# CITEBOOK

Favorable Case Law for Those Seeking Justice

Compiled by Paul Tallini

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# American Litigation Consultant LLC

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This Cite-book contains positive case law compiled over many years and is intended to help those seeking justice navigate and understand the system. You are in the battle of your life and the information contained herein will provide a solid foundation from which you can build your case. If you need assistance, whether in the pre-trial stages of a case or in the post-conviction stages visit our website at AmericanLitigationconsultantllc.com and our contact information is listed there. Best wishes Paul Tallini.

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## THE BATTLE FOR JUSTICE BEGINS HERE.

American Litigation Consultant LLC

Favorable Case Law for those seeking justice.

This cite-book was compiled over many years and contains decisions from the United States Supreme Court and the federal appellate courts that are favorable to the defense or that are otherwise noteworthy. I have not included any cases that relate exclusively to sentencing issues, that will be done at a later date. Occasionally, of course, cases are overruled, or are vacated pending rehearing. I have done my best to track the subsequent development of cases, but you should confirm the validity of any holding. I have included an index of all cases contained herein. On a regular basis, this website is updated so you may check for more recent cases within a topic. Please support Our mission to help educate and assist those who are incarcerated seeking justice. With your support we can continue to update these cases giving you the latest favorable court opinions as they come out. Click on any subject matter in this index and it will take you to the appropriate case law. Stay Blessed.


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## *ACCESSORY AFTER THE FACT*

***United States v. Centeno***, 793 F.3d 378 (3rd Cir. 2015) A constructive amendment of an indictment may occur because of a prosecutor's closing argument. In this case, the defendant was charged with aiding and abetting an assault (in a federal park). In closing argument, the prosecutor argued that the defendant could be found guilty of aiding and abetting the assault if he drove the person who actually committed the assault away from the scene. But this would not be aiding and abetting an assault, because the crime was already completed; instead, this would be accessory after the fact. This argument had the effect of amending the indictment and required setting aside the verdict.

***United States v. Calderon***, 785 F.3d 847 (2d Cir. 2015) In order to be guilty of accessory after the fact to the crime of murder (such as 18 USC § 1959), the defendant must know that the victim is dead or dying at the time that she assists the perpetrator. While she knew that the perpetrator had committed a crime and that she was assisting him in getting away, there was insufficient proof that the victim was dead or dying at the time. Even if she was aware that the victim had been shot (she may have heard the shots), that is not sufficient to prove that she was aware that he was dead or dying.

***United States v. Head,*** 707 F.3d 1026 (8th Cir. 2013) In order to prosecute a person for accessory after the fact, the government must prove that some other person actually committed the underlying offense. Proving only that the other person was convicted of the underlying offense is not sufficient. The defendant in the accessory prosecution must also be permitted to offer evidence that she was not aware that the principal committed the offense, or that the principal was acting in self-defense.

***United States v. Graves,*** 143 F.3d 1185 (9th Cir. 1998) In order to be convicted of accessory after the fact (18 U.S.C. § 3) to the crime of possession of a weapon by a convicted felon, the defendant must be shown not only to have known about the principal's possession of the weapon, but also that the principal had a felony offense. This is true, even though the government is not required to prove that the principal (in order to be guilty of being a felon in possession of a weapon) was aware that he had a felony conviction. It is true, moreover, even though someone may be found guilty of aiding and abetting another person's possession of a weapon by a convicted felon, even though the aider is unaware of the principal's status.

## *ADVICE OF COUNSEL OR OTHER EXPERT*

***United States v. Tobin***, 676 F.3d 1264 (11th Cir. 2012) The court held that "willfulness" is not an element of a § 841 offense (distribution of a controlled substance) and therefore, it is no defense that the defendant did not realize that his conduct was illegal or that he had consulted with a lawyer and the lawyer said the conduct was not illegal (this was an Internet Pharmacy prosecution). However, to be convicted of conspiracy to distribute a controlled substance, the defendant is required to act with knowledge of the illegality of his conduct, because under § 846, willfulness is an element of the offense and therefore, advice of counsel is a defense to a § 846 offense.

***United States v. Kottwitz***, 627 F.3d 1383 (11th Cir. 2010) The trial court erred in refusing to give an instruction on good faith reliance on advice of an accountant in this tax fraud prosecution. The defendant bears an extremely low threshold to justify the good faith reliance instruction and does not need to prove good faith. Whether the defendant fully disclosed the relevant facts, failed to disclose all relevant facts, or concealed information from his advisor, and relied in good faith on his advisor are matters for the jury – and not the court – to determine, under proper instruction. See also United States v. Morris, 20 F.3d 1111 (11th Cir. 1994); United States v. Eisenstein, 731 F.2d 1540 (11th Cir. 1984). United States v. Moran, 493 F.3d 1002 (9th Cir. 2007) Excluding evidence about what the defendant was told by her attorney and CPA about the legitimacy of the tax shelters was reversible error. Such testimony is not hearsay and cannot be excluded pursuant to Rule 403.

***United States v. McIntosh***, 124 F.3d 1330 (10th Cir. 1997) The defendant was charged with bankruptcy fraud and money laundering on the basis of his failure to disclose during his bankruptcy proceeding that he had received certain money and deposited some of those funds in a bank account he controlled through an unincorporated business he managed. The defendant's bankruptcy attorney testified that he was aware of the existence of the unincorporated business and was remiss in failing to inquire further and determine if its existence should have been disclosed to the bankruptcy court. This evidence was sufficient to prompt an "advice-of-counsel" instruction and the failure to instruct the jury on this defense was error.

***United States v. Walters***, 913 F.2d 388 (7th Cir. 1990) The defendant was prosecuted for his actions in connection with recruiting college players to play pro football. The players would lie about their amateur status in playing one more year in college despite the existence of a contract to play with a certain pro team. The defendant contended that he had sought the advice of counsel and had been informed that although this violated NCAA rules, it would not be a criminal offense. The trial

court erred in refusing to give an “advice of counsel” instruction to the jury. The trial judge’s decision that the defendant did not provide sufficient information to his attorneys was not a matter which should have been resolved by the judge – that is a matter for the jury.

***United States v. DeFries***, 129 F.3d 1293 (D.C. Cir. 1997) The trial court erred in failing to instruct the jury on the defense of reliance on advice of counsel. Though the defendant did not tell the lawyer virtually every fact that was needed to render sound advice, the primary facts which a lawyer would think pertinent were disclosed. Moreover, the fact that the defendant disregarded some of the lawyer’s advice did not negate the defense.

## *AIDING AND ABETTING*

***Rosemond v. United States***, 134 S. Ct. 1240 (2014) In order to be found guilty on an aiding and abetting theory, the defendant must intend that the crime be committed, and this “intention” must encompass the whole crime, not just one element. In Rosemond, the defendant was charged with aiding and abetting the offense of carrying a gun in connection with a drug offense in violation of 18 U.S.C. § 942(c). While his conduct need only aid a part of this crime (such as the drug offense), his intention must encompass the entire crime: both the drug offense and the firearm carrying offense. Moreover, his “intention” must precede his conduct. He must know, in advance, that one of his cohorts would be armed. It is not sufficient that he learned during the commission of the drug offense that one of his cohorts was armed.

***United States v. Fernandez-Jorge***, 894 F.3d 36 (1st Cir. 2018) A required element of the offense of possessing a firearm in a school zone, is that the defendant knew he was in a school zone. Though the convictions of several defendants in this case were affirmed, with respect to one defendant, who did not live in the community, there insufficient evidence that he was aware of the proximity to the school. The First Circuit reversed all defendants’ convictions who were prosecuted on an aiding and abetting theory, because the jury instruction did not comply with Rosemond: The instruction did not require that the aider and abettor knew the crime was to occur within a school zone.

***United States v. Ford***, 821 F.3d 63 (1st Cir. 2016) If a defendant is charged with aiding and abetting another person’s illegal possession of a firearm based on the other person’s felony record, the government must prove that the defendant knew the other person had a felony record, not just that she had “reason to know.” In this case, the defendant was the wife of the felon, but the trial court erred in failing to instruct the jury that the government was required to prove that she knew that his prior record involved a felony conviction.

***United States v. Prado***, 815 F.3d 93 (2d Cir. 2016) The trial court’s instruction on the law of aiding and abetting in this prosecution for a 924(c) violation was plainly erroneous in light of Rosemond v. United States. The instruction focused on the defendant’s aiding and abetting the underlying crime, without addressing the necessary intent to aid and abet the use of a firearm.

***United States v. Henry***, 797 F.3d 371 (6th Cir. 2015) The defendant was convicted of a 924(c) violation in connection with an armed robbery based on his aiding and abetting the principal perpetrator. The jury instruction, however, did not comply with Rosemond. The instruction failed to require that the government prove that the defendant intended to aid and abet the armed robbery with knowledge that the principal would use a firearm in connection with the armed robbery.

***United States v. Centeno***, 793 F.3d 378 (3rd Cir. 2015) A constructive amendment of an indictment may occur as a result of a prosecutor’s closing argument. In this case, the defendant was charged with aiding and abetting an assault (in a federal park). In closing argument, the prosecutor argued that the defendant could be found guilty of aiding and abetting the assault if he drove the person who actually committed the assault away from the scene. But this would not be aiding and abetting an assault, because the crime was already completed; instead, this would be accessory after the fact. This argument had the effect of amending the indictment and required setting aside the verdict.

***United States v. Encarnacion-Ruiz***, 787 F.3d 581 (1st Cir. 2015) In a child pornography production case, if a defendant is charged with aiding and abetting the production of child porn, a mistake of fact (the child’s age) is a defense. Unlike the principal perpetrator, who cannot raise this defense, pursuant to Rosemond v. United States, an aider and abettor must have the intent to commit the offense including all elements of the crime.

***United States v. Rodriguez-Martinez*****,** 778 F.3d 367 (1st Cir. 2015) The defendant was a passenger in a car. When the car was pulled over, the defendant got out, walked to the corner, and made a phone call. Drugs were found in the possession of the driver. The defendant was visibly nervous. A gun was found in the possession of the defendant. The First Circuit held that this evidence was insufficient to convict the defendant of aiding and abetting the possession with intent to distribute the drugs. His nervousness did not prove that he knew the driver was in possession of drugs and may just as well have reflected his concern about his own possession of the firearm. In addition, the court reversed the driver’s conviction of possessing a firearm in furtherance of a drug offense (the gun was possessed by the passenger). Because there was insufficient evidence that the driver, who possessed the drugs, knew that the passenger possessed a gun, he could not be convicted of the § 924(c) offense.

***United States v. Goldtooth***, 754 F.3d 763 (9th Cir. 2014) The government failed to prove that the defendant was aware that his colleague would rob the victim of tobacco that he had on his lap. Citing Rosemond v. United States, the Ninth Circuit held that to be guilty on an aiding and abetting theory, the government must prove that the defendant was aware of his colleagues’ intention to commit the crime prior to the actual commission of the crime.

***United States v. Rufai***, 732 F.3d 1175 (10th Cir. 2013) While the defendant's conduct aided the principal's health care fraud offense, the evidence was insufficient to show that the defendant was aware of the crime and thus he could not be convicted of aiding and abetting the health care fraud crime. Innocent explanations for his conduct were too reasonable to allow the government to convict based on alternative theories that supported the argument that he "must have known" about the principal's crime.

***United States v. Ferguson***, 676 F.3d 260 (2d Cir. 2011) In this securities fraud trial, one theory of culpability was aiding and abetting, i.e., "willfully caused an act to be done which, if directly performed by him or another would be an offense against the United States." The trial court properly defined "willfully" but failed to explain that the defendant's willful conduct must cause the act to be done by the other person. This was plain error requiring a reversal of the conviction.

***United States v. Turner***, 674 F.3d 420 (5th Cir. 2012) It was error – but harmless – to instruct the jury on an aiding and abetting theory of culpability. The evidence as presented at trial established that the defendant was either the sole participant in the crime or was an unwitting participant. Either way, he was not an aider and abettor.

***United States v. Silwo,*** 620 F.3d 630 (6th Cir. 2010) The defendant was instrumental in procuring a van that was later used to transport marijuana and was also observed engaging in activity that appeared to be counter-surveillance. This evidence, alone, did not suffice to support a conviction for conspiracy to possess with intent to distribute marijuana. The defendant was not present when the van was loaded. The defendant was clearly in a scheme, but the evidence did not show that he knew the scheme involved the distribution of marijuana. For the same reason, the defendant could not be convicted of aiding and abetting the possession with intent to distribute the marijuana.

***United States v. Perez-Melendez***, 599 F.3d 31 (1st Cir. 2010) While the evidence supported the conclusion that the defendant was aware that he was aiding and abetting the commission of criminal activity, the evidence did not establish beyond a reasonable doubt that he knew the criminal activity he was aiding was a cocaine transaction. The defendants gave inconsistent answers to agents when questioned about their activities, but this did not establish that they were aware of the specific crime that they were aiding.

***United States v. Tran***, 568 F.3d 1156 (9th Cir. 2009) The defendant was in a car that exited a warehouse that had been used as a drug distribution site. The defendant was a passenger and the marijuana was in the trunk. There was insufficient evidence establishing that the defendant possessed the marijuana with intent to distribute it, or that he conspired to do so. The Rule 404(b) evidence may have established that he had knowledge of the marijuana (the limited purpose for which the evidence was admitted), but it did not establish that he constructively or actually possessed the marijuana – or aided and abetted the possession of the marijuana – or that he conspired to do so. See also United States v. Sanchez-Mata, 925 F.2d 1166 (9th Cir. 1991) and United States v. Estrada-Macias, 218 F.3d 1064 (9th Cir. 2000).

***United States v. McDowell***, 498 F.3d 308 (5th Cir. 2007) The defendant was charged with aiding and abetting a violation of 18 U.S.C. § 1461, mailing obscene material using the U.S. Postal Service. Though the obscene material was, in fact, mailed, there was insufficient evidence that the defendant was aware that the mails were being used or that he aided and abetted the offense with the knowledge that the mails were being used to distribute the obscene videos.

***United States v. Gardner***, 488 F.3d 700 (6th Cir. 2007) Though intuition might lead one to conclude that to be prosecuted as an aider and abettor, the defendant is not required to have as much of a culpable state of mind as the principal, in certain situations, just the opposite is true. Consider the offense of possession of a firearm by a convicted felon. If one is charged with being a felon in possession of a firearm, the defendant may not defend on the basis that he did not know that he was a felon. An aider and abettor, however, must be proven to have actually known that the person who he aided in the possession was a felon.

***United States v. Penaloza-Duarte***, 473 F.3d 575 (5th Cir. 2006) The defendant was a passenger in a car loaded with methamphetamine. When a trooper in Louisiana stopped the car and discovered the drugs, the defendant claimed to be a confidential informant for a California detective, which was, in fact, verified by the California police. Though there was sufficient evidence of the defendant's knowing possession of the drugs (he acknowledged knowing the drugs were in the car), the evidence was not sufficient to prove that he associated himself with, and engaged in, some affirmative conduct designed to aid the criminal venture, which is an indispensable component of an aiding and abetting conviction. There was no evidence that he loaded, or assisted in loading the car, or that he did any of the driving, or that he even knew the location to which the load was heading. A conviction must be reversed if the evidence construed in favor of the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged. A subsequent Fifth Circuit decision abrogated the standard of review in this case.

***United States v. Vargas-Ocampo***, 747 F.3d 299 (5th Cir. 2014). ***Laird v. Horn***, 414 F.3d 419 (3rd Cir. 2005) Two defendants were tried for first degree murder in a Pennsylvania state court. The accomplice liability jury instruction did not clearly inform the jury that in order to be found guilty of aiding and abetting murder in the first degree (as opposed to being the actual killer), the defendant must have the intent to kill, not just the intent to engage in criminal activity that resulted in an accomplice killing the victim.

***Juan H. v. Allen***, 408 F.3d 1262 (9th Cir. 2005) The defendant's juvenile conviction for aiding and abetting first degree murder was not supported by sufficient evidence. Though the juvenile/defendant was present at the scene, there was insufficient proof that he was aware that the principal would commit the murders of the victims. The defendant may have had a motive, and may have fled after the murders, but neither motive, nor flight is sufficient to prove that the defendant aided and abetted the murders.

***United States v. Hornaday***, 392 F.3d 1306 (11th Cir. 2004) The defendant engaged in e-mail communications with an undercover agent and enticed the agent (who was posing as the father of a young girl) to facilitate a rendezvous between the defendant and the girl. The defendant could be prosecuted for violating 18 U.S.C. § 2422(b), but it was inappropriate (though harmless) to instruct the jury on an aiding and abetting theory, because there was no perpetrator, other than the defendant. While aiding and abetting liability under §2(b) does not require another actual perpetrator, there must at least be someone else who is participating in the offense, even if innocently. Thus, a defendant can aid and abet an innocent pawn in the commission of an offense, but if, as in this case, the only person engaged in any unlawful conduct (knowingly, or not) is the defendant, he is not aiding and abetting anybody else. The court also noted that a defendant can be prosecuted for aiding and abetting a drug offense where the only other participant is an undercover law enforcement officer. Again, however, in that situation the undercover agent is actually engaged in the drug transaction (i.e., moving the drugs), albeit in a non-criminal manner.

***United States v. Frampton***, 382 F.3d 213 (2d Cir. 2004) The government failed to prove that the person who committed the offense in this case did so with the requisite intent to convict him under the aiding and abetting statute. The offense was committing violence in support of a racketeering enterprise. 18 U.S.C. § 1959. One defendant hired another defendant to shoot a rival. The shooter was not shown to have known the reason that the shooting was requested. Therefore, he could not have known that his violent act was conducted “in aid of racketeering.” Thus, though he actually committed the offense, he could not be convicted of aiding and abetting the crime of committing an act of violence in aid of racketeering.

***United States v. Cartwright***, 359 F.3d 281 (3rd Cir. 2004) The evidence was insufficient to prove that the defendant was a knowing “lookout” for a drug transaction (as opposed to some other offense) and therefore his convictions for being a member of a drug conspiracy and for aiding and abetting the drug offense were reversed on sufficiency grounds. The government failed to prove that the defendant knew specifically that the illegal activity in which he was participating involved drugs rather than some other form of contraband. The court notes several other Third Circuit cases that have overturned drug conspiracy and aiding and abetting convictions because of the absence of evidence that the defendant agreed to participate in the specific crime alleged in the indictment. (NOTE: The Third Circuit later issued an opinion questioning whether this case utilized the proper standard of review, United States v. Caraballo-Rodriguez, 726 F.3d 418 (3rd Cir. 2013).

***United States v. Lombardi***, 138 F.3d 559 (5th Cir. 1998) The defendant was a knowing participant in a drug transaction and he knowingly aided and abetted the drug offense, but the evidence did not establish that he knew that a juvenile was involved in the venture. The conviction for knowingly and intentionally employing, hiring, using, persuading, inducing, enticing, or coercing a juvenile to commit a drug offense was not supported by this evidence. To be guilty of aiding and abetting an offense (i.e., using a juvenile), the defendant must not only knowingly participate in the drug offense, but also must knowingly participate in the offense of using a juvenile.

***United States v. Wilson***, 160 F.3d 732 (D. C. Cir. 1998) The evidence was insufficient to prove that the defendant aided and abetted or conspired with others to murder the victim. Though the defendant advised the two principals of the victim’s whereabouts, there was insufficient evidence that he knew that the other two intended to kill the victim. Even though he knew the two were looking for the victim, there was no proof that he knew why.

***United States v. Spinney***, 65 F.3d 231 (1st Cir. 1995) Evidence established that the defendant planned a bank robbery and participated in the surveillance before the robbery. The actual robber brandished a weapon when he entered the bank. Given this evidence, a jury could find the defendant guilty of aiding and abetting an armed bank robbery. However, this evidence alone was not sufficient to prove that the defendant aided and abetted a §924(c) offense. To be guilty of aiding and abetting an armed bank robbery, the government must prove that the defendant had at least constructive knowledge that a gun would be used – that is, that it is likely that a gun would be used. For §924(c) aiding and abetting liability, however, the government must establish that the defendant knew “to a practical certainty that the principal would be using a gun.” In this case, the government made a satisfactory showing with regard to the armed robbery count, but not with regard to the §924(c) count.

***United States v. Loder***, 23 F.3d 586 (1st Cir. 1994) The evidence failed to support defendant’s conviction for aiding and abetting his employer’s mail fraud scam. The defendant helped his employer “cut up” a vehicle which was fraudulently reported to an insurance company as being stolen. There was no evidence, however, that the defendant had any knowledge of the scheme to defraud the insurance company. Even circumstantial evidence failed to establish that the defendant was aware of the purpose of cutting up the car. Cars can be cut up for numerous purposes other than to accomplish a mail fraud scheme, such as recovering parts from a stolen car or destroying evidence used in an armed robbery or kidnapping.

***United States v. Amen***, 831 F.2d 373 (2d Cir. 1987) One cannot be convicted of CCE on the basis of aiding and abetting a person who manages or supervises five other individuals. United States v. Green, 25 F.3d 206 (3rd Cir. 1994) The defendant asked his colleague to threaten a federal employee who had been attempting to serve him with a subpoena. The colleague threatened not only the federal employee, but also his family. This was not envisioned or reasonably foreseeable by the defendant, and he could not be convicted of threatening the family member on an aiding and abetting theory. United States v. Salmon, 944 F.2d 1106 (3rd Cir. 1991) The defendant clearly was acting as a lookout for a narcotics transaction. While the evidence showed that he knowingly acted as a lookout, however, there was no evidence that he knew the transaction involved the distribution of cocaine. A conviction for aiding and abetting the cocaine transaction, or for conspiring to possess with intent to distribute cocaine, could not be sustained on this evidence alone. (NOTE: The Third Circuit later issued an opinion questioning whether this case utilized the proper standard of review, United States v. CaraballoRodriguez, 726 F.3d 418 (3rd Cir. 2013).

***United States v. Barel***, 939 F.2d 26 (3rd Cir. 1991) Defendant gave a false social security number to a bank in order to procure a loan for himself. This does not constitute the crime of making a false entry into the books or reports of a federally insured bank. That statute, 18 U.S.C. §1005, is not, on its face, limited to bank employees or insiders, but, nevertheless, that was the clear legislative intent, and the statute will be so construed. Furthermore, the defendant could not be convicted of violating the statute as an aider and abettor. The defendant did not have the specific intent to violate §1005, a requirement for aiding and abetting culpability, nor did he intend for the bank employees to violate the law (as in the case of CTR structuring offenses).

***United States v. Murray***, 988 F.2d 518 (5th Cir. 1993) The defendant was an employee of a pawnshop that also sold firearms. The owner arranged to sell an illegal weapon to a convicted felon. The defendant participated in the sale and could be convicted of the counts of the indictment charging him with aiding and abetting the sale of the illegal weapon. However, there was insufficient evidence to show that he was aware that the recipient was a convicted felon. The fact that the defendant's employer was aware is not sufficient to sustain the defendant's conviction: an aider and abettor must share the criminal intent of the principal. This would be impossible if the aider and abettor is unaware that the purchaser was a convicted felon.

***United States v. Martiarena***, 955 F.2d 363 (5th Cir. 1992) The defendant helped her father in his money exchange business. Though she asked her boyfriend to assist her father in violating the CMIR law (international monetary transactions), there was no evidence that she was aware that, once the money was in this country, her father would not comply with the CTR laws. The defendant was not shown to have actively participated in, or been rewarded by, the failure to file the CTR.

***United States v. Ledezma***, 26 F.3d 636 (6th Cir. 1994) The defendant entered into a drug conspiracy after the drugs were distributed by the principals. Though he could be found guilty of being in the conspiracy, the evidence did not support his conviction for aiding and abetting the offense.

***United States v. Superior Growers Supply Co***., 982 F.2d 173 (6th Cir. 1992) The trial court properly dismissed an indictment which charged the defendant supply company with supplying materials so that others could grow marijuana. The indictment charged the defendant with conspiring to aid and abet the growing of marijuana. The problem here is combining the conspiracy and aiding and abetting offenses. In order to conspire to aid and abet, there must be a crime in progress that the defendant agreed to aid. Here, there was no allegation in the indictment that there was a crime being aided or a crime that the defendant agreed to aid. The court considered United States v. Falcone, 311 U.S. 205 (1940), and Direct Sales Co. v. United States, 319 U.S. 703 (1943), in reaching this result: a supplier of innocent material can only be convicted of conspiring to produce an illegal product if the supplier knows of the end result and intends to further the illegal ends of the manufacturers.

***United States v. Doig***, 950 F.2d 411 (7th Cir. 1991) OSHA provides for criminal penalties for corporations and employers who willingly violate provisions of OSHA. The defendant, an employee of the company, was charged as an aider and abettor of the corporate defendant. This was not permissible. The Act only outlaws conduct by employers; an employee may not be convicted of aiding and abetting.

***United States v. Pino-Perez***, 870 F.2d 1230 (7th Cir. 1989) A person who is not supervised by a CCE "kingpin," but who aids and abets the kingpin, is subject to prosecution as an aider and abettor under §2 and thus can be prosecuted under 21 U.S.C. §848. This holding does not apply to a person who is supervised by the kingpin.

***APPEAL*** (***Cumulative Error Doctrine***)

***United States v. Certified Environmental Services, Inc.***, 753 F.3d 72 (2d Cir. 2014) Various improper comments by the prosecution during opening statement and in the rebuttal closing argument, as well as the improper exclusion of evidence offered by the defense cumulatively required reversal of the conviction, even if any one or two of these errors was not reversible error.

***United States v. Adams***, 722 F.3d 788 (6th Cir. 2013) The trial court abused its discretion in admitting certain Rule 404(b) evidence; abused its discretion in admitting certain witness intimidation evidence; abused its discretion in admitting certain evidence that should have been excluded pursuant to Rule 403; and abused its discretion in altering transcripts of undercover tapes. While none of these errors may have been reversible error, cumulatively, the errors required that the conviction be reversed.

***United States v. Delgado***, 631 F.3d 685 (5th Cir. 2011) Several errors in this case – when considered cumulatively – required that the conviction be set aside: (1) there was insufficient evidence offered to support a deliberate ignorance instruction, because there was no evidence of the defendant's knowledge of the high probability of the criminal activity; (2) the prosecutor improperly stated during closing argument that the defendant, who did not testify, had a "lied to agents when they interviewed her" when she denied guilt. This amounted to an improper statement of the prosecutor's personal opinion; (3) a government agent testified (non-responsively to a question) that defendant's trucking company had been involved in other drug trafficking; (4) the absence of a full transcript of the proceeding. In a separate holding, the Fifth Circuit also reversed the defendant's conspiracy conviction on sufficiency grounds. All these errors, when considered cumulatively, denied the defendant a fair trial.

***United States v. Al-Moayad***, 545 F.3d 139 (2d Cir. 2008) The Second Circuit concluded that the effect of various errors in this terrorism trial rendered the trial fundamentally unfair and reversed the conviction. The errors included improperly admitting a prior statement of a witness pursuant to Rule 801(d)(1)(b), and admitting testimony from a vicim of a terrorist bombing that was not shown to have had any connection to the defendant, in violation of Rule 403. (This case is discussed in greater detail in EVIDENCE (Rule 403)).

***United States v. Baker***, 432 F.3d 1189 (11th Cir. 2005) The cumulative error doctrine provides that the aggregation of non-reversible errors, i.e., plain errors that do not individually necessitate a reversal and harmless errors, can yield denial of the constitutional right to a fair trial, thereby necessitating a reversal of the conviction.

***United States v. Riddle***, 103 F.3d 423 (5th Cir. 1997) The trial court erred in permitting a government lay witness to offer expert testimony, excluding a defense expert, admitting improper Rule 404(b) evidence, and admitting evidence that should have been excluded pursuant to Rule 403. While not deciding that any one of these errors, viewed in isolation, would have been reversible, when considered cumulatively, the net effect was the denial of the defendant's right to a fair trial.

***United States v. Frederick***, 78 F.3d 1370 (9th Cir. 1996) Although no single trial error examined in isolation was sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors was sufficiently prejudicial to justify a reversal. The government introduced improper bolstering testimony, improperly vouched for its witnesses, and improperly maligned the defense attorney during closing argument. In isolation, none of the errors was enough to spoil the conviction; together, however, the defendant was unfairly prejudiced. This is the logical corollary of the harmless error doctrine which requires the appellate court to affirm a conviction if there is overwhelming evidence of guilt.

***APPEAL*** (***Government Appeal***)

***United States v. Chaudhry***, 630 F.3d 875 (9th Cir. 2011) The government may not appeal a decision by the trial court to commit a defendant to a psychiatric facility pursuant to 18 U.S.C. § 4241.

***United States v. Weyhrauch***, 544 F.3d 969 (9th Cir. 2008) The government failed to provide an adequate certification under 18 U.S.C. § 3731, because it was not signed by the U.S. Attorney himself, nor was there proof that a proper Department of Justice official approved the pretrial appeal.

***United States v. Giffen,*** 473 F.3d 30 (2d Cir. 2006) The government is authorized to appeal an adverse decision by the district court relating to the Classified Information Procedure Act (CIPA) insofar as the district court's ruling relates to the admissibility or non-admissibility of classified evidence. In this case, no specific ruling was made by the district court relating to any item of evidence; rather, the court simply held that the defendant's "public authority defense" would be considered in evaluating the CIPA issues.

***United States v. Arce-Jasso***, 389 F.3d 124 (5th Cir. 2004) The district court granted a motion to suppress after the trial was concluded. The government's appeal of this order more than thirty days after the decision was reached was untimely. The government's argument – that the time to appeal did not start until the trial court granted the post-verdict judgment of acquittal – was meritless, in light of the clear requirement of § 3731.

***United States v. Watson***, 386 F.3d 304 (1st Cir. 2004) The government may not appeal a trial court's denial of a government motion to appeal. See 18 U.S.C. § 3731. In this case, the prosecutor requested a continuance to secure the attendance of a witness who was out of the country and would not return voluntarily. The prosecutor wanted additional time to take the witness's deposition.

***United States v. Pharis***, 298 F.3d 228 (3rd Cir. 2002) During the course of trial, the trial court redacted certain portions of the indictment and limited certain evidence that the government could introduce. The government appealed, arguing that the trial court's ruling was tantamount to dismissing the indictment. The Third Circuit disagreed. 18 U.S.C. § 3731 only authorizes the government to appeal when the indictment, or some count in the indictment is dismissed, not when an evidentiary ruling makes it difficult to prove the case. Another sub-section of § 3731 authorizes the government to appeal when evidence is excluded or suppressed, but that only applies if the appeal is filed prior to trial.

***United States v. Hundley***, 858 F.2d 58 (2d Cir. 1988) The trial court wanted to permit the government to appeal his sentencing decision which did not include a government-sought fifteen-year enhancement under the Armed Career Criminal Act. To facilitate the government's appeal, the Court sentenced the defendant as the government proposed and then granted an immediate §2255 motion and set aside the sentence. Since the government can appeal a §2255 decision, an appeal was taken to the Second Circuit. The Second Circuit held that this "contrivance of a staged plea and sentence" could not confer jurisdiction on the appellate court.

***United States v. Carrillo-Bernal***, 58 F.3d 1490 (10th Cir. 1995) When the government appeals pursuant to 18 U.S.C. §3731, the government must certify that the appeal is not taken for purpose of delay and that the evidence suppressed represents a substantial proof of a material fact in the proceeding. The government may not comply with this requirement with a mere rubber stamp determination that the issue is important. Every district court order which suppresses evidence is not appropriately appealed under §3731.

***APPEAL*** (***Harmless Error / Plain Error***)

***United States v. Vonn***, 535 U.S. 55 (2002) If the defendant fails to object to a Rule 11 violation during the guilty plea colloquy, any error will be reviewed under a plain error standard of review.

***Johnson v. United States***, 520 U.S. 461 (1997) The district court erred in its jury instruction by removing the issue of materiality from the jury's consideration. The Court reviewed this error under the plain error standard and concluded that the error, though plain, did not affect the fairness, integrity or public reputation of the judicial proceedings. The court noted that an error is considered "plain" if it is obvious at the time of appellate review, not just at the time of trial.

***United States v. Lewis***, 492 F.3d 1219 (11th Cir. 2007) A defendant who failed to raise a double jeopardy claim in the district court is not forever foreclosed from raising a double jeopardy claim in the appellate court. He must establish, however, that it was plain error to allow the second trial to proceed. The court noted that there is a difference between forfeiting a claim (such as in this case, where the defendant simply fails to raise it, and thus must overcome the plain error standard of review) and affirmative waiver of an issue, which forecloses appellate review. See United States v. Olano, 507 U.S. 725 (1993).

***United States v. Virgil***, 444 F.3d 447 (5th Cir. 2006) The defendant has a right to counsel at the sentencing phase of his trial. In this case, the defendant fired his trial counsel and opted to proceed pro se, but the trial court conducted an inadequate Faretta inquiry. Faretta v. California, 422 U.S. 806 (1975). A Faretta violation at trial is not subject to harmless error analysis; nor is a Faretta violation at the sentencing phase subject to harmless error review.

***United States v. McKinney***, 120 F.3d 132 (8th Cir. 1997) The defendant was convicted of using a firearm in connection with a drug offense, but the evidence did not satisfy the standard of Bailey v. United States, 116 S.Ct. 501 (1995). Reconsidering an earlier opinion, the Eighth Circuit concluded that this conviction could not survive plain error review.

***United States v. Perez***, 116 F.3d 840 (9th Cir. 1997) Even if the defendant proposed the erroneous jury instruction, the appellate court may review the erroneous instruction under a plain error standard. If the error is affirmatively invited (that is, there was a knowing relinquishment of a right), the error may not be reviewed. But where the defendant was not aware of the error in the proposed instruction (here, the prosecution and the trial court were also unaware of the fault in the proposed instruction), the appellate court may review the error for plain error.

***United States v. Ross,*** 77 F.3d 1525 (7th Cir. 1996) The Seventh Circuit reviewed the “plain error” doctrine that was analyzed in United States v. Olano, 507 U.S. 725 (1993). In order to establish plain error, the defendant must show: (1) an error was committed; (2) the error was “plain” which means that it was clear or obvious. Whether an error is plain or obvious is considered as of the time of review – not at the time of trial (i.e., not at the time the error was committed); (3) the error must affect the defendant’s “substantial rights.” This is essentially the same test as the “harmless error” analysis, except in this context, the defendant shoulders the burden of establishing the prejudice. In making this showing, the defendant is not required to show that the result would have been different, but for the error; rather, he must demonstrate that the jury verdict in this case was affected by the district court’s faulty instruction. Finally, (4) the court must decide, in the exercise of discretion, if the district court’s error seriously affected the fairness, integrity, and public reputation of judicial proceedings.

***United States v. Frederick***, 78 F.3d 1370 (9th Cir. 1996) Although no single trial error examined in isolation was sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors was sufficiently prejudicial to justify a reversal. The government introduced improper bolstering testimony, improperly vouched for its witnesses, and improperly maligned the defense attorney during closing argument. In isolation, none of the errors was enough to spoil the conviction; together, however, the defendant was unfairly prejudiced. This is the logical corollary of the harmless error doctrine which requires the appellate court to affirm a conviction if there is overwhelming evidence of guilt.

***United States v. Eason***, 920 F.2d 731 (11th Cir. 1990) The defendant was convicted of five counts relating to a scheme to defraud the Farmers Home Administration. In a separate trial, his father had been convicted of conspiracy to commit the same offense. At the defendant’s trial, a witness was asked by the prosecution whether the defendant’s father had been convicted of committing the same crime which the defendant was charged with. Because the father never testified, this was not the proper subject of impeachment and evidence relating to the conviction of a co-conspirator was inadmissible. The government claimed that the error was harmless, in part because the defendant was convicted of some counts unrelated to his father’s conspiracy. The court disagrees: “Where a defendant is tried on several counts in one trial, highly prejudicial evidence is wrongfully introduced regarding some of those counts, and the jury convicts on those counts, we cannot know whether the jury was able to compartmentalize the evidence and the counts. That is, we cannot know whether the jury applied the improper evidence only to certain counts.” The court also notes that the government should not pride itself on having committed an error which might have been harmless. “One might think he is a better lawyer because he has transgressed a rule and ‘gotten away with it.’ He is not. That we find an error not to be reversible does not transmute that error into a virtue. The error is still an error. Urging the error upon the trial court still violates the United States Attorney’s obligation to the court and to the public.”

***APPEAL (Law of the Case Doctrine)***

***United States v. Romero***, 136 F.3d 1268 (10th Cir. 1998) As a matter of Circuit law, the Tenth Circuit adheres to the Law of Case doctrine which provides that if the government agrees to a particular jury instruction regarding an essential element of an offense, the government may not later change its position on appeal. Here, the government agreed at trial that the non-Indian status of the victim was an element of the offense. Given this position, the government could not protest on appeal that this was not an essential element of the offense.

***APPEAL (Magistrate Decision Appeal)***

***Johnson v. Finn***, 665 F.3d 1063 (9th Cir. 2011) The Federal Magistrate concluded that the state prosecutor had violated Batson. The district court judge rejected the Magistrate’s finding without conducting a new hearing. This was error. The Magistrate conducted a comparative analysis of the struck juror with other jurors who were not struck and determined that the state prosecutor had struck the juror on the basis of race and not the reasons offered at the habeas hearing.

***United States v. Powell***, 628 F.3d 1254 (11th Cir. 2010) If the Magistrate Judge makes a decision that is based in part on a credibility assessment of a witness, the district court judge may not reverse the decision of the Magistrate without undertaking a de novo hearing.

***APPEAL (Moot)***

***United States v. Koblan***, 478 F.3d 1324 (11th Cir. 2007) If a defendant dies pending the appeal of his conviction, the appeal will be dismissed with instructions to the lower court to vacate the conviction. This also operates to vacate any order of restitution. The Eleventh Circuit rejected the argument that this creates an unfair windfall for the defendant's heirs.

***United States v. Hamdi***, 432 F.3d 115 (2d Cir. 2005) The defendant had completed the service of his sentence and had been deported. On appeal, he challenged the length of his sentence under the Guidelines. The Second Circuit held that the appeal was not moot, because the defendant might try to re-enter the country in the future and the length of his sentence could impact the Attorney General's decision whether to allow him to re-enter, despite a prior conviction. This case contains a lengthy discussion of the issue of mootness for appellants who have completed their sentences but insist on litigating appellate issues.

***APPEAL (Preservation of Issue for appeal)***

***Class v. United States***, 138 S. Ct. 798 (2018) Even after a guilty plea and sentencing, a defendant may appeal, challenging the constitutionality of the statute that led to his indictment and conviction.

***United States v. St. Hubert***, 909 F.3d 335 (11th Cir. 2018) Same holding as Class: a guilty plea does not waive a challenge to the constitutionality of a statute.

***United States v. Carpenter***, 494 F.3d 13 (1st Cir. 2007) Rule 103(a), F.R.E., provides that once a court rules definitively on a matter pretrial (such as in a motion in limine), there is no need for a party to object to the introduction of that evidence at trial. In this case, the defense continually objected to the prosecution's introduction of evidence that the defendant's investment trading practices were very risky and amounted to gambling. The defendant was charged with wire fraud in connection with his investment of client's money. The trial court told counsel that his continuing objection was noted. During closing argument, the prosecutor repeatedly referred to the defendant as a gambler. The objection at trial was sufficient to preserve an objection to the closing argument.

***United States v. Lewis***, 492 F.3d 1219 (11th Cir. 2007) A defendant who failed to raise a double jeopardy claim in the district court is not forever foreclosed from raising a double jeopardy claim in the appellate court. He must establish, however, that it was plain error to allow the second trial to proceed. The court noted that there is a difference between forfeiting a claim (such as in this case, where the defendant simply fails to raise it, and thus must overcome the plain error standard of review) and affirmative waiver of an issue, which forecloses appellate review. See United States v. Olano, 507 U.S. 725 (1993).

***Gov't. of Virgin Islands v. Rosa***, 399 F.3d 283 (3rd Cir. 2005) This case contains a discussion of the difference between a waiver of an issue and the forfeiture of the right. A waiver amounts to a knowing relinquishment of an issue, for example, by way of stipulation, or express waiver of a right. A forfeiture of an issue involves a non-knowing failure to object to certain testimony or the non-knowing failure to object to a jury instruction. In the situation of a waiver, there is no right to appeal. With a forfeited right, however, the plain error standard applies.

***United States v. Valez***, 354 F.3d 190 (2d Cir. 2004) The defendant entered into a proffer agreement that provided that the government could use the defendant's statements if there was any evidence at trial (including the testimony of the defendant or any other witness) that contradicted his admissions. After plea negotiations broke down, the defendant sought to bar the government's use of his statements, arguing that only his statements could be impeached with his statements. The court disagreed, holding that if any witness's testimony was inconsistent with the defendant's proffer, the government could then use the defendant's statement. In light of this ruling, the defendant did not call any defense witnesses. On appeal, the government argued that pursuant to Luce v. United States, 469 U.S. 38 (1984), the defendant could not raise this issue on appeal, because the issue did not come to fruition. The Second Circuit disagreed and held that the issue was preserved for appellate consideration. Unlike the situation in Luce, the defendant in this case was not complaining about the lower court's balancing judgment; instead, he questioned whether the proffer agreement was constitutional. The Second Circuit ultimately ruled against the defendant.

***APPEAL (Spillover Effect)***

***Wolfe v. Clarke***, 691 F.3d 410 (4th Cir. 2012) The defendant was convicted of murder and given the death penalty. A principal witness at trial was a man named Barber, who was hired by Wolfe to kill the victim. When Barber was first arrested and before he implicated Wolfe in the murder, he was told by a police officer that if he implicated Wolfe, he (Barber) could avoid the death penalty. This conversation was memorialized in a police report that was never produced to the defense. This was a Brady violation that required granting the writ as to the conviction and sentence. The Fourth Circuit also held that the conviction for being involved in a drug conspiracy would also be vacated, because had the Brady information been disclosed, the defendant would likely not have testified at the trial and would not have been in the position of having to deny guilt of the murder, while admitting his role in the drug conspiracy.

***United States v. Wright***, 665 F.3d 560 (3rd Cir. 2012) The jury was instructed on different theories under which the defendant could be convicted of honest services mail fraud, including bribery and conflict of interest. The latter, post-Skilling was invalid. Not only were the honest services mail fraud counts reversed, but the traditional mail fraud counts were also reversed because

of the prejudicial spillover effect caused by the admission of evidence relating to the honest services counts that would not have been admitted in a traditional mail fraud trial. The Third Circuit explains at some length the procedure for analyzing prejudicial spillover where certain counts of conviction are defective, and others are not.

***United States v. Bruno***, 383 F.3d 65 (2d Cir. 2004) Reversal of the defendants' convictions on charges of Violence in Aid of Racketeering, RICO, and obstruction of justice required vacating a false statement conviction, as well, though there was no legal impediment to the conviction on that count.

***United States v. Keating***, 147 F.3d 895 (9th Cir. 1998) The defendant was tried in federal court for bank fraud, securities fraud and related charges. He was previously convicted in state court for the same conduct. Following his conviction in federal court, it was determined that at least one juror, and perhaps more, knew about his state conviction (learning about it during the federal trial), and discussed it with other jurors during deliberations. The trial court properly set aside the verdict and granted a new trial. Moreover, this evidence supported vacating the co-defendant's conviction, as well. "When a finding of guilt is dependent upon a connection between defendants, collateral information clearly prejudicial to one defendant is not harmless to the other defendant."

***United States v. Wilkins***, 139 F.3d 603 (8th Cir. 1998) After the government rested its case-in-chief, the trial court granted a judgment of acquittal on several counts. Thereafter, the jury acquitted the defendant on some counts and convicted him on one count. The trial court granted defendant's Motion for New Trial, on the grounds that the spillover effect of the evidence heard on the counts that the judge threw out prejudiced the defendant on the remaining count. The Court of Appeals concluded that this was not an abuse of discretion.

***United States v. Richardson***, 161 F.3d 728 (D.C. Cir. 1998) The improper joinder of DC local threat charges with a federal firearms charge was improper. The improper joinder tainted the firearms charge, as well.

***United States v. Adkinson,*** 135 F.3d 1363 (11th Cir. 1998) The indictment included charges that, at the time, did not amount to an offense. Nevertheless, the trial court allowed the government to proceed through trial with those counts in place and permitted the government to introduce considerable evidence on those counts. When the case was submitted to the jury after several months of trial, the indictment was redacted, and those counts were excised. The Eleventh Circuit reversed the entire conviction. The inclusion of those counts in the indictment rendered the trial fundamentally unfair.

***United States v. Tellier***, 83 F.3d 578 (2d Cir. 1996) The defendant's RICO conspiracy and substantive RICO conviction was reversed because the government introduced improper hearsay evidence (a co-conspirator statement that did not qualify under Rule 801(d)(2)(E)). Because of the insufficiency of evidence of the defendant's participation in this massive RICO conspiracy, the conviction on the other substantive count, a Hobbs Act count, would also be reversed. Once the RICO count fell, the prejudice on the remaining count was undeniable.

***United States v. Rooney***, 37 F.3d 847 (2d Cir. 1994) The defendant's conviction on an 18 U.S.C. §666 count was reversed based on insufficient evidence. Unrelated counts under 18 U.S.C. §1001 were supported by sufficient evidence but were tainted by the erroneous conviction of the §666 count. The evidence on the §666 count would not have been admissible if the §1001 counts had been tried alone and the evidence and argument relating to the §666 count was "pejorative."

***United States v. Eason***, 920 F.2d 731 (11th Cir. 1990) The government committed reversible error in introducing evidence of a co-conspirator's conviction. The co-conspirator did not testify, and thus, there was no need to impeach him. The court reviews the government's various arguments why the evidence should have been admissible, and that it was harmless error and rejects each of these arguments. The error was harmful and tainted not only the conviction with regard to counts where the co-conspirator was involved, but also all other counts of the indictment. The court characterized the government's efforts to introduce this evidence as governmental misconduct.

***APPEAL (Sufficiency of Evidence)***

This topic contains cases that explore the standards that appellate courts use in reviewing the sufficiency of the evidence. Cases which evaluate the sufficiency of the evidence that a particular offense was committed can be found under the heading for that crime.

***Tanner v. Yukins***, 867 F.3d 661 (6th Cir. 2017) The Sixth Circuit granted a § 2254 writ on the basis that only speculation supported the trial jury's verdict of guilty of murder. The state court failed to properly apply Jackson v. Virginia.

***United States v. Fries***, 725 F.3d 1286 (11th Cir. 2013) The defendant was charged with violating 18 U.S.C. §922(a)(5), which makes it a crime to sell a firearm to a person in another state unless either the seller or purchaser is a licensed firearms dealer. The purchaser in this case was an undercover ATF agent. There was no evidence at trial that the agent was not a licensed firearms dealer. Because this is an essential element of the offense, the conviction was set aside, even though the defendant did not move for a directed verdict.

***United States v. Head***, 707 F.3d 1026 (8th Cir. 2013) In order to prosecute a person for accessory after the fact, the government must prove that some other person actually committed the underlying offense. Proving only that the other person was convicted of the underlying offense is not sufficient. Introducing the principal's conviction in this case was reversible error and the failure to prove that the principal actually committed the offense resulted in an appellate determination that the government offered insufficient evidence to support the accessory's conviction, thus barring a retrial. The defendant in the

accessory prosecution must also be permitted to offer evidence that she was not aware that the principal committed the offense, or that the principal was acting in self-defense.

***O'Laughlin v. O'Brien***, 568 F.3d 287 (1st Cir. 2009) The First Circuit holds that the state court conviction of the defendant for assault and attempted murder was not supported by the evidence. The case contains a discussion of the lack of probative Ness of the "consciousness of guilt" evidence upon which the state relied in seeking to support the verdict.

***United States v. Miller***, 527 F.3d 54 (3rd Cir. 2008) A timely motion for acquittal under Rule 29(c) (a post-trial motion for judgment of acquittal) will preserve a sufficiency-of-the-evidence claim for review, irrespective of whether the defendant raised the claim at rial.

***United States v. Urciuoli***, 513 F.3d 290 (1st Cir. 2008) In this honest services fraud prosecution, the defendants were two hospital administrators who hired a legislator to provide "consulting" services. The evidence relating to what the legislator did in connection with the hospitals was to urge local municipalities to comply with the law regarding where ambulances should take patients; and urging health insurance companies to settle disputed claims with the hospitals. Because urging the municipalities to comply with the law was not improper and did not involve work on pending legislation, this could not be the basis of an honest services fraud prosecution. Pressuring insurance companies was an activity that could be prosecuted as honest services fraud. However, because the jury's verdict could have relied on the improper theory, the conviction was reversed.

***United States v. Moore***, 504 F.3d 1345 (11th Cir. 2007) Pursuant to the 1994 Amendment to Rule 29, if a defendant moves for a judgment of acquittal at the close of the government's case and the trial court reserves decision on the issue, the ultimate decision must be made based on the record as it stands at that point. Not only the trial court, but the appellate court is restricted in its consideration of the evidence to the record as it existed at that point during the trial. Thus, the defendant's testimony (which, if not believed by the jury can increase the quantum of evidence supporting a conviction) may not be considered in evaluating the sufficiency of the evidence.

***United States v. Kenyon***, 481 F.3d 1054 (8th Cir. 2007) The defendant was charged with several counts of child sex abuse. Two counts focused on allegations that he placed his penis in the victim's mouth. When the victim was asked about whether it happened on two occasions, she responded, "Twice, maybe." When asked again whether she knew whether he did it once or twice, she responded that she did not know. This was not sufficient evidence to support convictions on the two counts. "Maybe" does not constitute proof beyond a reasonable doubt.

***United States v. Penaloza-Duarte***, 473 F.3d 575 (5th Cir. 2006) The defendant was a passenger in a car loaded with methamphetamine. When a trooper in Louisiana stopped the car and discovered the drugs, the defendant claimed to be a confidential informant for a California detective, which was, in fact, verified by the California police. Though there was sufficient evidence of the defendant's knowing possession of the drugs (he acknowledged knowing the drugs were in the car), the evidence was not sufficient to prove that he associated himself with, and engaged in, some affirmative conduct designed to aid the criminal venture, which is an indispensable component of an aiding and abetting conviction. There was no evidence that he loaded, or assisted in loading the car, or that he did any of the driving, or that he even knew the location to which the load was heading. A conviction must be reversed if the evidence construed in favor of the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged. A subsequent Fifth Circuit decision abrogated the standard of review in this case.

***United States v. Vargas-Ocampo***, 747 F.3d 299 (5th Cir. 2014). Patterson v. Haskins, 470 F.3d 645 (6th Cir. 2006) An appellate court must decide the question of sufficiency of the evidence, even if another error requires that a case be retried.

***United States v. Lawrence***, 471 F.3d 135 (D.C. Cir. 2006) When evaluating the sufficiency of evidence on appeal, the appellate court is permitted to consider testimony offered by the defendant in his case. However, the court may not consider against a defendant the testimony offered by a co-defendant in deciding whether the government sustained its burden of proof in cases where the defendant does not introduce evidence.

***United States v. Richardson***, 421 F.3d 17 (1st Cir. 2005) When there are alternate grounds on which a jury can convict a defendant on one count, an issue often arises on appeal whether a deficiency with regard to one alternative requires that the appellate court set aside the verdict. This may occur where there is a conspiracy to commit more than one offense (for example, the defendant is charged with conspiring to sell drugs and launder the proceeds), or a perjury prosecution with numerous false statements alleged in the same count. This case explains how an appellate court considers these types of challenges: if the appellant contends that the evidence was insufficient with regard to one alternative, then the conviction will not be reversed, because the court will assume that the jury relied on the alternative that was supported by sufficient evidence. But if the appellant contends that the deficiency with regard to one of the alternatives was in the jury instruction, then the appellate court will reverse, because the jury will not be presumed to have known that the jury instruction was erroneous and may have relied on the improper definition to convict the defendant of that alternative means of committing the offense. See generally Griffin v. United States, 502 U.S. 46 (1991); Yates v. United States, 354 U.S. 298 (1957).

***United States v. Brown***, 459 F.3d 509 (5th Cir. 2006) When a jury is not asked to indicate the basis for its verdict where there are several objects of a conspiracy, the government "must prove all three theories in order for the court to affirm the convictions." In this case, the government's theory on the mail fraud (honest services) theory was flawed and, therefore, the conspiracy count was reversed.

***United States v. Lopez***, 443 F.3d 1026 (8th Cir. 2006) In gauging the sufficiency of evidence of a defendant's participation in a conspiracy, courts have sometimes said that if there is proof beyond a reasonable doubt of the existence of a conspiracy, only "slight evidence" is needed to show the defendant's participation in the conspiracy. The Eighth Circuit – like many other Circuits – held in this case that the slight evidence rule did not relax the requirement of proof beyond a reasonable doubt. Rather, the slight evidence rule simply means that the defendant's role in the conspiracy may be slight, or minor. The evidence, however, must still establish the defendant's participation beyond a reasonable doubt.

***Brown v. Palmer***, 441 F.3d 347 (6th Cir. 2006) The defendant was the driver of a car from which two occupants suddenly jumped out and carjacked another car. He jumped out of his car and ran away. The evidence did not establish that the driver was a participant in the crime.

***United States v. Irving***, 452 F.3d 110 (2d Cir. 2006) The defendant was charged with a variety of crimes, including sex tourism. The government relied on certain counts, on journals that were seized from the defendant, and which purported to chronicle his illegal acts with minors in a foreign country. The Second Circuit held that the journals did suffice to prove his guilt on those counts when coupled with other evidence developed in the case. In the initial panel decision, 432 F.3d 401 (2005), the Second Circuit held that the journal was not sufficient, based on the principle that a defendant's confession is sufficient, even without corroboration to prove his guilt of the crime if the corpus delecti is established in the confession and is reliable. See Opper v. United States, 348 U.S. 84 (1954). The Second Circuit has applied Opper to permit a conviction based on a confession if there is substantial independent evidence which would tend to establish the trustworthiness of the statement. In the rehearing decision, however, the Second Circuit held that there was sufficient corroboration of the journals.

***Chein v. Shumsky***, 373 F.3d 978 (9th Cir. 2004) The defendant was a doctor who testified as an expert witness in a personal injury case. He was charged with perjury because of his inflated testimony about his credentials. The Ninth Circuit held that the evidence was insufficient as a matter of law to establish that this testimony was "material" as defined by California law (the substantive law of the state in which the defendant was convicted). The Jackson v. Virginia standard of sufficiency must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.

***United States v. Allen***, 127 F.3d 260 (2nd Cir. 1997) Even if Congress declares that certain facts may create a permissive inference or presumption that a particular crime has been committed, this does not necessarily mean that proof of those facts automatically constitutes sufficient evidence to support a conviction. 18 U.S.C. § 892 outlaws, in part, an extortionate extension of credit which is defined as any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person. In this case, the defendant made a loan to an undercover agent. The defendant accepted collateral and the agent repaid the loan. The agent then borrowed money again and discussed with the defendant the difficulties the defendant must have in collecting sometimes. The two laughed about this and the defendant explained that that was why he required collateral and further explained that sometimes he took a loss, but his gains exceeded his losses. Then, when prompted by the agent, and not in connection with the pending transaction, the defendant stated that he once beat up someone. This evidence was not sufficient to support a conviction. The agent could not reasonably have had an understanding that if he did not repay the loan, he was subject to being beaten up based on this contrived conversation that he instigated. Regardless of the usurious interest rate and the unenforceability of the loan in court (factors that triggered a permissive presumption of extortion, pursuant to 18 U.S.C. § 892(b)), this evidence was not sufficient.

***United States v. McIntosh***, 124 F.3d 1330 (10th Cir. 1997) The defendant was charged with bankruptcy fraud and money laundering based on his failure to disclose during his bankruptcy proceeding that he had received certain money and deposited some of those funds in a bank account he controlled through an unincorporated business he managed. The indictment also alleged that he failed to disclose his interest in real estate that was owned by his father, but at which he lived and paid the mortgage payments. Count One of the indictment charged him with failure to disclose his interest in the unincorporated business and in his house. Because he did not own his house, however, the evidence was insufficient to sustain a conviction and though the evidence was sufficient regarding the business, because the jury may have convicted the defendant on the basis of the failure to report the house (the judge instructed the jury that they could convict the defendant if they believed he concealed his interest in either asset), the conviction on this count had to be reversed.

***United States v. Winfield***, 997 F.2d 1076 (4th Cir. 1993) Convictions based on theories not submitted to the jury cannot stand.

***United States v. Willoughby***, 27 F.3d 263 (7th Cir. 1994) The defendant entered a guilty plea to various drug charges but requested a bench trial on related firearms charges. In finding the defendant guilty of the firearms offense, the trial judge observed that the proximity of the weapon to the drugs was sufficient evidence to support a §924(c) conviction. The judge went on to complain that but for those appellate decisions, he might find otherwise. The trial judge misconceived his role. While an appellate court might affirm a conviction based on certain facts, that does not mean that the factfinder (including a judge at a bench trial) must find the defendant guilty given the same facts.

***Martineau v. Angelone***, 25 F.3d 734 (9th Cir. 1994) In order to convict a person of child abuse on a theory that the person delayed in seeking medical attention when the child was injured, the state in this case used the following evidence: (1) the two parents (lesbians) gave somewhat different stories to a doctor about the injuries; (2) an expert testified that if there are different stories which are told, the parents are probably abusers; (3) the expert further testified that abusers will often delay in seeking medical attention. This was the only evidence – i.e., theory – that suggested that the parents delayed. This was insufficient as a matter of law to find that the couple did, in fact, delay in reporting the injury to the child.

***United States v. Mills***, 29 F.3d 545 (10th Cir. 1994) The defendant, who lived in a house with another woman, was charged with being a felon in possession of weapons which were found in the house. In cases of joint occupancy, where the government seeks to prove constructive possession by circumstantial evidence, it must present evidence to show some connection or nexus between the defendant and the firearm or other contraband. Here, the defendant's housemate testified that the guns belonged to her, and she had put them in the house and in the bag in which they were found. Even if the jury disbelieved everything she said that disbelief cannot constitute evidence of the crimes charged and somehow substitute for knowing constructive possession in this joint occupancy situation.

***Stallings v. Tansy***, 28 F.3d 1018 (10th Cir. 1994) The state argued that the jury could have inferred petitioner's guilty knowledge from its disbelief of his testimony. In fact, several circuits have held that the jury's disbelief of a defendant's testimony can, in some limited instances, give rise to a positive inference of guilt. These circuits do not agree, however, on the circumstances that will support such an inference. The Fifth and Eleventh Circuits, for example, hold that if a defendant's testimony is sufficiently intrinsically incredible or implausible, then the jury can draw an inference of guilt from its disbelief of that testimony. The Second and Ninth Circuits, on the other hand, do not consider the quality of the defendant's testimony; rather, they require other corroborating evidence of guilt. These circuits would never allow a finding of guilt to be predicated on the jury's disbelief of the defendant's testimony, but they would allow the jury's disbelief of the defendant's testimony to bolster other, affirmative evidence of guilt. The D.C. Circuit, on the other hand, distinguishes between inferences to be drawn from the witness's demeanor, and those to be drawn from a defendant's facially inconsistent or implausible testimony. In this case, the defendant's testimony was not inherently implausible and considering the absence of other incriminating evidence, the conviction had to be set aside.

***United States v. Thomas***, 987 F.2d 697 (11th Cir. 1993) When a defendant presents evidence following a denial of his Rule 29 motion at the close of the government's case, the Rule 29 motion is thereby waived. The appellate court may then consider the evidence in both the government's case and the defense case (and any government rebuttal) in assessing the sufficiency of the evidence. In this case, however, after the Rule 29 motion was denied, the defendant presented evidence on one count, but not another. In situation, the Rule 29 motion is not waived with regard to the count for which the defendant offered no evidence. Therefore, the appellate court may only consider the evidence presented in the government's case in chief in gauging the sufficiency of the evidence – and not the testimony of co-defendants. There was insufficient evidence presented in the government's case relating to the count for which the defendant offered no evidence.

***United States v. Zeigler,*** 994 F.2d 845 (D.C.Cir. 1993) The appellate court concluded that the evidence offered by the government, in addition to the defendant's testimony and evidence, was insufficient to sustain the conviction. The government argued that the defendant's demeanor on the stand was the critical factor which led the jury to convict. The appellate court, however, held that this was not "evidence" which could be considered by the appellate court in considering the sufficiency of the evidence.

***United States v. Salamanca***, 990 F.2d 629 (D.C.Cir. 1993) Though the appellate court must affirm a conviction where "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," this does not mean that appellate review is "toothless." Here, the defendant was charged with aiding and abetting his brother's ruthless attack of a police officer. "The sufficiency of the evidence warrants particular scrutiny when the evidence strongly indicates that a defendant is guilty of a crime other than that for which he was convicted, but for which he was not charged. Under such circumstances, a trier of fact, particularly a jury, may convict a defendant of a crime for which there is insufficient evidence to vindicate its judgment that the defendant is blameworthy. Compelling evidence that a defendant is guilty of some crime is not, however, a cognizable reason for finding a defendant guilty of another crime." Here, the evidence was insufficient to support a conviction of aiding and abetting the assault. At most, the defendant was an accessory after the fact, or committed misprision.

***APPEAL (Transcripts) SEE ALSO: TRANSCRIPTS***

***United States v. Delgado***, 631 F.3d 685 (5th Cir. 2011) Several errors in this case – when considered cumulatively – required that the conviction be set aside: (1) there was insufficient evidence offered to support a deliberate ignorance instruction, because there was no evidence of the defendant's knowledge of the high probability of the criminal activity; (2) the prosecutor improperly stated during closing argument that the defendant, who did not testify, had a "lied to agents when they interviewed her" when she denied guilt. This amounted to an improper statement of the prosecutor's personal opinion; (3) a government agent testified (non-responsively to a question) that defendant's trucking company had been involved in other drug trafficking; (4) the absence of a full transcript of the proceeding. In a separate holding, the Fifth Circuit also reversed the defendant's conspiracy conviction on sufficiency grounds. All these errors, when considered cumulatively, denied the defendant a fair trial.

***Greene v. Brigano***, 123 F.3d 917 (6th Cir. 1997) As a matter of due process and equal protection, the state must afford an indigent defendant a trial transcript. See Britt v. North Carolina, 404 U.S. 226 (1971); Griffin v. Illinois, 351 U.S. 12 (1956). The fact that the defendant chose to represent himself on appeal did not operate to deprive him of the right to a transcript.

***APPEAL (Waiver of Right to Appeal Sentence)***

***Burgess v. United States***, --- F.3d --- (11th Cir. 2017) In a § 2255 petition, if the government fails to raise an appeal waiver as a basis to reject a claim, then the court may not sua sponte rely on an appeal waiver (or a collateral attack waiver) to dismiss a claim.

***United States v. Sanchez-Colberg***, 856 F.3d 180 (1st Cir. 2017) The waiver in this case provided that if the court accepted the recommendation, then the defendant would waive his right to appeal. The court accepted the recommendation but imposed a

sentence higher than the recommendation on one of the counts, though the total sentence was within the recommended range. The defendant was not barred from appealing given the ambiguity in the waiver.

***United States v. Vanderwerff,*** 788 F.3d 1266 (10th Cir. 2015) The trial court's rejection of the plea agreement on the basis that it included an appeal waiver was error.

***United States v. Santiago-Burgos***, 750 F.3d 19 (1st Cir. 2014) The plea agreement appeal-waiver provision stated that the parties agreed on a base offense level, but not the criminal history category. The agreement then provided that the defendant was entitled to ask for a low-end sentence. The trial court determined that the criminal history placed the defendant in Category II. This was erroneous. The appeal waiver provision did not bar an appeal, even though the actual sentence fell with the range that would have applied even if the court had found the defendant to be in Category I, because the low end of the Category I range was lower than the low end of the Category II range.

***United States v. Rollings***, 445 F.3d 202 (10th Cir. 2014) If a defendant challenges the voluntariness of his plea, the entire proceeding should be considered as a whole; that is, the court cannot simply consider the voluntariness of an appeal waiver as a component of the plea and then decide (if the waiver was voluntary) that any further review of the plea is unnecessary.

***Hurlow v. United States***, 726 F.3d 958 (7th Cir. 2013) Even with a valid appeal waiver, a defendant may assert an ineffective assistance of counsel claim in a § 2255 proceeding if the claim is that that the defendant would not have entered the plea but for the attorney's ineffective assistance (for example, the failure to file a Fourth Amendment motion to suppress that would have gutted the prosecution's case).

***United States v. Cong Van Pham***, 722 F.3d 320 (5th Cir. 2013) The trial court erred in concluding that the defendant did not adequately advise his attorney that he wished to appeal the sentence that was imposed. Counsel was ineffective in failing to file a notice of appeal.

***United States v. Murphy-Cordero***, 715 F.3d 398 (1st Cir. 2013) The plea agreement spelled out the recommendations that the government would make regarding the application of the guidelines. There was no mention of a gun enhancement. The appeal waiver provided that the waiver would apply if the trial court accepted this plea agreement and sentences the defendant according to its terms, conditions and recommendations. The trial court concluded that a gun enhancement applied and sentenced above the recommended guideline range envisioned in the plea agreement. The First Circuit held that this negated the appeal waiver entirely and the defendant could appeal any aspect of the sentence, not just the gun enhancement.

***United States v. Castro***, 704 F.3d 125 (3rd Cir. 2013) The defendant was convicted of making a false statement when he said that he had not received money from the bribe payor. He later entered a guilty plea to related charges and signed an appeal waiver. Regarding the false statement conviction, what he said was actually true (unbeknownst to him), because the money was paid by a government agent posing as a confederate of the bribe payer. The Third Circuit held that the conviction for making a false statement could not be sustained, because what the defendant said was true and, moreover, it would be a manifest injustice to enforce the appeal waiver on this count of the conviction.

***United States v. Davis***, 689 F.3d 349 (4th Cir. 2012) An appeal waiver may not be enforced where the district court provided inaccurate information at the plea colloquy about the maximum sentence that could be imposed.

***United States v. Gonzalez-Melchor*** 648 F.3d 959 (9th Cir. 2011) A judge who actively negotiated an appeal waiver in exchange for a shorter sentence violated Rule 11 and rendered the appeal waiver unenforceable.

***Dowell v. United States***, 694 F.3d 898 (7th Cir. 2012) Failure to file a notice of appeal when asked to do so by the defendant is ineffective assistance of counsel which can be raised even if the defendant's plea agreement provided for a waiver of the right to bring a collateral attack.

***United States v. Boneshirt***, 662 F.3d 509 (8th Cir. 2011) Because the trial court failed to advise the defendant about the appeal waiver during the plea colloquy, the waiver was not enforceable.

***United States v. Ortiz-Garcia,*** 665 F.3d 279 (1st Cir. 2011) The trial court failed to properly advise the defendant of the possible maximum sentence that he faced. This rendered the plea and the appeal waiver void.

***United States v. Divens***, 650 F.3d 343 (4th Cir. 2011) The defendant fully accepted responsibility for his crimes and did so in a timely manner. However, he declined to sign a "waiver of the right to appeal" provision in the plea agreement. Because of that refusal, the government refused to move for the additional one-level acceptance of responsibility reduction. The Fourth Circuit held that the government could not refuse to file for the one-level reduction based on the defendant's failure to waive the right to appeal. The discretion that the government enjoys in deciding whether to move for a reduction pursuant to § 5K1.1, is not mirrored in the discretion it has under § 3E1.1(b). The Fourth Circuit noted contrary authority in the Ninth, First and Fifth Circuits.

***United States v. Bowman***, 634 F.3d 357 (6th Cir. 2011) The appellate waiver permitted the defendant to appeal a sentence that was above the Guideline range. The court sentenced the defendant within the range, but ordered that the sentence run consecutive to a state sentence. The Sixth Circuit held that the appeal waiver did not bar challenging the trial court's failure to even consider a concurrent sentence. See also United States v. Stearns, 479 F.3d 175 (2d Cir. 2007).

***United States v. Woltmann***, 610 F.3d 37 (2d Cir. 2010) The defendant signed a plea agreement that provided that the guideline range would result in a sentence with a low end of 18 months. The defendant then cooperated in another investigation and the government filed a § 5K1.1 motion urging a below-guideline sentence. The trial judge refused, stating that this constituted an

abrogation of the plea agreement. The defendant appealed his sentence and the Second Circuit held that the trial court clearly erred. Moreover, an appeal waiver was unenforceable where the plea agreement was frustrated by the lower court.

***United States v. Almany,*** 598 F.3d 238 (6th Cir. 2010) Because the appeal waiver was not discussed during the plea colloquy, it was not enforceable. Judgment Vacated on Other Grounds by Supreme Court in light of Abbott and Gould; though the appeal waiver was, unenforceable, the merits of the appeal did not survive Supreme Court scrutiny.

***United States v. Madigan,*** 592 F.3d 621 (4th Cir. 2010) The trial court failed to discuss the appellate waiver with the defendant during the plea colloquy. Though the appellate waiver was plainly set forth in the plea agreement, this is not sufficient to make it enforceable absent a discussion of the waiver during the plea colloquy.

***United States v. Padilla-Colon,*** 578 F.3d 23 (1st Cir. 2009) Though the written waiver in the plea agreement was sufficient to waive the defendant's right to appeal, the plea colloquy (an essential component of a valid waiver) included this comment by the judge: "Depending on the facts the court finds and the sentence it eventually imposes, both you and the government may appeal the sentence in this case subject that waiver." This ambiguous language did not sufficiently apprise the defendant of the rights he was waiving and the defendant's statement that he understood did not establish that he did, in fact, understand the true scope of the waiver.

***United States v. Vazquez***, 558 F.3d 1224 (11th Cir. 2009) The defendant's plea agreement contained the typical appeal waiver language which provided that the waiver was inapplicable if the government appealed the sentence. In this case, the defendant was initially sentenced, and the government appealed. The case was remanded, and the defendant was sentenced again, but the government did not appeal. Could the defendant appeal? The Eleventh Circuit concluded that any ambiguity in the plea agreement would be resolved in favor of the defendant and permitted the defendant to appeal the second sentence, even though the government did not appeal that sentence.

***United States v. Lovelace***, 565 F.3d 1080 (8th Cir. 2009) If a defendant appeals the government's breach of a plea agreement after failing to challenge the breach in the lower court and after signing an appeal waiver, the appellate court will consider the allegation of breach under the plain error standard of review.

***United States v. Sura***, 511 F.3d 654 (7th Cir. 2007) The district court's failure to inquire about and advise the defendant of the consequences of the appeal waiver as required by Rule 11(b)(1)(N) was plain error that negated the voluntariness of the guilty plea.

***United States v. Jacobo Castillo***, 496 F.3d 947 (9th Cir. 2007) A waiver of appeal does not divest the appellate court of jurisdiction to hear the appeal.

***United States v. Gordon***, 480 F.3d 1205 (10th Cir. 2007) A plea agreement that effectively waived the defendant's right to appeal the sentence did not preclude his appeal of the order of restitution.

***United States v. Palmer***, 456 F.3d 484 (5th Cir. 2006) An appeal waiver that provides that there will be no appeal of the sentence does not preclude an appeal that targets the legitimacy of the guilty plea. In this case, the factual basis for the offense of possession of a firearm in furtherance of a drug trafficking crime was insufficient.

***United States v. Adams***, 448 F.3d 492 (2d Cir. 2006) The factual basis of the plea focused entirely on the defendant's role in a marijuana conspiracy. The plea did not support a sentence that focused on his participation in a cocaine conspiracy. The court also held that the "appeal waiver" did not bar a challenge to the underlying plea.

***United States v. Story***, 439 F.3d 226 (5th Cir. 2006) An appeal waiver does not deprive the appellate court of jurisdiction. Thus, if the government does not assert the waiver, the waiver is waived.

***United States v. Harris***, 434 F.3d 767 (5th Cir. 2005) The appeal waiver barred an appeal unless the sentence was more than the Guidelines did not operate to bar an appeal that challenged the application of the wrong Guideline in imposing sentence.

***Gomez-Diaz v. United States***, 433 F.3d 788 (11th Cir. 2005) Even though there was a limited waiver of appeal in the plea agreement, counsel was ineffective in failing to file an appeal at the request of the defendant. The trial court erred in holding that the defendant (i.e., habeas petitioner) was required to show a non-frivolous appeal issue in order to prevail on his ineffective claim.

***United States v. Hamdi,*** 432 F.3d 115 (2d Cir. 2005) The defendant agreed that his sentence was governed by the Guidelines and waived his right to appeal if the sentence was lower than 21 months. He was sentenced to 24 months. Though he agreed that he would be sentenced under the Guidelines, the Second Circuit held that this agreement did not bar an appeal predicated on Booker.

***Washington v. Lampert***, 422 F.3d 864 (9th Cir. 2005) An appeal waiver and collateral attack waiver may not be enforced to the extent that a defendant attempts to collaterally attack his counsel's effective assistance in allowing him to enter into such an agreement.

***United States v. Murdock***, 398 F.3d 491 (6th Cir. 2005) In evaluating whether there was plain error in failing to advise the defendant of an appeal waiver, the standard of United States v. Vonn, 535 U.S. 55 (2002), applies. Thus, the defendant is not required to prove that he would not have entered a guilty plea, but for the appeal waiver (i.e., the United States v. Dominguez Benitez, 542 U.S. 74 (2004), standard). In this case, the error was plain, because the district court violated Rule 11. The defendant's substantial rights were affected, because there was no showing on the record that he was aware of the waiver. The violation affected the fairness and integrity of the process, because the right to appeal is of critical importance in the judicial

system. The government's failure to refer to the appeal waiver when summarizing the plea agreement was a fact of some importance to the Sixth Circuit.

***United States v. Arellano-Gallegos***, 387 F.3d 794 (9th Cir. 2004) The trial court failed to advise the defendant about the nature of his appeal waiver, and it would, therefore, not be enforced.

***United States v. Hahn***, 359 F.3d 1315 (10th Cir. 2004 (en banc) The Tenth Circuit concludes that a waiver of appeal by a defendant does not deprive the appellate court of jurisdiction. The court did not hold that such waivers would be void – it simply held that there was no prohibition on the court exercising jurisdiction over the case. The court held that in determining whether to enforce a waiver, the court would assess whether the defendant knowingly and voluntarily waived his appellate rights, whether the appeal falls within the scope of the waiver of appellate rights, and whether enforcing the waiver would result in a miscarriage of justice. The court also outlined the proper procedure the government should follow in seeking to enforce the waiver.

***Chesney v. United States***, 367 F.3d 1055 (8th Cir. 2004) A waiver of the right to appeal a sentence does not foreclose the right to challenge the attorney's ineffectiveness. The court noted, however, that the defendant could waive his Sixth Amendment right, as well; but he did not do so in this case.

***United States v. Johnson***, 347 F.3d 412 (2d Cir. 2003). Though an appeal waiver is generally enforceable, if the defendant claims a constitutional infirmity in the sentencing, the waiver will be strictly construed in order to permit a review of the constitutional claim.

***United States v. Andis***, 333 F.3d 886 (8th Cir. 2003) An appeal waiver does not bar an appeal of an illegal sentence. In this case, the court defined an illegal sentence as a sentence that is outside the statutory limits. Other courts have excepted cases in which there would be a miscarriage of justice if the appeal waiver were to be enforced. The court did not find that the sentence in this case was illegal.

***United States v. Stubbs***, 279 F.3d 402 (6th Cir. 2002) Defendant was charged with conspiring to possess firearms in connection with a drug offense (18 U.S.C. §924(o)) but entered a guilty plea to possessing a firearm in connection with a drug offense (§ 924(c)). This tainted the guilty plea and as a matter of law it could not have been a knowing and voluntary plea. Not only do these statutes have different elements (one is a conspiracy, the other is a substantive offense), but they also have different sentence provisions. Finally, the court held that an appeal waiver did not apply. Here, the plea agreement itself was invalid, not just the sentence.

## *ARMED ROBBERY / BANK ROBBERY SEE ALSO: HOBBS ACT*

***Whitfield v. United States***, (2015) In order to trigger the 10-year mandatory minimum sentence under 18 U.S.C. § 2113(e), substantial movement of the robbery victim is not necessary. Even requiring a victim to move within the bank is sufficient to invoke the mandatory minimum.

***United States v Ornelas***, 906 F.3d 1138 (9th Cir. 2018) In a case involving a charge of attempted robbery, the government must prove that the defendant had the specific intent to rob and that the force he used was designed to accomplish the robbery. The trial court's failure to charge on the specific intent element of the offense was plain error.

**United States v. Carr**, 761 F.3d 1068 (9th Cir. 2014) The defendant participated in a meeting with other conspirators during which they discussed robbing a credit union. There was no discussion of using guns and no guns were displayed or visible at the meeting. This defendant did not go into the credit union and was not the getaway driver, though he was parked nearby. The district court found that there was sufficient evidence that the defendant was a member of the conspiracy to rob the credit union, but the evidence was insufficient to prove that he knew that guns would be used, even under the Pinkerton doctrine. The Ninth Circuit affirmed.

**United States v. Franco-Santiago,** 681 F.3d 1 (1st Cir. 2012) The defendant was charged with being a member of a conspiracy that participated in five armed robberies. Only the last robbery occurred within five years of the return of the indictment. The government agreed that the defendant was not involved in the first three robberies. The evidence was sufficient to demonstrate his participation in the fourth. After he was convicted of the conspiracy count, the government conceded at sentencing that he was not involved in the fifth robbery. The First Circuit concluded that the defendant only agreed to participate in one conspiracy and that he could not be held responsible for participating in the overarching conspiracy that involved several other defendants and the other four robberies. Though he agreed to join the conspiracy, the conspiracy that he agreed to join only involved the one robbery that occurred outside the statute of limitations. NOTE: The United States Supreme Court, in Musacchio v. United States, 136 S. Ct. 1737 (2016), held that raising a statute of limitations defense for the first time on appeal was too late and not subject to plain error review.

***United States v. Thornton***, 539 F.3d 741 (7th Cir. 2008) In order to be convicted of attempted bank robbery under the first paragraph of 18 U.S.C. § 2113(a), the government must show actual force and violence or intimidation. This is true even in an attempt case.

***Brown v. Palmer***, 441 F.3d 347 (6th Cir. 2006) he defendant was the driver of a car from which two occupants suddenly jumped out and carjacked another car. He jumped out of his car and ran away. The evidence did not establish that the driver was a participant in the crime.

***United States v. Sandles***, 469 F.3d 508 (6th Cir. 2006) In this bank robbery trial, the government failed to adequately prove that the bank was FDIC insured, an essential element of a bank robbery, or bank fraud offense.

***United States v. Burton***, 425 F.3d 1008 (5th Cir. 2005) The defendant forced the victim to withdraw money from an ATM and took the money from her. This does not amount to bank robbery under 18 U.S.C. § 2113(a). The money was taken from the victim, not the bank.

***United States v. Santos***, 449 F.3d 93 (2d Cir. 2006) The defendants tried to rob an undercover drug agent by flashing fake DEA badges. The use of the fake badge did not amount to "force" in support of a Hobbs Act robbery charge. With regard to one alleged co-conspirator, moreover, the evidence was insufficient to prove that that the defendant was a knowing participant in the conspiracy to rob the victim. Mere presence and association with the other conspirators were all that was established.

***United States v. Ballew***, 369 F.3d 450 (5th Cir. 2004) The defendant was charged under 18 U.S.C. § 2113(a) with "by force, violence an intimidation, intentionally attempt to take from the person and presence of another, money [of a bank]." The evidence established that he did enter the bank with the intention of robbing it (and arguably did attempt to rob the bank), but he never used any force or intimidation. He simply was waiting on a couch in anticipation of meeting with a manager, then left and later was stopped by the police when he returned the bank. He never actually used any force or intimidation. This does not qualify as "using force or intimidation in an attempt to rob a bank." Attempted intimidation does not suffice.

## *ARREST SEE: SEARCH AND SEIZURE (ARREST) SEARCH AND SEIZURE (TERRY STOPS)*

## *ARSON AND EXPLOSIVES*

***United States v. Ressam***, 128 S. Ct. 1858 (2008) The United States Supreme Court held that the federal offense that outlaws possessing explosives during the commission of a felony offense does not require that the explosives be "in relation to" the felony. All that is required is that the explosives are possessed while the felony is being committed. The Ninth Circuit's contrary conclusion was reversed.

***Jones v. United States***, 529 U.S. 848 (2000) Arson of a private residence does not affect interstate commerce for purposes of the federal arson statute's jurisdictional element, even though the residence was insured and mortgaged through out-of-state entities and heated with out-of-state natural gas.

***United States v. McBride***, 724 F.3d 754 (7th Cir. 2013) The crime of arson is not proven simply with evidence that the defendant used an accelerant to burn down a building. It is not arson unless the conduct is committed maliciously. It is not a crime, for example, to burn down an old shed in your backyard, even with the use of an accelerant. There must be some proof of malice, such as the fact that the building is no owned by the defendant, or that the building, if owned by the defendant, was burned down for the purpose of defrauding an insurance company, or to harm or injure occupants. The evidence in this case was not sufficient to support a conviction.

***United States v. Severns***, 559 F.3d 274 (5th Cir. 2009) The defendant was convicted of mail fraud (§ 1341), arson to commit mail fraud (§ 844(h)), arson to commit wire fraud (§ 844(h)), and arson (§ 844(i)). The Fifth Circuit held that consecutive sentences for arson and use of fire to commit mail fraud and mail fraud are permissible. However, consecutive sentences for use of fire to commit mail fraud and use of fire to commit wire fraud are not permissible if there is only one fire.

***United States v. Craft,*** 484 F.3d 922 (7th Cir. 2007) While affirming several counts of conviction, the Seventh Circuit held that the arson of the Hells Angels "clubhouse" was not a federal offense, because the clubhouse was not sufficiently connected to interstate commerce. While some of the members' dues were used to pay for members' interstate trips, this was not a sufficient nexus to interstate commerce.

***United States v. Davies***, 394 F.3d 182 (3 rd Cir. 2005) The defendant burned a church which bought supplies from out-of-state and graduated students who moved out-of-state. This was insufficient evidence to establish an impact on interstate commerce. Note that this was an arson prosecution, not a prosecution under the church burning statute, as in Ballinger, infra.

***United States v. Lamont***, 330 F.3d 1249 (9th Cir. 2003) Arson of a church will not necessarily amount to a federal offense, because of the absence of a sufficient nexus to interstate commerce, even if members of the church come from other states, the church has membership in an interstate organization, and there are interstate transfers of church funds.

***United States v. Ballinger***, 312 F.3d 1264 (11th Cir. 2002) The Eleventh Circuit panel initially held that there was insufficient interstate commerce evidence to convict the defendant of burning down several churches in rural Georgia in violation of 18 U.S.C. § 247(a)(1). The statute expressly requires proof that the arson be "in or affect interstate commerce." When purely intrastate activity is involved and the government argues that this activity affected interstate commerce, the proof must demonstrate a "substantial effect" on interstate commerce. REVERSED by the en banc court January 10, 2005. 395 F.3d 1218 (11th Cir. 2005) (en banc). The en banc court upheld the conviction on the theory that the defendant was traveling from state-to-state and burning churches wherever he went, thus satisfying the interstate commerce requirement.

***United States v. Spruill***, 118 F.3d 221 (4th Cir. 1997) Though the statute is worded awkwardly, 18 U.S.C. § 844(e) outlaws making threatening mailings or phone calls, which threaten physical injury by means of fire or explosives. The government argued, unsuccessfully, that the statute outlawed any threatening communication, one example being using fire or explosive. The court concluded that only threats involving fire or explosives are covered by the statute.

***United States v. Yoakam***, 116 F.3d 1346 (10th Cir. 1997) The evidence was insufficient to support defendant's arson conviction. Though the evidence was sufficient to prove that the fire was caused by arson, the evidence was insufficient to show that the defendant was the perpetrator. Even if there is evidence of financial motive, this is not sufficient to convict the defendant.

***United States v. Denalli***, 73 F.3d 328 (11th Cir. 1996), modified at 90 F.3d 444 The defendant burned down the house of his next-door neighbor. Because the neighbors' house was not used for, and did not affect, interstate commerce, a conviction under 18 U.S.C. §844(i) could not be sustained. The court concluded that, to sustain a conviction under the "affecting interstate commerce" theory, the government would have to prove that the residence had a substantial effect on interstate commerce.

## *ASSAULT*

***Cates v. United States***, 882 F.3d 731 (7th Cir. 2018) The offense of aggravated sexual abuse, 18 U.S.C. § 2241(a), requires as an element the use of force. This element requires more than coercion, psychological coercion, or even force inferred from a disparity in size between the defendant and the victim. Instructing the jury on aggravated sexual abuse in this case was error and trial counsel's failure to object was prejudicial error.

***United States v. Wolfname***, 835 F.3d 1214 (8th Cir. 2016) Assault is an element of the offense of resisting or interfering with an officer under 18 U.S.C. § 111(a)(1). Omitting this element of the offense from the jury instruction was plain error which required setting aside the verdict, even absent an objection from trial counsel.

***United States v. Zabawa***, 719 F.3d 555 (6th Cir. 2013) The defendant was charged with assaulting a federal corrections officer in violation of 18 U.S.C. § 111. That offense requires proof that the defendant "inflicted" an injury to the officer. In this case, the defendant assaulted the officer and the officer then "head-butted" the defendant who caused the officer's injury over his eye. While the defendant's conduct may have caused the injury to the officer, he did not inflict the injury. Conviction reversed.

***United States v. Acosta-Sierra***, 690 F.3d 1111 (9th Cir. 2012) The defendant threw a rock at a Border Patrol agent. The agent did not see the rock as it was thrown and was not aware of the defendant having thrown the rock until after it hit a gate near where the agent was walking. When the agent turned around and saw the defendant, he was not holding anything in his hand and the agent was not then fearful of an assault from the defendant. When the defendant ws arrested, he hit one of the agents on the side of the head. The rock throwing incident could not be prosecuted under the "reasonable apprehension of harm" prong of assault, because the agent was not aware of the rock throwing until it was over. The offense could have been prosecuted under the attempted battery prong of the assault statute, however.

***United States v. Davis***, 690 F.3d 127 (2d Cir. 2012) Canvassing the law relating to the definition of assault, 18 U.S.C. § 111, the Second Circuit held that the defendant must have engaged in conduct, not involving touching, "committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability causes a reasonable apprehension of immediate bodily harm." The evidence was not sufficient in this case. The defendant basically resisted arrest by making it difficult to handcuff him.

***United States v. Hertular***, 562 F.3d 433 (2d Cir. 2009) The evidence was insufficient to support an assault/threat conviction of the defendant. Though the defendant did make a threat to the agents, the requirement that the threat represent an "imminent" threat of harm was not established.

***United States v. Chapman***, 528 F.3d 1215 (9th Cir. 2008) 18 U.S.C. § 111(a) makes it a crime to forcibly resist, oppose, impede and interfere with a federal officer engaged in official duties. The Ninth Circuit holds that the conduct must at least amount to an assault, in order to sustain a defendant's conviction. Merely "tensing up" when an officer attempts to escort the defendant to a location is not enough to sustain a conviction.

***United States v. Temple***, 447 F.3d 130 (2d Cir. 2006) Assaulting a federal officer is outlawed by 18 U.S.C. § 111. Though an actual touching is not required, if the offense is limited to a threat of physical injury, the threat must be such as to represent an imminent threat of violence. Leaving a voice message on someone's phone does not amount to an assault under § 111.

## *ASSIMILATIVE CRIMES ACT*

***Lewis v. United States***, 118 S.Ct. 1135 (1998) The ACA applies when a person is guilty of an act or omission on a federal conclave which is not made a crime by any enactment of Congress but is made a crime by the state in which the enclave is located. The purpose of the ACA is to "fill in any gaps" where there is no federal criminal law governing conduct on a federal enclave. To determine whether a particular state statute is assimilated, a court must first ask the question, "Is the defendant's act or omission made punishable by any enactment of Congress?" If the answer is "no," then the state law is assimilated. If the answer is "yes," the court must ask the further question of whether the federal statutes that apply to the act or omission reveal a legislative intent to preclude application of the state law in question because the federal statutes reveal an intent to "occupy so much of a field" as would exclude use of the state statute. Thus, where, as here, a soldier kills a child on an army base, 18 U.S.C. §1111, which outlaws second-degree murder on a federal enclave, controls, rather than the state's first-degree murder provision.

***United States v. Davenport***, 131 F.3d 604 (7th Cir. 1997) Wisconsin's DUI statute, for first offenders, does not constitute a "crime" under Wisconsin law; for a first offense, only civil penalties are available. The Assimilative Crimes Act only assimilates a state's criminal law. Therefore, a defendant's first DUI offense on federal property cannot be prosecuted under the state law. Also, drunk driving on a military base is punishable under federal regulations, 32 C.F.R. § 634.25(f), where the offense occurs in a state, like Wisconsin, where the first DUI is considered a civil matter.

***United States v. Sylve***, 135 F.3d 680 (9th Cir. 1998) The State of Washington provides for "deferred prosecution" in the case of first time DUI offenders. The Ninth Circuit concluded that this is a form of punishment that is incorporated into federal law through the Assimilative Crimes Act.

***United States v. Harris***, 27 F.3d 111 (4th Cir. 1994) The North Carolina statute which provides for a maximum sentence of 24 hours for a DUI under certain conditions must be followed by a federal court exercising jurisdiction under the Assimilative Crimes Act, notwithstanding the Sentencing Guidelines.

***United States v. King***, 824 F.2d 313 (4th Cir. 1987) The defendants were convicted under the Assimilative Crimes Act for a crime committed on federal land. A special assessment for a victim's assistance fund was imposed. The Fourth Circuit holds that no such assessment may be imposed unless a similar penalty was available under the state law being applied.

***United States v. Palmer,*** 956 F.2d 189 (9th Cir. 1991) 36 C.F.R. §4.23 outlaws DUI in a national park. The government may not proceed on a more strict state law under the Assimilative Crimes Act.

***United States v. Garcia***, 893 F.2d 250 (10th Cir. 1989) The Sentencing Guidelines apply to violations of the Assimilative Crimes Act, but the sentence imposed must be within the penalty range authorized by the applicable state law.

## *ATTEMPTED CRIMES*

***United States v. Jett***, 908 F.3d 252 (7th Cir. 2018) The police reasonably believed that the defendants had committed two armed robberies and began to follow them. The police observed two of the defendants enter a stolen car and start driving towards a credit union. The police arrested them. In the car were masks and an air pistol. This evidence was not sufficient to convict the defendants of attempted armed robbery.

***United States v Ornelas***, 906 F.3d 1138 (9th Cir. 2018) In a case involving a charge of attempted robbery, the government must prove that the defendant had the specific intent to rob and that the force he used was designed to accomplish the robbery. The trial court's failure to charge on the specific intent element of the offense was plain error.

***United States v. Howard***, 766 F.3d 414 (5th Cir. 2014) The Fifth Circuit upheld the defendant's conviction for attempted enticement of a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b). The defendant communicated with an undercover agent about having sex with the agent's daughter. There were several communications, and the defendant instructed the agent to have sexual contact with the daughter to get her ready (groomed) and also sent a nude photo of himself. However, when the agent suggested that the defendant travel to meet "her" and the daughter, he refused. The Fifth Circuit held that the evidence was sufficient to support an attempt conviction, but just barely and that this case represented the outer limit of what could be prosecuted as an attempt. Id. at 427.

***United States v. Goldtooth***, 754 F.3d 763 (9th Cir. 2014) Though the crime of armed robbery is a general intent offense, the crime of attempted armed robbery requires proof of the specific intent to commit the offense. A robbery offense only requires proof of an intentional taking, without additional proof of the intent to steal. Attempted robbery, however, requires proof of the specific intent to take the property by force, violence, or intimidation.

***United States v. Thomas***, 690 F.3d 358 (5th Cir. 2012) Venue for the attempt crime was not proper in Texas. Though the conspiracy offense could be prosecuted in Texas based on the conduct of defendant's co-conspirators, the attempt offense could only be prosecuted where the defendant took substantial steps toward the commission of the crime.

***United States v. Chi Tong Kuok***, 671 F.3d 931 (9th Cir. 2012) It is not a violation of the Arms Export Control Act to attempt to cause another person to violate the AECA. It is a crime to export or attempt to export a defense article, but it is not a crime to attempt to cause another person to do so.

***United States v. Foy, 641 F.3d 455*** (10th Cir. 2011) Venue for an attempt crime is not proper in the district where other people involved in the attempted offense engage in the preparatory conduct if the defendant himself does not engage in such conduct in that district. Venue by imputation is appropriate in a conspiracy case, but not in an attempt case.

***United States v. Gladish***, 536 F.3d 646 (7th Cir. 2008) The defendant communicated with a person he believed was a young girl (actually an undercover agent) in an Internet chatroom. He suggested that at some point in the future, they should engage in sex. The Seventh Circuit held that this "hot air" did not qualify as enticement to engage in prohibited sexual activity in violation of 18 U.S.C. § 2422(b). Equating the enticement statute to an attempted crime, the court held that such talk did not involve a "substantial step" toward the commission of the crime. Judge Posner quoted T.S. Elliot: "Between the Conception; And the Creation; Between the Emotion; And the Response; Falls the Shadow."

***United States v. Kenyon***, 481 F.3d 1054 (8th Cir. 2007) Attempt crimes require proof of specific intent to commit the crime. Consequently, a defendant may defend on the basis that he did not intend to commit the crime, even if the crime itself is not a specific intent crime. In this case, the defendant was charged with attempt to commit child sex abuse. He claimed that he was too intoxicated to have that intent. Even though intoxication is not a defense to the crime of sex abuse, it is a defense to the crime of attempt to commit sex abuse. There was sufficient evidence of the defendant's intoxication in this case to warrant the giving of an intoxication instruction and the failure to do so was reversible error as to those counts.

***United States v. Cooper***, 121 F.3d 130 (3rd Cir. 1997) The defendant sold a bag of what was claimed to be cocaine to an informant on one occasion. The substance turned out to be procaine, which is not a controlled substance. The defendant and the informant then planned another transaction, but the defendant detected the surveillance and aborted the transaction. He then

threatened the informant and was charged with tampering with a witness. To be guilty of that offense, the underlying crime must be a federal offense. No such federal offense existed in this case. The defendant was not guilty of attempted sale of cocaine, because he knew the substance, he was selling was not a controlled substance and therefore he did not "attempt" to commit that crime.

***United States v. Ballew***, 369 F.3d 450 (5th Cir. 2004) The defendant was charged under 18 U.S.C. § 2113(a) with “by force, violence an intimidation, intentionally attempt to take from the person and presence of another, money [of a bank].” The evidence established that he did enter the bank with the intention of robbing it (and arguably did attempt to rob the bank), but he never used any force or intimidation. He simply was waiting on a couch in anticipation of meeting with a manager, then left and later was stopped by the police when he returned the bank. He never actually used any force or intimidation. This does not qualify as “using force or intimidation in an attempt to rob a bank.” Attempted intimidation does not suffice.

***United States v. $500,000 in U.S. Currency (Gordin***), 62 F.3d 59 (2d Cir. 1995) The defendant boarded a domestic flight to another city in the U.S. and was then going to connect to a foreign flight. He did not report the currency in his possession. The government could not proceed to forfeit the money on the theory that the defendant was “attempting” to violate the CTR laws because the law could not be violated until the defendant attempted to board the international flight and the offense was not “attempted” prior to that time.

***United States v. Delvecchio***, 816 F.2d 859 (2d Cir. 1987) The defendants agreed on the terms of a heroin purchase but stayed home at the appointed hour of the sale. The Court holds that they did not attempt to possess heroin because they did not take the required substantial step toward completion of the crime. The verbal agreement alone does not suffice to constitute the substantial step needed to prosecute for the attempt to commit the substantive offense.

***United States v. Baker,*** 985 F.2d 1248 (4th Cir. 1993) The defendant was charged with attempted possession with intent to distribute cocaine. He made numerous attempts to obtain money from a bank, and his supplier was arrested in possession of a kilogram of cocaine. The evidence was insufficient to convict the defendant of attempting to possess that cocaine. He might have been attempting to obtain money to pay a back bill for cocaine; he might have been attempting to obtain money to flee the area (he was being sought by the sheriff and his wife). Even more importantly, it was far from clear that he intended to purchase the cocaine in order to distribute it, as opposed to consuming it.

***United States v. Harper,*** 33 F.3d 1143 (9th Cir. 1994) The defendant left money in an automated teller machine, which generally will cause a bank employee to come to the bank to fix the problem. The defendant’s intent was to rob the bank when the serviceman arrived. The defendant was arrested in his car, apparently waiting for the serviceman to arrive. The defendant’s conduct did not amount to a substantial step toward the commission of the crime. Thus, he could not be convicted of attempted bank robbery. The defendant had done little more than simply “make an appointment” with a person he intended to rob.

***United States v. Darby***, 857 F.2d 623 (9th Cir. 1988) The defendant testified that he put a “stick-up” note in an empty bag in front of a bank teller because he wanted to be arrested and given psychiatric care, which he could not obtain through more conventional means. The trial court refused to instruct the jury that, in order to be convicted of attempted bank robbery, the defendant must intend to take the property or money. This was reversible error.

***United States v. Still***, 850 F.2d 607 (9th Cir. 1988) The defendant was observed wearing a blond wig and sitting in a van, with the engine running, approximately 200 feet from a bank. The defendant admitted after his arrest that he had planned to rob the bank, but his conduct was not a “substantial step” toward the commission of the bank robbery, and his conviction of attempted bank robbery was reversed.

***United States v. Buffington***, 815 F.2d 1292 (9th Cir. 1987) The defendants were assembling disguises and weapons and were “casing” a bank. The Court of Appeals for the Ninth Circuit holds that this is not sufficient, standing alone, to convict one of attempted robbery of the bank. The conduct of the defendants neither demonstrated intent to commit bank robbery nor constituted a substantial step toward the commission of the crime. Both are prerequisites for an attempt conviction.

***ATTORNEY-CLIENT ISSUES (Conflicts)***

***Mickens v. Taylor***, 535 U.S. 162 (2002) Absent a showing of actual prejudice, a defendant is not entitled to relief even if he can show that his attorney suffered from a conflict of interest. In this case, the judge knew (but the defendant did not), that the appointed counsel who was representing the defendant in this murder case had previously represented the murder victim in a juvenile case. The defendant claimed in his habeas corpus petition that he was entitled to a presumption of prejudice, as in Holloway v. Arkansas, 435 U.S. 475 (1978). The Supreme Court held that there would be no presumption of prejudice. In addition, the Court held that proving an actual adverse impact might not be enough. Though that was the standard set forth in Cuyler v. Sullivan, 446 U.S. 335 (1980), the Court suggested that the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984) might be the appropriate standard: a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.

***Wheat v. United States***, 486 U.S. 153 (1988) In this 5-4 decision, the Supreme Court holds that the trial court acted within its discretion in denying a defendant the right to choose as his attorney the attorney for a coconspirator who had entered a plea of guilty. The Court held, “The District Court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before the trial, but in the more common cases where a potential conflict exists which may or may not burgeon into an actual conflict as the trial progresses.” The Court recognized that there is a presumption in favor of the petitioner’s counsel of choice, but the presumption may be overcome by a showing of a

serious potential for conflict. The Court concludes, finally, that the District Court was not required to make this finding, but that it was within the Court's discretion to do so. Dissenting, Justices Marshall, Brennan, Stevens and Blackmun sharply criticized the majority's opinion.

***United States v. Blackledge***, 751 F.3d 188 (4th Cir. 2014) The trial court erred in failing to permit defense counsel to withdraw because of an internal conflict with the client. The client had filed a bar complaint against the attorney and the evidence was clear that there had been a total breakdown in communication. The attorney had also missed a critical deadline that prompted the defendant to lose faith in the attorney.

***Taylor v. Grounds***, 721 F.3d 809 (7th Cir. 2013) The defense attorney represented two brothers in a murder trial. Certain witnesses would have been favorable to one defendant, but not the other. The attorney did not call these witnesses. This was a clear conflict.

***United States v. McKeighan***, 685 F.3d 956 (10th Cir. 2012) Defense counsel was subpoenaed to produce fee information to the grand jury. Later, at a hearing, the attorney agreed to pay the fee into the registry of the court. Ultimately, the lawyer withdrew from the case. The Tenth Circuit held that this did not violate the defendant's right to counsel.

***Salts v. Epps***, 676 F.3d 468 (5th Cir. 2012) A conflict of interest was apparent in one attorney's representation of a husband and wife in this embezzlement case. The attorney brought the conflict to the attention of the trial judge on the eve of trial. The judge's decision to proceed to trial was error and the conviction was vacated in this habeas decision. In Holloway v. Arkansas, 435 U.S. 475 (1978), the Supreme Court held that automatic reversal was required where a potential conflict of interest is brought to the trial court's attention, but is not investigated, in the situation where one attorney is representing two defendants.

***Morris v. Beard***, 633 F.3d 185 (3rd Cir. 2011) The defendant, who was charged with murder, was represented at his state murder trial by a lawyer who was also representing the defendant's brother in a civil contingency-fee case. At trial, there was considerable evidence that the brother, not the defendant, was the person who shot the victim. At no time was there an on-the-record conflict waiver, or even any indication that the trial judge was aware of the conflict. At the habeas hearing, the lawyer said that the defendant was aware that the lawyer was also representing the brother. The Third Circuit holds that a more detailed evidentiary hearing was necessary to determine whether the conflict actually impacted the lawyer's performance, and whether the defendant would have allowed the attorney to place the blame on his brother.

***United States v. Turner***, 594 F.3d 946 (7th Cir. 2010) The attorney who was prepared to represent the defendant at trial also was representing a co-conspirator who had already been tried and convicted, but who was awaiting sentencing. Both clients waived any potential conflict and neither defendant was cooperating. Nevertheless, the district court disqualified the attorney from defendant's trial on the basis that one or the other defendant might decide to cooperate in the future. Disqualifying counsel was erroneous prejudicial because the improper disqualification of counsel amounts to structural error. This case contains a thorough discussion of the relationship between Wheat and Gonzalez-Lopez: the relationship between the court's obligation to assure that there is no conflict and the defendant's right to counsel of choice.

***Boykin v. Webb***, 541 F.3d 638 (6th Cir. 2008) Counsel suffered from an actual conflict of interest in this murder case. One defendant had a viable alibi, the other did not. The other was identified by an eyewitness. An unconflicted attorney for the defendant with the alibi would have pointed the finger at the other defendant. A co-defendant's subsequent habeas petition was also successful on the grounds that the attorney suffered from an actual conflict of interest in McElrath v. Simpson, 595 F.3d 624 (6th Cir. 2010).

***Ventry v. United States***, 539 F.3d 102 (2d Cir. 2008) Prior to being arrested, the defendant learned that his former girlfriend made a statement to the FBI implicating the defendant. The defendant went to see a lawyer and later wrote a letter to the girlfriend, telling her that his lawyer told him that the girlfriend should claim that she made the statement under duress, and that she should plead the Fifth. The defendant also threatened the girlfriend that he would reveal embarrassing things about her if she did not recant. The defendant was immediately arrested for the initial crime and for obstruction of justice. The defendant hired another lawyer who may (the record was unclear) have been a partner of the lawyer who supposedly gave the "advice" that the defendant passed on to the girlfriend. The government moved to disqualify the attorney because of the conflict. The motion was denied in part, because of potentially false statements made by the attorney regarding his relationship to the lawyer who provided the advice. The Second Circuit remanded the case to district court for further findings of fact. Interesting discussion of conflicts between law partners and conflicts by providing advice that the defendant may need to rely upon at trial in defense of his behavior.

***Houston v. Schomig***, 533 F.3d 1076 (9th Cir. 2008) A remand was required to determine if a conflict existed in light of the representation of the victim and a witness in this case by another member of the same public defender's office that employed the defendant's attorney.

***United States v. Culverhouse***, 507 F.3d 888 (5th Cir. 2007) Because of defense counsel's representation of the defendant and a co-conspirator, he may have suffered from a conflict of interest that tainted the defendant's guilty plea. A remand was necessary to make further findings about when defense counsel became aware of his actual conflict.

***United States v. Nicholson***, 475 F.3d 241 (4th Cir. 2007) The defendant was charged with possession of a firearm by a convicted felon. He told his lawyer that he carried the gun because a very dangerous man (Butts) had taken a contract out on his life; had shot his brother, and shot and killed his step-father. The attorney then became Butts' lawyer in his drug and conspiracy case (the sentencing for which included allegations that he shot and killed Nicholson's step-father). Nicholson did not know that

the attorney also represented Butts. This posed a clear actual conflict of interest. At Nicholson's sentencing, the attorney failed to argue that a downward departure was appropriate based on defendant's need to defend himself (a self-defense departure). Given the lawyer's conflict, he could not raise this defense. A remand was necessary for a hearing on the actual prejudice that the defendant suffered by virtue of the conflict. Following remand and appeal, the Fourth Circuit held that an actual conflict of interest that prejudiced the defendant was shown to exist. This opinion contains a lengthy analysis of the law governing actual conflicts, including a discussion of the standards for establishing prejudice. United States v. Nicholson, 611 F.3d 191 (4th Cir. 2010).

***United States v. Segarra-Rivera***, 473 F.3d 381 (1st Cir. 2007) Based on the defendant's pro se statements regarding the inappropriate pressure that counsel placed on him before he relented and signed his guilty plea, there was at least a colorable basis for inquiring into a possible conflict of interest before actually conducting a hearing on the issue of the defendant's Motion to Withdraw his Guilty Plea.

***Hammon v. Ward***, 466 F.3d 919 (10th Cir. 2006) Two brothers were arrested in a car with crack cocaine and guns. One lawyer represented them. Their theory was going to be that brother #1 possessed the gun, and neither possessed the drugs (they had borrowed the car). Brother #1, however, entered a guilty plea to probation with the understanding that he would testify against brother #2. The lawyer continued to represent brother #2 (and did not tell #2 that #1 had entered a guilty plea). Everything about this situation represented a conflict. Not only does this pose an actual conflict of interest, but appellate counsel was ineffective in failing to raise this issue in the state appeal. Because of some uncertainty in the record, however, a remand to the federal habeas court was necessary to more fully develop the record.

***United States v. Stitt***, 441 F.3d 297 (4th Cir. 2006) The attorney was laboring under an actual conflict of interest during the penalty phase of this death penalty trial. The federal court granted a writ, setting aside the penalty phase judgment. The defense attorney was paid considerable money to represent the defendant in this federal death penalty trial, though exactly how much was not clear, because the attorney claimed to have kept no records and had no recall. The trial court concluded that the attorney lacked credibility at the habeas hearing. Prior to trial, the attorney did not ask for funds to assist him in the penalty phase, because, according to the court, he did not want to expose his fee to court review. Instead, he hired less qualified experts. This amounted to a conflict of interest. The court invoked Cuyler v. Sullivan, 446 U.S. 335 (1980), as the controlling standard (as opposed to the Strickland standard that requires proof of actual prejudice), because the attorney suffered an actual conflict of interest, even though he was not representing two separate conflicting clients. The Sullivan standard requires that the defendant show that the attorney suffered from an actual (as opposed to a potential) conflict of interest and that the conflict significantly affected counsel's performance. If these two prongs are met, actual prejudice need not be shown. THE FOURTH CIRCUIT SUBSEQUENTLY VACATED THIS OPINION ON JURISDICTIONAL GROUNDS. 459 F.3d 483.

***Daniels v. Woodford***, 428 F.3d 1181 (9th Cir. 2005) The public defender's office suffered from a conflict of interest that should have led the trial court to appoint replacement counsel in this death penalty case. The defendant, who had been convicted of a previous crime, had filed a habeas corpus petition against the public defender's office in connection with the earlier case. Finally, shortly before trial, the court appointed two lawyers to replace the public defenders. For both the new attorneys, this was their first capital case. There was almost complete distrust between the defendant and his newly appointed attorneys (one of whom had recently left the DA's office). By the time of trial, the attorneys and the defendant were not on speaking terms. Virtually no investigation into possible mitigating evidence was undertaken by the attorneys. The Ninth Circuit concluded that there was a presumption of prejudice caused by the conflict and the writ was granted.

***United States v. Infante***, 404 F.3d 376 (5th Cir. 2005) The defendant's attorney previously represented two witnesses who testified for the government. An entirely insufficient Garcia hearing was held, at which the defendant was never asked if he understood the nature of a conflict. The witnesses' testimony did not implicate the defendant. Nevertheless, the record was not sufficient to demonstrate that the conflict did not adversely prejudice the defendant. A remand for further hearings was required to determine if the attorney could have developed additional testimony from the witnesses that would have exculpated his current client.

***United States v. Gonzalez-Lopez***, 399 F.3d 924 (8th Cir. 2005) This case does not involve a pretrial determination that a conflict existed, but its holding presumably would apply in such situations. In this case, the trial court improperly denied the defense counsel's application to appear pro hac vice. As a result, the defendant was denied his right to counsel of his choice. The Eighth Circuit holds that this is grounds for reversal without a showing of prejudice. The court specifically rejected the availability of harmless error review: "Attorneys are not fungible." The United States Supreme Court affirmed: See annotation at ATTORNEYS (Right To Counsel).

***United States v. Osborne***, 402 F.3d 626 (6th Cir. 2005) The trial court's evaluation, pretrial, of the potential conflict posed by the attorney's representation of both the defendant and her husband was inadequate. The court failed to comply with various components of Rule 44(c), including posing certain illustrative types of conflicts that might arise and the risks that these conflicts might entail.

***Locascio v. United States***, 395 F.3d 51 (2d Cir. 2005) The defendant, Locascio, made a sufficient showing to mandate a full evidentiary hearing on his claim that his attorney suffered from a conflict of interest at trial. The defendant offered evidence that the defendant's attorney had been threatened by the lead defendant (John Gotti) that he should not pursue a defense that had any potential for "individualizing Locascio at Gotti's expense."

***Lewis v. Moyle***, 391 F.3d 989 (9th Cir. 2004) The defendant's attorney at trial represented the only other possible perpetrator of the murder in a matter (DUI charges) immediately prior to undertaking the defendant's defense. The prior client was a witness for the prosecution. This represented an actual conflict of interest and the Ninth Circuit held that a habeas writ would be granted. The fact that there were "on-the record" waivers by both the defendant and the witness was not sufficient to waive the conflict, because the defendant did not seek the advice of outside counsel to fully explore the nature of the conflict and had only a cursory conversation with the judge about the possible conflict ramifications.

***Rodriguez v. Chandler***, 382 F.3d 670 (7th Cir. 2004) One of the murder defendant's trial lawyers also represented a lead detective in a real estate deal. The prosecutor moved to disqualify the attorney on the basis of this supposed conflict. The trial court agreed. The attorney was removed. The detective never testified at trial. The Seventh Circuit held that removing the lawyer was error. One alternative would have been to have co-counsel cross-examine the witness (if he had testified). However, the court also held that there was no prejudice. In short, the removal of a trial lawyer is not grounds for reversal per se. The defense must prove prejudice.

***United States v. Williams***, 372 F.3d 96 (2d Cir. 2004) Prior to entering his guilty plea, the defendant was represented by an attorney who participated in criminal conduct with the defendant. At sentencing (with new conflict-free counsel), the defendant was prejudiced, because his failure to cooperate earlier resulted in a sentence not as favorable as otherwise might have been imposed. The Second Circuit holds that a new sentencing should be held that endeavors to put the defendant in the position he would have been had there been no conflict.

***Hall v. United States***, 371 F.3d 969 (7th Cir. 2004) The defendant, who eventually entered a guilty plea, was represented by an attorney who previously represented another defendant who was a potential witness against the defendant. The Seventh Circuit holds that the petitioner was entitled to a hearing on this actual conflict of interest. Distinguishing Mickens v. Taylor, the Seventh Circuit held that the successive representation in this case was quite dramatic (the witness was represented ten days prior to the attorney's representation of the defendant – both defendants were inmates in a prison at the time of the closely interrelated offenses). Also Mickens does not prevent a petitioner from having an evidentiary hearing to probe the impact of the conflict.

***McFarland v. Yukins,*** 356 F.3d 688 (6th Cir. 2004) Trial counsel represented two defendants at trial. Just prior to the beginning of trial, the attorney told the trial judge that things had become a bit "sticky" and that perhaps some inquiry would be appropriate. The trial judge declined. However, the judge did grant a severance and the defendants proceeded to trial with one lawyer, but in separate trials. The trials were conducted as bench trials, back-to-back, over the course of three days. In fact, the trials actually overlapped. Pursuant to Holloway, the trial court erred in failing to fully inquire into the conflict that was presented to the court prior to trial. See also Harris v. Carter, 337 F.3d 758 (6th Cir. 2003). Though Holloway requires automatic reversal where a complaint is raised pre-trial to joint representation at the same trial, the same rule applies here, where the problem was raised prior to the scheduled joint trial and the only remedy was severance.

***United States v. Salado***, 339 F.3d 285 (5th Cir. 2003) Two defendants were represented by one attorney for the entry of a guilty plea. One defendant adequately demonstrated a conflict of interest to the extent that a remand to conduct a post-trial Rule 44(c) hearing was necessary. Even though the magistrate advised the defendants of some of the dangers of proceeding with one attorney, the district court judge did not renew the inquiry prior to the entry of the guilty plea.

***Harris v. Carter***, 337 F.3d 758 (6th Cir. 2003) Defense counsel represented two men charged with a drive-by shooting. Shortly before trial, the trial court severed the cases. The first defendant was tried and convicted. As the second trial began, the first defendant was immunized and ordered to testify against the second defendant. The trial attorney expressed concern about his ability to proceed in light of the conflict. The trial court's failure to further inquire into the conflict and appoint separate counsel was error requiring granting a writ of habeas corpus. See Holloway v. Arkansas, 435 U.S. 475 (1978).

***United States v. Newell***, 315 F.3d 510 (5th Cir. 2002) Though the court engaged in a pretrial Garcia hearing pursuant to Rule 44(c), the development of a conflict during trial was not thereby waived. Antagonistic defenses at trial should have prompted a further inquiry to ensure that the defendants both understood their right to separate un-conflicted counsel. The court reversed one defendant's conviction.

***Rubin v. Gee***, 292 F.3d 396 (4th Cir. 2002) After the defendant killed her husband, she called two lawyers who had her brought to a hospital and then took possession of certain evidence. Part of their motive was to delay her arrest until she could pay them a substantial retainer. The lawyers then employed another lawyer to try her case but remained in the case as "shadow" lawyers. Their involvement in the delay in turning her in was never revealed to the jury, though some of her conduct (as directed by the lawyers) was relied upon by the prosecution to show her consciousness of guilt. The fact that the lawyers could not testify at trial to explain the defendant's conduct after the shooting, and because they had an interest in protecting their fee, as well as shielding themselves from possible criminal prosecution, the defendant suffered a denial of the effective assistance of counsel.

***Smith v. Hofbauer***, 312 F.3d 809 (6th Cir. 2002) In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held if a defendant asserts that he was denied effective assistance of counsel, he must show that his counsel's performance was deficient, and that this deficient performance was prejudicial, i.e., that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." In the context of conflicts of interest, however, the Court in Holloway v. Arkansas, 435 U.S. 475 (1978), held that where the defense counsel simultaneously represents multiple defendants with divergent interests, prejudice is presumed. Later, in Cuyler v. Sullivan, 446 U.S. 335 (1980), the Court held that absent an objection by the defendant, the Holloway presumption does not apply. However, even when there is no objection, the Cuyler v. Sullivan Court held that the defendant is only required to show that the conflict adversely affected counsel's

representation – a showing less demanding than Strickland. In Mickens v. Taylor, 535 U.S. 162 (2002), this line of cases was extended to a case in which the trial judge knew of the defense attorney's conflict (he previously represented the victim in a juvenile case, and then represented the defendant charged with the murder). The Court held that the Holloway presumption of prejudice standard did not apply, even in that situation. The Court held that where there is no objection, the defendant must still demonstrate that the conflict adversely affected counsel's representation. In this case, the Sixth Circuit considered whether the reduced Cuyler standard of "adverse effect" applied in conflict situations other than simultaneous representation cases. This case involved an attorney being prosecuted for a drug offense by the same prosecutor's office that was prosecuting the defendant. In the state habeas court, the defendant claimed that there should be a presumption of prejudice. The state habeas court disagreed. Without deciding what the test should be, the Sixth Circuit held that the rule was not "clearly established" and thus the state habeas court's decision would not be upset.

***United States v. Moore***, 159 F.3d 1154 (9th Cir. 1998) A complete breakdown in communication between the defendant and his attorney represented a conflict that amounted to a denial of the defendant's Sixth Amendment right to counsel. The attorney failed to alert the defendant to a plea deadline; the defendant had threatened to sue the attorney; the attorney felt physically threatened by the defendant; the attorney did not interview witnesses or file motions that the defendant requested. The trial court, aware of some of these problems prior to trial, simply told the defendant that the trial would not be delayed, and he could change counsel if new counsel was ready by the scheduled trial date. The defendant could not find replacement counsel in time. Forcing the defendant to proceed with the attorney with whom there was a conflict was erroneous and required reversing the conviction.

***United States v. Jiang***, 140 F.3d 124 (2d Cir. 1998) Trial counsel's partner represented an alleged co-conspirator in a related forfeiture proceeding. Though there was no demonstrated actual conflict of interest, the trial court erred in failing to fully inquire into this matter more fully and determine whether there was an actual conflict and what effect this conflict had on the representation of the defendant.

***United States v. Taylor***, 139 F.3d 924 (D.C.Cir. 1998) The defendant was charged with criminal contempt for violating a freeze order. The defendant sought new counsel after he entered a guilty plea, claiming that his counsel was suffering from a conflict of interest in that his attorney had given him certain advice regarding the freeze orders that he complied with – and which were later the subject of the alleged contempt. The alleged conflict was sufficient to warrant an evidentiary hearing on the defendant's motion to withdraw the guilty plea.

***United States v. Kliti***, 156 F.3d 150 (2d Cir. 1998) The defendant's attorney was a witness to statements made by a key government witness (who the attorney previously represented) that exculpated the defendant. The trial court erred in failing to conduct a hearing to determine whether this "conflict" (i.e., the fact that the attorney was needed as a witness for the defendant) necessitated his removal from the case. When the witness denied making the exculpatory statement, the attorney was barred from offering impeachment evidence, thus depriving the defendant of important evidence in his defense. A remand was required to determine whether the defendant waived his right to conflict-free counsel.

***United States v. Luciano***, 158 F.3d 655 (2d Cir. 1998) A letter that the defense attorney wrote to the judge prior to sentencing that berated the defendant and sought to be relieved of further representation demonstrated a clear conflict. This was more than a simple fee dispute. In re Grand Jury Proceedings (Doe), 859 F.2d 1021 (1st Cir. 1988) The Supreme Court's holding in Wheat v. United States does not apply where it is only a "tenuous inferential relationship" between the attorney's clients. To conflict the attorney out of the case, there must be a direct link between the clients of the attorney or at least some concrete evidence that one client has information about another which would require the removal of the attorney.

***United States v. Diozzi***, 807 F.2d 10 (1st Cir. 1986) The trial court disqualified two defendants' attorneys on the grounds that pre-indictment memoranda submitted to the government by the attorneys was admitted into evidence. Prior to their indictment, the defendants, with the aid of their attorneys, had submitted memoranda to the Justice Department and the I.R.S. explaining their basis for submitting their tax returns. After indictment, the government intended to introduce these attorney-authored documents into evidence. The trial court disqualified the attorneys because they would be witnesses in the case. Because the defendants were willing to stipulate to the statements in those documents, the First Circuit reversed.

***United States v. Malpiedi,*** 62 F.3d 465 (2d Cir. 1995) Defendant was charged with obstruction of justice, among other offenses, because he altered documents before having them produced to the grand jury in response to a subpoena. The documents were brought to the grand jury by a records custodian who was represented by the same lawyer who represented the defendant at trial. At the grand jury, the records custodian lied about the alteration of the documents and the method of collecting the records. Prior to trial, however, the witness was granted immunity and testified at trial. The attorney suffered from an actual conflict of interest, because his prior representation of the witness limited the degree to which he could cross-examine this very important and damaging witness for the government.

***Ciak v. United States***, 59 F.3d 296 (2d Cir. 1995) Defendant's attorney in this firearm case had previously represented one of the government's witnesses in a related forfeiture proceeding. The relationship with the witness (former client) had deteriorated and during cross-examination, the attorney became an "unsworn witness" in his effort to impeach the witness with his prior statements. This resulted in the credibility of the attorney becoming an issue in the case. The conflict was aggravated by the fact that his cross-examination of the witness was at least in theory hampered by the inability to use statements, which were within the attorney-client privilege. Furthermore, the attorney was conflicted because his theory of the defense was that it was the former client who put the gun in the car which the defendant was now charged with possessing. Finally, because the attorney's fee was to be obtained from the forfeited property, he had a financial stake in ensuring that the former client secured the return of

the car (therefore it was at least arguably in his interest to have the defendant's guilt established, so that the former client could prevail as an innocent owner). Because the trial court failed to make any inquiry into these possible conflicts, the habeas writ would be granted. Note that Mickens v. Taylor holds that automatic reversal is not required simply by virtue of a failure to inquire into the conflict.

***Lopez v. Scully***, 58 F.3d 38 (2d Cir. 1995) After entering a guilty plea, but before sentencing, the defendant accused his attorney of coercing him to enter the plea and failing to properly prepare the case. The attorney announced on the record that he denied every allegation. The trial judge then proceeded to sentence the defendant. There was an actual conflict of interest which should have resulted in the appointment of new counsel. The attorney could not support the defendant's position at his own peril or contest the defendant's position at the defendant's peril.

***United States v. Levy***, 25 F.3d 146 (2d Cir. 1994) There were numerous circumstances which suggested that a conflict of interest impaired the attorney's representation of the defendant: (1) the attorney had represented a relative of the defendant previously, who was allegedly a member of the conspiracy involving the defendant (the relative was now a fugitive); (2) the attorney was awaiting sentencing on his own case; (3) the attorney was under investigation for helping the relative of the defendant escape the country and remain a fugitive; (4) the attorney was a witness to statements made by the relative during plea negotiations which inculpated the defendant. At no time did the trial court adequately confront these issues by addressing the defendant and ascertaining whether he was aware of, and waived, these possible conflicts. In some cases, the failure to make inquiry requires automatic reversal of the conviction. See, e.g., Hamilton v. Ford, 969 F.2d 1006 (11th Cir. 1992). Here, however, there was at least some inquiry by the district court into the possible conflict issues. Nevertheless, the record reveals that the attorney labored under an actual conflict of interest and therefore reversal of the conviction was necessary. First, the defendant's most plausible defense would have been to point the finger at his relative, who was the attorney's other client; second, the desire to avoid having the attorney testify against the defendant required shifting certain defense strategies; third, the attorney's possible desire to curry favor with the government in light of his own pending case created an actual conflict (even though the attorney was sentenced prior to the beginning of trial); finally, the attorney's possible role in assisting the relative to escape created a strong interest in the attorney to avoid investigating the relative's conduct.

***United States v. Fulton***, 5 F.3d 605 (2d Cir. 1993) During the course of trial, during a sidebar conference, a witness claimed that the defendant's attorney was involved in a heroin smuggling operation. The attorney should have been disqualified at this time. If the accusation were true, the attorney labored under an obvious actual conflict; if the accusation were false, the attorney was crippled by his inability to effectively impeach the witness. In either case, the defendant was deprived of effective assistance of counsel. In the former instance, prejudice is per se; in the latter instance, the Cuyler standard applies, but there is no means, during trial, to ascertain the truthfulness of the allegation. Therefore, disqualification is necessary in all such cases.

***United States v. Camisa***, 969 F.2d 1428 (2d Cir. 1992) A trial court's decision refusing to disqualify an attorney because of a possible conflict of interest is not immediately appealable by the government. This is true even if allowing the attorney to appear may necessitate excluding certain evidence.

***Strouse v. Leonardo***, 928 F.2d 548 (2d Cir. 1991) An attorney represented a defendant who had murdered his mother. The defendant had been listed as the executor of his mother's estate. The attorney was listed as a contingent executor. The Second Circuit remanded this habeas case to the district court to determine if this amounted to a conflict of interest.

***United States v. Voigt***, 89 F.3d 1050 (3rd Cir. 1996) In a lengthy opinion that thoroughly reviews the law governing claims by defendants that his chosen counsel was improperly disqualified, the court ultimately holds that disqualification in this case was proper. Though the government's argument that the attorney was a potential witness was weak, the argument that the attorney had previously represented co-defendants, as well as the corporate employer of the individual defendants, supported the lower court's decision disqualifying the attorney (who, incidentally, was the defendant's third retained counsel).

***United States v. Moscony***, 927 F.2d 742 (3rd Cir. 1991) The attorney represented several of the defendant's employees when they appeared at the grand jury. Those witnesses were now witnesses against the defendant. The attorney labored under a conflict and was properly removed, despite the defendant's willingness to waive the conflict.

***United States v. Gilliam***, 975 F.2d 1050 (4th Cir. 1992) The trial court's failure to conduct a Rule 44(c) hearing in light of the actual conflict of interest which arose by virtue of counsel's representation of both defendants (father and son) required a remand to inquire into the nature of the conflict. The conflict arose during the course of trial when the prosecutor offered a "package deal" plea bargain.

***United States v. Swartz***, 975 F.2d 1042 (4th Cir. 1992) Counsel represented both the defendant and her co-defendant. They both entered guilty pleas, having waived any potential conflict. At sentencing, however, an actual conflict arose when the trial court indicated that the guideline sentence of the two defendants was inappropriately disparate. Counsel's advocacy on behalf of the defendant suffered because of his effort to advocate on behalf of the co-defendant. The earlier waiver did not vitiate defendant's right to conflict-free counsel at sentencing.

***United States v. Tatum***, 943 F.2d 370 (4th Cir. 1991) The defendant was charged with bankruptcy fraud for having failed to list certain automobiles on his assets schedule. He was represented initially by an attorney who worked for the firm which advised him not to list the cars (another of whose lawyers owned one of the cars). That attorney was eventually disqualified, but he remained in the case and sat at counsel table and advised the new defense attorney. That attorney's participation, even as second chair, represented ineffective assistance of counsel because of the severe conflict.

***Hoffman v. Leeke***, 903 F.2d 280 (4th Cir. 1990) An attorney represented a murder defendant as well as a former co-defendant who had entered a plea agreement, given a statement to the police and then testified against the defendant. This constitutes a conflict of interest which resulted in vacating the conviction. The fact that the defendant consented to the multiple representation was inconsequential because he did not realize when he made this waiver that his former co-defendant would be testifying against him.

**Perillo v. Johnson**, 79 F.3d 441 (5th Cir. 1996) Defense counsel represented both the defendant and a key state's witness who had been given transactional immunity in exchange for her testimony at defendant's trial. An adverse effect was demonstrated by the obvious conflict that the attorney faced: it was in the witness's interest to testify (and receive immunity) and not to be shown to be lying. It was in the defendant's interest not to have the witness testify and to show that the witness was lying.

***United States v. Greig***, 967 F.2d 1018 (5th Cir. 1992) One defendant's attorney suffered an actual conflict of interest and the trial court's failure to make an inquiry into the situation necessitated reversing the conviction. On two occasions, the attorney had contacted a co-defendant who was contemplating pleading guilty and encouraged him not to do so. This contact was made without the knowledge of the co-defendant's counsel. Just prior to trial, the court was made aware of these improper contacts and advised the attorney that at the end of trial, a disciplinary hearing would be held. The court should have conducted a hearing with the defendant at that point and advised the defendant of the impending disciplinary hearing. During the course of trial, the attorney was in the position of having to defend himself, as well as the defendant. In fact, during the trial, the attorney questioned the co-conspirator in a way which minimized his contact with the co-conspirator, indicating that it was the defendant, not the attorney, who initiated the meetings. This posed an actual conflict of interest which required a Rule 44(c) hearing.

***United States v. Varca***, 896 F.2d 900 (5th Cir. 1990) Attorneys who share office space are not part of the same "firm" for purposes of determining whether there is a conflict by virtue of the fact that one attorney represents a government witness and another "space sharer" represents the defendant.

***United States v. Boling***, 869 F.2d 965 (6th Cir. 1989) An attorney represented the defendant's co-defendant previously. The co-defendant was the president and sole owner of the defendant's employer. Throughout the trial, it was apparent that the attorney allowed the interest of the co-defendant to override the interest of the attorney's own client.

***Thomas v. Foltz***, 818 F.2d 476 (6th Cir. 1987) Three defendants were represented by one attorney. The prosecutor offered a "package deal" which had to be accepted by all or none. The Court of Appeals held that the attorney rendered ineffective assistance of counsel to the less culpable member of the trio. But the court does not hold that it is per se ineffective assistance of counsel to represent three defendants when a package deal is offered. In this case, the least culpable defendant had constantly maintained his innocence.

***Griffin v. McVicar***, 84 F.3d 880 (7th Cir. 1996) Though the two defendants' lawyer did not reveal any conflict prior to trial in representing both defendants in this murder trial, the existence of an actual conflict of interest arose and the petitioner's conviction, therefore, was tainted by ineffective assistance of counsel. The defense of one defendant was hopeless and the attorney pursued a substantially flawed alibi defense. The petitioner, on the other hand, had a possible "bystander" defense, but, because of the attorney's strategy, went with the alibi for him, as well.

***United States v. Shorter***, 54 F.3d 1248 (7th Cir. 1995) At defendant's sentencing, it became apparent that the defendant was contending that the attorney had forced him to plead guilty against his wishes. The attorney denied this and accused the defendant of interfering with the integrity of the court. This reflected a conflict of interest, and a new attorney should have been appointed.

***Castillo v. United States***, 34 F.3d 443 (7th Cir. 1994) The defendant and his alleged accomplice were represented by one attorney. A cursory Rule 44(c) hearing was held. It was debatable whether the defendant understood English well enough to answer the Rule 44(c) questions. Though he answered "yes" to each of the waiver questions, this is not sufficient to establish a knowing and voluntary waiver of conflict-free counsel. The defendant's allegations of an actual conflict were satisfied by his affidavit that the attorney told him not to testify, because it could hurt the co-defendant.

***Stoia v. United States***, 22 F.3d 766 (7th Cir. 1994) The defendant was represented at trial by certain attorneys but claimed in this §2255 petition that another attorney, who did not file an appearance, was actually directing trial strategy. An ineffective assistance of counsel claim may be valid, even with respect to an attorney who has not filed an appearance. In this case, the non-appearing attorney was burdened with a conflict of interest. The non-appearing attorney made numerous tactical decisions which the defendant followed, including requesting a continuance, not interviewing certain witnesses, and recommending that the defendant not testify in his own behalf. He also failed to file any pretrial motions, which was his delegated responsibility in the case. The non-appearing attorney's conflict resulted from an agreement he had with the government, as part of his own plea agreement, that if he would not represent any person charged with crimes. The attorney was also involved in undercover work with law enforcement.

***United States ex rel Duncan v. O'Leary***, 806 F.2d 1307 (7th Cir. 1986) The defendant's attorney was the prosecutor's campaign manager for the office of district attorney. There was explicit evidence of collusion between the defense attorney and the prosecuting attorney. The state conviction was thrown out by the Seventh Circuit in this habeas proceeding.

***Dawan v. Lockhart***, 31 F.3d 718 (8th Cir. 1994) The public defender represented two individuals charged with burglary. The first defendant agreed to plead guilty and gave a statement implicating the second defendant. Prior to trial, however, the defense attorney and the prosecutor agreed that there was no conflict because neither side planned to call the first defendant. At trial,

however, the defendant ended up calling the guilty-pleading co-defendant and elicited testimony that completely exculpated the defendant. He asked no questions, however, about the prior inconsistent statement. The prosecutor cross-examined the witness about his prior inconsistent statement. Because the attorney should have been the first to raise the issue regarding the prior statement (to soften the blow), but failed to do so, arguably in order to protect his former client from a perjury charge, this actual conflict rendered him ineffective. To establish that the conflict prejudiced him, it is not necessary to meet the Strickland standard of prejudice. When there is an actual conflict, the defendant need only establish that the conflict of interest affected the adequacy of the representation.

***United States v. Del Muro***, 87 F.3d 1078 (9th Cir. 1996) A defendant has a constitutional right to counsel in pursuit of a new trial motion. Here, the defendant, pro se, claimed that trial counsel was ineffective. The district court required trial counsel to represent the defendant in connection with this motion during the new trial motion. This was an improper procedure. Trial counsel had a clear conflict in pursuing the claim that he was ineffective. The trial court should have appointed substitute counsel to prosecute the new trial motion.

***Quintero v. United States***, 33 F.3d 1133 (9th Cir. 1994) The defendant's fee was paid by a third person. The attorney urged the defendant to reject a proposed plea agreement. Whenever a defendant's fee is paid by a third person, a potential conflict of interest exists.

***Wood v. Georgia***, 450 U.S. 261 (1981). One risk is that the lawyer will prevent his client from obtaining leniency by preventing the client from offering testimony against his former employer or from taking other actions contrary to the employer's interests. A full evidentiary hearing was necessary to fully explore the petitioner's allegations.

***Fitzpatrick v. McCormick***, 869 F.2d 1247 (9th Cir. 1989) The attorney who represented the defendant at his murder trial had previously represented his co-defendant at a previous trial. At this trial, the defense was that the former client was the guilty party. This actual conflict of interest required reversal of the defendant's conviction.

***United States v. Allen***, 831 F.2d 1487 (9th Cir. 1987) One law firm, Oteri & Weinberg, sought to represent seventeen defendants in this drug conspiracy prosecution. The attorneys offered to rate the culpability of the defendants during the initial joint plea negotiations. Nevertheless, certain defendants ultimately obtained separate counsel and their convictions were affirmed despite the court's disapproval of the law firm's initial joint representation.

***United States v. Gallegos***, 108 F.3d 1272 (10th Cir. 1997) The defendant was entitled to a new trial because of her counsel's conflict of interest. The attorney also represented a witness called by a co-defendant and this posed a conflict, because his advice to the witness was that he should plead the Fifth, whereas his duty to his client was to urge the witness to provide exculpatory evidence in support of the ***defendant.***

***Edens v. Hannigan***, 87 F.3d 1109 (10th Cir. 1996) Trial counsel represented two defendants in this armed robbery / murder trial. One of the defendants was not at the scene, but allegedly participated in the planning and otherwise aided and abetted the offense. The other was a participant. An actual conflict of interest existed. The participant defended based on compulsion (from a third participant) and the petitioner claimed that he had no role in the offenses.

***Selsor v. Kaiser***, 81 F.3d 1492 (10th Cir. 1996) Two public defenders from the same firm were appointed to represent two defendants charged with robbery and murder. Pursuant to Holloway v. Arkansas, 435 U.S. 475 (1978), the state trial court should have appointed lawyers from separate firms after counsel indicated that there was a conflict.

***Burden v. Zant***, 24 F.3d 1298 (11th Cir. 1994) The public defender represented two defendants who had been arrested for murder. He informally obtained immunity for one of the defendants, in exchange for his cooperation against the other. This was an actual conflict of interest requiring the reversal of the conviction of the other defendant. See Ruffin v. Kemp, 767 F.2d 748 (11th Cir. 1985).

***Hamilton v. Ford***, 969 F.2d 1006 (11th Cir. 1992) State trial counsel's objection to representing both defendants in a murder trial should have been sustained by the trial court. The trial court failed to explore the basis of the asserted conflict. Where there is no objection pre-trial, in order to prevail on appeal or on habeas, the defendant must show an actual conflict prejudiced him.

***Cuyler v. Sullivan***, 446 U.S. 335 (1980). But where, as here, an objection is raised prior to trial, the defendants need not show an actual conflict of interest when a trial court fails to inquire adequately into the basis of the objection. Reversal is automatic if the trial court fails to make a reasonable inquiry into the asserted conflict.

***Buenoano v. Singletary***, 963 F.2d 1433 (11th Cir. 1992) A defendant's attorney also represented the defendant in connection with movie and book rights relating to the offense. This posed a possible conflict of interest and a full evidentiary hearing should have been conducted by the federal habeas court. The defendant had poisoned two of her husbands to collect life insurance proceeds and had tried to poison a third husband.

***McConico v. Alabama,*** 919 F.2d 1543 (11th Cir. 1990) The murder defendant's lawyer also represented the victim's life insurance beneficiaries, one of whom was a witness for the state at trial. If the defendant won at trial, there was a possibility that the beneficiaries would lose their benefits (the policy excluded benefits if the decedent was engaged in an assault or a felony – the defendant's defense was self-defense). This is an actual conflict of interest necessitating a new trial. This is a situation of inherently divided loyalty because the success of one client depends on discrediting another. A showing of "adverse effect" is necessary and the defendant made an adequate showing in this case.

***United States v. Stuckey***, 917 F.2d 1537 (11th Cir. 1990) When the trial court learned that the defendant's attorney had been paid from another source, and that the lead counsel for that defendant had also received money from another source, the trial judge questioned both lawyers about the source of their fees and questioned the defendant, outside the presence of the attorney, about the willingness to proceed in light of the potential conflict of interest. After conducting this inquiry, the trial judge removed the lead counsel despite the defendant's willingness to waive that potential conflict. The Eleventh Circuit affirms, concluding that there was an inescapable inference that a drug syndicate for which the defendant worked had paid for her attorney to assure her silence.

***United States v. Sims***, 845 F.2d 1564 (11th Cir. 1988) It was proper for the trial judge to require all attorneys to divulge the source of their fees in this multi-defendant drug prosecution. The record indicated that attorneys representing certain defendants had represented co-defendants in previous cases and that some defendants were paying for other defendants' lawyers.

***United States v. McLain***, 823 F.2d 1457 (11th Cir. 1987) Defendant's attorney was under investigation for a Hobbs Act violation but did not inform the defendant of his conflict. The Court holds that this creates an actual conflict of interest which requires a reversal of the defendant's conviction.

***Porter v. Wainwright***, 805 F.2d 930 (11th Cir. 1986) In this habeas case, the court held that the petitioner was entitled to a hearing to inquire into his attorney's conflict of interest in light of the attorney's prior representation of a key prosecution witness. The state court refused to give the defendant an evidentiary hearing on his claim of ineffective assistance of counsel based on his attorney's failure to cross-examine this witness.

***In re Paradyne Corp.,*** 803 F.2d 604 (11th Cir. 1986) The district court attempted to hold ex parte, in camera hearings to inquire into potential conflicts of interest among the lawyers. The court intended to question counsel about their possession or use of information disclosed by other attorneys who represented co-defendants. In addition, the court intended to question the defendants outside the presence of their attorneys.

***ATTORNEY-CLIENT (Contacting a Represented Party)***

***United States v. Koerber***, 966 F.Supp.2d 1207 (D.Utah 2013) Prosecutors violated state ethics rules when they directed FBI agents to contact and interview a target of a fraud investigation who was known to be represented at the time. Suppresion of evidence was an appropriate remedy.

***United States v. Carona***, 660 F.3d 360 (9th Cir. 2011) The Ninth Circuit holds that the use of an informant to communicate with (and to show a fake subpoena to) an unindicted subject (although represented by counsel) does not violate the California State Bar Rules.

***United States v. Brown***, 595 F.3d 498 (3rd Cir. 2010) The Third Circuit joins the majority of Circuits in concluding that a prosecutor, preindictment, may use an undercover agent or an informant to contact a suspect, even if the prosecutor is aware that the suspect has retained counsel with respect to the matter under investigation. The opinion contains an analysis of this issue that concludes that state laws that exempt contacts that are "otherwise authorized by law" in connection with the prohibition on contacting a represented party applies to prosecutors.

***United States v. Gonzalez-Lopez***, 403 F.3d 558 (8th Cir. 2005) Before the Supreme Court granted certiorari in the decision in Gonzalez-Lopez, annotated below, the Eighth Circuit considered a separate question raised by the controversy dealing with the defendant's right to counsel in his criminal case. Shortly after being arrested, the defendant was represented by a lawyer named Fahle. Within a matter of weeks, however, the defendant sought out the services of Attorney Lowe. Lowe went to the jail and talked with the defendant, knowing that he was already represented by Fahle. The district court judge held that this violated the ethics rule that bars contacting a represented party. The Eighth Circuit disagreed. The prohibition on contacting a represented party applies to lawyers already in a case. It does not apply to lawyers who are not attorneys currently in the litigation. Grievance Committee for the Southern District of N.Y. v. Simels, 48 F.3d 640 (2d Cir. 1995) The defendant's attorney interviewed a potential witness against his client, who was also a potential co-defendant in a murder case. In the murder case, the witness had been appointed an attorney. This was not a violation of DR 7-104(A)(1) (communicating with a represented party). The witness was not a "party" in the drug case and with respect to the murder case, the witness, though involved in the crime, was clearly a witness for the prosecution. Thus, the attorney did not interview a "party" represented by an attorney for that "matter." The attorney's obligations to represent his client under the Sixth Amendment prompted the court to give the Directory Rule this narrow interpretation.

***United States v. Hammad***, 846 F.2d 854 (2d Cir. 1988) The Assistant United States Attorney encouraged an informant to question a suspect who the prosecutor knew was represented by an attorney. No prosecution had yet been commenced, so there was no Massiah problem. Nevertheless, the Second Circuit holds that this conduct violates DR7- 104(A)(1) which prohibits a lawyer from communicating with a "party" he or she knows to be represented by counsel regarding the subject matter of that representation. The Second Circuit holds that in many circumstances, the exclusion of evidence would be a permissible sanction, but that in this case, because the law was previously unsettled, suppression would be an inappropriate remedy. In a revised opinion, 858 F.2d 834, the court added this caveat: In those rare cases where a career criminal has retained "house counsel" the prosecutor is "authorized by law" to employ certain investigative techniques despite the defendant's having retained an attorney.

***United States v. Balter***, 91 F.3d 427 (3rd Cir. 1996) A federal prosecutor may, through the use of informants, or undercover agents, obtain information from a suspect, even if the suspect is represented, prior to indictment.

***United States v. Chavez***, 902 F.2d 259 (4th Cir. 1990) It was improper for an FBI agent to communicate with an already-represented defendant. In this case, the defendant telephoned the FBI agent from the jail and complained about his attorney's refusal to let him cooperate with the government. The FBI agent told him that he ought to seek different counsel. There was no prejudice from this conversation, but it was still a violation of the ethical rules and was improper. No information was obtained from the defendant nor was this conversation used against him.

***United States v. Lopez***, 765 F.Supp. 1433 (N.D.Cal. 1991) Post-indictment meetings between an assistant United States Attorney and a represented defendant are such "egregious and flagrant" violations of the ethical rules that dismissal of the indictment is the only viable remedy. The "Thornburgh Memorandum" represents a "frontal assault" on the power of the court to promulgate ethical rules. The court also noted that this practice is apparently widespread and needs to be curbed. On appeal to the Ninth Circuit, 4 F.3d 1455, the appellate court agreed that the communication with the represented defendant was inappropriate and unethical, but the dismissal of the indictment was not necessary, as there was no prejudice to the defendant.

***United States v. Ferrara***, 847 F.Supp. 964 (D.D.C. 1993) A prosecutor contacted a represented party. A state bar proceeding was instituted against the A.U.S.A. The government moved to enjoin the state bar proceeding, relying on the Thornburgh Memo, arguing that the Memo "preempted" the state bar rules and the Supremacy Clause operated to supersede the state bar ethics rule. The D.C. District disagreed. A unilateral decision of the Attorney General does not trigger the Supremacy Clause. This proceeding involves the same prosecutor and events described in In re Doe, 801 F.Supp. 478 (D.N.M. 1992). The D.C. Circuit affirmed: 54 F.3d 825 (D.C.Cir. 1995). In re Doe, 801 F.Supp. 478 (D.N.M. 1992) The district court, in an impassioned opinion (evoking Sir Thomas More, among others) castigates the Justice Department's "Thornburgh Memorandum" and holds that AUSA's, too, must observe the ethical rules governing the conduct of attorneys.

***ATTORNEY-CLIENT ISSUES (Ineffective – Generally and Procedural Issues)***

***Strickland v. Washington***, 466 U.S. 668 (1984) To prevail on a claim of ineffective assistance of counsel, the defendant bears the burden of establishing by a preponderance of the evidence that his attorney's performance was deficient and that he was prejudiced by the inadequate performance.

***United States v. Cronic,*** 466 U.S. 648 (1984) The Court carved out an exception to the two-part Strickland test. There are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified, the Court held. Prejudice will be presumed if: (1) counsel is completely denied; (2) counsel is denied at a critical stage of trial; or (3) counsel fails to subject the prosecution's case to meaningful adversarial testing.

***United States v. Ortiz-Vega***, 860 F.3d 20 (1st Cir. 2017) Though the circumstances are rare, there are occasions in which a defendant can raise an ineffective assistance of counsel claim in the trial court prior to sentencing. Here, the defendant was initially represented by appointed counsel but later retained new counsel. He claimed that deficient performance by the appointed counsel prejudiced the case prior to sentencing. The First Circuit held that the trial court should have heard that claim prior to sentencing, rather than insisting the claim was premature and had to await the filing of a § 2255. See also United States v. Simpson, 864 F.3d 830 (7th Cir. 2017).

***Juniper v. Davis***, 737 F.3d 288 (4th Cir. 2013) Where the defendant's federal habeas challenges his state habeas counsel's representation as ineffective, and the state habeas was the first opportunity that the defendant had to raise the issue of ineffective assistance of trial counsel, the court must appoint counsel in the federal habease to represent the defendant. See Gray v. Pearson, Fed.Appx. 331 (4th Cir. 2013) and Martinez v. Ryan, 132 S. Ct. 1309 (2012).

***Lambright v. Ryan***, 698 F.3d 808 (9th Cir. 2012) The implied waiver of the attorney-client privilege when an ineffective assistance of counsel claim is filed is limited and must be carefully evaluated. The waiver is limited to allow the state to fairly litigate the claim, and is not a total waiver of all confidential communications.

***United States v. Brown***, 623 F.3d 104 (2d Cir. 2010) The Second Circuit holds that an ineffective claim should be resolved by the district court while the case is still pending in that court, rather than forcing the defendant to await collateral review if the issue can and should be resolved in the lower court on a New Trial Motion.

***United States v. Bergman***, 599 F.3d 1142 (10th Cir. 2010) If defense counsel was never a lawyer (as opposed to a lawyer who has been suspended, or disbarred), the defendant has automatically been denied the Sixth Amendment right to counsel.

***Murphy v. Puckett***, 893 F.2d 94 (5th Cir. 1990) After the District Court makes appropriate findings under Strickland v. Washington, that is, whether the lawyer was ineffective, and whether such ineffectiveness prejudiced the defendant, it is not necessary to thereafter engage in a "harmless error" analysis. The second prong of the Strickland analysis subsumes the harmless error issue.

**Frazer v. United States**, 18 F.3d 778 (9th Cir. 1994) The defendant filed a pro se §2255 petition, claiming that his appointed trial counsel had called him a "stupid nigger" and insisted that he agree to a stipulated facts / bench trial, or he would provide ineffective assistance. The defendant further claimed that the attorney failed to obtain and present mitigating evidence at sentencing. The Ninth Circuit holds that the trial court erred in failing to conduct a hearing on these allegations and, if they were proven, the verbal abuse would alone represent ineffective assistance per se. This type of verbal abuse is inconsistent with (1) the duty of loyalty owed a client by his attorney, (2) the responsibility of providing meaningful assistance, (3) the role of "guiding hand" described in Powell v. Alabama by Justice Sutherland. As Justice Black wrote in Von Moltke v. Gillies: "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client . . . Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service

for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent."

***United States v. Theodore***, 354 F.3d 1 (1st Cir. 2003) The trial court erred in declining to hold an evidentiary hearing on defendant's new trial motion that asserted an ineffective assistance of counsel claim. The attorney offered an affidavit that he suffered from an alcohol problem; a defense witness was improperly served with a subpoena and successfully quashed the subpoena (and counsel failed to appear at the hearing to quash the subpoena) and counsel's opening statement and closing argument were riddled with sustained objections. A hearing should have been held on the ineffective claim.

***ATTORNEY-CLIENT ISSUES (Ineffective Assistance of Counsel -- Appeal)***

***Roe v. Flores-Ortega***, 528 U.S. 470 (2000) Counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

***United States v. Allmendinger,*** 894 F.3d 121 (4th Cir. 2018) Appellate counsel failed to raise an issue on appeal that would have led to a reversal of certain money laundering counts in the indictment. The issue related to the merger of the money laundering counts into the underlying criminal violations. The fact that a new sentencing would not have resulted in a shorter sentence is not a relevant consideration in assessing the deficient appellate counsel's performance. Prejudice is measured only by the fact that a reversal of the conviction was likely.

***Overstreet v. Warden***, 811 F.3d 1283 (11th Cir. 2016) Overstreet was convicted of numerous counts of armed robbery and kidnapping. The kidnapping counts involved conduct that was related to the robberies (moving the restaurant manager from one room to another to open the safe). Under Georgia law, acts of "asportation" that are part and parcel of another offense are not sufficient to support an independent kidnapping conviction. Overstreet's counsel on direct appeal did not appeal the kidnapping counts on this basis. This was deficient performance that prejudiced the defendant and required granting a writ pursuant to § 2254.

***Long v. Butler***, 809 F.3d 299 (7th Cir. 2015) A witness gave a statement to the police that she saw the defendant shoot the victim. At defendant's first murder trial, the witness testified that she did not see the defendant shoot the victim and that she had recanted and told the police that her initial statement was not accurate. At the defendant's second trial, the witness testified that she did see the defendant shoot the victim. When cross-examined and asked about her prior recantation, the witness denied having recanted her identification. The prosecution failed to correct this perjurious testimony. The Seventh Circuit granted a writ. The prosecutor had a duty pursuant to Napue to correct this false testimony. The appellate court also held that the appellate counsel's failure to raise this issue on appeal was ineffective assistance of appellate counsel.

***Etherton v. Rivard***, 800 F.3d 737 (6th Cir. 2015) The defendant was convicted in state court of possessing cocaine in his vehicle. The prosecution introduced testimony from his co-defendant who was in the car with him, but that witness was significantly impeached. The other evidence (other than finding the cocaine in the vehicle) was a tip received by the police that the car was on the interstate, and it had cocaine in it. This existence of the tip was introduced twice, and the prosecutor referred to the tip in his closing argument. There was no objection to this evidence at trial and the issue was not raised on appeal. The tip was inadmissible evidence and violated the defendant's rights under the Confrontation Clause. The Sixth Circuit granted habeas relief. The Supreme Court reversed: The federal court did not afford sufficient ADEDPA deference to the conclusion of the state courts. The "tip" was not necessarily introduced for the truth of the matter asserted and trial counsel may have had a strategic reason not to object. 578 U.S. --- (2016).

***Gordon v. Braxton***, 780 F3d 196 (4th Cir. 2015) Trial counsel was ineffective for failing to appeal and for failing to consult with the client about the client's right to file an appeal following his state court conviction.

***Lynch v. Dolce***, 789 F.3d 303 (2d Cir. 2015) Appellate counsel's failure to raise an issue on appeal that was certainly meritorious (an instructional error regarding an essential element of the offense that was disputed at trial) was deficient performance that prejudiced the defendant and necessitated granting the writ.

***Franco v. United States***, 762 F.3d 761 (8th Cir. 2014) In this §2255 proceeding, the district court erred in denying the defendant's request for an evidentiary hearing on the issue of whether he requested that his attorney to file a notice of appeal.

***Payne v. Stansberry***, 760 F.3d 10 (D. C. Cir. 2014) The trial judge instructed the jury (according to the transcript), "If you find that the government has failed to prove any element of the offense, beyond a reasonable doubt, you must find that defendant guilty." Though this may have been a transcription error, the government failed to prove that it was. And if it were simply a slip of the tongue, that does not alter the fact that it was obvious and plain error affecting the defendant's substantial rights. Appellate counsel's failure to raise this issue on appeal amounted to ineffective assistance of counsel.

***Milton v. Miller***, 744 F.3d 660 (10th Cir. 2014) The state court applied the incorrect standard in evaluating petitioner's claim that his appellate counsel provided ineffective assistance of counsel. The key ingredient of this claim focuses on the appellate issue that was omitted, but which had merit. The state court in this case erroneously held that this fact, alone, is not sufficient to merit relief.

***Dowell v. United States***, 694 F.3d 898 (7th Cir. 2012) Failure to file a notice of appeal when asked to do so by the defendant is ineffective assistance of counsel which can be raised even if the defendant's plea agreement provided for a waiver of the right to bring a collateral attack.

***Glover v. Birkett***, 679 F.3d 936 (6th Cir. 2012) Trial counsel's failure to file a notice of appeal was ineffective assistance of counsel. The fact that the state appellate court subsequently decided adversely to the defendant his application for leave to file an appeal was not a sufficient substitute that obviated the prejudice.

***Ramchair v. Conway***, 601 F.3d 66 (2d Cir. 2010) At the defendant's state court trial, the prosecutor introduced evidence that the defendant was picked out of a line-up. The officer not only testified that the defendant was chosen by the witness, but that the line-up was properly composed – indeed, the defendant's trial counsel was present (according to the officer) and did not object to the composition of the line-up. The defense counsel objected and asked for a mistrial, explaining that he felt compelled to testify and explain why he did not object. The trial court denied the mistrial motion. Appellate counsel failed to raise this meritorious issue on appeal. Failing to raise this issue on appeal was ineffective assistance of appellate counsel.

***King v. United States***, 595 F.3d 844 (8th Cir. 2010) Appellate counsel provided ineffective assistance of counsel by failing to challenge the efficacy of an appeal waiver that was inapplicable, because the trial court declined to apply the sentencing recommendation in the plea agreement, which was a prerequisite to enforcing the appeal waiver.

***Bostick v. Stevenson***, 589 F.3d 160 (4th Cir. 2009) Trial counsel's failure to file an appeal of defendant's state murder conviction was ineffective assistance of counsel. The defendant announced his intention to appeal in court and this triggered, at a minimum, counsel's duty to consult with the client about filing an appeal.

***Hodge v. United States***, 554 F.3d 372 (3rd Cir. 2009) Counsel provided ineffective assistance of counsel by failing to file a timely notice of appeal. The remedy (imposed in this § 2255 case) was to remand the case to the district court to re-impose the sentence so that a timely notice of appeal could be filed.

***Scruggs v. United States***, 513 F.3d 675 (7th Cir. 2008) Appellate counsel was ineffective in failing to challenge a two-point gun enhancement to the Guideline Calculation.

***Corral v. United States***, 498 F.3d 470 (7th Cir. 2007) Trial counsel's unavailability during the ten day period after entry of the guilty plea, which prevented the defendant from requesting that an appeal be filed, amounted to ineffective assistance of counsel.

***United States v. Poindexter***, 492 F.3d 263 (4th Cir. 2007) If a client unequivocally instructs his attorney to file a notice of appeal – even if there was an appeal waiver in the plea agreement – it is ineffective assistance of counsel to fail to file an appeal.

***Watson v. United States***, 493 F.3d 960 (8th Cir. 2007) Same as Poindexter / Shedrick, and other cases – attorney must file notice of appeal, even if there is an appeal waiver if defendant expresses a desire to appeal.

***United States v. Shedrick***, 493 F.3d 292 (3rd Cir. 2007) Failure to file an appeal, even in a case with an appeal waiver, is ineffective assistance of counsel if the defendant requests that an appeal be filed.

***Thompson v. United States***, 504 F.3d 1203 (11th Cir. 2007) Counsel failed to properly consult with the defendant about his right to appeal his sentence. This was ineffective assistance of counsel.

***Hammon v. Ward***, 466 F.3d 919 (10th Cir. 2006) Two brothers were arrested in a car with crack cocaine and guns. One lawyer represented them. Their theory was going to be that brother #1 possessed the gun, and neither possessed the drugs (they had borrowed the car). Brother #1, however, entered a guilty plea to probation with the understanding that he would testify against brother #2. The lawyer continued to represent brother #2 (and did not tell the #2 that #1 had entered a guilty plea). Everything about this situation represented a conflict. Not only does this pose an actual conflict of interest, but appellate counsel was ineffective in failing to raise this issue in the state appeal. Because of some uncertainty in the record, however, a remand to the federal habeas court was necessary to more fully develop the record.

***Harrington v. Gillis***, 456 F.3d 118 (3rd Cir. 2006) The court rejected the state court's conclusion that in the absence of a specific request by the defendant to his attorney to file an appeal, there can be no ineffective finding regarding appellate counsel for failure to file an appeal. Roe v. Flores-Ortega requires a more detailed inquiry and rejected this per se rule. The court concluded that considering all the circumstances, the defendant did express an interest in pursuing an appeal of his conviction.

***Frazer v. South Carolina***, 430 F.3d 696 (4th Cir. 2005) Applying Roe v. Flores-Ortega, 528 U.S. 470 (2000), the court held that the state court trial counsel was ineffective in failing to consult with the defendant about his right to appeal his state court conviction.

***Franklin v. Anderson***, 434 F.3d 412 (6th Cir. 2006) Appellate counsel was ineffective in failing to raise the trial court's error in failing to excuse a prospective juror for cause. The juror demonstrated during voir dire that the juror could not comprehend the legal standard she was supposed to apply.

***Campusano v. United States***, 442 F.3d 770 (2d Cir. 2006) Even if there is an appeal waiver, if the defendant requests that the attorney file an appeal, it is ineffective assistance of counsel to fail to do so.

***Gomez-Diaz v. United States***, 433 F.3d 788 (11th Cir. 2005) Even though there was a limited waiver of appeal in the plea agreement, counsel was ineffective in failing to file an appeal at the request of the defendant. The trial court erred in holding that the defendant (i.e., habeas petitioner) was required to show a non-frivolous appeal issue to prevail on his ineffective claim.

***Fountain v. Kyler***, 420 F.3d 267 (3rd Cir. 2005) Appellate counsel was ineffective in advising the defendant not to appeal the state court's decision on the belief – erroneous, as it turns out – that a new state statute would be applied retroactively. Counsel believed that if the appeal were successful, the defendant would be facing a new death penalty trial under the new law. However, it was later decided that the new law could not be applied to old cases; thus, the defendant did not face the risk of the death penalty if he appealed.

***United States v. Sandoval-Lopez***, 409 F.3d 1193 (9th Cir. 2005) Though there was an explicit appeal waiver in the plea agreement, the attorney's failure to file an appeal, pursuant to the defendant's request, was ineffective assistance of counsel.

***United States v. Garrett***, 402 F.3d 1262 (10th Cir. 2005) Defendant was entitled to a hearing to determine whether he authorized his counsel not to file an appeal. Even though he signed an appeal waiver prior to entering a guilty plea, the defendant was entitled to file a notice of appeal and challenge the efficacy of the waiver.

***Ballard v. United States***, 400 F.3d 404 (6th Cir. 2005) Following defendant's conviction, the Supreme Court decided Appprendi. Appellate counsel was ineffective in failing to raise an Apprendi challenge to the sentence. The defendant was convicted of a drug conspiracy, but the evidence at trial was unclear whether the defendant was responsible for marijuana, or cocaine. The failure to challenge the sentence on appeal was ineffective, especially since appellate counsel was aware of the successful challenge raised by a co-defendant.

***Sanders v. Cotton***, 398 F.3d 572 (7th Cir. 2005) The state trial court erred in failing to instruct the jury, in accordance with state law, that if the issue of heat of passion is raised, the state was obligated to prove the absence of heat of passion beyond a reasonable doubt before it could convict the defendant of murder. The trial counsel requested the instruction. Appellate counsel provided ineffective assistance of counsel in failing to raise this meritorious issue in the state appeal.

***Richey v. Mitchell***, 395 F.3d 660 (6th Cir. 2005) Appellate counsel's failure to challenge the sufficiency of the evidence (and to attack trial counsel's failure to do so, as well) was ineffective assistance of counsel. The state had prosecuted the defendant for felony murder on a theory of transferred intent. But at the time, the state law did not provide for a conviction for felony murder on the basis of transferred intent. Failing to raise this was deficient on the part of both the trial and the appellate counsel. See also 498 F.3d 344 (6th Cir. 2007), where the writ was again issued (following remand from the Supreme Court, though the writ was issued on different grounds.

***United States v. Hilliard***, 392 F.3d 981 (8th Cir. 2004) Trial counsel's failure to file a timely motion for new trial following the defendant's conviction was ineffective assistance of counsel which necessitated setting aside the conviction, because the district court found that had such a motion been filed, it would have been granted.

***Mapes v. Tate***, 388 F.3d 187 (6th Cir. 2004) Appellate counsel's failure to raise an Eddings claim on appeal in this death penalty case was ineffective assistance of appellate counsel. The appropriate relief was to grant the writ, conditioned on the defendant being given the right to present the issue on direct appeal to the state appellate court.

***Lewis v. Johnson***, 359 F.3d 646 (3rd Cir. 2004) Pursuant to Fores-Ortega, defense counsel was ineffective in this case in failing to advise the defendant of his right to appeal.

***United States v. Reinhart***, 357 F.3d 521 (5th Cir. 2004) Appellate counsel was ineffective in failing to properly raise a meritorious challenge to the guideline application in this case.

***McFarland v. Yukins,*** 356 F.3d 688 (6th Cir. 2004) Trial counsel represented two defendants at trial. Just prior to the beginning of trial, the attorney told the trial judge that things had become a bit "sticky" and that perhaps some inquiry would be appropriate. The trial judge declined. However, the judge did grant a severance and the defendants proceeded to trial with one lawyer, but in separate trials. The trials were conducted as bench trials, back-to-back, over the course of three days. In fact, the trials actually overlapped. Pursuant to Holloway, the trial court erred in failing to fully inquire into the conflict that was presented to the court prior to trial. See also Harris v. Carter, 337 F.3d 758 (6th Cir. 2003). Though Holloway requires automatic reversal where a complaint is raised pre-trial to joint representation at the same trial, the same rule applies here, where the problem was raised prior to the scheduled joint trial and the only remedy was severance. Appellate counsel's failure to raise the conflict issue amounted to ineffective assistance of appellate counsel.

***Caver v. Straub***, 349 F.3d 340 (6th Cir. 2003) Appellate counsel was ineffective in failing to raise trial counsel's ineffectiveness in failing to be present when the jury sent a note back during deliberations and when the trial court re-charged the jury.

***United States v. Conley***, 349 F.3d 837 (5th Cir. 2003) Trial counsel was ineffective in failing to challenge the defendant's sentence on the § 371 conspiracy count. In the trial court, the parties and the court erroneously believed the conviction was for a money laundering conspiracy (§ 1956(h)). Section 371 limits exposure to five years, while § 1956(h) permits a twenty-year sentence. It was ineffective to fail to object to a sentence that exceeded the statutory maximum. Moreover, appellate counsel was ineffective in failing to appeal this error.

