constitutes a "medical examination" under the ADA, the 6th Circuit concluded that a defendant may still prevail "if such counseling was 'job related' and consistent with 'business necessity.'" *Id.* at 820.

***Mehanna v. United States Citizenship & Immigration Services*, 677 F.3d 312 (6th Cir. 2012)**

**QUESTION:** Whether 8 U.S.C. § 1252 (a)(2)(B)(ii) removed the 6th Circuit's jurisdiction to review the Secretary of Homeland Security's decision under § 1155 to revoke a visa petition as an act of discretion. *Id.* at 314.

**ANALYSIS:** The 6th Circuit looked to the plain language of § 1155 and determined that the use of the word "may" suggests discretion given



to the Secretary to revoke a visa. *Id.* at 315. The court then noted that the language, “the Secretary may revoke a visa petition ‘at any time,’ [is] a phrase that also suggests discretion.” *Id.* In addition, the court referred to the language in § 1155 that allows “revocation ‘for what [the Secretary] deems to be good and sufficient cause,’” and analyzed the word “deem” to mean “the statute leaves it to the Secretary’s opinion, judgment, or thought . . . to revoke a petition.” *Id.*

**CONCLUSION:** The 6th Circuit held that “the Secretary’s decision to revoke a visa petition under section 1155 is an act of discretion that Congress has removed from [the court’s] review.” *Id.*

***North Fork Coal Corp. v. Federal Mine Safety & Health Review Commission*, 691 F.3d 735 (6th Cir. 2012)**

**QUESTION:** Whether “the [Federal Mine Safety and Health Act of 1977] mandates that an employee’s temporary reinstatement continue after the Secretary [of Labor] determines that his complaint lacks merit.” *Id.* at \*2.

**ANALYSIS:** The court noted the dispute over the phrase “pending final order on the complaint” contained in 30 U.S.C. § 815(c)(2), the statute permitting a miner to file a complaint alleging employment discrimination. *Id.* at \*8. The Secretary interpreted “complaint” as referring to the miner’s underlying discrimination claim litigated either by the Secretary under 30 U.S.C. § 815(c)(2) or the miner under 30 U.S.C. § 815(c)(3). *Id.* The employer interpreted “complaint” as referring to the action filed by the Secretary before the Federal Mine Safety and Health Review Commission. *Id.* at \*9. The court found the phrase did not have a plain meaning. *Id.* at \*9–10. Although the Secretary was entitled to deference in her interpretation, the court reasoned that the Secretary’s interpretation had been offered in litigation and therefore should receive only *Skidmore* deference. *Id.* at \*16. The court determined that, for reasons of statutory construction and legislative history, the Secretary’s interpretation did not have the “power to persuade.” *Id.* at \*21.

**CONCLUSION:** The 6th Circuit held that “upon the Secretary’s determination that discrimination in violation of the Mine Act has not occurred, a miner is no longer entitled to temporary reinstatement.” *Id.* at \*22.

***Shelter Distribution, Inc. v. General Drivers, Warehousemen & Helpers Local Union No. 89*, 674 F.3d 608 (6th Cir. 2012)**

**QUESTION:** Whether “it is a violation of public policy for a union to indemnify an employer for any contingent liability to a pension plan established under the Employee Retirement Income Security Act of 1974 [ERISA] . . . as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381–1461.” *Id.* at 609.

**ANALYSIS:** The court first noted that “[t]he relevant public policy is derived by reference to the laws and legal precedents and not from general considerations of supposed public interests.” *Id.* at 611 (internal quotation marks omitted). The court explained that “the Multiemployer Pension Plan Amendments Act was enacted to correct deficiencies in ERISA and to provide even more security to employee retirement plans.” *Id.* at 612. The court then reasoned that ERISA would have been amended had “Congress thought that an employer should not be able to contractually obligate a third party to indemnify it for any financial responsibility incurred under ERISA.” *Id.* The court observed that “there is no logical difference between contracting with an insurance company . . . and negotiating an indemnification provision.” *Id.* at 613. The court finally noted that “although the Multiemployer Pension Plan Amendments Act sought to minimize the financial burden to a retirement plan when an employer withdrew from a multiemployer plan, and ERISA was designed to protect the pension benefits of employees, these goals still will be served even if indemnification agreements between employers and third parties are allowed, as long as the employer remains primarily liable.” *Id.*

**CONCLUSION:** The court held that the “collective bargaining agreement [did] not violate public policy.” *Id.*

***Taylor v. KeyCorp*, 680 F.3d 609 (6th Cir. 2012)**

**QUESTION:** Whether the court can consider a motion to intervene that is filed before the notice of appeal. *Id.* at 616.

**ANALYSIS:** The court reasoned that “a notice of appeal divests the district court of jurisdiction to resolve a motion to intervene filed after a notice of appeal.” *Id.* The court found the 7th Circuit’s reasoning persuasive when they stated “that a timely post-judgment motion to intervene may not always be resolved before a notice of appeal is due” but that “one seeking to intervene is not without recourse.” *Id.* The court further noted that one seeking to intervene can filing an emergency motion with the district court, or the district court may extend the time for filing an appeal. *Id.* The court reasoned that the 2nd, 5th, and 7th Circuits were correct in determining that the court should not consider a

motion to intervene when the court has not ruled on that motion prior to the filing of an appeal. *Id.*

**CONCLUSION:** The 7th Circuit held that the district court is divested of jurisdiction to rule on a motion to intervene once a notice of appeal is filed, even if one files the motion to intervene before the notice of appeal. *Id.* at 617.

***United States v. Coss*, 677 F.3d 278 (6th Cir. 2012)**

**QUESTION:** Whether 18 U.S.C. § 875(d) should be interpreted to criminalize threats that are unlawful or wrongful. *Id.* at 284.

**ANALYSIS:** The court agreed with the 2nd Circuit’s prior reasoning that a wrongfulness requirement was implicit in 18 U.S.C. § 875(d) by analyzing the structure and substance of 18 U.S.C. § 875 as a whole, the ordinary meaning of extortion, and 18 U.S.C. § 875(d)’s legislative history. *Id.* The 2nd Circuit reasoned that “each of the various subsections of 18 U.S.C. § 875 criminalizes conduct that plainly is inherently wrongful.” *Id.* (internal quotation marks omitted). The 2nd Circuit posited that the *Black’s Law Dictionary’s* definition of extort and the Hobbs Act’s definition of extortion support the position that § 875(d) criminalizes wrongful threats. *Id.* at 285. The 2nd Circuit stated that “there is strong evidence to suggest that Congress intended extortion to mean the same thing in 18 U.S.C. § 875 as it does in the Hobbs Act.” *Id.* The court stated that “to require a threat to be unlawful would be to require that the prosecution demonstrate beyond a reasonable doubt that the threat in question was independently illegal in either the criminal or civil sense, [and there is] no reason, nor any historical or statutory basis, for reading such a requirement into 18 U.S.C. § 875(d).” *Id.* at 286–87. The court added that “the hallmark of extortion, and its attendant complexities, is that it often criminalizes conduct that is otherwise lawful.” *Id.* at 287.

**CONCLUSION:** The 6th Circuit held “that 18 U.S.C. § 875(d) should be interpreted to criminalize only threats that are wrongful.” *Id.* at 284 (internal quotation marks omitted).

***United States v. Felts*, (6th Cir. 2012)**

**QUESTION:** Whether an offender can “be convicted for failure to register under [the Sex Offender Registration and Notification Act (SORNA)] if his home state . . . has not yet completely implemented the act [sic].” *Id.* at 602

**ANALYSIS:** The court reasoned that, for sex offenders, “the duty to register in a state registry is independent of a state’s degree of implementation of SORNA.” *Id.* at 603. The court noted that “no state’s

registry was in compliance with SORNA” at the time of its enactment in 2006. *Id.* at 604. The court reasoned that if a state was required to “fully implement” SORNA before an offender could be convicted for failing to register, then Congress, which provided the states with three years to comply without penalty, “would have effectively rendered SORNA nugatory in any non-compliant state until 2009.” *Id.*

**CONCLUSION:** The 6th Circuit held that the “duty of an offender to register is independent of whether or not the state has implemented SORNA.” *Id.*

***United States v. Kearney*, 675 F.3d 571 (6th Cir. 2012)**

**QUESTION:** “[W]hether a prior state conviction can qualify as a predicate “violent felony” under [the Armed Career Criminal Act (ACCA)] if the offense was enhanced pursuant to a state recidivism provision.” *Id.* at 575.

**ANALYSIS:** The 6th Circuit followed the Supreme Court’s guidance in *United States v. Rodriguez*, 553 U.S. 377 (2008) regarding this issue. *Id.* at 575. The 6th Circuit first noted that the language of the statute was unambiguous. *Id.* at 576. Next, the court pointed out “Congress’ intent to define a predicate offense with reference to underlying enhancements is clear and there is no compelling justification to interpret ACCA out of step with other sentencing enhancements.” *Id.* Lastly, the court reasoned that referencing “underlying enhancements when evaluating whether a predicate offense meets ACCA’s violent felony definition[]” best expressed the plain language of the ACCA, comported with its understanding of the statute’s legislative intent, and promoted consistency with the serious drug offense provision. *Id.* at 577.

**CONCLUSION:** The 2nd Circuit held that a prior state conviction that had been enhanced pursuant to a state recidivism provision could qualify as a predicate “violent felony” under the ACCA. *Id.*

SEVENTH CIRCUIT

***ADT Security Services v. Lisle-Woodridge Fire Protection District*, (8th Cir. 2012)**

**QUESTION:** Whether, under the Illinois Fire Protection District Act (IFPDA), a local fire district has the authority “to require (1) that fire alarm systems in the district direct-connect to a central monitoring facility operated by the District or its authorized agent; (2) that such connections be established by wireless radio technology; and (3) that all

account holders rely exclusively on the District and its chosen vendor for providing alarm equipment and monitoring services.” *Id.* at 498.

**ANALYSIS:** The court stated that fire districts have no inherent power, but must instead derive specific powers from the IFPDA. *Id.* at 498–99. The court evaluated the direct-connect and wireless requirements, and found that such requirements are in line with national standards and are within the plain meaning of the IFPDA. *Id.* at 500–02. The court found that the language of the statute does not grant the fire district the power “to establish a monopoly over alarm transmitters and monitoring services.” *Id.* at 499.

**CONCLUSION:** The 7th Circuit held that, while the powers granted are not broad enough to allow the Fire District to be the exclusive provider of the necessary services and devices, the IFPDA does authorize the requirement for buildings “to be equipped with wireless alarm signaling devices that communicate directly with the District’s board.” *Id.*

***Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012)**

**QUESTION:** Whether rejection of a contract under § 365(a) of the Bankruptcy Code terminates a licensee’s right to use the intellectual property. *Id.* at 3–4.

**ANALYSIS:** The court discussed a case cited in support of the proposition that a licensee’s right to use intellectual property is terminated upon rejection of the intellectual property license in bankruptcy. *Id.* at 3–4. The court explains that the subsequent addition of § 365(n) to the Bankruptcy Code, which “allows licensees to continue using the intellectual property after rejection, provided they meet certain conditions,” calls the aforementioned conclusion into question. *Id.* at 4. “Intellectual property,” as defined in the Bankruptcy Code, refers to patents, copyrights, and trade secrets, but makes no mention of trademarks. This omission led the court to conclude that § 365(n) has no effect on trademarks. *Id.* The court then examined § 365(g) of the Bankruptcy Code, which classifies rejection as a breach of contract, and explained that “what § 365(g) does by classifying rejection as breach is establish that in bankruptcy, as outside of it, the other party’s rights remain in place.” *Id.* at 9. Finally, the court clarified that rejection is not synonymous with rescission, explaining that rejection relieves the estate of the obligation to perform but does not make a contract void. *Id.* at 10–11.

**CONCLUSION:** The 7th Circuit held that the rejection of contract under § 365(a) of the Bankruptcy Code does not terminate a licensee's contractual rights to use intellectual property. *Id.* at 11.

#### EIGHTH CIRCUIT

***Alpine Glass, Inc. v. Country Mutual Insurance Co.*, 686 F.3d 874 (8th Cir. 2012)**

**QUESTION:** “Whether the collateral order doctrine supports jurisdiction for an appeal from a denial of a summary judgment motion to consolidate claims.” *Id.* at 877.