***Joshua v. Dewitt***, 341 F.3d 430 (6th Cir. 2003) The defendant was stopped for speeding and the trooper determined that he, along with his passenger were acting nervous and suspicious. The trooper called his dispatcher and was told that the defendant was listed as a suspicious person who was believed to be a drug courier in a "Read & Sign" book maintained by the police department. Based on this information, the trooper detained the defendant while waiting for a canine to arrive. The dog arrived forty-two minutes later. Drugs were found on the passenger, who implicated the defendant. State trial counsel failed to challenge the legitimacy of the Read and Sign book that prompted the detention. Instead, he simply challenged the length of the detention.

Based on United States v. Hensley, 469 U.S. 221 (1985), a detention based on a “flyer” or something else akin to a “Read and Sign” book requires proof that the author of the flyer had reasonable suspicion to list the suspect as a criminal. In this case, however, the state offered no proof that the Read and Sign book was based on reliable information. Moreover, the state’s contention that the defendant’s nervousness justified a detention was meritless. Nervousness may be a basis for an articulable suspicion, but only when it is coupled with evasive behavior. The state trial lawyer’s failure to challenge the stop and search on this basis was ineffective assistance of counsel. The Sixth Circuit also noted that Hensley is not limited to initial stops, but also covers situations in which a stop is prolonged based on this type of information. The Sixth Circuit concludes that not only was trial counsel ineffective, but appellate counsel was, as well.

***Garcia v. United States***, 278 F.3d 134 (2d Cir. 2002) Counsel’s advice to the defendant that he could not file a notice of appeal because of an appeal waiver was incorrect and violated the defendant’s right to effective assistance of counsel. When a habeas petitioner successfully shows that he was denied the right to direct appeal, the proper remedy is to vacate the sentence and remand for re-sentencing.

***Blankenship v. Johnson***, 118 F.3d 312 (5th Cir. 1997) If the state seeks discretionary review of the decision of the first appellate court, the defendant has the right to the assistance of counsel at this discretionary review proceeding. In this case, the appointed counsel did nothing. This amounts to ineffective assistance of counsel.

***Hughes v. Booker***, 220 F.3d 346 (5th Cir. 2000) Mississippi law enabled an appointed appellate counsel to withdraw after filing a certificate that stated that no reversible errors were found in a review of the record. This certificate did not satisfy the requirements of Anders v. California, 386 U.S. 738 (1967).

***Jackson v. Leonardo***, 162 F.3d 81 (2d Cir. 1998) Petitioner’s appellate counsel was ineffective in failing to raise a double jeopardy argument on appeal, challenging his conviction on two counts that could not be prosecuted separately without violating the double jeopardy clause.

***Ludwig v. United States***, 162 F.3d 456 (6th Cir. 1998) An attorney’s failure to file a notice of appeal, despite the wishes of the defendant, amounts to ineffective assistance of counsel, regardless of the merits of the appeal.

***Roe v. Delo***, 160 F.3d 416 (8th Cir. 1998) Appellate counsel was ineffective in failing to assert that it was plain error to give an incorrect definition of first-degree murder instruction to the jury. The state court instruction erroneously informed the jury that an intent to cause serious physical injury to the victim was a sufficiently culpable state of mind to support a first degree murder conviction. Actually, in Missouri, an intent to kill is required for a first degree murder conviction. The Eighth Circuit grants the writ: the remedy was to release the petitioner unless he was allowed to file a new appeal including this ground, in the state appellate court.

***Claudio v. Scully***, 982 F.2d 798 (2d Cir. 1992) Defendant’s first attorney allowed the defendant to make a confession. Under state law, the right to counsel had attached at this point. The trial court held that the confession should be suppressed because the first attorney rendered ineffective assistance of counsel. A new attorney was retained; the state appealed to the first-level appellate court and the trial court’s decision was reversed, on the theory that although there was a right to counsel at the time of the confession under the state constitution, there was no right to effective assistance. The second attorney did not raise the state right to counsel in his appeal of this decision to the second-level appellate court, relying instead on the federal Sixth Amendment (which had not attached, because there was no indictment at the time of the confession). The second attorney’s failure to raise the state constitutional claim in the higher court was ineffective assistance of counsel under the Sixth Amendment.

***United States v. Peak***, 992 F.2d 39 (4th Cir. 1993) An attorney’s failure to file a notice of appeal is per se ineffective and there is no requirement that the defendant establish prejudice – that is, the defendant need not establish that the appeal would raise meritorious grounds.

***Griffin v. United States***, 109 F.3d 1217 (7th Cir. 1997) The failure to file any brief in support of defendant’s appeal is ineffective assistance.

***Mason v. Hanks***, 97 F.3d 887 (7th Cir. 1996) Appellate counsel failed to raise on appeal the trial court’s error in permitting the state to introduce hearsay evidence: an informant’s statements that the defendant was dealing drugs. This was ineffective and necessitated granting the writ unless the petitioner was allowed an opportunity to file a new appeal including this issue. Alternatively, the petitioner was entitled to a new trial.

***United States v. Nagib***, 56 F.3d 798 (7th Cir. 1995) If the defendant told his lawyer to appeal, and the lawyer dropped the ball, then the defendant has been deprived not of effective assistance of counsel, but of any assistance of counsel on appeal. Abandonment is a per se violation of the Sixth Amendment.

***Castellanos v. United States***, 26 F.3d 717 (7th Cir. 1994) Where an attorney fails to file an appeal as requested by the client, this amounts to ineffective assistance of counsel per se. There is no requirement of a showing of prejudice.

***Thomas v. O’Leary***, 856 F.2d 1011 (7th Cir. 1988) The defendant won a suppression motion at the trial court, but failed to file any brief in support of this favorable ruling when appealed by the state. The failure to file a brief constitutes ineffective assistance of counsel per se without a showing of prejudice.

***United States v. Del Muro***, 87 F.3d 1078 (9th Cir. 1996) A defendant has a constitutional right to counsel in pursuit of a new trial motion. Here, the defendant, pro se, claimed that trial counsel was ineffective. The district court required t counsel to represent the defendant in connection with this motion during the new trial motion. This was an improper procedure. Trial counsel had a

clear conflict in pursuing the claim that he was ineffective. The trial court should have appointed substitute counsel to prosecute the new trial motion.

***Baker v. Kaiser***, 929 F.2d 1495 (10th Cir. 1991) Following his state court conviction, the defendant expressed a desire to appeal, but no appointed counsel filed the proper notice. The defendant was denied effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985); Douglas v. California, 372 U.S. 353 (1963).

***Abels v. Kaiser***, 913 F.2d 821 (10th Cir. 1990) The defendant was denied the effective assistance of counsel on appeal, because his attorney withdrew, and the State refused to provide him with appointed counsel after concluding that the defendant was not indigent. In assessing the prejudice suffered by the defendant by virtue of not being able to appeal his conviction, it is not necessary to assess the merits of any appeal which could have been perfected.

***Martin v. United States***, 81 F.3d 1083 (11th Cir. 1996) Where a defendant requests that his attorney file a notice of appeal, even after a guilty plea, if the attorney fails to do so, the defendant is prejudiced, and he should thereafter be entitled to file an out-of-time appeal.

***Montemoino v. United States***, 68 F.3d 416 (11th Cir. 1995) If an attorney fails to file a notice of appeal following a guilty plea and there is an issue relating to the sentencing guidelines, the defendant may obtain relief based on the ineffectiveness of his attorney. This is an exception to the rule that the failure to file an appeal following the entry of a guilty plea is not grounds for asserting ineffective assistance of counsel. The appropriate remedy is to permit an out-of-time appeal of any sentencing guideline issue.

***Orazio v. Dugger***, 876 F.2d 1508 (11th Cir. 1989) Appellate counsel was ineffective because of his failure to appeal the lower court's denial of the defendant's motion to proceed pro se. Because of the failure to raise this in the initial appeal, collateral relief was unavailable because of the procedural default.

***ATTORNEY-CLIENT ISSUES (Ineffective Assistance of Counsel -- Death Penalty Cases)***

***Rompilla v. Beard***, 125 S.Ct. 2456 (2005): Death penalty counsel's failure to investigate the circumstances of the defendant's prior conviction, (such as the file in the clerk's office) which was used as an aggravating factor in the penalty phase (and which had loads of mitigating evidence present in the clerk's file) was ineffective and prejudicial. The file of the prior case contained information about the defendant's childhood and mental health problems.

***Florida v. Nixon***, 543 U.S. 175 (2004) The Supreme Court held that an attorney may concede the defendant's guilt during the guilt-innocence portion of a death penalty trial even without the express approval of the defendant. This concession of guilt (prompted by a strategy of prevailing during the sentencing phase) is not the functional equivalent of a guilty plea, which would require a full waiver by the defendant.

***Bell v. Cone***, 535 U.S. 685 (2002) The standard of Strickland v. Washington, applies in death penalty cases, even where the defense counsel does virtually nothing during the penalty phase. The Sixth Circuit's decision applying United States v. Cronic – failure to subject the prosecution's case to meaningful adversarial testing – was erroneous.

***Wiggins v. Smith***, 123 S.Ct. 2527 (2003) Counsel was ineffective in the death penalty phase. Inadequate pretrial investigation of the defendant's horrendous upbringing led to a presentation of mitigating evidence at the penalty phase that was inadequate to satisfy Sixth Amendment requirements. Relying on Williams v. Taylor, 529 U.S. 362 (2000), the Court held that the state habeas courts used the correct legal standard but that the ruling was "an unreasonable application of clearly established Federal law."

***Porter v. McCollum,*** 130 S. Ct. 447 (2009) Over the course of several weeks in the fall of 2009, the Supreme Court issued three per curiam opinions in death penalty cases involving ineffective assistance of counsel claims. In this case, the Court reversed the Eleventh Circuit and held that counsel's failure to introduce evidence of defendant's experiences in the Korean War – he was in two battles that resulted in the death of countless soldiers around him and left him with extreme emotional scars – was ineffective assistance of counsel that would have changed the outcome of the trial. The unanimous Court held that his heroic service during these horrific battles surely would have had an impact on any jury.

***Sears v. Upton***, 130 S. Ct. 3259 (2010) The state death penalty trial counsel was ineffective in failing to investigate available mitigation evidence. The state court applied an incorrect standard in determining whether there was prejudice and the Supreme Court remanded for a new determination of prejudice that considered all the evidence presented in the post-conviction pleadings.

***Phillips v. White***, 851 F.3d 567 (6th Cir. 2017) Trial counsel conducted no investigation and presented no evidence in mitigation at the defendant's death penalty trial. Nor did he explain to the jury the options that were available and why a lesser sentence than life without parole was appropriate. The jury returned a verdict of life without parole (which the judge followed and imposed). The Sixth Circuit held that the Cronic standard applied and prejudice was presumed, but even under the Strickland standard, the petitioner showed that prejudice resulted from the trial counsel's failure to investigate, or present mitigating evidence.

***Hardwick v. Secretary, Fla. Dept. of Corrections***, 803 F.3d 541 (11th Cir. 2015) Several months before the Supreme Court decided Wiggins v. Smith in 2003, the Eleventh Circuit announced its decision in Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003). Quoting from Strickland, the court wrote: Counsel's duty of inquiry in the death penalty sentencing phase is somewhat unique. First, the preparation and investigation for the penalty phase are different from the guilt phase. The penalty phase focuses not on absolving the defendant from guilt, but rather on the production of evidence to make a case for life. The purpose of investigation is to find witnesses to help humanize the defendant, given that a jury has found him guilty of a capital offense.

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. 320 F.3d at 1163, quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. The Hardwick court went on to hold that the failure to do any investigation because of the mistaken notion that mitigating evidence is inappropriate is indisputably below reasonable professional norms. Moreover, when mental health mitigating evidence is available, and absolutely none was presented by counsel to the sentencing body, and no strategic reason was put forward for this failure, this omission is objectively unreasonable. 320 F.3d at 1164. The same reasoning applies to evidence relating to defendant's family background, and alcohol and drug abuse. In Hardwick, trial counsel presented no evidence during either the guilt-innocence, or penalty phase of the trial. Available evidence documented that the defendant was drugged and drunk at the time of the crime. This evidence could have led the jury, or the sentencing judge, to find that the defendant lacked the judgment to conform his conduct to the requirements of the law. Additional evidence established that he was reared in a dysfunctional family and suffered mental and physical abuse as a child and teen. The Eleventh Circuit concluded that a full evidentiary hearing was required in the district court to determine whether the writ should be granted. When that hearing was held, the district court concluded that the defendant was deprived of the effective assistance of counsel and the Eleventh Circuit affirmed, setting aside the death penalty. Hardwick v. Secretary, Fla. Dept. of Corrections, 803 F.3d 541 (11th Cir. 2015).

***Saranchak v. Secretary, Pa. Dept. of Corrections***, 802 F.3d 579 (3rd Cir. 2015) There were sufficient red flags of mental illness that defense counsel was aware of through his investigation that further inquiry and investigation was required and the failure to do so amounted to deficient penalty phase performance.

***Bemore v. Chappell***, 788 F.3d 1151 (9th Cir. 2015) Trial counsel's penalty phase preparation was deficient and necessitated setting aside the death sentence in this case. The evidence of organic brain damage was readily available and should have been developed and presented during the penalty phase.

***Pruitt v. Neal***, 788 F.3d 248 (7th Cir. 2015) Trial counsel's performance during the penalty phase investigation was objectively deficient because of the failure to locate the develop evidence that the defendant suffered from paranoid schizophrenia.

***Doe v. Ayers***, 782 F.3d 425 (9th Cir. 2015) The available evidence that could have been presented during the mitigation phase of this death penalty case included abuse as a child, significant brutality, and rapes that defendant suffered when imprisoned at a young age and other evidence of a deprived childhood. This lengthy opinion by Judge Reinhart is encyclopedic in its review of the duty of trial counsel to investigate and present mitigating evidence, even when not assisted by the defendant himself, and to pursue all leads that might exist based on the information that is furnished by family members.

***Wharton v. Chappell***, 765 F.3d 953 (9th Cir 2014) Trial counsel's failure to present evidence about the defendant suffering sexual abuse as a child constituted ineffective assistance of counsel during the penalty phase.

***DeBruce v. Commissioner, Ala. Dept. of Corrections,*** 758 F.3d 1263 (11th Cir. 2014) Trial counsel performed inadequately in preparing for the mitigation phase of this death penalty trial. He had no investigator working on the mitigating evidence and failed to locate and present available mental health evidence.

***Stankewitz v. Wong***, 698 F.3d 1163 (9th Cir. 2012) State trial counsel's failure to investigate present substantial available mitigation evidence about the defendant's upbringing, mental illness, and drug use was ineffective assistance of counsel that required that the death penalty be set aside in this case.

***Cauthern v. Colson***, 736 F.3d 465 (6th Cir. 2013) Trial counsel was ineffective in failing to properly develop and present available mitigating evidence.

***Hooks v. Workman***, 689 F.3d 1148 (10th Cir. 2012) Counsel's death penalty presentation was sub-par in numerous respects, including a failure to develop and present family and social history, failure to present available and significant mental-health evidence and failure to rebut the prosecution's case in aggravation.

***Winston v. Pearson***, 683 F.3d 489 (4th Cir. 2012) State trial counsel were ineffective in failing to adequately investigate and prepare a mental retardation defense in this death penalty prosecution.

***James v. Ryan***, 679 F.3d 780 (9th Cir. 2012) Trial counsel's inadequate investigation into the defendant's mental health problems, as well as his drug abuse and other childhood problems amounted to ineffective assistance of counsel necessiting that the death penalty be vacated. Affirmed on remand from the Supreme Court, 733 F.3d 911 (9th Cir. 2013)

***Blystone v. Horn***, 664 F.3d 397 (3rd Cir. 2011) Trial counsel provided ineffective assistance of counsel in this death penalty trial because of his failure to locate and present mitigating evidence.

***James v. Schriro***, 659 F.3d 855 (9th Cir. 2011) Ineffective mitigation phase preparation.

***Foust v. Houk***, 655 F.3d 524 (6th Cir. 2011) Trial counsel's failure to obtain records from the Children's Services Office that documented the incredibly abusive and horror of the defendant's childhood and to interview family members, as well counsel's failure to retain a mitigation expert, or to interview the defense-retained psychologist, was ineffective assistance of counsel.

***Cooper v. Sec'y Dept. of Corrections***, 646 F.3d 1328 (11th Cir. 2011) Trial counsel was ineffective in failing to locate and present available mitigating evidence in this death penalty case. There was considerable evidence of the abuse defendant suffered as a child and psychological evidence was also available, but never developed by the defense.

***Johnson v. Sec'y DOC***, 643 F.3d 907 (11th Cir. 2011) The trial attorney failed to perform adequate investigation into defendant's abusive childhood. His mother and brother both committed suicide – a fact that the attorney never learned – and his father regularly abused him. The defendant witnessed prior suicide attempts by his mother. "No reasonable attorney who has

every expectation that his client will be convicted and will be facing a death sentence would wait until the guilt stage ended before beginning to investigate the existence of non-statutory mitigating circumstances. No reasonable attorney, after being told by his client that he had an abusive upbringing, would fail to interview members of his client's family who were readily available and could corroborate or refute the allegations of abuse. No reasonable attorney told by his client that he had an alcoholic and abusive father would fail to pursue those non-statutory mitigating circumstances simply because the father denied it."

***Sowell v. Anderson***, 663 F.3d 783 (6th Cir. 2011) Trial counsel's mitigation evidence investigation was inadequate in failing to locate and present evidence of the horrific childhood the defendant endured.

***Ferrell v. Hall***, 640 F.3d 1199 (11th Cir. 2011) Trial counsel was ineffective in investigating and presenting mitigating evidence in this death penalty trial. Trial counsel never discovered the extent of defendant's extensive disabling mental health problems. Nor did they learn about his suicide attempt at age eleven, as well as his organic brain damage. Nor did they learn about the father's abusive behavior.

***Griffin v. Pierce***, 622 F.3d 831 (7th Cir. 2010) Trial counsel's failure to engage in any mitigation investigation was ineffective assistance of counsel.

***Stanley v. Schriro***, 598 F.3d 612 (9th Cir. 2010) Commenting, that "We simply cannot in good conscience continue to send men to their deaths without ensuring that their cases were not prejudiced by inadequate legal representation at any phase of [death penalty] proceedings" the Ninth Circuit sent this case back to the habeas court to consider the allegations that a sufficient pursuit of mitigating evidence was not undertaken by defense counsel.

***Robinson v. Schriro***, 595 F.3d 1086 (9th Cir. 2010) Trial counsel was ineffective in failing to investigate possible mitigating evidence and presented no evidence or witnesses during the penalty phase. The failure to present evidence about his abused childhood and psychological impairments was prejudicial and a new sentencing hearing was necessary to affort the defendant the effective assistance of counsel.

***Johnson v. Mitchell***, 585 F.3d 923 (6th Cir. 2009) Trial counsel's sole preparation for the penalty phase was to ask the defendant for anybody who could say something nice about him. The defendant could not think of anybody, so no mitigating evidence was presented at the sentencing phase. The Sixth Circuit granted a writ of habeas corpus as to the sentencing phase. Hamilton v. Ayers, 583 F.3d 1100 (9th Cir. 2009) Trial counsel's failure to property investigate and present mitigating evidence amounted to a denial of the sixth amendment right to effective assistance of counsel. There was abundant evidence available (indeed, some of it in the trial counsel's file, but he had never reviewed it) dealing with the defendant's upbringing in various foster homes.

***Sechrest v. Ignacio***, 549 F.3d 789 (9th Cir. 2008) Counsel was ineffective in providing to the prosecution a confidential psychiatric report that provided considerable ammunition to the prosecutor during the penalty phase. The defense had decided not to use the expert and there was no other evidence that supported the psychiatric diagnosis that was so damning to the defense. The defense attorney also should not have stipulated to the admissibility of his own expert as a witness for the prosecution.

***Johnson v. Bagley***, 544 F.3d 592 (6th Cir. 2008) Trial counsel provided ineffective assistance in investigating potential mitigation evidence. The fact that the defendant was not cooperative is not a basis to foreclose reasonable investigation. The Sixth Circuit cited the ABA Guidelines on death-penalty representation as a good guide in determining what is necessary to fulfill counsel's duty.

***Mason v. Mitchell***, 543 F.3d 766 (6th Cir. 2008) Counsel failed to adequately investigate defendant's childhood. He interviewed none of the members of defendant's family and relied exclusively on the records produced by the state. This was ineffective assistance of counsel and required granting a writ on the death sentence.

***Williams v. Allen***, 542 F.3d 1326 (11th Cir. 2008) Trial counsel's preparation of the mitigating phase of this death penalty trial was inadequate and was ineffective assistance of counsel. Testimony offered during the habeas hearing about the abuse that the defendant suffered as a child was available and portrayed a level of abuse that was astounding, including the use of deadly weapons by the defendant's father against the defendant, his siblings, and his mother.

***Kindler v. Horn***, 542 F.3d 70 (3rd Cir. 2008) Trial counsel's failure to investigate available mitigating evidence relating to the defendant's background and mental health problems amounted to ineffective assistance of counsel. See 642 F.3d 398, opinion on remand from the Supreme Court.

**Bond v. Beard**, 539 F.3d 256 (3rd Cir. 2008) Trial counsel was ineffective in failing to adequately present mitigating evidence relating to defendant's mental health and dysfunctional family.

***Jells v. Mitchell***, 538 F.3d 478 (6th Cir. 2008) Trial counsel was ineffective in failing to prepare for the mitigation phase of this death penalty trial and in failing to use a mitigation specialist.

***Gray v. Branker***, 529 F.3d 220 (4th Cir. 2008) Trial counsel provided ineffective assistance of counsel in failing to investigate develop the available evidence of the defendant's severe mental illness.

***Duncan v. Ornoski***, 528 F.3d 1222 (9th Cir. 2008) Defense counsel was ineffective in failing to properly investigate certain blood evidence that was found at the scene of the murder that might have implicated another person as the trigger man. Lawyers have considerable discretion to make strategic decisions about what to investigate, but only after those lawyers have gathered sufficient evidence upon which to base their tactical choices. When defense counsel merely believes certain testimony might not

be helpful, no reasonable basis exists for deciding not to investigate. It is especially important for counsel to seek the advice of an expert when he has no knowledge or expertise about the field. While the evidence would not have altered the defendant's conviction for felony murder, a reasonable probability existed that this would have altered the jury's decision to impose the death penalty.

***Lawhorn v. Allen***, 519 F.3d 1272 (11th Cir. 2008) Counsel provided ineffective assistance of counsel by waiving closing argument in the penalty phase of a death penalty trial. The attorney made this decision erroneously believing that this would bar the prosecutor from giving a closing argument. The attorney was legally wrong: the prosecutor was permitted to give a closing argument despite the defendant's waiver.

***Morales v. Mitchell***, 507 F.3d 916 (6th Cir. 2007) Trial counsel was ineffective during the penalty phase of the death penalty trial. He failed to adequately investigate defendant's background and failed to interview key witnesses. Nor did he hire a mitigation expert or investigator or contact any of the defendant's family members, except for his father.

***Haliym v. Mitchell***, 492 F.3d 680 (6th Cir. 2007) Trial counsel inadequately investigated defendant's background and presented a constitutionally ineffective mitigation phase case. Evidence of the defendant's abusive upbringing and the loss of his family (his father died of a drug overdose) should have been discovered and presented at trial.

***Lambright v. Schriro***, 490 F.3d 1103 (9th Cir. 2007) Trial counsel did virtually nothing to prepare for the penalty phase of this death penalty trial. The Ninth Circuit granted a writ. The fact that the mitigating evidence (Vietnam-induced trauma and other psychological issues) did not relate specifically to the offense did not lessen the impact the evidence may have had on the jury when considering what sentence to impose.

***Stevens v. McBride***, 489 F.3d 883 (7th Cir. 2007) Defense counsel's investigation into mitigating evidence was insufficient and, coupled with disastrous penalty phase decisions, necessitated granting a writ of habeas corpus. The defense hired a psychiatrist who turned out to be somewhat of a quack (he did not believe that mental illness existed) and when he wrote a report that was extremely unfavorable, he told the defense lawyers that he wrote the report to sandbag the prosecution and that when called to the stand he would be like Christine Helm Vole in Witness for the Prosecution. The defense did not call the psychiatrist at trial but did call him as a witness in the penalty phase. During his testimony, things went from bad to worse (including a disclosure by the psychiatrist that the defendant masturbated on the victim, a young boy, after killing him). The Seventh Circuit concluded that the sentencing phase presentation amounted to ineffective assistance of counsel.

***Anderson v. Sirmons***, 476 F.3d 1131 (10th Cir. 2007) Trial counsel focused almost exclusively on the guilt-innocence phase of the trial and failed to investigate, locate, or present mitigating evidence that was available. Evidence was available about the defendant's upbringing in circumstances of neglect and abuse. Failing to perform proper investigation was ineffective and prejudicial. A writ of habeas corpus was granted as to the penalty phase.

***Joseph v. Coyle***, 469 F.3d 441 (6th Cir. 2006) Trial counsel was ineffective in failing to challenge the indictment and jury instructions in this case, which failed to properly allege and explain the aggravating specification that supported the death sentence.

***Correll v. Ryan***, 539 F.3d 938 (9th Cir. 2008) Trial counsel was ineffective in his investigation and presentation of mitigating evidence in this death penalty trial. No effort was made to gather psychiatric records and he made insufficient efforts to obtain "he's a good person" evidence.

***Frierson v. Woodford***, 463 F.3d 982 (9th Cir. 2006) Counsel was ineffective in his preparation of the penalty phase of this death penalty trial and was also ineffective in failing to challenge the propriety of a witness's invocation of the Fifth Amendment. The defendant attempted during the penalty phase to show that another person had committed a prior murder that the state was using as an aggravating circumstance. That person invoked his Fifth Amendment, but he had already been acquitted of the charge in juvenile court, so the invocation was invalid. The Ninth Circuit concluded that the facts of this case were materially indistinguishable from the facts in Rompilla v. Beard, 125 S.Ct. 2456 (2005).

***Williams v. Anderson***, 460 F.3d 789 (6th Cir. 2006) The defense attorney delivered an incomprehensible closing argument that seemed to suggest that the only reason to return a life sentence was residual doubt. The only evidence he offered during the penalty phase was the defendant's testimony, during which he made a two or three sentence plea for mercy. The defense attorney provided ineffective assistance of counsel.

***Hovey v. Ayers***, 458 F.3d 892 (9th Cir. 2006) Trial counsel was ineffective in failing to properly prepare his mitigation psychiatric expert, including failing to provide him with all the background psychiatric information from the defendant's background that was available.

***Poindexter v. Mitchell***, 454 F.3d 564 (6th Cir. 2006) State trial counsel was ineffective in investigating possible mitigation evidence. The defendant's father beat him; his mother attempted to kill him; and he was constantly malnourished and sent to school in filthy clothes.

***Dickerson v. Bagley***, 453 F.3d 690 (6th Cir. 2006) Trial counsel conducted inadequate mitigating evidence investigation. The defendant's childhood was marked by violence, pimps and prostitutes. He had an IQ of 77. The attorney waived his right to a jury on the belief that a conversation he had with a judge assured him that the death penalty would not be imposed and that no mitigating evidence needed to be presented.

***Draughon v. Dretke***, 427 F.3d 286 (5th Cir. 2006) The defendant was sentenced to death based on a conviction for killing a bystander after attempting to rob a store. The defendant admitted trying to rob the store and that when he fled, he feared the people who were chasing him and that he fired into the air to get them to stop chasing him. Defense counsel did not hire a firearm's expert to analyze the path of the bullet. The state argued that the shooting was point-blank from a short distance. At the habeas hearing, the defendant offered evidence that the bullet clearly ricocheted off the pavement into the victim's body. The Fifth Circuit held that defense counsel's failure to retain a ballistics expert prior to trial was ineffective assistance of counsel.

***Marshall v. Cathel***, 428 F.3d 452 (3rd Cir. 2005) Trial counsel failed to engage in any investigation in preparation for the penalty phase of this death penalty trial. The Third Circuit set aside the death sentence.

***Daniels v. Woodford***, 428 F.3d 1181 (9th Cir. 2005) The public defender's office suffered from a conflict of interest that should have led the trial court to appoint replacement counsel in this death penalty case. The defendant, who had been convicted of a previous crime, had filed a habeas corpus petition against the public defender's office in connection with the earlier case. Finally, shortly before trial, the court appointed two lawyers to replace the public defenders. For both the new attorneys, this was their first capital case. There was almost complete distrust between the defendant and his newly appointed attorneys (one of whom had recently left the DA's office). By the time of trial, the attorneys and the defendant were not on speaking terms. Virtually no investigation into possible mitigating evidence was undertaken by the attorneys. The Ninth Circuit concluded that there was a presumption of prejudice caused by the conflict and the writ was granted.

***Summerlin v. Schriro***, 427 F.3d 623 (9th Cir. 2005) Despite the defendant's request that the attorney present no mitigation evidence, the attorney is professionally obligated to investigate all available mitigation evidence that was available.

***Earp v. Stokes***, 423 F.3d 1024 (9th Cir. 2005) The defendant was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel relating to inadequate penalty phase investigation. Amended and superseded at 431 F.3d 1158 (9th Cir. 2005).

***Smith v. Dretke***, 422 F.3d 269 (5th Cir. 2005) The petitioner submitted sufficient evidence to support the necessity of a hearing on his claim that his trial counsel inadequately investigated the availability of mitigating evidence in his state death penalty trial.

***Harries v. Bell***, 417 F.3d 631 (6th Cir. 2005) Counsel's penalty phase investigation was deficient. Counsel failed to adequately investigate the defendant's mental health background and or to seek the assistance of a mental health expert. Counsel also failed to fully explore issues relating to the defendant's family upbringing.

***Boyde v. Brown***, 404 F.3d 1159 (9th Cir. 2005) Counsel's failure to present evidence of the defendant's childhood abuse during the penalty phase was ineffective assistance of counsel. The decision was amended to order a remand to the district court for a hearing on the question of prejudice. The court also ordered that the case be re-assigned to a different district court judge. 421 F.3d 1154

***Canaan v. McBride***, 395 F.3d 376 (7th Cir. 2005) Failing to advise a defendant in a death penalty case that he may testify during the penalty phase – even if he did not testify in the guilt-innocence phase – is ineffective assistance of counsel.

***Smith v. Mullin***, 379 F.3d 919 (10th Cir. 2004) Trial counsel failed to adequately develop evidence of defendant's mental illness. At the habeas hearing, in fact, counsel conceded that he did not even know that this would be admissible evidence in the penalty phase. The death sentence was set aside.

***Allen v. Woodford***, 366 F.3d 823 (9th Cir. 2004) Trial counsel performed deficiently in waiting until one week prior to trial to prepare for the sentencing phase of this death penalty case – however, there was no showing of prejudice, because the evidence was overwhelming that the defendant was guilty of a triple murder as well as having conspired to murder several other people. Opinion amended at 395 F.3d 979 (9th Cir. 2004).

Stankewitz v. Woodford, 365 F.3d 706 (9th Cir. 2004) Based on the Supreme Court decisions in Wiggins v. Smith, 123 S.Ct. 2527 (2003) and Williams v. Taylor, 529 U.S. 362 (2000), a remand was required in this case to determine if more effective development of the defendant's background should have been undertaken by trial counsel.

***Roberts v. Dretke***, 356 F.3d 632 (5th Cir. 2004) Trial counsel complied with the defendant's demands not to pursue certain lines of defense. Complying with these demands, however, arguably amounted to ineffective assistance of counsel, because of the defendant's mental illness. A Certificate of Appealability should have been granted to evaluate this claim. Specifically, counsel should have consulted more with the court-appointed psychiatrist and should have properly developed the mental health evidence.

***Lewis v. Dretke***, 355 F.3d 364 (5th Cir. 2004) Trial counsel's failure to investigate information relating to defendant's childhood abuse was ineffective assistance of counsel.

***Hamblin v. Mitchell***, 354 F.3d 482 (6th Cir. 2003) Counsel's deficient performance during the preparation of the penalty phase of this death penalty trial required that the sentence be set aside. He made no effort to find the defendant's family history or mental health background.

***Frazier v. Huffman***, 343 F.3d 780 (6th Cir. 2003) The entire penalty phase on the part of the defendant was his unsworn statement declaring his innocence and requesting mercy. The trial attorney failed to introduce evidence of the defendant's brain injury. He failed to introduce any evidence of his background, history, or character.

***Brownlee v. Haley***, 306 F.3d 1043 (11th Cir. 2002) The two defense attorneys spent a total of one and one-half hours with the defendant prior to trial. They interviewed no witnesses, did not investigation. Spoke to none of his family members and made no

effort to compile a psychological profile. They presented no evidence during the penalty phase and their combined closing arguments were contained in five pages of the transcript. Ironically, during the closing argument, one of the lawyers lamented to the jury that the jurors did not know the defendant as a person, like the lawyers did. There was, in fact, considerable mitigating evidence that was available. The writ was granted with regard to the penalty phase.

***Caro v. Woodford***, 280 F.3d 1247 (9th Cir. 2002) The habeas court found that the defendant suffered brain damage as a result of his personal background (exposure to crop dusters and poisoned drinking water) and exposure to neurotoxicants (pesticides). Trial counsel's failure to investigate this mitigation evidence and to present it to the jury during the penalty phase of the trial was ineffective assistance of counsel.

***Silva v. Woodford***, 279 F.3d 825 (9th Cir. 2002) Trial counsel's failure to investigate and present mitigation evidence was ineffective. Trial counsel claimed that the defendant absolutely barred him from conducting any investigation into his background. The Ninth Circuit held that a client's wishes have some weight when it comes to which witnesses to call, but the client's wishes should not control the attorney's independent investigation of the defendant's background.

***Sallahdin v. Gibson***, 275 F.3d 1211 (10th Cir. 2002) Trial counsel was arguably ineffective in failing to present evidence of defendant's steroid use in mitigation during the sentencing phase of his death penalty trial. At the time of defendant's trial, there was substantial and consistent scientific literature showing that anabolic steroids could cause sever psychiatric effects in some individuals. Introducing this evidence might have altered the jury's decision regarding the aggravating circumstance of future dangerousness. Moreover, it would have explained how the defendant, who was known to be mild-mannered, suddenly participated in the brutal murder involved in this case. Nevertheless, the case was remanded for the trial court to better assess whether counsel had evaluated each of these factors and whether he was, therefore, ineffective, or simply exercising strategic judgment.

***Bean v. Calderon***, 163 F.3d 1073 (9th Cir. 1998) The attorney appointed to represent the defendant during the penalty phase of this death penalty trial did nothing to prepare for the penalty phase, relying instead on the guilt-innocence attorney's potential competency presentation. Significant neuropsychological evidence would have been available had the attorney properly investigated the available mitigating evidence. The court also held, "The family portrait painted at the federal habeas hearing was far different from the unfocused snapshot handed the superior court jury. The jury which committed [petitioner] to death had no knowledge of the indisputably sadistic treatment [he] received as a child, including repeated beatings which left a permanent indentation in his head."

***Rickman v. Bell***, 131 F.3d 1150 (6th Cir. 1997) Trial counsel's defense in this death penalty case fell far below the standard required by the Sixth Amendment. The crime, to be sure, was atrocious. Nevertheless, the defense attorney, for all purposes, joined forces with the prosecution in presenting the case. Repeatedly, the attorney elicited testimony about the defendant's violent, aggressive, criminal behavior, and his proclivity to commit violent acts without provocation. He expressly revealed his contempt for the defendant. The trial counsel's conduct, according to the Sixth Circuit opinion, was "appalling."

***Caro v. Calderon***, 165 F.3d 1223 (9th Cir. 1999) Counsel's failure to develop evidence regarding the defendant's brain damage and poisoning required an evidentiary hearing in the lower court to further evaluate the ineffective assistance of counsel claim.

***Smith v. Stewart***, 140 F.3d 1263 (9th Cir. 1998) Trial counsel was ineffective during the penalty phase of this death penalty trial. He presented no mitigating evidence and essentially presumed no argument on defendant's behalf. There was no tactical reason offered for the failure to present mitigating evidence and such evidence did exist, such as his drug addiction, and his family relationships.

***Bloom v. Calderon***, 132 F.3d 1267 (9th Cir. 1997) The petitioner was convicted in state court of killing his father, stepmother, and stepsister. He was sentenced to death. Trial counsel, however, failed to adequately prepare a psychiatric defense, including waiting until just before trial to hire an expert, and then providing too little information to the expert to aid him in preparing psychiatric report. In the habeas proceeding, it was revealed that the defendant suffered from a long history of severe childhood abuse. He was born into a family plagued by generations of mental illness and domestic abuse. A psychologist testified that the defendant's testing revealed striking, consistent, and clear evidence of cognitive sensori-motor deficits, brain dysfunction and brain damage. None of this evidence was uncovered by the trial counsel. Trial counsel's performance was constitutionally deficient and necessitated granting the writ.

***Dobbs v. Turpin***, 142 F.3d 1383 (11th Cir. 1998) This was the fourth time this case had been considered by the Eleventh Circuit. In this appeal, the court concluded that the defendant was denied effective assistance of counsel because his attorney made no effort to investigate the defendant's background; did not make a strategic decision to present no mitigating evidence; and made an ineffective closing argument (including making a prediction that the Supreme Court would once again invalidate the death penalty and that no executions would occur; and failed to make any particularized plea for mercy for the defendant).

***Austin v. Bell***, 126 F.3d 843 (6th Cir. 1997) Defense counsel's failure to conduct any investigation or to present any mitigation during the penalty phase of this death penalty trial amounted to ineffective assistance of counsel.

***Glenn v. Tate***, 71 F.3d 1204 (6th Cir. 1995) Trial counsel was ineffective in failing to adequately investigate and prepare the mitigation portion of this death penalty trial. The defendant had organic brain damage, yet, no effort was made to develop psychiatric evidence, or evidence of his troubled childhood and mental retardation. Counsel also failed to request expert assistance, relying, instead, on court appointed doctors whose reports were not favorable to the defense.

***Hall v. Washington***, 106 F.3d 742 (7th Cir. 1996) Trial counsel was ineffective in failing to develop and present mitigating evidence. Among the witnesses who were available was a prison guard who would have testified that the defendant was a good prisoner. He had also saved someone's life during a robbery in the past.

***Emerson v. Gramley***, 91 F.3d 898 (7th Cir. 1996) Trial counsel was ineffective in preparing and presenting the penalty phase evidence at this death penalty trial. He offered no evidence.

***Brewer v. Aiken***, 935 F.2d 850 (7th Cir. 1991) Counsel's performance during the penalty phase was ineffective considering his failure to introduce any evidence of the defendant's mental and family history, as well as his inadequate presentation and argument of mitigating evidence.

***Antwine v. Delo***, 54 F.3d 1357 (8th Cir. 1995) Defense counsel's failure to investigate the defendant's psychological background was ineffective. A proper investigation would have revealed that the defendant suffered from bipolar disorder. This likely would have affected the sentencing proceeding and spared the defendant a death sentence.

***Hill v. Lockhart***, 28 F.3d 832 (8th Cir. 1994) The defense attorneys provided ineffective assistance of counsel during the penalty phase, because of their failure to adequately discover and present evidence of the defendant's psychiatric problems.

**Starr v. Lockhart**, 23 F.3d 1280 (8th Cir. 1994) Trial counsel was ineffective in failing to object to jury instructions during the penalty phase of this death penalty trial relating to "pecuniary gain" and "heinous, atrocious, or cruel" aggravating circumstances. Both aggravating circumstances had been found unconstitutional at the time of the defendant's trial. Though the "pecuniary gain" circumstance was later found to be constitutional (and thus there was no prejudice from failing to object to this instruction), the "heinous, atrocious, or cruel" circumstance was unconstitutionally vague and did not adequately limit the death-eligible defendants. See Godfrey v. Georgia, 446 U.S. 420 (1980); and Maynard v. Cartwright, 486 U.S. 356 (1988). Though one aggravating circumstance was still valid, in a "weighing" state, such as Arkansas (the jury weighs the aggravating circumstances against the mitigating circumstances), if there is one invalid aggravating circumstance, the death sentence must be set aside.

***Kenley v. Armontrout***, 937 F.2d 1298 (8th Cir. 1991) Counsel's failure to present available mitigating evidence, including both lay and expert testimony relating to his troubled childhood and abusive father, his prior psychological history, and his alcohol problem, amounted to ineffective assistance of counsel.

***Hendricks v. Calderon,*** 70 F.3d 1032 (9th Cir. 1995) The defense attorney provided ineffective assistance of counsel at the sentencing phase of this death penalty trial. In short, the attorney developed no mitigating evidence. This was not a matter of strategy, but a matter of neglect. The defendant's "strategy" was, "Let's put on whatever we have and beg for mercy." The attorney was on notice that the defendant suffered from some mental impairment.

***Clabourne v. Lewis***, 64 F.3d 1373 (9th Cir. 1995) The defense attorney rendered ineffective assistance during the sentencing phase of this death penalty trial. He called no witnesses, introduced no evidence of the defendant's mental illness, and did not argue any mitigating circumstances, other than the defendant's mental condition at the time of the offense. The attorney did not introduce sufficient evidence at trial to make up for this deficiency.

***Wade v. Calderon***, 29 F.3d 1312 (9th Cir. 1994) Trial counsel was ineffective in failing to adequately present mitigating evidence during the penalty phase of this death penalty prosecution. Among other things, the attorney called the defendant, who had multiple personality disorder, to the stand and elicited testimony from the defendant's "other personality" who was profane and insulting and requested the death penalty for the defendant. No evidence of the defendant's abused childhood was introduced. Finally, the defense attorney in closing argument suggested the death penalty might be the appropriate thing to do to spare the defendant the misery he had endured his whole life.

***Hendricks v. Vasquez***, 974 F.2d 1099 (9th Cir. 1992) Counsel's failure to contact any of the death penalty defendant's family members. Counsel presented the testimony of a psychologist to testify about the effects of the defendant's traumatic childhood. However, there was no proof that the defendant suffered a traumatic childhood. The prosecutor's cross-examination of the psychologist, therefore, was most effective and the defense counsel's failure to prove the facts upon which the expert rendered her opinion might have been ineffective. A remand was necessary to develop this claim more fully.

***Evans v. Lewis***, 855 F.2d 631 (9th Cir. 1988) During the sentencing phase of a death penalty trial, the defense attorney failed to offer any evidence regarding his client's mental instability. The failure to investigate was not a trial tactic in light of the attorney's failure to produce any evidence in mitigation. This constitutes ineffective assistance of counsel requiring a new penalty phase trial.

***Osborn v. Shillinger***, 861 F.2d 612 (10th Cir. 1988) At the defendant's death penalty trial, his attorney failed to adequately prepare the defense he chose and failed to investigate other plausible lines of defense. He also failed to uncover or investigate any mitigating evidence including the medical history of the defendant. The defense attorney failed to fulfill his duty of loyalty to his client and failed to object to the prosecutor's engaging in ex parte communications with the trial judge. This all constitutes ineffective assistance of counsel.

***Baxter v. Thomas***, 45 F.3d 1501 (11th Cir. 1995) Defendant's trial counsel in this death penalty case failed to adequately investigate the defendant's long history of mental illness. This was ineffective assistance of counsel at the sentencing phase and required that the sentence be set aside. Among other things, the attorneys failed to discover that the defendant had been committed to Central State Hospital because of his mental illness.

***Jackson v. Herring***, 42 F.3d 1350 (11th Cir. 1995) Trial counsel's failure to introduce any evidence in mitigation, or to prepare for the sentencing phase of this death penalty trial rendered him ineffective and required setting aside the death sentence. There was substantial evidence that the defendant was abused as a child, was an alcoholic and that a prior killing (she killed her former boyfriend) was the result of being abused. The decision not to introduce any mitigating evidence was not the result of any strategic planning. There simply was no planning.

***Cave v. Singeltary,*** 971 F.2d 1513 (11th Cir. 1992) Counsel's failure to prepare for the sentencing portion of defendant's death penalty trial prejudiced him and necessitated a new sentencing trial. No mitigation witnesses were presented despite the availability of the defendant's mother and other relatives.

***Blanco v. Singletary***, 943 F.2d 1477 (11th Cir. 1991) Counsel's failure to undertake a reasonable search for mitigating evidence for presentation during the sentencing phase of this death penalty trial was ineffective assistance of counsel. This ineffectiveness was compounded by the attorney's statement to the trial judge (who, in Florida ultimately sentences the defendant) that no mitigating evidence existed.

***Horton v. Zant***, 941 F.2d 1449 (11th Cir. 1991) Defendant's trial counsel was ineffective in the sentencing phase of this death penalty trial. The attorney offered no evidence and made no opening. His closing argument focused on the history of the death penalty in Georgia. During the closing, the attorney distanced himself from his client, acknowledging that perhaps it was best for the defendant to die – that perhaps the defendant was a worthless person. This was ineffective and prejudicial.

***Cunningham v. Zant***, 928 F.2d 1006 (11th Cir. 1991) The defendant was denied effective assistance of counsel at the penalty phase of this death penalty prosecution. Despite the availability of such evidence, the defense failed to introduce evidence of the defendant's mental retardation, head injury, the death of his father when the defendant was a child, his socioeconomic background, the lack of any schooling beyond elementary school, and his reputation as a good father.

***Harris v. Dugger***, 874 F.2d 756 (11th Cir. 1989) Two attorneys representing the defendant in this death penalty trial believed that the other was investigating mitigating evidence in preparation for the sentencing phase. This does not constitute a strategic decision but mere neglect and requires the granting of habeas corpus relief.

***Middleton v. Dugger,*** 849 F.2d 491 (11th Cir. 1988) Trial counsel's failure to conduct a reasonable background investigation and thus unearth overwhelming amounts of documentary and mitigating evidence was ineffective assistance counsel. The psychiatric evidence in the existing documents had the potential to totally change the picture of the defendant and his homicidal behavior.

***Stephens v. Kemp***, 846 F.2d 642 (11th Cir. 1988) Despite having learned from the defendant's sister that the defendant had spent time in a mental hospital prior to the shooting, counsel failed to investigate, present any evidence or argue to the jury the issue of the defendant's mental history. The Eleventh Circuit holds that this is ineffective assistance of counsel.

***Armstrong v. Dugger***, 833 F.2d 1430 (11th Cir. 1987) The defense counsel failed to investigate and present available mitigating evidence at the defendant's death penalty trial. The writ was granted.

***Agan v. Dugger***, 828 F.2d 1496 (11th Cir. 1987) The defense counsel spent fifteen hours in preparation for this death penalty case. The Eleventh Circuit holds that an evidentiary hearing on the ineffective assistance of counsel claim was necessary.

***Magill v. Dugger***, 824 F.2d 879 (11th Cir. 1987) Both the guilt phase and the penalty phase of the defendant's conviction are reversed on the basis of ineffective assistance of counsel. The attorney replaced the public defender during the first day of jury selection to the surprise of both the public defender and the defendant. He met with the defendant only 15 minutes prior to the defendant's testimony in his case-in-chief.

***ATTORNEY-CLIENT ISSUES (Ineffective Assistance of Counsel – Guilty Plea)***

***Padilla v. Kentucky***, 130 S. Ct. 1473 (2010) The failure to advise a defendant about the deportation consequences of entering a plea in a felony drug case amounted to ineffective assistance of counsel. The Court held that in certain situations, the failure to provide any advice constitutes ineffective assistance – especially where the consequence of a plea is easy to determine and is "automatic" – while in other cases, it is required at a minimum that counsel advise the defendant that there may be immigration consequences and that the defendant should seek advice from an immigration law attorney. In other words, to be effective, an attorney may be required to provide accurate advice if the immigration consequences are clear; and at a minimum, should warn the defendant of possible consequences if the result of entering a plea is not so clear. The Court held that the right to effective assistance of counsel is not violated only when counsel provides erroneous advice.

***Hill v. Lockhart***, 474 U.S. 52 (1985) When a defendant challenges a guilty plea after sentencing on the ground that his lawyer provided him ineffective assistance, he must demonstrate that (1) his counsel's advice was not within the range of competence demanded of attorneys in criminal cases, and (2) there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

***Missouri v. Frye***, 132 S. Ct. 1399 (2012) Failure to communicate to the defendant a plea offer is ineffective assistance of counsel. To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, the defendant must demonstrate a reasonable probability both that he would have accepted the more favorable plea offer had he been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law.

***Lafler v. Cooper***, 132 S. Ct. 1376 (2012) Where counsel's ineffective advice led to an offer's rejection, and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed.

***United States v. Aguiar***, 894 F.3d 351 (D.C. Cir. 2018) The defendant was facing a 30-year sentence if he pled guilty, but if he rejected the plea, he was facing a superseding indictment with a potential for considerably more, including 35- years mandatory for successive § 924(c) violations. He contended in his § 2255 that his counsel did not advise him about the potential exposure if he rejected the 30-year deal. The D.C. Circuit held that a remand to determine if it was reasonable that the defendant would have accepted the offer if he had known of the potential consequences of rejecting the offer.

***United States v. Swaby***, 855 F.3d 233 (4th Cir. 2017) Prior to entering a guilty plea to trafficking in counterfeit goods, the defendant was not warned by his trial counsel that this offense would make him categorically deportable because the offense was an aggravated felony. Even though the trial judge advised the defendant during the plea colloquy in general terms about the possibility of immigration consequences, the defense counsel's failure to advise the defendant amounted to ineffective assistance of counsel and the plea was not voluntary. As for prejudice, the defendant established that he would have gone to trial if he had known the consequences of entering the guilty plea.

***United States v. Castro-Taveras***, 841 F.3d 34 (1st Cir. 2016) The court explores at length the availability of coram nobis relief for a defendant who entered a guilty plea prior to the decision in Padilla based on affirmative misinformation provided by his attorney. The court distinguished cases in which the attorney failed to provide advice from cases in which the defendant was affirmatively provided inaccurate advice about the immigration consequences of pleading guilty. The court held that in false advice cases, the issue is not retroactivity of Padilla, because false advice was always a basis for collateral relief.

***Sullivan v. Secretary, Fla. Dept. of Corrections,*** 837 F.3d 1195 (11th Cir. 2016) The defendant was charged with fleeing and eluding and drug charges. The state offered ten years for a plea. The defense attorney advised the defendant that he would pursue a "voluntary intoxication" defense (a non-existent defense under state law) and rejected the offer. The defendant was convicted and sentenced to thirty years in prison as a habitual offender. Appellate counsel failed to raise trial counsel's ineffectiveness in the post-conviction proceedings. Thereafter, Mr. Sullivan retained habeas counsel who claimed that both Sullivan's trial counsel and his appellate counsel provided ineffective assistance of counsel. The Eleventh Circuit held that the defendant received ineffective assistance of trial and appellate counsel and granted the writ.

***Torres-Chavez v. United States***, 828 F.3d 582 (7th Cir. 2016) While there is a wide range of conduct that constitutes reasonable performance, an attorney's performance is deficient if the attorney grossly mischaracterizes the evidence or advises a client to reject a plea offer and go to trial in the face of overwhelming evidence and no viable defenses. This case was remanded in order to conduct an evidentiary hearing on defendant's claim that his attorney's advice was objectively unreasonable in telling the him that he would be acquitted and should proceed to trial, despite a favorable plea offer.

***United States v. Newman***, 805 F.3d 1143 (D.C. Cir. 2015) Padilla requires attorneys to provide advice to defendants about to plead guilty about immigration consequences. But in Chaidez v United States, 133 S. Ct. 1103 (2013), the Court held that Padilla was not retroactive so if a defendant's claim was simply that he was not advised before entering a plea about immigration consequences, this was not a basis for § 2255 or coram nobis relief for a case that pre-dated Padilla. In this case, however the defendant did not claim simply that he was not provided advice prior to entering a guilty plea. Instead, he claimed that his attorney expressly provided erroneous advice. This deficient type of attorney advice was a basis for collateral relief even before Padilla. The slight twist in this case was that the erroneous advice was provided after the plea was entered, but prior to sentence being imposed. The district court held that this precluded coram nobis relief. The D.C. Circuit reversed and remanded, holding that the court should have conducted a hearing to determine if the plea might have been withdrawn had the attorney not provided erroneous advice, and if the lower court would have permitted the defendant to withdraw his plea, whether the defendant would have insisted on going to trial.

***United States v. Rodriguez-Vega***, 797 F.3d 781 (9th Cir. 2015) Defense counsel failed to advise the defendant of the virtual certainty of her removal if she entered a guilty plea to the charged offense. The Ninth Circuit concludes that the defendant likely would have either gone to trial or entered a guilty plea to a different offense had she known of the certainty of removal.

***Pidgeon v. Smith***, 785 F.3d 1165 (7th Cir. 2015) Petitioner's trial counsel advised him to accept a plea to avoid a mandatory life without parole sentence. This advice was based on the erroneous belief that a prior conviction was a predicate offense for recidivist punishment that would necessitate a life without parole conviction. The writ was properly granted by the district court because there was a reasonable likelihood that petitioner would have insisted on a trial if he had known that he was not facing a mandatory life sentence. It was not necessary, to rule in petitioner's favor, that he call the trial attorney to testify at either the state or the federal habeas proceedings.

***Hernandez v. United States***, 778 F.3d 1230 (11th Cir. 2015) The defendant was entitled to raise a Padilla claim based on his attorney's statement, "The government almost never issues a detainer for a Cuban, because they won't deport to Cuba." The fact that the plea was entered one year prior to the decision in Padilla does not mean that the attorney was not ineffective in providing this inaccurate advice.

***United States v. Bui***, 795 F.3d 363 (3rd Cir. 2014) Trial counsel erroneously advised the defendant that if he entered a guilty plea to possessing drugs within 1000 feet of a school, he could receive safety-valve relief and receive a shorter sentence.

However, the safety valve is not available for this drug offense. The attorney provided ineffective assistance in connection with the guilty plea and the plea was therefore set aside.

***Roundtree v. United States,*** 751 F.3d 923 (8th Cir. 2014) An evidentiary hearing should have been held to determine whether trial counsel failed to warn the defendant that he was facing a mandatory life sentence if convicted at trial.

***Kovacs v. United States***, 744 F.3d 44 (2d Cir. 2014) Counsel's erroneous advice about the deportation consequences of a plea to misprision of a felony was grounds to award coram nobis relief.

***Heard v. Addison,*** 728 F.3d 1170 (10th Cir. 2013) The defendant entered a guilty plea in state court to child molestation and received a twenty-five-year sentence. The Tenth Circuit granted a writ, because a state court unpublished decision (issued prior to the time the defendant entered his guilty plea) indicated that the precise conduct that was involved in defendant's case was not a crime under Oklahoma law (looking under the dress of a girl who is wearing underwear). If the defendant had known about this ruling, he would not have entered a guilty plea. Interestingly, a decision issued by the Oklahoma courts after the defendant entered his plea suggested that his conduct would be criminal.

***United States v. Reed***, 719 F.3d 369 (5th Cir. 2013) The Fifth Circuit remanded this § 2255 case back to the district court to conduct an evidentiary hearing on whether trial counsel was ineffective in failing to properly advise the defendant about what sentence he would have received had he entered a guilty plea. Trial counsel (according to the defendant) advised him that he would be sentenced to 36 months if he accepted the plea offered by the government. The defendant claimed in his § 2255 petition that he was facing between 8 – 14 months had he accepted the plea. A hearing on the merits of the claim was required.

***Johnson v. Uribe***, 682 F.3d 1238 (9th Cir. 2012) Counsel provided ineffective assistance in advising the defendant about the plea offer that had been made by the state. The proper remedy, post-Lafler was to allow the defendant to replead, and not just have a re-sentencing. The decision was amended, and rehearing en banc was denied, at 700 F.3d 413.

***United States v. Juarez***, 672 F.3d 381 (5th Cir. 2012) The defendant entered guilty pleas to illegal reentry and filing a false firearm transaction report (regarding his citizenship). Counsel failed to investigate and research the possibility that defendant was a citizen under the principle of "derivative citizenship" since his mother was naturalized. This was ineffective assistance of counsel that tainted the guilty plea.

***United States v. Smith***, 640 F.3d 580 (4th Cir. 2011) If a defendant claims that his lawyer was so deficient that it amounted to no counsel at all, this can taint a guilty plea. Though a guilty plea generally waives all non-jurisdictional defects, this doctrine does not bar a challenge to the right to counsel, because this affects the voluntariness of the plea.

***United States v. Weeks***, 653 F.3d 1188 (10th Cir. 2011) In the context of reviewing an ineffective assistance of counsel claim for a defendant who entered a guilty plea to a conspiracy offense, the Tenth Circuit emphasized that a conspiracy conviction requires proof that the defendant knew that his agreement involved a violation of the law, not simply an agreement to engage in certain conduct: "An agreement with others that certain activities be done, without knowing at the time of the agreement that the activities violate the law, is therefore insufficient to establish conspiracy." The defendant's § 2255 petition in this case was sufficient to allege facts that necessitated a hearing on the question of whether he fully understood the nature of the charges. The plea colloquy was insufficient to show that the defendant understood the nature of the proof that was required to prove his guilt, given his reluctance to acknowledge that he knew, at the time the events occurred, that his conduct was illegal.

***Tovar Mendoza v. Hatch***, 620 F.3d 1261 (10th Cir. 2010) The trial attorney's grossly inaccurate statement to the defendant about the amount of time he would be required to serve if he pled guilty amounted to ineffective assistance of counsel and rendered the guilty plea involuntary. Defense counsel told the defendant his sentence would be three years. The sentence imposed was 25 years.

***Bauder v. Department of Corrections***, 619 F.3d 1272 (11th Cir. 2010) The Eleventh Circuit held that the defendant's attorney provided ineffective assistance of counsel because of his failure to advise the defendant of the possibility that his guilty plea to stalking under Florida law could lead to civil commitment as a sexually violent person under state law. The Eleventh Circuit relied on Padilla in holding that even though the law was not clear that civil commitment was a collateral consequence, the attorney had the obligation to at least warn the defendant of the possibility.

***Williams v. Jones***, 571 F.3d 1086 (10th Cir. 2009) If an attorney gives bad advice to a client that prompts the client to go to trial and reject a plea agreement, this may constitute ineffective assistance of trial, even if the trial was conducted in fair manner. In this case, the defendant was offered a ten-year deal. His attorney told him that if he accepted the deal, he "would be committing perjury" and the attorney would withdraw. The defendant went to trial and was convicted and sentenced to life without parole. The lower court found that the defendant was denied effective assistance of counsel, and this was not appealed. The question facing the Tenth Circuit was the appropriate remedy. The Court refused to decide what the appropriate remedy should be and remanded to the lower court to fully explore the available options that would put the defendant in the situation he would be without having been deprived of his right to effective assistance of counsel.

***Dasher v. Attorney General, Florida***, 574 F.3d 1310 (11th Cir. 2009) The defendant was offered a plea agreement that would require him to serve 13 months. He drew the line at 12 months (so he could serve the sentence in the county jail) and the attorney advised him to simply enter a plea "straight up" without a plea agreement and see if another month could be shaved off the sentence. The defendant took the advice and the judge sentenced the defendant to ten years. The attorney was unaware of prior convictions that changed the judge's mind. The attorney provided ineffective assistance of counsel. Even without the

recidivist issue, advising the defendant to reject a 13-month certain sentence and plead without an agreement to see if he could get 12 months was not sound advice.

***United States v. Mooney***, 497 F.3d 397 (4th Cir. 2007) Trial counsel was ineffective in advising the defendant that he should plead guilty in this felon-in-possession case, because there was no justification defense available. The defendant seized the gun from his wife, who was threatening him, and promptly went to the police who were at his place of employment and gave them the weapon.

***Julian v. Bartley***, 495 F.3d 487 (7th Cir. 2007) Counsel advised the defendant that pursuant to the (then) new decision in Apprendi, the state could not impose consecutive sentences based on the defendant's recidivist status, because the prior offense was not set forth in the indictment. Because Apprendi exempted prior offenses from the scope of its decision (prior offenses need not be set forth in the indictment or proved to a jury in order to affect the sentence), the attorney's advice was ineffective assistance of counsel. The defendant rejected a plea offer and went to trial. The Seventh Circuit granted the writ. Oddly, the court held that the state is not required to offer the original deal. It may offer that deal, but it is not required to do so. The state may also simply re-try the defendant.

***United States v. Morris***, 470 F.3d 596 (6th Cir. 2006) In a crowded state court holding cell, the defendant met his appointed attorney for the first time. He was offered a plea of four years or face federal charges. The attorney had virtually no time to review discovery or have a private conversation with the defendant. She also provided inaccurate advice about the possible federal sentence if he did not take the state plea. This was ineffective assistance of counsel. The defendant rejected the state plea offer and was then prosecuted in federal court. The district court judge concluded that the federal indictment should be dismissed so that the defendant could be given a reasonable opportunity to consider entering a plea to the state charge.

***Dando v. Yukins,*** 461 F.3d 791 (6th Cir. 2006) Trial counsel was ineffective in failing to request expert funds to investigate the defendant's possible duress (battered spouse) defense to charges that she assisted her boyfriend in a string of robberies. The attorney declined to hire the expert because he thought that funds were not available to investigate this type of defense. The defendant's guilty plea was tainted by this ineffective assistance of counsel.

***Satterlee v. Wolfenbarger***, 453 F.3d 362 (6th Cir. 2006) Trial counsel's failure to communicate to the defendant a plea offer that was made by the prosecutor on the first day of trial was ineffective assistance of counsel.

***United States v. Booth***, 432 F.3d 542 (3rd Cir. 2005) The Third Circuit held that the defendant was entitled to an evidentiary hearing on the question of whether the defense attorney was ineffective in failing to inform the defendant that he could enter a non-negotiated ("open") plea to the indictment and thereby earn an acceptance of responsibility reduction in sentence. The defendant claimed that he was forced to either accept the plea agreement offered by the government or proceed to trial.

***Davis v. Greiner***, 428 F.3d 81 (2d Cir. 2005) The defendant gave a proffer to the state court prosecutors pursuant to an agreement that provided that if he were to proceed to trial, what he said could be used to impeach him. His attorney did not explain this to him. After giving the proffer and incriminating himself, he backed out of the deal and proceeded to trial, not realizing that if he testified, his statements could be used against him. The attorney provided ineffective assistance of counsel. The court ultimately concluded, however, that the ineffective assistance of counsel was not prejudicial.

***United States v. Herrera***, 412 F.3d 577 (5th Cir. 2005) Had the attorney correctly advised the defendant of his exposure if he went to trial, the defendant claimed that he would have entered a guilty plea. The Fifth Circuit held that this claim merited an evidentiary hearing. The attorney supposedly told the defendant he faced a maximum 51-month guideline sentence, when, in fact, he faced a guideline range of 78 – 97 months after conviction at trial.

***United States v. Kwan***, 407 F.3d 1005 (9th Cir. 2005) An attorney's inaccurate advice about the immigration consequences of a guilty plea was ineffective assistance of counsel. The attorney's initial advice was correct, but a change in the law rendered it incorrect and this change occurred between the time that the plea was entered and sentencing. The attorney had a duty to correct the advice when the law changed and the failure to do so tainted the defendant's guilty plea. The Ninth Circuit held that coram nobis relief was appropriate in this situation.

***United States v. Howard***, 381 F.3d 873 (9th Cir. 2004) The defendant offered proof in his § 2255 petition that he was under the influence of a powerful narcotic drug (painkiller) at the time he entered his guilty plea and that his attorney was aware of this. The district court erred in not conducting an evidentiary hearing to inquire into the factual support for this claim.

***United States v. Grammas***, 376 F.3d 433 (5th Cir. 2004) Defense counsel erroneously advised the defendant that the base offense level for his crime was level 8, whereas the actual base offense level was 20. Counsel apparently was relying on the incorrect Guideline Manual or did not realize that his client would be treated as an Armed Career Criminal. By underestimating the defendant's sentencing exposure, counsel breaches his duty as a defense lawyer in a criminal case to advise his client fully on whether a particular plea to a charge appears desirable. A remand for a hearing on the issue of prejudice was necessary.

***United States v. White***, 366 F.3d 291 (4th Cir. 2004) The defendant entered into a guilty plea but claimed in a § 2255 petition that he was orally assured by his attorney and the AUSA that he could appeal the denial of the suppression motion. Both parties in the § 2255 proceeding agreed that defense counsel made this assurance. Both parties also agreed that this rendered the plea involuntary, because the defendant did not understand the consequences of his plea. The Fourth Circuit held that the trial court should have conducted a full evidentiary hearing to determine if the government did, in fact, orally assure the defendant that he could enter a conditional plea.

***Moore v. Bryant***, 348 F.3d 238 (7th Cir. 2003) Trial counsel's erroneous advice about good time credits was ineffective assistance of counsel and necessitated setting aside the conviction. The attorney advised petitioner that a change in the law would reduce good time credits, so if he were convicted at trial, he would be required to serve 85% of the time imposed, but if he entered a guilty plea, he would serve only 50%. However, the change in the law was not going to be retroactive, so this advice was erroneous.

***Nunes v. Mueller***, 350 F.3d 1045 (9th Cir. 2003) Prior to trial, the state prosecutor offered a negotiated deal to the defendant that would have capped his sentence at eleven years. The defense attorney did not convey this offer correctly to the defendant (he portrayed the deal as a twenty-two-year offer). The right to effective assistance of counsel includes the right to counsel during the plea negotiation process. The right that the defendant lost in this case was not the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate. The circumstances demonstrated the defendant would have accepted the offer had it been communicated to him properly.

***Maples v. Stegall***, 340 F.3d 433 (6th Cir. 2003) The defendant entered a guilty plea, having been advised by his attorney that he could still preserve for appeal his state speedy trial act claim. His advice was erroneous. This amounted to ineffective assistance of counsel. The Sixth Circuit remanded the case to the district court to evaluate the merits of the defendant's speedy trial act claim, to determine whether he was prejudiced by the attorney's ineffectiveness.

***United States v. Couto***, 311 F.3d 179 (2d Cir. 2002) Trial counsel affirmatively misled the defendant into believing there were things that could be done to avoid deportation (when, in fact, there were none). This affirmative misrepresentation is different than a failure to advise the defendant of collateral consequences of a plea.

***Smith v. United States***, 348 F.3d 545 (6th Cir. 2004) Trial counsel, according to the petitioner in this § 2255 petition, failed to advise him properly about a pending plea offer. At a minimum the court should have held a hearing on this matter. Specifically, petitioner claimed that he should have been fully informed about the various Sentencing Guideline scenarios that would exist following a trial, versus following the entry of a guilty plea. The possible sentence following trial was ten times harsher than the sentence that was offered in the negotiated plea and this information was not (according to the petitioner) conveyed to him.

***Griffin v. United States***, 330 F.3d 733 (6th Cir. 2003) Trial counsel's failure to advise the defendant of a plea offer was ineffective assistance of counsel. Though the defendant protested that he was innocent throughout the pretrial stage of the case, he still may have accepted a guilty plea. A hearing should have been conducted so the trial court could determine whether the defendant would, in fact, have been willing to accept the offer, had it been communicated to him by counsel.

***Paters v. United States***, 159 F.3d 1043 (7th Cir. 1998) Prior to trial, the government offered the defendant a five-year deal. Defense counsel incorrectly advised the defendant that he did not face more than that if he went to trial. Counsel failed to explain the concept of relevant conduct, or acceptance of responsibility. Following a conviction at trial, the defendant was sentenced to 121 months. The government and the defendant agreed that the trial attorney's performance was deficient. The Seventh Circuit held that the deficient performance was prejudicial, if the defendant could establish, on remand, that but for the incorrect advice, he would have accepted the plea agreement.

***United States v. Alvarez-Tautimez***, 160 F.3d 573 (9th Cir. 1998) Two defendants were arrested for smuggling marijuana. Alvarez entered a guilty plea, but the court had not yet accepted the plea. Thereafter, the co-defendant won his motion to suppress – a motion that would have succeeded for Alvarez, as well. The government had already indicated that it would not appeal the co-defendant's successful motion. Nevertheless, Alvarez's counsel did not move to withdraw the guilty plea and re-assert a Motion to Suppress. This was ineffective assistance of counsel. Because the court had not accepted the guilty plea yet, the defendant was entitled to withdraw the plea. The case would then have been dismissed.

***Meyers v. Gillis***, 142 F.3d 664 (3rd Cir. 1998) Trial counsel gave the petitioner incorrect advice as to his parole eligibility and the defendant relied on that advice to his prejudice. The petitioner believed that he would be eligible for parole at some point after entering his plea, when, in fact, the conviction resulted in a sentence of life without parole. Petitioner established that he would not have entered a guilty plea had he known about the life without parole sentence.

***United States v. Gordon***, 156 F.3d 376 (2d Cir. 1998) Defense counsel's erroneous prediction of the Guideline sentence that the defendant faced amounted to ineffective assistance of counsel.

***Boria v. Keane***, 99 F.3d 492 (2d Cir. 1996) The trial counsel was ineffective in failing to advise the defendant that it was in his best interest to enter a guilty plea. The plea that was offered would have resulted in a sentence of one to three years. Following his rejection of this offer, the state re-indicted under the "Rockefeller Law" and the resulting conviction resulted in a sentence of twenty years to life. Trial counsel admitted that he never advised the defendant that it was advisable to accept the plea, before the state re-indicted him.

***United States v. Hansel***, 70 F.3d 6 (2d Cir. 1995) The defendant pled guilty to two counts of the indictment which were barred by the statute of limitations. Though the guilty plea amounts to a waiver of the issue on appeal, he received ineffective assistance of counsel and the guilty plea was therefore not knowing and voluntary and the convictions on those counts would be set aside.

***Teague v. Scott***, 60 F.3d 1167 (5th Cir. 1995) If counsel misinforms the defendant of the maximum possible sentence (as in this case, where the defendant was advised that the maximum sentence was twenty years, but the actual maximum was 99 years), this amounts to ineffective assistance of counsel. Prejudice can be shown by the defendant's refusal to accept a plea offer which was far below the sentence which was ultimately imposed following a trial.

***United States v. Acklen***, 47 F.3d 739 (5th Cir. 1995) In this §2255 proceeding, the petitioner contended that his counsel failed to investigate, prior to entering the guilty plea, whether the methamphetamine with which the defendant was charged was 1-methamphetamine, or d-methamphetamine. There is a substantial difference in sentencing liability between these two types of the drug. Without deciding whether the petitioner in fact proved that he was only responsible for the less serious type of drug, the court held that he was entitled to limited discovery on this issue. If the drug actually was 1-methamphetamine, then the trial counsel would have been ineffective in failing to prove this at sentencing.

***United States v. Castro***, 26 F.3d 557 (5th Cir. 1994) The writ of error coram nobis is an extraordinary remedy available to a petitioner no longer in custody who seeks to vacate his conviction in circumstances where the petitioner can demonstrate that he is suffering civil disabilities as a consequence of the criminal conviction and that the challenged error is of sufficient magnitude to justify the extraordinary relief. Coram nobis relief is available if the petitioner can establish that he suffered from ineffective assistance of counsel. Here, the defendant entered a guilty plea, but his attorneys were unaware that they could seek a judicial recommendation against deportation and, therefore, they did not make this request. This was ineffective assistance of counsel and coram nobis relief should have been granted if the petitioner, on remand, could satisfy the Strickland standards.

***Bouchillon v. Collins***, 907 F.2d 589 (5th Cir. 1990) The habeas court concluded that the petitioner was mentally incompetent at the time he entered his guilty plea and that his trial counsel was ineffective in failing to investigate his client's competency to stand trial and a possible insanity defense. The Fifth Circuit affirms. To satisfy the prejudice prong of Strickland, the petitioner need only demonstrate a "reasonable probability" that he was incompetent, "sufficient to undermine confidence in the outcome." This represents a lower burden of proof than the preponderance of evidence standard.

***Lewandowski v. Makel***, 949 F.2d 884 (6th Cir. 1991) Trial counsel failed to advise the defendant accurately about the possible ramifications of successfully withdrawing a guilty plea – that is, that he could be tried and sentenced to life without parole. The Sixth Circuit agreed with the District Court that this was ineffective assistance and was prejudicial.

***Hart v. Marion Correctional Institution***, 927 F.2d 256 (6th Cir. 1991) The defendant was incorrectly advised by his attorney about the actual amount of time he might face if he entered a guilty plea. This ineffective assistance of counsel was compounded by inaccurate advice at the guilty plea colloquy from the trial judge. The writ would be granted.

***Sparks v. Sowders***, 852 F.2d 882 (6th Cir. 1988) Under state law, there is no such penalty as "life without parole." This, however, was what trial counsel advised the defendant he would receive if he did not plead guilty. This constitutes gross misadvise rendering a guilty plea defective on the grounds of ineffective assistance of counsel.

***Garmon v. Lockhart***, 938 F.2d 120 (8th Cir. 1991) Counsel advised the defendant that he would only have to serve 1/6 of his sentence. This was inaccurate advice. He would have to serve 15 years – not five years – before he was eligible for parole. This was ineffective assistance of counsel and necessitated granting a writ and vacating the guilty plea.

***Hill v. Lockhart***, 894 F.2d 1009 (8th Cir. 1990) The defendant pled guilty, relying in part on the advice of his attorney concerning his parole eligibility date. His attorney's advice was erroneous. This constitutes ineffective assistance of counsel and renders the guilty plea invalid. This is not simply a case of the attorney making a bad prediction. Here the misadvise was of a "solid nature" directly affecting the defendant's decision to plead guilty.

***United States v. Blaylock***, 20 F.3d 1458 (9th Cir. 1994) It is ineffective assistance of counsel to fail to communicate to a client a plea offer. The appropriate remedy is to reinstate the plea offer and allow the defendant to accept it if he so desires.

***Montemoino v. United States***, 68 F.3d 416 (11th Cir. 1995) If an attorney fails to file a notice of appeal following a guilty plea and there is an issue relating to the sentencing guidelines, the defendant may obtain relief based on the ineffectiveness of his attorney. This is an exception to the rule that the failure to file an appeal following the entry of a guilty plea is not grounds for asserting ineffective assistance of counsel. The appropriate remedy is to permit an out-of-time appeal of any sentencing guideline issue.

***Finch v. Vaughn***, 67 F.3d 909 (11th Cir. 1995) The defendant was on parole from a federal sentence when he was arrested by state agents on a drug charge. At the beginning of his state trial, he entered into a plea agreement which if he would plead guilty in exchange for receiving a ten-year sentence to run concurrent with his federal parole violation sentence. After the plea was entered, the federal government declined to revoke his parole, returning him to state custody. The government indicated that his federal parole would be revoked after he served his state sentence. Because it was clearly the defendant's view that the sentences would run concurrently, this amounted to an involuntary plea of guilty. A voluntary plea requires an awareness of the consequences of the plea. Moreover, his counsel rendered ineffective assistance of counsel.

***Yordan v. Dugger***, 909 F.2d 474 (11th Cir. 1990) The defendant's attorney advised him that if he were to plead guilty to the charges, he would become eligible for parole after serving between five and seven years in prison. Having pled guilty to the offense, he was not eligible for parole until having served twenty-five years. The Eleventh Circuit holds that further hearings must be conducted to determine whether the defendant was denied the effective assistance of counsel.

***Betancourt v. Willis***, 814 F.2d 1546 (11th Cir. 1987) The judge told the defense attorney that he would reduce the sentences at some time in the future if the defendant would plead guilty. This agreement was never put in writing, and the attorney failed to make any mention of this statement by the judge during the plea agreement at the initial sentencing or taking of the plea. This represents ineffective assistance of counsel, and the guilty plea was ordered withdrawn by the Eleventh Circuit.

***United States v. Streater***, 70 F.3d 1314 (D.C.Cir. 1995) Counsel was ineffective in advising the defendant that he should enter a guilty plea. Counsel advised the defendant, after losing a suppression hearing, that having asserted standing to contest a search of the car (albeit without having testified), he could not then testify at trial that he did not know there were drugs in the car. This erroneous advice rendered the guilty plea involuntary.

***United States v. Loughery***, 908 F.2d 1014 (D.C. Cir. 1990) The defendant agreed to enter a plea that would result in the dismissal of all the pending mail fraud counts in exchange for her plea on one other count. Just before the plea was entered, McNally v. United States was decided that rendered the mail fraud counts invalid. The attorney's failure to appreciate the significance of this development — it meant that the government was giving up nothing in exchange for the plea — rendered his representation ineffective in advising the defendant in connection with the guilty plea.

***ATTORNEY-CLIENT ISSUES (Ineffective Assistance of Counsel – Pre-trial Motions and Investigation)***

***Hinton v. Alabama***, 134 S. Ct. 1081 (2014) An attorney who did not realize that he could seek additional funds to secure an expert witness to assist in analyzing forensic ballistics evidence, provided ineffective assistance of counsel.

***Rivera v. Thompson***, 879 F.3d 7 (1st Cir. 2018) The police responded to a report of a stabbing. When an officer arrived at the scene, a man was seen jogging away. The officer ordered the man to lie down, pulled his weapon and asked him what he was doing. The defendant's responses should have been suppressed. The defendant was in custody and was being interrogated. Trial counsel's failure to move to suppress the statements was ineffective assistance of counsel.

***United States v. Simpson***, 864 F.3d 830 (7th Cir. 2017) Defendant urged the trial court to conduct an evidentiary hearing on his Rule 33 motion for new trial based on ineffective assistance of counsel, because his trial counsel failed to interview witnesses who would have supported his defense. The trial court declined to conduct an evidentiary hearing. The Seventh Circuit reversed holding, among other things, that the trial court erroneously viewed the proposed testimony piecemeal, rather than cumulatively.

***United States v. Mohammed***, 863 F.3d 885 (D.C. Cir. 2017) The central witness at defendant's narco-terrorism trial was a man from the same Afghanistan village as the defendant who had previous run-ins with the defendant and had a motive to falsely accuse him of being associated with the Taliban. The witness had previously been accused (in Afghanistan) of stealing jewelry and the defendant had sat in judgment of him in that case. The witness was known to be upset by that decision. The D.C. Circuit held that the trial attorney performed deficiently in failing to locate, prepare and present this testimony at trial. Certain counts of the indictment were vacated by this ineffective assistance of counsel.

***Weeden v. Johnson***, 854 F.3d 1063 (9th Cir. 2017) Trial counsel was ineffective in failing to investigate a possible psychological defense in this murder trial involving a 14-year-old defendant.

***Hardy v. Chappell***, 849 F.3d 803 (9th Cir. 2017) Trial counsel was ineffective in failing to investigate and present evidence that the state's key witness in this murder trial was the actual perpetrator of the murder.

***United States v. Arny***, 831 F.3d 725 (6th Cir. 2016) The defendant was a doctor, convicted of unlawfully prescriptions of pain medication. Trial counsel failed to interview a key witness (and was untruthful with the defendant about the availability of certain witnesses), as well as certain patients who would have provided testimony that refuted the government's theory. The trial court granted a post-trial Rule 33 motion and the Sixth Circuit affirmed.

***Blackmon v. Williams***, 823 F.3d 1088 (7th Cir. 2016) A federal evidentiary hearing was necessary to fully develop the habeas petitioner's claim that his state trial counsel provided ineffective assistance of counsel in failing to investigate and present alibi witnesses who were available to testify.

***United States v. Freeman***, 818 F.3d 175 (5th Cir. 2016) Trial counsel was ineffective in failing to move to dismiss a count of the indictment that was barred, on its face, by the statute of limitations.

***Yun Hseng Liao v. Junious***, 817 F.3d 678 (9th Cir. 2016) The defendant was charged with assaulting his girlfriend's son with a hammer in the middle of the night when the son was asleep in bed. He claimed that he was sleepwalking. The defense hired a renowned expert in the field of sleepwalking, and he agreed to testify, but explained to the lawyers that he needed the defense to have a sleep study performed in order to allow him to make an informed diagnosis. The lawyer asked the magistrate for funds to have the sleep study performed. The lawyer was told by a clerk of the magistrate that the request for funds was denied. Though, the magistrate had approved the request and filed the approval. The lawyer went to trial without the sleep study, but with the expert, whose testimony was significantly impaired because of the lack of a sleep study. When the lawyer's deficient performance finally made its way to the Ninth Circuit, the court held that this amounted to ineffective assistance of counsel and the conviction was vacated.

***Grueninger v. Dir., Virginia Dept. of Corrections***, 813 F.3d 517 (4th Cir. 2016) The defendant was questioned by the police after he was arrested and he promptly said, "These are felonies, I need an attorney." The police immediately stopped the questioning, but came back a few days later, initiated further discussions when additional warrants were served during which the defendant confessed to having had sexual contact with his minor daughter. The Fourth Circuit held that this was a violation of Edwards v. Arizona, and trial counsel's failure to file a motion to suppress the confession was deficient performance that required setting aside the conviction.

***Thomas v. Clements***, 789 F.3d 760 (7th Cir. 2015) The defendant was charged with killing his ex-wife. He claimed that they were having sex and he mistakenly strangled her. The defense counsel failed to consult with an expert to determine if there was any way to challenge the expert opinion of the state's medical examiner who testified that the death could not occur accidentally.

Counsel did not make a strategic decision: he simply failed to seek expert advice. The defense expert presented at the habeas hearing offered an alternative explanation and pointed out flaws in the state's expert's testimony. Thus, trial counsel's deficient performance was prejudicial.

***United States v. Mercedes-De La Cruz***, 787 F.3d 61 (1st Cir. 2015) This is the rare case in which a Sixth Amendment ineffective assistance of counsel claim was successfully raised on direct appeal. Trial counsel failed to file a motion to suppress the defendant's inculpatory statements. The evidence developed at trial demonstrated the circumstances of the defendant's statements and, had the motion been filed, the statements would have been suppressed (the only basis for detaining the defendant, during which time he made the incriminating statements, was that he was in the same general area where a drug-smuggling venture was occurring). There was no strategic reason not to file a meritorious motion to suppress.

***Campbell v. Reardon***, 780 F.3d 752 (7th Cir. 2015) Trial counsel's failure to interview three eyewitnesses, whose names and statements were contained in police reports, and whose testimony contradicted the testimony of the state's witnesses was deficient performance that required setting aside the state court conviction.

***Government of Virgin Islands v. Vanterpool***, 767 F.3d 157 (3rd Cir. 2014) Trial counsel was arguably ineffective in failing to challenge the constitutionality of the Virgin Islands harassing phone calls statute prior to trial. A remand to develop the record on this issue was necessary.

***Detrich v. Ryan***, 740 F.3d 1237 (9th Cir. 2013) The en banc Ninth Circuit concluded that petitioner was entitled to a remand to the district court for an evidentiary hearing on his § 2254 ineffective assistance of counsel claim. Trial counsel failed to interview several witnesses who could have contradicted the state's witnesses and established the motive of another person to be the perpetrator of the murder. Additionally, a remand was appropriate to determine why trial counsel failed to impeach a witness with a prior inconsistent statement and failed to conduct independent forensic testing of certain physical evidence.

***Vega v. Ryan***, 757 F.3d 960 (9th Cir. 2014) Trial counsel was ineffective in failing to locate and present at trial a priest to whom the child victim in this child molestation case had recanted his allegations.

***Newman v. Harrington***, 726 F.3d 921 (7th Cir. 2013) Trial counsel was ineffective in failing to seek a competency hearing for the defendant.

***Stitts v. Wilson***, 713 F.3d 887 (7th Cir. 2013) Though a remand for further fact finding was required, he Seventh Circuit held that if the defendant's trial attorney failed to properly investigate a possible alibi defense (beyond interviewing one witness), this would have amounted to ineffective assistance of counsel in this case.

***McClellan v Rapelje***, 703 F.3d 344 (6th Cir. 2013) Trial counsel was grossly ineffective in failing to interview numerous available witnesses in this murder case who were prepared to testify that the defendant acted in self-defense.

***Wooley v. Rednour***, 702 F.3d 411 (7th Cir. 2012) Trial counsel was ineffective in failing to secure an expert witness to counter the expert crime scene reconstruction expert employed by the state. However, the state court's decision that the defendant suffered no prejudice as a result of this insufficient investigation survived AEDPA scrutiny.

***Harris v. Thompson***, 698 F.3d 609 (7th Cir. 2012) The trial court's decision to exclude a defense witness who was 6-years old based on the child's competence as a witness violated the defendant's Compulsory Process rights to present evidence in his defense. The child had critical exculpatory evidence and the jury should have been allowed to evaluate the credibility issue. The fact that the child believed in the tooth fairy, Santa Claus and Spiderman did not render him unfit to testify. (Part of the child's apparent confusion about who was "real" and who was not "real" was the way that questions were posed, which drew a distinction between characters in movies that were cartoons, or animated, and characters who were played by live actors). The state trial court violated the state statute that placed the burden of proving incompetency of a witness on the state, rather than proving competence of witness on the party calling the witness, as the court did in this case. In addition, the court held that the trial attorney provided ineffective assistance of counsel in failing to properly litigate the competency issue and to interview and prepare the child to testify. This case contains an encyclopedic review of Compulsory Process cases.

***Mosley v. Atchison***, 689 F.3d 838 (7th Cir. 2012) State trial counsel's failure to interview and then present testimony from two alibi witnesses was ineffective assistance of counsel necessitating that the federal court grant a writ of habeas corpus. A subsequent review of this case netted the same result. 762 F.3d 579.

***Foster v. Wolfenbarger***, 687 F.3d 702 (6th Cir. 2012) Trial counsel's failure to further investigate a possible alibi defense and to present this defense at trial was ineffective assistance of counsel. The attorney interviewed the witness briefly. If the attorney concluded that the witness's testimony was not sufficiently definite, he had a duty to further investigate and not simply abandon the alibi defense.

***Matthews v. United States***, 682 F.3d 180 (2d Cir. 2012) Trial counsel retained an ex-cop as an investigator who had prior run-ins with the defendant. There was clearly a basis for believing that the investigator had a conflict in working for the defendant. This led the Second Circuit to conclude that an evidentiary hearing was necessary to determine whether the attorney provided ineffective assistance of counsel in investigating the facts of this case.

***Gardner v. United States***, 680 F.3d 1006 (7th Cir. 2012) The defendant contended that he was unlawfully frisked. He also claimed that the gun that was found was planted on him by the police. The trial court indicated that unless the defendant acknowledged that the gun was his, he could not assert the Fourth Amendment claim. The defense attorney failed to file a

motion to suppress. This was ineffective assistance of counsel. There is no reason that a defendant cannot claim both that the gun was planted on him and that the search was unlawful.

***Thomas v. Chappell***, 678 F.3d 1086 (9th Cir. 2012) Trial counsel conducted inadequate investigation into possible witnesses who would have corroborated defendant's claim of innocence and the role of another perpetrator.

***United States v. Marshall***, 669 F.3d 288 (D.C. Cir. 2012) The government's motion to permit the introduction of Rule 404(b) evidence did not stop the Speedy Trial clock. Trial counsel was ineffective in failing to move to dismiss the indictment given the violation of the Speedy Trial Act.

***Elmore v. Ozmint***, 661 F.3d 783 (4th Cir. 2011) In this nearly 100-page opinion, the Fourth Circuit ultimately concludes that trial counsel provided ineffective assistance of counsel in failing to test and investigate the validity of the state's forensic evidence.

***Tice v. Johnson***, 647 F.3d 87 (4th Cir. 2011) The defendant was a suspect in a rape / murder. During his interrogation, he agreed to have a polygraph administered. After the polygraph was administered by another police officer, the defendant was asked if he wanted to continue making a statement and he said that he did not want to answer any more questions. Thereafter, the initial interrogation officer returned to the room and continued the interrogation. No further Miranda warnings were given. The Fourth Circuit held that trial counsel was ineffective in failing to move to suppress the ensuing confession.

***Sussman v. Jenkins***, 636 F.3d 329 (7th Cir. 2011) Trial counsel failed to provide pretrial notice of the intent to introduce evidence that the child molestation victim had made prior false allegations of sexual abuse against another man (his father). Trial counsel's failure was ineffective assistance of counsel because such evidence – prior false allegation evidence – was admissible and significant evidence relating to the child's credibility and motive for fabricating allegations (i.e., to get attention, or for punishing people for not paying attention to him). This evidence was clearly admissible under the Confrontation Clause.

***Showers v. Beard***, 635 F.3d 625 (3rd Cir. 2011) Trial counsel was ineffective in failing to consult with an expert to determine if a person who ingested liquid morphine would taste the substance. The defendant was charged with killing her spouse with liquid morphine. The government contended that the drug could be put in the victim's food, and he would not know it. The defense attorney had been told by a psychiatric expert that he should consult with an expert on this subject. The defense attorney did not consult with an expert. An expert would have testified that a substantial amount of a "masking agent" would have been necessary for the victim not to realize he was being poisoned and, therefore, the autopsy should have revealed the masking agent. (Absent a masking agent, the defendant's theory – that the victim intentionally ingested the drug was far more likely, given the strong taste of the substance without a masking agent).

***Couch v. Booker***, 632 F.3d 241 (6th Cir. 2011) In this murder case, the victim died after being beaten by the defendant. However, there was considerable evidence that the victim had ingested a considerable quantity of marijuana and cocaine, as well as alcohol and may have had a pre-existing heart condition. The victim fought with medics prior to dying and was observed by others acting strangely prior to being beaten by the defendant. The defense attorney failed to adequately investigate a causation defense, including reading available reports from medics. Though a defense attorney is certainly entitled (and obligated) to make strategic decisions, those decisions must be informed and cannot be "strategic" if they are made without considering available alternatives.

***Wilson v. Gaetz***, 608 F.3d 347 (7th Cir. 2010) Trial counsel ineffectively developed the insanity defense evidence that was available in defense of the defendant who was charged with murder. The defendant was apparently operating under a delusional compulsion that required him to commit the crime. His delusion led him to believe that what he was doing was morally proper, even if it might have been a crime.

***Howard v. Clark***, 608 F.3d 563 (9th Cir. 2010) Trial counsel was ineffective in failing to interview the second victim of a shooting that the defendant was charged with perpetrating. The other victim died. The surviving victim, however, later made a statement that the defendant was not the perpetrator. The fact that the witness may not have been credible does not excuse the attorney's failure to interview him and decide whether to call him as a witness.

***Johnson v. United States***, 604 F.3d 1016 (7th Cir. 2010) Trial counsel did not file a motion to suppress evidence seized from the car that the defendant was driving, because he believed that the defendant did not have an expectation of privacy, because he did not own the car and had borrowed it. This was legally incorrect: the driver of a car that he has borrowed from another has a reasonable expectation of privacy in the vehicle. The attorney's second justification for not filing the motion – he wanted to argue at trial that the drugs did not belong to his client, because the car was borrowed – was not a basis to fail to file the motion to suppress, because if he won the motion to suppress, there would be no trial, and if he lost the motion to suppress, he could still disavow ownership or knowledge of the drugs. Finally, the attorney's fear that the defendant's testimony at a suppression hearing could be used against him at trial would be foreclosed by Simmons v. United States, 390 U.S. 377 (1968).

***English v. Romanowski***, 602 F.3d 714 (6th Cir. 2010) State trial counsel was ineffective in failing to adequately investigate the availability of a witness to provide exculpatory information. Because of the failure to adequately investigate the witness's testimony, the attorney believed that the witness had favorable testimony to offer. During trial, he realized that the witness was not that helpful, but he had already promised to call the witness during his opening statement. The decision not to call the witness was a sound decision; the failure to determine this before trial, and then promising to call the witness during opening statement, was ineffective assistance of counsel.

***Gentry v. Sevier***, 597 F.3d 838 (7th Cir. 2010) The defendant was walking with a wheelbarrow through a neighborhood late at night. The police were called. When the police arrived, they summoned the defendant over to their car and told him to "keep his

hands up." This amounted to a seizure, which was not supported by an articulable suspicion. The officer then patted down the defendant, locating a garage opener. There was no basis for this frisk: there was no reason to believe the defendant was armed or dangerous and he was not subject to a legitimate arrest or detention. Moreover, there was no basis to keep the garage door opener (and thereafter walk down the street seeing if it opened any garage in the neighborhood), because it was not a weapon, or apparent to be contraband. Finally, the search of the wheelbarrow was illegal. Though some items on the top of the pile in the wheelbarrow were subject to plain view, other items below the surface could only be seen when the officer probed beneath the surface. The defendant's trial counsel was ineffective in failing to move to suppress the fruits of the search.

***Green v. Nelson***, 595 F.3d 1245 (11th Cir. 2010) A search warrant application falsely stated that semen was collected from a rape victim and that obtaining a DNA sample from the defendant was therefore necessary to perform a comparison. Actually, no DNA had been obtained from that victim, but the DNA collected from the defendant was used to match his DNA with another rape victim, from whom semen was obtained. The failure to file a Motion to Suppress based on this Franks v. Delaware violation was ineffective assistance of counsel. The state habeas court's observation that the decision whether to file a Motion to Suppress is always a strategic decision was clearly erroneous where the decision not to file the Motion was an erroneous understanding of the facts, not a conscious weighing of the potential positive and negative consequences of filing the motion. However, there was sufficient additional information in the affidavit to support the issuance of the warrant, so, though counsel was ineffective in failing to raise the issue, there was no prejudice.

***Bigelow v. Haviland***, 576 F.3d 284 (6th Cir. 2009) Trial counsel's failure to investigate further defendant's alibi defense and locate an additional witness who was available and able to provide corroboration of the alibit, was ineffective assistance.

***Hummel v. Rosemeyer***, 564 F.3d 290 (3rd Cir. 2009) The defendant was tried for murder in state court and found guilty. The record established that he suffered from the effects of a gunshot to the head (self-inflicted) and psychological trauma. He slept through much of the trial and suddenly screamed during the prosecutor's closing argument and was removed from the courtroom. Trial counsel was ineffective in failing to move for a competency hearing.

***Siehl v. Grace***, 561 F.3d 189 (3rd Cir. 2009) Counsel was ineffective in failing to retain an expert to counter the state's expert who testified that the defendant's fingerprint was on the showerhead of the tub where the victim was found stabbed to death, and that the angle of the fingerprint, as well as other forensic evidence established that the fingerprint belonged to the killer. An evidentiary hearing was needed to develop the record further to determine if another expert could have countered this forensic testimony of the state, as the defendant proffered at the state habeas hearing.

***Brown v. Smith***, 551 F.3d 424 (6th Cir. 2008) The defendant's trial counsel was ineffective in the state sexual abuse prosecution because of counsel's failure to subpoena the therapy records of the victim (his daughter) that would have revealed the victim's inclination to fabricate charges against the defendant considering her father's imminent marriage to another woman. Under the relevant state law, the records, though presumptively confidential, could be reviewed by the trial court in camera to determine if they contained any information that was necessary to the defense.

***Avery v. Prelesnik***, 548 F.3d 434 (6th Cir. 2008) Trial counsel failed to adequately investigate defendant's possible alibi defense, or to interview the alibi witnesses. The Sixth Circuit affirms granting a writ of habeas corpus.

***Osagiede v. United States***, 543 F.3d 399 (9th Cir. 2008) Though the failure of the government to afford a defendant his right to notification of the consulate under the Vienna Convention may not result in the suppression of evidence, if a defense attorney fails to take advantage of the Vienna Convention and advise the defendant of his right to notify his country's consulate, this may amount to ineffective assistance of counsel. The prejudice, if it can be shown, would be that the defendant was deprived of the right to have the consulate help him find favorable witnesses, or otherwise assist in the defense in a way that could have altered the result.

***Harrison v. Quarterman***, 496 F.3d 419 (5th Cir. 2007) Trial counsel was arguably ineffective in failing to interview an eyewitness to a prior event involving the sexual assault victim that was denied by her at trial. The prior event (involving a consensual sexual encounter between the defendant and the victim) would have been admissible and would have cast considerable doubt on the victim's trial testimony. The absence of the witness, moreover, was pointed out by the prosecutor during closing argument as a reason to disbelieve that the prior event occurred. A remand was necessary to determine exactly what the witness would have said, if called as a witness.

***United States v. Weathers***, 493 F.3d 229 (D.C. Cir. 2007) Defense counsel was ineffective in failing to file a multiplicity objection to charges that the defendant threatened a federal official and a separate count of threatening the same official in violation of D.C. law.

***Ramonez v. Berghuis***, 490 F.3d 482 (6th Cir. 2007) Trial counsel's failure to interview three eyewitnesses to the assault with which the defendant was charged was ineffective assistance of counsel necessitating granting the writ.

***Raygoza v. Hulick***, 474 F.3d 958 (7th Cir. 2007) Defense counsel's failure to investigate the defendant's alibi claim was deficient and prejudicial. Ten witnesses, as well as telephone records, supported the alibi. The court observed that defense counsel may have believed that his client was guilty and that pursuing an alibi defense would be futile, "This, however, would hardly distinguish him from legions of defense counsel who undoubtedly do the same every day, yet who conscientiously investigate their clients' cases before coming to a final decision about trial strategy." Id at 964.

***Stewart v. Wolfenbarger***, 468 F.3d 338 (6th Cir. 2006) Trial counsel's failure to comply with the law requiring pretrial notice of reliance on an alibi defense constituted ineffective assistance of counsel. The fact that there were other alibi witnesses – and

therefore the witness who was barred from testifying would have provided cumulative testimony – did not lessen the impact of the prejudice. Failure to interview certain witnesses and conduct sufficient pretrial investigation was also deficient.

***Stanley v. Bartley***, 465 F.3d 810 (7th Cir. 2006) Trial counsel failed to interview any witnesses or engage in any meaningful pretrial preparation. His cross-examination of witnesses reflected his lack of preparation. Judge Posner held that a new trial was necessary.

***Dando v. Yukins***, 461 F.3d 791 (6th Cir. 2006) Trial counsel was ineffective in failing to request expert funds to investigate the defendant's possible duress (battered spouse) defense to charges that she assisted her boyfriend in a string of robberies. The attorney declined to hire the expert because he thought that funds were not available to investigate this type of defense. The defendant's guilty plea was tainted by this ineffective assistance of counsel.

***Adams v. Bertrand***, 453 F.3d 428 (7th Cir. 2006) Trial counsel's failure to interview a key witness to the events that occurred prior to and after the alleged sexual assault on the victim was ineffective assistance of counsel requiring that the verdict be set aside. The victim was a woman in a college dormitory. The witness observed the victim and the defendant enter a room together and had been with them prior to the time they went into the room. After the alleged assault that occurred in the room, the witness was aware that they all sat around together smoking cigarettes. Failing to interview this witness (whose statement was in a police report and who testified at a co-defendant's trial) and establishing the contradictions with the victim's testimony was not a strategic decision; it was a violation of the Sixth Amendment right to counsel.

***Rolan v. Vaughn***, 445 F.3d 671 (3rd Cir. 2006) Trial counsel was ineffective in failing to investigate available witnesses who would have testified that the defendant acted in self-defense.

***Draughon v. Dretke***, 427 F.3d 286 (5th Cir. 2006) The defendant was sentenced to death based on a conviction for killing a bystander after attempting to rob a store. The defendant admitted trying to rob the store and that when he fled, he feared the people who were chasing him and that he fired into the air to get them to stop chasing him. Defense counsel did not hire a firearm's expert to analyze the path of the bullet. The state argued that the shooting was point-blank from a short distance. At the habeas hearing, the defendant offered evidence that the bullet clearly ricocheted off the pavement into the victim's body. The Fifth Circuit held that defense counsel's failure to retain a ballistics expert prior to trial was ineffective assistance of counsel.

***United States v. Jones***, 403 F.3d 604 (8th Cir. 2005) Trial counsel was ineffective in failing to challenge the indictment as multiplicitous. The defendant was charged in one count of the indictment with being a felon in possession of a firearm in August and another count of being a felon in possession of the same firearm in October. The crime, however, outlaws the continued possession of the weapon and this cannot be multiplied by however many days, or hours, the gun is possessed as a separate crime.

***Dugas v. Coplan***, 428 F.3d 317 (1st Cir. 2005) The defendant was charged in state court with arson. The defense chose the "some other guy did it" defense, which was reasonable. However, there was considerable question whether it was an arson at all and the attorney did not consult with an expert to develop this alternative defense, and thus was unprepared to deal with the state's expert who testified that it was arson. The First Circuit concluded that the attorney was ineffective: "A tactical decision to pursue one defense does not excuse failure to present another defense that would bolster rather than detract from the primary defense."

***Gersten v. Senkowski***, 426 F.3d 588 (2d Cir. 2005) Trial counsel was ineffective in failing to investigate available expert testimony that would have contradicted the state's expert testimony on the child abuse accommodation syndrome and other psychological evidence that was offered by the state in this child sex abuse case. The attorney also failed to research available evidence that would have contradicted the state's expert's testimony about proof of penetration. The Second Circuit opinion is a thorough primer on the child abuse accommodation syndrome and its questionable basis, as well as the proper steps that counsel should (must) take in a child sex abuse case, to be prepared.

***Towns v. Smith***, 395 F.3d 251 (6th Cir. 2005) Trial counsel's failure to interview and investigate a witness who claimed to have knowledge of the murder and who claimed that the defendant was not involved, amounted to ineffective assistance of counsel.

***Richey v. Mitchell***, 395 F.3d 660 (6th Cir. 2005) Trial counsel's failure to fully investigate the scientific evidence in this arson case was ineffective assistance of counsel. Hiring one expert but limiting his work to ten hours was insufficient. After receiving an unfavorable report from this witness, the defense lawyer included his name on a witness list. When he did not call the witness, the state did call the witness and elicited testimony from that expert favorable to the state. After remand from the United States Supreme Court, the court re-affirmed this earlier decision, 498 F.3d 344 (6th Cir. 2007).

***United States v. Hamilton***, 391 F.3d 1066 (9th Cir. 2004) After counsel was done completing his examination of a witness in a suppression hearing, he excused himself from further participation in the matter because of a scheduling conflict. The government elicited testimony from a subsequent witness that related to that attorney's client. The attorney was provided a transcript and stated that he did not wish to further cross-examine that witness. This was improper. Counsel's absence from the proceeding that related to his client operated as a denial of the defendant's Sixth Amendment right to counsel.

***Owens v. United States***, 387 F.3d 607 (7th Cir. 2004) Stone v. Powell does not prohibit a habeas petition predicated on an attorney's ineffective assistance of counsel in failing to file a motion to suppress or to raise properly a Fourth Amendment violation.

***Clinkscale v. Carter***, 375 F.3d 430 (6th Cir. 2004) Trial counsel's failure to file a state-required alibi notice prior to trial was ineffective assistance of counsel. Even if the attorneys envisioned some strategic benefit to be gained by failing to file a timely alibi notice, this strategy was symptomatic of the ineffective assistance of counsel.

***Harris v. Cotton***, 365 F.3d 552 (7th Cir. 2004) The defendant killed a man who he claimed was assaulting him. A toxicology report was in existence that revealed that the victim was under the influence of alcohol and cocaine. Defense counsel's failure to obtain this report and use it at trial was ineffective assistance of counsel. The outcome of the trial may well have been different if the jury were aware of the victim's level of intoxication.

***Young v. Dretke***, 356 F.3d 616 (5th Cir. 2004) Trial counsel failed to file a motion to dismiss the state indictment on timeliness grounds – a motion that would have been granted if filed. This failure amounted to ineffective assistance of counsel.

***Riley v. Payne***, 352 F.3d 1313 (9th Cir. 2003) Defense counsel was ineffective in failing to interview a key witness who would have testified that the victim was the aggressor in this assault case. The fact that the witness acknowledged that he ran away before the actual shooting did not render his testimony inconsequential, because his version of the events portrayed the victim as the initial aggressor and his version contradicted the victim's version.

***U.S. ex rel. Hampton v. Leibach***, 347 F.3d 219 (7th Cir. 2003) Trial counsel's failure to investigate the facts of this case necessitated the granting of habeas relief. Counsel failed to interview witnesses who were present at the scene of the alleged sexual assault (a brutal gang assault during a rock concert). The court noted that the eyewitness testimony that was presented in this case was subject to the shortcomings that infect eyewitness testimony generally, making it "frequently less reliable than other types of evidence." See Wright v. Gramley 125 F.3d at 1043 n. 4. The court further held that defense counsel's unfulfilled promises during opening statement also amounted to ineffective assistance of counsel: he promised that his client would testify and state that he did not participate in the assault, and he promised that there would be no proof that the defendant was a member of a gang. Both promises were broken. "A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it as made."

***Joshua v. Dewitt***, 341 F.3d 430 (6th Cir. 2003) The defendant was stopped for speeding and the trooper determined that he, along with his passenger were acting nervous and suspicious. The trooper called his dispatcher and was told that the defendant was listed as a suspicious person who was believed to be a drug courier in a "Read & Sign" book maintained by the police department. Based on this information, the trooper detained the defendant while waiting for a canine to arrive. The dog arrived forty-two minutes later. Drugs were found on the passenger, who implicated the defendant. State trial counsel failed to challenge the legitimacy of the Read and Sign book that prompted the detention. Instead, he simply challenged the length of the detention. Based on United States v. Hensley, 469 U.S. 221 (1985), a detention based on a "flyer" or something else akin to a "Read and Sign" book requires proof that the author of the flyer had reasonable suspicion to list the suspect as a criminal. In this case, however, the state offered no proof that the Read and Sign book was based on reliable information. Moreover, the state's contention that the defendant's nervousness justified a detention was meritless. Nervousness may be a basis for an articulable suspicion, but only when it is coupled with evasive behavior. The state trial lawyer's failure to challenge the stop and search on this basis was ineffective assistance of counsel. The Sixth Circuit also noted that Hensley is not limited to initial stops, but also covers situations in which a stop is prolonged based on this type of information. The Sixth Circuit concludes that not only was trial counsel ineffective, but appellate counsel was, as well.

***Anderson v. Johnson***, 338 F.3d 382 (5th Cir. 2003) Failure to interview eyewitnesses is ineffective assistance of counsel, which in this case was prejudicial. Merely cross-examining witnesses at trial is not a cure for failing to interview them.

***Brown v. Myers***, 137 F.3d 1154 (9th Cir. 1998) Defense counsel was ineffective in failing to investigate the availability of alibi witnesses. Witnesses were available (they testified at the habeas hearing) to testify that the defendant was not at the scene of the assault but was at his girlfriend's house.

***Holsomback v. White***, 133 F.3d 1382 (11th Cir. 1998) The defendant was charged with repeatedly sodomizing his son over several years. The son was examined by a doctor, who found no evidence to support this charge. Defense counsel, however, never interviewed the doctor or called him as a witness. Counsel also failed to interview the child's treating physician, who was aware of no signs (physical or psychological) of abuse. The attorney's justification for not calling these witnesses might have been reasonable but given the fact that the attorney never even interviewed the witnesses, there was no support for the state's argument that this reflected a tactical decision on the part of the defense counsel.

***United States v. Gaviria***, 116 F.3d 1498 (D.C. Cir. 1997) Trial counsel advised the defendant incorrectly about the mandatory sentence he was facing if he were to plead guilty. An evidentiary hearing was required to determine whether the defendant would have accepted the offer (and whether it really was formally extended by the government) had he been properly advised of the consequences.

***Seidel v. Merkle***, 146 F.3d 750 (9th Cir. 1998) There were abundant signs in the record that the defendant suffered from mental illness. Nevertheless, trial counsel failed to conduct any investigation at all into his client's psychiatric history and therefore neglected to pursue a potentially successful defense. Counsel failed to obtain defendant's military, prison, or medical records. He failed to interview any witnesses regarding defendant's mental state. He never requested a mental health evaluation of the defendant. Mental health evidence may have convinced the jury to conclude that the defendant acted without malice, thus reducing the degree of the offense from second-degree murder to manslaughter.

***Turner v. Duncan***, 158 F.3d 449 (9th Cir. 1998) Counsel's performance was characterized as follows: "failure to consult with petitioner before trial, investigate witnesses, follow up on the psychiatric report, undertake discovery, research any legal issues, or call any witnesses other than petitioner." The defendant claimed that he had been sexually abused, sodomized, and beaten by the man he eventually killed. An investigation of available witnesses and psychiatric evidence would have supported defendant's heat of passion defense.

***United States v. Tarricone***, 996 F.2d 1414 (2d Cir. 1993) The defendant made a plausible showing that his trial counsel was ineffective in failing to retain a handwriting expert to show that certain handwriting on a key document was not penned by the defendant. A remand to fully develop this claim was necessary.

***United States v. Kauffman,*** 109 F.3d 186 (3rd Cir. 1997) Counsel knew that at the time of the defendant's arrest, he had been described as manic and psychotic. Nevertheless, he failed to investigate a possible insanity defense. This was ineffective. While the evidence of the defendant's guilt was considerable, this did not excuse the failure to conduct any investigation at all of the possible insanity defense.

***United States v. Gray***, 878 F.2d 702 (3rd Cir. 1989) Though the attorney was aware of a witness who could provide exculpatory testimony, he did not interview her. At the post-conviction hearing, that witness's testimony was offered, and the defendant was thereby able to establish prejudice. The attorney's failure to interview the witness rendered him ineffective.

***United States v. Dawson***, 857 F.2d 923 (3rd Cir. 1988) The defendant was entitled to an evidentiary hearing on his habeas claim which asserted non-frivolous issues involving his trial counsel's failure to call or interview numerous favorable witnesses.

***Bryant v. Scott***, 28 F.3d 1411 (5th Cir. 1994) The defendant's attorney in state court was ineffective in failing to investigate possible alibi witnesses after he was made aware of their existence by the defendant; failing to interview the eyewitnesses; and failing to interview the co-defendant who confessed to the crime and who exonerated the defendant.

***Montgomery v. Petersen***, 846 F.2d 407 (7th Cir. 1988) The defense counsel's failure to investigate the only available disinterested alibi witness was ineffective assistance of counsel.

***Hadley v. Groose***, 97 F.3d 1131 (8th Cir. 1996) Trial counsel was ineffective in failing to pursue an alibi witness revealed to them by the defendant, who would have provided an alibi for an alleged similar transaction.

***Driscoll v. Delo***, 71 F.3d 701 (8th Cir. 1995) Although the blood on the knife of the defendant did not match the blood of the victim, the state's expert explained that this was due to the "masking" of the victim's blood type during the testing process. The defense attorney was not prepared to confront this testimony and failed to show that certain tests were not tainted by this "masking." The defense attorney provided ineffective assistance.

***Chambers v. Armontrout***, 907 F.2d 825 (8th Cir. 1990) The defense attorney's failure to interview or call witnesses deprived the capital murder defendant of the effective assistance of counsel.

**Tosh v. Lockhart**, 879 F.2d 412 (8th Cir. 1989) Despite the availability of three witnesses who offered to provide alibi evidence, the defense attorney interviewed none of them. The defendant was denied effective assistance of counsel.

***Jones v. Wood***, 114 F.3d 1002 (9th Cir. 1997) Petitioner should have been granted a hearing to test the validity of his claim of ineffective assistance of counsel. First, the defendant's suggestion that his daughter's boyfriend might have been the murderer was not adequately investigated. Second, trial counsel made no attempt to test the available physical evidence.

***Johnson v. Baldwin***, 114 F.3d 835 (9th Cir. 1997) Petitioner's trial counsel inadequately investigated the defendant's alibi defense in preparation for this rape trial. Had the attorney investigated this defense, he would have learned that it was not true and that the defendant, in fact, was at the scene of the crime, but that no rape had occurred at all. (The petitioner's co-defendant was tried separately and testified that they were both present and no sexual conduct occurred at all with the victim; he was acquitted).

***Baylor v. Estelle***, 94 F.3d 1321 (9th Cir. 1996) Trial counsel was ineffective in failing to pursue a lead that the semen sample from one rape victim did not match the defendant's blood traits. Even though the defendant had confessed to the crime on videotape, this evidence, if properly pursued and developed, ultimately would have established (as it was during the habeas proceedings) that the defendant could not have been the perpetrator.

***Harris v. Wood***, 64 F.3d 1432 (9th Cir. 1995) The defense attorney's deficiencies in this case are almost too numerous to set forth. He failed to interview known witnesses for the prosecution; failed to make proper objections at trial; failed to investigate witnesses who could provide exculpatory information; failed to secure an independent evaluation of the ballistic evidence; and failed to raise meritorious issues on appeal. He was also ineffective in calling the defendant to testify; advising the defendant to make a statement to prosecutors; and giving a closing argument which was critical of the defendant.

***United States v. Palomba***, 31 F.3d 1456 (9th Cir. 1994) In the criminal complaint, the defendant was charged with mail fraud. The original indictment, however, did not allege mail fraud. A superseding indictment three months later, added the mail fraud counts. This violated the Speedy Trial Act, 18 U.S.C. §3161(b). Trial counsel's failure to move to dismiss these charges amounted to ineffective assistance of counsel.

***Williamson v. Ward***, 110 F.3d 1508 (10th Cir. 1997) Trial counsel was ineffective in failing to investigate and present to the jury the fact that prior to defendant's trial, another individual had confessed to the murder and in failing to investigate the defendant's mental illness which might have explained his "confession" – his confession was that he "dreamed" that he had committed the murder. There was considerable evidence in support of the defendant's mental illness. There was a reasonable probability that

the defendant was tried while incompetent, and that his “dream confession” was a product of his mental illness. Counsel (who was blind) had his son sit near him during the trial and had instructed him to wrestle the defendant to the ground if he made any sudden movements toward him during the trial.

***Huynh v. King***, 95 F.3d 1052 (11th Cir. 1996) Counsel was ineffective in failing to file a timely suppression motion.

***United States v. Yizar***, 956 F.2d 230 (11th Cir. 1992) An evidentiary hearing was necessary to evaluate defendant’s claim of ineffective assistance of counsel. Among counsel’s alleged errors was the failure to interview witnesses which would have revealed that the co-defendant had told the prosecutor that the defendant was innocent. Had counsel learned of this, he may have been entitled to a severance in order to use the co-defendant’s testimony pursuant to Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970).

***ATTORNEY-CLIENT ISSUES (Ineffective – trial and sentencing)***

***Workman v. Superintendent Albion SCI***, 915 F.3d 928 (3rd Cir. 2019) Trial counsel provided ineffective assistance of counsel in failing to address in any meaningful way the proof offered by the prosecution at trial.

***Lobbins v. United States***, 900 F.3d 799 (6th Cir. 2018) Two sections of § 1512 apply to witness tampering: § 1512(a)(1)(C) applies to killing or attempting to kill a witness and § 1512 (a)(2)(C) applies to the use of physical force to prevent a witness from communicating with federal law enforcement. In Fowler, discussed above, the Court held that the government must prove in a § 1512(a)(1)(C) case a “reasonable likelihood” that the witness was communicated with federal law enforcement. In this case, the Sixth Circuit holds that the same proof is required in a § 1512 (a)(2)(C) case: the government must prove a reasonable likelihood that the witness against whom the defendant used physical force would have communicated with federal law enforcement about a federal offense. Trial counsel’s failure to object to a jury instruction that incorrectly explained this element of the offense was ineffective assistance of counsel requiring that this conviction be set aside.

***Cates v. United States***, 882 F.3d 731 (7th Cir. 2018) The offense of aggravated sexual abuse, 18 U.S.C. § 2241(a), requires as an element the use of force. This element requires more than coercion, psychological coercion, or even force inferred from a disparity in size between the defendant and the victim. Instructing the jury on aggravated sexual abuse in this case was error and trial counsel’s failure to object was prejudicial error.

***Stephenson v. Neal***, 865 F.3d 956 (7th Cir. 2017) Requiring the defendant to wear a stun belt during the penalty phase of this death penalty trial was reversible error. Trial counsel’s failure to object was ineffective assistance of counsel.

***United States v. Laureys***, 866 F.3d 432 (D.C. Cir. 2017) Trial counsel provided ineffective assistance of counsel by failing to secure expert testimony in this Internet child enticement case. An expert could have countered the testimony of the detective that anybody who drives to the location for a proposed rendezvous with a child intends to have sex with the minor. The expert would have testified that this is not necessarily true and then many men would go to the location intending to have sex with an adult, while continuing to fantasize about having sex with a child.

***Jones v. Calloway***, 842 F.3d 454 (7th Cir. 2016) The defendant and two others were charged with murder. The trials were severed. At the first trial, defendant Stone testified that he shot the victim in defense of his brother. The defendant was convicted. At Jones’s trial, the prosecution claimed that he shot the victim. The defense attorney did not call Stone as a witness. The state habeas court held that because Stone presumably would have invoked his fifth amendment right, there was no showing of prejudice. However, if Stone had invoked his fifth amendment right to remain silent, his prior trial testimony would have been admissible. The Seventh Circuit held that trial counsel was ineffective, and the writ was granted.

***Jordan v. Hepp***, 831 F.3d 837 (7th Cir. 2016) Three times during closing argument the prosecutor vouched for the detective’s credibility, stating that the detective would lose her job if she gave false testimony. This type of improper vouching is improper because it introduced information to the jury that was not in evidence (the consequences when a detective provides false testimony). Defense counsel was ineffective in failing to object. The attorney’s deficient performance was prejudicial, though a remand was necessary to determine if the attorney had a strategic reason for failing to object. Gaylord v. United States, 829 F.3d 500 (7th Cir. 2016) Trial counsel was ineffective in failing to challenge the enhancement in this drug case that the offense “caused death” considering the absence of proof that the drugs distributed by the defendant was the but-for cause of the decedent’s death. A remand for a hearing on this section 2255 claim was necessary.

***United States v. Nwoye***, 824 F.3d 1129 (D.C. Cir. 2016) Trial counsel provided ineffective assistance of counsel by his failure to introduce expert testimony about battered spouse syndrome. The defendant claimed that she participated in an extortion scheme because her husband beat her and coerced her to engage in the criminal conduct. The failure to present such evidence resulted in the trial court refusing to instruct the jury on the law of duress, because of the absence of any proof of the “no reasonable alternative” prong of the duress defense’s prerequisites. With such evidence, the instruction would have been required. Thus, the defendant was prejudiced by counsel’s failure to present expert testimony on the phenomenon of battered spouse syndrome.

***United States v. Ragin***, 820 F.3d 609 (4th Cir. 2016) A lawyer who sleeps throughout substantial portions of the trial denies his client effective assistance of counsel and reversal is required, even if the evidence at trial was overwhelming. The error is structural when the lawyer is absent through sleep during substantial portions of the trial, which means the defendant is not required to show prejudice as a result of his sleeping attorney.

***United States v. Abney***, 812 F.3d 1079 (D. C. Cir. 2016) The defendant’s crack cocaine offense occurred prior to the passage of the Fair Sentencing Act in 2010, which dramatically altered the mandatory minimum calculations. His sentencing was

scheduled for the day after Congress passed the bill, but prior to the President signing it into law (which was scheduled to occur in the next few days). The defense attorney failed to request a continuance which would have enabled the defendant to take advantage of the new provisions (and permit a substantially lower sentence). Though it was not certain that the law would be applied retroactively to defendants in Abney's situation (crime committed prior to the passage of the law, but sentencing after passage of the law), it was deficient performance to fail to request a continuance in order to provide Abney the benefit of the new law if it were held to be retroactive (which it was, in Dorsey v. United States, 132 S.Ct. 2321 (2012)).

***Etherton v. Rivard***, 800 F.3d 737 (6th Cir. 2015) The defendant was convicted in state court of possessing cocaine in his vehicle. The prosecution introduced testimony from his co-defendant who was in the car with him, but that witness was significantly impeached. The other evidence (other than finding the cocaine in the vehicle) was a tip received by the police that the car was on the interstate, and it had cocaine in it. This existence of the tip was introduced twice, and the prosecutor referred to the tip in his closing argument. There was no objection to this evidence at trial and the issue was not raised on appeal. The tip was inadmissible evidence and violated the defendant's rights under the Confrontation Clause. The Sixth Circuit granted habeas relief. The Supreme Court reversed: The federal court did not afford sufficient ADEDPA deference to the conclusion of the state courts. The "tip" was not necessarily introduced for the truth of the matter asserted and trial counsel may have had a strategic reason not to object. 578 U.S. --- (2016).

***Ramirez v. United States***, 799 F.3d 845 (7th Cir. 2015) Trial counsel was ineffective in failing to object to the designation of the defendant as a career offender. One of his predicate offenses involving a crime that categorically included reckless conduct and was therefore not properly classified as a violent felony.

***Crace v. Herzog***, 798 F.3d 840 (9th Cir. 2015) Failing to request an instruction on a lesser included offense (which would have eliminated the application of the three-strikes sentencing provision), was ineffective assistance of counsel.

***Gabaree v. Steele***, 792 F.3d 991 (8th Cir. 2015) Trial counsel's failure to object when a doctor, in a child sex abuse prosecution, testified that he "believed the girls," was deficient performance. Trial counsel also failed to object to another doctor's testimony that based on his testing of the defendant, the defendant exhibited signs of (or had the propensity to) commit child sexual abuse. At the habeas hearing, the lawyer did not testify that she followed any particular strategy in the failure to object to this testimony or could not remember if she followed a strategy. On several counts of the conviction, this deficient performance was prejudicial and required setting aside the convictions.

***Zapata v. Vasquez,*** 788 F.3d 1106 (9th Cir. 2015) The defendant was charged with murdering a Mexican man on a street. There was at least one witness who saw the shooting, but he could not hear what was said prior to the two shots being fired, though he could see the shooter gesticulating at the victim. In the prosecutor's closing argument, he repeatedly asked the jury to imagine the last words heard by the victim, "You fuckin' wetback." There was no support for this argument, which was repeated several times during the rebuttal argument. There was no reason for the defense attorney to fail to object to this improper argument. The state habeas court's conclusion that a defense attorney could have thought that this argument would backfire was objectively unreasonable.

***Lee v. Clarke***, 781 F.3d 114 (4th Cir. 2015) The trial attorney provided ineffective assistance of counsel in the defendant's murder trial by failing to request an instruction that defined heat of passion which was an essential element of the lesser-included offense manslaughter.

***Rivas v. Fischer***, 780 F.3d 529 (2d Cir. 2015) The defense attorney's failure to cross-examine the medical examiner about why he changed the possible time of death was deficient performance that required setting aside the conviction. The time of death determination was critical to the defendant's alibi defense. Initially, the medical examiner posited a time of death for which the defendant had an alibi. The medical examiner then changed the possible range of time to defeat the alibi. Cross-examining the medical examiner on this change was essential.

***Peoples v. Lafler***, 734 F.3d 503 (6th Cir. 2013) Trial counsel failed to impeach the credibility of key witnesses with known false testimony. The impeachment would have demonstrated that two of the state's witnesses not only lied, but that they told the same lie, showing that they cooked up their story while sharing a jail cell.

***Griffin v. Harrington***, 727 F.3d 940 (9th Cir. 2013) Trial counsel's failure to object when the key prosecution witness testified without taking an oath was ineffective assistance of counsel. The notion that this was "strategic" was rejected by the Ninth Circuit. The witness was a reluctant witness and initially refused to take the oath. The jury was excused, and the judge admonished the witness that he was required to take the oath. The jury then returned, but no oath was administered. After the witness testified in a manner that did not inculpate the defendant, his prior recorded statement was introduced and that established the defendant's guilt. The Ninth Circuit concluded that failing to object to the witness's unsworn testimony enabled the prosecution to bring in the prior statement; moreover, failing to object led to the state appellate court holding that the issue was waived for appellate purposes.

***Grant v. Lockett***, 709 F.3d 224 (3rd Cir. 2013) Trial counsel's failure to investigate the state's key witness's criminal background and parole status, and the failure to present that impeaching information at trial was ineffective assistance of counsel. The fact that the defendant, in the habeas petition, was not able to present evidence that the witness was promised anything in return for his testimony was not fatal to a showing of prejudice. The impeaching evidence would still have been admissible under Davis v. Alaska and the failure to impeach the witness undermined confidence in the verdict.

***Cannedy v. Adams***, 706 F.3d 1148 (9th Cir. 2013) State trial counsel's failure to locate and present evidence from a witness who could have testified that the alleged child molestation victim had made recanting statements, and the failure to present the victim's recantation statements that she posted on the internet, was ineffective assistance of counsel and a writ was properly granted by the district court.

***McPhearson v. United States***, 675 F.3d 553 (6th Cir. 2012) Defense counsel provided ineffective assistance of counsel at sentencing because of his failure to contend that the cocaine on the defendant's person was for personal use and should not have been considered as relevant conduct in his drug amount calculation.

***United States v. Rodriguez***, 676 F.3d 183 (D. C. Cir. 2012) Trial counsel was ineffective in failing to seek safety-valve relief. This was a matter that could be considered on direct appeal.

***Cornell v. Kirkpatrick***, 665 F.3d 369 (2d Cir. 2011) Trial counsel's failure to challenge venue in this rape prosecution was ineffective assistance of counsel.

***Walker v. McQuiggan***, 656 F.3d 311 (6th Cir. 2011) Trial counsel's failure to recognize the viability of an insanity defense, given the records of defendant's history of mental illness and the absurdity of the defendant's defense to the murder charges was ineffective assistance of counsel.

***Breakiron v. Horn***, 642 F.3d 126 (3rd Cir. 2011) Trial counsel was ineffective in failing to request an instruction on the lesser included offense of theft in this murder / robbery prosecution.

***Hodgson v. Warren***, 622 F.3d 591 (6th Cir. 2010) A witness who had critical exculpatory testimony to offer did not appear at trial and defense counsel took no steps to assure her appearance, including a request for an adjournment or a bench warrant. This was ineffective assistance of counsel.

***United States v. Withers***, 618 F.3d 1008 (9th Cir. 2010) Trial counsel was arguably ineffective in failing to object when the trial court ordered the spectators to leave the courtroom prior to the beginning of jury selection. This was a structural error that violated the defendant's right to a public trial.

***United States v. Washington***, 619 F.3d 1252 (10th Cir. 2010) The defendant's attorney failed to advise the defendant about the consequences of admitting to "relevant conduct" during a presentence interview with a probation officer. As a result, the defendant volunteered that he had engaged in numerous prior drug deals, which resulted in an increased sentence. The Tenth Circuit held that this amounted to ineffective assistance of counsel.

***United States v. Luck***, 611 F.3d 183 (4th Cir. 2010) Trial counsel was ineffective, and the conviction was required to be set aside, because he failed to request a jury instruction that cautioned the jury that an informant's testimony needed to be examined and weighed with greater care than the testimony of an ordinary witness. Even a general credibility instruction does not substitute for an instruction that specifically points out the potential for perjury born out of self-interest.

***White v. Thaler***, 610 F.3d 890 (5th Cir. 2010) Trial counsel was ineffective during trial in numerous respects: (1) Failure to object to the defendant's post-arrest, pre-Miranda silence. Though this did not violate federal constitutional law, the use of post-arrest, pre-Miranda silence is not allowed under Texas law and, therefore, the failure to object was ineffective assistance of counsel; (2) failure to object to evidence that the victim was pregnant. The defendant was charged with driving out of a parking lot of a bar and running over the victim, with whom he had no prior contact. He was charged with murder. The fact that the victim was pregnant was entirely irrelevant to the issues in the trial and the failure to object was prejudicial.

***English v. Romanowski***, 602 F.3d 714 (6th Cir. 2010) State trial counsel was ineffective in failing to adequately investigate the availability of a witness to provide exculpatory information. Because of the failure to adequately investigate the witness's testimony, the attorney believed that the witness had favorable testimony to offer. During trial, he realized that the witness was not that helpful, but he had already promised to call the witness during his opening statement. The decision not to call the witness was a sound decision; the failure to determine this before trial, and then promising to call the witness during opening statement, was ineffective assistance of counsel.

***Wilson v. Mazzuca***, 570 F.3d 490 (2d Cir. 2009) In this armed robbery case, the trial defense attorney made numerous inexplicable trial decisions that prejudiced the defendant, including opening the door to the admissibility of the defendant's prior criminal conduct (because he offered character evidence), allowing a mug shot of the defendant to be introduced, and asking questions that enabled the state to offer evidence of a witness's prior identification of the defendant as the perpetrator, which would not otherwise have been admissible. This was ineffective assistance of counsel that necessitated granting the writ. (During the trial, the trial judge expressed concern about the attorney's conduct and asked him whether he had some strategy to explain these tactics and the attorney responded affirmatively; the Second Circuit rejected this self-serving statement as a basis for rejecting the claim of ineffective assistance of counsel).

***Richards v. Quarterman,*** 566 F.3d 553 (5th Cir. 2009) For a host of reasons, trial counsel provided ineffective assistance of counsel to the defendant. Exculpatory evidence was not presented (in fact, trial counsel prevented the prosecutor from introducing some evidence that was exculpatory); a lesser included offense instruction was not requested; key witnesses were not interviewed prior to trial.

***Toliver v. McCaughtry***, 539 F.3d 766 (7th Cir. 2008) Trial counsel's failure to introduce the testimony of two witnesses whose testimony would have contradicted the theory of the state's case was ineffective assistance of counsel. The attorney did not even

interview one of the exculpatory witnesses and had no valid reason for failing to call the other. In a subsequent appeal, the Seventh Circuit granted the writ after further fact-finding by the trial court.

***Toliver v. Pollard***, 688 F.3d 853 (7th Cir. 2012).

***Tilcock v. Budge***, 538 F.3d 1138 (9th Cir. 2008) Trial counsel's failure to challenge the use of certain prior convictions as qualifying predicate convictions for recidivist sentencing may have been ineffective assistance of counsel. Remand needed to determine if such a challenge would have been successful.

***Malone v. Walls***, 538 F.3d 744 (7th Cir. 2008) Trial counsel's failure to call to the stand an eyewitness who exculpated his client was ineffective assistance of counsel.

***Armstrong v. Kemna***, 534 F.3d 857 (8th Cir. 2008) Trial counsel's failure to research and invoke the Uniform Act to secure the attendance of out-of-state witnesses was ineffective assistance of counsel. A remand to determine whether this was prejudicial was ordered by the Eighth Circuit.

***Girts v. Yanai***, 501 F.3d 743 (6th Cir. 2007) During closing argument, the prosecutor repeatedly referred to the "only person" who could answer certain questions. This amounted to an improper comment on the defendant's failure to testify. Trial counsel's failure to object and preserve the error for appellate review was ineffective assistance of counsel.

***Bell v. Miller***, 500 F.3d 149 (2d Cir. 2007) The victim was robbed in the street and shot. When the police asked him who shot him, he said "a black male wearing a lemon-colored shirt." He lost copious amounts of blood and then slipped into a coma. Eleven days later he began to recover and was asked to identify the assailant again. This time he identified an acquaintance. Trial counsel did not hire an expert to explain the effects of the coma and the drugs the victim had taken and how this could have altered his identification. This was ineffective assistance of counsel.

***Miller v. Martin***, 481 F.3d 468 (7th Cir. 2007) Standing mute at sentencing is not a valid "strategic" decision that a defense attorney can make. The defendant was absent for his trial but appeared for sentencing. The attorney decided that saying nothing at sentencing was a good strategy. The Seventh Circuit disagreed, concluding that this amounted to ineffective assistance of counsel.

***Higgins v. Renico***, 470 F.3d 624 (6th Cir. 2006) On the last day of trial, the prosecutor announced that he had found a key witness and called him to testify. The defense attorney had not obtained this witness's pretrial testimony and asked for an adjournment so he could prepare to cross-examine the witness. The judge denied the request for a several hour break and allowed the attorney a brief time to prepare. When trial re-commenced, the attorney refused to cross-examine the witness in protest. The Sixth Circuit held that this amounted to ineffective assistance of counsel.

***Lankford v. Arave***, 468 F.3d 578 (9th Cir. 2006) Trial counsel in this death penalty case offered a jury instruction on the law of accomplice testimony that was incorrect under state law (it omitted the requirement of corroboration) that lessened the state's burden of proof. This was ineffective assistance of counsel.

***Goodman v. Bertrand***, 467 F.3d 1022 (7th Cir. 2006) Trial counsel was ineffective in failing to subpoena favorable witnesses, failing to file motions in limine regarding supposed threat evidence, opening the door (during direct examination of the defendant) to prior offenses of the defendant, and failing to show a prosecution witness's motive to testify for the prosecution. The Seventh Circuit noted that while viewed in isolation, the attorney's mistakes may not have been prejudicial, but taken in their totality, the errors constituted prejudicial ineffective assistance of counsel.

***Stanley v. Bartley***, 465 F.3d 810 (7th Cir. 2006) Trial counsel failed to interview any witnesses or engage in any meaningful pretrial preparation. His cross-examination of witnesses reflected his lack of preparation. Judge Posner held that a new trial was necessary.

***Reynoso v. Giurbino***, 462 F.3d 1099 (9th Cir. 2006) Trial counsel's failure to question the two eyewitnesses about their expectation of receiving a reward for their participation in the prosecution of the defendant was ineffective assistance of counsel that necessitated setting aside the conviction.

***Medina v. Diguglielmo***, 461 F.3d 417 (3rd Cir. 2006) Trial counsel was ineffective in failing to challenge the competency of a child witness to testify. Nevertheless, counsel's error did not prejudice the defendant and was not a basis for granting the writ.

***Virgil v. Dretke,*** 446 F.3d 598 (5th Cir. 2006) Trial counsel's failure to conduct further voir dire, or to move to remove certain prospective jurors for cause or peremptorily was ineffective assistance of counsel. The jurors expressed an inability to be fair. One juror said that because his mother had been mugged, he could not be fair. Another juror said that his relationship to law enforcement officers would preclude him from being an impartial juror. Failing to move to strike the jurors for cause – and failing to exercise a peremptory strike against these jurors – was not a matter of strategy. In addition to the decision's analysis of the ineffective claim, the court extensively reviews the case law relating to the requirement of ensuring that jurors are impartial.

***Davis v. Grigas***, 443 F.3d 1155 (9th Cir. 2006) The trial attorney was ineffective in incorrectly advising the court about the sentence to which the defendant had stipulated as part of his plea. The stipulated sentence was a sentence of 6-to-15-year caps. But the attorney told the sentencing judge that the defendant stipulated to a sentence of 15 years. This was grounds for federal habeas relief.

***United States v. Alferahin,*** 433 F.3d 1148 (9th Cir. 2006) The defendant was charged with a violation of 8 U.S.C. § 1425(a), knowingly procuring naturalization contrary to law. The trial court did not instruct the jury on the concept of materiality in connection with the false statement that the defendant allegedly made on his naturalization application. The trial defense

attorney acquiesced to the failure to instruct the jury on the concept of materiality. The Ninth Circuit held that materiality is an element of the offense, the failure to instruct the jury on this essential element was plain error and the attorney was ineffective in failing to object.

***Thomas v. Varner***, 428 F.3d 491 (3rd Cir. 2005) Trial counsel was ineffective in failing to challenge the admissibility of the out-of-court and the in-court identification of his client by one of the victims. The victim was initially unable to identify the perpetrator. He was shown numerous photos and still could not identify the perpetrator. Finally, the officer took out two photos and showed them to the victim, who agreed that one of the photos showed the perpetrator. This was an impermissibly suggestive identification procedure. Counsel initially objected pretrial to any identification evidence, but the victim failed to identify the defendant in court during that hearing, so the motion was withdrawn. At trial, however, the victim spontaneously identified the defendant. Trial counsel failed to object or seek any remedial measure. This was ineffective assistance of counsel.

***Hodge v. Hurly***, 426 F.3d 368 (6th Cir. 2005) The Sixth wrote, "During his egregiously improper closing argument, the prosecutor commented on the credibility of witnesses, misrepresented the facts of the case, made derogatory remarks about the defendant, and generally tried to convince the jury to convict on the basis of bad character, all while defense trial counsel sat idly by. We conclude that defendant's trial counsel was constitutionally ineffective in failing to object to this misconduct . . ."

***Martin v. Grosshans***, 424 F.3d 588 (7th Cir. 2005) At defendant's state child molestation trial, the state introduced evidence that years after the alleged act of molestation, the defendant, a priest, disagreed with a proposal for how to handle allegations of abuse at the church. The state argued that this reflected his consciousness of guilt. The Seventh Circuit held that failing to object to this testimony, which was irrelevant and prejudicial, was ineffective assistance of counsel. In addition, the failure to object to the defendant's failure to answer questions posed by an investigator, because his lawyer advised him not to answer questions was also ineffective assistance.

***Ward v. Dretke***, 420 F.3d 479 (5th Cir. 2005) Trial counsel was ineffective in failing to object to closing argument statements by the prosecutor that the jury would be ridiculed if they sentenced the defendant too leniently; and that they should use Biblical standards in imposing punishment.

***Miller v. Dretke***, 420 F.3d 356 (5th Cir. 2005) Trial counsel performed deficiently by failing to introduce various medical records and testimony regarding the defendant that demonstrated severe mental health issues that would have had an impact on her sentencing.

***Smith v. Dretke***, 417 F.3d 438 (5th Cir. 2005) Trial counsel's failure to present evidence in this murder / self-defense case about the victim's long history of violence was ineffective assistance of counsel.

***Tenny v. Dretke***, 416 F.3d 404 (5th Cir. 2005) Trial counsel was ineffective in failing to fully investigate and present evidence at trial relating to the defendant's viable self-defense claim.

**United States v. Holder**, 410 F.3d 651 (10th Cir. 2005) The trial court erred in failing to conduct an evidentiary hearing regarding trial counsel's failure to call to the stand an eyewitness to the shooting that the defendant was charged with. The eyewitness would have supported the defendant's self-defense claim and there was no evidence in the record to explain any strategic basis for failing to call this witness to the stand.

***United States v. McCoy***, 410 F.3d 124 (3rd Cir. 2005) The defendant was charged with a drug offense. The government threatened to introduce a prior firearm conviction as Rule 404(b) evidence unless the defendant stipulated to the defendant's "state of mind" about the drug offense. The defendant agreed to the stipulation which informed the jury that the defendant denied possessing the duffel bag, but if the jury found that the defendant did possess the duffel bag, it could also find, based on the stipulation, that the defendant knew its contents and intended to possess the drugs. While this might be a reasonable stipulation in some circumstances – and was, in fact a reasonable stipulation for the co-defendant to enter – for the defendant in this case, the stipulation was a poor choice for two reasons: first, he unquestionably did possess the duffel bag at some point; and second, the prior firearm conviction, though damaging, did not really prove his state of mind in possessing the duffel bag (the co-defendant had a prior drug conviction, thus explaining his rationale for entering into the stipulation). A remand was necessary to fully develop the prejudice prong of this ineffective claim.

***Henry v. Poole***, 409 F.3d 48 (2d Cir. 2005) The defense attorney's inadequate performance in presenting a flawed alibi defense was ineffective assistance of counsel. The alibi was for the wrong night.

***Cox v. Donnelly***, 387 F.3d 193 (2d Cir. 2004) Trial counsel's failure to object to an improper jury instruction in this murder case (an instruction that minimized the state's burden of proving the defendant's intent – a Sandstrom violation), was ineffective assistance of counsel, though a remand was necessary to inquire into the reason (if any) that prompted the attorney's failure to object. Following remand, the Second Circuit agreed with the District Court that the defense attorney's failure to object was objectively unreasonable and warranted granting habeas relief.

***Miller v. Webb***, 385 F.3d 666 (6th Cir. 2004) Trial counsel was ineffective in failing to request that a juror be excused for cause – and then failing to utilize a peremptory strike on the juror. During voir dire, the juror expressed her bias in favor of the government's key witness in this murder case. She knew the witness from Bible study courses. The juror should have been removed for cause.

***United States v. Colon-Torres,*** 382 F.3d 76 (1st Cir. 2004) There was considerable evidence to find that the defense attorney rendered ineffective assistance of counsel during the sentencing proceedings. The court – reviewing the case on direct appeal –

decided that a collateral attack was not necessary, though further evidence was required in the lower court. The attorney failed to investigate his client's criminal history before entering into a plea agreement. (The attorney did not realize that his client was a career offender). Counsel was also arguably ineffective in failing to move to withdraw the plea once it was learned that the envisioned sentence was an impossibility due to the defendant's criminal history.

***Earls v. McCaughtry***, 379 F.3d 489 (7th Cir. 2004) The defendant was charged with molesting a six-year-old child. There were no witnesses to the events and no physical evidence corroborating the child's statements. A social worker who interviewed the child and testified as an expert said that she believed the child. This was inadmissible evidence and the attorney's failure to object amounted to ineffective assistance of counsel. In addition, during the videotape of the child prepared by the social worker, the social worker told the child that she believed her, and the defendant should not have done that to her. The attorney's failure to redact the tape was ineffective assistance of counsel.

***Soffar v. Dretke***, 368 F.3d 441 (5th Cir. 2004) Trial counsel's failure to investigate and present the inconsistent statements that were made by the only survivor of a robbery (three others were killed) – inconsistencies about identification that dramatically contradicted the defendant's own alleged confession – amounted to ineffective assistance of counsel which required setting aside the conviction. For example, the witness stated that there was only one perpetrator who wore no mask and that the victims were quiet before they were killed. The defendant's confession, on the other hand, indicated that there were two perpetrators, that they wore masks and that the victims were screaming before they were killed. Trial counsel also failed to employ a ballistic expert. Such testimony also would have contradicted the defendant's alleged confession (and the state's theory of the events).

***Reagan v. Norris***, 365 F.3d 616 (8th Cir. 2004) Defendant was charged with murdering his girlfriend's young child. The girlfriend was also charged with the homicide and ultimately entered a guilty plea to a lesser charge. The defendant claimed that if he was the cause of death, it was accidental. In the jury instruction, the trial court erroneously failed to tell the jury that to be found guilty, the defendant had to knowingly cause the death of the victim. Instead, the instruction simply stated that the defendant had to be shown to have caused the death. Trial counsel's failure to object to this omission in the instruction was ineffective assistance of counsel necessitating a new trial.

***Alaniz v. United States***, 351 F.3d 365 (8th Cir. 2003) Trial counsel was ineffective in failing to challenge the use of an uncharged drug offense to increase the mandatory minimum sentence.

***Caver v. Straub***, 349 F.3d 340 (6th Cir. 2003) Appellate counsel was ineffective in failing to raise trial counsel's ineffectiveness in failing to be present when the jury sent a note back during deliberations and when the trial court re-charged the jury.

***United States v. Conley***, 349 F.3d 837 (5th Cir. 2003) Trial counsel was ineffective in failing to challenge the defendant's sentence on the § 371 conspiracy count. In the trial court, the parties and the court erroneously believed the conviction was for a money laundering conspiracy (§ 1956(h)). Section 371 limits exposure to five years, while § 1956(h) permits a twenty-year sentence. It was ineffective to fail to object to a sentence that exceeded the statutory maximum. Moreover, appellate counsel was ineffective in failing to appeal this error.

***U.S. ex rel. Hampton v. Leibach***, 347 F.3d 219 (7th Cir. 2003) Trial counsel's failure to investigate the facts of this case necessitated the granting of habeas relief. Counsel failed to interview witnesses who were present at the scene of the alleged sexual assault (a brutal gang assault during a rock concert). The court noted that the eyewitness testimony that was presented in this case was subject to the shortcomings that infect eyewitness testimony generally, making it "frequently less reliable than other types of evidence." See Wright v. Gramley 125 F.3d at 1043 n. 4. The court further held that defense counsel's unfulfilled promises during opening statement also amounted to ineffective assistance of counsel: he promised that his client would testify and state that he did not participate in the assault, and he promised that there would be no proof that the defendant was a member of a gang. Both promises were broken. "A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it as made."

***United States v. Smack***, 347 F.3d 533 (3rd Cir. 2003) Trial counsel was arguably ineffective in failing to raise at sentencing the sentencing guideline application note that reduces the drug quantity attributable to the defendant in a case involving a reverse sting, if he either did not intend to transact the quantity involved in the deal or lacked the funds necessary to complete the deal. Remand was necessary to further develop the facts.

***Davis v. Secretary for Dept. of Corrections***, 341 F.3d 1310 (11th Cir. 2003) When state trial counsel fails to preserve a Batson challenge for appellate review, the federal habeas court assesses the ineffectiveness in same manner that an attorney's ineffectiveness on appeal would be assessed: that is, whether the issue would have resulted in reversal of the conviction had it been properly preserved. Thus, the question of prejudice focuses on the merits of the Batson challenge, not the prejudice to the determination of guilt / innocence.

***Paine v. Massie***, 339 F.3d 1194 (10th Cir. 2003) Trial counsel's failure to introduce expert evidence about battered spouse syndrome was ineffective assistance of counsel that required a remand for the purpose of conducting a hearing on the issue of prejudice.

***United States v. Mullins***, 315 F.3d 449 (5th Cir. 2002) Defense counsel prevented the defendant from testifying in his firearms trial. Council's decision was based on the desire to keep out impeaching information, such as the defendant's prior drug dealing and bad check charges. The Fifth Circuit concludes that barring the defendant from testifying is deficient performance under Strickland v. Washington, though there was no prejudice in this case. Counsel is obligated to advise the defendant of the

strategy decisions being made, but with regard to whether the defendant should testify, the defendant makes the ultimate decision, and that decision may not be vetoed by counsel.

***United States v. Leonti,*** 326 F.3d 1111 (9th Cir. 2003) The defendant was entitled to effective assistance of counsel in the post-plea, presentencing phase of his case. Though a defendant does not have the right to the effective assistance of counsel during an interview with a probation officer preparing a presentence report, the attorney in this case was needed to facilitate discussions between the defendant and the prosecutor that were essential to the defendant's cooperation agreement. The petitioner also claimed that his attorney should have helped modify a release order that required him to wear an ankle bracelet, which limited his ability to make deals for the investigators. The Ninth Circuit agreed, in principle, and remanded for a hearing on the question of whether the attorney was, in fact, ineffective in these endeavors.

***Eagle v. Linahan***, 279 F.3d 926 (11th Cir. 2001) At trial, defense counsel raised a Batson claim. The prosecutor responded that the ratio of blacks on the jury mirrored the ratio in the venire, thus there could be no Batson claim. The judge agreed with this argument, but commented at the conclusion of the Batson hearing, ``I think both of you were doing what you could to get the different races off.'' Appellate counsel was ineffective in failing to raise what was a blatant error of law committed by the trial court in denying the Batson claim on an improper basis (comparing the venire with the jury), especially in light of the judge's comment that demonstrated that the Batson claim was meritorious.

***Ouber v. Guarino***, 293 F.3d 19 (1st Cir. 2002) After promising to the jury emphatically during opening statement that the defendant would testify, the defense attorney decided not to call the defendant to the stand. This was ineffective assistance of counsel requiring that a writ of habeas corpus be granted.

***United States v. Holman***, 314 F.3d 837 (7th Cir. 2002) Though it may be sound trial strategy, an attorney may not concede guilt on one count of an indictment without the client's permission.

***McGurk v. Stenberg***, 163 F.3d 470 (8th Cir. 1998) Trial counsel's failure to determine that he had a right to a jury trial for his third-offense DWI amounted to ineffective assistance of counsel.

***Bloomer v. United States***, 162 F.3d 187 (2d Cir. 1998) The district court's numerous "embellishments" on the definition of proof beyond a reasonable doubt were erroneous. The trial court instructed the jury that if they did not find the elements proven beyond a reasonable doubt, the jury "could" return a not guilty verdict. Absent such proof, the jury would be required to return a not guilty verdict. In addition, the trial court misleadingly explained, "To support a verdict of guilty, you need not find every fact beyond a reasonable doubt." The court also incorrectly stated, "So a reasonable doubt means only a substantial doubt." The Second Circuit also concluded that the failure to object to these improper instructions was probably ineffective assistance of counsel, but additional testimony was required in the lower court before this decision could be made with finality.

***Tejeda v. Dubois***, 142 F.3d 18 (1st Cir. 1998) The state trial disintegrated into a battle between defense counsel and the judge. Counsel yelled at the judge, threw his papers around the court, and made facial expressions. Counsel was ultimately held in contempt. Counsel changed his tactic from attempting to defend the defendant to attempting to antagonize the judge. As a result, counsel neglected to exploit some of the inconsistencies in the prosecution witnesses' testimony. Whether the unfair trial which resulted was caused by the intolerance of the judge, or the tactics of the defendant was hard to determine, but one way or the other, the defendant was denied the effective assistance of counsel.

***Groseclose v. Bell***, 130 F.3d 1161 (6th Cir. 1997) Defendant's counsel was ineffective during the guilt phase of this death penalty trial. Counsel had no independent theory of the defense, relying instead, on the defenses of the codefendants. He waived closing argument, urged the defendant not to testify (though the defendant had no record and always maintained his innocence), and cross-examined fewer than half of the state's witnesses. He introduced no evidence in defense of the defendant.

***United States v. Soto***, 132 F.3d 56 (D.C. Cir. 1997) Trial counsel's failure to request a downward adjustment for minor role under the Sentencing Guidelines amounted to ineffective assistance of counsel. The defendant was a courier who was carrying drugs for the first time from New York to North Carolina. She was not even aware of the quantity of drugs she was transporting. Though counsel requested a downward departure, he never requested a downward role adjustment.

***United States v. Russell***, 221 F.3d 615 (4th Cir. 2000) The government moved in limine to introduce three convictions of the defendant if he testified. The defendant told his attorney that two of the convictions had been overturned. The attorney did not investigate, in fact, he advised the defendant to admit the prior convictions during direct examination. In fact, two of the convictions had been vacated and were invalid. The attorney's failure to determine the status of the two convictions was unreasonable and ineffective assistance and necessitated vacating the conviction.

***Washington v. Smith***, 219 F.3d 620 (7th Cir. 2000) Counsel's failure to read the police report in this case, and his failure to assure the presence of several alibi witnesses was deficient and prejudiced the defendant. Writ granted. The failure to track down the witnesses and to get them under subpoena in enough time to assure their appearance cannot be excused based on crowded court dockets and the uncertainty about when a trial will actually begin. Additionally, telling his incarcerated client that he should arrange for the appearance of favorable witnesses is not satisfactory.

***Paters v. United States***, 159 F.3d 1043 (7th Cir. 1998) Prior to trial, the government offered the defendant a five-year deal. Defense counsel incorrectly advised the defendant that he did not face more than that if he went to trial. Counsel failed to explain the concept of relevant conduct, or acceptance of responsibility. Following a conviction at trial, the defendant was sentenced to 121 months. The government and the defendant agreed that the trial attorney's performance was deficient. The Seventh Circuit

held that the deficient performance was prejudicial, if the defendant could establish, on remand, that but for the incorrect advice, he would have accepted the plea agreement.

***Genius v. Pepe***, 50 F.3d 60 (1st Cir. 1995) The defendant's state trial counsel was ineffective in failing to pursue an insanity defense. Experts had already determined that the defendant was mentally deficient.

***Anderson v. Butler***, 858 F.2d 16 (1st Cir. 1988) During his opening statement, the defense attorney promised that he would call an expert witness on the issue of defendant's psychiatric problems. At trial, however, the defense attorney changed his mind and did not introduce this testimony. The First Circuit holds that this is ineffective assistance of counsel.

***Henry v. Scully***, 78 F.3d 51 (2d Cir. 1996) Trial counsel was ineffective in failing to make a hearsay and confrontation clause objection to the admissibility of a co-defendant's confession which implicated the defendant.

***Tippins v. Walker***, 77 F.3d 682 (2d Cir. 1996) Trial counsel slept through substantial portions of the petitioner's trial. This is not consistent with the Sixth Amendment right to effective assistance of counsel. The petitioner's conviction was set aside, even though he could point to no objection that should have been raised, or other specific inadequacy of his trial counsel — other than the fact that he was virtually unconscious during the testimony of several witnesses who testified against the defendant.

***DeLuca v. Lord***, 77 F.3d 578 (2d Cir. 1996) Trial counsel was ineffective in failing to develop and present a defense based on extreme emotional disturbance.

***Berryman v. Morton***, 100 F.3d 1089 (3rd Cir. 1996) Three men were charged with raping a woman. One defendant was tried first, and that case involved two trials because of a hung jury. At the third trial, the petitioner's trial, his attorney failed to use transcripts from the first two trials to expose inconsistencies in the victim's identification of the defendant. Counsel also inexplicably opened the door to evidence that the co-defendant, and at least implicitly the petitioner himself, was the subject of an armed robbery/homicide investigation. Finally, counsel was ineffective in failing to call as a witness two individuals who could provide exculpatory evidence.

***Government of Virgin Islands v. Weatherwax***, 20 F.3d 572 (3rd Cir. 1994) On the third day of defendant's murder trial, a local newspaper purported to recount the defendant's testimony, but did so in a distorted and prosecution-oriented manner. Jurors were seen carrying the newspaper into the jury room. This was brought to the attention of the defense attorney, but he made no effort to seek a voir dire of the jury. This sets forth a non-frivolous case of ineffective assistance of counsel, requiring further factual development in the trial court.

***United States v. Headley***, 923 F.2d 1079 (3rd Cir. 1991) The defendant was deprived of effective assistance of counsel when his attorney failed to urge that the trial court award a downward adjustment for the defendant's role in the offense. This could be addressed on direct review and did not require a habeas petition.

***Government of the Virgin Islands v. Forte***, 865 F.2d 59 (3rd Cir. 1989) The attorney's failure to make a Batson challenge rendered him ineffective. Curiously, Batson had not been decided at the time this trial occurred. Nevertheless, the defendant, as well as a consulting attorney, had instructed the trial attorney to make the Batson objection. The attorney later explained that because she had frequently excluded whites from juries when she was representing black defendants, she was "too embarrassed" to make this type of challenge.

***United States v. Breckenridge***, 93 F.3d 132 (4th Cir. 1996) Trial counsel was ineffective in failing to argue that defendant's prior convictions were related, and therefore did not subject him to career offender status. The case was remanded to determine whether, in fact, the prior offenses were related, and thus whether the ineffective assistance prejudiced the defendant.

***Luchenburg v. Smith***, 79 F.3d 388 (4th Cir. 1996) The defendant was convicted of the "compound crime" of using a handgun during the commission of a crime of violence. The trial attorney failed to request an instruction cautioning the jury that they must first convict the defendant of the crime of violence, before they could convict the defendant of using a handgun during the crime of violence, and cautioning the jury that common law assault is not a crime of violence. Instead, the court's instruction could have conveyed to the jury that the use of a weapon might be considered in deciding whether the defendant committed a crime of violence (which is not the law in Maryland). Trial counsel's failure to request this instruction and his failure to object to the instruction that was given was prejudicial.

***United States v. Tatum***, 943 F.2d 370 (4th Cir. 1991) The defendant was charged with bankruptcy fraud for having failed to list certain automobiles on his assets schedule. He was represented initially by an attorney who worked for the firm which advised him not to list the cars (another of whose lawyers owned one of the cars). That attorney was eventually disqualified, but he remained in the case and sat at counsel table and advised the new defense attorney. That attorney's participation, even as second chair, represented ineffective assistance of counsel because of the severe conflict.

***Tucker v. Day***, 969 F.2d 155 (5th Cir. 1992) At defendant's re-sentencing, the appointed counsel did not consult with him, had no knowledge of the facts, and acted as a mere spectator. The defendant was denied the assistance of counsel.

***Gravley v. Mills***, 87 F.3d 779 (6th Cir. 1996) The prosecutor improperly introduced evidence and argued to the jury the significance of this evidence, relating to the defendant's post-Miranda silence. The defense counsel did not object and did not raise this issue in the new trial motion, or on direct appeal. This was ineffective assistance of counsel. The court found that this constituted the "cause" necessary to excuse the procedural default and granted the writ.

***Ward v. United States***, 995 F.2d 1317 (6th Cir. 1993) Defendant's trial counsel was ineffective in several ways: he opened the character door by his inept cross-examination of one witness; was inappropriately hostile to the prosecutor and acted in such a way that the jury was snickering at him.

***Crowe v. Sowders,*** 864 F.2d 430 (6th Cir. 1989) During the course of the defendant's trial, the judge explained to the jury the parole consequences of a verdict. The defense attorney did not object, did not move for a mistrial and failed to move for a new trial after the verdict was returned. This was ineffective assistance of counsel.

***Green v. Arn,*** 809 F.2d 1257 (6th Cir. 1987) Defense counsel absented himself from trial during portions of the proceedings. This constitutes ineffective assistance of counsel per se. After remand from the Supreme Court to consider whether the issue was moot, because of defendant's release from parole, the Sixth Circuit reinstated its original opinion. 839 F.3d 300 (6th Cir. 1988).

***Patrasso v. Nelson***, 121 F.3d 297 (7th Cir. 1997) Trial counsel was ineffective in the penalty phase of this murder (non-death penalty) trial. There was considerable mitigating evidence, which was not presented by the defense counsel, and, for all relevant purposes, counsel was a mere spectator at the sentencing hearing.

***Nichols v. United States***, 75 F.3d 1137 (7th Cir. 1996) The petitioner was entitled to an evidentiary hearing to determine whether his trial counsel was ineffective in failing to challenge the relevant conduct that the probation officer recommended should be considered in imposing a sentence under the Sentencing Guidelines.

***Williams v. Washington***, 59 F.3d 673 (7th Cir. 1995) Defense counsel failed to review discovery materials provided by the state; failed to object to the admissibility of certain evidence which was introduced in violation of the rules against hearsay; and apparently conducted no investigation of the case prior to trial.

***Stoia v. United States***, 22 F.3d 766 (7th Cir. 1994) The defendant was represented at trial by certain attorneys but claimed in this §2255 petition that another attorney, who did not file an appearance, was directing trial strategy. An ineffective assistance of counsel claim may be valid, even with respect to an attorney who has not filed an appearance. In this case, the non-appearing attorney was burdened with a conflict of interest. The non-appearing attorney made numerous tactical decisions which the defendant followed, including requesting a continuance, not interviewing certain witnesses, and recommending that the defendant not testify in his own behalf. He also failed to file any pretrial motions, which was his delegated responsibility in the case. The non-appearing attorney's conflict resulted from an agreement he had with the government, as part of his own plea agreement, that if he would not represent any person charged with crimes. The attorney was also involved in undercover work with law enforcement.

***Moffett v. Kolb***, 930 F.2d 1156 (7th Cir. 1991) At defendant's state attempted murder trial, trial counsel failed to impeach a witness (who testified that the defendant shot the gun) with prior statements that another person shot the gun. This was ineffective assistance of counsel. Though counsel asked the witness whether he had made inconsistent statements, he failed to produce the statements when the witness denied the prior inconsistent statement.

***Harris v. Reed***, 894 F.2d 871 (7th Cir. 1990) During opening statements, the defense attorney promised the jury that an alternative theory of the killing would be presented; the defense presented no evidence, however, relying instead on the perceived weakness of the State's case. Furthermore, there were two witnesses available to the defense to suggest that a person other than the defendant had committed the crime. This constitutes ineffective assistance of counsel.

***United States v. Myers***, 892 F.2d 642 (7th Cir. 1990) Trial counsel failed to review Brady material turned over by the government and failed to submit an instruction designed to limit the impact of certain evidence. A full evidentiary hearing was necessary to determine whether the defendant was, in fact, denied effective assistance of counsel.

***Freeman v. Class***, 95 F.3d 639 (8th Cir. 1996) Trial counsel's failure to request a cautionary instruction amounted to ineffective assistance of counsel. Specifically, the state relied on the testimony of an accomplice and under state law the defendant was entitled to an instruction that cautioned the jury about the reliability of accomplice testimony. Trial counsel was also ineffective in offering hearsay evidence that implicated the defendant. Finally, counsel was ineffective in failing to object when the state offered evidence of the defendant's silence after being advised of his Miranda rights.

***Starr v. Lockhart***, 23 F.3d 1280 (8th Cir. 1994) Trial counsel was ineffective in failing to object to jury instructions during the penalty phase of this death penalty trial relating to "pecuniary gain" and "heinous, atrocious, or cruel" aggravating circumstances. Both aggravating circumstances had been found unconstitutional at the time of the defendant's trial. Though the "pecuniary gain" circumstance was later found to be constitutional (and thus there was no prejudice from failing to object to this instruction), the "heinous, atrocious, or cruel" circumstance was unconstitutionally vague and did not adequately limit the death-eligible defendants. See Godfrey v. Georgia, 446 U.S. 420 (1980); and Maynard v. Cartwright, 486 U.S. 356 (1988). Though one aggravating circumstance was still valid, in a "weighing" state, such as Arkansas (the jury weighs the aggravating circumstances against the mitigating circumstances), if there is one invalid aggravating circumstance, the death sentence must be set aside.

***Prichard v. Lockhart***, 990 F.2d 352 (8th Cir. 1993) The defendant was sentenced as a recidivist because of a prior out-of-state drug conviction. The plain language of the statute under which he was sentenced, however, precluded the use of out-of-state convictions. His trial attorney's failure to object to the use of this prior conviction was plainly ineffective and prejudicial. The fact that the state statute had not been construed by the state court to preclude the use of out-of-state convictions until after the sentence was imposed in this case is not relevant, because the statute plainly barred consideration of such convictions.

***Houston v. Lockhart***, 982 F.2d 1246 (8th Cir. 1993) Though an evidentiary hearing was necessary to develop the record, the petitioner set forth a valid ineffective assistance of counsel claim. There was an oral agreement between the defense attorney and the prosecutor to stipulate to the admissibility of polygraph results. The defendant passed the polygraph. An oral stipulation, however, was not sufficient under state law. The attorney was ineffective in not requesting that the agreement be in writing prior to the polygraph; or in at least asking that it be reduced to writing after the polygraph results were obtained.

***United States v. Span***, 75 F.3d 1383 (9th Cir. 1996) Trial counsel was ineffective in failing to request a jury instruction on an applicable affirmative defense in this assault case; failing to object to the trial court's substitute instruction; and failing to present available evidence as a foundation for the affirmative defense. In summary, trial counsel failed to present the excessive force defense to a charge of assaulting a federal officer, relying instead on a simple self-defense defense.

***Crotts v. Smith***, 73 F.3d 861 (9th Cir. 1996) The defendant was tried in state court on a charge of assaulting a police officer. He had previously been convicted of a sexual offense. A witness to the assault on the police officer was asked by the prosecutor whether the defendant had told her that he had "just done ten years for killing a cop?" The prosecutor also asked the defendant, on cross-examination, whether he had told the witness that he was "wanted" for killing a cop. The prosecutor knew, in fact, that the defendant had never been convicted for such an offense. The defense attorney did not object. This was ineffective assistance of counsel. Even if the defendant had made these boastful (but untruthful) statements to the witness, they were not admissible, because not probative of whether he assaulted the police officer in this case.

***Tomlin v. Myers***, 30 F.3d 1235 (9th Cir. 1994) The petitioner's trial counsel failed to challenge an out-of-court identification (because it was conducted without the benefit of counsel), as well as the in-court identification which may have been the product of the unlawful out-of-court identification. This was ineffective assistance of counsel, necessitating the granting of habeas relief.

***Sanders v. Ratelle***, 21 F.3d 1446 (9th Cir. 1994) The defendant's attorney was aware that the defendant's brother had confessed to his mother that he was the person who killed the victim. Nevertheless, the attorney did not pursue this defense and did not call the brother to the stand, or seek to admit his out-of-court confession under the applicable state rule of evidence which would permit the introduction of a statement against interest.

***United States v. Swanson***, 943 F.2d 1070 (9th Cir. 1991) Conceding during the closing argument that there was no reasonable doubt that the defendant robbed the bank was grossly ineffective – a total breakdown in the adversary system which required granting a new trial even without any inquiry into actual prejudice.