**ANALYSIS:** The court reasoned that “[j]urisdiction is proper under that doctrine if the order appealed from (1) conclusively determines the disputed issue; (2) which is an *important* issue completely separate from the merits; and (3) is *effectively unreviewable* on appeal from a final judgment.” *Id.* (internal quotation marks omitted). The court noted that the Supreme Court has stressed that this “narrow” exception should “stay that way” and that a party “is entitled to a single appeal, to be deferred until final judgment has been entered.” *Id.* The court then stated that “the denial of a motion to consolidate arbitrations does not imperil a substantial public interest sufficient to warrant jurisdiction under the collateral order doctrine.” *Id.* at 879 (internal quotation marks omitted).

**CONCLUSION:** The 8th Circuit held that under the collateral order doctrine, there was no jurisdiction for appeal from the denial of a summary judgment motion to consolidate claims for arbitration. *Id.*

***Pattison Sand Co. v. Federal Mine Safety & Health Review Commission*, 688 F.3d 507 (8th Cir. 2012)**

**QUESTION:** Whether the Federal Mine Safety and Health Review Commission “possesses authority to modify a § 103(k) order apart from the Act’s temporary relief provision.” *Id.* at 515.

**ANALYSIS:** The court stated that “[t]he Act is silent regarding the Commission’s ability to review § 103(k) orders, but its power to conduct such review has been recognized by judicial decisions analyzing the Act’s structure and legislative history.” *Id.* The 8th Circuit pointed out that “the Secretary [of Labor] does not challenge the Commission’s ability to review § 103(k) orders and affirm or vacate them.” *Id.* at 516. The court stated that it “can discern no limiting principle that would allow Commission review of § 103(k) orders but prohibit modification of such orders.” *Id.*

**CONCLUSION:** The 8th Circuit held that “the [Federal Mine Safety and Health Review Commission] has the power to modify § 103(k) orders.” *Id.*

***United States v. Bynum*, 669 F.3d 880 (8th Cir. 2012)**

**QUESTION:** Whether “an offer to sell a controlled substance categorically ‘involves’ distribution of a controlled substance within the meaning of the [Armed Career Criminal Act (ACCA)].” *Id.* at 885.

**ANALYSIS:** The court reasoned that “mere agreement to distribute a controlled substance, even absent some overt act in furtherance of the conspiracy, is sufficient to violate federal drug conspiracy laws.” *Id.* at 887. The court rejected the notion that “drug distribution within the meaning of the ACCA depends on whether the offense requires an offer to exchange the drugs for value as opposed to an offer to distribute them gratuitously.” *Id.* The court further determined that “both conspiracy and attempt to distribute controlled substances are serious drug offenses under the ACCA.” *Id.*

**CONCLUSION:** The 8th Circuit held that an offer to sell and an actual sale of drugs are both “serious drug offenses within the meaning of the AACA” and that both involve the distribution of drugs within the meaning of the ACCA. *Id.* at 887–88.

***United States v. Ghane*, 673 F.3d 771 (8th Cir. 2012)**

**QUESTION:** Whether “or not, to adopt a ‘dangerous patient’ exception to the psychotherapist-patient [testimonial] privilege.” *Id.* at 779.

**ANALYSIS:** The court noted that other circuits have applied a “dangerous patient” exception to the psychotherapist-patient privilege, where “a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.” *Id.* at 784. The court reasoned that if there were such an exception, justified by “the standard of care exercised by a treating psychotherapist in complying with a state’s duty to protect requirement”, then the “scope of this federal testimonial privilege would vary depending upon state determinations of what constitutes reasonable professional conduct.” *Id.* at 785. The court further reasoned that “adopting [this exception] would necessarily have a deleterious effect on the confidence and trust the Supreme Court held is implicit in the confidential relationship between the therapist and a patient.” *Id.*

**CONCLUSION:** The 8th Circuit agreed with the 6th and 9th Circuits, holding that there is no “dangerous patient exception to



the federal psychotherapist-patient testimonial privilege” to allow a “therapist [to] testify at his patient’s own involuntary commitment proceedings” when “a patient properly asserts the . . . privilege.” *Id.* at 785-86.

#### NINTH CIRCUIT

***Alderson v. United States*, 686 F.3d 791 (9th Cir. 2012)**

**QUESTION:** Whether, for tax purposes, a False Claims Act qui tam award may be characterized as capital gains rather than ordinary income. *Id.* at 795.

**ANALYSIS:** The court noted that the Internal Revenue Code defines “capital gain” as “gain from the sale or exchange of a capital asset.” *Id.* The court then sought to determine the required elements of “sale or exchange” and “capital asset.” *Id.* Beginning with “sale or exchange,” the court found the requirement that an appellant provide information to the government was a “precondition for pursuing [a] qui tam suit,” and that it was unlikely that the government would have accepted an offer from an appellant to sell the information. *Id.* Therefore, an appellant who did not provide the information as part of a “sale or exchange,” especially since Appellant went far beyond merely handing over the information by performing “numerous acts” to facilitate the qui tam suit’s success. *Id.* at 796. In defining a “capital asset,” the court found that the information Appellant provided to the government was not Appellant’s property, as Appellant had no “legal right” to maintain “exclusive possession or control” over that information. *Id.* at 796–97. The court was also not convinced that a relator’s award sufficiently counted as property to make it a capital investment since Appellant’s incurring of expenses—a consequence of generating ordinary income as well—did not constitute an “investment of capital.” *Id.* at 797. Finally, the court did not view the increase in value of Appellant’s relator’s share as an “accretion in value” since Appellant did not “buy and hold the relator’s award” during the time in question but was instead working on the case to obtain it. *Id.* at 798.

**CONCLUSION:** The 9th Circuit held that a qui tam award won under the False Claims Act was ordinary income rather than capital gains. *Id.*

***Bagdasarian Productions, LLC v. Twentieth Century Fox Film Corp.*, 673 F.3d 1267 (9th Cir. 2012)**

**QUESTION:** “[W]hether an order compelling enforcement of a contractual agreement to submit a dispute to a referee, and staying proceedings in the interim, is immediately appealable.” *Id.* at 1268.