***Williamson v. Ward***, 110 F.3d 1508 (10th Cir. 1997) Trial counsel was ineffective in failing to investigate and present to the jury the fact that prior to defendant's trial, another individual had confessed to the murder and in failing to investigate the defendant's mental illness which might have explained his "confession" – his confession was that he "dreamed" that he had committed the murder. There was considerable evidence in support of the defendant's mental illness. There was a reasonable probability that the defendant was tried while incompetent, and that his "dream confession" was a product of his mental illness. Counsel (who was blind) had his son sit near him during the trial and had instructed him to wrestle the defendant to the ground if he made any sudden movements toward him during the trial.

***United States v. Glover***, 97 F.3d 1345 (10th Cir. 1996) Trial counsel was ineffective in failing to challenge whether the methamphetamine that was the subject of the defendant's sentencing was "d" or "l" meth.

***Capps v. Sullivan***, 921 F.2d 260 (10th Cir. 1990) The defendant testified, admitting every element of the offense of trafficking in heroin. There was evidence to support a defense of entrapment, but the attorney opted instead to go for jury nullification. The failure to request an entrapment instruction was ineffective assistance.

***United States v. Cronic***, 839 F.2d 1401 (10th Cir. 1988) On remand from the United States Supreme Court which revamped the rules for gauging ineffective assistance of counsel, this case was again reversed by the Tenth Circuit on grounds that the attorney was ineffective. The attorney failed to assert a good faith defense in this mail fraud prosecution and failed to investigate the bank's acceptance of security for the overdraft upon which this prosecution was based.

***Nichols v. Butler,*** 953 F.2d 1550 (11th Cir. 1992) Counsel threatened to withdraw from representing the defendant mid-trial if the defendant insisted on testifying. This amounted to ineffective assistance of counsel under the United States v. Teague standard.

***United States v. Teague***, 953 F.2d 1525 (11th Cir. 1992) A defendant has the fundamental right to testify in his own defense. This may only be waived personally, not solely through counsel. Thus, if the attorney vetoes the defendant's decision to testify, the defendant may challenge his conviction. After rehearing the case en banc, the Eleventh Circuit re-affirmed the principle that the defendant has a fundamental right to testify and that the right may not be unilaterally waived by his attorney. However, the facts in this case did not show that the defendant's will was overborne. Rather, the attorney urged the defendant not to testify and the defendant agreed. Consequently, there was no ineffective assistance of counsel.

***Smelcher v. Alabama***, 947 F.2d 1472 (11th Cir. 1991) Defendant's trial attorney failed to object to the trial judge's prohibition of any evidence that the rape victim had had prior sexual liaisons with the defendant. A hearing on the attorney's ineffectiveness was required.

***Oyola v. Bowers***, 947 F.2d 928 (11th Cir. 1991) Defendant's trial counsel was ineffective in failing to object to a jury instruction which incorrectly set forth the elements of the offense of conviction.

***Thomas v. Harrelson***, 942 F.2d 1530 (11th Cir. 1991) The proof at trial amounted to a constructive amendment of the indictment. The trial attorney failed to object to this variance and did not preserve the issue for appellate review. This was ineffective assistance of counsel.

***Hollis v. Davis***, 941 F.2d 1471 (11th Cir. 1991) In 1959, the defendant was convicted of burglary. His sentence, which he was still serving in 1990, was 99 years. He was denied effective assistance of counsel based on his attorney's failure to challenge the pervasive discrimination in both the grand and petit juries in the Alabama jurisdiction in 1959.

***Atkins v. Attorney General of Alabama***, 932 F.2d 1430 (11th Cir. 1991) Trial counsel was ineffective in failing to object to the introduction of defendant's fingerprint card which contained a notation of the defendant's prior arrest.

***Nixon v. Newsome,*** 888 F.2d 112 (11th Cir. 1989) The defendant was denied effective assistance of counsel considering his lawyer's failure to cross-examine the only eyewitness to the murder with regard to her prior sworn testimony that it was not the defendant, but another person who shot the victim. The lawyer had the transcript of this prior testimony at counsel table but failed to introduce the prior inconsistent statements which would have been admissible as substantive evidence under Georgia law.

***Harrison v. Jones***, 880 F.2d 1279 (11th Cir. 1989) Under Alabama law, a former plea of nolo contendere is not admissible to enhance the defendant's sentence. The lawyer's failure to object to such evidence at the sentencing of his client operated to deprive the defendant of effective assistance of counsel.

***Harding v. Davis***, 878 F.2d 1341 (11th Cir. 1989) The trial judge directed a verdict of guilty against the defendant. The failure to object represents ineffective assistance even without a showing of prejudice.

***Chatom v. White***, 858 F.2d 1479 (11th Cir. 1988) The Eleventh Circuit holds that the failure to object to the introduction of an "atomic absorption test" which reportedly demonstrated that an accomplice had not fired the murder weapon constituted ineffective assistance of counsel. Because the case against the defendant was entirely circumstantial, the test had the potential of conclusively establishing for the jury that the defendant, and not the accomplice, had fired the gun.

***Julius v. Johnson***, 840 F.2d 1533 (11th Cir. 1988) Defense counsel was ineffective for failing to request a cautionary instruction regarding the admissibility of the defendant's prior murder conviction during the guilt phase of his murder prosecution. This was harmless error in this case.

***Quartararo v. Fogg***, 679 F.Supp. 212 (E.D.N.Y. 1988) Defense counsel was ineffective in failing to object to a whole range of hearsay evidence which the prosecutor introduced. Police officers were permitted to testify about what the defendant's parents had opined about the truthfulness of their son and their belief that the defendant's denials were false. The attorney also failed to object to the prosecutor's closing argument which relied on this testimony. The Second Circuit affirmed: 849 F.2d 1467.

***ATTORNEY-CLIENT ISSUES (Attorney-Client Privilege)***

***Mohawk Industries Inc. v. Carpenter,*** 130 S. Ct. 599 (2009) Justice Sotomayor, in her first opinion, holds (for the unanimous Court) that a district court order that compels disclosure of what is claimed to be attorney-client privileged material is not immediately appealable under the collateral order doctrine. Though the "cat is out of the bag" argument has some merit, the normal rules that prohibit piecemeal appeals controls. The aggrieved party may appeal after trial and, if successful, can win a new trial at which the information may not be used. Also, the party may simply refuse to comply, suffer an order of contempt, and appeal that order. Third, the party may seek to invoke 28 U.S.C. § 1292(b) which authorizes the district court to certify an interlocutory appeal.

***United States v. Zolin***, 491 U.S. 554 (1989) In determining whether the crime fraud exception to the attorney/client privilege applies, the district court may conduct an in camera review of the communications themselves if the party opposing the privilege satisfies the court that there is a reasonable belief that such examination will yield evidence establishing the applicability of the crime fraud exception. Any evidence may be used to make this showing.

***Swidler & Berlin v. United States***, 118 S. Ct. 2081 (1998) The attorney-client privilege survives the death of the client.

***In re Grand Jury Subpoena***, 909 F.3d 26 (1st Cir. 2018) At least in some circumstances, the attorney-client privilege applies to government employees and government attorneys. In this case, the apparent target of the grand jury subpoena was not a government employee, so the privilege applied to communications between an employee and the government lawyer.

***United States v. Krug***, 868 F.3d 82 (2d Cir. 2017) When two clients who are in a joint defense agreement have a discussion, it is possible that the discussion is privileged, even if a lawyer is not present, if the discussion reflects the advice of one of the lawyers, or was a discussion intended to be repeated to one of the participants' lawyers. In this case, however, the conversation between two member of the joint defense agreement was not privileged. Notwithstanding that the lawyers for the defendants were nearby and had recently been in communication with their clients, the excluded statements were not made for the purpose of obtaining legal advice from a lawyer, nor did the excluded statements share among defendants' advice given by a lawyer, nor did the excluded statements seek to facilitate a communication with a lawyer. Here, the hallway discussion consisted of one member of the JDA conveying his independent, nonlegal research to another member of the JDA while noting he had sent the same research to his attorney. No legal advice was mentioned, much less shared or otherwise conveyed, among the co-defendants.

***In re Grand Jury Matter #3***, 847 F.3d 157 (3rd Cir. 2017) In order for work product or attorney client privileged communications to be stripped of the privilege based on the crime-fraud exception, the defendant must engage in some overt act of fraud or criminality and not simply muse about using the information to commit a crime. In this case, the document was submitted to the

grand jury which returned an indictment and later a second grand jury returned a superseding indictment. Nevertheless, because the government conceded that the grand jury was still investigating the defendant, the district court had jurisdiction to consider the privilege issue.

***In re Grand Jury Investigation***, 810 F.3d 1110 (9th Cir. 2016) The initial decision that the crime fraud exception applies to attorney-client communications may be made by the court without reviewing the actual documents. However, once the prima facie case is made, the court must then review the documents individually that the government seeks, to determine whether the specific documents were sufficiently related to and were made in furtherance of the intended fraud. The trial court failed to conduct this second step and simply held that all documents must be produced. This was error, requiring a remand for further fact-finding on a document-by-document basis.

***Schaeffler v. United States***, 806 F.3d 34 (2d Cir. 2015) In this IRS summons enforcement action, the Second Circuit held that the joint defense / common interest privilege applied to documents that were shared among clients, including a consortium of banks, that shared a common interest in the tax treatment of a refinancing and corporate restructuring. Additionally, the court held that the work-product doctrine applied to documents analyzing the tax treatment of the refinancing and restructuring that were prepared in anticipation of litigation with the IRS. See United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998). In this case, the documents were prepared by a federally authorized tax practitioner (whose communications are treated the same as the attorney-client privilege, 26 U.S.C. § 7525(a)(1)).

***United States v. Nelson***, 732 F.3d 504 (5th Cir. 2013) The defendant entered a plea – later withdrawn – that contained an express waiver of his rights under Rule 410 to exclude evidence of his statements in the event he withdrew. At his trial, the government sought to introduce not only his statements, but also his then-attorney's testimony about the circumstances surrounding the preparation of the factual basis. This violated the attorney-client privilege. The defendant's waiver regarding the use of his statements did not also waive the attorney-client privilege.

***Gennusa v. Canova***, 748 F.3d 1103 (11th Cir. 2014) A suspect and her attorney went to a police station to be interviewed. Prior to the interview, the attorney and the suspect were placed in an interview room (the suspect was not in custody) and were not warned that their conversation would be taped. The Eleventh Circuit held that monitoring the conversation violated the Fourth Amendment rights of the two individuals and that a § 1983 action could be brought, because the deputies were not entitled to qualified immunity for this obvious violation of the Fourth Amendment and the attorney-client privilege.

***In re Grand Jury Subpoena***, 745 F.3d 681 (3rd Cir. 2014) This case contains a thorough primer on the procedures that are appropriate when the government seeks to pierce the attorney-client privilege by invoking the crime-fraud exception. The procedure – proceeding in camera before a trial judge ex parte is appropriate. An immediate appeal under the Perlman doctrine is appropriate when, as here, the information is in the possession of the attorney, who would otherwise have no reason to risk being held in contempt in order to protect his client's privilege; thus, the client may appeal, rather than having to wait for the attorney to be held in contempt and relying on the attorney's decision to appeal. On the merits, the Third Circuit held that crime fraud exception applies only if the client was in the process of committing a crime, or contemplating committing a crime when the attorney was consulted. It does not apply if the attorney is consulted and later the client decides to commit a crime or fraud.

***In re Grand Jury, 705 F.3d 133*** (3rd Cir. 2012) When a grand jury subpoena is issued to a corporation for certain documents, or to an attorney for the corporation who is in possession of certain of the corporate documents the attorney must suffer the consequences of contempt in order to perfect an appeal of an Order by the district court that the attorney-client privilege does not apply. The Order requiring the attorney to produce the records is not directly appealable. The exception recognized in Perlman v. United States, 247 U.S. 7 (1918), only applies to a third-party custodian who has no interest in being held in contempt. In that situation, the client has the right to appeal the Order, because the custodian has no interest in perfecting an appeal and the client is not subject to contempt, so the client must be afforded the opportunity to appeal without the custodian, or the client first being held in contempt. In the situation with an attorney custodian, however, the client can simply insist that the documents be returned to the client and the client can then refuse to produce the documents, be held in contempt and appeal. With respect to Orders directed at former employees (including former in-house counsel), the corporation may appeal, because the corporation may not require former employees to return documents to the corporation. Finally, the Third Circuit held that Mohawk did not eliminate the Perlman rule, at least in the context of grand jury subpoenas. The Third Circuit, having disposed of the jurisdictional issue, then reached the merits of the crime fraud exception issue, as it related to the former employees and concluded that a sufficient showing was made by the government to invoke the crime fraud exception.

***United States v. Gonzalez***, 669 F.3d 974 (9th Cir. 2012) The Ninth Circuit holds that the defendant established the existence of a joint defense agreement and was therefore entitled to prevent the attorney from offering testimony during this § 2255 proceeding. The court also held that the privilege survives the client's filing of a § 2255 proceeding alleging ineffective assistance of counsel.

***United States v. Krane***, 625 F.3d 568 (9th Cir. 2010) Even post-Mohawk, if a subpoena for arguably privileged documents is issued to a disinterested third party, the "client" may intervene and pursue an interlocutory appeal of the production of the documents. The Ninth Circuit, relying on Perlman v. United States, 247 U.S. 7. (1918), held that the third-party custodian presumably has no interest in resisting disclosure, or being held in contempt, and therefore, without permitting the client to intervene and appeal, there is no avenue for the client to advocate for the privilege. The Ninth Circuit noted, however, that this rule only applies if the disinterested third party (i.e., the law firm which is subpoenaed to produce documents) is no longer the defendant's counsel. That is, the Perlman rule only applies if the third party is the former attorney for the defendant.

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***United States v. Graf, 610 F.3d 1148*** (9th Cir. 2010) The defendant was an independent contractor who provided consulting services to an insurance corporation. He was probably the principal operator of the corporation, whose official title was not as an officer or employee because he was barred from employment with any insurance company. Attorneys for the corporation discussed various matters with him about the operations of the company. He was ultimately indicted. The corporation officially waived the privilege and the attorneys testified against the defendant. The Ninth Circuit affirms. For purposes of the attorney client privilege, the attorneys were attorneys for the corporation, not the individual; and he was an employee of the corporation because of the way he conducted his consulting business.

***United States v. Thompson***, 562 F.3d 387 (D.C. Cir. 2009) The government was investigating WPC, Corp. The corporation conducted an internal investigation and turned over the results of the investigation to the government. Accompanying the disclosure was a letter that sought to preserve both the attorney client and work product privileges. The corporation settled with the government. Thompson, however, was indicted. He filed a Rule 16 request for the documents and interviews submitted by the corporation, as well as a Brady request. The corporation sought to bar disclosure to the defendant. The D.C. Circuit held that the defendant was entitled to both Brady and Rule 16 material. The court cautioned, however, that a wholesale disclosure of all the materials presented to the government by the corporation were not required to be furnished, because if the material did not qualify as Brady and would not be "material to the defendant's ability to prepare a defense," there was no basis for requiring its disclosure.

***United States v. Novak***, 531 F.3d 99 (1st Cir. 2008) An individual who was incarcerated and facing a federal sentencing contacted an attorney – the defendant in this case – from the jail telephone and the two discussed illegal ways in which the attorney could eliminate the defendant's criminal history. The jail telephone warned all callers that the call would be taped, though state law provided that the police would not listen to calls with attorneys. The police listened to these calls, however, in violation of that state regulation. The attorney was prosecuted for his participation in the obstruction of justice scheme. The First Circuit concluded that the inmate's consent to the taping of the call was sufficient to render the Fourth Amendment claim meritless. Regarding the attorney-client privilege, the attorney-defendant did not claim that the taping violated the defendant's Sixth Amendment rights, and the First Circuit did not address these potential claims.

***In re Grand Jury Proceedings***, 492 F.3d 976 (8th Cir. 2007) Even if the government succeeds in persuading the court that certain documents were covered by the crime-fraud exception to the attorney-client privilege, the work product privilege survives, assuming the attorney was an unwitting participant in the client's fraud.

***Jenkins v. Bartlett***, 487 F.3d 482 (7th Cir. 2007) Generally, if a third party is sitting in during a conversation between a client and a lawyer, the conversation will not be privileged. In limited situations, however, the presence of a person who is assisting the lawyer will not vitiate the privilege. In this case a union representative for the police brought the officer who was accused of wrongdoing to the lawyer and assisted in preparing materials for the representation. The presence of the union rep did not render the communications unprivileged.

***In re Grand Jury Subpoenas*** 04-124-03, 454 F.3d 511 (6th Cir. 2006) When a grand jury issues a subpoena to a person or entity that holds documents that arguably are privileged, the holder of the privilege (i.e., the target of the grand jury investigation) has the right to review the documents and assert the privilege. The government in this case argued that the government, using a taint team, should do the initial privilege review. The Sixth Circuit held that the privilege takes precedence over the grand jury's power to investigate and subpoena records.

***United States v. Bergeson***, 425 F.3d 1221 (9th Cir. 2005) A defendant jumped bail. His attorney, Ms. Bergeson, was subpoenaed to testify at the grand jury about whether she had told her attorney about the trial date. The trial court held that the information was not privileged, but the subpoena would be quashed as unreasonable and oppressive, because compliance with the subpoena would destroy the attorney-client relationship. The government had other evidence of the defendant's knowledge of the trial date (from the defendant's mother and an earlier pleading filed by counsel indicating that the defendant agreed to a continuance). The Ninth Circuit affirmed, holding that the trial court did not abuse his discretionary authority under Rule 17(c)(2).

***United States v. DeFonte,*** 441 F.3d 92 (2d Cir. 2006) A witness for the government was an inmate at a federal pretrial detention center. The inmate kept a journal that recorded her conversations with her attorney and that also noted various observations that she intended to later relate to her attorney. The Second Circuit held that the first category of information fell within the attorney-client privilege. The second category – notes or outlines of what the client intended to discuss with the attorney – would be considered privileged if, in fact, the conversations did occur at some point after the document was prepared. In other words, an outline for future discussion is not privileged until after the discussion occurs.

***In re Grand Jury Subpoena***, 445 F.3d 266 (3d Cir. 2006) The attorney communicated with the corporate client representative, advising her about a subpoena duces tecum. The crime fraud exception applied to this communication, because the government claimed that the client made decisions about shredding documents and deleting emails (or at least not preventing the deletion of documents) based on this communication. This case contains a lengthy analysis of the crime fraud exception to the attorney client privilege. emails (or at least not preventing the deletion of documents) based on this communication. This case contains a lengthy analysis of the crime fraud exception to the attorney client privilege.

***United States v. Doe***, 429 F.3d 450 (3rd Cir. 2005) The crime fraud exception applied in this case where the client, a law enforcement officer, consulted an attorney and sought information that would have enabled the client to conceal his criminal activity.

***In re Lott***, 424 F.3d 446 (6th Cir. 2005) Even when a defendant in a successive habeas petition relies on the "actual innocence" doctrine, his communications with trial counsel which indicate guilt are not subject to disclosure to the prosecution.

***In re Grand Jury Subpoena***, 419 F.3d 329 (5th Cir. 2005) When a client uses his attorney's advice to further a crime or fraud, this does not vitiate the privilege regarding all communications between the attorney and client. The privilege is only lost regarding those communications and papers that are used in furtherance of the fraud or crime. The district court's order in this case correctly found that the crime fraud exception applied, but the order was too broad in ordering the disclosure of all documents relating to the attorney-client relationship.

***In re Grand Jury Subpoena (Under Seal),*** 415 F.3d 333 (4th Cir. 2005) This case explores the rules established in Upjohn v. United States, 449 U.S. 383 (1981), dealing with the attorney-client privilege in situations where corporate counsel talks to employees. An employee who communicates with his employer's internal investigation counsel and is specifically apprised that the lawyer represented only the company could not personally invoke the attorney-client privilege.

***In re Grand Jury Proceedings,*** 417 F.3d 18 (1st Cir. 2005) First, the standard for applying the crime-fraud exception: It is enough to overcome the privilege that there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud. Second, the First Circuit considered the impact of such a finding on a joint defense agreement that was not infected with the fraud: the joint defense agreement protects the privileged communications.

***United States v. Under Seal,*** 401 F.3d 247 (4th Cir. 2005) In order to rule on the crime fraud exception, the district court must consider the contents of the documents and may not simply accept the prosecutor's proffer. The court did not expressly hold that the trial court must examine the documents personally, but the contents must be the focus of the inquiry.

***In re Grand Jury Investigation (United States v. Doe***), 399 F.3d 527 (2d Cir. 2005) A state official's communication with a state attorney may qualify as a privileged communication. In this case, the governor's counsel engaged in privileged communications with the governor (who was the target of the investigation) as well as staff personnel in the governor's office.

***United States v. Almeida,*** 341 F.3d 1318 (11th Cir. 2003) The Eleventh Circuit considered various aspects of the joint defense privilege in this case. The critical holding is that when one participant joins a defense privilege agreement and later testifies as a government witness, the admissions he made pursuant to the "privilege" to other attorneys may be used by his erstwhile co-defendants to impeach him.

***In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.,*** 348 F.3d 16 (1st Cir. 2003) The First Circuit considers issues of attorney-client communication waiver in circumstances where the purported waiver occurs not in a judicial proceeding. The corporation retained outside counsel who conversed with another corporation's representatives about the subject matter of the grand jury's investigation. The attorney's conversation with the other corporate representative, including statements about what he told his client, did not operate to waive the attorney-client privilege regarding all communications related to that subject matter. Similarly, meetings between corporate counsel and the government, meetings that were preceded with an explicit statement that the attorney-client privilege would not be waived, did not waive the privilege regarding all related communications. Regarding implied waivers (extending beyond the actual conversations that were revealed to other communications on the same subject matter), the court held that there would be no implied waivers of privileged subject matters in an extra-judicial setting, unless the client sought to gain some tactical advantage from the disclosure.

***In re Grand Jury Subpoena***, 341 F.3d 331 (4th Cir. 2003) The defendant was questioned about an answer he provided on an INS application regarding his prior record. When confronted with the falsity of the answer, he stated that he had consulted with

an attorney before answering the question. The attorney was then brought to the grand jury and asked about the advice provided to the defendant about the answer to that question on the application. Though the question to the attorney was a matter that would generally be privileged (and the fact that the application itself was not confidential did not vitiate the privilege), the privilege was waived by the defendant's reliance on that advice when responding to the agents' questions.

***United States v. Rakes***, 136 F.3d 1 (1st Cir. 1998) The defendant was charged with perjury. He was the victim of extortion and had been called to the grand jury to testify about the crime but denied that he had been victimized. He confided in his wife, and his attorney about the extortion. The government then sought to compel the testimony of his wife and attorney. The district court upheld the marital communication and attorney-client privilege claims. The First Circuit affirmed. There is no exception to the privileges in cases in which the client is the victim of a crime.

***In re Grand Jury Subpoenas***, 123 F.3d 695 (1st Cir. 1997) When the grand jury issues a subpoena to a law firm for records relating to a client, if the trial court denies a motion to quash on attorney / client privilege grounds, the company may immediately appeal and need not wait until the law firm is held in contempt. Turning to the merits of this appeal, the First Circuit concluded that billing records may, in some circumstances, contain attorney / client privileged information where, for example, the bill reveals the nature of the work performed by the attorney. The record was too sparse in this case, however, to make this determination and a remand for further development of the facts was necessary.

***United States v. Bauer***, 132 F.3d 504 (9th Cir. 1997) The defendant was charged with bankruptcy fraud, including allegations of concealing assets. As the government 's last witness, the defendant's bankruptcy attorney was called to the stand and asked to testify whether he told the defendant of his duty to disclose all assets and whether he was told the bankruptcy forms were filled out under the penalty of perjury. Even though the attorney was told not to discuss the exact words that were used, or to reveal any specifics of their conversations, this still violated the attorney-client privilege and necessitated reversing the conviction. The Ninth Circuit noted that the attorney-client privilege is a two-way street: it covers statements made by the client, as well as the advice rendered by the attorney. The court also held that the crime-fraud exception did not apply, because the attorney's advice was not used to further a crime or fraud.

***In re Grand Jury Proceedings***, 219 F.3d 175 (2d Cir. 2000) A corporation was being investigated for illegal firearms sales. The corporation explicitly sought to enforce the attorney-client privilege. An officer of the corporation, however, testified at the grand jury about certain dealings of the corporation and procedures that the corporation adopted considering counsel's advice; and the corporation's in-house counsel also testified, but refused to disclose certain notes that were taken by his assistant during a meeting about which he testified (claiming that this was work product). The government claimed that the corporation waived both the attorney-client and the work product privileges. The Second Circuit held that waiver may be found where the privilege holder asserts a claim that in fairness requires examination of protected communications. Fairness comes into play when a party attempts to use the privilege both as a sword and as a shield. In other words, a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party. A quintessential example of waiver is the advice of counsel defense. Circumstances may also dictate that there has been a partial waiver. The issue is more complicated in the context of corporate entities, because, as here, the corporation may assert the privilege, but an officer – acting in an individual capacity – may inadvertently (or, for that matter, intentionally) waive the privilege. This case contains a thorough review of the jurisprudence of waiver and corporate attorney-client privilege and work product privilege issues.

***Whitehouse v. United States District Court for District of Rhode Island,*** 53 F.3d 1349 (1st Cir. 1995) The District Court did not exceed its authority in issuing a local rule which adopted the ABA ethics rule requiring judicial approval before a subpoena is issued to an attorney seeking information about a client.

***United States v. Klubock,*** 832 F.2d 664 (1st Cir. 1987) The First Circuit divides three to three thereby affirming the district court decision which upheld a rule which requires federal prosecutors to seek permission from the court prior to issuing a subpoena to a lawyer. The rule was adopted by the district court for the District of Massachusetts as a local rule.

***In re Richard Roe, Inc.,*** 68 F.3d 38 (2d Cir. 1995) In analyzing a claim that a lawyer-client communication is subject to the crime-fraud exception, the court must determine whether there was probable cause to believe that a crime or fraud has been attempted or committed and that the specific communication was in furtherance of that fraud. It is not enough that the documents or communications are relevant evidence of the fraud. Rather, the communications must be in furtherance of the fraud. Thus, the communication must either facilitate or cover-up the fraud. The lower court's findings in this case were not sufficient to make this determination.

***Vingelli v. United States***, 992 F.2d 449 (2d Cir. 1993) An attorney who paid the fee for another lawyer to represent a defendant may not refuse to identify his client – the person who gave him the money to give to the attorney representing the defendant. Client-identity and fee-payment information is not privileged. Though the Second Circuit recognizes that in some circumstances such disclosures can be resisted, such as where the substance of a confidential communication has already been revealed, but not its source, this exception does not apply here. The fee-payor's fear of possibly being tarnished with guilt by association is insufficient.

***United States v. Schwimmer***, 892 F.2d 237 (2d Cir. 1989) A joint defense privilege may exist even prior to the initiation of litigation and the privilege exists even if one party talks to another party's lawyer outside the presence of the first party's lawyer. The privilege also covers conversations between one party and the accountant of another if the accountant was retained by the lawyer of the other party and the communication was intended to be confidential. The protection afforded by the privilege applies

even indirectly, such as by bringing out facts brought to knowledge solely by reason of a confidential communication. Here, the accountant who was hired by one defendant's attorney provided various documents to the prosecutor after that defendant entered a guilty plea. Some of the information, however, had been acquired from the other defendant, who had relied on the joint defense privilege. Though those documents were not themselves introduced, the prosecutor used information derived from these sources. A full evidentiary hearing was necessary to determine whether the government had this information independently.

***United States v. Dennis***, 843 F.2d 652 (2d Cir. 1988) A person charged with the defendant was appointed counsel by the court. That codefendant sought the advice of defendant's attorney prior to trial. Subsequently, the co-defendant became a government witness. The Second Circuit holds that the defense attorney should be permitted to cross-examine the co-defendant as to the substance of their pre-trial conversation.

***In re Von Bulow***, 828 F.2d 94 (2d Cir. 1987) Alan Dershowitz was given permission by his client, Von Bulow, to publish a book which contained communications between the defendant and his counsel. At a subsequent trial, the plaintiffs who sued Von Bulow in a civil proceeding sought to obtain other communications on the basis that they were waived by these disclosures. The court holds that although the published conversations are no longer privileged, unpublished communications remain privileged even if they were part of the published conversations or if they relate to the subject matter of the conversations.

***In re Impounded Case (Law Firm),*** 879 F.2d 1211 (3rd Cir. 1989) The government sought to invoke the crime fraud exception to obtain documents which embodied attorney/client communications. The fraud was alleged to have been committed by the attorney, not the client. The Third Circuit holds that the crime fraud exception applies in such circumstances. However, the specific documents which are pertinent to the accusation of criminal activity by the attorney are the only documents which may be disclosed.

***In re Grand Jury Subpoenas 89-3 and 89-4***, 902 F.2d 244 (4th Cir. 1990) The joint defense privilege applies regardless of whether there is a pending action; it applies regardless of whether the allied parties are plaintiffs or defendants; and it applies regardless of whether the litigation is civil or criminal.

***In re Antitrust Grand Jury (Advance Publications, Inc***.), 805 F.2d 155 (6th Cir. 1986) In order to apply the crime or fraud exception to the attorney/client privilege, a trial court must conduct an in camera ex parte hearing. The trial court must then distill what documents were subject to the crime fraud exception and may not simply authorize the disclosure of all documents and communications between the attorney and the client. The Sixth Circuit also held that the government must make prima facie showing of the crime or fraud and must also demonstrate the relationship between the fraud and the communication which the government seeks to compel disclosed. The court emphasizes that the crime fraud exception only applies to those communications intended to further the crime or fraud, and the trial court must make an in-camera review of each document.

***United States v. Evans***, 113 F.3d 1457 (7th Cir. 1997) While evidentiary rulings are not generally immediately appealable, clients make take an immediate appeal when their attorneys are required to testify or produce documents in the face of an assertion of attorney-client privilege and no substantial breach of the privilege has yet occurred. Here, the government moved in limine to introduce the testimony of the defendant's former lawyer. The privilege did not apply, however, because the defendant chose to have another person present during the conversation – the other person was also an attorney, but was there as a friend, not as a lawyer – after being cautioned that the presence of the other person rendered the privilege inapplicable.

***In the Matter of Grand Jury Proceeding (Cherney),*** 898 F.2d 565 (7th Cir. 1990) A member of a drug conspiracy consulted with a lawyer and asked the attorney to represent a co-defendant. This client, who paid the fee for the co-defendant, was never himself indicted. The government asked the attorney who the client was who acted as the benefactor of the other defendant. The attorney moved to quash the subpoena, the District Court granted the motion and the Seventh Circuit affirmed.

***United States v. Sindel***, 53 F.3d 874 (8th Cir. 1995) The defense attorney was successful in claiming that with regard to one client's fee, he should not be required to furnish fee-payor information on an 8300 form.

***United States v. Chen***, 99 F.3d 1495 (9th Cir. 1996) The attorney-client privilege applies to communications between corporate employees and counsel, made at the direction of corporate superiors to secure legal advice.

***Upjohn Co. v. United States***, 449 U.S. 383 (1981). Only the corporation may waive the attorney-client privilege where the corporation is the client. This same rationale applies to ex-employees. The power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. In addition to issues of waiver, this case contains a lengthy analysis of the attorney-client privilege as it applies in the context of lawyers providing "business-legal" advice to a corporation. In conclusion, however, the court held that the crime fraud exception applied, and the communications were not privileged.

***United States v. Rowe***, 96 F.3d 1294 (9th Cir. 1996) The senior partner in a law firm discussed with two associates the fact that another lawyer in the firm might be engaged in misconduct and asked them to do some investigation. The government subpoenaed the associates to reveal what the senior partner told them. The appellate court concluded that the attorney client privilege applied. The associates were acting in their capacities as lawyers in their discussions with the senior partner – in effect, as in-house counsel.

***Ralls v. United States***, 52 F.3d 223 (9th Cir. 1995) The attorney was paid by an individual to represent the defendant at a bond hearing and at an initial appearance. The government subpoenaed the attorney to the grand jury to disclose the identity of the fee-payor. The Ninth Circuit holds that the information was privileged in this case: "An examination of [the attorney's] sealed affidavit leaves no doubt that the fee arrangements and the fee-payor's identity are inextricably intertwined with confidential

communications and fall within the attorney-client privilege." The fee-payor sought the attorney's advice regarding his involvement in the crime for which the client was arrested.

***In re Grand Jury Subpoena (Horn),*** 976 F.2d 1314 (9th Cir. 1992) Despite the fact the subpoena disclaimed any attempt to require the production of privileged information, because of the breadth of the request, it was unenforceable. The subpoena sought all financial information relating to sixteen of the attorney's clients, without narrowing the specific financial information requested. "All financial information" would include retainer agreements which would set forth the nature of the work performed, as well as the strategy of the attorney.

***In re Grand Jury Investigation (U.S. v. Corporation),*** 974 F.2d 1068 (9th Cir. 1992) The corporation properly refused to produce certain documents, relying on the attorney client privilege. The government failed, in its showing pursuant to United States v. Zolin, to establish the need for an in-camera review by the district court of the documents to determine whether the crime-fraud exception applied. The Zolin court held that an in-camera review is appropriate if the government can show a factual basis adequate to support a good faith belief by a reasonable person that in camera review of the materials may reveal evidence to establish the claim that the crime fraud exception applies. The court also held that the Zolin rule also applied regarding other issues regarding the attorney client privilege, such as whether the privilege applied to the documents in the first place.

***United States v. De La Jara***, 973 F.2d 746 (9th Cir. 1992) In order to determine whether a letter from an attorney to a client falls within the crime fraud exception, the government may seek an in camera review of the letter, but must first establish, using non-privileged evidence "sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability." Even though the government already had seized the document, this requirement of United States v. Zolin applies. Here, the government relied only on the document itself. This was an inadequate showing. The court concluded, however, that the defendant waived the privilege by failing to protest its seizure and request the return of the document for the six months between the seizure and the trial.

***Tornay v. United States***, 840 F.2d 1424 (9th Cir. 1988) The Ninth Circuit continued its conservative trend with respect to subpoenas to attorneys holding that an IRS subpoena directed to a lawyer for information regarding fees paid by his clients who are under investigation for tax violations would not violate the attorney-client privilege. Here, the court rejects dictum in the oft-cited case of United States v. Hodge & Zweig, 548 F.2d 1347, which had held that fee information would be privileged if disclosure was likely to "implicate the client in the very criminal activity for which legal advice was sought."

***In re Grand Jury Subpoenas***, 803 F.2d 493 (9th Cir. 1986) The Ninth Circuit holds that a client's identity and fee arrangement are not privileged unless the identity of the defendant is, in substance, a confidential communication in the professional relationship between the attorney and client. This case represents a departure by the Ninth Circuit from its earlier decisions which had held that the identity and fee arrangement may be privileged in more circumstances than those listed here.

***In re Grand Jury Matter No. 91-01386***, 969 F.2d 995 (11th Cir. 1992) The last link exception to the rule that client identification is not generally within the attorney-client privilege is inapplicable in a case where the attorney has received a counterfeit bill and the grand jury is asking who paid the attorney that money.

***United States v. Leventhal***, 961 F.2d 936 (11th Cir. 1992) Attorneys must file an 8300 Form upon receipt of more than $10,000 in currency from a client.

***In re Grand Jury Proceedings 90-2 (Garland),*** 946 F.2d 746 (11th Cir. 1991) The last link exception survives in the Eleventh Circuit. The attorney was subpoenaed to the grand jury to reveal the identity of the client who asked the attorney to find another lawyer for his "friend" who had just been arrested. The attorney refused to identify the client. The attorney was held in contempt. The Eleventh Circuit reversed. This is a case in which the disclosure of the name would be the last link of incriminating evidence against the client. What he told the attorney was already known to the prosecutor – only his identity remained confidential. And so, it should remain, the Eleventh Circuit decided.

***In re Federal Grand Jury Proceedings, 89-10 (MIA),*** 938 F.2d 1578 (11th Cir. 1991) An attorney was subpoenaed to produce memoranda to the grand jury which was investigating one of his clients. The memoranda memorialized prior conversations between the attorney and the client which arguably came within the crime-fraud exception to the privilege. However, the memoranda themselves were not prepared during the course of the client's crime. That is, though the initial communication between the attorney and the client were not privileged, the attorney's subsequent communication with the client, which referred to those prior conversations was privileged. "The attorney-client privilege protects communications rather than information. . . Thus, although communications otherwise covered by the attorney client privilege lose their privileged status when used to further a crime or fraud, post-crime repetition or discussion of such earlier communications, made in confidence to an attorney, may still be privileged even though those earlier communications were not privileged because of the crime-fraud exception."

***In re Grand Jury Proceedings 88-9 (Newton),*** 899 F.2d 1039 (11th Cir. 1990) An attorney was subpoenaed to appear before a grand jury and to bring financial documents relating to an unidentified client. The government, unaware of the identity of the client, sought information relating to a particular cashier's check received by the attorney. The attorney claimed that the subpoena violated the Sixth Amendment right of his client as well as the attorney/client privilege. The Eleventh Circuit rejects both arguments. This information would not provide the "last link in the discovery of the client's identity, nor would it violate the defendant's Sixth Amendment right to counsel because there is nothing in the record to indicate that the disclosure of this information would result in the severance of the attorney/client relationship between the client and the subpoenaed attorney."

***In re Sealed Case***, 107 F.3d 46 (D.C. Cir. 1997) Counsel provided advice to a company about election finance laws. A vice president then violated the law. This did not make the attorney's advice subject to the crime fraud exception, because the attorney was giving advice to the company, not the vice president and the company could insist on maintaining the privilege. Also, the government failed to prove that the vice president intended to violate the law when the legal advice was provided. The crime fraud exception only applies if the client's fraudulent or criminal intent existed at the time the privileged communication was provided.

***In re Sealed Case***, 29 F.3d 715 (D.C.Cir. 1994) In additional to the joint defense privilege, there is also a "common interest privilege." This privilege protects communications between a lawyer and two or more clients regarding a matter of common interest. See In re Auclair, 961 F.2d 65 (5th Cir. 1992)(privilege applies if persons consult an attorney together as a group with common interests seeking common representation). In such cases, one client cannot unilaterally waive the privilege.

***United States v. White***, 887 F.2d 267 (D.C. Cir. 1989) The defendant explained to government investigators that prior to hiring his codefendant, an official convicted of bribery, he had gone to his attorney and thoroughly reviewed the matter. Having gone to his attorney in good faith, the defendant did not waive his right to the attorney/client privilege since he was seeking an opinion as to the legality of conduct which was not clear to a lay person.

***In re Sealed Case***, 877 F.2d 976 (D.C. Cir. 1989) A defense contractor received a grand jury subpoena and turned to its attorney for advice. The document containing this advice was privileged even though it contained financial data which had been or would soon be reported to the IRS. This is not a case in which "details" which underlie information given to counsel with the expectation that it will be revealed to others is being sought by the grand jury. Here, in contrast, the government sought to demonstrate that the target altered the books on counsel's advice after the investigation began.

***United States v. Gertner***, 873 F.Supp. 729 (D.Mass. 1995) The IRS could not enforce a summons to obtain the identity of a client in this IRS 8300- form proceeding. The attorney established that there was a pending case involving the fee-payor. In this circumstance, the identity of the fee payor would incriminate the client. The First Circuit affirmed on the grounds that the IRS failed to comply with the required John Doe summons procedure. 65 F.3d 963 (1st Cir. 1995).

***In re Grand Jury Subpoena (DeGuerin),*** 752 F.Supp. 239 (S.D. Tex. 1991) After remand from the Fifth Circuit, the District Court again allowed the attorney to claim the privilege and refuse to disclose the identity of the fee-payor because the fee-payor was the attorney's client, and the fee arrangements were part of their confidential communications. The Fifth Circuit affirmed: 926 F.2d 1423 (5th Cir. 1991).

***ATTORNEY-CLIENT ISSUES (Right To Counsel)***

***Rothgery v. Gillespie County***, 128 S. Ct. 2578 (2008) The Sixth Amendment right to counsel attaches at a defendant's "first appearance" at which he is apprised of the formal charges and his bond situation may be addressed. The right to counsel attaches even if there is no prosecutor in court.

***United States v. Gonzalez-Lopez,*** 548 U.S. 140 (2006) In an opinion by Justice Scalia, the Court held that the improper denial of defendant's choice of counsel is a denial of the Sixth Amendment, and it is not subject to harmless error review or a requirement that the defendant establish prejudice. In this case (as summarized below in the Eighth Circuit opinion), the trial court improperly denied the defendant's chosen counsel's motion to appear pro hac. All parties agreed that the trial judge's decision was incorrect. On appeal, however, the government argued that the attorney who did represent the defendant performed adequately and therefore the defendant was unable to establish that he was denied the effective assistance of counsel. The Supreme Court agreed with the defendant: the denial of his right to counsel of choice was not subject to harmless error review. The Sixth Amendment right to counsel is not simply a subsidiary right of the right to a fair trial. Thus, if the defendant had a fair trial, this does not, ipso facto, mean that the denial of his right to counsel of choice was inconsequential. The right to counsel of choice is a fundamental right which, when denied, requires relief. In short, the denial of the right to counsel of choice is a structural error.

***Alabama v. Shelton***, 535 U.S. 654 (2002) A defendant has the right to counsel, even if he is not sentenced to a term of imprisonment, if he receives a suspended sentence that can later be converted into a term of imprisonment.

***Perry v. Leeke***, 488 U.S. 272 (1989) The Supreme Court reverses the decision of the Court of Appeals regarding the propriety of preventing counsel from speaking with the defendant during a brief recess which occurred while the defendant was on the stand. The Court held that a criminal defendant has no right under the Sixth Amendment's guarantee of effective assistance of counsel to consult with his attorney during such a brief recess when the consultation would relate entirely to the defendant's ongoing testimony.

***United States v. Roy***, 855 F.3d 1133 (11th Cir. 2017) Trial counsel returned from lunch 7 minutes after the afternoon's proceedings commenced. The trial, which lasted six days, involved charges of a sex-related offense. When the defense attorney missed the 7 minutes, the government was introducing the testimony of a law enforcement officer who was discussing the images found on the defendant's computer. There were a total of 18 questions asked during the attorney's absence. The lawyer was absent for a total of 7 minutes. It will take a lot longer than that to read this 122-page opinion in the federal reporter, including several dissents. The fundamental question that necessitated so much ink is whether the complete absence of counsel amounts to structural error that leads to automatic reversal (as the panel opinion originally held) or if there is a harmless error escape hatch for this type of flaw in the trial. The majority opinion holds that the harmless beyond a reasonable doubt standard applies in this situation.

***United States v. Velazquez***, 855 F.3d 1021 (9th Cir. 2017) Defendant's first appointed counsel moved to withdraw, and the motion was granted. The defendant moved to replace the second appointed counsel, claiming that there were no communications between her and her attorney and that her attorney had engaged in no pretrial investigation. When that motion was ultimately denied, she entered a guilty plea. The Ninth Circuit holds that the trial court erred in failing to grant the motion to replace counsel. In addition, the Ninth Circuit held that the guilty plea had to be vacated.

***United States v. Yepiz,*** 844 F.3d 1070 (9th Cir. 2016) The defendant initially had an appointed counsel. He later retained counsel, but several months prior to trial wrote a letter to the court expressing dissatisfaction with retained counsel (who wanted additional fees that exceeded the defendant's ability to pay) and the defendant requested a new panel attorney. The judge essentially ignored the letter, as well as the defendant's subsequent in-court request to consider his request. The defendant proceeded to trial with the retained counsel. The Ninth Circuit reversed the conviction and held that it was error to ignore the defendant's request for new appointed counsel, because the defendant has a right to fire retained counsel without having to offer a valid reason to do so (assuming no delay in trial would be caused).

***United States v. Jimenez-Antunez***, 820 F.3d 1267 (11th Cir. 2016) The defendant attempted to fire his retained counsel and requested court-appointed counsel. The trial court concluded that there was an insufficient basis to fire his retained counsel. The Eleventh Circuit reversed: the defendant has an unqualified right to fire retained counsel without explanation and if the defendant qualifies for court-appointed counsel, that has no bearing on his right to fire retained counsel.

***United States v. Cavallo***, 790 F.3d 1202 (11th Cir. 2015) The trial court violated the defendant's right to counsel by forbidding the defendant to talk to his lawyer during two overnight recesses during his testimony. The trial court's caveat – explaining that the defendant could discuss his "constitutional rights" with his lawyer – did not cure the problem. The defendant has a right to discuss all aspects of his case with his lawyer during an overnight recess. ***Geders v. United States***, 425 U.S. 80 (1976).

***United States v. Yamashiro***, 788 F.3d 1231 (9th Cir. 2015) The trial court committed structural error when, during sentencing, a victim was permitted to testify prior to defense counsel's arrival in court.

***United States v. Brown***, 785 F.3d 1337 (9th Cir. 2015) A defendant has an absolute right to discharge retained counsel at any time. If the defendant is then financially unable to retain counsel and qualifies under CJA, the court must appoint counsel unless there is sufficient reason to refuse to appoint counsel (such as the timing of the motion to discharge his retained counsel). In this case, the trial court did not express any concern with the timing of the request; the court simply denied the request to discharge the retained lawyer because the defendant did not offer a sufficient explanation why he wanted to discharge the lawyer. No reason was necessary, however. The right to discharge retained counsel is not conditioned on reasonable cause, or the existence of a conflict.

***Koenig v. North Dakota***, 755 F.3d 636 (8th Cir. 2014) The state court decision that the defendant was not entitled to appointed counsel on direct appeal was clearly contrary to established Supreme Court jurisprudence. The fact that the defendant engaged in manipulative conduct did not disentitle him to counsel.

***United States v. Ross***, No. 09-1852 (6th Cir. 2012) Even though the defendant had previously waived his right to counsel and was permitted to proceed pro se, when the government moved for a competency hearing and the judge agreed, an attorney should have been appointed to represent the defendant.

***United States v. McKeighan***, 685 F.3d 956 (10th Cir. 2012) Defense counsel was subpoenaed to produce fee information to the grand jury. Later, at a hearing, the attorney agreed to pay the fee into the registry of the court. Ultimately, the lawyer withdrew from the case. The Tenth Circuit held that this did not violate the defendant's right counsel.

***Rodgers v. Marshall***, 678 F.3d 1149 (9th Cir. 2012) A defendant has the right to counsel at post-conviction pre-appeal proceedings, such as a motion for new trial. Even if the defendant waived his right to counsel at trial, he has the right to re-assert the right to assistance of counsel post-trial. The Supreme Court reversed, holding that this issue was sufficiently unclear that under the AEDPA standard, the Ninth Circuit erred in granting habeas relief. ***Marshall v. Rodgers***, 569 U.S. ---, 133 S.Ct. 1446 (2013).

***United States v. Simels***, 654 F.3d 161 (2d Cir. 2011) Noting that there are inconsistent decisions in the appellate courts, the Second Circuit assumes, for the sake of argument, that an attorney has "third-party standing" to assert a violation of a defendant's Sixth Amendment right to counsel. In this case, the government initiated an investigation of the attorney in connection with his representation of a client during that representation. The Second Circuit held that there was no Sixth Amendment violation.

***United States v. Sellers***, 645 F.3d 830 (7th Cir. 2011) The defendant hired one attorney to represent him at trial. Another attorney, at the request of the retained attorney, made the first appearance and attended various preliminary hearings and ultimately filed motions. As the trial date neared, however, the retained attorney had still not filed his appearance and the defendant complained that he wanted the retained attorney to represent him. Ultimately, the retained attorney had a conflict and could not appear on the scheduled trial date and the defendant insisted that a newly retained attorney be substituted as his attorney, but that this would require a continuance, since this new attorney was not prepared. The trial court erred in denying the defendant's request for a continuance to enable his newly retained attorney to prepare. The attorney who had been representing the defendant up until that point had never been retained by the defendant and was only filling in for the initially retained attorney. That attorney as required to proceed to trial. Though the continuance would cause inconvenience to the court and other litigants, the defendant's right to counsel was not adequately considered by the trial court. The conviction was reversed.

***United States v. Smith***, 618 F.3d 657 (7th Cir. 2010) The defendant was represented by retained counsel. Another attorney filed a motion to be substituted as counsel of record. At a hearing, the trial court indicated that his substitution would be permitted, but that trial was scheduled to begin approximately eight weeks later. Actually, prior to that hearing, there had been no notice to the government or the defendant that trial had been scheduled. The new attorney stated that he had a conflict with another trial during that period. The trial court thereafter denied the attorney's motion to enter the case, appointed another attorney and the defendant thereafter entered a guilty plea (with an appeal waiver). The Seventh Circuit held that the appeal waiver did not bar an appeal of the claim that the defendant was denied the right to counsel of his choice. Denying counsel of choice is a structural error that affected the voluntariness of the plea. The colloquy, at the time the plea was entered, was insufficient to advise the defendant that a possible Sixth Amendment was subject to the appeal waiver. The Seventh Circuit also held that denying the defendant's request to have new counsel violated his Sixth Amendment right. The court made no effort to accommodate the defendant's right to change counsel by modifying the trial schedule.

***United States v. Rivera-Corona***, 618 F.3d 976 (9th Cir. 2010) After entering a guilty plea, the defendant requested that the court remove his retained counsel and replace him with appointed counsel. The trial court's failure to engage in any factfinding violated the defendant's right to counsel. The court should have inquired whether the defendant was eligible for court-appointed counsel under the Criminal Justice Act. Because this was a post-plea request (and there was no suggestion that changing counsel would delay the proceedings), there was no need for the court to evaluate whether a change in counsel was necessary (such as by inquiring into the nature of the conflict between the attorney and the defendant).

***United States v. Aguirre***, 605 F.3d 351 (6th Cir. 2010) The defendant was arrested in possession of several thousand dollars in cash. Charged with a drug offense, his attorney suggested that the defendant simply did not have a bank account, so it was natural that he would keep cash. The prosecutor then introduced the financial affidavit that the defendant signed to get appointed counsel; the document showed that he was unemployed. The Sixth Circuit held introducing this document violated the defendant's right to counsel. The defendant should not be put in the position of either waiving he right to counsel or producing evidence that would be used against him at trial.

***United States v. Turner***, 594 F.3d 946 (7th Cir. 2010) The attorney who was prepared to represent the defendant at trial also was representing a co-conspirator who had already been tried and convicted, but who was awaiting sentencing. Both clients waived any potential conflict and neither defendant was cooperating. Nevertheless, the district court disqualified the attorney from defendant's trial on the basis that one or the other defendant might decide to cooperate in the future. Disqualifying counsel was erroneous and prejudicial because the improper disqualification of counsel amounts to structural error. This case contains a thorough discussion of the relationship between Wheat and Gonzalez-Lopez: the relationship between the court's obligation to assure that there is no conflict and the defendant's right to counsel of choice.

***Smith v. Grams***, 565 F.3d 1037 (7th Cir. 2009) The state trial court erred in failing to appoint counsel to the defendant and requiring him to proceed pro se. The defendant repeatedly stated that he wanted counsel appointed, though he complained about the two attorneys who had been appointed. The trial court gave the defendant a choice of either withdrawing his motion for a speedy trial or going to trial pro se was not a valid choice to present to the defendant.

***United States v. Stein***, 541 F.3d 130 (2d Cir. 2008) Affirming the district court's decision, the Second Circuit dismisses the indictments against numerous employees of KPMG based on the government's "use" of the Thompson memorandum to discourage KPMG from paying fees for the employees. The Thompson memorandum, which was later replaced with the McNulty memorandum, and still later replaced by a new provision in the U.S. Attorney's Manual, provided that the Department of Justice would (or at least could) consider a corporation's decision to pay an employee's attorney's fees as a sign that the corporation was not sufficiently accepting responsibility for wrongdoing and thus as one factor that the government would consider in deciding whether to indict the corporation. In this case, the lower court found that KPMG would have paid fees, through indictment and trial, of the employees but for the pressure put on the corporation by the U.S. Attorney's office which explicitly condemned the decision to pay fees. The Second Circuit held that the pressure put on KPMG by the government transformed the decision by KPMG to refuse to pay fees into "state action" and violated the employee/defendant's Sixth Amendment right to counsel. The court also noted that any infringement of the right to counsel is a structural error not subject to harmless error analysis. The court also held that the pre-indictment conduct had a post-indictment affect, thus implicating the Sixth Amendment.

***United States v. Garey***, 540 F.3d 1253 (11th Cir. 2008) (en banc) The Eleventh Circuit concluded that a defendant who demands to have his court appointed counsel replaced faces the possibility of being compelled to proceed pro se if the trial court presents the defendant with a simple choice: proceed with court-appointed counsel, or proceed on your own. As long as the trial court explains the Faretta rights and warnings, the trial court is entitled to present that binary choice to the defendant. Thus, the defendant may not insist on a third option: a new attorney. If the defendant, cognizant of the choice that has been presented to him, and warned of the dangers of proceeding pro se, responds by demanding new counsel, the trial court may (but certainly is not required to) direct the defendant to proceed without counsel. In a companion case, Jones v. Walker, 540 F.3d 1277 (11th Cir. 2008) (en banc), decided the same day, the court held that the trial court failed to adequately advise the defendant of the consequences of his decision (i.e., the hazards of proceeding pro se), but because Jones was a habeas petition, the burden was on the defendant to prove prejudice and to prove that he did not know the dangers. He failed to carry that burden. Garey, whose case was on direct appeal, was advised of the dangers of proceeding without counsel, so the government sustained its burden of proving a knowing and voluntary waiver of counsel.

***Carlson v. Jess***, 526 F.3d 1018 (7th Cir. 2008) Shortly before trial, the defendant requested a continuance to switch from one retained counsel to another, revealing that there was a breakdown in communication with his current lawyer and a failure to prepare the case as needed. Both attorneys appeared and urged the court to grant the continuance to facilitate the change of counsel. The trial court refused, noting that the administration of justice required that the case proceed to trial. The Seventh Circuit concludes that the state court acted arbitrarily in denying the request for a continuance in this situation. “In sum, the trial judge ignored the presumption in favor of Carlson’s counsel of choice and insisted upon expeditiousness for its own sake.” The court finally concluded that the denial of his right to retain his chosen counsel had an adverse effect on the presentation of his case.

***Benitez v. United States***, 521 F.3d 625 (6th Cir. 2008) If a defendant seeks the substitution of counsel, the court should make adequate inquiry, regardless of whether the defendant has retained, or appointed counsel. In this case, at the beginning of the guilty plea colloquy, the defendant stated that he no longer wanted to be represented by his retained counsel. The judge’s failure to conduct an inquiry required that the case be remanded to conduct a new sentencing hearing.

***United States v. Ryals***, 512 F.3d 416 (7th Cir. 2008) The trial court’s failure to inquire into the dispute between the defendant and his counsel was erroneous and the defendant’s insistence that a new attorney be appointed to represent him during sentencing should have been evaluated in more depth than the judge did in this case. The attorney’s “scant participation” in the sentencing proceedings demonstrated that the defendant was prejudiced by the failure to appoint new counsel.

***United States v. Forrester***, 512 F.3d 500 (9th Cir. 2008) The trial court conducted a Faretta hearing, but failed to state the charges and erroneously stated the range of possible punishment (the court told the defendant he was facing 10 years to life, when in fact he was facing zero to twenty). The court notes that when a judge misstates the possible sentence during a Faretta hearing, it does not matter if the error overstates or understates the possible sentence. The court also rejects the notion that there is any harmless error analysis when a Faretta colloquy is faulty.

***United States v. Barnwell***, 477 F.3d 844 (6th Cir. 2007) During deliberations in this trial, an FBI agent in an unrelated case who was monitoring a wiretap determined that one of the deliberating jurors was possibly contacting people about her deliberations. Two prosecutors (not the trial prosecutors in this case), asked to speak to the judge and explained the situation. The trial prosecutors were aware of this ex parte communication. Over the next day or two, five ex parte meetings were held. The defendant and his attorneys had no idea this was occurring. There were also some meetings with the foreman (these were in the presence of the defense attorney, but he did not know exactly what prompted the meetings). Eventually, a mistrial was declared when the jury was unable to reach a verdict. The ex parte communications remained a secret. A new trial was held, and the defendant was found guilty. After that trial, the events that occurred during the first trial were unsealed and furnished to defense counsel. The Sixth Circuit held that the ex parte communications violated the defendant’s right to counsel and his right to be present at all stages of the proceedings, as well as his right to be tried with an impartial judge. The court set aside the verdict in the second trial, even though it was not directly affected by the ex parte communication. The decision ends with a series of observations about the impropriety of conducting ex parte communications and the necessity of judicial impartiality.

***Van v. Jones***, 475 F.3d 292 (6th Cir. 2007) The defendant was charged with murder. A hearing was scheduled to determine whether his case would be consolidated with other charges against other defendants. The defendant’s appointed attorney did not appear at the hearing and the hearing was conducted without counsel for the defendant voicing any objection to the consolidation of the cases. The question posed to the habeas court was whether this constituted a “critical stage” of the proceedings which necessitated the presence of counsel. In a lengthy opinion the Sixth Circuit reviews at great length the definition of “critical stage” and ultimately concludes that in this case, the hearing was not a critical stage. Consequently, the attorney’s absence from the hearing did not necessitate setting aside the conviction on Cronic grounds (complete absence of counsel at critical stage).

***United States v. Stein***, 440 F.Supp.2d 315 (S.D.N.Y. 2006) The district court condemned the provision in the Thompson Memo that states that a corporation’s payment of attorney fees for targeted employees is a factor that the prosecutor should consider in deciding whether to indict the corporation for the conduct of employees. The Court held that the employees’ due process rights to have their attorneys’ fees paid by their employer – as had been customary with this employer (KPMG) – was violated. The court also relied on the Sixth Amendment right to counsel which, the court held, was infringed by the prosecutor’s efforts to dissuade the corporation from paying the employees’ fees. The result was the suppression of statements made by the defendants that were “coerced” by their employer, KPMG, which felt compelled to require the employees to speak to the government because of the Thompson Memo requirement that corporations cooperate. The Second Circuit opinion, which is noted above, affirmed the district court’s other decision (435 F.Supp.2d 330) dismissing the indictment against numerous individual defendants.

***United States v. Nolen***, 472 F.3d 362 (5th Cir. 2006) The defendant was represented by an attorney who was appearing pro hac vice. During the course of the representation, the attorney made an unfounded allegation of dishonesty on the part of the magistrate. This amounts to an ethical violation. The attorney’s pro hac status was revoked. The Fifth Circuit held that while it is permissible to revoke an attorney’s pro hac status, the trial court must consider the impact of this decision on the defendant’s Sixth Amendment right to counsel. Having failed to conduct this type of balancing inquiry, the case was remanded to the lower court to conduct a post-trial inquiry.

***United States v. Sandoval-Mendoza***, 472 F.3d 645 (9th Cir. 2006) After the defendant testified on direct, an overnight recess occurred. The trial court directed the attorney that he could speak with the defendant, but not about his testimony. The Ninth

Circuit held that this violated the defendant's right to counsel. See Geders v. United States, 425 U.S. 80 (1976); Perry v. Leeke, 488 U.S. 272 (1989).

***James v. Brigano***, 470 F.3d 636 (6th Cir. 2006) The defendant did not voluntarily and knowingly waive his right to counsel. The state court's determination that the defendant's decision to dismiss his appointed counsel was simply a delaying tactic did not explain why no Faretta inquiry was conducted.

***Taveras v. Smith***, 463 F.3d 141 (2d Cir. 2006) New York State law has a discretionary fugitive disentitlement rule that permits but does not require an appellate court to dismiss an appeal if the defendant is a fugitive, including if the defendant is returned to custody prior to the disposition of his appeal. In this case, the defendant was returned to custody prior to the disposition of his appeal, but the appellate court thereafter dismissed the appeal without appointing an attorney to litigate the fugitive disentitlement issue. This violates the defendant's Sixth Amendment right to appellate counsel under Douglas v. California, 372 U.S. 353 (1963); Evitts v. Lucey, 469 U.S. 387 (1985).

***United States v. Jones***, 452 F.3d 223 (3rd Cir. 2006) Though the defendant requested permission to proceed pro se, his request was couched in terms, "If you won't appoint me another attorney, I would rather represent myself." The court conducted an insufficient Faretta inquiry and the defendant was therefore denied his right to counsel. In fact, the court failed to inquire into many of the Faretta considerations, including the defendant's understanding of the nature of the charges, the possible defenses and other issues might arise at trial.

***United States v. Parker***, 439 F.3d 81 (2d Cir. 2006) The Second Circuit reviews the law governing when a defendant with retained counsel can ask for CJA funds mid-trial. The court concludes that mid-trial appointment is permissible but was properly denied in this case. The court also approved the trial court's practice of ensuring that retained counsel is "fully retained" when she makes an appearance in the case at the outset. The Second Circuit held that such an inquiry, though appropriate, did not foreclose in appropriate circumstances the appointment of counsel mid-trial when necessary, in the interest of justice.

***United States v. Jones***, 421 F.3d 359 (5th Cir. 2005) The trial court failed to undertake the proper Faretta dialogue with the defendant. Allowing him to proceed pro se was error.

***United States v. Gonzalez-Lopez***, 403 F.3d 558 (8th Cir. 2005) Before the Supreme Court granted certiorari in the decision in Gonzalez-Lopez, annotated above, the Eighth Circuit considered a separate question raised by the controversy dealing with the defendant's right to counsel in his criminal case. Shortly after being arrested, the defendant was represented by a lawyer named Fahle. Within a matter of weeks, however, the defendant sought out the services of Attorney Lowe. Lowe went to the jail and talked with the defendant, knowing that he was already represented by Fahle. The district court judge held that this violated the ethics rule that bars contacting a represented party. The Eighth Circuit disagreed. The prohibition on contacting a represented party applies to lawyers already in a case. It does not apply to lawyers who are not attorneys currently in the litigation.

***United States v. Collins***, 430 F.3d 1260 (10th Cir. 2005) Because of acrimony between the defendant and his counsel, counsel moved to withdraw. On the day his motion was filed, the court conducted a competency hearing. Counsel declined to participate considering his pending motion to withdraw. After a brief discussion, the court determined that the defendant was competent. This procedure was improper. The defendant was denied the right to counsel at his competency hearing.

***United States v. Virgil***, 444 F.3d 447 (5th Cir. 2006) If a defendant asks to represent himself at sentencing, but the trial court does not comply with the Faretta inquiry, the defendant is entitled to a re-sentencing. This is the same result if the defendant's pro se representation at trial is found to have occurred without sufficient Faretta compliance.

***Pazden v. Maurer***, 424 F.3d 303 (3rd Cir. 2005) The defendant's waiver of counsel was not freely and voluntarily given. His counsel, who was newly appointed declared that she was unprepared to defend the case considering the number of witnesses and the complexity of the issues. The court gave the defendant the defendant the choice of proceeding pro se or going forward with unprepared counsel. This is not a constitutionally acceptable choice.

***United States v. Hamilton***, 391 F.3d 1066 (9th Cir. 2004) After counsel was done completing his examination of a witness in a suppression hearing, he excused himself from further participation in the matter because of a scheduling conflict. The government elicited testimony from a subsequent witness that related to that attorney's client. The attorney was provided a transcript and stated that he did not wish to further cross-examine that witness. This was improper. Counsel's absence from the proceeding that related to his client operated as a denial of the defendant's Sixth Amendment right to counsel.

***United States v. Ellerbe***, 372 F.3d 462 (D. C. Cir. 2004) The trial court permitted the defendant to represent himself at trial and requested that the appointed counsel remain as standby counsel. At the conclusion of the trial, the attorney was excused from any further duty. At sentencing, the defendant appeared pro se. This violated the defendant's right to counsel. At sentencing, counsel could have advanced legal arguments that would have resulted in guideline findings favorable to the defendant and he did not expressly waive his right to counsel at sentencing.

***Robinson v. Ignacio***, 360 F.3d 1044 (9th Cir. 2004) A Nevada state law provided that if the defendant waived his right to counsel at trial, this waiver applied at sentencing, as well. The Ninth Circuit holds that the state practice was unconstitutional. The defendant waived his right to counsel at trial but asked for the assistance of counsel at sentencing and the denial of this request was a Sixth Amendment violation.

***United States v. Midgett***, 342 F.3d 321 (4th Cir. 2003) The defendant told his attorney that he was asleep in the backseat of the car when two other people committed the crime. There was no other evidence to support this version of events. The attorney

asked to withdraw from the case, claiming an ethical issue and when the court denied the motion to withdraw, refused to call the defendant to the stand. The judge gave the defendant the choice to either proceed pro se or acquiesce to the attorney's decision that the defendant would not testify. This was improper. There was insufficient evidence to establish the defendant's intent to commit perjury.

***Moore v. Purkett***, 275 F.3d 685 (8th Cir. 2001) The state court committed reversible error by denying the defendant the right to confer with his counsel in the courtroom during trial. Except when the defendant is testifying, or during brief recesses in that testimony, the defendant enjoys an absolute right to unrestricted access to his lawyer for advice on a variety of trial-related matters.

***United States v. Elder***, 309 F.3d 519 (9th Cir. 2002) The defendant was not denied due process simply because the lead defense attorney was removed from the courtroom in handcuffs after arguing with the judge. Blankenship v. Johnson, 118 F.3d 312 (5th Cir. 1997) If the state seeks discretionary review of the decision of the first appellate court, the defendant has the right to the assistance of counsel at this discretionary review proceeding.

***Crandell v. Bunnell***, 144 F.3d 1213 (9th Cir. 1998) Where an indigent defendant is appointed a particular public defender with whom he was dissatisfied, with whom he would not cooperate, and with whom he would not in any manner whatsoever, communicate, the defendant's constitutional rights are violated. In this case, the defendant had no communication with appointed counsel and ended up representing himself in a death penalty trial. If the appointed counsel was incompetent at an early stage of the proceeding and the defendant sought new counsel, the failure to appoint new counsel is constitutional error. The Ninth Circuit later questioned the standard of review that was used by the court in this case. Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000).

**United States v. Pollani**, 146 F.3d 269 (5th Cir. 1998) The defendant represented himself at various pretrial proceedings but retained counsel shortly before trial was set to begin. Newly retained counsel then moved for a continuance. The trial court denied the motion (which was permissible), and then prevented newly retained counsel from participating at trial, other than in a stand-by capacity. This was error. Though the defendant waived his right to counsel, he had the right to withdraw that waiver and retain counsel.

***United States v. Musa***, 220 F.3d 1096 (9th Cir. 2000) The defendant requested a substitution of counsel at his supervised release revocation hearing. The trial court summarily denied the request. This was error. A district court may not deny a substitution of counsel request simply because the court thinks current counsel's representation is adequate. The absence of any inquiry in this case deprived the appellate court of the ability to determine whether the defendant's complaint about his attorney was meritorious.

***Roberts v. State of Maine***, 48 F.3d 1287 (1st Cir. 1995) The right to counsel under the Sixth Amendment is not triggered at a roadside stop where the police suspect the driver of driving under the influence of alcohol, nor when the driver is brought to the station to have his blood or breath tested. However, in this case, the police advised the defendant about the consequences of refusing to take the test and neglected to inform the defendant that his refusal to take a test would result in a mandatory two-day jail sentence if he were convicted of driving under the influence. After receiving this inaccurate advice about the consequences of refusing to take the test, the defendant requested an opportunity to speak with his attorney. In this situation, the failure to allow the defendant to speak with his attorney violated the defendant's right to due process. This holding only applies in situations where the police have misinformed the defendant about the consequences of a choice he is facing.

***Cinelli v. Cutillo***, 896 F.2d 650 (1st Cir. 1990) Detectives were sued by a defendant after they attempted to coerce him into abandoning his lawyer. The detectives were not entitled to any immunity in this lawsuit for violating the defendant's constitutional rights to the assistance of counsel.

***Jones v. Vacco***, 126 F.3d 408 (2d Cir. 1997) The trial court's ban on communication between counsel and the defendant during an overnight recess violated the defendant's constitutional right to counsel. See Geders v. United States, 425 U.S. 80 (1976).

***United States v. Ming He***, 94 F.3d 782 (2d Cir. 1996) When a cooperating witness is debriefed by government agents after tendering a guilty plea, he has the right to the assistance of counsel. Counsel's presence can relieve the defendant's anxiety and facilitate the debriefing by ensuring that the defendant understands what is being asked and encouraging the defendant to fully respond to the questions. While not squarely deciding the Sixth Amendment issue, the court held that the practice of interviewing witnesses without their attorney being present would no longer be tolerated under the supervisory powers of the court.

***Grievance Committee for the Southern District of N.Y. v. Simels,*** 48 F.3d 640 (2d Cir. 1995) The defendant's attorney interviewed a potential witness against his client, who was also a potential co-defendant in a murder case. In the murder case, the witness had been appointed an attorney. This was not a violation of DR 7-104(A)(1) (communicating with a represented party). The witness was not a "party" in the drug case and with respect to the murder case, the witness, though involved in the crime, was clearly a witness for the prosecution. Thus, the attorney did not interview a "party" represented by an attorney for that "matter." The attorney's obligations to represent his client under the Sixth Amendment prompted the court to give the Directory Rule this narrow interpretation.

***United States v. Novak***, 903 F.2d 883 (2d Cir. 1990) Defendant's attorney was admitted to the bar by making fraudulent representations about the course of his studies and service in the armed forces. Because the attorney was not properly admitted to the bar, the defendant was denied the effective assistance of counsel.

***United States v. Cocivera***, 104 F.3d 566 (3rd Cir. 1997) The trial court erred in allowing a non-attorney to represent the corporation in this criminal trial. The corporation may not proceed pro se by having a stockholder who is not an attorney represent it.

***United States v. Pavelko***, 992 F.2d 32 (3rd Cir. 1993) Defendant was charged with bank robbery. The government introduced evidence that after the robbery, defendant made numerous cash expenditures. To prove that this money must have been the fruit of the robbery, the government then offered into evidence the defendant's financial affidavit which he was required to file in order to obtain a CJA attorney. The form indicated that the defendant had no money and was not employed. This was error. The Fifth Amendment right to remain silent may not be conditioned on the sacrifice of the Sixth Amendment right to counsel. If the form is required to be filled out to secure counsel, the information provided may not be used against the defendant at trial.

***Fuller v. Diesslin***, 868 F.2d 604 (3rd Cir. 1989) In the defendant's New Jersey state court trial, he sought to employ counsel from Illinois and D.C. The trial court denied the request based on a fear of delays. This is reversible constitutional error. A defendant has a right to counsel of choice including the right to be represented by out-of-state counsel.

***United States v. Gravatt***, 868 F.2d 585 (3rd Cir. 1989) The trial court denied the defendant's request for a court-appointed attorney. The defendant refused to complete a financial affidavit form on the grounds that it did not correctly describe the offense with which he was charged and that to provide the information violated his Fifth Amendment rights. The trial court's refusal to appoint counsel for the defendant was improper since the financial information that was provided was sufficient to establish his eligibility for an appointed attorney.

***United States v. Romano***, 849 F.2d 812 (3rd Cir. 1988) The defendant indicated that she wanted to proceed in her trial pro se. The trial court instructed her that if during the trial, she decided to use the services of an attorney, she would have to accept an attorney appointed by the court. This was error. If the defendant decides to hire an attorney during the course of the trial, she is permitted to do so and select her own attorney.

***United States v. Accetturo***, 842 F.2d 1408 (3rd Cir. 1988) It was improper for the District Court in New Jersey to require a Florida attorney to undertake the representation of a defendant mid-trial following the terminal illness of the original counsel. However, the District Court properly required nominal local counsel to proceed.

***United States v. Mullen***, 32 F.3d 891 (4th Cir. 1994) The defendant's parents retained a lawyer for her. She was unhappy with the choice and filed a motion for court-appointed counsel. The trial court abused its discretion in refusing this request. In evaluating whether the trial court abused its discretion in denying a defendant's motion for substitution, the appellate court considers three factors: the timeliness of the motion; the adequacy of the court's inquiry into the defendant's complaint; and whether the attorney/client conflict was so great that it had resulted in total lack of communication preventing an adequate defense. In this case, there was a total breakdown in communications.

***United States v. Taylor***, 933 F.2d 307 (5th Cir. 1991) Defendant insisted on proceeding at trial pro se. After conviction, however, he sought the assistance of counsel at sentencing. Denying this request deprived him of his Sixth Amendment right to counsel. Granting this request would not have interfered with the schedule, or otherwise interfered with the administration of justice. There is no requirement that the defendant make a showing of prejudice. Moreover, the presence of "standby counsel" from the Federal Defender's office was an inadequate substitute. Standby counsel is not responsible for the defense and that is what is required by the Sixth Amendment.

***United States v. Dodson***, 25 F.3d 385 (6th Cir. 1994) At defendant's probation revocation hearing, the trial court directed the defendant to make a statement but would not allow his attorney to elicit testimony in a question-answer format. This procedure denied the defendant due process. Though there is no absolute right to counsel at all revocation hearings, where, as here, there is some complexity to the issues being raised, the trial court must afford the defendant the right to counsel who must be permitted to advocate on the defendant's behalf, call witnesses in support of his client's position, or in mitigation of punishment and elicit testimony in the traditional format.

***Robinson v. Norris***, 60 F.3d 457 (8th Cir. 1995) Following his conviction on robbery charges, the defendant was advised by the trial court that if he desired to challenge the effectiveness of his trial counsel, he would have to do so pro se within thirty days. The defendant did not file such a motion and remained with his initial counsel. The trial judge's statement violated the defendant's Sixth Amendment right to counsel. The right to counsel applies at all critical stages of the prosecution, including the filing of a new trial motion and, in that proceeding, asserting an ineffective assistance of trial counsel claim.

***Young v. Lockhart***, 892 F.2d 1348 (8th Cir. 1989) The state trial court should have allowed the defendant to substitute counsel prior to trial. The first appointed counsel had not visited the defendant in six months, until just before trial. There was no indication that the defendant's desire to have substitute appointed counsel was designed to obstruct justice. Forcing the defendant to go to trial either pro se or with the initial attorney violated his Sixth Amendment rights.

***Berry v. Lockhart***, 873 F.2d 1168 (8th Cir. 1989) After disagreements with his appointed counsel arose, the state court defendant requested that another lawyer be appointed to represent him. He specifically told the trial court that he was not qualified to represent himself. Because the trial judge did not seek to ascertain the basis for the disagreement between the appointed counsel and the defendant, he improperly compelled the defendant to proceed without the assistance of counsel.

***United States v. Amlani***, 111 F.3d 705 (9th Cir. 1997) During pretrial discussions, the prosecutor repeatedly disparaged defense counsel in front of the defendant and the counsel. The defendant replaced that counsel, went to trial, and was convicted. No evidentiary hearing was held on the allegation of a Sixth Amendment violation, but the Ninth Circuit held that on remand, if

the facts were as alleged by the defendant, then the court should set aside the conviction. The defendant was not required to show that the replacement counsel was ineffective, or even less qualified than the original counsel. The government's interference with the defendant's original counsel was, if proven, sufficient to violate the defendant's constitutional right to counsel of choice.

***United States v. Del Muro,*** 87 F.3d 1078 (9th Cir. 1996) A defendant has a constitutional right to counsel in pursuit of a new trial motion. Here, the defendant, pro se, claimed that trial counsel was ineffective. The district court required trial counsel to represent the defendant in connection with this motion during the new trial motion. This was an improper procedure. Trial counsel had a clear conflict in pursuing the claim that he was ineffective. The trial court should have appointed substitute counsel to prosecute the new trial motion.

***United States v. Duarte-Higareda***, 68 F.3d 369 (9th Cir. 1995) The district court must appoint counsel in any §2255 proceeding in which an evidentiary hearing is required. Rule 8(c), Rules Governing §2255 Proceedings.

***United States v. D'Amore***, 56 F.3d 1202 (9th Cir. 1995) The defendant, who was facing revocation of his supervised release, complained that he was not happy with his appointed counsel, and had retained a private attorney and wanted a continuance. The district court made little or perhaps no inquiry into the reason for the delay in retaining private counsel; there was evidence of a considerable conflict between the defendant and his appointed counsel and a complete breakdown in communication; and while the official motion to continue was filed the day before the hearing, the defendant had made efforts to bring the matter to the court's attention much earlier. The Ninth Circuit later questioned the standard applied in this case (the court in this case held that the trial court must find a "compelling reason" to deny a continuance).

***United States v. Garrett***, 179 F.3d 1143 (9th Cir. 1999). United States v. Unimex, Inc., 991 F.2d 546 (9th Cir. 1993) It is essential that a corporation have counsel at trial, for a corporation cannot appear pro se. Here, there was no counsel for the corporation and the government virtually assured this by forfeiting all the corporation's assets prior to trial. The district court did not appoint an attorney for the corporation; indeed, there is no Sixth Amendment right to appointed counsel (because there is no risk of jail time); and the Criminal Justice Act does not apply to corporations. In this situation, Caplin & Drysdale and Monsanto do not apply. The seizure of all the corporate assets deprived the corporation of the ability to retain counsel and there was no other means to defend itself at trial.

***United States v. Lillie***, 989 F.2d 1054 (9th Cir. 1993) A defendant has a right to switch retained counsel, even if this switch occurs at the last moment before trial. While a delay in the trial may inconvenience the court, the prosecutor, and witnesses, denying the request infringes on the defendant's right to counsel of his choice. While a change of counsel should not be permitted if the sole basis is to obtain a delay, the court should make inquiry into the circumstances and permit a change, especially if newly retained counsel is prepared to proceed on schedule. The Ninth Circuit later questioned the standard applied in this case (the court in this case held that the trial court must find a "compelling reason" to deny a continuance). United States v. Garrett, 179 F.3d 1143 (9th Cir. 1999).

***United States v. Torres-Rodriguez***, 930 F.2d 1375 (9th Cir. 1991) On the morning of trial, the defendant expressed a desire for a substitute counsel. The trial court's denial of this request was reversible error. There was no indication that the substitution of trial counsel would delay the proceedings.

***United States v. Herrera-Figueroa***, 918 F.2d 1430 (9th Cir. 1991) The Ninth Circuit concludes that a defendant has a right to counsel during the presentence interview conducted by the probation officer in connection with a sentencing guidelines report. The court does not rely on Sixth Amendment grounds, relying instead on its supervisory powers.

***United States v. Walker***, 915 F.2d 480 (9th Cir. 1990) The defendant sought to dismiss his appointed counsel and requested substitute counsel. The evidence revealed that the appointed counsel and the defendant were not communicating at all during the trial because of irreconcilable differences. The trial court erred in denying the defendant's request for substitute counsel. Furthermore, the defendant desired to testify in his own defense and because of his attorney's decision not to call him as a witness, the defendant was denied this right. The defendant was entitled to a new trial.

***United States v. Robinson***, 913 F.2d 712 (9th Cir. 1990) The defendant voluntarily waived his right to counsel at trial. Nevertheless, the defendant sought the assistance of counsel at sentencing. The trial court's denial of this request amounted to a violation of the defendant's Sixth Amendment right to counsel at a critical stage of the proceedings.

***United States v. Bohn***, 890 F.2d 1079 (9th Cir. 1989) The defendant was charged with tax evasion and claimed that the Fifth Amendment provided a valid defense. To establish this defense, the defense requested an ex parte in camera hearing with the Court. The trial judge agreed to hold such a hearing, but only if both attorneys or no attorneys were present. The hearing was held with just the defendant and the judge. The Ninth Circuit reverses: The Sixth Amendment is violated whenever the accused is denied counsel at a critical stage of his trial. An in-camera hearing to assess the validity of a taxpayer's Fifth Amendment claim is a critical stage of the proceeding.

***Menefield v. Borg***, 881 F.2d 696 (9th Cir. 1989) The defendant voluntarily represented himself at trial, but after that failed, he sought to have an attorney appointed to represent him in preparing and arguing a motion for new trial. The Ninth Circuit holds that such a proceeding is a "critical stage" of a criminal prosecution and the Sixth Amendment guarantees the assistance of counsel.

***United States v. Harwell***, 80 F.3d 1471 (10th Cir. 1996) A defendant's financial affidavit that is completed to secure appointed counsel after being indicted may not be used by the government at trial to prove that the defendant has no legitimate income.

Using this affidavit penalizes the defendant's right to secure appointed counsel and, pursuant to Simmons v. United States, 390 U.S. 377 (1968), the defendant's right to counsel cannot be conditioned on providing incriminating information to the government. The court reaffirmed on rehearing, 88 F.3d 897 (10th Cir. 1996).

***Shillinger v. Haworth***, 70 F.3d 1132 (10th Cir. 1995) The defendant was held in custody prior to trial. He and his attorney wished to prepare for trial in the courtroom and the attorney hired a deputy sheriff so the defendant could be in the courtroom. It was agreed by the deputy that he would be paid by the defense attorney for this overtime work. The deputy, however, was contacted by the DA and told him what had happened during these rehearsals. This amounted to a violation of the defendant's Sixth Amendment rights. The fact that the DA learned the defendant's trial strategy was harmful, even though the trial court did not permit the DA to introduce actual statements made by the attorney, or the defendant during these sessions. When the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed. No other standard can adequately deter this sort of misconduct. A remand was necessary to determine the appropriate remedy.

***United States v. Rantz***, 862 F.2d 808 (10th Cir. 1988) The trial court compelled the defendant to testify prior to any other defense testimony being offered. This violates the defendant's right to the "guiding hand of counsel." The trial court imposed this requirement to avoid any problem arising from the joint trial of the defendant with his three co-defendants. The Tenth Circuit holds that the error was harmless considering the overwhelming evidence that the defendant would not have testified even without this requirement.

***Sanchez v. Mondragon***, 858 F.2d 1462 (10th Cir. 1988) The trial court gave general advice to the defendant against self-representation but failed to inquire into the specifics of the petitioner's conduct in seeking substitute counsel. More thorough investigation into the defendant's wishes in seeking to discharge a public defender is required.

***Jackson v. James***, 839 F.2d 1513 (11th Cir. 1988) The defendant's appointed counsel sought to withdraw on the morning of trial. The trial court permitted the attorney to withdraw and required the defendant to appear pro se despite the defendant's request for a one- or two-day continuance to hire an attorney. The Eleventh Circuit grants the writ of habeas corpus holding that this deprived the defendant of the right to effective assistance of counsel.

***United States v. Walker***, 839 F.2d 1483 (11th Cir. 1988) During the course of Walker's trial, not only was he a defendant, but he was also an informant for the government. His trial counsel was unaware of his client's dual status. A new rial was granted by the District Court after this prosecutorial misconduct was learned, but the defendant's motion to dismiss the indictment was denied. The defendant failed to show that a new trial with new counsel would not remove all taint from the prior governmental misconduct.

***United States v. Eniola***, 893 F.2d 383 (D.C. Cir. 1990) During the course of the defendant's drug trial, it was learned that an informant had set up the sale from the defendant to the undercover officer. During the course of two bench conferences, the trial judge instructed the defense attorney not to reveal the identity of the informant to the defendant. This constituted a denial of the defendant's right to effective assistance of counsel. The trial court's order impaired counsel's ability to prepare an entrapment defense.

***Mudd v. United States***, 798 F.2d 1509 (D.C. Cir. 1986) A trial judge's order to a defense attorney not to speak with his client over a weekend recess concerning the client's testimony deprived the defendant of his Sixth Amendment right to the effective assistance of counsel. An order such as that requires automatic reversal without a showing of any prejudice.

***ATTORNEY-CLIENT ISSUES (Criminal Justice Act "CJA")***

***United States v. Rivera-Corona***, 618 F.3d 976 (9th Cir. 2010) After entering a guilty plea, the defendant requested that the court remove his retained counsel and replace him with appointed counsel. The trial court's failure to engage in any factfinding violated the defendant's right to counsel. The court should have inquired whether the defendant was eligible for court-appointed counsel under the Criminal Justice Act. Because this was a post-plea request (and there was no suggestion that changing counsel would delay the proceedings), there was no need for the court to evaluate whether a change in counsel was necessary (such as by inquiring into the nature of the conflict between the attorney and the defendant).

**United States v. Aguirre**, 605 F.3d 351 (6th Cir. 2010) The defendant was arrested in possession of several thousand dollars in cash. Charged with a drug offense, his attorney suggested that the defendant simply did not have a bank account, so it was natural that he would keep cash. The prosecutor then introduced the financial affidavit that the defendant signed to get appointed counsel; the document showed that he was unemployed. The Sixth Circuit held introducing this document violated the defendant's right to counsel. The defendant should not be put in the position of either waiving he right to counsel or producing evidence that would be used against him at trial.

***United States v. Chase***, 499 F.3d 1061 (9th Cir. 2007) The trial court erred in denying the defendant's request for expert assistance to help in preparing for sentencing. The expert was necessary to evaluate how much methamphetamine could have been produced at a laboratory.

***United States v. Parker,*** 439 F.3d 81 (2d Cir. 2006) The Second Circuit reviews the law governing when a defendant with retained counsel can ask for CJA funds mid-trial. The court concludes that mid-trial appointment is permissible but was properly denied in this case. The court also approved the trial court's practice of ensuring that retained counsel is "fully retained" when she makes an appearance in the case at the outset. The Second Circuit held that such an inquiry, though appropriate, did not foreclose in appropriate circumstances the appointment of counsel mid-trial when necessary, in the interest of justice.

***United States v. Hardin***, 437 F.3d 463 (5th Cir. 2006) CJA counsel moved for the appointment of an expert who could test, and then testify about, the methamphetamine by-product that the government sought to include in the drug weight. The expert was prepared to testify that much of the substance was part of the production process and not consumable as methamphetamine. An ex parte hearing should have been held pursuant to the defendant's motion and the court should have appointed the expert to assist in the defense.

***United States v. Rodriguez-Lara***, 421 F.3d 932 (9th Cir. 2005) The trial court erred in refusing to authorize money for the payment of an expert to assist the defendant in his grand and petite jury composition challenge.

***ATTORNEY-CLIENT ISSUES Right To Counsel (Waiver of Right – Faretta Issues) SEE ALSO: DEFENDANT'S RIGHT TO SELF-REPRESENTATION FOR CASES IN WHICH THE COURT IMPROPERLY DENIED THE DEFENDANT THE RIGHT TO SELFREPRESENTATION***

***Indiana v. Edwards***, 128 S. Ct. 2379 (2008) A defendant who is mentally competent to go to trial is not, ipso facto, entitled to represent himself. A trial court may find that the defendant is competent to go to trial, but not mentally equipped to represent himself.

***Iowa v. Tovar***, 541 U.S. 77 (2004) When a defendant pleads guilty without counsel, the court should ensure that the defendant understands that he has the right to counsel. The court is not required to specifically advise the defendant that he may be overlooking a possible defense, or that he is giving up the right to an independent assessment of the case, by waiving the right to counsel.

***Godinez v. Moran***, 509 U.S. 389 (1993) Despite language in precedents to the contrary, the standard for assessing the competence of a defendant to enter a guilty plea is the same as for assessing the defendant's competence to stand trial: whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him. Moreover, the defendant's capacity to waive the assistance of counsel is measured by the same standard – the ability to understand the nature of the proceeding and to waive the right to counsel with an understanding of what is being waived.

***Ayers v. Hall***, 900 F.3d 829 (6th Cir. 2018) The defendant in this state tax evasion prosecution was an experienced criminal defense lawyer. From the initiation of the case, he represented himself. No inquiry was made of any kind about his knowledge or waiver of the right to counsel. Shortly before trial began, he requested a continuance to obtain retained counsel. The continuance motion was denied, and he appeared pro se at trial and was convicted. The Sixth Circuit held that the defendant's constitutional right to counsel were violated. Even a criminal defense attorney is entitled to a full Faretta hearing and warning. Though some modification of the warning may be appropriate, in this case, there was absolutely no warning and no inquiry into the defendant's voluntary relinquishment of the right to counsel.

***Imani v. Pollard,*** 826 F.3d 939 (7th Cir. 2016) The defendant requested that he be permitted to represent himself at trial. The state court judge decided that the defendant failed to show that he could represent himself and stated on the record that the defendant's decision was "immature." The Wisconsin Supreme Court held that the defendant failed to show that he was competent to represent himself. The Seventh Circuit granted the writ. The defendant is only required to make the request to represent himself and it is then the duty of the trial court to determine if the defendant is incompetent, or otherwise incapable of representing himself. The burden is not initially on the defendant to prove his competence. "Before allowing a defendant to proceed without counsel, a trial court … has the duty to warn a defendant about what he is getting himself into, but the court cannot just deny the defendant the right he has invoked. The imperative of a knowing and voluntary choice is a requirement for valid waiver of the right to counsel; it is not a condition that must be fulfilled before an accused may be "allowed" to exercise his Sixth Amendment right to represent himself." The lower court also erred in holding that the defendant must proffer a reason why he wants to represent himself. No such burden exists on the defendant.

***Burton v. Davis***, 816 F.3d 1132 (9th Cir. 2016) The state trial court erred in denying the defendant's repeated efforts to represent himself. Simply because the defendant requested more time to prepare was not a sufficient basis to deny the request.

***United States v. Kowalczyk***, 805 F.3d 847 (9th Cir. 2015) A defendant facing a competence hearing is not entitled to waive the right to counsel.

***United States v. Ductan***, 800 F.3d 642 (4th Cir. 2015) The defendant gave a variety of nonsense answers to the magistrate when the magistrate asked about appointing counsel for the defendant. The defendant also refused to cooperate with stand-by counsel. The district court's conclusion that the defendant had forfeited his right to counsel and would be required to represent himself was not supported by the evidence. The defendant did not affirmatively insist on representing himself and was never provided adequate Faretta warnings.

***United States v. Lee***, 760 F.3d 692 (7th Cir. 2014) Denying the defendant the right to self-representation is a structural error that is not subject to harmless error analysis.

***McKaskle v. Wiggins***, 465 U.S. 168 (1984). In this case, the Seventh Circuit held that the right to self-representation applies at a suppression hearing.

***United States v. Diaz-Rodriguez***, 745 F.3d 586 (1st Cir. 2014) The trial court erred in failing to inquire further into defendant's conflict with his attorney and his request for substitute counsel. The fact that the defendant's attorney was retained at the time he

expressed a need for new appointed counsel did not affect the judge's attorney to inquire into the nature of the conflict that prompted the defendant to request that new counsel be appointed.

***United States v. Booker***, 684 F.3d 421 (3rd Cir. 2012) The trial court's failure to properly alert the defendant to the possible range of sentences for a § 924(c) conviction rendered the Faretta colloquy defective, and the waiver of counsel was therefore invalid.

***Batchelor v. Cain***, 682 F.3d 400 (5th Cir. 2012) The defendant's clear and unequivocal request to represent himself and have counsel available as stand-by counsel was improperly denied and violated Faretta.

***United States v. Loya-Rodriguez***, 672 F.3d 849 (10th Cir. 2012) The defendant unequivocally announced his intention and desire to represent himself at sentencing, even though he was represented by counsel at trial. Denying the defendant, the right to represent himself at sentencing was a Faretta violation.

***Jones v. Norman***, 633 F.3d 661 (8th Cir. 2011) The trial court denied the defendant the right to represent himself. This was error. The fact that the defendant did not know the technical rules of Missouri evidence did not foreclose his right to represent himself. The fact that the defendant did not know the exact range of penalties he was facing was also not a basis to deny him the right of self-representation. The proper procedure would have been to appoint standby counsel and allow the defendant to represent himself. McKaskle v. Wiggins, 465 U.S. 168 (1984).

***United States v. Farias***, 618 F.3d 1049 (9th Cir. 2010) On the day before trial, the defendant expressed an unequivocal request to represent himself. The trial court advised him that he had the right to do so, but then explained that this would not result in a delay of the trial, which would begging the next day even if the defendant proceeded pro se. This was error. Though a defendant may not decide to represent himself in an effort solely to delay the trial, there was no finding in this case that the defendant's request was made to delay the trial, so the trial court should have completed the Faretta hearing and made findings and conclusions about a continuance request. Summarily advising the defendant that the trial would proceed as scheduled and thus deterring the defendant from representing himself is not appropriate.

***Smith v. Grams***, 565 F.3d 1037 (7th Cir. 2009) The state trial court erred in failing to appoint counsel to the defendant and requiring him to proceed pro se. The defendant repeatedly stated that he wanted counsel appointed, though he complained about the two attorneys who had been appointed. The trial court gave the defendant a choice of either withdrawing his motion for a speedy trial or going to trial pro se was not a valid choice to present to the defendant.

***Frantz v. Hazey***, 533 F.3d 724 (9th Cir. 2008) In this en banc opinion, the Ninth Circuit provides a survey of the law relating to a defendant's right to represent himself without interference from stand-by counsel. The basic principle was articulated in McKaskle v. Wiggins, 465 U.S. 168 (1984). Because the record was not entirely clear about the defendant's acquiescence to participation by standby counsel, a remand was necessary.

***United States v. Garey***, 540 F.3d 1253 (11th Cir. 2008) (en banc) The Eleventh Circuit concluded that a defendant who demands to have his court appointed counsel replaced faces the possibility of being compelled to proceed pro se if the trial court presents the defendant with a simple choice: proceed with court-appointed counsel or proceed on your own. If the trial court explains the Faretta rights and warnings, the trial court is entitled to present that binary choice to the defendant. Thus, the defendant may not insist on a third option: a new attorney. If the defendant, cognizant of the choice that has been presented to him, and warned of the dangers of proceeding pro se, responds by demanding new counsel, the trial court may (but certainly is not required to) direct the defendant to proceed without counsel. In a companion case, Jones v. Walker, 540 F.2d 1277 (11th Cir., 2008) (en banc), decided the same day, the court held that the trial court failed to adequately advise the defendant of the consequences of his decision (i.e., the hazards of proceeding pro se), but because Jones was a habeas petition, the burden was on the defendant to prove prejudice and to prove that he did not know the dangers. He failed to carry that burden. Garey, whose case was on direct appeal, was advised of the dangers of proceeding without counsel, so the government sustained its burden of proving a knowing and voluntary waiver of counsel.

***United States v. Cano***, 519 F.3d 512 (5th Cir. 2008) A defendant has a constitutional right to represent himself at sentencing, even if he appeared with counsel at trial. Failing to conduct a hearing pursuant to Faretta v.California, 422 U.S. 806 (1975), to determine if the defendant should be permitted to represent himself on appeal was error, requiring a remand for re-sentencing after an adequate Faretta inquiry is conducted.

***United States v. Forrester***, 512 F.3d 500 (9th Cir. 2008) The trial court conducted a Faretta hearing, but failed to state the charges and erroneously stated the range of possible punishment (the court told the defendant he was facing 10 years to life, when in fact he was facing zero to twenty). The court notes that when a judge misstates the possible sentence during a Faretta hearing, it does not matter if the error overstates or understates the possible sentence. The court also rejects the notion that there is any harmless error analysis when a Faretta colloquy is faulty.

***James v. Brigano***, 470 F.3d 636 (6th Cir. 2006) The defendant did not voluntarily and knowingly waive his right to counsel. The state court's determination that the defendant's decision to dismiss his appointed counsel was simply a delaying tactic did not explain why no Faretta inquiry was conducted.

***United States v. Jones***, 452 F.3d 223 (3rd Cir. 2006) Though the defendant requested permission to proceed pro se, his request was couched in terms, "If you won't appoint me another attorney, I would rather represent myself." The court conducted an insufficient Faretta inquiry and the defendant was therefore denied his right to counsel. In fact, the court failed to inquire into

many of the Faretta considerations, including the defendant's understanding of the nature of the charges, the possible defenses and other issues might arise at trial.

***United States v. Virgil***, 444 F.3d 447 (5th Cir. 2006) If a defendant asks to represent himself at sentencing, but the trial court does not comply with the Faretta inquiry, the defendant is entitled to a re-sentencing. This is the same result if the defendant's pro se representation at trial is found to have occurred without sufficient Faretta compliance.

***Pazden v. Maurer***, 424 F.3d 303 (3rd Cir. 2005) The defendant's waiver of counsel was not freely and voluntarily given. His counsel, who was newly appointed declared that she was unprepared to defend the case considering the number of witnesses and the complexity of the issues. The court gave the defendant the defendant the choice of proceeding pro se or going forward with unprepared counsel. This is not a constitutionally acceptable choice.

***United States v. Jones***, 421 F.3d 359 (5th Cir. 2005) The trial court failed to undertake the proper Faretta dialogue with the defendant. Allowing him to proceed pro se was error.

***Robinson v. Ignacio***, 360 F.3d 1044 (9th Cir. 2004) A Nevada state law provided that if the defendant waived his right to counsel at trial, this waiver applied at sentencing, as well. The Ninth Circuit holds that the state practice was not constitutional. The defendant asked for the assistance of counsel at sentencing and the denial of this request was a Sixth Amendment violation.

***United States v. Erskine***, 355 F.3d 1161 (9th Cir. 2004) The defendant's waiver of counsel was not knowing and waiver. The colloquy between the trial judge and the defendant indicated that the defendant did not know the sentence that he was facing, yet the judge did not correct him and then allowed him to represent himself. The defendant told the judge that he thought the possible sentence was one year in prison, when in fact the possible sentence was five years on each count.

***Cordova v. Baca***, 346 F.3d 924 (9th Cir. 2003) A defective Faretta waiver is structural error that requires granting a writ of habeas corpus.

***United States v. Pollani***, 146 F.3d 269 (5th Cir. 1998) The defendant represented himself at various pretrial proceedings but retained counsel shortly before trial was set to begin. Newly retained counsel then moved for a continuance. The trial court denied the motion (which was permissible), and then prevented newly retained counsel from participating at trial, other than in a stand-by capacity. This was error. Though the defendant waived his right to counsel, he had the right to withdraw that waiver and retain counsel.

***Henderson v. Frank***, 155 F.3d 159 (3rd Cir. 1998) A generic waiver of counsel form which simply stated, "I wish to proceed on my own behalf" – was insufficient to satisfy the state's weighty obligation to prove an intentional relinquishment or abandonment of the right to counsel.

***United States v. Moskovits,*** 86 F.3d 1303 (3rd Cir. 1996) The trial court did not adequately advise the defendant of the potential sentence he was facing when the hearing was held to determine whether the defendant should be permitted to proceed without counsel. The trial court must fully advise the defendant of the risks of proceeding pro se and this includes advice about the possible sentence. The appropriate remedy was to limit the exposure, rather than to set aside the conviction, however.

***United States v. Goldberg,*** 67 F.3d 1092 (3rd Cir. 1995) A defendant may lose the right to counsel in one of three circumstances: first, there is a knowing and voluntary waiver of the right; second, the defendant may forfeit the right to counsel because of extremely dilatory conduct; third, waiver may occur by defendant's conduct. This third category involves conduct which is less egregious than conduct warranting a forfeiture, but may still result in the loss of the right to counsel. In this third category of cases, however, the court must warn the defendant of the consequences of his action and the risk of proceeding pro se. In this case, the defendant demanded that his appointed counsel file a motion to withdraw and threatened to kill him. The appointed counsel then asked to withdraw, which the trial court granted, and the defendant was required to proceed pro se. This was a violation of the defendant's Sixth Amendment rights. The conduct in this case did not fall within the forfeiture category of cases, and, assuming it fit within the third category of cases, because the defendant had received no warnings from the trial court about the consequences of his actions or the dangers of proceeding pro se, the conviction was set aside. Significantly, at the hearing where the attorney was allowed to withdraw, the defendant was not present.

***United States v. Salemo***, 61 F.3d 214 (3rd Cir. 1995) When a defendant seeks to waive the assistance of counsel at sentencing, the court must make a careful inquiry into the voluntariness of the defendant's decision. The inquiry made in this case was inadequate. United States v. Romano, 849 F.2d 812 (3rd Cir. 1988) The defendant indicated that she wanted to proceed in her trial pro se. The trial court instructed her that if during the trial she decided to use the services of an attorney, she would have to accept an attorney appointed by the court. This was error. If the defendant decides to hire an attorney during the course of the trial, she is permitted to do so and select her own attorney.

***United States v. Taylor***, 933 F.2d 307 (5th Cir. 1991) Defendant insisted on proceeding at trial pro se. After conviction, however, he sought the assistance of counsel at sentencing. Denying this request deprived him of his Sixth Amendment right to counsel. Granting this request would not have interfered with the schedule, or otherwise interfered with the administration of justice. There is no requirement that the defendant make a showing of prejudice. Moreover, the presence of "standby counsel" from the Federal Defender's office was an inadequate substitute. Standby counsel is not responsible for the defense and that is what is required by the Sixth Amendment.

***United States v. Sandles,*** 23 F.3d 1121 (7th Cir. 1994) The indigent defendant sought new counsel because he and his appointed attorney had developed serious personal problems. The defendant made numerous allegations of misconduct and

inadequate preparation directed at the attorney. The attorney also requested an opportunity to withdraw because of a breakdown in communication, though he denied the allegations of any impropriety. The trial court told the defendant he could either proceed pro se or stick with the initial attorney. This was improper. The district court did not adequately warn the defendant of the dangers of proceeding without counsel, and it was not clear that the defendant was attempting to manipulate the system.

***Berry v. Lockhart***, 873 F.2d 1168 (8th Cir. 1989) After disagreements with his appointed counsel arose, the state court defendant requested that another lawyer be appointed to represent him. He specifically told the trial court that he was not qualified to represent himself. Because the trial judge did not seek to ascertain the basis for the disagreement between the appointed counsel and the defendant, he improperly compelled the defendant to proceed without the assistance of counsel.

***United States v. Keen***, 104 F.3d 1111 (9th Cir. 1997) In order to waive the right to counsel, the waiver must be intelligent, voluntary, and unequivocal. Though the Ninth Circuit does not require a rigid litany of warnings before a defendant can waive the right to counsel and proceed pro se the defendant must be made aware by the court of the nature of the charges, the possible penalties, and the dangers and disadvantages of self-representation. The government bears the burden of proving a knowing and intelligent waiver on the part of the defendant. The waiver in this case was inadequate.

***Snook v. Wood***, 89 F.3d 605 (9th Cir. 1996) The state trial court inadequately cautioned the defendant about the dangers of proceeding on appeal pro se and, therefore, he would be entitled to file a new appeal in the state court, or the conviction would be set aside. Crandell v. Bunnell, 25 F.3d 754 (9th Cir. 1994) This was a capital murder prosecution in California. At his initial municipal court proceeding, the defendant elected to proceed pro se, complaining that his appointed counsel had done nothing during the first two months of his representation. The trial court allowed the defendant to represent himself. Though a defendant is free to represent himself, this waiver is not valid if he was, in fact, confronted with the choice of representing himself, or proceeding with ineffective counsel. The trial court should have determined if the appointed counsel was ineffective before accepting the waiver. If he was ineffective, the defendant should have been afforded the choice between competent counsel and representing himself. A remand was necessary to determine if appointed counsel was ineffective for doing nothing during the initial stages of his representation, prior to the preliminary hearing in municipal court.

***United States v. Mohawk***, 20 F.3d 1480 (9th Cir. 1994) The defendant had difficulty relating to either of his first two appointed counsel. He proceeded pro se. The record failed to establish that the waiver of counsel was knowingly and intelligently made, and that the defendant was sufficiently warned of the dangers of proceeding without counsel. See Godinez v. Moran, 113 S.Ct. 2680 (1993).

***Hendricks v. Zenon***, 993 F.2d 664 (9th Cir. 1993) The defendant and the appointed public defender had several disagreements about the appeal of defendant's state conviction. The defendant urged the state appellate court to substitute a new appointed counsel, but the court refused, requiring him to proceed through the first appeal pro se. This was a denial of defendant's right to counsel on appeal. Douglas v. California, 372 U.S. 353 (1963); Evitts v. Lucey, 469 U.S. 387 (1985). Though the defendant was appointed an attorney at the outset and his actions caused this attorney to withdraw, he never requested an opportunity to proceed pro se, so he did not waive his right to counsel.

***United States v. Taylor,*** 113 F.3d 1136 (10th Cir. 1997) Other than warning the defendant that criminal procedure was very technical and not a simple matter, the trial judge did nothing to caution the defendant about the dangers of self-representation. The denial of the right to counsel is never subject to harmless error analysis.

***United States v. Allen***, 895 F.2d 1577 (10th Cir. 1990) The trial court failed to adequately determine whether the defendant intended to proceed without the assistance of counsel. The inquiry on the record failed to reveal that the trial judge advised the defendant of the problems of proceeding pro se. Though the defendant may have been engaging in conduct which amounted to a waiver of the right to counsel – refusing to talk to an appointed attorney, refusing to hire his own attorney – the trial court must still advise the defendant of the hazards of proceeding without an attorney before this waiver can be determined to be knowing and voluntary.

***United States v. Silkwood***, 893 F.2d 245 (10th Cir. 1989) The trial court conducted an inadequate hearing in deciding whether the defendant desired to proceed through sentencing without counsel. The defendant was dissatisfied with his trial counsel and refused to continue with his representation but was not properly advised of the hazards of proceeding pro se.

***United States v. Cash***, 47 F.3d 1083 (11th Cir. 1995) Defendant was charged with attempted murder and obstruction of justice. He was first declared incompetent to stand trial, and later, when he was declared competent, he requested that he be allowed to represent himself. This request was granted on the morning of trial. The Eleventh Circuit reversed. Though a pretrial hearing on the Faretta issue is not mandatory, it is preferable. To ensure that a waiver of counsel is voluntary, the court must ensure that the defendant fully understands the hazards of self-representation including the importance of evidentiary rules. The closer to trial an accused's waiver of the right to counsel is, the more rigorous, searching, and formal the questioning by the trial judge should be. Here, the waiver was made on the day of trial; the trial court did not question the defendant about his understanding of the possible sentence, or the nature of the charges. The factors which the appellate court must consider when evaluating the voluntariness of a waiver of counsel are (1) the defendant's age, educational background, and physical and mental health; (2) the extent of the defendant's contact with lawyers prior to trial; (3) the defendant's knowledge of the nature of the charges, possible defenses, and penalties; (4) the defendant's understanding of the rules of procedure, evidence and courtroom decorum; (5) the defendant's experience in criminal trials; (6) whether standby counsel was appointed and the extent to which that counsel aided the defendant; (7) any mistreatment or coercion of the defendant; and (8) whether the defendant was trying to manipulate the events of the trial. Considering all of these factors, the court held that the defendant's waiver was not shown to be voluntary.

***Marshall v. Dugger***, 925 F.2d 374 (11th Cir. 1991) The trial court inadequately assured that the defendant desired to proceed pro se and therefore his conviction was reversed. The defendant sought to have his appointed attorney replaced – the judge responded, in essence, by requiring the defendant to proceed pro se. There was virtually no effort made to effectively warn the defendant of the dangers of self-representation. Waiver of the right to counsel at trial requires a showing that (1) the defendant clearly and unequivocally asserts his desire to represent himself and to waive his right to counsel; and (2) this waiver was made knowingly and intelligently. This case may not have survived Jones v. Walker, 540 F.3d 1277 (11th Cir. 2008).

***Strozier v. Newsome***, 871 F.2d 995 (11th Cir. 1989) The record did not clearly demonstrate that the defendant knowingly and voluntarily waived his right to counsel during his state court trial. When the defendant sought to fire his third attorney, the trial judge instructed the attorney to remain present with the defendant but never addressed the defendant personally to ascertain whether his decision to proceed pro se was knowing and voluntary.

***Jackson v. James***, 839 F.2d 1513 (11th Cir. 1988) The defendant's appointed counsel sought to withdraw on the morning of trial. The trial court permitted the attorney to withdraw and required the defendant to appear pro se despite the defendant's request for a one- or two-day continuance to hire an attorney. The Eleventh Circuit grants the writ of habeas corpus holding that this deprived the defendant of the right to effective assistance of counsel.

***ATTORNEY-CLIENT ISSUES (Attorney Work Product)***

***In re Doe***, --- F.3d --- (3rd Cir. 2017) In order for work product or attorney client privileged communications to be stripped of the privilege based on the crime-fraud exception, the defendant must engage in some overt act of fraud or criminality and not simply muse about using the information to commit a crime.

***In re Grand Jury Subpoena***, 870 F.3d 312 (4th Cir. 2017) After a criminal trial concluded, the prosecution realized that a defense exhibit was a forgery. A grand jury subpoena was issued to the defense attorneys asking (1) where did the document come from; (2) who gave it to the defense team; (3) what did [a particular person] tell you? The Fourth Circuit considered whether the attorney work product privilege applied. The court noted that the privilege is held by both the attorney and the client. The court also distinguished opinion work product from fact work product. The latter is easier to breach. Moreover, the crime fraud exception applies. In this case, the court concluded that the third question amounts to opinion work product, because it requires the attorneys to opine what was said and would disclose the attorneys' impressions and interpretations as reflected in a witness interview memorandum. See Hickman v. Taylor, 329 U.S. 495 (1947).

***Schaeffler v. United States***, 806 F.3d 34 (2d Cir. 2015) In this IRS summons enforcement action, the Second Circuit held that the joint defense / common interest privilege applied to documents that were shared among clients, including a consortium of banks, that shared a common interest in the tax treatment of a refinancing and corporate restructuring. Additionally, the court held that the work-product doctrine applied to documents analyzing the tax treatment of the refinancing and restructuring that were prepared in anticipation of litigation with the IRS. See United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998). In this case, the documents were prepared by a federally authorized tax practitioner (whose communications are treated the same as the attorney-client privilege, 26 U.S.C. § 7525(a)(1)).

***United States v. Deloitte LLP***, 610 F.3d 129 (D.C. Cir. 2010) Deloitte a public accounting firm that prepared an audit of certain corporate tax structures. The D.C. Circuit discusses the work product doctrine in this context, ultimately holding that the work product doctrine applied.

***United States v. Thompson (The Willams Companies Inc***.), 562 F.3d 387 (D.C. Cir. 2009) The corporation was under investigation by DOJ for price manipulation in the natural gas marget and wire fraud. The corporation retained an outside law firm to conduct an internal investigation. Eventually, the results of the investigation were furnished to the government with a cover letter that if it was confidential and should not be disclosed to any other party or entity. The corporation was given a deferred prosecution agreement. An individual in the corporation was indicted. He sought the results of the internal investigation under Rule 16 and Brady. The D.C. Circuit held that the trial court was required to review the material and furnish any information to the defendant that would qualify as discoverable under Rule 16 or Brady. The corporation's desire to maintain the confidentiality of the internal investigation did not trump the defendant's due process and Rule 16 rights.

***In re Grand Jury Subpoena Dated July 6, 2005***, 510 F.3d 180 (2nd Cir. 2007) A defense attorney instructed his client to surreptitiously record another person to create evidence of the client's innocence. The AUSA learned about this tape and subpoenaed it to the grand jury. The Second Circuit held that the work product doctrine did not preclude enforcement of the subpoena. The tape constituted "fact" work product, as opposed to "mental impressions, conclusions, opinions, or legal theories" work product. The former is entitled to less production.

***In re Grand Jury Proceedings***, 492 F.3d 976 (8th Cir. 2007) Even if the government succeeds in persuading the court that certain documents were covered by the crime-fraud exception to the attorney-client privilege, the work product privilege survives, assuming the attorney was an unwitting participant in the client's fraud.

***United States v. Roxworthy***, 457 F.3d 590 (6th Cir. 2006) The work product privilege has both an objective and a subjective component. The memorandum in this case satisfied both prongs. The memo was written by KPMG, the audit and consulting firm after their client filed a tax return that reported a transaction that generated a $112 million loss for tax purposes only. KPMG prepared the memorandum, believing that this would ultimately trigger litigation from the IRS and the memorandum was written in anticipation of that litigation.

***In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management),*** 357 F.3d 900 (9th Cir. 2004) An attorney who was retained by a company under DOJ investigation, hired an environmental consultant. The consultant interviewed witnesses and helped prepare the defense to the charges. In an effort to avoid prosecution, the company submitted numerous documents to the EPA, some of which were prepared by the consultant. The grand jury then subpoenaed all the consultant's work papers, records and documents. The Ninth Circuit held that the consultant properly withheld from production the documents that were prepared in anticipation of litigation and at the request of the attorney. Other documents, which were prepared in connection with the EPA consent order, qualified under the "dual purpose" doctrine for protection, as well. That is, these documents, though prepared for more than one purpose, were still prepared "because of" the prospect of litigation. See also United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998).

***In re Grand Jury Proceedings (John Doe Co.) v. United States***, 350 F.3d 299 (2d Cir. 2003) Counsel for the defendant corporation wrote a letter to the government, explaining that the conduct of the corporation being investigated had been the subject of a prior conversation with ATF agents who told the corporation's lawyers that the corporate conduct was lawful. This did not amount to a waiver of the work product privilege and the corporation could not be compelled to produce the attorneys' notes from those prior meetings. There was nothing "unfair" about allowing the corporation to retain the privilege, because the disclosure by counsel was not submitted to the fact finder (i.e., the grand jury), but only to the AUSA who was handling the prosecution.

***In re: Sealed Case***, 146 F.3d 881 (D.C. Cir. 1998) The work product privilege turns not on whether a specific claim existed, but instead, on whether, under all the circumstances, the lawyer prepared the materials "in anticipation of litigation." For a document to meet this standard, the lawyer must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable.

***In re Grand Jury Proceedings***, 219 F.3d 175 (2d Cir. 2000) A corporation was being investigated for illegal firearms sales. The corporation explicitly sought to enforce the attorney-client privilege. An officer of the corporation, however, testified at the grand jury about certain dealings of the corporation and procedures that the corporation adopted considering counsel's advice; and the corporation's in-house counsel also testified, but refused to disclose certain notes that were taken by his assistant during a meeting about which he testified (claiming that this was work product). The government claimed that the corporation waived both the attorney-client and the work product privileges. The Second Circuit held that waiver may be found where the privilege holder asserts a claim that in fairness requires examination of protected communications. Fairness comes into play when a party attempts to use the privilege both as a sword and as a shield. In other words, a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party. A quintessential example of waiver is the advice of counsel defense. Circumstances may also dictate that there has been a partial waiver. The issue is more complicated in the context of corporate entities, because, as here, the corporation may assert the privilege, but an officer – acting in an individual capacity – may inadvertently (or, for that matter, intentionally) waive the privilege. This case contains a thorough review of the jurisprudence of waiver and corporate attorney-client privilege and work product privilege issues.

***United States v. Horn***, 29 F.3d 754 (1st Cir. 1994) Discovery in this massive bank fraud prosecution was being maintained at an independent document management firm. The defense was allowed to review documents at that location and to make copies. Unbeknownst to the defense, however, whenever the employees made a copy of a document for the defense, an extra copy was made for the government. The defense learned about this and a moved to seal the government's copies. Prior to a hearing on this motion, the government made an extra copy of their set of the defendant's documents. The lower court held that this amounted to serious governmental misconduct, violating the defendant's right to due process, to the effective assistance of counsel and violated the work product doctrine. 811 F. Supp. 739 (D.N.H. 1992). The appellate court agreed with this assessment but reversed the lower court's award of attorney's fees and costs.

***In re Grand Jury Proceedings (U.S. v. Under Seal),*** 33 F.3d 342 (4th Cir. 1994) Though the government offered sufficient evidence to pierce the attorney client privilege based on the crime-fraud exception, the information offered by the government was not sufficient to pierce the work product privilege which the attorney asserted. To pierce the work product privilege (unlike the attorney client privilege), the government must show that the attorney was aware that his advice was being used by the client to further a crime.

***In re Grand Jury Proceedings***, 43 F.3d 966 (5th Cir. 1994) The attorney work product privilege may be asserted by the defendant, or the attorney, and includes, among other things, the attorney's notes of interviews of third parties. Moreover, the privilege extends to proceedings which are closely related to the pending proceeding, such as a forfeiture action and a criminal proceeding. The test for whether a third-party communication is privileged by the work product doctrine is whether the information recorded by the attorney is "obtained or prepared by an adversary's counsel with an eye toward litigation."

***Hickman v. Taylor***, 329 U.S. 495 (1947). In re Sealed Case, 146 F.3d 881 (D.C.Cir. 1998) In order to raise the work product privilege, it is not necessary that the attorney establish that there was litigation then pending, or that there was a specific claim being considered by the attorney. All that is required is that the material was prepared "in anticipation of litigation," as opposed to documents that were prepared in the ordinary course of business (e.g., to deal with issues such as interest rates, payment schedules, or collateral).

***In re Sealed Case***, 29 F.3d 715 (D.C. Cir. 1994) An individual who had been engaged in illegal transactions with Libya sought counsel from an attorney. No grand jury had been empaneled to investigate the individual's transactions at that time.

Nevertheless, the work product doctrine covered these conversations because the doctrine applies to work performed, “with an eye toward litigation.” In determining, whether the materials in the lawyer’s files are protected by the work product privilege, the testing question is whether, considering the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. The privilege may be asserted not only by a lawyer, but also by his client.

***United States v. Paxson***, 861 F.2d 730 (D.C. Cir. 1988) A defendant and his attorney attended an interview with government antitrust lawyers during which the attorney took notes. At the trial of another defendant, the defendant on trial subpoenaed the attorney’s notes of this interview. The Court holds that the work product doctrine prevents disclosure of these notes. Absent a showing of necessity and unavailability by other means, such notes constitute work product and cannot be the subject of compelled disclosure.

***BAIL REFORM ACT (Bail Pending Appeal)***

***United States v. Zimny***, 857 F.3d 97 (1st Cir. 2017) The defendant, post-trial, learned that one (or perhaps more than one) juror reviewed blog posts about the case (and about how evil the defendant was) during trial. The First Circuit remanded the case to the district court for further development of the record. (See 848 F.3d 458 for the initial appeal). The defendant moved for bond pending appeal. 18 USC § 3143(b)(1). The district court denied the request and the defendant immediately appealed and the First Circuit reversed, holding that the issues presented were sufficient to necessitate bond pending appeal. The defendant was neither a danger to society nor a flight risk (which was evidenced by the district court’s willingness to allow him to self-surrender after sentencing). The First Circuit held that the facts relating to the jury misconduct were sufficient to satisfy the “substantial question of fact” prong and the “likelihood of reversal if facts were proven” prong of the bond pending appeal statute.

***United States v. Goforth***, 546 F.3d 712 (4th Cir. 2008) 18 U.S.C. § 3145(c) severely limits bail pending appeal in cases of drug cases and violent crimes. The code provides that in “exceptional circumstances” the judicial officer may permit bond. Some courts have held that only an appellate judge can make the “exceptional circumstances” finding. The Fourth Circuit rejects that argument in this case, holding that the district court is empowered to grant bond in exceptional circumstances pursuant to § 3145(c).

***United States v. Johnson***, 399 F.3d 1297 (11th Cir. 2005) The crime of being a felon in possession of a firearm (18 U.S.C. § 922(g)) is not a crime of violence that triggers § 3143(a)’s requirement of detention immediately following a conviction.

***United States v. Abuhamra***, 389 F.3d 309 (2d Cir. 2004) A district court’s order of detention pending sentencing is a final order that may be appealed to the court of appeals. 18 U.S.C. § 3145(c). In this case, the Second Circuit held that an appeal bond may not be denied based on an ex parte showing to the district court relating to the defendant’s alleged risk of flight and dangerousness.

***United States v. Garcia***, 340 F.3d 1013 (9th Cir. 2003) People found guilty of violent offenses or serious drug offenses are not permitted to be released on appeal, or pending sentencing, except in exceptional circumstances. 18 U.S.C. § 3145(c). In this case, the Ninth Circuit sets forth some of the factors that should be considered in assessing exceptional circumstances. Among those factors are whether the defendant’s conduct was aberrational; whether the defendant previously led an exemplary life; whether there were exceptionally strong grounds for the appeal; the length of the prison sentence; whether there was an unusual health situation that would make the hardship of prison especially harsh; an exceptional unlikelihood of flight. See also United States v. Brown, 368 F.3d 992 (8th Cir. 2004).

***United States v. Swanquist***, 125 F.3d 573 (6th Cir. 1997) When the trial court denies a defendant's application for an appeal bond, it must set forth the reasons for this denial. Merely reciting the statutory requirements and stating conclusions that the criteria for release are not met is not sufficient. The court must set forth the actual reasons.

***United States v. Blasini-Lluberas***, 144 F.3d 881 (1st Cir. 1998) Because the trial court did not enter a written order denying bail to the defendant pending appeal, the case had to be remanded.

***BAIL REFORM ACT (Bail Pending Sentencing)***

***United States v. Meister***, 744 F.3d 1236 (11th Cir. 2013) The district court judge has the authority to release a defendant for exceptional circumstances pending sentencing and appeal. This authority is not limited to appellate judges. The court was construing the provision in § 3145(c).

***United States v. Ingle***, 454 F.3d 1082 (10th Cir. 2006) A conviction for the offense of possession of a firearm by a convicted felon does not trigger the provision that requires detention pending sentencing. 18 U.S.C. § 3143(a)(2). 18 U.S.C. § 3156(a)(4) (defining crime of violence).

***United States v. Johnson***, 399 F.3d 1297 (11th Cir. 2005) A conviction for the offense of possession of a firearm by a convicted felon does not trigger the provision that requires detention pending sentencing. 18 U.S.C. § 3143(a)(2). 18 U.S.C. § 3156(a)(4) (defining crime of violence).

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whether there were exceptionally strong grounds for the appeal; the length of the prison sentence; whether there was an unusual health situation that would make the hardship of prison especially harsh; an exceptional unlikelihood of flight.

***BAIL REFORM ACT (Crime of Violence)***

***United States v. Salerno***, 481 U.S. 739 (1987) The United States Supreme Court upheld the pre-trial detention aspects of the Bail Reform Act which permit detention based on dangerousness.

***United States v. Bowers***, 432 F.3d 518 (3rd Cir. 2005) Possession of a firearm by a convicted felon is not a crime of violence for purposes of determining whether to grant the defendant pretrial release.

***United States v. Johnson***, 399 F.3d 1297 (11th Cir. 2005) A conviction for the offense of possession of a firearm by a convicted felon does not trigger the provision that requires detention pending sentencing. 18 U.S.C. § 3143(a)(2). 18 U.S.C. § 3156(a)(4) (defining crime of violence).

***United States v. Twine***, 344 F.3d 987 (9th Cir. 2003) The Bail Reform Act does not permit pretrial detention without bail based solely on a finding of dangerousness. This interpretation would render meaningless 18 U.S.C. § 314(f)(1) and (2). In addition, the court holds that the offense of felon in possession of a firearm is not a crime of violence for purposes of the Bail Reform Act. Thus, the presumptions are not triggered by this offense.

***BAIL REFORM ACT (Miscellaneous)***

***United States v. King***, 849 F.2d 485 (11th Cir. 1988) In reviewing a Magistrate's release or detention order, a District Judge must make written findings of fact in affirming, modifying, or reversing the Magistrate's decision. The Court of Appeals stated that in reviewing the Magistrate's decision, the District Court must review the case de novo, although it need not conduct a de novo hearing. It must, however, review all the facts presented to the Magistrate.

***United States v. Gaviria***, 828 F.2d 667 (11th Cir. 1987) The government may proceed by proffer of evidence at a pre-trial detention hearing subject to the discretion of the judicial officer presiding. The defendant only has a conditional right to call adverse witnesses during his presentation at the detention hearing. Again, the presiding officer is vested with discretion whether to allow defense counsel to call adverse witnesses with or without an initial proffer of the expected benefit of the witness' testimony.

***In re Smith***, 823 F.2d 401 (11th Cir. 1987) The district court could not deny defendant release pending appeal without specifying its reason in writing.

***BAIL REFORM ACT (Risk of Flight)***

***United States v. Nwokoro***, 651 F.3d 108 (D.C. Cir. 2011) The trial court failed to document the reasons that bail was denied in this case. Though there was evidence at the hearing that the defendant had assets in Nigeria and the judge stated that there was a risk of flight, the judge failed to make specific findings (or document those findings) in an order that reflected a weighing of the factors that suggested that the defendant was not a flight risk, including the fact that the defendant was previously on bond and did not flee.

***United States v. Sabhnani***, 493 F.3d 63 (2d Cir. 2007) In light of the government's concession that there were certain conditions that would minimize the risk of flight, the Second Circuit held that the defendant should have been released on those conditions.

## *BANK FRAUD*

***Loughrin v. United States***, 134 S. Ct. 2384 (2014) A charge under § 1344(2) does not require proof of an intent to defraud the bank. The victim of the defendant's fraud may be a customer of the bank, as long as money is obtained from the bank through false or fraudulent pretenses, representations, or promises.

***Shaw v. United States***, 137 S.

Ct. 462 (2016) Even if a defendant intends to defraud solely a bank customer and not the bank, the defendant may be convicted of bank fraud under 18 U.S.C. § 1344(1) if the method of defrauding the customer was by taking money from the customer's account at the bank.

***Neder v. United States***, 527 U.S. 1, 119 S.Ct. 1827 (1999) Though there is no explicit materiality element set forth in the mail fraud, wire fraud and bank fraud statutes, this element is implicit in the concept of fraud. Thus, the government must prove that any misrepresentation involved in a mail, wire or bank fraud prosecution relates to a material fact. This issue, pursuant to United States v. Gaudin, must be submitted to the jury.

***United States v. Wells***, 519 U.S. 482 (1997) Materiality is not an element of a bank fraud offense under 18 U.S.C. §1014 (false statement to a bank).

***United States v. Bouchard***, 828 F.3d 116 (2d Cir. 2016) There was no evidence that the mortgage lender in certain counts of this bank fraud case was federally insured and insufficient evidence that the defendant knew that that lender's loans were transferred to a federally insured entity. (The conduct in this case occurred prior to 2009, when the definition of a financial institution was amended to include mortgage lenders, 18 U.S.C. § 20). Pursuant to Loughrin v. United States, 134 S. Ct. 2384 (2014), the government must prove that the defendant intended to defraud a financial institution, and a financial institution had to

be federally insured. The same rationale required the reversal of the § 1014 false statement counts, because they required proof that the defendant knew the false statement was supplied to a bank.

***United States v. Ajayi***, 808 F.3d 1113 (7th Cir. 2015) The defendant deposited an altered check into his bank account. Thereafter, he withdrew funds from the account that were only in the account as a result of the altered check. Each withdrawal was indicted as a separate count. The Seventh Circuit held that the bank fraud offense was the deposit of the altered check, and the withdrawals were not separate indictable executions of the scheme, therefore the counts were multiplicitous.

***United States v. Phillips***, 731 F.3d 649 (7th Cir. 2013) In this en banc decision, the Seventh Circuit held that the defendants should have been permitted to introduce evidence that the defendants (who were charged with making a false statement to a bank in violation of § 1014) were told by their broker that lying in response to certain questions on a loan application form was permissible. Th evidence was relevant to whether the defendants actually knew that their answers were false and whether they believed that answering the questions in that way would "influence" the bank's decision.

***United States v. Davis***, 735 F.3d 194 (5th Cir. 2013) The government failed to prove with sufficient evidence that the victim (American Express) was FDIC insured. The proof offered at trial was confusing between the American Express holding company and the credit card company.

***United States v. Kurlemann***, 736 F.3d 439 (6th Cir. 2013) A material omission on a bank loan application is not a "false statement" under 18 U.S.C. § 1014. A material omission may amount to fraud, but § 1014 only prohibits false statements, not fraud.

***United States v. Nkansah***, 699 F.3d 743 (2d Cir. 2012) The defendant was involved in a scheme to obtain fraudulent refund checks from the IRS. To further the scheme, he opened bank accounts in fake names that matched the fraudulent identifications that he created to obtain the refunds. The defendant cashed the fraudulent checks at the bank. This evidence did not support a § 1344 bank fraud offense, because there was no evidence that the bank was at risk of losing money or was the victim envisioned by the defendant in executing the scheme.

***United States v. Steffen***, 687 F.3d 1104 (8th Cir. 2012) The Eighth Circuit concludes that in certain situations, a bank fraud prosecution under § 1344 can be based on a failure to disclose material information. However, the court then concludes that the failure to disclose in this case was not adequately set forth in the indictment. The court notes that the failure to disclose that the defendant had sold the collateral could not constitute bank fraud if the collateral was sold after the loan was approved, despite the fact that the defendant obtained draws on the loan after having sold the collateral. This amounts to a breach of contract, not a fraud. Other theories of fraudulent omission were also rejected by the Eighth Circuit, which held that the trial court property dismissed the indictment.

***United States v. Phillips***, 688 F.3d 802 (7th Cir. 2012) Judge Easterbrook and Judge Posner face off on the question of whether a defendant is guilty of making a false statement to a bank if the defendant is not aware that the false statement would influence the bank (because the defendant is lured into believing that the bank does not care about this particular statement). Judge Easterbrook in the panel opinion, concluded (for the majority) that the defendant need only be shown to have known that the statement was false, and it was submitted to the bank with the understanding that the bank would consider the loan application when deciding whether to authorize the loan. Judge Posner writes, in dissent, that the trial court erred in prohibiting the defendant from introducing evidence that the defendant, though knowing that the statement was false, was led to believe that it was not something the bank cared about. This case involved the typical "stated income" mortgage fraud case in which the mortgage broker told the customer/defendant that it made no difference what was written on the loan application, because "no doc" loans were known as "liar's loans" and the bank was not interested in the customer's recitation of income, because all that mattered was the customer's credit score. REHEARING EN BANC GRANTED, and the conviction was reversed: In the en banc decision, Judge Posner wrote the majority opinion, and held that the evidence about what the defendants were told was admissible and could have disproved that they had the required state of mind to commit the offense. 731 F.3d 649 (7th Cir. 2013).

***United States v. Alexander***, 679 F.3d 721 (8th Cir. 2012) In order to succeed in a § 1014 false statement prosecution, the government must establish that the victim financial institution was FDIC insured. In this case, the government proved that Bank of America was FDIC insured, but not that Bank of America, N.A. or Bank of America Mortgage was FDIC insured or that the latter two institutions were subsidiaries of Bank of America so that they qualified under § 1014.

***United States v. Parkes***, 668 F.3d 295 (6th Cir. 2012) The defendant, a customer of a small Tennessee bank, was charged with participating in bank fraud. His company had large debts to the bank, in fact, the debts exceeded the lending limits permitted by the bank and the FDIC. The president of the bank altered the books to make it look like the loans were actually to several different unrelated companies (some of which were non-existent), so that it did not appear on the books as an outsized loan to the defendant. The evidence was insufficient to prove that the defendant was aware of the falsification undertaken by the president. The bank president did not testify. Other evidence pointed to the fact that the defendant was not, in fact, aware of the president's conduct.

***United States v. Bennett***, 621 F.3d 1131 (9th Cir. 2010) A bank fraud prosecution cannot be predicated on fraud involving a bank's wholly owned subsidiary that is not itself a "financial institution" insured by the FDIC.

***United States v. Rigas***, 490 F.3d 208 (2d Cir. 2007) Though affirming the defendants' convictions on numerous counts, the Second Circuit holds that there was insufficient proof of materiality with regard to one group of counts.

**United States v. Sandles, 469 F.3d 508 (6th Cir. 2006)** In this bank robbery trial, the government failed to adequately prove that the bank was FDIC insured, an essential element of a bank robbery, or bank fraud offense.

***United States v. Staples***, 435 F.3d 860 (8th Cir. 2006) This opinion contains an interesting discussion of the different Circuits' decisions about what the government is required to prove in a bank fraud prosecution. Some Circuits require that the bank be victimized; others required that the bank be defrauded; others require only that the defendant commits a fraud against someone, and the bank is used in the fraudulent endeavor. The distinction sometimes reflects whether the government is proceeding under subsection (1) or (2) of 18 U.S.C. § 1344. The decision in this case was complicated by the fact that the government acquiesced to a jury instruction which obligated it to prove the elements of both subsections (1) and (2). The end result is that the government failed to prove that two defendants were guilty of bank fraud – again, a result of the jury instructions that increased the elements required to be proved. The problem is that the entire loss caused by the defendants' conduct was suffered by Title Companies, not the bank.

***United States v. Omer***, 395 F.3d 1087 (9th Cir. 2005) The defendant's bank fraud indictment failed to allege that the falsehood was material. He moved to dismiss the indictment prior to trial, but this motion was denied. The conviction could not be sustained in light of his timely challenge to the sufficiency of the indictment.

***United States v. Anderson***, 391 F.3d 970 (9th Cir. 2004) When the government initiates a money laundering sting involving money supposedly derived from bank fraud, the agent must convey information to the target that the bank was insured by the FDIC – otherwise, the proceeds would not be from specified unlawful activity (i.e., federal bank fraud). Because no such representation was made to the target in this case, the conviction was not supported by sufficient evidence. The government's argument that it would be too difficult to represent, in an undercover capacity, that the bank was federally insured, was met with the court's response, "Simply put, with time, resources, and opportunity to design the scenario, it is not too much to ask the government to get it right."

***United States v. Ponec***, 163 F.3d 486 (8th Cir. 1998) The government is not required to prove a financial loss to a bank in order to successfully prosecute a bank fraud case. In this case, the defendant diverted checks made payable to his employer and deposited the checks into his own account. This constitutes bank fraud. However, when the defendant withdrew money from his own account – an account that had his own money in it, as well as his employer's money – he did not commit bank fraud. The government failed to prove that there was any fraud in withdrawing the money, which may have been his own money.

***United States v. Rodriguez***, 140 F.3d 163 (2d Cir. 1998) A co-conspirator of the defendant, an employee of a publishing company, issued checks to the defendant as if she, the defendant, were a vendor of the company. The defendant then took these checks and deposited them into her own account. Obviously, this scheme defrauded the company. The Second Circuit held, however, that this did not amount to bank fraud, because she made no false statements to the bank and the bank was never even a potential victim of the scheme.

***United States v. Adkinson***, 135 F.3d 1363 (11th Cir. 1998) The indictment in this case alleged that the defendants had a scheme to defraud a bank. The indictment did not allege, however, an execution of the scheme. Both elements are essential to a bank fraud prosecution. The indictment was defective and the conviction was reversed.

***United States v. Schnitzer***, 145 F.3d 721 (5th Cir. 1998) In this complicated savings and loan fraud case, the Fifth Circuit upheld the lower court's decision to grant a judgment of acquittal on certain counts. With regard to certain false entry counts, however, the appellate court found sufficient evidence to support the verdict but upheld the lower court's decision granting a new trial on those counts. Among the issues decided by the court was the impropriety of permitting the government to introduce evidence about a violation of a banking regulation to prove that the defendants intended to deceive regulators. The banking regulation was insufficiently related to the supposed false entry to support its admission. The court also upheld the reversal of a misapplication conviction (18 U.S.C. § 657), relying on United States v. Beuttenmuller, 29 F.3d 973 (5th Cir. 1994).

***United States v. Mulder***, 147 F.3d 703 (8th Cir. 1998) Good faith constitutes a complete defense to a charge of fraudulent intent. In this case, the defendant was charged with bank fraud. At trial, he offered a financial statement which appeared to accurately reflect his assets, and which was contained in the bank's lending file. Excluding this document, even though it was internally inconsistent, was reversible error.

United States v. Mueller, 74 F.3d 1152 (11th Cir. 1996) The defendant was engaged in civil litigation with a financial institution. During the course of that litigation, the defendant filed a false affidavit and engaged in obstruction of the discovery process. This did not support a bank fraud conviction.

***United States v. Thorn***, 17 F.3d 325 (11th Cir. 1994) The defendant, an attorney, prepared a title insurance policy for a loan to a law office partnership of which the attorney was a member. The attorney knew that a prior mortgage existed on the property but failed to note it in the title policy. This did not defraud the bank. The title policy did not make any representation about the existence of any prior mortgages; it simply insured against them. Indeed, the policy expressly stated that it would insure the lender against any existing mortgages. The bank, in short, was not the recipient of a false statement. The trial court correctly granted a post-trial judgment of acquittal.

## *BANKS, MISAPPLICATION OF BANK FUNDS*

***United States v. Flanders***, 491 F.3d 1197 (10th Cir. 2007) 18 U.S.C. § 656 makes it a federal crime for a bank officer or director to willfully misapply bank funds with the intent to injure or defraud the bank. Though the evidence was sufficient for a conviction on some counts of this indictment, the government failed to prove that the defendant willfully misapplied bank funds with regard to one count. There was insufficient evidence of an intent to defraud or an intent to injury the bank.

***BANK ROBBERY See: Armed Robbery / Bank Robbery***

## *BANKRUPTCY FRAUD*

***United States v. Knight***, 800 F.3d 491 (8th Cir. 2015) The trial court did not abuse its discretion in granting a new trial in this case. The defendant, an attorney, was convicted of bankruptcy fraud and related offenses in connection with his representation of a real estate client. The government's theory of the fraudulent conduct of the attorney was vague and authorized the trial court to grant a new trial based on the weakness of the case, even though there was sufficient evidence to support a conviction.

***United States v. Milwitt***, 475 F.3d 1150 (9th Cir. 2007) In order to properly allege a bankruptcy fraud offense under 18 U.S.C. § 157, the indictment must allege the defendant's specific intent to defraud an identifiable victim or class of victims of the particular fraudulent scheme. The evidence at trial was insufficient to support a conviction of the defendant consistent with the charges contained in the indictment.

***United States v. Mitchell***, 476 F.3d 539 (8th Cir. 2007) A prosecution for bankruptcy fraud may not be predicated on a failure to reveal income received pre-petition, even if the income is received from an asset that later is part of the estate.

***United States v. McIntosh***, 124 F.3d 1330 (10th Cir. 1997) The defendant was charged with bankruptcy fraud and money laundering on the basis of his failure to disclose during his bankruptcy proceeding that he had received certain money and deposited some of those funds in a bank account he controlled through an unincorporated business he managed. The indictment also alleged that he failed to disclose his interest in real estate that was actually owned by his father, but at which he lived and paid the mortgage payments. Count one of the indictment charged him with failure to disclose his interest in the unincorporated business and in his house. Because he did not own his house, however, the evidence was insufficient to sustain a conviction Though the evidence was sufficient regarding the business, because the jury may have convicted the defendant on the basis of the failure to report the house (the judge instructed the jury that they could convict the defendant if they believed he concealed his interest in either asset), the conviction on this count had to be reversed. Also, one count charged the defendant with concealing an asset. Another count charged him with filing a false report in the bankruptcy court. These counts were multiplicitous.

***United States v. Gilbert***, 136 F.3d 1451 (11th Cir. 1998) In a bankruptcy fraud concealment of assets case, the statute of limitations does not begin to run until the debtor is discharged or denied a discharge. 18 US.C. § 3284. Here, the court held that if the defendant converts the corporate bankruptcy from a Chapter 11 to a Chapter 7, thus precluding discharge, the statute of limitations begins to run at that time. The prosecution in this case was barred by the statute of limitations.

***United States v. Rowe***, 144 F.3d 15 (1st Cir. 1998) The evidence was insufficient in this bankruptcy fraud prosecution to prove that the defendant's answer on a bankruptcy schedule was fraudulent.

## *BATSON SEE: JURY SELECTION (BATSON)*

## *BILL OF PARTICULARS*

***United States v. GAF, Corp.,*** 928 F.2d 1253 (2d Cir. 1991) In the third trial of the corporation, the defense sought to introduce the bill of particulars which had previously been filed by the government in an earlier prosecution. The trial court erred in excluding this evidence. The bill showed that the government had abandoned its earlier broad (and inconsistent) theory of the offense.

***United States v. Davidoff,*** 845 F.2d 1151 (2d Cir. 1988) The Second Circuit reversed the defendant's conviction based on the denial of his request for a Bill of Particulars. In order to prove the existence of a RICO offense, the government introduced numerous instances of extortion which were not listed in the indictment but which the defendant requested in his Bill of Particulars. The Second Circuit holds that "it is simply unrealistic to think that a defendant preparing to meet charges of extorting funds from one company had a fair opportunity to defend against allegations of extortion against unrelated companies, allegations not made prior to trial."

***United States v. Bortnovsky,*** 820 F.2d 572 (2d Cir. 1987) The government was required to provide a bill of particulars in this mail fraud and RICO case specifying with connection to various insurance fraud counts which insurance claims were fraudulent, and which invoices were allegedly falsified. In this case, the Second Circuit held that the failure to provide this information was reversible error.

***United States v. Earnhart***, 683 F.Supp. 717 (W.D.Ark. 1987) The defendant, charged with income tax evasion, was entitled to a Bill of Particulars setting forth the alleged gross income, the adjusted gross income, the alleged unreported income, the alleged availability of deductions and exemptions, and corporate expenditures which were alleged to have been "constructive dividends."

***United States v. Rogers***, 636 F.Supp. 237 (D.Colo. 1986) The district court dismissed a tax fraud indictment in this case for failing to specify what deductions were fraudulent.

***United States v. White***, 753 F.Supp. 432 (D.Conn. 1990) Defendant's bill of particulars would be granted with respect to the following matters: (1) co-conspirators; (2) the location of the acts performed by the principals; (3) the location where the principal offense occurred.

***United States v. Madeoy***, 652 F.Supp. 371 (D.D.C. 1987) The defendant was charged in a 121-count indictment involving fraud, conspiracy, and RICO. The district court held that he was entitled to a bill of particulars specifying in detail the laws and regulations which were allegedly violated. In particular, one count of the indictment stated that the defendant had violated certain regulations, without specifying which regulations in the 700-page code were violated.

***United States v. Feola***, 651 F.Supp. 1068 (S.D.N.Y. 1987) In this narcotics prosecution, the defendants were entitled to the names of the persons whom the government claimed were co-conspirators; whether the individuals present during the commission of overt acts were, in fact, informants or undercover agents; the names of witnesses to overt and substantive acts; and the exact dates that the defendants joined the conspiracy. The defendants were also entitled to the statements which the government intended to rely upon to show an agreement among the conspirators; the quantity of cocaine distributed and possessed; and whether it was going to be the government's contention that certain defendants were aiders and abettors. Finally, the court held that the government must specify the manner in which one defendant used a vehicle to facilitate a conspiracy, the names, and places where the defendant met with others, and the time, place, and manner in which the government would claim at trial that two defendants became members of the conspiracy.

***BRADY (Generally)***

***United States v. Ruiz***, 536 U.S. 622 (2002) The government may implement a policy of permitting a defendant to enter a "fast-track" guilty plea, and receiving a downward departure, with the understanding that he will not receive any information from the government that could be used to impeach witnesses or support an affirmative defense. The defendant is not required to accept this offer, but there is nothing unconstitutional about making such an offer to the defendant and conditioning the entry of a guilty plea and receiving a downward departure on waiving the right to receive such Giglio information.

***Kyles v. Whitley***, 514 U.S. 419 (1995) In the Court's most sweeping (and favorable) Brady decision in decades, the Court reverses this murder conviction on the basis of withheld information which was material to the issue of guilt or innocence. Along the way, the Court reviews a number of issues relating to materiality, including: (1) A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in acquittal; rather, all that need be shown is a "reasonable probability" of a different result. In other words, "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" (2) The question is not whether all the evidence, including the withheld evidence would result in sufficient evidence to convict, or not. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. The question is whether the excluded evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. (3) Once a showing of constitutional error has been made, there is no need for a "harmless error" analysis. By definition, if the excluded evidence was material under the tests above, the Brady violation could not be harmless. (4) In reviewing the materiality of the withheld evidence, it should be considered cumulatively, not in isolation, item-by-item. (5) It is no excuse that information is known to the police and withheld from the prosecutor. The prosecutor should adopt procedures which ensure that information known to the police is conveyed to the prosecutor. In concluding, the Court notes that when faced with a tough question whether to disclose or not, the prosecutor should disclose: "This is as it should be. Such disclosure will serve to justify trust in the prosecutor as the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations."

***Pennsylvania v. Ritchie***, 480 U.S. 39 (1987) The United States Supreme Court was confronted with the question of whether a welfare department could withhold its files in this child molestation case. In a lengthy opinion, Justice Powell reviews the various means by which this information could be disclosed to the defendant, including subpoena power and the due process requirement that exculpatory evidence be disclosed to the defendant. Though the decision does not give hard and fast rules, it is a favorable decision insofar as it holds that a child welfare agency's file must be produced to the defendant as Brady information if it contains exculpatory information. That is, the important aspect of this case is the holding that the welfare department is, in effect, an arm of the prosecution and thus under the duty to disclose exculpatory information.

***United States v. Abdallah***, 911 F.3d 201 (4th Cir. 2018) The trial court erred in refusing to review agents' notes and communications given the inconsistency in their versions of what occurred when the defendant was interrogated. If a defendant makes a plausible showing that exculpatory evidence exists in the government's file, the court should review the information that is identified by the defendant as potentially including exculpatory information.

***McCormick v. Parker***, 821 F.3d 1240 (10th Cir. 2016) The prosecutor utilized a Sexual Assault Nurse Examiner (SANE) in connection with the state court prosecution of the defendant. The SANE falsely testified that she was certified. The Tenth Circuit held that the SANE was a member of the prosecution team, and therefore, her false testimony was deemed to be known to the prosecution team (i.e., she knew she was testifying falsely, even if the prosecutor himself did not actually know). This misrepresentation was material for Brady purposes because of the importance of the SANE's testimony and also because if her misrepresentation to the jury had been exposed, the jury may have given her remaining testimony less weight.

***United States v. Pasha***, 797 F.3d 1122 (D.C. Cir. 2015) A criminal defense attorney and two investigators (both of whom were women) were prosecuted for obstruction of justice based on their effort to fabricate evidence to support a client's defense. A witness to the events involving the fabrication had told the AUSA and law enforcement officers that he saw one man and one woman entering the house where the fabricated evidence was filmed. This statement was revealed just prior to trial (eight months after the witness's interview). This statement was exculpatory because both investigators (defendants) were women (mother and daughter). The AUSA then interviewed the witness again, and this time, he said that there were two women. The district court judge expressed concern that there was a Brady violation caused by the delay in furnishing to the defense the interview in a timely manner and by the time of trial, the witness's memory was different. The district court wrote, "At the moment the eyewitness said the two individuals who arrived at the photo shoot were a man and a woman (rather than two women), 'counsel for the Government should have understood that as soon as they were finished talking with that gentleman, they had an obligation to give that information to the defense.'" The district court ultimately held that the Brady violation was not prejudicial. The D.C. Circuit reversed: The failure to turn over the favorable interview in a timely manner was prejudicial and denied the defense the opportunity to obtain a sworn statement from the witness to preserve that testimony (and his memory). Not only did this taint the trial, but the remedy might be dismissal of the indictment, because now even more time passed since the witness made the exculpatory statement and there might be no way to recreate his favorable memory. The remedy decision needed to be made in the first instance by the district court on remand.

***Lewis v. Conn. Com'r. of Correction***, 790 F.3d 109 (2d Cir. 2015) There is no due diligence requirement on the defendant to discover allegedly exculpatory evidence before relief may be granted based on the prosecution's failure to reveal the information. In this case, the prosecution failed to reveal that a witness had previously denied any knowledge about the crime.

***Barton v. Warden, Southern Ohio Corr. Facility***, 786 F.3d 450 (6th Cir. 2015) Brady applies to exculpatory information, even if it is not admissible evidence, if the information might lead to the discovery of admissible evidence.

***Amado v. Gonzalez***, 758 F.3d 1119 (9th Cir. 2014) The state's failure to reveal impeaching evidence about a key prosecution witness was a Brady violation that necessitated setting aside the murder conviction in this case. The witness actually balked at testifying at trial, so his earlier statement to the police was read by the officer who interviewed the witness. The prosecution failed to reveal that the witness was on probation for a robbery offense and that he was a member of a rival gang at the time he made the statement to the police. The state appellate court rejected the Brady claim on the basis that the trial attorney could have found the information and thus it was not "withheld" by the prosecution. The Ninth Circuit held that the defendant does not have the duty to seek exculpatory or impeaching information; the prosecution has the duty to produce it. There is no "due diligence" requirement imposed on the defense when it comes to Brady or Giglio information. In addition, citing Kyles v. Whitley, the court held that the prosecutor had a duty to locate and reveal this information, even if it was not literally in the prosecutor's file: "[b]ecause the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned."

***United States v. Olsen***, 737 F.3d 625 (9th Cir. 2013) Judge Kozinski's dissent to the denial of en banc review is full of outrage about the epidemic proportions that Brady violations have reached, citing scores of cases from around the country in both state and federal courts. This case involved the failure to disclose a pending investigation into the incompetence of a laboratory analysis upon whose conclusions the conviction in this case was based.

***Munchinski v. Wilson***, 694 F.3d 308 (3rd Cir. 2012) The Third Circuit described the Brady violations in this case as staggering and the lower court described the events as "extraordinary." Police reports were intentionally redacted by state court prosecutors to eliminate references to recorded statements of witnesses; alternative suspects were not revealed and witness statements that implicated alternative suspects were never disclosed. Significant portions of an autopsy report were not revealed. An offer of leniency to the state's key witness were not revealed and the prosecutor, in closing argument, expressly denied that any motive existed for the witness to testify for the prosecution. The Third Circuit concluded that there was clear and convincing evidence of actual innocence and that a successive habeas petition would be permitted and granted.

***United States v. King***, 628 F.3d 693 (4th Cir. 2011) Generally, Brady violations are discovered post-trial and the existence and scope of the exculpatory information that was not revealed is known. Occasionally, however, the existence of exculpatory information is not known with certainty, but its location is "probable." In that situation, the defendant should request that the trial court conduct an in-camera inspection of the material to determine whether exculpatory information is contained therein. That would include records of social service agencies and, as in this case, grand jury testimony. A sufficient showing was made in this case to require a remand to review the grand jury testimony of one witness.

***Arnold v. Secretary, Dept of Corrections***, 595 F.3d 1324 (11th Cir. 2010), adopting district court decision 622 F.Supp.2d 1294 (M.D. Fla. 2009) The police detective who was the lead investigator in this case had committed crimes that were clearly discoverable pursuant to Brady. However, only the detective and not the prosecutor knew about the detective's crimes. The Eleventh Circuit held that this information was required to be furnished to the defense, because the detective was part of the prosecution team, and any information known to any member of the prosecution team must be disclosed.

***United States v. Salem***, 578 F.3d 682 (7th Cir. 2009) Prior to trial, the government was aware that there was information that its star witness was involved in a murder. There was no plea agreement, or any other kind of agreement in place to protect the witness; nevertheless, this information should have been furnished to the defendant prior to his trial. However, further development of the record was necessary in order to determine if the defendant was entitled to a new trial.

***United States v. Robinson***, 583 F.3d 1265 (10th Cir. 2009) The trial court erred in barring the defense from reviewing the mental health records of the key eyewitness in this case. The parties and the lower court knew that the defendant had just been released from a mental health facility prior to his testimony, but the defense was barred from reviewing the records. The trial court also erred in barring the defense from cross-examining the witness about his mental health infirmity and use of drugs. Among the cases relied upon by the Tenth Circuit were United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983) and Greene v. Wainwright, 634 F.2d 272 (5th Cir. 1981).

***United States v. Price***, 566 F.3d 900 (9th Cir. 2009) The AUSA who tried this case involving possession of a firearm by a convicted felon presumably did not know about his star witness's repeated run-ins with local police officers, including numerous arrests and convictions for petty theft, and motor vehicle offenses involving dishonesty (false registration stickers). The Ninth Circuit holds that the witness's criminal record was constructively known to the AUSA, because it was known to the law enforcement officers with whom he worked in this case: the local police officers who had access to the computers that contained the witness's lengthy arrest and conviction records.

***United States v. Burke***, 571 F.3d 1048 (10th Cir. 2009) The notion that there is automatically no Brady violation if the information is disclosed during trial is false. The question regarding the remedy for late disclosure of Brady must be determined on a case-by-case basis. Late disclosure – even during trial – could have an impact on pretrial strategy, including what defenses to investigate and pursue. The question is whether the defendant was prejudiced and that cannot be determined based on a rule that immutably excuses tardiness that is remedied at the time of trial. It may be too late by then.

***Steidl v. Fermon***, 494 F.3d 623 (7th Cir. 2007) After the defendant was convicted and while his case was proceeding through postconviction proceedings, the police became aware of information that substantially undermined the reliability of the verdict. The defendant was ultimately released when it was discovered that he was falsely convicted. In this civil case, he sued the police for withholding the information. The Seventh Circuit held that the police had a continuing duty under Brady to reveal the exculpatory information to the defendant during post-conviction proceedings.

***United States v. Duval***, 496 F.3d 64 (1st Cir. 2007) The First Circuit criticized the government's delayed disclosure of impeaching and exculpatory information and noted especially the agent's apparent failure to take notes when interviewing witnesses if the witness did not make statements that were consistent with the theory of guilt (thus, turning over the agents' reports did not fully reveal the extent of Brady information known to the agents). Harmless error.

***United States v. Rodriguez***, 496 F.3d 221 (2d Cir. 2007) The government does not relieve itself of its Brady obligation by simply not taking notes of interviews with witnesses who provide information that is exculpatory. In this case, while being questioned by the government, a cooperating witness was asked (and responded affirmatively) that everything he said during his first interview with the agents was a complete lie. The defense requested information about that interview. The agents explained that no notes were taken of the interview. The Second Circuit held that a remand was required to determine exactly what the lies were and whether the lies were material to the testimony of the witness.

***United States v. White***, 492 F.3d 380 (6th Cir. 2007) In this complex white collar fraud case, it became apparent post-trial that certain documents were not revealed to the defense prior to trial that might amount to Brady information. The appellate court remanded the case to the district court for a fuller evaluation of the information and to conduct an evidentiary hearing on the post-trial Brady claim. In response to the government's claim that the defendants were on a fishing expedition, the appellate court responded that "the fish swim just below the surface of the pond and for reasons squarely within the government's control, the waters run cloudy, rendering the defendants unable to discern the nature of the fish."

***United States v. Velarde***, 485 F.3d 553 (10th Cir. 2007) Post-trial, in preparation for a new trial motion, the trial court should have empowered the defendant to subpoena records relating to the government's chief witness, whose prior inconsistent statements (or prior false accusations directed at others) were not disclosed to the defense prior to trial.

***Ferrara v. United States***, 456 F.3d 278 (1st Cir. 2006) Twelve years ago, the defendant entered a guilty plea to a RICO case that charged various predicate offenses, including murder. A key witness for the government provided a statement implicating the defendant in one of the charged murders. Later, however, he recanted and told the AUSA and the case agents that the defendant was not involved in the murder. The AUSA and agents met once again with the witness, and he recanted his recantation. The witness's recantation was never provided to the defense, despite Brady obligations that were ongoing pursuant to the Constitution and Local Rules. The defendant entered a guilty plea, though during the plea colloquy, he never admitted participation in the murder. Years later, the witness's recantation was revealed. The District Court granted § 2255 relief. The First Circuit affirmed, concluding that the government's conduct amounted to a violation of Brady and amounted to gross governmental misconduct.

***United States v. Risha***, 445 F.3d 298 (3rd Cir. 2006) The defendant claimed that information known to state authorities was improperly withheld from him prior to his federal trial and that this information was exculpatory. The Third Circuit set forth the factors to be considered when determining whether such information should have been disclosed, even assuming it was not actually known by the federal prosecutor. (1) Were investigative agents working in tandem? (2) Was there a joint investigation? (3) Was the information readily available to the federal prosecutor? The Third Circuit decided to remand the case to the district court for further consideration of these factors.

***United States v. Blanco***, 392 F.3d 382 (9th Cir. 2004) The government's failure to reveal that an informant had an ongoing relationship with the INS (in addition to the disclosed relationship with DEA) and that he had been given a "special parole visa"

enabling him to remain in the U.S. was error that necessitated a remand for consideration of an appropriate remedy. The record in this case demonstrated that, at least to some extent, the DEA was intentionally withholding information from the AUSA. This, of course, is no defense to a Brady violation. The duty under Brady extends to the DEA and any other law enforcement agency involved in the prosecution of the defendant. United States v. Sipe, 388 F.3d 471 (5th Cir. 2004) The government's failure to reveal that one of the government witnesses told the government that he "disliked" the defendant; as well as the "benefits" granted to numerous other government witnesses, amounted to a Brady violation that required setting aside the conviction. The Fifth Circuit noted that evidence of guilt was "significant," but that the withheld evidence, when considered in the totality, undermined confidence in the verdict.

***United States v. Avellino***, 136 F.3d 249 (1998) A Brady violation may taint a guilty plea, though the information that was not disclosed in this case was not deemed to be material. The court noted that if there was a Brady violation, a motion to withdraw a guilty plea must be granted – the court need not evaluate prejudice to the government.

***United States v. Pelullo***, 105 F.3d 117 (3rd Cir. 1997) Rough notes of law enforcement interviews of witnesses contained Brady information that was not disclosed to the defense prior to his first trial. The conviction in that trial was tainted by this Brady violation. Two more trials followed that initial trial. In the last trial, the defendant's testimony from the first trial was introduced. The defendant claimed that but-for the Brady violation, he would not have testified at the first trial. See Harrison v. United States, 392 U.S. 219 (1968). This was a valid argument but required additional fact-finding by the lower court.

***United States v. Tincher,*** 907 F.2d 600 (6th Cir. 1990) Despite the defendant's request for Jencks or Brady material, the government failed to disclose material which clearly fell within the scope of both requests. The prosecutor failed to disclose grand jury testimony of the agent who was testifying against the defendant. In light of the deliberate misrepresentation of the prosecutor, the conviction was reversed.

***Miller v. Vasquez***, 868 F.2d 1116 (9th Cir. 1989) A police officer's bad faith failure to collect evidence at the scene of a crime may constitute a Brady violation. A hearing is necessary to determine whether the failure to collect potential exculpatory evidence is a result of an investigator's bad faith. In this case, the law enforcement officer failed to collect and analyze the blood-stained jacket of the victim after interviewing her at her apartment less than twenty-four hours after the attack.

***United States v. Brooks***, 966 F.2d 1500 (D.C. Cir. 1992) The prosecutor has the duty not only to turn over favorable evidence, but also in certain circumstances, to actually search for information which may be exculpatory, including searching files of other agencies. In this case, the testimony of the investigating officer from the defendant's first trial was read at the second trial. Between the first and the second trial, the officer was shot and killed with her own service revolver in the presence of another officer. The AUSA should have searched the files of the Metropolitan D.C. Police files to determine if there was anything in those files relating to the officer's death which would have cast doubt on her credibility. The court reviewed precedents from several other Circuits dealing with the duty of the AUSA to engage in a search for exculpatory evidence in certain circumstances. See, e.g., United States v. Auten, 632 F.2d 478 (5th Cir. 1980); United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973); United States v. Perdomo, 929 F.2d 967 (3rd Cir. 1991); Carey v. Duckworth, 738 F.2d 875 (7th Cir. 1984).

***BRADY (Other Exculpatory Evidence)***

***Floyd v. Vannoy***, 894 F.3d 143 (5th Cir. 2018) The defendant was convicted in state court of killing a man with whom he allegedly had a gay relationship. The deceased was found naked, in his room and there were two glasses of whiskey on the table. Another man was killed in almost identical circumstances, leading the police to charge the defendant with that murder, too. The defendant confessed to the murders. But he had a limited IQ, and he was easily persuadable. The state failed to reveal that fingerprints on the whiskey glasses in both locations showed that fingerprints were neither the victims', nor the defendants. This contradicted the defendant's alleged confession. Moreover, a statement by the defendant's friend, that he preferred having sex with black men, was not revealed to the defendant, and one of the victims was white. The failure to reveal this information violated Brady and required setting aside the conviction.

***Juniper v. Zook***, --- F.3d --- (4th Cir. 2017) The Fourth Circuit remands this habeas case back to the district court for a full evidentiary hearing on the Brady claim that included proof of undisclosed impeachment evidence and undisclosed exculpatory evidence. The case contains a lengthy discussion of the standards for granting an evidentiary hearing (and the test for materiality) in a § 2254 case.

***United States v. Cessa***, 861 F.3d 121 (5th Cir. 2017) Reviewing certain 302's after trial, the Fifth Circuit holds that some of the information in the 302's relating to a key government witness qualified as exculpatory and, in some instances, contradicted the testimony of the witness. The trial court's failure to furnish these reports to the defense violated Brady. A remand was necessary to determine what relief was appropriate.

***Dennis v. Secretary, Pa. Dept. of Corrections***, 834 F.3d 263 (3rd Cir. 2016) This 100+-page en banc opinion results in granting habeas relief to a defendant sentenced to death for a murder over twenty years previously, based on Brady violations. The defendant approached two girls as they exited a Philadelphia subway and ripped the earrings off one of the girls and then shot and killed her. The defendant gave a statement that at the time of the shooting he was on a bus returning to his apartment complex and saw a girl he knew and waved at her. The girl gave a statement (and testified) that she remembered seeing him, but it was two hours later than he claimed, based on her chronology of activities that day (including picking up her welfare check at 3:03 that afternoon). After trial, it was revealed that she actually picked up her check at 1:03 that afternoon, which would have more-closely aligned with the chronology of the defendant's statement (and would have significantly impeached the chronology

that the witness provided at trial). The police had a copy of the proof of the time the girl picked up her check but did not reveal it to the defense. In addition, another witness told her parents that night of the shooting that she recognized the assailant from her high school, but the defendant did not attend that witness's high school. At trial, the witness positively identified the defendant as the shooter. The police did not reveal this inconsistency to the defense. Finally, a jailhouse informant was told by a cellmate that he was the perpetrator. The police did not reveal this to the defense. This case is a hornbook of Brady law in the context of AEDPA review.

***United States v. Pasha***, 797 F.3d 1122 (D.C. Cir. 2015) A criminal defense attorney and two investigators (both of whom were women) were prosecuted for obstruction of justice based on their effort to fabricate evidence to support a client's defense. A witness to the events involving the fabrication had told the AUSA and law enforcement officers that he saw one man and one woman entering the house where the fabricated evidence was filmed. This statement was revealed just prior to trial (eight months after the witness's interview). This statement was exculpatory, because both investigators (defendants) were women (mother and daughter). The AUSA then interviewed the witness again, and this time, he said that there were two women. The district court judge expressed concern that there was a Brady violation caused by the delay in furnishing to the defense the interview in a timely manner and by the time of trial, the witness's memory was different. The district court wrote, "At the moment the eyewitness said the two individuals who arrived at the photo shoot were a man and a woman (rather than two women), 'counsel for the Government should have understood that as soon as they were finished talking with that gentleman, they had an obligation to give that information to the defense.'" The district court ultimately held that the Brady violation was not prejudicial. The D.C. Circuit reversed: The failure to turn over the favorable interview in a timely manner was prejudicial and denied the defense the opportunity to obtain a sworn statement from the witness to preserve that testimony (and his memory). Not only did this taint the trial, but the remedy might be dismissal of the indictment, because now even more time passed since the witness made the exculpatory statement and there might be no way to recreate his favorable memory. The remedy decision needed to be made in the first instance by the district court on remand.

***Comstock v. Humphries***, 786 F.3d 701 (9th Cir. 2015) The defendant acknowledged pawning a ring. The owner of the ring told the police that the ring was stolen, though it was possible that he mistakenly left the ring outside when he was cleaning his motorcycle. The prosecution neglected to tell the defendant of the "victim's" alternative possibility. This was Brady information. The failure to disclose the information required setting aside the verdict.