**ANALYSIS:** The court explained that it has jurisdiction to hear appeals from all final decisions of the district courts. *Id.* at 1270. The court will, in limited circumstances, permit immediate appeal if a “stay order puts the plaintiff ‘out of court’—creating a substantial possibility there will be no further proceedings in the federal forum, because a parallel proceeding might moot the action or become *res judicata* on the operative question.” *Id.* at 1270–71. The court was unconvinced that a plaintiff would be put “out of court” as a result of a non-jury proceeding before a referee, as the decision of the referee would be reviewable as if made by a court. *Id.* at 1271. The court, therefore, declined to treat the stay pending the referee proceedings as a final decision subject to immediate appeal. *Id.* at 1272. Further, the collateral order doctrine failed to provide an avenue for immediate appeal of the stay order for the same reason; namely, the requirement that the order be “effectively unreviewable” was not met. *Id.* Finally, the court pointed out that stays pending arbitration and stays pending reference are similar, and should therefore be treated similarly. *Id.* at 1273.

**CONCLUSION:** The 9th Circuit held that a district court’s order compelling referee proceedings is not final and does not put a plaintiff “out of court.” *Id.* Thus, an immediate interlocutory appeal was premature and the court lacked jurisdiction over the matter. *Id.* at 1273–74.

***C.O. v. Portland Public Schools*, 679 F.3d 1162 (9th Cir. 2012).**

**QUESTION:** Whether “a party may bring a damages action based upon the admissions policies of a magnet school.” *Id.* at 1169.

**ANALYSIS:** The court first noted that the requirements of § 504 of the Rehabilitation Act merely requires an educational institution to not exclude an “otherwise qualified” person based on his or her disability rather than requiring that it disregard a disability or make substantial program modifications to allow a disabled person to participate. *Id.* The court further noted that it “extends judicial deference to a school’s academic decisions in [Americans with Disabilities Act (ADA)] and Rehabilitation Act cases.” *Id.* The court reasoned that reading this provision in the context of Congress’ other education policies shows that “Congress did not intend to provide a private cause of action for monetary damages based on such a claim.” *Id.*

**CONCLUSION:** The 9th Circuit held that a party may not bring a damages action against a magnet school based upon its admissions policies, absent any further indication of congressional intent. *Id.* at 1170.

***Drew v. Equifax Information Services, LLC*, No. 11-15008, 2012 U.S. App. LEXIS 16378 (9th Cir. Aug. 7, 2012)**

**QUESTION:** Whether an individual's direct complaint to a bank, unaccompanied by a credit reporting agency's (CRA) notification of dispute, will trigger the bank's duties to "investigate and correct erroneous information" under 15 U.S.C. § 1681s-2(b) or the Fair Credit Reporting Act (FCRA). *Id.* at \*1, 8.

**ANALYSIS:** The court reasoned that under subsection b, a "direct complaint . . . [does] not trigger[] any duty . . . [when] unaccompanied by CRA notification." *Id.* at \*9. The court noted, however, that when a credit agency furnishes a letter regarding a fraudulent account application, then this letter provides sufficient notice to the bank under the statute to trigger the bank's duties to investigate the erroneous information. *Id.* at \*10–11.

**CONCLUSION:** The 9th Circuit held that "although [a client's] communication with [his bank] ha[s] no statutory impact, [a CRA's later] notification [is] . . . sufficient to trigger [the bank's] duties under the FCRA." *Id.* at \*11.

***Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012)**

**QUESTION:** Whether the 2004 Amendment to California's DNA and Forensic Identification Data Base and Data Bank Act of 1998 (DNA Act), which requires all adult felony arrestees to provide DNA samples to law enforcement officers, violates the Fourth Amendment. *Id.* at 1050.

**ANALYSIS:** The court evaluated the constitutionality of the Amendment by using the totality of the circumstances test, by "'balancing the arrestees' privacy interests against the Government's need for the DNA samples." *Id.* The court further noted that the actual intrusion to personal privacy involved is not that significant and that arrestees have limited expectations of privacy. *Id.* at 1058–60. The court reasoned that the benefit that law enforcement receives from the DNA, however, is substantial. *Id.* at 1062–64.

**CONCLUSION:** The 9th Circuit held that the government's interest in collecting DNA from felony arrestees outweighs the privacy concerns of those arrested, and therefore the Amendment to the DNA Act does not violate the Fourth Amendment. *Id.* at 1051.

***Pacific Ship Repair & Fabrication Inc. v. Director*, 687 F.3d 1182 (9th Cir. 2012)**

**QUESTION:** Whether, for purposes of apportioning liability in a disability claim under the Longshore and Harbor Workers' Compensation Act, "an employee who has a permanent partial disability may be reclassified as temporarily totally disabled during a recovery period following surgery." *Id.* at 1183.

**ANALYSIS:** The court stated that "a condition deemed permanent is not immutably so" and further noted that "[n]othing in the Longshore Act limits re-characterizations to a one-way street from temporary to permanent; instead, the statute's broad thoroughfare allows for two-way traffic." *Id.* at 1186. The court found that no matter how an injury is characterized at its outset, a disability may be temporary "so long as there [is] a possibility or likelihood of improvement through normal and natural healing." *Id.* (internal quotation marks omitted). The court noted that "even though a permanent disability itself persists through periods of temporary exacerbation, an *award* for temporary total disability will subsume an award for a permanent partial disability stemming from the same injury because a total disability presupposes the loss of all wage-earning capacity." *Id.* at 1187 (internal quotation marks omitted). The court then reasoned that "a prior finding of partial permanent disability does not preclude a later finding of temporary disability for the same underlying injury during a period of recovery following surgery." *Id.* at 1187–88. Therefore, the court found that an employer is held responsible for temporary total disability payments when a claimant's partial permanent disability is re-characterized as a temporary total disability. *Id.* at 1188.

**CONCLUSION:** The 9th Circuit held that an employee's partial permanent disability "may properly be re-characterized as a temporary total disability in accord with changed circumstances . . . ." *Id.*

***Peng v. Holder*, 673 F.3d 1248 (9th Cir. 2012)**

**QUESTION:** Whether, under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), § 212(c) waiver of removal "is available to aliens who proceeded to trial if they can plausibly argue that they relied on the availability of relief" prior to the Act's repeal. *Id.* at 1256.

**ANALYSIS:** The court first distinguished the instant case from others, noting that the alien had "not been charged with or convicted of an aggravated felony," but rather a crime of moral turpitude. *Id.* The

court then observed that a guilty plea or guilty verdict “would not have disqualified [the alien] from eligibility to apply for § 212(c) relief, because only aliens who (1) were convicted of an aggravated felony and (2) served more than five years were disqualified from § 212(c) relief.” *Id.* at 1256–57.

**CONCLUSION:** The 9th Circuit held that an alien charged with a crime of moral turpitude may apply for § 212(c) waiver of removal under IIRIRA. *Id.* at 1257.