***Gumm v. Mitchell***, 775 F.3d 345 (6th Cir. 2014) The police were aware that witnesses had identified another perpetrator of the offense and that the other person had told the witnesses that he was the perpetrator. Failing to reveal this information to the defendant violated Brady and was material, even though the defendant confessed to the crime. The court noted that even inadmissible evidence must be disclosed if it can lead to admissible evidence and is material, though it concluded that the admissible information that was not disclosed was sufficient to merit habeas relief. In a related case, Bies v. Sheldon, 775 F.3d 386 (6th Cir. 2014), which involved the conviction of the co-defendant, the Sixth Circuit held that evidence about the shoddy investigation and the failure to follow up on leads would also have been admissible evidence and the failure to reveal this information was also a Brady violation.

***Aguilar v. Woodford***, 725 F.3d 970 (9th Cir. 2013) Someone exited a white Volkswagen and killed the victim. A "scent dog" indicated that the defendant had recently been in the Volkswagen and this was the strongest evidence linking the defendant to the crime. The state knew, however, that the dog had made false "scent" identifications in the past and, in fact, the dog evidence had been excluded previously in another case. This information was not revealed to the defense. The Ninth Circuit ordered that the writ be granted.

***United States v. Tavera***, 719 F.3d 705 (6th Cir. 2013) Just prior to trial the AUSA interviewed the co-defendant, who entered a plea agreement and was told that the defendant was ignorant about the drugs in the truck. Later, the codefendant changed his statement and said that the defendant was aware of the drugs in the truck. The co-defendant did not testify at trial. This was not disclosed to the defense. This was a Brady violation that required vacating the conviction. (The court also ordered the U.S. Attorney's Office to investigate why this information was not revealed to the defense prior to trial). The Sixth Circuit rejected the government's argument that the defendant had a due diligence obligation to learn about the co-defendant's statements that were made in connection with his guilty plea. The Sixth Circuit also noted that the fact that the evidence was sufficient to convict is not relevant to whether the suppressed statement was material.

***United States v. Mahaffy***, 693 F.3d 113 (2d Cir. 2012) Investigative depositions that were obtained by the SEC (and shared with the prosecutors) of various witnesses, were never disclosed to the defense prior to this criminal securities fraud trial. The depositions contained information that was inconsistent with the government's theory of the case regarding the confidentiality of information that the defendants' disclosed. During trial, one of the SEC lawyers who was serving as a special AUSA expressly advised another AUSA that there was Brady information in the depositions. The recipient AUSA ignored the warning. Failure to reveal this information to the defense was a Brady violation that warranted setting aside the verdict. "Even if it is by no means certain that arguments based on wrongfully withheld evidence would have swayed the jury, it is a real enough possibility to undermine confidence in the verdict." The court also noted that the fact that some of the evidence was not "admissible" is not fatal to a Brady claim, because the information may have led to admissible evidence. Additionally, the court noted that certain portions of the withheld depositions could have been used to "discipline" a witness who denied that the information in the deposition was accurate – in other words, the depositions could have been used to show a prior inconsistent statement if the witness had been called by the defense and testified inconsistent with the prior sworn testimony.

***Goudy v. Basinger***, 604 F.3d 394 (7th Cir. 2010) The state court failed to consider the overall effect of the exculpatory information that was withheld in this Indiana prosecution. Under the Kyles standard, the suppressed evidence must be considered cumulatively. The suppressed evidence included misidentifications of the defendant; reports that implicated another gunman (the person who testified at trial that the defendant was the perpetrator), and other information that was inconsistent with the state's theory at trial.

***United States v. Johnson***, 592 F.3d 164 (D.C. Cir. 2010) The defendant was charged with possession with intent to distribute heroin that was found in his room during a search conducted by the FBI. At some point prior to trial, the FBI learned from an informant who was working with the FBI in a large gang investigation, that another target in that case had told the informant that the drugs found in the defendant's house actually belonged to the target and that the target's mother had told the defendant's mother that he (the defendant) had to "take the beef." The government's failure to reveal this information to the defense was a Brady violation necessitating a reversal of the conviction. The fact that the defendant "must have known" prior to trial that the drugs belonged to the other person does not negate the significance of the fact that the government was in possession of a witness statement in which the actual owner of the drugs confessed that the drugs were his.

***Simmons v. Beard***, 590 F.3d 223 (3rd Cir. 2009) A number of Brady violations, when considered collectively (rather than in isolation) were sufficient to set aside the verdict. One witness was intimidated by law enforcement officers to cooperate, on threat of being prosecuted for murder; another witness made false statements on a firearm application (for which the prosecutor helped avoid a criminal prosecution); and another witness failed to pick the defendant out of book of mug shots. This information should have been provided to the trial attorneys.

***United States v. Thompson,*** 562 F.3d 387 (D.C. Cir. 2009) The corporation was under investigation by DOJ for price manipulation in the natural gas market and wire fraud. The corporation retained an outside law firm to conduct an internal investigation. Eventually, the results of the investigation were furnished to the government with a cover letter that provided that it was confidential and should not be disclosed to any other party or entity. The corporation was given a deferred prosecution agreement. An individual in the corporation was indicted. He sought the results of the internal investigation under Rule 16 and Brady. The D.C. Circuit held that the trial court was required to review the material and furnish any information to the defendant that would qualify as discoverable under Rule 16 or Brady. The corporation's desire to maintain the confidentiality of the internal investigation did not trump the defendant's due process and Rule 16 rights.

***Jells v. Mitchell***, 538 F.3d 478 (6th Cir. 2008) In this death penalty habeas case, the Sixth Circuit concluded that various witness statements that were withheld from the trial defense counsel undermined the prosecution's theory of the events leading up to the murder of the victim, including whether the victim was randomly kidnapped off the streets of Cleveland, as opposed to voluntarily went with the defendant in his van, prior to the murder. This tainted the penalty phase of the trial.

***United States v. Aviles-Colon***, 536 F.3d 1 (1st Cir. 2008) The DEA had a report documenting the statement of a confidential informant that the defendant and his alleged co-conspirator were actually part of rival gangs who were at war. Failing to produce this report to the defense was a Brady violation that required setting aside the conviction.

***United States v. Garner***, 507 F.3d 399 (6th Cir. 2007) Just as the trial was beginning, the government furnished to the defense cell phone records that were obtained by the government several days earlier. The cell phone records belonged to the victim of the carjacking. The cell phone was stolen along with the car and the records apparently disclosed the identity of people that the perpetrator called. Failing to turn the records over to the defense violated Brady. Alternatively, the trial court should have granted a continuance to enable the defense to investigate the numbers called by the perpetrator.

***Trammell v. McKune***, 485 F.3d 546 (10th Cir. 2007) Despite the fact that an eyewitness identified the defendant as the perpetrator of a car theft, Brady information that was in the possession of the police pointed the finger at another person who was the perpetrator (in fact, this was one of the people who identified the defendant as the culprit). Failing to reveal this other evidence was error requiring that the writ be granted.

***United States v. Jernigan***, 492 F.3d 1050 (9th Cir. 2007) In this en banc decision, the Ninth Circuit held that it was a Brady violation for the government to fail to reveal that after the defendant's arrest, nearby banks had been robbed by a woman whose description bore a physical resemblance to the defendant. This case contains a useful discussion of the fallibility of eyewitness identification.

***Graves v. Dretke***, 442 F.3d 334 (5th Cir. 2006) The prosecutor neglected to inform the defendant that on the day before the key prosecution witness testified, he told the prosecutor that he, the witness, alone was responsible for the murders and had also revealed previously that his wife was involved. The prosecutor also asked the witness at trial whether all of his statements consistently implicated the defendant (with one exception). The witness responded affirmatively, as did a police officer who was asked the same question. Yet, the witness had not been consistent and had exculpated the defendant and implicated his wife. The Brady violation necessitated reversing the conviction.

***Gantt v. Roe***, 389 F.3d 908 (9th Cir. 2004) The prosecutor failed to reveal certain investigative interviews conducted by the police that produced information inconsistent with the prosecution's theory. The murder defendant had a matchbook on him at the time of his arrest. The state theorized that he took the matchbook from the victim during the course of the robbery that preceded the killing. But a phone number written on the matchbook was linked to a restaurant at which nobody knew the victim. The court noted that proof of the prosecutor's "bad faith" is not important in considering a Brady violation. If the prosecutor, or a

police officer involved in the case, has favorable information and it is not revealed to the defense, there has been a Brady violation, notwithstanding the prosecutor's good faith.

***United States v. Rivas***, 377 F.3d 195 (2d Cir. 2004) The defendant was charged with conspiring to possess cocaine on board a ship arriving in the U.S. The principal government witness was a shipmate who acknowledged participating in prior drug transactions with the defendant. One day prior to trial, he revealed to government agents that he had actually brought the drugs on board that were found in the defendant's locker (though he did not change his story that the drugs belonged to the defendant). The defense questioned the witness at trial about the last time he talked to the government, and he said that it was three days prior to trial. The government agents did not disclose the existence of the conversation the day prior to trial; nor the fact that the witness now admitted actually bringing the drugs on board for the defendant. The Second Circuit initially criticized the AUSA for not correcting the false statement of the witness about the last time he was debriefed by the government. The court then went on to hold that the undisclosed information was exculpatory and required reversal of the conviction. The government's post-trial excuse in the lower court, "There was a tactical reason – having the witness recount his receipt of the narcotics might well have confused him" – was, in the words of the Second Circuit, "totally unacceptable."

***Cooper v. Woodford***, 358 F.3d 1117 (9th Cir. 2004) The defendant made a sufficient showing of actual innocence to support the filing of a successive habeas petition. Affidavits from two witnesses demonstrated that law enforcement officers withheld favorable evidence that may have exonerated the defendant.

***Hall v. Director of Corrections***, 343 F.3d 976 (9th Cir. 2003) At the defendant's murder trial, an informant's written questions to the defendant (with the defendant's written answers) were introduced in evidence. Later, the informant conceded that he re-wrote the questions to make the answers look incriminating. For example, at trial, the question posed was "After you guys killed the girl, did you kill her brother, too?" to which the defendant answered, "possibly." The informant later acknowledged, however, that the question the defendant answered (before the informant changed the written question) was "Do you think you will get any time on this case?" Though Brady and Napue v. Illinois, 360 U.S. 264 (1959), generally apply only when the prosecutor is aware of the false evidence, to allow this conviction to stand would violate due process.

***Jaramillo v. Stewart***, 340 F.3d 877 (9th Cir. 2003) The state's failure to reveal the existence of an eyewitness to the homicide was a Brady violation that necessitated granting a writ of habeas corpus, if the petitioner could prove in the district court the factual basis for his claim.

***DiLosa v. Cain***, 279 F.3d 259 (5th Cir. 2002) The defendant was charged with murdering his wife and faking a home invasion by a black male. The state withheld evidence from the defense that certain hairs found at the scene were, in fact, non-Caucasian. In addition, a taxi driver testified that he saw two suspicious black men leaving the neighborhood early in the morning. The state habeas court erroneously concluded that there was no Brady violation, because the excluded evidence would not have resulted in an acquittal; the proper test focuses on whether the evidence cast the case in such a different light as to undermine confidence in the verdict.

***United States v. Fernandez,*** 136 F.3d 1434 (11th Cir. 1998) The defendant was alleged to have tipped off some drug smugglers about possible federal law enforcement surveillance. After trial, it was revealed that the CIA might have been involved in the drug smuggling venture, and therefore may have been the origin of the tip. A hearing was necessary to inquire into the facts of this claim.

***United States v. Service Deli, Inc.,*** 151 F.3d 938 (9th Cir. 1998) A government attorney interviewed a former president of the defendant corporation and took notes of the interview. A typewritten version of the interview was produced, but the appellate court concluded that the rough notes contained information not included in the typewritten summary and that the omitted information that was material and exculpatory.

***United States v. Spagnoulo***, 960 F.2d 990 (11th Cir. 1992) A new trial was necessary in light of the government's failure to produce to the defendant a psychiatric report relating to the defendant. While awaiting trial, the defendant attacked another inmate at the jail. He was examined by a government psychiatrist who concluded that he suffered from a psychiatric disorder. In his drug trial, he did not assert an insanity defense. Nevertheless, though the government's failure to disclose the report to the defense was not intentional, this amounted to a Brady violation. The fact that the report was in the possession of the FBI agent, and not the prosecutor, is not pertinent. The agent was a member of the "prosecution team." Also, the fact that the defendant was aware that he was examined by a psychiatrist is not relevant: he did not know of the existence of a report. Finally, materiality was established, because the report would have "altered the defense strategy and made an insanity defense a viable option."

***United States v. Severdija,*** 790 F.2d 1556 (11th Cir. 1986) During the course of boarding a vessel which was found to contain 8,000 pounds of marijuana, one of the boarding Coast Guard officers wrote a note about interviewing the defendant. This report was not released until after the jury had returned a guilty verdict. The report by the customs officer was consistent with the defendant's statement that he did not know that drugs were in the boat. The Eleventh Circuit reverses the conviction.

***United States v. Udechukwu,*** 11 F.3d 1101 (1st Cir. 1993) The defendant was arrested carrying heroin at the airport in Puerto Rico. She immediately agreed to cooperate and claimed that she had been coerced into carrying the drugs by a sinister drug dealer in Aruba. The government investigated the identity of the Aruba connection and in fact determined that this person existed and was the target of an ongoing investigation. This was not made known to the defense. During closing argument, the prosecutor repeatedly expressed skepticism about this supplier, intimating that there was no such person, or that he was not

whom the defendant claimed he was. This was prosecutorial misconduct necessitating a reversal. The improper withholding of Brady information, coupled with the misleading closing argument denied the defendant her due process rights.

***Miller v. Angliker***, 848 F.2d 1312 (2d Cir. 1988) The defendant entered a plea of not guilty by reason of insanity. The prosecutor had withheld evidence from the defense that another person may have been the perpetrator of the crime. The Second Circuit holds that this violates Brady. Although the defendant acknowledged that he was the perpetrator when he entered his not guilty by reason of insanity plea, that does not excuse the government's failure to notify the defense that another suspect existed. At trial, the defendant was in fact found not guilty by reason of insanity and committed to a mental institution. Nevertheless, the Second Circuit vacates the plea holding that the Brady violation violated the defendant's right to due process.

***Guerra v. Johnson***, 90 F.3d 1075 (5th Cir. 1996) The district court made findings – and they were supported in the record – that the state withheld exculpatory evidence from the defendant, including statements from witnesses who claimed that it was defendant's colleague and not the defendant, who shot and killed the police officer. The district court also found that witnesses were threatened by the police to implicate the defendant and not the colleague (who was shot by police shortly after the police officer was killed). Because the district court's findings were not clearly erroneous, the Fifth Circuit affirmed.

***Clemmons v. Delo***, 124 F.3d 944 (8th Cir. 1997) The state withheld Brady information from the defense in this death penalty case, specifically, evidence that someone other than the defendant committed the prison murder. The conviction was set aside.

***United States v. Wood***, 57 F.3d 733 (9th Cir. 1995) Though the prosecutor was not aware of the existence of information in the files of the Food and Drug Administration (FDA) which cast doubt on the nature of the substance which the defendant was charged with distributing, the FDA itself was certainly aware of this information. "For Brady purposes, the FDA and the prosecutor were one . . . Under Brady the agency charged with administration of the statute which has consulted with the prosecutor in the steps leading to the prosecution is to be considered as part of the prosecution in determining what information must be made available to the defendant charged with violation of the statute. The government cannot with its right hand say it has nothing, while its left hand holds what is of value."

***United States v. Barton***, 995 F.2d 931 (9th Cir. 1993) The government's destruction of evidence prior to an evidentiary hearing on a motion to suppress (alleging a Franks v. Delaware violation) must be analyzed under the principles of Brady and Arizona v. Youngblood to determine if the defendant's right to due process has been violated. Thus, if the evidence was exculpatory – in the sense of supporting the Franks violation – and the government acted in bad faith in destroying the evidence, a due process violation might be found.

***Banks v. Reynolds***, 54 F.3d 1508 (10th Cir. 1995) The prosecutor failed to reveal to the defense that another person had previously been arrested for the murder which the defendant now stood accused. In addition, eyewitnesses had identified the other suspects as having been at the location of the crime shortly before the homicide. This information, too, was withheld from the defense. This was a Brady violation which necessitated granting a new trial to the defendant, who had been sentenced to death.

***United States v. Robinson***, 39 F.3d 1115 (10th Cir. 1994) During the trial, the prosecutor interviewed a witness who claimed to have seen one person retrieve the drugs which were the subject of this prosecution. The prosecutor told defense counsel that the person he interviewed could not identify the person who retrieved the drugs. Actually, the witness did provide some identifying characteristics of the person who retrieved the drugs, and the description clearly did not identify the defendant. In the context of this case, this evidence, had it been disclosed to the defense, may well have altered the result of the trial.

***Bowen v. Maynard***, 799 F.2d 593 (10th Cir. 1986) The defendant should have been provided with the name of an early suspect in this case who had an equally valid motive to commit the murder. The failure to disclose this individual to the defendant required the granting of a habeas petition six years later.

***United States v. Alzate***, 47 F.3d 1103 (11th Cir. 1995) The defendant was intercepted at the Miami airport attempting to smuggle a kilogram of cocaine into the country. His sole defense was duress. He claimed that he owed certain people in Colombia money, and they threatened to kill him if he did not bring the suitcase from Colombia to Miami. At trial, the government introduced evidence that the defendant made a remark when he was arrested that carrying a quantity of cocaine to the United States might be worth $8,000.00. The defendant contended at trial that this was in response to the agent's question about another quantity of cocaine which had been seized that day and which was on the table in the room where he was being interrogated. The prosecutor disputed this explanation at trial, arguing to the court, the jury, and in cross-examination of the defendant, that there was no other seizure that day, there was no cocaine other than the defendant's sitting on the table, and that this was all the defendant's fabricated explanation for his statement. Prior to the close of the evidence, the agent determined that there was another seizure that day, and the cocaine was sitting on the table in the room where the interrogation was taking place. The agent told this to the AUSA who decided not to reveal this information to the court or the defense. This was a Brady violation which warranted a new trial. Under the general Brady standard, the standard of materiality is as follows: evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. This case, however, involves the prosecutor making false statements to the court and the jury and failing to correct them when he learned that they were false. In this type of case, the proper question is whether the false testimony "could have" affected the judgment of the jury. The withheld evidence met that standard in this case. The court concluded, "It may be that Alzate will be convicted after a fair trial. We do not know, but we do know that he has not yet had one."

***United States v. Lloyd***, 71 F.3d 408 (D.C. Cir. 1995) The defendant was charged with aiding others in the preparation of false tax returns. He requested an opportunity to see the others' tax returns for prior years to see if the same false statements were contained in those returns. The trial court decided that the defendant was not entitled to see the tax returns for the previous years. Even though it was the judge, and not the prosecutor who "withheld" the exculpatory information in this context, it was still a Brady violation, and the conviction would be reversed. The court pointed out that Brady violations do not focus on the bad faith of the prosecutor; the issue is whether materially exculpatory information was withheld from the defendant, thereby meeting the standard that there was a reasonable probability that the result would have been different.

***BRADY (Other Impeaching Evidence)***

***Wearry v. Cain***, 577 U.S. ---, 136 S. Ct. 1002 (2016) In a per curium opinion issued without full briefing, the Supreme Court ordered a new trial for the petitioner in this Louisiana death penalty case. The state failed to reveal to the defense that one prosecution witness had told another inmate that he wanted the defendant to get the death penalty because the defendant had "jacked me over." The state was also aware that that witness had coached another witness to lie. Another prosecution witness had twice sought a deal to reduce his existing sentence in exchange for testifying against the defendant. Another person who was described by the first witness as having been involved in the murder had recently had knee surgery (prior to the murder), which arguably made it unlikely that he was able to run, or lift any heavy weight, which was inconsistent with the first witness's trial testimony. The Court held that the newly revealed evidence sufficed to undermine confidence in Wearry's conviction. "The State's trial evidence resembled a house of cards, built on the jury crediting the witness's account rather than the defendant's alibi." "Even if the jury – armed with all of this new evidence – could have voted to convict Wearry, we have no 'confidence that it would have done so.'" The Court also emphasized that Brady applies to information known to the police, even if it is not known to the prosecutor. Slip op. at 8, footnote 8.

***Smith v. Cain***, 132 S. Ct. 627 (2012) The Supreme Court holds – in an 8-1 decision – that withholding from the defense a report that showed that the one eyewitness previously failed to identify the defendant was a Brady violation requiring that the conviction be set aside. The witness was portrayed by the state prosecutor (in New Orleans) as having consistently identified the defendant as the perpetrator of the quintuple murder, when, in fact, he had previously failed to identify the defendant.

***Juniper v. Zook***, --- F.3d --- (4th Cir. 2017) The Fourth Circuit remands this habeas case back to the district court for a full evidentiary hearing on the Brady claim that included proof of undisclosed impeachment evidence and undisclosed exculpatory evidence. The case contains a lengthy discussion of the standards for granting an evidentiary hearing (and the test for materiality) in a § 2254 case.

***Thomas v. Westbrooks***, 849 F.3d 659 (6th Cir. 2017) After a key witness testified for the federal government in a federal prosecution of the defendant for robbing and shooting an armored car driver, she was given $750 by the FBI as a reward. The defendant was later prosecuted in state court for the murder of the driver. The reward money was not revealed to the defense. During her testimony, the witness denied receiving any reward and the prosecutor emphasized that the witness was only testifying because it was "the right thing to do." The Sixth Circuit vacated the conviction based on the Brady / Agurs violation.

***United States v. Yepiz***, 848 F.3d 1070 (9th Cir. 2016) The Ninth Circuit rejects the government's argument that undisclosed evidence of money paid to an informant did not merit a new trial simply because the witness was otherwise impeached. The Ninth Circuit held that the additional impeachment evidence may have been sufficient to lead the jury to disbelieve the entirety of the witness's testimony.

***Fuentes v. Griffin***, 829 F.3d 233 (2d Cir. 2016) A witness's psychiatric problems should be revealed to the defense if known by the prosecution and the failure to do so, like here, constitutes a Brady violation that necessitates granting a writ of habeas corpus. This was a rape case in which the "victim" had a psychiatric consult when she went to the hospital to report the rape and the record of that consult revealed that she was depressed for the past two years, she did not report that she was raped, she had problems living at home with her mother and she was a drug abuser.

***United States v. Dvorin***, 817 F.3d 438 (5th Cir. 2016) The defendant was charged with bank fraud. After he was convicted, the government filed notice that it realized it had failed to reveal a part of a witness's plea agreement. The conviction was set aside, and the defendant was tried again. The issue in this case – the appeal of the second conviction – was whether sanctions against the prosecutor were appropriate and whether the second trial should have been barred based on the misconduct. Here is the background: A key prosecution witness was a co-conspirator. His plea agreement had a sealed addendum which provided that if he cooperated, his testimony could not be used against him at sentencing and the government, in its sole discretion, would file a motion to reduce the sentence. This document was not disclosed to the defense at trial and the witness testified that he hoped for a reduced sentence or leniency but did not acknowledge the existence of the sealed agreement. The Fifth Circuit held that the document was not equally accessible to the defense, because it was sealed. Therefore, it was "suppressed." The Court also held that it should have been furnished to the defense, because it qualified as material: the witness knew that the government had committed in writing to reduce the sentence if he satisfied the government's standard of cooperation and also that his testimony could not be used against him. The court, quoting United States v. Bagley, noted, "the fact that the government's willingness to seek leniency for a defendant is not guaranteed, but "was expressly contingent on the [g]overnment's satisfaction with the end result, serve[s] only to strengthen any incentive to testify falsely in order to secure a conviction." The court also held that the testimony satisfied the Napue standard, because the witness did not acknowledge the existence of the agreement and the government failed to correct this false testimony.

**Shelton v. Marshall**, 796 F.3d 1075 (9th Cir. 2015) In this state murder prosecution, the prosecutor failed to reveal to the defense that part of the deal with the key prosecution witness was that he would not obtain a competency test until after he testified. This was a Brady violation that necessitated setting aside the conviction. The prosecutor's doubt about the witness's mental competency should have been revealed to the defense.

***United States v. Parker***, 790 F.3d 550 (4th Cir. 2015) The prosecution failed to reveal the existence of an SEC fraud investigation that was being pursued against a prosecution witness. The evidence of the fraud investigation would have been admissible to show the bias of the witness and motive to testify for the government. The information may also have been admissible pursuant to Rule 608(b).

***United States v. Flores-Rivera,*** 787 F.3d 1 (1st Cir. 2015) The lead cooperator in the case wrote a letter to the AUSA expressing concern about his girlfriend (and his desire that she be permitted to visit him in jail) and also about his children and requested that the prosecutor assist him in these matters. He also provided notes of conversations with other co-conspirators in the jail (who also testified at defendant's trial). These notes were given to the prosecutor. At trial, the witness denied ever discussing testimony with the other witnesses. Finally, the agents' rough notes of interviews with the witnesses contained additional impeaching information that was not revealed to the defense prior to trial. The First Circuit concluded that it was reasonably probable that the impeachment evidence would have caused the jury to acquit two of the defendants.

***Amado v. Gonzalez***, 758 F.3d 1119 (9th Cir. 2014) The state's failure to reveal impeaching evidence about a key prosecution witness was a Brady violation that necessitated setting aside the murder conviction in this case. The witness actually balked at testifying at trial, so his earlier statement to the police was read by the officer who interviewed the witness. The prosecution failed to reveal that the witness was on probation for a robbery offense and that he was a member of a rival gang at the time he made the statement to the police. The state appellate court rejected the Brady claim on the basis that the trial attorney could have found the information and thus it was not "withheld" by the prosecution. The Ninth Circuit held that the defendant does not have the duty to seek exculpatory or impeaching information; the prosecution has the duty to produce it. There is no "due diligence" requirement imposed on the defense when it comes to Brady or Giglio information. In addition, citing Kyles v. Whitley, the court held that the prosecutor had a duty to locate and reveal this information, even if it was not literally in the prosecutor's file: "[b]ecause the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned."

***United States v. Sedaghaty***, 728 F.3d 885 (9th Cir. 2013) The defendant was charged with tax violations, but the focus of the trial was on the defendant's activities that supposedly involved funding terrorists. A key witness for the government testified about the defendant's desire to fund the terrorists. The government failed to reveal various interview notes with this witness and the fact that the witness was offered money by the FBI and her husband was offered substantial payments by the FBI. The district court denied the post-trial Brady motion, finding that the undisclosed information was clearly Brady (both the contents of the undisclosed interview notes, as well as the financial payments that were made and offered) and important to that witness's credibility, but that the witness's testimony related only to the reason the tax law violations occurred (in order to fund terrorists), whereas the charges focused on the fact that tax laws were violated regardless of the underlying motivation. The Ninth Circuit reversed and ordered a new trial: throughout the trial, the government trumpeted the terrorism-related purpose for the defendant's conduct, repeatedly referring to terrorists, Bin-Laden, and other terrorist organizations and terrorist training camps.

***Browning v. Trammell***, 717 F.3d 1092 (10th Cir. 2013) The defendant was sentenced to death for killing his girlfriend's parents. The girlfriend was a key witness for the prosecution. The state had psychiatric records relating to the girlfriend in its possession (sent to the state by the girlfriend's lawyer) that showed that she was severely mentally ill, including suffering from magical thinking and blurring of reality and fantasy. These records were not revealed to defense counsel. The Tenth Circuit affirmed the lower court's granting a writ of habeas corpus.

***Milke v. Ryan***, 711 F.3d 998 (9th Cir. 2013) The defendant was convicted of murdering her child. The only evidence supporting the conviction was a confession given to Officer Saldate. No recording of the confession was made, and the defendant denied confessing to the officer. The state failed to reveal to the defense the fact that the Officer had been found to have lied about confessions on four separate occasions; that several other confessions had been suppressed based on courts finding violations of the accused's Fifth and Sixth Amendment rights; that he had been suspended for taking "liberties" with a female motorist that he had stopped. More information was probably also available to the prosecution about the officer, none of which was revealed to the defense. The Ninth Circuit granted a writ of habeas corpus based on the Brady violation. The lengthy opinion documents the acts of misconduct by the officer, as well as the prosecutors, some of whom were actually aware of the officer's checkered past, and others of whom failed to reveal the information even after the conviction was being challenged in state habeas proceedings.

***Johnson v. Folino***, 705 F.3d 117 (3rd Cir. 2013) The state prosecutor failed to disclose voluminous amounts of information about the state's key witness's involvement in other crimes that should have been revealed to the defense. Though the information did not relate to convictions, the information may have led to admissible evidence and may have been effectively used in cross examination to establish the witness's reasons for providing information to the police.

***Wolfe v. Clarke***, 691 F.3d 410 (4th Cir. 2012) The defendant was convicted of murder and given the death penalty. A principal witness at trial was a man named Barber, who was hired by Wolfe to kill the victim. When Barber was first arrested and before he implicated Wolfe in the murder, he was told by a police officer that if he implicated Wolfe, he (Barber) could avoid the death penalty. This conversation was memorialized in a police report that was never produced to the defense. This was a Brady

violation that required granting the writ as to the conviction and sentence. The Fourth Circuit also held that the conviction for being involved in a drug conspiracy would also be vacated, because had the Brady information been disclosed, the defendant would likely not have testified at the trial and would not have been in the position of having to deny guilt of the murder, while admitting his role in the drug conspiracy.

***Guzman v. Secretary, Dept. of Corrections***, 663 F.3d 1336 (11th Cir. 2011) A police officer testified falsely about whether any benefit had been provided to a key witness. The police denied that any benefit had been provided, but, in fact, the officer had given the witness, a crack addict, $500.00. The prosecutor was not aware of this benefit and was not aware that the officer testified falsely. Nevertheless, the knowledge (and false testimony) of the officer was attributed to the prosecutor and a new trial was ordered. This case contains a thorough review of the "materiality" standard for gauging Giglio violations post-conviction.

***Sivak v. Hardison,*** 658 F.3d 898 (9th Cir. 2011) The state's failure to reveal certain benefits that the jailhouse snitch received from the prosecution (favorable parole letters) and the fact that the snitch lied as a witness about these benefits necessitated that the death sentence be set aside.

***United States v. Kohring***, 637 F.3d 895 (9th Cir. 2011) The government failed to reveal to the defendant that a key prosecution witness was being investigated by state agents for child sex abuse offenses and efforts to obstruct justice in connection with those sex offenses. Though the trial court recognized that this evidence should have been disclosed, the trial court further held that the evidence would not have been admissible under Rule 403, because it would have confused the issues. The Ninth Circuit reversed. The evidence should have been disclosed and it would have been admissible to impeach the witness. This case contains a lengthy analysis of Brady violation jurisprudence, including the question when undisclosed impeaching evidence is "material" and sufficient to require a new trial. In one section of the decision, the court holds that the government's failure to turn over investigators' notes that revealed that the witness was having trouble remembering details of certain events was also a material Brady violation. In addition, emails between members of the prosecution team that might otherwise qualify as work product should have been disclosed, because the emails revealed exculpatory facts that were not otherwise revealed to the defendant.

***Breakiron v. Horn***, 642 F.3d 126 (3rd Cir. 2011) The state prosecutor's failure to reveal that a jailhouse witness (1) had requested a deal in exchange for his testimony, (2) had a prior conviction for a crime of assault with intent to rob, and (3) was the subject of a pending investigation for new charges, required that the writ be granted. The witness's testimony was material even with regard to matters that he did not testify about, because if the witness was believed regarding matters that he did address, this meant that the defendant was lying, so that the defendant's testimony on the other matters might also have been disbelieved by the jury.

***Maxwell v. Roe***, 628 F.3d 486 (9th Cir. 2010) The state failed to reveal to the defense that the informant in this state murder prosecution had originally negotiated a certain deal in exchange for his testimony and that thereafter, the informant insisted on an even better deal in exchange for his testimony in the murder case. The informant also committed perjury during the course of his testimony, including about his background, his education, a conversation he had the with the prison rabbi about testifying against the defendant, as well as his history of providing "snitch" evidence in other cases. This case contains an extensive discussion of the perils of jailhouse informant testimony.

***Simmons v. Beard***, 590 F.3d 223 (3rd Cir. 2009) The prosecution's failure to reveal that a key witness had been pressured to cooperate with the police (and to surreptitiously record the defendant, albeit unsuccessfully) prior to his arrest violated Brady. At trial, the witness appeared to willingly condemn her boyfriend, which could have been rebutted, if the defense knew that she had been pressured to cooperate. Another witness had lied on an application to purchase a firearm, and the prosecution had helped her avoid liability for this offense. This evidence had also been withheld from the defense. New trial ordered.

***Robinson v. Mills***, 592 F.3d 730 (6th Cir. 2010) The state's failure to reveal that an eyewitness to the murder was also a confidential informant at the time that she witnessed the crime and at the time she testified at trial was a Brady violation that required granting the writ. The status of the witness would have demonstrated that she had a bias in favor of the prosecution; and the jury may have discounted the testimony of an informant more than a disinterested witness.

***Wilson v. Beard***, 589 F.3d 651 (3rd Cir. 2009) The prosecution failed to turn over to the defense a key witness's rap sheet; another witness's financial relationship to the lead detective (i.e., the detective was giving loans to the witness in his capacity as an informant) and medical records and mental health records regarding another witness. The medical records would have been admissible to demonstrate the witness's ability to perceive. The fact that the rap sheet was a matter of public record does not absolve the prosecution of its duty to furnish the information to the defense. All of these Brady violations required granting the writ.

***United States v. Torres***, 569 F.3d 1277 (10th Cir. 2009) The government produced certain information about the testifying C.I. but failed to reveal that she had worked for the government as a C.I. previously and had "fallen off the wagon" and committed offenses while a C.I. that led to criminal prosecutions. Because the C.I.'s credibility was a central issue in this case, the failure to disclose this information was a reversible Brady violation.

***Drake v. Portuondo***, 553 F.3d 230 (2d Cir. 2009) The state relied on an expert who testified about his various credentials, as well as his involvement in the investigation of this murder case. His testimony was false in virtually all respects. He was not an expert (he was a lab technician) and he had reviewed the evidence for the state for a period of time quite different that his testimony suggested. The state may not have known the extent to which he lied about his credentials, but it did know about the

amount of time he had spent reviewing the evidence. In addition, the state prosecutor knew that the expert was not a “published scholar” but asked at trial whether the witness had “written papers in his field” to which the witness answered in the affirmative (technically, this was true, but nothing had been published). The Second Circuit granted the writ based on the state’s failure to reveal the perjurious nature of the “expert” at trial.

***United States v. Banks***, 546 F.3d 507 (7th Cir. 2008) A crime lab expert testified at trial about the nature of the substance tested, as well as its weight. Unbeknownst to the prosecutor and the defendant (but known to the DEA), the expert was under investigation by the DEA for misuse of a government credit card. At the point she testified, she did not know the outcome of this investigation. Shortly thereafter, she received an informal reprimand. When the defendant learned about this after trial, he moved for a new trial and the trial court granted the motion. The Seventh Circuit affirmed, holding that the district judge was within the bounds of his discretion in granting the new trial based on this Brady violation.

***Silva v. Brown***, 416 F.3d 980 (9th Cir. 2005) As part of a plea agreement, a witness and the state agreed that the witness would not undergo psychological testing until after he testified at the defendant’s trial. Failing to disclose this part of the deal to the defendant was a Brady violation that necessitated granting a writ of habeas corpus. Evidence of a witness’s competence (or lack thereof) is critically important impeaching information that should not be hidden from the defense). See also Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002) (holding that undisclosed evidence of a crucial government witness’s drug use during the defendant’s trial was material because it would reflect on that witness’s competence and credibility as a witness).

***Conley v. United States***, 415 F.3d 183 (1st Cir. 2005) The government failed to reveal an FBI report of interview that contained a witness statement that was inconsistent with his trial testimony. The witness stated during the interview that he was uncertain about what he observed at the crime scene and his request to be hypnotized to help him recall. At trial he expressed no uncertainty. The failure to reveal this information was a Brady violation that necessitated a new trial.

***United States v. Sipe***, 388 F.3d 471 (5th Cir. 2004) The government’s failure to reveal that one of the government witnesses told the government that he “disliked” the defendant; as well as the “benefits” granted to numerous other government witnesses, amounted to a Brady violation that required setting aside the conviction. The Fifth Circuit noted that evidence of guilt was “significant,” but that the withheld evidence, when considered in the totality, undermined confidence in the verdict.

***United States v. Jackson***, 345 F.3d 59 (2d Cir. 2003) Brady applies to information about declarants who do not testify, but whose out-of-court statements are introduced in evidence. Norton v. Spencer, 351 F.3d 1 (1st Cir. 2003) Affidavits from the alleged child molestation victim’s mother and sibling claimed that the allegations were false. The state did not reveal these affidavits to the defendant prior to the state trial. Habeas granted.

***Silva v. Woodford***, 279 F.3d 825 (9th Cir. 2002) An evidentiary hearing was necessary to inquire into the facts of defendant’s Brady claim. The defendant claimed that a co-defendant who testified for the state had severe mental problems. In fact, the co-defendant’s attorney had intended to have his client’s competency evaluated but was encouraged by the state (and there was an agreement between the codefendant and the state) to wait until after the co-defendant testified at the defendant’s trial. The Ninth Circuit held that if this claim was shown to be true at an evidentiary hearing, the conviction would have to be set aside.

***East v. Johnson***, 123 F.3d 235 (5th Cir. 1997) During the sentencing phase of the defendant's death penalty trial, the state called a witness who claimed that the defendant had brutally raped her, threatened to kill her, and revealed that he had killed other witnesses. The state failed to reveal to the defendant the witness's rap sheet. Had the defendant seen the rap sheet and investigated the witness's prior arrest, he would have discovered that she had been declared incompetent to stand trial because she experienced bizarre sexual hallucinations and believed that unidentified individuals were attempting kill her. The psychiatric report further concluded that the witness was incapable of distinguishing between reality and fantasies caused by her hallucinations. This undisclosed impeaching information may well have had an impact on the jury's evaluation of the witness's credibility and this witness's testimony was significant in the death penalty presentation of the state. The sentence was vacated on the basis of this Brady violation.

***Carriger*** v. Stewart, 132 F.3d 463 (9th Cir. 1997) The state's star witness in this death penalty prosecution was a witness with a long history of lying to the police and blaming others for crimes he committed. The court quoted from its earlier opinion in United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993): "[Informants granted immunity are] by definition . . . cut from untrustworthy cloth[,] and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom . . . . Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy. . . . Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery. This responsibility includes the duty as required by Giglio to turn over to the defense in discovery all material information casting a shadow on a government witness's credibility." The court also stressed that the government cannot avoid its obligation with the excuse that it did not possess the relevant files relating to their witness. When the state relies on a witness who has an extensive criminal record, the state has the burden to investigate prison records, and any information contained therein that might bear on the witness's credibility.

***United States v. Brooks***, 966 F.2d 1500 (D.C. Cir. 1992) The prosecutor has the duty not only to turn over favorable evidence, but also in certain circumstances, to actually search for information which may be exculpatory, including searching files of other agencies. In this case, the testimony of the investigating officer from the defendant’s first trial was read at the second trial. Between the first and the second trial, the officer was shot and killed with her own service revolver in the presence of another officer. The AUSA should have searched the files of the Metropolitan D.C. Police files to determine if there was anything in those

files relating to the officer's death which would have cast doubt on her credibility. The court reviewed precedents from several other Circuits dealing with the duty of the AUSA to engage in a search for exculpatory evidence in certain circumstances. See, e.g., United States v. Auten, 632 F.2d 478 (5th Cir. 1980); United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973); United States v. Perdomo, 929 F.2d 967 (3rd Cir. 1991); Carey v. Duckworth, 738 F.2d 875 (7th Cir. 1984).

***United States v. Perdomo***, 929 F.2d 967 (3rd Cir. 1991) There was no evidence of a prosecution witness's record in the NCIC; however, the local records (in the Virgin Islands) contained a criminal record of the witness. The prosecutor had the duty to ascertain whether such a record existed. (Virgin Island records are not contained in the NCIC). The fact that the public defender's office had previously represented the witness – and the defendant in this case was also represented by the PD's office – does not alter the result.

***Carter v. Rafferty***, 826 F.2d 1299 (3rd Cir. 1987) The Third Circuit affirmed the district court's grant of a habeas petition to Hurricane Carter twenty years after he was convicted of murder. The Third Circuit agrees with the district court that the government's failure to produce information that the star prosecution witness was utterly incapable of telling the truth represented a violation of the defendant's due process rights under Brady. The evidence withheld in this case was the lie detector report which revealed that the witness did not tell the truth. The court holds that lie detector reports of tests administered to a prosecution witness are material for purposes of Brady.

***United States v. Kelly***, 35 F.3d 929 (4th Cir. 1994) The defendant was convicted of kidnapping. He had been retained by a woman to "recover" her daughter from a cult. He approached a woman, who identified herself as being the daughter, and brought her to the mother. The mother said that this was the wrong person. The "victim" was then returned to the place from which she was taken. The "victim" was another member of the cult and was also under investigation by the Feds for money laundering, CTR violations and filing false loan applications to a bank. At trial, she answered questions about the loan application falsely and the government failed to correct this testimony. Also, there were Brady violations: the government failed to disclose the extent of the victim's participation in the cult, the true scope of her criminal conduct which was under investigation (including a search warrant affidavit which supported a search of her house) and the various false statements she had made to her employer, the EPA, to which she had lied about her health in order to use several months of paid sick leave – while she continued to work at other jobs. Jean v. Rice, 945 F.2d 82 (4th Cir. 1991) Prior to being hypnotized, the rape victim could not identify the defendant as the assailant. After being hypnotized, she could. The state was under a duty, pursuant to Brady, to disclose the tapes and other documents of the hypnosis sessions.

***McDowell v. Dixon***, 858 F.2d 945 (4th Cir. 1988) Only one eyewitness identified the defendant who assaulted the victim. First the eyewitness stated that the assailant was white, though the defendant was black; the eyewitness testified that the assailant had shoulder length hair, but later that he had an afro. The prosecutor failed to reveal the prior misidentifications. This violated Brady and requires reversal of the conviction.

***East v. Johnson***, 123 F.3d 235 (5th Cir. 1997) The state failed to reveal a penalty-phase witness's criminal record which, if disclosed, would also have led to the discovery of the witness's considerable mental health problems. Withholding this Brady information resulted in unimpeached testimony that the defendant posed a significant risk of future dangerousness. The appellate court set aside the death sentence.

***United States v. Minsky***, 963 F.2d 870 (6th Cir. 1992) It was a Brady violation to withhold from the defense the fact that a witness had previously lied to the FBI. United States v. Kehm, 799 F.2d 354 (7th Cir. 1986) The government should have revealed to the defendant that a prosecution witness had refused, either out of fear or friendship, to testify against a certain group of people. It was part of the witness' immunity agreement that he would not be prosecuted, and not required to testify or make any statements against the group.

***United States v. O'Conner***, 64 F.3d 355 (8th Cir. 1995) Several co-conspirators who agreed to cooperate with the government threatened other cooperating witnesses in order to "get their story straight." These threats were known to the DEA and to the AUSA. Nevertheless, the defense was not informed of this information. With regard to the counts of conviction for which there was no corroborating evidence, the failure to disclose this information was reversible error.

***United States v. Wayne***, 903 F.2d 1188 (8th Cir. 1990) Following his conviction on drug related counts, the defendant was granted a new trial on two counts because the government had withheld evidence critical to the cross-examination of a key government witness. The information suppressed was a record of drug transactions kept by a cooperating witness. However, the trial court did not err in not granting a new trial as to other counts which were not affected by the suppression of this information.

***Reutter v. Solem***, 888 F.2d 578 (8th Cir. 1989) The key witness against the defendant in this drug prosecution was his former law partner and close friend. Unbeknownst to the defense, this witness, who was currently serving a term of imprisonment himself, had applied for commutation of his sentence and the State was actively supporting it. Furthermore, among the members of the commutation board was the prosecutor in defendant's trial. None of this information was provided to the defense despite a request for all exculpatory and impeaching evidence. This Brady violation was aggravated by the prosecutor's closing argument during which he argued that the witness had no reason whatsoever to lie and had nothing to gain from cooperating with the State. The conviction was reversed.

***United States v. Steinberg***, 99 F.3d 1486 (9th Cir. 1996) A confidential informant was involved in a drug transaction involving counterfeit money with the defendant. The government agent was aware but did not tell the defense at trial (or the prosecutor), that the informant was also involved in unauthorized counterfeit transactions at the same time. Also, the government was aware

that the informant owed money to the defendant but did not reveal this information to the defense. This evidence was material, because the informant's testimony at trial was critical, and this evidence would have undermined his credibility. The failure to reveal this information to the defense was reversible error.

***United States v. Kojayan***, 8 F.3d 1315 (9th Cir. 1993) Three people were caught smuggling drugs. Two defendants went to trial, while the third provided information to the government. The cooperating individual did not testify. During closing argument, the prosecutor argued that the third individual could not be compelled to testify. This was not true; the witness had signed a cooperation agreement and the government withheld this from the defense and the jury. This type of misconduct on the part of the government necessitated reversing the conviction. The government made this argument in response to the defendant's argument that the government failed to call the cooperating individual, and therefore the witness probably had nothing to say that was favorable to the government. The government's response was untrue and thus unfairly undercut the defendant's argument.

***United States v. Bernal-Obeso,*** 989 F.2d 331 (9th Cir. 1993) Just prior to trial, the government alerted the defense that an informant had killed two people several years earlier, but had never been charged with a crime. The defense learned that the informant had in fact pled guilty to two counts of manslaughter and asked the court to permit the defense additional time to determine the background, and also asked to be permitted to ask the informant why he lied to the DEA about his background. Both requests were denied by the trial court. The Ninth Circuit reversed. "We expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery (by informants) including turning over, as Giglio requires, all material information casting a shadow on an informant's credibility." The defendant should be permitted to question the informant, pursuant to Rule 608(b), about his lying to the DEA regarding his criminal record.

***United States v. Brumel-Alvarez***, 991 F.2d 1452 (9th Cir. 1992) One informant for the government testified that he went to Bolivia and witnessed the source of the cocaine involved in the conspiracy alleged in this indictment. No other cocaine was introduced, seized, or known to have been in possession of any of the defendants. The prosecutor acknowledged in both his opening and his closing that the informant's testimony was the key to the case. The prosecutor, however, failed to reveal to the defense a memorandum written by a DEA agent who severely criticized the operation and the credibility of the informant. Only a redacted version was provided to the defense. Among other things, the memorandum documented various false claims of the informant and his predilection to "run" the operation. The memorandum also revealed that the informant declined to make undercover calls to the supposed "higher-ups" who were involved in the smuggling venture. The memorandum also qualified as Jencks Act material of the author of the memorandum – the disgruntled DEA agent who testified on behalf of the government.

***Smith v. Sec'y of New Mexico Dept. of Corrections***, 50 F.3d 801 (10th Cir. 1995) After a lengthy review of the evidence in this double murder prosecution, the court holds that Brady information was withheld from the defense and the writ of habeas corpus would be granted. Along the way, the court recognized that the withheld information did not have to be known to the prosecutor, as long as the police were aware of the favorable information. Also, the fact that the information is characterized as "impeachment" is not fatal to the Brady claim. Impeachment evidence can also undermine confidence in the verdict. Finally, the state's claim that its "open file" policy satisfied its Brady obligation was not persuasive. Of course, if the information is not in the prosecutor's file, it will not have been disclosed to the defense in the open file review. Here, the information (including impeachment information relating to the state's key witness) was undeniably in the possession of the law enforcement agents who investigated the murder.

***United States v. Yizar***, 956 F.2d 230 (11th Cir. 1992) Though an evidentiary hearing was necessary to develop the facts, the defendant made a colorable claim that the government violated Brady by failing to disclose to the defense that just prior to being brought into the grand jury, the co-defendant told the prosecutor that the defendant was not guilty of the arson with which he was charged.

***United States v. Cuffie***, 80 F.3d 514 (D.C. Cir. 1996) The defendant's conviction was spoiled by a Brady violation: the government was aware that one of its witnesses, a police officer who pled guilty to drug offenses and was testifying pursuant to a plea agreement, had also perjured himself in a prior arrest expungement proceeding involving his cousin. Even though the witness was otherwise impeached at trial concerning his drug conviction and plea agreement, the evidence of prior perjury was material and could have substantially affected the efforts of defense counsel to impeach the witness. In short, this was a different – yet powerful – kind of impeachment (prior perjury) that was not otherwise available to the defense.

***United States v. Smith***, 77 F.3d 511 (D.C. Cir. 1996) The government failed to reveal to the defense that one of the government's witnesses had a D.C. Superior Court case dismissed against him and also had a psychiatric history. This was reversible error. Citing Kyles v. Whitley, the appellate court observed that in determining the materiality of the non-disclosed information, the lower court should not simply determine whether the evidence was still sufficient to convict the defendant if the witness whose history was not disclosed were ignored.

***BRADY (Perjured Testimony / Inconsistent Statement of Witness)***

***Strickler v. Greene***, 119 S.Ct. 1936 (1999) The state presented an eyewitness that testified about a carjacking (which later led to the killing of the driver). The witness testified that she had an exceptionally good memory about the event. The state did not disclose to the defense, however, that the eyewitness had previously stated that she did not have a clear memory of the event, that she thought it was simply a college prank, that her memory was "muddled", that she once said she could not identify anybody, and that she once stated she could not remember being at the abduction site. Though there was a reasonable possibility that disclosure of this information to the defense may have produced a different result, there was not a reasonable

probability that disclosure would have produced a different result. This is the correct Brady standard and federal habeas relief was not granted.

***Banks v. Dretke,*** 540 U.S. 668 (2004) The Supreme Court set aside a death sentence and remanded this case to the lower court for further consideration of the validity of the guilt-innocence judgment, based on the Brady violations. Specifically, the state failed to reveal to the defense that a witness was a paid informant (though the witness denied it at trial).

***United States v. Walter***, 870 F.3d 622 (7th Cir. 2017) A government witness testified that he had stopped selling drugs and had quit the business and repented. The government knew, however, that this was untrue and that the witness was still selling drugs. Failing to correct this false testimony resulted in setting aside the conviction.

***Haskell v. Superintendent Greene SCI***, 866 F.3d 139 (3rd Cir. 2017) The state's witness in this murder case testified that she had no deal with the prosecution, which the prosecutor knew was not true. The false testimony was not corrected by the prosecutor. The Third Circuit ordered that the writ be granted. Under Napue, a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. The same result obtains when the state although not soliciting false evidence, allows it to go uncorrected when it appears. Moreover, a conviction must be set aside even if the false testimony goes only to a witness's credibility rather than the defendant's guilt.

***Long v. Butler***, 809 F.3d 299 (7th Cir. 2015) A witness gave a statement to the police that she saw the defendant shoot the victim. At defendant's first murder trial, the witness testified that she did not see the defendant shoot the victim and that she had recanted and told the police that her initial statement was not accurate. At the defendant's second trial, the witness testified that she did see the defendant shoot the victim. When cross-examined and asked about her prior recantation, the witness denied having recanted her identification. The prosecution failed to correct this perjurious testimony. The Seventh Circuit granted a writ. The prosecutor had a duty pursuant to Napue to correct this false testimony. The appellate court also held that the appellate counsel's failure to raise this issue on appeal was ineffective assistance of appellate counsel.

***Dow v. Virga***, 729 F.3d 1041 (9th Cir. 2013) The defendant, a suspect in a robbery, was placed in a line-up. He had a scar under his right eye. Prior to the witness being brought into the line-up room, the defendant's lawyer asked that all the participants in the line-up wear a bandage under the right eye so that the defendant's scar would not differentiate him from the other participants in the line-up. At trial, the prosecutor asked the police officer about what happened at the line-up and the officer responded that the defendant insisted that everybody wear a bandage under their right eye so as not to differentiate him. The officer knew, as did the prosecutor, that it was the defendant's lawyer and not the defendant himself who made this request. In closing argument, the prosecutor argued that the defendant's request revealed a consciousness of guilt. The Ninth Circuit held that this was a Napue error requiring that the conviction be set aside.

***Guzman v. Secretary, Dept. of Corrections***, 663 F.3d 1336 (11th Cir. 2011) A police officer testified falsely about whether any benefit had been provided to a key witness. The police denied that any benefit had been provided, but, in fact, the officer had given the witness, a crack addict, $500.00. The prosecutor was not aware of this benefit and was not aware that the officer testified falsely. Nevertheless, the knowledge (and false testimony) of the officer was attributed to the prosecutor and a new trial was ordered. This case contains a thorough review of the "materiality" standard for gauging Giglio violations post-conviction.

***Sivak v. Hardison***, 658 F.3d 898 (9th Cir. 2011) The state's failure to reveal certain benefits that the jailhouse snitch received from the prosecution (favorable parole letters) and the fact that the snitch lied as a witness about these benefits necessitated that the death sentence be set aside.

***United States v. Freeman***, 650 F.3d 673 (7th Cir. 2011) In this drug conspiracy trial, a key witness for the government described an important meeting that occurred among the conspirators that included specific identified people, at a specific location at a specific time. Prior to trial, one of the defense attorneys alerted the prosecutor to the fact that his client – one of the identified participants in this meeting – was in jail at the relevant time. The prosecutor forged on ahead, despite this warning. At trial, the witness was thoroughly cross-examined, but the prosecutor did not relent, until several weeks later, when he offered a stipulation that one of the participants in this supposed meeting was, in fact, in jail at the time. During closing argument, however, the prosecutor argued that this was a minor mistake that could easily be the result of faulty memory about the date of the meeting. The trial court granted a post-trial motion for new trial on the basis of this Napue violation and the Seventh Circuit affirmed.

***Lambert v. Beard***, 633 F.3d 126 (3rd Cir. 2011) The key witness for the state in this murder prosecution (a co-conspirator) was thoroughly impeached with several prior inconsistent statements. One part of his testimony however, remained constant and was not the subject of a prior inconsistent statement: the defendant and one other person were the perpetrators. However, the state had failed to produce one other prior inconsistent statement in which the witness identified another perpetrator. The Third Circuit held that even though the witness was "thoroughly" impeached with prior inconsistent statements, the undisclosed statement was significant and of a different nature than the impeachment evidence that was previously furnished. The Third Circuit granted the writ. The Supreme Court subsequently Reversed on February 21, 2012.

***Wetzel v. Lambert***, 132 S. Ct. 1195 (2012). On remand, though, in an unpublished decision, the Third Circuit again granted the writ on the basis of the Brady violation. Lambert v. Beard, 537 Fed.Appx. 78 (3rd Cir. 2013).

***Maxwell v. Roe***, 628 F.3d 486 (9th Cir. 2010) The state failed to reveal to the defense that the informant in this state murder prosecution had originally negotiated a certain deal in exchange for his testimony and that thereafter, the informant insisted on

an even better deal in exchange for his testimony in the murder case. The informant also committed perjury during the course of his testimony, including about his background, his education, a conversation he had the with the prison rabbi about testifying against the defendant, as well as his history of providing “snitch” evidence in other cases. This case contains an extensive discussion of the perils of jailhouse informant testimony.

***United States v. Triumph Capital Group, Inc.,*** 544 F.3d 149 (2d Cir. 2008) The government failed to reveal an agent’s notes of a witness’s proffer session that were materially inconsistent with the witness’s testimony at trial (and inconsistent with the Jencks material that was furnished to the defense). See also United States v. Rivas, 377 F.3d 195 (2d Cir. 2004).

***Mahler v. Kaylo***, 537 F.3d 494 (5th Cir. 2008) Prior to trial, witnesses gave statements that the defendant shot the victim while they were wrestling over a shotgun. At trial, however, the witnesses testified that the victim was walking away from the defendant when the defendant shot him in the back. Failing to provide the inconsistent witness statements to the defendant prior to trial was a Brady violation that required granting a writ of habeas corpus.

***Jackson v. Brown***, 513 F.3d 1057 (9th Cir. 2008) The prosecution failed to reveal promises it had made to prosecution witnesses and when the witnesses lied on the stand about any promises, the prosecutor failed to correct the misrepresentation. Other promises were made by the police to certain witnesses (and were not even known to the prosecutors). All these Brady errors required setting aside the death penalty.

**Ferrara v. United States**, 456 F.3d 278 (1st Cir. 2006) Twelve years ago, the defendant entered a guilty plea to a RICO case that charged various predicate offenses, including murder. A key witness for the government provided a statement implicating the defendant in one of the charged murders. Later, however, he recanted and told the AUSA and the case agents that the defendant was not involved in the murder. The AUSA and agents met once again with the witness, and he recanted his recantation. The witness’s recantation was never provided to the defense, despite Brady obligations that were ongoing pursuant to the Constitution and Local Rules. The defendant entered a guilty plea, though during the plea colloquy, he never admitted participation in the murder. Years later, the witness’s recantation was revealed. The District Court granted § 2255 relief. The First Circuit affirmed, concluding that the government’s conduct amounted to a violation of Brady and amounted to gross governmental misconduct.

***Morris v. Ylst***, 447 F.3d 735 (9th Cir. 2006) A status report was prepared by a legal assistant that advised another prosecutor that a witness had perjured herself at the defendant’s trial. The Ninth Circuit held that this report – work product – was not required to be produced to the defense pursuant to Brady. However, the prosecutor did have a duty to investigate this allegation A prosecutor may not remain willfully ignorant of the facts.

***Graves v. Dretke***, 442 F.3d 334 (5th Cir. 2006) The prosecutor neglected to inform the defendant that on the day before the key prosecution witness testified, he told the prosecutor that he, the witness, alone was responsible for the murders and had also revealed previously that his wife was involved. The prosecutor also asked the witness at trial whether all of his statements consistently implicated the defendant (with one exception). The witness responded affirmatively, as did a police officer who was asked the same question. Yet, the witness had not been consistent and had exculpated the defendant and implicated his wife. The Brady violation necessitated reversing the conviction.

***Slutzker v. Johnson***, 393 F.3d 373 (3rd Cir. 2004) The state’s failure to produce police reports in which an eyewitness affirmatively denied that she saw the defendant at the scene of the crime was a Brady violation. The same witness testified at trial that the defendant was the person she saw at the scene. The trial occurred fifteen years after the murder and the police report had been taken at the time of the murder. Though there were three other eyewitnesses, their testimony was dubious (two of the witnesses were 5 and 6 years old at the time of the murder and claimed to have recovered memories in which they saw the defendant at the scene of the crime).

***Shih Wei Su v. Filion,*** 335 F.3d 119 (2d Cir. 2003) The Second Circuit concluded that the prosecutor knowing elicited perjured testimony relating to a witness’s cooperation agreement with the government and granted a writ of habeas corpus. In fact, there was an agreement that if he cooperated, the witness would be afforded youthful offender treatment. At trial, however, it was represented that there was no agreement on the terms of the plea agreement.

***Bailey v. Rae,*** 339 F.3d 1107 (9th Cir. 2003) The defendant was charged with sexual offenses that required, as an element, proof that the victim was incapable of giving consent to the sexual contact. The state was aware of, and had possession of therapy notes of the victim, that revealed that she knew the difference between good touching and bad touching. These reports contradicted, to some degree, the state’s contention that the victim was mentally defective to the extent that she could not give consent. Failure to provide this information to the defense was reversible Brady error.

***United States v. Arnold***, 117 F.3d 1308 (11th Cir. 1997) The government possessed numerous tape recordings of an IRS special agent talking with the government’s star witness while he was in prison. On the tapes were several conversations involving the witness’s expectation of a reduced sentence and the agent’s assurance that the witness would receive a reduced sentence in exchange for his cooperation. These tapes were never disclosed to the defense. At trial, the witness denied any expectation of a reduced sentence in exchange for his cooperation. The Eleventh Circuit reversed the conviction.

***Jacobs v. Singletary***, 952 F.2d 1282 (11th Cir. 1992) The government violated Brady by failing to reveal to the defense that a witness, in a prior statement to a polygrapher, had stated that he was not sure who shot the gun. This was inconsistent with the witness’s trial testimony. This was material evidence and withholding it required a new trial.

***DeMarco v. United States***, 928 F.2d 1074 (11th Cir. 1991) Though the defense attorney was aware that one of the prosecutor's witnesses was committing perjury, the prosecutor's allowing this to occur and then capitalizing on the testimony in her closing was grounds to vacate the judgment. The perjured testimony in this case was the existence of deals and promises from the government. The defense attorney was formally provided notice of the deals, but at trial, the witness denied there were any deals and the prosecutor did nothing to correct this false testimony. The fact that the prosecutor referred to these lies in her closing argument is the reason for reversal despite the defense attorney's knowledge of the lies.

***Brown v. Wainwright***, 785 F.2d 1457 (11th Cir. 1986) The State knowingly introduced false testimony relating to a witness' tentative plea agreement. In granting habeas relief, the Eleventh Circuit holds that the proper legal standard is not whether the defendant can prove that the correction of the false testimony "probably would have resulted in an acquittal." Rather, where, as here, the State intentionally uses false testimony, a new trial is required if the false testimony "could in any reasonable likelihood have affected the judgment of the jury."

***United States v. Vozzella***, 124 F.3d 389 (2d Cir. 1997) The defendant was charged with conspiring to extend extortionate loans. A critical component of the government's case was proof that the people to whom he made loans, made loans themselves with the borrowed money, hence the conspiracy. At trial, however, most of the borrowers testified that they used the money for their own purposes (such as gambling). The government relied on one borrower who did not testify, but whose records, according to an FBI agent reflected that he re-loaned the money. The government knew, however, from interviewing the witness that he did not re-loan the money. This amounted to the presentation of perjured, false testimony and the conviction had to be set aside. To the extent that the government did not know if all the records of the borrower reflected that he did not re-loan the money, the government's ignorance in this regard was willful given the information that was provided by the borrower.

***United States v. Payne***, 63 F.3d 1200 (2d Cir. 1995) A co-defendant, in a related case, filed an affidavit proclaiming her innocence. Later, she became a cooperating witness and testified against the defendant. Her affidavit was Brady information which should have been furnished to the defendant. Though her affidavit was filed in the public records of the related case, there was no reason to believe that defendant's counsel would be aware of this affidavit. Harmless error.

***United States v. Kelly***, 35 F.3d 929 (4th Cir. 1994) The defendant was convicted of kidnapping. He had been retained by a woman to "recover" her daughter from a cult. He approached a woman, who identified herself as being the daughter, and brought her to the mother. The mother said that this was the wrong person. The "victim" was then returned to the place from which she was taken. The "victim" was another member of the cult and was also under investigation by the Feds for money laundering, CTR violations and filing false loan applications to a bank. At trial, she answered questions about the loan application falsely and the government failed to correct this testimony. Also, there were Brady violations: the government failed to disclose the extent of the victim's participation in the cult, the true scope of her criminal conduct which was under investigation (including a search warrant affidavit which supported a search of her house) and the various false statements she had made to her employer, the EPA, to which she had lied about her health in order to use several months of paid sick leave – while she continued to work at other jobs.

***United States v. Fisher***, 106 F.3d 622 (5th Cir. 1997) The government produced an inconsistent statement of a witness to the defense after the witness testified on the last day of trial. This was reversible error. This decision was subsequently OVERRULED on other grounds in Ohler v. United States, 529 U.S. 753 (2000).

***United States v. Weintraub***, 871 F.2d 1257 (5th Cir. 1989) At sentencing, the government furnished information in the PSI that the defendant was responsible for distributing 50 to 70 pounds of cocaine. The government withheld evidence that the witness had made a prior inconsistent statement suggesting that the defendant was responsible for a much smaller amount of cocaine. The sentence had to be set aside based on this improper withholding of evidence.

***United States v. Boyd***, 55 F.3d 239 (7th Cir. 1995) Another of the El Rukn convictions was set aside because of the prosecutor's failure to reveal the extent to which witnesses for the prosecution were rewarded with sexual favors, phone privileges, physical contact with relatives and drug transfers. One witness for the prosecution testified that he no longer used drugs, even though the prosecution was aware that he was dealing drugs in prison during the time that he testified. The failure to disclose this to the defense was a Brady violation which required reversal of the conviction. The trial court properly granted a new trial to the defendant.

***United States v. Foster***, 874 F.2d 491 (8th Cir. 1988) The prosecutor failed to correct false and misleading testimony which was given by witnesses who had made agreements with the government. The failure to correct these misstatements amounted to the knowing use of false testimony by the government and violated the defendant's right to due process.

***United States v. Hanna***, 55 F.3d 1456 (9th Cir. 1995) Prior statements of a witness that are both material and inconsistent with his anticipated testimony fall within the Brady rule. Here, the police report prepared by the arresting officer contained material discrepancies with the witness's trial testimony. A remand for further evaluation of this Brady issue was required, even though the inconsistencies were "aired" during the course of the trial.

***BRADY (Presentence Report and Probation Reports of Witnesses)***

***United States v. Garcia***, 562 F.3d 947 (8th Cir. 2009) The trial court erred in failing to conduct an in camera review of cooperating witnesses' PSR's. United States v. Scroggins, 379 F.3d 233 (5th Cir. 2004) The trial court erred in declining to review the co-conspirators' PSR's to determine if any Brady or Giglio information was contained in their reports.

***United States v. Alvarez***, 358 F.3d 1194 (9th Cir. 2004) The Ninth Circuit discusses the issues raised when a defendant seeks to have the district court review a witness's presentence report. If the defendant has a basis for claiming that Brady information is contained in the file, the trial court should conduct an in-camera review of the file.

***United States v. Moore***, 949 F.2d 68 (2d Cir. 1991) When a defendant requests an opportunity to review a pre-sentence report of an accomplice-witness, the trial court should review the pre-sentence report to determine if there is any exculpatory information, or impeaching information contained therein and whether there is a compelling need to reveal that information to the defense.

***United States v. Trevino***, 89 F.3d 187 (4th Cir. 1996) The court considered the question of when the trial court is required to review a government witness's PSR at the request of the defendant, to determine if there is any Brady information contained therein. The court concluded that a district court is under no duty to conduct an in-camera examination of a requested PSR unless the accused has first clearly specified the information contained in the report that he expects will reveal exculpatory or impeachment evidence.

***BRADY (Undisclosed Deals of Witness)***

***United States v. Mazzarella***, 784 F.3d 532 (9th Cir. 2015) The defendant was convicted of bank fraud. At a subsequent trial relating to other defendants, a key witness (employee of the defendant's company), testified that she obtained documents from the defendant's company at the request of the FBI and also related that she had been urged to do so with the lure of not being prosecuted. The disclosure of this possible Fourth Amendment violation and Brady information necessitated that the district court conduct a full evidentiary hearing.

***Phillips v. Ornoski,*** 673 F.3d 1168 (9th Cir. 2012) The state's failure to reveal that it had agreed to dismiss charges against a prosecution witness violated Brady and Napue and required that a death sentence be vacated. The deal was reached between the prosecutor and the witness's attorney, but it was conditioned on the witness's attorney's agreement not to tell the witness. Thus, the witness was not expressly told about the benefit that she would receive in exchange for her testimony. The fact that the "deal" was not disclosed to the witness by her attorney (at the request of the prosecutor) is not consequential. The prosecution knew that there was a deal and failed to correct false testimony. Moreover, the witness's attorney had urged the witness to testify, thus, the "benefit" that she was to receive was an incentive for her to testify. The Ninth Circuit also noted the difference between the materiality standard for a Brady claim and a Napue claim: a Napue violation is material when there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury."

***United States v. Agurs***, 427 U.S. 97, 103 (1976). In contrast, a Brady violation is material to a jury's verdict when "there is a reasonable probability that the result of the proceeding would have been different by for the violation. ***United States v. Bagley,*** 473 U.S. 667, 682 (1985).

***Lacaze v. Warden Louisiana Correctional Institute for Women,*** 645 F.3d 728 (5th Cir. 2011) The prosecution failed to reveal that a witness had been promised that in exchange for his cooperation, the witness's son would not be prosecuted. The Fifth Circuit granted the writ.

***Maxwell v. Roe***, 628 F.3d 486 (9th Cir. 2010) The state failed to reveal to the defense that the informant in this state murder prosecution had originally negotiated a certain deal in exchange for his testimony and that thereafter, the informant insisted on an even better deal in exchange for his testimony in the murder case. The informant also committed perjury during the course of his testimony, including about his background, his education, a conversation he had the with the prison rabbi about testifying against the defendant, as well as his history of providing "snitch" evidence in other cases. This case contains an extensive discussion of the perils of jailhouse informant testimony.

***Douglas v. Workman***, 560 F.3d 1156 (10th Cir. 2009) Tacit agreements with cooperating witnesses must also be disclosed under the command of Brady, not just express agreements to provide leniency or no prosecution in the witness's case. Note: *A tacit term is an unexpressed provision in a legal agreement or contract which derives from the common intention of the parties, and which is inferred from the express terms of the contract and the surrounding circumstances.* In ***Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration****,* the court stipulated a tacit term to be '. . . an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. Whether a contract contains such a term is a question of interpretation. Generally, a court would be very slow to import a tacit term into a contract, particularly where the parties have concluded a comprehensive written agreement that deals in detail with the subject and where it is not necessary to give the contract business efficacy.

***Harris v. Lafler***, 553 F.3d 1028 (6th Cir. 2009) A key witness who testified for the prosecution had been promised that he would be released and that his girlfriend would be released based on his testimony establishing the defendant's guilt. He was also told to deny, if asked, that any deals had been made for his testimony. When this came to light, after trial, the state court still concluded that the withheld evidence was immaterial. The Sixth Circuit disagreed and ordered that the conviction be set aside.

***Tassin v. Cain***, 517 F.3d 770 (5th Cir. 2008) The state prosecutor's failure to reveal the existence of a deal with a prosecution witness required that the defendant's murder conviction be set aside. The witness's attorney submitted an affidavit after trial that he had an understanding with the prosecutor that the witness would receive a ten-year sentence, an agreement that the trial judge was also aware of.

***United States v. Morris***, 498 F.3d 634 (7th Cir. 2007) During the trial the prosecutor repeatedly stressed that the cooperating witness was facing a mandatory minimum ten years in prison. In closing argument, the prosecutor emphasized this, again. After

trial, the prosecutor filed a motion for a downward departure, including relief from the mandatory minimum. This amounts to prosecutorial misconduct. But harmless error.

***Horton v. Mayle***, 408 F.3d 570 (9th Cir. 2004) The state's failure to disclose the existence of an immunity agreement between a key prosecution witness and the state violated Brady. The witness's testimony was the "glue" that kept the state's case together and the immunity agreement would have been a powerful tool of impeachment.

***Hayes v. Brown***, 399 F.3d 972 (9th Cir. 2005) The prosecutor and a witness's attorney reached an agreement that provided that if the attorney's client testified against the defendant, felony charges against the witness would be dismissed. One part of the agreement required the attorney to not disclose the agreement to the witness, so he could testify at the defendant's trial and honestly deny the existence of any deal with prosecutors. The Ninth Circuit granted habeas relief, holding that this deal should have been disclosed to the defense, even though the witness did not know about the deal. The witness's denial of a deal was, in fact false, and pursuant to Pyle and Acorta, the state had a duty to correct the false testimony.

***United States v. Blanco***, 392 F.3d 382 (9th Cir. 2004) The government's failure to reveal that an informant had an ongoing relationship with the INS (in addition to the disclosed relationship with DEA) and that he had been given a "special parole visa" enabling him to remain in the U.S. was error that necessitated a remand for consideration of an appropriate remedy. The record in this case demonstrated that, at least to some extent, the DEA was intentionally withholding information from the AUSA. This, of course, is no defense to a Brady violation. The duty under Brady extends to the DEA and any other law enforcement agency involved in the prosecution of the defendant.

***United States v. Sipe***, 388 F.3d 471 (5th Cir. 2004) The government's failure to reveal that one of the government witnesses told the government that he "disliked" the defendant; as well as the "benefits" granted to numerous other government witnesses, amounted to a Brady violation that required setting aside the conviction. The Fifth Circuit noted that evidence of guilt was "significant," but that the withheld evidence, when considered in the totality, undermined confidence in the verdict.

***Shih Wei Su v. Filion***, 335 F.3d 119 (2d Cir. 2003) The Second Circuit concluded that the prosecutor knowing elicited perjured testimony relating to a witness's cooperation agreement with the government and granted a writ of habeas corpus. In fact, there was an agreement that if he cooperated, the witness would be afforded youthful offender treatment. At trial, however, it was represented that there was no agreement on the terms of the plea agreement.

***Grisby v. Blodgett***, 130 F.3d 365 (9th Cir. 1997) Post-trial, a witness stated that he had lied at trial when he testified that he had not been offered a deal by the police detectives in exchange for his testimony. A full evidentiary hearing should have been conducted. The proffered evidence, if true, would establish that the witness gave perjured testimony. A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

***Singh v. Prunty, 142 F.3d 1157*** (9th Cir. 1998) The state failed to inform the defendant in his state murder trial that a key prosecution witness was promised certain benefits for his testimony, including favorable treatment on various pending criminal charges.

***DeMarco v. United States***, 928 F.2d 1074 (11th Cir. 1991) Though the defense attorney was aware that one of the prosecutor's witnesses was committing perjury, the prosecutor's allowing this to occur and then capitalizing on the testimony in her closing was grounds to vacate the judgment. The perjured testimony in this case was the existence of deals and promises from the government. The defense attorney was formally provided notice of the deals, but at trial, the witness denied there were any deals and the prosecutor did nothing to correct this false testimony. The fact that the prosecutor referred to these lies in her closing argument is the reason for reversal despite the defense attorney's knowledge of the lies.

***Moore v. Kemp***, 809 F.2d 702 (11th Cir. 1987) The prosecution's withholding from the defendant of portions of the criminal record of the prosecution's key witness, as well as failing to disclose an agreement the State had with that witness requires a further evidentiary hearing to determine whether the conviction and sentence should be set aside.

***Brown v. Wainwright***, 785 F.2d 1457 (11th Cir. 1986) The State knowingly introduced false testimony relating to a witness' tentative plea agreement. In granting habeas relief, the Eleventh Circuit holds that the proper legal standard is not whether the defendant can prove that the correction of the false testimony "probably would have resulted in an acquittal." Rather, where, as here, the State intentionally uses false testimony, a new trial is required if the false testimony "could in any reasonable likelihood have affected the judgment of the jury."

***Gilday v. Callahan***, 59 F.3d 257 (1st Cir. 1995) The prosecutor made a deal with the witness's attorney that, if the witness testified, no criminal charges would be brought against the witness. The witness's attorney apparently did not reveal this to the witness but did tell the witness that it would be in his best interest to testify. The failure to disclose this "deal" with the witness violated Brady. Nevertheless, it was harmless error in this case.

***Ouimette v. Moran***, 942 F.2d 1 (1st Cir. 1991) The district court's decision granting a writ of habeas corpus was affirmed. The district court found that the state prosecutor withheld evidence of deals made with prosecution witnesses, as well as the criminal record of witnesses. In a lengthy analysis of the evidence in the case and the extent of prosecutorial misconduct in withholding exculpatory and impeaching evidence, the appellate court concludes that the misconduct necessitated a new trial.

***United States v. Luc Levasseur***, 826 F.2d 158 (1st Cir. 1987) The First Circuit upholds the trial court's ordering the government to make pre-trial disclosure of all promises, rewards and inducements made to any witness the government intended to call in its case-in-chief.

***United States v. Boyd***, 55 F.3d 239 (7th Cir. 1995) Another of the El Rukn convictions was set aside because of the prosecutor's failure to reveal the extent to which witnesses for the prosecution were rewarded with sexual favors, phone privileges, physical contact with relatives and drug transfers. One witness for the prosecution testified that he no longer used drugs, even though the prosecution was aware that he was dealing drugs in prison during the time that he testified. The failure to disclose this to the defense was a Brady violation which required reversal of the conviction. The trial court properly granted a new trial to the defendant.

***Bagley v. Lumpkin***, 798 F.2d 1297 (9th Cir. 1986) Despite specific requests by the defense, the government failed to produce evidence that the key prosecution witness was acting under financial inducements. This is the case which earlier had gone to the United States Supreme Court which redefined the standard of review in Brady cases.

***United States v. Bagley***, 473 U.S. 667. Back in the Ninth Circuit, the Court holds that a reversal was still required under the new standard.

***United States v. Smith***, 77 F.3d 511 (D.C. Cir. 1996) The government failed to reveal to the defense that one of the government's witnesses had a D.C. Superior Court case dismissed against him and also had a psychiatric history. This was reversible error. Citing Kyles v. Whitley, the appellate court observed that in determining the materiality of the non-disclosed information, the lower court should not simply determine whether the evidence was still sufficient to convict the defendant if the witness whose history was not disclosed were ignored.

## *BRIBERY AND GRATUITIES SEE ALSO: MAIL FRAUD (INTANGIBLE RIGHTS -- HONEST SERVICES) HOBBS ACT*

***McDonnell v. United States***, 136 S. Ct. 2355 (2016) An "official act" is a decision or action on a "question, matter, cause, suit, proceeding or controversy." That question or matter must involve a formal exercise of governmental power and must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that question or matter or agree to do so. Setting up a meeting, talking to another official, or organizing an event—without more—does not fit that definition of "official act." On the other hand, a decision or action to initiate a research study would qualify as an "official act." In addition, a public official's effort to persuade another official to perform an official act also qualifies.

***United States v. Sun-Diamond Growers of California***, 119 S. Ct. 1402 (1999) In order to violate the federal gratuity statute, 18 U.S.C. § 201(c)(1)(A), the government must prove that the gratuity was given to the official because of his performance of a specific act. It is not enough to merely prove that the gratuity was given because of the official's position generally. In short, the gratuity statute does not outlaw all gift-giving, just gifts that are linked to specific action on the part of the official.

***Sabri v. United States***, 541 U.S. 600 (2004) Affirming the decision of the Eighth Circuit, the Supreme Court held that the government is not required to prove in a § 666 case that a bribe to a person who is an employee of a local government agency affected any federal program or federal funds. It is sufficient if the local agency receives federal funds, and the employee is bribed to influence some official conduct.

***Salinas v. United States***, 118 S. Ct. 469 (1997) In a §666 gratuity prosecution, there is no requirement that the government prove that the corrupt payment affected federal funds.

***United States v. Silver***, 864 F.3d 102 (2d Cir. 2017) Sheldon Silver's conviction for honest services fraud and Hobbs Act violations were reversed based on an error in the jury instructions, which failed the McDonnell requirements for an "official act." The trial court incorrectly explained that an "official act" was any action taken or to be taken under color of official authority.

***United States v. Skelos***, --- F.3d --- (2d Cir. 2017) Two New York state officials' federal bribery convictions were reversed based on an erroneous jury instruction that did not comply with McDonnell.

***United States v. Boyland***, 862 F.3d 279 (2d Cir. 2017) The district court's instruction to the jury on the law of honest services fraud for a public official did not satisfy the standard of McDonnell, because it included within the definition of "official act," "contacting or lobbying other government agencies." But the error in the instruction in this case did not satisfy the plain error standard.

***United States v. Pinson***, 860 F.3d 152 (4th Cir. 2017) The defendant was charged with a RICO conspiracy with some of the predicate acts being § 666 violations. The various crimes, however, were not related to each other, though a couple grew out of his receipt of money from individuals or companies that benefitted from his role on the Board of Trustees of South Carolina State University. The Fourth Circuit held that the crimes did not demonstrate the type of continuity, relationship between the members of the supposed enterprise and longevity to qualify as an association in fact enterprise. The evidence also failed to support the § 666 violations, because the person receiving the illicit payments was not proven to be an agent of the covered entity. Finally, with regard to a third § 666 count, the evidence failed to show that the recipient of federal funds qualified under the $10,000 threshold, because the money received was earmarked for the construction of housing and this does not qualify as a grant, loan, or contract.

***United States v. Doran***, 854 F.3d 1312 (11th Cir. 2017) This § 666 conviction was reversed because the government failed to prove that the entity from which the defendant stole money received any federal money. The entity was a Student Investment Fund that was created to give students in the Florida State University Business School experience in investing money. None of the money in the fund came from either the school itself or from any federal source. Embezzling money from the fund, therefore, did not amount to a § 666 offense.

***United States v. Tavares***, 844 F.3d 46 (1st Cir. 2016) The defendants were officials in the Massachusetts State Probation Department. They were charged with a RICO, bribery/gratuities and mail fraud offenses based on their practice of hiring people for various Probation Department positions based on requests by State Legislators, who, in turn, would vote favorably on Probation legislation (including increased budgets). The First Circuit reversed the conviction on all counts: there was insufficient proof of a nexus between any act of the Probation Department officials (rigging the hiring process) and any official act of the legislature. Regarding the mail fraud counts, there was insufficient proof that any mailing was linked to any fraudulent conduct. Each mailing was a rejection letter to an applicant who was allegedly more qualified for a position than the person who was hired at the request of a legislator.

***United States v. McLean***, 802 F.3d 1228 (11th Cir. 2015) In this comprehensive opinion evaluating the sufficiency of evidence to establish the $10,000 element of a § 666 offense, the Eleventh Circuit held that the government failed to offer sufficient evidence that federal funds that were earmarked for the city, some small portion of which was then sent to the agency, which was affected by the bribe, were sufficiently linked to the bribe. The government offered virtually no evidence that the federal program (which sent money to the city) had a purpose or objective that had any relationship at all to the agency that ultimately received the money. The money was sent by the federal government to the city; the city later provided a few bus shelters to the Redevelopment Agency, the entity which later approved the bribe-payors application for funds.

***United States v. Blagojevich***, 794 F.3d 729 (7th Cir. 2015) Though many of his convictions were affirmed, the Seventh Circuit reversed Blagojevich's convictions on certain bribery / extortion counts. Those counts involved what was described as "logrolling": The defendant asked for a cabinet appointment in exchange for appointing a particular person to the United States Senate, for example. A proposal to trade one public act for another is not the same as swapping an official act for a private payment.

***United States v. Hawkins***, 777 F.3d 880 (7th Cir. 2015) Though 18 U.S.C. § 666 covers both bribes and gratuities, in order to violate § 1346, the payment must amount to a bribe, not a gratuity.

***United States v. Fernandez***, 722 F.3d 1 (1st Cir. 2013) In this lengthy discussion of the elements of a § 666 offense, the First Circuit concludes that a §666 prosecution requires proof of a bribe, not just a gratuity. The essential difference between a bribe and a gratuity is the quid quo pro requirement. If the payment is made after the official act occurs, this is generally typical of a gratuity (though not conclusive).

***United States v. Terry***, 707 F.3d 607 (6th Cir. 2013) Thorough discussion of the law regarding bribes vs. campaign contributions. The former requires a quid pro quo.

***United States v. Owens***, 697 F.3d 657 (7th Cir. 2012) The defendant was a housing inspector who twice received $600 bribes to issue permits for units he did not actually inspect. But § 666 requires proof that the thing obtained in exchange for the bribe must be worth $5,000.00. There was insufficient evidence in this case that the permits were worth $5,000.00. The fact that the houses or the units were worth more than $5,000 is not sufficient.

***United States v. Dean***, 629 F.3d 257 (D.C. Cir. 2011) The defendant received license fees from people in D.C. She told some of the applicants that they had to pay certain license fees in cash, which she then pocketed. The citizens were not aware of her theft. This does not constitute bribery under § 201, because there was no quid pro quo. This did not amount to a Hobbs Act violation for the same reason. Clearly, she had committed a theft, but the citizen who paid the money was never told that the money had to be paid to her personally for some reason other than to have the license issued in exchange for the proper amount of the fee. In fact, the citizens had no idea that she was pocketing the money.

***United States v. Langston***, 590 F.3d 1226 (11th Cir. 2009) The government failed to prove that the defendant who stole state money under his control was actually a state "agent" as that term is defined in § 666. The defendant was an employee of a state commission, not of the state.

***United States v. Whitfield***, 590 F.3d 325 (5th Cir. 2009) The defendants were state judges who accepted bribes in connection with their judicial decision-making. The only federal funds received by the judiciary involved grants given to the administrative office of the courts, which was not involved in judicial decision-making. The purpose of the administrative office of the courts is to "assist in the efficient administration of the nonjudicial business of the courts of the state." The Fifth Circuit held that § 666 did not cover the judges.

***United States v. Hoffman***, 556 F.3d 871 (8th Cir. 2009) The Eighth Circuit provides a thorough primer on the elements of a 18 U.S.C. § 201(c) illegal gratuity case. In particular the court focuses on the element of the offense that requires that the "gift" be given "because of" an official act. The court ultimately concludes that the evidence was sufficient in this case and though the jury instruction defining the relationship between the gift and the official act was not correct, the conviction was affirmed, because other instruction properly explained the law.

***United States v. Ganim***, 510 F.3d 134 (2nd Cir. 2007) The Second Circuit extensively reviews the bribery / gratuity / honest services offenses in the context of a mayor who accepted money with the understanding that at some point in the future he

would engage in future official acts that favored the payor. The court, reviewing the Evans, McCormick and Sun-Diamond decisions held that an agreement to perform some unspecified act in the future in exchange for the money violated federal bribery and honest services laws.

***United States v. Abu-Shawish,*** 507 F.3d 550 (7th Cir. 2007) In order to violate § 666, the defendant's fraud must affect the program that employs the defendant. Thus, it is not enough that the defendant commits a fraud while employed by a covered organization (i.e., recipient of federal funds). The fraud must impact the organization. The indictment in this case failed to allege that the defendant defrauded the organization for which he worked. Though he was alleged to have defrauded the City of Milwaukee, he was not employed by Milwaukee. Thus, the indictment failed to allege that he defrauded the entity for which he worked and was fatally defective.

***United States v. Thompson***, 484 F.3d 877 (7th Cir. 2007) An honest services fraud prosecution may not be predicated on proof that the defendant made decisions about awarding contracts for state work based on the contractor's political affiliation or alliance with the political party in power. The court reversed not only the § 1346 honest services conviction, but also the § 666 bribery/gratuity/misapplication conviction. The defendant did not "misapply" the money by making a procurement decision based in part on political considerations, even if her decision was not completely in accordance with state procurement rules. With regard to the honest services conviction, even though the defendant received a raise, based in part on her work on this contract, this did not convert her state regulatory violation into a federal mail fraud offense.

***United States v. Ford***, 435 F.3d 204 (2d Cir. 2006) In this § 666 prosecution, the defendant, who was running for a leadership position in a union, allowed another person to perform volunteer work for the campaign, supposedly in exchange for being awarded a contract by the union for work in the future. The trial court's jury instruction failed to adequately explain that the volunteer work must have represented a quid pro quo for a contract to be awarded in the future. The essential problem with the instruction was that it focused on what the person paying the gratuity (i.e., performing the volunteer work) intended, as opposed to what the recipient intended. The fact that the volunteer expected to be rewarded with a contract is admissible evidence of the understanding between the parties, but it is not, in itself, all that is required to be proven by the government. The government must prove that the defendant/recipient accepted the volunteer work in exchange for the future benefit. Even if the recipient knows of the other person's intent, this is not sufficient. Thus, even if the defendant knew that the volunteer expected to be rewarded, this would not be sufficient; the defendant must have accepted the volunteer work with the intent to provide the quid pro quo.

***Valdes v. United States***, 475 F.3d 1319 (D.C. Cir. 2007) An informant paid a detective to run license plate numbers through a law enforcement data base. The D.C. Circuit, en banc, concluded that this did not amount to the payment of an unlawful gratuity, because the detective's acts did not qualify as "an official act" under 18 U.S.C. § 201(c)(1)(B). To qualify under that provision, the act of the defendant must be something more than simply an act that he can perform within the scope of his official duties. Rather, the act must have some influence on the outcome of some public question. In other words, the act that the government employee undertakes must "directly affect a formal government decision made in fulfillment of the government's public responsibility."

***United States v. Evans***, 344 F.3d 1131 (11th Cir. 2003) The court reversed the defendants' § 201 convictions because the recipient of the "bribe" did not qualify as a federal official, or a person who had some degree of official responsibility for carrying out a federal program or policy. The recipient was an employee of an agency that owned housing units that received Section 8 housing assistance grants from the federal government. In this capacity, he was not a federal official and had no authority for carrying out a federal program or policy.

***United States v. Ceballos***, 340 F.3d 115 (2d Cir. 2003) The defendant was convicted of conspiracy to distribute drugs and conspiracy to bribe a public official. The evidence was insufficient to establish his knowing participation in a conspiracy to bribe the public official. The government used undercover agents posing as drug purchasers who were capable of producing phony green cards through their supposed connection with a corrupt INS agent. The undercover agents would buy drugs from a middleman and pay partly in cash and partly in phony green cards which they (and the undercover INS agent) would manufacture for the middleman. As the operation continued, the undercover agents eventually convinced the middleman to introduce them to their drug supplier, the defendant in this case. This evidence did not establish the defendant's participation in the bribery conspiracy. Even if he knew that the money owed to him, as the drug supplier, was obtained by the purchaser from the proceeds of another crime committed by the purchaser, this does not make him a member of the purchaser's conspiracy.

***United States v. Choy***, 309 F.3d 602 (9th Cir. 2002) The defendant participated in a scheme to influence a food inspector, but the only thing of value that he gave the inspector was a computer with which he could carry out the fraudulent inspections. This was insufficient, the Ninth Circuit held, to satisfy the "thing of value" element of 18 U.S.C. § 201(b)(1).

***United States v. Mills***, 140 F.3d 630 (6th Cir. 1998) In order to violate § 666, the value of the property obtained through the bribe, or gratuity, must be worth at $5,000.00. Bona fide wages, salary, fees, or other compensation cannot be included in the $5,000.00 amount. In this case, people paid the Sheriff money in exchange for being hired as a deputy sheriff. The government relied on the deputies' salaries to reach the threshold amount. The Sixth Circuit affirmed the decision of the trial court dismissing the indictment. The salaries were not shown to be other than bona fide and therefore, the value of the property obtained by virtue of the bribe, not including bona fide salary, did not exceed $5,000.00

***United States v. Copeland***, 143 F.3d 1439 (11th Cir. 1998) Title 18 U.S.C. § 666 makes it a crime to offer or receive anything of value of $5,000 or more, if the person taking the bribe is an agent of an organization or agency that receives in any one year,

benefits in excess of $10,000 from the federal government involving a grant, contract, subsidy, loan, guarantee, insurance of other form of federal assistance. Lockheed, which is a prime Defense Department contractor does not qualify as such an organization. Though organizations that receive money pursuant to a "contract" qualify, according to the terms of the contract, the law only applies where the money is received in the form of federal assistance; it does not apply to organizations that provide goods or services to the government in exchange for the money.

***United States v. Phillips***, 219 F.3d 404 (5th Cir. 2000) The defendant, who was charged with a §666 offense, was the tax assessor for a local parish that received food stamps. In this case, the government employee misappropriated purely local funds that had nothing to do with food stamps. The court held that the question of whether he is an agent turns on whether he, as tax assessor, was authorized to act on behalf of the parish with respect to federal funds. The court held the tax assessor is not an agent of the parish for § 666 purposes.

***United States v. Jennings***, 160 F.3d 1006 (4th Cir. 1998) The court discusses at some length the difference between a bribe and a gratuity under 18 U.S.C. § 201. A bribe requires a specific corrupt intent to influence the action of a public official; a gratuity "rewards" a public official for action that he took (or is going to take) notwithstanding the payment of the gratuity. The court then turned to the question of what § 666 prohibits. The defendant argued that § 666 only outlaws bribes. The court declines to answer this question: the evidence was sufficient to prove the payment of a bribe. The Fourth Circuit agreed that the lower court's definition of "corrupt intent" (the instruction did not include the concept of quid pro quo). However, it was not plain error and therefore the conviction was affirmed.

***United States v. Rooney***, 37 F.3d 847 (2d Cir. 1994) The defendant was developing a senior citizens home and was using federal FMHA funds. This was a project covered by 18 U.S.C. §666. The defendant became indebted to the contractor and had a choice of either continuing with his debt to him or applying for more loans from FMHA to pay off this debt. The defendant told the developer that he would apply for more loans if the contractor would build a pond at the site. This did not violate §666. There was nothing corrupt about this "solicitation," and a conviction under §666 could not be upheld.

***United States v. Biaggi***, 909 F.2d 662 (2d Cir. 1990) Numerous defendants were charged with tax evasion, extortion, and bribery in connection with payments made to a congressman. The evidence did not support the conviction of the congressman's son for bribery. The government contended that payments made to the son were for the purpose of bribing the congressman. The evidence failed to show that the son was aware that the payments made to him were for the purpose of affecting the congressman's actions as opposed to simply helping the congressman circumvent limits on the amount of money he could receive.

***United States v. Cicco***, 938 F.2d 441 (3rd Cir. 1991) The defendants in this case told municipal workers that, unless they supported the defendants (the mayor and councilman), they would lose their jobs. This is not bribery under §666.

***United States v. Valentine***, 63 F.3d 459 (6th Cir. 1995) 18 U.S.C. §666 makes it a crime for a person working for an agency receiving at least $10,000 in federal funds to misappropriate $5,000. The Sixth Circuit holds that the $5,000 must be received during the course of one 12-month period. The government may not aggregate funds received over an extended period of time and rely on a total sum of $5,000 received over the entire period.

## *BRUTON*

***Gray v. Maryland***, 523 U.S. 185 (1998) Bruton bars the introduction of a non-testifying co-defendant's confession that impliedly implicates the defendant, even if the defendant's name was redacted from the confession.

***Richardson v. Marsh***, 481 U.S. 200 (1987) A co-defendant's confession may be admitted at a joint trial if the confession is redacted so that it omits all reference to the defendant and even to the existence of another guilty party if the jury could infer that the co-defendant's statement implicates the defendant.

***Cruz v. New York***, 481 U.S. 186 (1987) The Court rejects the "interlocking confession" rule. Even if the defendant has confessed, a co-defendant's confession which implicates the defendant may not be introduced. Limiting instructions do not suffice.

***Lambert v. Warden Greene SCI***, 861 F.3d 459 (3rd Cir. 2017) The prosecution arguably relied on the statements of one defendant to a psychiatrist that qualified as testimonial statements to implicate the other defendant in the murder. Though the statement itself only implicated the declarant/defendant, the trial court should have instructed the jury that the statement could only be used against the declarant/defendant. Trial counsel's failure to seek a limiting instruction was ineffective assistance of counsel, which required a remand to evaluate the appropriate relief.

***Brown v. Superindendent Greene SCI***, 834 F.3d 506 (3rd Cir. 2016) A co-defendant's statement implicated the defendant, so it was redacted to remove references to the defendant. The prosecutor in closing argument, however, argued that the "other person" was the defendant. This was a violation of Bruton and required granting the writ.

***Washington v. Sec'y Pa. Dep't of Corr.,*** 801 F.3d 160 (3rd Cir. 2015) The redactions of the co-defendant's statement to the police were not sufficient under Richardson. The redacted statement still contained references to "someone I know," "another guy," "the driver," and other references to the defendant.

***United States v. Taylor***, 745 F.3d 15 (2d Cir. 2014) The redactions of the defendant's statement made it obvious that the names that were redacted were the co-defendants. This violated Bruton. In assessing whether the redactions are sufficient, the court should consider whether the jury would realize that specific names were omitted (i.e., the defendant's actual statement was

altered), or whether the redaction was done in such a way that the jury would believe that the defendant did not actually implicate the codefendant. Thus, changing a statement to say, “I turned to another person and said, ‘look another person’, we need to get out of here” is not an appropriate redaction. Once it is obvious that specific names have been pruned from the actual statement, the question is whether the range of possibilities is narrow enough that the co-defendant’s identity is the obvious choice.

***United States v. Powell***, 732 F.3d 361 (5th Cir. 2013) The defendant and his girlfriend were co-defendants and were alleged to have driven to Lubbock to purchase cocaine. The girlfriend made a statement confessing. At trial, the confession was redacted so that her statement only implicated herself. When the defendant testified, the prosecutor asked him repeatedly why his girlfriend acknowledged that she had been to Lubbock to purchase drugs? This questioning violated Bruton. The questioning had the effect of using the co-defendant’s statements “against” the defendant. Harmless error.

***Washington v. Secretary of Pa. Dept. of Corrections***, 726 F.3d 471 (3rd Cir. 2013) The state violated Bruton in introducing the statement of a non-testifying co-defendant that implicated the defendant in the robbery/murder. The Third Circuit thoroughly reviews the law regarding efforts to redact references to the defendant by the use of pronouns – discussing the Supreme Court decisions in Richardson and Gray – and concludes that the redaction efforts in this case were insufficient to overcome the Confrontation Clause violation. Following remand from the Supreme Court, the Third Circuit reached the same decision in Washington v. Secretary Pennsylvania Department of Corrections, --- F.3d --- (September 1, 2015).

***Ray v. Boatwright***, 592 F.3d 793 (7th Cir. 2010) The police officer who took the defendant’s statement testified at trial and recounted the circumstances of his interrogation of the defendant. Included in this recitation were statements such as, “When he was confronted with the fact that his co-conspirators claimed to have been present at the time of the shooting” and “When confronted with statements by the coconspirators that the defendant was doing the shooting” – the defendant responded in a certain fashion. This amounted to a Confrontation Clause violation, because the co-conspirators did not testify and the officer who testified recounted exactly what they had told the police. The error was sufficiently harmful that a new trial was required.

***United States v. Cabrera-Rivera***, 583 F.3d 26 (1st Cir. 2009) The prosecutor elicited testimony from a police officer about his interrogation of a coconspirator. Despite minimal efforts to eliminate references to the defendant, the officer testified that based on his interrogation of the co-conspirator, he determined that the defendant had received part of the proceeds of the robbery. This was a clear violation of Bruton which was compounded by the prosecutor’s closing argument that stressed the information learned from the co-conspirator in proving the defendant’s guilt.

***United States v. Tuyet Thi-Bach Nguyen***, 565 F.3d 668 (9th Cir. 2009) Allowing an officer to testify about the statement of a co-defendant and then allowing the co-defendant’s counsel to cross-examine the agent eliciting further details about the codefendant’s statement was reversible error as to the defendant. The Ninth Circuit states, during the course of the opinion, that admitting the co-defendant’s statement was a Crawford Confrontation Clause violation and whether or not the statement implicated the defendant only related to the harmless/harmful nature of the error.

***United States v. Hardwick***, 544 F.3d 565 (3rd Cir. 2008) The statements of a co-defendant – even redacted to remove the defendant’s name – sufficiently implicated the defendant that permitting those statements to be introduced violated Bruton.

***Vazquez v. Wilson***¸ 550 F.3d 270 (3rd Cir. 2008) The state introduced the co-defendant’s statement at trial. In place of the defendant’s name, the court permitted the substitution of “my boy” and “the other guy” as a substitute for the defendant’s name in the co-defendant’s statement. This did not protect the defendant’s Confrontation Clause rights and the Bruton violation required that the writ be granted.

***United States v. Schwartz***, 541 F.3d 1331 (11th Cir. 2008) This decision contains an encyclopedic review of Bruton jurisprudence and ultimately concludes that an affidavit of a co-defendant, who did not testify at trial, that was introduced into evidence against the co-defendant, clearly implicated the defendant and, coupled with the prosecutor’s closing argument, which pointed to the affidavit and argued that the jury could infer the defendant’s guilt from the affidavit’s assertions, required reversal of the conviction. The affidavit did not implicate Schwartz by name. Rather, the out-of-court statement of the codefendant only implicated Schwartz circumstantially (referring to corporations that Schwartz owned). The trial court cautioned the jury not to consider the affidavit against Schwartz (a cautionary note that Bruton itself said is inadequate to protect a defendant’s Confrontation Clause rights). In Richardson v. Marsh, 481 U.S. 200 (1987), the Supreme Court held that redacting the defendant’s name from a co-defendant’s out-of-court statement is a satisfactory method of avoiding a Confrontation Clause problem.

***Gray v. Maryland***, 523 U.S. 185 (1998), held that a redaction that replaces a defendant’s name with an obvious indication of deletion, such as a blank space, or [delete], does not avoid a Bruton problem. Synthesizing these cases, as well as several Eleventh Circuit precedents, the court concluded, “A defendant’s confrontation right is violated when the court admits a codefendant statement that, in light of the Government’s whole case, compels a reasonable person to infer the defendant’s guilt.”

***Stevens v. Ortiz***, 465 F.3d 1229 (10th Cir. 2006) A clear Bruton violation. The state’s argument was that the statement had sufficient indicia of reliability to be admissible. The Tenth Circuit granted the writ: neither the fact that the statement was against the declarant’s penal interest (he accepted some responsibility for the murder, but “shared” that responsibility with the defendant), nor the fact that it had some indicia of reliability was sufficient to overcome the Confrontation Clause violation. See Lilly v. Virginia, 527 U.S. 116, 119 S. Ct. 1887 (1999).

***United States v. Santos***, 449 F.3d 93 (2d Cir. 2006) The trial court redacted portions of a co-defendant’s post-arrest statement and removed references to the defendants and instructed the jury not to consider the statement as evidence of the defendants’

participation in the conspiracy. However, the statement that was included revealed that the intention of the conspirators was to rob through the use of force. This was a contested element of the Hobbs Act prosecution and admitting this portion of the statement violated the remaining defendants' confrontation clause rights.

***Madrigal v. Bagley***, 413 F.3d 548 (6th Cir. 2005) The Bruton error was obvious (and conceded by the state) and was also prejudicial. The defendant's conviction and sentence of death was reversed.

***United States v. Vega Molina,*** 407 F.3d 511 (1st Cir. 2005) The trial court approved certain redactions in a co-defendant's confession which replaced the defendant's name with vague reference to "another person." This was permissible under Bruton. However, the trial court failed to instruct the jury not to consider the confession of the co-defendant against the defendant. The defendant did not request such an instruction; nevertheless, it was plain error in this case, because the prosecutor, in closing argument, urged the jury to conclude that "another person" was, in fact, the defendant. Thus, the prosecutor argued precisely what the trial court should have instructed the jury was an improper inference.

***Howard v. Walker***, 406 F.3d 114 (2d Cir. 2005) A co-conspirator's statement to the police was excluded on Bruton grounds. However, an expert witness for the state relied on that statement in reaching her conclusion that the victim's death was caused by conduct of the conspirators. Though an expert may generally rely on inadmissible evidence in reaching a conclusion, including hearsay, that rule assumes that an expert will carefully analyze the basis of his opinion and that the trial court will conduct a sufficient Daubert hearing to ensure the reliability of the expert's underlying data from which she draws her conclusion. In this case, the unreliable statements of the co-conspirator were not reliable, and the expert's opinion was therefore improperly admitted.

***Murillo v. Frank***, 402 F.3d 786 (7th Cir. 2005) The state trial court erroneously admitted the statement of a witness who made a custodial statement implicating the defendant shortly after the murder. The witness refused to testify at trial, even with a grant of immunity. This evidence would clearly be barred under Crawford, but Crawford does not apply retroactively. Nevertheless, this evidence was also inadmissible under Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887 (1999).

***United States v. Macias***, 387 F.3d 509 (6th Cir. 2004) A co-defendant offered the testimony (from prior grand jury testimony) of a law enforcement officer who stated, during the grand jury testimony that the co-defendant implicated the defendant. This is a Bruton violation. Confrontation Clause violations can be caused by the introduction of testimony by a co-defendant's counsel.

***United States v. Vejar-Urias***, 165 F.3d 337 (5th Cir. 1999) Though it was harmless error, the trial court erred in permitting the government to introduce the co-defendant's post-arrest statement. Merely replacing the defendant's name with the word "someone" did not vitiate the Confrontation Clause violation. See Gray v. Maryland, 523 U.S. 185 (1998).

***United States v. Peterson***, 140 F.3d 819 (9th Cir. 1998) The co-defendant's post-arrest statement made reference to the defendant, but the references were redacted at trial and replaced with "person X." During closing argument, the prosecutor argued that "person X" was the defendant. The Ninth Circuit concluded that the redaction was insufficient and violated Bruton. The closing argument of the prosecutor, needless to say, also violated Bruton. Reversible error.

***United States v. Walker***, 148 F.3d 518 (5th Cir. 1998) The government improperly admitted evidence that violated Bruton. The government suggested that the evidence was not offered for the truth of the matter asserted, but the Fifth Circuit held that even if that were the case, there was still a Bruton violation. Harmless error.

***Graham v. Hoke***, 946 F.2d 982 (2d Cir. 1991) The decision in Cruz v. New York, 481 U.S. 186 (1987), which eliminated the interlocking confession exception to the Bruton rule, should be applied retroactively to cases on habeas review. Arguably, Cruz did not establish a new rule, but even if it did, the rule fit at least one of the Teague v. Lane exceptions to the non-retroactive application of new rules to old cases.

***Holland v. Scully***, 797 F.2d 57 (2d Cir. 1986) Both the defendant and his co-defendant confessed prior to trial. Though they were similar in many details, the co-defendant's confession indicated that the defendant was the mastermind and had invited him to commit the robbery. In this context, the introduction of the co-defendant's confession was prejudicial error under Bruton.

***United States v. Schmick***, 904 F.2d 936 (5th Cir. 1990) The defendant was confronted with the incriminating statements of his co-defendant in violation of Bruton. Despite the trial judge's instructions to the jury to disregard the statements, the defendant was prejudiced by the admission of this testimony, especially in light of the prosecutor's reliance on those statements during his closing argument. The trial court should have granted a new trial to the defendant.

***Sanders v. Lane***, 835 F.2d 1204 (7th Cir. 1987) The admission of the co-defendant's confession which implicated the defendant was reversible error. The defendant's own confession was admitted during the course of this trial, but the statement of his co-defendant was more incriminating than his own confession.

***United States v. Payne,*** 923 F.2d 595 (8th Cir. 1991) The co-defendant's redacted confession referred to helping "someone" escape from federal custody. Everyone at trial knew who the "someone" was: the co-defendant who was charged with conspiracy to escape. Though the error was harmless, this violated Bruton.

***Hardnett v. Marshall***, 25 F.3d 875 (9th Cir. 1994) Three defendants were charged with murder. One of the defendants had made statements to the police about another one of the defendants. The declarant did not testify at trial. The other defendant did and was cross-examined by the prosecutor about the statements of the non-testifying defendant. This violated Bruton, but was harmless error. See Robbins v. Small, 371 F.2d 793 (1st Cir. 1967).

***Toolate v. Borg***, 828 F.2d 571 (9th Cir. 1987) A co-defendant testified and offered a confession which was incriminating both of himself and of the defendant. The co-defendant refused to be cross-examined by the defendant. This constitutes a violation of the Bruton rule even though Bruton refers to out-of-court confessions. The inability to cross-examine the co-defendant in court represents the same confrontation problems as envisioned in the classic Bruton situation.

***United States v. Glass***, 128 F.3d 1398 (10th Cir. 1997) The Bruton violation in this case was harmful error requiring reversal of the defendant's conviction. A police officer testified that one of the defendants (who did not testify) made a statement that incriminated herself and expressly incriminated another defendant, as well. The other defendant's right to confront the testimony against him was violated by this Bruton violation.

***United States v. Hill***, 901 F.2d 880 (10th Cir. 1990) The defendant and co-defendant were tried jointly. At the beginning of trial, the codefendant's attorney announced that his client would take the stand. In reliance on this prediction, the government introduced the co-defendant's confession which implicated the defendant. The co-defendant did not take the stand. This constitutes a Bruton violation and the defendant's conviction was reversed. The defendant cannot be penalized for the co-defendant's attorney's inaccurate prediction.

***United States v. Brazel***, 102 F.3d 1120 (11th Cir. 1996) Though it was not plain error, the government improperly elicited testimony that one non-testifying co-defendant inculpated another defendant in his out-of-court statement.

***Glock v. Singletary***, 36 F.3d 1014 (11th Cir. 1994), rev'd on other grounds 65 F.3d 878 (11th Cir. 1995) The state violated Bruton by introducing a non-testifying co-defendant's confession. Even though the confessions "interlocked," this does not eliminate the Bruton concerns. The error was harmless, however.

***United States v. Costa***, 31 F.3d 1073 (11th Cir. 1994) The government offered the confession of a co-defendant (who was not on trial with the defendant) which implicated both the defendant on trial, and the co-defendant, himself. The government relied on Rule 804(b)(3). The court reversed: even though the statement might appear to be against the declarant's penal interest, the part of the statement implicating the defendant was not sufficiently against the declarant's penal interest to be admissible under this theory. Under Bruton, such statements must be excluded. The declarant's statement was made while he was in custody, and after he was told by the AUSA that if he did not provide substantial assistance, he would face life in prison.

***United States v. Veltmann***, 6 F.3d 1483 (11th Cir. 1993) The Bruton violation in this case was not harmless error. Admitting evidence of a codefendant's jailhouse statement to a cellmate which implicated the defendant was reversible error.

***United States v. Beale***, 921 F.2d 1412 (11th Cir. 1991) A non-testifying co-defendant's post-arrest statement that another co-defendant used the alias "Bee" should not have been admitted at trial. Bruton errors are subject to the constitutional harmless error test. The error in this case was not harmless and the conviction of this defendant was reversed.

***United States v. Perez-Garcia***, 904 F.2d 1534 (11th Cir. 1990) The trial court erred in permitting the government to introduce testimony concerning what the defendant's co-conspirator stated to a DEA agent following his arrest. An arrest amounts to a termination of the conspiracy and under Bruton, such statements are hearsay and are inadmissible. The failure to object to the introduction of this testimony, however, precluded reversal.

***United States v. Pendegraph***, 791 F.2d 1462 (11th Cir. 1986) Even though the co-defendant's confession was redacted to omit the defendant's name, its admission was error under Bruton. There was no possible person other than the defendant who could have been referred to as "the individual" in the co-defendant's confession.

## *CARJACKING*

***Holloway v. United States***, 119 S. Ct. 966 (1998) The carjacking statute makes it a federal crime to take a car by force, violence, or intimidation with the intent to cause death or serious bodily harm. Here, the defendant testified that he had no intent to cause death, or serious bodily harm, unless the driver resisted. The Court held that this "conditional intent" is sufficient to support a conviction.

***United States v. Bailey***, 819 F.3d 92 (4th Cir. 2016) Fleeing from the police, the defendant jumped into a car being driven by the victim and implored the victim, "Drive, drive, drive, I'll pay you anything." The victim refused and the defendant placed a "cold hard object against the back of his neck." Though the victim was justifiably scared, there was no evidence that the defendant actually had a weapon, or that his conduct satisfied the Holloway standard. Conviction reversed.

***United States v. Petruk,*** 781 F.3d 438 (8th Cir. 2015) The defendant stole a truck belonging to Behning, but Behning was not present. When Behning was informed about the theft, he confronted the defendant shortly thereafter twice. On the first occasion, the defendant briefly stopped, then drove off; on the second occasion, the defendant pulled over in the truck and went back to the vehicle being driven by Behning and assaulted him and then drove off. Neither of these encounters qualified as carjacking. The defendant did not act with intent to cause death or serious bodily harm and the vehicle was not taken from the person of the victim (he was not present when the car was stolen).

***Brown v. Palmer***, 441 F.3d 347 (6th Cir. 2006) The defendant was the driver of a car from which two occupants suddenly jumped out and carjacked another car. He jumped out of his car and ran away. The evidence did not establish that the driver was a participant in the crime.

***United States v. Harris***, 420 F.3d 467 (5th Cir. 2005) The government failed to prove that the defendant, at the moment he seized control of the victim's car, had the intent to kill or harm the victim if necessary to take the car.

## *CHANGE OF VENUE*

***United States v. Casellas-Toro***, 807 F.3d 380 (1st Cir. 2015) Three months after being convicted in a highly publicized murder trial in Puerto Rico, the defendant was tried for lying to FBI agents in an interview that preceded the murder, but which was allegedly the defendant's set-up to commit the murder of his wife. The presumption of prejudice was undeniable: the live broadcast of his sentencing in the murder case had "top Nielson ratings." Virtually all of the jurors knew about the murder conviction and two-thirds were disqualified for cause. The evidence in this case clearly satisfied the test of Skilling v. United States, 561 U.S. 358 (2010).

***In re Tsarnaev***, 780 F.3d 14 (1st Cir. 2015) Though deciding that a change of venue was not required in the Boston Marathon Bombing case, the First Circuit thoroughly reviews the law on this topic in both the majority and dissenting opinions.

***United States v. Garza***, 593 F.3d 385 (5th Cir. 2010) For reasons that were not adequately explained in the record, the district court transferred the case from one district to another, over the objection of the defendants. The trial was held 300 miles away from the original venue and several of the appointed defense attorneys were replaced. Though there was some indication that the reason for the transfer was the recusal of the initial judge (the defendants did move to recuse the judge), there was inadequate justification for transferring the case pursuant to Fed.R.Crim.P. 18.

***United States v. Stanko***, 528 F.3d 581 (8th Cir. 2008) Fed.R.Crim.P. 18 requires that a district court give due regard to the convenience of the defendant and witnesses and the prompt administration of justice when deciding where, within the district the trial will be held. In this case, there was a Local Rule prescribing that all trials would be held in one of two divisions within the district. The defendant complained that these divisions were far from his home and requested that trial be held in a division closer to his home. The district court denied the motion, but there was no indication that the district court considered the factors (convenience of defendant and witnesses) in denying the motion. This was error. See also United States v. Burns, 662 F.2d 1378 (11th Cir. 1981) (same).

***Daniels v. Woodford***, 428 F.3d 1181 (9th Cir. 2005) The saturated press coverage in the community of this double police officer homicide mandated a finding that there was a presumption of prejudice and, therefore, a change of venue should have been granted.

***In the Matter of Balsimo***, 68 F.3d 185 (7th Cir. 1995) A refusal to transfer a criminal case can be challenged by means of a petition for a writ of mandamus. In this case, the lower court used the incorrect legal standard in evaluating a motion for change of venue under Rule 21(b). The lower court held that a change of venue would only be appropriate if the movant established "truly compelling circumstances." It is enough if, all relevant things considered, the case would be better off transferred to another district.

***CHARACTER EVIDENCE SEE ALSO: EVIDENCE (Rule 404(a))***

***United States v. Hough***, 803 F.3d 1181 (11th Cir. 2015) The Eleventh Circuit affirmed its prior holding that "guilt-assuming" hypotheticals are inappropriate in cross-examining good character witnesses. See United States v. Guzman, 167 F.3d 1350 (11th Cir. 1999). In this case, however, the questions posed by defense counsel opened the door to this type of cross-examination. The defense attorney asked the witnesses if their opinion would remain the same about the defendant's character if they were aware of the allegations in the indictment and the witnesses responded, "I wouldn't believe it."

***United States v. Yarbrough***, 527 F.3d 1092 (10th Cir. 2008) The trial court erred in excluding good character evidence in this obstruction of justice trial. The fact that the defendant acknowledged committing the acts with which he was charged did not foreclose him from contending that he did not act willfully in violation of the law. His reputation for law-abidingness, and his general good character were relevant on this issue.

***United States v. De Leon***, 728 F.3d 500 (5th Cir. 2013) The defendant did not testify at trial. The defense called a character witness who was asked if the defendant was a law-abiding person. The prosecutor objected, citing Rule 608(a). The trial court improperly sustained the objection. Rule 404(a) allows the defense to introduce evidence of the defendant's law-abiding trait. This rule applies regardless of whether the defendant testifies. Rule 608(a), on the other hand, only applies to the credibility of a witness (either the defendant, or any other witness), and focuses on the issues of truthfulness, not law abidingness. Harmless error.

***United States v. Kellogg***, 510 F.3d 188 (3rd Cir. 2007) Generally, the government is not permitted to cross-examine a "reputation" good character witness in a manner that assumes the guilt of the defendant, because the witness could only speculate about the affect these assumed facts would have on the defendant's reputation (i.e., other people's opinion about the defendant). However, an "opinion" character witness may be asked hypothetical questions that assume the guilt of the defendant.

***United States v. Ndiaye***, 434 F.3d 1270 (11th Cir. 2006) The defendant was on trial for immigration fraud and related offenses. The government obtained a copy of a letter he wrote to a neighbor, which documented his extra-marital affair with the neighbor. When the defendant called a character witness in his defense, the prosecutor questioned the character witness about the defendant's character, assuming he was the author of the letter and assuming he was engaged in an extra-marital affair. This was improper cross-examination of the character witness, because an extra-marital affair does not relate directly to the defendant's truthfulness and honesty. Harmless error.

***United States v. Damblu,*** 134 F.3d 490 (2d Cir. 1998) The defendant defended a drug charge on the basis that he was entrapped into selling drugs to the agent on one occasion. He admitted that one sale. In cross-examining a character witness, the prosecutor asked, "In your opinion a person would not be honest if he went around selling crack, would he?" This was improper. Though a character witness may be cross-examined about a matter that the defendant admits, this cross-examination assumed that the defendant sold drugs on other occasions. Harmless error.

***United States v. Oshatz***, 912 F.2d 534 (2d Cir. 1990) Though not reversible error, it was improper for the government to cross-examine the defendant's character witnesses in a manner which assumed the guilt of the defendant. That is, the prosecutor may not pose a hypothetical to the character witnesses, assuming the facts as alleged by the government and then asking whether the character witnesses' assessment of the defendant would remain the same assuming the truth of the hypothetical.

***United States v. Mason,*** 993 F.2d 406 (4th Cir. 1993) Guilt-assuming hypotheticals posed to a good character witness are inappropriate. This is so regardless of whether the good character witness offers his personal opinion, or reputation evidence. Reversible error.

***United States v. Siers***, 873 F.2d 747 (4th Cir. 1989) Though not requiring reversal, it was improper to permit the prosecutor to cross-examine character witnesses in a manner that assumed that the defendant was guilty of the offense for which he was on trial.

***United States v. Monteleone***, 77 F.3d 1086 (8th Cir. 1996) When a prosecutor cross examines a defendant's reputation good character witness the prosecutor must not only have a good faith basis for believing that the defendant committed the offense (which the witness is being asked about), but also that the offense is known in the community. Here, the prosecutor believed that the defendant lied in a grand jury proceeding in the past, but that was not a matter that could have been known in the community and therefore it was improper – reversible error – to question the character witness about his knowledge that the defendant had lied in the grand jury room.

***United States v. Wilson***, 983 F.2d 221 (11th Cir. 1993) The defendant was charged with engaging in a scheme to defraud banks by selling to an undercover agent credit card numbers. In cross-examining his good character witnesses, the prosecutor asked if their opinion would be the same if they knew that he had engaged in a scheme to sell these credit card numbers. This was not error, because the defendant did not deny selling the credit card numbers – he claimed he did it for an innocent purpose (selling a list of customers). Because the cross-examination did not assume the guilt of the accused, that is, the question did not assume that the defendant had the requisite mens rea, this was not improper cross-examination. See United States v. Candelaria-Gonzalez, 547 F.2d 291 (5th Cir. 1977).

**CHILD SEX OFFENSES SEE ALSO: PORNOGRAPHY (which includes child pornography cases) ENTICING A MINOR FOR SEX INTERSTATE OFFENSES SEX TOURISM.**

***United States v. Davis***, 854 F.3d 601 (9th Cir. 2017) The defendant was charged with sexual exploitation of a minor. The indictment alleged that he recruited the child to participate in a sex video, "knowing or in reckless disregard of the fact that the person had not attained the age of 18." The jury instruction, however, the trial court instructed the jury that the knowledge requirement of the offense could be satisfied with roof that "the defendant had a reasonable opportunity to observe "the person]." This amounted to a constructive amendment of the indictment, because it provided the jury a path to conviction that was not alleged in the indictment. See also United States v. Dipentino, 242 F.3d 1090 (9th Cir. 2001).

***United States v. DeFoggi***, 839 F.3d 701 (8th Cir. 2016) 18 U.S.C. § 2252A(g) makes it a crime to engage in a child exploitation enterprise. This offense (like the drug CCE statute) requires proof that the defendant participate in three felony violations involving more than one victim and that these offenses are committed in concert with three or more other persons. In this case, the court held that participating in a chat room and viewing child pornography available on a website that other child pornography viewers also view does not satisfy the "in concert" element of this offense.

***United States v. Daniels***, 653 F.3d 399 (6th Cir. 2011) The defendant was charged with engaging in a child exploitation enterprise, in violation of 18 U.S.C. § 2252A(g)(2). This offense requires proof of three or more violations (a "series") involving more than one victim, undertaken in concert with at least three or more persons. The "in concert" element cannot include child victims, even if the "victims" are consenting child pornography, or child prostitution participants. In this case, the government failed to prove that there were three or more people acting in concert with the defendant.

***United States v. Broxmeyer***, 616 F.3d 120 (2d Cir. 2010) The defendant was charged with violating 18 U.S.C. § 2423, transporting a minor in interstate commerce with intent that the individual engaged in any sexual activity for which any person can be charged with a criminal offense. This statute is the offspring of the original Mann Act, which dealt primarily with transporting prostitutes across state lines. In this case, the defendant was a field hockey coach who was charged with transporting one of his players (a minor) across state lines in connection with a practice and engaging in sexual conduct with her. The Second Circuit reversed the conviction, because there was insufficient evidence to support the government's theory that the defendant caused the defendant to travel across state lines with regard to the trip to the practice (her father drove her to the practice and was available to pick her up the next day, so the defendant was not the cause of her interstate travel). The defendant did eventually drive the minor back home after practice and during the return trip, they engaged in sexual conduct. However, the evidence established that the sexual conduct occurred prior to the crossing of a state line and in order to be guilty

of a § 2423 offense, the defendant must form the intent to engage in sexual conduct before crossing the state line and then engage in the sexual conduct after crossing the state line.

***United States v. Taylor***, 640 F.3d 255 (7th Cir. 2011) The defendant masturbated in front of a webcam while communicating with a child (actually, a police officer who he thought was a child) and also invited the girl to masturbate. He was prosecuted under 18 U.S.C. § 2422: using a means of interstate commerce to knowingly persuade, induce, entice, or coerce any child to engage in any sexual activity for which any person can be charged with a criminal offense, or attempt to do so. Judge Posner decided that this activity did not constitute "sexual activity." There is no definition of the term in the code. The term "sexual act" in a subsequent section of the code does require proof of physical contact.

***United States v. Cherer***, 513 F.3d 1150 (9th Cir. 2008) When a defendant has targeted an adult decoy posing as a child, the government must prove beyond a reasonable doubt that the defendant believed that the person he was targeting was a child in order to convict the defendant for an offense under 18 U.S.C. § 2422(b).

## *CHILD SUPPORT RECOVERY ACT*

***United States v. Kerley***, 544 F.3d 172 (2d Cir. 2008) The defendant's failure to pay child support in accordance with a court order to two children (twins) amounted to one § 228 violation.

***United States v. Fields***, 500 F.3d 1327 (11th Cir. 2007) The CSRA (18 U.S.C. § 228) requires proof that the defendant willfully failed to pay a past due support obligation to his child who resided in another state. Is the state required to prove that the defendant knew that his child resided in another state? According to this decision, the answer is "yes." Though the "out of state" requirement is also a federal jurisdictional element of the offense, the court concludes that defendant's knowledge of the location of the child is also an element of the offense that the government must prove.

***United States v. Bigford***, 365 F.3d 859 (10th Cir. 2004) The Deadbeat Parents Punishment Act of 1998 criminalizes the willful failure to pay a support obligation with respect to a child who resides in another state. 18 U.S.C. § 228(a). Though virtually every Circuit to have considered the issue has held that the defendant may not attack the substantive lawfulness of the underlying state support obligation or permit a federal court to revise the order in any way, the Tenth Circuit holds that the federal court may inquire into the jurisdictional validity of the underlying support obligation. Thus, if the court that issued the support obligation lacked personal jurisdiction over the defendant and issued a default judgment, the defendant in a federal Deadbeat Parents case may raise that as a defense.

***United States v. Mussari***, 152 F.3d 1156 (9th Cir. 1998) The defendant's CSRA conviction was reversed because the court improperly considered conduct that occurred prior to the enactment of the statute. The Ninth Circuit also questioned the government's selection of defendants: "In choosing among the thousands of persons delinquent in honoring their child support obligations, the government need not show itself an unfeeling monster, or make the law hideous, by selecting as its target an ineffectual worker, plagued by accidents and bad luck, without assets to make any restitution, without children to whom he has any legal connection, and with a present wife and family to whom he has important ties."

## *CIGARETTE OFFENSES*

***United States v. Mohamed***, 759 F.3d 798 (7th Cir. 2014) The government failed to prove that the cigarettes in the possession of the defendant were required to bear a tax stamp, because there was not sufficient proof that the cigarettes had been shipped, sold, distributed, or consumed in Indiana. This is a prerequisite for proof of a violation of the state tax law. See 18 U.S.C. § 2341.

***United States v. Tang Nguyen***, 758 F.3d 1024 (8th Cir. 2014) The defendant was charged with conspiracy to fraudulently import contraband cigarettes. The Eighth Circuit held that although this is a general intent crime, the government is still required to prove "knowledge" that the defendant was transacting in contraband cigarettes. She undeniably knew that she was receiving cigarettes from overseas, but there was insufficient proof that she knew that they were contraband. A knowingly violation of the law requires proof that the defendant knew the essential facts, even if she did not know the law regarding contraband cigarettes.

## *CLASSIFIED INFORMATION PROCEDURE ACT*

***United States v. Sedaghaty***, 728 F.3d 885 (9th Cir. 2013) In a lengthy opinion reviewing various aspects of this tax prosecution that involved terrorist funding, the Ninth Circuit held that the government violated CIPA by providing an unclassified summary of classified information that was not a fair summary of the exculpatory information.

### *CLOSING ARGUMENT (Comment on Evidence or Information not in the Record or Mischaracterization of Evidence)*

***United States v. Davis***, 863 F.3d 894 (D.C. Cir. 2017) The defendant and his mother were prosecuted for tax offenses relating to their tax preparation business. The son was, at most, a minimal participant in the offense. During closing argument, however, the prosecutor stated that the "staggering" amount of money that he made, coupled with his failure to report his income, was evidence of his guilt. There was no evidence, however, about his income, or his underreporting of income on his taxes. The trial court's cautionary instruction that the lawyers' arguments are not evidence did not cure the harm caused by the prosecutor's misrepresentations during closing argument. Along with other misstatements at closing argument, this misconduct necessitated reversing his conviction.

***United States v. Maloney***, 755 F.3d 1044 (9th Cir. 2014) (en banc) At the request of the government, the defendant's conviction was reversed based on the prosecutor's improper closing argument that discussed evidence that was not included in the record

of the trial. At oral argument the prosecutor acknowledged that he had “sandbagged” the defense by waiting until rebuttal argument to mention the “evidence” but did not concede that this was improper. The U.S. Attorney for the district later filed a motion requesting that the conviction be vacated.

***United States v. Wright***, 625 F.3d 583 (9th Cir. 2010) During the prosecutor’s closing argument in this child pornography case, he stated that he had tried numerous similar cases and that it was not infrequent for the defendant to blame the crime on his roommate, or that some other person (or hacker) put the child pornography on his computer, and that the interrogating officer did something wrong. The prosecutor then commented that seeing all three arguments in one case – a trifecta – was unusual. The Ninth Circuit held that this argument was improper, because it amounted to introducing evidence that was not in the record and also “denigrated the defense as a sham.” Harmless error.

***United States v. Klebig***, 600 F.3d 700 (7th Cir. 2009) In this firearms prosecution, the prosecutor conducted a “demonstration” during the closing argument, showing that a device (described as a silencer) fit over a shotgun. There had been no testimony explaining this, and no opportunity for the defense to challenge the demonstration. This was reversible error.

***United States v. Reyes***, 577 F.3d 1069 (9th Cir. 2009) In this “combative” trial involving allegations of illegal options back-dating, the defendant, who was a corporate executive who signed corporate financial statements defended on the basis that he thought the Finance Department was aware of the backdating and properly documented the options transactions in the financial statements. Only one person from the Finance Department testified for the government and she testified that she did not know about the backdating. However, the government knew – both through FBI interviews and through a pending SEC lawsuit against other people in the Finance Department – that people in the Finance Department were aware of the backdating. No other people from the Finance Department testified (in part because they asserted the Fifth Amendment right not to testify). In closing argument, the defendant argued that other people in the Finance Department knew (though there was no evidence of this at trial). The government then responded that no other people in the Finance Department knew (though the government knew that this was false). The Ninth Circuit held that this amounted to prosecutorial misconduct that necessitated reversing the conviction. “We do not lightly tolerate a prosecutor asserting as a fact to the jury something known to be untrue or, at the very least, that the prosecution had every strong reason to doubt.”

***United States v. Farinella***, 558 F.3d 695 (7th Cir. 2009) In this case involving misbranded food, the prosecutor repeatedly misrepresented the nature of the evidence. The food that the defendant purchases wholesale had a “best when sold by” date on the label. He changed that date and re-sold the food. There was no evidence what the “best when sold by” date referred to. There was no evidence that the food expired or was unhealthy after that date. Nevertheless, throughout the trial, the prosecutor referred to the food as having “expired” and being rancid and suggested that it posed a health risk. None of this was true. To make matters considerably worse, the prosecutor also decried the “high-paid” lawyer and urged the jury not to let the defendant “buy his way” out of a conviction. All of these comments amounted to reversible error and merited sanctions imposed on the prosecutor. Because the conviction was reversed on sufficiency grounds, the appellate court could not provide any further relief to the defendant.

***United States v. Mendoza***, 522 F.3d 482 (5th Cir 2008) A prosecutor may not comment, during closing argument, on the defendant’s demeanor at counsel table in a case in which the defendant did not testify. Harmless error.

***United States v. Azubike***, 504 F.3d 30 (1st Cir. 2007) The AUSA mistakenly stated during rebuttal closing argument that a taped conversation revealed that the defendant did know one of the co-conspirators. This was inaccurate, yet the prosecutor made the statement twice. Though it was not shown that the prosecutor intentionally misled the jury, the “misconduct” was prejudicial and required that the conviction be reversed. The trial judge’s admonition that lawyer’s arguments are not evidence and instruction to the jury to listen to the tapes and make up their own mind about what was said was not an adequate cure. Because portions of the tape were unintelligible, the prosecutor’s statement might have served as a substitute for the evidence which could not be heard by the jury.

***United States v. Carpenter***, 494 F.3d 13 (1st Cir. 2007) The defendant was charged with mail and wire fraud in connection with a scheme by which he defrauded investors into investing money with him based on the safe nature of the investments he would make. In fact, his investments were very risky, and he lost considerable money. During trial, the defense repeatedly objected to references to “gambling” by the government’s expert witnesses and the trial court noted that the focus of the allegations was on the representations made by the defendant at the time the money was obtained, not his ultimate trading losses. Nevertheless, the prosecutor repeatedly made references to gambling and gambling metaphors during the closing arguments. The trial court granted a new trial based on these arguments and the First Circuit affirmed.

***Hodge v. Hurly***, 426 F.3d 368 (6th Cir. 2005) The Sixth Circuit wrote, “During his egregiously improper closing argument, the prosecutor commented on the credibility of witnesses, misrepresented the facts of the case, made derogatory remarks about the defendant, and generally tried to convince the jury to convict on the basis of bad character, all while defense trial counsel sat idly by. We conclude that defendant’s trial counsel was constitutionally ineffective in failing to object to this misconduct . . .”

***United States v. Silva***, 380 F.3d 1018 (7th Cir. 2004) On more than occasion during the course of the trial, the government offered evidence that was clearly hearsay (including what informants told the police and the results of drug tests by crime labs) under the theory that the testimony was offered to explain the officers’ conduct, not for the truth of the matter asserted in the out of court statement. The Seventh Circuit reversed. The evidence was compounded by the prosecutor’s closing argument during which he relied on the hearsay evidence to show that the defendant was guilty.

***United States v. Earle***, 375 F.3d 1159 (D.C. Cir. 2004) During the trial, several defense witnesses were cross-examined about when they first told anybody their "story." They responded that they told the defense attorney's investigator several months earlier. The court took judicial notice that defense attorney had been retained just prior to trial. However, there was discussion between counsel and the court (not heard by the jury) that the newly retained attorney had been in contact with the defendant prior to being retained for several months. During closing argument, the prosecutor asked the jury to infer that the witnesses were lying, because it was unreasonable to assume that a newly retained attorney would have talked to these witnesses prior to being retained. This was an improper argument because it asked the jury to infer facts that the prosecutor knew, in fact, to be untrue. "The prosecutor had every reason to doubt, and no good reason to support, the inferences he propounded to the jury in his closing argument." Reversible error.

***United States v. Maddox***, 156 F.3d 1280 (D.C. Cir. 1998) When the police approached the defendant on the street, he was seen dropping a key. The police retrieved the key and in the car that it matched a gun was found. The defendant was charged with possession of a weapon by a convicted felon. The key was not introduced in evidence and the defense made a point of that failure. In closing argument, the prosecutor stated that the key was returned to the rental car company. But there was no evidence that this is what occurred, and it was not a reasonable inference from the record. The prosecutor added that the there were other witnesses (police officers) who would have testified about seeing the defendant drop the keys, but that it was unnecessary. The Court of Appeals wrote, "When a prosecutor starts telling the jury about what other potential witnesses would have said if the government had only called them, it is time not merely to sustain an objection but to issue a stern rebuke and a curative instruction, or if there can be no cure, to entertain a motion for a mistrial." Conviction reversed.

***United States v. Udechukwu***, 11 F.3d 1101 (1st Cir. 1993) The defendant was arrested carrying heroin at the airport in Puerto Rico. She immediately agreed to cooperate and claimed that she had been coerced into carrying the drugs by a sinister drug dealer in Aruba. The government investigated the identity of the Aruba connection and in fact determined that this person existed and was the target of an ongoing investigation. This was not made known to the defense. During closing argument, the prosecutor repeatedly expressed skepticism about this supplier, intimating that there was no such person, or that he was not whom the defendant claimed he was. This was prosecutorial misconduct necessitating a reversal. The improper withholding of Brady information, coupled with the misleading closing argument denied the defendant her due process rights.

***United States v. Santana-Camacho***, 833 F.2d 371 (1st Cir. 1987) Although no objection was raised at trial, the prosecutor's remark in closing argument that the defendant had illegally entered into the United States required reversal. There was no evidence that the defendant had entered the country illegally during the course of this trial where the defendant was charged with transporting illegal aliens within the United States.

***United States v. Forlorma***, 94 F.3d 91 (2d Cir. 1996) The prosecutor's closing argument had no factual basis in the record. The defendant was arrested at the airport when customs agents found four kilos of heroin in one of his suitcases. The defendant denied ownership of that bag, claiming that someone else gave him the suitcase before he boarded his flight back to the U.S. In closing argument, the prosecutor repeatedly stated that one of the suits in the suitcase fit the defendant. There was no evidence to support this argument. Considering these unsupported statements in the context of the entire trial, the defendant was denied a fair trial. Even after cautionary instructions to the jury and sustaining the objection of defense counsel, this argument had too great a potential to mislead the jury.

***United States v. Valentine***, 820 F.2d 565 (2d Cir. 1987) The prosecutor committed reversible error by mischaracterizing the testimony during the closing argument. Specifically, the prosecutor referred to the witness' grand jury testimony inaccurately. United States v. Molina-Guevara, 96 F.3d 698 (3rd Cir. 1996) The government's case against the defendant relied on the testimony of one coconspirator, as well as a statement made by the defendant to two interviewing government agents. Only one of the agents testified at trial. The defense attorney, in closing argument, suggested that the testifying agent was erroneous in her testimony about the defendant's statement. The prosecutor responded by stating that the other agent who was present (but who did not testify) would support the testifying agent's testimony. This was reversible error. It was also reversible error for the prosecutor to state, with regard to the agent who did testify, that it was ridiculous to suggest that the government would put liars on the stand.

***United States v. Kang***, 934 F.2d 621 (5th Cir. 1991) It was reversible error to permit a prosecutor to argue to the jury that hearsay evidence admitted for the sole purpose of explaining an agent's conduct (in initiating an investigation) was substantive evidence of the defendant's predisposition to commit the offense. The evidence was admitted for a limited purpose and it could not be used for another purpose in the closing argument.

***United States v. Murrah***, 888 F.2d 24 (5th Cir. 1989) During the course of the defendant's trial on charges of mail fraud in connection with an arson scheme, the prosecutor, in opening statement, promised that a witness would be presented who had been solicited by the defendant to burn the building previously. The witness never appeared. During closing argument, the prosecutor argued that the defense had tried to hide a witness from the prosecution. No such evidence of an effort to hide a witness had been presented at trial. These comments required reversal of the conviction even though the court sustained objections to the improper remarks. A prosecutor may not directly refer to, or even allude to, evidence that was not adduced at trial; he may not give a personal opinion about the veracity of a witness; and he may not suggest that other supportive evidence exists which the government chose not to develop.

***United States v. Catton***, 89 F.3d 387 (7th Cir. 1996) The conviction in this case was reversed, because a government agent lied on the stand (he claimed to have talked to a third party about critical evidence the day before, when, in fact, he had one of

his agents ask the witness to fax information to the government's case agent) and the prosecutor, in closing argument, misstated the evidence on a crucial point.

***United States v. Keskey***, 863 F.2d 474 (7th Cir. 1988) The prosecutor committed error in arguing during his rebuttal argument about why a potential government witness was not called. The prosecutor knew that his offered explanation was not honest. However, the witness was not a key witness and the error did not constitute plain error.

***United States v. Kojayan***, 8 F.3d 1315 (9th Cir. 1993) Three people were caught smuggling drugs. Two defendants went to trial, while the third provided information to the government. The cooperating individual did not testify. During closing argument, the prosecutor argued that the third individual could not be compelled to testify. This was not true; the witness had signed a cooperation agreement and the government withheld this from the defense and the jury. This type of misconduct on the part of the government necessitated reversing the conviction. The government made this argument in response to the defendant's argument that the government failed to call the cooperating individual, and therefore the witness probably had nothing to say that was favorable to the government. The government's response was untrue and thus unfairly undercut the defendants' argument.

***United States v. Schuler***, 813 F.2d 978 (9th Cir. 1987) During closing argument, the prosecutor referred to the defendant's laughing during the trial. The defendant did not testify in this case and these remarks by the prosecutor constituted reversible error: It was an attempt to put the defendant's character in issue and also represented a comment on his failure to testify. Finally, references to the defendant's demeanor while at counsel table represented the introduction of evidence during the closing argument which was not admitted at trial.

***United States v. Word***, 129 F.3d 1209 (11th Cir. 1997) A man and woman were charged with securities fraud and related offenses. They were romantically involved when the offenses were occurred, and subsequently were married. The wife sought to offer evidence at their joint trial that she was battered and obeyed her husband's demands without question. The trial court excluded this evidence. The government, however, then argued that the wife had to have guilty knowledge – after all, she was married to the man who orchestrated the fraud – and the jury never learned about the acrimony in their relationship. The combination of allowing the government to make this argument and excluding the defendant's evidence was reversible error.

***Davis v. Zant***, 36 F.3d 1538 (11th Cir. 1994) The defense contended that another person was the actual perpetrator of the murder, and that person gave a taped confession to the defense. At trial, however, the actual perpetrator refused to testify, and the trial court ruled that her statement could not be admitted. During his testimony, the defendant referred to the perpetrator's confession. This was improper testimony on the part of the defendant, but the prosecutor engaged in improper conduct by objecting with the statement, "that is not true, and it's not evidence." Also, in closing argument, the prosecutor argued that this theory of another perpetrator was a recent fabrication of the defense. This argument was a blatant lie. The prosecutor intentionally painted for the jury a distorted picture of the realities of this case in order to secure a conviction.

***United States v. Blakey***, 14 F.3d 1557 (11th Cir. 1994) During closing argument, the prosecutor stated that the defendant was a professional criminal; that he presented insufficient exculpatory evidence; and that he was arrested with false credit cards, indicating that the defendant had "real problems." Each of these remarks was improper. There was no evidence of any prior record – the defendant was not a "professional criminal." The failure to introduce exculpatory evidence was an improper burden-shifting argument; and the reference to the circumstances of the arrest violated a pretrial agreement limiting the relevance of this evidence. The cumulative effect of these arguments required a reversal, even though the trial court instructed the jury to disregard these arguments.

***Mann v. Dugger,*** 817 F.2d 1471 (11th Cir. 1987), reh'g on other grounds, 844 F.2d 1446 (11th Cir. 1988) The prosecutor blatantly mischaracterized the defendant's expert testimony when he stated during his closing argument the defendant had admitted other criminal episodes to the psychiatrist. The prosecutor further erred in telling the jury that he had not shown the jury everything that was available but only that evidence which the judge would permit him to introduce.

***United States v. Donato***, 99 F.3d 426 (D.C. Cir. 1996) The defendant was charged with conspiring with another person to steal her leased car so she could get out from the onerous payments. In closing argument, that prosecutor told the jury that the payments were $600 per month for four more years and this was what motivated the crime. However, this was inaccurate, because had she turned the car back in, the value of the car would have been deducted from this amount and, in fact, she would have had to pay almost nothing. The prosecutor's erroneous closing argument was reversible error because of its substantial misrepresentation of fact that provided a non-existent motive to commit the crime.

***United States v. Foster***, 982 F.2d 551 (D.C.Cir. 1993) During closing argument, the prosecutor made repeated references – some implicit, some explicit – to the fact that the defendant had made numerous prior drug sales. There was no evidence of this at trial, however. Such comments as "There were some complaints" and "The cloud started long, long, before" clearly suggested that there was additional evidence which was not presented at trial. This was impermissible argument by the prosecutor.

***United States v. Perholtz,*** 842 F.2d 343 (D.C. Cir. 1988) Though not plain error, the prosecutor's closing remarks about the purpose of bank accounts in the Cayman Islands was unsupported by any evidence in the case.

***CLOSING ARGUMENT (Improper Comment on Defendant's Failure to Testify***)

***Ford v. Wilson***, 747 F.3d 944 (7th Cir. 2014) Doyle v. Ohio, 426 U.S. 610 (1976) prohibits impeaching a defendant with the defendant's post-Miranda silence (i.e., "You didn't' tell this story after you were arrested, did you?"). In Griffin v. California, 380 U.S. 609 (1965), the Supreme Court held that a prosecutor may not comment during closing argument about the defendant's failure to testify at trial. Both of these decisions address the improper suggestion that invoking the Fifth Amendment can be costly

to the defendant. Griffin, however, is subject to exceptions if the defense attorney's closing argument raises the issue and the prosecutor is simply responding.

***United States v. Robinson***, 485 U.S. 25 (1988). In this case, the defendant was charged with murder. The defense attorney argued in his closing that the prosecutor failed to prove any motive why the defendant would kill the victim. In response, in his closing, the prosecutor argued that there were only two people were there who could explain what happened and one of them was dead. "The next possible source is the person who committed the offense. If that person who committed the offense don't talk, how would we ever know?" In this habeas, case, the Seventh Circuit ultimately held that habeas relief was not required for procedural reasons.

***United States v. Lopez***, 818 F.3d 125 (3rd Cir. 2016) The defendant was charged with possession of a weapon by a convicted felon. At trial he protested that he was framed by the police. After having been Mirandized, he made no statements. Yet, the prosecutor cross-examined the defendant about his failure to raise this "framed" defense prior to trial and also argued to the jury that this was a reason to question the defendant's credibility. This violated Doyle and was reversible error.

***Gongora v. Thaler***, 710 F.3d 267 (5th Cir. 2013) Repeatedly during his closing argument, the prosecutor rhetorically asked, "Who do you expect to hear from?" This rhetorical question was posed in connection with the various people in a car from which shots were fired. The defendant was one of the occupants. The prosecutor said, "You're not going to hear from the shooter, of course." And he then tried to correct this improper comment, by saying, "of course the defendant has no duty to testify." He then continued to rhetorically ask, "Who do you expect to hear from?" Though the state trial judge repeatedly sustained objections and also instructed the jury to disregard the improper comments, the Fifth Circuit held that this was a violation of the defendant's Fifth Amendment rights and necessitated granting a writ of habeas corpus.

***Girts v. Yanai***, 501 F.3d 743 (6th Cir. 2007) During closing argument, the prosecutor repeatedly made reference to the "only person" who could answer certain questions. This amounted to an improper comment on the defendant's failure to testify. Trial counsel's failure to object and preserve the error for appellate review was ineffective assistance of counsel.

***Ben-Yisrayl v. Davis***, 431 F.3d 1043 (7th Cir. 2005) The prosecutor made improper comments during closing argument that focused on the defendant's failure to offer an explanation at trial why he had confessed to the murder if he had not, in fact, committed the murder: "Let the defendant tell you why somebody would freely and voluntarily confess . . ." See Griffin v. California, 380 U.S. 609 (1965).

***DePew v. Anderson***, 311 F.3d 742 (6th Cir. 2002) The prosecutor's improper comment on the defendant's failure to testify, along with numerous other improper comments deprived the defendant of a fair death penalty sentencing proceeding. The Sixth Circuit granted the writ, noting that the state court's statement that despite the errors, the brutality of the murder supported the community's expectation of the death penalty, was not the proper way to evaluate constitutional violations.

***United States v. Johnston***, 127 F.3d 380 (5th Cir. 1997) The prosecutor erred in arguing to the jury that they should not go back to the jury room and "make up a story" for the defendants. He continued, "You can't play 'what if.' You can't say, 'Well, if they testified, well, maybe they would have explained this. Maybe they would have said that.'" This amounted to an improper comment on the defendants' failure to testify.

***United States v. Roberts***, 119 F.3d 1006 (1st Cir. 1997) The prosecutor stated in closing argument that when the defense decides to present a defense, it has the same responsibility as the government, that is, to present a compelling case. This remark was made immediately after advising the jury that the defendant has no burden to testify and the fact that he did not testify should not be considered by the jury. This argument required setting aside the conviction.

***United States v. Hardy***, 37 F.3d 753 (1st Cir. 1994) The prosecutor argued that the two defendants were still "running and hiding," just as they had the night of the arrest. Because the defendants were in court, they clearly were not hiding. Therefore, this argument could only have been interpreted to mean that the defendants were hiding behind their right not to testify. This was an improper comment on the defendants' right not to testify and the conviction was reversed.

***Floyd v. Meachum***, 907 F.2d 347 (2d Cir. 1990) The Second Circuit holds that the cumulative effect of the prosecutor's improper arguments denied the defendant a fair trial requiring granting a writ of habeas corpus. Among the prosecutor's improper statements was the statement that the Fifth Amendment guarantee that a conviction must rely upon proof beyond a reasonable doubt is a shield for the innocent, not a shield for the guilty. The prosecutor also repeatedly referred to her position as a prosecutor, "seeking justice." Furthermore, the prosecutor's repeated references to the Fifth Amendment constituted an improper comment on the defendant's refusal to testify.

***United States v. Sardelli***, 813 F.2d 654 (5th Cir. 1987) A prosecutor commented during closing argument about the total absence of defense evidence. There is only one person who could possibly have had any knowledge, the defendant. This constituted an impermissible comment on the defendant's failure to testify.

***Lent v. Wells***, 861 F.2d 972 (6th Cir. 1988) Repeated references to the uncontradicted nature of the evidence violated the defendant's right to remain silent. Actually, much of the evidence was rebutted, the only missing link was the defendant's testimony. Thus, the conviction must be reversed.

***United States v. Cotnam***, 88 F.3d 487 (7th Cir. 1996) A prosecutor's comment that the government's case was "uncontradicted," "undenied," "unrebutted," "undisputed," "uncontroverted," etc., amount to a violation of the defendant's Fifth

Amendment rights if the only person who could have contradicted, denied, rebutted, or disputed the government's evidence was the defendant himself. In this case, the remarks satisfied this standard, and the defendant's conviction was reversed.

***United States v. Sehnal***, 930 F.2d 1420 (9th Cir. 1991) The prosecutor asked rhetorical questions during closing argument which clearly emphasized the defendant's failure to testify. Specifically, the prosecutor urged the jury to address questions to defense counsel, repeatedly asking him to explain this, or that, during the defendant's closing argument: "Ask him why it took him so long to produce his bank records . . . Ask him why he set up separate accounts" etc. This was error; but the defendant did not object and the error did not amount to plain error.

***United States v. Schuler***, 813 F.2d 978 (9th Cir. 1987) During closing argument, the prosecutor referred to the defendant's laughing during the trial. The defendant did not testify in this case and these remarks by the prosecutor constituted reversible error: It was an attempt to put the defendant's character in issue and also represented a comment on his failure to testify. Finally, references to the defendant's demeanor while at counsel table represented the introduction of evidence during the closing argument which was not admitted at trial.

***Lincoln v. Sunn***, 807 F.2d 805 (9th Cir. 1987) During the closing argument, the prosecutor repeatedly referred to the defendant as the only person who could explain the incriminating evidence, and the evidence went unexplained. The case was sent back to the lower court to determine whether the error was sufficient to warrant setting aside the conviction.

***CLOSING ARGUMENT (Improper Restriction on Defendant's Closing Argument)***

***Simmons v. South Carolina***, 512 U.S. 154 (1994) When the prosecutor argues during closing argument that the imposition of the death penalty is the only sure way to ensure that the defendant will not pose a danger to the community in the future, the defendant may argue, or obtain an instruction from the trial court, that the only available option to the death penalty is life without parole.

***United States v. Brown***, 859 F.3d 730 (9th Cir. 2017) 18 U.S.C. § 2251(d)(1) makes it a crime to advertise the availability of child pornography. The defendant had a bulletin board on his website that advertised the availability of child pornography, but it was a "closed" bulletin board. The government moved in limine to bar the defendant from arguing to the jury that the fact that the bulletin board was "closed" meant that it did not qualify as an advertisement. The trial court granted the motion. The Ninth Circuit reversed. While the defense counsel's proposed argument did not suggest that a "closed" bulletin board was legally incapable of qualifying as an advertisement, it was fair game to argue that the jury could decide that the closed nature of the bulletin board meant that it did not qualify as an advertisement. It was a fact question, not a legal question and the defendant was entitled to make his argument to the jury.

***United States v. Lawson***, 494 F.3d 1046 (D.C. Cir. 2007) A "missing witness" argument is generally only appropriate if the party who supposedly failed to call the witness had a special ability to do so. In this case, involving a sale of drugs, the defendant claimed that there was insufficient evidence that he committed the offense and pointed out in closing argument that one of the supposed witnesses to the sale did not testify. He did not argue, however, that the missing witness presumably had something favorable to say for the defense (and thus was not called by the prosecution). Rather, he was simply pointing out the types of evidence that were not presented (i.e., eyewitness testimony). This was an appropriate argument and the trial court erred in cautioning the jury that the "missing witness" argument was invalid. Harmless error.

***United States v. Miguel***, 338 F.3d 995 (9th Cir. 2003) Defense attorney's efforts to argue to the jury that the shooting was accidental had an evidentiary support in the record and the trial court's restriction of this argument was constitutional error that required reversal of the conviction.

***United States v. Poindexter***, 942 F.2d 354 (6th Cir. 1991) It was reversible error to preclude the defense attorney from arguing about the lack of fingerprint evidence on the container in which the cocaine was found. The attorney simply wanted to argue that the government's failure to present fingerprint evidence – after it was determined that the container had been "dusted" – was sufficient to raise a reasonable doubt.

***United States v. Tory***, 52 F.3d 207 (9th Cir. 1995) The defense should be allowed to argue that the government's failure to produce relevant evidence within its control gives rise to an inference that the evidence would be unfavorable to it. Here, there was some dispute about what the bank robber was wearing. The bank had surveillance photographs, but they were not introduced in evidence.

***United States v. Thompson,*** 37 F.3d 450 (9th Cir. 1994) The defendant was arrested at the L.A. airport and her suitcase contained several kilos of crack. She claimed that she was an unwitting mule – her friend gave her the suitcase to bring to a person in Cleveland. The government moved in limine to exclude evidence that the government failed to take any fingerprints from inside the suitcase. The trial court erred in granting this motion: Evidence comes in various forms, some stronger and some weaker, and a defendant is entitled to argue to the jury that the government's failure to present a particular type of strong evidence against her – e.g., fingerprints – weakens its case. Where, as here, the defense is lack of knowledge, the absence of fingerprint evidence may be argued in closing argument.

***CLOSING ARGUMENT (Improper Vouching or Bolstering) SEE ALSO: WITNESSES (IMPROPER VOUCHING)***

***Jordan v. Hepp,*** 831 F.3d 837 (7th Cir. 2016) Three times during closing argument the prosecutor vouched for the detective's credibility, stating that the detective would lose her job if she gave false testimony. This type of improper vouching is improper because it introduced information to the jury that was not in evidence (the consequences when a detective provides false

testimony). Defense counsel was ineffective in failing to object. The attorney's deficient performance was prejudicial, though a remand was necessary to determine if the attorney had a strategic reason for failing to object.

***United States v. Smith***, 814 F.3d 268 (5th Cir. 2015) During closing argument, the prosecutor stated that the government's witnesses were worthy of belief and also rhetorically questioned why the government would prosecute an innocent person. The prosecutor then stated he was "totally convinced" that a government witness was truthful. Though there was no contemporaneous objection, these improper arguments constituted plain error that resulted in reversing the conviction.

***United States v. Alcantara-Castillo***, 788 F.3d 1186 (9th Cir. 2015) It was plain error for the prosecutor to question the defendant, "So it is your testimony that [the agent] was inventing stories about you [in his testimony]?" This cross-examination required setting aside the conviction. See also United States v. Combs, 379 F.3d 564 (9th Cir. 2004), discussed below. Also improper was the prosecutor's rebuttal closing argument that the agent should be believed, because he is sworn to uphold the law. This improper closing argument merits reversing a conviction, even if the judge promptly tells the jury to disregard the comment.

***United States v. Alexander***, 741 F.3d 866 (7th Cir. 2014) It is not proper for the prosecutor to argue that the professional oath taken by law enforcement officers is somehow proof of their veracity. Moreover, it is not proper to argue that a police officer has no "incentive" to lie or falsely implicate the defendant. This argument implies that there is some undisclosed punishment that would occur if the officer testified falsely. Not plain error, however.

***United States v. Raney***, 633 F.3d 385 (5th Cir. 2011) The Fifth Circuit strongly condemns the prosecutor's argument that suggested that "the police have no reason to lie" and "the officers wouldn't put their careers on the line." The Fifth Circuit held that the failure of prosecutors to heed the decisions of the appellate courts that forbid this type of argument might result in the court reconsidering its jurisprudence on curative instructions and plain error.

***United States v. Miller***, 621 F.3d 723 (8th Cir. 2010) The defense argued that the police officer may have been mistaken about the location that a gun was found (or when or who dropped it). The prosecutor responded by stating that in order to find the defendant not guilty, the jury would have to believe that the officer was lying. This was improper – and inaccurate – and necessitated reversing the conviction. It was also improper to argue that in order to acquit, the jury would have to find that the officer would jeopardize his career by lying in court.

***United States v. McCann***, 613 F.3d 486 (5th Cir. 2010) A prosecutor should not argue to the jury that it is improper for a defense attorney to challenge the credibility of a police officer, because a police officer risks his life to protect the community and doesn't deserve to be "shot at again" in the courtroom by defense counsel. Harmless error.

***United States v. Gracia***, 522 F.3d 597 (5th Cir. 2008) The prosecutor's rebuttal argument, which offered his personal assurance of the truthfulness of government witnesses ("In my opinion, they were very, very credible witnesses"); and that law enforcement witnesses should be believed because they were doing their job, amounted to plain error requiring reversal of the conviction. The court held that a prosecutor may not ask the jury the rhetorical question whether federal agents would risk their careers to commit perjury.

***United States v. Brown***, 508 F.3d 1066 (D.C. Cir. 2007) During closing argument, the prosecutor repeatedly stated that he believed the government witnesses. Improper vouching suggests to the jury that there may be additional evidence known to the prosecutor that supports the witness's credibility, and also suggests that the prosecutor, as a representative of the government should be trusted because of his status. There was no objection, however, and the argument of the prosecutor did not satisfy the plain error standard.

**United States v. Harlow**, 444 F.3d 1255 (10th Cir. 2006) Telling the jury in closing argument that the trial judge had to approve allowing a cooperating witness to receive a reduced sentence and plea agreement in return for his cooperation (thus vouching for the witness's credibility) was error, though harmless in this case.

***United States v. Weatherspoon***, 410 F.3d 1142 (9th Cir. 2005) Two improper arguments by the prosecutor required reversing the conviction: (1) the prosecutor improperly vouched for the the cops' testimony by arguing that they would lose their jobs if they lied at trial; (2) the prosecutor urged the jury to convict the defendant in order to reduce the crime rate generally.

***United States v. Combs***, 379 F.3d 564 (9th Cir. 2004) It is not proper for a prosecutor to ask a defendant who is testifying whether a government agent was lying when his testimony was inconsistent with the defendant's testimony. See also United States v. Sanchez, 176 F.3d 1214 (9th Cir. 1999). In this case, the error was plain error, particularly because it was compounded by the prosecutor's statements in closing argument that in order to acquit the defendant, the jury would have to believe that the agent risked losing his job by lying on the stand. This amounts to improper vouching of the government's witness.

***United States v. Walker***, 155 F.3d 180 (3rd Cir. 1998) At great length, the Third Circuit reviews the law regarding improper vouching by the prosecutor during closing argument. Repeatedly, the prosecutor stated such things as, "I submit that there was no reason for the witness to lie. . ." The court concludes that this does not amount to improper vouching. Where a prosecutor argues that a witness is being truthful based on the testimony given at trial and does not assure the jury that the credibility of the witness based on his own personal knowledge, the prosecutor is engaging in proper argument and is not vouching. Likewise, a prosecutorial comment that points to a lack of evidence in the record which supports a defendant's argument that the witness is not credible is proper so long as the comment does not constitute an assurance by the prosecutor that the witness is credible.

***United States v. Garcia-Guizar***, 160 F.3d 511 (9th Cir. 1998) The prosecutor committed the sin of vouching when he characterized one witness's testimony as "compelling" and called the defendant a liar. The prosecutor did not ask the jury to draw inferences from the evidence, but simply announced his view of the defendant's and witness's veracity.

***United States v. Manning***, 23 F.3d 570 (1st Cir. 1994) During closing argument, the prosecutor declared that the prosecution witnesses were "bound by the truth" and that prosecution witnesses "cannot" engage in lying. This was improper vouching. He also stated that the government "had to be fair" in acknowledging that the partial fingerprints were not sufficient to link the defendant to the briefcase; this implicitly suggested that the fingerprints were the defendants, but there were not enough points to allow for a positive identification. These improper statements necessitated reversing the conviction.

***United States v. Mejia-Lozano***, 829 F.2d 268 (1st Cir. 1987) It is improper for a prosecutor during closing argument to state that a DEA officer is "honest" and that the witness was "telling you the truth." However, the error was harmless in this case.

***United States v. Ingraldi,*** 793 F.2d 408 (1st Cir. 1986) It is improper for a prosecutor to remark during closing argument that the chief government witness, who was a government informant, had not been indicted. Error, but not reversible.

***United States v. Melendez***, 57 F.3d 238 (2d Cir. 1995) The prosecutor stated in closing that the trial judge knew the cooperating witness was telling the truth. This was more prejudicial than simply saying the prosecutor believed in the credibility of the witness. Nevertheless, because the court told the jury to disregard the remark and the defense counsel requested no further cure, this was not reversible error.

***United States v. Molina-Guevara***, 96 F.3d 698 (3rd Cir. 1996) The government's case against the defendant relied on the testimony of one coconspirator, as well as a statement made by the defendant to two interviewing government agents. Only one of the agents testified at trial. The defense attorney, in closing argument, suggested that the testifying agent was erroneous in her testimony about the defendant's statement. The prosecutor responded by stating that the other agent who was present (but who did not testify) would support the testifying agent's testimony. This was reversible error. It was also reversible error for the prosecutor to state, with regard to the agent who did testify, that it was ridiculous to suggest that the government would put liars on the stand.

***United States v. DiLoreto***, 888 F.2d 996 (3rd Cir. 1989) The prosecutor vouched for the credibility of one of his witnesses, relying on evidence which was not in the record. This is reversible per se. The prosecutor explained to the jury that the government "does not put liars on the stand." This requires that the conviction be set aside. In a later opinion, the Third Circuit held that, though it was error to make this argument, such errors are not to be considered reversible per se. United States v. Zehrbach, 47 F.3d 1252 (3rd Cir. 1995).

***United States v. Carroll***, 26 F.3d 1380 (6th Cir. 1994) In his closing argument, the prosecutor repeatedly stressed that the cooperating witnesses would receive no benefit if they told a lie – only by telling the truth could they benefit. Moreover, the prosecutor stressed that the judge would not reduce the witnesses' sentences if they told a lie. This was improper closing argument. Implicit in these arguments is the suggestion that the government was somehow able to determine the truth by some independent means and that the determination had been made that the witnesses were truthful. The error in this case required a new trial.

***United States v. Skarda***, 845 F.2d 1508 (8th Cir. 1988) It was improper for a prosecutor to argue that there was no motive for the government to have an accomplice-witness lie. The prosecutor continued that the government was doing the best it could to convict someone whom the government obviously felt should be convicted. Because of the overwhelming evidence in this case, the error was harmless.

***United States v. Frederick***, 78 F.3d 1370 (9th Cir. 1996) The prosecutor engaged in misconduct during her closing argument. First, she improperly vouched for a witness by claiming that the witness's in-court testimony was consistent with her out-of-court statements to law enforcement agents (but her out-of-court statements were not admitted in court). Second, she complimented the defense attorney for successfully cross-examining a prosecution witness and confusing her on the stand. She also said that the defense attorney's job is to ask the jury to look at a tiny piece of the evidence, while "the government and the judge will be asking you to consider all of the evidence in making your decision."

***United States v. Smith***, 962 F.2d 923 (9th Cir. 1992) The prosecutor's closing argument amounted to plain error. The prosecutor argued that his job was to present the truth to the jury and that he would prosecute anybody for perjury who told a lie. He also stated that the court would not let him do anything wrong. He repeatedly stated that his job was not to secure a conviction, but only to present the truth and to turn over all favorable evidence to the defense. Because the witness for whom the prosecutor was vouching was a critical witness for the government, this was plain error – that is, reversible error, despite the absence of a contemporaneous objection.

***United States v. Boyd,*** 54 F.3d 868 (D.C. Cir. 1995) It is improper for a prosecutor to force a defendant to evaluate the credibility of other witnesses for the government. Thus, when a defendant is testifying, he should not be asked by the prosecutor why government law enforcement agents would lie about him. The error was compounded in this case when the prosecutor stated in closing argument that there was no reason for the law enforcement witnesses to lie and that they would not put their careers on the line by lying in this case. Harmless error in this case.

***CLOSING ARGUMENT (Other Improper Arguments)***

***United States v. Barragan***, 871 F.3d 689 (9th Cir. 2017) Prosecutors should not implore the jury to return a guilty verdict in order to "send a message" to the community, or to otherwise deter other people from committing crimes. The prosecutor may urge the jury to convict based on what the defendant has done, not what others may do in the future.