***In re Tober*, 688 F.3d 1160 (9th Cir. 2012)**

**QUESTION:** Whether a debtor’s named beneficiary is required to be a “dependent” in order to qualify for an exemption under Ariz. Rev. Stat. Ann. § 33-1126(A)(6) and (7). *Id.* at 1161.

**ANALYSIS:** The 9th Circuit noted that for the exemption to apply, the term “other” in the statute must operate as a word of differentiation so “that an individual can *either* be exempted as a listed family member (who need not be dependent) or as any ‘other’ family member who is dependent.” *Id.* at 1162. The court reasoned that “[i]f the legislature had wanted only dependent family members to be exempted, then the legislature could have exempted ‘dependent family members,’ rather than list certain close family members *and* exempt other dependent family members.” *Id.* The court also noted that the term “other” in the statute is ambiguous and “where the text of a statutory exemption is ambiguous as to whether it applies, the debtor is entitled to the exemption.” *Id.* at 1163.

**CONCLUSION:** The 9th Circuit held that the statutory text does not require a debtor’s beneficiary to be a “dependent” to qualify for an exemption. *Id.*

***United States v. Goodbear*, 676 F.3d 904 (9th Cir. 2012)**

**QUESTION:** Whether “use of a minor can be attributed to another for the purposes of applying an enhancement pursuant to USSG § 3B1.4 for a misprision of felony offense . . . .” *Id.* at 905.

**ANALYSIS:** The court stated that “whether the two-level enhancement under § 3.B1.4 is appropriate . . . is driven by the plain language of § 2X4.1 and its commentary.” *Id.* at 910. The court stated that the “[g]uidelines and their commentary . . . instruct the court to determine the offense level for the underlying offense exactly as it would have had the defendant been convicted of that offense, and from there, to apply the misprision guideline provision.” *Id.* at 911. The court further reasoned that “Application Note 1 to § 2X4.1 directs the court to apply

the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant.” *Id.* (internal quotation marks omitted).

**CONCLUSION:** The 9th Circuit held that “the use of a minor can be attributed to another for misprision of felony offense.” *Id.* at 910.

***United States v. Pope*, 686 F.3d 1078 (9th Cir. 2012)**

**QUESTION:** Whether a command to “empty one’s pockets” constitutes a Fourth Amendment search when the party at whom the command is directed has a reasonable expectation of privacy in the contents of his pockets and “does not comply with the command.” *Id.* at 1081.

**ANALYSIS:** Citing 9th Circuit precedent, the court reasoned that a Fourth Amendment search occurs when police order a person to reveal something in which he has a reasonable expectation of privacy and the item is actually revealed. *Id.* at 1082. The court distinguished the facts at bar from those at issue in the earlier 9th Circuit decision, and reasoned that the search in the earlier case was “substantially contemporaneous with the arrest,” whereas, in the present case, “probable cause to arrest [the criminal defendant] did not exist prior to the initial command” to empty his pockets. *Id.*

**CONCLUSION:** The 9th Circuit held that, by itself, a command to empty one’s pockets before compliance, does not constitute a Fourth Amendment search. *Id.*

***United States v. Suarez*, 682 F.3d 1214 (9th Cir. 2012)**

**QUESTION:** Whether a guilty plea to a felony drug charge, which was at no point appealable and was dismissed without entry of judgment, qualifies as a prior conviction that has become “final” under 21 U.S.C. § 841(b)(1)(A). *Id.* at 1221.

**ANALYSIS:** The court analyzed the meaning of the word “final” in the sentencing context. *Id.* The court noted that legislative history did not assist in interpreting the meaning of the phrase “has become final” in § 841(b)(1)(A). *Id.* The court then noted that two factually similar cases from the 1st and 8th Circuits did not directly address or resolve the finality issue before the court and instead focused on whether the suspended sentences were “prior convictions.” *Id.* at 1221–22. The court pointed out that it had recognized “that the finality requirement in § 841(b)(1)(A) likely reflects a temporal concern, rather than a substantive one.” *Id.* at 1222. The court then noted that “a legally cognizable sentence that was never subject to appeal under state law could still constitute a final prior conviction under § 841(b)(1)(A).” *Id.*

**CONCLUSION:** The 9th Circuit held that “in order to qualify as a final prior conviction under 21 U.S.C. § 841(b)(1)(A), a guilty plea must either: (1) ripen into a final judgment; or (2) result in a legally cognizable sentence.” *Id.*

***United States v. Turner*, 689 F.3d 1117 (9th Cir. 2012)**

**QUESTION:** “Whether a civil detention under the [Walsh] Act constitutes a term of imprisonment that both precludes and tolls the commencement of a supervised release term of a sex offender who has completed his incarceration for a criminal conviction.” *Id.* at 1118.

**ANALYSIS:** The court noted that the Walsh Act’s “stay-of-release provision relates to *all* of the procedures and proceedings in a comprehensive civil commitment statute.” *Id.* at 1122. The court reasoned that “civil commitment procedures commence with the government’s initial certification[,] . . . continue through the civil commitment hearing and, for a committed individual, are not completed until a court determines by a preponderance of evidence that the individual is no longer a ‘sexually dangerous person’ and may be discharged.” *Id.* The court further noted that “custody of the Bureau of Prisons does not determine whether someone is imprisoned.” *Id.* at 1124. Rather, the courts must examine the nature of the custody, and detention pending the outcome of a civil commitment hearing does not amount to “imprison[ment] in connection with a conviction.” *Id.* at 1124–25.

**CONCLUSION:** The 9th Circuit held that a term of supervised release does not toll during the civil detention of a person who is awaiting the outcome of a civil commitment hearing pursuant to 18 U.S.C. § 4248. *Id.* at 1125.

***United States v. Wing*, 682 F.3d 861 (9th Cir. 2012)**

**QUESTION:** “[W]hether, under 18 U.S.C. § 3583, a district court has jurisdiction to revoke a future term of supervised release based upon newly discovered violations of conditions of a past term of supervised release.” *Id.* at 864.

**ANALYSIS:** The court recognized that Congress established a structure of separate terms of supervised release in § 3583. *Id.* at 868. Despite recognizing that the relevant clause in § 3583(e)(3) is ambiguous when read by itself, the court reasoned that Congress’ use of the term “revoke” was in the ordinary sense, since any other interpretation would lead to a result unintended by Congress. *Id.* at 867–68. The court went on to note that the *Guidelines Manual*, U.S.S.G. § 7B1.1, sentencing scheme for violations of supervised release supported its interpretation of



§ 3583(e)(3). *Id.* at 871–72. Finally, the court dispelled public policy concerns, noting that “district courts have tools to safeguard against the release of defendants who may pose a danger to the public . . . and the power to penalize defendants who abuse the court’s trust during release.” *Id.* at 873.

**CONCLUSION:** The 9th Circuit held that 18 U.S.C. § 3583(e)(3) requires “that the court find by a preponderance of the evidence that the defendant violated a condition of the term of supervised release that is being revoked.” *Id.* at 874.

#### TENTH CIRCUIT

***Hooks v. Workman*, 606 F.3d 1148 (10th Cir. 2012)**

**QUESTION:** Whether the Sixth Amendment’s guarantee of effective assistance of counsel extends to an *Atkins* proceeding. *Id.* at 1183.

**ANALYSIS:** The court noted that the Sixth Amendment’s guarantee to effective counsel is implicit within the principle that the “Fourteenth Amendment’s Due Process Clause applies as fully to an *Atkins* proceeding as to any other jury trial.” *Id.* The court reasoned that an *Atkins* trial is “inextricably intertwined” with sentencing and essentially determines whether the State has the power to take his life. *Id.* at 1184. The court further reasoned that “a mentally retarded defendant [who] has a right not to be executed by the state [should also have] a right to counsel in proceedings where the question of mental retardation will be determined . . . .” *Id.* at 1184–85.

**CONCLUSION:** The 10th Circuit held that a defendant in an *Atkins* proceeding, “ill equipped to represent [himself]”, has a right to effective counsel pursuant to the Sixth and Fourteenth Amendments, where a post-conviction *Atkins* proceeding is the “first designated proceeding” at which he could raise a claim of mental retardation. *Id.* at 1183.

#### ELEVENTH CIRCUIT

***Chao Lin v. United States Attorney General*, 677 F.3d 1043 (11th Cir. 2012)**

**QUESTION:** Whether a court may be considered inaccessible within the meaning of Fed. R. App. P. § 26(a)(1) when the clerk’s office is open for business. *Id.* at 1045 (internal quotation marks omitted).

**ANALYSIS:** The court stated that “official closure of the clerk’s office for any reason makes that office inaccessible.” *Id.* The court

stated that evidence of inclement weather or lack of internet access could be offered as standards of inaccessibility. *Id.* The court agreed with the 2nd, 6th, and 9th Circuit's reasoning that "total closure may be necessary to extend the time for filing." *Id.* at 1046.

**CONCLUSION:** The 11th Circuit held that when a clerk's office is open, it is not considered inaccessible within the meaning of Fed. R. App. P § 26(a)(1), and any petitions due but not filed by that date are considered untimely. *Id.*

***Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012)**

**QUESTION:** Whether a foreign arbitral panel was a "tribunal" under 28 U.S.C. § 1782, which permits domestic discovery for use in foreign proceedings. *Id.* at 994.

**ANALYSIS:** The court noted that "the determination of whether a foreign arbitration falls within the scope of section 1782 is guided in substantial measure by the Supreme Court's seminal decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004)," to construe the term "tribunal" broadly. *Id.* In that case, the Supreme Court explained that "Congress introduced the word 'tribunal' to ensure that assistance is not confined to proceedings before conventional courts, but extends also to administrative and quasi-judicial proceedings." *Id.* The 11th Circuit reasoned that the arbitral panel in question "ha[d] the authority to receive evidence, resolve the [billing] dispute [between the parties], . . . award a binding decision[,] . . . [and] the parties w[ould] be able to appeal the decision before an ordinary court of [the foreign nation] for cases related to procedural defects during the proceedings . . ." *Id.* at 995 (internal quotation marks omitted). These designations of authority met the "functional criteria" articulated by the Supreme Court. *Id.*

**CONCLUSION:** The 11th Circuit held that as a "first-instance decisionmaker whose judgment is subject to judicial review," the foreign arbitral panel was a "tribunal" for purposes of § 1782. *Id.* at 997.

***Juris v. Inamed Corp.*, 685 F.3d 1294 (11th Cir. 2012)**

**QUESTION:** Whether the holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), requires "that an absent class member be afforded an opportunity to exclude herself from a limited fund class settlement." *Id.* at 1330.

**ANALYSIS:** The court noted that the "opt-out requirement in *Shutts* addressed the class action court's jurisdiction over absent class members

without minimum contacts with the forum” and that “established law holds that a court with jurisdiction over a res or fund also has jurisdiction over all claims against that fund.” *Id.* at 1333. The court posited that “the presence within the jurisdiction of a res or fund that is the subject of the litigation resolves the personal jurisdiction objection of absent claimants” in a limited fund class action. *Id.* at 1331.

**CONCLUSION:** The 11th Circuit held that a limited fund recovery, prior to class certification, creates a sufficient basis for a court’s jurisdiction over the claimants to the fund, regardless of their location. *Id.* at 1332.

***Lyashchynska v. United States Attorney General*, 676 F.3d 962 (11th Cir. 2012)**

**QUESTION:** Whether “the Investigator conducting the investigation of Petitioner’s alleged abuse in the [foreign country] failed to comply with the confidentiality requirement of 8 C.F.R. § 1208.6, which generally prohibits disclosing information submitted in an asylum application unless the applicant gives written consent.” *Id.* at 967.

**ANALYSIS:** First, the 11th Circuit noted that courts usually give government records and official conduct a presumption of legitimacy with respect to the confidentiality requirement of 8 C.F.R. § 1208.6(a). *Id.* at 970. The court referred to decisions of the 2nd and 8th Circuits, which held that disclosure of a foreign national’s name or date of birth does not necessarily result in a breach of confidentiality regulations because such disclosure may occur independent of an application for asylum, providing examples such as on birth certificates or marriage licenses. *Id.* To determine whether there was such a breach, the court followed the factors used by the 8th Circuit: “a breach occurs when information is disclosed to a third party and the disclosure is significant enough that it allows the third party to connect the identity of the applicant to: (1) the fact that the applicant is seeking asylum; (2) specific facts or allegations pertaining to the individual asylum claim in the application; or (3) facts or allegations that are sufficient to give rise to a reasonable inference that the person is seeking asylum.” *Id.* (internal citation omitted). The 11th Circuit found that no information contained in or pertaining to an asylum application was disclosed. *Id.* The court noted that “[d]isclosure of a person’s name is not sufficient for a breach of confidentiality; indeed without disclosure of a name, investigating these claims would be impossible.” *Id.*

**CONCLUSION:** The 11th Circuit held that the “Petitioner did not overcome the presumption of regularity afforded to government investigations,” and therefore, the investigation did not breach the

confidentiality requirement of 8 C.F.R. § 1208.6(a) in the asylum application process. *Id.* at 971.