***United States v. Williams***, 836 F.3d 1 (D.C. Cir. 2016) The defendant was charged with second degree murder for his role in a "hazing" incident involving another soldier on a military base. The hazing involved several soldiers beating another soldier (with his consent) for a few minutes. The incident resulted in the death of the haze. The defendant argued that the victim's consent was relevant to the defendant's state of mind. Second degree murder requires the government to prove malice and malice can be proven by showing that a defendant intended to kill or, as the government argued here, that he consciously disregarded an extreme risk of death or serious bodily injury. While it is true that the defendant cannot "blame the victim," the defense is still entitled to offer evidence that negates his culpable state of mind. The defense counsel argued that the victims' consent to being hazed was relevant to the determination whether the defendant acted with malice. In closing argument, the prosecutor told the jury that that was entirely erroneous, and that the victim's consent was not relevant to any issue in the case. After closing argument, the judge declined to issue an instruction that explained that the victim's consent could be relevant to the issue of malice. The D.C. Circuit reversed the conviction. The victim's consenting behavior—that is, his "continued, and enthusiastic, statements that he wanted the initiation to continue"—suggested that Williams was not conscious of an extreme risk that Johnson might die or be seriously injured.

***Government of the Virgin Islands v. Mills***, 821 F.3d 448 (3rd Cir. 2016) The government made numerous improper arguments during its closing argument, including arguments that suggested to the jurors that they would not be safe, even in their own homes, if the defendant were not convicted; an argument that the gun used by the defendant to kill the victim was never found, so it poses a danger to children; and the use of gruesome crime scene photos of the corpse during the rebuttal closing argument. Nevertheless, these arguments did not satisfy the plain error standard and the conviction was sustained.

***United States v. Green-Bowman***, 816 F.3d 958 (8th Cir. 2016) In Judge Bright's dissenting opinion, he explains why improper argument by the prosecutor concerning the proper way to consider Rule 404(b) evidence should have resulted in a reversal of the conviction in this case. This dissenting opinion persuasively shows that when a prosecutor uses a "paralleling" argument, the jury is likely to consider the 404(b) evidence for an improper propensity purpose. In this case, the defendant was charged with possession of a firearm by a convicted felon. He had previously been convicted of the same offense. The prior offense was admitted proving "knowledge" that the gun was in the car next to him. In closing argument, the prosecutor argued, "The prior conviction shows what he knows, what happens: When I have a gun, when I run, and when I eventually admit that I had the gun, I get convicted of carrying a weapon. So, what did he do here? He walks away, he lies about even being in the car, an obvious lie. He walks away nonchalantly. The defendant knew – based on the context of what he had done previously and what happened the time previously, it shows what he knew on that day and why he acted the way he did."

***Deck v. Jenkins***, 814 F.3d 954 (9th Cir. 2016) A prosecutor's erroneous explanation of law during closing argument may amount to a violation of due process. In this case, the erroneous explanation was prejudicial and required that the state court conviction be set aside. The defendant was charged with attempted lewd act upon a minor in violation of state law. He was in a chat room and invited a young girl (actually, an undercover agent) to meet him. The first meeting was just going to be a meeting to talk (and he would give her some pie), but no touching. Then, they could have sex on another occasion if they wanted to. When the defendant arrived at the pre-arranged location, he had the pie with him (and some condoms). He was immediately arrested. The prosecutor argued that to convict the defendant of the attempted offense, the state did not have to prove that he intended to have sex with her that day; the intent could be to have sex at some future day, perhaps a few weeks in the future. This was wrong under state law. Because the defendant's entire defense was that he was not guilty of attempt, because he had no intention of having sex with the girl that day, the Ninth Circuit concluded that the prosecutor's misstatements about the law were prejudicial and constituted a violation of clearly established constitutional law. Darden v. Wainwright, 477 U.S. 168 (1986). See also Parker v. Matthews, 132 S. Ct. 2148 (2012).

***United States v. Centeno***, 793 F.3d 378 (3rd Cir. 2015) A constructive amendment of an indictment may occur as a result of a prosecutor's closing argument. In this case, the defendant was charged with aiding and abetting an assault (in a federal park). In closing argument, the prosecutor argued that the defendant could be found guilty of aiding an abetting the assault if he drove the person who actually committed the assault away from the scene. But this would not be aiding and abetting an assault, because the crime was already completed; instead, this would be accessory after the fact. This argument had the effect of amending the indictment and required setting aside the verdict.

***Zapata v. Vasquez***, 788 F.3d 1106 (9th Cir. 2015) The defendant was charged with murdering a Mexican man on a street. There was at least one witness who saw the shooting, but he could not hear what was said prior to the two shots being fired, though he could see the shooter gesticulating at the victim. In the prosecutor's closing argument, he repeatedly asked the jury to imagine the last words heard by the victim, "You fuckin' wetback." There was no support for this argument, which was repeated several times during the rebuttal argument. There was no reason for the defense attorney to fail to object to this improper argument. The state habeas court's conclusion that a defense attorney could have thought that this argument would backfire was objectively unreasonable.

***United States v. Certified Environmental Services, Inc.,*** 753 F.3d 72 (2d Cir. 2014) The prosecutor's closing argument was improper in several respects, including comments that amounted to improper vouching for witnesses, comments that there was additional evidence that was not introduced, and comments that the jury's verdict would have important consequences.

***Cauthern v. Colson***, 736 F.3d 465 (6th Cir. 2013) The state prosecutor's closing argument in this death penalty was patently improper and required granting a writ. The prosecutor compared the defendant to the two most recent notorious killers (Daumer and Susan Smith), but the present case and those cases had no similarity. The prosecutor also made numerous Biblical references that were inappropriate and implored the jurors to perform their duty to return a death penalty, which the prosecutor suggested was, in fact, obligatory.

***United States v. Andaverde-Tinoco***, 741 F.3d 509 (5th Cir. 2013) The prosecutor improperly referenced the defendant's post-arrest silence during closing argument in an effort to imply that this disproved the defendant's defense that he was justified in illegally crossing the border after being beaten and robbed before crossing the Rio Grande. Not plain error, however.

***United States v. Richards***, 719 F.3d 746 (7th Cir. 2013) The defendant was charged with being a member of a drug conspiracy. He denied knowing that he was being used as a drug courier. The government offered Rule 404(b) evidence to show that the defendant was familiar with the drug trade. Admitting this testimony was not error. However, the government during closing argument insisted that the evidence proved that the defendant was, in fact, a drug dealer and therefore, the jury could infer that he was guilty of the charged offense. This was an improper propensity argument that was inconsistent with the limited purpose for which the 404(b) evidence was offered.

***United States v. Woods***, 710 F.3d 195 (4th Cir. 2013) The prosecutor may not state during closing argument that "the defendant lied when he testified" because this implies that the prosecutor has some basis for claiming that the defendant lied other than the evidence in the case. This error was "plain" error, but not sufficient to warrant reversal of the conviction.

***United States v. Darden***, 688 F.3d 382 (8th Cir. 2012) A prosecutor should not argue to the jury that in order to find the defendant not guilty, it would mean that police officers were lying, who had no motive to lie to frame an innocent man and who face danger in their jobs every day from violent criminals. Harmless error (though no one judge dissented, stating that the argument was reversible error, and noted other ways in which the argument was improper, including denouncing defense counsel).

***United States v. Parkes***, 668 F.3d 295 (6th Cir. 2012) The defendant, a customer of a small Tennessee bank, was charged with participating in bank fraud. During closing argument, the prosecutor argued, "And if it's right to acquit them, you do it, you let them keep the $4 million, you tell the government, "Shame on you for persecuting these poor people." This was improper for at least two reasons: First, the government knew that in a civil settlement, the defendant had already agreed to a repayment plan. Second, even if there had been no repayment plan that was not a reason to convict if there had been no fraud. In fact, the government had previously moved to exclude evidence that the defendant had, in fact, repaid most of the money. "Even a single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated."

***United States v. Sanchez***, 659 F.3d 1252 (9th Cir. 2011) The defense in this drug smuggling case was that the suppliers in Mexico threatened the courier to bring the drugs into the U.S. In his closing argument, the prosecutor said that if the defendant's argument was validated, we might as well send a memo to the Mexican cartels that the defense of duress was all that was needed to win an acquittal in a drug smuggling case. The Ninth Circuit held that this was plain error requiring reversal of the conviction even in the absence of an objection. This was a plea to convict the defendant despite his defense, which if believed, was a valid defense. Asking the jury to convict because of the possible social consequences of acquitting – despite a valid defense – is an improper argument.

***United States v. Aguilar***, 645 F.3d 319 (5th Cir. 2011) The prosecutor committed plain error by arguing to the jury that the agent risked their lives by pursuing drug dealers, only to come to court to be called a liar by the defense. The Fifth Circuit reversed the conviction.

***United States v. Delgado***, 631 F.3d 685 (5th Cir. 2011) Several errors in this case – when considered cumulatively – required that the conviction be set aside: (1) there was insufficient evidence offered to support a deliberate ignorance instruction, because there was no evidence of the defendant's knowledge of the high probability of the criminal activity; (2) the prosecutor improperly stated during closing argument that the defendant, who did not testify, had "lied to agents when they interviewed her" when she denied guilt. This amounted to an improper statement of the prosecutor's personal opinion; (3) a government agent testified (non-responsively to a question) that defendant's trucking company had been involved in other drug trafficking; (4) the absence of a full transcript of the proceeding. In a separate holding, the Fifth Circuit also reversed the defendant's conspiracy conviction on sufficiency grounds. All these errors, when considered cumulatively, denied the defendant a fair trial.

***United States v. Warshak***, 631 F.3d 266 (6th Cir. 2010) The prosecutor impermissibly commented about his service in the military and the JAG Corps, none of which was relevant in any way to the issues on trial. He simply attempted to increase his stature with the jury, which was not proper. The prosecutor also improperly suggested that the decision of the grand jury to indict the defendant pointed to their belief that the defendants were guilty. Again, an improper argument. Harmless error.

***United States v. Wright***, 625 F.3d 583 (9th Cir. 2010) During the prosecutor's closing argument in this child pornography case, he stated that he had tried numerous similar cases and that it was not infrequent for the defendant to blame the crime on his roommate, or that some other person (or hacker) put the child pornography on his computer, and that the interrogating officer did something wrong. The prosecutor then commented that seeing all three arguments in one case – a trifecta – was unusual. The Ninth Circuit held that this argument was improper, because it amounted to introducing evidence that was not in the record and also "denigrated the defense as a sham." Harmless error.

***United States v. Hills***, 618 F.3d 619 (7th Cir. 2010) During the prosecutor's closing argument in this multi-defendant case, the prosecutor said, "And you don't really need to worry about that Fifth Amendment protection unless you're worried that you're doing something illegal. They knew perfectly well precisely what they were doing. . . . In this case, they're using the Fifth Amendment not as a shield to protect themselves from incrimination, but as a sword to prevent the IRS from getting the information that they are entitled to." This improper argument amounted to prosecutorial misconduct that required setting aside one defendant's conviction under the plain error standard. See Griffin v. California, 380 U.S. 609 (1965).

***United States v. Reyes***, 577 F.3d 1069 (9th Cir. 2009) In this "combative" trial involving allegations of illegal options back-dating, the defendant, who was a corporate executive who signed corporate financial statements defended on the basis that he thought the Finance Department was aware of the backdating and properly documented the options transactions in the financial statements. Only one person from the Finance Department testified for the government and she testified that she did not know about the backdating. However, the government knew – both through FBI interviews and through a pending SEC lawsuit against other people in the Finance Department – that people in the Finance Department were aware of the backdating. No other people from the Finance Department testified (in part because they asserted the Fifth Amendment right not to testify). In closing argument, the defendant argued that other people in the Finance Department knew (though there was no evidence of this at trial). The government then responded that no other people in the Finance Department knew (though the government knew that this was false). The Ninth Circuit held that this amounted to prosecutorial misconduct that necessitated reversing the conviction. "We do not lightly tolerate a prosecutor asserting as a fact to the jury something known to be untrue or, at the very least, that the prosecution had every strong reason to doubt."

***United States v. Ayala-Garcia***, 574 F.3d 5 (1st Cir. 2009) The defendants were prosecuted for drugs and firearm offenses. During rebuttal closing argument, the prosecutor held up the individual bullets – 31 of them – and said that each bullet represented a life that was saved. He further argued that there was a war going on in the housing projects and the defendant was a soldier in that war. The First Circuit held that these improper arguments necessitated granting a new trial.

***United States v. Mannava***, 565 F.3d 412 (7th Cir. 2009) The defendant was charged under 18 U.S.C. § 2422(b) with attempting to persuade a person to engage in sexual activity that constitutes a violation of state law. The state law that was allegedly violated was statutory rape, which is actually termed "child molestation" under Indiana law. Repeatedly, however, the prosecutor decried the defendant's effort to "rape" the victim in this case (there was no victim, just FBI agent posing as a child in email conversations with the defendant). These improper accusations by the prosecutor were reversible error.

***United States v. Farinella***, 558 F.3d 695 (7th Cir. 2009) In this case involving misbranded food, the prosecutor repeatedly misrepresented the nature of the evidence. The food that the defendant purchases wholesale had a "best when sold by" date on the label. He changed that date and re-sold the food. There was no evidence what the "best when sold by" date referred to. There was no evidence that the food expired or was unhealthy after that date. Nevertheless, throughout the trial, the prosecutor referred to the food as having "expired" and being rancid and suggested that it posed a health risk. None of this was true. To make matters considerably worse, the prosecutor also decried the "high-paid" defense lawyer and urged the jury not to let the defendant "buy his way" out of a conviction. All of these comments amounted to reversible error and merited sanctions imposed on the prosecutor. Because the conviction was reversed on sufficiency grounds, the appellate court could not provide any further relief to the defendant.

***United States v. Clark***, 535 F.3d 571 (7th Cir. 2008) A prosecutor should not argue that a defendant's defense is "the standard defense" raised by defendants in drug cases. As the Supreme Court noted in Taylor v. Kentucky, 436 U.S. 478 (1978), arguments such as this (and arguments that diminish the importance of the presumption of innocence and the requirement of proof beyond a reasonable doubt) improperly suggest that all defendants are guilty. Harmless error.

***United States v. Mendoza***, 522 F.3d 482 (5th Cir 2008) A prosecutor may not comment, during closing argument, on the defendant's demeanor at counsel table in a case in which the defendant did not testify. Harmless error.

***United States v. Shoup,*** 476 F.3d 38 (1st Cir. 2007) The government may not invite the jury to make an inference regarding the absence of a witness whose unavailability has arisen because of the invocation of his Fifth Amendment right against self-incrimination. In this case, the prosecutor referred to the "phantom" witness, who the prosecutor knew had invoked his Fifth Amendment right not to testify. Harmless error.

***United States v. Palma***, 473 F.3d 899 (8th Cir. 2007) In this Social Security fraud trial, the prosecutor pointed to each member of the jury and told them that they were each victim of this crime. This was improper argument. Characterizing the jurors as victims was akin to the prohibited "golden rule" argument.

***United States v. Van Eyl***, 468 F.3d 428 (7th Cir. 2006) The prosecutor's closing argument advanced a theory of guilt that had previously been rejected by the trial court. The trial court acted within its discretion in granting a new trial. The prosecutor repeatedly referred to various witnesses' lay opinion that the defendant's conduct in this complex fraud trial was fraudulent. The prosecutor repeatedly referred to witnesses' testimony that it did not take a CPA to tell the difference between right and wrong.

***United States v. Yakobowicz***, 427 F.3d 144 (2d Cir. 2005) The trial court utilized a procedure that allowed both sides to offer a brief summary argument after each witness testified. The defendant objected. The Second Circuit reversed the conviction, holding that this procedure, which is not envisioned in the Federal Rules of Criminal Procedure, gives an unfair advantage to the prosecutor. Though interim arguments or summaries have been permitted in certain circumstances, in this case, there was no

need. In addition, the government used the summary procedure to repeatedly argue its case (not just to summarize complex testimony), asking rhetorical questions and urging the jury to draw inferences from the testimony that was just heard.

***Weaver v. Bowersox***, 438 F.3d 832 (8th Cir. 2006) The prosecutor urged the penalty phase jury to do their duty and vote to execute the defendant. The comments implored the jury to act as good soldiers do and protect the community. This is business. Toughen up. The message for these types of people must be death. I am the top law enforcement officer in this jurisdiction, and I determine which cases are appropriate for the death penalty. Etc. The Eighth Circuit held these comments were too inflammatory and required setting aside the death penalty. The comments also violated Caldwell, and Zant v. Stephens.

***United States v. Perlaza***, 439 F.3d 1149 (9th Cir. 2006) During the closing argument, the prosecutor argued to the jury that once the evidence was introduced, the presumption of innocence went out the window. When the defense objected, the judge failed to correct this erroneous statement, commenting, instead, that "that's proper rebuttal." The defendant's conviction was reversed.

***Hodge v. Hurly***, 426 F.3d 368 (6th Cir. 2005) The Sixth wrote, "During his egregiously improper closing argument, the prosecutor commented on the credibility of witnesses, misrepresented the facts of the case, made derogatory remarks about the defendant, and generally tried to convince the jury to convict on the basis of bad character, all while defense trial counsel sat idly by. We conclude that defendant's trial counsel was constitutionally ineffective in failing to object to this misconduct . . ."

***Ward v. Dretke***, 420 F.3d 479 (5th Cir. 2005) Trial counsel was ineffective in failing to object to closing argument statements by the prosecutor that the jury would be ridiculed if they sentenced the defendant too leniently; and that they should use Biblical standards in imposing punishment.

***United States v. Holmes***, 413 F.3d 770 (8th Cir. 2005) Statements by the prosecutor that the defense counsel was "colluding" with the defendant to deceive the jurors was an improper argument. Arguments by the prosecutor that repeatedly referred to counsel, by name, and claimed that he was using red herrings to confuse the jury were inappropriate. The prosecutor was encouraging the jury to focus on defense counsel, rather than the evidence. The improper argument of the prosecutor required that the conviction be set aside.

***Bates v. Bell***, 402 F.3d 635 (6th Cir. 2005) In this death penalty trial, the prosecutor's closing argument included the following improper arguments (1) suggested to the jury that if the defendant's life was spared, the jurors would be accomplices in the defendant's subsequent crimes; (2) accused the defense attorney of being paranoid and criticized the attorney's frequent objections to evidence; (3) commented on the credibility, by expressing personal opinions, about the defense mental health experts; (4) likened the defendant to a rabid dog, the only solution to which is death. The Sixth Circuit set aside the death penalty.

***United States v. Weatherspoon***, 410 F.3d 1142 (9th Cir. 2005) Two improper arguments by the prosecutor required reversing the conviction: (1) the prosecutor improperly vouched for the the cops' testimony by arguing that they would lose their jobs if they lied at trial; (2) the prosecutor urged the jury to convict the defendant in order to reduce the crime rate generally.

***United States v. Moore***, 375 F.3d 259 (3rd Cir. 2004) Defendant was charged with arson and possession of a weapon by a convicted felon. Throughout the trial, the prosecutor introduced various "bad acts" evidence that had no bearing whatsoever on the charged offenses, including domestic abuse and drug dealing. No objection was raised by the defense attorney. Then, in closing argument, the prosecutor labeled the defendant a terrorist. Again, no objection. The Third Circuit held that the prosecutor's behavior amounted to plain error and reversed the conviction, noting, "There was a serious break down here."

***United States v. Ollivierre,*** 378 F.3d 412 (4th Cir. 2004) The prosecutor improperly impugned the integrity of the defense attorney when he argued that it was incredible that the defense attorney could make his arguments "with a straight face." Arguments such as this and arguments that suggest that defense attorneys' role is to muddle the issues are inappropriate. See also, United States v. Vaccaro, 115 F.3d 1211 (5th Cir. 1997). Harmless error.

***Boyle v. Million***, 201 F.3d 711 (6th Cir. 2000) Among the sins committed by the special prosecutor in this murder case was "accusing" the defendant of hiring the best expensive lawyer he could who nit-picked every issue. A host of other improper arguments resulted in granting a writ and setting aside the murder conviction.

***Frazier v. Huffman***, 343 F.3d 780 (6th Cir. 2003) It was improper for the prosecutor to place an empty chair in front of the jury (representing the decedent) during the closing argument. Not grounds for granting a writ, however.

***United States v. Wilson***, 135 F.3d 291 (4th Cir. 1998) The defendant was on trial for CCE. There was evidence that on occasion, a person came to his apartment complex and grabbed something from him and that he took out a gun and fired at the car when it drove off. During closing argument, the prosecutor suggested that the defendant shot and killed the driver of the car. The defendant was not charged with murder and there was, in fact, no evidence that the driver was shot, or killed. This closing argument was improper and required reversing the conviction. (In fact, the prosecutor knew that someone else had been convicted in state court for the murder of the driver).

***United States v. Boyd***, 131 F.3d 951 (11th Cir. 1997) The prosecutor's closing argument that referred to the War on Drugs and the defendants' participation in that war, as the enemy, was inappropriate. Harmless error.

***United States v. Rodrigues***, 159 F.3d 439 (9th Cir. 1998) The prosecutor's closing argument criticized the defense counsel's theory of the defense. However, the defendant's theory – that is, his explanation of what the government was required to prove but failed to prove – was theoretically correct. The prosecutor argued, in essence, that the government was not required to prove

what the defense attorney claimed it was required to prove. But the defense counsel was correct. Moreover, the prosecutor improperly argued that the defense attorney had attempted to deceive the jury from the start. “When [the prosecutor] says the defendant’s counsel is responsible for lying and deceiving, his accusations cannot fail to leave an imprint on the jurors’ minds. And when no rebuke of such false accusations is made by the court, when no response is allowed the vilified lawyer, when no curative instruction is given, the jurors must necessarily be thinking that the false accusations had a basis in fact. The trial process is distorted.”

***United States v. Udechukwu,*** 11 F.3d 1101 (1st Cir. 1993) The defendant was arrested carrying heroin at the airport in Puerto Rico. She immediately agreed to cooperate and claimed that she had been coerced into carrying the drugs by a sinister drug dealer in Aruba. The government investigated the identity of the Aruba connection and in fact determined that this person existed and was the target of an ongoing investigation. This was not made known to the defense. During closing argument, the prosecutor repeatedly expressed skepticism about this supplier, intimating that there was no such person, or that he was not whom the defendant claimed he was. This was prosecutorial misconduct necessitating a reversal. The improper withholding of Brady information, coupled with the misleading closing argument denied the defendant her due process rights.

***Arrieta-Agressot v. United States***, 3 F.3d 525 (1st Cir. 1993) The prosecutor’s “war on drugs” closing argument, referring to the defendants as enemy soldiers who have poisoned the youth of the society was improper and required reversing the convictions. The court characterized this argument as “150 proof rhetoric.”

***United States v. Mandelbaum***, 803 F.2d 42 (1st Cir. 1986) It is error for a prosecutor to tell jurors to “do their duty and return a verdict of guilty.” It was harmless error in this case.

***United States v. Burns***, 104 F.3d 529 (2d Cir. 1997) After the defense attorney completed his closing argument, the prosecutor responded by sarcastically applauding, suggesting that it was a great “act.” This was inappropriate, but not reversible error.

***United States v. Friedman***, 909 F.2d 705 (2d Cir. 1990) The prosecutor told the jury during closing argument that “some people go out and investigate drug dealers and prosecute, while there are others who defend them, try to get them off, perhaps even for high fees.” The prosecutor also referred to the defendant’s opening statement as “unsworn testimony.” These improper remarks by the prosecutor required reversal of the conviction. This is so even though the trial court sustained certain objections to the closing argument of the Assistant United States Attorney.

***Floyd v. Meachum***, 907 F.2d 347 (2d Cir. 1990) The Second Circuit holds that the cumulative effect of the prosecutor’s improper arguments denied the defendant a fair trial requiring granting a writ of habeas corpus. Among the prosecutor’s improper statements was the statement that the Fifth Amendment guarantee that a conviction must rely upon proof beyond a reasonable doubt is a shield for the innocent, not a shield for the guilty. The prosecutor also repeatedly referred to her position as a prosecutor, “seeking justice.” Furthermore, the prosecutor’s repeated references to the Fifth Amendment constituted an improper comment on the defendant’s refusal to testify.

***United States v. Thame***, 846 F.2d 200 (3rd Cir. 1988) The defendant refused to consent to a search of his suitcase. During closing argument, the prosecutor argued that this was evidence that the defendant knew that the suitcase contained cocaine. This was error. This does not constitute plain error, however, and thus the failure to object at trial waives the issue.

**United States v. Flores-Chapa**, 48 F.3d 156 (5th Cir. 1995) Twice during the course of the trial, the judge instructed the prosecutor not to elicit hearsay testimony from the agents relating to what a co-conspirator told them after his arrest. Then, in closing argument, the prosecutor explicitly referred to the post-arrest statement of the co-conspirator. This amounted to plain error.

***Guidroz v. Lynaugh***, 852 F.2d 832 (5th Cir. 1988) The prosecutor’s argument concerning the effect of a jury verdict of not guilty by reason of insanity constituted reversible error.

***United States v. Jones***, 839 F.2d 1041 (5th Cir. 1988) During closing argument, the prosecutor stated that a defense witness perjured himself when he accused a government witness of lying, and further, that the defense attorneys sponsored the perjury. Though this argument was reprehensible, it was harmless in light of the overwhelming evidence, the substantial grounds for disbelieving the testimony of the witness, and the curative instruction by the trial judge.

***United States v. Solivan***, 937 F.2d 1146 (6th Cir. 1991) Although it is permissible for the prosecutor to appeal to the jury to act as the community conscience, inciting the jury by means of prejudice and passion are not permissible. Here, the prosecutor argued to the jury that because of the defendant’s transactions, the drug problem facing the community would continue if they did not convict her. The defendant’s constitutional right to a fair trial was violated because the appeal to the community conscience in the context of the War on Drugs prejudicially impacted her. The court held that this was not harmless error. Throughout the opinion, the court observes that the War on Drugs is no excuse for suspending constitutional rights.

***Sizemore v. Fletcher***, 921 F.2d 667 (6th Cir. 1990) Throughout the course of the closing argument, the prosecutor made disparaging references to the defense attorneys, including their activities representing the defendant prior to trial and their arguments to the jury during the course of trial. A prosecutor may not argue that an accused’s decision to meet with counsel, even shortly after the incident giving rise to a criminal indictment, implies guilt. Nor may a prosecutor suggest to the jury that a defendant hires an attorney in order to generate an alibi, take care of everything, or get his story straight. A writ of habeas corpus was granted.

***United States v. Morgan***, 113 F.3d 85 (7th Cir. 1997) The key issue in this case was whether a witness who claimed to see the defendant drop a weapon in the bushes was credible. The defense claimed he was not. The prosecutor argued that it was a sad day when a person in the community was willing to come to court and testify and the defense attorney called him a liar. The prosecutor then asked the jurors to consider how they would feel if they came to testify about something they saw and were then labeled a liar. This was improper argument. In short, the prosecutor violated the proscription against appealing to the jurors' emotions and inviting the jury to consider the social consequences of its verdict. Harmless error.

***United States v. Keskey,*** 863 F.2d 474 (7th Cir. 1988) The prosecutor committed error in arguing during his rebuttal argument about why a potential government witness was not called. The prosecutor knew that his offered explanation was not honest. However, the witness was not a key witness and the error did not constitute plain error.

***United States v. Dominguez***, 835 F.2d 694 (7th Cir. 1987) It was inappropriate for the prosecutor during closing argument to turn to the defendant and thank him for "coming to the area so that my sister can use drugs." The error was harmless in this case. United States v. Cannon, 88 F.3d 1495 (8th Cir. 1996) The defendants, who were African-American, were tried in North Dakota on drug and weapons charges. The percentage of African-Americans in North Dakota is approximately .6%. During the rebuttal closing argument, the prosecutor stated the defendants were "bad people" and "We are lucky where we live not to come in contact with as many as there may be in other parts of the country. But there are still some around here." While this was not explicitly a racial comment, the appellate court determined that it was a thinly veiled reference to race and reversed the conviction of both defendants on all counts.

***Miller v. Lockhart***, 65 F.3d 676 (8th Cir. 1995) During his sentencing phase closing argument in this death penalty trial, the prosecutor made numerous improper comments, including: (1) pointing to the victim's family and telling the jury, "You know what their presence here is asking you to do . . . you should consider their wishes" (none of the victim's family testified); (2) noting the tremendous financial burden on the taxpayers for food, clothing and guards a life sentence entails; (3) urging the jury not to award the defendant with a life without parole sentence, because the defendant had escaped once before; (4) referring to the failure of the defendant to take the stand during the penalty phase; (5) observing that in his life as a prosecutor, he had never seen a tougher defendant. These comments violated the defendant's right to due process under the standard set forth in Donnelly v. DeChristoforo, 416 U.S. 637 (1974). With regard to the cost of a life sentence argument, "there is simply no legal or ethical justification for imposing the death penalty on the basis that it is less costly than life imprisonment."

***Antwine v. Delo,*** 54 F.3d 1357 (8th Cir. 1995) During the closing argument, the prosecutor suggested that the gas chamber presented a quick and painless death to the defendant. Actually, evidence established that the death can be prolonged and painful, including several minutes of conscious suffocation. The prosecutor's argument may have affected the jury's decision and was impermissible under Caldwell v. Mississippi, 472 U.S. 320 (1985). In addition, the prosecutor erred in imploring the jury to sentence the defendant to death to save the taxpayer's money.

***United States v. Johnson***, 968 F.2d 768 (8th Cir. 1992) In light of the marginal evidence presented against the defendant, it was reversible error for the prosecutor to argue to the jury that they must act as the bulwark against drugs in the community. The court reviews several cases, including Supreme Court precedent condemning this type of argument: "The drug problem is a matter of great concern in this country today. This court is sympathetic to prosecutors' vigorous efforts to prosecute participants in the drug trade. However, . . . the pressing nature of the problem does not give prosecutors license to encumber certain defendants with responsibility for the larger societal problem in addition to their own misdeeds."

***Reutter v. Solem,*** 888 F.2d 578 (8th Cir. 1989) The key witness against the defendant in this drug prosecution was his former law partner and close friend. Unbeknownst to the defense, this witness, who was currently serving a term of imprisonment himself, had applied for commutation of his sentence and the State was actively supporting it. Furthermore, among the members of the commutation board was the prosecutor in defendant's trial. None of this information was provided to the defense despite a request for all exculpatory and impeaching evidence. This Brady violation was aggravated by the prosecutor's closing argument during which he argued that the witness had no reason whatsoever to lie and had nothing to gain from cooperating with the State. The conviction was reversed.

***United States v. Frederick***, 78 F.3d 1370 (9th Cir. 1996) The prosecutor engaged in misconduct during her closing argument. First, she improperly vouched for a witness by claiming that the witness's in-court testimony was consistent with her out-of-court statements to law enforcement agents (but her out-of-court statements were not admitted in court). Second, she complimented the defense attorney for successfully cross-examining a prosecution witness and confusing her on the stand. She also said that the defense attorney's job is to ask the jury to look at a tiny piece of the evidence, while "the government and the judge will be asking you to consider all of the evidence in making your decision."

***United States v. Kerr***, 981 F.2d 1050 (9th Cir. 1992) The prosecutor committed plain error in his closing remarks by repeatedly stating that "he didn't think" the witnesses were lying; and "he didn't think the witnesses were hoodwinking" the agents. Even absent objection, these comments necessitated reversing the conviction. The only objection which was made – and was sustained – was when the prosecutor suggested that the judge believed the witness in accepting his plea agreement. The sustained objection, however, was not sufficiently forceful and did not remove the taint of the improper argument.

**Mahorney v. Wallman**, 917 F.2d 469 (10th Cir. 1990) The prosecutor's incorrect and misleading comments about the presumption of innocence necessitated a new trial.

***United States v. Smith***, 806 F.2d 971 (10th Cir. 1986) It is plain error for a prosecutor during closing argument to refer to the defendant's coconspirators having pled guilty. The prosecutor stated that these pleas should be used as substantive evidence against the defendant.

***United States v. Gainey***, 111 F.3d 834 (11th Cir. 1997) The prosecutor argued as follows: Mr. Gainey's residence was a drug den. He had the spoons. He had the needles. He had the cut. He had the heroin around his neck. And he had the weapons. These are all tools of the drug trade. Ladies and gentlemen, we live here in south Florida, and we are very familiar with it by now. This was an improper reference to current events. Jurors may be asked to rely on their common sense, but they may not be implored to consider current events from the newspaper. The prosecutor tried to exploit inappropriately the widespread community fears about drugs.

***United States v. Blakey***, 14 F.3d 1557 (11th Cir. 1994) During closing argument, the prosecutor stated that the defendant was a professional criminal; that he presented insufficient exculpatory evidence; and that he was arrested with false credit cards, indicating that the defendant had "real problems." Each of these remarks was improper. There was no evidence of any prior record – the defendant was not a "professional criminal." The failure to introduce exculpatory evidence was an improper burden-shifting argument; and the reference to the circumstances of the arrest violated a pretrial agreement limiting the relevance of this evidence. The cumulative effect of these arguments required a reversal, even though the trial court instructed the jury to disregard these arguments.

***United States v. Beasley***, 2 F.3d 1551 (11th Cir. 1993) The prosecutor's references in the closing argument to the war on drugs and the jury's role in that war was improper and was calculated to inflame the jury. Nevertheless, the trial court sustained an objection and neutralized any harm.

***Presnell v. Zant,*** 959 F.2d 1524 (11th Cir. 1992) In this death penalty habeas, the court holds that the state prosecutor's closing argument which recited potions of the 1873 Georgia Supreme Court decision in Eberhart v. State, was prejudicial. The Eberhart court had decried the plea for mercy and held that the victim's family was more important than the defendant.

***Cunningham v. Zant***, 928 F.2d 1006 (11th Cir. 1991) The prosecutor argued to the jury that he was "offended" that the defendant had exercised his Sixth Amendment right to a jury trial in the guilt innocence phase of the trial. This was an outrageous argument, which, along with other errors, warranted the granting of the writ.

***McCorquodale v. Kemp,*** 829 F.2d 1035 (11th Cir. 1987) During McCorquodale's death penalty trial, the prosecutor stated that, "after your decision, the appellate court will have a very important responsibility." It is improper to refer to appellate review in a capital case. However, the trial court's admonition that the statement was highly improper and that the case ended with the jury's verdict, was sufficient to correct any improper impression the jury may have had about the importance of what it was deciding.

***United States v. Richardson***, 161 F.3d 728 (D.C. Cir. 1998) The prosecutor was black; the jurors were black; the defendant was black, and the eyewitness was black. The defense attorney was white. The defense was misidentification. In closing argument, the defense attorney argued vigorously that the eyewitness may have confused the defendant with someone else who may have been the perpetrator. The prosecutor responded that the jury should not fall prey to the "we all look alike" argument. The prosecutor repeated that "we all don't look alike." Then, in response to the defendant's argument that the eyewitness was only 17, and therefore able to make a mistake, the prosecutor responded that in the defense attorney's world, perhaps 17-year-olds have not come of age, but in this world, they are grownups. Both of these arguments played on racial prejudice and amounted to plain error necessitating reversal of the conviction, even without there having been any objection by defense counsel.

## *CO-DEFENDANT'S GUILTY PLEA OR CONVICTION*

***United States v. Head***, 707 F.3d 1026 (8th Cir. 2013) In order to prosecute a person for accessory after the fact, the government must prove that some other person actually committed the underlying offense. Proving only that the other person was convicted of the underlying offense is not sufficient. Introducing the principal's conviction in this case was reversible error and the failure to prove that the principal actually committed the offense resulted in an appellate determination that the government offered insufficient evidence to support the accessory's conviction, thus barring a retrial. The defendant in the accessory prosecution must also be permitted to offer evidence that she was not aware that the principal committed the offense, or that the principal was acting in self-defense.

***United States v. Landron-Class***, 696 F.3d 62 (1st Cir. 2012) Evidence, or argument about co-defendants' or co-conspirators' guilty pleas or convictions is inadmissible.

***United States v. Maliszewski,*** 161 F.3d 992 (D.C. Cir. 1998) It was error (though harmless) for the district court judge to explain to the jury that certain co-defendants listed in the indictment had entered guilty pleas prior to trial.

***United States v. Polasek***, 162 F.3d 878 (5th Cir. 1998) The defendant denied her guilt of participating in an odometer roll-back scheme. When the case agent was testifying, the prosecutor repeatedly asked if the defendant's name was included in the paperwork that was associated with other people who were prosecuted in connection with the scheme. The Fifth Circuit held that this line of questioning essentially suggested that the fact that the defendant had done title work for individuals later convicted of odometer fraud established her guilt. This was improper guilt by association. Reversible error.

***United States v. Ramirez***, 973 F.2d 102 (2d Cir. 1992) The only evidence against the defendant in this conspiracy prosecution was offered by a guilty-pleading codefendant. The trial court committed reversible error in failing to instruct the jury that they should not consider the co-defendant's plea as evidence against the defendant.

***United States v. Cosentino***, 844 F.2d 30 (2d Cir. 1988) Once a defendant launches an attack on the credibility of a co-conspirator who is testifying for the government, the government is free to introduce the entire plea agreement, including those portions which bolster the witness' credibility. However, absent such an attack, such evidence is not admissible to support a witness' credibility. The government is always permitted to introduce the impeaching aspects of the plea agreement in order to diffuse the defendant's efforts to introduce such matters in a more damaging manner. But the bolstering aspects of a plea agreement may only be introduced once the credibility of the witness has been attacked, even if this occurs in the opening statement.

***United States v. Fernandez***, 829 F.2d 363 (2d Cir. 1987) The credibility of a government witness was not challenged on cross-examination to the extent justifying the admissibility of a cooperation agreement between the government and a witness on re-direct examination. Only after a witness' credibility has been challenged is a plea agreement by that witness admissible.

***United States v. Mitchell***, 1 F.3d 235 (4th Cir. 1993) The prosecutor stressed during closing argument the fact that the defendant's witness, an alleged co-conspirator, was convicted of the same crime and his version of the facts was apparently rejected by the prior jury. This was plain error, necessitating a reversal even though there was no objection at trial.

***United States v. Blevins***, 960 F.2d 1252 (4th Cir. 1992) Though the error was harmless, the trial court should not have permitted the government to reveal to the jury, and should not himself have mentioned, that six non-testifying codefendants had pleaded guilty to various counts of the indictment.

***United States v. Leach***, 918 F.2d 464 (5th Cir. 1990) References to a co-conspirator's guilty plea may amount to plain error. An exception to this rule applies when the record reflects a defensive strategy which relies on the co-conspirator's guilt. Here, with respect to some of the counts, the error was plain error. The prosecutor had the duty, after realizing that the guilty co-conspirator would not testify, to request an instruction which limited or struck the evidence which he had introduced regarding that co-conspirator's guilty plea.

***United States v. Cunningham***, 804 F.2d 58 (6th Cir. 1986) The government improperly introduced in evidence at the defendants' counterfeit trial the guilty plea of his relatives for the offense of passing counterfeit currency. The government introduced no evidence that the defendants were aware of their relatives' guilty plea, and thus no proof that the defendants were aware that the currency was counterfeit.

***United States v. Carraway***, 108 F.3d 745 (7th Cir. 1997) The trial court erred – but it was harmless – in permitting the government to offer the guilty pleas of five non-testifying co-defendants on the basis that it would put the charged conspiracy "into context."

***United States v. Johnson***, 26 F.3d 669 (7th Cir. 1994) Though the error was harmless in this case, it was error to permit a co-defendant's counsel to refer during opening statement to another co-defendant's guilty plea.

***United States v. Brown***, 108 F.3d 863 (8th Cir. 1997) During the trial, news accounts of the guilty plea of a corporate co-defendant were read by certain jurors. After trial, questioning of the jurors revealed that some of the jurors considered this information in their deliberations. This extraneous influence on the jury's deliberations supported the trial judge's decision to grant a new trial.

***United States v. Smith,*** 806 F.2d 971 (10th Cir. 1986) It is plain error for a prosecutor during closing argument to refer to the defendant's coconspirators' having pled guilty. The prosecutor stated that these pleas should be used as substantive evidence against the defendant.

***United States v. Eason***, 920 F.2d 731 (11th Cir. 1990) The government committed reversible error in introducing evidence of a co-conspirator's conviction. The co-conspirator did not testify, and thus there was no need to impeach him. The court reviews the government's various arguments why the evidence should have been admissible, and also that it was harmless error, and rejects each of these arguments. The error was harmful and tainted not only the conviction with regard to counts where the co-conspirator was involved, but also all other counts of the indictment. The court characterized the government's efforts to introduce this evidence as governmental misconduct.

***United States v. McLain***, 823 F.2d 1457 (11th Cir. 1987) A co-defendant's guilty plea may not be used as substantive evidence of a defendant's guilt. The admission of the co-defendant's unredacted plea agreement was clear error, even though the trial judge instructed the jury the plea agreement could be considered only for purposes of evaluating the co-defendant's credibility.

## *COMPETENCE TO STAND TRIAL OR ENTER GUILTY PLEA*

***Sell v. United States***, 123 S. Ct. 2174 (2003) The Court found insufficient justification to forcibly medicate the defendant in order to render him competent to stand trial. The four factors to consider are (1) the treatment is medically appropriate; (2) the medication is substantially unlikely to have side effects that may undermine the fairness of the trial; (3) there are no less intrusive alternatives; and (4) the medication is necessary to significantly further important governmental trial-related interests.

***Cooper v. Oklahoma***, 517 U.S. 348 (1996) Though the state may presume that the defendant is competent and require him to shoulder the burden of proving his incompetence by a preponderance of the evidence, the state may not require that the defendant prove incompetence by clear and convincing evidence.

***Godinez v. Moran***, 509 U.S. 389 (1993) Despite language in precedents to the contrary, the standard for assessing the competence of a defendant to enter a guilty plea is the same as for assessing the defendant's competence to stand trial: whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him. Moreover, the defendant's capacity to waive the assistance of counsel is measured by the same standard – the ability to understand the nature of the proceeding and to waive the right to counsel with an understanding of what is being waived.

***Riggins v. Nevada***, 504 U.S. 127 (1992) The involuntary administration of anti-psychotic medication to a defendant during his murder trial, in the absence of findings by the district court about the need for that treatment, created a substantial risk that the defendant's right to participate in his own defense was impaired.

***United States v. Berry***, 911 F.3d 354 (6th Cir. 2018) Among the reasons that it was not appropriate to forcibly medicate the defendant was the fact that if the defendant were forcibly medicated, tried and convicted, his maximum sentence would approximate the amount of time he had already served pretrial. This fact significantly undercuts the government's interest in pursuing the case and requiring

***Anderson v. United States***, 865 F.3d 914 (7th Cir. 2017) The district court was aware that the defendant suffered from some form of mental illness and the defendant's responses during the guilty plea colloquy were such that the judge should have ordered a competency examination.

***United States v. Ohuoha***, 820 F.3d 1049 (9th Cir. 2016) The government failed to demonstrate that the treatment plan that was proposed to restore the defendant to competency was medically appropriate for the defendant.

***United States v. Kowalczyk***, 805 F.3d 847 (9th Cir. 2015) A defendant facing a competence hearing is not entitled to waive the right to counsel.

***United States v. Watson***, 793 F.3d 416 (4th Cir. 2015) The government failed to meet its burden of proving that involuntary medication was substantially likely to restore the defendant's competency. "Forcible medication is not justified every time an incompetent defendant refuses treatment; on the contrary, 'those instances may be rare.'"

***United States v. Wingo***, 789 F.3d 1226 (11th Cir. 2015) The trial court failed to sua sponte conduct a competency hearing when it became apparent that there were issues relating to the defendant's competence prior to accepting his guilty plea.

***United States v. Brooks***, 750 F.3d 1090 (9th Cir. 2014) The trial court did not make sufficient findings on the first Sell factor, that is, whether there are sufficiently important governmental interests at stake to justify the administration of involuntary medication. One ingredient of this calculus is the amount of time the defendant is facing if convicted versus the amount of time that he would be involuntarily committed based on his refusal to take the medication and therefore remain hospitalized based on his incompetence to stand trial (coupled with the amount of time he has already been committed). The court should also consider other factors including any risk that evidence would be lost due to any delay, or other prejudice that might affect the government's ability to proceed to trial at a later date.

***United States v. Curtis,*** 749 F.3d 732 (8th Cir. 2014) The trial court failed to make adequate findings on the fourth Sell factor, whether administering anti-psychotic drugs constituted medically appropriate treatment for the defendant. The district court did not consider the circumstances relevant to such a required finding, such as the defendant's need for long term treatment and his current qualify of life.

***United States v. Debenedetto,*** 757 F.3d 547 (7th Cir. 2014) The trial court made inadequate findings on several of the Sell factors and the Seventh Circuit remanded the case to the lower court for further findings.

***United States v. Chavez***, 734 F.3d 1247 (10th Cir. 2013) At the Sell hearing, the expert testified that a specific treatment plan had not yet been prepared and the decision about which drugs to use had not yet been made. The expert testified that he was awaiting court approval before making these decisions. The Tenth Circuit held that the treatment plan and the specific drugs must be identified before the hearing to enable the trial judge to make the appropriate Sell findings.

***United States v. Chatmon***, 718 F.3d 369 (4th Cir. 2013) The trial court failed to adequately address the Sell factor relating to less intrusive means of restoring defendant to competence. A remand was required to address this consideration.

***United States v. Gillenwater***, 717 F.3d 1070 (9th Cir. 2013) The defendant was represented by counsel at a competency hearing. The attorney refused to call him to the stand and the defendant complained – disruptively – and was removed from the courtroom. The Ninth Circuit holds that a defendant has a constitutional right to testify at his competency hearing, even over the advice of counsel. (The dialogue at the hearing was essentially as follows: "Counsel: I have advised him not to testify." Defendant: "That's because you're a criminal." Court: "Mr. Gillenwater, that's enough." Defendant: "Then get me the fuck out of here.")

***United States v. Ross***, No. 09-1852 (6th Cir. 2012) Even though the defendant had previously waived his right to counsel and was permitted to proceed pro se, when the government moved for a competency hearing and the judge agreed, an attorney should have been appointed to represent the defendant.

***United States v. Grigsby***, 712 F.3d 964 (6th Cir. 2013) In a particularly fact-intensive opinion, the Sixth Circuit concludes that involuntary medication of the defendant was not appropriate in this case. Among the factors the court considered was the length of the possible sentence (according to the Guidelines), the likelihood of a successful insanity defense, and the likelihood and length of involuntary civil commitment if the prosecution did not proceed.

***United States v. Dreyer***, 693 F.3d 803 (9th Cir. 2012) The defendant, a psychiatrist, developed dementia at the age of 63 and entered into a drug conspiracy. He entered a guilty plea. The Ninth Circuit held that at the sentencing hearing, the judge should have sua sponte ordered a competency hearing. At the sentencing hearing, the defense attorney declined to have the defendant speak, because he didn't know what the defendant would say, and his dementia might lead him to deny responsibility and he might say something inappropriate. This should have prompted the trial judge to order a competency examination. The appellate court also ordered that the case be reassigned to a different judge on remand because of comments made by the trial judge that reflected her premature judgment about the defendant's possible incompetence and his manipulative behavior. See also 705 F.3d 951 (9th Cir. 2013) (opinion regarding denial of rehearing en banc).

***United States v. Neal***, 679 F.3d 737 (8th Cir. 2012) Both the defense and the government agreed that a competency determination was appropriate. The government insisted on an in-patient examination; the defendant argued that out-patient evaluation was sufficient. The Eighth Circuit held that as a matter of Due Process, the trial court must make findings before ordering an in-patient (custodial) evaluation under 18 U.S.C. §4241.

***United States v. Loughner***, 672 F.3d 731 (9th Cir. 2012) This comprehensive opinion reviews the law regarding forced medication under the standards of See, Riggins and Washington v. Harper, 494 U.S. 210 (9th Cir. 2012), ultimately holding that forced medication in this case was appropriate.

***United States v. Duncan***, 643 F.3d 1242 (9th Cir. 2011) In this federal death penalty trial, the defendant insisted on representing himself. The Ninth Circuit held that even over the defendant's objection, standby counsel has the right to assert that the defendant was not competent to waive his right to counsel, or to waive his right to appeal.

***United States v. Ruiz-Gaxiola,*** 623 F.3d 684 (9th Cir. 2010) The trial court erred in its application of the Sell factors. The defendant was charged with illegal reentry. The Ninth Circuit began by holding that the government must establish that the Sell factors are met with clear and convincing evidence. The government failed to prove the second factor (the administration of drugs is substantially likely to render the defendant competent and that there will not be significant side effects impairing the defendant's ability to consult with counsel). The government also failed to satisfy the fourth factor: the medication is in the defendant's best interest.

***United States v. White***, 620 F.3d 401 (4th Cir. 2010) The defendant was incompetent to stand trial. The district court, however, ordered that she be medicated in order to render her competent. The Fourth Circuit held that the trial court did not properly apply the Sells test. The Sells test requires that even if the government has an important interest in prosecuting the defendant, there may be special circumstances that are countervailing. The lower court failed to consider sufficiently the special circumstances in this case. Such circumstances include the length of time already served by the defendant; the nature of the crime; the treatment proposed; and, finally, a determination of whether this case is sufficiently exceptional (as opposed to routine) to justify forced medication. The court also noted that the presumption of innocence should play a role in the court's consideration of the forced medication issue.

***Maxwell v. Roe***, 606 F.3d 561 (9th Cir. 2010) The state court judge failed to order a psychiatric examination, despite the fact that the defendant had a history of mental illness, attempted suicide during trial and was committed to a psychiatric facility during trial. Failing to assess his competency violated the Due Process Clause.

***United States v. Arenburg***, 605 F.3d 164 (2d Cir. 2010) Defendant's behavior during trial should have prompted the court to re-evaluate whether the defendant was competent to stand trial (to say nothing of representing himself). 18 U.S.C. § 4241(a).

***United States v. Bush***, 585 F.3d 806 (4th Cir. 2009) The court reviews the various factors that the court should consider in deciding whether the government has a sufficient interest in forcefully medicating the defendant in order to render her competent to stand trial. Among the factors that weigh against the government's purported interest would be the amount of time the defendant has already served in pretrial confinement; the fact that the defendant might be involuntarily committed to a psychiatric facility if the criminal case is not pursued; the likelihood that medication will succeed in allowing the defendant to regain her competence. The trial court in this case did not engage in the proper analysis and a remand was necessary to address these various factors.

***United States v. Ruston***, 565 F.3d 892 (5th Cir. 2009) The trial court erred in failing to sua sponte conducting a competency hearing when the defendant, acting pro se, cross-examined witnesses about completely irrelevant matters and accused the judge and agents of being members of a conspiracy.

***Hummel v. Rosemeyer,*** 564 F.3d 290 (3rd Cir. 2009) The defendant was tried for murder in state court and found guilty. The record established that he suffered from the effects of a gunshot to the head (self-inflicted) and psychological trauma. He slept through much of the trial and suddenly screamed during the prosecutor's closing argument and was removed from the courtroom. Trial counsel was ineffective in failing to move for a competency hearing.

***McMurtrey v. Ryan***, 539 F.3d 1112 (9th Cir. 2008) There was considerable evidence during the state trial that the defendant was not competent, including the amount of medication he was taking, his lack of memory and his erratic behavior. The state trial

court's failure to conduct a competency hearing violated the defendant's right to due process. This due process violation was not cured by a hearing conducted thirteen years later.

***United States v. Hernandez-Vazquez***, 513 F.3d 908 (2008) The Ninth Circuit extensively reviews Sell jurisprudence and concludes that the trial court failed to spell out limitations on its Sell order that allowed the B.O.P. to medicate the defendant so that he would be competent. The trial court may not provide unlimited authority to the B.O.P. to provide necessary treatment and medication.

***Nara v. Frank***, 488 F.3d 187 (3rd Cir. 2007) The defendant sufficiently demonstrated that he was incompetent when he entered a guilty plea to a double murder twenty years earlier. Granting habeas relief was appropriate.

***United States v. Valenzuela-Puentes***, 479 F.3d 1220 (10th Cir. 2007) The district court did not clearly apply the correct standard in determining that the defendant would be competent if he was administered medication involuntarily. This finding must be made under a standard of clear and convincing evidence.

***United States v. Collins***, 430 F.3d 1260 (10th Cir. 2005) Because of acrimony between the defendant and his counsel, counsel moved to withdraw. On the day his motion was filed, the court conducted a competency hearing. Counsel declined to participate in light of his pending motion to withdraw. After a brief discussion, the court determined that the defendant was competent. This procedure was improper. The defendant was denied the right to counsel at his competency hearing.

***United States v. Baldovinos,*** 434 F.3d 233 (4th Cir. 2006) The defendant was medicated for the purpose of enabling him to be sentenced. The government did not, however, satisfy the Sell factors.

***United States v. White***, 431 F.3d 431 (5th Cir. 2005) The district court improperly ordered that the defendant be involuntarily medicated without first following the administrative procedures outlined in 28 C.F.R. § 549.43. These procedures permit the defendant to have a due process hearing before a psychiatrist. The district court is not permitted to bypass these procedures.

***United States v. Rivera-Guerrero***, 426 F.3d 1130 (9th Cir. 2005) 296 The trial court erred in denying the defendant a continuance after the government experts testified about the types of drugs they intended to use to medicate the defendant "back into competency." The attorney could have hired an expert prior to the hearing, but the expert would have needed more time after the government witnesses testified to prepare a response to their planned treatment protocol. The other factors governing whether a denial of a continuance was an abuse of discretion also counseled in favor of reversing the decision of the lower court.

***Burt v. Uchtman***, 422 F.3d 557 (7th Cir. 2005) The defendant in this death penalty trial was under heavy medication, including psychotropic drugs. Suddenly, during trial and against the advice of his attorney, he insisted on entering a guilty plea. The trial court should have conducted a competency hearing to determine whether the defendant was competent to make this decision.

***United States v. Morrison***, 415 F.3d 1180 (10th Cir. 2005) The trial court failed to properly analyze the need for the administration of antipsychotic drugs under the Sell standard. Before undertaking the four-part analysis, the court must first decide whether it is appropriate to medicate the defendant to ensure the defendant's safety or the safety of others. See Washington v. Harper, 494 U.S. 210 (1990) (deciding standard for administration of drugs to convicted felon); Riggins v. Nevada, 504 U.S. 127 (1992) (applying Harper to pre-trial detainees).

***United States v. Evans***, 404 F.3d 227 (4th Cir. 2005) Though the government adequately addressed the issue of the importance of the case because of the seriousness of the charges, the presentation in the lower court did not adequately address the Sell factor dealing with the specific medications that would be used and that the medications were necessary. A remand to address these concerns was ordered.

***United States v. Ghane***, 392 F.3d 317 (8th Cir. 2004) The government's experts opined that if the defendant was forcibly medicated, there was a ten percent chance that he would be restored to competency to stand trial. The Eighth Circuit concludes that this evidence was insufficient to satisfy the Sell test for the forcible medication of a defendant. The second Sell factor articulated above, includes a component that the involuntary medication is substantially likely to render the defendant competent to stand trial. A ten percent chance is not a substantial likelihood.

***United States v. Howard***, 381 F.3d 873 (9th Cir. 2004) The defendant offered proof in his § 2255 petition that he was under the influence of a powerful narcotic drug (painkiller) at the time he entered his guilty plea and that his attorney was aware of this. The district court erred in not conducting an evidentiary hearing to inquire into the factual support for this claim.

***United States v. Friedman***, 366 F.3d 975 (9th Cir. 2004) The trial court correctly concluded that the defendant was incompetent to stand trial. The Ninth Circuit also held that the government was entitled to appeal this decision as an appealable collateral order.

***United States v. Rinaldi***, 351 F.3d 285 (7th Cir. 2003) Between the time the defendant entered his plea and the scheduled sentencing date, the defendant moved to withdraw his plea, claiming that he suffered from A.D.D. The trial court ordered that the defendant be committed for a 45-day evaluation. The Seventh Circuit held that the provisions of Fed.R.Crim.P. Rule 12.2 do not apply, because the defendant was relying on a defense of insanity: his claim related only to his intent to present a diminished capacity defense (lack of capacity to form specific intent).

***Deere v. Woodford***, 339 F.3d 1084 (9th Cir. 2003) An evidentiary hearing in the district court would be required to determine whether the defendant was competent to enter a guilty plea. A psychiatrist offered his opinion that the defendant understood what was going on around him, but he had no ability to help in his defense and had a compulsion to be punished with the death penalty. His guilty plea was the product of that compulsion. In short, he was bent on self-destruction.

***United States v. Jones***, 336 F.3d 245 (3rd Cir. 2003) Pursuant to Drope v. Missouri, 420 U.S. 162 (1975) and Pate v. Robinson, 383 U.S. 375 (1966), a trial court must order a competency hearing must be conducted if there is reasonable cause to believe that the defendant is not competent to participate in the proceeding. The court must examine the unique circumstances of the case and decide whether the defendant has the capacity to assist in his own defense and comprehend the nature and possible consequences of a trial. If either prong is not met, the court has reasonable cause to order a competency hearing. The trial court's failure to order a competency hearing in this case was reversible error.

***United States v. Loyla-Dominguez***, 125 F.3d 1315 (9th Cir. 1997) Defendant's suicide attempt on the eve of trial should have prompted a competency hearing. When questioned about his understanding of why he was in court, his only response was, "I don't know. I've never been here like this, so I don't know." A hearing to determine his competency should have been held.

***United States v. Nevarez-Castro***, 120 F.3d 190 (9th Cir. 1997) After a defendant is released from a hospital where he had been committed pursuant to 18 U.S.C. § 4241(d), the court shall conduct a competency hearing in accordance with § 4247(d). 18 U.S.C. § 4241(e). This is not discretionary. The court's failure to conduct a competency hearing in this case required a remand to conduct a competency hearing and a new trial.

***United States v. Boigegrain***, 122 F.3d 1345 (10th Cir. 1997) A commitment order pursuant to 18 U.S.C. § 4241(d) is appealable. That section empowers the district court to commit the defendant to the custody of the Attorney General for a period up to four months for treatment and to determine if the defendant is likely to attain the capacity to permit the trial to proceed.

***United States v. Haywood***, 155 F.3d 674 (3rd Cir. 1998) After the defendant was examined by one psychiatrist who found him incompetent to stand trial, the defendant was committed to an institution. About one month later, a psychiatrist certified that the defendant was then competent. The trial was held. Two times prior to trial, however, the judge received reports that suggested that the defendant might not be competent to proceed. At no time was a hearing held. The failure to hold a hearing violated 18 U.S.C. § 4241. Even after an expert opines that the defendant has regained his competence, subsection (e) of § 4241 mandates in no uncertain terms that a hearing beheld and a finding made.

***United States v. Soldevila-Lopez***, 17 F.3d 480 (1st Cir. 1994) In deciding whether to grant a continuance, the factors which should be considered are (1) the extent of the defendant's diligence in preparing his defense prior to the date set for hearing; (2) the likely utility of the continuance if granted; (3) the inconvenience to the court and the opposing party, including witnesses; (4) the extent to which the moving party may have suffered prejudice from the denial. Here, the defendant sought a continuance to obtain a psychiatric evaluation of his competence to be sentenced. Though the defendant was not particularly diligent and there was certain inconvenience to the expert witnesses, the trial court erred in not granting a short continuance in order to enable the defendant to retain an expert to evaluate his competence to be sentenced.

***United States v. Purnett,*** 910 F.2d 51 (2d Cir. 1990) The trial court expressed serious reservations about the defendant's mental competence to stand trial; yet, at the same time he allowed the defendant to waive his right "knowingly and intelligently" to trial counsel. Because the trial court failed to adequately address the competence of the defendant prior to allowing him to waive his right to trial counsel, a new trial was necessary.

***United States v. Renfroe***, 825 F.2d 763 (3rd Cir. 1987) At his sentencing hearing, it was established that the defendant had been a habitual cocaine user for 16 years and was not able to help his attorney in structuring his defense. Under these circumstances, a hearing was required to determine whether the defendant was competent to stand trial and participate in his own sentencing.

***United States v. Mason***, 52 F.3d 1286 (4th Cir. 1995) 18 U.S.C. §4241 requires the district court to conduct a competency hearing at any time prior to sentencing if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. In this case, the trial court denied defendant's request for a hearing. This was error. In determining whether there is reasonable cause to order a competency hearing, a trial court must consider all evidence before it, including evidence of irrational behavior, the defendant's demeanor at trial, and the medical opinions concerning the defendant's competence. Here, the defendant attempted to commit suicide the day after the verdict was reached, but prior to the forfeiture proceeding. Medical experts opined that he suffered from depression before the suicide attempt, possibly as long as two years before the trial.

***United States v. Davis,*** 93 F.3d 1286 (6th Cir. 1996) The defendant gave notice that she was intending to offer the defense of diminished capacity and or mental disease or defect, pursuant to Rule 12.2(b). The district court ordered that the defendant be detained and examined, pursuant to Rule 12.2(c) and 18 U.S.C. §§4241 and 4242. The appellate court reversed. Because the defendant did not indicate that she would be raising an insanity defense, those provisions did not apply. Moreover, there was no basis for ordering a competency examination because there was no information suggesting that she was not competent to stand trial.

***United States v. Graves***, 98 F.3d 258 (7th Cir. 1996) The defendant, who had never committed a crime, had a severe stroke, and suddenly began robbing a bank, over and over again. At the guilty plea proceeding he had apparent trouble understanding some of the questions. The trial judge questioned the defendant closely about his understanding of the proceedings and concluded on the record that he did understand the proceedings. The Seventh Circuit, however, held that in this situation, a full-scale hearing with expert testimony is required to determine the competency of the defendant.

***Reynolds v. Norris***, 86 F.3d 796 (8th Cir. 1996) The defendant had a long history of mental illness. Prior to the beginning of his trial, he had been committed to a hospital after it was determined that he was not competent to stand trial. Subsequent hearings revealed that he had improved to the point that he was competent. Nevertheless, the trial court erred in not conducting another hearing immediately prior to (or during) the trial. During the trial, the defendant testified that the murder was somehow related to the Gulf War, or perhaps President Bush. He also commented on the balanced budget, the "Reagan Party" and Bill Clinton's tenure as governor (this was in Arkansas), and his increase in taxes. The appropriate remedy was to conduct a post-conviction competency hearing.

***Miles v. Stainer***, 108 F.3d 1109 (9th Cir. 1997) The Due Process Clause requires a trial judge to sua sponte conduct a competency hearing whenever the evidence before it raises a reasonable doubt whether a defendant is mentally competent to go to trial or enter a guilty plea. In this case, the defendant had previously been declared incompetent and was taking large doses of anti-psychotic drugs. The state trial court should have inquired whether the defendant was using the drugs at the time of the plea. Indications existed that he was not using the drugs, and thus his ability to comprehend the proceedings would have been compromised.

***United States v. Hoskie***, 950 F.2d 1388 (9th Cir. 1991) The record established that the defendant was not competent to stand trial.

***United States v. Williams***, 113 F.3d 1155 (10th Cir. 1997) The defendant's conduct during the trial should have triggered a competency hearing. The defendant spoke rapidly and at times incoherently and, according to the appellate court was "out of control."

**Sena v. New Mexico State Prison**, 109 F.3d 652 (10th Cir. 1997) One year prior to entry of the plea, the state court judge had declared the defendant incompetent to stand trial. Between then and the time the plea was entered, no judicial determination had been made that the defendant had regained his competence. Even though there was a report submitted to the court that the defendant was competent, the trial judge was obligated to conduct an adversary hearing to properly resolve this issue.

***Lafferty v. Cook***, 949 F.2d 1546 (10th Cir. 1991) The trial court erred in holding that the defendant, who suffered from paranoid delusions, was competent to stand trial. The state trial court used an incorrect legal standard, focusing on the defendant's awareness of his surroundings, rather than inquiring into his rational thought process, as well.

***James v. Singletary***, 957 F.2d 1562 (11th Cir. 1992) An evidentiary hearing was required to determine the validity of defendant's contention that he was tried while incompetent in violation of Pate v. Robinson, 383 U.S. 375 (1966). The Court spells out the difference between a claimed violation of Pate which requires that a competency determination be made sua sponte when the trial court determines that the defendant may not be competent; and a claim simply that the defendant was tried while incompetent – but not focusing on the trial court's failure to sua sponte conduct a competency hearing.

***Tiller v. Esposito***, 911 F.2d 575 (11th Cir. 1990) Courts must focus on three factors in determining whether the trial court violated the defendant's procedural due process rights by failing to hold sua sponte a competency hearing: (1) Evidence of the defendant's irrational behavior; (2) the defendant's demeanor at trial; and (3) prior medical opinion regarding the defendant's competence to stand trial. The state trial court in this case erred in not conducting such a hearing in light of the evidence which indicated that the defendant may well have been incompetent to enter a guilty plea. There was psychiatric testimony that the defendant suffered from auditory hallucinations and was a severe paranoid schizophrenic. During the plea colloquy, the defendant asked if he could have psychiatric treatment. Furthermore, the state trial judge wrote a letter to the Department of Corrections requesting that the defendant be committed to Central State Hospital. Finally, there was evidence that the defendant had attempted suicide on more than one occasion. Therefore, the writ of habeas corpus was granted, and the case remanded to determine whether a Nunc pro tunc inquiry could be made into the question of whether the defendant was, at the time of the plea hearing, incompetent to plead guilty.

***Bailey v. Spears***, 847 F.2d 695 (11th Cir. 1988) A habeas petitioner alleged sufficient facts to raise questions about his sanity at the time of the offense, and his competence to stand trial, requiring a remand for the taking of additional evidence.

***Demos v. Johnson***, 835 F.2d 840 (11th Cir. 1988) The trial court erred in refusing to grant the defendant's request for a psychiatric examination. Evidence indicated that the defendant had a history of glue sniffing and had two prior occasions of psychiatric treatment.

***Agan v. Dugger***, 835 F.2d 1337 (11th Cir. 1987) During the course of the grand jury proceedings, and at sentencing, the defendant expressed no regret at having committed a murder, expressed dissatisfaction that his victim had not died a more painful death, and announced his intention to find and murder the partner of his victim. The court holds that this "highly irregular" conduct should have prompted the judge to conduct a competency hearing prior to accepting the guilty plea.

***United States v. Weissberger***, 951 F.2d 392 (D.C. Cir. 1991) An order pursuant to 18 U.S.C. §4241(a), requiring the defendant to submit to a thirty-day evaluation, is appealable. This is an order analogous to an order denying bond. Though not a final order, it is a collateral order which is immediately appealable.

## *COMPUTER FRAUD AND ABUSE ACT*

***United States v. Valle***, 807 F.3d 508 (2d Cir. 2015) The defendant, a NYC police officer was given access through his job to a law enforcement website that allowed him to engage in certain investigations, including access to the NCIC. At home, at night, however, he accessed these sites to track down women who he fantasized raping. He never actually engaged in any such criminal conduct with the women. (See the discussion of this case in the topic Conspiracy). He was prosecuted for violating the Computer Fraud and Abuse Act. One provision of that Act provides that it is a crime to "intentionally access[] a computer without authorization or [to] exceed authorized access and thereby obtain[] information ... from any department or agency of the United States." 18 U.S.C. § 1030(a)(2)(B). The defendant was, in fact, permitted to access the NCIC, so his access to that site, alone, would not be a crime, unless his access for an unauthorized purpose is included in the criminal provision. The Second Circuit holds that the statutes is ambiguous, because "exceeds authorized access" could mean either that the defendant's "purpose" for accessing the site was beyond authorization, or it could mean that the defendant accessed a site that he was not authorized to access. Invoking the rule of lenity, the Second Circuit held that a conviction for accessing a site that the defendant was authorized to access, but not for a proper purpose, is not an offense under the CFAA.

***United States v. Auernheimer***, 748 F.3d 525 (3rd Cir. 2014) The Third Circuit discussed various issues relating to the Computer Fraud and Abuse Act, including the question of venue in a computer hacking case. The court decided the venue in a hacking case brought under 18 U.S.C. § 1030(a)(2)(C). The Third Circuit did not address the issue resolved in Nosal, but with regard to venue, held that venue is proper where the defendant accessed a computer without authorization or obtained information from it.

***United States v. Nosal***, 676 F.3d 854 (9th Cir. 2012) The Computer Fraud and Abuse Act, 18 U.S.C. § 1030, only applies to individuals who violate an employer's restrictions on access to a computer, not to limitations on the use of the computer. The court explained that under the government's interpretation, if an employee logged on to ESPN.com while at work, this would be a federal crime, if the employer forbids employees from non-work use of a computer. If someone logged onto another person's Facebook page – even with the other person's permission – this would be a federal crime because Facebook forbids people from accessing another person's account. Other websites prohibit minors from using the site, including Amazon and Netflix. Making a misrepresentation on a dating website (which is forbidden by the websites' rules) would be a federal crime. If "exceeding permissible use" was in fact a crime, in each of these situations, the user of the computer would be committing a federal crime. This decision is contrary to the decisions of other Circuits, including United States v. Rodriguez, 628 F.3d 1258 (11th Cir. 2010); United States v. John, 597 F.3d 263 (5th Cir. 2010). After remand, the case was tried and the appellate decision affirming the conviction is found at 828 F.3d 865 (9th Cir. 2016). That opinion also reviews at great length (with a dissent by Judge Reinhardt) various aspects of the CFAA.

***United States v. Christensen***, 801 F.3d 970 (9th Cir. 2015) The conviction in this case was reversed based on Nosal. This decision was amended and superseded on denial of rehearing at 828 F.3d 763 (9th Cir. 2016).

## *COMPULSORY PROCESS SEE ALSO: (EVIDENCE – DEFENDANT'S RIGHT TO PRESENT EXCULAPTORY EVIDENCE)*

***United States v. Carmen***, 697 F.3d 964 (9th Cir. 2012) Deporting a potentially exculpatory witness prior to providing the defense an opportunity to interview the witness violates the defendant's right to compulsory process and to due process. The defendant, however, is required to show that the government acted in bad faith, a showing that was, in fact, made in this case.

***Harris v. Thompson***, 698 F.3d 609 (7th Cir. 2012) The trial court's decision to exclude a defense witness who was 6-years old based on the child's competence as a witness violated the defendant's Compulsory Process rights to present evidence in his defense. The child had critical exculpatory evidence and the jury should have been allowed to evaluate the credibility issue. The fact that the child believed in the tooth fairy, Santa Claus and Spiderman did not render him unfit to testify. (Part of the child's apparent confusion about who was "real" and who was not "real" was the way that questions were posed, which drew a distinction between characters in movies that were cartoons, or animated, and characters who were played by live actors). The state trial court violated the state statute that placed the burden of proving incompetency of a witness on the state, rather than proving competence of witness on the party calling the witness, as the court did in this case. In addition, the court held that the trial attorney provided ineffective assistance of counsel in failing to properly litigate the competency issu and to interview and prepare the child to testify. This case contains an encyclopedic review of Compulsory Process cases.

***United States v. Moussaoui***, 365 F.3d 292 (4th Cir. 2004) In this celebrated 9/11 trial of the suspected terrorist, the defendant sought access to witnesses who were in custody of the U.S. military as suspected Al Quaeda terrorists. He sought access to them to interview them, and to take their depositions pursuant to Rule 15, Fred. R. Crim. P. The Fourth Circuit agreed with the lower court and held that the Compulsory Process Clause, as well as the defendant's due process right to present a defense necessitated granting him access to these witnesses – or, in the alternative, granting some other relief (such as dismissal of the death penalty) if such access was denied as a matter of national security. See also 382 F.3d 453 (4th Cir. 2004).

### *CONFESSION (Fruit of Illegal Arrest or Illegal Search)*

***Taylor v. Alabama***, 457 U.S. 687 (1982) A confession resulting from custodial interrogation following an illegal arrest must be excluded from evidence unless "intervening events break the causal connection" between the confession and the illegal arrest so that the confession is sufficiently an act of free will to purge the primary taint.

***United States v. Hernandez***, 670 F.3d 616 (5th Cir. 2012) The police received a tip that the defendant was harboring illegal aliens. They went to her trailer and started banging on the door and windows and demanding entry. The defendant came to the door and acknowledged that there was an illegal alien inside. The Fifth Circuit concluded that the banging on the doors and windows and demanding entry amounted to a Fourth Amendment violation (an illegal seizure) and the defendant's subsequent statement was not attenuated from that illegal conduct. Therefore, her statement should have been suppressed. The court also held that the statements obtained by witnesses inside (as well as additional evidence) were the fruit of the Fourth Amendment violation, as well and those statements, too, would be suppressed.

***United States v. Shetler***, 665 F.3d 1150 (9th Cir. 2011) Based on a tip, the police conducted a warrantless search of the defendant's garage (which the district court held was justified by exigent circumstances and was a valid security sweep) and then the police entered the house without a warrant and continued to conduct a search. This latter search was not lawful. The defendant, confronted with evidence that was uncovered during the search, made numerous incriminating statements. The Ninth Circuit held that all statements were the fruit of the poisonous tree and should have been suppressed. The Court further held that the confession was not sufficiently "attenuated" from the illegal search so as to break the causal chain. The fact that he was Mirandized prior to making the statements also did not break the causal chain.

***United States v. Olivares-Rangel***, 458 F.3d 1104 (10th Cir. 2006) If a defendant is illegally seized or arrested and as the result of that illegal arrest, the defendant makes a statement, the defendant's identity is learned, and his illegal status is ascertained, the court may suppress all the evidence. The suppression of the defendant's statement is governed by Brown v. Illinois, 422 U.S. 590 (1975). The suppression of the identity evidence (as well as the defendant's "A-file") is more complicated. The government argued that INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), holds that the identity of the defendant may never be suppressed. The Tenth Circuit rejected this argument. The defendant, himself, may not be suppressed (i.e., he may be brought to court), but evidence derived from the illegal detention may be suppressed, including fingerprint evidence in certain circumstances (see Davis v. Mississippi, 394 U.S. 721 (1969); Hayes v. Florida, 470 U.S. 811 (1985)) and independently created and maintained government records. The fact that the defendant does not have an expectation of privacy in the government records is not relevant. The standing issue focuses on the defendant's rights regarding the illegal arrest. The defendant need not have an expectation of privacy in the fruits that are the result of the unlawful arrest. In other words, the defendant is not required to prove an expectation of privacy in both the primary violation and the fruits. If his expectation of privacy was violated, the fruits of that violation may be suppressed, regardless of whether the fruits are discovered in a place for which the defendant does not have an expectation of privacy.

***United States v. Shaw***, 464 F.3d 615 (6th Cir. 2006) A woman reported to the police that her three-year old child reported that he had been sexually molested by a relative. Based only on that report, the police arrested the defendant (the relative). After his arrest, the relative confessed. The Sixth Circuit held that the second-hand report from the mother was not sufficient to support an arrest. There was no corroborating evidence (a medical examination produced no physical signs of trauma or sexual penetration). The confession was tainted by the unlawful arrest.

***United States v. Reed***, 349 F.3d 457 (7th Cir. 2003) The court concluded that the defendant's confession, made several hours after an illegal arrest (i.e., an arrest not supported by probable cause) was the fruit of the arrest and not sufficiently attenuated to purge the initial taint. There were no external circumstances that separated the arrest from the confession. A remand was necessary, however, to determine the precise time of the illegal arrest.

***United States v. Patzer***, 277 F.3d 1080 (9th Cir. 2002) The police lacked probable cause to arrest the defendant for DUI, because the officer may have believed that the defendant had ingested marijuana, but there was no information suggesting that this impaired his ability to drive which is an element of the DUI offense. Absent probable cause to arrest the defendant, the ensuing search of his automobile could not be justified as a search incident to arrest. Similarly, the defendant's consent was tainted by the unlawful arrest. Finally, the court ordered suppressed the statements made by the defendant that were the product of the illegal arrest.

***CONFESSION (Fruit of Illegally Obtained Confession)***

***United States v. Patane***, 542 U.S. 630 (2004) The Supreme Court held that the exclusionary rule does not bar the introduction of physical evidence that is discovered as the result of a Miranda tainted statement of the defendant. The defendant was arrested for violating a restraining order. The police officer questioned the defendant at the time of the arrest without properly advising him of his Miranda rights. The defendant told the officer where his gun was located in the house. The 5 – 4 decision of the Supreme court concluded that the fruit of the poisonous tree doctrine did not extend to physical evidence discovered as a result of a statement taken without Miranda warnings.

***Missouri v. Seibert***, 542 U.S. 600, 124 S.Ct. 2601 (2004) The police intentionally interrogated the suspect without providing Miranda warnings. During the course of this interrogation, the suspect confessed to being involved in a murder. Immediately thereafter, the police Mirandized the suspect and asked her to repeat what she had just said. The Supreme Court held that this procedure violated Miranda and ordered that the subsequent, Mirandized statement be suppressed. Distinguishing Oregon v. Elstad, the Court concluded that the intentional effort to circumvent Miranda in a manner that eviscerated the protection rendered the subsequent statement inadmissible. In Oregon v. Elstad, the initial questioning amounted to a brief casual question that elicited an incriminating response, followed much later by a Mirandized statement that did not exploit the earlier statements.

***United States v. Ray***, 803 F.3d 244 (6th Cir. 2015) This case contains a lengthy discourse on the Seibert decision. The court notes that there was no majority opinion on precisely how to evaluate whether the officers engaged in the improper sequential

interrogation. The court ultimately concludes that the proper test is an objective test, not the subjective intent of the officers. Under the objective test, the factors that should be considered are the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second interrogations, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

***Reyes v. Lewis***, 798 F.3d 815 (9th Cir. 2015) The state court violated clearly established Supreme Court law in failing to hold that the interrogation technique used in this case violated Seibert. The initial questioning of the defendant (a juvenile) was at the police station after the defendant's house was searched. The questioning began with the officer telling the defendant that he was free to leave, but that he had strong evidence pointing to the defendant as the perpetrator of a murder. Repeatedly, during this questioning, the defendant asked that officers to stop asking him questions. The officers refused. Thereafter, he was brought home. The next day, he went with the police to take a polygraph test. After he took the test, he was told that he failed the test and during additional questioning that followed he made incriminating statements. Later, Miranda warnings were given, and the defendant gave an incriminating statement. The Ninth Circuit granted the writ.

***Lujan v. Garcia***, 734 F.3d 917 (9th Cir. 2013) After his arrest for murder, the defendant was given defective Miranda warnings that failed to properly advise him of his right to counsel. He gave a full confession. The state trial court denied a Motion to Suppress. The California appellate court held that the confession should have been suppressed pursuant to Miranda, but it was otherwise voluntary. The defendant's testimony at trial, therefore, was not tainted by virtue of the improperly admitted confession. The Ninth Circuit held that the defendant's testimony at trial represented the fruit of the poisonous tree. Relying on Harrison v. United States, 392 U.S. 219 (1968), the court held that once the trial court permitted the inadmissible confession into evidence, the defendant's testimony, which was prompted by the need to explain the confession, was the fruit: "The question is not whether the petitioner made a knowing decision to testify [at trial], but why. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible."

***United States v. Barnes***, 713 F.3d 1200 (9th Cir. 2013) The agents' interrogation technique in this case was a clear violation of the principle announced in Missouri v. Seibert. The defendant was questioned in custody without Miranda warnings. He incriminated himself. The defendant was then given the warning and repeated the incriminating statement.

***United States v. Swanson***, 635 F.3d 995 (7th Cir. 2011) The defendant was arrested on a warrant charging him with possession of a weapon in violation of state law. The judge who issued the warrant wrote on the warrant that there would be no bond unless the defendant turned in his gun. When he was arrested, the defendant was told about the bond condition by the arresting officer before he was Mirandized. This statement by the police amounted to interrogation. The defendant responded by telling the police where his guns were in the house. The statement should have been suppressed. Later the defendant was taken to the police station where he received Miranda warnings and he gave a statement. This latter statement was inadmissible pursuant to Seibert. The court also held that the defendant's supposed consent to search his vehicle to find an additional shotgun was involuntary, because the officers serving the arrest warrant stated that he was "ordered" to turn over all guns, thus implying that he had no choice in the matter.

***United States v. Capers***, 627 F.3d 470 (2d Cir. 12/1/10) The Second Circuit elaborates on the rule announced in Missouri v. Seibert. First, the court agreed with several other courts in holding that Justice Kennedy's concurring opinion represents the controlling decision in the Seibert decision. Second, the court holds that numerous factors, objective and subjective, may be considered in deciding whether the two-step interrogation procedure was intentionally used by the police. Finally, the court holds that the government has the burden of proving that the procedure used was not deliberately designed to evade the Miranda protection. The court concluded that the procedure utilized in this case constituted a violation of Seibert and that the government failed to prove that it was not a deliberate violation.

***Dixon v. Houk***, 627 F.3d 553 (6th Cir. 2010) When initially questioned, the defendant stated that he would not answer questions without a lawyer. The police approached the defendant a second time, did not Mirandize him and offered to "cut him a deal" after which the defendant made an incriminating statement. He was the Mirandized and repeated the incriminating statement. The statement was inadmissible because it was obtained in violation of Miranda, it violated his right to counsel, it was not "voluntary" (because of the offer of a deal) and violated Seibert. The Supreme Court Revised, holding that the two-step Siebert type of interrogation was not employed by the police in this case. See Bobby v. Dixon, 132 S. Ct. 26 (2011).

***United States v. Villa-Gonzalez***, 623 F.3d 526 (8th Cir. 2010) If physical evidence is seized as the result of a confession that was obtained in violation of Miranda, the physical evidence is not suppressed. United States v. Patane. However, if physical evidence is seized as the result of a confession that was obtained pursuant to an illegal detention (and therefore a Fourth Amendment violation), then the physical evidence is the fruit of the Fourth Amendment violation and is suppressed pursuant to Wong Sun v. United States.

***United States v. Heron***, 564 F.3d 879 (7th Cir. 2009) The Seventh Circuit explored the problem of interpreting Seibert in light of the fractured opinions that composed the decision to reverse the conviction. No majority explained what the rationale of the decision was. One interpretation is that Elstad has been limited and the focus is on the defendant's state of mind. Another interpretation focuses on whether the police intended to exploit the two-step process. The Heron court did not decide how to resolve this dilemma, but the case is worth considering whenever a Seibert issue arises.

***United States v. Pacheco-Lopez***, 531 F.3d 420 (6th Cir. 2008) After learning incriminating information from the defendant during pre-Miranda questioning, the police promptly Mirandized the defendant and asked him the same questions. This violated Seibert and required that the post-Miranda statements be suppressed.

***United States v. Ollie***, 442 F.3d 1135 (8th Cir. 2006) Relying on Seibert, the Eighth Circuit held that a Mirandized statement that was obtained immediately after obtaining an un-Mirandized statement was the fruit of the tainted statement and should be suppressed.

***United States v. Williams***, 435 F.3d 1148 (9th Cir. 2006) The federal agents interrogated the defendant in the manner described in Seibert – that is, a two-step procedure in which the defendant is interrogated without being warned of his rights, and as soon as he confessed, he was Mirandized and asked to repeat, or write down, the confession. The Ninth Circuit remanded this case to the district court to reconsider its decision in light of Seibert. The Court noted, moreover, that because of the splintered opinions in Seibert, the rationale that garnered at least five votes was the opinion of Justice Kennedy (albeit not the "majority" opinion), which stated that the two-step interrogation process must have been conducted intentionally for the purpose of subverting Miranda's protection. Thus, not all pre- Miranda statements will taint a subsequent Mirandized statement, even if the latter statement follows close on the heels of the earlier statement.

***United States v. Naranjo***, 426 F.3d 221 (3rd Cir. 2005) The Third Circuit remanded this case to the trial court to conduct a more thorough Seibert analysis. The court noted that Justice Kennedy's test – which focuses on the intention of the officers in conducting a "two-step" interrogation – was not properly analyzed by the trial court.

***United States v. Aguilar***, 384 F.3d 520 (8th Cir. 2004) For nearly two hours, the police interrogated the defendant prior to giving him Miranda warnings. The defendant was told that if he cooperated, he would be released. Based on Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601 (2004), the Mirandized statement was inadmissible. Moreover, the post-Miranda statements were the product of coercion. Though the promise of release is not alone a basis for finding the confession involuntary, it is one of many factors that supported the trial court's finding that the confession was not voluntary.

***United States v. Byram***, 145 F.3d 405 (1st Cir. 1998) The defendant was present when two friends played Russian Roulette, resulting in the death of one of the friends. The defendant was later arrested on a parole violation warrant. While in court on his matter, the police questioned him (without Mirandizing him) and asked about the killing. He implicated the surviving friend, as well as himself. He later was asked to testify at the surviving friend's murder trial, which he did (further implicating himself). The First Circuit concluded that the testimony at the friend's trial was the inadmissible fruit of the Miranda-tainted interrogation. The court considered whether the prior trial testimony was involuntary but concluded that though it was obtained through some deception (the officer did not advise the defendant the purpose for which he was being questioned, and even assured him that it was not for purposes of a criminal case against him), the statement did not satisfy the definition of "involuntary" in current Supreme Court parlance. See Colorado v. Connelly, 479 U.S. 157 (1986). Turning to the Miranda issue, the court concluded that the defendant was being interrogated and was "in custody" – though he was already under arrest for his own parole matter, the interrogation occurred in a separate room in the courthouse where the defendant was taken by the interrogating officer. The next question is whether testimony at a co-defendant's trial can qualify as "fruit" of a Miranda-tainted statement. The Supreme Court has already held that Miranda does not apply to testimony in court. United States v. Mandujano, 425 U.S. 564 (1976) (grand jury witness is not entitled to a Miranda warning before testifying). Also, Oregon v. Elstad, 470 U.S. 298 (1985) held that there is no "fruit" exclusionary rule where a Mirandatainted statement is followed by a statement that is preceded by a fully Miranda warning and waiver. In this case, however, the First Circuit distinguished Elstad. Here, the initial tainted statement was not the product of a mere "technical" Miranda violation. Second, there was a substantial nexus between the first statement and the trial testimony. Third, the trial testimony (which the government was seeking to introduce at the defendant's own trial) was itself not preceded by Miranda. In all three respects, Elstad is distinguishable.

***CONFESSION (Miranda – Sufficiency of Waiver)***

***Berghuis v. Thompkins***, 130 S. Ct. 2250 (2010) The defendant was read the Miranda warning and did not respond when asked if he waived the right to remain silent. He was then questioned for several hours, during which time he answered very few questions, just silently listening to the interrogation. Then he answered one question. The Supreme Court held that in order to invoke the right to remain silent and to thereby terminate further interrogation, the defendant must unequivocally invoke the right to remain silent. Simply remaining silent is not sufficient. In addition, once the defendant answered the question, this amounted to a waiver of the right to remain silent.

***United States v. Giddins***, 858 F.3d 870 (4th Cir. 2017) The defendant's car was used in a bank robbery. The perpetrators who were arrested told the police that Giddins was involved in a prior robbery. An arrest warrant was taken out for the defendant, but before it was served, the police told him that his car had been seized and he could come to the police station to claim it. When he arrived at the police station, he was brought to an interrogation room where he was repeatedly told that he was "not in trouble at this time" and that in order to retrieve his car, the police had to ask few questions and he would be required to waive his Miranda rights. The defendant then waived his Miranda rights and answered questions. The Fourth Circuit held that the defendant was in custody and that the police tactic vitiated the voluntariness of his Miranda waiver. While trickery is permissible and there is no requirement that the police reveal the existence of an arrest warrant, the police in this case affirmatively misled the defendant about whether he was in trouble, thus leading him to waive his rights. In addition, it was improperly coercive to tell the defendant that he could not have his car back without waiving his Miranda rights.

***Sessoms v. Runnels***, 691 F.3d 1054 (9th Cir. 2012) (en banc) After receiving Miranda warnings, in order to invoke the prohibition of further questioning required by Edwards v. Arizona, the defendant's invocation of the right to an attorney must be unambiguous.

***Davis v. United States***, 512 U.S. 452 (1994). What happens, however, if the defendant invokes his right to counsel in an ambiguous manner before he is read his Miranda rights? In this en banc decision, the Ninth Circuit holds that questioning must stop. The rationale is that an effort to obtain the assistance of counsel prior to being read Miranda warnings must be honored even if the request is not clear, because the target may not fully understand his rights at that point in time; whereas after having been informed of his rights, the defendant's rights should be clear to him and therefore, his invocation must be unambiguous. Following remand from the U.S. Supreme Court, the en banc court concluded that the invocation in this case was, in fact, unambiguous, so further questioning was inappropriate.

***Sessoms v. Grounds***, 776 F.3d 615 (9th Cir. 2015). The defendant asked, "There wouldn't be any possible way that I could have a – a lawyer present while we do this?" and then "Yeah, that's what my dad asked me to ask you guys – uh, give me a lawyer." There was nothing ambiguous about this request.

***Garner v. Mitchell***, 557 F.3d 257 (6th Cir. 2009) The panel opinion, 502 F.3d 394, contained a thorough consideration of the law requiring that a Miranda waiver must be voluntary (i.e., free from coercion) and knowing. The court begins by reminding that the requirement that a confession be voluntary is a different matter than requiring that a Miranda waiver be voluntary.

***Moran v. Burbine***, 475 U.S. 412, 421 (1986). In order to prove that a confession is involuntary, police coercion is required, Colorado v. Connelly, 479 U.S. 157 (1986). Police coercion is not required in order to establish that a Miranda waiver was not voluntary. In this case, based on the defendant's age, education and IQ and other factors relating to his mental state, the panel concluded that the evidence did not establish that the defendant voluntarily waived his Miranda rights. Rehearing was granted – and the en banc court reversed the panel opinion, reinstating the conviction, 557 F.3d 257 (6th Cir. 2009)( en banc).

***CONFESSION (Miranda – Sufficiency of Warning***)

***Florida v. Powell***, 130 S. Ct. 1195 (2010) A somewhat ambiguous Miranda warning was not sufficiently defective to warrant excluding the resulting confession. The police advised the defendant that he could have the assistance of counsel before being interrogated. The defendant claimed that this was erroneous, because he was entitled to the assistance of counsel during interrogation, as well. The defendant was correct about the right to counsel but was wrong when he insisted that his confession should be excluded on the basis of this erroneous Miranda warning. Miranda does not require a precise formulation of the warning. See California v. Prysock, 453 U.S. 355 (1981) and Duckworth v. Eagan, 492 U.S. 195 (1989).

***United States v. Botello-Rosales***, 728 F.3d 865 (9th Cir. 2013) The Spanish translation of the Miranda warning stated that the defendant could receive a "free" lawyer. Experts testified that the word "libre" in Spanish, however, meant that a lawyer who was available (i.e., not otherwise busy), as opposed to a lawyer who would cost no money. The warning also did not make it clear that a lawyer would definitely be provided by the government, as opposed to the appointment being contingent on a court's approval. This warning was not adequate, and the confession should have been suppressed. In addition, the court held that a correct English-language warning that was read to the defendant was not sufficient, because even if the defendant spoke English, providing inconsistent warnings without clarifying which warning provided the accurate advice does not satisfy Miranda's requirement.

***United States v. IMM***, 747 F.3d 754 (9th Cir. 2014) Miranda warnings must be read to the defendant, not simply in his presence. In this case, the juvenile was present when the officer read the Miranda warnings to the juvenile's mother. This does not satisfy the requirement that the defendant receive the warning.

***United States v. Wysinger***, 683 F.3d 784 (7th Cir. 2012) The officer's Miranda warning was confusing and inaccurate. The warning suggested that the time to invoke the right to counsel had not yet arrived – this was told to him when he unambiguously invoked his right to counsel – and also suggested that the defendant must choose either to invoke his right to counsel either before the questioning began, or during the questioning.

***Doody v. Schriro,*** 596 F.3d 620 (9th Cir. 2010) (en banc) The Ninth Circuit granted a writ of habeas corpus in this murder case because of two flaws in the state's method of gaining the defendant's confession: first, the Miranda warning was confusing and inaccurate – the police advised the defendant that he had the right to counsel if he was involved in the crime; the police also advised the defendant (a juvenile) that the warnings were "just formalities." The one-page Miranda form was explained by the police over twelve pages of the interrogation transcript. In addition, a thirteen-hour long interrogation of a sleep-deprived teenager resulted in a confession that was not voluntary. Relentless questioning implies to the suspect that he does not, in fact, have the right to remain silent. Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948). Rehearing the case once again after remand from the U.S. Supreme Court, the Ninth Circuit reached the same result, even after considering Florida v. Powell, 130 S. Ct. 1195 (2010). Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011).

***United States v. Street***, 472 F.3d 1298 (11th Cir. 2006) Advising the defendant that he had the right to remain silent and the right to counsel during questioning was not sufficient to satisfy the warning requirement of Miranda. The warning omitted the warning that whatever the defendant said could be used against him and omitted the advice that a lawyer would be appointed if he could not afford one. As Judge Carnes, wrote, "This is one instance in which halfway is not close enough for government work."

***United States v. Perez-Lopez,*** 348 F.3d 839 (9th Cir. 2004) The Miranda warning included the phrase, “You have the right to solicit the court for an attorney if you have no funds.” This was incorrect. The government is required to appoint a lawyer if the defendant has no funds. The defendant’s post-Miranda statements had to be suppressed based on this erroneous advice.

***Zappulla v. New York***, 391 F.3d 462 (2d Cir. 2004) When initially arrested on theft charges, the defendant waived his Miranda rights and gave a statement. Shortly thereafter a dead body was found in his hotel room. He briefly escaped from custody and when re-captured, was interrogated about the murder, but without new Miranda warnings. The New York State courts, as well as the federal courts, all agreed that the interrogation was conducted in violation of Miranda; the Second Circuit concluded that the admission of his statements was not harmless error and required that a writ of habeas corpus be granted.

***CONFESSION (Miranda – In Custody Requirement)***

***J.D.B. v. North Carolina***, 131 S. Ct. 2394 (2011) The suspect’s age is a factor that the court must consider in deciding whether the defendant would reasonably believe that he was “in custody” and thus whether Miranda warnings were required.

***Howes v. Fields***, 131 S. Ct. 1047 (2012) The prisoner in this case was not “in custody” when he was asked by sheriff’s deputies to answer questions about another investigation. The defendant was brought to a conference room in another building in the prison but was not restrained and was specifically told that he was free to leave. Maryland v. Shatzer, 130 S. Ct. 1213 (2010) In Edwards v. Arizona, the Court held that once the defendant invokes the right to counsel during custodial interrogation, the police must cease interrogation and can never reinitiate interrogation. The question in this case is whether the “never can re-initiate questioning” rule applies even if the defendant is released from custody? The Court holds that once the defendant is released from custody (and that includes being returned to general population in prison, which is not “in custody” for Miranda purposes), the police may re-initiate questioning after fourteen days. In other words, if the defendant invokes his right to counsel and is later released from custody, the police must wait at least fourteen days prior to contacting the defendant and interrogating him.

***Yarborough v. Alvarado***, 541 U.S. 652, 124 S.Ct. 2140 (2004) In this habeas case, the Supreme Court held that the state court did not unreasonably apply controlling Supreme Court doctrine when it held that a suspect’s age is not factored to be considered in deciding whether he is “in custody” for Miranda purposes. The Court did not definitively hold that age is not a factor, but simply held that in the context of a habeas petition, the state court did not err in holding that age is not a factor. The Court indicated, however, that whether a suspect is “in custody” should be decided under a strict objective standard – not a subjective evaluation of whether the suspect in this case believed he was in custody. The suspect’s age, lack of experience with the criminal justice system, or other psychological factors, are not relevant considerations, because the police cannot be expected to know all of these characteristics of the suspect and would not know, consequently, when Miranda warnings are necessary. Note, again, that this is a habeas case, and the Court did not definitively decide this question; rather, it simply held that lower federal courts should have deferred to the state court habeas decision.

***Stansbury v. California***, 511 U.S. 318 (1994) In a per curium opinion, the Supreme Court reiterates that the question whether a person is in custody for Miranda purposes focuses on the objective circumstances, not the subjective intent of the police officer. While an officer’s knowledge or beliefs may bear upon the custody issue if they are conveyed by word or deed to the individual being questioned, the officer’s personal view of whether he was going to let the suspect go, or not, is irrelevant, in and of itself. The officer may be asked about his intent, insofar as this may be relevant in testing his or her credibility of what happened during an interrogation.

***Illinois v. Perkins***, 496 U.S. 292 (1990) The defendant was in jail on charges unrelated to a murder which the police were investigating. The police put an undercover agent in the jail cell block who elicited a confession from the defendant about the murder. The confession was admissible. His right to remain silent and his right to counsel were not violated. Because the essential ingredients of a “police dominated atmosphere” were missing, there was no need for the undercover agent to advise the defendant of his Miranda rights. The atmosphere in the prison was not coercive, at least not with respect to the undercover agents’ conversation with the defendant. The Sixth Amendment was not implicated, because no murder charges had been filed against the defendant at the time of the “interrogation.” Thus, the decisions in Massiah and United States v. Henry and Maine v. Moulton are all distinguishable. In those cases, the undercover agent questioned the defendant about the charges which had already been filed against the defendant, and for which his Sixth Amendment rights had attached.

***Rivera v. Thompson***, 879 F.3d 7 (1st Cir. 2018) The police responded to a report of a stabbing. When an officer arrived at the scene, a man was seen jogging away. The officer ordered the man to lie down, pulled his weapon and asked him what he was doing. The defendant’s responses should have been suppressed. The defendant was in custody and was being interrogated. Trial counsel’s failure to move to suppress the statements was ineffective assistance of counsel.

***United States v. Giddins***, 858 F.3d 870 (4th Cir. 2017) See annotation, above (Confession – Sufficiency of Waiver).

***United States v. Molina-Gomez***, 781 F.3d 13 (1st Cir. 2015) Though a person being questioned at the border may not be “free to leave” this does not necessarily mean that the defendant is in custody for Miranda purposes. In this case, however, the secondary questioning was conducted in a small windowless room with two CBP officers. He was held in the room for between one-and-a-half and two hours. The questioning was not routine; it was already known to the officers that the defendant was an American citizen. The focus of the interrogation on illegal activity elevated this encounter to the level of “custodial interrogation” for Miranda purposes.

***United States v. Borostowski,*** 775 F.3d 851 (7th Cir. 2014) When the police executed a search warrant at the defendant’s house, he was handcuffed and confined to a small room for three hours. This satisfied the “in custody” requirement of Miranda.

While the agents' statement to the defendant "You are not under arrest" is relevant, it did not counterbalance the other factors that would lead a reasonable person to believe that he was not free to leave.

***United States v. IMM***, 747 F.3d 754 (9th Cir. 2014) For purposes of Miranda, the juvenile defendant was in custody when he was questioned. He was in a police interrogation room. As far as the juvenile could determine, the room was locked (he was told that if he needed to go to bathroom, he should knock on the door and obtain a detective's permission. The police station was located 30 – 40 minutes from his home. He was alone in the room. Though his mother had been told that the juvenile was not in custody, the question must be addressed from the defendant's point of view, not his mother's.

***United States v. Hashime,*** 734 F.3d 278 (4th Cir. 2013) Though he was told that he was not under arrest, the defendant was awaken by numerous armed agents who were executing a search warrant in his house. He was taken at gunpoint to a storage room where he was questioned for several hours and told that during the execution of the search warrant, he must remain under guard. The defendant was in custody and the failure to Mirandize him required that the confession be set suppressed.

***United States v. Cowan***, 674 F.3d 947 (8th Cir. 2012) The defendant was in custody when he was handcuffed, patted down, and questioned. The encounter occurred in an apartment that was being searched pursuant to a search warrant. The defendant was a visitor in the apartment. When the search started, he was handcuffed and ordered to produce identification. He was then asked questions about where he had come from and why he had car keys in his possession if he had taken the bus there. The defendant's statements were not preceded by Miranda warnings and his statements should have been suppressed.

***United States v. Cavazos***, 668 F.3d 190 (5th Cir. 2012) Fourteen law enforcement officers executed a search warrant at the defendant's house. He was handcuffed and led into the kitchen and separated from his family. Thereafter, the handcuffs were removed, and he was brought to a bedroom where he sat the bed and two officers sat across from him and questioned him. He was told that he was not in custody. The Fifth Circuit held that the number of agents involved, the movement of the defendant around the house while he was continuously monitored, the fact that he was initially handcuffed, all led the conclusion that he was in custody for Miranda purposes.

***United States v. Rogers***, 659 F.3d 74 (1st Cir. 2011) The defendant, a soldier, was ordered to return to his home by his commanding officer. There, he was questioned by police, but expressly told that he was not under arrest. In an opinion by retired Justice David Souter, the First Circuit held that the defendant was "in custody" for Miranda purposes because of the compulsion resulting from his military status and orders from his superiors.

***United States v. Villa-Gonzalez***, 623 F.3d 526 (8th Cir. 2010) The defendants were in custody when they were confronted and questioned on the porch outside their trailer. Several law enforcement officers questioned the brothers. They were accused of being drug dealers. Their identification papers were taken from them. This amounted to a seizure of Fourth Amendment purposes and for Miranda purposes.

***United States v. Slaight,*** 620 F.3d 816 (7th Cir. 2010) A Judge Posner opinion on the definition of "in custody" for Miranda purposes concludes that the defendant was in custody, even though the police told him he was "free to leave." The police used a battering ram to gain entry into the defendant's house with a search warrant. After the dust settled, the police "invited" him to come to the police station to be interviewed about child pornography on his computer. He agreed and was placed in a small interview room in the police station. The room was approximately eight by eight and had no window. The defendant knew the police had already discovered the child porn on his computer. The defendant eventually confessed. The court also notes that some police manuals advise the police to tell the suspect that he is not in custody in order to avoid having to Mirandize the suspect, and after the defendant confesses the defendant should be Mirandized. The Seventh Circuit reverses, holding that the failure to advise the defendant of his Miranda warnings was error.

***United States v. Chavira***, 614 F.3d 127 (5th Cir. 2010) At the initial border checkpoint, the defendant was not in custody during routine questioning. But when she was brought to a secondary processing, the situation changed dramatically. She was handcuffed to a chair; the officers already knew that she had made a false statement and acknowledged that she was not free to leave; the officers stated that they intentionally did not Mirandize her, because they wanted her to confess first; the questioning was clearly not limited to routine immigration questions; her identification papers had been confiscated and were in possession of the agents.

***Simpson v. Jackson***, 615 F.3d 421 (6th Cir. 2010) The defendant was in custody in the prison when investigators came to interview him about a murder case. The Supreme Court vacated and remanded for further consideration in light of Howes v. Fields.

***United States v. Brobst***, 558 F.3d 982 (9th Cir. 2009) When the defendant arrived home, agents were executing a search warrant at his house. He was directed to "come with me" by one of the agents and was confronted with the fact that the agents had located child pornography in the house. The Ninth Circuit concluded that the defendant was "in custody" for Miranda questioning and he should have been advised of his rights.

***United States v. Craighead***, 539 F.3d 1073 (9th Cir. 2008) The police questioned the defendant in his home without Mirandizing him. The government argued that the defendant was not in custody – he was in his own home and was told that he was not in custody. The Ninth Circuit holds that the defendant was in custody and that he should have been Mirandized. Interrogations in the home, particularly where, as here, the police are executing a search warrant and therefore are not in the home with the defendant's consent, may be more "custodial" than interrogations elsewhere. Moreover, telling the defendant that he is free to leave is a rather unusual suggestion, because the defendant is in his own home, and it is not a sign of "freedom" that he has

been invited by the police to leave his own home. The court rhetorically asked, “Where will he go? The library? The police station. He is already in the most constitutionally protected place on earth: [his own home].”

***United States v. Colonna***¸ 511 F.3d 431 (4th Cir. 2007) The defendant was in custody, for Miranda purposes, when twenty-three officers went to his house, kicked open his bedroom door and at gunpoint, ordered him to get dressed and come downstairs. Despite the fact that one officer told the defendant that he was not under arrest, his circumstances amounted to being in custody and he should have been Mirandized before being interrogated.

***United States v. Mittel-Carey***, 493 F.3d 36 (1st Cir. 2007) Agents were executing a search warrant at the defendant’s house. The agents went into his bedroom, where he was asleep, ordered him to get up and get dressed. He was escorted downstairs. He was questioned for a period of time. He was allowed to go to the bathroom and to speak with his girlfriend when she left to go to work. The agents left without arresting him. The First Circuit held that the defendant was “in custody” for Miranda purposes and the statements he made were properly excluded by the trial court.

***United States v. Martinez***, 462 F.3d 903 (8th Cir. 2006) The police spotted the defendant, who generally matched the description of a man who recently robbed a bank. The police approached him and told him about the robbery. He responded that he had a lot of money in his pocket. He was frisked and when the police found the money, they handcuffed him. He then was further questioned and made incriminating statements. The Eighth Circuit held that when the defendant was handcuffed, he was in custody for Miranda purposes and his subsequent statements were inadmissible. The court rejected the notion that a Terry stop (as opposed to an arrest) does not trigger the necessity for Miranda warnings. A detention that does not rise to the level of an arrest may still be sufficiently “custodial” to necessitate warnings before interrogation. See generally Berkemer v. McCarty, 468 U.S. 420 (1984); Thompson v. Keohane, 516 U.S. 99 (1995).

***United States v. Ollie***, 442 F.3d 1135 (8th Cir. 2006) The defendant’s parole officer instructed him to go to the police station and talk with the chief about a pending investigation. The defendant did so, but was not Mirandized by the police when he arrived at the station. The Eighth Circuit holds that the defendant was in custody during this questioning and his statement should have been suppressed. Though Minnesota v. Murphy, 465 U.S. 420 (1984), had held that an interview with a probation officer need not be preceded by Miranda warnings, in this case, the defendant was “ordered” by the parole officer to speak with the police chief, thus creating a reasonable expectation that failure to speak would result in consequences.

***United States v. Jacobs***, 431 F.3d 99 (3rd Cir. 2005) The defendant, a confidential informant for the police, was in-custody when she was asked to come to the police station and then confronted with evidence of her criminal activity. Among the factors considered by the Third Circuit was the confrontational and intimidating nature of the questioning, the location of the questioning, and the officer’s belief, which he conveyed to the defendant, that she was guilty. In addition, the defendant believed that she was still an active informant for the FBI and was required to continue cooperating with the agency.

***Reinert v. Larkins***, 379 F.3d 76 (3rd Cir. 2004) The defendant was in custody when he made a statement to the police while in an ambulance. Harmless error. A.M. v. Butler, 360 F.3d 787 (7th Cir. 2004) The state court determined that the defendant was not “in custody” when he was being interrogated. The state trial court’s failure to take into account the fact that the defendant was an 11-year-old at the time he was being interrogated amounted to an unreasonable application of clearly established federal law. (This decision was reached while Yarborough v. Alvarado, 541 U.S. 652, 124 S.Ct. 2140 (2004) was pending in the Supreme Court; the Seventh Circuit cited the lower court’s decision in Yarborough that held that age is a relevant factor in deciding the question of custodial status).

***United States v. Newton***, 369 F.3d 659 (2d Cir. 2004) In deciding whether a person is “in custody” for Miranda purposes, one factor is whether the defendant is “free to leave” at the time the questioning occurs. But this factor is not outcome determinative, because a motorist stopped for a motor vehicle offense is not “free to leave” but is not entitled to Miranda warnings prior to being questioned.

***Berkemer v. McCarty***, 468 U.S. 420 (1984). Rather, the “free to leave” factor is just one of the factors; other factors include whether the questioning occurs in a coercive atmosphere, whether the defendant was handcuffed, the length of time involved in the detention, the public versus private setting, the number of officers involved in the stop, and presence of firearms being brandished by the police. The ultimate question is whether the defendant was subject to “formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.”

***California v. Beheler***, 463 U.S. 1121, 1125 (1983). In this case, the defendant was “in custody.” The fact that he was expressly told that he was not under arrest did not establish that he was not, in fact, in custody for Miranda purposes. The court went on to hold, however, that the “public safety” exception exempted the police from issuing a Miranda warning.

***Parsad v. Greiner***, 337 F.3d 175 (2d Cir. 2003) The state court’s determination that the defendant was not in custody for Miranda purposes was an unreasonable determination of the facts, but the error in admitting the defendant’s statement was harmless. Police officers told the defendant that they were going to take him to the police station to talk to him (he was homeless). Once at the station, the defendant removed his pants, which further inhibited his ability to leave.

***United States v. Clemons***, 201 F.Supp.2d 142 (D.D.C. 2002) The stop of the defendant’s vehicle was justified, because the defendant was driving on two flat tires. The court determined that this was a Terry stop and not a full-scale arrest. Nevertheless, for Miranda purposes, the defendant was “in custody” and therefore should have been read his rights when the police started questioning him about the ownership of guns that were found in the car. See also United States v. Perdue, 8 F.3d 1455 (10th Cir. 1993).

***United States v. Chamberlain***, 163 F.3d 499 (8th Cir. 1998) The defendant was a state prisoner who worked in a prison office that had computers. The police suspected he was involved in obtaining child pornography. He was interviewed in the office of the prison. The Eighth Circuit concluded that he was “in custody” for Miranda purposes during this interview. Though all interrogations of suspects who are already incarcerated is not necessarily “custodial,” in this case, the defendant was escorted to the room where he was interviewed; the room was in a secure area; he was never told that the questioning was voluntary, or that he could leave.

***Tankleff v. Senkowski***, 135 F.3d 235 (2d Cir. 1998) The defendant was in custody, and should have been Mirandized, when the police questioned him for several hours, and told him (untruthfully) that the victim had come out of a coma and accused the defendant of the assault. At that point in the questioning, when he was accused of the crime, he would not have felt free to leave. Nevertheless, the defendant's subsequent Mirandized statement was admissible.

***United States v. Byram***, 145 F.3d 405 (1st Cir. 1998) The defendant was in custody on a parole violation warrant. While in the courthouse lock-up awaiting a hearing on this charge, the police questioned him about a murder case involving a friend (and, ultimately, the defendant). The defendant was taken to another room in the courthouse by the police before he was questioned. The defendant was “in custody” and should have been Mirandized.

***United States v. Madoch,*** 149 F.3d 596 (7th Cir. 1998) Law enforcement agents entered the defendant’s house and arrested her husband. She was escorted into the kitchen and questioned for several hours. During the course of the questioning, she was permitted to go to the bathroom to pump her breast milk, but only with a female agent watching. The totality of the circumstances demonstrated that she was not free to leave, and she should have been advised of her Miranda rights.

***United States v. Doe***, 878 F.2d 1546 (1st Cir. 1989) The Coast Guard seized a vessel on the high seas and questioned the defendants about their citizenship. In light of the circumstances, Miranda warnings should have been issued.

***United States v. Ali***, 68 F.3d 1468 (2d Cir. 1995) Miranda warnings are required whenever a person is in custody. This includes a detention short of an arrest. Thus, if a suspect is interrogated in the context of a Terry stop, Miranda warnings are still necessary. In this case, the defendant was asked to step away from the boarding area, his travel documents were removed, and he was surrounded by seven officers with visible handguns. This amounted to being in custody – the defendant would not have felt free to leave – and statements he made without being Mirandized should have been suppressed. The Second Circuit reached this decision on the basis of the trial record after deciding that a remand was not necessary because the question is a legal question. See 86 F.3d 275 (2d Cir. 1996).

***United States v. Johnson***, 846 F.2d 279 (5th Cir. 1988) Although postal inspectors advised the suspect that he was not under arrest, their inquiries took the form of demands and their hostile reactions to the suspect’s explanations altered the nature of the contact into an arrest.

***United States v. Griffin***, 922 F.2d 1343 (8th Cir. 1990) An “interview” of a bank robbery suspect in his home amounted to an arrest and should have been preceded by Miranda warnings. The defendant was never told that he was under arrest and was not physically restrained; nevertheless, he was not told that he could leave and when he walked around the house to get cigarettes, an agent would accompany him. Among the factors to be considered in determining whether the defendant was in custody are: (1) whether he was told that he was free to leave; (2) whether he had unrestrained freedom during the course of the interview; (3) whether the suspect contacted the agents, or the agents approached the suspect at the beginning of the interview; (4) whether strong-arm or deceptive practices were utilized by the agents; (5) whether the atmosphere of the interview was “police dominated”; (6) whether the suspect was formally arrested at the conclusion of the interview.

***United States v. Carter***, 884 F.2d 368 (8th Cir. 1989) A bank employee was brought to the bank president’s office and questioned by postal inspectors. No Miranda warnings were given. The mere fact that the questioning occurred at the accused’s place of employment does not detract from the fact that the questioning was clearly custodial in nature. The improper interrogation spoils not only the confession given in the room but a subsequent written confession as well.

***United States v. Longbehn***, 850 F.2d 450 (8th Cir. 1988) A police officer was suspected of criminal conduct. Although he was not placed under formal arrest, his forced removal from the workplace to his home represented a de facto arrest. Under the totality of the circumstances, the suspect’s freedom of action was curtailed to a degree associated with formal arrest. The failure to give Miranda warnings tainted the subsequent statements.

***United States v. Ricardo, D.,*** 912 F.2d 337 (9th Cir. 1990) The Ninth Circuit concludes that the detention of the juvenile during field questioning amounted to a de facto arrest. The juvenile was patted down, gripped by the arm, told he was not to run, and directed to the back of one of two patrol cars present at the scene. This conduct transformed the investigatory stop into an arrest.

***United States v. Perdue***, 8 F.3d 1455 (10th Cir. 1993) Defendant was properly stopped based on an articulable suspicion, pursuant to Terry v. Ohio, when he approached property in a rural location that was being searched. He was ordered out of the car at gunpoint, handcuffed and ordered to lie down on the ground, as was his pregnant fiancée. He was asked what he was doing there and responded that he was there to check out his marijuana. Though this was a Terry stop, and not a full-scale arrest, Miranda warnings were required. Miranda warnings are not necessary for every Terry stop (Berkemer v. McCarty, 468 U.S. 420 (1984)), but where, as here, the Terry stop involves a degree of force and a show of authority which represents a significant curtailment of the defendant’s freedom, the warnings are required. See also United States v. Smith, 3 F.3d 1088 (7th Cir. 1993). A subsequent interrogation, which followed this initial questioning, and which was preceded by Miranda warnings was tainted by the improper use of force and was thus involuntary, despite Miranda warnings. Helicopters were flying overhead; the

defendant was told that his pregnant fiancée could go free if he confessed; the questioning occurred in an isolated rural area; fifteen to twenty law enforcement officers surrounded the defendant.

***United States v. Griffin***, 7 F.3d 1512 (10th Cir. 1993) The defendant and her friend were approached by agents at the airport. Currency was seized from them, and they were brought to the police office where they stood in a conference room while the money was counted. The defendant was then asked to come into a small room with a police officer who began to question her. The only way out of the room was past the officer; she was never advised of her right to refuse to answer questions, or to leave; she was separated from her friend; questioning continued even after the defendant made incriminating statements. Given these facts, the defendant was "in custody" and should have been given full Miranda warnings.

***United States v. Adams***, 1 F.3d 1566 (11th Cir. 1993) The government agents tracked a plane leaving U.S. airspace heading south. When the plane returned to U.S. airspace several hours later, the agents followed the plane to the landing site, ordered the pilot to lie down on the tarmac, emptied the pilot's suitcase, ordered him to remain where he was, and held him at gun point. The pilot was "in custody" and his un-Mirandized statements should not have been admitted. Harmless error. Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992) After running a roadblock and having had her car shot at by police, the defendant crashed her car. When she emerged from the car, she was confronted by several officers with guns drawn. One officer asked her if she liked shooting at troopers. Her response ("We had to.") was inadmissible. The defendant was in custody at the time she exited the car and because the police did not Mirandize her, this was improper interrogation. The state's claim that the question was merely rhetorical and thus, not "interrogation," was not persuasive. "Assuming arguendo the question was rhetorical, if the accused is in custody, the police do not read the accused her rights and a question is asked and answered, then the statement must be suppressed."

***CONFESSION (Impeaching Defendant With Miranda- or Massiah-Tainted Statement*) *SEE ALSO:***

***Post-Arrest Silence Kansas v. Ventris***, 556 U.S. 586 (2009) The Supreme Court concluded that a Massiah-tainted statement was admissible to impeach the defendant if he testified inconsistently with his out-of-court statement at trial. The Court has already ruled that statements obtained in violation of Miranda may be used to impeach a defendant.

***Harris v. New York***, 401 U.S. 222 (1971). United States v. Lopez, 818 F.3d 125 (3rd Cir. 2016) The defendant was charged with possession of a weapon by a convicted felon. At trial he protested that he was framed by the police. After having been Mirandized, he made no statements. Yet, the prosecutor cross-examined the defendant about his failure to raise this "framed" defense prior to trial and also argued to the jury that this was a reason to question the defendant's credibility. This violated Doyle and was reversible error.

***United States v. Ramirez-Estrada***, 749 F.3d 1129 (9th Cir. 2014) The use of the defendant's post-Miranda silence to impeach his testimony at trial was improper. At trial, the defendant testified that he was seeking medical assistance when he came to the border, he was not trying to sneak into the country. After invoking his Miranda rights at the time of arrest, he was asked if he had any medical problems and he answered, "no." The government should not have been permitted to use his post-Miranda silence to impeach him.

***United States v. Caruto***, 532 F.3d 822 (9th Cir. 2008) Generally, a defendant who invokes his Miranda rights may not be impeached by evidence that he invoked his rights or that he remained silent. Doyle v. Ohio, 426 U.S. 610 (1976); Wainwright v. Greenfield, 474 U.S. 284 (1986). In this case, the defendant started making a statement – waiving her right to remain silent – but then stopped and invoked her right to remain silent. At trial, when she was cross-examined, she expanded on her statement. The prosecutor then cross-examined her, pointing out that various facts included in her testimony at trial were not included in her statement to the police. The "omission" was the result of her invocation of the right to remain silent. In other words, the only way the defendant could explain that certain portions of her trial testimony were omitted from her statement to the police, was to explain that she invoked her right to remain silent. The Ninth Circuit held that in this limited circumstance, the prosecutor should not be permitted to cross-examine the defendant about the omitted portion of the statement.

***CONFESSION (Miranda -- Interrogation Requirement)***

***Fellers v. United States***, 540 U.S. 519 (2004) When a defendant has been indicted, the Sixth Amendment forbids the use of any statement that has been "deliberately elicited" from him by the police. In this case, the defendant had been indicted and the police went to his house and told him that they were there to discuss his involvement in a drug distribution conspiracy. The defendant responded in an incriminating way. The Supreme Court held that the statement was inadmissible because the statement was deliberately elicited by the police. The Court held that "deliberately elicited" is different than the "interrogation" standard of Rhode Island v. Innis, 446 U.S. 291 (1980).

***Pennsylvania v. Muniz***, 496 U.S. 582 (1990) After his arrest for driving under the influence, the defendant was brought to a police station where he was asked a number of questions, including his name, address, height, weight, eye color, and the date of his sixth birthday. He was unable to answer this last question. He also made several incriminating statements during the course of performing a physical sobriety test. At that point, he was advised of his Miranda rights. The Supreme Court holds that only the defendant's response to the question concerning his sixth birthday constituted a testimonial response to custodial interrogation. His other comments during the course of the physical sobriety test were not the product of interrogation and could be admitted despite the failure of the police to issue prompt Miranda warnings. Thus, evidence about the defendant's slurred speech and lack of muscular coordination revealed by his responses to the demographic questions was admissible. The question relating to his

sixth birthday, however, elicited a testimonial response, because it was the content of his answer, not the method of speaking, which the state sought to introduce.

***Arizona v. Mauro,*** 481 U.S. 520 (1987) The defendant invoked his right to remain silent after his arrest. Subsequently, the defendant's wife went to the police station and talked to the defendant in a private room. In the room, however, was a police officer for purposes of safety and a tape recorder which was clearly visible to anyone. The Supreme Court holds that this does not constitute interrogation and the statements made by the defendant were permitted to be introduced at trial to rebut his insanity defense.

***Rivera v. Thompson***, 879 F.3d 7 (1st Cir. 2018) The police responded to a report of a stabbing. When an officer arrived at the scene, a man was seen jogging away. The officer ordered the man to lie down, pulled his weapon and asked him what he was doing. The defendant's responses should have been suppressed. The defendant was in custody and was being interrogated. Trial counsel's failure to move to suppress the statements was ineffective assistance of counsel.

***United States v. Williams***, 842 F.3d 1143 (9th Cir. 2016) Booking questions that elicit an arrestee's response about gang affiliation are subject to Miranda. Though most booking questions to do not elicit an incriminating response – and thus the "booking exception" to Miranda – if the arrestee is asked about gang affiliation, the arrestee's response is not admissible at trial unless the arrestee was warned and waived his Miranda rights.

***Jackson v. Conway***, 763 F.3d 115 (2d Cir. 2014) The defendant was in custody in a county jail on charges that he raped his wife, ex-wife, and a daughter. A social worker interviewed the defendant for a possible "family court action." The Second Circuit held that this amounted to custodial interrogation and should have been preceded by a Miranda warning. A social worker is a mandatory reporter and thus is involved in law enforcement. Moreover, as the United States Supreme Court held in Mathis v. United States, 391 U.S. 1 (1968), if a civil IRS agent questions a defendant while in custody, Miranda warnings are required. See also Estelle v. Smith, 451 U.S. 454 (1981) (court-appointed psychiatrist interviewing defendant should have given Miranda warning). Admitting the statements that the defendant gave to the social worker was reversible error that required granting a writ.

***United States v. Benard,*** 680 F.3d 1206 (10th Cir. 2012) The defendant was stopped on the road on suspicion that he was involved in a drug transaction. Eventually, he was arrested. He was asked, "Will I find anything in the car when I search it?" The defendant responded that there was a gun in the car. The question qualified as "interrogation" and was not subject to the public safety exception. Because this appeal followed a conditional guilty plea, the proper remedy was to remand the case and allow the defendant to withdraw his plea if he chooses to do so.

***United States v. Swanson,*** 635 F.3d 995 (7th Cir. 2011) The defendant was arrested on a warrant charging him with possession of a weapon in violation of state law. The judge who issued the warrant wrote on the warrant that there would be no bond unless the defendant turned in his gun. When he was arrested, the defendant was told about the bond condition by the arresting officer before he was Mirandized. This statement by the police amounted to interrogation. The defendant responded by telling the police where his guns were in the house. The statement should have been suppressed. Later the defendant was taken to the police station where he received Miranda warnings and he gave a statement. This latter statement was inadmissible pursuant to Seibert. The court also held that the defendant's supposed consent to search his vehicle to find an additional shotgun was involuntary, because the officers serving the arrest warrant stated that he was "ordered" to turn over all guns, thus implying that he had no choice in the matter.

***Smiley v. Thurmer***, 542 F.3d 574 (7th Cir. 2008) The police asked the defendant numerous questions about his knowledge of the cause of the victim's death, who lived in the same house as the defendant. The defendant was in custody on other charges at the time. No Miranda warnings were given, and the state explained that this was permissible, because the defendant was not being interrogated; he was just being asked questions. The Seventh Circuit rejected this argument and held that pursuant to Rhode Island v. Innis, 446 U.S. 291 (1980), any "questioning" constitutes interrogation, for Miranda purposes if the police anticipate that the person being questioned will provide answers to the questions. Admitting the un-Mirandized statements was error that required granting the writ.

***United States v. Jackson***, 544 F.3d 351 (1st Cir. 2008) The police were at the defendant's apartment searching for a gun. The government conceded that he was in custody. The police urged the defendant to cooperate and offered leniency. The defendant did not respond. The police then obtained consent to search the apartment from another occupant and announced this, within earshot of the defendant. He then revealed the location of the gun. The First Circuit held that this encounter amounted to "interrogation" for Miranda purposes and because no warnings were given, the defendant's statement should have been suppressed.

***United States v. Pacheco-Lopez***, 531 F.3d 420 (6th Cir. 2008) Certain "booking" questions do not amount to interrogation for Miranda purposes. The questions that were posed to the defendant in this case, however, did not qualify as "booking" questions. Questions such as, "When he arrived at his house?" were not booking-type questions.

***United States v. Brownlee***, 454 F.3d 131 (3rd Cir. 2006) The defendant carjacked a jeep and then had a wreck. He was in the back of a patrol car after the wreck and the officer, who knew the defendant from the neighborhood, engaged him in conversation. The conversation was not preceded by a Miranda warning and the defendant answered questions about how he got there, how he got out of the jeep and where he got the gun. This "conversation" qualified as "interrogation" for Miranda purposes. The Third Circuit noted that the perception of the defendant and the intent of the officer are relevant in deciding whether the "conversation" amounts to interrogation.

***United States v. Chen***, 439 F.3d 1037 (9th Cir. 2006) INS questioning of the defendant amounted to “interrogation”. Chen was in INS custody in administrative detention; an agent went to talk to him about the target of an alien-smuggling investigation. The statements that he gave during this interview were later used as the basis for proving that earlier statements he made to the INS were false.

***United States v. Padilla***, 387 F.3d 1087 (9th Cir. 2004) During the process of arresting the defendant, the officer said something to the effect that this was the defendant’s last chance to cooperate in the investigation of another target. This statement was not preceded by Miranda warnings. The statement qualified as “interrogation” and the defendant’s response should have been suppressed – though the failure to suppress the evidence was harmless error.

***United States v. Westbrook***, 125 F.3d 996 (7th Cir. 1997) Questions posed by the police to the defendant after he was in custody amounted to "interrogation" and should have been preceded by Miranda warnings. One officer asked the defendant where the other people he had been with were. This question was not a simple information-gathering query, such as when an officer is merely asking for someone's identity. The question was posed to ascertain who the co-conspirators were. Harmless error.

***United States v. Montana***, 958 F.2d 516 (2d Cir. 1992) After effectively invoking his right to remain silent, the defendant was transported in the DEA agent’s car. The agent said to the defendant that he could help himself if he cooperated. This amounted to interrogation and the defendant’s response was not admissible.

***Nelson v. Fulcomer,*** 911 F.2d 928 (3rd Cir. 1990) Two defendants were arrested for murder. One confessed; the other was confronted with his confederate and asked, “How much did you tell them?” That statement was admitted at trial. The Third Circuit concludes that this does constitute interrogation, if the defendant was, in fact, aware that his confederate had confessed when he was confronted with him. The decision contains a lengthy discussion of the current status of Rhode Island v. Innis, and its application to cases in which a defendant, who has asserted his right to remain silent, is confronted with circumstances that the police should know will elicit an incriminating statement, such as the confession of a co-defendant.

***United States v. Elias***, 832 F.2d 24 (3rd Cir. 1987) The defendant was detained in his parked vehicle and asked about irregularities in his driver’s license. During the suppression hearing, there were inconsistencies in the State’s evidence regarding the level of coercive pressure to which the defendant was subjected. The lower court held that the defendant made an “uninvited spontaneous utterance” that was not the product of interrogation. The record, however, clearly revealed that the defendant was answering the officers’ questions when he acknowledged the presence of cocaine in his briefcase. The statement should have been suppressed, because the defendant was never Mirandized.

***United States v. Soto***, 953 F.2d 263 (6th Cir. 1992) After the defendant invoked his right to the assistance of counsel, the police began to inventory his property. Upon finding a picture of the defendant’s wife and child, the officer asked, “What were you doing with crap like that when you have these two waiting for you at home?” The defendant responded, “That’s not my coke.” This statement was not admissible and required a new trial. The officer’s question amounted to interrogation.

***United States v. D.F.,*** 63 F.3d 671 (7th Cir. 1995) The defendant, a juvenile, was involuntarily committed to a mental health facility due to drug problems. Patients were encouraged to talk to therapists and were rewarded for doing so. A therapist, aware that the juvenile was a suspect in a murder case, questioned the juvenile about her past behavior, without clearly informing her that the questioning was designed, in part, for investigative purposes. This rendered the confession involuntary. Though the therapist was not a law enforcement agent, she questioned the defendant with an eye toward a future prosecution. This decision was re-affirmed after remand from the Supreme Court at United States v. D.F., 115 F.3d 413 (7th Cir. 1997). In this latter decision, the court addresses at some length the role of an appellate court in determining the voluntariness of a confession.

***Killebrew v. Endicott***, 992 F.2d 660 (7th Cir. 1993) Though it was harmless error, the state trial court erred in allowing the state to introduce a non-Mirandized statement. The officer “told” the defendant (who was in custody) that he wanted to know whether the defendant acted alone; and advised the defendant that any cooperation would be made known to the D.A. The defendant said he acted alone. The state argued that the officer did not “ask” the defendant anything; he merely “told” him what he was interested in. This was interrogation, nevertheless.

***Pope v. Zenon***, 69 F.3d 1018 (9th Cir. 1995) Prior to the time that the defendant was given his Miranda warnings, he was told about the incriminating evidence which the police already had against him. He promptly made an incriminating statement. The tactic of revealing incriminating evidence against the defendant amounted to interrogation. The statement made by the defendant at that time was not admissible. The officers then read the defendant his Miranda warning and he made additional incriminating statements. These statements, too, had to be suppressed. The initial statements represented the “beachhead” in interrogation parlance and, once that is achieved – that is, once the defendant makes the first admission – subsequent admissions are easier to obtain. See Missouri v. Seibert, 542 U.S. 600 (2004). The police are not allowed to use the tactic of using pre-advice interrogation to open up a suspect. Admitting the confession, however, was harmless error.

***United States v. Henley***, 984 F.2d 1040 (9th Cir. 1993) The defendant was stopped by police investigating a bank robbery. The police had reason to believe that the car in which the defendant was stopped was the car used in the robbery. The police asked the defendant whose car it was. The defendant responded that it was his car. This amounted to interrogation and did not qualify as “routine booking questions” in light of the officer’s knowledge about the car and his intent in asking the question – and his knowledge that the inquiry could lead to an incriminating response. Miranda warnings should have preceded this inquiry.

***United States v. Disla***, 805 F.2d 1340 (9th Cir. 1986) During questioning, the police asked the defendant what his address was. The officer knew at that point that a large quantity of cocaine had been found at an apartment and he was interrogating the defendant to find out if that was his apartment. The defendant's response should have been preceded by a Miranda warning and the responses were therefore suppressed.

***United States v. Ramsey***, 992 F.2d 301 (11th Cir. 1993) The defendant was arrested at the airport. He was brought to the DEA office and read his Miranda warnings by one of the arresting agents. He responded by turning his head away. This was, at least, an equivocal invocation of his right to remain silent and further questioning had to be preceded by an attempt to ascertain whether the defendant did, in fact, desire to remain silent. Nevertheless, within twenty minutes of this occurrence, other agents told the defendant about the length of the sentence he was facing, and the value cooperation would be at this time. This amounted to interrogation and in light of the equivocal request to remain silent, was improper. Admitting the subsequent statement into evidence was reversible error. This case probably did not survive the decision in Davis v. United States, 512 U.S. 452 (1994). See Coleman v. Singletary, 30 F.3d 1420 (11th Cir. 1994).

***Jacobs v. Singletary,*** 952 F.2d 1282 (11th Cir. 1992) After running a roadblock and having had her car shot at by police, the defendant crashed her car. When she emerged from the car, she was confronted by several officers with guns drawn. One officer asked her if she liked shooting at troopers. Her response ("We had to.") was inadmissible. The defendant was in custody at the time she exited the car and because the police did not Mirandize her, this was improper interrogation. The state's claim that the question was merely rhetorical and thus, not "interrogation," was not persuasive. "Assuming arguendo the question was rhetorical, if the accused is in custody, the police do not read the accused her rights and a question is asked and answered, then the statement must be suppressed."

***United States v. Gomez***, 927 F.2d 1530 (11th Cir. 1991) After his arrest, the defendant was advised of his Miranda rights and responded that he wanted to speak with an attorney. Following this request, an agent told the defendant that he should immediately discuss with his attorney the benefits of cooperating and that if he cooperated, he could get a sentence of less than life in prison. A few minutes later, the defendant – having not seen an attorney – gave a full statement. The agent's comments amounted to improper continued "interrogation" and the resulting confession should have been suppressed. "Interrogation" means "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

***CONFESSION (Public Safety Exception)***

***United States v. Simmons***, 661 F.3d 151 (2d Cir. 2011) The police went to the defendant's apartment, accompanied by his former roommate who told the police that the defendant had a gun. When the police entered the apartment, they asked the defendant about the presence of a gun, which the defendant acknowledged and then said that the gun was in his bedroom. This statement was within the public safey exception. However, the police then went into the bedroom. This was impermissible. There were no exigent circumstances that justified the warrantless search of the bedroom. There were no other occupants in the house and no other reason that the police could not have obtained a warrant to search the bedroom.

***United States v. Brathwaite***, 458 F.3d 376 (5th Cir. 2006) The public safety exception to Miranda – New York v. Quarles, 467 U.S. 649 (1984) -- did not apply in this case. The defendant was in handcuffs and the police had completed two sweep searches of the house and, therefore, there was no urgency to the interrogation regarding the location of guns in the house. See also United States v. Raborn, 872 F.2d 589 (5th Cir. 1989).

***CONFESSION (Psychiatric Examination)***

***Kansas v. Cheever***, 134 S. Ct. 596 (2013) The defendant provided notice that he would rely on a mental capacity defense. The court ordered that he submit to a psychiatric examination. At trial, the defendant introduced the testimony of an expert that the defendant was suffering from the effects of long-term voluntary intoxication. This opened the door to the state's introduction of the expert testimony of the state's expert on rebuttal.

***Powell v. Texas***, 492 U.S. 680 (1989) Neither the defendant nor his counsel was advised that psychiatric examinations which were to be performed were for the purpose of determining the issue of future dangerousness. There was no basis in the record to conclude that the defendant waived his Sixth Amendment right to counsel.

***Satterwhite v. Texas***, 486 U.S. 249 (1988) Following the defendant's arraignment, the state arranged for a psychiatrist to question the defendant. A notice was filed by the District Attorney and by the court but such notices were not served on the defendant's attorney and he was not aware of these documents having been filed. The Court holds that this violates the defendant's Sixth Amendment right to counsel. See Estelle v. Smith, 451 U.S. 454 (1981). The Court also held that a harmless error analysis can be applied, but that the error was not harmless in this case.

***Petrocelli v. Baker***, 869 F.3d 710 (9th Cir. 2017) The state trial occurred one year after Estelle v. Smith was decided and the psychiatric interview suffered from the same Fifth and Sixth Amendent violation, including interviewing the defendant in jail without notice to his attorney and without a Miranda warning.

***Gibbs v. Frank***, 387 F.3d 268 (3rd Cir. 2004) Prior to the defendant's first state trial, he advised that he was raising a mental health defense. He waived his Miranda rights and submitted to a court-ordered psychiatric examination. At his second trial (his first trial resulted in a conviction that was reversed), he did not raise a psychiatric defense. The state was not permitted to use statements he made during the psychiatric examination. Permitting the state to do so was grounds for granting a writ of habeas corpus. The court reviewed the relevant Supreme Court precedent: Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v.

Kentucky, 483 U.S. 402 (1987); Satterwhite v. Texas, 486 U.S. 249 (1988); Powell v. Texas, 492 U.S. 680 (1989); and Penry v. Johnson, 532 U.S. 782 (2001). A compelled psychiatric interview implicates Fifth and Sixth Amendment rights. The warnings must advise the defendant of the consequences of foregoing the right to remain silent. When the defendant initiates the interview, the Fifth Amendment privilege is waived to the extent that the state may use the results to rebut a psychiatric defense. In this case, the state did not establish that the waiver involved a clear explanation of the consequences of the interview (i.e., that it could be used in any subsequent trial, including one in which the defendant did not raise a psychiatric defense).

***Woods v. Johnson,*** 75 F.3d 1017 (5th Cir. 1996) It was error, but harmless, to permit a psychiatrist to testify as to future dangerousness, where the psychiatrist's examination of the defendant was conducted without notice to counsel, and without Miranda safeguards. Brown v. Butler, 876 F.2d 427 (5th Cir. 1989) The defendant was compelled to be interviewed by a forensic psychiatrist. Though the error was harmless, it was improper during the State's rebuttal to use the defendant's non-Mirandized statements to the psychiatrist.

***United States v. Wagner***, 834 F.2d 1474 (9th Cir. 1987) The trial court gave a consciousness of guilt instruction based on the defendant's refusal to submit to a psychiatric examination. Though error, the court holds that it was not plain error and the defendant's failure to object constitutes a waiver of the error.

***Delguidice v. Singletary***, 84 F.3d 1359 (11th Cir. 1996) The defendant had two pending charges and two attorneys. When the defendant was ordered to submit to an examination with regard to one of the cases, neither lawyer was informed that the psychiatrist would examine the defendant with regard to both cases. Admitting the psychiatrist's testimony in the second case was reversible error.

***CONFESSION (Right To Counsel)***

***Montejo v. Louisiana***, 129 S. Ct. 2079 (2009) For 22 years, since the decision in Michigan v. Jackson, 475 U.S. 625 (1986), the law has been that once a defendant has been indicted and an attorney has been requested at arraignment, the police may not initiate questioning of the defendant. That is, the indictment and request for counsel at arraignment was, in the Sixth Amendment context, the same as a defendant invoking his right to the assistance of counsel after being advised of his Miranda rights in the Fifth Amendment context. Police-initiated questioning is not permitted after a defendant invokes his right to counsel in either context, even if the defendant waives his right to counsel after the police improperly initiate the questioning. In this decision, however, the United States Supreme Court overruled Michigan v. Jackson. Noting that requesting an attorney at arraignment is not the same as requesting an attorney during interrogation, the Court concluded that the police should be permitted to initiate questioning even after a defendant has requested the assistance of counsel in court. The defendant, of course, is free to refuse to be interviewed and once he refuses a request to be interviewed, further police-initiated questioning is generally barred (especially, of course, if the defendant is in custody).

***Maryland v. Shatzer***, 130 S. Ct. 1213 (2010) In Edwards v. Arizona, the Court held that once the defendant invokes the right to counsel during custodial interrogation, the police must cease interrogation and can never reinitiate interrogation. The question in this case is whether the "never can re-initiate questioning" rule applies even if the defendant is released from custody? The Court holds that once the defendant is released from custody (and that includes being returned to general population in prison, which is not "in custody" for Miranda purposes), the police may re-initiate questioning after fourteen days. In other words, if the defendant invokes his right to counsel and is later released from custody, the police must wait at least fourteen days prior to contacting the defendant and interrogating him.

***Fellers v. United States***, 540 U.S. 519 (2004) When a defendant has been indicted, the Sixth Amendment forbids the use of any statement that has been "deliberately elicited" from him by the police. In this case, the defendant had been indicted and the police went to his house and told him that they were there to discuss his involvement in a drug distribution conspiracy. The defendant responded in an incriminating way. The Supreme Court held that the statement was inadmissible because the statement was deliberately elicited by the police. The Court held that "deliberately elicited" is different than the "interrogation" standard of Rhode Island v. Innis, 446 U.S. 291 (1980).

***Davis v. United States***, 512 U.S. 452 (1994) After initially waiving his right to counsel and interrogation commenced, the defendant stated, "Maybe I should talk to a lawyer." The Military appellate court held that clarifying questions by the interrogators were appropriate, and that it was not necessary to cease all questioning. The Supreme Court holds that absent a clear invocation of the right to counsel, there is no reason to cease questioning. While asking clarifying questions after an ambiguous request may be prudent, it is not necessary. Thus, if a suspect says, "Maybe I should talk to a lawyer," the police may continue questioning without clarifying the suspect's intent.

***McNeil v. Wisconsin***, 501 U.S. 171 (1991) The defendant was charged with one offense, robbery, and at his first appearance, requested the assistance of counsel. An attorney was appointed. This did not prohibit the police from questioning the defendant about uncharged crimes. Under Edwards v. Arizona, of course, once an accused seeks the assistance of counsel in connection with interrogation – a Fifth Amendment right – the suspect may not be interrogated about any offense without complying with his request for counsel. However, where the defendant asserts his right to counsel in connection with a legal proceeding – that is, his Sixth Amendment right to counsel – this is an "offense-specific" request which does not prevent interrogation on unrelated charges.

***Texas v. Cobb***, 532 U.S. 162 (2001) There is no exception to the "offense-specific" rule for closely related, or factually related crimes. Thus, if a defendant has counsel in connection with one charged offense, the police may question the defendant, or

initiate questioning about another offense, even if the other offense is factually related to the charged offense for which the defendant has counsel.

***Minnick v. Mississippi***, 498 U.S. 146 (1990) Surprisingly, the bright line of Edwards v. Arizona was neither bent nor curved in this Supreme Court decision which holds that once an accused requests the assistance of counsel, he cannot be further questioned by the police even if an interview with his attorney has occurred. That is, even if the defendant's right to counsel is honored and he begins communications with an attorney, the police are thereafter still precluded from attempting to initiate communications with the defendant.

***Illinois v. Perkins***, 496 U.S. 292 (1990) The defendant was in jail on charges unrelated to a murder which the police were investigating. The police put an undercover agent in the jail cell block who elicited a confession from the defendant about the murder. The confession was admissible. His right to remain silent and his right to counsel were not violated. Because the essential ingredients of a "police dominated atmosphere" were missing, there was no need for the undercover agent to advise the defendant of his Miranda rights. The atmosphere in the prison was not coercive, at least not with respect to the undercover agent's conversation with the defendant. The Sixth Amendment was not implicated, because no murder charges had been filed against the defendant at the time of the "interrogation." Thus, the decisions in Massiah and United States v. Henry and Maine v. Moulton are all distinguishable. In those cases, the undercover agent questioned the defendant about the charges which had already been filed against the defendant, and for which his Sixth Amendment rights had attached. Michigan v. Harvey, 494 U.S. 344 (1990) In Michigan v. Jackson, 475 U.S. 625 (1986), the Supreme Court held that the Sixth Amendment bars the police from initiating any interrogation of a defendant who has been formally charged and who has requested the right to counsel. In this case the Supreme Court holds that a violation of this rule does not bar the use of the subsequently obtained statements to impeach the defendant. That is, though the statements may not be used in the State's case-in- chief, the statements may be used to impeach the defendant if he testifies contrary to his statements.

***Duckworth v. Eagan***, 492 U.S. 195 (1989) Advising a suspect that an attorney would be appointed "if and when you go to court" complies with Miranda. That advice correctly reflects the State's procedure for appointment of counsel which occurs after the defendant's first court appearance.

***Patterson v. Illinois***, 487 U.S. 285 (1988) Following the defendant's indictment on murder charges, he gave two confessions after being advised of his Miranda warnings and waiving those rights. At trial, the defendant claimed that, because his right to counsel had been triggered by the indictment, the Miranda warnings were not sufficient to protect his Sixth Amendment rights. The Supreme Court disagrees. A waiver of the right to remain silent and the right to counsel may be knowingly made by a defendant even after indictment.

***Arizona v. Roberson***, 486 U.S. 675 (1988) The defendant was arrested on charges of burglary. He immediately invoked his right to counsel, thereby shutting off any further interrogation. Three days later, another police officer, unaware of the invocation of the right to counsel, asked the defendant if he would discuss a separate burglary with him. The defendant gave an incriminating statement about that separate burglary. The Supreme Court reverses: Once the defendant has invoked his right to remain silent, he cannot be questioned about any crime. That includes the crime for which he was arrested and all other crimes which the police may want to investigate.

***Hendrix v. Palmer***, --- F.3d --- (6th Cir. 2018) After he was arrestd, the defendant invoked his right to counsel. Interrogation stopped, but two days later, the police went back to him and questioned him some more and he made statement that were used against him at trial. The Sixth Circuit granted the writ.

***Rodriguez v. McDonald***, 872 F.3d 908 (9th Cir. 2017) The state trial court clearly erred in holding that the police scrupulously honored the defendant's request for counsel. Rather than honoring the request, the police continued the interrogation and obtained additional incriminating information from the defendant. After invoking the right to counsel, the police reminded the defendant, who was 14 years old that they would let the prosecutor know of any cooperation he provided an otherwise played on his youth and immaturity to induce him to waive his right to counsel and to answer more questions.

***Grueninger v. Dir., Virginia Dept. of Corrections,*** 813 F.3d 517 (4th Cir. 2016) The defendant was questioned by the police after he was arrested and he promptly said, "These are felonies, I need an attorney." The police immediately stopped the questioning, but came back a few days later, initiated further discussions when additional warrants were served during which the defendant confessed to having had sexual contact with his minor daughter. The Fourth Circuit held that this was a violation of Edwards v. Arizona, and trial counsel's failure to file a motion to suppress the confession was deficient performance that required setting aside the conviction.

***Mays v. Clark***, 807 F.3d 968 (9th Cir. 2015) Though not satisfying the AEDPA standard for granting a writ, the facts of this case demonstrated a failure to honor a suspect's invocation of the right to counsel. During interrogation, the defendant requested that he wanted to call his stepdad "and have my lawyer come down here." This was not ambiguous, and questioning should have stopped at that point.

***United States v. Hunter***, 708 F.3d 938 (7th Cir. 2013) The defendant was shot by the police and was in the hospital, handcuffed to a gurney. The officer who was sitting with him started talking to him and then read him his Miranda warnings. The defendant responded, "Can you call my lawyer?" The Seventh Circuit concludes that this request amounted to an unambiguous request for counsel and any further interrogation should have immediately ceased.

***United States v. Santistevan***, 701 F.3d 1289 (10th Cir. 2012) The defendant was in custody, having been arrested for armed robbery. When initially Miranized, he invoked his right to counsel. Later he called the FBI agent and told him he wanted to discuss the matter. However, before the agent arrived at the jail, he was contacted by the defendant's lawyer who said that the defendant did not want to talk at this time and that the defendant had a letter expressly invoking the right to counsel at any interrogation. When the agent arrived at the jail, the defendant handed the letter to the agent. The agent then asked the defendant if he wanted to talk to him; the defendant said that he did and then made incriminating statements. The Tenth Circuit held that his was improper interrogation that violated Edwards v. Arizona. Once the letter invoking the right to counsel was handed to the agent, any further interrogation, or attempt to initiate questioning was improper. There was no ambiguity in the letter.

***Moore v. Berghuis***, 700 F.3d 882 (6th Cir. 2012) After his arrest, the defendant was placed in an interrogation room. When the police started to interrogate him, he gave the officer an attorney's business card and asked the officer to call the attorney, commenting, "Maybe I should talk to an attorney." The officer did so, but just connected to an answering machine. The officer returned to the interrogation room and asked the defendant if he wanted to continue and make a statement, which the defendant agreed to do. The Sixth Circuit held that providing the attorney's business card was a sufficient invocation of the right to counsel and the officer re-initiation of interrogation was improper. Though Thompkins v. Berghuis held that the invocation of the right to remain silent must be unequivocal, that did not alter the rule that once counsel had been invoked, as in this case, a subsequent waiver may not be initiated by the police. See Edwards v. Arizona. The ensuing confession should have been suppressed and the writ of habeas corpus was granted.

***United States v. Wysinger***, 683 F.3d 784 (7th Cir. 2012) The defendant's invocation of the right to counsel was not ambiguous and the failure to cease interrogation necessitated suppressing the statements made after he sought the assistance of counsel.

***United States v. Scott***, 693 F.3d 715 (6th Cir. 2012) The defendant was presented with a Miranda waiver of rights form. The second to last question was, "Do you understand the rights I've explained to you?" The last question was, "Having these rights in mind, do you wish to talk to us now?" The defendant answered "yes" to the first question and "no" to the second question. The government contended that the "no" answer only applied to his decision to remain silent, and not necessarily to his right to counsel. If he only invoked his right to remain silent, the police could re-initiate questioning later. If he invoked his right to counsel, however, the police could never re-initiate questioning. The Sixth Circuit held that any ambiguity in the form was held against the government.

***Sessoms v. Runnels***, 691 F.3d 1054 (9th Cir. 2012) (en banc) After receiving Miranda warnings, in order to invoke the prohibition of further questioning required by Edwards v. Arizona, the defendant's invocation of the right to an attorney must be unambiguous.

***Davis v. United States***, 512 U.S. 452 (1994). What happens, however, if the defendant invokes his right to counsel in an ambiguous manner before he is read his Miranda rights? In this en banc decision, the Ninth Circuit holds that questioning must stop. The rationale is that an effort to obtain the assistance of counsel prior to being read Miranda warnings must be honored even if the request is not clear, because the target may not fully understand his rights at that point in time; whereas after having been informed of his rights, the defendant's rights should be clear to him and therefore, his invocation must be unambiguous. After remand from the United States Supreme Court (for further consideration in light of Salinas v. Texas, 133 S. Ct. 2174 (2013)), the en banc court concluded that the invocation of the request for counsel was, in fact, unambiguous, and therefore any further questioning was improper.

***Sessoms v. Grounds***, 776 F.3d 615 (9th Cir. 2015) (en banc). The defendant asked, "There wouldn't be any possible way that I could have a – a lawyer present while we do this?" and then "Yeah, that's what my dad asked me to ask you guys – uh, give me a lawyer." There was nothing ambiguous about this request.

***Wood v. Ercole***, 644 F.3d 83 (2d Cir. 2011) When the police said that they wanted to tape the defendant's statement, he said, "I think I should get a lawyer." This was an unambiguous request for counsel and any further interrogation was improper.

***Dixon v. Houk***, 627 F.3d 553 (6th Cir. 2010) When initially questioned, the defendant stated that he would not answer questions without a lawyer. The police approached the defendant a second time, did not Mirandize him and offered to "cut him a deal" after which the defendant made an incriminating statement. He was the Mirandized and repeated the incriminating statement. The statement was inadmissible because it was obtained in violation of Miranda, it violated his right to counsel, it was not "voluntary" (because of the offer of a deal) and violated Seibert. The Supreme Court Reversed, holding that the two-step Siebert type of interrogation was not employed by the police in: BOBBY v. DIXON, --- S. Ct. --- 10-1540 (11/7/11).

***Ayers v. Hudson***, 623 F.3d 301 (6th Cir. 2010) When the police place an informant in a cell with a defendant and the defendant confesses to the informant, this presents a Massiah or United States v. Henry issue, which involves a violation of the defendant's Sixth Amendment right to counsel through the use of an "agent" of the state. Massiah v. Uninted States, 377 U.S. 201 (1964); United States v. Henry, 447 U.S. 264 (1980). The question in this case was what makes the informant an "agent of the state?" The Sixth Circuit held that a violation of the Sixth Amendment does not require proof that the police expressly directed the informant to question the defendant. In fact, a Sixth Amendment violation can occur even when the police specifically instruct the informant not to initiate any conversation with the defendant regarding the offense with which the defendant has been indicted. The focus of the court's analysis must be on the likely result of the state's conduct. The facts of this case showed that the detectives may have actually provided to the informant certain topics about which the police needed more information. The Sixth Circuit granted a writ.

***Tolliver v. Sheets***, 594 F.3d 900 (6th Cir. 2010) During the course of the interrogation of the defendant, he announced that he did not want to talk anymore prior to seeing a lawyer. The police continued the interrogation despite this clear invocation of his right to counsel. Admitting the ensuing incriminating statements (some of which were introduced to show the defendant's lack of credibility, even though the statements were not explicitly incriminating), was error. Harmless error.

***United States v. Mir***, 525 F.3d 351 (4th Cir. 2008) The defendant, an attorney, was charged with certain offenses relating to immigration fraud. While the case was pending, the government learned that he was trying to induce certain witnesses to lie to the grand jury and to the prosecutors. The government wired these witnesses and sent them in to talk to the defendant. Though the defendant was indicted for the immigration fraud offense, the investigation was for a separate offense (witness tampering and obstruction of justice), therefore, communication with the defendant was not barred by the Sixth Amendment under the Texas v. Cobb, rule. The court noted that if the defendant had requested that portions of the undercover tapes be redacted, a severance might have been appropriate to delete any references to the underlying fraud offense.

***United States v. Lee***, 413 F.3d 622 (7th Cir. 2005) After having the Miranda rights read to him, the defendant asked, "Can I have a lawyer?" This was an unambiguous request for counsel and any further interrogation or effort to clarify was improper. United States v. Mills, 412 F.3d 325 (2d Cir. 2005) In Texas v. Cobb, 532 U.S. 162 (2001), the Supreme Court held that the "offense specific" feature of the Sixth Amendment means that if a defendant's Sixth Amendment rights are invoked with regard to one offense, that invocation has no bearing on related, but different offenses. In this case, however, the defendant had been indicted in state court on firearm charges and was improperly questioned in violation of the Sixth Amendment. But the feds argued that they could use the statements, because the subsequent federal charges – virtually indistinguishable federal firearms charges – were not the same offense. The Second Circuit held hat Texas v. Cobb notwithstanding, the improper state interrogation for the firearms charge could not be utilized by the federal government in a prosecution for the same firearm possession. The Fourth Circuit reached a contrary result (as have numerous other courts) in United States v. Alvarado, 440 F.3d 191 (4th Cir. 2006).

***United States v. Johnson***, 400 F.3d 187 (4th Cir. 2005) After being advised of his Miranda rights, the defendant was given a written waiver form which had the following question: "Do you want to make a statement at this time without a lawyer?" The defendant responded "No." The government argued that this amounted to an invocation of the right to remain silent (after which the police were entitled to renew questioning with further advice of rights), as opposed to an invocation of the right to counsel, which bars any further questioning at any time. The Fourth Circuit rejected the government's argument, holding that this was not an equivocal request and that any ambiguity in the form was the fault of the government, which drafted the form. Admitting the subsequent statement of the defendant was harmless error.

***Guidry v. Dretke,*** 397 F.3d 306 (5th Cir. 2005) The defendant invoked his right to counsel and the police then left the room. Shortly thereafter they returned and told the defendant that his attorney told them it was ok for him to make a statement. Actually, the police never contacted the attorney. The ensuing confession should have been suppressed.

***United States v. Johnson***, 400 F.3d 187 (4th Cir. 2005) A form was given to the defendant after he was arrested and he checked the "no" box next to the question, "Do you want to make a statement at this time without a lawyer?" This amounted to a request for counsel and subsequent interrogation violated the rule of Edwards v. Arizona, which bars any questioning after the invocation of the right to counsel. The checked box was not limited to the issue of right to remain silent, because of the explicit reference to the right to counsel. If the defendant had only invoked his right to remain silent (as opposed to the additional right to counsel), subsequent questioning would have been permitted).

***Abela v. Martin***, 380 F.3d 915 (6th Cir. 2004) When initially questioned by the police, the defendant stated, "Maybe I should talk to a lawyer," and then displayed his lawyer's card and mentioned him by name. This is an unequivocal request for counsel and further questioning should not have occurred. The court distinguished the seminal case on equivocal requests, Davis v. United States, 512 U.S. 452 (1994), because in that case, the question, "Maybe I should talk to a lawyer" was too nonspecific and did not relate to a specific lawyer. The fact that the officer left the room and then returned and read Miranda warnings to the defendant did not cure the problem, because pursuant to Edwards v. Arizona, 451 U.S. 477 (1981), the police may not re-initiate interrogation of a suspect after the suspect has requested the assistance of counsel.

***Randolph v. California***, 380 F.3d 1133 (9th Cir. 2004) Although the facts were not clearly established in the lower court, one interpretation of the facts indicated that the police returned a jailhouse informant to a jail cell in which the defendant was housed. The police knew the informant was seeking leniency in his case and that the informant had made specific reference to the fact that he was housed with the defendant. No specific promise was made to him, however, and there was no deal in place. Sure enough, the informant testified at defendant's trial about statements made by the defendant after the informant was returned to the jail. This interpretation would amount to a Messiah violation. Placing the informant back in the jail, knowing that he was going to attempt to obtain statements from the defendant in exchange for leniency in his own case amounted to "specifically eliciting" statements from the defendant in violation of his Sixth Amendment rights. Because the timing of the initial meeting with the police was not clear, however, a remand for better development of the facts was required.

***Hart v. Florida Attorney General***, 323 F.3d 884 (11th Cir. 2003) After waiving his Miranda rights, the defendant asked to speak with a detective with whom he was acquainted. He asked the detective about the pros and cons of having an attorney. The detective told him that the "con" was that the attorney would tell him not to answer the police officer's questions. The detective also told the defendant that honesty wouldn't hurt him." The defendant then confessed. The Eleventh Circuit held that the

detective's statements violated Miranda. Honesty could, in fact, hurt the defendant, and the statement discouraging the use of a lawyer was inappropriate. Both statements contradicted the protection of Miranda.

***Ghent v. Woodford***, 279 F.3d 1121 (9th Cir. 2002) The continued questioning of the defendant after he requested the assistance of counsel was error. Suggesting, moreover, that the defendant talk to a psychiatrist was error, after the defendant invoked his right to counsel. The use of the defendant's post-invocation statements was reversible error at the penalty phase of his death penalty trial.

***United States v. Abdi***, 142 F.3d 566 (2d Cir. 1998) Following defendant's arraignment on drug importation charges, he gave a statement to an INS agent. The government sought to introduce this statement (characterizing it as "impeachment") to prove that the defendant understood English. The defendant had already retained counsel at the time of this interview and had not waived his right to counsel. Because there was no waiver of the right to counsel, this statement was not even admissible as impeachment. See United States v. Spencer, 955 F.2d 814 (2d Cir. 1992) (Michigan v. Harvey limited Michigan v. Jackson, by holding that a statement obtained during police-initiated questioning after a request for counsel, while violative of Sixth Amendment prophylactic standards, may be admissible to impeach a defendant on cross-examination if given after a knowing and voluntary waiver of his right to counsel). Absent such a waiver, the statement would be inadmissible even for impeachment purposes.

***United States v. Bender***, 221 F.3d 265 (1st Cir. 2000) While awaiting trial on charges of possession of a firearm by a convicted felon, the defendant told some of cellmates that he planned to fabricate an alibi and possibly murder government witnesses. His cellmates reported the plans to the authorities and an undercover agent went to the jail, posing as an "alibi-for-hire." The agent did not discuss the present charges (i.e., the possession of the firearm), but did talk about the plans to fabricate an alibi and to hire a hit man. The trial court suppressed the statements on the grounds that the interrogation of an indicted defendant violated his sixth amendment rights.

***Maine v. Moulton***, 474 U.S. 159 (1985). The First Circuit affirmed. The government argued that the statements related to a future crime (suborning perjury and murder) not the indicted offense. The First Circuit disagreed: the statements were plainly incriminating as to the charged offense. The government is free to use the statements in a subsequent prosecution for suborning perjury, or attempted murder; but the statements are not admissible in the felon in possession case.

***United States v. Browne***, 891 F.2d 389 (1st Cir. 1989) Law enforcement agents failed to honor the defendant's request to consult with a lawyer prior to the continuation of interrogation. All subsequent statements violated the rule of Edwards v. Arizona and should have been suppressed at trial.

***United States v. Szymaniak***, 934 F.2d 434 (2d Cir. 1991) Defendant requested to have counsel present before answering any questions. Specifically, the defendant stated, "I'm in a lot of trouble and I want to speak to my lawyer." At trial, the government was permitted to introduce this statement. This was reversible error.

***United States v. Hammad***, 846 F.2d 854 (2d Cir. 1988) The Assistant United States Attorney encouraged an informant to question a suspect who the prosecutor knew was represented by an attorney. No prosecution had yet been commenced, so there was no Massiah problem. Nevertheless, the Second Circuit holds that this conduct violates DR7- 104(A)(1) which prohibits a lawyer from communicating with a "party" he or she knows to be represented by counsel regarding the subject matter of that representation. The Second Circuit holds that in many circumstances, the exclusion of evidence would be a permissible sanction, but that in this case, because the law was previously unsettled, suppression would be an inappropriate remedy. In a revised opinion, 858 F.2d 834, the court added this caveat: In those rare cases where a career criminal has retained "house counsel" the prosecutor is "authorized by law" to employ certain investigative techniques despite the defendant's having retained an attorney.

***United States v. Arnold***, 106 F.3d 37 (3rd Cir. 1997) The Sixth Amendment right to counsel is offense specific. Thus, generally, if a person has been indicted for one offense and is represented by counsel, the police may not question the defendant about that offense but may initiate questioning of the defendant with regard to another, uncharged offense. In this case, however, the defendant was indicted for witness intimidation and the police-initiated questioning on the subject of attempted murder (of the same witness). The court held that these offenses were "closely related" and the Sixth Amendment barred this questioning. That is, the Sixth Amendment prohibits questioning an indicted defendant about the charged offense, or any "closely related" charge. This Decision was overruled by Texas v. Cobb, 532 U.S. 162 (2001).

***Wilson v. Murray***, 806 F.2d 1232 (4th Cir. 1986) At the time of his arrest, the defendant refused to answer any questions and sought the advice of counsel. He renewed his request for counsel at the time of his arraignment. Nevertheless, shortly after the arraignment, police confronted the defendant with a co-defendant who had confessed. When confronted with his co-defendant, the defendant made statements which were incriminating. The Fourth Circuit ruled these statements inadmissible under Edwards v. Arizona, and Michigan v. Jackson, (request for attorney at arraignment foreclosed further questioning).

***United States v. Rodriguez***, 993 F.2d 1170 (5th Cir. 1993) Defendant and several others were arrested on state drug charges. An attorney was appointed at arraignment to represent the defendant. Later, one of several co-conspirators contacted a federal agent and said "they" wanted to talk to him. The federal agent interviewed the defendant who made a statement. This interview was "initiated" by the police under the Edwards v. Arizona standard because the defendant did not initiate the interview. His statement should have been suppressed and his conviction was therefore reversed.

***United States v. Cannon***, 981 F.2d 785 (5th Cir. 1993) Though the record needed further development, the defendant offered sufficient proof that after he requested the assistance of counsel, the agents renewed questioning of him. After making an incriminating statement to one agent, he later made a statement to another agent after being advised of his Miranda rights again. Nevertheless, if the first statement was Edwards tainted, then the second statement would also be tainted as the fruit of the first statement.

***United States v. Johnson***, 954 F.2d 1015 (5th Cir. 1992) The defendant was aware that one of his co-defendants had announced his intention to enter a guilty plea. After the co-defendant entered into the plea, he was wired by IRS agents, and he went to the defendant's home and taped him – eliciting incriminating responses. This "interrogation" violated Massiah and Maine v. Mouton. Though the defendant was aware that the co-defendant had entered a plea, he did not know that he was being questioned, in essence, by the police, in the absence of his lawyer.

***Davis v. Puckett***, 857 F.2d 1035 (5th Cir. 1988) While in the custody of a sheriff, the defendant unequivocally requested the services of an attorney. Counsel failed to appear, and the sheriff initiated another round of interrogation. Although the defendant was fully advised of his rights and signed the waiver of those rights, the police-initiated questioning was improper requiring the suppression of the statement. However, because of a procedural default, the issue was waived.