***Solutia Inc. v. McWane, Inc.*, 672 F.3d 1230 (11th Cir. 2012)**

**QUESTION:** Whether “parties subject to a consent decree may file claims for cost recovery under § 107(a) of [the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)], or whether their remedies are limited to filing claims for contribution under § 113(f) of CERCLA.” *Id.* at 1233.

**ANALYSIS:** The court reasoned that “[w]hether § 107(a) . . . grants parties a right to recover cleanup costs that they directly incur in complying with a consent decree is a matter of statutory interpretation . . .” *Id.* at 1235. The court noted that the Supreme Court recently held in two decisions that each of the CERCLA provisions at issue in this case provide private parties with a right of action to recover costs. *Id.* The 11th Circuit had previously held that a consent decree gives a private party the right to contribution pursuant to § 113(f), but the court had not previously addressed whether this was the sole recovery mechanism available. *Id.* at 1236. The court reasoned that “[i]f a party subject to a consent decree could simply repackage its § 113(f) claim for contribution as one for recovery under § 107(a), then the structure of CERCLA remedies would be completely undermined.” *Id.* at 1236. The court further noted that “parties could circumvent the different statutes of limitations[,] thwart the contribution protection afforded to parties that settle their liability with the EPA[,]” and parties subject to a consent decree could further impose joint and several liability against similarly situated parties who would then be barred from asserting counterclaims under § 113(f). *Id.* at 1236–37.

**CONCLUSION:** The 11th Circuit held that there is no § 107(a) remedy granted to parties to recover cleanup costs they incurred as a result of their compliance with a consent decree. *Id.* at 1237.

***United States v. Alabama Department of Mental Health & Mental Retardation*, 673 F.3d 1320 (11th Cir. 2012)**

**QUESTION:** Whether “the United States can sue a State to enforce [the Uniformed Services Employment and Reemployment Rights Act (USERRA)] on behalf of a particular veteran.” *Id.* at 1325 n.3.

**ANALYSIS:** The 11th Circuit noted that USERRA gives the federal government the right to sue States in federal court to enforce federal law. *Id.* at 1326. The court reasoned that the United States, not the individual, has “control over prosecution of the case” and that “the United States has an independent interest in enforcing USERRA.” *Id.* at 1327. The court

also noted that the 4th, 5th, 6th, and 7th Circuits have “rejected States’ contentions that lawsuits brought by the United States on behalf of specific victims are simply private lawsuits.” *Id.* at 1328.

**CONCLUSION:** The 11th Circuit held that Eleventh Amendment sovereign immunity does not bar suit since “the United States has a clear and substantial interest in enforcing USERRA.” *Id.*

***United States v. Daniels*, 685 F.3d 1237 (11th Cir. 2012)**

**QUESTION:** “[W]hether a conviction under 18 U.S.C. § 2422(b) requires the government to prove that the defendant knew that the victim was a minor.” *Id.* at 1240.

**ANALYSIS:** The court distinguished section 2422(b) from 18 U.S.C. § 1028(a)(1), an aggravated identity theft statute that requires that the defendant had specific knowledge that the “means of identification” he or she was using belonged to someone else. *Id.* at 1248. The court noted that while the two statutes were grammatically similar, the intent behind the statutes differed. *Id.* In writing section 2422(b), Congress sought to protect minors rather than victims of identity theft. *Id.* This “special context” called for a contextual approach to statutory interpretation. *Id.* Consistent with this approach, the court declined to require knowledge that the victim was a minor, as this interpretation offered more protection. *Id.* The court also noted that other courts did not apply this knowledge requirement to 18 U.S.C. § 2423(a) because protections of minors rebut the general presumption that a knowing mens rea applies to every element in the statute. *Id.* at 1248–49. Due to the similarities between sections 2422(b) and 2423(a), the court interpreted section 2422(b) accordingly. *Id.* at 1248 n.14.

**CONCLUSION:** The 11th Circuit held that § 2422(b) does not require that a defendant know that the victim was a minor. *Id.* at 1248.

***United States v. Haile*, 685 F. 3d 1211 (11th Cir. 2012)**

**QUESTION:** Whether the imposition of enhanced penalties following a conviction for gun possession under 18 U.S.C § 922(k) requires the government to prove beyond a reasonable doubt that the defendant knew at the time he possessed the gun that the serial number was obliterated. *Id.* at 1220.

**ANALYSIS:** The court acknowledged that “other circuits have consistently held that knowledge of the obliterated serial number is an element of the offense.” *Id.* The court further noted that § 924(a)(1)(B), the statutory provision governing penalties for violations of § 924(k), “applies only to ‘knowing’ violations.” *Id.* The court reasoned that [the] knowledge [element of § 922(k)] can be demonstrated by direct evidence

of actual knowledge or “may be inferred when the defendant has possessed the gun under conditions which an ordinary man would have inspected it and discovered the absence of a serial number.” *Id.* (internal quotation marks omitted).

**CONCLUSION:** The Eleventh Circuit joined its sister circuits “in holding that a defendant’s knowledge of the obliterated serial number is an element of the § 922(k) offense.” *Id.* at 1220.

***United States v. Pena*, 684 F.3d 1137 (11th Cir. 2012)**

**QUESTION:** Whether the “United States has jurisdiction to prosecute a nominated surveyor . . . for knowingly violating the [International Convention for the Prevention of Pollution from Ships (MARPOL)], while aboard a foreign vessel docked in the United States.” *Id.* at 1141.

**ANALYSIS:** The court first recognized that “district courts have original jurisdiction over all offenses against the laws of the United States.” *Id.* at 1145. The court then observed that Congress created two express limitations to the application of the MARPOL, when it implemented the treaty under the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. § 1901 *et seq.* *Id.* The court went on to note that the second limitation requires that any action taken by the United States under APPS must be taken in accordance with well-established international law. *Id.* The court explained that Article 4 of the MARPOL states that “for violations that occur within the jurisdiction of the Port State, the Port State and the Flag State have concurrent jurisdiction.” *Id.* at 1146. The court further explained that by signing the MARPOL treaty, the United States “consented to surrender its exclusive jurisdiction over violations within its ports, but maintains concurrent jurisdiction to sanction violations of the treaty according to U.S. law.” *Id.* The court did not find the United States either expressly or impliedly consented to surrender its concurrent jurisdiction over violations of the APPS occurring on foreign ships while docked at U.S. ports, in Article 4 or the APPS. *Id.* at 1147. The court concluded that “18 U.S.C. § 3231 and 33 U.S.C. §§ 1907 and 1908 give U.S. district courts jurisdiction over violations of MARPOL committed on foreign-flagged ships in U.S. ports.” *Id.*

**CONCLUSION:** The 11th Circuit held that the “United States had jurisdiction to prosecute a surveyor of a foreign-flagged ship for a knowing violation of MARPOL committed on a foreign-flagged ship at a U.S. port.” *Id.*

**Zinni v. ER Solutions, Inc., 2012 U.S. App. LEXIS 18163 (11th Cir. Aug. 27, 2012)**

**QUESTION:** Whether debt collectors’ “settlement offers for the full amount of statutory damages requested under the [Fair Debt Collection Practices Act (FDCPA)] rendered claims moot, requiring their dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).” *Id.* at 1166.

**ANALYSIS:** The court noted that “[o]ffers for the full relief requested have been found to moot a claim,” and highlighted that full relief means “the full amount of statutory damages *plus* a judgment.” *Id.* at 1166–67. The court agreed with the 4th Circuit that a settlement offer is not full relief and that an offer of judgment against defendants is preferable for a plaintiff because a court may enforce a judgment. *Id.* at 1167. Therefore, the 11th Circuit reasoned that, because the relief offered by the settlement offer was incomplete, “a live controversy remained over the issue of a judgment and the cases were not moot.” *Id.* at 1167–68.

**CONCLUSION:** The 11th Circuit held that the debt collector’s failure “to offer judgment prevented the mooting of FDCPA claims.” *Id.* at 1168.

#### FEDERAL CIRCUIT

**Dominion Resources, Inc. v. United States, 681 F.3d 1313 (Fed. Cir. 2012)**

**QUESTION:** Whether Treasury Regulation § 1.263A-11(e)(1)(ii)(B), which “sets out the general rule that when improving real property, certain costs must be capitalized instead of deducted from taxable income,” can validly be applied to interest incurred on debt that is unrelated to capital improvements being made to the real property. *Id.* at 1314.

**ANALYSIS:** The Federal Circuit analyzed the validity of § 1.263A-11(e)(1)(ii)(B) under the two-step test set forth in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), first determining whether the interpreted statute directly addresses the question at issue. *Id.* at 1317. If the statute does not address the question, then agency’s answer to that question is determined based on a permissible construction of the statute. *Id.* The court agreed with the finding of the United States Court of Federal Claims that § 1.263A-11(e)(1)(ii)(B) does not contradict the text of I.R.C. § 263A(f)(2)(A)(ii), because the statute is circular in its elucidation of the amount of interest



to be capitalized. *Id.* The Federal Circuit found that § 1.263A-11(e)(1)(ii)(B) was not a reasonable interpretation of the “avoided-cost rule” set forth in I.R.C. § 263A(f)(2)(A)(ii) because the regulation defined “production expenditures” as including the adjusted basis of the designated property. *Id.* The court explained that the “avoided-cost rule,” as noted in the statute’s legislative history, recognizes that if a capital improvement is not made, those funds can be used to pay down outstanding debt on the property, reducing accrued interest. *Id.* at 1317–18. When a capital improvement is made, the amount of capitalized interest should be calculated by multiplying the interest rate by the cost of the improvement. *Id.* This calculation should not include the property’s adjusted basis as § 1.263A-11(e)(1)(ii)(B) improperly instructs, since this amount would not have been available to pay down the debt had the improvement not been made. *Id.* Moreover, the Treasury’s failure to provide a reasoned explanation for adopting § 1.263A-11(e)(1)(ii)(B) violated *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983), which requires the Treasury to “articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” *Id.* at 1319 (internal quotation marks omitted.)

**CONCLUSION:** The Federal Circuit held that the “associated-property rule” under Treasury Regulation § 1.263A-11(e)(1)(ii)(B) was invalid because it misinterpreted I.R.C. § 263A(f)(2)(A)(ii) as requiring the adjusted basis of property temporarily withdrawn from service due to a capital improvement constituting production of designated property to be included in the calculation of capitalized interest. *Id.* at 1319.

***VanDesande v. United States*, 673 F.3d 1342 (Fed. Cir. 2012)**

**QUESTION:** Whether a Stipulation Agreement Regarding Damages between the Government and a federal employee, “resulting from a settlement of an earlier personnel case, is a contract, a consent decree, or perhaps both.” *Id.* at 1343.

**ANALYSIS:** The court cited Supreme Court precedent to support the notions that consent decrees and settlement agreements are not mutually exclusive as a matter of law, that consent decrees are a hybrid between contracts and judicial acts, and that a consent decree is treated as a contract or a judicial order depending on the nature of the case. *Id.* at 1348–49. The court stated that consent decrees are treated as contracts for purposes of enforcement, explaining that “the application of contract concepts lies at the heart of any claim for enforcement,” due to the fundamental inquiry of whether the non-breaching party will receive the

benefit of the bargain absent enforcement. *Id.* at 1350. The court also pointed out that settlement agreements tend to contain all of the elements of a contract, including the very term “agreement.” *Id.* at 1351. The court reasoned that since the answer to this issue determined whether it had subject-matter jurisdiction to hear the dispute under the Tucker Act, which confers federal jurisdiction over “claim[s] against the United States . . . founded . . . upon any express or implied contract with the United States,” to hold otherwise would be “inconsistent with the well-established rule that neither a court nor the parties ha[ve] the power to alter a federal court’s statutory grant of subject matter jurisdiction.” *Id.* at 1350.

**CONCLUSION:** The Federal Circuit held that consent decrees and settlement agreements are not mutually exclusive, and that the stipulation agreement was a contract for purposes of enforcement. *Id.* at 1350–51.