***United States v. Wolf,*** 879 F.2d 1320 (6th Cir. 1989) The defendant, in state custody awaiting trial on unrelated charges, was questioned by federal agents about a murder. The defendant had sought the assistance of counsel at her state court arraignment. The questioning by federal agents was improper and the statement was not admissible. The court held that the defendant's request for counsel at the arraignment was the equivalent of asking for counsel for Miranda purposes and, pursuant to Arizona v. Roberson, the police could not initiate questioning about any crime, once the defendant seeks an attorney for Miranda purposes. This decision would probably be different post-McNeil v. Wisconsin, 501 U.S. 171 (1991).

***Espinoza v. Fairman***, 813 F.2d 117 (7th Cir. 1987) At the time of his arraignment on weapons charges, the defendant accepted the appointment of a public defender. Subsequently, police questioned him about an unrelated murder charge. The Seventh Circuit holds that this is improper. Once the defendant has an attorney at arraignment, he cannot be questioned about related crimes. This constitutes a violation of Edwards v. Arizona. This decision did not survive McNeil v. Wisconsin, 501 U.S. 171 (1991).

***Pope v. Zenon***, 69 F.3d 1018 (9th Cir. 1995) During interrogation, the defendant asked about one of the clauses of the Miranda waiver form, which provided that he had the right to have the advice of counsel before questioning. The officer responded that he could not have a lawyer until tomorrow. The questioning then continued. This was impermissible. The defendant has the right to the assistance of counsel before questioning continues, not "tomorrow." Admitting the confession, however, was harmless error.

***United States v. Cheely***, 36 F.3d 1439 (9th Cir. 1994) The defendant was in prison but was being investigated for a mail bomb murder. Postal inspectors read him his Miranda rights and he declined to sign a waiver, explaining, "My attorney would not want me to talk with you." The officers responded, "With that in mind, would you still want to talk to us?" The defendant said he would speak. This was improper interrogation. Once the defendant made the statement about his attorney, further questioning should have ceased. The court re-affirmed its ruling after reconsideration in light ofDavis v. United States, 114 S.Ct. 2350 (1994).

***United States v. de la Jara,*** 973 F.2d 746 (9th Cir. 1992) Though there was some ambiguity to the defendant's request for counsel (made in Spanish), the officer apparently understood the defendant to be asking for a lawyer and thus, the interrogation should have ceased.

***United States v. Martinez***, 972 F.2d 1100 (9th Cir. 1992) The defendant was arrested on a state weapon charge, and at arraignment requested the assistance of counsel. The state charges were subsequently dropped, but the defendant was held in jail on the basis of a parole violation. Later, the federal grand jury indicted the defendant for possessing the same weapon which gave rise to the state charge. He was approached by federal law enforcement agents, Mirandized, and made incriminating statements. In Michigan v. Jackson, the Supreme Court held that once a defendant has been indicted and exercises his Sixth Amendment right to counsel, he cannot be re-interrogated. However, in McNeil v. Wisconsin, the Court held that this right was "offense-specific"; that is, the police may interrogate the defendant about offenses other than those for which the Sixth Amendment applied, the offense set forth in the indictment. Here, the question is whether McNeil applies to the same "conduct" (possessing the weapon), or the same offense (state charges vs. federal charges). The Ninth Circuit holds that the request for counsel in connection with the offense conduct does not necessarily trigger the absolute bar of Michigan v. Jackson, but McNeil v. Wisconsin does not clearly authorize the interrogation in this case. If both charges were pending at the same time, then the question is simply whether the prosecutions were inextricably intertwined. Here, however, the charges in the state system had been dismissed prior to the federal indictment. In that situation, the question is whether the governments cooperated in a manner designed to circumvent the Sixth Amendment. A remand for further fact-finding was required.

***United States v. Lucas,*** 963 F.2d 243 (9th Cir. 1992) Defendant was arrested on an auto theft charge and, when read his Miranda rights, requested the assistance of counsel. Shortly thereafter, the FBI arrived to question the defendant about his participation in a recent bank robbery. Defendant waived his rights and confessed. The confession should have been suppressed. Re-interrogation was not permissible after the invocation of the right to counsel. The fact that it was different officers, asking about a different case, is inconsequential. Arizona v. Roberson.

***Collazo v. Estelle,*** 940 F.2d 411 (9th Cir. 1991) When he was first interrogated the defendant requested the assistance of counsel. The police responded that that would make it worse for him, and then left. Three hours later, the defendant initiated

further contact and then confessed. This amounted to an involuntary waiver of Miranda rights and the confession should not have been admitted. Not only did the police misconduct amount to a Miranda violation, but it also rendered the confession involuntary since it suggested that the failure to confess right then would have severe consequences. The lapse in time between the officer's "threat" and the defendant's re-initiation of contact did not cure the error. The defendant's communication with the police reflected his fear of what would happen if he didn't: a fear engendered by the police officer's threat. Even under Arizona v. Fulminante, the coerced confession was grounds for reversal.

***Robinson v. Borg***, 918 F.2d 1387 (9th Cir. 1990) Upon being interrogated, the defendant told the police officers, "I have to get me a good lawyer, man." This constitutes an unambiguous request for an attorney and all further questioning should have immediately ceased.

***United States v. Kimball***, 884 F.2d 1274 (9th Cir. 1989) The defendant was in custody on money laundering charges. Informants were sent to the jail and asked the defendant to help them recover money which was owed to them. The court held that not only the suppression of the defendant's statements to the informant and other agents was necessary, but evidence derived from those statements, including statements of coconspirators would also be suppressed. It is enough that absent the unconstitutional jailhouse encounter, the co-conspirator probably would not have continued to deal with the agents.

***Smith v. Endell,*** 860 F.2d 1528 (9th Cir. 1988) The defendant was arrested on drug charges and waived his Miranda rights and began providing information to the police. The interrogation turned to the issue of an unresolved murder and the defendant stated if he was a suspect in that, he would like to talk to a lawyer. The officer stated that he might be a suspect but failed to terminate questioning at that point. Suppression of the ensuing confession was required.

***United States v. Nordling***, 804 F.2d 1466 (9th Cir. 1986) A detainee stated that he wanted to speak with his lawyer. This is sufficient to invoke his right to remain silent and subsequent questioning by a narcotics officer was improper and resulting statements were suppressed.

***United States v. March***, 999 F.2d 456 (10th Cir. 1993) The defendant interrupted questioning with the inquiry, "Do you think I need an attorney?" This amounted to an ambiguous request for counsel which required the cessation of all substantive questioning. The police properly told the defendant that the "call was his" and that they would ask no further questions if he wanted to speak with an attorney. Thereafter the defendant agreed to be questioned.

***United States v. Kelsey***, 951 F.2d 1196 (10th Cir. 1991) During the course of a search of the defendant's house, but before he had the Miranda rights read to him, the defendant requested to see his lawyer. Thereafter, he was Mirandized and questioned. He made incriminating statements. The statements should have been suppressed. The fact that the request for counsel preceded the reading of the Miranda rights did not avoid the bright line rule of Edwards v. Arizona. Also, the fact that the interrogating officers were different than the officers to whom the defendant made his request for counsel is not consequential. Once a request for counsel is made, knowledge of that request is imputed to all law enforcement officers.

***United States v. Mitcheltree***, 940 F.2d 1329 (10th Cir. 1991) Defendant, after being released on bond, contacted her friend and hairstylist about her pending prosecution. She knew her friend was a potential witness. Her friend, unbeknownst to her, was bugging her. The method by which the hairdresser questioned the defendant and led her to certain topics was a violation of Massiah and Maine v. Moulton and United States v. Henry. The government's argument that they were investigating witness tampering would be meritorious (Illinois v. Perkins), except for the fact that the informant was clearly working at obtaining incriminating admissions about the pending indictment. Finally, the court concludes that the statements were not admissible even in the witness tampering counts: "When a deliberate Sixth Amendment violation occurs concerning pending charges, the government may not use defendant's uncounseled incriminating statements at a trial of those or very closely related subsequent charges." This case contains an encyclopedia of case law on the issues presented.

***Parker v. Singletary,*** 974 F.2d 1562 (11th Cir. 1992) Shortly after the defendant's arrest, he was brought to the DA's office. He refused to talk. He was later brought to the jail where he told a magistrate that he was going to hire an attorney. Later, the public defender's office informed the sheriff that they represented the defendant. A student intern from the P.D.'s office was sent over to meet with the defendant. The defendant insisted on hiring his own lawyer, however. Nevertheless, the defendant, in the presence of the intern from the P.D.'s office, made a full statement to the sheriff. During the course of the statement, the defendant repeatedly stated that he was still interested in having his mother hire a lawyer for him. Even though the intern was present, this confession was taken in violation of the defendant's right to have counsel present. At a minimum, defendant's persistent requests to have his own attorney present amounted to an equivocal request for counsel.

***Stokes v. Singletary,*** 952 F.2d 1567 (11th Cir. 1992) Immediately after being arraigned and having an attorney appointed to represent him, the defendant was brought to an interrogation room and questioned about his participation in a murder. In a lengthy opinion reviewing the standards for evaluating this type of claim in a habeas proceeding, the court holds that a further evidentiary hearing was necessary to determine whether the state violated defendant's Sixth Amendment right to counsel.

***Cannady v. Dugger***, 931 F.2d 752 (11th Cir. 1991) The defendant stated, "I think I should call my lawyer." After balking at making a phone call the defendant was asked by the police, "Would you like to talk about it?" This was improper interrogation and was not a request for clarification of an ambiguous request for counsel.

***United States v. Gomez,*** 927 F.2d 1530 (11th Cir. 1991) After his arrest, the defendant was advised of his Miranda rights and responded that he wanted to speak with an attorney. Following this request, an agent told the defendant that he should immediately discuss with his attorney the benefits of cooperating and that if he cooperated, he could get a sentence of less than

life in prison. A few minutes later, the defendant – having not seen an attorney – gave a full statement. The agent's comments amounted to improper continued "interrogation" and the resulting confession should have been suppressed.

***United States v. Terzado-Madruga***, 897 F.2d 1099 (11th Cir. 1990) After arresting the defendant, the police arranged to have a former colleague of his make a number of taped phone conversations while the defendant remained in jail. The defendant was taped in his efforts to enlist his former colleague in murdering another individual. This violated the defendant's Sixth Amendment rights. Massiah v. United States, 377 U.S. 201 (1964); United States v. Henry, 447 U.S. 264 (1980); Maine v. Moulton, 474 U.S. 159 (1985). However, evidence of the defendant's murder for hire plot was not introduced in his drug trial which was the subject of this appeal; the severance of counts and the exclusion of the statements rendered the Sixth Amendment violation moot with regard to this prosecution. The court goes on to hold, however, that the incriminating statements with regard to the murder-for-hire scheme would be admissible in that trial since his Sixth Amendment right to counsel had not yet attached with regard to that offense.

***Cervi v. Kemp,*** 855 F.2d 702 (11th Cir. 1988) The defendant was arrested and brought before a magistrate for an initial court appearance at which time he requested the services of an attorney. The defendant was subsequently moved to Georgia where he was interrogated without being furnished the services of an attorney. The defendant's invocation of his right to an attorney barred all further counselless questioning unless initiated by the defendant himself.

***Owen v. Alabama,*** 849 F.2d 536 (11th Cir. 1988) After being advised of his Miranda rights, the defendant stated, "I think I'll let you all appoint me one." Interrogation of the defendant should have been suspended in order to determine whether he, in fact, did want an attorney present.

***Fleming v. Kemp,*** 837 F.2d 940 (11th Cir. 1988) The defendant stated that he did not want appointed counsel because he was going to get his own attorney. This constitutes the invocation of the right to counsel and subsequent police-initiated questioning was invalid under Edwards v. Arizona. The admission of these statements, however, did not require vacating the death sentence since these statements had no bearing on the aggravating circumstance of whether the victim had been murdered while engaged in the performance of his duties as a police officer.

***United States v. Johnson***, 812 F.2d 1329 (11th Cir. 1986) Following his invocation of the right to counsel, the defendant stated, "All this trouble, all for trying to get some money." This statement was not admissible at trial as it was made after his invocation of the right to remain silent. Furthermore, the defendant's subsequent testimony at trial admitting his participation in some criminal activity did not moot the issue. Had the statement been ruled inadmissible, the defendant might not have taken the stand and the error would not have been rendered moot.

***CONFESSION (Right to Remain Silent)***

***Berghuis v. Thompkins***, 130 S. Ct. 2250 (2010) The defendant was read the Miranda warning and did not respond when asked if he waived the right to remain silent. He was then questioned for several hours, during which time he answered very few questions, just silently listening to the interrogation. Then he answered one question. The Supreme Court held that in order to invoke the right to remain silent and to thereby terminate further interrogation, the defendant must unequivocally invoke the right to remain silent. Simply remaining silent is not sufficient. In addition, once the defendant answered the question, this amounted to a waiver of the right to remain silent.

***United States v. Abdallah***, 911 F.3d 201 (4th Cir. 2018) There was nothing ambiguous about the defendant's invocation of his Miranda right to refuse to answer any questions. When the agent was giving the defendant the Miranda warning, the defendant interrupted and said, "I am not going to say anything al all." There was not an ambiguous invocation and admitting his subsequent statement was reversible error. The interrogators failed to scrupulously honor his request to remain silent. Though the court may consider the circumstances that preceded the invocation to determine if it was ambiguous, the court cannot consider subsequent events to find ambiguity that arose because the interrogators failed to scrupulously honor the request.

**Jones v. Harrington**, 829 F.3d 1128 (9th Cir. 2016) Once a defendant, during interrogation, stated, I don't want to talk no more, man" any further questioning or effort to seek clarification, was improper. The unequivocal request to remain silent should have been scrupulously honored.

***Garcia v. Long***, 808 F.3d 771 (9th Cir. 2015) The police suspected Garcia of child molestation. He was brought to the police station for questioning and read his Miranda warning, after which the officer asked, "Now understanding your rights, do you wish to talk to me?" Garcia answered: "no." That was his only response. Further questioning of any kind was not permissible, even to ask for clarification, because the answer "no" needed no clarification. The fact that Garcia, after being asked a couple more times, then provided a three-hour confession does not mean that the initial answer was ambiguous.

***United States v. Okatan***, 728 F.3d 111 (2d Cir. 2013) When confronted by the police – but not while in custody – the defendant answered a few questions, but then invoked his right to counsel. Repeatedly during trial, the government highlighted the fact that when questioned by the police, the defendant invoked his right to counsel. This occurred during the examination of the interrogating officer and during closing argument. This was reversible error. Unlike the situation in Salinas v. Texas, the defendant in this case did not simply remain silent in response to questions, here, the defendant affirmatively asserted his right to counsel. Using that express assertion of the privilege to remain silent (which in this context was the same as the invocation of the right to counsel), as evidence of guilt, violates the Fifth Amendment rights of the defendant, even post-Salinas.

***Tice v. Johnson,*** 647 F.3d 87 (4th Cir. 2011) The defendant was a suspect in a rape / murder. During the course of his interrogation, he agreed to have a polygraph administered. After the polygraph was administered by another police officer, the

defendant was asked if he wanted to continue making a statement and he said that he did not want to answer any more questions. Thereafter, the initial interrogation officer returned to the room and continued the interrogation. No further Miranda warnings were given. The Fourth Circuit held that trial counsel was ineffective in failing to move to suppress the ensuing confession.

***Hurd v. Terhune***, 619 F.3d 1080 (9th Cir. 2010) The defendant shot and killed his wife. The police took him into custody and began to interrogate him. He initially waived his Miranda rights. The police asked him to re-enact the shooting (he claimed it was an accident). He refused to do the re-enactment. At trial, the prosecutor repeatedly relied on this refusal as evidence of the defendant's guilt. The Ninth Circuit granted habeas relief. Once a defendant waives his right to remain silent, he retains the right to re-assert his right to remain silent at any time. And when the defendant does assert the right to remain silent, this fact may not be used against him. Doyle v. Ohio, 426 U.S. 610 (1976). The Ninth Circuit distinguished Berghuis v. Thompkins, which, according to the Ninth Circuit, only held that the police may continue to ask questions after an ambiguous request to remain silent. The Supreme Court did not hold, according to the Ninth Circuit, that the defendant's silence can be used against him, even if he has not unambiguously invoked the right to counsel. In addition, there was nothing ambiguous about the defendant's refusal to perform a reenactment.

***Perkins v. Herbert***, 596 F.3d 161 (2d Cir. 2010) Once a defendant invokes his right to remain silent, the police must scrupulously honor his right. Michigan v. Mosley, 423 U.S. 96 (1975). However, unlike when the defendant invokes his right to counsel, the police are permitted to re-initiate questioning of the defendant after a period of time, but only after providing fresh Miranda warnings. In this case, the defendant invoked his right to remain silent. The police waited a period of time, and then returned and began questioning the defendant again, without having re-advised him of his Miranda rights. The resulting confession should have been suppressed. Harmless error.

***Anderson v. Terhune***, 516 F.3d 781 (9th Cir. 2008) During questioning, the defendant said, "I don't even wanna talk about this no more" and "Uh! I'm through with this" and finally stated, "I plead the Fifth." These statements amounted to unequivocal invocations of the right to remain silent, and any further interrogation was improper. The continued questioning of the defendant represented the antithesis of scrupulously honoring his expressed invocation of the right to remain silent.

***United States v. Rodriguez***, 518 F.3d 1072 (9th Cir. 2008) If a defendant makes an equivocal request to remain silent prior to waiving his rights pursuant to Miranda, the police must cease interrogation and resolve the ambiguous request. The rule that requires that questioning must cease only after an unequivocal request is made (Davis v. United States, 512 U.S. 452 (1994)), only applies after the defendant has initially waived his right to remain silent.

***United States v. Lafferty***, 503 F.3d 293 (3rd Cir. 2007) The defendant and her boyfriend were both Mirandized and invoked their right to remain silent. Later, the boyfriend told the police that he wanted to make a statement with his girlfriend in attendance. The boyfriend signed a written waiver, but the defendant did not. They then incriminated themselves. This violated the defendant's Miranda rights. She did not re-initiate questioning and her boyfriend's conduct could not be attributed to her unless she expressly agreed to re-initiate questioning.

***United States v. Jumper***, 497 F.3d 699 (7th Cir. 2007) During the course of an interrogation that the defendant initially agreed to undergo, he repeatedly refused to answer certain questions. When this occurs, that portion of the interrogation may not be offered in front of the jury. The defendant has the right to selectively invoke his right to remain silent.

***Arnold v. Runnels***, 421 F.3d 859 (9th Cir. 2005) The defendant initially waived his Miranda rights and gave a statement. When the police brought out a tape recorder, however, he refused to talk on tape. The tape was put on and questions were asked, to which the defendant responded, "No comment." Playing this tape violated the defendant's right to remain silent.

***United States v. Rambo***, 365 F.3d 906 (10th Cir. 2004) Shortly after the defendant's interrogation began, the officer asked the defendant, "So, do you want to talk to me about this stuff?" to which the defendant succinctly responded, "No." Any further questioning, or statements about the consequences of failing to talk, or statements about what the police were going to do next, were impermissible and the ensuing statements by the defendant were inadmissible.

***Jackson v. Giurbino***, 364 F.3d 1002 (9th Cir. 2004) The law enforcement officer's blatant violation of Miranda resulted in a statement that should have been excluded at trial. Admitting the statement of the defendant was reversible error.

***United States v. Tyler***, 164 F.3d 150 (3rd Cir. 1998) The admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his right to cut off questioning was scrupulously honored. Michigan v. Mosley, 423 U.S. 96 (1975). In this case, the defendant promptly invoked his right to remain silent when he was arrested. He was later brought to a room in a different police station – a room which was "decorated" with crime scene photos and timelines. Officers began talking to him about hunting, the defendant's education, and his mother's health. The defendant began to cry and made an incriminating statement. The officers' conduct did not satisfy the "scrupulously honor" standard and the statement should have been suppressed. A remand was needed to determine whether a later statement by the defendant should also be suppressed, despite the fact that it was obtained after a Miranda waiver was executed.

***United States v. Barone,*** 968 F.2d 1378 (1st Cir. 1992) Even if a defendant's statement is factually voluntary, if it is obtained by exploiting a Miranda violation, it is inadmissible. The defendant told the police that he did not want to make a statement. A day and a half later, another officer approached the defendant and urged him to talk, which the defendant did. Because this violated the simple rule of Miranda and Michigan v. Mosley, 423 U.S. 96 (1975)(restricting the officer's right to re-interrogate the defendant after the defendant invoked his right to remain silent), the statements were correctly suppressed by the trial court.

***Coppola v. Powell***, 878 F.2d 1562 (1st Cir. 1989) When confronted on the street, the suspect told the police, “Let me tell you something. I’m not one of your country bumpkins. I grew up on the streets of Providence, Rhode Island. And if you think I’m going to confess to you, you’re crazy.” This constitutes the invocation of the right to remain silent and is inadmissible in the prosecution’s case-in-chief. When a defendant does not testify at trial it is impermissible to refer to any Fifth Amendment rights that he has exercised.

***United States v. Montana***, 958 F.2d 516 (2d Cir. 1992) After being advised of his Miranda rights, the defendant said nothing. Despite repeated questioning, he remained silent. This conduct is sufficient to invoke the right to remain silent and terminate further questioning. The defendant in this case refused even to answer standard pedigree questions.

***Vujosevic v. Rafferty***, 844 F.2d 1023 (3rd Cir. 1988) Though the defendant invoked her right to remain silent, New Jersey police officers questioned her four more times. Subsequent statements were ruled inadmissible.

**Charles v. Smith**, 894 F.2d 718 (5th Cir. 1990) On two occasions, the defendant refused to waive his right to remain silent. Despite these unequivocal requests to invoke his Fifth Amendment rights, the defendant was then asked by a police officer who owned a hat and a coat found at the rape scene. This question was clearly designed to provoke an answer from the defendant and the answer which was given should have been suppressed at trial. The court holds, however, that the admission of this testimony was harmless error.

***Kordenbrock v. Scroggy***, 919 F.2d 1091 (6th Cir. 1990) In an en banc decision, the Sixth Circuit concludes that the admission of defendant’s confession, which was elicited by the police after he repeatedly invoked his right to remain silent, was error requiring reversal of both the guilt phase and the penalty phase of the trial.

***United States v. Soliz,*** 129 F.3d 499 (9th Cir. 1997) When the defendant was questioned, he stated that he was willing to answer questions about his citizenship. The police asked questions about other topics, however. This violated the defendant’s right to limit the topics of questioning and to cut off questioning at any time. A person in custody may selectively waive his right to remain silent by indicating that he will respond to some questions, but not to others. Introducing his statements was reversible error.

***United States v. Poole,*** 794 F.2d 462 (9th Cir. 1986) An F.B.I. agent questioned the defendant about his name, date of birth and place of birth. The Court held that this amounted to interrogation which should not have taken place after defendant asserted the right to remain silent.

***United States v. Ramsey***, 992 F.2d 301 (11th Cir. 1993) After being read his Miranda rights, the defendant acknowledged that he understood; but, when he was asked whether he wanted to make a statement, he looked away. This amounted to at least an ambiguous request to remain silent, which should have terminated further questioning without a determination made whether the defendant did, in fact, wish to make a statement. “Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to questioning, that he wishes to remain silent, the interrogation must cease . . . One way an individual can invoke his right to remain silent is by refusing to speak.” This case probably did not survive the decision in Davis v. United States, 512 U.S. 452 (1994). See Coleman v. Singletary, 30 F.3d 1420 (11th Cir. 1994).

***Jacobs v. Singletary,*** 952 F.2d 1282 (11th Cir. 1992) After being arrested, the defendant was Mirandized and questioned about her participation in a murder. She did not say anything, refused to sign the Miranda form, refused to identify herself and would not answer any questions about herself. Though she did not specifically invoke her right to remain silent, this conduct amounted to the invocation of her right to remain silent and further questioning should not have occurred. Furthermore, the efforts of the police to re-interrogate her repeatedly over the course of the next few hours – even with fresh Miranda warnings – violated her right to remain silent.

***United States v. Pena***, 897 F.2d 1075 (11th Cir. 1990) Following his arrest, the defendant was asked if he wanted to make a statement. He responded, “I really want to but I can’t. They will kill my parents.” This amounted to at least an ambiguous invocation of his right to remain silent. The government should have clarified the defendant’s desire before continuing the interrogation. His subsequent incriminating statements should not have been used, though it was harmless error. Also, the Court notes that a defendant’s post-Miranda ambiguous expression of a desire to remain silent is not admissible in evidence. The same is true, of course, for an unambiguous expression of intent to remain silent. This case probably did not survive the decision in Davis v. United States, 512 U.S. 452 (1994). See Coleman v. Singletary, 30 F.3d 1420 (11th Cir. 1994).

***Christopher v. Florida***, 824 F.2d 836 (11th Cir. 1987) The defendant invoked his right to remain silent. The police officers continued to interrogate the defendant and claimed at trial that his subsequent answers evidenced his decision to no longer remain silent. The Eleventh Circuit grants the habeas petition and holds that all questioning should have ceased. The defendant was brought to the police station on an accusation of murder. He stated that if he was charged with murder then he had nothing else to say. The police continued to question him, and he repeated his invocation of the right to remain silent. Interrogation continued. The police attempted to justify further questioning and the admissibility of the confession on the grounds that the invocation of the right to remain silent was equivocal as demonstrated by his subsequent confession. The Eleventh Circuit holds that the invocation of the right to remain silent was not equivocal and further questioning was improper. The confession should have been suppressed. The Eleventh Circuit reviews a substantial body of case law involving an equivocal verses unequivocal invocation of the right to remain silent, and the right of the police to re-initiate questioning.

***CONFESSION (Jackson-Denno hearings)***

***United States v. Mathurin***, 148 F.3d 68 (2d Cir. 1998) The defendant moved prior to trial to suppress his custodial statements, claiming in an affidavit that he never waived his right to counsel before making the incriminating statement. An assertion that Miranda warnings were not given, when the government asserts the contrary creates a specific factual dispute. That dispute cannot properly be resolved without an evidentiary hearing. The failure to hold a hearing in this case was error. Although the defendant's assertion that warnings were not given is conclusory, any statement that a specific event did not occur will normally be conclusory.

***CONFESSION (Juveniles)***

***United States v. Juvenile Male***, 595 F.3d 885 (9th Cir. 2010) The requirements of 18 U.S.C. § 5033 apply even if the law enforcement officer is unaware of the suspect's age. The requirement applies, even if the defendant gives a false birthday to the police officer, thus causing the police officer not to know his juvenile status.

***United States v. L.M.K.***, 149 F.3d 1033 (9th Cir. 1998) Holding the defendant for 33 hours before she was brought to a magistrate violated 18 U.S.C. § 5033. The failure to notify the juvenile's parents in a reasonable time, another violation of the Act. The juvenile's statements should have been suppressed but the failure to do so was not reversible error.

***CONFESSION (McNabb-Mallory Rule)***

***Corley v. United States***, 129 S. Ct. 1558 (2009) The Supreme Court considered the effect of Congress's apparent effort to undermine McNabb-Mallory when it enacted 18 U.S.C. § 3501. That provision had been read by some courts to mandate a strict "voluntariness" test, regardless of whether the defendant's statement was obtained more than six hours after arrest without presentment to a Magistrate. The Corley Court decided that that McNabb-Mallory survived the enactment of § 3501. Though § 3501(a) reflected Congress's attempt (albeit unsuccessful) to overrule Miranda (see Dickerson v. United States, 530 U.S. 428 (2000)), when Congress enacted § 3501(c), it expressly preserved the prophylactic rule of McNabb-Mallory that ensures that statements obtained outside the six-hour time frame (i.e., if more than six hours have elapsed and the defendant was not presented to magistrate) are not admissible absent a finding by the trial judge that presentment to a magistrate earlier was not reasonable.

***United States v. Thompson***, 772 F.3d 752 (3rd Cir. 2014) Delaying presentment to a magistrate in order to explore the possibility of cooperation is not an acceptable excuse and any statements made by the defendant during this period of time should have been suppressed.

***United States v. Pimental***, 755 F.3d 1095 (9th Cir. 2014) The delay in presenting the defendant to a Magistrate following his arrest was not reasonable and the statement he made during the delay should have been suppressed. The defendant was a passenger in a vehicle that was crossing the border. At the border, a drug dog alerted to the vehicle. After the defendant was initially interrogated and invoked his right to counsel, the agents arrested him. Four hours later, a federal Magistrate had a calendar call. The defendant was not brought to court. The agents knew that the next available court calendar would be several days later because of a holiday weekend. Approximately 48 hours after his arrest, he made a statement to the agents, while being transported to a holding cell, still having not been presented to a Magistrate. The delay in this case was not reasonable or necessary and the statement should have been suppressed. The delay was not caused by the necessity for further investigation about whether to charge the defendant, because he had already been charged.

***United States v. Valenzuela-Espinoza***, 697 F.3d 742 (9th Cir. 2012) The defendant was not brought before a magistrate, following his arrest, for over twenty-four hours. Approximately six hours after his arrest, he was questioned and provided a detailed incriminating statement. The delay in bringing him to a Magistrate, coupled with interrogating him during the delay, rendered the confession inadmissible. The court noted that an internal policy adopted by Magistrates in the district that required paperwork to be completed in the morning if a first appearance was to be scheduled in the afternoon, did not trump the requirements of Rule 5 (requiring prompt presentment of an arrestee to a Magistrate) and the McNabb-Mallory rule.

***United States v. Liera***, 585 F.3d 1237 (9th Cir. 2009) The police arrested the defendant but waited thirty hours to bring him before a magistrate (who was in court fifteen minutes away) until the police could re-tape an interview with the defendant. The tape recorder was broken, and the delay was caused by the need to obtain a replacement. The Ninth Circuit held that this delay was not reasonable and suppressed the statement.

***CONFESSION (Sufficiency of Evidence to Corroborate a Confession)***

***United States v. Adams***, 583 F.3d 457 (6th Cir. 2009) The trial court erred in refusing to instruct the jury that it could not convict the defendant based solely on the defendant's own confession, without corroborating evidence. The fact that there was other corroborating evidence does not eliminate the need to properly instruct the jury if a request is made.

***United States v. Stephens***, 482 F.3d 669 (4th Cir. 2007) The defendant was arrested and found in possession of a gun. He promptly confessed that he had been involved in a drug deal and needed the gun for protection (and had actually shot at another participant in the drug deal). Though the police had heard the gunshots (this is what prompted the defendant's arrest), there was no other evidence to establish the existence of any drug transaction. The evidence was insufficient to support his convictions of carrying a gun in relation to a drug trafficking crime and conspiracy to distribute cocaine.

***United States v. Irving***, 452 F.3d 110 (2d Cir. 2006) The defendant was charged with a variety of crimes, including sex tourism. The government relied on certain counts, on journals that were seized from the defendant and which purported to chronicle his illegal acts with minors in a foreign country. The Second Circuit held that the journals did suffice to prove his guilt on those counts

when coupled with other evidence developed in the case. In the initial panel decision, 432 F.3d 401 (2005), the Second Circuit held that the journal was not sufficient, based on the principle that a defendant's confession is sufficient, even without corroboration to prove his guilt of the crime if the corpus delecti is established in the confession and is reliable. See Opper v. United States, 348 U.S. 84 (1954). The Second Circuit has applied Opper to permit a conviction based on a confession if there is substantial independent evidence which would tend to establish the trustworthiness of the statement. In the rehearing decision, however, the Second Circuit held that there was sufficient corroboration of the journals.

***United States v. Norris***, 428 F.3d 907 (9th Cir. 2005) Though the evidence was sufficient on other counts of the indictment, the evidence was insufficient on one of the indictments for which only the defendant's confession established that he committed the offense charged.

***United States v. Reynolds***, 367 F.3d 294 (5th Cir. 2004) The defendant was charged with robbing three banks. The victims never witnessed his possession of a firearm, however. When he was arrested, he made the statement that he "always had that gun with him" and that he "never intended on using the gun either on a victim teller or on the police but on himself in the event that he got caught." These uncorroborated confessions by the defendant were not sufficient to sustain a §924(c) conviction.

***CONFESSION (Voluntariness)***

***Arizona v. Fulminante***, 499 U.S. 279 (1990) The bad news is that an erroneously admitted coerced confession may be harmless error. The good news is that in this case, the error was not harmless. The defendant was in custody on a weapons charge. He was threatened by other inmates because of rumors that he had murdered a child. A government informant who was in prison with the defendant told the defendant that he would protect him – but only if he told him the truth about the murder. This amounted to a coerced confession.

***Colorado v. Connelly***, 479 U.S. 157 (1986) In considering whether a confession was voluntary or not, the focus of the inquiry must be on whether there was any police overreaching.

***United States v. Allen***, 864 F.3d 63 (2d Cir. 2017) The Fifth Amendment prohibition on the use of compelled testimony in criminal proceedings applies even when a foreign government compels a foreigner to answer questions, which are then used in a prosecution of the foreigner in an American court. In this case, the foreigner (British citizen) was given use immunity, but not derivative use immunity and compelled to answer questions by British authorities. He was later prosecuted in New York. One of the witnesses against him had reviewed the defendant's answers to the British interrogation and his testimony was affected by his review of those statements. The Second Circuit held that the Fifth Amendment applied, that the government was required to satisfy the Kastigar requirement to prove that the witness's testimony was not affected by his review of the defendant's compelled testimony, and that the witness's simple assurance that his testimony was not affected, was insufficient to satisfy the Kastigar requirement.

***Dassey v. Dittman***, 860 F.3d 933 (7th Cir. 2017) This is the case made famous by the Netflix series, "Making a Murderer." In this panel opinion, the Seventh Circuit held that the interrogation of Dassey resulted in an involuntary confession. After this ruling was issued, however, it was vacated when the Seventh Circuit granted rehearing en banc on August 4, 2017. Subsequently, this case made it to the United States Supreme Court, where the following question was posed: Whether the Wisconsin Court of Appeals unreasonably applied this Court's precedent when it held that a confession made by a juvenile with significant intellectual and social limitations was voluntary—and, if so, whether on de novo review the confession was involuntary. The Petition for Cert. was denied.

***United States v. West***, 813 F.3d 619 (7th Cir. 2016) The defense sought to introduce expert testimony that would have explained that the defendant was a mentally ill person with a low IQ and was suggestible (all for the purpose of explaining that his confession was not reliable). The trial court excluded the expert testimony on the basis that it was just a back doorway of trying to get an insanity defense before the jury. The Seventh Circuit reversed: evidence which shows that a confession is not reliable is admissible and expert testimony is no exception.

***Sharp v. Rohling***, 793 F.3d 1216 (10th Cir. 2015) During the course of her statement to the police, the defendant asked if she was going to go to jail. To encourage her to keep talking, the officer responded, "No, no, no, no." The officer also stated that he would help the defendant and her children find a homeless shelter. At no point did he qualify his assurance about no jail time with a statement that the prosecutor makes the final recommendation. The confession was involuntary, and the writ was granted.

***United States v. Hufstetler***, 782 F.3d 19 (1st Cir. 2015) It is not necessarily impermissible for the police to coax a statement from a defendant by noting that the police may decide not to prosecute or arrest a spouse, or girlfriend. In order to render a confession involuntary, the defendant would need to show that the spouse or girlfriend was not subject to being arrested; in other words, the threat essentially warned the defendant that if he did not confess, the police would arrest the spouse without a lawful basis to do so. See, e.g., United States v. Tingle, 658 F.2d 1332 (9th Cir. 1981)(threatening mother that she would not be able to see her child); Brown v. Horell, 644 F.3d 969 (9th Cir. 2011) (same); United States v. Ortiz, 943 F.Spp.2d 447, 456 (S.D.N.Y. 2013) and United States v. Andrews, 847 F.Supp.2d 236, 249 (D. Mass. 2012).

***United States v. Taylor***, 745 F.3d 15 (2d Cir. 2014) The police apprehended the defendant as he was leaving the scene of a robbery. The defendant consumed a bottle of pills as he was arrested. He was hospitalized and interrogated by the police. He was essentially stupefied when he made his post-arrest statements. He fell asleep repeatedly during questioning and was only intermittently alert. Although he was supposedly lucid when he made the statements that were introduced in evidence at trial, the entire interrogation was tainted by his obvious inability to voluntarily make statements to the police, a fact that the police took

advantage of during their questioning. The defendant's conviction was similar to the condition of the defendant in Mincey v. Arizona, 437 U.S. 385 (1978), where a hospitalized suspect was interrogated, despite his obvious impairment. The conviction was reversed based on the use of these involuntary statements.

***United States v. Preston***, 751 F.3d 1008 (9th Cir. 2014) (en banc) The personal characteristics of the suspect are relevant in determining whether the tactics used by the police during an interrogation are coercive and thereby render any confession involuntary. In this case, the defendant had a low IQ and, though the tactics used by the police to interrogate the defendant might not be deened to be coercive if employed with a more intelligent suspect, the low IQ of the defendant was a factor that should have been considered by the trial court in assessing the voluntariness of the confession. Among the tactics used by the police was questioning such as: Either you molested the victim because you are a monster, or because it was just a one-time thing; which was it? The police also assured the defendant that if he wrote out an apology to the victim, they would keep it confidential.

***Aleman v. Village of Hanover Park***, 662 F.3d 897 (7th Cir. 2011) In this civil rights case, the Seventh Circuit held that if the police lie to a suspect about the nature of a victim's injuries (e.g., the cause of the victim's injuries must have been the defendant's conduct), a statement obtained from the suspect is not voluntary. In this case, the suspect admitted that she shook a baby in order to wake the baby up. The police lied to the suspect, telling her that the only way the baby could have sustained the injuries was from this type of shaking. The suspect then said that she must be responsible because she did, in fact, shake the baby.

***Dixon v. Houk***, 627 F.3d 553 (6th Cir. 2010) When initially questioned, the defendant stated that he would not answer questions without a lawyer. The police approached the defendant a second time, did not Mirandize him and offered to "cut him a deal" after which the defendant made an incriminating statement. He was the Mirandized and repeated the incriminating statement. The statement was inadmissible because it was obtained in violation of Miranda, it violated his right to counsel, it was not "voluntary" (because of the offer of a deal) and violated Seibert.

***Simpson v. Jackson***, (6th Cir. 2010) The defendant made a number of Mirandized statements to the police about a murder committed by the defendant's colleague. His statements exculpated him for the most part. The police went back to him and told him that they wanted him to take a polygraph and indicated that if he were telling the truth, he would not need a lawyer. This statement violated Miranda. The Supreme Court vacated and remanded for further consideration in light of Howes v. Fields. United States v. Lall, 607 F.3d 1277 (11th Cir. 2010) The police went to the location where the defendant in this case had been the victim of a robbery. After reading Miranda warnings to the defendant, the officer explained that he wanted to know about the crime for which the defendant was a victim, not the crimes that the defendant had perpetrated. The officer also said that any information the defendant shared with the police would not be used to prosecute him. During the course of the ensuing statement of the defendant, he confessed to crimes that he had perpetrated. The Eleventh Circuit held that the confession was involuntarily obtained and was inadmissible under the Due Process Clause. See Bram v. United States, 168 U.S. 532 (1897) (A confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight."). It is not significant that the defendant was not in custody. A statement is inadmissible if it is not voluntary, even if it is not a custodial statement and regardless of whether Miranda warnings were given. The Eleventh Circuit also discussed the use of deception on the part of the police. The court noted that deception as to certain facts does not necessarily render a confession involuntary (for example, distorting the amount of information already known to the police); while deceiving the defendant about a legal matter (nothing you say will be used against you) is a different matter. See also United States v. Rutledge, 900 F.2d 1127 (7th Cir. 1990); United States v. Walton, 10 F.3d 1024 (3rd Cir. 1993).

***Doody v. Schriro***, 596 F.3d 620 (9th Cir. 2010) (en banc) The Ninth Circuit granted a writ of habeas corpus in this murder case because of two flaws in the state's method of gaining the defendant's confession: first, the Miranda warning was confusing and inaccurate – the police advised the defendant that he had the right to counsel if he was involved in the crime; the police also advised the defendant (a juvenile) that the warnings were "just formalities." The one-page Miranda form was explained by the police over twelve pages of the interrogation transcript. In addition, a thirteen-hour long interrogation of a sleep-deprived teenager resulted in a confession that was not voluntary. Relentless questioning implies to the suspect that he does not, in fact, have the right to remain silent. Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948). Rehearing the case once again after remand from the U.S. Supreme Court, the Ninth Circuit reached the same result, even after considering Florida v. Powell, 130 S. Ct. 1195 (2010).

***Doody v. Ryan***, 649 F.3d 986 (9th Cir. 2011). United States v. Stein, 440 F.Supp.2d 315 (S.D.N.Y. 2006) The district court condemned the provision in the Thompson Memo that states that a corporation's payment of attorney fees for targeted employees is a factor that the prosecutor should consider in deciding whether to indict the corporation for the conduct of employees. The Court held that the employees' due process rights to have their attorneys' fees paid by their employer – as had been customary with this employer (KPMG) – was violated. The court also relied on the Sixth Amendment right to counsel which, the court held, was infringed by the prosecutor's efforts to dissuade the corporation from paying the employees' fees. The result was the suppression of statements made by the defendants that were "coerced" by their employer, KPMG, which felt compelled to require the employees to speak to the government because of the Thompson Memo requirement that corporations cooperate. The Second Circuit affirmed, United States v. Stein, 541 F.3d 130 (2d Cir. 2008), in a decision annotated above in ATTORNEYS (Right to Counsel).

***United States v. Lopez,*** 437 F.3d 1059 (10th Cir. 2006) When the police provide an assurance of a specific sentence that the defendant will receive if he confesses and assures him that the sentence will be more if he doesn't confess, the resulting confession is not voluntary.

***United States v. Jacobs***, 431 F.3d 99 (3rd Cir. 2005) A promise by a law enforcement agent that a defendant's statement will not be used against him is a factor – and perhaps a significant factor – in determining that the statement was not voluntary. In this case, the Court determined that the statements made by the defendant during one interview were subject to a promise that the statements would not be used, based in part on the fact that the defendant had been providing information to the FBI agent for ten years.

***United States v. Aguilar***, 384 F.3d 520 (8th Cir. 2004) For nearly two hours, the police interrogated the defendant prior to giving him Miranda warnings. The defendant was told that if he cooperated, he would be released. Based on Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601 (2004), the Mirandized statement was inadmissible. Moreover, the post-Miranda statements were the product of coercion. Though the promise of release is not alone a basis for finding the confession involuntary, it is one of many factors that supported the trial court's finding that the confession was not voluntary.

***Taylor v. Maddox***, 366 F.3d 992 (9th Cir. 2004) The Ninth Circuit concluded that the state trial court, the state appellate court and the federal habeas trial court all erred in finding the defendant's confession voluntary. The defendant was a sixteen-year-old boy who was brought to the police station late at night by several police officers after they entered his apartment while he was asleep. They interrogated him in a small room for over two hours before finally turning on a tape recorder and recording his confession. Immediately after this confession, he called an attorney and told the attorney that he had promptly asked to speak to an attorney and to his mother, that this request was denied, that he was threatened with a life sentence if he did not confess, but would receive a shorter sentence if he did confess, that he was tired and confessed to a crime he did not commit so the interrogation would end and he could call the attorney. The Ninth Circuit United States v. Garibay, 143 F.3d 534 (9th Cir. 1998) The trial court erred in finding that the defendant knowingly and voluntarily waived his Miranda rights. The record clearly established that the defendant spoke limited English. The agent did not offer to provide the Miranda warnings in Spanish and had to repeat and explain the concepts to the defendant, who clearly did not understand English. The evidence also established that the defendant was borderline mentally retarded. The burden of proof is on the government to prove a waiver – the burden is not on the defendant to prove that he understands no English. Admitting the defendant's statement was reversible error.

***Weaver v. Brenner,*** 40 F.3d 527 (2d Cir. 1994) A coerced confession may not be introduced at any stage of a criminal proceeding, including the grand jury.

***United States v. Swint***, 15 F.3d 286 (3rd Cir. 1994) The defendant was invited to a state D.A.'s office to make an off-the-record proffer in connection with a proposed plea agreement. During the course of the initial conversation, the DEA arrived and confronted the defendant with evidence of additional criminal conduct. The defendant then made a full statement. This was not a confession which could be used in court. Though the DEA portion of the interview was not announced to be "off-the-record," it was never made clear to the defendant that it was "on-the-record" and thus, the government failed to prove that the statement was voluntary. The trial court's findings that the government engaged in an inappropriate "bait and switch" was amply supported by the record. A comparable case is United States v. Rogers, 906 F.2d 189 (5th Cir. 1990).

***United States v. Walton***, 10 F.3d 1024 (3rd Cir. 1993) The defendant was involved in illegal firearm sales. He called an old friend who was an ATF agent and asked if he could have an "off the record" conversation. He did not know that he was already being investigated by the ATF. They met on a park bench and the agent agreed they could talk "off the cuff." The ATF agent also brought along another agent. The defendant's subsequent statements could not be introduced against him. The assurance of confidentiality rendered the ensuing confession involuntary. Even under the Arizona v. Fulminate standard, this statement was involuntary. Given the uniquely influential nature of a promise from a law enforcement official not to use a suspect's inculpatory statement, such a promise may be the most significant factor in assessing the voluntariness of an accused's confession in light of the totality of the circumstances.

***United States v. Rogers***, 906 F.2d 189 (5th Cir. 1990) The defendant was summoned to a state sheriff's department and asked about stolen guns which he had purchased from a third party. The state agents told him he would not be prosecuted if he identified the person from whom he had obtained the guns and helped in retrieving the guns. Later, he became the focus of a federal investigation but was never advised that his continuing cooperation would be used against him. Though he was Mirandized, his subsequent statement should not have been used against him because of the failure of the federal agents to advise him that the earlier assurances of the state agents no longer applied.

***United States v. Finch***, 998 F.2d 349 (6th Cir. 1993) Five police officers broke down the door where the defendant was residing, drew their weapons, and then broke down the door where the defendant and a woman were. When the police encountered the defendant, he was told that they were looking for cocaine and if they found any, everybody in the house would be arrested. The defendant then pointed out where the cocaine was located. This confession was involuntary. Coercion may involve psychological, as well as physical threats. Threats to arrest members of the suspect's family may render a confession involuntary.

***Cooper v. Scroggy***, 845 F.2d 1385 (6th Cir. 1988) Police officers assaulted the suspect thus rendering involuntary any subsequent statements. Furthermore, the assault on the suspect rendered his co-arrestee's statement involuntary as well.

***United States v. D.F.,*** 63 F.3d 671 (7th Cir. 1995) The defendant, a juvenile, was involuntarily committed to a mental health facility due to drug problems. Patients were encouraged to talk to therapists and were rewarded for doing so. A therapist, aware that the juvenile was a suspect in a murder case, questioned the juvenile about her past behavior, without clearly informing her that the questioning was designed, in part, for investigative purposes. This rendered the confession involuntary. Though the therapist was not a law enforcement agent, she questioned the defendant with an eye toward a future prosecution. This decision was re-affirmed after remand from the Supreme Court at United States v. D.F., 115 F.3d 413 (7th Cir. 1997). In this latter decision, the court addresses at some length the role of an appellate court in determining the voluntariness of a confession.

***Wilson v. O'Leary,*** 895 F.2d 378 (7th Cir. 1990) A rape suspect was accosted by the victim's husband, as well as a group of his friends (including an off-duty police officer). He made an un-Mirandized involuntary statement. Later, an officer arrested the defendant and asked him what he told the mob which accosted him. He responded that he identified the second rapist. Both statements were inadmissible. Though the first statement to the group was not introduced, the second statement was equally inadmissible and required vacating the conviction.

***Woods v. Clusen,*** 794 F.2d 293 (7th Cir. 1986) The confession of a 16-1/2-year-old was ruled inadmissible. The police showed graphic pictures of the murder scene and told the accused a number of lies about the strength of the case against him. Despite the fact that he was uncommunicative, the defendant was confronted with additional questioning until he finally confessed.

***United States v. Wimberly***, 930 F.2d 16 (8th Cir. 1991) Even though the trial court had already decided that the defendant's confession was voluntary, the defendant was still permitted to introduce evidence tending to show that the statement was involuntary. This is true, even though at trial the defendant denied making the statement at all.

***United States v. Harrison***, 34 F.3d 886 (9th Cir. 1994) Shortly after being arrested, the defendant was asked rhetorically by the police whether she thought it would be better if the judge were told she had cooperated or had not cooperated. Though a suggestion that cooperation will be rewarded is sometimes permissible, a suggestion that silence will be punished is always improper. Even, as in this case, implying that the failure to cooperate will be brought to the attention of the prosecutor, or court, renders a confession involuntary.

***Collazo v. Estelle***, 940 F.2d 411 (9th Cir. 1991) When he was first interrogated the defendant requested the assistance of counsel. The police responded that that would make it worse for him, and then left. Three hours later, the defendant initiated further contact and then confessed. This amounted to an involuntary waiver of Miranda rights and the confession should not have been admitted. Not only did the police misconduct amount to a Miranda violation, it also rendered the confession involuntary since it suggested that the failure to confess right then would have severe consequences. The lapse in time between the officer's "threat" and the defendant's re-initiation of contact did not cure the error. The defendant's communication with the police reflected his fear of what would happen if he didn't: a fear engendered by the police officer's threat. Even under Arizona v. Fulminante, the coerced confession was grounds for reversal.

***United States v. Jenkins***, 938 F.2d 934 (9th Cir. 1991) The defendant was arrested after a shootout with the police. When he was apprehended, he was kicked in the groin and stomach, and threatened with being killed. His confession to possessing a sawed-off shotgun should have been suppressed. One confession was made five hours after the beating (and after being released from the hospital); the second confession was made five hours after the first confession. Both were tainted by the beating. The error in admitting the confession was not harmless under Arizona v. Fulminante.

***United States v. Moreno***, 891 F.2d 247 (9th Cir. 1989) The defendant was arrested after she admitted being a resident in a house which had just been searched and found to have substantial quantities of cocaine and cash. The defendant was brought into the kitchen where she was told to make a call to make arrangements for the baby to be picked up. Just before the baby was taken away, the defendant saw her three children being taken away in handcuffs, her sixteen-year-old daughter in tears. The defendant, at that point, asked to make a statement. The Ninth Circuit held that it was error for the District Court not to hold a hearing to determine whether the ensuing confession was voluntary. Although the Fifth Amendment does not protect the defendant from moral and psychological pressures to confess emanating from sources other than official coercion, Colorado v. Connelly, 479 U.S. 157 (1986), in these circumstances, the moral and psychological pressure to confess may have resulted from the law enforcement official's action.

***United States v. Perdue***, 8 F.3d 1455 (10th Cir. 1993) Defendant was properly stopped based on an articulable suspicion, pursuant to Terry v. Ohio, when he approached property in a rural location which was being searched. He was ordered out of the car at gunpoint, handcuffed and ordered to lie down on the ground, as was his pregnant fiancée. He was asked what he was doing there and responded that he was there to check out his marijuana. Though this was a Terry stop, and not a full-scale arrest, Miranda warnings were required. Miranda warnings are not necessary for every Terry stop (Berkemer v. McCarty, 468 U.S. 420 (1984)), but where, as here, the Terry stop involves a degree of force and a show of authority which represents a significant curtailment of the defendant's freedom, the warnings are required. See also United States v. Smith, 3 F.3d 1088 (7th Cir. 1993). A subsequent interrogation, which followed this initial questioning, and which was preceded by Miranda warnings was tainted by the improper use of force and was thus involuntary, despite Miranda warnings. Helicopters were flying overhead; the defendant was told that his pregnant fiancée could go free if he confessed; the questioning occurred in an isolated rural area; fifteen to twenty law enforcement officers surrounded the defendant.

***Griffin v. Strong***, 983 F.2d 1540 (10th Cir. 1993) In this civil rights action, the plaintiff established that a confession he made which led to a prior criminal conviction had been coerced. The Tenth Circuit agreed: the officer threatened the defendant and warned him that he would never see his daughter again unless he confessed to raping her. At a subsequent session, the officer

promised to protect the defendant from being injured in the jail if he would make an additional statement. This type of interrogation, too, rendered the statement involuntary.

***Smith v. Zant***, 887 F.2d 1407 (11th Cir. 1989) The defendant had a mental age of ten or eleven and an I.Q. of about 65. Expert testimony revealed that the defendant would have difficulty understanding the Miranda warnings. His purported waiver of Miranda rights was not voluntary requiring the suppression of his statements. The error was harmless as to guilt-innocence but required vacating the death sentence. This decision is the product of an equally divided en banc court affirming the district court judgment.

***Miller v. Dugger,*** 838 F.2d 1530 (11th Cir. 1988) Cognizant of the U.S. Supreme Court decision in Colorado v. Connelly, the Eleventh Circuit holds that although a suspect's mental problems cannot by themselves negate a waiver of Miranda rights on the basis of voluntariness, such mental illness may establish that the waiver of constitutional rights was not intelligent.

***United States v. Bradshaw,*** 935 F.2d 295 (D.C. Cir. 1991) Colorado v. Connelly involves the defendant's mental capacity to voluntarily waive his Miranda rights and held that the question of voluntariness focuses only on the existence vel none of police coercion. Here, the question was whether the schizophrenic defendant comprehended his Miranda rights, that is, whether his waiver was knowing and intelligent. In connection with this inquiry, the Connelly limitation (i.e., did the police coerce the defendant) does not apply. Rather, the trial court must determine whether the defendant had the mental capacity to waive his Miranda rights knowingly and intelligently.

## *CONFLICT OF INTEREST*

***United States v. White Eagle***, 721 F.3d 1108 (9th Cir 2013) 18 U.S.C. § 208 is the basic criminal conflict of interest statute that makes it a crime for a federal official to participate in a proceeding, application or contract determination in which he has a financial interest. In this case, the defendant supposedly concealed another person's criminal conduct in order to facilitate the continuation of a government program in which she also was a participant. This did not qualify as a conflict of interest.

***CONFRONTATION See also: Cross Examination; Defendant's Right to Be Present Evidence; (Hearsay – Evidence Offered by the Government)***

***Lilly v. Virginia***, 527 U.S. 116, 119 S. Ct. 1887 (1999). The Supreme Court reversed this state court murder conviction on the grounds that the state was permitted to introduce the statement of a co-defendant that implicated the defendant. The co-defendant was not tried with the defendant (thus, this was not a Bruton situation) and he invoked his Fifth Amendment right not to testify. In his out-of-court statement, he admitted some participation in the crime spree, but implicated the defendant (his brother) in the murder. The state argued that this was admissible under the state exception to the hearsay rule for statements against the declarant's penal interest. The Supreme Court held that the statement implicating the defendant in the murder was not sufficiently against the declarant's penal interest to be admitted. The admission of this testimony violated the Confrontation Clause of the Sixth Amendment. White v. Illinois, 502 U.S. 346 (1992) Statements of a child molestation victim which were admitted pursuant to the hearsay exceptions for spontaneous declarations and as part of a medical examination were admissible even without proof of the declarant's unavailability.

***Maryland v. Craig,*** 497 U.S. 836 (1990) The right of confrontation may be satisfied absent a physical, face-to-face confrontation at trial where the denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured. The State's interest in protecting a child witness from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure such as allowing the child to testify by video tape. In order to use such a procedure, however, there must be a finding by the trial court which is case specific. In this case, the child was permitted to testify through a one-way closed-circuit television.

***Idaho v. Wright***, 497 U.S. 805 (1990) The Supreme Court holds that the admission of hearsay statements made by a child to an examining pediatrician violated the defendant's rights under the confrontation clause of the Sixth Amendment. The Court held that the child's statements did not fall within a traditional hearsay exception and lacked "particularized guarantees of trustworthiness" because the doctor had conducted the interview without procedural safeguards: He failed to videotape the interview, asked leading questions, and had a preconceived idea of what the child should be disclosing.

***Coy v. Iowa***, 487 U.S. 1012 (1988) In child molestation cases, the Iowa courts permit a screen to be placed which prevents the child witness from seeing the defendant during trial. The United States Supreme Court holds that this violates the defendant's right to confront the witnesses against him.

***United States v. Owens***, 484 U.S. 554 (1988) The victim of a brutal assault was able to identify the defendant while in the hospital recuperating. By the time of trial, the witness was no longer capable of identifying the defendant as the assailant but was able to recall identifying him while in the hospital. The United States Supreme Court holds that this does not violate the confrontation clause or the rule against hearsay and affirms the conviction based on the out-of-court identification and the in-court testimony about that identification.

***Richardson v. Griffin***, 866 F.3d 836 (7th Cir. 2017) The state introduced testimony from an officer concerning what witnesses told him about the identity of the shooter. The state argued that his evidence was introduced to explain the course of the police investigation, not for the truth of the matter asserted. The Seventh Circuit held that this violated the Confrontation Clause and granted the writ.

***United States v. Jimison***, 825 F.3d 260 (5th Cir. 2016) Though the right of Confrontation is more limited in a supervised release hearing, in this case, the Fifth Circuit held that the defendant's due process rights were violated by limiting the defendant's right to cross-examine the law enforcement agent who repeated what he was told by an informant regarding the defendant's criminal acts. The district court also erred in preventing the defendant from calling the informant to the stand to testify.

***Etherton v. Rivard,*** 800 F.3d 737 (6th Cir. 2015) The defendant was convicted in state court of possessing cocaine in his vehicle. The prosecution introduced testimony from his co-defendant who was in the car with him, but that witness was significantly impeached. The other evidence (other than finding the cocaine in the vehicle) was a tip received by the police that the car was on the interstate, and it had cocaine in it. This existence of the tip was introduced twice, and the prosecutor referred to the tip in his closing argument. There was no objection to this evidence at trial and the issue was not raised on appeal. The tip was inadmissible evidence and violated the defendant's rights under the Confrontation Clause. The Sixth Circuit granted habeas relief. The Supreme Court reversed: The federal court did not afford sufficient ADEDPA deference to the conclusion of the state courts. The "tip" was not necessarily introduced for the truth of the matter asserted and trial counsel may have had a strategic reason not to object. 578 U.S. --- (2016).

***United States v. Brooks***, 772 F.3d 1161 (9th Cir. 2014) The prosecutor asked a DEA agent to tell the jury "in summary" what he was told by a postal supervisor. The fact that the agent summarized what he was told rather than reciting word-for-word what he was told did not alleviated the Confrontation Clause violation. The government's alternative theory that the statements were not offered for the truth of the matter asserted was also rejected by the Ninth Circuit.

***Blackston v. Rapelje,*** 780 F.3d 340 (6th Cir. 2014) If the state introduces a prosecution witness's prior sworn testimony at defendant's trial, the defense is entitled to introduce evidence that the witness recanted that testimony. This is implicit in the right to confront one's accusers. The prior sworn testimony in this case occurred at the defendant's first trial. After that trial, two of the principal witnesses recanted. At the retrial, the two witnesses refused to testify, and the state was permitted to read their testimony from the first trial. The defense was prohibited from impeaching their testimony with the recantations. This error required granting a writ of habeas corpus.

***United States v. Jordan***, 742 F.3d 276 (7th Cir. 2014) Though the Confrontation Clause does not require that the government present non-hearsay evidence at a supervised release revocation hearing, the trial court must explicitly balance the defendant's Confrontation Clause rights with the government's reasons for denying these rights. See Morrissey v. Brewer, 408 U.S. 471 (1972).

***Ortiz v. Yates,*** 704 F.3d 1026 (9th Cir. 2012) The defense sought to cross-examine the defendant's wife regarding whether she was afraid to deviate from her initial statements accusing her husband of abuse because of threats the prosecutor's investigator made towards her about changing her story (that is, the investigator had threatened to put her in prison for lying at the preliminary hearing if she did not stick to that version of events). The trial court prevented this line of questioning. This violated the defendant's right of Confrontation.

***United States v. Walker***, 673 F.3d 649 (7th Cir. 2012) The government offered considerable evidence about what an informant said, and did, without putting the informant on the stand. Undercover tapes in which the informant talked to the defendant and statements that the informant made to the officers were also introduced. The Seventh Circuit held that the Confrontation Clause was violated, but it was harmless error.

***Sussman v. Jenkins***, 636 F.3d 329 (7th Cir. 2011) Trial counsel failed to provide pretrial notice of the intent to introduce evidence that the child molestation victim had made prior false allegations of sexual abuse against another man (his father). Trial counsel's failure was ineffective assistance of counsel, because such evidence – prior false allegation evidence – was admissible and significant evidence relating to the child's credibility and motive for fabricating allegations (i.e., to get attention, or for punishing people for not paying attention to him). This evidence was clearly admissible under the Confrontation Clause.

***Adamson v. Cathel***, 633 F.3d 248 (3rd Cir. 2011) The defendant testified and explained that his confession was false and that he had been shown the statements of his alleged co-conspirators prior to making his confession and that is how he learned the facts that formed the basis for his confession. When the prosecutor cross-examined the defendant, he read to him significant portions of the co-conspirator's statement (much of which was unrelated to the defendant's own confession) that clearly implicated the defendant in the crimes. The trial court did not issue a limiting instruction to caution the jury not to consider the co-conspirator's statement for the truth of the matter asserted. Informing the jury about the co-conspirator's statement that implicated the defendant violated the defendant's rights under the Confrontation Clause and required setting aside the conviction. See Tennessee v Street, 471 U.S. 409 (1985) (approving use of co-conspirator's statement in this manner, but only with a limiting instruction).

***Perkins v. Herbert,*** 596 F.3d 161 (2d Cir. 2010) The state trial court concluded that the defendant procured a witness's unavailability and therefore, the hearsay statement of the witness was admissible. The factual finding of the trial court, however, was not supported by sufficient evidence and the admission of the witness's grand jury testimony violated the Confrontation Clause. Harmless error.

***Earhart v. Konteh***, 589 F.3d 337 (6th Cir. 2009) Over objection of the defendant, the state utilized a deposition of one witness who had a prepaid vacation scheduled for the day of trial. There was no effort made by the state to secure the witness's presence and no showing of necessity was made. Using the deposition violated the Confrontation Clause.

***United States v. Tirado-Tirado,*** 563 F.3d 117 (5th Cir. 2009) The government insisted on using the videotaped deposition of a witness who was deported to Mexico after the deposition. The defendant argued that the witness was not "unavailable" because the government did not make good faith efforts to secure the attendance of the witness. The Fifth Circuit agreed. The court lists the various measures that the prosecution could have taken to assure, or at least improve the chances that, the witness would appear at trial. In the absence of a good faith effort on the part of the government to secure the attendance of the witness, using the deposition violated the Confrontation Clause. The fact that the defendant had the full opportunity to cross examine the witness at the deposition does not change the fact that the witness was not legally "unavailable for trial" because of the absence of good faith efforts to secure his appearance and, therefore, the defendant's Confrontation Clause rights were violated.

***Taylor v. Cain,*** 545 F.3d 327 (5th Cir. 2008) The state offered testimony from an investigating officer about the investigation he performed including the information provided to him by other witnesses to the murder that implicated the defendant as the perpetrator. This constituted inadmissible hearsay that violated the defendant's right of Confrontation.

***Fratta v. Quarterman***, 536 F.3d 485 (5th Cir. 2008) The defendant was tried in state court for hiring hitmen to kill his wife. The trial was conducted pre-Crawford. At trial, the statements of the hitmen, neither of whom testified, were admitted. To some extent the statements were redacted to eliminate the defendant's name as the employer for the hit. Nevertheless, the statements still implicated the defendant. The Fifth Circuit held that the evidence violated the Confrontation Clause even as it was interpreted pre-Crawford.

***Barbe v. McBride***, 521 F.3d 443 (4th Cir. 2008) The defendant was charged with child sexual assault. An expert testified that the victim exhibited signs of sexual abuse. The defendant sought to introduce evidence that the defendant had been abused by other adults (and the child had made prior accusations about these prior assaults). Relying on the state rape shield statute, the trial court excluded the evidence. The Fourth Circuit granted the writ. Excluding evidence that would provide an alternative explanation for the expert's findings violated the defendant's right to confront the evidence against him. Pursuant to Michigan v. Lucas, 500 U.S. 145 (1991), the trial court must make a case-by-case determination whether the state evidence rule trumps the Sixth Amendment. In this case, the state trial court invoked a per se ban on any evidence of prior sexual activity of the victim.

***United States v. Becker***, 502 F.3d 122 (2d Cir. 2007) Prior to Crawford, the Second Circuit had held that a person's plea allocution was sufficiently against the person's penal interest that it would be admissible in another person's trial. Pursuant to that rule, a co-conspirator's statement at his plea was introduced against the defendant in this case to prove the existence of a conspiracy. Post-Crawford, this violated the Confrontation Clause and required that the defendant's conviction be set aside. Same result was reached in United States v. Riggi, 541 F.3d 94 (2d Cir. 2008).

***United States v. Hearn,*** 500 F.3d 479 (6th Cir. 2007) Permitting the government to introduce considerable hearsay evidence to "explain the officer's conduct" in keeping the defendant under surveillance, violated the rule against hearsay as well as the defendant's Confrontation Clause rights.

***United States v. Powers***, 500 F.3d 500 (6th Cir 2007) The trial court erred when it permitted the prosecution to elicit evidence about what the confidential informant told the police. The evidence implicated the defendant was not necessary to provide background, or to explain the officers' conduct. Harmless error.

***Winzer v. Hall***, 494 F.3d 1192 (9th Cir. 2007) The defendant was alleged to have said to his wife and child that he was going to "smoke them" (kill them). They called the police and the police officer interviewed them and they confirmed that this happened. The wife did not testify at trial and the child, who did testify, did not remember the event. The police officer testified about the statements made to him by the two "victims." Even though this trial was held pre-Crawford, the evidence was admitted in violation of the defendant's Confrontation Clause rights and the Ninth Circuit granted a writ of habeas corpus. Because the statements were made to the police hours after the supposed threat, they did not qualify as "excited utterances."

***Vasquez v. Jones***, 496 F.3d 564 (6th Cir. 2007) The state trial court's decision to bar the defense from introducing impeachment evidence relating to a hearsay declarant's criminal record violated the Confrontation Clause. The right to offer evidence of a witness's criminal record to demonstrate his lack of credibility is a core principle of the Confrontation Clause and applies with equal force to a "witness" who does not appear at trial but whose out-of-court statements are offered through a hearsay exception.

***United States v. Thomas***, 453 F.3d 838 (7th Cir. 2006) Even post-Crawford, if the government seeks to introduce hearsay that does not qualify under a traditional hearsay exception, the test of Ohio v. Roberts must be satisfied, i.e., particularized guarantees of trustworthiness. Even though Crawford held that the Confrontation Clause only applied to testimonial statements, this did not mean that non-testimonial statements were exempt from Confrontation Clause analysis. This case involved a "non-testimonial" 911 call, that the court held satisfied the Ohio v. Roberts standard.

***United States v. Larson***, 460 F.3d 1200 (9th Cir. 2006) The trial court erred in barring defense counsel from cross-examining a cooperating witness about the mandatory minimum sentence he would face but for his cooperation. Harmless error. The en banc court reached the same conclusion, finding that excluding evidence about the mandatory minimum sentence was a Confrontation Clause violation, but was harmless.

***Kittelson v. Dretke***, 426 F.3d 306 (5th Cir. 2005) At the defendant's child molestation trial, the state was permitted to introduce evidence that suggested that another girl had alleged that the defendant molested her, as well. That girl, in fact, had made the allegation the same time as the victim (they were friends) but immediately recanted her allegation. Allowing the prosecutor to

introduce the evidence (albeit by inference) and barring the defense from introducing the fact that the girl had, in fact, made the statement, but then recanted, denied the defendant his Confrontation Clause rights.

***United States v. Bordeaux***, 400 F.3d 548 (8th Cir. 2005) After the child witness expressed fear of the defendant, the court allowed the witness to complete her testimony via two-way closed-circuit television. Though 18 U.S.C. § 3509(b)(1)(B)(i) permits this procedure in certain circumstances, the Eighth Circuit held that the Confrontation Clause was violated in this case. Pursuant to Maryland v. Craig, 497 U.S. 836 (1990), the court may employ closed-circuit television where there is a finding that the child is fearful of testifying in front of the defendant. It is not enough, however, if the child is simply fearful of testifying in a courtroom. If the fear is of the courtroom generally, the court may permit testimony in a more accommodating environment, but still in the presence of the defendant. To the extent that § 3509(b)(1)(B)(i) permits the use of closed-circuit television based on the child's fear of the courtroom, it violates the Confrontation Clause.

***United States v. Yates***, 438 F.3d 1307 (11th Cir. 2006)(en banc) Two-way videoconferencing of a witness's testimony does not satisfy the Confrontation Clause. The government used a two-way teleconference to obtain the testimony of an out of country witness. Though the witness could see the defendant and vice-versa, this was not adequate face-to-face confrontation.

***Fischetti v. Johnson***, 384 F.3d 140 (3rd Cir. 2004) Defendant was tried twice in state court for a series of burglaries. At the second trial, some of the burglary witnesses' testimony was presented through the transcript of their testimony at the first trial. However, there was no showing that those witnesses were unavailable to testify at the second trial. Admitting the prior testimony violated his Confrontation Clause rights.

***United States v. Turning Bear***, 357 F.3d 730 (8th Cir. 2004) After briefly questioning the child-victim, the court concluded that because the child was afraid of the defendant (her father) and also afraid of the prosecutor and the jury, the child would testify via closed-circuit television. The Eighth Circuit concluded that the court's findings were not adequate to comply with the requirements of Maryland v. Craig, 497 U.S. 836 (1990). The trial court failed to find that the child's fear was prompted by the father, as opposed to the courtroom, in general. In fact, the child testified at the hearing relating to her inability to testify in court and it was apparent that it was the jury, more than the defendant, that frightened her. See also Hoversten v. Iowa, 998 F.2d 614 (8th Cir. 1993).

***Brown v. Keane,*** 355 F.3d 82 (2d Cir. 2004) The state offered evidence that a 911 caller reported that two men were in front of a bar shooting. The state offered the tape under the "present sense impression" exception to the hearsay rule. The federal district court, on habeas review, concluded that it was not certain that the caller was actually witnessing the shooting; it was possible the caller had earlier seen the two men, and then heard shooting and assumed that the men were involved in the shooting. The lower court concluded, however, that the present sense impression exception to the hearsay rule was "firmly rooted" and therefore the evidence should be admitted, despite the fact that there was an absence of a particularized guarantee of trustworthiness. The Second Circuit reversed: First, the court concluded that the tape did not qualify as a present sense impression for the same reason that the lower court found a lack of trustworthiness – there was no proof that the caller was actually describing events that he was contemporaneously witnessing. The court also rejected the theory that the caller's statement qualified as an "excited utterance." Again, however, excitement without contemporaneous observation does not qualify under that hearsay exception.

***Lewis v. Wilkinson***, 307 F.3d 413 (6th Cir. 2002) The Sixth Circuit held that the application of a state rape shied statute in this rape prosecution denied the defendant of his Sixth Amendment right of Confrontation. In the victim's diary, there were various references to her other sexual conduct and the fact that she was apparently viewed by boys as a "nympho." She wrote, "I'm just not strong enough to say no to them. I'm tired of being a whore. This is where it ends." Excluding this evidence was reversible error.

***United States v. Moses***, 137 F.3d 894 (6th Cir. 1998) The trial court violated the defendant's Confrontation Clause rights (and the Child Victims' and Child Witnesses" Rights Act – 18 U.S.C. § 3509(b)(1)(B)) when it permitted a child witness to testify by closed circuit television. The Act provides that a closed-circuit television may be used where there is a case-specific showing a child witness would suffer substantial fear or trauma and be unable to testify or communicate reasonably because of the physical presence of the defendant. The trial court's findings in this case were insufficient to trigger the provisions of the Act. The witness, in fact, specifically stated that she was not afraid of the defendant. The testimony of a government expert – a social worker – on this subject was also insufficient.

***Crespin v. New Mexico,*** 144 F.3d 641 (10th Cir. 1998) Admitting the co-conspirator's statement that implicated the defendant was erroneous. The state's theory that the statement was "against the declarant's penal interest" did not survive appellate habeas scrutiny. The Tenth Circuit held that the state courts failed to properly apply the "indicia of reliability" test. The court reiterated the "time-honored" principle that "a codefendant's confession inculpating the accused is inherently unreliable."

***Horton v. Zant***, 941 F.2d 1449 (11th Cir. 1991) Under Georgia law, a co-conspirator declaration may be admissible during the "concealment phase" of the conspiracy – that is, after the offense has been completed, but before the culprits have been caught. The statement need not be in furtherance of the conspiracy. Here, a co-conspirator statement was admitted which fell within the expanded Georgia definition. The court holds that in this case, the hearsay statement violated the confrontation clause. The statement was exculpatory as to the declarant and was wholly declarative of a past event (i.e., the defendant killed the decedent). This statement did not have indicia of reliability. Though Dutton v. Evans, 400 U.S. 74 (1970), held the Georgia statute constitutional, that case dealt with a particular application – an out-of-court declaration which did have indicia of reliability.

The statement in this case did not have such characteristics and admitting the statement was a confrontation clause violation. Furthermore, the error was not harmless.

***Gholston v. Jones***, 848 F.2d 1156 (11th Cir. 1988) The defendant's parole revocation was based solely on the unsworn violation report by a parole officer. This violated the parolee's due process right to confront the witnesses against him.

***Brown v. Dugger***, 831 F.2d 1547 (11th Cir. 1987) Two defendants were arrested and charged with murder. They were put in a room together with the police officer encouraging one to incriminate the other. At trial, the police officer testified that one of the defendants did, in fact, incriminate the other. This violated the defendant's right to confront the witnesses and is inadmissible hearsay (a Bruton violation). The murder sentence was vacated based on this Sixth Amendment violation.

## *CONFRONTATION CLAUSE*

***Crawford v. Washington,*** 541 U.S. 36, 124 S. Ct. 1354 (2004) Overruling Ohio v. Roberts, in part, the Supreme Court held that the Confrontation Clause bars the use of out-of-court declarations that are "testimonial" in nature, and which do not satisfy a standard "firmly rooted" hearsay exception. The Ohio v. Roberts "indicia of reliability" alternative basis for admitting out of court statements was jettisoned in this case. The Court did not set forth a precise definition of "testimonial" but held that statements made to law enforcement officers certainly fit the definition and therefore are excluded, regardless of the "indicia of reliability" of the statement. The same applies for prior sworn testimony that was not subject to cross-examination.

***Melendez-Diaz v. Massachusetts***, 129 S. Ct. 2527 (2009) Crawford applies to crime lab technicians. Thus, a state law that allows the prosecution to introduce a crime lab report without bringing in the technician for cross-examination is unconstitutional.

***Williams v. Illinois***, 132 S. Ct. 2221 (2012) A very complicated decision that appears to alter the landscape of the Bullcoming and Melendez-Diaz terrain. In this case, a DNA test established that the blood of the perpetrator had certain characteristics. Nobody from CellMark testified. However, an expert was permitted to testify that the DNA results from Cellmark matched the DNA of the defendant. This was a bench trial, a fact stressed by Judge Alito in his plurality opinion. He concluded that the Cellmark test results were not actually introduced for the truth of the matter asserted. He also concluded that even if they were introduced for that purpose, it was not a Confrontation Clause violation. The fifth vote, by Justice Thomas, agreed that it was not a Confrontation Clause violation for an entirely different reason. Justice Breyer, who agreed with Justice Alito, stressed the fact that it was a bench trial. Four Justices concluded that this was a Confrontation Clause violation. Davis v. Washington and Hammon v. Indiana, 547 U.S. 813 (2006) If a person makes a 911 call to report a crime – particularly an ongoing crime – and the purpose of the call is to seek immediate aid, the statement is not "testimonial" in the Crawford sense. But if a person tells the police facts about a past crime, that statement is "testimonial" in the Crawford sense. The focus of the inquiry is on the "primary purpose" of the interrogation. The Court noted that even in the 911-call situation, if the conversation evolves into a recitation of past facts, the trial court should redact the statement to ensure that any "testimonial" component of the statement is eliminated.

***Michigan v. Bryant***, 131 S. Ct. 1143 (2011) The police responded to a report that a man had been shot. When the police arrived, they asked him what happened. The victim said that he had been shot by "Rick" at "Rick's house. Shortly thereafter the victim was taken to the hospital and died. The Supreme Court concluded that the victim's statements to the police were not "testimonial" and were not barred by the Confrontation Clause. The existence of an "emergency" as that term was discussed in Davis v. Washington is not outcome-determinative on the question of whether a statement is testimonial. The ultimate question is whether the statement by the declarant was obtained or made for the purpose of subsequent use, or to deal with an immediate cause for concern. The type of weapon used, the location of the assault or shooting, the relationship between the victim and the assailant, the location of the assailant, are all factors that are relevant in deciding why the police asked the questions and why the declarant responded.

***Bullcoming v. New Mexico***, 131 S. Ct. 2705 (2011) The Supreme Court decided that a surrogate crime lab technician may not be used to offer testimony about a drug test, or other chemical test that the surrogate did not participate in performing. Simply reciting what another analyst wrote or reading the results from the machine that the surrogate did not have any role in preparing, violates the Confrontation Clause.

***Ohio v. Clark,*** 135 S. Ct. 2173 (2015) The child victim made a statement to a teacher about being molested by his mother's boyfriend. The Supreme Court held that the statement to the teacher did not qualify as a "testimonial" statement covered by the Confrontation Clause. The child's statements to the teacher were not made for the "primary purpose" of creating evidence for the prosecution of the perpetrator.

***Lambert v. Warden Greene SCI***, 861 F.3d 459 (3rd Cir. 2017) The prosecution arguably relied on the statements of one defendant to a psychiatrist that qualified as testimonial statements to implicate the other defendant in the murder. Though the statement itself only implicated the declarant/defendant, the trial court should have instructed the jury that the statement could only be used against the declarant/defendant. Trial counsel's failure to seek a limiting instruction was ineffective assistance of counsel, which required a remand to evaluate the appropriate relief.

***Etherton v. Rivard***, 800 F.3d 737 (6th Cir. 2015) The defendant was convicted in state court of possessing cocaine in his vehicle. The prosecution introduced testimony from his co-defendant who was in the car with him, but that witness was significantly impeached. The other evidence (other than finding the cocaine in the vehicle) was a tip received by the police that the car was on the interstate, and it had cocaine in it. This existence of the tip was introduced twice, and the prosecutor referred to the tip in his closing argument. There was no objection to this evidence at trial and the issue was not raised on appeal. The tip

was inadmissible evidence and violated the defendant's rights under the Confrontation Clause. The Sixth Circuit granted habeas relief. The Supreme Court reversed: The federal court did not afford sufficient ADEDPA deference to the conclusion of the state courts. The "tip" was not necessarily introduced for the truth of the matter asserted and trial counsel may have had a strategic reason not to object. 578 U.S. --- (2016).

***United States v. Esparza***, 791 F.3d 1067 (9th Cir. 2015) The defendant was arrested at the border, driving a car that had marijuana hidden in various compartments. He claimed that he had borrowed the car from a friend. At trial, the government introduced a Department of Motor Vehicles Form that was signed by the previous owner of the vehicle that declared that she had sold the car to the defendant six days prior to the arrest. The DMV form had been sent to the previous owner with an accompanying letter that explained that the car had been seized with drugs. The previous owner sent in the form, aware that there was a criminal investigation. The form, therefore, was testimonial. It was not a routine business record, though it was in the DMV files, because it was not created by an agency employee in the routine course of business and because of the criminal investigation, the previous owner had a motive to disassociate herself from the vehicle.

***United States v. Brooks***, 772 F.3d 1161 (9th Cir. 2014) A postal inspector was permitted to repeat what he was told by the supervisor about the identity of the person who was mailing certain parcels. The fact that the supervisor's statements were not repeated verbatim is irrelevant. The content of the supervisor's identification testimony was introduced, and the defendant was not able cross-examine the supervisor. "Out of court statements admitted at trial are statements for the purpose of the Confrontation Clause if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify at trial." The statements in this case were testimonial, because the supervisor knew his statements were being used to further an investigation and would be used to collect information necessary to make out a case against the suspect.

***McCarley v. Kelly***, 759 F.3d 535 (6th Cir. 2014) A child's statements to a child psychologist about the murder of the child's mother were testimonial statements and allowing the psychologist to read these statements to the jury violated Crawford. The child was interviewed by the psychologist after the child was brought to the doctor by the police who were investigating the murder of the child's mother. The Supreme Court granted cert and reversed and remanded for further consideration in light of Davis v. Ayala (2015). On remand, the Sixth Circuit again granted the writ, concluding that the child's statements were admitted in violation of the Confrontation Clause. McCarley v. Kelly, 801 F.3d 652 (6th Cir. 2015).

***United States v. Ferguson***, 752 F.3d 613 (4th Cir. 2014) At the defendant's supervised release revocation hearing the government offered a laboratory analysis to prove that the substance possessed by the defendant was marijuana. Rule 32.1(b)(2)(C) permits hearsay evidence if the government offers good cause for not presenting firsthand information (such as the unavailability of the witness). There was no showing of good cause in this case. Even a showing of reliability is not alone sufficient to establish good cause, though reliability of the evidence is also a component of good cause.

***United States v. Duron-Caldera***, 737 F.3d 988 (5th Cir. 2013) The fact that an out of court declarant made a statement that was not "accusatory" does not mean that it was not "testimonial" or that it comes within the rule announced in Williams v. Illinois. In this case, the out of court declaration was testimonial and was inadmissible under the Confrontation Clause. The statement was made by the defendant's grandmother decades earlier in an affidavit that was prepared in connection with an investigation of the defendant's parents' immigration status. It was used in this case, which alleged that the defendant was guilty of illegal reentry.

***United States v. James***, 712 F.3d 79 (2d Cir. 2013) If there is any uncertainty about the complexity or long-term effect of the decision in Williams v. Illinois, 132 S. Ct. 2221 (2012), this decision should dispel that thought. The Second Circuit concludes that there is no way to discern what is the holding subscribed to by a majority of the Justices and, furthermore, there is no way to determine with any degree of certainty, whether the holding requires the exclusion of testimony relating to an autopsy and toxicology report. The case is an excellent primer on the confusing nature of the Williams decision.

***United States v. Cameron***, 699 F.3d 621 (1st Cir. 2012) A report from Yahoo! that implicated the defendant in the possession and trading of child pornography should not have been admitted at trial. The report qualified as testimonial evidence. The court held that these reports did not qualify as business records.

***United States v. Bustamante***, 687 F.3d 1190 (9th Cir. 2012) In order to prove the defendant's guilt of illegal reentry, the government introduced a document purporting to be a transcription of a birth certificate from the Philippines. The Ninth Circuit held that this document was testimonial and introducing it at trial violated defendant's Confrontation Clause rights. The document was not an actual birth certificate, but a document prepared by a Philippine official in response to a request for this information by an American official. Thus, it was prepared for use at trial, and it fell within the scope of the Confrontation Clause.

***United States v. Walker***, 673 F.3d 649 (7th Cir. 2012) The government offered considerable evidence about what an informant said, and did, without putting the informant on the stand. Undercover tapes in which the informant talked to the defendant and statements that the informant made to the officers were also introduced. The Seventh Circuit held that the Confrontation Clause was violated, but it was harmless error.

***Peak v. Webb***, 673 F.3d 465 (6th Cir. 2012) The government played the confession of a co-conspirator who made himself available to testify if either party called him as a witness. Without deciding whether this procedure violated the Confrontation Clause, the Sixth Circuit held that under the AEDPA standard, it was not so clear that this violated the Constitution since the witness was available to be cross-examined.

***United States v. Ignasiak***, 667 F.3d 1217 (11th Cir. 2012) The defendant, a doctor, was charged with over-prescribing pain medication resulting in the deaths of certain patients. Over a Confrontation Clause objection, the government was permitted to introduce autopsy reports through the testimony of a medical examiner who did not perform the autopsy. The Ignasiak court held that the autopsy reports qualified as "testimonial' evidence. The government argued that the reports were admissible under the business records exception to the hearsay rule. The Eleventh Circuit rejected this argument. The exceptions to the hearsay rules are not automatically exceptions to the Confrontation Clause. Of course, most business records are not "testimonial" in nature, because they are not prepared in anticipation of being used "prosecutorial." Autopsy results, however, are prepared with this expectation. Thus, the Confrontation Clause applies, and the reports should only have been admitted through the testimony of the person who actually performed the autopsy.

***United States v. Ramos-Gonzalez***, 664 F.3d 1 (1st Cir. 2011) Utilizing an expert witness to testify about crime lab results (drug analysis) despite the fact that the expert was not present when the drug tests were performed, violates Bullcoming, even though the actual drug test results were not introduced in evidence. This is a pre-Williams v. Illinois decision and the First Circuit expressly noted that the decision in Williams (which had already bee argued, but not yet decided when this decision was reached), could impact the result in this case.

**Merolillo v. Yates**, 663 F.3d 444 (9th Cir. 2011) The defendant was charged with murder. He carjacked a vehicle and one of the occupants tried to escape but was dragged along the payment for several hundred yards before breaking free. One month later she died from a ruptured aorta. The issue at trial was whether the defendant's conduct caused her death. An autopsy pathologist testified at a preliminary hearing, but his testimony was somewhat equivocal, though he ultimately concluded that the carjacking was a contributing cause of death. At trial, the prosecution did not call that witness to the stand. Instead, the prosecutor called other experts, each of whom relied, to some extent, on the conclusions of the autopsy pathologist. This violated the defendant's Confrontation Clause rights.

***United States v. Moore***, 651 F.3d 30 (D.C.Cir. 2011) In this lengthy drug/murder/CCE trial, certain crime lab and autopsy evidence was offered that violated the rule announced in Bullcoming (a decision that was issued after oral argument in this case). The D.C. Circuit remanded certain counts of conviction to the trial court to evaluate whether admitting the evidence in violation of the Confrontation Clause was harmless error.

***Ocampo v. Vail***, 649 F.3d 1098 (9th Cir. 2011) A police officer testified that a witness – who was not available to testify, because he had returned to Mexico – corroborated the testimony of other witnesses that implicated the defendant's presence at the shooting. Though the specifics of what the missing witness said was not revealed, the substance of his testimony was unmistakable and was not only introduced through the testimony of the officer but was also relied on during the prosecutor's closing argument as further proof of the defendant's guilt. The Ninth Circuit ordered that the writ be granted.

***United States v. Meises***, 645 F.3d 5 (1st Cir. 2011) A DEA agent was asked on direct examination whether he interviewed one of the drug conspirators who had been arrested. He responded that he did interview him. He was then asked if he did anything after that interview. He responded that he arrested the defendant. This violated the Confrontation Clause. Masking the hearsay by not asking specifically what was said by the conspirator did not avoid the error.

***United States v. Smith***, 640 F.3d 358 (D.C. Cir. 2011) The defendant was charged with possession of a firearm by a convicted felon. Just prior to trial, the prosecutor asked the clerk of the court where the defendant had his felony conviction to verify his record. The clerk sent a letter that verified the existence of a felony conviction. The letter was signed by the clerk and was "certified." The court held that this violated the Confrontation Clause. The letter was testimonial – it was written for the express purpose of being used at defendant's trial.

***Jones v. Basinger,*** 635 F.3d 1030 (7th Cir. 2011) The defendant was charged with murder. The key witness for the state testified that he participated in the home invasion with the defendant. That witness was vigorously cross-examined. The prosecution responded by calling the police officer who received a tip from an informant who provided considerable evidence against the defendant, as well as recited what he (the informant) had been told by one of the other participants in the murder. The state argued that this was offered to explain the police officers' investigation and not for the truth of the matter asserted in the informant's statement. The Seventh Circuit held that the evidence was not, in fact, offered for this purpose and was inadmissible hearsay that violated the Confrontation Clause.

***United States v. Causevic***, 636 F.3d 998 (8th Cir. 2011) The defendant was prosecuted for a § 1001 and § 1546 violation, relating to lying on an immigration form about whether he had ever killed anybody (he denied having ever killed anybody). In order to prove that this was a lie, the government introduced a Bosnian conviction for murder. The defense claimed that this violated his Confrontation Clause rights. The Eighth Circuit agreed. Though the judgment (proof of the conviction for murder) is admissible as a public record, the judgment was not admissible of proof of the facts underlying the conviction. In short, the judgment was admissible to prove that the defendant had been convicted of murder; but it was not admissible to prove that he had ever killed anybody. See also Kirby v. United States, 174 U.S. 47 (1899).

***United States v. Jackson***, 636 F.3d 687 (5th Cir. 2010) A DEA agent explained how and why drug traffickers keep drug ledgers. A coconspirator's drug ledgers that implicated the defendant were then introduced into evidence under the Business Records exception to the hearsay rule (the co-conspirator did not testify) and as a co-conspirator statement. The Fifth Circuit held that this was error. The agent's testimony did not satisfactorily authenticate the records or establish the necessary foundation that these records were kept in the regular course of business or that they were prepared during the course of the conspiracy. Though a person other than a record custodian may authenticate a business record, the witness must be able to

authenticate this business record and not, as here, business records (or drug ledgers) in general. Admitting the ledgers constituted a violation of Confrontation Clause and required that the conviction be reversed. The Fifth Circuit further explained that the notebooks were inadmissible on Confrontation Clause grounds, because the government failed to prove that they were not testimonial. Because no effort was made to authenticate the notebooks (i.e., how, or when they were written), the introduction of the notebooks became, in essence, the functional equivalent of the author testifying live in court. It is the government's burden to prove that an out-of-court statement is non-testimonial.

***United States v. Williams***, 632 F.3d 129 (4th Cir. 2011) The government asked the defense to stipulate to the drugs in this drug prosecution. The defense attorney agreed, but the defendant himself objected. The defense attorney told the judge that she would stipulate, over the objection of the defendant, if the court approved. The court approved. This violated the defendant's Confrontation Clause rights. Though a defense attorney may waive the Confrontation Clause rights of a defendant under usual circumstances, this waiver may not occur over the objection of the defendant.

***United States v. Holmes,*** 620 F.3d 836 (8th Cir. 2010) The issue in this case was whether the defendant lived at a house where drugs and guns were found during the execution of a search warrant. When cross-examining the police officer, the defense attorney asked whether a certain item of evidence was all there was linking the defendant to the house. On re-direct, the prosecutor asked the officer to read the search warrant affidavit at length, which included the statement of a C.I. who did not testify at trial and who linked the defendant to the house. The Eighth Circuit held that this was error on hearsay and Confrontation Clause grounds. The evidence was not offered to "explain the officer's conduct" and the defense attorney's cross-examination did not "open the door" to the rebuttal or waive the defendant's Confrontation Clause guarantee.

***United States v. Gomez***, 617 F.3d 88 (2d Cir. 2010) The police arrested Rivas. The officer told Rivas to call the person who supplied him with all the ecstasy pills. Rivas called the defendant, Gomez. At trial, the government offered this evidence to support the charge that Gomez was the supplier for Gomez. Rivas did not testify at trial. The Second Circuit reversed the conviction, holding that this was hearsay evidence (by inference) that also amounted to a violation of the Confrontation Clause. Even a limiting instruction by the court to the jury cautioning the jury not to consider the evidence for the truth of the matter asserted was not sufficient to cure the error. See also Ryan v. Miller, 303 F.3d 231 (2d Cir. 2002).

***United States v. Smalls***, 605 F.3d 765 (10th Cir. 2010) This case contains a thorough review of the impact that Crawford had on Ohio v. Roberts and explains the current Confrontation Clause jurisprudence. The court explained that Ohio v. Roberts was wrong for two reasons, according to Crawford. First, with regard to non-testimonial hearsay, the Confrontation Clause provides no prohibition. If the out-of-court statement is not testimonial, then only the traditional hearsay rules apply, not the Confrontation Clause. On the other hand, if the out-of-court statement is testimonial, then the statement is automatically excluded, regardless of how reliable it is. Thus, Ohio v. Roberts excluded some testimony that should have been admissible (at least under Constitutional standards) and permitted the introduction of other evidence that should have been excluded without regard to reliability.

***Jones v. Cain,*** 600 F.3d 527 (5th Cir. 2010) A witness to a murder provided recorded statements to the police prior to his death from unrelated causes. He also testified at a suppression hearing prior to this death. His testimony at the suppression hearing was admissible because it was prior sworn testimony. His statements to the police, however, were not admissible. The state argued that the statements to the police were not offered for the truth of the matter asserted, but this was clearly belied by the record. The statements were not merely used to "shore up the witness's credibility" or to "explain the investigators' conduct."

***United States v. Martinez-Rios***, 595 F.3d 581 (5th Cir. 2010) A "certificate of the non-existence of a record" is a testimonial statement that is covered by Crawford. In this case, the government introduced a certificate that established that the defendant's alien file revealed no documents that allowed him to re-enter the country. Jensen v. Romanowski, 590 F.3d 373 (6th Cir. 2009) During the defendant's state trial, an officer testified about what a prior victim told him about the defendant's sexual assault. There was no basis for admitting this hearsay evidence and this violation of the Confrontation Clause necessitated granting a writ of habeas corpus.

***Bobadilla v. Carlson***, 575 F.3d 785 (8th Cir. 2009) A child's statement to a clinical social worker who has been asked to conduct a forensic interview in connection with a child abuse investigation is "testimonial" under Crawford. In this case, the child's statement to the social worker was admitted at trial and the child was deemed incompetent to testify live at trial. The Eighth Circuit held that this violated the Confrontation Clause.

***United States v. Tuyet Thi-Bach Nguyen,*** 565 F.3d 668 (9th Cir. 2009) Allowing an officer to testify about the statement of a co-defendant and then allowing the co-defendant's counsel to cross-examine the agent eliciting further details about the codefendant's statement was reversible error as to the defendant. The Ninth Circuit states, during the course of the opinion, that admitting the co-defendant's statement was a Crawford Confrontation Clause violation and whether or not the statement implicated the defendant only related to the harmless/harmful nature of the error.

***United States v. Lee***, 549 F.3d 84 (2d Cir. 2008) The government conceded that introducing the out-of-court statement of a conspirator that implicated the defendants in the murder for hire was error. The Second Circuit concluded that the error was not harmless beyond a reasonable doubt and reversed the defendants' convictions.

United States v. Mejia, 545 F.3d 179 (2d Cir. 2008) The government offered the testimony of an expert in this gang case. The expert testimony about the structure of the gang, its history and various other matters that was admissible because (1) the testimony was not based on any data or information that was the proper subject of expert testimony; (2) the testimony included

the expert's lay opinion, rather than expert opinion; (3) the expert simply repeated some things he was told by co-conspirators and was therefore testimonial hearsay in violation of Crawford. Reversible error.

***United States v. McGee***, 529 F.3d 691 (6th Cir. 2008) The statements of a confidential informant to a police officer providing information about the defendant qualify as testimonial and, in this case, the officer should not have been permitted to testify about what the informant told him, even as "background" or to "explain the officer's conduct." Harmless error.

***United States v. Harwick***, 523 F.3d 94 (2d Cir. 2008) Introducing the co-conspirators plea colloquy was plain error in light of Crawford.

***United States v. Alvarado-Valdez***, 521 F.3d 337 (7th Cir. 2008) The defendant's co-conspirator fled to Mexico prior to trial. Before fleeing, however, the co-conspirator made a lengthy statement to the police, outlining the defendant's role in the conspiracy. The trial was held pre-Crawford and the trial court held that the statements had sufficient indicia of reliability. Post-Crawford, the Seventh Circuit held that this was reversible error. The government's effort to establish harmless error under the Chapman v. California standard was rejected.

***United States v. Maher***, 454 F.3d 13 (1st Cir. 2006) The fact that the government offers an informant's statements to the police "to explain the officer's conduct" does not eliminate a Confrontation Clause problem. If the point of the inquiry is simply to explain what the officer did, then the officer should simply be asked, "Based on information received did you . . ." Because the defense did not object in this case, however, the error was only reviewed for plain error and was not sufficiently prejudicial to require setting aside the judgment.

***United States v. Santos,*** 449 F.3d 93 (2d Cir. 2006) The trial court redacted portions of a co-defendant's post-arrest statement and removed references to the defendants and instructed the jury not to consider the statement as evidence of the defendants' participation in the conspiracy. However, the statement that was included revealed that the intention of the conspirators was to rob through the use of force. This was a contested element of the Hobbs Act prosecution and admitting this portion of the statement violated the remaining defendants' confrontation clause rights.

***United States v. Hinton***, 423 F.3d 355 (3d Cir. 2005) An out of court statement qualifies as "testimonial" if statement was made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. The defendant's statement to the police identifying the perpetrator was a testimonial statement. Harmless error.

***United States v. Pugh***, 405 F.3d 390 (6th Cir. 2005) Introducing the out-of-court identification statement of a witness that fingered the defendants as the bank robbery (based on the declarant's viewing of a surveillance tape) violated Crawford. The statement was given by the declarant to a police investigator (thus it was "testimonial") and the statement was offered for the truth of the matter asserted – not, as the government suggested, merely to explain the officer's conduct.

***Murillo v. Frank***, 402 F.3d 786 (7th Cir. 2005) The state trial court erroneously admitted the statement of a witness who made a custodial statement implicating the defendant shortly after the murder. The witness refused to testify at trial, even with a grant of immunity. This evidence would clearly be barred under Crawford, but Crawford does not apply retroactively. Nevertheless, this evidence was also inadmissible under Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887 (1999).

***United States v. Bordeaux***, 400 F.3d 548 (8th Cir. 2005) A child's statement to a social worker who was investigating charges of child molestation was "testimonial" and introducing these statements violated the defendant's Confrontation Clause rights. Significantly, the child's testimony at trial was partially conducted via closed-circuit television, thus the defendant's Confrontation Clause rights were not protected by the child's in-court appearance. The court also reversed the conviction based on the use of the closed-circuit television (see annotation in previous section).

***United States v. Summers***, 414 F.3d 1287 (10 th Cir. 2005) Attempting to provide answers that were side-stepped by Crawford, the Tenth Circuit holds that statements that qualify as "testimonial" reflect the objective intention of the declarant. Thus, the question is whether "a reasonable person would objectively foresee that his statement might be used in the investigation or prosecution of a crime." In this case, a bank robber, when apprehended by the police, asked, "How did you guys find us so fast?" This was a testimonial statement and introducing the statement against the defendant violated his confrontation clause rights. Harmless error.

***Dorchy v. Jones***, 398 F.3d 783 (6th Cir. 2005) At Dorchy's trial, the state was permitted to introduce the testimony of a witness who could not be located that was given at a co-defendant's earlier trial. Evaluating the Confrontation Clause issue under Ohio v. Roberts (this case was tried prior to Crawford), the Sixth Circuit held that the state court's decision was clearly contrary to the law even under Ohio v. Roberts. There were no particularized guarantees of trustworthiness, and the fact that the witness was cross-examined by a co-conspirator's counsel was factually erroneous, because the defense in the earlier trial was clearly not the same as the defense in this case.

***United States v. Gilbert***, 391 F.3d 882 (7th Cir. 2004) When the defendant's spouse refused to testify at trial, relying on the marital privilege, the trial court allowed the government to play her previous statement, because the court found that it had circumstantial guarantees of trustworthiness. Post-Crawford, this was erroneous.

***United States v. Rodriguez-Marrero,*** 390 F.3d 1 (1st Cir. 2004) The government offered the testimony of a witness who recited what a cooperating witness had told him. The government argued that the cooperating witness' death (he was murdered) rendered the evidence admissible, because the statements were reliable and because the defendant "acquiesced" in his murder, though he was not directly responsible for the murder. The First Circuit held that Crawford v. Washington barred this evidence on

Confrontation Clause grounds, and that Rule 804(b)(6) did not apply, because the lower court made no findings that would support the conclusion that the defendant was responsible (in the conspiratorial sense) for the murder of the witness, as opposed to simply being aware of the order from others that the witness was to be killed.

***United States v. Cromer***, 389 F.3d 662 (6th Cir. 2004) During the defendant's cross-examination of a police officer, he asked questions about a CI's description that linked him to drug dealing. On re-direct, the government was permitted to pursue this line of questioning by asking about the specific statements made to the police by the CI. The trial court admitted the hearsay on the basis that the defendant "opened the door." The Sixth Circuit disagreed. While as a matter of evidence law, the defendant may have opened the door, as a matter of constitutional law, he did not forfeit his rights under the Confrontation Clause. The admission of the CI's statement to the police was a clear violation of Crawford. The cross-examination of the police officer amounted to foolish trial strategy, not misconduct that would forfeit the Confrontation Clause rights. Moreover, the government elicited other hearsay from the officer when he was asked about the basis for obtaining a search warrant.

***United States v. Bruno***, 383 F.3d 65 (2d Cir. 2004) The trial court committed plain error in permitting the government to introduce the plea allocution of one co-conspirator and the grand jury testimony of another. These statements were "testimonial" under the Crawford definition. The inadmissible evidence was critical evidence with regard to certain counts of the indictment and reversal on those counts was therefore required.

***United States v. Wilmore***, 381 F.3d 868 (9th Cir. 2004) The government's introduction into evidence of a witness's grand jury testimony, coupled with the lower court's restriction of defendant's cross-examination of that government witness amounted to a violation of defendant's Confrontation Clause rights and necessitated reversal of the conviction. The witness had testified at the grand jury that she had seen the defendant (charged with being a felon in possession of a gun) in possession of a gun. At trial, she was called as a witness for the government and denied seeing the defendant in possession of the weapon. The government introduced relevant portions of the grand jury testimony and when the witness was confronted by the government with her previous grand jury testimony, she ultimately invoked her Fifth Amendment rights. The judge then instructed defense counsel to avoid asking any questions that would lead to further invocations of the Fifth Amendment. This was erroneous. Because the grand jury testimony was actually introduced in evidence by the government, the defendant could not be limited in his cross-examination of the witness regarding the circumstances of that testimony. More importantly, the introduction of the grand jury testimony amounted to testimony that was not subject to cross-examination, which violated Crawford v. Washington, 124 S. Ct. 1354 (2004).

United States v. McClain, 377 F.3d 219 (2d Cir. 2004) Relying on Crawford, the Second Circuit held that the admission of co-conspirators' plea allocutions was error, but harmless. See also United States v. Al-Sadawi, 432 F.3d 419 (2d Cir. 2005) (same)

***United States v. Jones***, 371 F.3d 363 (7th Cir. 2004) The defendant's co-codefendant confessed to the crime with which he was charged, but then became a fugitive prior to trial. The government offered the co-conspirator's confession at trial, though all references to the defendant were redacted. The Seventh Circuit held that the statement should not have been admitted. First, because the declarant was not at trial, the statement obviously could only be used against the defendant, thus, redacting the defendant's name did not satisfy the Bruton concerns. Second, according to Crawford v. Washington, this statement could not be admitted without violating the defendant's right of confrontation.

***CONSPIRACY (Drug Cases – Insufficient Evidence) SEE ALSO: CONSPIRACY (Drug Cases -- Buyer-Seller Cases)***

***United States v. Louis***, 861 F.3d 1330 (11th Cir. 2017) The police received a tip that a ship was smuggling drugs into the country. The police set up surveillance of the ship and at one point, boxes were removed from the ship and placed on the dock. Later, the boxes were placed in a car and the defendant was watched driving the car away from the dock. The police stopped the car and the defendant tried to flee. The boxes contained cocaine. The Eleventh Circuit holds that this evidence was insufficient to prove that the defendant was involved in a conspiracy to possess with intent to distribute the cocaine. There was insufficient proof that he knew what was in the boxes and even his flight did not establish his specific intent to possess with intent to distribute cocaine.

***United States v. Loveland***, --- F.3d --- (9th Cir. 2016) Another buyer-seller decision that dooms a drug conspiracy conviction. Even if the number of drugs sold is more than the buyer could consume, this does not mean that the seller and buyer had a conspiratorial relationship to sell the drugs. Absent such proof, a conviction for conspiracy could not be sustained.

***United States v. Lomax***, 816 F.3d 468 (7th Cir. 2016) The trial court's failure to instruct the jury on the principle that a buyer-seller relationship is not necessarily sufficient to prove the existence of a conspiracy, required reversing the conviction in this case. Though the defendant was buying the drugs to resell, that was not a basis for denying his request for a buyer-seller instruction.

***United States v. Blue***, 808 F.3d 226 (4th Cir. 2015) The evidence was insufficient to convict the defendant of constructive possession of heroin, or of conspiring to possess with intent to distribute at least 100 grams of heroin. The defendant was observed selling heroin to an informant. Later, he was observed going into an apartment. At a later time, the police obtained a search warrant for that apartment, found two people inside, as well as over 100 grams of heroin. Though the defendant had a key to that apartment, the evidence was not sufficient to show that he used the apartment as a stash house or that he had any connection to the 100 grams that were found in that apartment. The court held that this evidence was insufficient to convict him

of constructive possession or conspiracy. The government's invitation to remand for entry of a judgment of conspiring to possess less than 100 grams based on the other transition was rejected by the Fourth Circuit.

***United States v. Cruse***, 805 F.3d 795 (7th Cir. 2015) The Seventh Circuit once again reverses a conviction because of the trial court's failure to instruct the jury on the principle that a buyer-seller relationship is not, alone, sufficient to prove a conspiracy. In this case, there was considerable evidence of sales to and from the defendant and even an occasional credit sale, but this evidence did not necessarily refute the defendant's defense that he was simply involved in buyer-seller relationships with the other parties.

***United States v. Santos-Soto***, 799 F3d 49 (1st Cir. 2015) The defendant, a police officer was involved in a conspiracy to deprive certain people of their civil rights. However, there was insufficient evidence to support her conviction for knowingly joining a conspiracy to distribute controlled substance. "It is hard to imagine how someone furnishing a peripheral service to a drug conspiracy could be deemed to join that conspiracy unless he knew both that the drug conspiracy existed and that the peripheral service being furnished was designed to foster the conspiracy."

***United States v. Randolph***, 794 F.3d 602 (6th Cir. 2015) The defendant was charged with being a member of a drug conspiracy with various members of his family. On the verdict form, the jury was asked to first mark whether the defendant was "guilty" or "not guilty" of the conspiracy charge and then, "If you unanimously find that a particular controlled substance was not involved in the offense [i.e., cocaine, crack cocaine, marijuana], mark 'none' on the appropriate special verdict form." The jury returned a verdict of guilty against Randolph but marked "none" beside each of the three drugs. The Sixth Circuit held that this amounted to an acquittal, because the jury had to find that the conspiracy had as its object at least one of the drugs. This is not a case in which there are inconsistent verdicts (which generally do not require a reversal). This was one count of the indictment for which the jury apparently found insufficient evidence with regard to one of the elements of the offense.

***United States v. Burgos***, 703 F.3d 1 (1st Cir. 2012) The defendant was a police officer. The government alleged that he was aware that a car repair shop on his "beat," where his brother-in-law had worked as a mechanic, was a drug dealing location. The defendant also used the repair shop for his own vehicles. The defendant also became aware that the Vice Squad was surveilling the location. The defendant told the owner that his repair shop was "hot." The First Circuit held that this evidence was insufficient to support the defendant's conviction of being a member of a conspiracy to possess with intent to distribute drugs.

***United States v. LaPointe***, 690 F.3d 434 (6th Cir. 2012) Defendant was charged with conspiracy to possess with intent to distribute oxycodone. He requested an instruction on the lesser included offense of conspiracy to possess oxycodone (a conspiracy). The trial court erred in failing to instruct the jury as requested. First, the court held that the fact that the indictment alleged that the defendants conspired to distribute and to possess with intent to distribute did not mean that a conspiracy to possess was no a lesser included offense because it is not a lesser offense of the conspiracy to distribute. (An indictment frequently charges in the conjunctive, but a jury can convict of either of the methods). Second, the fact that all conspirators did not share the limited conspiracy to simply possess the drugs did not mean that the defendant did not have that limited agreement with others.

***United States v. Gaskins***, 690 F.3d 569 (D. C. Cir. 2012) The evidence was insufficient to prove that the defendant was a member of the large drug conspiracy that was prosecuted in this case. Virtually no evidence linked him to any drugs, any drug transactions or conversations about drugs involving the conspirators. One drug sale that was proven had no relationship to the charged conspiracy. The fact that the defendant purchased plane tickets for other conspirators did not link him to the conspiracy because no evidence established that he knew the purpose of the co-conspirators' travels.

***United States v. Silwo***, 620 F.3d 630 (6th Cir. 2010) The defendant was instrumental in procuring a van that was later used to transport marijuana and was also observed engaging in activity that appeared to be counter-surveillance. This evidence, alone, did not suffice to support a conviction for conspiracy to possess with intent to distribute marijuana. The defendant was not present when the van was loaded. The defendant was clearly in a scheme, but the evidence did not show that he knew the scheme involved the distribution of marijuana. For the same reason, the defendant could not be convicted of aiding and abetting the possession with intent to distribute the marijuana.

***United States v. Torres***, 604 F.3d 58 (2d Cir. 2010) The evidence was insufficient to support the defendant's conviction for being a member of a drug conspiracy. The case involved the aborted delivery of two large packages from Puerto Rico to the defendant at a location in New York. UPS attempted to deliver the packages, but the defendant's identification, though listing his name correctly, failed to show that he resided at that address. UPS refused to deliver the packages to him. Later, UPS brought the packages back to the office and opened them discovering that cocaine was hidden in the packages. The defendant was called to the UPS store and was given the packages, after which he was arrested. This evidence failed to show that he was a knowing member of a narcotics conspiracy. There was no additional evidence that he knew what was concealed in the packages, or that he was being paid to participate in the distribution of cocaine.

***United States v. Caldwell***, 589 F.3d 1323 (10th Cir. 2009) The defendant was asked by another drug dealer for a recommendation of another drug source. The defendant introduced him to his supplier. The defendant was present at the first meeting but had no further dealings between the other two and received no money, commissions, or other benefit from the others' dealings. This did not make the defendant a member of a three-person drug distribution conspiracy. The mere introduction of a common supplier, made by one drug dealer to another, is not sufficient to create a single conspiracy among all the dealers. Having concluded that there was a variance, the Tenth Circuit then concluded that the variance was not prejudicial and affirmed the conviction.

**United States v. Tran,** 568 F.3d 1156 (9th Cir. 2009) The defendant was in a car that exited a warehouse that had been used as a drug distribution site. The defendant was a passenger, and the marijuana was in the trunk. There was insufficient evidence establishing that the defendant possessed the marijuana with intent to distribute it, or that he conspired to do so. The Rule 404(b) evidence may have established that he had knowledge of the marijuana (the limited purpose for which the evidence was admitted), but it did not establish that he constructively or actually possessed the marijuana – or aided and abetted the possession of the marijuana – or that he conspired to do so. See also United States v. Sanchez-Mata, 925 F.2d 1166 (9th Cir. 1991) and United States v. Estrada-Macias, 218 F.3d 1064 (9th Cir. 2000).

***United States v. Paret-Ruiz***, 567 F.3d 1 (1st Cir. 2009) Though there was considerable evidence that the defendant had conversations with other individuals about possible cocaine loads, the only "agreement" he had to import drugs was with an undercover agent. There was insufficient evidence that the conversations with others matured into an agreement to commit the drug offenses.

***United States v. Boidi***, 568 F.3d 24 (1st Cir. 2009) A conspiracy to possess drugs is a lesser included offense of a conspiracy to possess with intent to distribute. The government acknowledged that possession is a lesser included offense of possession with intent to distribute; but argued that this logic does not apply to conspiracy offenses. The First Circuit rejected this argument but held that in order to insist on such an instruction, the defendant must show that that, on the evidence presented, it would be rational for the jury to convict only on the lesser included offense and not the greater one. Failure to instruct the jury on the lesser included offense in this case was error. This case also includes a useful discussion of the "buyer-seller" doctrine that provides that a buyer-seller agreement is not, ipso facto a conspiracy to possession with intent to distribute.

***United States v. Ogando***, 547 F.3d 102 (2d Cir. 2008) The defendant, a hired cab driver, was at the airport waiting to transport a drug smuggler to the smuggler's intended destination. The smuggler had already been arrested and was wearing a wire. The cab driver, who acknowledged being called earlier and told to meet the person at the airport, was not shown to be a member of the conspiracy and his conviction was reversed by the Second Circuit. The fact that the defendant made certain false statements to the police at the time of his arrest is not sufficient to support the verdict. Though such evidence is admissible and probative, it is not unreasonable to assume that anybody who is arrested might tend to falsify information that looks incriminating, while still being innocent of the charged offense.

***United States v. Lorenzo***, 534 F.3d 153 (2d Cir. 2008) Though there was ample evidence that there was a drug smuggling conspiracy and that the two defendants engaged in activity that furthered the conspiracy, there was insufficient proof that the defendants knew that what they were doing was in furtherance of a drug conspiracy. Both defendants participated in ferrying a smuggler from the airport to a hotel and one defendant even delivered money to the smuggler, but no evidence demonstrated that either defendant saw drugs, talked about drugs, or was informed by a knowing participant that they were involved in cocaine smuggling. One defendant's false exculpatory statement about his activities does demonstrate a consciousness of guilt, it did not show that the defendant was aware that he was involved in a cocaine smuggling conspiracy.

***United States v. Garcia***, 497 F.3d 964 (9th Cir. 2007) With regard to certain counts, the evidence was not sufficient to prove that the defendant could be held responsible for conduct of other conspirators under a Pinkerton theory, because he was not shown to have been a member of the conspiracy at that time.

***United States v. Lopez-Vanegas***, 493 F.3d 1305 (11th Cir. 2007) Though the courts have applied the drug laws extraterritorially, there are limits. In this case, the defendants, while in Florida, discussed transporting cocaine from Colombia to France for distribution throughout Europe. There was no intention that the drugs ever come to (or through) the United States. The Eleventh Circuit held that the defendants could not be convicted in the United States of conspiracy to possess with intent to distribute cocaine. See also United States v. Benbow, 539 F.3d 1327 (11th Cir. 2008) (holding that in a case somewhat similar to Lopez-Vanegas, it was reversible error to fail to instruct the jury that the government was required to prove that the defendant conspired to either possess, or to distribute drugs in the United States).

***United States v. Esquivel-Ortega***, 484 F.3d 1221 (9th Cir. 2007) The defendant was a passenger in a van that was found to be smuggling a large quantity of drugs. The evidence was insufficient to convict of possessing the drugs with intent to distribute, or with conspiracy to possess with intent to distribute. Mere presence in the van is not sufficient to convict the defendant of possession or conspiracy.

***United States v. Radomski***, 473 F.3d 728 (7th Cir 2007) The defendant and his colleague certainly conspired to do something, and while it is possible that the something was to sell drugs, it was equally likely that they actually conspired to rip off the potential purchaser. Given this state of the record, a conspiracy conviction for conspiring to sell drugs could not be sustained.

***United States v. Korey***, 472 F.3d 89 (3rd Cir. 2007) The defendant was charged with using a firearm during and in relation to a conspiracy to distribute cocaine. A correct instruction on the law of conspiracy to distribute cocaine was required. The evidence established that the defendant was asked by a cocaine dealer to kill someone, in exchange for which the dealer would pay the defendant with cocaine. The district court judge instructed the jury that if they found that the defendant agreed to accept cocaine in payment for killing the victim, that is a conspiracy to distribute cocaine. This was erroneous. This instruction failed to explain correctly that a conspiracy to distribute cocaine requires proof of a "unity of purpose" between the conspirators to distribute cocaine and this instruction did not include that concept. Merely accepting payment in the form of cocaine is not the same as sharing a purpose with the dealer to distribute cocaine. Reversible error.

***United States v. Arbane***, 446 F.3d 1223 (11th Cir. 2006) The government failed to prove that there were any co-conspirators (other than a government informant) in defendant's importation offense, thus, a conspiracy conviction could not be sustained. Though there was some evidence of at least one other person's awareness of the defendant's plan and that the other person helped store drugs in a foreign county, the evidence was insufficient to prove that the other person conspired to import the drugs. The government is obligated to prove that the defendant and the other person shared the same object in order to find the existence of a conspiracy. If the other person only conspired to possess the drugs, or conspired to distribute the drugs in South America, this would not be sufficient.

***United States v. Mendoza-Larios***, 416 F.3d 872 (8th Cir. 2005) Two defendants, driving a car owned by another person, were found guilty of possessing cocaine that was hidden in a welded compartment under the air bag compartment. The Eighth Circuit holds that the evidence was insufficient to convict either defendant. There was no proof that either defendant had knowledge of the drugs that were concealed in the car.

***United States v. Dunmire***, 403 F.3d 722 (10th Cir. 2005) Post-Apprendi, the government is required to prove to the jury that a certain threshold quantity of drugs is involved in an offense. In this case, for example, the government was required to prove that the defendant conspired to distribute at least fifty grams (or, as a lesser included offense, five grams) of crack cocaine. The evidence established that she actually distributed 2.97 grams, but the government argued that the surrounding circumstances established a conspiracy to distribute more. The Tenth Circuit rejected this argument, holding that there was insufficient evidence that the defendant conspired to distribute the quantity that would trigger the higher sentence.

***United States v. Jones***, 393 F.3d 107 (2d Cir. 2004) The evidence was insufficient to support the defendants' possession with intent, and conspiracy to possess with intent, convictions. Though the two defendants were located in a house from which drugs were distributed, there was no evidence linking them to the activity.

***United States v. Cruz***, 363 F.3d 187 (2d Cir. 2004) The defendant was "hired" by a drug dealer to assault some men, but later the task was changed to "watch my back [while I finish] a deal." This evidence was not sufficient to support a conviction of the "back-watcher" for possession with intent to distribute. While the defendant may have known that some type of crime was in progress, there was insufficient proof that he knew that it was a drug deal. See also United States v. Rodriguez, 392 F.3d 539 (2d Cir. 2004) (in same case, another defendant's conspiracy conviction was likewise insufficiently proven).

***United States v. Garcia-Torres***, 280 F.3d 1 (1st Cir. 2002) Though the evidence was sufficient to prove that the defendant participated in a kidnapping and murder, there was insufficient proof that he was aware that the crimes were designed to further (or were in any way related to) his colleagues' drug enterprise. He could not be convicted of conspiracy of possession with intent to distribute cocaine.

***United States v. Cartwright***, 359 F.3d 281 (3rd Cir. 2004) The evidence was insufficient to prove that the defendant was a knowing "lookout" for a drug transaction (as opposed to some other offense) and therefore his convictions for being a member of a drug conspiracy and for aiding and abetting the drug offense were reversed on sufficiency grounds. The government failed to prove that the defendant knew specifically that the illegal activity in which he was participating involved drugs rather than some other form of contraband. The court notes several other Third Circuit cases that have overturned drug conspiracy and aiding and abetting convictions because of the absence of evidence that the defendant agreed to participate in the specific crime alleged in the indictment. (NOTE: The Third Circuit later issued an opinion questioning whether this case utilized the proper standard of review, United States v. Caraballo-Rodriguez, 726 F.3d 418 (3rd Cir. 2013).

***United States v. Gore***, 154 F.3d 34 (2d Cir. 1998) Proof of the existence of a buyer-seller relationship, without more, is not sufficient to prove the existence of a conspiracy. The § 846 conviction in this case was reversed.

***United States v. Mercer***, 165 F.3d 1331 (11th Cir. 1999) A co-defendant was approached by an informant about buying drugs. The co-defendant referred the informant to the defendant, but refused to personally make an introduction, or to call the defendant. This did not sufficiently establish the existence of a conspiracy between the defendant and the co-defendant. Additional evidence that the defendant sold cocaine to undercover officers did not establish a conspiracy, because the person from whom the defendant was buying the drugs (to then sell to the undercover agent) was not shown to have been in a conspiratorial relationship with the defendant (as opposed to simply being his supplier). The government's additional theory (all cocaine comes from South America, and therefore the distribution of cocaine is part of a conspiracy) was rejected by the Eleventh Circuit, as well.

***United States v. Toler***, 144 F.3d 1423 (11th Cir. 1998) The evidence against one of the indicted conspirators was insufficient. The only evidence at trial was that the defendant allowed a former boyfriend to use her apartment (she had moved to her mother's apartment) for a brief period of time. She did not consent to his use of the apartment to deal, or store drugs. After the drug dealer over-stayed his welcome, the defendant changed the locks on the apartment and appropriated some drugs he left behind to reimburse her for utility expenses. The Eleventh Circuit held that this evidence was insufficient. The court also explained that the "slight evidence" rule did not refer to the quantum of evidence needed to support a conviction (only proof beyond a reasonable doubt will suffice) but refers to the extent of the defendant's participation in the conspiracy that the government must prove.

***United States v. Jensen,*** 141 F.3d 830 (8th Cir. 1998) Witnesses identified Jensen as their methamphetamine supplier. Witnesses testified that occasionally they bought drugs from Jensen and re-sold them. This evidence was not sufficient to support a conspiracy conviction. The evidence only established a series of buyer-seller relationships.

***United States v. Thomas***, 150 F.3d 743 (7th Cir. 1998) and 284 F.3d 746 (7 th Cir. 2002). The defendant indisputably sold crack cocaine to an informant. Two sales of drugs (plus a prior sale of bogus drugs) occurred during the course of one week. There was no evidence that the defendant had any stake in the informant's subsequent sales. The Seventh Circuit held that the trial court erred in failing to instruct the jury that a mere buyer-seller relationship does not suffice to convict the seller for being in a conspiracy with the buyer. An agreement (the essence of a conspiracy) is not the equivalent of repeated transactions, though the latter may be evidence of the former. The defendant requested an instruction to this effect but failed to object. Nevertheless, it was plain error to fail to instruct the jury on this principle. Upon retrial, moreover, the evidence was insufficient to establish the existence of a conspiracy.

***United States v. Thomas***, 284 F.3d 746 (7th Cir. 2002). The government's evidence established that the defendant sold cocaine to another person and through the other person, to his customers. This evidence did not establish that the defendant "conspired" with the other people. This only demonstrated a buyer-seller relationship. Even if the seller knows that the buyer is re-selling the drugs, this does not prove that there is a conspiracy.

***United States v. Idowu***, 157 F.3d 265 (3rd Cir. 1998) The government failed to prove that the defendant was aware of the specific unlawful object of the conspiracy. Though the government satisfactorily proved that the defendant was a knowing participant in some form of unlawful activity involving contraband, there was insufficient proof that he was aware that the co-conspirator was involved in a drug transaction. (NOTE: The Third Circuit later issued an opinion questioning whether this case utilized the proper standard of review, United States v. Caraballo-Rodriguez, 726 F.3d 418 (3rd Cir. 2013).

***United States v. Meyer***, 157 F.3d 1067 (7th Cir. 1998) The trial court erred in failing to instruct the jury that a conspiracy could not be proven with proof of only a buyer-seller relationship. The defendant purchased drugs from his codefendants, sometimes for cash, sometimes on credit. Though there was considerable evidence that the defendant was also involved in various aspects of the drug dealing enterprise (constructing false fuel tanks, transporting drugs, acting as a "lieutenant"), there was also evidence that he was simply one of many customers of the principal distributors. The jury should have been instructed on the law regarding a "buyer-seller" relationship.

***United States v. Morillo,*** 158 F.3d 18 (1st Cir. 1998) The evidence failed to support defendant's drug conspiracy conviction. The government theorized that the defendant's apartment in Puerto Rico was used by various mules as the operational center for drug storing and packaging. Though the defendant had previously lived in the apartment and paid rent there, he was not shown to have been involved in any drug dealing, nor was there evidence that he participated in any of the storing or packaging of the drugs.

***United States v. Valerio***, 48 F.3d 58 (1st Cir. 1995) The police searched an apartment known to have been occupied by a co-defendant. Drugs were found in the apartment, as well as a gun. The defendant was also in the apartment. Rent receipts were found in the defendant's name, but the co-defendant testified that the defendant rarely stayed there. The landlord also testified that he had never seen the defendant there before, though rent receipts were made out in her name. Though the government need not exclude every reasonable hypothesis of innocence in order to sustain the conviction, the court is loath to stack inference upon inference in order to uphold the jury's verdict. There was no evidence that the defendant participated in, or helped facilitate, the distribution of drugs. There was no proof that she intended the drugs found in the apartment to be distributed. Thus, the only theory relied on by the government was the inference that, from the quantity of drugs found, it could be inferred that she was part of a conspiracy to distribute drugs. But the government failed to establish that this defendant was even aware of the bulk of the cocaine secreted in the apartment.

***United States v. Ocampo***, 964 F.2d 80 (1st Cir. 1992) The evidence failed to establish the defendant's participation in a conspiracy to distribute cocaine. Though defendant shared a townhouse with another conspirator and probably knew about the cocaine sales, there was insufficient evidence to show that she had agreed to participate in the transaction. A conspiracy cannot be established by piling inferences upon inferences.

***United States v. Aponte-Suarez***, 905 F.2d 483 (1st Cir. 1990) The evidence failed to support a conspiracy conviction for one of the defendants. This defendant had been asked by other conspirators for the use of his airstrip. He refused. Later, however, he introduced one conspirator to another, but did not participate in any subsequent efforts toward the successful completion of any drug importation venture. Although the defendant was aware that the drug importation scheme was taking place, the government presented no evidence that he participated in the venture at all besides the mere introduction of one conspirator to another. "Clearly, this evidence is insufficient to establish guilt."

***United States v. Steuben***, 850 F.2d 859 (1st Cir. 1988) The evidence was sufficient to sustain a conviction of the boat captain, the mechanic, and the English-speaking seaman. The evidence was not sufficient with regard to another crewman who was present during a communication between the captain and the overseer of the marijuana scheme as no other evidence linking him to the crime was presented.

***United States v. Glenn***, 828 F.2d 855 (1st Cir. 1987) The indictment in this drug conspiracy case charged the defendant with being a member of a conspiracy to import and possess marijuana from Thailand and hashish from Pakistan. The evidence only connected the defendant to the conspiracy involving Pakistan hashish. The variance was sufficient that a new trial should have been granted to the defendant.

***United States v. Atehortva***, 17 F.3d 546 (2d Cir. 1994) Members of a cocaine conspiracy had a falling out and one of the leaders decided to kidnap and hold for ransom another member. The leader recruited the appellant to carry out the task. The

government introduced no evidence, however, that the appellant knew that the purpose of the kidnapping was to hold the victim for ransom related to a cocaine transaction debt. Though the appellant was undeniably guilty of kidnapping, this evidence did not support a conviction for conspiracy to possess and possess with intent to distribute cocaine. The evidence also failed to establish that the defendant possessed a weapon in connection with a narcotics trafficking offense.

***United States v. Nusraty***, 867 F.2d 759 (2d Cir. 1989) The evidence was insufficient to convict the defendant of participating in a conspiracy to smuggle heroin. There was no direct evidence of the defendant's agreement with any coconspirators and no evidence that would warrant an inference that the defendant, in fact, had joined the conspiracy.

***United States v. Thomas***, 114 F.3d 403 (3rd Cir. 1997) While the evidence was sufficient to prove that the defendant knew he was engaged in some kind of illicit activity, the evidence did not establish that he knew the object of the conspiracy was possession with intent to distribute a large quantity of cocaine. (NOTE: The Third Circuit later issued an opinion questioning whether this case utilized the proper standard of review, United States v. Caraballo-Rodriguez, 726 F.3d 418 (3rd Cir. 2013).

***United States v. Obialo***, 23 F.3d 69 (3rd Cir. 1994) Though there was sufficient evidence of defendant's actual possession with intent to distribute heroin, there was insufficient evidence to establish that he conspired with anybody to do so. During discussions with an informant about the drugs, the defendant did use the term "we" when discussing how the heroin was smuggled into the country, and there was evidence that the defendant's uncle had some heroin and paraphernalia at his house. Nevertheless, the uncle was granted a Rule 29 directed verdict on the basis that the evidence of his knowledge of the drugs in his house and evidence of his participation in a conspiracy was insufficient. The evidence did not support the trial court's holding that the defendant was shown to have conspired with unknown "third persons." Though it is not necessary for the government to actually name the other conspirators, the government must introduce evidence that the defendant conspired with someone. Also, the mere amount of heroin in which the defendant was involved does not alone establish that he was part of a conspiracy.

***United States v. Salmon***, 944 F.2d 1106 (3rd Cir. 1991) The defendant clearly was acting as a lookout for a narcotics transaction. While the evidence showed that he knowingly acted as a lookout, however, there was no evidence that he knew the transaction involved the distribution of cocaine. A conviction for aiding and abetting the cocaine transaction, or for conspiring to possess with intent to distribute cocaine, could not be sustained on this evidence alone. (NOTE: The Third Circuit later issued an opinion questioning whether this case utilized the proper standard of review, United States v. CaraballoRodriguez, 726 F.3d 418 (3rd Cir. 2013).

***United States v. Terselich***, 885 F.2d 1094 (3rd Cir. 1989) Drugs were found hidden in an automobile. Though the defendant shared driving chores and lodging with the driver, there was no evidence of his participation in a conspiracy.

***United States v. Wexler***, 838 F.2d 88 (3rd Cir. 1988) While there was substantial evidence that the jury could conclude that the defendant was involved in a conspiracy concerning the movement of a truck's cargo, there was no evidence that the defendant knew the cargo was hashish. His conviction for conspiracy to distribute hashish was reversed on sufficiency grounds. (NOTE: The Third Circuit later issued an opinion questioning whether this case utilized the proper standard of review, United States v. Caraballo Rodriguez, 726 F.3d 418 (3rd Cir. 2013).

***United States v. Lewis***, 53 F.3d 29 (4th Cir. 1995) The defendant participated in a deal to possess with intent to distribute cocaine. Arguably, however, the only other "conspirators" were government informants/agents. The defendant requested an instruction to advise the jury that a conspiracy can only occur if at least one of the other conspirators is not a government agent. The trial court committed reversible error by failing to instruct the jury in accordance with this request.

***United States v. Baker***, 985 F.2d 1248 (4th Cir. 1993) The defendant was charged with conspiring to possess with intent to distribute cocaine; however, there was a plausible theory that he intended to purchase the cocaine in order to consume it. It was reversible error to fail to instruct the jury on the lesser offense of conspiring to possess cocaine.

***United States v. Giunta***, 925 F.2d 758 (4th Cir. 1991) The defendant was charged with conspiracy to import drugs. The conspiracy involved two undercover agents, the defendant, and others. The proof at trial showed that the defendant's motive in dealing with the undercover agents was to "rip them off," not to actually pursue any drug transaction. This was not sufficient evidence to sustain the defendant's conviction for conspiracy to import drugs. Also, a "facilitator's" efforts to put a willing buyer in contact with a willing seller does not necessarily prove that he is a member of a conspiracy to sell or buy drugs. Finally, if two "facilitators" are working at helping a buyer to purchase drugs, but one of the facilitators is actually planning only to rip off the buyers, then the other facilitator cannot be found guilty of a conspiracy with the bogus facilitator. Note: A subsequent Fourth Circuit decision overruled the standard of review invoked by Giunta. United States v. Burgos, 94 F.3d 849 (4th Cir. 1996).

***United States v. Ross***, 58 F.3d 154 (5th Cir. 1995) Two drug dealers sold cocaine to an undercover agent. The agent did not have the correct change to pay the dealers, but they agreed to make the change among themselves. This evidence, alone, did not make the two dealer conspirators. The mere act of making change, albeit for an illegal transaction, does not provide proof beyond a reasonable doubt that the two were conspirators.

***United States v. Flores-Chapa***, 48 F.3d 156 (5th Cir. 1995) The evidence was not sufficient to support the defendant's drug conspiracy conviction. The only evidence linking the defendant to the conspiracy was his possession of a small amount of cocaine, a pager which linked him to other members of the conspiracy, and the unsupported testimony of agents who opined that someone other than the other conspirators was also involved.

***United States v. Maltos,*** 985 F.2d 743 (5th Cir. 1992) Mere presence and association is not sufficient to support a conspiracy conviction. The government may not prove up a conspiracy merely by presenting evidence placing the defendant in a climate of activity that reeks of something foul. Here, the evidence was insufficient.

***United States v. Rosas-Fuentes***, 970 F.2d 1379 (5th Cir. 1992) No evidence supported the inference that the defendant controlled the vehicle in which marijuana was found or that he controlled the marijuana. There was no proof that the defendant even knew of the marijuana hidden in the gas tank. His possession conviction, therefore, was reversed. The government could not rely on a Pinkerton theory because there was no evidence that he knowingly entered into a conspiracy.

***United States v. Menesses***, 962 F.2d 420 (5th Cir. 1992) Simply because one associates with conspirators does not mean that a jury can reasonably find that he is a member of the conspiracy. Here, the evidence did not support the inference that the defendant was involved in the conspiracy to distribute drugs. Juries must not be allowed to convict on mere suspicion and innuendo.

***United States v. Sacerio***, 952 F.2d 860 (5th Cir. 1992) Defendant agreed to drive a car for a friend from Miami to New Orleans. He was stopped in Mississippi and, after consenting to a search of the car, two kilos of cocaine were discovered hidden in the car. In the meantime, defendant had requested a friend to come out and help him. When the room was searched where the defendant and his friend were staying, 1/2 gram of cocaine was found. The evidence did not support the defendant's (or his friend's) conviction for conspiracy to possess the cocaine in the car or possession of cocaine in the car. Although some of the circumstances are suspicious, mere suspicion cannot support a verdict of guilty. It is not enough that the defendant merely associated with those participating in a conspiracy, nor is it enough that the evidence "places the defendant in a climate of activity that reeks of something foul."

***United States v. Skillern***, 947 F.2d 1268 (5th Cir. 1991) The evidence did not support one of the defendant's conspiracy convictions. In this case, the defendant associated with the conspirators, and another conspirator speculated that the defendant was involved. Another witness testified that the defendant and another were present at a particular transaction and stated that "they" did this and that, without specifying who was actually engaged in the transaction. This evidence did not support a conspiracy conviction.

***United States v. Guerra-Marez***, 928 F.2d 665 (5th Cir. 1991) The evidence did not support defendant's conspiracy conviction. The government relied on the fact that the defendant was related to another conspirator and had discussed a heroin deal with the supplier of the other conspirator. The evidence showed, however, that the defendant was not conspiring with the other conspirators charged in the indictment. In short, while the evidence showed that the defendant distributed drugs, the evidence did not show that this conduct was part of the conspiracy proved at trial.

***United States v. Lewis,*** 902 F.2d 1176 (5th Cir. 1990) The evidence was not sufficient to sustain one defendant's conviction for conspiracy. The only evidence relating to this defendant was his relationship to an individual who was in possession of cocaine. The defendant's mere presence at the scene where drugs were seized and the fact that he had a beeper, like the other defendant, was not sufficient to sustain his conviction for being a conspirator.

***United States v. Villasenor***, 894 F.2d 1422 (5th Cir. 1990) Though the evidence supported defendant's conviction for possessing marijuana with intent to distribute, there was inadequate evidence that he was a member of a conspiracy to do so. There was no proof that he knew of any unindicted co-conspirators. While there likely were co-conspirators, there was no proof as to who they were or what roles they played with regard to the marijuana found in the defendant's house.

***United States v. Espinoza-Seanez***, 862 F.2d 526 (5th Cir. 1988) The defendant was arrested and in possession of a cellular telephone and a large amount of cash. While this may have created a suspicion that he was a drug trafficker, it was not sufficient to sustain a conviction for conspiracy to possess marijuana with intent to distribute.

***United States v. Peters,*** 15 F.3d 540 (6th Cir. 1994) The police executed a search warrant at an apartment. The male was found in the bedroom, where a small quantity of cocaine and a firearm were also found. A female was found downstairs, dressed in a nightgown. This evidence was insufficient to convict the female of possessing either the gun or the drugs. The evidence also failed to establish that the two were engaged in a conspiracy.

***United States v. Superior Growers Supply Co***., 982 F.2d 173 (6th Cir. 1992) The trial court properly dismissed an indictment which charged the defendant supply company with supplying materials so that others could grow marijuana. The indictment charged the defendant with conspiring to aid and abet the growing of marijuana. The problem here is combining the conspiracy and aiding and abetting offenses. In order to conspire to aid and abet, there must be a crime in progress that the defendant agreed to aid. Here, there was no allegation in the indictment that there was a crime being aided or a crime that the defendant agreed to aid. The court considered Falcone and Direct Sales in reaching this result: a supplier of innocent material can only be convicted of conspiring to produce an illegal product if the supplier knows of the end result and intends to further the illegal ends of the manufacturers.

***United States v. Pearce***, 912 F.2d 159 (6th Cir. 1990) The record was devoid of any evidence that two defendants entered into an agreement to distribute drugs. One defendant's mere presence in the house does not, by itself, demonstrate any tacit or mutual understanding between him and the other defendant to distribute drugs. Furthermore, the fact that one of the defendants shouted, "It's a bust!" when the police entered the house does not contribute sufficient evidence to sustain the verdict.

***United States v. Mims,*** 92 F.3d 461 (7th Cir. 1996) The defendant defended this drug conspiracy charge on the basis that he was a purchaser of cocaine from the alleged supplier and was not a co-conspirator. The court held that the mere agreement to

buy cocaine supplied by another person does not amount to a conspiracy. Even one who is a frequent purchaser is not necessarily a conspirator. Moreover, even proof that one purchases drugs from another for the purpose of re-selling the drugs is not necessarily sufficient to prove a conspiracy. Unless there is an agreement that binds the parties in the illicit enterprise, the mere fact that one buys drugs from another, even if the buyer later re-sells the drugs, is not sufficient to prove a conspiracy. The failure to properly instruct the jury in this case amounted to plain error.

***United States v. Smith***, 34 F.3d 514 (7th Cir. 1994) A conspiracy conviction cannot be based solely on proof that the defendant purchased a large quantity of cocaine base from another on one occasion.

***United States v. Lechuga,*** 994 F.2d 346 (7th Cir. 1993)(en banc) Evidence that a defendant sold a quantity of drugs to another person in excess of a consumer quantity is not alone sufficient to sustain a conviction for conspiracy to distribute cocaine. Though it is assumed that the purchaser will distribute the cocaine, this does not, alone, establish that there was a conspiracy between the defendant and his wholesale purchaser. There must be proof of an agreement to commit a crime other than the crime that consists of the sale itself. The evidence of a conspiratorial relationship between the defendant and his purchaser, as well as subsequent purchasers, was sufficient in this case.

***United States v. Blankenship***, 970 F.2d 283 (7th Cir. 1992) Defendant rented his trailer to people who he knew intended to manufacture methamphetamine at that location. The court concluded that, under the facts of this case, said conduct alone did not suffice to make the defendant a co-conspirator in the methamphetamine manufacturing conspiracy. The court canvassed the law, dating back to Judge Learned Hand's decision in United States v. Falcone, 109 F.2d 579 (2d Cir. 1940), the Supreme Court decision in Falcone, 311 U.S. 205 (1940), and Direct Sales Co. v. United States, 319 U.S. 703 (1943). Even the fact that the defendant charged exorbitant rent for the trailer does not alter the result. In deciding that the landlord was not guilty of being a member of the conspiracy, the court also discusses the reasons why a purchaser is not a member of the conspiracy.

***United States v. Sullivan***, 903 F.2d 1093 (7th Cir. 1990) The defendant was found in possession of cocaine when stopped at the train station in Chicago. He was convicted of possession with intent to distribute cocaine and conspiracy to possess with intent to distribute cocaine. There was no evidence that the defendant was acting in concert with any other person, however. The mere fact that the defendant had a substantial quantity of cocaine with a high purity level does not indicate that he was engaged in a conspiracy. This simply does not constitute sufficient evidence to prove the existence of a conspiracy.

***United States v. Mancari***, 875 F.2d 103 (7th Cir. 1989) The defendant was charged with being a member of a narcotics conspiracy. The only named co-conspirator was acquitted. Though there were other suppliers, this evidence was admitted as "other crimes evidence" without notice having been given to defendant of the possibility that this evidence would be used to establish his membership in a conspiracy. Evidence insufficient.

***United States v. Douglas***, 818 F.2d 1317 (7th Cir. 1987) It is plain error for the trial court to fail to give a "buyer/seller" instruction. That is, a buyer and seller of narcotics are not engaged in a conspiratorial relationship sufficient to justify a conviction for conspiracy. The defendant has a right to a clear instruction on this point.

***United States v. Manzella***, 791 F.2d 1263 (7th Cir. 1986) The defendant was a broker in a major cocaine deal, but never possessed, either constructively or actually, the cocaine involved. He could not be convicted of the substantive offense of possessing the drug with the intent to distribute. He could, however, be convicted of conspiring to distribute the drug. Furthermore, under the Pinkerton doctrine, as a conspirator, he could be held liable for the crimes of another if committed in furtherance of the conspiracy. Because the government did not rely upon the Pinkerton doctrine, the possession with intent to distribute charge is reversed.

***United States v. West***, 15 F.3d 119 (8th Cir. 1994) On several occasions, the defendant sold consumer quantities of cocaine to several individuals. This evidence only established a buyer-seller relationship, which is not enough to support a conspiracy conviction.

***United States v. Rork***, 981 F.2d 314 (8th Cir. 1992) Following defendant's conviction for conspiring to distribute cocaine, the district judge granted a judgment of acquittal; the Eighth Circuit affirmed. The defendant was present when his friend sold cocaine to an undercover agent. Defendant's knowledge, coupled with his presence, was not enough to sustain a conspiracy conviction.

***United States v. Carper***, 942 F.2d 1298 (8th Cir. 1991) Evidence that the defendant had sold methamphetamine, coupled with evidence that he knew a supplier of methamphetamine, did not suffice to prove that the defendant and the other person were conspiring to sell methamphetamine.

***United States v. Sweeney***, 817 F.2d 1323 (8th Cir. 1987) The person acting as a government informant in negotiating a drug purchase with the defendant cannot be the defendant's co-conspirator in connection with those drug sales.

***United States v. Wiseman***, 25 F.3d 862 (9th Cir. 1994) Though the defendant drove a car loaded with marijuana, the government never proved that he was aware of what was in the car. It was not his car, and the undisputed evidence was that he was asked by a co-defendant to "fetch" the car and was never told what was in the car. A conspiracy conviction cannot be sustained on this evidence. A later Ninth Circuit case questioned the standard of review used by the Ninth Circuit in this case. United States v. Nevils, 598 F.3d 1158 (9th Cir. 2010).

***United States v. Ramos-Rascon,*** 8 F.3d 704 (9th Cir. 1993) Evidence that the defendants were present during discussions about a drug transaction and that they were later present when drugs were delivered to an undercover agent was insufficient to

support a conviction for either conspiring to possess drugs or for aiding and abetting the possession of the drugs. After reviewing the various theories, the government advanced to support the conviction, the court wrote, “That a defendant is probably guilty is not enough. Our system works well. We can be proud of the safeguards that protect the innocent, even though they sometimes allow a guilty person to go free. No system can ensure accurate results in all cases. We learned long ago that it is better to err on the side of caution than to convict an innocent person. That historic wisdom remains true today, notwithstanding the current willingness to abandon constitutional protections in order to further the seemingly endless and potentially futile war on drugs.”

***United States v. Martin***, 4 F.3d 757 (9th Cir. 1993) The evidence failed to show that one of the defendants was involved in the overall conspiracy as charged in the indictment. The defendant introduced an undercover agent to his partner in the drug business. Unknown to the defendant, however, his “partner” double-crossed him and began dealing to the undercover agent, along with the other co-conspirators. The defendant was not aware of these other deals and thus could not be convicted of being a member of that conspiracy.

***United States v. Umagat***, 998 F.2d 770 (9th Cir. 1993) Several people were involved in numerous marijuana smuggling ventures into Guam. On the last haul, some of the conspirators enlisted the defendant, a rental car dealer, to provide a non-traceable car; he agreed. There was no evidence that he was aware of the full scope of the smuggling conspiracy. The defendant’s reward for providing the car was an ounce of marijuana.

***United States v. Ocampo***, 937 F.2d 485 (9th Cir. 1991) The evidence did not support defendant’s conviction for possession with intent to distribute and for conspiracy to possess with intent to distribute. A pickup, parked in the garage of defendant’s house, was found to contain 82 kilos of cocaine; the defendant did not have a key to the truck, but a fingerprint of the defendant was found on one window of the truck. Though defendant was seen in the company of another conspirator who was involved in the distribution of cocaine, the evidence did not support defendant’s conviction on either a substantive or conspiracy count.

***United States v. Sanchez-Mata***, 925 F.2d 1166 (9th Cir. 1991) The evidence did not sufficiently link the defendant with the conspiracy to possess with intent to distribute marijuana. Defendant was a passenger in a car containing 141 pounds of marijuana in the trunk, but there was no other link between him and the drugs. The government introduced evidence that he had a prior drug conviction, but this did not suffice to establish anything other than that he may have had knowledge of the existence of the marijuana; however, knowledge alone is not sufficient to sustain a conspiracy conviction.

***United States v. Ramirez***, 880 F.2d 236 (9th Cir. 1989) The defendant was found in the master bedroom of his mother’s house during the execution of a search warrant. Substantial quantities of heroin and cocaine were found in the residence. A triple beam scale was found in plain view in the bathroom. A jar of heroin in the bathroom drawer, cocaine in a shoe box, a quantity of currency, drug packaging material, and a ledger recording drug sales were also located. A roll of $20 bills with traces of cocaine, as well as a razor blade and some plastic bags, were found on the defendant’s person. Nevertheless, the evidence was insufficient to convict the defendant for conspiracy to distribute the cocaine and heroin found in the house. The evidence only established the defendant was a cocaine user in a house where large amounts of cocaine were found.

***United States v. Penagos***, 823 F.2d 346 (9th Cir. 1987) The evidence was insufficient to link the defendant to a narcotics conspiracy where the only evidence was that he had been observed looking up and down the street as nearby drug dealers loaded and unloaded cocaine from automobiles.

***United States v. Jones***, 44 F.3d 860 (10th Cir. 1995) There was insufficient evidence to support the conviction of a passenger of a car which was transporting over 200 kilos of cocaine for either conspiracy to possess the drugs or for aiding and abetting the possession of the drugs. Throughout the interrogation of the driver on the side of the interstate, the passenger said virtually nothing: she did not have keys to the car or the trunk; she did not have any belongings in the trunk where the cocaine was; nor were the passenger’s fingerprints found on the cocaine. Even if a jury could believe that the passenger had knowledge of the drugs in the trunk, mere knowledge that the car in which she was a passenger contained cocaine does not make her a conspirator.

***United States v. Riggins***, 15 F.3d 992 (10th Cir. 1994) A state trooper stopped a van in which the defendant was a passenger. The driver consented to a search of the car. In a bag belonging to another passenger (not the defendant), the trooper found cocaine. This evidence did not support a conviction of the defendant for conspiring to possess cocaine. Evidence of mere presence at the scene of the crime or association with codefendants is not enough to support a conspiracy conviction. “We cannot sustain a conspiracy conviction if the evidence does no more than create a suspicion of guilt or amounts to a conviction resulting from piling inference on top of inference.”

***United States v. Anderson***, 981 F.2d 1560 (10th Cir. 1992) Though the defendant was seen delivering a small quantity of marijuana to other conspirators, the evidence did not establish that he was a member of the others’ conspiracy to distribute large quantities of marijuana. Only by piling inference upon inference could the conviction for conspiracy be sustained.

***United States v. Evans***, 970 F.2d 663 (10th Cir. 1992) The mere knowledge of illegal activity, even in conjunction with participation in a small part of the conspiracy, does not by itself establish that the person has joined the grand conspiracy. Thus, even if a person knows that his cocaine comes from Medellin, that does not make him a member of a grand conspiracy including all purchasers of Medellin cocaine. Also, a single conspiracy does not exist merely because several people purchase cocaine from a common supplier. There must be a shared objective joining the spokes of the wheel. Here, one conspirator was shown to have purchased four ounces of cocaine from the principal supplier. There was no evidence that this was not for personal consumption. Though she had scales which she provided to the supplier on one occasion, this could have been an isolated act

among friends, as opposed to an act in furtherance of the conspiracy. The proof in this case amounted to proof that this defendant simply occupied the position of a buyer, as opposed to a conspirator. The court must be particularly vigilant when the government seeks to bring many individuals under the umbrella of a single conspiracy. The risk is that a jury will be so overwhelmed with evidence of wrongdoing by other alleged co-conspirators that it will fail to differentiate among particular defendants.

***United States v. McIntyre***, 836 F.2d 467 (10th Cir. 1987) The defendant purchased cocaine from several sources and, in certain instances, shared cocaine with the informant and others. Nevertheless, the evidence was insufficient to sustain the defendant's conviction for conspiracy to distribute cocaine.

***United States v. Jones,*** 808 F.2d 754 (10th Cir. 1987) The defendant, a doctor, lost his license to write prescriptions. Thereafter, he tried to help his assistant get a job with another doctor where he could write fraudulent prescriptions. The evidence was insufficient in this case to convict the defendant of being a member of the drug conspiracy.

***United States v. Lopez-Ramirez***, 68 F.3d 438 (11th Cir. 1995) A truck containing cocaine and an unidentified passenger drove to a house where the defendant resided and backed up to the garage. It was not established that the defendant was the passenger. The driver was seen unloading the cocaine in the garage, and the defendant was seen standing in the garage at this time. This evidence was insufficient to convict the defendant of conspiracy to possess the drugs or for possessing the drugs with intent to distribute. Mere association with a conspirator and presence in a vehicle that engages in counter-surveillance maneuvers is not sufficient to establish participation in a conspiracy to distribute cocaine or possession with intent to distribute cocaine. There was no evidence in this case that the defendant was aware of the contents of the container that was unloaded into the garage of the house where she was arrested.

***United States v. Newton***, 44 F.3d 913 (11th Cir. 1994) The defendant rented an apartment for the leader of a drug conspiracy so that the leader could have a place for his girlfriend to live. There was no evidence that the defendant used (or knowingly used) tainted funds to make any of the rent payments or that the apartment was used to facilitate the drug conspiracy in any way. This evidence did not support a money laundering conviction or a conviction for aiding and abetting the drug conspiracy. It is not enough that the defendant knew the kingpin, and it is not enough that he leased a house for the kingpin. Association with a co-conspirator is insufficient to prove participation in a conspiracy. At a minimum, the defendant must willfully associate himself in some way with the criminal venture and willfully participate in it as he would in something he wished to bring about.

***United States v. Stanley***, 24 F.3d 1314 (11th Cir. 1994) The defendant was a passenger in a car being driven by a drug distributor and which had another occupant who was involved in the distribution of drugs. Drugs that were to be distributed were in the car. This evidence alone did not suffice to convict the defendant of either a conspiracy or substantive offense involving the drugs.

***United States v. Clavis***, 977 F.2d 538 (11th Cir. 1992) In assessing whether the evidence is sufficient in a conspiracy case, the proper standard is whether, viewing the evidence in a light most favorable to the government, the jury necessarily must have entertained a reasonable doubt concerning the guilt of the defendant. The previously announced standard, which held that, once the existence of a conspiracy has been established, only slight evidence need connect the defendant to it, is not the proper standard and will not be employed.

***United States v. Andrews***, 953 F.2d 1312 (11th Cir. 1992) The government offered no evidence linking the defendant to the conspiracy alleged in the indictment. Though the defendant was shown to have bought cocaine on several occasions, there was nothing to link these purchases with the conspiracy alleged in the indictment. On the contrary, the evidence showed that the defendant was a competitor of the other individuals in the conspiracy.

***United States v. Mieres-Borges***, 919 F.2d 652 (11th Cir. 1990) The evidence was not sufficient to convict one of the defendants of conspiring to possess with intent to distribute cocaine. Mere presence, even coupled with flight, is not sufficient to convict the defendant of possession or of conspiring to possess.

***United States v. Villegas***, 911 F.2d 623 (11th Cir. 1990) The evidence against one defendant was insufficient to sustain a conviction for conspiracy to possess with intent to distribute cocaine. The government's theory was that the defendant was engaged in counter-surveillance activity when he accompanied his brother to the site of a drug transaction and then "stood guard" while the transaction occurred inside. In reversing the conviction, the Court reviews a number of prior Eleventh Circuit decisions which reversed convictions on sufficiency grounds.

***United States v. Khoury***, 901 F.2d 948 (11th Cir. 1990) The defendants were convicted of conspiring to create a counterfeit substance. 21 U.S.C. §841(a)(2). At a minimum, the government must provide some evidence that the conspirators planned to place on the substance or its container a trademark, a trade name, or other identifying mark of a manufacturer other than the person actually manufacturing the substance. The government failed to introduce sufficient evidence in this case, and a conviction on this count was reversed.

***United States v. Hernandez***, 896 F.2d 513 (11th Cir. 1990) The evidence was insufficient to sustain one defendant's conviction for conspiracy to possess with intent to distribute cocaine. The defendant was clearly associated with a member of the conspiracy who transacted in drugs and was present when the transaction occurred. Although the defendant's prior conviction for a drug offense was probative of his intent to join the conspiracy, there was no proof that he had any knowledge that a conspiracy even existed. Conspiratorial intent cannot exist without knowledge; evidence of knowledge must be clear and unequivocal.

***United States v. Hardy***, 895 F.2d 1331 (11th Cir. 1990) The defendant frequently had parties at his home where guests would consume cocaine. Fifteen of the defendant's friends and acquaintances testified at trial that they had been at his home and had consumed cocaine there. None of these witnesses, however, identified the defendant as a drug dealer. There was no evidence that the defendant at any time possessed more than an eighth of an ounce of cocaine or that he had ever earned money through the sale of cocaine. The evidence was not sufficient to sustain a conviction for conspiracy to possess with intent to distribute cocaine. The fact that the defendant possessed and shared a small amount of cocaine is not a sufficient basis for the inference that he intended to distribute cocaine or entered into an agreement to do so. There was no evidence that he possessed drug packaging paraphernalia, large quantities of money, "cut," or any other items that would support the inference that he intended to distribute cocaine, rather than consume it himself. Furthermore, joint possession of a controlled substance does not prove a conspiracy to distribute. Finally, transferring a small amount of cocaine to a guest in his home does not support a conviction beyond a reasonable doubt. One isolated incident of distribution does not establish a prior contemporaneous agreement, which is necessary for a conspiracy conviction. The Court concluded with the admonition, "Conspiracy law is not a dragnet for apprehending those with criminal dispositions."

***United States v. Kelly***, 888 F.2d 732 (11th Cir. 1989) The defendant, a criminal defense attorney, was prosecuted for being a member of a drug conspiracy. The attorney was approached by a former client who was working undercover for the government. The client sought to have the attorney obtain cocaine from another client, but the attorney refused. The government alleged that the attorney was in a conspiracy to protect the other client's cocaine. The Eleventh Circuit reverses. The attorney did what he should do – refuse to participate in the proposed plan.

***United States v. Brown***, 872 F.2d 385 (11th Cir. 1989) The defendant purchased less than an ounce of cocaine from the lead member of the cocaine conspiracy on several occasions. The evidence was insufficient to support the defendant's conviction for conspiracy to distribute or possess with intent to distribute cocaine. There was no evidence that he resold the cocaine or took any other measures to aid the objects of the conspiracy.

***United States v. Fredericks***, 857 F.2d 733 (11th Cir. 1988) A deputy sheriff's conspiracy conviction was not based on sufficient evidence where the government's proof was limited to evidence that the defendant was seen standing on a bridge while smugglers were bringing marijuana ashore. The testimony of the witnesses was that the person might have been standing next to what appeared to be a police car. But their testimony identifying the defendant was inconclusive and uncorroborated.

***United States v. Andrews,*** 850 F.2d 1557 (11th Cir. 1988) Overruling the decision of the former Fifth Circuit, the Eleventh Circuit holds that a drug conspiracy defendant may be convicted despite the fact that his co-conspirator was found not guilty in a joint trial. Because there was sufficient evidence to support the defendant's conviction, the inconsistent verdict does not invalidate his conviction.

***United States v. Fernandez***, 797 F.2d 943 (11th Cir. 1986) Evidence that the defendant recommended a pilot to a person who wished to import marijuana by air was not sufficient to establish the existence of a conspiracy to possess marijuana with the intent to distribute on the part of the referrer.

***United States v. Morris***, 836 F.2d 1371 (D.C. Cir. 1988) The defendant sold a total of three ounces of PCP to a co-defendant on two occasions. Though he also referred to "my people" being available for the sale of drugs, this was not sufficient to support his conviction for conspiracy to distribute and possess with intent to distribute PCP. The evidence failed to support the inference that the co-defendant was a regular source.

***CONSPIRACY (Drug Conspiracy – Buyer / Seller*** Cases)

***United States v. Musgraves***, 831 F.3d 454 (7th Cir. 2016) Even if the defendant sells to another wholesaler, this does not mean that the buyer and seller are in a conspiratorial relationship. Also, the existence of a "trusting relationship" between the buyer and seller does not a conspiracy make. Conspiracy conviction reversed.

***United States v. Loveland***, 825 F.3d 555 (9th Cir. 2016) Another buyer-seller decision that dooms a drug conspiracy conviction. Even if the number of drugs sold is more than the buyer could consume, this does not mean that the seller and buyer had a conspiratorial relationship to sell the drugs. Absent such proof, a conviction for conspiracy could not be sustained.

***United States v. Lomax***, 816 F.3d 468 (7th Cir. 2016) The trial court's failure to instruct the jury on the principle that a buyer-seller relationship is not necessarily sufficient to prove the existence of a conspiracy, required reversing the conviction in this case. Though the defendant was buying the drugs to resell, that was not a basis for denying his request for a buyer-seller instruction.

***United States v. Cruse***, 805 F.3d 795 (7th Cir. 2015) The Seventh Circuit once again reverses a conviction because of the trial court's failure to instruct the jury on the principle that a buyer-seller relationship is not, alone, sufficient to prove a conspiracy. In this case, there was considerable evidence of sales to and from the defendant and even an occasional credit sale, but this evidence did not necessarily refute the defendant's defense that he was simply involved in buyer-seller relationships with the other parties.

***United States v. Boykin***, 794 F.3d 939 (8th Cir. 2015) The defendant was simply a buyer of drugs from his supplier and was not in a conspiratorial relationship with him. There was no agreement to purchase drugs for resale and no evidence of multiple sales of resale quantities, the evidence will generally support only a buyer-seller relationship.

***United States v. Pulgar***, 789 F.3d 807 (7th Cir. 2015) Though the defendant was a substantial seller of cocaine to the purchaser who eventually became an informant and testified at trial, the relationship was a buyer-seller relationship, not a conspiratorial relationship. There was insufficient proof of credit transactions, or "fronting"; there was evidence that they had a "return" policy if the drugs were not good, but this does not establish that there was a conspiracy. A return policy may be evidence that the sales were made on a consignment basis (which is typically a feature of a conspiracy), but here the return policy was limited to instances where the product was bad. Finally, evidence that the buyer and seller were friends and had a social relationship did not mean that they were conspirators to distribute drugs. The conspiracy conviction was reversed.

***United States v. Brock***, 789 F.3d 60 (2d Cir. 2015) The Second Circuit reverses a drug conspiracy conviction because the government proved nothing more than a buyer-seller relationship. Though the defendant purchased quantities of drugs from the seller on a regular basis and then resold the drugs, this did not envelope the buyer and seller in a conspiratorial relationship. The buyer was not restricted as to where he could resell the drugs, he purchased drugs from other people, as well and he did not share the profits with the seller. Though he bought from the seller regularly and in significant quantities, these two facts, standing alone, do not make this a conspiratorial relationship.

***United States v. Brown***, 726 F.3d 993 (7th Cir. 2013) A lengthy opinion that clarifies the Seventh Circuit's jurisprudence on the issue of conspiracy vs. buyer-seller.

***United States v. Johnson***, 592 F.3d 749 (7th Cir. 2010) Another conspiracy conviction falls victim to the buyer-seller rule that the Seventh Circuit announced in United States v. Colon. Even if the buyer purchases a large quantity of drugs, this does not make him a conspirator with the seller. Even a repeat wholesale customer is not necessarily a co-conspirator. Indications that a conspiracy existed are such things as (1) sales on credit or consignment; (2) an agreement to look for other customers; (3) payment of commission on sales; (4) an indication that one party advised the other on the conduct of the other's business; (5) an agreement to warn of future threats to each other's business stemming from competitors or law enforcement authorities. None of these circumstances were present in this case.

***United States v. Colon***, 549 F.3d 565 (7th Cir. 2008) The evidence only established the existence of a buyer-seller relationship between the defendant and his supplier. Therefore, he could not be convicted of either conspiracy (with the supplier) or aiding and abetting the conspiracy with the supplier. The Seventh Circuit held that a purchaser – even a wholesale purchaser who buys a large quantity – is not, by that evidence alone, conspiring with the supplier. The Seventh Circuit cited with approval, United States v. Dekle, 165 F.3d 826 (11th Cir. 1999).

***United States v. Hawkins***, 547 F.3d 66 (2d Cir. 2008) The Second Circuit affirms the defendant's conspiracy conviction but includes a lengthy discussion that explains why a buyer is not a co-conspirator with the seller, unless something more is shown than the simple buyer-seller relationship. The evidence established in this case an ongoing relationship that the "buyer" would be a distributor for the "seller."

***United States v. Wexler***, 522 F.3d 194 (2d Cir. 2008) The defendant, a doctor, wrote prescriptions to a patient for various drugs, including dilaudid. The doctor knew that the patient was distributing the drugs to others and the prescriptions themselves were not medically necessary. The patient did not, however, distribute any of the dilaudid and the prescriptions were not in amounts that would have led the doctor to believe the patient was distributing the dilaudid. Rather, the patient was consuming the dilaudid himself. The patient died from the dilaudid. The jury found the defendant guilty of conspiring to distribute drugs, including distribution that led to the death of that patient. The Second Circuit reversed. With respect to the dilaudid, the doctor and patient had a "buyer-seller" relationship and therefore a conspiracy conviction between them could not be upheld. United States v. Dekle, 165 F.3d 826 (11th Cir. 1999) A buyer-seller relationship does not qualify as a § 846 conspiracy. The buyer's purpose is to buy; the seller's purpose is to sell. There is, therefore, no joint objective. Even if the sales are repeated, there is no proof of a conspiracy, unless the sales are for the purpose of re-sale and the generation of proceeds.

***CONSPIRACY (Generally)***

***United States v. Jiminez Recio***, 537 U.S. 270 (2003) The Ninth Circuit decision, which had held that a conspiracy conviction may not be sustained unless the defendant joined the conspiracy before its mission was doomed to failure by police interception, was reversed by the Supreme Court. The fact that the police had infiltrated the conspiracy and seized the drugs before the defendants agreed to participate in the venture did not protect them from conspiratorial liability.

***Ocasio v. United States,*** 136 S. Ct. 1423 (2016) The defendant was a police officer who accepted bribes from a car repair shop to which he referred car accident victims. He was prosecuted under the Hobbs Act – extortion – for receiving money, with the consent of the car repair shop owner, under color of official right. The charge alleged that he conspired with the owner to violate the law. The officer claimed that he could not "conspire" with the person who was allegedly the victim of the extortion. The Supreme Court disagreed, holding that the defendant and the car repair shop owner did, in fact, conspire to commit the Hobbs Act violation, which essentially criminalizes the payment of bribes in this context.

***United States v. Ellis***, 868 F.3d 1155 (10th Cir. 2017) The defendant was sentenced to a mandatory minimum sentence of life in prison based on a finding by the judge that the drug conspiracy with which he was involved at least 5 kilos of cocaine, coupled with a recidivist notice. The jury, however, made no findings regarding drug quantity, and absent a finding of at least 5 kilos of cocaine, the appropriate statutory range was 0 – 20 years. Pursuant to Alleyne v. United States, 570 U.S. 99 (2013), the court could not impose a sentence of life in prison absent a jury finding that triggered the greater statutory range.

***United States v. Valle***, 807 F.3d 508 (2d Cir. 2015) The defendant was a participant in an online chat room whose participants fantasized about various brutal and graphic schemes of kidnapping, torturing, cooking, raping, murdering, and cannibalizing various women. The defendant also participated outside the chatroom with other people (whom he never met, talked to, or even knew the true identifies of) about the same topics. The government offered no evidence that the defendant ever engaged in any criminal activity, to say nothing of any of the activity described in the chats, though he did post pictures of some of the women whom he fantasized killing or torturing. He was charged with conspiracy to kidnap the women. The district court granted a Rule 29 motion after trial and the Second Circuit affirmed. The fantasy chats and the "real chats" were, for purposes of determining the existence of a conspiracy, indistinguishable and there was, therefore no proof of an agreement to actually commit any crime. The fact that the some of the "victims" were real women; and the fact that the defendant engaged in internet searches to learn how to "cannibalize" a person, did not convert the fantasy into a conspiracy. Not only did the government fail to prove that the defendant had a real conspiratorial intent, it also failed to prove that the people with whom he was chatting had conspiratorial intent and, of course, it takes two to tango.

***United States v. Willner***, 795 F.3d 1297 (11th Cir. 2015) This case involved a health care fraud conspiracy in which recruiters were paid to send ineligible patients to a facility that was supposedly performing sleep studies. The patients were not eligible, they were kept as long as Medicare would pay, then they were discharged and often then re-admitted so that more fraudulent billings could occur. The evidence was sufficient to support the conviction of most of the defendants who were involved in this scheme. However, one doctor, Dr. Abreu, was not shown to have had knowledge of the scheme and her conviction was reversed on sufficiency grounds.

***United States v. Tobin,*** 676 F.3d 1264 (11th Cir. 2012) The court held that "willfulness" is not an element of a § 841 offense (distribution of a controlled substance) and therefore, it is no defense that the defendant did not realize that his conduct was illegal or that he had consulted with a lawyer and the lawyer said the conduct was not illegal (this was an Internet Pharmacy prosecution). However, to be convicted of conspiracy to distribute a controlled substance, the defendant is required to act with knowledge of the illegality of his conduct, because under § 846, willfulness is an element of the offense and therefore, advice of counsel is a defense to a § 846 offense.

***United States v. Weeks***, 653 F.3d 1188 (10th Cir. 2011) In the context of reviewing an ineffective assistance of counsel claim for a defendant who entered a guilty plea to a conspiracy offense, the Tenth Circuit emphasized that a conspiracy conviction requires proof that the defendant knew that his agreement involved a violation of the law, not simply an agreement to engage in certain conduct: "An agreement with others that certain activities be done, without knowing at the time of the agreement that the activities violate the law, is therefore insufficient to establish conspiracy."

***United States v. Tyson***, 653 F.3d 192 (3rd Cir. 2011) There was sufficient evidence to support defendant's conviction of several firearms counts, but there was insufficient evidence that his crime was committed as part of a conspiracy with another person. The co-defendant / alleged co-conspirator was acquitted at trial; and though the rule of consistency has been abolished, there was no evidence to support the defendant's conspiracy conviction, because there was no evidence that the conspirator was in league with him in the commission of the crimes.

***United States v. Rigas,*** 605 F.3d 194 (3rd Cir. 2010) A conviction under § 371's conspiracy offense clause bars a subsequent prosecution under § 371's defraud clause. The two offenses included in § 371 are two ways of committing the same offense. In this case, the prosecution of Rigas under the conspiracy to commit an offense clause was shown to be sufficiently close to the pending defraud clause prosecution that the burden was on the government to prove that the former did not bar, on double jeopardy grounds, a prosecution under the latter provision. On Rehearing En Banc, the court affirmed this decision. 605 F.3d 194 (3rd Cir. 2010).

United States v. Boidi, 568 F.3d 24 (1st Cir. 2009) A conspiracy to possess drugs is a lesser included offense of a conspiracy to possess with intent to distribute. The government acknowledged that possession is a lesser included offense of possession with intent to distribute; but argued that this logic does not apply to conspiracy offenses. The First Circuit rejected this argument but held that in order to insist on such an instruction, the defendant must show that on the evidence presented, it would be rational for the jury to convict only on the lesser included offense and not the greater one. Failure to instruct the jury on the lesser included offense in this case was error.

***United States v. Turner***, 548 F.3d 1094 (D.C. Cir. 2008) Determining when a conspiracy end is important in numerous contexts, including a defense that the statute of limitations has expired; a claim that a co-conspirator statement was not made during the course of a conspiracy and, as in this case, in deciding which version of the Sentencing Guidelines to apply (i.e., a possible Ex Post Facto claim). In this case, the conspirator forged certain documents that enabled them to receive money as the beneficiary of another person who died. The forgery and receipt of the money occurred in 2001. When questioned by the police about these events in 2006, the conspirators lied. The D. C. Circuit held that the conspiracy ended in 2001 when the objects of the conspiracy were achieved. See generally Grunewald v. United States, 353 U.S. 391 (1957); Krulewitch v. United States, 336 U.S. 440 (1949); Lutwak v. United States, 344 U.S. 604 (1953).

***United States v. Kapelioujnyj,*** 547 F.3d 149 (2d Cir. 2008) The evidence in this § 2315 case was insufficient to prove that the defendant was aware that the stolen properly he was enlisted to help sell was valued at least $5,000.00. The government also failed to prove the interstate commerce element of the offense. Though the stolen property had traveled between New York and New Jersey, the defendant was not, at that time, a member of the conspiracy to sell the stolen property. The fact that the seller

was attempting to get others to help sell the stolen item cannot be imputed to the defendant, who was never shown to have entered a conspiracy to sell stolen property across state lines.

***United States v. Mendez***, 528 F.3d 811 (11th Cir. 2008) The defendant was charged with a § 371 defraud clause offense; that is, he was charged with conspiracy to defraud the United States, as opposed to conspiring to commit a federal offense. In order to sustain a conviction under this theory, the government must prove that the government was, in fact, the target of the defendant's offense.

***Tanner v. United States***, 483 U.S. 107 (1987). In this case, the defendant was alleged to have engaged in a fraudulent effort to produce documents to obtain a Florida commercial driver's license. This offense did not target the United States, even if there was a collateral impact on the Department of Transportation's ability to monitor commercial driver's licenses.

***United States v. Salgado***, 519 F.3d 411 (7th Cir. 2008) The defendants attempted to rob a person who they thought was bringing money to purchase drugs. Actually, the person was an informant, working with the DEA. The informant had no money in his possession. The government prosecuted the defendant for attempting to rob a person who was in possession of money belonging to the United States (18 U.S.C. § 2114) and conspiracy to commit that offense. The Seventh Circuit held that neither theory could be used. The defendant could not be convicted of conspiracy, because the defendants did not know they were attempting to rob a government employee, thus, their agreement could not be to steal government money. They could not be convicted of attempting to steal government money, because the informant had no money in his possession.

***United States v. Lopez***, 443 F.3d 1026 (8th Cir. 2006) In gauging the sufficiency of evidence of a defendant's participation in a conspiracy, courts have sometimes said that if there is proof beyond a reasonable doubt of the existence of a conspiracy, only "slight evidence" is needed to show the defendant's participation in the conspiracy. The Eighth Circuit – like many other Circuits – held in this case that the slight evidence rule did not relax the requirement of proof beyond a reasonable doubt. Rather, the slight evidence rule simply means that the defendant's role in the conspiracy may be slight, or minor. The evidence, however, must still establish the defendant's participation beyond a reasonable doubt.

***United States v. Johnson***, 440 F.3d 1286 (11th Cir. 2006) The defendant was charged with money laundering and conspiracy to launder money. The court reversed several counts of conviction. First, the court held that the mere transfer of money from one account to another (even overseas) did not satisfy the "concealment prong" of a money laundering prosecution, without further proof of the defendant's efforts to conceal the location or source of the money. Second, the court held that the conspiracy conviction could not be sustained, because the only alleged co-conspirator was not shown to have had knowledge of the tainted source of the money. If the other member of the conspiracy, as a matter of law, was not proven to be guilty, then a conspiracy conviction could not be sustained.

***United States v. Santos***, 449 F.3d 93 (2d Cir. 2006) The defendants tried to rob an undercover drug agent by flashing fake DEA badges. The use of the fake badge did not amount to "force" in support of a Hobbs Act robbery charge. With regard to one alleged co-conspirator, moreover, the evidence was insufficient to prove that that the defendant was a knowing participant in the conspiracy to rob the victim. Mere presence and association with the other conspirators was all that was established.

***United States v. Summers***, 414 F.3d 1287 (10th Cir. 2005) The evidence was insufficient to establish one defendant's membership in the conspiracy to rob a bank. His presence and companionship with the other perpetrators after the robbery, coupled with evidence that there was one more participant in the robbery (i.e., there was an unidentified getaway driver) did not establish that the defendant was the getaway driver.

***United States v. Chandler***, 388 F.3d 796 (11th Cir. 2004) Forty-three defendants were charged with conspiring to commit mail fraud. The conspiracy involved cheating in a McDonald's game. The leader of the alleged conspiracy stole winning "stamps" from McDonald's products and then, through a series of transfers, would "sell" the winning stamps to other members of the conspiracy. In fact, down the "food chain" some of the purchasers did not know the source of the winning pieces. The four defendants who were tried in this part of the case were not even alleged to have known that the winning pieces were embezzled. Instead, the government alleged that these people claimed to be legitimate "winners" when, in fact, they knew that they had purchased the winning pieces from someone else. The definition of "legitimate" was quite problematic, because the McDonald's game rules did not clearly set forth who was a "legitimate" winner (the transfer of a winning piece from one person to another was not specifically prohibited). The Eleventh Circuit reversed the convictions. First, the appellate court addressed the allegation that the defendant conspired to commit mail fraud by defrauding McDonalds. The fraudulent representation was alleged to be the representation that the game piece was acquired through legitimate means. Yet, it was never clear what this meant. McDonald's representatives acknowledged that winning pieces were traded on E-bay and that pieces could even be traded on McDonald's own web site. Thus, there was no unequivocal prohibition on trading or selling winning pieces and the act of redeeming the piece did not amount to a representation that the piece was acquired in any one particular manner. Again, there was no proof that these defendants ever knew that the pieces were initially stolen. Second, the court focused on the absence of an agreement that united the alleged conspirators. Given the fact that the ultimate purchasers of the game pieces were unaware that they were stolen, or even obtained illegally, the government failed to prove the existence of one conspiracy with members all having agreed to commit a crime. Moreover, the initial thief – the person who embezzled the pieces – kept it a secret from each of the people he recruited to sell the pieces that there were other sellers and buyers. This was a classic hub-and-spoke conspiracy without a rim. Each spoke in this scenario amounts to a separate conspiracy.

***United States v. Jones***, 371 F.3d 363 (7th Cir. 2004) Defendant accompanied another man to a gun store where the other man purchased a gun as a straw purchaser (filling in an incorrect name on the "owner of firearm" space in the paperwork). The

defendant's presence when the gun was purchased, however, was not sufficient to convict of conspiring to commit the false statement offense. Even if he knew what the other man was doing, such knowledge, alone, does not mean that he conspired to commit the offense. "Even though a jury may infer facts, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation."

***United States v. Ceballos***, 340 F.3d 115 (2d Cir. 2003) The defendant was convicted of conspiracy to distribute drugs and conspiracy to bribe a public official. The evidence was insufficient to establish his knowing participation in a conspiracy to bribe the public official. The government used undercover agents posing as drug purchasers who were capable of producing phony green cards through their supposed connection with a corrupt INS agent. The undercover agents would buy drugs from a middleman and pay partly in cash and partly in phony green cards which they (and the undercover INS agent) would manufacture for the middleman. As the operation continued, the undercover agents eventually convinced the middleman to introduce them to their drug supplier, the defendant in this case. This evidence did not establish the defendant's participation in the bribery conspiracy. Even if he knew that the money owed to him, as the drug supplier, was obtained by the purchaser from the proceeds of another crime committed by the purchaser, this does not make him a member of the purchaser's conspiracy.

***United States v. Syme***, 276 F.3d 131 (3rd Cir. 2002) The Third Circuit explains that where a conspiracy alleges that the defendants conspired to commit an offense in several ways, if the evidence is sufficient with regard to certain ways, but not others, a general verdict of guilty will be sustained on the theory that the jury properly evaluated the evidence and convicted on the sufficient basis. However, where the judge instructs the jury incorrectly about one of the ways, the verdict will not be upheld, because the jury may not have realized the legal elements of one of the alternative methods of committing the offense. In this case, the conviction was upheld. See generally Griffin v. United States, 502 U.S. 46 (1991); Yates v. United States, 354 U.S. 298 (1957); Stromberg v. California, 283 U.S. 359 (1931).

***United States v. Hernandez***, 141 F.3d 1042 (11th Cir. 1998) To be guilty of conspiring to commit murder-for-hire the government must show an agreement by two or more persons to achieve the unlawful purpose of murder-for-hire, the defendant's knowing and voluntary participation in the agreement, and an overt act committed by any one of the conspirators in furtherance of the conspiratorial objective. In this case, the court found insufficient evidence, where the defendant was present when other family members discussed a murder-for-hire, but he did not participate in the discussion or participate in the actual homicide.

***United States v. Wilson***, 160 F.3d 732 (D. C. Cir. 1998) The evidence was insufficient to prove that the defendant aided and abetted or conspired with others to murder the victim. Though the defendant advised the two principals of the victim's whereabouts, there was insufficient evidence that he knew that the other two intended to kill the victim. Even though he knew the two were looking for the victim, there was no proof that he knew why.

***United States v. Garcia***, 151 F.3d 1243 (9th Cir. 1998) Gang membership itself cannot establish guilt of a crime, and a general agreement, implicit or explicit, to support one another in gang fights does not provide substantial proof of the specific agreement required for a conviction of conspiracy to commit assault. There can be no conviction for guilt by association. Though the defendant participated in a fight with others, there was no proof of a concerted or coordinated effort to engage in a fight.

***United States v. Williams***, 809 F.2d 75 (1st Cir. 1986) During the course of the trial, a number of overt acts alleged in the conspiracy count of the indictment were not proven. The Court rules that the better practice is to edit the conspiracy count by removing those overt acts before submission of that count of the indictment to the jury. Reading to the jury overt acts in the indictment which were not supported by the evidence is an error of constitutional dimension.

***CONSPIRACY (Multiple Conspiracies***)

***United States v. Jones***, 858 F.3d 221 (4th Cir. 2017) In the Eastern District of Virginia, the defendant pled guilty to being in a conspiracy to possess with intent to distribute cocaine during the summer of 2012. Later, he was indicted in the Western District of Virginia he was charged with conspiring to possession with intent to distribute cocaine from 1998 to 2012 (including the same people identified in the Eastern District conspiracy). The Fourth Circuit held that the latter indictment was barred by the Double Jeopardy Clause.

***United States v. Mize***, 814 F.3d 401 (6th Cir. 2016) The proof at trial suffered from a prejudicial variance from the indictment. There were two separate conspiracies proven at trial, not one overarching conspiracy. Most of the evidence presented at trial focused on the other conspiracy, which was not the indicted conspiracy. The defendants were prejudiced by this variance and a new trial was necessary.

***United States v. Lapler***, 796 F.3d 1090 (9th Cir. 2015) The defendant was charged with conspiracy to sell drugs over a fifteen-month period. The proof at trial, however, showed two separate conspiracies, one with one supplier, another with a second supplier. In this situation, the jury should have been instructed that the jurors must unanimously agree on what conspiracy the defendant was involved in (or both). There was a genuine possibility of jury confusion in this case.

***United States v. Franco-Samtiago***, 681 F.3d 1 (1st Cir. 2012) The defendant was charged with being a member of a conspiracy that participated in five armed robberies. Only the last robbery occurred within five years of the return of the indictment. The government agreed that the defendant was not involved in the first three robberies. The evidence was sufficient to demonstrate his participation in the fourth. After he was convicted of the conspiracy count, the government conceded at sentencing that he was not involved in the fifth robbery. The First Circuit concluded that the defendant only agreed to participate in one conspiracy and that he could not be held responsible for participating in the overarching conspiracy that involved several

other defendants and the other four robberies. Though he agreed to join the conspiracy, the conspiracy that he agreed to join only involved the one robbery that occurred outside the statute of limitations. NOTE: The United States Supreme Court, in Musacchio v. United States, 136 S. Ct. 1737 (2016), held that raising a statute of limitations defense for the first time on appeal was too late and not subject to plain error review.

***United States v. Dellosantos***, 649 F.3d 109 (1st Cir. 2011) The First Circuit concluded that the variance between the charged overarching conspiracy to distribute cocaine and marijuana, and the proof at trial, which showed separate conspiracies that involved a different combination of drugs, was prejudicial and required reversal of the conspiracy conviction. The separate conspiracies were not interdependent and involved different people.

***United States v. Rabhan***, 628 F.3d 200 (5th Cir. 2010) The defendant was convicted of conspiracy to commit bank fraud in Georgia in connection with obtaining a loan from one bank. At the same time that he was engaged in defrauding that bank, he also defrauded another bank in Mississippi for another business loan. The conspiracies involved the same time frame, the same personnel, the same substantive offense. The Fifth Circuit held that the double jeopardy clause barred the second prosecution in Mssissippi.

***United States v. Caldwell***, 589 F.3d 1323 (10th Cir. 2009) The defendant was asked by another drug dealer for a recommendation of another drug source. The defendant introduced him to his supplier. The defendant was present at the first meeting but had no further dealings between the other two and received no money, commissions, or other benefit from the others' dealings. This did not make the defendant a member of a three-person drug distribution conspiracy. The mere introduction of a common supplier, made by one drug dealer to another, is not sufficient to create a single conspiracy among all the dealers. Having concluded that there was a variance, the Tenth Circuit then concluded that the variance was not prejudicial and affirmed the conviction.

***Robertson v. Klem***, 580 F.3d 159 (3rd Cir. 2009) The opposite of a multiple conspiracy problem is where a defendant is convicted of two conspiracy charges where there was but one agreement. In this case, the defendant was convicted of two counts of conspiracy to commit murder (there were two victims). Both victims were killed at the same time as the result of one conspiratorial agreement. Only one conspiracy existed and only one count of conviction could be sustained.

***United States v. Swafford***, 512 F.3d 833 (6th Cir. 2008) The defendant sold iodine, an ingredient for the production of methamphetamine, to numerous customers. The customers, however, were not affiliated with one another. This does not constitute one overarching conspiracy. This was a wheel conspiracy with no rim connecting the spokes. Because the joinder of the various "sales" into one overarching conspiracy would have led the jury to believe that the offense was considerably more nefarious (as opposed to evidence of individual sales to different customers), the variance was prejudicial and required setting aside the conspiracy conviction.

***United States v. Stigler***, 413 F.3d 588 (7th Cir. 2005) The government alleged that the defendant was part of a larger conspiracy that involved the negotiation of several counterfeit checks. The evidence at trial, however, only demonstrated his knowledge of one check and that he had no role in, or knowledge of, the other checks being handled by other people. This amounted to an improper variance.

***United States v. Geibel***, 369 F.3d 682 (2d Cir. 2004) An insider provided inside information to two other people, who traded on this information. Unbeknownst to the insider, the other people were selling the information to other people, as well. The conspiratorial agreement between the insider and his tipper did not encompass or envision further remote tippees. The court considered several factors in deciding whether there was one overarching, as opposed to separate conspiracies: (1) the insider's knowledge of remote tippees; (2) the insider's mutual dependence on the remote tippees; (3) the extent to which the insider discouraged the further dissemination of the information; (4) the foreseeability of additional tippees. The Second Circuit concluded that there was not one overarching conspiracy, but also decided that the variance -- charging the defendants in one conspiracy – did not prejudice them.

***United States v. Glinton***, 154 F.3d 1245 (11th Cir. 1998) The court rejected the government's contention that there was a single conspiracy in this drug case. The case presented a classic wheel conspiracy with no rim: one defendant was the supplier of drugs for many of the alleged co-conspirators, but there was nothing linking these various purchasers. The court concluded, however, that there was no prejudice to the defendants by this variance.

***United States v. Johansen***, 56 F.3d 347 (2d Cir. 1995) The defendant used fraudulent credit cards in schemes with two different sets of coconspirators. Other conspirators also used fraudulent credit cards among themselves. The proof at trial did not show that there was one overarching conspiracy; rather, there were separate conspiracies. The error was prejudicial in this case because the evidence relating to other conspirators involved allegations of "mob" connections (including a connection to John Gotti). This evidence had no connection to the defendant. Moreover, the judge instructed the jury that, if a conspiracy involving the defendant was shown to exist, the acts of other conspirators could be considered in weighing the evidence against the defendant.

***United States v. Stowell***, 947 F.2d 1251 (5th Cir. 1991) Defendant was charged with conspiracy to possess with intent to distribute marijuana. He contended at trial that he never entered into that conspiracy and that he only conspired to import the marijuana. The trial court's failure to instruct the jury on the law of multiple conspiracies was reversible error.

***United States v. Guerra-Marez***, 928 F.2d 665 (5th Cir. 1991) The evidence did not support defendant's conspiracy conviction. The government relied on the fact that the defendant was related to another conspirator and discussed a heroin deal with the

supplier of the other conspirator. The evidence showed, however, that the defendant was not conspiring with the other conspirators charged in the indictment. In short, while the evidence showed that the defendant distributed drugs and was part of a conspiracy, the evidence did not show that this conduct was part of the conspiracy alleged in the indictment.

***United States v. Erwin***, 793 F.2d 656 (5th Cir. 1986) It was reversible error to refuse to give a multiple conspiracy instruction in this case. Though the evidence would warrant affirming the jury's finding of a single conspiracy, an instruction on multiple conspiracies should have been given. Two groups operated similarly in the same time period and in close proximity. They cooperated with each other, shared information, and the two "bosses" shared supplies. However, co-conspirators testified that they worked for one or the other of the alleged bosses and turned their supplies and profits over to their respective bosses. With one minor exception, there was no interchange of personnel. In this circumstance, a multiple conspiracy instruction should have been given.

***United States v. Dennis***, 917 F.2d 1031 (7th Cir. 1990) The government failed to prove that there was one conspiracy involving three individuals. Rather, the evidence seemed to indicate that there were two conspiracies, both of which had one common member. The fact that the common member referred to his supplier as "my man" did not establish that the other defendant had any relationship to that supplier.

***United States v. Rosnow***, 977 F.2d 399 (8th Cir. 1992) Though each of the alleged conspirators engaged in a pattern of filing false reports with the IRS (phony 1099s, reporting income to their "enemies"), the defendants were not acting jointly and were not members of one overall conspiracy. This was a wheel conspiracy with no rim. The success of the venture of each taxpayer was not dependent on the success of any other person's acts, so this was not a valid chain conspiracy. There were, therefore, multiple conspiracies, which, in turn, amounted to a material variance from the indictment. The defendants suffered from "an imputation of guilt from others' conduct."

***United States v. Martin***, 4 F.3d 757 (9th Cir. 1993) The evidence failed to show that one of the defendants was involved in the overall conspiracy as charged in the indictment. The defendant introduced an undercover agent to his partner in the drug business. Unknown to the defendant, however, his "partner" double-crossed him and began dealing to the undercover agent, along with the other co-conspirators. The defendant was not aware of these other deals and could not be convicted of being a member of that conspiracy.

***United States v. Harrison***, 942 F.2d 751 (10th Cir. 1991) The evidence at trial revealed the existence of three separate conspiracies, not one overall conspiracy as charged. Nevertheless, the error did not affect defendant's right to a fair trial. Evidence against others in the indictment did not affect the jury's consideration of the evidence against the defendant.

***United States v. Coy***, 19 F.3d 629 (11th Cir. 1994) A low-flying airplane dropped bales of marijuana into the Gulf of Mexico, apparently after being chased by a Customs plane. Two boats that happened to be in the vicinity retrieved the marijuana and brought it to shore, where the owners of the boats then distributed the marijuana separately. Though the crews and owners of the boats knew each other, there was no evidence that the two groups were acting as a single conspiracy; rather, though they engaged in similar conduct, there was no proof that this represented a conspiracy among the two occupants of the two boats. However, the defendants suffered no prejudice.

***United States v. Andrews,*** 953 F.2d 1312 (11th Cir. 1992) The government offered no evidence linking the defendant to the conspiracy alleged in the indictment. Though the defendant was shown to have bought cocaine on several occasions, there was nothing to link these purchases with the conspiracy alleged in the indictment. On the contrary, the evidence showed that the defendant was a competitor of the other individuals in the conspiracy.

***United States v. Fernandez***, 892 F.2d 976 (11th Cir. 1989) The defendant was charged with being in a conspiracy to illegally influence the operations of an employee-benefit plan. The defendant was the president of a local union and allegedly received a bribe to steer the health care contract to another defendant. The individual who paid the bribe also paid another bribe to another defendant who was a union official. The evidence at trial failed to establish that there was one overarching conspiracy linking all the defendants. Rather, the evidence indicated that there were separate conspiracies, neither of which was the indicted conspiracy. The defendant moved for a severance under Rule 8(b), but failed to renew the motion under Rule 14 following the close of the government's case. Though this was the preferred method, the Eleventh Circuit held that the defendant's reliance on the initial Rule 8 motion was not unreasonable and that, thus, the Court would decide whether the failure to sever at the close of the government's case would have constituted an abuse of discretion had the motion been made. The Court holds that the improper joinder was prejudicial in this case.

***CONSPIRACY (Objects of the Conspiracy)***

***Salinas v. United States***, 118 S. Ct. 469 (1997) A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. If conspirators have a plan that calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators. A person, moreover, may be liable for conspiracy even though he was incapable of committing the substantive offense.

***United States v. Santos-Soto***, --- F.3d --- (1st Cir. 2015) Though the police officer-defendant was guilty of conspiring to deny the dealer's civil rights by planting drugs on a drug dealer, the conviction for conspiring to possess with intent to distribute the drugs could not be sustained, because there was insufficient evidence that she intended to possess or distribute the drugs.

***United States v. Randolph***, 794 F.3d 602 (6th Cir. 2015) The defendant was charged with being a member of a drug conspiracy with various members of his family. On the verdict form, the jury was asked to first mark whether the defendant was "guilty" or

"not guilty" of the conspiracy charge and then, "If you unanimously find that a particular controlled substance was not involved in the offense [i.e., cocaine, crack cocaine, marijuana], mark 'none' on the appropriate special verdict form." The jury returned a verdict of guilty against Randolph but marked "none" beside each of the three drugs. The Sixth Circuit held that this amounted to an acquittal, because the jury had to find that the conspiracy had as its object at least one of the drugs. This is not a case in which there are inconsistent verdicts (which generally do not require a reversal). This was one count of the indictment for which the jury apparently found insufficient evidence with regard to one of the elements of the offense.

***United States v. LaPointe***, 690 F.3d 434 (6th Cir. 2012) Defendant was charged with conspiracy to possess with intent to distribute oxycodone. He requested an instruction on the lesser included offense of conspiracy to possess oxycodone (a conspiracy). The trial court erred in failing to instruct the jury as requested. First, the court held that the fact that the indictment alleged that the defendants conspired to distribute and to possess with intent to distribute did not mean that a conspiracy to possess was not a lesser included offense because it is not a lesser offense of the conspiracy to distribute. (An indictment frequently charges in the conjunctive, but a jury can convict of either of the methods). Second, the fact that all conspirators did not share the limited conspiracy to simply possess the drugs did not mean that the defendant did not have that limited agreement with others.

***United States v. Hassan***, 578 F.3d 108 (2d Cir. 2008) The defendant was prosecuted for conspiring to import "khat" a plant grown in the Africa that sometimes contains a controlled substance known as cathinone. The plant itself is not illegal, but cathinone is. The evidence was sufficient to prove that he conspired to import khat containing cathinone. However, the jury instruction explaining the offense to the jury was erroneous. The jury instruction suggested that if the defendant conspired to import any controlled substance, the jury could convict the defendant. In this case, however, because of the confusion about whether khat was a controlled substance (it is not, but many government witnesses erroneously testified that it is), the judge should have specifically instructed the jury that the government had to prove that the defendant conspired to import khat containing cathinone in order to convict him of the conspiracy offense.

***United States v. Howard***, 517 F.3d 731 (5th Cir. 2008) The defendant was charged with several counts of fraud, including one count that alleged that he falsified the company's books (or was a co-conspirator with someone else who falsified the books) and thus committed honest services mail fraud. One theory on which the government relied was that pursuant to Pinkerton, he was guilty of the substantive acts of his co-conspirators. That theory, however, relied on an improper definition of honest services mail fraud. Because there was no way to determine if the jury relied on this improper theory, as opposed to another theory that would have been a permissible basis for a conviction, the Fifth Circuit agreed with the lower court that the conviction needed to be vacated.

***United States v. Arbane***, 446 F.3d 1223 (11th Cir. 2006) The government failed to prove that there were any co-conspirators (other than a government informant) in defendant's importation offense, thus, a conspiracy conviction could not be sustained. Though there was some evidence of at least one other person's awareness of the defendant's plan and that the other person helped store drugs in a foreign county, the evidence was insufficient to prove that the other person conspired to import the drugs. The government is obligated to prove that the defendant and the other person shared the same object in order to find the existence of a conspiracy. If the other person only conspired to possess the drugs, or conspired to distribute the drugs in South America, this would not be sufficient.

***United States v. Richardson***, 421 F.3d 17 (1st Cir. 2005) When there are alternate grounds on which a jury can convict a defendant on one count, an issue often arises on appeal whether a deficiency with regard to one alternative requires that the appellate court set aside the verdict. This may occur where there is a conspiracy to commit more than one offense (for example, the defendant is charged with conspiring to sell drugs and launder the proceeds), or a perjury prosecution with numerous false statements alleged in the same count. This case explains how an appellate court considers these types of challenges: if the appellant contends that the evidence was insufficient with regard to one alternative, then the conviction will not be reversed, because the court will assume that the jury relied on the alternative that was supported by sufficient evidence. But if the appellant contends that the deficiency with regard to one of the alternatives was in the jury instruction, then the appellate court will reverse, because the jury will not be presumed to have known that the jury instruction was erroneous and may have relied on the improper definition to convict the defendant of that alternative means of committing the offense. See generally Griffin v. United States, 502 U.S. 46 (1991). See also United States v. Banki, 660 F.3d 665, 677-78 n.9 (2d Cir. 2011).

***United States v. Garcia-Torres***, 280 F.3d 1 (1st Cir. 2002) Though the evidence was sufficient to prove that the defendant participated in a kidnapping and murder, there was insufficient proof that he was aware that the crimes were designed to further (or were in any way related to) his colleagues' drug enterprise. He could not be convicted of conspiracy of possession with intent to distribute cocaine.

***United States v. Nattier***, 127 F.3d 655 (8th Cir. 1997) The defendant was charged in one count with conspiring to embezzle money and then to launder the proceeds of this embezzlement. The trial court cured any potential duplicity problem by instructing the jury that in order to convict the defendant on this count, the jury was required to unanimously agree on the particular object of the conspiracy the defendant agreed to commit (i.e., embezzlement, or money laundering, or both).

***United States v. High***, 117 F.3d 464 (11th Cir. 1997) The defendants were charged in one count with conspiring to violate several criminal laws, one of which was structuring currency transactions in violation of the CTR laws (31 U.S.C. § 5324). The trial was held prior to the decision in Ratzlaf v. United States, 510 U.S. 135 (1994), which held that a defendant had to be shown to have known the illegality of his conduct before he could be convicted of a CTR structuring violation. The trial court erroneously

instructed the jury on this object of the conspiracy (incorrectly stating that ignorance of the criminal law was no defense). The Eleventh Circuit held that where the trial court erroneously sets forth the elements of one of the objects of a multi-object conspiracy, the conviction on the conspiracy count may not be sustained, even if there is sufficient evidence on the other objects and the other objects were property defined.

***United States v. Idowu***, 157 F.3d 265 (3rd Cir. 1998) The government failed to prove that the defendant was aware of the specific unlawful object of the conspiracy. Though the government satisfactorily proved that the defendant was a knowing participant in some form of unlawful activity involving contraband, there was insufficient proof that he was aware that the co-conspirator was involved in a drug transaction. (NOTE: The Third Circuit later issued an opinion questioning whether this case utilized the proper standard of review, United States v. Caraballo-Rodriguez, 726 F.3d 418 (3rd Cir. 2013).

***United States v. Durham***, 825 F.2d 716 (2d Cir. 1987) The defendants were charged with a conspiracy to commit arson. They requested an instruction that they must have had the specific intent to commit the arson in order to be guilty of the charged conspiracy. Their theory of defense was that they simply intended to take money for the venture, but never actually commit the arson. The trial court refused to give the instruction; this constituted reversible error.

***United States v. Thomas***, 114 F.3d 403 (3rd Cir. 1997) While the evidence was sufficient to prove that the defendant knew he was engaged in some kind of illicit activity, the evidence did not establish that he knew the object of the conspiracy was possession with intent to distribute a large quantity of cocaine. (NOTE: The Third Circuit later issued an opinion questioning whether this case utilized the proper standard of review, United States v. Caraballo-Rodriguez, 726 F.3d 418 (3rd Cir. 2013).

***United States v. Alston,*** 77 F.3d 713 (3rd Cir. 1996) This was a pre-1994 (i.e., Ratzlaf-controlled) CTR prosecution in which the defendant was charged with a double-edged §371 conspiracy (conspiracy to commit a CTR offense and conspiracy to defraud the U.S.), as well as with a substantive CTR violation. The court concludes that the erroneous instruction regarding willfulness infected the entire case. Obviously, the substantive count was invalid because of Ratzlaf. In addition, the conspiracy to commit the CTR offense was void because, in order to convict a defendant of conspiracy under the “offense” clause, the government must prove whatever level of mens rea is required for conviction of the underlying substantive offense. The Third Circuit concluded here, moreover, that proving a conspiracy to defraud the United States also requires proof that the defendant know the CTR structuring prohibition.

***United States v. Schramm***, 75 F.3d 156 (3rd Cir. 1996) The defendant, who was a wholesaler of diesel fuel, was charged with conspiring to evade the payment of retail state fuel taxes. He claimed that the evidence only supported a charge that he conspired to evade the payment of wholesale federal fuel taxes. This was a valid defense. The evidence did not show that the defendant knew, or should have known, that the retailers intended to evade the payment of their retail taxes. The mere fact that defendant’s actions aided the retailers in evading their taxes was not sufficient without proof that he knowingly engaged in that conspiracy. In a conspiracy charge like this, the object of the conspiracy, as alleged, must be proved.

***United States v. Wexler***, 838 F.2d 88 (3rd Cir. 1988) Where there was substantial evidence that the jury could conclude that the defendant was involved in a conspiracy concerning the movement of a truck’s cargo, there was no evidence that the defendant knew the cargo was hashish. His conviction for conspiracy to distribute hashish was reversed on sufficiency grounds. (NOTE: The Third Circuit later issued an opinion questioning whether this case utilized the proper standard of review, United States v. Caraballo Rodriguez, 726 F.3d 418 (3rd Cir. 2013).

***United States v. Palazzolo,*** 71 F.3d 1233 (6th Cir. 1995) The defendant was charged with a conspiracy which had three illegal objects, one of which was structuring financial transactions. The trial court instructed the jury erroneously about the mens rea element of the structuring offense (see Ratzlaf v. United States, 114 S.Ct. 655 (1994)). The conspiracy conviction had to be set aside. Because the jury may have relied on the invalid object – that is, the object that was improperly defined – the general verdict could not be upheld.

***United States v. Martinez***, 83 F.3d 371 (11th Cir. 1996) The government must prove that the object of the conspiracy, as alleged in the indictment, is, in fact, the object the defendant agreed to achieve. Here, the defendant participated in the theft of a suitcase, which the other participants knew contained drugs. He claimed that he thought he was participating in a theft of money. Because there was no testimony that he was told that the theft involved drugs, his conviction for conspiracy to possess with intent to distribute drugs was reversed.

***United States v. Howard***, 918 F.2d 1529 (11th Cir. 1990) The evidence was not sufficient to support the defendant’s conviction for conspiring or attempting to kidnap a DEA agent. The defendants were attempting to “rip-off” the undercover DEA agent. When he was inspecting the cocaine, he was about to purchase, the agent was pushed into a car and guns were drawn. He immediately drew his gun and escaped. This was not sufficient evidence to prove that the defendants were attempting to kidnap, or conspiring to kidnap, him.

**CONSPIRACY (Pinkerton)**

***United States v. Howard***, 517 F.3d 731 (5th Cir. 2008) The defendant was charged with several counts of fraud, including one count that alleged that he falsified the company’s books (or was a co-conspirator with someone else who falsified the books) and thus committed honest services mail fraud. One theory on which the government relied was that pursuant to Pinkerton, he was guilty of the substantive acts of his co-conspirators. That theory, however, relied on an improper definition of honest services mail fraud. Because there was no way to determine if the jury relied on this improper theory, as opposed to another theory that would

have been a permissible basis for a conviction, the Fifth Circuit agreed with the lower court that the conviction needed to be vacated.

***United States v. Bruno***, 383 F.3d 65 (2d Cir. 2004) The conspirators could not have envisioned those six years after they participated in a murder, one of their confederates would lie to investigators about the crime. Under a Pinkerton theory, a conviction for making a false statement could not be sustained.

***United States v. Tarallo***, 380 F.3d 1174 (9th Cir. 2004) The government sought to sustain certain counts in this securities fraud prosecution under the "co-schemer" theory that provides that when a group of people perpetrate a fraud, one fraudster is responsible for the frauds committed by his confederates. The problem in this case, however, is that the government did not request an instruction to the jury on this theory and therefore a conviction on this theory could not be sustained.

***United States v. Rawlings***, 341 F.3d 657 (7th Cir. 2003) The defendant was the driver for a couple armed bank robbers. He was aware that they possessed guns when the other two exited the car to rob the bank, though there was no evidence that he was aware of their possession of the guns before that time. The trial court instructed the jury that possession had to be "knowing" but did not instruct the jury on the concept of constructive possession, or Pinkerton. In a decision by Judge Posner, the court held that the evidence was insufficient to prove the defendant's conviction of possession of a firearm by a convicted felon. The problem, according to Judge Posner was not the instructional error, there was simply insufficient proof that the defendant was, in fact, in either actual or constructive possession of the firearms that his co-defendants possessed. There was no evidence that he purchased the guns, gave them to the conspirators, or encouraged them to be armed. No other evidence suggested that he exercised dominion or control over the guns. With regard to Pinkerton, that concept enables a person to be convicted of an offense committed by someone else in the conspiracy, but it does not authorize the finding of specific elements of some other offense (such as the possession of a weapon) based on a conspirator's conduct. Thus, the defendant, on a Pinkerton theory, could be found guilty of other offenses of the conspirators, but not, on that theory, of their possession of a firearm.

***United States v. Morfin***, 151 F.3d 1149 (9th Cir. 1998) The trial court erroneously instructed the jury that "any person who conspires to commit an offense . . . is guilty of the offense, the commission of which was the object of the conspiracy." It is not true that conviction of a conspiracy automatically results in conviction of the substantive offense. This instruction, however, was harmless error.

***United States v. Blackmon***, 839 F.2d 900 (2d Cir. 1988) It is improper to instruct the jury in a conspiracy case that it is the jury's duty to convict a member of a conspiracy for substantive offenses committed by co-conspirators prior to the defendant's entry into the conspiracy. The defendant cannot be held retroactively liable for substantive offenses committed prior to his joining the conspiracy.

***United States v. Labat***, 905 F.2d 18 (2d Cir. 1990) There was no evidence supporting the defendant's conviction of possessing cocaine. Although the evidence was sufficient to support his conspiracy conviction, the trial judge did not instruct the jury on the law of Pinkerton, thus the Court of Appeals could not affirm the conviction on that theory.

***United States v. Polk***, 56 F.3d 613 (5th Cir. 1995) Though a conspirator may be found guilty of substantive offenses committed by coconspirators which were within the scope of the conspiracy under the Pinkerton theory, if the jury is not instructed about the Pinkerton theory, then a conviction on this theory may not be upheld. In this case, the conviction of one conspirator on one of the substantive counts was reversed because the only evidence of his participation was that his car was used in a drug transaction; however, he was not seen in the car nor was he identified as having participated in the transaction in any way.

***United States v. Elizondo***, 920 F.2d 1308 (7th Cir. 1990) The trial judge gave an incomplete Pinkerton instruction; nevertheless, it was harmless error in this case.

***United States v. Spudic***, 795 F.2d 1334 (7th Cir. 1986) In this mail fraud prosecution, the jury was not instructed on a Pinkerton theory of culpability. That is, the jury was not instructed that the acts of one co-conspirator can be attributed to the defendant if he had agreed to be a member of the conspiracy. If the jury so found, the defendant could be found guilty of the substantive offenses committed by other coconspirators. Because the jury was not instructed on a Pinkerton theory, the substantive conviction could not stand.

***CONSPIRACY (Withdrawal)***

***Smith v. United States***, 133 S. Ct. 714 (2013) If a defendant claims that he withdrew from a conspiracy outside the statute of limitations period, he has the burden of proving, by a preponderance of the evidence, this defense.

***United States v. Arias***, 431 F.3d 1327 (11th Cir. 2005) The defendant introduced sufficient evidence to warrant an instruction on the law of withdrawal from the conspiracy – and thus a statute of limitations defense. The defendant, a doctor, was charged with conspiring with others to defraud Medicare. More than five years prior to the indictment, he wrote a letter to Medicare, stating that he no longer would be a Medicare provider at the facility where the crime was being committed, thus signaling his withdrawal from the conspiracy to other conspirators who had previously relied on his participation in the program as a means to commit the crime.

***CONTEMPT (Procedural Issues)***

***Hicks v. Feiock,*** 108 S.Ct. 1423 (1988) The Supreme Court set forth a number of rules governing contempt proceedings in the context of failure to comply with a court order. The Court concludes that the type of remedy or punishment imposed provides a strong indication whether the proceeding is criminal or civil, but that other considerations must also be evaluated. If the Court

determines that a proceeding is criminal, the full panoply of constitutional protections must be afforded the accused: he must be provided with adequate notice and the State must prove beyond a reasonable doubt all the elements of the offense, including, in a contempt proceeding, the ability of the respondent to comply with the court order. In a civil case, on the other hand, it is permissible to require the respondent to demonstrate that he was incapable of complying with the court order, such as the payment of child support.

***Young v. United States ex rel Vuitton Et Fils***, 106 S.Ct. 3270 (1987) The Supreme Court holds that it is permissible to have a private prosecutor in a contempt action, but it is improper to appoint a party that would be the beneficiary of the court order that supposedly had been violated. A private prosecutor should be as disinterested in the outcome of a criminal prosecution as a public prosecutor would be.

***United States v. Agosto-Vega***, 731 F.3d 62 (1st Cir. 2013) Prior to the re-trial of the defendant, counsel filed numerous motions in limine. The trial court held the lawyer and the defendant in contempt and fined them $2,000 for the "abusive" late filing of the motions. There was nothing in the record, however, that limited the right to file motions in limine, or set forth a timetable for such motions. The trial court also failed to provide any notice to the lawyer or defendant about the proposed sanctions and did not give them a right to be heard on this issue. The sanctions, therefore, could not be upheld.

***United States v. Britton***, 731 F.3d 745 (7th Cir. 2013) Defense counsel failed to appear at a status conference and was held in contempt following a show cause hearing. The trial judge found that the attorney makes false statements about his reason for not appearing both in writing and at the show cause hearing (i.e., he claimed to have a conflict in another court). The Seventh Circuit reversed, because the summary contempt procedures outlined in Rule 42(b) were not appropriate in this circumstance. The failure to appear in court is not conduct that occurs "in the presence of the court" so that conduct does not justify summary contempt proceedings and because the trial court relied on extrinsic evidence in making his findings about the lawyer's statements at the show cause hearing, this cannot support summary contempt proceedings.

***United States v. Peoples***, 698 F.3d 185 (4th Cir. 2012) The defendant was prosecuted for contempt of court. At his contempt trial, he appeared late (he had appeared late at previous proceedings, as well). The court held the defendant in contempt on the charged offense and then summarily held him in contempt a second time for being late to court for the contempt hearing. The Fourth Circuit held that a summary contempt proceeding was not appropriate for the charge that he was late to court. The court should have set this matter down for a hearing, provided time for the defendant to prepare and appointed a prosecutor.

***Federal Trade Commission v. Trudeau***, 606 F.3d 382 (7th Cir. 2010) The defendant in this FTC action was not pleased with the course of the proceedings and on his radio program, he exhorted his audience to send emails to the district court judge on his behalf. The judge held the defendant in direct criminal contempt because of this "virtual" contact with the judge. The Seventh Circuit reversed. Because the judge had to engage in factfinding (i.e., had to determine the genesis of the emails that were sent to him) and the defendant's conduct did not occur in the immediate presence of the court this could not be characterized as direct criminal contempt that required immediate action without a hearing.

***In re Gates***, 600 F.3d 333 (4th Cir. 2010) Counsel appeared in court fifteen minutes late for a change of plea hearing. This does not constitute an act committed "in the actual presence of the court" and is therefore not punishable summarily under Rule 42(b). See also United States v. Nunez, 801 F.2d 1260 (11th Cir. 1986) (same). The Fourth Circuit also concluded that the evidence was insufficient to find that the attorney was in willful contempt of court. The attorney explained that his assistant had received an ambiguous phone call from the prosecutor stating that the change of plea hearing might occur the next day (as opposed to the previously scheduled date). The trial court's statement that the attorney should have followed up and clarified the matter was not a basis to hold the attorney in contempt.

***United States v. Cohn***, 586 F.3d 844 (11th Cir. 2009) The Eleventh Circuit holds that a contempt "conviction" is not a felony under the sentencing statutes. In fact, it is neither a felony, nor a misdemeanor. Rather it is sui generis. No particular sentencing guideline applies.

***United States v. Moncier***, 571 F.3d 593 (6 th Cir. 2009) The attorney disobeyed a court order rather than appealing. This supported a contempt conviction. However, the case should have been tried before a judge other than the judge whose order was disobeyed. Rule 42(a)(3).

***In re Troutt***, 460 F.3d 887 (7th Cir. 2006) The trial court erred in suspending the attorney from practicing in federal court as a sanction for his alleged criminal contempt. The only two penalties for criminal contempt are a fine, or imprisonment. If the judge wanted to impose some other form of punishment, he should have instituted disciplinary proceedings. In addition, the conduct in this case – writing vitriolic letters to the judge – was not direct contempt and should have been heard by a different judge after due process protections were afforded the attorney.

***In re Contempt Order (Petersen),*** 441 F.3d 1266 (10th Cir. 2006) A Magistrate held a prosecutor in summary contempt for being five minutes late to a hearing. This was improper. Being late to court is not conduct that occurs "in the presence of the court" and the attorney must be afforded the right to explain his tardiness.

***United States v. Glass***, 361 F.3d 580 (9th Cir. 2004) The trial court held the defendant in summary contempt for making misrepresentations about her finances during an inquiry into her eligibility for appointed counsel. There was no need to conduct summary contempt proceedings, however, and the Ninth Circuit reversed. There was no need to dispel an immediate threat to the court; and the contemptuous conduct that was committed in the presence of the court could only be proved with facts that

were extrinsic to the proceedings. See Pounders v. Watson, 521 U.S. 982 (1997) (Rule 42(b) summary contempt is appropriate only where all of the essential elements of the misconduct are under the eye of the court and are actually observed by the court).

***United States v. Cooper***, 353 F.3d 161 (2d Cir. 2003) The attorney reported to the judge that his client was going to be hospitalized for a cancer operation. The District Court judge responded, "If you're stating that somebody is sick, we have to have a doctor's affidavit that says that." Later, the attorney reported that the client was suffering from a heart condition. The judge, in a phone conference with the attorneys, again demanded a written doctor's affidavit. The attorney produced a fax from the hospital documenting the client's admission to the hospital's coronary care unit. When the hearing was held, the client did not appear and the judge held the attorney in contempt for failing to produce an affidavit. The Second Circuit reversed: The attorney did nothing to disrupt the proceedings in such a manner that the summary contempt proceedings were necessary to restore order. The appellate court also questioned whether the failure to produce an affidavit in this situation could even have amounted to contemptuous conduct. The absence of any formal Order from the trial court (i.e., the trial judge relied on her telephone conversation to support the contempt citation) however, was fatal to the adjudication of contempt.

***Doral Produce Corp. v. Paul Steinberg Associates, Inc.,*** 347 F.3d 36 (2d Cir. 2003) Even in summary contempt proceeding, the "defendant" must be afforded the right to make a statement before the court makes a finding of contempt. Only the need to take immediate action obviates this requirement. In this case, the defendant was a lawyer who pursued a line of questioning that had been previously ruled improper.

***United States v. Pina***, 844 F.2d 1 (1st Cir. 1988) Three contempt hearings were held during the course of the trial that served as the stage for the contemnor's misconduct. The contempt hearings were conducted without a jury. Each hearing involved numerous contempt charges, and the total possible sentence far exceeded six months for each hearing. The First Circuit holds that the contemnor had a right to trial by jury.

***United States v. 20th Century Fox Film Corp***., 882 F.2d 656 (2d Cir. 1989) A corporation is entitled to a jury trial in a prosecution for criminal contempt under the Sixth Amendment if there is a possibility of the imposition of a substantial fine. The Second Circuit holds that a fine in excess of $100,000 is automatically sufficient to trigger the right to a jury trial.

***United States v. Ayer***, 866 F.2d 571 (2d Cir. 1989) A contempt order in this case required the defendant to serve 15 days of confinement. There was no method by which the defendant could purge the order of contempt. Therefore, this was a criminal contempt order and was invalid because of the failure to provide the procedural safeguards necessary for an adjudication of criminal contempt.

***Taberer v. Armstrong World Industries, Inc.,*** 954 F.2d 888 (3rd Cir. 1992) When contemptuous conduct occurs in proceedings before a Magistrate, the District Court must conduct a de novo hearing. The district judge may not rely on the record established in the Magistrate's division. The Third Circuit also reviews the general rules governing criminal contempt proceedings. No prior civil contempt sanction must be attempted prior to resorting to criminal contempt and no "obstruction of justice" must occur as a prerequisite to criminal contempt proceedings unless summary contempt proceedings are utilized.

***United States v. Neal***, 101 F.3d 993 (4th Cir. 1996) A witness failed to appear after being subpoenaed. The district judge conducted a contempt proceeding and acted as the prosecutor, asking the witness questions, and then adjudicating the recalcitrant witness guilty. This was procedurally flawed. The district court should have appointed a prosecutor to handle the prosecutorial function of the case.

***In re Johnson***, 921 F.2d 585 (5th Cir. 1991) An attorney was held in contempt and barred from practicing in the bankruptcy court because of an apparent misrepresentation she made to one judge about what another judge had said. The judge whose statement had been erroneously repeated by the attorney entered the contempt and disbarment order. The judge should have recused himself in light of his evident partiality.

***S.E.C. v. Carter***, 907 F.2d 484 (5th Cir. 1990) The S.E.C. issued an injunction relating to certain activities of two corporations and an individual. The S.E.C. alleged that the defendants violated the injunction and sought to hold them in contempt. It was improper for the S.E.C. lawyers to handle the case on behalf of the government.

***Griffith v. Oles***, 895 F.2d 1503 (5th Cir. 1990) Bankruptcy courts have no authority to hold a party in criminal contempt for willful disobedience of its orders. For a contempt charge governed by 18 U.S.C. §401(3), the party must be tried in District Court.

***United States v. Bayshore Associates, Inc.,*** 934 F.2d 1391 (6th Cir. 1991) The court imposed a fine on the defendant corporation because of its failure to comply with injunctive orders issued by the court. These fines were not contingent on the defendant's taking, or refraining from taking, any action and were not compensatory – the fines were paid to the court, not the government (plaintiff). The fines, therefore, were punitive and thus criminal in nature, not civil. As such, the fines were improper because the government was not required to prove that the defendant was in contempt beyond a reasonable doubt.

***In re Chandler***, 906 F.2d 248 (6th Cir. 1990) The defendant's tardiness upon appearing in court should not have been punished by contempt. He was late because of a conflict of which he was unaware until the day in question. The defendant lacked the requisite intent, and his contempt citation was vacated. The Sixth Circuit holds that, not only was the evidence insufficient, but the procedure followed by the District Court was inadequate. The trial court could not have known why the attorney was late, thus the contemptuous conduct did not occur in his presence. Summary disposition of the matter was therefore inappropriate.

***In re Contempt of Greenberg***, 849 F.2d 1251 (9th Cir. 1988) A defense attorney was held in summary criminal contempt because of his action of slamming his book down on the table and demanding "at the top of his voice" a ruling on his objection.

However, the trial judge, in his order of contempt, failed to comply with Rule 42(a) because he failed to certify that he "saw or heard" the contemptuous conduct. The transcript of the proceedings may not be used to fulfill the certification requirement.

***CONTEMPT (Substantive Issues***)

***Pounders v. Watson***, 521 U.S. 982 (1997) The Court reiterated the principle that summary contempt procedures must be reserved for those cases in which the misconduct occurs in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court and are actually observed by the court, and where immediate punishment is essential to prevent demoralization of the court's authority before the public. The Court upheld a summary contempt conviction in this case where an attorney asked his client a question about the possible sentence he was facing after the court repeatedly warned the attorneys in the case that this evidence was not admissible during the guilt phase of this trial.

***In re Goode***, 821 F.3d 553 (5th Cir. 2016) In order to punish an attorney for contumacious behavior pursuant to the court's inherent powers, there must be a finding that the attorney acted in bad faith. To punish an attorney for violating local rule, however, does not require a finding of bad faith. In this case, an attorney spoke to the press about a case during a lunch break. Prior to the break, the court indicated that it intended to declare a mistrial after lunch and, in fact, after lunch it did declare a mistrial (one of the defendants committed suicide that morning). The Fifth Circuit held that punishing the attorney for making the lunch time press statement violated the First Amendment. The Local rule essentially forbid any communications with the press. However, prior restraints on trial participants must be narrowly tailored to only prohibit speech that has a "meaningful likelihood of materially impairing the court's ability to conduct a fair trial."

***United States v. Pickering***, 794 F.3d 802 (7th Cir. 2015) A woman was summoned to appear for jury duty and failed to appear. She explained at a show cause hearing that she forgot about the notice to appear. If true, her forgetfulness was not the equivalent of willful disobedience of a summons. The trial judge, however, improperly put the burden on her to prove her forgetfulness and this was improper. There was not proof beyond a reasonable doubt that she did not forget, so the evidence was insufficient to convict her.

***United States v. Farah***, 766 F.3d 599 (6th Cir. 2014) The defendant was held in contempt for refusing to testify about a fellow gang member. In a separate proceeding, the defendant refused to testify about another gang member. This does not support separate contempt prosecutions. Once the defendant announced the refusal to testify against fellow gang members, the government may not create additional "opportunities" for the defendant to be held in contempt again. See also Yates v. United States, 355 U.S. 66 (1957) (the prosecution cannot multiply contempt's by repeated questioning on the same subject of inquiry within which a recalcitrant witness already refused answers).

***United States v. Aleo***, 681 F.3d 290 (6th Cir. 2012) Defense counsel filed a motion that the district court decided was designed to intimidate the child abuse victim from testifying. The Sixth Circuit held that the record did no support the defense counsel's motion was filed in bad faith. Whether the position the attorney advanced was right or wrong, it was not a bad faith effort to obstruct justice.

***United States v. Kimsey***, 668 F.3d 691 (9th Cir. 2012) The defendant was charged with contempt under § 402 on the basis that he was ghostwriting pleadings for a pro se litigant and was not a licensed attorney. This violated a local rule of court which adopted state criminal offenses. The Ninth Circuit, agreeing with the DC Circuit, held that violating a local rule is not the proper subject of a contempt conviction under § 402. Only violations of orders, writs, processes, or commands qualifies to support a contempt prosecution. Even though the list also includes "rules" the intent of Congress was not to include local rules.

***United States v. Allen,*** 587 F.3d 246 (5th Cir. 2009) In order to be found guilty of contempt under 18 U.S.C. § 401(3), the elements are (1) a reasonably specific orderly (2) violation of the order; and (3) the willful intent to violate the order. The third elements – willfulness – requires more than negligence. In this case, the court explained that the willfulness element could be established with proof that the defendant "reasonably should have been aware that her conduct was wrong." This is not the correct standard. At a minimum, the defendant must have acted recklessly, not negligently.

***In re Troutt***, 460 F.3d 887 (7th Cir. 2006) The trial court erred in suspending the attorney from practicing in federal court as a sanction for his alleged criminal contempt. The only two penalties for criminal contempt are a fine, or imprisonment. If the judge wanted to impose some other form of punishment, he should have instituted disciplinary proceedings. In addition, the conduct in this case – writing vitriolic letters to the judge – was not direct contempt and should have been heard by a different judge after due process protections were afforded the attorney.

***United States v. Rangolan***, 464 F.3d 321 (2d Cir. 2006) A plaintiff in a civil case approached a juror who was in the cafeteria of the courthouse (ten floors away from the courtroom) and suggested that he read certain papers. The juror promptly reported the contact to the court. The Second Circuit holds that this contact did not amount to contempt "in the immediate presence of the court" as required by 18 U.S.C. § 401(1). The cafeteria was too far away from the courtroom (and court was not in session when the contact occurred) to satisfy this element of the criminal contempt statute.

***In re Contempt Order (Petersen***), 441 F.3d 1266 (10th Cir. 2006) A Magistrate held a prosecutor in summary contempt for being five minutes late to a hearing. This was improper. Being late to court is not conduct that occurs "in the presence of the court" and the attorney must be afforded the right to explain his tardiness.

***United States v. Cooper***, 353 F.3d 161 (2d Cir. 2003) The attorney reported to the judge that his client was going to be hospitalized for a cancer operation. The District Court judge responded, "If you're stating that somebody is sick, we have to have

a doctor's affidavit that says that." Later, the attorney reported that the client was suffering from a heart condition. The judge, in a phone conference with the attorneys, again demanded a written doctor's affidavit. The attorney produced a fax from the hospital documenting the client's admission to the hospital's coronary care unit. When the hearing was held, the client did not appear, and the judge held the attorney in contempt for failing to produce an affidavit. The Second Circuit reversed: The attorney did nothing to disrupt the proceedings in such a manner that the summary contempt proceedings were necessary to restore order. The appellate court also questioned whether the failure to produce an affidavit in this situation could even have amounted to contemptuous conduct. The absence of any formal Order from the trial court (i.e., the trial judge relied on her telephone conversation to support the contempt citation) however, was fatal to the adjudication of contempt.

***United States v. Arredondo***, 349 F.3d 310 (6th Cir. 2003) The defendant filed a § 2255 in which he alleged that his trial attorney failed to notify him about a plea offer. The defendant's version changed, over time, however and it was apparent that he was fabricating his story. The District Court denied the § 2255 petition and then held the defendant in contempt. The Sixth Circuit upheld the denial of the petition but reversed the contempt conviction. Perjury committed in court is not, alone, a basis for holding a person in contempt.

***United States v. Rapone***, 131 F.3d 188 (D.C. Cir. 1997) The defendants were charged with violating a court order that prohibited correction officers from retaliating against department employees who claimed they were victimized by sexual harassment. With regard to one defendant, however, the evidence failed to show that he did anything other than complain generally about the employee's work habits, as opposed to retaliating against her in response to her sexual harassment claim.

***United States v. West Fawer***, 21 F.3d 607 (5th Cir. 1994) After disobeying the judge's directions limiting certain areas of cross-examination, the defense attorney was fined $200 for being in contempt. After the jury left the room, the defense attorney said that he would not pay the fine. The trial judge then ordered the attorney incarcerated for 12 hours. This was inappropriate: the attorney's conduct was disrespectful and imprudent, but it did not cross the line into the area of criminal contempt.

***In re Chandler***, 906 F.2d 248 (6th Cir. 1990) The defendant's tardiness upon appearing in court should not have been punished by contempt. He was late because of a conflict of which he was unaware until the day in question. The defendant lacked the requisite intent, and his contempt citation was vacated. The Sixth Circuit holds that, not only was the evidence insufficient but the procedure followed by the District Court was inadequate. The trial court could not have known why the attorney was late, thus the contemptuous conduct did not occur in his presence. Summary disposition of the matter was therefore inappropriate.

***United States v. Mottweiler***, 82 F.3d 769 (7th Cir. 1996) While the jury was deliberating, the attorneys were told to remain "accessible" in case a question or verdict was returned. The attorney gave his pager number to the clerk and then left. The jury returned a verdict, but the attorney's pager did not work. This did not amount to willful wrongdoing and did not support a criminal contempt conviction. Perhaps the lawyer could be ordered, in a civil context, to reimburse the court for the expense of bringing the jurors back the next day, but a criminal contempt conviction was not appropriate.

***In re Betts***, 927 F.2d 983 (7th Cir. 1991) Defense counsel was held in contempt for failing to appear at a hearing involving the recusal of the trial judge. The notice of hearing, however, did not clearly require the attendance of counsel. The notice simply set a date for a final hearing and acknowledged the receipt of memoranda. This did not provide an adequate basis for contempt. Also, even though the attorney served his sentence (15 days), because of collateral consequences of a contempt conviction, the case was not moot.

***United States v. Wunscn***, 84 F.3d 1110 (9th Cir. 1996) After the attorney was conflicted out of representing the defendant, he sent a letter, which had sexist content, to the female assistant United States attorney. This was not a basis for imposing sanctions on the attorney. His conduct did not interfere with the administration of justice and did not impugn the integrity of the court. A local rule which adopted a California statute which provided "it is the duty of an attorney to abstain from all offensive personality" was unconstitutionally vague.

***United States v. Maynard***, 933 F.2d 918 (11th Cir. 1991) An attorney failed to appear on time at a status conference and was held in contempt of court. He explained to the judge that he was on a scheduled flight that would have arrived on time, but the flight was cancelled, and the next flight resulted in his being one and one-half hours late. The trial judge erred in holding the attorney in contempt. To be in willful contempt, the attorney must have acted deliberately and intended to violate the court's order. The evidence in this case was insufficient to uphold a contempt citation.

***United States v. Robinson***, 922 F.2d 1531 (11th Cir. 1991) An attorney made a "speaking objection." ("Your honor, I would submit he has no independent recollection and that this is the only way he can identify it, and I would object. That's what the government has done all throughout this trial.") This "objection" was not sufficient to subject the attorney to being held in contempt. "It is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the Court's ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts."

***Krasnow v. Navarro***, 909 F.2d 451 (11th Cir. 1990) The Eleventh Circuit upheld an attorney's contempt conviction. The attorney failed to appear at a scheduled trial and provided no notice to the trial court that he was in trial in another court at that time. Although the attorney did have a real conflict, he should have notified the Court.

***In re Finkelstein,*** 901 F.2d 1560 (11th Cir. 1990) The defendant, the attorney for certain civil rights plaintiffs, prevailed during the liability portion of the trial. Prior to the commencement of the damages hearing, the attorney wrote a letter to the defendant's counsel which contained numerous veiled threats about the attorney's intentions of contacting the press and local union

organizers. The district court issued an order suspending the attorney from the practice of law because of his unprofessional conduct. The Eleventh Circuit reverses. Because the attorney was not on notice that such conduct would be considered unethical in the Middle District of Georgia, his suspension could not be upheld.

***United States v. Burstyn***, 878 F.2d 1322 (11th Cir. 1989) The Court of Appeals holds that a defense attorney's failure to appear on the first day of a specially set trial suffices to authorize a conviction for contempt. The attorney was specifically ordered by the Court to appear on that day and failed to notify the Court of a conflict which necessitated his being out of town.

***United States v. Wright***, 854 F.2d 1263 (11th Cir. 1988) The defendant's action in hitting his defense attorney in the courtroom was sufficient to support a contempt conviction under 18 U.S.C. §401(1). Because the sentencing proceeding had not yet ended, his conduct did interfere with the administration of justice.

***United States v. Turner*** (In re Moore), 812 F.2d 1552 (11th Cir. 1987) The attorney was held in contempt for pursuing a line of questioning which had been prohibited by the court. The prohibition, however, was not sufficiently specific. The contempt conviction could not be upheld.

***United States v. NYNEX Corp***., 8 F.3d 52 (D.C. Cir. 1993) The consent decree in this case was not sufficiently clear to authorize a contempt conviction for its violation.

## *CONTINUANCES*

***United States v. Sellers***, 645 F.3d 830 (7th Cir. 2011) The defendant hired one attorney to represent him at trial. Another attorney, at the request of the retained attorney, made the first appearance and attended various preliminary hearings and ultimately filed motions. As the trial date neared, however, the retained attorney had still not filed his appearance and the defendant complained that he wanted the retained attorney to represent him. Ultimately, the retained attorney had a conflict and could not appear on the scheduled trial date and the defendant insisted that a newly retained attorney be substituted as his attorney, but that this would require a continuance, since this new attorney was not prepared. The trial court erred in denying the defendant's request for a continuance to enable his newly retained attorney to prepare. The attorney who had been representing the defendant up until that point had never been retained by the defendant and was only filling in for the initially retained attorney. That attorney as required to proceed to trial. Though the continuance would cause inconvenience to the court and other litigants, the defendant's right to counsel was not adequately considered by the trial court. The conviction was reversed.

***United States v. Kloehn***, 620 F.3d 1122 (9th Cir. 2010) Shortly before the defendant was scheduled to testify in his criminal trial, his son was suddenly stricken ill and was expected to die imminently. The defense requested a continuance. The trial court denied the motion and required the defendant to testify on schedule but excused the defendant thereafter. The Ninth Circuit reversed. Forcing the defendant to prepare for his testimony while his son was about to die was unreasonable and a continuance should have been granted mid-trial.

***United States v. Williams***, 576 F.3d 385 (7th Cir. 2009) Denying the defendants' motion for a continuance of trial was an abuse of discretion. Five days prior to trial, the AUSA announced that he had an additional witness in this armed robbery case: the getaway driver. In addition, the government revealed that it had released from subpoena another witness (whose testimony would have been inconsistent with the getaway driver's testimony). The defendants were not able to locate the witness and secure his testimony. The Seventh Circuit held that denying a continuance was an abuse of discretion. The Seventh Circuit also held that the defendants are not required to prove actual prejudice in arguing prejudice post-trial. In other words, the defendants are not required to do the investigative work that they could have done pretrial (if given enough time) in order to show that denying the continuance resulted in actual prejudice.

***United States v. Heron***, 564 F.3d 879 (7th Cir. 2009) The trial court erred in denying the defendant's motion for a continuance. One key witness for the government (defendant's erstwhile co-defendant) had provided a statement to the DEA that the defendant was a reluctant participant in one drug transaction. The night before trial, however, the witness changed his story and revealed that the defendant had participated in prior drug transactions with the witness. The trial court erred in denying defendant's motion to grant a continuance so the new allegations could be investigated.

***Carlson v. Jess***, 526 F.3d 1018 (7th Cir. 2008) Shortly before trial, the defendant requested a continuance in order to switch from one retained counsel to another, revealing that there was a breakdown in communication with his current lawyer and a failure to prepare the case as needed. Both attorneys appeared and urged the court to grant the continuance in order to facilitate the change of counsel. The trial court refused, noting that the administration of justice required that the case proceed to trial. The Seventh Circuit concludes that the state court acted arbitrarily in denying the request for a continuance in this situation. "In sum, the trial judge ignored the presumption in favor of Carlson's counsel of choice and insisted upon expeditiousness for its own sake." The court finally concluded that the denial of his right to retain his chosen counsel had an adverse effect on the presentation of his case.

***United States v. Garner***, 507 F.3d 399 (6th Cir. 2007) Just as the trial was beginning, the government furnished to the defense cell phone records that were obtained by the government several days earlier. The cell phone records belonged to the victim of the carjacking. The cell phone was stolen along with the car and the records apparently disclosed the identity of people that the perpetrator called. Failing to turn the records over to the defense violated Brady. Alternatively, the trial court should have granted a continuance to enable the defense to investigate the numbers called by the perpetrator.

***United States v. Rivera-Guerrero***, 426 F.3d 1130 (9th Cir. 2005) The trial court erred in denying the defendant a continuance after the government experts testified about the types of drugs, they intended to use to medicate the defendant "back into competency." The attorney could have hired an expert prior to the hearing, but the expert would have needed more time after the government witnesses testified to prepare a response to their planned treatment protocol. The other factors governing whether a denial of a continuance was an abuse of discretion also counseled in favor of reversing the decision of the lower court.

***Pazden v. Maurer***, 424 F.3d 303 (3d Cir. 2005) In a complicated white-collar prosecution, counsel requested a continuance in order to prepare. This request was denied, and the defendant then announced that he would represent himself, because the attorney could not be ready. The defendant did, in fact, proceed pro se and the Third Circuit held that this amounted to a violation of his sixth amendment right to counsel. The defendant's waiver of his right to counsel was not the product of a free and meaningful choice.

***United States v. Verderame***, 51 F.3d 249 (11th Cir. 1995) The trial court, in its haste to dispose of cases on its docket, denied the defendant his Sixth Amendment right to assistance of counsel. Here, there were 34 days between the arraignment and the trial. The case involved two drug conspiracies and massive criminal forfeitures which were predicated on a net worth theory. The trial court should have granted the defendant's motion for a continuance to prepare his defense. Additionally, the government did not comply with a request for a bill of particulars until shortly before trial and was also late in disclosing certain Rule 16 material. See generally Ungar v. Sarafite, 376 U.S. 575 (1964); Avery v. Alabama, 308 U.S. 444 (1940).

***Bennett v. Scroggy***, 793 F.2d 772 (6th Cir. 1986) It was reversible error to fail to give the defendant an overnight continuance to secure the attendance of a subpoenaed witness who would have testified favorably to him.

***United States v. Mejia***, 69 F.3d 309 (9th Cir. 1995) At the defendant's suppression hearing, the defense requested a one-day continuance in order to secure the attendance of the two investigating officers, the credibility of whom was critical to the findings of the judge conducting the hearing. The judge denied the motion, holding instead that he would read the transcript of the officers' testimony at an earlier suppression hearing which was held before a different judge who could not conclude the hearing and who then became ill. Even though the defense attorney had cross-examined the two witnesses at the earlier aborted hearing, this was an abuse of discretion. The initial judge had made no findings of fact regarding the testimony of the officers. When the credibility of a witness's testimony is essential to the trier of fact, the factfinder must observe the demeanor of the witness before deciding whether the witness is credible.

***Manlove v. Tansy***, 981 F.2d 473 (10th Cir. 1992) The state trial court denied petitioner's right to due process by denying his motion for a continuance in order to have a witness in court. The defendant was being tried for rape. The prosecutrix's roommate indicated to defense counsel that the prosecutrix had made up these "fantasies" before – similar to her description of this alleged occurrence. The witness, however, successfully evaded service of a subpoena in fear for her safety.

***United States v. West***, 828 F.2d 1468 (10th Cir. 1987) The defendant was entitled to a continuance to obtain a defense witness who would have testified that a third person involved in a fight between the defendant and the victim had struck the fatal blow to the back of the victim's head. The defendant's murder conviction was reversed.

## *CONTINUING CRIMINAL ENTERPRISE*

***Richardson v. United States***, 119 S. Ct. 1707 (1999) In a CCE prosecution, the jury must unanimously agree on the three predicate offenses the defendant committed. Thus, if the government alleges that the defendant committed more than three predicate drug offenses, the jury must agree on the three (or more) predicate offenses the defendant committed. Merely agreeing that there were three predicates (while disagreeing on which three) is not sufficient.

***United States v. Eiland***, 738 F.3d 338 (D.C. Cir. 2013) The evidence was insufficient to support the defendant's CCE conviction. The government failed to develop sufficient evidence of the defendant's leadership role with regard to a sufficient number of supervisees.

***United States v. Lewis***, 476 F.3d 369 (5th Cir. 2007) With regard to one defendant, the evidence was insufficient to prove that he was guilty of CCE, because there was not proof that he managed or supervised fire persons in the methamphetamine trade.

***United States v. Bass***, 310 F.3d 321 (5th Cir. 2002) The fact that the defendant has numerous drug customers does not satisfy the five-person "organizer, manager or supervisor" component of a CCE prosecution.

***United States v. Russell***, 134 F.3d 171 (3rd Cir. 1998) The trial court erred in failing to instruct the jury must agree on the specific three predicate offenses committed by the defendant in order to convict him of a CCE charge. Merely instructing the jury that they had to unanimously agree that there were three predicate offenses is not sufficient.

***United States v. Otis***, 127 F.3d 829 (9th Cir. 1997) The government failed to prove that the defendant supervised or managed at least five other people in this CCE prosecution and the CCE conviction was reversed.

***CONTINUING CRIMINAL ENTERPRISE (CCE) (Underlying Conspiracy Conviction)***

***United States v. Dixon***, 132 F.3d 192 (5th Cir. 1997) A conspiracy conviction and a CCE conviction cannot both stand if the conspiracy involves the same enterprise.

## *COPYRIGHT*

***United States v. Liu***, 731 F.3d 982 (9th Cir. 2013) In a criminal copyright prosecution, 17 U.S.C. § 506(a), the term "willfully" requires proof that the defendant intended to violate a criminal law, not just that he or she intended to make a copy of a copyrighted work. In a case involving counterfeit labels, the term "knowingly" requires proof that the defendant knew that the labels were counterfeit, not just that he knew that he was trafficking in labels that happened to turn out to be counterfeit.

## *COUNTERFEIT GOODS*

***United States v. Liu***, 731 F.3d 982 (9th Cir. 2013) In a criminal copyright prosecution, 17 U.S.C. § 506(a), the term "willfully" requires proof that the defendant intended to violate a criminal law, not just that he or she intended to make a copy of a copyrighted work. In a case involving counterfeit labels, the term "knowingly" requires proof that the defendant knew that the labels were counterfeit, not just that he knew that he was trafficking in labels that happened to turn out to be counterfeit.

***United States v. Yi***, 460 F.3d 623 (5th Cir. 2006) With regard to one of counterfeit counts of this indictment, the evidence was insufficient to show that the defendant was aware that he was selling counterfeit Nike sandals.

***United States v. Habegger***, 370 F.3d 441 (4th Cir. 2004) Defendant was charged with trafficking in counterfeit goods, in violation of 18 U.S.C. § 2320. The Fourth Circuit concluded that there was insufficient evidence to support the trafficking element of the offense. The term "traffic" means transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or make or obtain control of with intent so to transport, transfer, or dispose of." In this case, there was insufficient proof of any consideration. The government argued that the defendant transferred the goods to his customer in order to foster good will and encourage subsequent counterfeit transactions. Yet, there was no proof that the purchaser was going to make any additional purchases or was going to pay for these goods. "For a shipment of goods to constitute consideration, there must be more than a mere hope on the part of the sender that the recipient will purchase goods in the future."

## *COUNTERFEITING*

***United States v. Schmuckler***, 792 F.3d 158 (D.C. Cir. 2015) A counterfeit check is a check that that was "falsely made or manufactured in its entirety" rather than an otherwise "genuine document that was simply falsely altered." Both types of checks are outlawed by 18 U.S.C. § 513, but in this case, the government only charged the defendant with uttering a counterfeit security. The check that was the subject of one count in this case was not shown to have been counterfeit, as opposed to altered. Therefore, the evidence was insufficient to prove the counterfeiting charge.

***United States v. Cone***, 714 F.3d 197 (4th Cir. 2013) Under 18 U.S.C. § 2320, the criminal counterfeiting statute eliminates from the universe of "counterfeit marks" any mark that was placed on a good by its authorized manufacturer and confirms that goods that have been marked in that fashion are not counterfeit. The defendant's conduct of altering the product that is marked with a legitimate mark to be a different product than the one to which the mark was originally fixed does not amount to counterfeiting.

***United States v. Canty***, 499 F.3d 729 (7th Cir. 2007) The police found counterfeit money on the defendant's printer. There was no question that the money was counterfeit and the defendant was manufacturing the bills. The defendant claimed, however, that he was manufacturing the bills as a favor to the government, because he was going to give the bills to the police who could then use them as "flash money." The defendant was facing a pending drug charge and thought that this "assistance" could inure to his benefit. At trial, the court precluded the defendant from offering this defense, because the defense did not give pretrial notice of public authority defense pursuant to Rule 12.3(a)(1). The Seventh Circuit reversed: the defendant's defense was not that he actually had the public authority to counterfeit the money, but that he lacked the intent to defraud, which is an essential element of a counterfeiting charge under 18 U.S.C. § 471.

***United States v. Lee***, 439 F.3d 381 (7th Cir. 2006) Fake checks that do not identify either a real drawee bank or a real corporate account holder do not qualify as "counterfeit" checks under 18 U.S.C. § 513.

## *CREDIT CARD FRAUD SEE ALSO: IDENTITY THEFT*

***United States v. Hughey***, 147 F.3d 423 (5th Cir. 1998) The defendant opened a checking account in a false name and then deposited counterfeit checks into the account and withdrew cash. This does not qualify as unauthorized use of an access device, because that offense – 18 U.S.C. § 1029 – does not include transfers that originated solely by paper instruments.

## *CRIME OF VIOLENCE:*

Begay v. United States, 128 S. Ct. 1581 (2008) The Supreme Court held that prior DUI's do not count as violent felonies under § 924(e)(2)(B). Though DUI's do pose a danger to people, the Court concluded that only crimes that are similar in kind to the listed offenses in § 924(e)(2)(B)(ii) – burglary, arson, extortion, and crimes involving explosives – qualify as violent felonies. The listed crimes all involve purposeful, violent, and aggressive conduct, unlike DUI's.

***United States v. Fuertes***, 805 F.3d 485 (4th Cir. 2015) The defendant was charged with a § 924(c) violation in connection with the offense of sex trafficking by force, fraud, or coercion. 18 U.S.C. § 1591(a). In order to be convicted of a § 924(c) offense, the underlying crime must be a crime of violence, which is defined in § 924(c)(3) as an offense which requires the use of force as an element, or which, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. The Fourth Circuit held that the crime is "indivisible" under the Descamps v. United

States, 133 S. Ct. 2276 (2013) standard, and because the offense can be committed by “fraud” (which is not “force”), the offense does not categorically qualify as a crime of violence. Nor is the offense of sex trafficking by its nature, an offense that involves a substantial risk of physical force. Therefore, a § 924(c) conviction may not be based on the use of a weapon in connection with a sex trafficking offense.

***United States v. Hull***, 456 F.3d 133 (3rd Cir. 2006) 18 U.S.C. § 842(p)(2)(A) makes it a crime to distribute information about explosives with the intent that the explosives would be used in a crime of violence. The Third Circuit holds that it is not a violation of this section to simply teach someone how to make a pipe bomb, since the mere fact of making or possessing a pipe bomb is not a “crime of violence.” The term “crime of violence” is defined at 18 U.S.C. § 16 and was construed in Leocal v. Ashcroft, 543 U.S. 1 (2004). In Leocal, the court concluded that DUI was not a crime of violence, because § 16 requires the active employment of force, or knowledge that physical force might be used against another in committing the offense.

## *CROSS-EXAMINATION SEE ALSO: CONFRONTATION*

***Olden v. Kentucky,*** 488 U.S. 227 (1988) The Supreme Court, in a per curium decision, reversed the defendant’s kidnapping, rape, and forcible sodomy conviction because of improper restrictions on the cross-examination of the alleged victim. The defendant sought to establish that the victim was trying to protect her relationship with her boyfriend when he saw her disembark from the defendant’s car. The defendant contended that the sexual conduct was consensual. The trial court prevented the defendant from cross-examining the victim about her living arrangements with her boyfriend. Citing Davis v. Alaska, 415 U.S. 308 (1974); Pointer v. Texas, 380 U.S. 400 (1965); Delaware v. Van Arsdall, 475 U.S. 673 (1986), the Court held that this limitation on a matter which represents a prototypical form of bias on the part of the witness required reversal of the conviction.

***United States v. Nickle***, 816 F.3d 1230 (9th Cir. 2016) Barring the defense from questioning prosecution witnesses about a possible Rule 35 that they were anticipating was reversible error. The fact that a Rule 35 had not yet been filed did not prevent the defense from showing possible bias of the witnesses who may have been testifying in anticipation of a future Rule 35.

***Nappi v. Yelich,*** 793 F.3d 246 (2d Cir. 2015) The defendant was charged with felon in possession of a firearm that was located in his house. His wife, who resided in the house, but in a separate bedroom, was the principal witness against him. At trial, the defense wanted to cross-examine her about her relationship with another man and argued that this was her motive to frame the defendant to get rid of him. The trial court excluded this line of cross-examination as a “collateral matter.” The Second Circuit granted a writ of habeas corpus.

***Blackston v. Rapelje***, 780 F.3d 340 (6th Cir. 2014) If the state introduces a prosecution witness’s prior sworn testimony at defendant’s trial, the defense is entitled to introduce evidence that the witness recanted that testimony. This is implicit in the right to confront one’s accusers.

***United States v. Mergen***, 764 F.3d 199 (2d Cir. 2014) The government was permitted to ask an FBI agent if he believed that his informant – the defendant – had done anything wrong. The agent testified that he had violated the terms of his informant agreement and was criminally responsible for his conduct. The defendant offered a taped statement of the defendant talking to the agent in which the informant asked the agent, “Did I do anything wrong” and the agent responded, “No, no.” Excluding this impeachment evidence on evidentiary grounds (including hearsay) was reversible error.

***Alvarez v. Ercole***, 763 F.3d 223 (2d Cir. 2014) The state trial court erred in preventing the defense from cross-examining the lead detective about other investigations that were not pursued. The investigation that was not done was not subject to a hearsay objection, because the issue is not the truthfulness of what was told to a police officer conducting the investigation, but whether there were leads that were not followed. Denying the defense, the right to cross-examine the detective violated the Confrontation Clause and was particularly harmful, because the prosecutor argued in closing that the investigation was thorough.

***Ortiz v. Yates,*** 704 F.3d 1026 (9th Cir. 2012) The defense sought to cross-examine the defendant’s wife regarding whether she was afraid to deviate from her initial statements accusing her husband of abuse because of threats the prosecutor’s investigator made towards her about changing her story (that is, the investigator had threatened to put her in prison for lying at the preliminary hearing if she did not stick to that version of events). The trial court prevented this line of questioning. This violated the defendant’s right of Confrontation.

***United States v. White***, 692 F.3d 235 (2d Cir. 2012) Based on Cedeno, noted below, which was decided after the trial was held in this case, the Second Circuit held that it was reversible error to exclude evidence of a prior judicial finding that a government witness was not credible. The prior judicial finding involved the law enforcement officer’s testimony at a suppression hearing which the judge, in that case, refused to credit. The appellate court also held that excluding evidence of the government’s initial charging decision was also reversible error. The defendant was an occupant of a vehicle with four women. Three guns were found in the car. One of the guns was allegedly found in the defendant’s pocket. The women, however, were initially charged with possessing all the guns, including the gun allegedly found in the defendant’s pocket. Subsequently, the government changed its charging decision. The appellate court held that the defendant should have been permitted to introduce evidence about the initial arrest of the women for that gun.

***United States v. Sanabria***, 645 F.3d 505 (1st Cir. 2011) A co-conspirator came to the defendant’s attorney’s office and reported that the agents had intimidated him and threatened him to conform his story to the testimony that helped the government. At trial, the co-conspirator testified for the government. The defense attorney sought to cross-examine the co-conspirator about having

been intimidated by the agents, as had been reported to the attorney. The trial judge excluded this testimony on the theory that it was outside the scope of direct. This was error.

***United States v. Woodard***, 699 F.3d 1188 (10th Cir. 2012) The trial court erred in barring the defendant from cross-examining a law enforcement officer about a prior judge's determination that the officer was not credible. This method of impeachment is permitted under Rule 608(b). The factors the court should consider in exercising his discretion are as follows: (1) whether the prior finding involved a determination of the officer's credibility generally, or just in that case; (2) whether the prior testimony involved a subject matter similar to the subject matter in the instant case; (3) whether the prior "lie" was in a judicial proceeding or some other forum; (4) whether the prior lie was about a significant matter; (5) how much time had elapsed between the two proceedings; (6) whether the witness had a motive to lie in the prior proceeding and whether the same motive existed in this proceeding; (7) whether any explanation offered by the witness in the prior proceeding was plausible. The holding in this case is not limited to prior testimony of law enforcement officers but applies to any witness.

***United States v. Cedeno***, 644 F.3d 79 (2d Cir. 2011) The trial court erred – though it was harmless error – in barring the defense from questioning a prosecution witness about a prior judicial finding that the witness was not credible. The witness's prior testimony can be viewed as prior conduct that comes within the scope of Rule 608(b). See also, United States v. Terry, 702 F.2d 299, 316 (2d Cir. 1983).

***United States v. Kohring***, 637 F.3d 895 (9th Cir. 2011) The government failed to reveal to the defendant that a key prosecution witness was being investigated by state agents for child sex abuse offenses and efforts to obstruct justice in connection with those sex offenses. Though the trial court recognized that this evidence should have been disclosed, the trial court further held that the evidence would not have been admissible under Rule 403, because it would have confused the issues. The Ninth Circuit reversed. The evidence should have been disclosed and it would have been admissible to impeach the witness.

***Sussman v. Jenkins***, 636 F.3d 329 (7th Cir. 2011) Trial counsel failed to provide pretrial notice of the intent to introduce evidence that the child molestation victim had made prior false allegations of sexual abuse against another man (his father). Trial counsel's failure was ineffective assistance of counsel because such evidence – prior false allegation evidence – was admissible and significant evidence relating to the child's credibility and motive for fabricating allegations (i.e., to get attention, or for punishing people for not paying attention to him). This evidence was clearly admissible under the Confrontation Clause.

***Childers v. Floyd***, 642 F.3d 953 (11th Cir. 2011) The defendant, a county commissioner, was on trial for paying a bribe to another commissioner to vote on a particular project that benefitted a citizen who was paying the bribe money. The second commissioner was the key government witness. At a trial involving the citizen bribe-payor, the second commissioner testified, and the bribe payor was acquitted. The second commissioner then was debriefed again and added to his factual recitation and changed other facts. The government threatened to revoke his plea agreement, but the court would not allow it. The first commissioner's trial then was held, and the trial judge held that the defendant could not mention the acquittal of the bribe payor or the circumstances surrounding the second commissioner's change of story, though he was allowed to cross-examine the witness about the prior inconsistent statements. A panel of the Eleventh Circuit reversed the conviction, but the en banc court held that regardless of what the court might do in a case on direct review, under the deference required pursuant to the AEDPA, it was not proper to grant the writ. See also 736 F.3d 1331.

***United States v. Robinson***, 583 F.3d 1265 (10th Cir. 2009) The trial court erred in barring the defense from reviewing the mental health records of the key eyewitness in this case. The parties and the lower court knew that the witness had just been released from a mental health facility prior to his testimony, but the defense was barred from reviewing the records. The trial court also erred in barring the defense from cross-examining the witness about his mental health infirmity and use of drugs. Among the cases relied upon by the Tenth Circuit were United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983) and Greene v. Wainwright, 634 F.2d 272 (5th Cir. 1981).

***Holley v. Yarborough***, 568 F.3d 1091 (9th Cir. 2009) The defendant was charged with child molestation. Barring cross-examination of the child about her "active" sexual imagination and her prior statements about having sex with neighborhood children and her brother deprived the defendant of his Sixth Amendment right of Confrontation and required that the writ be granted. The excluded evidence would have shown her tendency to exaggerate, if not fabricate allegations of sexual conduct and demonstrate her familiarity of sexual terminology.

***Slovik v. Yates***, 556 F.3d 747 (9th Cir. 2009) A witness for the state was on probation as a result of a DUI conviction. He was asked by the defense whether, at the time of his testimony, he was on probation. He responded that he was not. This was not true, and the defense sought to cross-examine him with a document that showed that he was on probation. The state judge excluded the cross-examination. This was constitutional error for two reasons: first, the cross-examination that he was on probation was admissible as evidence of bias; second, the witness's false testimony that he was not on probation was a further basis for cross-examination to show the jury that the witness was willing to lie under oath.

***Brinson v. Walker***, 547 F.3d 387 (2d Cir. 2008) The defendant was accused of robbing the victim. The defense attempted to cross-examine the victim on his racist attitudes. The defense was that the victim concocted the entire robbery story because he was a racist, even though he had no particular animus directed toward the defendant personally. Precluding this line of questioning violated the defendant's Sixth Amendment right of confrontation and the Second Circuit held that the writ should have been granted. The Second Circuit reached a similar result in a decision five days later in United States v. Figueroa, 548 F.3d 222 (2008), where the defendant sought to cross-examine the witness about his swastika tattoos to demonstrate that he

was a bigot, thus showing the jury the witness's bias against the defendant. The court in Figueroa held that limiting the cross-examination violated the defendant's Confrontation Clause rights but was harmless error.

***Vasquez v. Jones***, 496 F.3d 564 (6th Cir. 2007) The constitutional right to cross-examine a witness is not limited to exploring motive, bias and prejudice. Other attacks on credibility, including information about the prior criminal record of the witness, are also protected by the Sixth Amendment's Confrontation Clause. In this case, barring the defense from introducing impeachment evidence (criminal record) of a non-testifying hearsay declarant was a violation of the Confrontation Clause.

***United States v. Larson***, 495 F.3d 1094 (9th Cir. 2007) Though it was harmless error, the trial court erred in limiting the defendant's cross-examination of a witness about the mandatory minimum sentence she faced and was trying to eliminate based on her cooperation.

***United States v. Jiminez,*** 464 F.3d 555 (5th Cir. 2006) The trial court committed reversible error by limiting the defendant's cross-examination of an officer on the subject of his exact location when he claimed to have surveilled the defendant's house, and the defendant selling drugs from her house.

***United States v. Smith***, 454 F.3d 707 (7th Cir. 2006) When a defense attorney is cross-examining a government witness, if the witness is prepared to answer questions about what his lawyer told him (i.e., the value of cooperating, the meaning of a § 5K1.1 departure, etc), the government may not object on grounds of attorney client privilege. The government may bring the privilege to the attention of the court and the witness but may not object. The privilege may only be asserted by the witness. Thus, in this case, when the government objected and the trial court promptly granted the objection (without the witness every having invoked the privilege), it was error. Harmless error in this case.

***United States v. Watler***, 461 F.3d 1005 (8th Cir. 2006) The trial court erred in barring the defense from cross-examining a witness about a threat he made to stab the defendant if he ever met him in the street. Harmless error.

***United States v. Larson***, 460 F.3d 1200 (9th Cir. 2006) The trial court erred in barring defense counsel from cross-examining a cooperating witness about the mandatory minimum sentence he would face but for his cooperation. Harmless error. The en banc court reached the same conclusion, finding that excluding evidence about the mandatory minimum sentence was a Confrontation Clause violation, but was harmless.

***United States v. Smith***, 451 F.3d 209 (4th Cir. 2006) The trial court erred in barring the defense from questioning a law enforcement officer about the destruction of evidence (drugs) that were the basis for the prosecution in this case. The drugs had been seized by state agents and were initially the focus of a state prosecution. When the case was transferred to the federal prosecutors, the state case was dismissed, and the drugs were destroyed. Cross-examination on the inappropriate destruction of the contraband should have been permitted – but the error was harmless.

***United States v. Montelongo***, 420 F.3d 1169 (10th Cir. 2005) The defendant was convicted of transporting marijuana in a truck. The owner of the truck also owned other trucks and another of the trucks was also found to have been carrying marijuana. When the owner testified, the defendant sought to cross-examine him about the other incident to suggest that the owner was using the trucks to haul marijuana, unbeknownst to the drivers. Barring this cross-examination was reversible error. The defendant was permitted under Rule 404(b) to show the other incident to prove his innocence.

***White v. Coplan***, 399 F.3d 18 (1st Cir. 2005) A state court decision that limited a defendant's ability to cross-examine two child molestation victims about prior false allegations violated the Confrontation Clause. The state court required that before such evidence may be admitted, the trial court must find that the prior allegations were "demonstrably false" – a threshold that the First Circuit held was too demanding in the context of this case.

***Kittelson v. Dretke***, 426 F.3d 306 (5th Cir. 2005) The state court violated the defendant's confrontation clause rights by barring cross examination in this child molestation on the topic of prior false allegations.

***Fowler v. Sacramento County Sheriff's Department***, 421 F.3d 1027 (9th Cir. 2005) Barring questioning about prior false molestation accusations violated the defendant's right to confront his accuser.

***United States v. Vega Molina***, 407 F.3d 511 (1st Cir. 2005) Limiting a defendant's cross-examination of a cooperating co-conspirator was reversible error. Among the topics that should have been allowed was probing the witness's relationship to another defendant who was on trial and who supposedly conspired with the witness to frame the defendant. In addition, the other defendant's abuse of the witness was a proper subject of cross-examination.

***Howard v. Walker***, 406 F.3d 114 (2d Cir. 2005) A co-conspirator's statement to the police was excluded on Bruton grounds. However, an expert witness for the state relied on that statement in reaching her conclusion that the victim's death was caused by conduct of the conspirators. Though an expert may generally rely on inadmissible evidence in reaching a conclusion, including hearsay, that rule assumes that an expert will carefully analyze the basis of his opinion and that the trial court will conduct a sufficient Daubert hearing to ensure the reliability of the expert's underlying data from which she draws her conclusion. In this case, the unreliable statements of the co-conspirator were not reliable, and the expert's opinion was therefore improperly admitted. The error was compounded by the state trial court's ruling that if the defense cross-examined the witness about her conclusions, the inadmissible Bruton statement would be admitted. A defendant cannot be compelled to sacrifice one right – the Sixth Amendment right to cross-examine witnesses – to protect another right – i.e., the right of Confrontation embodied in the Bruton doctrine.

***Simmons v. United States, 390 U.S. 377 (1968). De LiSi v. Crosby, 402 F.3d 1294 (11th Cir. 2005) A witness*** who waives his Fifth Amendment privilege with regard to a topic in a judicial proceeding, may not later invoke the privilege, even in a separate legal proceeding, on the same topic. In this case, a prosecution witness previously waived his Fifth Amendment rights regarding possible charges of tax evasion. When cross-examined by the defendant at the defendant's trial, the trial court erred in permitting the witness to invoke his Fifth Amendment rights. Harmless error.

***United States v. Schoneberg,*** 396 F.3d 1036 (9th Cir. 2004) Because the witness's plea agreement left it up to the government whether to offer the witness a reduction in sentence, the defendant should have been allowed to cross-examine the witness about his expectation of a Rule 35. The specific questions that were disallowed focused on the fact that only the government had the power to file the Rule 35 motion. This was not harmless error, even though the jury was able to review the witness's plea agreement, which was admitted in evidence with the Rule 35 language. The trial court's repeated statements that it was the jury in this case, not the prosecutor who assessed the credibility of the witness missed the point of the cross-examination, which was to explore the witness's motive to exaggerate, fabricate, and shade his testimony to please the government.

***United States v. Wilmore***, 381 F.3d 868 (9th Cir. 2004) The government's introduction into evidence of a witness's grand jury testimony, coupled with the lower court's restriction of defendant's cross-examination of that government witness amounted to a violation of defendant's Confrontation Clause rights and necessitated reversal of the conviction. The witness had testified at the grand jury that she had seen the defendant (charged with being a felon in possession of a gun) in possession of a gun. At trial, she was called as a witness for the government and denied seeing the defendant in possession of the weapon. The government introduced relevant portions of the grand jury testimony and when the witness was confronted by the government with her previous grand jury testimony, she ultimately invoked her Fifth Amendment rights. The judge then instructed defense counsel to avoid asking any questions that would lead to further invocations of the Fifth Amendment. This was erroneous. Because the grand jury testimony was actually introduced in evidence by the government, the defendant could not be limited in his cross-examination of the witness regarding the circumstances of that testimony. More importantly, the introduction of the grand jury testimony amounted to testimony that was not subject to cross-examination, which violated Crawford v. Washington, 124 S.Ct. 1354 (2004).

***United States v. Whitmore***, 359 F.3d 609 (D. C. Cir. 2004) The trial court erred in precluding the defendant from cross-examining a police officer about his prior untruthful testimony in an unrelated trial. In that prior trial, the trial judge concluded that the officer had lied and granted a judgment of acquittal for the defendant on trial. Excluding the evidence of that prior perjury was erroneous. "Nothing could be more probative of a witness's character for untruthfulness than evidence that the witness has previously lied under oath." The D.C. Circuit also held that the trial court erred in preventing the defense from cross-examining the officer about his suspended driver's license and his failure to pay child support. Reversible error.

***United States v. Chandler***, 326 F.3d 210 (3rd Cir. 2003) Barring the defense attorney from questioning a witness about the sentence he could have faced had he been held responsible for the large amount of drug dealing with which he was involved was reversible error.

***United States v. Love***, 329 F.3d 981 (8th Cir. 2003) The trial court erred in preventing the defense counsel from questioning a critical government witness about his mental defects. The witness suffered from short- and long-term memory impairment. The nature of the mental defect, coupled with the timing of the diagnosis made this evidence relevant to the jury's evaluation of the credibility of his testimony.

***United States v. Cruz-Garcia***, 344 F.3d 951 (9th Cir. 2003) The defense attempted to prove the facts underlying the witness's prior convictions to show that he had the capacity to commit the offenses with which the defendant was charged. The trial court erroneously excluded this evidence. The evidence was admissible under Rule 404(b) to prove the witness's capacity to commit the crime. Indeed, the prosecutor had repeatedly argued that the witness was too stupid to have committed the crime without the defendant's help. The court noted that Rule 404(b) should be more liberally interpreted when the evidence is being offered against a witness, as opposed to the defendant.

***United States v. Mills***, 138 F.3d 928 (11th Cir. 1998) Both a corporate and individual defendant were charged with Medicare Fraud. The trial court became impatient with duplicative cross-examination of witnesses and finally declared that only one attorney could cross-examine one of the government's summary witnesses. This was error; but harmless. A party may not be denied the right of cross-examination, despite the similarity of interest of that party with another party.

***United States v. Stavroff,*** 149 F.3d 478 (6th Cir. 1998) The trial court erred in refusing to allow the defendant to question a cooperating coconspirator about his hopes in entering a plea agreement. The court also criticized the trial judge for sua sponte excluding this line of cross-examination, despite the government's failure to raise an objection. If the trial judge believes that a question posed by the defense is inappropriate, but the government does not object, the trial court should ask the lawyers to approach the bench, rather than taking on an adversarial role with the defense counsel. Harmless error.

***United States v. Lynn***, 856 F.2d 430 (1st Cir. 1988) The trial court erred in preventing the defendant from cross-examining a co-conspirator on the issue of a polygraph examination that was administered pursuant to a plea agreement. The inquiry was intended to show the motivation of the witness to continue to lie to curry favor with the government.

***United States v. Kaplan***, 832 F.2d 676 (1st Cir. 1987) It was error for the trial court to prohibit the defense from questioning a government witness about his cocaine use. Because the defendant sought to establish that the witness was using cocaine

during the times relevant to his testimony, and in connection with his ability to remember or observe the events about which he was testifying, the impeachment was relevant. Harmless error in this case.

***United States v. Giovanelli***, 945 F.2d 479 (2d Cir. 1991) The trial court erred in prohibiting counsel from cross-examining witnesses about their testimony in the prior trial of the defendants – a trial which resulted in mistrials and acquittals. The trial court's concern with the jury's inability to digest the fact that there had been a prior trial was understandable, but the defendant's Sixth Amendment rights to confront witnesses, to point out prior inconsistent testimony and to suggest recent fabrication were improperly sacrificed.

***Harper v. Kelly***, 916 F.2d 54 (2d Cir. 1990) A defendant was denied his Sixth Amendment right to confrontation when his attorney was prevented from cross-examining an armed robbery victim about her state of mind at the time of the incident. The purpose of the cross-examination was to demonstrate the frailty of the victim's identification testimony. The exclusion of this line of questioning was reversible error.

***United States v. Riggi***, 951 F.2d 1368 (3rd Cir. 1991) The trial court's failure to permit the defense to re-cross-examine witnesses, after the government was permitted to ask "new" questions on redirect, was reversible error. Even though the defense counsel did not object to new matters being covered on redirect, this did not forfeit his right to cross-examine the witness about these new matters.

***United States v. Williams***, 892 F.2d 296 (3rd Cir. 1989) Though a ten-year old conviction cannot be used for impeachment purposes, a defendant should have been permitted to use that conviction to show the witness' bias. The error in excluding this testimony, however, was harmless.

***United States v. Nelson***, 852 F.2d 706 (3rd Cir. 1988) The defendant was on trial for obstruction of a grand jury investigation. The defendants were prohibited from cross-examining a government witness about the purpose for which the grand jury subpoena was issued, a line of questioning intended to demonstrate that the subpoenas were not issued for the purpose of obtaining evidence before a grand jury. Reversible error.

***United States v. Landerman***, 109 F.3d 1053 (5th Cir. 1997) Restricting defendant's cross-examination of a prosecution witness was reversible error. Specifically, the trial court erred in prohibiting the defense from questioning a witness about a pending state felony charge which carried a potential life sentence.

***United States v. Stewart***, 93 F.3d 189 (5th Cir. 1996) The trial court abused its discretion in the manner in which it limited the defendant's cross-examination of the police officer during the suppression hearing. The attorney attempted to place the witness's testimony in the context of his prior testimony and the judge erroneously barred this method of examining the witness on the theory that it was simply a reiteration of prior testimony. Harmless error.

***United States v. Alexius***, 76 F.3d 642 (5th Cir. 1996) The trial court erred in prohibiting the defendant from cross-examining a government witness about pending federal felony charges. This was reversible error.

***United States v. Cooks***, 52 F.3d 101 (5th Cir. 1995) The trial court granted a new trial to one defendant because of an improper limitation on the defendant's cross-examination of the witness relating to the possible sentence on pending charges in another jurisdiction which, arguably, the witness was trying to mitigate by his cooperation in this case. The court also disallowed questioning about a subsequent and pending purse-snatching charge. The government appealed the granting of the new trial. The Fifth Circuit affirmed.

***United States v. Smith***, 831 F.2d 657 (6th Cir. 1987) Defense counsel was entitled to cross-examine a prosecution witness as to the bias that witness held against the defendants because of the defendants' alleged threat to have the witness' baby taken away from her if the witness did not engage in immoral conduct. Refusal to permit this cross-examination was harmless in this case.

***United States v. Ebens***, 800 F.2d 1422 (6th Cir. 1986) A key witness in this civil rights prosecution had been "coached" in preparation of his testimony. The defense attorney sought to play a tape of this coaching but was prohibited by the trial court which held that this constituted impermissible hearsay. The Sixth Circuit holds that this is incorrect. The tapes were introduced not to prove the truth of the matter asserted – quite the contrary – they were introduced to show that the witness was influenced by this coaching.

***Lindh v. Murphy***, 124 F.3d 899 (7th Cir. 1997) The state introduced evidence from an expert psychiatrist about the defendant's mental condition when he committed several murders. The trial judge barred the defense from cross-examining the psychiatrist about the fact that he had sexually abused some of his patients, was about to lose his medical license and his prestigious faculty positions and stood a chance of going to prison. Though the psychiatrist had no reason to believe that his testimony would alter his future (that is, that the state would reward him), the false impression created by the prosecutor about the psychiatrist's impeccable credentials necessitated allowing the defense to show the jury the truth about the psychiatrist.

***Clark v. O'Leary***, 852 F.2d 999 (7th Cir. 1988) In the defendant's murder trial, he sought to demonstrate that certain state's witnesses were members of a gang to suggest that their testimony was colored by fear of retaliation and gang loyalty. The trial court's refusal to permit such cross-examination violated the defendant's right to full confrontation. The trial court's preliminary screening of the credibility of the witnesses was improper and required reversal.

***United States v. Eagle***, 867 F.2d 436 (8th Cir. 1989) The trial court was clearly wrong in preventing a defendant from cross-examining a witness about the details of her plea agreement. The witness had been a co-defendant in this murder

prosecution but had agreed to testify in exchange for a plea to voluntary manslaughter. Because the witness's testimony did not incriminate the defendant, the error was not reversible.

***United States v. Barnes***, 798 F.2d 283 (8th Cir. 1986) Prior to trial, the defendant filed a motion to dismiss the indictment on grounds that the chief DEA agent had lied about the existence of exculpatory tapes. The motion was denied by the trial court on the grounds that the DEA agent may have misunderstood his obligations under Brady. At trial, the defense attorney, while cross-examining the DEA agent, sought to question him about his misconduct in the case. The trial court denied this line of questioning. This was reversible error. The court of appeals relies on the Supreme Court decision in Crane v. Kentucky, in holding that a pre-trial ruling does not bar relevant cross-examination on the same issue. In this case, the cross-examination may have served to impeach the credibility of the DEA agent who, according to the defense theory, was using improper means to secure a conviction.

***United States v. Dees***, 34 F.3d 838 (9th Cir. 1994) The defendant was charged with mail fraud in connection with her scheme to defraud a couple who sent the defendant money to adopt her child. The defendant sought to question the victim about a movie contract she had signed about her plight and thus her efforts to profit from the conviction of the defendant. The trial court's limitation of this cross-examination was an abuse of discretion, though harmless error. If a victim/witness stands to gain more from a conviction than an acquittal, then that fact is relevant to bias.

***United States v. Mayans***, 17 F.3d 1174 (9th Cir. 1994) The trial court erred in holding that the best evidence of the witness' understanding of a plea agreement was the agreement itself. Rather, the witness' understanding is an issue which the defense is allowed to probe with the witness himself, regardless of what the agreement actually provides.

***United States v. Bernal-Obeso***, 989 F.2d 331 (9th Cir. 1993) Just prior to trial, the government alerted the defense that an informant had killed two people several years earlier but had never been charged with a crime. The defense learned that the informant had in fact pled guilty to two counts of manslaughter and asked the court to permit the defense additional time to determine the background, and also asked to be permitted to ask the informant why he lied to the DEA about his background. Both requests were denied by the trial court. The Ninth Circuit reversed. A lie by an informant-witness to the authorities paying for his services about his felony criminal record would be relevant evidence as to the informant's credibility.

***United States v. Jones***, 982 F.2d 380 (9th Cir. 1992) The trial court's ruling which precluded re-cross-examination after re-direct was a violation of defendant's right to confront the witnesses. Because new matters were brought out on re-direct, the defense had a right to re-cross the witness about these new matters.

***United States v. Vargas***, 933 F.2d 701 (9th Cir. 1991) In order to prevent any improper questioning of a witness in front of the jury, the trial judge required the attorneys to question the witness with the jury out of the courtroom and then, when the jury returned the next day, the lawyers were only permitted to question the witness from the transcript – as edited by the judge. If the witness's answer differed in front of the jury from the rehearsed testimony, the judge "impeached" the witness with the transcript. This procedure amounted to a denial of the right to cross-examine the witness and required the reversal of the conviction of all defendants on all counts.

***United States v. Platero***, 72 F.3d 806 (10th Cir. 1995) The defendant was charged with sexually assaulting the victim. He sought to cross-examine the victim about the relationship she had with another man (not her husband) a la Olden v. Kentucky, 488 U.S. 227 (1988). The trial court determined that there was insufficient evidence of such a relationship and barred the testimony pursuant to Rule 412. This was error. If a jury could believe that such a relationship existed, the defendant must be allowed to probe this topic. The judge may not make a preliminary factual finding barring the testimony if there is evidence which would support the jury's determination. See Huddleston v. United States, 485 U.S. 681 (1988).

***United States v. DeSoto***, 950 F.2d 626 (10th Cir. 1991) The witness testified that the defendant was carrying a gun when he purchased a car from her boyfriend. The defendant sought to cross-examine the witness with evidence that the defendant had accused the boyfriend of stealing the defendant's money, and thus the girlfriend was "retaliating" on behalf of her boyfriend for these earlier allegations. The trial court's ruling precluding this area of cross-examination was reversible error. Any motive for a witness to falsify her testimony may be probed by the defendant.

***United States v. Morales-Quinones***, 812 F.2d 604 (10th Cir. 1987) The defendant may impeach a government witness by cross-examining him about specific instances of conduct not resulting in conviction if the conduct is probative of the witness' character, truthfulness, or untruthfulness.

***United States v. Burston***, 159 F.3d 1328 (11th Cir. 1998) The district court erred – though harmlessly – in restricting the defense from cross-examining the government's witness about his numerous prior felony convictions. The witness had four prior felony convictions for theft, aggravated assault, and armed robbery. The trial court limited the defense to asking simply if the witness had a prior felony conviction, without even specifying the number or nature of the offenses. This was an improper limitation on the defendant's right to present evidence pursuant to Rule 609 to impeach the witness.

***United States v. Sheffield***, 992 F.2d 1164 (11th Cir. 1993) A witness may be cross-examined about a prior failure to make a statement which was consistent with the statement made at trial. That is, a prior failure to implicate the defendant in a statement made by the witness is the proper subject of cross-examination.

***United States v. Lankford***, 955 F.2d 1545 (11th Cir. 1992) The defendant, the Sheriff of Fulton County, Georgia, was on trial for extortion and filing false tax returns. One of the prosecution's witnesses had two sons who had been charged in the state with selling marijuana. The defense sought to cross-examine the witness about his sons to show a possible motive or bias. The trial

court's preclusion of this topic of cross-examination was reversible error. The fact that there was, in fact, no deal does not foreclose the admissibility of this line of inquiry, for it is the witness's perception and personal motive, not the actual existence of a deal which is probative. Furthermore, the fact that the son had already been prosecuted and sentenced was not determinative, because there could have been a separate federal prosecution. "A reasonable juror could have concluded that [the witness's] testimony was the result of his desire to protect his sons and to obtain federal assistance in avoiding a subsequent federal prosecution against them."

***United States v. Williams***, 954 F.2d 668 (11th Cir. 1992) The trial court committed reversible error by excluding evidence about the amount of reward money received by the informant. Incredibly, the trial court held that the amount of money given to the informant (nearly $450,000) was so obscene (he was given 25% of all assets seized in connection with his deals), that it would prejudice the government to allow this evidence to be heard by the jury. The Eleventh Circuit holds that it is precisely for this reason that the evidence is admissible: "The jury has the right to know what may be motivating a witness, especially a government paid, regularly employed, informant-witness. If the amount paid an informant is felt by the government to be too prejudicial for an American jury to hear about, the solution is for the government to make reasonable payments; the solution is not for the court to rule the evidence irrelevant as too prejudicial."

***United States v. Cohen***, 888 F.2d 770 (11th Cir. 1989) One of the government's key witnesses was a former business partner of the defendants who testified that they were engaged in a tax fraud scheme. The defense sought to cross-examine the witness and demonstrate that he had previously engaged in fraudulent acts unbeknownst to the defendant. The trial court excluded the evidence. The defendants argued that the evidence was admissible under Rule 404(b): The evidence of the witness' other crimes, wrongs or acts demonstrated his ability to concoct and manage a fraudulent scheme without the knowledge of the defendants. This case is significant in recognizing that Rule 404(b) can be applied against a government witness, not just a criminal defendant.

***Brown v. Dugger***, 831 F.2d 1547 (11th Cir. 1987) A police officer testified about the statements of a third party. Defense counsel sought to cross-examine that officer in a way to demonstrate bias on the part of that third party declarant. The trial court prohibited this mode of cross-examination of the officer. This was error of constitutional dimensions and required reversal.

***United States v. Smith***, 77 F.3d 511 (D.C. Cir. 1996) In the context of considering a Brady challenge to a conviction, the D.C. Circuit held that evidence of a witness's prior psychiatric history may be admissible to impeach the witness. Therefore, the district court should have reviewed the medical records to determine if the witness's medical condition was the proper subject of cross-examination.

***United States v. Shyllon***, 10 F.3d 1 (D.C. Cir. 1993) The defendant claimed that the prosecution witnesses had been intimidated by the investigator into testifying against him. In support of this argument, he sought to call a potential prosecution witness, who did not testify for the government, and elicit testimony that the investigator threatened him, too. The defendant also tried to cross-examine the investigator about his threatening that non-testifying witness. The trial court erroneously excluded the testimony and the cross-examination. If the investigator intimidated that potential witness, it would make it more likely that he intimidated the other witnesses; therefore, the testimony was relevant under Rule 401. Harmless error.

***United States v. Foster***, 982 F.2d 551 (D.C. Cir. 1993) A police officer was a witness to several drug sales by the defendant. At the preliminary hearing, the officer made no mention of seeing the defendant give the proceeds to anybody. When the defendant was arrested, he had no cash on him. At trial, however, the police officer testified that he observed the defendant give the sales proceeds to another individual after each sale. The defense sought to cross-examine the officer about why he did not testify about this at the preliminary hearing. The trial court's ruling curtailing this topic of cross-examination was reversible error. Moreover, even though the officer's written report was introduced – and it, too, was silent about where the proceeds went – the defense should have been permitted to question the officer about his prior sworn testimony. (Majority opinion authored by Judge, now-Justice Ruth Bader Ginsburg).

***United States v. Stock***, 948 F.2d 1299 (D.C. Cir. 1991) The defendant sought to impeach a police officer with a prior statement of his which did not contain the same allegations as his courtroom testimony. Prior statements that omit details covered at trial are inconsistent if it would have been "natural" for the witness to include them in the earlier statement. The judge's error in denying this cross-examination prevented defense counsel from arguing that the officer had a poor memory or was fabricating parts of his story in order to ensure a conviction. Harmless error.

***United States v. Pryce***, 938 F.2d 1343 (D.C. Cir. 1991) The trial court erred in prohibiting defense counsel from cross-examining a prosecution witness about hallucinations the witness suffered prior to the time of the transaction about which the witness was testifying. Limiting the cross-examination to the month of the transaction was an improper restriction. The defense attorney decided not to ask about hallucinations during that month, fearful that the witness would deny hallucinations at that time and the defendant would not be able to impeach the witness with the psychiatric report he had obtained for the prior months. The defendant's decision not to ask the question about the particular month did not waive the issue as to the trial court's error in preventing the attorney from asking about the prior months.

***United States v. Anderson***, 881 F.2d 1128 (D.C. Cir. 1989) Murder charges against a prosecution witness had been dismissed recently but could have been revived. The defense sought to cross-examine the witness with regard to these charges. The trial court's exclusion of the evidence was a violation of the defendant's right to confront the witness and demonstrate possible motives for fabrication or exaggeration.

***CROSS-EXAMINATION (Improper Prosecutorial Questioning)***

***United States v. Pereira***, 848 F.3d 17 (1st Cir. 2017) The prosecutor repeatedly asked the defendant on cross-examination whether he thought the government's other witnesses simply "made" up their testimony (which implicated the defendant in the drug conspiracy) and whether he thought the witnesses were lying. This was improper cross-examination and was reversible error.

***United States v. Lopez***, 818 F.3d 125 (3rd Cir. 2016) The defendant was charged with possession of a weapon by a convicted felon. At trial he protested that he was framed by the police. After having been Mirandized, he made no statements. Yet, the prosecutor cross-examined the defendant about his failure to raise this "framed" defense prior to trial and also argued to the jury that this was a reason to question the defendant's credibility. This violated Doyle and was reversible error.

***United States v. Alcantara-Castillo***, 788 F.3d 1186 (9th Cir. 2015) It was plain error for the prosecutor to question the defendant, "So it is your testimony that [the agent] was inventing stories about you [in his testimony]?" This cross-examination required setting aside the conviction. See also United States v. Combs, 379 F.3d 564 (9th Cir. 2004), discussed below. Also improper was the prosecutor's rebuttal closing argument that the agent should be believed, because he is sworn to uphold the law. This improper closing argument merits reversing a conviction, even if the judge promptly tells the jury to disregard the comment.

***United States v. Abair***, 746 F.3d 260 (7th Cir. 2014) The prosecutor improperly cross-examined the defendant in a manner that assumed her culpability for false statements on a tax return and on a student financial aid application. This was improper Rule 608(b) impeachment. When the defendant denied making the false statement, which should have concluded the Rule 608(b) inquiry, the prosecutor pressed on, assuming the defendant's guilt of the false statement without sufficient foundation. The government failed to offer sufficient reason to believe that the tax return and financial aid application had any bearing on the defendant's truthfulness.

***United States v. Truman***, 688 F.3d 129 (2d Cir. 2012) A prosecutor may not question a witness about whether another witness is lying or mistaken. In this case, however, the Second Circuit held that this misconduct was not a sufficient basis to grant a new trial.

***United States v. Schmitz***, 634 F.3d 1247 (11th Cir. 2011) A prosecutor may not ask a defendant whether other witnesses, in the defendant's opinion, are lying. Asking one witness about the veracity of another witness invades the province of the jury. Also, just because two witnesses offer testimony that is inconsistent does not mean that one is lying. Faulty memory, or slightly different versions of the question, also explains inconsistent answers, for example.

***United States v. Osazuwa***, 564 F.3d 1169 (9th Cir. 2009) When a witness (including the defendant) is being cross-examined about a prior conviction, the fact of the conviction is the scope of the proper cross-examination. The cross-examination of the witness is controlled by Rule 609, not 608, if there is a conviction. Under Rule 609, the attorney may not ask the witness questions about the circumstances relating to the prior offense.

***United States v. Moreland***, 622 F.3d 1147 (9th Cir. 2007) It was improper for the prosecutor to repeatedly cross-examine the defendant on the subject of whether he believed the prosecution witnesses were lying. However, this did not amount to plain error.

***United States v. Nunez***, 532 F.3d 645 (7th Cir. 2008) The trial court erred in permitting the prosecutor to question the defendant about the veracity of the DEA agent. Harmless error.

***United States v. Sine***, 493 F.3d 1021 (9th Cir. 2007) In a prior civil proceeding, a judge made numerous extremely unflattering comments about the defendant, who was a lawyer in that case. When the defendant testified at his criminal trial – as well as other witnesses – the prosecutor confronted him with those observations by the judge. The district court should have excluded this line of cross-examination pursuant to Rule 403 and as hearsay.

***United States v. Harris***, 471 F.3d 507 (3rd Cir. 2006) The prosecutor questioned the defendant about whether he thought other witnesses, police officers, were lying. The Third Circuit holds that this is improper cross-examination. One witness is not capable of determining whether another witness is "lying" or "mistaken" or "telling the truth." Moreover, such questioning invades the province of the jury.

***United States v. Williams***, 461 F.3d 441 (4th Cir. 2006) The defense attorney asked the defendant to try on a "fanny pack" to demonstrate that it did not fit him. The trial court decided that based on this demonstration, the prosecutor should be permitted to cross-examine the defendant, including asking him about prior convictions. This was error. A courtroom demonstration does not amount to a testimonial act, or a waiver of the Fifth Amendment right not to answer any questions. Harmless error.

***United States v. Ndiaye***, 434 F.3d 1270 (11th Cir. 2006) The defendant was on trial for immigration fraud and related offenses. The government obtained a copy of a letter he wrote to a neighbor, which documented his extra-marital affair with the neighbor. When the defendant called a character witness in his defense, the prosecutor questioned the character witness about the defendant's character, assuming he was the author of the letter and assuming he was engaged in an extra-marital affair. This was improper cross- examination of the character witness because an extra-marital affair does not relate directly to the defendant's truthfulness and honesty. Harmless error.

***United States v. McGee***, 408 F.3d 966 (7th Cir. 2005) The defendant testified at trial and on cross examination, he stated that he did not routinely lie to people to get out of trouble. The prosecution then played a taped phone call (made at the jail where he

was held) between the defendant and his employer during which the defendant made up an elaborate lie about his absence from work. This violated the provision in Rule 608(b) which bars the use of extrinsic evidence. The tape was not admissible as a Rule 613 prior inconsistent statement, because the tape was not inconsistent with specific trial testimony; rather, it was offered to prove the defendant's lack of credibility, that is, Rule 608(b) other bad act impeachment evidence. Harmless error.

***United States v. McKee***, 389 F.3d 697 (7th Cir. 2004) The prosecutor erred in questioning the defendant about the credibility of other witnesses. It is improper to ask one witness to comment on the veracity of the testimony of another witness. This was not plain error, however.

***United States v. Combs***, 379 F.3d 564 (9th Cir. 2004) It is not proper for a prosecutor to ask a defendant who is testifying whether a government agent was lying when his testimony was inconsistent with the defendant's testimony. See also United States v. Sanchez, 176 F.3d 1214 (9th Cir. 1999). In this case, the error was plain error, particularly because it was compounded by the prosecutor's statements in closing argument that in order to acquit the defendant, the jury would have to believe that the agent risked losing his job by lying on the stand. This amounts to improper vouching of the government's witness.

***United States v. Thiongo***, 344 F.3d 55 (1 st Cir. 2003) It is improper for an attorney to ask a witness whether another witness lied on the stand. It is not improper to ask if another witness was mistaken, however.

***United States v. Williams***, 343 F.3d 423 (5th Cir. 2003) The Fifth Circuit agrees with other Circuits that it is improper for a prosecutor to ask a defendant whether he believes that another witness lied. But, like other Circuits, it was not grounds to reverse a conviction.

***Boyle v. Million***, 201 F.3d 711 (6th Cir. 2000) The Sixth Circuit granted a writ where the special prosecutor's cross-examination of the defendant was described as follows: "Boyle's trial began innocently enough with Thomas Osborne serving as the special prosecutor in Wiesenberger's stead. When Osborne began his cross-examination of defendant Boyle, however, the code of ethics and civility that should undergird the legal profession began to take devastating blow after blow. Immediately, Osborne launched into theatrics. He prefaced his third question to Boyle with the query, "Now, that is an outright lie, isn't it, Doctor?" With the boost from that springboard, he then began badgering Boyle, interrupting his answers, and even going so far as to throw a deposition into Boyle's lap. When chastised by the court for his outburst, Osborne unrepentantly proclaimed before the jury, "Dr. Boyle, I apologize if I dropped those records in your lap too hard. I didn't mean anything by that. I just was frustrated that you were lying and I'm going to prove it...." (Emphasis added.) After further contentious questioning, Osborne drew an additional reprimand from the trial judge for suggesting, again before the jury while questioning Boyle, that Boyle needed a psychiatrist."

***United States v. Sullivan***, 85 F.3d 743 (1st Cir. 1996) It is not proper for a prosecutor to ask the defendant, or any other witness, whether another witness had lied.

***United States v. Schwab***, 886 F.2d 509 (2d Cir. 1989) During the defendant's testimony, the prosecutor was permitted to ask whether he had previously been charged with income tax fraud in 1970. Actually, the defendant had been acquitted of these charges. Although this was error, it was harmless in light of the overwhelming evidence of the defendant's guilt.

***United States v. Richter***, 826 F.2d 206 (2d Cir. 1987) While the defendant was testifying, the prosecutor cross-examined him and asked him whether he believed that the law enforcement officer was simply mistaken or was lying when he testified to facts contradictory to the defendant's version. When the defendant stated that the police officer had made false statements, the prosecutor called additional witnesses to corroborate the officer's testimony. The Second Circuit holds this to be improper cross-examination, improper impeachment, and represents clear error requiring reversal.

***United States v. Hall***, 989 F.2d 711 (4th Cir. 1993) Defendant's wife made statements to an investigator which implicated the defendant in drug dealing. Prior to trial, however, the wife asserted her marital privilege and refused to testify. The prosecutor, in cross-examining the defendant made repeated references to the wife's statement, even announcing to the jury that his questions were based on the wife's three-page statement. Aside from violating the marital privilege, this amounted to the improper introduction of hearsay. Even a curative instruction, directing the jury to disregard the alleged statements of the wife, did not cure this error.

***United States v. Norris***, 910 F.2d 1246 (5th Cir. 1990) It is improper to permit a prosecutor to cross-examine the defendant about the fact that he previously entered a not guilty plea. This cannot be the subject of impeachment.

***United States v. Robinson***, 8 F.3d 398 (7th Cir. 1993) When a defendant is impeached with a prior conviction under Rule 609, it is not proper for the government to inquire into the specifics of the offense – all that is relevant is the fact of the conviction (the date, the nature of the offense, and the fact of conviction). Harmless error in this case. The prosecutor also improperly asked the defendant about other frauds he committed, knowing that he had no factual predicate for the question. Again, though, harmless error.

***United States v. Elizondo***, 920 F.2d 1308 (7th Cir. 1990) Defendant testified that he was not at the scene of the drug transaction and produced a Mexican car accident report to support his alibi. On cross-examination, the prosecutor suggested that the accident report had been "bought" and prepared by the defendant. There was no support for this inquiry. When the prosecution asks damning questions that go to a central issue in the case, these questions must be supported by evidence available or inferable from the trial record.

The fact that the government had evidence that the defendant was at the transaction site (rather than in Mexico) does not support this type of cross-examination. Harmless error.

***United States v. Monteleone***, 77 F.3d 1086 (8th Cir. 1996) When a prosecutor cross examines a defendant's reputation good character witness the prosecutor must not only have a good faith basis for believing that the defendant committed the offense (which the witness is being asked about), but also that the offense is known in the community. Here, the prosecutor believed that the defendant lied in a grand jury proceeding in the past, but that was not a matter that could have been known in the community and therefore it was improper – reversible error – to question the character witness about his knowledge that the defendant had lied in the grand jury room.

***United States v. Kallin***, 50 F.3d 689 (9th Cir. 1995) The defendant was charged with tax evasion. When he was cross-examined by the prosecutor, he was asked whether he had ever told the IRS agent that he was innocent; and asked whether he had hired a criminal defense attorney when he was first approached by the IRS. Both of these lines of questioning were improper and merited a reversal of the conviction, even though the trial court later directed the jury to disregard these questions and answers. The questions amounted to improper Doyle v. Ohio questions. Even with regard to non-custodial questioning by the IRS agent, because the agent advised the defendant of his right to an attorney, and his right to remain silent, the invocation of that right could not be used to impeach the defendant or suggest that he was demonstrating a consciousness of guilt. With regard to the curative instruction, the instruction merely repeated the offensive questions and answers and then urged the jury to ignore the testimony. This was not an adequate curative instruction.

***United States v. Albers***, 93 F.3d 1469 (10th Cir. 1996) The trial court erred when it permitted the government to ask the defendant specifics of his prior convictions. Only the fact of the conviction, the nature of the offense, and the sentence, but not the specifics of the crime may be probed.

***United States v. Elkins***, 70 F.3d 81 (10th Cir. 1995) The defendant's conviction was reversed because of the improper admission of evidence that a defense witness was a member of a gang. Such evidence is only admissible if it is shown that the witness belongs to the same gang as the defendant, or if it is shown that the witness was afraid of the defendant. Neither showing was made in this case and therefore the prosecutor's cross-examination of the witness on this topic was reversible error.

***United States v. Boyd***, 54 F.3d 868 (D.C. Cir. 1995) It is improper for a prosecutor to force a defendant to evaluate the credibility of other witnesses for the government. Thus, when a defendant is testifying, he should not be asked by the prosecutor why government law enforcement agents would lie about him. The error was compounded in this case when the prosecutor stated in closing argument that there was no reason for the law enforcement witnesses to lie. Harmless error in this case.

## *CURRENCY TRANSACTION REPORTS (CTR)*

***United States v. Taylor***, 816 F.3d 12 (2d Cir. 2016) The defendant operated a liquor store and maintained the liquor store and his personal bank account at the same credit union. On several occasions, he would make two deposits – each for under $10,000, but totaling more than $10,000 – at the credit union at the same time. The deposits were either made into the same account, or into the liquor store and his personal bank account. The deposits were made with the same teller within seconds or minutes of each other. The evidence in this case did not support the jury's verdict that required proof that the defendant structured his transactions with the intent to evade the reporting requirement. The tellers had the duty to file the CTR and there was insufficient evidence that the defendant's conduct was designed to frustrate the teller's duty. In fact, there was no evidence that the defendant was aware that a CTR was not filed. Finally, the evidence showed that on numerous occasions, the defendant deposited money in excess of $10,000 into one account, thus negating the inference that he wanted to evade the reporting requirement.

***United States v. Lang***, 732 F.3d 1246 (11th Cir. 2013) The crime of structuring a financial transaction (31 U.S.C. § 5324), is not committed simply by the depositing of an amount of money in increments less than $10,000.00. Rather the offense is committed by the act of "structuring" not the act of "depositing" and the critical element is that there is a larger sum of money that is being broken into incremental deposits. Therefore, an indictment that simply alleges that the defendant made deposits of less than $10,000 (even if there are dozens of such deposits and some occurred on the same day), it is not a crime, unless the indictment expressly alleges that there was an amount of money in excess of $10,000 that was divided into separate deposits for the purpose of evading the reporting requirement. The indictment in this case was defective and the conviction was reversed.

***United States v. Ibisevic***, 675 F.3d 342 (4th Cir. 2012) The defendant carried over $10,000 into an international flight from Dulles Airport heading to Bosnia. An ICE agent who had a Puerto Rican accent questioned the defendant and his mother (the mother spoke no English) about whether they were carrying cash. The defendant responded that they had $5,000.00. During this "questioning" the defendant turned to his mother and translated, "They are asking how much the luggage is worth if it is lost." The defendant and his mother actually had about $40,000 in the luggage, on their persons and in the mother's purse. At trial, the defendant claimed that he did not understand the question and that the mother's testimony (about what the defendant said to the mother) was admissible as a "present sense impression" to show a lack of understanding. The trial court held that this was hearsay and inadmissible. The Fourth Circuit reversed: The defendant's statement was not hearsay (it was not offered for the truth of the matter asserted; it nevertheless would qualify as a present sense impression; and it was important to his defense regarding his lack of understanding that he was making a false statement or knowingly failing to file a currency form in violation of the law.

***DeGuerin v. United States***, 214 F.Supp.2d 726 (S.D. Tex 2002) The attorneys failed to establish that revealing the identity of the clients who paid cash fees would disclose confidential, privileged information.

***Gerald B. Lefcourt, P.C. v. United States***, 125 F.3d 79 (2d Cir. 1997) A criminal law firm's willing and knowing failure to file a § 6050I form (Form 8300) when it received in excess of $10,000 from a client resulted in the assessment of a $25,000 penalty by the IRS. The Second Circuit rejected the law firm's effort seeking a refund of this penalty.

***DEATH PENALTY (Penalty Phase)***

***Glossip v. Gross,*** 135 S. Ct. 2726 (2015) The Supreme Court narrowly approves the use of Oklahoma's lethal injection method of execution. Justice Breyer, joined by Justice Ginsburg, questioned the constitutionality of the death penalty.

***Kansas v. Marsh***, 548 U.S. 163 (2006) The death penalty procedure in Kansas is constitutional. That state permits the imposition of the death penalty where the aggravating factors are not outweighed by the mitigating factors. The defendant claimed that if the factors are in equipoise, the death penalty would be unconstitutional. The Supreme Court disagreed.

***Brown v. Payton***, 544 U.S. 133 (2005) The state court's jury instruction regarding mitigating evidence was not defective. The instruction invited the jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The defendant complained that this instruction did not encompass information relating to the defendant (as opposed to the crime) such as his post-offense jail house conversion. The Supreme Court held that the instruction was sufficient.

***Roper v. Simmons***, 543 U.S. 551 (2005) The death penalty may not be imposed in a case in which the defendant was under the age of 18 at the time the offense was committed.

***Atkins v. Virginia***, 536 U.S. 304 (2002) Executing the mentally retarded violates the Cruel and Unusual Punishment Clause.

***Ring v. Arizona***, 536 U.S. 584 (2002) Pursuant to Apprendi, the jury must make the findings of fact on the essential elements required to impose the death penalty.

***Kelly v. South Carolina***, 534 U.S. 246 (2002) When the state introduces evidence that suggests that the defendant is dangerous, the trial court is required to instruct the jury about the defendant's ineligibility for parole. It is not necessary that the prosecutor actually argue future dangerousness in order to require such an instruction.

***Harris v. Alabama***, 513 U.S. 504 (1995) Under Alabama's capital sentencing scheme, the jury renders an advisory opinion. It does not offend the Eighth Amendment that the statute does not specify what weight the trial judge should give the jury's recommendation when the judge imposes the sentence.

***Simmons v. South Carolina***, 512 U.S. 154 (1994) When the prosecutor argues during closing argument that the imposition of the death penalty is the only sure way to ensure that the defendant will not pose a danger to the community in the future, the defendant may argue or obtain an instruction from the trial court, that the only available option to the death penalty is life without parole.

***Dawson v. Delaware***, 503 U.S. 159 (1992) At the defendant's death penalty trial, evidence of his membership in a white racist organization was introduced. His affiliation with this group had nothing to do with the crime. The introduction of this evidence violated the defendant's First Amendment rights.

***Payne v. Tennessee***, 501 U.S. 808 (1991) The Court changes its mind and holds that victim impact evidence is admissible.

***McKoy v. North Carolina***, 494 U.S. 433 (1990) North Carolina's death penalty scheme required the jury to find the existence of a particular mitigating factor with unanimity when balancing such factors against the existence of aggravating circumstances. This violated the Eighth Amendment insofar as it limited the jurors' ability to recommend against a death sentence.

***Penry v. Lynaugh***, 492 U.S. 302 (1989) It is improper during the penalty phase instructions to fail to permit the jury to express its "reasoned moral response" to the mitigating evidence of the defendant's mental retardation and his background of being abused. Nevertheless, the Eighth Amendment does not categorically prevent the state from executing a mentally retarded person. But see Atkins v. Virginia.

***South Carolina v. Gathers,*** 490 U.S. 805 (1989) The prosecutor read a religious tract and a voter registration card that was found in the possession of a victim of a murder for which the defendant was being prosecuted. This evidence was not relevant to the defendant's moral culpability and the reading of these papers to the jury required a new sentencing proceeding. (This decision was overruled in Payne v. Tennessee, 501 U.S. 808 (1991).

***Johnson v. Mississippi***, 486 U.S. 578 (1988) The defendant's death penalty was based in part on his having earlier committed a crime in New York State. However, following the imposition of the death penalty in Mississippi, New York vacated his conviction in that state. The Supreme Court unanimously holds that the Mississippi death sentence must be vacated.

***Beck v. Alabama***, 447 U.S. 625 (1980) A death sentence cannot constitutionally be imposed unless the jury is permitted to consider a verdict of guilt as to a lesser-included non-capital offense, provided that the evidence would support such a verdict.

***Lawlor v. Zook***, 909 F.3d 614 (4th Cir. 2018) The state court committed constitutional error by prohibiting the defendant from introducing expert opinion during the penalty phase of his trial that he posed a very low risk of future violence if sentenced to life in prison.

***Hedlund v. Ryan***, 854 F.3d 557 (9th Cir. 2017) The state trial court improperly limited mitigating evidence in this case to events or circumstances that had a causal connection to the crime.

***Pensinger v. Chappell***, 787 F.3d 1014 (9th Cir. 2015) The state trial court's failure to properly instruct the jury on the special circumstances required to return a death penalty violated the defendant's right to due process and required setting aside the death sentence.

***Van Tran v. Colson***, 764 F.3d 594 (6th Cir. 2014) The state courts failed to properly apply Atkins and a proper assessment of the defendant's claim under the proper legal standard.

***Dodd v. Trammell*** 753 F.3d 971 (10th Cir. 2013) Habeas relief was granted in this death penalty case because a victim impact statement included a recommendation of death for the defendant.

***Hodges v. Epps***, 648 F.3d 283 (5th Cir. 2011) The trial court erroneously instructed the jury that a life sentence would make the defendant eligible for parole. This was a due process violation that necessitated setting aside the death penalty.

***Phillips v. Workman***, 604 F.3d 1202 (10th Cir. 2010) A Beck v. Alabama, 447 U.S. 625 (1980) error resulted in granting a writ in this death penalty case. If the trial court in a capital case fails to give a lesser included offense instruction that is appropriate under state law, this is a Beck violation.

***Robinson v. Schriro***, 595 F.3d 1086 (9th Cir. 2010) If a defendant does not order, intend, or participate in a murder, and the murder was not reasonably foreseeable, the state may not rely on the "cruel, heinous or depraved" aggravator.

***Sechrest v. Ignacio***, 549 F.3d 789 (9th Cir. 2008) The prosecutor's repeated references during closing argument in this death penalty case to the likelihood that the defendant would be paroled, if not sentenced to death, were constitutionally impermissible. Statements such as, "Nobody actually dies in prison" and "People don't die of old age in prison" were false and denied the defendant his right to due process. The prosecutor also improperly labeled the defense a "fraud" and told the jurors that if the defendant was released and killed a child or another person, that would be the juror's burden.

***Kindler v. Horn***, 542 F.3d 70 (3rd Cir. 2008) Another death sentence vacated because of a Mills v. Maryland defect.

***Abu-Jamal v. Horn***, 520 F.3d 272 (3rd Cir. 2008) The defendant's death sentence suffered from a Mills v. Maryland defect. The trial court instructed the jury, "The Crimes Code provides that a verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances. This may have led the jury to believe that a mitigating factor should not be considered unless the jury reached unanimous agreement about the mitigating factor. The flaw in this instruction was compounded by the verdict form that similarly suggested that a mitigating factor must be agreed to by the jury unanimously. The decision survived a subsequent remand from the United States Supreme Court, Abu-Jamal v. Secretary, Pa. Dept of Corrections, 643 F.3d 370 (3rd Cir. 2011).

***Tennard v. Dretke***, 442 F.3d 240 (5th Cir. 2006) Following remand from the Supreme Court, the Fifth Circuit set aside the defendant's death penalty on the basis that the trial court was too restrictive in preventing the defendant's evidence of low IQ.

***Weaver v. Bowersox***, 438 F.3d 832 (8th Cir. 2006) The prosecutor urged the penalty phase jury to do their duty and vote to execute the defendant. The comments implored the jury to act as good soldiers do and protect the community. This is business. Toughen up. The message for these types of people must be death. I am the top law enforcement officer in this jurisdiction, and I determine which cases are appropriate for the death penalty. Etc. The Eighth Circuit held these comments were too inflammatory and required setting aside the death penalty. The comments also violated Caldwell, and Zant v. Stephens.

***Bigby v. Dretke***, 402 F.3d 551 (5th Cir. 2005) The state court's penalty phase instruction offered the jury the option of disregarding relevant mitigating evidence: the defendant's paranoid schizophrenia. This violated the Eighth Amendment. See Smith v. Texas, 125 S.Ct. 400 (2004).

***Bates v. Bell***, 402 F.3d 635 (6th Cir. 2005) In this death penalty trial, the prosecutor's closing argument included the following improper arguments (1) suggested to the jury that if the defendant's life was spared, the jurors would be accomplices in the defendant's subsequent crimes; (2) accused the defense attorney of being paranoid and criticized the attorney's frequent objections to evidence; (3) commented on the credibility, by expressing personal opinions, about the defense mental health experts; (4) likened the defendant to a rabid dog, the only solution to which is death. The Sixth Circuit set aside the death penalty.

***Jones v. Polk***, 401 F.3d 257 (4th Cir. 2005) The defense sought to elicit testimony that the defendant had expressed remorse for his actions. The state trial court erred in excluding this testimony on hearsay grounds. A trial court may not apply hearsay rules mechanistically to defeat the ends of justice at a capital sentencing.

***Green v. Georgia***, 442 U.S. 95 (1979). Lockett holds that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

***Mollett v. Mullin***, 348 F.3d 902 (10th Cir. 2003) The trial court's failure to instruct the jury regarding the impact of a life without parole sentence violated Simmons v. South Carolina, 512 U.S. 154 (1994). Because the state argued future dangerousness, the trial court should have instructed the jury that LWOP means LWOP, rather than simply stating that the jurors should not be concerned with the issue of parole.

***Spears v. Mullin***, 343 F.3d 1215 (10th Cir. 2003) The victim was severely beaten and stabbed, but the medical experts agreed that he was either dead, or certainly unconscious long before the stabbings began and shortly after the beating began. During the penalty phase, the state introduced several gruesome photographs that showed the results of the stabbings and the beating. This violated the defendant's right to due process and required that the death sentence be set aside.

***Depew v. Anderson***, 311 F.3d 742 (6th Cir. 2002) The prosecutor's cross examination of defense witnesses during the penalty phase and his closing argument contained numerous inflammatory and inadmissible statements, including a reference to an unproven (and untrue) prior knife assault committed by the defendant. He also told the jury that had the defendant taken the stand (he did not), the prosecutor would have asked him about a prior conviction. In addition, the prosecutor admitted, without any authentication, a picture of the defendant standing next to a marijuana plant. These errors necessitated granting the writ of habeas corpus.

***Riley v. Taylor***, 277 F.3d 261 (3rd Cir. 2001) The prosecutor's reference to "automatic appellate review" during his closing argument was a Caldwell error that was one reason the Third Circuit granted a writ of habeas corpus in this death penalty trial.

***McLain v. Calderon***, 134 F.3d 1383 (9th Cir. 1998) The trial court erred in instructing the jury that a sentence of life without parole could be commuted by the governor and reduced to a sentence that could lead to parole. Though this instruction may be appropriate in certain circumstances, see California v. Ramos, 463 U.S. 992 (1983), it was inappropriate in this case, where the governor did not have that power.

***McDowell v. Calderon***, 130 F.3d 833 (9th Cir. 1997) The trial court's failure to correct the jury's misconception about the proper role of certain mitigating evidence violated the defendant's rights under the Eighth Amendment. A note from the jury during deliberations suggested that a "hold out" juror was considering mitigating factors that the rest of the jurors thought should not be considered. The trial court should have instructed the jury that they could consider any mitigating facts, including those being considered by the hold out.

***Frey v. Fulcomer***, 132 F.3d 916 (3rd Cir. 1997) The sentencer cannot be precluded from considering any mitigating evidence, either by statute, evidentiary rulings, or the jury instructions. Moreover, the jury may not be instructed that unanimity is required before a mitigating factor can be considered. The instruction in this case was ambiguous: "Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances." This instruction was erroneous and required setting aside the death sentence.

***Smith v. Singletary***, 61 F.3d 815 (11th Cir. 1995) In capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. The trial court's error in excluding such evidence in this case was not harmless error.

***Duest v. Singletary***, 967 F.2d 472 (11th Cir. 1992) Defendant's death sentence was based in part on a Massachusetts conviction which was subsequently set aside.

***Johnson v. Mississippi,*** 486 U.S. 578 (1988) dictates that the sentencing phase had to be retried. On remand from the United States Supreme Court, for analysis under the standard of Brecht v. Abrahamson, the Eleventh Circuit again reversed the sentence, 997 F.2d 1336 (11th Cir. 1993).

***Gore v. Dugger***, 933 F.2d 904 (11th Cir. 1991) The trial court's failure to instruct the jury about non-statutory mitigating circumstances required vacating the death sentence.

***Jackson v. Dugger***, 931 F.2d 712 (11th Cir. 1991) Limiting the jury's consideration of mitigating circumstances to those found in the statute was harmful error in light of the defendant's military background which the jury was not allowed to consider. The defendant had served in Vietnam and had been in the armed forces for eight years.

***Cunningham v. Zant,*** 928 F.2d 1006 (11th Cir. 1991) The state trial court erred in failing to instruct the jury that a life sentence could be rendered even if the state proved the existence of an aggravating circumstance beyond a reasonable doubt.

***Aldridge v. Dugger***, 925 F.2d 1320 (11th Cir. 1991) The state trial court erred in instructing the jury that it could consider only statutory mitigating factors on the issue of the death penalty.

***Booker v. Dugger***, 922 F.2d 633 (11th Cir. 1991) The state trial court committed a reversible Hitchcock error by failing to accurately instruct the jury about their right to consider non-statutory mitigating circumstances.

***DeLap v. Dugger***, 890 F.2d. 285 (11th Cir. 1989) The trial judge erred in instructing the jury that only statutory mitigating circumstances could be considered in deciding whether the death sentence was appropriate. This violates the rule of Hitchcock v. Dugger, 481 U.S. 393 (1987) and Lockett v. Ohio, 438 U.S. 586 (1978). The death sentence was also reversed because the sentencing jury was instructed on the law of felony murder as an aggravating circumstance, despite the fact that the defendant had previously been acquitted of the felony murder.

***Jones v. Dugger,*** 867 F.2d 1277 (11th Cir. 1989) The trial's court's failure to advise the jury that it should consider all mitigating evidence in the record in deciding whether to impose the death penalty was reversible error.

***Knight v. Dugger,*** 863 F.2d 705 (11th Cir. 1988) The defense attorney, the judge, and the prosecutor all suggested to the jury that only statutory mitigating factors can be considered by the jury. Because the jury can consider any mitigating factors, this was erroneous and required a new sentencing proceeding.

***Ruffin v. Dugger,*** 848 F.2d 1512 (11th Cir. 1988) The trial court failed to instruct the jury after reviewing the seven statutory mitigating factors, that the jury could also consider any other mitigating evidence present in the record. Despite the fact that the trial court did not tell the jury that the seven mitigating factors constituted an exhaustive list, the trial court's failure to specifically advise the jury that it could consider other mitigating circumstances taints the death penalty verdict. Mann v. Dugger and Harich v. Wainwright, 844 F.2d 1446 and 1464 (11th Cir. 1988) Sitting en banc, the Eleventh Circuit reviewed closing arguments in two

cases which involved a prosecutor minimizing the role of the jury in imposing the death penalty. In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Supreme Court held that this type of argument was inconsistent with the Eighth Amendment's heightened need for reliability in determining whether death is the appropriate sentence. The prosecutor in these cases, arising in Florida, held that because a jury only makes an advisory verdict, Caldwell should not apply. The Eleventh Circuit disagreed and held that such argument by the prosecutor is as inappropriate in Florida as it is in Mississippi. Stone v. Dugger, 837 F.2d 1477 (11th Cir. 1988) The judge and jury improperly believed that they were limited to considering only statutory mitigating factors in fixing sentence. This required a reversal and a new sentencing proceeding.

***Jackson v. Dugger***, 837 F.2d 1469 (11th Cir. 1988) The trial judge improperly instructed the jury that death is presumed to be the proper sentence for murder when one or more of the aggravating circumstances is found and is not overcome by mitigating circumstances. There is no such presumption.

***Godfrey v. Kemp***, 836 F.2d 1557 (11th Cir. 1988) Having found that the evidence presented at the defendant's first sentencing trial was insufficient to support the death sentence, the Double Jeopardy Clause barred resentencing the defendant to death. Only one aggravating circumstance was presented to the first jury and insufficient evidence was presented to support this basis for death.

***Messer v. Florida***, 834 F.2d 890 (11th Cir. 1987) It was improper for the trial court during the sentencing phase of this death penalty trial to limit the jury's consideration of mitigating circumstances. Having done so in this case, the death sentence was reversed.

***Moore v. Kemp***, 809 F.2d 702 (11th Cir. 1987) It is improper for a trial court to inform a jury during the penalty phase in Georgia that the jury is required to return a death sentence if it finds aggravating circumstances. The proper rule is that the jury may return a death sentence if statutory aggravating circumstances are found.

***DEATH PENALTY (Federal Death Penalty)***

***Jones v. United States***, 527 U.S. 373 (1999) In its first review of a federal death penalty conviction, the Court upholds the conviction and sentence of death. The Court holds that it is not necessary that the jury be informed of the consequences of a "hung jury" (i.e., that this would result in a sentence of less than death, rather than a retrial). The Court also held that submitting duplicative, and vague aggravating factors to the jury may be harmless error.

***United States v. Whitten***, 610 F.3d 168 (2d Cir. 2010) In its death penalty closing argument, the prosecutor suggested that the defendant's decision to go to trial was an illustration of his lack of remorse and was one reason the death penalty should be imposed. The prosecutor also argued that the defendant could have testified during the penalty phase (rather than simply make an allocution that was unsworn and not subject to cross-examination). Both of these arguments were improper and led to reversal of the death penalty.

***United States v. Williams***, 610 F.3d 271 (5th Cir. 2010) The FDPA includes the term "act of violence "as one of the qualifiers for imposition of the death penalty. The Fifth Circuit held that this requires the use of force. The defendant in this case failed to turn on his truck's air conditioning, knowing that illegal aliens were left in the truck. Several of the aliens died in the truck. The Fifth Circuit held that failing to turn on the air conditioning does not qualify as an act of violence.

***United States v. Brown***, 441 F.3d 1330 (11th Cir. 2006) Various constitutional challenges to the federal death penalty act were denied, as well as a challenge to the "pecuniary gain" aggravating circumstance.

***United States v. Allen***, 406 F.3d 940 (8th Cir. 2005) A federal death penalty indictment must include at least one statutory aggravating factor and the mens rea element.

***United States v. Fell***, 360 F.3d 135 (2d Cir. 2004) Reversing the decision of the trial court, the Second Circuit holds that the federal death penalty is constitutional. In particular, this case focused on the provision of the statute that permits the introduction of evidence during the sentencing phase that would not be admissible under the federal rules of evidence.

***United States v. Allen***, 357 F.3d 745 (8th Cir. 2004) An indictment must contain the elements of the offense charged. Where a statutory aggravating factor operates as the functional equivalent of an element, it too must be noticed in the indictment. In this case, the death penalty indictment did not sufficiently allege the statutory aggravator that the defendant committed the offense in the expectation of pecuniary gain. See 406 F.3d 940.

***United States v. Bernard***, 299 F.3d 467 (5th Cir. 2002) 18 U.S.C. § 3592(c)(8) makes the fact that a murder was committed for pecuniary gain an aggravating circumstance supporting a death sentence. This provision is limited to murder for hire cases and other circumstances where the murder itself was committed as consideration for, or in expectation of, something of value. A carjacking or robbery that also leads to a murder is not included as a murder that is committed for pecuniary gain.

## *DEFENDANT'S APPEARANCE AT TRIAL (SHACKLING)*

***Deck v. Missouri***, 125 S. Ct. 2007 (2005) Shackling the defendant, even during the sentencing phase of a death penalty trial, violates due process. A defendant may not be forced to appear in shackles unless the trial court has found that such restraint is warranted by an essential state interest specific to the particular defendant.

***Stephenson v. Neal***, 865 F.3d 956 (7th Cir. 2017) Requiring the defendant to wear a stun belt during the penalty phase of this death penalty trial was reversible error. Trial counsel's failure to object was ineffective assistance of counsel.

***United States v. Sanchez-Gomez***, 798 F.3d 1204, 859 F.3d 649 (9th Cir. 2015) A policy adopted in the Southern District of California required all detainees to appear in shackles for all non-jury proceedings. The Ninth Circuit held that this policy was unconstitutional. In order to shackle a defendant, a particularized need must be shown. Reviewing the case en banc, the Ninth Circuit reached the same decision in a decision issued in 2017, 859 F.3d 649.

***United States v. Haynes***, 729 F.3d 178 (2d Cir. 2013) The trial court improperly ordered that the defendant be shackled during trial, despite the absence of any findings on the record regarding the need to shackle the defendant. The government indicated during oral argument that shackling the defendant is a routine practice in the NDNY and that the Marshal's office communicates directly with the judge in each case about the need to shackle detained defendants. The Second Circuit condemned this practice (shackling is appropriate only when there is an on-the-record finding that shackling is necessary as a last resort to satisfy a compelling reason, such as the preservation of safety in the courtroom) and held that, along with various other errors at trial, necessitated reversing the conviction.

***United States v. Banegas,*** 600 F.3d 342 (5th Cir. 2010) The defendant was shackled at trial because, according to the judge, she always shackled pro se defendants. Though the evidence was unclear whether the jury could see the shackles, the burden was on the government to prove that the jury did not see the shackles; the burden was not on the defendant to show that the jury did see the shackles. The conviction was reversed.

***United States v. Miller***, 531 F.3d 340 (6th Cir. 2008) The defendant's attorney expressed fear about sitting at counsel table with the defendant and said that the defendant had threated her. The court declined to allow her to withdraw from representing the defendant but required the defendant to wear a stun belt during trial. The Sixth Circuit held that the trial court failed to make an adequate inquiry prior to using the stun-belt. There was no hearing and no evidence, other than the attorney's statement. The defendant, however, never complained. The Sixth Circuit held that use of the belt was not plain error.

***Gray v. Moore***, 520 F.3d 616 (6th Cir. 2008) Before a defendant may be removed from the courtroom because of his misbehavior, the trial court must warn the defendant of the consequences of his actions.

***Illinois v. Allen***, 397 U.S. 337 (1970). Because the state trial court promptly removed the defendant from the courtroom when he yelled at a witness, "You're lying" without warning the defendant of the consequences of his outburst, a writ of habeas corpus was granted.

***Lakin v. Stine***, 431 F.3d 959 (6th Cir. 2005) It was error, but harmless, for the state court to shackle the defendant without having made a case-by-case determination of the necessity, and simply deferring to the request of the corrections officer's request.

***Ruimveld v. Birkett***, 404 F.3d 1006 (6th Cir. 2005) The defendant, an inmate in a state prison, was charged with poisoning a guard (putting cleaning fluid in the guard's coffee). During trial, which occurred in a courtroom in the prison, the defendant was shackled. The Sixth Circuit granted a writ. Even in this situation – a known prisoner, in a prison courtroom – the defendant should not be shackled absent proof of the need for this procedure.

***United States v. Durham***, 287 F.3d 1297 (11th Cir. 2002) The Eleventh Circuit holds that the district court made insufficient findings regarding the use of a stun belt during trial. Though the belt was apparently not seen by jurors, the defendant claimed that his fear that the belt would be activated by the marshals deterred him from talking to his counsel during trial or making any movements at defense table. He became preoccupied during trial that he would be stunned and could not concentrate on the evidence.

***Gonzalez v. Pliler***, 341 F.3d 897 (9th Cir. 2003) Based on the Eleventh Circuit decision in Durham, the Ninth Circuit held that the state court's use of a stun belt was not supported by any findings of the trial court. The case was remanded to the lower court for a hearing on the question of prejudice.

***Rhoden v. Rowland***, 172 F.3d 633 (9th Cir. 1998) Shackling the defendant during trial in a manner that was visible to the jury is inherently prejudicial. Illinois v. Allen, 397 U.S. 337 (1970); Estelle v. Williams, 425 U.S. 501 (1976); Holbrook v. Flynn, 475 U.S. 560 (1986). When the shackling was unnecessary, it is reversible error.

## *DEFENDANT'S PRESENCE AT TRIAL*

***Crosby v. United States***, 506 U.S. 255 (1993) Pursuant to Rule 43, Fed. R. Crim. P., a defendant who does not appear on the first day of trial may not be tried in absentia. A defendant who leaves the jurisdiction during the course of trial may be tried in absentia.

***United States v. Martinez,*** 850 F.3d 1097 (9th Cir. 2017) The defendant was charged with unlawful re-entry. One issue that had to be decided unanimously by the jury was the date of his prior removal. A special verdict form required the jury to answer whether the defendant's prior removal occurred after a specific date. The jury sent in a note during deliberations asking what the significance of his question was. The judge, without telling counsel, answered, "It is a matter for the court to consider, not the jury. The jury has to consider whether the defendant was deported or removed after that date." Shortly thereafter the jury returned a verdict. The Ninth Circuit reversed. Answering the question without advising the attorneys or the defendant was erroneous. Proceeding in the absence of the defendant violated Rule 43(a). Trial counsel would have insisted that the judge advise the jury that the response to the question required the jury to believe beyond a reasonable doubt that the removal occurred after a specific date.

***Jones v. Murphy***, 694 F.3d 225 (2d Cir. 2012) A very lengthy opinion that canvasses the law governing situations in which a defendant's recalcitrant behavior leads to his exclusion from the courtroom. The Second Circuit ultimately concludes that proceeding in the absence of the defendant in this case was acceptable, because the trial court determined that the defendant was determined to interfere with the proceedings if he was permitted to return after initially being removed.

***Ayala v. Wong***, 693 F.3d 945 (9th Cir. 2012) It is not proper to permit the prosecutor to present the race-neutral reasons for the exercise of strikes in an ex parte proceeding. The defense has the right to be present and to argue that the reasons are pretextual. See also 756 F.3d 656 (9th Cir. 2014). The Supreme Court reversed, holding that the petitioner was not entitled to AEDPA relief. Davis v. Ayala, 135 S. Ct. 2187 (2015).

***Grayton v. Ercole***, 691 F.3d 165 (2d Cir. 2012) The defendant has the right to be present at a pretrial evidentiary hearing at which the state seeks to admit certain hearsay on the theory that the defendant forfeited his right to contest the hearsay (and the Confrontation Clause protection) by his wrongdoing.

***United States v. Collins***, 665 F.3d 454 (2d Cir. 2012) During deliberations, the jurors became embroiled in an altercation that clearly exceeded deliberations. A series of notes were sent to the judge. Initially, the judge shared the notes with counsel and responded appropriately. A subsequent note, however, was not shared with counsel but the judge told the parties he was going to have a private conversation with one of the jurors. Defense counsel stated, "I am not consenting to this course of action." The judge then spoke to the juror and admonished the juror to continue deliberating. The Second Circuit reversed the subsequent conviction, holding that this procedure violated the defendant's right to be present at all stages of the proceedings.

***United States v. Williams***, 641 F.3d 758 (6th Cir. 2011) Video conferencing is not permissible for a sentencing proceeding.

***United States v. Ward***, 598 F.3d 1054 (8th Cir. 2010) If the defendant is disruptive and the judge is contemplating removing him from the courtroom, the judge must first question the defendant – not just the defense attorney – about his conduct and warn the defendant personally of the consequences of his actions. Simply relying on defense counsel to advise the court about the defendant's intentions is not sufficient.

***Gray v. Moore***, 520 F.3d 616 (6th Cir. 2008) Before a defendant may be removed from the courtroom because of his misbehavior, the trial court must warn the defendant of the consequences of his actions.

***Illinois v. Allen***, 397 U.S. 337 (1970). Because the state trial court promptly removed the defendant from the courtroom when he yelled at a witness, "You're lying" without warning the defendant of the consequences of his outburst, a writ of habeas corpus was granted.

***United States v. Demott***, 513 F.3d 55 (11th Cir. 2008) When a defendant is re-sentenced pursuant to a remand from the appellate court, he has the right to be present. The trial court's summary imposition of the same sentence without announcing findings in open court and without the defendant present was error. On remand, the case would be assigned to a different judge because of the judge's apparent lack of receptivity to the arguments of counsel (because he had not even given them an opportunity to be heard at the last proceeding).

***United States v. Barnwell***, 477 F.3d 844 (6th Cir. 2007) During deliberations in this trial, an FBI agent in an unrelated case who was monitoring a wiretap determined that one of the deliberating jurors was possibly contacting people about her deliberations. Two prosecutors (not the trial prosecutors in this case), asked to speak to the judge and explained the situation. The trial prosecutors were aware of this ex parte communication. Over the next day or two, five ex parte meetings were held. The defendant and his attorneys had no idea this was occurring. There were also some meetings with the foreman (these were in the presence of the defense attorney, but he did not know exactly what prompted the meetings). Eventually, a mistrial was declared when the jury was unable to reach a verdict. The ex parte communications remained a secret. A new trial was held, and the defendant was found guilty. After that trial, the events that occurred during the first trial were unsealed and furnished to defense counsel. The Sixth Circuit held that the ex parte communications violated the defendant's right to counsel and his right to be present at all stages of the proceedings, as well as his right to be tried with an impartial judge. The court set aside the verdict in the second trial, even though it was not directly affected by the ex parte communication. The decision ends with a series of observations about the impropriety of conducting ex parte communications and the necessity of judicial impartiality.

***United States v. Sepulveda-Contreras***, 466 F.3d 166 (1st Cir. 2006) After pronouncing the sentence in court, the judge prepared a written judgment that added conditions of supervised release. This violated the defendant's right to be present when sentence was imposed.

***United States v. Napier***, 463 F.3d 1040 (9th Cir. 2006) After imposing sentence orally in court, the judge entered a written order that set forth certain non-standard conditions of supervised release that exceeded what was said in court. This denied the defendant his Sixth Amendment (and Rule 43(a)(3)) right to be present when sentence was imposed.

***Bradley v. Henry***, 428 F.3d 811 (9th Cir. 2005) Retained counsel asked to withdraw, claiming significant conflicts of interest, including the defendant's failure to pay the fee. A hearing was held in chambers with the prosecutor, the defense attorney and lawyers who were destined to take over the case. The defendant, however, was not present. The Ninth Circuit held that this procedure violated he right to be present at critical stages of the proceedings. See generally Kentucky v. Stincer, 482 U.S. 730 (1987).

***Bradley v. Henry***, 428 F.3d 811 (9th Cir. 2005) The exclusion of the defendant from a hearing in chambers that involved the replacement of retained counsel and a discussion about threats made to the prosecutor by the defendant's father violated the defendant's right to be present at all critical stages of the proceedings.

***Moore v. Knight***, 368 F.3d 936 (7th Cir. 2004) During the course of their deliberations, the jury sent out a note asking specific factual questions about the defendant's alibi. The trial judge responded, in writing, without consulting with the defendant or his counsel. The record is not entirely clear about what the judge's responses were, but essentially, the judge instructed the jury that he would not answer their questions and that no further questions should be asked. The Seventh Circuit held that this improper ex parte communication with the jury was improper and granted a writ of habeas corpus.

***United States v. Mejia***, 356 F.3d 470 (2d Cir. 2004) On the third day of deliberations, the jury sent a note to the judge indicating that they were divided 11-1 and that this had been the division for over two days. Though the parties had previously discussed an Allen charge and previous notes and responses were handled in the presence of the defendant and his counsel, this time, the judge simply sent a note back to the jury instructing it not to reveal its division to the court, hoping that the same note would be returned without a notation of the division. Shortly thereafter, the jury reached a verdict. The defendant unsuccessfully challenged the verdict on the basis of the court's ex parte response to the jury's note. The Second Circuit reversed the conviction, holding that responding to the jury without consulting with the attorneys and outside the presence of the defendant violated the Sixth Amendment. See also United States v. Ronder, 639 F.2d 931 (2d Cir. 1981); Krische v. Smith, 662 F.2d 177 (2d Cir. 1981).

***United States v. Peters***, 349 F.3d 842 (5th Cir. 2003) During deliberations, the foreman sent out a note indicating that he was "not going to take insults and I ask to be relieved." The parties agreed that the judge could talk to the juror in chambers alone. During the course of the meeting, however, the conversation between the court and the juror included a revelation about the current status of deliberations (11 – 1), the prospects of a mistrial (including a discussion akin to an Allen charge), and even a short explanation of the law, i.e., a substantive charge on the law.

***United States v. Canady***, 126 F.3d 352 (2d Cir. 1997) A defendant's right to be present at trial includes presence during a bench trial. It also includes a right to be present when the judge announces his decision. In this case, it was improper for the judge to conclude the trial and then mail his decision to counsel at a later date. The court's announcement of the verdict should be performed in open court.

***United States v. Rosales-Rodriguez***, 289 F.3d 1106 (9th Cir. 2002) The court was aware that one of the jurors would have to be excused on the second day of deliberations because of a scheduling conflict. In anticipation of the problem, the judge sent a note to the jury during the first day of deliberations explaining that if no verdict was reached by the end of the day, the deliberations would have to start over the next day with the alternate. Neither counsel, nor the defendant was aware that the court was sending this unsolicited note to the jury, and neither was present when this occurred. This violated the defendant's right to be present under Rule 43, Fed. R. Crim. P. and the Fifth and Sixth Amendments for all critical stages of the proceedings. Harmless error.

***United States v. Torres-Palma***, 290 F.3d 1244 (10th Cir. 2002) The defendant's right to be present in court is not satisfied by his presence via teleconferencing.

***Cohen v. Senkowski***, 290 F.3d 485 (2d Cir. 2002) Though a defendant's presence during the exercise of peremptory strikes is not constitutionally required, his presence at the pre-screening of jurors is constitutionally guaranteed. This applies to pre-screening sessions related to a juror's substantive qualification, not to administrative matters, such as matters related to personal hardship.

***Campbell v. Rice***, 302 F.3d 892 (9th Cir. 2002) Excluding the defendant from a hearing on his counsel's potential conflict (the attorney was being prosecuted by the same DA's office that was prosecuting the defendant) violated his Fourteenth Amendment right to Due Process. Reviewing the case en banc, the Ninth Circuit held that excluding the defendant from the proceeding was harmless error. 408 F.3d 1166.

***United States v. Latham***, 874 F.2d 852 (1st Cir. 1989) The trial continued in the absence of the defendant after he attempted to commit suicide after the first day. This is erroneous. Unlike the case of flight to avoid trial altogether, the defendant's attempt to commit suicide cannot be characterized as an attempt to postpone the proceedings. The mere fact that the defendant's conduct was voluntary did not constitute a ground for proceeding in his absence.

***United States v. Mackey***, 915 F.2d 69 (2d Cir. 1990) The voir dire, jury selection and the first prosecution witnesses testified prior to the defendant's arrival at the courthouse. The defendant's car had broken down, but the trial judge concluded, "The animals do not run the zoo." He also offered to permit the defendant to read the transcript prepared by the court reporter. The conviction was reversed.

***United States v. Reiter***, 897 F.2d 639 (2d Cir. 1990) The defendant entered a guilty plea to the fourth superseding indictment and then fled. He was tried in absentia on the twelfth superseding indictment. The two indictments were insufficiently similar to justify a trial in absentia. Because of the lack of sufficient similarity, the court could not find that the defendant was aware of the nature of the proceedings against him. Absent the defendant's appearance at arraignment, there can be no waiver of the constitutional right to be present, and the corresponding right under Rule 43.

***United States v. Fontanez***, 878 F.2d 33 (2d Cir. 1989) The jury asked that certain testimony be read back to them and the judge delivered an Allen charge all in the absence of the defendant. This violates the defendant's right to be present at all stages of the trial.

***United States v. Rhodes***, 32 F.3d 867 (4th Cir. 1994) During deliberations, the jury asked about the definition of possession with intent, versus simple possession. The trial judge assembled the attorneys in chambers and discussed the proper response. The defendant was not present, and his presence was not waived. This was error, though harmless.

***United States v. Camacho***, 955 F.2d 950 (4th Cir. 1992) The trial judge commenced the defendant's trial in the defendant's absence. The defendant was delayed by bad weather. He arrived several hours after the beginning of trial – after jury selection and the first witness had been called. This was reversible error. The defendant's failure to appear, in light of the weather problems, could not be deemed to be a waiver of his right to be present for the trial. Finally, defendant's absence from the entire jury selection process cannot be deemed to be harmless error.

***United States v. Alikpo***, 944 F.2d 206 (5th Cir. 1991) The trial court erred in conducting the bulk of the jury selection in the absence of the defendant. An express waiver by the defendant is necessary to waive the defendant's presence at proceedings where counsel can assist the attorney, as opposed to hearings dealing solely with points of law.

***United States v. Pressley***, 100 F.3d 57 (7th Cir. 1996) Rule 43(a) entitles a defendant to be present at all stages of his trial. This includes times when the judge communicates with the jury. Here, the judge communicated with a juror privately in chambers after the juror told a marshal she wanted to speak to the judge. The juror told the judge that she had previously served on a jury which had "hung" on racial lines, and this appeared to be happening again with this jury. The judge responded along the lines of "that kind of thing happens" and the juror returned. This was an improper communication outside the presence of the defendant, but the error was harmless.

***United States v. Patterson***, 23 F.3d 1239 (7th Cir. 1994) While the jury was deliberating, a question was sent out. The judge instructed his secretary to call the two attorneys and solicit their proposed response. The defendant was not present and none of this was done in open court. This was improper. The defendant has a right to be present; the proceedings should be held in open court; and both attorneys should have been allowed to hear what the other attorney had to say to the judge (through the secretary). Harmless error.

***United States v. Watkins***, 983 F.2d 1413 (7th Cir. 1993) The defendant resisted efforts while in the jail to be brought to trial on the first day. He was forcibly brought to court by the marshals. The defendant remained "limp" and had to be brought to court in a wheelchair. Without inquiring directly of the defendant whether he wished to waive his right to be present, the district court ordered that the defendant be removed. The court of appeals concluded that there was inadequate evidence in the record to support the lower court's decision that the defendant waived his presence. The defendant was only present in the court for three minutes prior to his removal and the evidence of his conduct at the jail that morning was not adequately developed. Nor was the public interest served by a trial in absentia – a prerequisite even if the defendant did waive his presence.

***Sturgis v. Goldsmith***, 796 F.2d 1103 (9th Cir. 1986) The trial court conducted a competency hearing without the defendant being present. This is reversible error.

***Larson v. Tansy***, 911 F.2d 392 (10th Cir. 1990) The defendant was not present during the trial court's instruction to the jury, the closing arguments, and the rendering of the verdict. This violated his right to be present at all stages of the proceedings. The fact that the defendant's attorney waived the defendant's right to be present and the defendant said nothing when this occurred does not constitute an effective waiver. Mere acquiescence is not sufficient to waive a fundamental right. The defendant must himself waive the right to be present.

***United States v. Songer***, 842 F.2d 240 (10th Cir. 1988) Although the defendant may be convicted of a criminal offense in absentia, a forfeiture proceeding cannot be held in the absence of the defendant. The Federal Rules of Criminal Procedure specifically provide for continuing a trial when a defendant intentionally absents himself, but no similar rule exists for forfeiture proceedings.

***Cumbie v. Singletary***, 991 F.2d 715 (11th Cir. 1993) The trial court permitted the child molestation victim to testify via closed circuit television. The defendant was not in the room where the witness was testifying. This violated the Confrontation Clause of the Sixth Amendment and was grounds for habeas relief.

***United States v. Gordon***, 829 F.2d 119 (D.C. Cir. 1987) Defense counsel waived the defendant's right to be present during the entire jury selection process. Conviction reversed. Only a personal, on the record waiver by the defendant himself, constitutes valid waiver of his presence.

***DEFENDANT'S RIGHT TO SELF-REPRESENTATION SEE ALSO: Attorney – Client (Right to Counsel), for cases in which the Court holds that an inadequate Faretta hearing resulted in the denial of the right to counsel. SEE ALSO: Attorney-Client: Right To Counsel (Waiver of Right – Faretta Issues)***

***Indiana v. Edwards***, 128 S. Ct. 2379 (2008) A defendant who is mentally competent to go to trial is not, ipso facto, entitled to represent himself. A trial court may find that the defendant is competent to go to trial, but not mentally equipped to represent himself.

***Templin v. Muniz***, 894 F.3d 1076 (9th Cir. 2018) The defendant unequivocally expressed a desire to represent himself if the only option was to have a public defender appointed. This unequivocal request was denied when the court appointed a public

defender. This violated the defendant's Faretta right to represent himself. A criminal defendant's unsuccessful attempt to hire private counsel does not make equivocal his request to represent himself if the only alternative to self-representation is representation by a public defender.

***Tatum v. Foster***, 847 F.3d 459 (7th Cir. 2017) The state trial court judge denied the defendant the right to represent himself because of his educational level, though he was found competent to stand trial. The Seventh Circuit granted a writ: even under the deferential AEDPA standard, the state courts' decision was inconsistent with clearly established law. While Indiana v. Edwards authorizes the trial court to consider the defendant's competence in deciding whether to accept a Faretta waiver, this does not authorize the court to consider the defendant's scholastic achievements or trial skills.

***United States v. Sanders***, 843 F.3d 1050 (5th Cir. 2016) The defendant unequivocally invoked his right to represent himself at sentencing and the trial court's failure to allow him to do so required that the case be remanded to the trial court for a new sentencing hearing.

***United States v. Smith***, 830 F.3d 803 (8th Cir. 2016) The trial court denied the defendant's request to represent himself on the basis that he failed to comply with various pretrial procedures, he had a history of obstructionist conduct and had advanced improper arguments. The Eighth Circuit reversed: the defendant might be advancing arguments that would not carry the day, but he has the right to represent himself. His obstructionist conduct was not sufficient to deny him this right.

***United States v. Hung Thien Ly***, 646 F.3d 1307 (11th Cir. 2011) The defendant represented himself at trial. The judge asked him if he wanted to testify. The defendant expressed concern that he would not a lawyer to ask him questions, and he would have to submit to cross-examination without having the opportunity to present his testimony. The judge kept asking him, "Do you want to testify, or not?" without explaining that he would, in fact, have the opportunity to present his own sworn testimony. This was reversible error. Though a judge has no obligation to explain the law to a defendant who is representing himself, the judge is required to correct a misimpression as in this case.

***United States v. Duncan***, 643 F.3d 1242 (9th Cir. 2011) In this federal death penalty trial, the defendant insisted on representing himself. The Ninth Circuit held that even over the defendant's objection, standby counsel has the right to assert that the defendant was not competent to waive his right to counsel, or to waive his right to appeal.

***Moore v. Haviland***, 531 F.3d 393 (6th Cir. 2008) Mid-trial, the defendant asked to be permitted to represent himself, because counsel wasn't asking all the right questions. At a brief sidebar, the state judge said that request was not sufficiently clear and ignored it. The Sixth Circuit granted the writ, holding that the court should have conducted a full Faretta hearing. This was structural error that required granting a writ of habeas corpus.

***United States v. Cano***, 519 F.3d 512 (5th Cir. 2008) A defendant has a constitutional right to represent himself at sentencing, even if he appeared with counsel at trial. Failing to conduct a hearing pursuant to Faretta v.California, 422 U.S. 806 (1975), to determine if the defendant should be permitted to represent himself on appeal was error, requiring a remand for re-sentencing after an adequate Faretta inquiry is conducted.

***Frantz v. Hazey***, 533 F.3d 724 (9th Cir. 2008) The en banc Ninth Circuit discusses the role of stand-by counsel in a case in which a defendant exercises his Faretta right to represent himself. See McKaskle v. Wiggins, 465 U.S. 168 (1984). The court concluded, tentatively, that an in-chambers conference about what to do about a jury note – a conference attended by stand-by counsel, but without the defendant – may have violated his right to represent himself. The decision is tentative because a remand was necessary to develop the record more fully about what actually occurred prior to the in-chambers conference.

***United States v. Tucker***, 451 F.3d 1176 (10th Cir. 2006) The trial court erred in barring the defendant from representing himself during voir dire. The defendant did not request a delay or a continuance when he requested that his attorney be discharged and that he be permitted to proceed pro se. Therefore, the trial court's explanation for why his request to proceed pro se would be denied (i.e., the court held that further delay of trial was not proper) did not support the trial court's decision. The fact that the trial court eventually relented and permitted the defendant to represent himself did cure the error in barring the defendant from representing himself during voir dire.

***United States v. Virgil***, 444 F.3d 447 (5th Cir. 2006) The defendant has a right to counsel at the sentencing phase of his trial. In this case, the defendant fired his trial counsel and opted to proceed pro se, but the trial court conducted an inadequate Faretta inquiry. Faretta v. California, 422 U.S. 806 (1975). A Faretta violation at trial is not subject to harmless error analysis; nor is a Faretta violation at the sentencing phase subject to harmless error review.

***Pazden v. Maurer***, 424 F.3d 303 (3d Cir. 2005) In a complicated white-collar prosecution, counsel requested a continuance in order to prepare. This request was denied, and the defendant then announced that he would represent himself, because the attorney could not be ready. The defendant did, in fact, proceed pro se and the Third Circuit held that this amounted to a violation of his sixth amendment right to counsel. The defendant's waiver of his right to counsel was not the product of a free and meaningful choice.

***United States v. Jones***, 421 F.3d 359 (5th Cir. 2005) The trial court failed to undertake the proper Faretta dialogue with the defendant. Allowing him to proceed pro se was error.

***Hirschfield v. Payne***, 420 F.3d 922 (9th Cir. 2005) The state trial court erred in denying the defendant's request to represent himself.

***Jones v. Jamrog***, 414 F.3d 585 (6th Cir. 2005) The defendant asked to be permitted to represent himself, because certain discovery material was being furnished to his lawyer, but copies were not being furnished to him. The state had a policy that provided that certain discovery would only be provided to the defense attorney with the agreement that the material would remain in the attorney's custody. The trial court concluded that the defendant's request was not "voluntary" because it was predicated on his desire to obtain copies of the discovery, not an honest request to dispense with counsel. The Sixth Circuit concluded that the trial court's decision violated Faretta.

***United States v. Mack***, 362 F.3d 597 (9th Cir. 2004) The defendant was permitted to represent himself, but was obstreperous, disobedient, and otherwise impossible. The district court simply ordered him to keep quiet, barred him from calling witnesses or making a closing argument. His conviction could not be affirmed. Either counsel should have been appointed (and perhaps removing the defendant from the courtroom), or some other remedy should have been fashioned.

***Van Lynn v. Farmon,*** 347 F.3d 735 (9th Cir. 2003) The state trial court's refusal to allow the defendant to represent herself because she lacked the ability to present her defense in "an informed, reasonable or intelligent manner" violated Faretta and required granting a writ of habeas corpus.

***Williams v. Bartlett***, 44 F.3d 95 (2d Cir. 1994) A criminal defendant must make a timely and unequivocal request to proceed pro se in order to ensure the orderly administration of justice and prevent the disruption of both the pretrial proceedings and a criminal trial. Assuming, however, that a defendant's request to proceed pro-se is informed, voluntary and unequivocal, the right of a defendant in a criminal case to act as his own lawyer is unqualified if invoked prior to the start of the trial. The trial court's reasons for denying the request – the defendant's lack of legal training, college education and skills or on-the-job training – furnish no basis to refuse a knowing, voluntary and unequivocal waiver of one's right to counsel. The defendant's conviction was set aside because of the denial of his constitutional right to self-representation.

***Myers v. Johnson***, 76 F.3d 1330 (5th Cir. 1996) A defendant has a constitutional right to represent himself on appeal, at least to the extent of choosing what issues to raise and the preparation of the brief. A defendant does not have a constitutional right to argue his appeal in court, however.

***Moore v. Calderon***, 108 F.3d 261 (9th Cir. 1997) A defendant's request two weeks before trial for the right to represent himself was not untimely and the denial of that request provided grounds for granting habeas relief.

***Peters v. Gunn***, 33 F.3d 1190 (9th Cir. 1994) The trial court denied the defendant the right to represent himself. A defendant has a Sixth Amendment right to represent himself. Faretta v. California, 422 U.S. 806 (1975). In order to invoke the right, the request must be knowing and intelligent, unequivocal, timely, and not for purposes of delay. The trial court's reason for denying the defendant's request in this case was a finding that, "It does not appear to me as if you have the capacity to represent yourself . . ." It was not clear what the judge meant by this. The defendant was apparently able to read, and a defendant's lack of legal qualifications cannot be a bar to a request to represent himself.

***United States v. Baker***, 84 F.3d 1263 (10th Cir. 1996) The trial court denied the defendant his right to represent himself. In order for the defendant to invoke his right, he must clearly and unequivocally assert his intention to represent himself. Second, this assertion must be timely. Finally, there must be a showing that he knowingly and intelligently relinquishes the benefits of representation by counsel. The key question is whether the defendant is competent to waive his or her right to counsel, not whether the defendant possesses legal knowledge or is otherwise competent to represent him or herself. In this case, the defendant satisfied all three tests and the trial court's reason for denying his request was a fear that the defendant did not have enough legal knowledge. This was an improper basis. The court noted that there is no harmless error analysis that can be undertaken in this context. Either the defendant was denied his right, or he was not.

***United States v. McDermott***, 64 F.3d 1448 (10th Cir. 1995) When a defendant requests the right to represent himself and standby counsel is appointed to assist him, it is error to exclude the defendant from bench conferences where substantive issues are addressed.

***United States v. McKinley***, 58 F.3d 1475 (10th Cir. 1995) With unmistakable clarity, the defendant requested an opportunity to represent himself. In assessing the defendant's competence to represent himself, the court should only be concerned with the defendant's competence to waive his right to counsel, not his competence to represent himself.

***Godinez v. Moran***, 509 U.S. 389 (1993). That is, the defendant's legal prowess is not a factor in gauging his right to self-representation.

## *DEFENDANT'S RIGHT TO TESTIFY*

***Casiano-Jimenez v. United States***, 817 F.3d 816 (1st Cir. 2016) Trial counsel failed to advise his client of his right to testify, and that the decision was his to make. Instead, a group of lawyers assembled a group of the defendants and said that the strategy would be for no defendant to testify. This amounted to ineffective assistance of counsel.

***United States v. Gillenwater***, 717 F.3d 1070 (9th Cir. 2013) The defendant was represented by counsel at a competency hearing. The attorney refused to call him to the stand and the defendant complained – disruptively – and was removed from the courtroom. The Ninth Circuit holds that a defendant has a constitutional right to testify at his competency hearing, even over the advice of counsel. (The dialogue at the hearing was essentially as follows: "Counsel: I have advised him not to testify." Defendant: "That's because you're a criminal." Court: "Mr. Gillenwater, that's enough." Defendant: "Then get me the fuck out of here.")

***United States v. Hung Thien Ly***, 646 F.3d 1307 (11th Cir. 2011) The defendant represented himself at trial. The judge asked him if he wanted to testify. The defendant expressed concern that he would not a lawyer to ask him questions, and he would have to submit to cross-examination without having the opportunity to present his testimony. The judge kept asking him, "Do you want to testify, or not?" without explaining that he would, in fact, have the opportunity to present his own sworn testimony. This was reversible error. Though a judge has no obligation to explain the law to a defendant who is representing himself, the judge is required to correct a misimpression as in this case.

***Canaan v. McBride***, 395 F.3d 376 (7th Cir. 2005) Failing to advise a defendant in a death penalty case that he may testify during the penalty phase – even if he did not testify in the guilt-innocence phase, is ineffective assistance of counsel.

***United States v. Mullins***, 315 F.3d 449 (5th Cir. 2002) Defense counsel prevented the defendant from testifying in his firearms trial. Council's decision was based on the desire to keep out impeaching information, such as the defendant's prior drug dealing and bad check charges. The Fifth Circuit concludes that barring the defendant from testifying is deficient performance under Strickland v. Washington, though there was no prejudice in this case. Counsel is obligated to advise the defendant of the strategy decisions being made, but with regard to whether the defendant should testify, the defendant makes the ultimate decision, and that decision may not be vetoed by counsel.

***United States v. Midgett,*** 342 F.3d 321 (4th Cir. 2003) The defendant told his attorney that he was asleep in the backseat of the car when two other people committed the crime. There was no other evidence to support this version of events. The attorney asked to withdraw from the case, claiming an ethical issue and when the court denied the motion to withdraw, refused to call the defendant to the stand. The judge gave the defendant the choice to either proceed pro se or acquiesce to the attorney's decision that the defendant would not testify. This was improper. There was insufficient evidence to establish the defendant's intent to commit perjury.

***United States v. Vargas***, 920 F.2d 167 (2d Cir. 1990) Though deciding the case on other grounds, the appellate court addressed the question of how a defendant should raise a claim that his attorney refused to call him to testify at trial. Without deciding the question, the court concludes that the defendant's failure to complain at trial does not amount to a waiver of this claim that he was denied the constitutional right to testify.

***United States v. Pennycooke***, 65 F.3d 9 (3rd Cir. 1995) It is not appropriate for the trial judge to question the defendant about his decision whether to testify, or not. Instructing the defendant that he has the right to testify could influence the defendant to waive his Fifth Amendment right not to testify. Therefore, only in an unusual case, where there appears to be discord between the defendant and his attorney should the trial court address the issue – but even then, only discreetly.

***Nichols v. Butler***, 953 F.2d 1550 (11th Cir. 1992) The defendant's attorney insisted that the defendant not testify in his own defense. The attorney threatened to withdraw if the client did testify. This violated the defendant's right to testify and required a new trial. The right to testify at trial cannot be forfeited by counsel, but only by a knowing, voluntary, and intelligent waiver by the defendant himself. The right to testify in his own defense is a fundamental right.

***Rock v. Arkansas***, 483 U.S. 44 (1987). After rehearing en banc, the decision was affirmed.

***United States v. Teague***, 953 F.2d 1525 (11th Cir. 1992) A defendant has the fundamental right to testify in his own defense. This may only be waived personally, not solely through counsel. Thus, if the attorney vetoes the defendant's decision to testify, the defendant may challenge his conviction. After rehearing the case en banc, the Eleventh Circuit re-affirmed the principle that the defendant has a fundamental right to testify, and the right may not be unilaterally waived by his attorney. However, the facts in this case did not show that the defendant's will was overborne. Rather, the attorney urged the defendant not to testify and the defendant agreed. Consequently, there was no ineffective assistance of counsel.

## *DEPOSITIONS*

***United States v. Farfan-Carreon***, 935 F.2d 678 (5th Cir. 1991) The defendant was caught smuggling drugs into the country. He claimed that he was set up by a Mexican who asked him to drive the truck across the border. On the morning of trial, the defendant moved to take the deposition of the Mexican, in Mexico. The trial court erred in denying the defendant's motion to take the deposition pursuant to Rule 15(a).

***United States v. Guadian-Salazar***, 824 F.2d 344 (5th Cir. 1987) The government introduced two videotaped depositions of government witnesses in this prosecution for illegal transportation of aliens. The court holds that this violated the defendant's right of confrontation. Immediately following the signing of the depositions by the witnesses, the witnesses were released from Mexico and were present in the country at the time of trial.

***United States v. Wang***, 964 F.2d 811 (8th Cir. 1992) When arrested, the defendant was charged with conspiracy to harbor illegal aliens. Prior to deporting the aliens, their depositions were taken with defendant and her counsel present. The defendant was later indicted on charges of harboring the aliens – but not with conspiracy. Using this deposition at trial was improper and the trial court properly granted a new trial. Taking a deposition while one charge is pending and using it during a trial on other charges violates the defendant's right to confrontation.

***United States v. Miguel***, 111 F.3d 666 (9th Cir. 1997) During a deposition taken pursuant to 18 U.S.C. §3509 (a deposition of an alleged child molestation victim), the arrangement provided for the defendant to speak with his attorney only during breaks. The statute provides that arrangements must be made for "contemporaneous communication" between the accused and his counsel. The procedure in this case violated the terms of the statute. Harmless error.

***Guam v. Ngirangas***, 806 F.2d 895 (9th Cir. 1986) The Ninth Circuit holds that the trial court has discretion under Rule 15(a) to permit the taking of the deposition of a fugitive. The Court rules that although a fugitive may not invoke the protection of the criminal justice system, a defendant should not be deprived of evidence simply by virtue of the fact that a witness is a fugitive.

***United States v. Ramos***, 45 F.3d 1519 (11th Cir. 1995) The trial court erred in denying the defendant's motion to take a deposition in Colombia. The trial court's conclusion that the deposition would be dangerous for the prosecutor to attend was not a sufficient basis to deny the defendant's request. The three factors which the court should consider in determining whether to grant a Rule 15 motion to take a deposition are, (1) whether the witness will be unavailable to testify at trial; (2) whether injustice will result because testimony material to the movant's case will be absent; (3) whether there are countervailing factors which render taking the deposition unjust to the nonmoving party. The witness, who had been deported prior to trial, was clearly unavailable. Though the court could not determine what the materiality of the witness's testimony was, because the government conceded this prong, it was assumed that the witness's testimony was material. None of the countervailing factors cited by the government were sufficient to deny the motion to take the deposition, including the fact that the witness would not face exposure to a perjury prosecution if he lied under oath; the danger to the prosecutor of traveling to Colombia; the time constraints for taking the deposition; and the lack of proof that the testimony would be relevant or admissible.

## *DESTRUCTION OF EVIDENCE*

***United States v. Zaragoza-Moreira***, 780 F.3d 971 (9th Cir. 2015) The defendant was charged with smuggling drugs across the border. She explained to the Border agent who arrested her that she acted under duress and that she was standing online with the person who was coercing her and did everything she could to attract the attention of the guards. The Border agent then allowed the videotape of the people in line to be destroyed. This was more than simply negligence or recklessness. The destruction of the tape occurred after defense counsel wrote to the prosecutor to request that the tape be preserved. The acted in bad faith and violated the defendant rights to due process.

***United States v. Plavcak***, 411 F.3d 655 (6th Cir. 2005) It is a federal crime to destroy evidence that is subject to seizure. 18 U.S.C. § 2232. In order to prosecute a person for committing the offense, the government must prove that there was either a valid warrant authorizing the seizure of the evidence, or an applicable warrant exception that would have resulted in the seizure of the evidence.

***United States v. Barton***, 995 F.2d 931 (9th Cir. 1993) The government's destruction of evidence prior to an evidentiary hearing on a motion to suppress (alleging a Franks v. Delaware violation) must be analyzed under the principles of Brady and Arizona v. Youngblood to determine if the defendant's right to due process has been violated. Thus, if the evidence was exculpatory – in the sense of supporting the Franks violation – and the government acted in bad faith in destroying the evidence, a due process violation might be found.

***United States v. Cooper***, 983 F.2d 928 (9th Cir. 1993) The DEA busted a home laboratory, believing that methamphetamine was being produced. Immediately after the equipment was seized, the defendant contacted the DEA and explained that it was not Meth, but an AIDS cure which the defendants were manufacturing. The DEA said the equipment was being kept for evidence, but the agents actually knew that the equipment was being destroyed. An expert for the defense testified that if the lab were configured as described by the defense, then methamphetamine could not have been the product. Because of the exculpatory nature of the destroyed evidence, as well as the bad faith conduct of the government, the only appropriate remedy was the dismissal of the indictment.

***United States v. Bohl***, 25 F.3d 904 (10th Cir. 1994) Despite the defendants' repeated efforts to obtain access to critical evidence in this case, the government destroyed the evidence. The prosecution was barred by the due process clause. In California v. Trombetta, 467 U.S. 479 (1984), the Court held that the government violates a defendant's right to due process when it destroys evidence whose exculpatory significance is "apparent before" destruction and the defendant remains unable to obtain comparable evidence by other reasonably available means. In Arizona v. Youngblood, 488 U.S. 51 (1988), the Court extended Trombetta to provide that, if the exculpatory value of the evidence is indeterminate and all that can be confirmed is that the evidence was "potentially useful" for the defense, then a defendant must show that the government acted in bad faith in destroying the evidence. This case fits the Youngblood mold, because the evidence was not obviously exculpatory; However, the defense has shown that the government acted in bad faith in destroying the evidence. The defendants were charged with making defective radio towers in conjunction with an FAA contract. The FAA destroyed all the towers prior to trial, despite numerous requests by the defendants and their attorneys to examine the material to perform independent tests.

***United States v. Belcher***, 762 F. Supp. 666 (W.D. Va. 1991) The state officials' destruction of the marijuana in this case barred a federal prosecution of the defendants for possessing the marijuana. This case is not controlled by Arizona v. Youngblood, 488 U.S. 51 (1988), which held that a defendant who complains of the loss of "potentially useful" evidence must demonstrate that the police displayed "bad faith." See also California v. Trombetta, 467 U.S. 479 (1984). Here, the evidence was not just "potentially useful," it was the evidence which the government relied on in its case-in-chief. The evidence was critical to the state's case, not just "potentially useful."

## *DETAINERS*

***United States v. Kelley***, 402 F.3d 39 (1st Cir. 2005) The Interstate on Detainers (IAD), § 2, Art. III(d) requires that a person who is brought to a jurisdiction pursuant to a detainer must have his case resolved prior to being sent back to the jurisdiction from which he was brought. In this case, the government violated the anti-shuttling provision. The proper remedy was a dismissal without prejudice of the federal charge.

## *DISCOVERY*

***United States v. Abdallah,*** 911 F.3d 201 (4th Cir. 2018) The trial court erred in refusing to review agents' notes and communications given the inconsistency in their versions of what occurred when the defendant was interrogated. If a defendant makes a plausible showing that exculpatory evidence exists in the government's file, including agents' rough notes, the court should review the information that is identified by the defendant as potentially including exculpatory information.

***United States v. Sellers***, 906 F.3d 848 (9th Cir. 2018) The Ninth Circuit concludes that the strict standard for authorizing discovery in a selective prosecution claim (i.e., the Armstrong standard), does not apply in a selective enforcement, reverse-sting case. The Ninth Circuit joined the Seventh and Third Circuits in this holding: United States v. Davis, 793 F.3d 712 (7th Cir. 2015); United States v. Washington, 869 F.3d 193 (3rd Cir. 2018).

***United States v. Soto-Zuniga***, 837 F.3d 992 (9th Cir. 2016) The trial court erred in denying the defendant's discovery request that sought information about the immigration checkpoint where the defendant was stopped and arrested. The defendant claimed that the immigration checkpoint was used to engage in drug interdiction, rather than legitimate immigration investigation. United States v. Liew, 856 F.3d 585 (9th Cir. 2017) Though generally, agent's rough notes of interviews are not required to be disclosed to the defense, in this case, there was reason to believe that the 302's did not accurately recite all that was said by the witness, who had died prior to trial. The witness's lawyer revealed that his client, during the interviews, said exculpatory things about the defendants that were not included in the 302's.

***United States v. Mackin***, 793 F.3d 703 (7th Cir. 2015) Prior to trial, the government produced an incomplete chain of custody document. This apparently led the defendant to believe that he could base his defense on the flawed chain of custody. Mid-trial, the government produced the complete document that showed the complete chain of custody. The Seventh Circuit held that the trial court should have granted a mistrial. Whether the chain of custody document was subject to Rule 16 or not, because the government produced the misleading document prior to trial, it had a duty to furnish the correct document prior to the middle of trial.

***United States v. Gray-Burriss***, 791 F.3d 50 (D.C. Cir. 2015) The defendant failed to comply with Rule 16 and at trial produced an exculpatory document that arguably refuted a component of the government's mail fraud case. The trial court prohibited the defense from introducing the document because of the discovery violation. The D.C. Circuit, held that this sanction was inappropriate, given the absence of a finding of bad faith or any prejudice to the government. But the error was harmless in the guilt-innocence phase. A remand to determine whether the document would affect the sentencing calculation was required.

***United States v. Sims***, 776 F.3d 583 (8th Cir. 2015) The government's late disclosure of a DNA expert report justified the district court's decision to exclude the evidence. While the district court could have granted a continuance, the court acted within its discretionary authority to exclude the evidence in light of the government's reckless disregard of its discovery obligations.

***United States v. Thomas***, 726 F.3d 1086 (9th Cir. 2013) When the government relies on a drug dog alert in support of a search, the defendant has the right to request discovery about the dog's training. The Ninth Circuit has held that the government is obligated to disclose the handler's log, as well as training records and score sheets, certification records, and training standards and manuals pertaining to the dog. In this case, the records provided to the defense were so heavily redacted that the discovery was insufficient. A remand was required to determine what information was redacted.

***United States v. Hernandez-Meza***, 720 F.3d 760 (9th Cir. 2013) The trial court erred in this case in permitting the government to re-open the evidence and introduce evidence that was not previously produced to the defense as required by Rule 16. The government protested that the defendant's defense was unexpected (it was revealed when the defendant submitted his proposed requests to charge) and that the additional evidence was needed to refute the newly revealed theory of defense. The Ninth Circuit held that allowing the government to re-open the evidence was reversible error. The fact that the new defense was factually not realistic is not relevant, the defense had the right to raise this defense and to point out the gaps in the government's proof. Judge Kozinski wrote, "[A] criminal defendant, unlike the government, needn't have a good faith belief in the factual validity of a defense. So long as the defendant doesn't perjure himself or present evidence, he knows to be false—and Hernandez–Meza presented no evidence at all—he's entitled to exploit weaknesses in the prosecution's case, even though he may believe himself to be guilty. What matters in satisfying the government's burden of proof in a criminal case is not objective reality nor defendant's personal belief, but the evidence the government presents in court. No competent prosecutor would be surprised, based on what he thinks defendant should know, to find defense counsel poking holes in the government's case. The argument is without merit, yet the government made it before the district court, and again on appeal. The government's failure to produce the evidence in its Rule 16 production was not justified. The Rule requires the production of all documents "material to the preparation of the defense." Information is material even if it simply causes a defendant to completely abandon a planned defense and take an entirely different path. If the defendant in this case knew that government had this evidence, the defendant may not have relied on this defense. Moreover, a defendant need not spell out his theory of the case in order to obtain discovery.

Nor is the government entitled to know in advance specifically what the defense is going to be. Discovery must still be provided pursuant to Rule 16(a)(1)(E)(i). The Ninth Circuit held that the trial judge's summary rejection of the defendant's Rule 16 argument, as well as his unsupported decision to allow the government to re-open the evidence, required that the case be remanded and that a new judge preside over the case.

***United States v. Muniz-Jaquez***, 718 F.3d 1180 (9th Cir. 2013) In this illegal reentry case, a relevant fact was whether the border patrol agent had the defendant under surveillance as he was crossing the border. During trial, it was learned that the patrol agent had called for back-up over his service radio and this call was tape recorded. The Ninth Circuit holds that under Rule 16, this tape should have been produced. Even if the information on the tape was not exculpatory, it was certainly relevant to the defense. "A defendant who knows that the government has evidence that renders his planned defense useless can alter his trial strategy. Or he can seek a plea agreement instead of going to trial." The standard is not simply whether the information constitutes Brady or Jencks.

***United States v. Budziak,*** 697 F.3d 1105 (9th Cir. 2012) The trial court erred in refusing to require the government to make available to the defense discovery relating to the government's forensic program that was used to develop the evidence of child pornography possession and distribution that was presented at trial. Discovery relating to the software should have been granted, because it could have resulted in the discovery of material evidence relevant to his defense or to the merits of the government's case. A remand was required to determine if the defendant suffered prejudice.

***United States v. Jarman,*** 687 F.3d 269 (5th Cir. 2012) 18 U.S.C. § 3509(m) provides that in a child pornography case, the pornography shall remain in the custody of the government or the court. In order for the defense to view the evidence pursuant to Rule 16, the law further provides, "property or material shall be deemed to be reasonably available to the defendant if the government provides ample opportunity for inspection, viewing and examination at a government facility by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial." § 3509(m)(2)(B). The district court in this case concluded that the defense expert was not given ample opportunity to forensically examine the material because of time limitations placed on the expert's examination. The Fifth Circuit affirmed.

***United States v. Liburd***, 607 F.3d 339 (3rd Cir. 2010) The defendant was arrested attempting to smuggle cocaine form the Virgin Islands into the United States. When he went through the TSA checkpoint in the Virgin Islands, two blocks were seen in the Xray scanner and when questioned about the items, he said that they were blocks of cheese. Later, another TSA agent found that the blocks were cocaine. At trial, the defendant claimed that someone must have placed the items in his bag. The government never revealed in discovery that the defendant had made the "cheese statement" and prior to trial told the court unequivocally that no statement of the defendant would be introduced at trial. Repeatedly during trial, however (including opening statement), the prosecutor referred to the cheese statement. This was misconduct and that necessitated granting a new trial.

United States v. Stever, 603 F.3d 747 (9th Cir. 2010) The defendant was charged with growing marijuana on his property. He defended on the basis that Mexican drug organizations must have planted the marijuana on his property. He made a Rule 16 request for any information in the possession of the government about the practice of Mexican drug organizations planting marijuana on private property in this district. The government refused to provide the information. The Ninth Circuit held that the lower court's failure to direct the government to produce this information was reversible error. The error was compounded by the lower court's order directing both parties not to mention anything about Mexican drug organizations, because any such evidence was speculative. The Ninth Circuit held that the defendant is entitled to present evidence of an alternative perpetrator and the lower court may not bar the defendant from presenting his defense.

***United States v. Lee***, 573 F.3d 155 (3rd Cir. 2009) The defendant was charged with possession with intent to distribute cocaine base. One central question in the case was how long he resided at a particular hotel (where the drugs were found). He claimed that he was there for just one day. The drugs were found in the hotel room several days later. A hotel registration card was obtained by the government and was copied and furnished to the defendant in discovery. It showed that he resided in the room for one day. The original registration card was introduced in evidence. The jury, during deliberations asked what the meaning of the back of the card meant (it indicated that the defendant extended his stay at the hotel for several days). The back of the card had not been copied or furnished to the defendant prior to trial. The government did not know that the back of the card contained incriminating evidence. The trial court instructed the jury not to consider the information on the back of the card. The Third Circuit reversed the conviction. Because the length of the defendant's stay at the hotel was the critical question in this case and the critical document was not furnished to the defendant prior to trial – even though it was not withheld intentionally – a new trial was required. The fact that the card was accessible to the defense prior to trial did not defeat his claim that there was a Rule 16 violation. Moreover, the defendant's failure to examine the card before it was introduced in evidence did not defeat his claim. Finally, the trial judge's instruction to the jury was insufficient to avoid prejudice.

***United States v. Thompson*** 562 F.3d 387 (D.C. Cir. 2009) The corporation was under investigation by DOJ for price manipulation in the natural gas market and wire fraud. The corporation retained an outside law firm to conduct an internal investigation. Eventually, the results of the investigation were furnished to the government with a cover letter that provided that it was confidential and should not be disclosed to any other party or entity. The corporation was given a deferred prosecution agreement. An individual in the corporation was indicted. He sought the results of the internal investigation under Rule 16 and Brady. The D.C. Circuit held that the trial court was required to review the material and furnish any information to the defendant

that would qualify as discoverable under Rule 16 or Brady. The corporation's desire to maintain the confidentiality of the internal investigation did not trump the defendant's due process and Rule 16 rights.

***United States v. W.R. Grace***, 526 F.3d 499 (9th Cir. 2008) The en banc Ninth Circuit held that the district court is authorized to direct the government to provide a witness list to the defense and to enter an order that the government may not call any witness not on the list. The court also approved the district court's order requiring the government to identify its evidentiary documents prior to trial. Nothing in Rule 16 prohibits this kind of order and Rule 2 implicitly authorizes the exercise of the court's discretion in this regard.

***United States v. Nacchio***, 555 F.3d 1234 (10th Cir. 2009) The defendant was charged with insider trading. He filed notice pursuant to Rule 16 of his intent to introduce expert testimony from an economist who would offer testimony about trading patterns of the defendant and the economic consequences of the defendant's trades. The trial court held that the notice was deficient (because the notice did not specifically detail the expert's "methodology") and even if the notice was sufficient, the subject matter was not the proper subject of expert testimony. The Tenth Circuit initially reversed on both grounds. With regard to the notice issue, the Tenth Circuit held that the defendant is required to provide notice of the subject matter of the expert's testimony, as well as the bases and reasons of that opinion; but the notice is not required to include the "methodology." Nor is the report required, on its face, to set forth a prima facie basis for complying with Daubert. A Daubert inquiry may or may not be necessary, but the defendant is not required to spell out his Daubert presentation in the Rule 16 notice. Thus, the failure to provide a detailed explanation of the expert's methodology was not a basis for excluding the testimony. When the case was reviewed en banc, the Tenth Circuit did not question this aspect of the panel opinion. The en banc Court, however, held that the district court did not, ultimately, reject the defendant's expert on the basis of a notice deficiency, but rather, excluded the expert after concluding that the defendant failed to satisfy the Daubert standard of admissibility. Thus, the conviction was affirmed.

***Ferensic v. Birkett***, 501 F.3d 469 (6th Cir. 2007) Defense counsel was directed to furnish his expert witness reports to the state two months prior to trial but waited until eleven days before trial to submit the report. The state trial court excluded the evidence. The Sixth Circuit affirmed the district court's granting of a writ of habeas corpus. The exclusion of the evidence in this case operated to deny the defendant the Constitutional right to present a defense. See generally Taylor v. Illinois, 484 U.S. 400 (1988). Less severe sanctions were available to remedy the defense attorney's error that would have protected the defendant's rights. This is especially so, because there was an inadequate showing that the state was prejudiced by the tardy disclosure.

***United States v. White***, 492 F.3d 380 (6th Cir. 2007) Testimony offered by employees of Medicare fiscal intermediaries about the mechanics of Medicare reimbursement, as well as defining "related-party transactions" and "reasonable costs" qualified as "expert testimony." The government did not qualify these witnesses as experts and failed to provide the required Rule 16 discovery regarding their testimony. Harmless error.

***United States v. Medearis,*** 380 F.3d 1049 (8th Cir. 2004) The defendant sought to cross-examine the government's key witness with a letter written by the witness. The government objected that the letter had not been provided to the government in reciprocal discovery. The court erred in sustaining the government's objection. Documents used by the defendant need not be provided under the rules of discovery if they are used to impeach a government witness. Reciprocal discovery is only required if the document is to be used by the defendant in his case in chief. Harmless error.

***United States v. Cedano-Arellano***, 332 F.3d 568 (9th Cir. 2003) The government is obligated to provide all records relating to a drug-detecting dog's training and certification. The court held that the records should have been produced under both Rule 16(a)(1)(E) and Rule 16(a)(1)(F).

***United States v. Marshall***, 132 F.3d 63 (D.C. Cir. 1997) Rule 16(a)(1)(C) requires the government to produce evidence it intends to use in its case-in-chief, as well as evidence that is "material to the preparation of the defendant's defense." This latter requirement is not limited to Brady or favorable evidence. In this case, the defendant claimed that he was not the person who returned a page to an informant. He announced that he was calling as a witness the person from whose phone the return call was made. The government had in its possession records from the jail showing that the witness had visited the defendant in jail (thus suggesting that she knew the defendant and that the defendant was at her house when the return phone call was made). The government did not turn these records over to the defense, however, on the theory that they were not helpful to the defense. The D.C. Circuit disagreed. Evidence that is material to the preparation of the defense need not be "helpful" or exculpatory; it can also reveal pitfalls in the defense. The trial court did not err, however, in failing to invoke the exclusionary rule.

***United States v. Alvarez***, 987 F.2d 77 (1st Cir. 1993) The trial court committed reversible error by failing to suppress a statement of the defendant made to a customs officer which had never been produced pursuant to Rule 16(a)(1)(A). The statement amounted to the most incriminating evidence against the defendant and sabotaged the defense and prevented the defense from designing an intelligent defense strategy.

***United States v. Formanczyk***, 949 F.2d 526 (1st Cir. 1991) The government initially disclosed to the defense that the informant had left the country. Later, the government learned that the informant had returned, but no disclosure of this was made to the defendant. The government was under a continuing duty to disclose this information, especially in circumstances where a prior discovery response is rendered misleading or wrong by new developments. Harmless error.

***United States v. Molina-Guevara***, 96 F.3d 698 (3rd Cir. 1996) The agent's rough notes of an interview of the defendant (during which the defendant supposedly made incriminating statements) should have been produced pursuant to Rule 16.

***United States v. Butler***, 988 F.2d 537 (5th Cir. 1993) Upon request of the defendant, the government must permit an independent analysis of physical evidence, including, as in this case, cocaine. Fed.R.Crim.P. 16(a)(1)(C). The trial court erred in denying the request in this case. A remand was necessary to permit the test and determine if an issue of fact is raised by this test.

***United States v. Santiago***, 46 F.3d 885 (9th Cir. 1995) Information is "within the possession, custody or control of the government" under Rule 16(a)(1)(C) not just if it is in the possession of the prosecuting attorney. Here, the prosecutor should have produced Bureau of Prison files relating to the prosecution.

***United States v. Bryan***, 868 F.2d 1032 (9th Cir. 1989) Under Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure, the government must produce documents which are outside the district which the prosecutor has knowledge of and access to. The government's obligation to produce documents which are "in the possession of the government" which are material or intended to be used by the government in its case-in-chief or which were obtained from the defendant, includes documents wherever they are located if they are accessible to and known to the government.

***United States v. Cargo-Vergara***, 57 F.3d 993 (11th Cir. 1995) Prior to trial, the government provided the defendant's in-custody statement to the defense. The agent said that the defendant, when shown the cocaine, claimed to have said "No, I don't want any, but [he] admitted touching it." At trial, the agent said that the defendant said, "I touched it and the kilos were strange." The statement about the cocaine being strange had not been revealed to the defense prior to trial. This was a discovery violation which required reversal of the conviction. The fact that the discovery violation was inadvertent does not render it harmless; the defendant was still prejudiced at trial. The defense attorney, in his opening statement, for example, stressed that the defendant simply denied wanting to have anything to do with the cocaine and that he had no prior experience with cocaine. If, as the agent testified, the defendant said that the cocaine was "strange," this would indicate that he had some prior contact with cocaine.

***In re United States***, 918 F.2d 138 (11th Cir. 1990) Under Rule 16, a corporate defendant is entitled to the same discovery as an individual defendant regarding statements of the "defendant." With regard to a corporation, this requires that the government produce the statements of employees of the corporation to the government which the government intends to introduce at trial, where the declarant (1) was at the time the statement was made so situated as an officer or employee as to have been able to legally bind the defendant in respect to the conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to the conduct in which he was involved.

***United States v. Lloyd***, 992 F.2d 348 (D.C. Cir. 1993) The defendant was charged with aiding and abetting various individuals in filing false tax returns. Pursuant to Rule 16(a)(1)(C), he requested copies of those individuals' prior tax returns. The trial court erroneously denied the request. Under that Rule, the defendant is entitled to review documents in the possession of the government which are material to the defense. Establishing materiality under this Rule is not a heavy burden. In this case, if the prior years' returns contained the same false information, this would buttress the defendant's claim that the falsity originated with the taxpayers, not him. The court also noted 26 U.S.C. §6103(h)(4)(D), which cautions courts against disclosing tax returns. The court concludes that this statement of Congressional policy merely raises the level of materiality, but this higher standard was also met in this case. Also, certain portions of the tax returns could be redacted to protect the privacy of the taxpayer.

***United States v. Noe***, 821 F.2d 604 (11th Cir. 1987) The government had a tape recorded conversation of the defendant and an undercover agent which was used by the government to impeach the defendant's alibi defense. The government had failed to disclose the existence of this tape-recorded conversation in violation of Rule 16. The Eleventh Circuit holds that this is reversible error. Had the existence of this tape recording been known, the defendant may not have taken the stand and avoided the impeachment.

***United States v. Rodriguez***, 799 F.2d 649 (11th Cir. 1986) The government seized a wallet from the defendant at the time of his arrest. The defense asked if there was any discovery which should be provided to him, and the case agent denied the existence of any discovery. The Eleventh Circuit holds that this is reversible error, because of the government's use of documents found in the wallet during cross-examination of the defendant.

***United States v. Shields***, 767 F. Supp. 163 (N.D. Ill. 1991) The government would be required to turn over to the defense draft transcripts of monitored telephone calls. Because of the poor quality of the tapes, the different versions of the transcript might aid in determining what transcript is correct.

***United States v. Modarressi***, 690 F. Supp. 87 (D. Mass. 1988) The defendants were entitled to obtain technical data and related information regarding the exportability of certain items. They were charged with conspiring to violate the Arms Export Control Act.

**United States v. Horn**, 811 F. Supp. 739 (D.N.H. 1992) The defense was provided with a room full of discovery and attempted to make certain copies of key documents with the aid of the private contractor who was maintaining the discovery for the government. Unbeknownst to the defense, whatever they wanted copied, an extra copy was made for the prosecutor. This was improper and intruded on the attorney work product and violated the Sixth Amendment right to counsel. The remedy, among other things, was the disqualification of the prosecutor who was made privy to what the defense considered important, and a mandatory disclosure to the defense of all witness statements and summaries of testimony of prospective witness. The appellate court agreed with this assessment but reversed the lower court's award of attorney's fees and costs. 29 F.3d 754 (1st Cir. 1994).

***United States v. Halpin***, 145 F.R.D. 447 (N.D. Ohio 1993) In order to find a corporation criminally liable for the illegal acts of one of its officers or agents, it is essential that the illegal conduct be related to and done within the course of employment and have some connection with the furtherance of the business of the corporation. It is essential that the officer or agent intended, at least in part, to benefit the corporation through her illegal conduct. Though proof of actual benefit is not essential to establish the corporation's guilt, proof of actual benefit or the lack thereof, has significant evidentiary value and thus may amount to Brady and is discoverable under the rules of discovery. Under Rule 16(a)(1)(C), evidence that is "material to the preparation of the defendant's defense" has been broadly construed to allow discovery of documents for which there is a strong indication that they will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal. The documents relating to the benefit to the corporation are discoverable under this standard. Also, documents which belong to the defendant, but which are under the control of the government are discoverable.

***United States v. McDade***, 827 F. Supp. 1153 (E.D. Pa. 1992) In a case involving voluminous documentary evidence, the government should be required to at least point out the haystacks in which the needles might be found. Thus, the government should identify portions of material which will not be used.

***United States v. Dailey***, 155 F.R.D. 18 (D.R.I. 1994) A local rule obligated both the defense and the government to provide discovery to one another. This contravened Rule 16, which conditions the defendant's obligation to provide discovery upon his request that the government provide discovery. Rule 57, which authorizes the promulgation of local rules, does not permit the creation of rules which are inconsistent with the Federal Rules of Criminal Procedure.

***United States v. Noel***, 708 F. Supp. 177 (W.D. Tenn. 1989) The defendants were entitled to a sample of the narcotics they were prosecuted for intending to distribute. If the government seeks to introduce such evidence in support of the prosecution, the defense has a right to test a sample.

***DOUBLE JEOPARDY (Collateral Estoppel)***

***Dowling v. United States***, 493 U.S. 342 (1990) The collateral estoppel component of the double jeopardy clause does not prohibit the use of a prior acquittal as 404(b) evidence in a subsequent trial.

***Yeager v. United States***, 129 S. Ct. 2360 (2009) The Court re-affirms the principle announced in Ashe v. Swenson: if a jury acquits a defendant on certain charges, additional charges may not then be brought that would require, as proof, an element necessarily decided in favor of the defendant in the first trial. This is true even if the "additional charges" were separate counts in the first trial that resulted in a hung jury. Thus, as in this case, if the defendant is acquitted of certain fraud counts and failed to reach a verdict on insider trading counts, the government would be barred from retrying the defendant on the insider trading counts if the court determines that the basis of the fraud acquittal necessarily included a finding that an element of the insider trading count was not proven. On remand to the Fifth Circuit, the court held that applying the Supreme Court's standard, a subsequent prosecution of Yeager would be barred by the collateral estoppels doctrine. United States v. Yeager, 5th Cir. 2009).

***Bravo-Fernandez v. United States***, --- S. Ct. --- (2016) If a jury returns inconsistent verdicts on two counts (guilty on a substantive charge, but not guilty of the conspiracy charge involving the same offense), and the conviction is later reversed on some procedural ground, the defendant may not raise collateral estoppel on the basis of the acquittal on the conspiracy offense. The inconsistent verdicts precludes a determination that the jury in fact made a finding that the defendant did not commit the offense, or some element of the offense.

***Wilkinson v. Gingrich***, 806 F.3d 511 (9th Cir. 2015) At his speeding trial, the defendant claimed that he was not the driver of the car. That was the only defense, and he was found not guilty. Later he was prosecuted for perjury on the basis that he was, in fact, the driver of the car. The collateral estoppel prong of double jeopardy barred this prosecution.

***United States v. Fernandez***, 722 F.3d 1 (1st Cir. 2013) The jury's acquittal of the defendant on a charge of conspiring to violate § 666, the collateral estoppel doctrine foreclosed prosecuting the defendant for conspire to travel for the purpose of violating §666 and thus a conspiracy to violate the Travel Act could not be pursued.

***United States v. Coughlin***, 610 F.3d 89 (D.C. Cir. 2010) Defendant's acquittal on certain mail fraud counts (and a hung jury on several additional mail fraud counts) precluded, pursuant to the collateral estoppel doctrine, a retrial on the mail fraud counts that were part of the same scheme. The only logical explanation for the acquittals was a finding by the jury that there was no scheme to defraud. Given that finding, a retrial on the remaining mail fraud counts could not proceed.

***United States v. Ohayon***, 483 F.3d 1281 (11th Cir. 2007) The defendant was charged with attempted possession of ecstasy and conspiracy to possess with intent to distribute the ecstasy. The defendant was enlisted by a drug dealer to transport a duffle bag from a courier to a drug dealer. The defendant claimed at trial that though he retrieved the duffle bag, he did not know the contents. The jury acquitted him of attempted possession of the drugs but deadlocked on the conspiracy charge. In a lengthy decision that canvassed the law on the topic of collateral estoppel, the court concluded that a re-prosecution for the conspiracy charge was barred by the double jeopardy clause. The only rational explanation for the jury's decision on the attempt charge was that the government failed to prove that the defendant knew the contents of the duffle bag. Given the unanimous decision on that "fact," a subsequent jury could not find the defendant guilty of the conspiracy count. The court discounted the government's argument that there are no legal elements common to the attempt and conspiracy offenses, holding that there are "facts" that needed to be proved for both offenses and having failed to convince the jury of these facts in one count, the government could not try again.

***United States v. Castillo-Basa***, 483 F.3d 890 (9th Cir. 2007) The Ninth Circuit held that a defendant may not be prosecuted for perjury based on his testimony at a trial which resulted in his acquittal of another offense if, as a practical matter, the jury must have credited his testimony at that trial in order to return the not guilty verdict. . At the defendant illegal re-entry trial, he testified that he did not attend the deportation hearing that resulted in his prior deportation. The jury acquitted him which, given the practicalities of the case, meant that the jury believed what he said. The government later found a tape that established that he was, in fact, at the deportation hearing. The Ninth Circuit held that the defendant could not be prosecuted for perjury, because of collateral estoppel.

***United States v. Ford***, 371 F.3d 550 (9th Cir. 2004) The defendant was previously acquitted of a charge of opening a house for the purpose of distributing cocaine. The government then charged him with managing and controlling a house for the same purpose. Though the double jeopardy clause did not bar the subsequent prosecution because of the distinct elements of these offenses, the collateral estoppel principle applied, because the objective activity proscribed by the two subsections is identical.

***United States v. Gallardo-Mendez***, 150 F.3d 1240 (10th Cir. 1998) In 1991, the defendant was deported as an illegal alien following a guilty plea to a charge of being an alien who illegally reentered the country. In a subsequent criminal case for illegal reentry of a deported alien, the government urged the trial court to instruct the jury that alienage was not a disputed issue – that the defendant was collaterally estopped from contesting that he was, in fact, an alien. The trial court agreed. The Tenth Circuit reversed. The government may not use a judgment in a criminal case following a plea of guilty, to collaterally estop a defendant from relitigating an issue in a subsequent criminal proceeding.

***United States v. Gonzalez-Sanchez***, 825 F.2d 572 (1st Cir. 1987) The defendant was initially acquitted on a conspiracy charge. He was then tried for participation with the same co-conspirators in another conspiracy. It was reversible error for the trial court to permit the introduction of any evidence which related to the first conspiracy.

***United States v. Pelullo***, 14 F.3d 881 (3rd Cir. 1994) Defendant was convicted of wire fraud in his first trial. At his second trial, which included a RICO count, the judge instructed the jury that the wire fraud conviction – one of the predicate offenses – was committed “as a matter of law.” The judge further instructed the jury that they did not have to further consider whether that offense had been committed, because, as a matter of law, it had been committed. This was reversible error. In a criminal trial, the prosecution must prove every element beyond a reasonable doubt, including the predicate offenses. The Third Circuit noted that the goal of collateral estoppel (efficiency and public policy concerns) is not necessarily consistent with the Sixth Amendment’s guarantee of a jury trial in all cases.

***United States v. Morris***, 79 F.3d 409 (5th Cir. 1996) The defendant was acquitted of a substantive money laundering charge, but the jury was deadlocked on a conspiracy charge which included, as one of the overt acts, the same money laundering transaction. On retrial, the doctrine of collateral estoppel did not bar introduction of evidence of this transaction as an overt act in the conspiracy. However, the court concluded that the jury would be confused by this limited admissibility of the evidence and decided that pursuant to Rule 403, Fed. R. Evid., the evidence would be excluded. The Fifth Circuit affirmed, concluding that this was within the district court’s Rule 403 discretion.

***United States v. Frazier***, 880 F.2d 878 (6th Cir. 1989) In a prior trial, the defendant was acquitted on some counts, but the jury was unable to reach a verdict on other counts. In such a situation, the principle of collateral estoppel may preclude retrial of certain charges.

***United States v. Bailin***, 977 F.2d 270 (7th Cir. 1992) In the first trial, certain counts resulted in acquittals; others resulted in a mistrial. On retrial, the government could not prove facts that were necessarily decided in the defendant’s favor in the initial trial. Double jeopardy does not apply, because, according to

***Richardson v. United States***, 468 U.S. 317 (1984), the “new” prosecution of the mis-tried counts does not amount to “new” or “double” jeopardy – the original jeopardy continues past the declaration of a mistrial due to a hung jury. Collateral estoppel, however, does bar an attempt to prove facts which were necessarily decided at the first trial in favor of the defendants for the counts which resulted in acquittals. Among other things, the government cannot rely on counts which resulted in acquittals in attempting, once again, to prove the predicate offenses of a RICO violation.

***United States v. Romeo***, 114 F.3d 141 (9th Cir. 1997) The defendant drove a car across the border with a trunkful of marijuana. He was tried on charges of importation and possession with intent to distribute. The jury acquitted him on the possession charge but deadlocked on the importation charge. The defendant’s defense was that he had no idea what was in the trunk, having been asked to drive the car across the border by an acquaintance. The collateral estoppel component of the double jeopardy clause barred a retrial on the importation charge.

***United States v. Stoddard,*** 111 F.3d 1450 (9th Cir. 1997) The defendant’s previous acquittal of a drug conspiracy charge collaterally estopped a subsequent tax offense prosecution which required, for conviction, convincing the jury that the defendant was involved in a drug transaction that the earlier jury must have believed there was insufficient proof to convict.

***United States v. McLaurin***, 57 F.3d 823 (9th Cir. 1995) The defendant was charged alternatively with bank robbery and receipt of stolen bank funds. The trial court inadvertently failed to instruct the jury that they should first consider the bank robbery charge and only if the defendant was not guilty of that offense should they consider the lesser charge of receiving the stolen money. The jury remained hung on the bank robbery charge but convicted the defendant of the lesser “receipt” offense. This verdict barred a retrial on the bank robbery charge. The jury’s verdict represented a finding that the defendant did not steal the money, but that he received it after it was stolen. This collaterally estopped the government from retrying the defendant on the robbery charge.

***United States v. Weems***, 49 F.3d 528 (9th Cir. 1995) In a civil forfeiture proceeding, the district court held that the defendant was an innocent owner of his property, unaware of the growing marijuana on the property. The defendant was later prosecuted for structuring currency transactions in violation of 31 U.S.C. §5324. At trial, the government sought to introduce evidence of the marijuana on the defendant's property. The Ninth Circuit held that the government was collaterally estopped from introducing this evidence.

***United States v. Barragan-Cepeda***, 29 F.3d 1378 (9th Cir. 1994) In a 1980 trial, the defendant was charged with being an alien who re-entered the country after deportation. He was acquitted. In this case, he was prosecuted for the same offense. He submitted affidavits from some 1980 jurors to the effect that they decided that he was not an alien. These affidavits were admissible, because the affidavits were not offered on the question of the validity of the 1980 verdict. Because the 1980 jury decided that the defendant was not an alien, the government was collaterally estopped from re-litigating this issue in this prosecution.

***United States v. Cejas***, 817 F.2d 595 (9th Cir. 1987) The defendant was prosecuted for conspiracy in one district and convicted. Subsequently, he was prosecuted again and contended that the double jeopardy clause barred the indictment because many of the same overt acts were used in the second indictment as were used in the first indictment. The district court dismissed the indictment. The government did not appeal, instead they simply obtained a new indictment. The Court of Appeals holds that the dismissal of the indictment was a judgment on the merits of the double jeopardy claim and since it was not appealed, it constituted a final order. As such, it had a collateral estoppel effect on any future indictment for the same offense.

***United States v. Rogers***, 960 F.2d 1501 (10th Cir. 1992) A prior civil case can erect a collateral estoppel bar to a subsequent criminal prosecution. Here, a prior SEC case resolved the tax shelter fraud charges in favor of the defendant. This precluded a subsequent prosecution for mail fraud relating to the same scheme.

***Buck v. Maschner***, 878 F.2d 344 (10th Cir. 1989) The defendant was tried and acquitted on two counts of child molestation in 1982. In 1984 he was again tried for child molestation and the state was permitted to introduce evidence of the prior charges. The Tenth Circuit holds that the doctrine of collateral estoppel bars the use of such testimony as a matter of constitutional law. The risk is that the government may view scant evidence of a subsequent violation of the law as an opportunity to once again present evidence of the defendant's prior alleged wrong doing to a second jury, the vice which the Fifth Amendment specifically was designed to prevent. The risk is also great that the defendant will be convicted based not on the evidence for which he is charged but upon the evidence of the prior incident.

***United States v. Shenberg***, 89 F.3d 1461 (11th Cir. 1996) The collateral estoppel bar may apply even in cases in which the double jeopardy clause would not bar a prosecution. In this case, the prior acquittal of the defendants on certain substantive counts barred the government from using these crimes as predicate offenses in a substantive RICO prosecution.

***United States v. Garcia,*** 78 F.3d 1517 (11th Cir. 1996) The defendant's prior acquittal, on a Rule 29 motion of conspiracy to import and possess cocaine, barred a subsequent Travel Act prosecution. The earlier acquittal was predicated on the government's failure to prove that the defendant knew that the boat on which he was traveling was laden with cocaine. Given this finding, a prosecution for a Travel Act offense, based on the same venture, was barred.

***United States v. Harnage,*** 976 F.2d 633 (11th Cir. 1992) Though a criminal defendant may utilize collateral estoppel to bar a prosecution or argument of facts necessarily established in a prior proceeding or to completely bar a subsequent prosecution where one of the facts necessarily determined in the former trial is an essential element of the conviction the government seeks, the government may not collaterally estop a criminal defendant from relitigating an issue decided against him in a different court proceeding. Here, the trial court barred the defendant from asserting the attorney-client privilege concerning some discussions about a planned drug transaction. In a prior case, in another district, this same defense had been rejected by the trial court.

***United States v. Farmer***, 923 F.2d 1557 (11th Cir. 1991) Initially charged with one count of conspiring to violate a person's civil rights (18 U.S.C. §241) and one count of violating a person's rights under color of state law (18 U.S.C. §242), the defendant was tried and acquitted of the former (conspiracy) and a hung jury resulted in a mistrial on the misdemeanor count (§242). The defendant was a private citizen who "worked over" a suspect with two law enforcement officers. Prior to his retrial, he argued that a retrial was barred under the principle of collateral estoppel because, as a private citizen, if he did not conspire with the law enforcement officers, he could not possibly have been acting "under color of state law," an ingredient of the §242 offense. In a lengthy decision which reviews the doctrine of collateral estoppel, the Court rejected the argument. Conspiring with law enforcement officers is not the same as acting under color of state law. That is, a private citizen can act under color of state law without conspiring with law enforcement officers.

***United States v. Corley***, 824 F.2d 931 (11th Cir. 1987) The defendant was acquitted of aiding and abetting the embezzlement of funds from a savings and loan. The jury was deadlocked on a conspiracy count relating to the same scheme. In retrying the defendant on the conspiracy count, the government was precluded from introducing any evidence relating to the aiding and abetting offense.

***DOUBLE JEOPARDY (Double Punishment)***

***United States v. Lara***, 541 U.S. 193 (2004) The defendant, an American Indian, was convicted in tribal court for the offense of violence to a policeman. He was subsequently prosecuted in federal court for assaulting an officer. The Supreme Court held that the Indian tribe was a separate sovereign, and a subsequent prosecution was therefore permissible under the dual sovereign doctrine.

***Hudson v. United States***, 522 U.S. 93 (1997) Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. Thus, if Congress labels a particular punishment "civil," only the clearest proof will suffice to override this legislative intent. Several factors must be considered, including whether the "civil" sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether the behavior to which it applies is already a crime; whether it appears excessive in relation to the alternative purpose assigned, whether it comes into play only on a finding of scienter. In this case, the Court concluded that a prior civil monetary penalty imposed by the Office of the Comptroller of the Currency did not bar a subsequent criminal prosecution for the same conduct that prompted the civil penalty.

***United States v. Ursery***, 518 U.S. 267 (1996) Civil forfeitures do not amount to punishment for purposes of the Double Jeopardy Clause.

***Witte v. United States***, 515 U.S. 389 (1995) Following the defendant's first conviction for distributing marijuana, his sentence was calculated including, as relevant conduct, cocaine which the defendant conspired to distribute during an earlier phase of the conspiracy. Later, he was indicted for the cocaine offense. This latter prosecution was not barred by the double jeopardy clause. The defendant was not previously put in jeopardy for the cocaine transaction which gave rise to the second prosecution. Double jeopardy principles do not bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime. At the second sentencing, the court may consider the prior sentence in imposing a Guideline sentence.

***Department of Rev. of Montana v. Kurth Ranch,*** 511 U.S. 767 (1994) A Montana statute imposes a punitive tax on the possession and storage of dangerous drugs. Because of the high tax rate, coupled with the purpose of the statute which is to deter unlawful conduct, and the fact that the tax only applies to the commission of an unlawful act, the imposition of the fine amounts to double jeopardy and cannot be assessed following a criminal conviction for the possession of the marijuana.

***United States v. Halper***, 490 U.S. 435 (1989) The defendant was prosecuted for filing false claims for Medicare benefits. Subsequently, he was a defendant in a False Claims Act lawsuit. Under the terms of the act, he was subjected to a substantial penalty. The Supreme Court holds that this constitutes double jeopardy, because the civil penalty in the subsequent proceeding bore no rational relation to the goal of compensating the government for its loss, but rather qualifies as "punishment" in the plain meaning of the word. Note, however, that the analysis of Halper was rejected later in Hudson v. United States, 522 U.S. 93 (1997), where the court held that whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction.

***United States v. Bonilla***, 579 F.3d 1233 (11th Cir. 2009) Convictions for identity theft (§ 1028(a)(7)) and aggravated identity theft (§ 1028A(a)(1)) may not be sustained. Punishment for both offenses would violate the Double Jeopardy Clause. Neither of the statutes requires proof of an additional fact that the other does not.

***United States v. Tann***, 577 F.3d 533 (3rd Cir. 2009) Convictions for both possession of a firearm and possession of ammunition for that firearm violate the double jeopardy clause. See Bell v. United States, 349 U.S. 81 (1955) (transporting two women across state lines in violation of Mann Act is only one offense).

***United States v. Severns***, 559 F.3d 274 (5th Cir. 2009) The defendant was convicted of mail fraud (§ 1341), arson to commit mail fraud (§ 844(h)), arson to commit wire fraud (§ 844(h)), and arson (§ 844(i)). The Fifth Circuit held that consecutive sentences for arson and use of fire to commit mail fraud and mail fraud are permissible. However, consecutive sentences for use of fire to commit mail fraud and use of fire to commit wire fraud are not permissible if there is only one fire.

***United States v. Davenport***, 519 F.3d 940 (9th Cir. 2008) A defendant may not be found guilty of both receiving and possessing child pornography. See also United States v. Johnston, 789 F.3d 934 (9th Cir. 2015); United States v. Schales, 546 F.3d 965 (9th Cir. 2008) and United States v. Lynn, 636 F.3d 1127 (9th Cir. 2011).

***Willette v. Fischer***, 508 F.3d 117 (2d Cir. 2007) The defendant failed to notify law enforcement officers of his change of address which he was required to do under the state sex offender registration law. The state prosecuted him in three counts for three separate days of failing to report. The Second Circuit held that this was a continuing offense that could only be subject to one count of the indictment, and not multiple punishments.

***Dye v. Frank***, 355 F.3d 1102 (7th Cir. 2004) Wisconsin's tax on drug possession (an occupational tax) was so punitive that it constituted a criminal punishment, thereby barring a subsequent state prosecution for the same possession. The state actually seized money from his account, but later returned it. No matter: the seizure of the money amounted to the punishment and the attachment of "jeopardy." The fact that the state then returned the money did not undo the punishment that had been imposed. See Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994).

***United States v. Marquardo***, 149 F.3d 36 (1st Cir. 1998) The defendant was the subject of a civil contempt proceeding when he refused to testify before a grand jury, despite having been granted immunity. When the term of the grand jury expired, he was released. Thereafter, he was indicted for criminal contempt. The First Circuit holds that this does not violate double jeopardy. This case contains a lengthy discussion of the differences between civil and criminal contempt, both historically and in modern practice.

***Rogers v. Lynaugh***, 848 F.2d 606 (5th Cir. 1988) The defendant had previously been convicted of three offenses. At the closing argument of the sentencing phase of the current trial, the prosecutor stated that each of the prior robberies was "worth at least 10 years." This argument necessarily urged the sentencing judge to assess a new punishment in addition to the earlier punishments which were already imposed for those three prior offenses. This violates the double jeopardy clause of the Fifth Amendment.

***United States v. Horodner***, 993 F.2d 191 (9th Cir. 1993) The defendant purchased a gun on January 10; he brought it back to the shop and had it repaired, picking it up on January 20. He was charged with two counts of being a felon in possession of a firearm. This violated double jeopardy. His possession was continuous and constituted only one act of possession and he could only be punished once for this single offense.

***United States v. Kaiser***, 893 F.2d 1300 (11th Cir. 1990) The defendant pled guilty to charges of filing a false tax return and tax evasion by virtue of the same tax return. Despite his plea of guilty, the defendant did not waive his double jeopardy claim. The two counts of the indictment violated the double jeopardy clause and this was evident from the face of the indictment. Cumulative punishment for the lesser and greater offense should not have been imposed.

***United States v. Davis***, 799 F.2d 1490 (11th Cir. 1986) The defendant could not be sentenced consecutively for possession of a tractor-trailer as well as the transportation and sale of the stolen goods.

***DOUBLE JEOPARDY (Mistrials; Reversals and Dismissals)***

***Smith v. Massachusetts,*** 543 U.S. 462 (2005) The trial judge granted a directed verdict at the close of the state's case on one count of the indictment. At the close of the defendant's case, however, the defendant's case the judge reconsidered and allowed this count to go to the jury. The Supreme Court held that this violated the double jeopardy clause. Though reconsideration of a directed verdict motion may be a rule that can be enacted by the state, there was no such procedure in Massachusetts and therefore, the court's earlier ruling could not be reconsidered after the defendant began his case.

***Martinez v. Illinois***, 134 S. Ct. 2070 (2014) A jury was empaneled and sworn, but the prosecutor refused to participate in the trial because the state was not ready. The trial court directed a verdict of not guilty. The Illinois appellate court held that in this situation, the defendant was not really ever at risk of a conviction and thus, jeopardy had not attached. The Supreme Court unanimously reversed. Once the jury was empaneled and sworn the defendant was in jeopardy. The Double Jeopardy Clause barred a new trial.

***Blueford v. Arkansas***, 132 S. Ct. 2044 (2012) The defendant was charged with murder. The jury was instructed to first consider the offense of capital murder; if the jury found him not guilty of that offense, the jury should consider first degree murder; if the jury found him not guilty of that offense, the jury should consider manslaughter. During deliberations, the jury announced that it was deadlocked. The jury was brought into the courtroom and announced that it was unanimous for not guilty of capital murder and first-degree murder but deadlocked on the lesser charge of manslaughter. The judge issued an Allen charge and the jury then returned to deliberate. The jury then sent in another note declaring that they were deadlocked, and a mistrial was declared. The U.S. Supreme Court held that the defendant could be retried on all charges: There was no "verdict" on the capital or first-degree murder charge. A jury's "announcement" does not constitute a verdict and there was nothing preventing the jury from reconsidering its initial vote on the greater offenses, during the continued deliberations. Therefore, there was no final verdict and no bar to retrying the capital and first-degree murder charges.

***Sattazahn v. Pennsylvania,*** 537 U.S. 101 (2003) In Pennsylvania, if the sentencing jury is unable to reach a unanimous verdict that the death penalty is appropriate, the judge will then enter a life sentence. In this case, the jury was deadlocked, and a life sentence was ordered by the trial court. The defendant then appealed his conviction and the appellate court reversed. The state again sought the death penalty when the case was re-tried. The Supreme Court held that this was permissible. Had the first jury unanimously returned a life sentence, the defendant could not be sentenced to death on retrial. But because the first jury did not reach a verdict, the Double Jeopardy Clause was not violated. See Richardson v. United States, 468 U.S. 317 (1984).

***Lockhart v. Nelson***, 488 U.S. 33 (1988) The double jeopardy clause allows retrial of a defendant when the appellate court determines that a defendant's conviction was based in part on evidence which was erroneously admitted and that the remaining evidence was insufficient to support a conviction. A retrial is permitted to enable the defendant the opportunity to obtain fair adjudication of his guilt with legal evidence.

***Richardson v. United States***, 468 U.S. 317 (1984) The Double Jeopardy Clause does not apply in the context of a retrial of mis-tried counts, because a retrial is a continuation of the original jeopardy.

***Monge v. California***, 118 S. Ct. 2246 (1998) In California, a person convicted of a crime who has previously been convicted of a prior violent offense receives a considerably harsher sentence. At the sentencing proceeding, the state must prove the prior offense pursuant to the rules of evidence and with proof beyond reasonable doubt. The state offered insufficient evidence and the appellate court reversed, but remanded so the state could try again. This was permissible under the Double Jeopardy Clause (though the rule is otherwise if the state is seeking the death penalty, Bullington v. Missouri, 451 U.S. 430 (1981)). The Double Jeopardy Clause does not apply to non-capital sentencing proceedings, because a sentencing proceeding does not place the defendant "in jeopardy" for an offense.

***Renico v. Lett***, 130 S. Ct. 1855 (2010) Relying on the AEDPA standard, the Supreme Court held that the Michigan Supreme Court did not act unreasonably in concluding that the state trial court acted within its authority in granting a mistrial after four hours of deliberations when the jury indicated that it was deadlocked. The Michigan Court applied the correct standard, and its decision was not an "unreasonable application of clearly established Federal law." There is no minimum time that the jury must be allowed to deliberate, and there is no constitutional requirement that the jury be questioned prior to the declaration of a mistrial.

***United States v. Thompson***, 690 F.3d 977 (8th Cir. 2012) The trial judge granted a judgment of acquittal after hearing argument as to one count for one defendant. The defendant rested without putting on evidence. Another defendant then began putting on

his case. The trial judge then called a recess and changed his mind, allowing the one count to proceed to verdict. The Eighth Circuit, relying on Smith v. Massachusetts and distinguishing United States v. Hill, 643 F.3d 807 (11th Cir. 2011), held that this violated double jeopardy. In Hill, the judge changed his mind shortly after having announced his decision and before any other proceedings occurred.

***United States v. Alvarez-Moreno***, 657 F.3d 896 (9th Cir. 2011) The defendant was charged with transporting an illegal alien for profit. The trial was conducted as a bench trial. After the bench trial was concluded, the judge realized that a proper waiver of a jury trial had not been accomplished. The judge then entered and order granting a new trial pursuant to Rule 33. This was not appropriate, however, because the defendant never filed a motion for a new trial. The judge then entered an Ordered mistrial in the case. Before a retrial was initiated, the defendant filed a motion to dismiss on double jeopardy grounds. The Ninth Circuit holds that a retrial was not permissible, because the defendant never requested a mistrial, and a manifest necessity was not present. Of course, if the defendant appealed the conviction resulting from the bench trial, a retrial would be permitted.

***United States v. Fisher***, 624 F.3d 713 (5th Cir. 2010) The defendant's trial started, but a two-day adjournment was necessitated by a problem with discovery furnished to the defense. During that two-day interim, government witnesses (including the drug laboratory chemist) became unavailable because of other cases at which he was required to testify and a seminar he needed to attend. The court then granted a mistrial over the objection of the defense. There was no manifest necessity for granting the mistrial and the double jeopardy clause barred re-initiating the prosecution.

***United States v. Cornelius,*** 623 F.3d 486 (7th Cir. 2010) After a sidebar conference that limited what a witness could say about one defendant's conduct, the prosecutor asked a question which resulted in the witness saying precisely what he was not supposed to say. The prosecutor claimed that the answer was not responsive to the question that was asked ("Did you have any other suppliers?" to which the witness did not simply answer "yes" but, instead, answered, "Yes, Mike."). The trial court granted a mistrial. The Seventh Circuit held that an evidentiary hearing was necessary to determine if the question by the prosecutor was designed to goad the defendant into requesting a mistrial. Though the prosecutor objected to the mistrial and requested a limiting instruction – and this is probative of the prosecutor's intention – this fact, alone, is not sufficient to conclude that the prosecutor did not intentionally goad the defendant into requesting a mistrial.

***United States v. Lara-Ramirez***, 519 F.3d 76 (1st Cir. 2008) Without the consent of the defendant, the trial court granted a mistrial when a Bible was seen in the jury deliberation room and a juror said the foreman said that the jurors should consider what God says. Declaring a mistrial was not a manifest necessity. Retrying the defendant would violate the double jeopardy clause.

***United States v. Razmilovic***, 507 F.3d 130 (2nd Cir. 2007) Over the objection of defense counsel, the trial court declared a mistrial when the jury announced that they were deadlocked (after three days of deliberations). There was no manifest necessity for doing so. The jury only sent in one note of stating that they were deadlocked, and no Allen charge had been given. The various factors that should have been considered before declaring a mistrial (length and complexity of trial; jury notes; length of deliberations; Allen charge) did not support this step, in light of the parties' request that deliberations continue.

***United States v. Lewis***, 492 F.2d 1219 (11th Cir. 2007) A defendant who failed to raise a double jeopardy claim in the district court is not forever foreclosed from raising a double jeopardy claim in the appellate court. He must establish, however, that it was plain error to allow the second trial to proceed. The court noted that there is a difference between forfeiting a claim (such as in this case, where the defendant simply fails to raise it, and thus must overcome the plain error standard of review) and affirmative waiver of an issue, which forecloses appellate review. See United States v. Olano, 507 U.S. 725 (1993).

***Brazzel v. Washington***, 491 F.3d 976 (9th Cir. 2007) The defendant was charged with attempted murder and, as an alternative, assault. The jury left the attempted murder verdict form blank but convicted the defendant of assault. There was no elaboration on the blank form. Pursuant to Green v. United States, 355 U.S. 184 (1957), this amounted to an acquittal of the greater offense. On appeal, the conviction was reversed. Back in the trial court, the defendant was prosecuted for attempted murder again. Once again, the jury convicted him of the lesser offense. The Ninth Circuit granted the writ. The defendant should not have been forced to go to trial for the attempted murder charge again. Having been acquitted of that charge, the Double Jeopardy Clause barred a retrial, even if the conviction for the lesser offense was reversed. Forcing him back to trial on that count – even though he was once again acquitted and found guilty of assault – prejudiced his defense to the assault charge.

***United States v. Blanton***, 476 F.3d 767 (9th Cir. 2007) After the defendant was found guilty of a firearm offense, he waived his right to a jury as the Armed Career Criminal Act sentencing enhancement phase. The trial court granted his Rule 29 motion with regard to certain offenses. The Ninth Circuit held that the government may not appeal this judgment because of the Double Jeopardy Clause.

***Walck v. Edmondson***, 472 F.3d 1227 (10th Cir. 2007) The defendant sought federal habeas corpus relief (§ 2241) to bar the initiation of a state trial that was about to occur, on the basis that a prior mistrial had not properly been declared and the double jeopardy clause barred the state from proceeding. The Tenth Circuit held that federal habeas corpus relief was available to bar the initiation of trial and that Younger v. Harris abstention did not apply.

***United States v. Black Lance***, 454 F.3d 922 (8th Cir. 2006) Following the cross-examination of the victim in this assault case, the trial judge told the prosecution that his case just went out the window and that he was dismissing the charges. This amounted to an acquittal, even though the prosecutor had not rested. See Fong Foo v. United States, 369 U.S. 141 (1962).

***United States v. Ogles***, 440 F.3d 1095 (9th Cir. 2006) At the conclusion of the government's case, the trial court granted a judgment of acquittal pursuant to Rule 29, on the basis that in the court's view, the statute did not cover the conduct in which the defendant engaged. Whether the trial court's view was correct or not, this amounted to an acquittal based on factual insufficiency of the evidence and a retrial could not be held.

***United States v. Serawop,*** 410 F.3d 656 (10th Cir. 2005) The defendant was charged with murder, but convicted of voluntary manslaughter. The trial court erred, however, in its instruction to the jury on the law of voluntary manslaughter. A retrial was permitted, but only on the voluntary manslaughter offense. The verdict for the lesser included offense operated as an acquittal of the charged offense. See Green v. United States, 355 U.S. 184 (1957).

***Stow v. Murashige,*** 389 F.3d 880 (9th Cir. 2004) Pursuant to 28 U.S.C. § 2241, a defendant facing trial in a state court may file a federal habeas corpus petition seeking to bar the trial on double jeopardy grounds. In this case, the jury returned a verdict finding the defendant guilty of attempted first degree murder, but also noted that the defendant was not guilty of attempted second degree murder. The first-degree murder count was reversed by the state appellate court. Retrial on the attempted second-degree murder count was barred by the double jeopardy clause.

***United States v. Rivera***, 384 F.3d 49 (3rd Cir. 2004) Just prior to the close of the government's case, a key witness was in the middle of his testimony when court adjourned for the weekend. Over the weekend, the witness broke his leg and was hospitalized. Further delays resulted from the witness's inability to travel back to the courthouse. Initially, defense counsel requested a mistrial, but this was denied. A couple days later (still waiting for the witness), defense counsel requested that the case go forward without the witness. The judge then declared a mistrial. There was no manifest necessity for doing so and the Double Jeopardy Clause barred further prosecution.

***United States v. Patterson***, 381 F.3d 859 (9th Cir. 2004) Fallout from the decision in Ellis, which is annotated below: The defendant in this case entered a guilty plea pursuant to Rule 11(b)(1)(B). The amount of marijuana plants was acknowledged by the government and the defense to be in dispute and would require a hearing at sentencing. After the plea was entered, Apprendi was decided and the government acknowledged that the number of plants became an element of the offense. The district court vacated the plea. The Ninth Circuit held that this was impermissible. Once the plea was entered, only the defendant has the power to withdraw the plea; the court may reject the plea agreement, but it cannot vacate the guilty plea, itself. Vacating the plea in this case violated the Double Jeopardy Clause.

***United States v. Toribio-Lugo***, 376 F.3d 33 (1st Cir. 2004) The trial court sua sponte declared a mistrial when one of the jurors failed to appear during the fourth day of trial, and then was informed that the missing juror had also missed part of the prior day's proceedings. The defense attorney did not consent to the granting of the mistrial. There was no manifest necessity for declaring a mistrial because defense counsel may have consented to an eleven-person jury. See Fed. R. Crim. P. Rule 23(b)(2)(A).

***United States v. Bonas***, 344 F.3d 945 (9th Cir. 2003) The district court judge declared a mistrial after learning that certain jurors were not being paid by their employers and were going to suffer financial hardship as a result of their service. There was no manifest necessity for doing so and further prosecution was prohibited.

***United States v. Bordeaux***, 121 F.3d 1187 (8th Cir. 1997) The defendant was charged with attempted aggravated sexual abuse. The jury announced that it could not agree on a verdict on this charge but found the defendant guilty of the lesser offense of abusive sexual contact by force. The conviction was set aside, because the trial court failed to properly instruct the jury on this lesser offense. Can the defendant be tried for the greater offense? Yes. Distinguishing Green v. United States, 355 U.S. 184 (1957) and Price v. Georgia, 398 U.S. 323 (1970), the court concluded that there was no "implicit acquittal" of the greater offense -- the jury explicitly explained that it failed to reach a verdict on the greater offense -- so the closer analogy was to Richardson v. United States, 468 U.S. 317 (1984), which held that a mistrial caused by a hung jury does not terminate the first jeopardy, and therefore there is no "double" jeopardy when trial commences anew.

***United States v. Lynch***, 162 F.3d 732 (2d Cir. 1998) The District Court initially issued a permanent injunction, barring the defendants from obstructing ingress into, or egress from, an abortion clinic. When the defendants allegedly violated the injunction, they were arrested and charged with criminal contempt. Though they acknowledged violating the terms of the injunction, both defendants were acquitted by the District Court judge, who reasoned that the defendants' religious convictions led him to believe that their conduct was not "willful." The government appealed. The Second Circuit held that Double Jeopardy barred the appeal of this acquittal.

***United States v. Ramirez***, 884 F.2d 1524 (1st Cir. 1989) Because a mistrial was granted without manifest necessity, and because the defendants expressed a desire to continue with the trial despite irregularities in the selection of the jury, the double jeopardy clause prevented the retrial.

***United States v. Rivera***, 872 F.2d 507 (1st Cir. 1989) During the deliberations in the defendant's first trial, the jury indicated that it had reached a verdict on two counts but not on the third. The government accepted guilty verdicts on the two counts and dismissed the third count. Subsequently, the Court of Appeals reversed the conviction on the first two counts. Nevertheless, the government cannot retry the defendant on the third count which had previously been dismissed.

***United States v. Huang***, 960 F.2d 1128 (2d Cir. 1992) At the first trial, it was discovered that the interpreter was not properly certified and had at one point been summarizing answers, as opposed to fully interpreting. Two of the four defendants moved for a mistrial, the other two objected to the request for a mistrial. A mistrial was granted. The double jeopardy clause barred a retrial for the two who contested the mistrial. There was no manifest necessity for a mistrial; there was no certainty that the error would

have resulted in a reversal (one of the tests of manifest necessity) and the “summary interpreting” was not shown to have been inaccurate.

***Love v. Morton***, 112 F.3d 131 (3rd Cir. 1997) Shortly after the defendant’s initial trial, the judge declared a mistrial for personal reasons – his mother-in-law died unexpectedly. The defendant did not consent to a mistrial. Actually, he neither objected, nor consented. Commencing a new trial violated the double jeopardy clause. There was no manifest necessity to declare a mistrial, since a continuance could have been considered, or the use of a substitute judge.

***Gilliam v. Foster***, 75 F.3d 881 (4th Cir. 1996) In the last of several trips this case made to the Fourth Circuit, the court again holds that the double jeopardy clause barred the state trial court from trying the defendants following the earlier declaration of a mistrial. The court held that the federal court had the authority to enjoin the state trial where it was determined that the trial would violate the double jeopardy clause of the constitution. Gilliam v. Foster, 61 F.3d 1070 (4th Cir. 1995) The defendants’ first state court trial ended in a mistrial at the request of the state when the defense allowed jurors to see pictures from the crime scene which were not formally introduced in evidence. The photos were cumulative of other photos which were admitted in evidence. When the case commenced a second time, over the double jeopardy objection of the defendants, the defendants filed a habeas petition in federal district court, seeking to enjoin the state trial. The district court denied the petition, concluding that there was a manifest necessity for the mistrial. The Fourth Circuit, however, disagreed and entered an order enjoining the trial, which was then in progress, on the grounds that the defendants should not be required to endure a second trial. Following an evidentiary hearing in the lower court, the full court decided that the double jeopardy clause barred a new trial. 63 F.3d 287 (4th Cir. 1995).

***United States v. Sloan***, 36 F.3d 386 (4th Cir. 1994) During his opening statement, the attorney for the defendant described the defendant’s Horatio Alger life. Throughout the course of the trial, moreover, the trial court stated that it based evidentiary rulings on the defendant’s asserted intention to take the stand. At the close of the government’s case, however, the defendant opted not to testify. The trial court declared a mistrial. There was no manifest necessity to do so, and a retrial was barred by the double jeopardy clause. With regard to the evidentiary rulings, the record demonstrated that the few times the issue of the defendant’s expected testimony was raised, it was when the district court ruled out certain defense-offered testimony, on the basis that such evidence would have to wait until the defendant testified. With regard to the opening statement, the trial court did not entertain options short of declaring a mistrial. Here, unlike in Arizona v. Washington, 434 U.S. 497 (1978), the attorney did not refer to clearly inadmissible evidence. Rather, as in Frazier v. Culp, 394 U.S. 731 (1969), the attorney had a good faith belief in the availability of the evidence which he referred to in the opening statement.

***United States v. Shafer***, 987 F.2d 1054 (4th Cir. 1993) During the course of this arson trial, the government introduced evidence that the defendant was in a precarious financial condition. In response to a defendant’s subpoena, a police officer brought to court a box full of documents which had been misplaced in the property room which demonstrated that defendant’s business was in good financial shape. These documents clearly should have been produced pursuant to Brady. The district court promptly declared a mistrial without asking what the defendant’s desire was. This was error and a retrial was barred. There were alternatives to granting a mistrial and the defendant did not move for, or agree to, a mistrial.

***United States v. Council***, 973 F.2d 251 (4th Cir. 1992) During the jury’s deliberations, the trial court decided that he had improperly restricted the defendant’s offer of proof on the defense of justification and declared a mistrial. The defendant objected. Declaring a mistrial was not a manifest necessity and a retrial was therefore barred by the double jeopardy clause.

***Harpster v. State of Ohio***, 128 F.3d 322 (6th Cir. 1997) The state trial judge declared a mistrial when the defense counsels, cross-examining a state’s witness revealed the possible penalty for the charged offense. There was no manifest necessity for the mistrial and retrying the defendant was barred by the double jeopardy clause.

***Terry v. Potter***, 111 F.3d 454 (6th Cir. 1997) The defendant was initially charged with committing wanton or intentional murder under Kentucky state law. The jury convicted him of wanton murder and left the intentional murder verdict form blank. The state appellate court reversed the conviction, holding that “wanton” murder only applies where the intention to commit murder is found, but the wrong person is killed. This holding by the appellate court barred another prosecution for intentional murder. Even though the jury was silent on its findings regarding the intentional murder theory, the court concluded that this amounted to an “implicit acquittal.” See Green v. United States, 355 U.S. 184 (1957).

***United States v. White***, 914 F.2d 747 (6th Cir. 1990) The defendant’s first trial was aborted by a declaration of mistrial prompted by the prosecutor’s improper questioning of a witness. A co-defendant moved for a mistrial; the defendant said nothing. Because this defendant did not consent to the declaration of the mistrial and there was no manifest necessity for declaring a mistrial in regard to him, the Sixth Circuit concludes that a retrial of this defendant was barred on double jeopardy grounds.

***Taylor v. Dawson***, 888 F.2d 1124 (6th Cir. 1989) The defendant’s initial trial was mis tried, but because there was no “manifest necessity” the double jeopardy clause barred a retrial. The initial mistrial was declared because the defense attorney elicited testimony that the victim of the murder had beaten the defendant as well as others and had used drugs. The trial court had indicated that such evidence would not be admissible in the trial. The Sixth Circuit holds that the defense attorney had not been instructed to avoid those topics and, furthermore, Kentucky law specifically permitted the introduction of such testimony.

***Saylor v. Cornelius***, 845 F.2d 1401 (6th Cir. 1988) The defendant was charged with murder in an indictment which would have supported a conviction on either a conspiracy or accomplice theory. At trial, the prosecutor introduced evidence which would have supported a verdict of guilty only on an accomplice theory. The judge instructed the jury only on a conspiracy theory. The jury returned a verdict of guilty. The Kentucky State Supreme Court reversed the conviction but permitted a re-trial to allow the

State to present its conspiracy theory. The federal court granted habeas relief: Although the State Supreme Court did not hold that the evidence was insufficient to convict the defendant of murder, jeopardy had attached and a re-trial to permit the State to present its conspiracy theory would violate the double jeopardy clause.

***United States v. Oseni***, 996 F.2d 186 (7th Cir. 1993) In some cases, such as this one, it is appropriate to conduct an evidentiary hearing to determine if the prosecutor's conduct in causing a mistrial was intended to do just that – that is, cause a mistrial in order to improve its position in a retrial. If that was the government's intent, of course, a retrial would be barred by the double jeopardy clause.

***Oregon v. Kennedy***, 456 U.S. 667 (1982). Here, an assistant U.S. attorney was called as a witness and her testimony improperly referred to statements of the defendant's attorney during preliminary discussions which indicated that the attorney believed the defendant was lying. Whether the witness/prosecutor did this in order to induce a mistrial should have been the subject of an evidentiary hearing at which the prosecutor could be cross-examined.

***United States v. Givens***, 88 F.3d 608 (8th Cir. 1996) Shortly after the trial began in this multi-defendant case, the attorney for one defendant notified the court that, in light of one witness's testimony, he might have to appear as a witness to discredit that witness. The court suggested that a mistrial would be declared, and that defendant could retain a new lawyer. The remaining defendants objected. Nevertheless, a mistrial was declared. The Double Jeopardy Clause barred a retrial. Judicial economy is not a proper basis for a finding of manifest necessity.

***United States v. Allen***, 984 F.2d 940 (8th Cir. 1993) Three defendants were tried jointly. Mid-trial, it was learned that substantial exculpatory information about two of the defendants had not been produced. Over the objection of the third defendant, a mistrial was granted. The retrial of that defendant was prohibited by the double jeopardy clause. There was no necessity to declare a mistrial as to the defendant who objected and who had not been deprived of discoverable material prior to trial.

***United States v. Cavanaugh***, 948 F.2d 405 (8th Cir. 1991) Defendants were charged with assault and murder. At trial, the government prevailed on the jury to return a verdict of guilty on the murder, without reaching any verdict on the assault charges. When the murder conviction was reversed on sufficiency grounds by the appellate court, a prosecution for assault could not be pursued.

***United States v. Dixon***, 913 F.2d 1305 (8th Cir. 1990) A trial judge declared a mistrial based on the disclosure that jurors saw a TV broadcast which the trial judge determined was prejudicial to both the government and the defense. However, the trial judge did not try to poll the jury or to warn the jury not to pay attention to any news reports. Consequently, there was no manifest necessity for declaring the mistrial and because jeopardy had attached during the first trial, a retrial was barred by the Double Jeopardy Clause.

***United States v. Gaytan***, 115 F.3d 737 (9th Cir. 1997) Angered by the government's Brady violation, the district court dismissed the case midtrial and declared that it was dismissed "with prejudice." The appellate court reversed, holding that the discovery violation did not necessitate a dismissal of the indictment. A retrial was barred, however, because the defendant did not consent, or request the mistrial.

**United States v. Sammaripa**, 55 F.3d 433 (9th Cir. 1995) In a jury trial, jeopardy attaches when the jury is impaneled and sworn. In this case, after the jury was impaneled and sworn, the prosecutor voiced a Batson challenge, and the trial court thereafter granted a mistrial. There was no manifest necessity for doing so because the prosecutor should have made the Batson challenge before the jury was impaneled and sworn. Therefore, the double jeopardy clause barred trying the defendant after this first aborted attempt.

***Weston v. Kernan***, 50 F.3d 633 (9th Cir. 1995) When the state introduced evidence about the defendant's character which the trial court had already held to be inadmissible, the defense attorney requested that the trial court grant a mistrial on its own motion on the grounds of prosecutorial misconduct and declare that a retrial would be barred by the double jeopardy clause. The trial court declared a mistrial "without prejudice" and denied the defendant's double jeopardy motion. There was no manifest necessity for granting the mistrial and retrial was barred by the double jeopardy clause. It was clear that the defendant did not request a mistrial unless it was granted "with prejudice," that is, without allowing the state to prosecute the defendant again. Thus, the defendant did not consent to the granting of the mistrial motion and a retrial was barred. A simple cautionary instruction was sufficient to cure the prosecutor's error.

***United States v. Blount***, 34 F.3d 865 (9th Cir. 1994) The defendant was charged with several counts relating to his efforts to prevent the "harvesting" of trees in a National Forest. At the conclusion of the government's case, the defendant's motion for judgment of acquittal was granted on certain counts. The next day, however, the trial court reinstated those counts as lesser included misdemeanors. This violated the double jeopardy clause: the district court's ruling was clearly a determinative ruling on the merits and that ended the matter with regard to that charge, as well as any lesser included offense.

***United States v. Bates***, 917 F.2d 388 (9th Cir. 1990) Despite the trial court's ruling that a police officer could not give certain testimony without laying a proper foundation, the police officer did so. The trial court declared a mistrial without the defendant's permission. This constituted an abuse of discretion and was not necessitated by any manifest necessity. A retrial was barred on double jeopardy grounds.

***United States v. Baptiste***, 832 F.2d 1173 (9th Cir. 1987) A magistrate decided that the police lacked probable cause to order the defendant out of his car. Subsequently, the prosecution dismissed the indictment. This amounted to an acquittal and barred a subsequent prosecution.

***Venson v. Georgia***, 74 F.3d 1140 (11th Cir. 1996) At the defendant's state trial, his attorney asked a witness an impeaching question which was improper under state law. This witness was testifying about two counts of the three-count indictment. Though a mistrial was properly granted as to the two counts about which the witness testified, there was no manifest necessity to grant a mistrial as to the other count. Retrial on this other count was, therefore, barred.

***United States v. Butler***, 41 F.3d 1435 (11th Cir. 1995) An indictment charged nineteen people with being members of a drug conspiracy. The defendants were severed into two groups. During the second day of the first trial, all but one of the defendants in the first group entered guilty pleas. The government moved for a mistrial in the case and put the remaining defendant into the second group. The defendant objected, noting that any interviews of these new witnesses (i.e., the former co-defendants) could be accomplished during the evening. Over objection, the trial court granted a mistrial. There was no manifest necessity for a mistrial and the double jeopardy clause barred a retrial. Moreover, the government's fear that the defendant would have been prejudiced because the jury would know that all the codefendants had pled guilty could be handled with a cautionary instruction.

***United States v. Quiala***, 19 F.3d 569 (11th Cir. 1994) At the conclusion of the trial of the defendant's co-defendants, the parties agreed that the defendant would be permitted to introduce certain additional evidence before submitting his case to the jury which would have been prejudicial to the co-defendants. During an overnight recess, the defense counsel flew from Key West back to Miami, intending to return on the early morning flight the next day. She was accompanied by court personnel. The morning flight, however, was delayed by mechanical difficulties and the earliest the attorney could return was 11:30 a.m. In the meantime, the trial court granted a mistrial. There was no manifest necessity to do so and the double jeopardy clause barred a retrial.

***United States v. Chica***, 14 F.3d 1527 (11th Cir. 1994) Two defendants moved for a mistrial when a witness testified about inadmissible matters which prejudiced them. The two other defendants insisted on proceeding. The trial court held that the mistrial was granted not only because of the inadmissible evidence, but also because a case agent was engaged in the Waco, Texas standoff. The latter explanation did not represent a manifest necessity, because the agent's unavailability was known prior to the beginning of trial and arrangements were contemplated. With regard to the necessity of mistrial for the other defendants, this represents nothing more than an interest in judicial economy – the trial court's desire not to have to try the case twice if a severance of defendants were granted. However, judicial economy is not a manifest necessity. If the original jury is capable of rendering a fair verdict, then the inconvenience of trying the case twice can never amount to a manifest necessity.

***Freer v. Dugger***, 935 F.2d 213 (11th Cir. 1991) Following his murder conviction, the defendant moved the trial court to enter a judgment of acquittal. The trial judge indicated that he thought the evidence was insufficient to support the conviction, but, at the urging of the state, simply granted a motion for new trial (thus permitting the appellate court to review the evidence and the state to retry the defendant). In light of the trial judge's findings that the evidence was insufficient, a retrial was barred by the double jeopardy clause.

***United States v. Bennett***, 836 F.2d 1314 (11th Cir. 1988) At his first trial, the defendant was found not guilty of importation of drugs, but the jury deadlocked on other substantive and conspiracy offenses. Prior to the second trial, the Eleventh Circuit set forth the rules governing the government's right to present evidence on the offenses which were already adjudicated and on the offenses which were not adjudicated. The Eleventh Circuit canvasses both the rules of collateral estoppel and double jeopardy. Essentially, all the evidence is admissible if it relates to the offenses for which the defendant is now standing trial, but the jury must be cautioned that the evidence should only be considered as relating to the counts which the evidence relates to.

***DOUBLE JEOPARDY (Same Crime; Lesser Included Offenses)***

***United States v. Dixon***, 509 U.S. 688 (1993) A prosecution for a criminal offense is barred by the double jeopardy clause if a prior contempt prosecution punished the same conduct, in the context of a violation of the condition of release. The criminal offense is, in effect, a lesser included offense of the contempt offense. In reaching this decision, a majority of the court voted to overrule Grady v. Corbin. Also, a prior civil contempt "prosecution" instituted against a husband for beating his wife barred a subsequent simple assault prosecution, though it did not bar a subsequent assault with intent to kill prosecution.

***United States v. Felix***, 503 U.S. 378 (1992) Conspiracy and substantive offenses may be prosecuted separately. The double jeopardy clause does not bar the government from prosecuting the defendant for a conspiracy offense after having prosecuted him for substantive offenses which were listed as the overt acts in the conspiracy prosecution.

***United States v. Gonzales***, 841 F.3d 339 (5th Cir. 2016) 18 U.S.C. §924(c) makes it a crime to use and carry a firearm during a drug trafficking offense. 18 U.S.C. § 924(j) makes it a crime to commit murder with a firearm in relation to a drug trafficking offense. A defendant cannot be convicted and sentenced for both offenses. The § 924(c) offense is a lesser included offense of the murder offense.

***United States v. Jones***, 858 F.3d 221 (4th Cir. 2017) In the Eastern District of Virginia, the defendant pled guilty to being in a conspiracy to possess with intent to distribute cocaine during the summer of 2012. Later, he was indicted in the Western District of Virginia where he was charged with conspiring to possession with intent to distribute cocaine from 1998 to 2012 (including the same people identified in the Eastern District conspiracy). The Fourth Circuit held that the latter indictment was barred by the Double Jeopardy Clause.

***United States v. Ehle***, 640 F.3d 689 (6th Cir. 2011) Convictions for both possessing and receiving child pornography violated the double jeopardy clause. The convictions could not stand, even though the defendant entered a guilty plea.

***United States v. Lynn***, 636 F.3d 1127 (9th Cir. 2011) It violates double jeopardy to convict a person of both receiving and possessing child pornography. Even if the offenses were alleged to have occurred on different dates, this does not necessarily alleviate the constitutional problem.

***United States v. Rabhan***, 628 F.3d 200 (5th Cir. 2010) The defendant was convicted of conspiracy to commit bank fraud in Georgia in connection with obtaining a loan from one bank. At the same time that he was engaged in defrauding that bank, he also defrauded another bank in Mississippi for another business loan. The conspiracies involved the same time frame, the same personnel, the same substantive offense. The Fifth Circuit held that the double jeopardy clause barred the second prosecution in Mississippi.

***United States v. Wayerski***, 624 F.3d 1342 (11th Cir. 2010) A defendant may not be convicted of both being a member of a child exploitation enterprise (18 U.S.C. § 2252A(g)) and conspiring to participate in a child exploitation enterprise. Analogizing to CCE and conspiracy convictions, the Eleventh Circuit held that the "acting in concert" language of the substantive offense and the "agreement" language of the conspiracy offense, rendered separate punishments a violation of the Double Jeopardy Clause.

***United States v. Robertson***, 606 F.3d 943 (8th Cir. 2010) Convictions for the offenses of attempted aggravated sexual abuse and attempted abusive sexual contact in Indian country amounted to double jeopardy in this case.

***United States v. Basciano***, 599 F.3d 184 (2d Cir. 2010) The defendant was previously convicted of a RICO offense based on his participation in the activities of the Bonnano Crime Family. He was subsequently prosecuted for a substantive RICO offense in connection with this Crime Family activities. The Second Circuit concluded that the pattern of racketeering activity described the same "pattern" and was therefore subject to the Double Jeopardy Clause.

***United States v. Peel***, 595 F.3d 763 (7th Cir. 2010) The defendant was convicted of bankruptcy fraud and obstruction of justice based on his conduct of blackmailing a creditor into dropping a bankruptcy claim. This violated Double Jeopardy, because the obstruction offense was a lesser included offense of the bankruptcy fraud.

***United States v. Diaz***, 592 F.3d 467 (3rd Cir. 2010) There can only be one § 924(c) conviction for each count of conviction of a drug offense. Thus, if there is only one drug offense set forth in the indictment, there can only be one § 924(c) conviction, even if more than one gun is possessed, and even if a gun is possessed on more than one occasion during the course of a drug conspiracy.

***United States v. Rigas,*** 605 F.3d 194 (3rd Cir. 2010) A conviction under § 371's conspiracy offense clause bars a subsequent prosecution under § 371's defraud clause. The two offenses included in § 371 are two ways of committing the same offense. In this case, the prosecution of Rigas under the conspiracy to commit an offense clause was shown to be sufficiently close to the pending defraud clause prosecution that the burden was on the government to prove that the former did not bar, on double jeopardy grounds, a prosecution under the latter provision.

***United States v. McIntosh***, 580 F.3d 1222 (11th Cir. 2009) The defendant entered a guilty plea to certain charges and the court unconditionally accepted the plea. Prior to sentencing, the government moved to dismiss the indictment because of an error in a date and presented a second indictment which corrected the error. The defendant objected, claiming that jeopardy had attached. The defendant then conditionally entered a plea to the second indictment. The Eleventh Circuit held that jeopardy had attached, and the defendant could not be prosecuted under the second indictment for the same offense.

***United States v. James***, 556 F.3d 1062 (9th Cir. 2009) Convictions for robbery and felony murder violated the double jeopardy clause, because the robbery was the underlying felony. The court also concluded that a § 924(c) conviction that was linked to the robbery offense could not be sustained, because the robbery conviction was barred by the double jeopardy clause.

***United States v. Hope***, 545 F.3d 293 (5th Cir. 2008) The defendant was arrested in possession of a firearm. It was determined that the same firearm had been used by the defendant the previous day to commit a robbery. There was no evidence that he ever relinquished control of the firearm. This evidence could not support two counts of possession of a firearm by a convicted felon.

***United States v. Olmeida***, 461 F.3d 271 (2d Cir. 2006) The defendant was prosecuted in district court in North Carolina for unlawfully possessing ammunition in North Carolina "and elsewhere." At the time the prosecution in North Carolina was brought, the government knew that the defendant also possessed ammunition in New York and had no reason to believe that the defendant possessed ammunition in any location other than North Carolina and New York. The defendant entered a guilty plea to the charge in North Carolina. The Double Jeopardy Clause barred a prosecution for possession of ammunition in New York.

***Gonzalez v. Justices of Municipal Court***, 382 F.3d 1 (1st Cir. 2004) Though rejecting the claim on the merits, the First Circuit holds that a defendant facing a state criminal trial that he claims would violate his rights under the Double Jeopardy Clause may file habeas in federal court (28 U.S.C. § 2241) to prevent the trial from going forward. See also Stow v. Murashige, 389 F.3d 880 (9th Cir. 2004). The Supreme Court granted cert on the merits of the double jeopardy claim and remanded for further consideration in light of Smith v. Massachusetts, 543 U.S. 462 (2005).

***United States v. Maslin,*** 356 F.3d 191 (2d Cir. 2004) The defendant was previously charged and convicted of a marijuana conspiracy which was described by the prosecutor, in his opening statement, as a "far-flung conspiracy." The defendant was later charged with a marijuana and cocaine conspiracy in another case in the same district. There was an overlap of time, co-conspirators, and methods of operation. Double jeopardy barred the subsequent prosecution.

***United States v. Lopez***, 356 F.3d 463 (2d Cir. 2004) The two conspiracies with which the defendant was charged were, in fact, different aspects of one conspiracy.

***Wilson v. Czerniak,*** 355 F.3d 1151 (9th Cir. 2004) Under Oregon law, the crime of intentional murder is a lesser included offense of aggravated felony murder, because intentional murder does not require proof of any element not contained within aggravated felony murder. In this case, the re-prosecution for aggravated felony murder, following jury's acquittal of the defendant for intentional murder, was barred by the double jeopardy clause.

***United States v. Holloway***, 309 F.3d 649 (9th Cir. 2002) The defendant was prosecuted under the Federal Bank Robbery statute, 18 U.S.C. § 2113(a). Because the government failed to prove an essential element of the offense, the conviction was reversed. The government then sought to prosecute the defendant under the Hobbs Act, 18 U.S.C. § 1951. The Ninth Circuit held that the Double Jeopardy Clause barred this prosecution. It is impossible to violate the Federal Bank Robbery Act without also violating the Hobbs Act. ***United States v. Bordeaux***, 121 F.3d 1187 (8th Cir. 1997) The defendant was charged with attempted aggravated sexual abuse. The jury announced that it could not agree on a verdict on this charge but found the defendant guilty of the lesser offense of abusive sexual contact by force. The conviction was set aside, because the trial court failed to properly instruct the jury on this lesser offense. Can the defendant be tried for the greater offense? Yes. Distinguishing Green v. United States, 355 U.S. 184 (1957) and Price v. Georgia, 398 U.S. 323 (1970), the court concluded that there was no "implicit acquittal" of the greater offense -- the jury explicitly explained that it failed to reach a verdict on the greater offense -- so the closer analogy was to Richardson v. United States, 468 U.S. 317 (1984), which held that a mistrial caused by a hung jury does not terminate the first jeopardy, and therefore there is no "double" jeopardy when trial commences anew.

***Lucero v. Kerby***, 133 F.3d 1299 (10th Cir. 1998) Under the Blockburger test, the elements of second degree criminal sexual penetration include the offense of aggravated burglary since the sexual offense (as alleged in this case) could only have been committed in the second degree if it was committed during the course of the aggravated burglary.

***United States v. All Assets of G.P.S. Automotive Corp. (Schaffer),*** 66 F.3d 483 (2d Cir. 1995) The state prosecuted the defendant for dealing in stolen car parts. The state prosecutor then referred the case to the U.S. Attorney's office to proceed on a money laundering forfeiture action. The state prosecutor was deputized as a special assistant U.S. Attorney. The claimant argued that the proceeds from the forfeiture would be given to the state. This was sufficient to require a hearing on whether an exception to the dual sovereignty doctrine applied, as set out in Bartkus v. Illinois, 359 U.S. 121 (1959). This exception applies when one sovereign is acting "as a tool" for another. Before reaching the Bartkus issue, the Second Circuit conducts a lengthy analysis of the double jeopardy jurisprudence in the forfeiture context.

***United States v. Forester***, 836 F.2d 856 (5th Cir. 1988) The defendant was prosecuted for possessing P2P and given a consecutive sentence for attempting to make methamphetamine. The Fifth Circuit reverses holding that these counts represent "successive steps in one criminal undertaking, the manufacture of methamphetamine." Consequently, he can only receive one sentence.

***Rashad v. Burt***, 108 F.3d 677 (6th Cir. 1997) The police executed a search warrant at the defendant's house and found a substantial quantity of cocaine. The car in the driveway was impounded and several days later, it was found to contain another stash of cocaine. The defendant was tried twice, once for the quantity in the house and later for the quantity in the car. This violated the double jeopardy clause.

***United States v. Hebeka***, 89 F.3d 279 (6th Cir. 1996) The government cannot prosecute a defendant for both food stamp fraud, 7 U.S.C. §2024(c), and submitting a false claim, 18 U.S.C. §287. The latter statute does not contain any element that is not also required by the former statute.

***Costo v. United States***, 904 F.2d 344 (6th Cir. 1990) The defendant was prosecuted for distribution of cocaine and attempting to distribute cocaine. The defendant first distributed one kilogram of cocaine to purchasers and immediately attempted to induce them to purchase more when they approved the first kilo sample. This constitutes only one offense, and the defendant could not be convicted of both distributing the first kilo and attempting to distribute the other three kilos.

***United States v. Podell***, 869 F.2d 328 (7th Cir. 1989) The defendant removed and tampered an automobile's VIN and then altered the VIN on the same car. The proper unit of prosecution under 18 U.S.C. §511(a) is an individual automobile. Thus, only one prosecution can be instituted for the alteration or tampering of a single automobile VIN.

***United States v. Dickerson***, 857 F.2d 414 (7th Cir. 1988) The defendant was sentenced to four years under 18 U.S.C. §922(g) and fifteen years on §924(e)(1) in violation of the double jeopardy clause. Because the §924 sentence represented a sentence enhancement and not a sentence on an additional offense, two sentences could not be imposed.

***McIntyre v. Caspari***, 35 F.3d 338 (8th Cir. 1994) Under Missouri law, the crime of tampering with an automobile is a lesser included offense of auto theft. Therefore, having been convicted of tampering with an automobile, the defendant could not later be prosecuted for theft of the same automobile. (This case was decided twice previously, once under prevailing Grady v. Corbin law; once after the decision in Felix, see supra).

***McIntyre v. Trickey***, 975 F.2d 437 (8th Cir. 1991) On remand from the United States Supreme Court, the Eighth Circuit reaffirms its decision granting the writ of habeas corpus. The defendant was initially prosecuted for unauthorized use of a vehicle and subsequently prosecuted for theft of the automobile. Even after Felix, this violated the double jeopardy clause.

***United States v. Corona***, 108 F.3d 565 (9th Cir. 1997) Title 18, U.S.C. §844(i) sets forth the crime of arson. Title 18, U.S.C. §844(h)(i) outlaws the use of fire in committing a felony. Convictions under 18 U.S.C. §844(h)(i) and §844(i) violate the double jeopardy clause where the §844(i) offense involves the same fire that triggers the §844(h)(i) conviction, and the felony set forth in the §844(h)(i) count is arson.

***United States v. Bernhardt***, 831 F.2d 181 (9th Cir. 1987) Successive state and federal prosecutions are generally permissible. However, here, the federal prosecution was paid for and organized by the state prosecutor. The state prosecutor also acted as the prosecutor in the federal forum. The case had earlier been dismissed in the state court because of the statute of limitations defense. The Ninth Circuit holds that the case would be remanded to the trial court to determine whether there was "sufficient federal involvement" in the case to save the prosecution from an otherwise valid double jeopardy claim.

***Mansfield v. Champion***, 992 F.2d 1098 (10th Cir. 1993) The defendant robbed a liquor store, taking cash from the cash register, liquor from the shelf and money from the clerk. He was prosecuted for two counts of robbery, one count dealing with the clerk's money and the other count relating to the store's property. This violated the double jeopardy clause. The defendant was being punished twice for the same act of robbery.

***United States v. Frazier***, 89 F.3d 1501 (11th Cir. 1996) A defendant may not be prosecuted both for 21 U.S.C. §841 and §860. That is, a prosecution for possessing with intent to distribute drugs is a lesser included offense of possession with intent to distribute drugs within 1,000 feet of a school.

***United States v. Reed***, 980 F.2d 1568 (11th Cir. 1993) A defendant who has already been convicted of being a member of a conspiracy to import cocaine cannot later be prosecuted for a CCE violation where the conspiracy was part of the "series" element of the CCE. Though the Supreme Court held in Garrett v. United States, 471 U.S. 773 (1985) that a defendant could be prosecuted for CCE after a substantive drug conviction, that reasoning does not apply with regard to a prior conspiracy conviction.

***Mars v. Mounts***, 895 F.2d 1348 (11th Cir. 1990) The defendant was charged with murder, and in a bill of particulars the State alleged that the crime occurred between 5:00 p.m. on January 29 and 12:59 a.m. on January 30. At trial, however, the evidence showed that the homicide occurred after 12:59 a.m. on January 30. The trial court instructed the jury that the State had to prove the facts specified in the bill of particulars. The jury indicated that it did not believe the crime occurred within that time period and acquitted the defendant. The State sought to retry the defendant alleging a different time. The Eleventh Circuit granted habeas relief. The second indictment charged the defendant with "the same offense" under the Blockburger test.

***United States v. Fiallo-Jacome***, 784 F.2d 1064 (11th Cir. 1986) The defendant was convicted on two counts (among others) of possession of a controlled substance. Both counts involved cocaine and one count involved a lengthy period of time which contained the date alleged in the second count. This constitutes double punishment for the same offense since there was no evidence that there were separate possessions.

***United States v. Rosenberg***, 888 F.2d 1406 (D.C. Cir. 1989) The defendant was convicted in New Jersey of conspiracy to possess unregistered firearms, explosives, and false identification documents. In D.C., he was prosecuted for the substantive offense of aiding and abetting in the bombing of several buildings. Though the defendants did not actually participate in the bombings, the government, proceeding on a Pinkerton theory, charged that they were responsible because of their membership in the conspiracy. The government conceded that the conspiracy to commit the bombings was the same conspiracy for which he had been convicted earlier. Thus, the defendant could not be prosecuted on a vicarious liability theory where he had previously been convicted of being a member of the conspiracy itself. In effect, the conspiracy was a lesser included offense of the substantive bombing offense.

***DRUGS (Analogue Act)***

***McFadden v. United States***, 135 S. Ct. 2298 (2015) In a normal prosecution for possession, possessing with intent to distribute, or distributing a controlled substance, the government can satisfy the element of "knowledge" in one of two ways: (1) the defendant knew that he was possessing/distributing a controlled substance (though not necessarily which one – he or she did know however, that the object possessed was a controlled substance); or (2) the defendant knew that he or she was in possession of a particular substance (e.g., heroin, marijuana, cocaine, methamphetamine) which is, in fact, a controlled substance, even if the defendant did not know that the particular substance that he knew he was possessing was in fact a controlled substance. In other words, the defendant must either know that the substance possessed was some kind of controlled substance (though not necessarily which one) or that the substance was a particular substance, even if he did not know that that substance was a controlled substance. In a case involving an Analogue Drug, the same rule applies: the defendant must either be shown to know that the substance possessed was a particular substance that he knew to be an analogue, or he must be shown to have known that he possessed a particular substance which is, in fact, a qualifying analogue.

***United States v. Stanford***, 823 F.3d 814 (5th Cir. 2016) This case was tried prior to the decision in McFadden v. United States, 135 S. ct. 2298 (2015), but that Supreme Court decision was issued while this appeal was pending. The jury instruction at trial did not comply with McFadden's knowledge requirement. The error was not harmless, even though a special interrogatory correctly included the knowledge requirement for a prosecution under the Analogue Act, because the special interrogatory did not repeat that the element of knowledge had to be found beyond a reasonable doubt.

***United States v. Makkar,*** 810 F.3d 1139 (10th Cir. 2015) The district court erred when it instructed the jury that it could infer the defendant had the requisite mens rea in this Analogue Drug prosecution if the defendant knew that inhaling the "incense" had the

same effect as marijuana. The government did not attempt to argue that the defendant knew the drug was illegal (one method of establishing intent under McFadden), and the instruction failed to include the second element of the mens rea requirement (knowledge of the chemical structure) which is part of the second McFadden method of proving intent. Instead, the instruction simply explained that if the chemical structure was the same and the defendant knew it had the same effect as a listed drug, the jury could infer that the defendant knew the chemical structure was the same. The effect of the lower court's instruction was to eliminate one of the elements of the offense as explained by McFadden: the defendant's knowledge that the drug had the same chemical composition as a listed drug. This was plain error.

***United States v. Turcotte***, 405 F.3d 515 (7th Cir. 2005) In order convict a defendant of possessing or distributing controlled substance analogues (21 U.S.C. § 802(32)(A)), the government must prove that the defendant (1) knew that the substance had a chemical structure substantially similar to a controlled substance; and either (2) that it has similar physiological effects, or (3) that he represented to others (or intended) that it had similar physiological effects.

***DRUGS (Causing Death)***

***Burrage v. United States***, 134 S. Ct. 881 (2014) In order to sentence the defendant pursuant to § 841(b)(1)(C), the government must prove that the defendant would not have died but for the drugs distributed by the defendant. On remand to the Eighth Circuit, the court of appeals held that under this standard, the evidence was insufficient to support the (b)(1)(C) sentence, because the government conceded that there was no evidence that the victim would have lived but for his heroin use. United States v. Burrage, 747 F.3d 995 (10th Cir. 2014). See also Ragland v. United States, 784 F.3d 1213 (8th Cir. 2015).

***United States v. Hatfield***, 591 F.3d 945 (7th Cir. 2010) The Seventh Circuit tackles the question what the government is required to prove in order to establish that a defendant's distribution of drugs "resulted in" death or serious bodily injury. 21 U.S.C. § 841(b)(1)(C). Specifically, the court rejected the trial court's formulation of causation and concluded that a simple instruction as follows is sufficient: "The jury must determine whether the United States has established, beyond a reasonable doubt, that the victims died, or suffered serious bodily injury, as a result of ingesting a controlled substance or controlled substances distributed by the defendant." The trial court erred by adding to this simple instruction, "the distribution of the controlled substance must have been a factor that resulted in death or serious bodily injury" and "must have at least played a part in the death or in the serious bodily injury." These additional explanations were reversible error. The court discusses at length various issues relating to causation.

***DRUGS (Doctors / Pharmacists)***

***United States v. Tobin***, 676 F.3d 1264 (11th Cir. 2012) The court held that "willfulness" is not an element of a § 841 offense (distribution of a controlled substance) and therefore, it is no defense that the defendant did not realize that his conduct was illegal or that he had consulted with a lawyer and the lawyer said the conduct was not illegal (this was an Internet Pharmacy prosecution). However, to be convicted of conspiracy to distribute a controlled substance, the defendant is required to act with knowledge of the illegality of his conduct, because under § 846, willfulness is an element of the offense and therefore, advice of counsel is a defense to a § 846 offense.

***United States v. Lovern***, 590 F.3d 1095 (10th Cir. 2009) Prosecution of pharmacist for his role in dispensing drugs based on on-line prescriptions. The conviction of the lead defendant was upheld, but one employee's conviction was reversed on sufficiency grounds, based on the failure to prove that he knew the prescriptions were issued online, rather than pursuant to the usual course of professional practice.

***United States v. Bek***, 493 F.3d 790 (7th Cir. 2007) With regard to one count of the indictment, the evidence was insufficient to prove that the doctor prescribed medicine outside the scope of his medical practice. His conviction on several other counts was affirmed. The case contains a useful discussion of the elements of this kind of case – doctors acting as "drug dealers."

***United States v. Fuchs***, 467 F.3d 889 (5th Cir. 2006) Internet pharmacist and doctors prosecuted for drug dealing. They were using internet pharmacy to dispense hydrocodone. The pharmacist was convicted and sentenced under CCE to a mandatory minimum twenty-year sentence. A good discussion of various internet pharmacy and CCE issues.

***United States v. Hurwitz***, 459 F.3d 463 (4th Cir. 2006) In a lengthy opinion explaining the law governing the prosecution of doctors for prescribing pain medication, the Fourth Circuit concludes that reversible error occurred when the trial court instructed the jury that good faith is not a defense to a § 841 prosecution of a doctor. The core holding is that an objective standard is appropriate, but this is not necessarily inconsistent with a good faith defense.

***United States v. Feingold***, 454 F.3d 1001 (9th Cir. 2006) Though it is permissible to introduce evidence about the standard of care in prescribing medicine, the jury must be instructed carefully that violating the standard of care is not criminal. The district court must ensure that the benchmark for criminal liability is the higher showing that the practitioner intentionally has distributed controlled substances for no legitimate medical purpose and outside the usual course of professional practice. See United States v. Moore, 423 U.S. 122 (1975); 21 C.F.R. § 1306.04. The court noted, "A practitioner becomes a criminal not when he is a bad or negligent physician, but when he ceases to be a physician at all. The court affirms the defendant's conviction in this case after thoroughly reviewing the law in several Circuits on the issue of prosecuting a doctor for violating the Controlled Substance Act by overprescribing drugs.

***DRUGS (Importation)***

***United States v. Cabaccang***, 332 F.3d 622 (9th Cir. 2003) Transporting drugs on a flight between two places in the United States does not amount to importation, even if the plane travels across international borders during the flight. The defendant in this case carried drugs on a flight from L.A. to Guam.

***United States v. Paul***, 142 F.3d 836 (5th Cir. 1998) The evidence was insufficient to prove that the defendants were involved in a conspiracy to import drugs into the United States. Their efforts to acquire drugs began after a ship carrying the drugs had arrived in port and there was no proof that either defendant was aware of the shipment's existence until after they were called to help retrieve the drugs from the ship.

***DRUGS (Maintaining A House for Purpose of Distributing Drugs)***

***United States v. Mancuso***, 718 F.3d 780 (9th Cir. 2013) In order for a defendant to be found guilty of 21 U.S.C. § 856(a)(1), the manufacture, or distribution or use of drugs must be at least one of the primary or principal uses to which the house is put.

***DRUGS (Possession -- Possession with Intent to Distribute)***

***McFadden v. United States***, 135 S. Ct. 2298 (2015) In a normal prosecution for possession, possessing with intent to distribute, or distributing a controlled substance, the government can satisfy the element of "knowledge" in one of two ways: (1) the defendant knew that he was possessing/distributing a controlled substance (though not necessarily which one – he or she did know however, that the object possessed was a controlled substance); or (2) the defendant knew that he or she was in possession of a particular substance (e.g., heroin, marijuana, cocaine, methamphetamine) which is, in fact, a controlled substance, even if the defendant did not know that the particular substance that he knew he was possessing was in fact a controlled substance. In other words, the defendant must either know that the substance possessed was some kind of controlled substance (though not necessarily which one) or that the substance was a particular substance, even if he did not know that that substance was a controlled substance. In a case involving an Analogue Drug, the same rule applies: the defendant must either be shown to know that the substance possessed was a particular substance that he knew to be an analogue, or he must be shown to have known that he possessed a particular substance which is, in fact, a qualifying analogue.

***United States v. Dorman***, 860 F.3d 675 (D.C. Cir. 2017) Drugs were found in the defendant's mother's house in a common area, but not in plain view. The defendant occupied a bedroom in that house. The D.C. Circuit held that the presence of drugs in a common area, but not in plain view cannot support a constructive possession conviction of one of several occupants of that house.

***United States v. Lemus***, 847 F.3d 1016 (9th Cir. 2016) Though the defendant was charged with possession of 50 grams of methamphetamine, the police never seized any drugs from him, and the prosecution relied on the defendant's statements during an undercover negotiation that he had a pound of meth with him. The evidence was sufficient to support a conviction for possession, but not a conviction for possession of more than 50 grams of methamphetamine, because there was insufficient proof of the purity of the meth that he claimed to have and the agent's testimony at trial about the typical purity of methamphetamine seized in Los Angeles was not sufficient to prove the purity of the meth that the defendant claimed to possess.

***United States v. Simpson***, 845 F.3d 1039 (10th Cir. 2017) In the Tenth Circuit, constructive possession requires not only proof that the defendant knew about the guns (or drugs), but also that the defendant intended to exercise control over the items. The failure to include the requirement of intent amounted to plain error for some of the firearm counts of conviction in this case.

***United States v. Blue***, 808 F.3d 226 (4th Cir. 2015) The evidence was insufficient to convict the defendant of constructive possession of heroin, or of conspiring to possess with intent to distribute at least 100 grams of heroin. The defendant was observed selling heroin to an informant. Later, he was observed going into an apartment. At a later time, the police obtained a search warrant for that apartment, found two people inside, as well as over 100 grams of heroin. Though the defendant had a key to that apartment, the evidence was not sufficient to show that he used the apartment as a stash house or that he had any connection to the 100 grams that were found in that apartment. The court held that this evidence was insufficient to convict him of constructive possession or conspiracy. The government's invitation to remand for entry of a judgment of conspiring to possess less than 100 grams based on the other transation was rejected by the Fourth Circuit.

***United States v. Washington***, 783 F.3d 1198 (10th Cir. 2015) The defendant was the driver of the car that had been borrowed by the passenger. In the passenger's duffel bag was a substantial quantity of marijuana. There was also the smell of marijuana in the car. There were scales in the car, but they were not visible to the defendant. While the smell of marijuana might support the defendant's conviction for consumption (possession) of marijuana, the evidence presented in this case was insufficient to support the defendant's conviction for possession with intent to distribute the marijuana.

***United States v. Rodriguez-Martinez***, 778 F.3d 367 (1st Cir. 2015) The defendant was a passenger in a car. When the car was pulled over, the defendant got out, walked to the corner, and made a phone call. Drugs were found in the possession of the driver. The defendant was visibly nervous. A gun was found in the possession of the defendant. The First Circuit held that this evidence was insufficient to convict the defendant of aiding and abetting the possession with intent to distribute the drugs. His nervousness did not prove that he knew the driver was in possession of drugs and may just as well have reflected his concern about his own possession of the firearm.

***United States v. Clark***, 740 F.3d 808 (2d Cir. 2014) The defendant was arrested, handcuffed, and placed in the back of a patrol car and was driven to the police station, which took about one minute. When he was removed from the car, an officer looked under the back seat (where the bottom and back of the seat meet) and found a quantity of crack cocaine. It was not in a baggie.

There was not a trace of crack cocaine on the defendant's clothes or on his hands. Though an officer testified that the car was checked before the defendant was placed in the car and he was the only "passenger," the Second Circuit held that the likelihood that the defendant, while handcuffed removed a quantity of crack cocaine measuring five inches in length and one inch wide, without leaving any trace of the drug on his hands or in his pockets or on his clothes, was so remote that a verdict of possessing the drug could not be sustained. "However, one prefers to quantify an unacceptable risk of convicting the innocent, it is difficult to imagine a case where the possibility that an innocent person has been convicted of an offense is greater than the one now before us."

***United States v. Pillado***, 656 F.3d 754 (7th Cir. 2011) The defendant was enlisted by undercover agents to help unload a kilogram of marijuana from a truck. The defendant was at first reluctant, but later agreed to help. He was prosecuted for possession with intent to distribute the marijuana. He requested an instruction on simple possession. The Seventh Circuit held that the trial court erred in failing to instruct the jury on simple possession. Though he obviously did not possess the marijuana for personal use, that is not the only type of simple possession that exists. The government failed to prove that the defendant's only possession could have been for the purpose of distributing it. The defendant may have simply abandoned the marijuana, in which case he would not have possessed it with the intent to distribute it.

***United States v. Silwo***, 620 F.3d 630 (6th Cir. 2010) The defendant was instrumental in procuring a van that was later used to transport marijuana and was also observed engaging in activity that appeared to be counter-surveillance. This evidence, alone, did not suffice to support a conviction for conspiracy to possess with intent to distribute marijuana. The defendant was not present when the van was loaded. The defendant was clearly in a scheme, but the evidence did not show that he knew the scheme involved the distribution of marijuana. For the same reason, the defendant could not be convicted of aiding and abetting the possession with intent to distribute the marijuana.

***United States v. Wilson***, 619 F.3d 787 (8th Cir. 2010) Though the defendant was involved in a cocaine and marijuana conspiracy with others, his conviction for possession with intent to distribute cocaine that was found in one of his coconspirators' cars on a particular date was not could not be sustained, because there was no evidence that he knew his co-conspirator had cocaine in the car on that day and there was no evidence that the defendant exercised dominion or control over the drugs in that car.

***United States v. Aponte***, 619 F.3d 799 (8th Cir. 2010) The two defendants were stopped driving an SUV in Nebraska. They had borrowed the car from another person. The police searched the vehicle and noticed that a cooler found in the cargo area had an odd weight. They eventually found cocaine in a hidden compartment in the cooler. The Eighth Circuit held that there was insufficient evidence to support the defendants' conviction. It was not obvious that the cooler had a hidden compartment and, because the vehicle had been borrowed from a friend, there was no basis to assume that the defendants possessed or knew about the cocaine.

***United States v. Perez-Melendez***, 599 F.3d 31 (1st Cir. 2010) The defendant was driving a truck with palletes of paper, some of which contained cocaine. While the evidence supported the conclusion that the defendant was aware that he was aiding and abetting the commission of criminal activity, the evidence did not establish beyond a reasonable doubt that he knew the criminal activity he was aiding was a cocaine transaction. The defendants gave inconsistent answers to agents when questioned about their activities, but this did not establish that they were aware of the specific crime that they were aiding.

***United States v. Dooley***, 580 F.3d 682 (8th Cir. 2009) The police found a gun in the vehicle that the defendant was driving. The defendant denied knowing the gun was in the car. The court, at the request of the government, instructed the jury that "A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a firearm, or over a vehicle in which the firearm is located, is then in constructive possession of the firearm." This was reversible error. Being in possession of the vehicle (actually, or constructively) does not automatically equate to possession of all the contents of the vehicle.

***United States v. Tran***, 568 F.3d 1156 (9th Cir. 2009) The defendant was in a car that exited a warehouse that had been used as a drug distribution site. The defendant was a passenger, and the marijuana was in the trunk. There was insufficient evidence establishing that the defendant possessed the marijuana with intent to distribute it, or that he conspired to do so. The Rule 404(b) evidence may have established that he had knowledge of the marijuana (the limited purpose for which the evidence was admitted), but it did not establish that he constructively or actually possessed the marijuana – or aided and abetted the possession of the marijuana – or that he conspired to do so. See also United States v. Sanchez-Mata, 925 F.2d 1166 (9th Cir. 1991) and United States v. Estrada-Macias, 218 F.3d 1064 (9th Cir. 2000).

***United States v. Garcia***, 497 F.3d 964 (9th Cir. 2007) With regard to certain counts, the evidence was not sufficient to prove that the defendant could be held responsible for conduct of other conspirators under a Pinkerton theory, because he was not shown to have been a member of the conspiracy at that time.

***United States v. Esquivel-Ortega***, 484 F.3d 1221 (9th Cir. 2007) The defendant was a passenger in a van that was found to be smuggling a large quantity of drugs. The evidence was insufficient to convict him of possessing the drugs with intent to distribute, or with conspiracy to possess with intent to distribute. Mere presence in the van is not sufficient to convict the defendant of possession or conspiracy.

***United States v. Penaloza-Duarte***, 473 F.3d 575 (5th Cir. 2006) The defendant was a passenger in a car loaded with methamphetamine. When a trooper in Louisiana stopped the car and discovered the drugs, the defendant claimed to be a

confidential informant for a California detective, which was, in fact, verified by the California police. Though there was sufficient evidence of the defendant's knowing possession of the drugs (he acknowledged knowing the drugs were in the car), the evidence was not sufficient to prove that he associated himself with, and engaged in, some affirmative conduct designed to aid the criminal venture, which is an indispensable component of an aiding and abetting conviction. There was no evidence that he loaded, or assisted in loading the car, or that he did any of the driving, or that he even knew the location to which the load was heading. A conviction must be reversed if the evidence construed in favor of the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged. A subsequent Fifth Circuit decision abrogated the standard of review in this case.

***United States v. Vargas-Ocampo***, 747 F.3d 299 (5th Cir. 2014). United States v. Rojas Alvarez, 451 F.3d 320 (5th Cir. 2006) The evidence was insufficient to prove one defendant's knowing possession of drugs that were found secreted in his trailer. The fact that he had custody and control of a residence are not dispositive of his knowledge of any narcotics located in that residence.

***United States v. Scofield***, 433 F.3d 580 (9th Cir. 2006) The defendant's conviction for possession with intent to distribute was reversed on sufficiency grounds. His presence in the house where the principal distributor operated was not a sufficient basis for finding that he was in constructive possession of the drugs in the house. Mere physical proximity to the drugs was not sufficient to sustain a possession conviction.

***United States v. Mendoza-Larios***, 416 F.3d 872 (8th Cir. 2005) Two defendants, driving a car owned by another person, were found guilty of possession cocaine that was hidden in a welded compartment under the air bag compartment. The Eighth Circuit holds that the evidence was insufficient to convict either defendant. There was no proof that either defendant had knowledge of the drugs that were concealed in the car. See also United States v. Aponte, 619 F.3d 799 (8th Cir. 2010), annotated above.

***United States v. Hussein***, 351 F.3d 9 (1st Cir. 2003) Claiming that it is an issue of first impression, the First Circuit holds that it is no defense to a § 841 charge that the defendant did not know the type, or quantity of drugs that he possessed. In this case, the defendant acknowledged that he possessed a controlled substance knowingly but claimed he did not know what type of drug, or the quantity. The First Circuit held that even post-Apprendi, this is not a defense.

***United States v. King***, 345 F.3d 149 (2d Cir. 2003) Drug dealers convicted under §841(a) need not know the type and quantity of drugs in their possession in order to be subject to sentencing enhancements contained in § 841(b). The court notes that this holding is consistent in virtually every Circuit.

***United States v. Bennafield***, 287 F.3d 320 (4th Cir. 2002) The police found cocaine inside the defendant's car and some more on the ground outside the car where he had been stopped. This only supports one prosecution for simple possession. The simultaneous possession of separate bags of drugs only amounts to one offense of possession under 21 U.S.C. § 844(a).

***United States v. Cruz,*** 363 F.3d 187 (2d Cir. 2004) The defendant was "hired" by a drug dealer to assault some men, but later the task was changed to "watch my back [while I finish] a deal." This evidence was not sufficient to support a conviction of the "back-watcher" for possession with intent to distribute. While the defendant may have known that some type of crime was in progress, there was insufficient proof that he knew that it was a drug deal. See also United States v. Rodriguez, 392 F.3d 539 (2d Cir. 2004).

***United States v. Cartwright***, 359 F.3d 281 (3rd Cir. 2004) The evidence was insufficient to prove that the defendant was a knowing "lookout" for a drug transaction (as opposed to some other offense) and therefore his convictions for being a member of a drug conspiracy and for aiding and abetting the drug offense were reversed on sufficiency grounds. The government failed to prove that the defendant knew specifically that the illegal activity in which he was participating involved drugs rather than some other form of contraband. The court notes several other Third Circuit cases that have overturned drug conspiracy and aiding and abetting convictions because of the absence of evidence that the defendant agreed to participate in the specific crime alleged in the indictment. (NOTE: The Third Circuit later issued an opinion questioning whether this case utilized the proper standard of review, United States v. Caraballo-Rodriguez, 726 F.3d 418 (3rd Cir. 2013).

***United States v. Jenkins***, 345 F.3d 928 (6th Cir. 2003) The defendant received an express mail package that the police believed contained drugs. The package was delivered to the defendant's house and shortly thereafter she was approached by the police and questioned. She denied knowing what was in the package, claiming that she was paid $50 to receive it for someone else. The police "told" her it contained drugs and she responded, "Yeah" but again denied knowing what was in the package. The government offered evidence that she admitted to being a crack cocaine user, though she denied that it came from the person to whom the package was ultimately destined. The trial court committed error in admitting the statement that she used crack cocaine. The use of cocaine is not sufficiently probative of her intent to participate in the possession with intent to distribute cocaine. The court also concluded that the evidence was insufficient to support the conviction.

***United States v. Brito***, 136 F.3d 397 (5th Cir. 1998) Two substantive counts of possession of marijuana were not supported by the evidence. The defendant participated in planning the shipment of marijuana, including finding drivers for the shipment. The defendant, however, did not participate in the actual shipment. The jury was not instructed that the defendant could be found guilty on the theory of aiding and abetting, so that theory was not available to support the conviction.

***United States v. Valadez-Gallegos***, 162 F.3d 1256 (10th Cir. 1998) The defendant was a passenger in a truck with an attached camper that was stopped for driving too slowly. The defendant knowing the driver's name; and the driver denied knowing the defendant's name. The defendant claimed to have spent a few days at the driver's aunt's house. A subsequent search of the

camper revealed a substantial quantity of ephedrine hidden in a fake roof. Though the defendant gave numerous inconsistent (and seemingly suspicious) statements during several interviews, the Tenth Circuit concluded that there was insufficient evidence linking him to the hidden contraband in the vehicle. Presence and proximity are inadequate to support a conviction.

***United States v. Hunt***, 129 F.3d 739 (5th Cir. 1997) In a search of the defendant's apartment, the police discovered 7.998 grams of crack, some of which was cut in small quantities. A police officer testified that the smaller quantities were sufficient to distribute to "crack heads." The remaining evidence (including expert testimony and the presence of a gun in the apartment), was not sufficient to prove the "intent to distribute" element of the charged offense. A remand to enter a judgment on the lesser offense of misdemeanor simple possession was the appropriate remedy.

***United States v. Delagarza-Villarreal***, 141 F.3d 133 (5th Cir. 1997) The defendant and his co-conspirator arranged to buy marijuana from (unbeknownst to them) an undercover agent. When the defendant and his co-conspirator arrived, the agent handed the co-conspirator a 4 ½ pound brick to inspect as a sample. The co-conspirator was satisfied with the sample (which he returned to the agent) and they agreed to engage in a large transaction later. This evidence did not a support a conviction for aiding and abetting the possession with intent to distribute the marijuana. The mere inspection of the sample did not constitute possession. Because the co-conspirator never possessed the marijuana, the defendant could not be convicted of aiding and abetting his possession of the marijuana.

***United States v. Stephens***, 118 F.3d 479 (6th Cir. 1997) The defendant possessed two separate quantities of cocaine on the same date, but at different locations. Even though the drugs were acquired at different times, this amounted to only one offense of possession with intent to distribute. Thus, the defendant could not receive a gun enhancement pursuant to his possession of one cache of drugs (and a gun), and a § 942(c) sentence in connection with his possession of the other cache of drugs.

***United States v. Leonard***, 138 F.3d 906 (11th Cir. 1998) The defendant was a passenger in the backseat of a vehicle that was stopped on the Interstate and found to contain drugs and guns. The evidence did not support the conviction of this defendant's conviction. No evidence linked this defendant to the drugs hidden in the tailgate, and there was no evidence that he aided and abetted the other occupants' possession of the contraband, even if he had knowledge of the drugs hidden in the car.

***United States v. Stewart***, 145 F.3d 273 (5th Cir. 1998) The defendant was the driver of a car that was stopped on the interstate. His passenger was found to be in possession of cocaine (the car was owned by the passenger's girlfriend). There was no evidence linking the defendant to the cocaine found in the passenger's pants. When the defendant and the passenger were arrested and put in the back of the patrol car, they were – unbeknownst to them – taped. The passenger repeatedly chastised the defendant for speeding; but this did not establish that the defendant knew that the passenger was carrying drugs. The defendant's conviction was reversed. The Fifth Circuit later abrogated the standard of review used in this case.

***United States v. Vargas-Ocampo,*** 747 F.3d 299 (5th Cir. 2014). United States v. Ortega Reyna, 148 F.3d 540 (5th Cir. 1998) The defendant and his family came to the border driving a pickup truck that he claimed was borrowed. Drugs were found in the tire. Though a person's control of a vehicle supports an inference that the person knows about drugs in the vehicle, something more is required when drugs are secreted in hidden compartments. This is particularly true where, as here, the person who is driving the car borrowed the car and had only been in control of the car a short time. Moreover, the defendant did not appear nervous; he readily answered the border patrol agents' questions; he provided neither implausible, nor inconsistent answers about the vehicle or his travels; and he did not possess a large amount of cash. The standard of review in this case was later abrogated in United States v. Vargas-Ocampo, 747 F.3d 299 (5th Cir. 2014).

***United States v. Quintanar***, 150 F.3d 902 (8th Cir. 1998) The defendant apparently arranged with a source to have drugs delivered to an unsuspecting third person. When the drugs arrived at that person's house, she arranged to have the suspicious package delivered to her at another location, where she was then with the defendant. When the package was brought to her, she promptly got in the car with the drugs and drove to the police station. The defendant's name was not on the package and neither his name, nor address was on the package. He never touched the package. This evidence did not establish the defendant's constructive possession of the drugs.

***United States v. Clotida***, 892 F.2d 1098 (1st Cir. 1989) There was no evidence to support the defendant's conviction of possession with intent to distribute cocaine. The defendant was the traveling partner of another individual in whose suitcase a substantial quantity of cocaine was found. There was no evidence, however, that the defendant knew that her colleague was carrying the cocaine or participated or aided and abetted in this endeavor.

***United States v. Martinez***, 54 F.3d 1040 (2d Cir. 1995) The defendant possessed 3-1/2 grams of cocaine, a cutting agent, a hand-held scale, and a gun. In the original panel opinion, the court held that the evidence was insufficient to prove that the defendant possessed the drugs with the intent to distribute. 44 F.3d 148. Reconsidering this opinion, however, the court decided to defer to the jury's verdict, which was sufficiently supported by the evidence to establish the requisite intent. The court cited other cases in which substantially greater quantities of cocaine did not establish an intent to distribute. Turner v. United States, 396 U.S. 398 (1970)(14.68 grams of cocaine); United States v. Boissoneault, 926 F.2d 230 (2d Cir. 1991)(5 grams); United States v. Gaviria, 740 F.2d 174 (2d Cir. 1984)(7 grams); United States v. Garrett, 903 F.2d 1105 (7th Cir. 1990)(1 ounce of cocaine).

***United States v. Boissoneault***, 926 F.2d 230 (2d Cir. 1991) The trial court should not have allowed an agent to conclude that all of the physical evidence in the case suggested that the defendant was involved in the street level distribution of cocaine. Such a conclusion was not beyond the ken of the jury. Furthermore, even assuming the admissibility of this testimony, the evidence was

insufficient to support a conviction of possession with intent to distribute. The defendant was arrested after a traffic stop. He had none of the typical paraphernalia of a distributor. He had a ledger (which the agent described as a drug account receivable ledger), $1,460 in cash, and 5 grams of cocaine. Only a possession offense could be upheld.

***United States v. Labat***, 905 F.2d 18 (2d Cir. 1990) There was no evidence supporting the defendant's conviction of possessing cocaine. Although the evidence was sufficient to support his conspiracy conviction, the trial judge did not instruct the jury on the law of Pinkerton, thus the Court of Appeals could not affirm the conviction on that theory.

***United States v. Jenkins***, 90 F.3d 814 (3rd Cir. 1996) The police followed suspects into an apartment where they found the defendant and another individual sitting in front of a coffee table on which there was 55 grams of cocaine, scales, guns and Ziplock-bags. There was no evidence linking the defendant to the drugs on the table. He was a visitor in the apartment and did not have actual possession of the drugs, nor was there evidence that he exercised dominion or control over the drugs. Mere proximity to drugs, without more, does not support a possession conviction.

***United States v. Brown***, 3 F.3d 673 (3d Cir. 1993) One of the defendants in this case was convicted based on the facts that she acknowledged that the house where drugs were found was hers (though the deed to the house was in another occupant's name); she had a key to the house; and drugs were found in various locations, including the refrigerator (though not in her room). Two other men also resided at the house. The evidence supported a conclusion that the defendant was aware of the drugs in the house and also that she was probably aware that drugs were distributed from the house. Nevertheless, the evidence was insufficient to prove that the defendant possessed the drugs in the house.

***United States v. Salmon***, 944 F.2d 1106 (3rd Cir. 1991) The defendant clearly was acting as a lookout for a narcotics transaction. While the evidence showed that he knowingly acted as a lookout, there was no evidence that he knew the transaction involved the distribution of cocaine. A conviction for aiding and abetting the cocaine transaction, or for conspiring to possess with intent to distribute cocaine, could not be sustained on this evidence alone. (NOTE: The Third Circuit later issued an opinion questioning whether this case utilized the proper standard of review, United States v. Caraballo-Rodriguez, 726 F.3d 418 (3rd Cir. 2013).

***United States v. Fountain***, 993 F.2d 1136 (4th Cir. 1993) The defendant was arrested in possession of two guns and approximately 2.3 grams of marijuana. The marijuana was in three baggies, all contained within another baggie. He also had some rolling papers and some change. This evidence did not support a conviction of possession with intent to distribute. Consequently, the gun possession conviction was also reversed, as the underlying drug offense must be a trafficking offense.

***United States v. Baker***, 985 F.2d 1248 (4th Cir. 1993) The defendant was charged with attempted possession with intent to distribute cocaine. He made numerous attempts to obtain money from a bank, and his supplier was arrested in possession of a kilogram of cocaine. The evidence was insufficient to convict the defendant of attempting to possess that cocaine. He might have been attempting to obtain money to pay a back bill for cocaine or he might have been attempting to obtain money to flee the area (he was being sought by the sheriff and his wife). Even more importantly, it was far from clear that he intended to purchase the cocaine in order to distribute it, as opposed to consume it. With regard to the conspiracy count, moreover, the trial court erred in failing to instruct the jury on the lesser offense of conspiracy to possess cocaine, in addition to conspiracy to possess with intent to distribute.

***Goldsmith v. Witkowski***, 981 F.2d 697 (4th Cir. 1992) The evidence was insufficient to sustain defendant's state court conviction for possessing drugs found in an apartment where the defendant was visiting. Though drugs were found in plain view throughout the house, no evidence established that the defendant exercised actual or constructive possession of the drugs.

***United States v. Jones***, 945 F.2d 747 (4th Cir. 1991) The evidence did not support defendant's conviction for possession with intent to distribute cocaine. Though he possessed paraphernalia consistent with the distribution of drugs, this evidence did not suffice.

***United States v. Skipper***, 74 F.3d 608 (5th Cir. 1996) The defendant was arrested after committing a motor vehicle offense (and attempting to evade the officer) and was found in possession of 2.89 grams of crack. Also in the car was a razor. The Fifth Circuit held that, as a matter of law, this evidence did not support a conviction of possession with intent to distribute. On remand, the lower court should enter a judgment of conviction on the lesser offense of simple possession.

***United States v. Polk***, 56 F.3d 613 (5th Cir. 1995) Though a conspirator may be found guilty of substantive offenses committed by coconspirators which were within the scope of the conspiracy under the Pinkerton theory, if the jury is not instructed about the Pinkerton theory, then a conviction on this theory may not be upheld. In this case, the conviction of one conspirator on one of the substantive counts was reversed because the only evidence of his participation was that his car was used in a drug transaction; however, he was not seen in the car nor was he identified as having participated in the transaction in any way.

***United States v. Rosas-Fuentes***, 970 F.2d 1379 (5th Cir. 1992) No evidence supported the inference that the defendant controlled the vehicle in which marijuana was found or that he controlled the marijuana. There was no proof that the defendant even knew of the marijuana hidden in the gas tank. His possession conviction, therefore, was reversed. In addition, the government could not rely on a Pinkerton theory because there was no evidence that he knowingly entered into a conspiracy.

***United States v. Sacerio,*** 952 F.2d 860 (5th Cir. 1992) Defendant agreed to drive a car for a friend from Miami to New Orleans. He was stopped in Mississippi and, after consenting to a search of the car, two kilos of cocaine were discovered hidden in the car. In the meantime, defendant had requested a friend to come out and help him. When the room was searched where the defendant and his friend were located, 1/2 gram of cocaine was found. The evidence did not support the defendant's (or his

friend's) conviction for conspiracy to possess the cocaine in the car or possession of cocaine in the car. Although some of the circumstances are suspicious, mere suspicion cannot support a verdict of guilty. It is not enough that the defendant merely associated with those participating in a conspiracy, nor is it enough that the evidence "places the defendant in a climate of activity that reeks of something foul."

***United States v. Pigrum***, 922 F.2d 249 (5th Cir. 1991) The evidence linking defendant to the possession with intent to distribute the cocaine was as follows: (1) she was present in the house where the cocaine was discovered; (2) undergarments were found in the bedroom dresser; (3) drug residue and paraphernalia were in plain view in the house; (4) when the police arrived at the scene, defendant didn't open the door until she announced to the other occupant in the house that the police were present; and (5) an undercover purchase of cocaine had been made at the house shortly before the search. This was not sufficient evidence to support the conviction.

***United States v. Garcia***, 917 F.2d 1370 (5th Cir. 1990) The evidence was insufficient to support a conviction of the defendant for possessing contraband found in a vehicle. The evidence failed to establish that the defendant ever actually or constructively possessed the marijuana. In addition, the evidence did not support an inference that he had dominion or control over either the vehicle in which the marijuana was found or the parking lot in which the vehicle was parked.

***United States v. Onick***, 889 F.2d 1425 (5th Cir. 1989) There was insufficient evidence to justify the conviction of one defendant for possession to distribute heroin or cocaine. The room in which this defendant was found contained no drugs and no one testified that this defendant possessed any drugs at any time. At most, the evidence revealed that the defendant associated with another defendant who was in possession of the drugs. This evidence was not sufficient.

***Young v. Guste***, 849 F.2d 970 (5th Cir. 1988) Drugs were found on a dresser that also had the defendant's jewelry on it. This evidence alone does not show that the defendant had constructive possession of the drugs. The jewelry on the dresser only indicated that the defendant had access to the general area, not the ability to exercise dominion or control over the contents of the dresser.

***United States v. Moreno-Hinojosa***, 804 F.2d 845 (5th Cir. 1986) The defendant did not constructively possess the 50 kilograms of marijuana found in the trailer of a truck in which he was a passenger. The defendant did not have the key to the tractor or trailer, none of his fingerprints were found on any of the marijuana packages, and the government agents could find no marijuana residue on any of his clothes or boots.

***United States v. Ledezma***, 26 F.3d 636 (6th Cir. 1994) The defendant entered into a drug conspiracy after the drugs were distributed by the principals. Though he could be found guilty of being in the conspiracy, the evidence did not support his conviction for aiding and abetting the offense.

***United States v. Peters***, 15 F.3d 540 (6th Cir. 1994) The police executed a search warrant at an apartment. The male was found in the bedroom, where a small quantity of cocaine and a firearm were found. A female was found downstairs, dressed in a nightgown. This evidence was insufficient to convict the female of possessing either the gun or the drugs. The evidence also failed to establish that the two were engaged in a conspiracy.

***United States v. Pena***, 983 F.2d 71 (6th Cir. 1993) The evidence did not support defendant's conviction for possession of cocaine. She was a passenger in a car containing 17 kilograms of cocaine. Though she stated that she thought something illegal was in the car, she had no specific knowledge of what it was. There was no evidence that she took any steps to assist in the transportation or delivery of the contraband. The mere fact of being a passenger in the car is not sufficient to support a conviction.

***United States v. Walker***, 972 F.2d 679 (6th Cir. 1992) Defendant was charged with possession of prescription drugs. All he actually possessed, however, was the prescription. Possession of the prescription does not amount to constructive possession of the drugs.

***United States v. White,*** 932 F.2d 588 (6th Cir. 1991) A marijuana patch was located three feet from the trailer in which the defendant lived with others. When questioned, the defendant acknowledged knowing about the patch. This knowledge, however, is not the same as possession or the intent to possess. The property did not belong to the defendant; therefore, the evidence was insufficient to support his conviction.

***United States v. Mahar***, 801 F.2d 1477 (6th Cir. 1986) A conviction for unlawful distribution of a controlled substance to a patient of a medical clinic on a particular date could not be sustained solely on the evidence that, on that date, the patient received the medicine, but was not a patient of the clinic.

***United States v. Kitchen***, 57 F.3d 516 (7th Cir. 1995) The defendant was the target of a reverse sting in which the government provided the cocaine, and he provided the money. At the time of the proposed transaction, the defendant brought the money, and the government agent brought the cocaine. The defendant picked up the cocaine to examine it for two or three seconds and was then arrested. The court holds that this did not amount to possession, and the defendant could not be convicted for possession with intent to distribute the cocaine. There was no evidence that the defendant was about to leave in possession of the drugs, which would have explained an expeditious arrest. Even though the defendant actually had the cocaine in his hands for a moment, he did not actually possess the cocaine since he did not exercise dominion or control of the cocaine and there was no evidence that he actually considered the sale complete.

***United States v. Windom***, 19 F.3d 1190 (7th Cir. 1994) In order to be convicted of possession of cocaine with intent to distribute on a constructive possession theory, the government must do more than establish “legal authority” to possess or distribute the drugs. Rather, the government must establish that defendant has the “recognized authority in his criminal milieu” to possess and determine the disposition of the contraband. In this case, the defendant was found in a house in which a backpack was found to contain heroin and cocaine. This evidence did not establish defendant’s constructive possession of the cocaine and heroin.

***United States v. Manzella***, 791 F.2d 1263 (7th Cir. 1986) The defendant was a broker in a major cocaine deal, but never possessed, either constructively or actually, the cocaine involved. He could not be convicted of the substantive offense of possessing the drug with the intent to distribute. He could, however, be convicted of conspiring to distribute the drug. Furthermore, under the Pinkerton doctrine, as a conspirator, he could be held liable for the crimes of another if committed in furtherance of the conspiracy. Because the government did not rely upon the Pinkerton doctrine, the possession with intent to distribute charge was reversed.

***United States v. Lopez***, 42 F.3d 463 (8th Cir. 1994) The defendant’s possession of four grams of methamphetamine which was 41% pure was not sufficient to convict the defendant of possession with intent to distribute. Neither the quantity nor the purity was sufficient to establish that the defendant did not possess the drugs for personal consumption.

***United States v. Dunlap***, 28 F.3d 823 (8th Cir. 1994) The defendant was in the apartment when it was searched. He was in possession of a gun. In the house was cocaine and paraphernalia associated with the distribution of cocaine. This evidence does not support a conviction for either aiding and abetting the possession with intent to distribute the cocaine or for constructively possessing the cocaine with intent to distribute. The evidence equally supported the theory that the defendant was present to purchase cocaine for his own use.

***United States v. Townley***, 942 F.2d 1324 (8th Cir. 1991) Defendant’s conviction for possessing cocaine with intent to distribute was reversed on sufficiency grounds. Though defendant’s fingerprints were on the tape in which the drugs were wrapped, and he was photographed with other people involved in the narcotics transaction, the evidence did not show that the defendant possessed the drugs at the time and at the location alleged in the indictment.

***United States v. Pace***, 922 F.2d 451 (8th Cir. 1990) Though the defendant was arrested driving a car with 200 pounds of cocaine in the trunk and in the back seat, the evidence was not sufficient to support his conviction. He testified at trial that the passenger had hired him to drive the car to Chicago and that he had no idea what was in the trunk or in the closed containers in the back seat. Although the defendant was present and was helping to commit the crime, the evidence did not establish that he knew the cocaine was present or that he was transporting the drugs.

***United States v. Kearns***, 61 F.3d 1422 (9th Cir. 1995) The defendant and her co-conspirator conspired to purchase marijuana from an undercover agent. At the location of the proposed sale, the co-conspirator was arrested shortly after examining the marijuana and then showing the “seller” the buy money. Because the conspirator never had actual or constructive possession of the marijuana, a conviction for possession with intent to distribute could not be sustained.

***United States v. Earl***, 27 F.3d 423 (9th Cir. 1994) The evidence failed to establish that the defendant, who was found in a house with several other individuals, exercised constructive possession of any of the drugs found in the house. The fact that he was present when drug sales were discussed and saw cocaine openly in the house is not sufficient to establish his dominion over the drugs.

***United States v. Ramos-Rascon***, 8 F.3d 704 (9th Cir. 1993) Evidence that the defendants were present during discussions about a drug transaction and that they were later present when drugs were delivered to an undercover agent was insufficient to support a conviction for either conspiring to possess drugs or for aiding and abetting the possession of the drugs. After reviewing the various theories which the government advanced to support the conviction, the court wrote, “That a defendant is probably guilty is not enough. Our system works well. We can be proud of the safeguards that protect the innocent, even though they sometimes allow a guilty person to go free. No system can ensure accurate results in all cases. We learned long ago that it is better to err on the side of caution than to convict an innocent person. That historic wisdom remains true today, notwithstanding the current willingness to abandon constitutional protections in order to further the seemingly endless and potentially futile war on drugs.”

***United States v. Vasquez-Chan***, 978 F.2d 546 (9th Cir. 1992) Six hundred kilograms of cocaine were seized from a house in which the defendants were temporarily residing. The massive undercover operation and surveillance had never previously identified the defendants as participants in the conspiracy. None of the other conspirators ever mentioned these defendants in conversations with undercover agents. The defendants were residing in a “stash” house. One of the defendants’ fingerprints were on the various cartons of cocaine located in the bedroom of one of the defendants, but no prints were found inside the containers. The defendants admitted knowing the drugs were in the house but denied “possessing” the drugs. The defendant’s mere proximity to the drug, her presence on the property where it was located, and her association with the person who controls it are insufficient to support a conviction for possession. The proof failed to establish that either defendant exercised dominion or control over the cocaine. This evidence did not support defendants’ conviction of possession, aiding and abetting the possession, or conspiring to possess the cocaine. The Ninth Circuit later questioned the standard of review that was used in this case. United States v. Nevils, 598 F.3d 1158 (9th Cir. 2010).

***United States v. Rubio-Villareal***, 967 F.2d 294 (9th Cir. 1992) A trial court should not give an instruction to the jury to the effect that an inference can be drawn that the driver of a vehicle knows of the existence of any contraband in the vehicle. In effect, this instruction could lead the jury to ignore other relevant facts and decide based solely on the facts giving rise to the inference.

***United States v. Ocampo***, 937 F.2d 485 (9th Cir. 1991) The evidence did not support defendant's conviction for possession with intent to distribute and for conspiracy to possess with intent to distribute. A pickup, parked in the garage of defendant's house, was found to contain 82 kilos of cocaine. The defendant did not have a key to the truck. Although a fingerprint of the defendant was found on one window of the truck and the defendant was seen in the company of another conspirator who was involved in the distribution of cocaine, the evidence did not support this defendant's conviction on either a substantive or conspiracy count.

***United States v. Leos-Quijada***, 107 F.3d 786 (10th Cir. 1997) The defendant's vehicle was seen at a location that appeared suspicious. The vehicle left hurriedly. The police believed that the vehicle was at that location to meet drug couriers, so the police brought a similar vehicle to the same location and, sure enough, drug couriers approached the vehicle. This evidence was not sufficient to convict the defendant of possession with intent to distribute.

***United States v. Reece***, 86 F.3d 994 (10th Cir. 1996) The police stopped a car being driven by the defendant. In the passenger's lap were two marijuana cigarettes and a bag containing marijuana. In his pockets was cocaine. The evidence was not sufficient to convict the defendant of possession of any of the drugs, even though it was his car, and he was the driver.

***United States v. Jones***, 49 F.3d 628 (10th Cir. 1995) Four occupants of a rented car were stopped on the interstate. A search of the trunk revealed cocaine and a gun in the lining of the trunk. One of the occupants, in whose name the car was rented, became a government witness. She testified that, prior to leaving L.A. en route to Denver, the two male defendants, who were in the back, loaded the trunk of the vehicle. The witness did not see either of the defendants place the cocaine or the gun in the vehicle. Only speculation could support the inference that the defendants were responsible for the drugs and gun in the car, and their convictions could not be upheld on this evidence alone.

***United States v. Jones***, 44 F.3d 860 (10th Cir. 1995) There was insufficient evidence to support the conviction of a passenger of a car that was transporting over 200 kilos of cocaine for either conspiracy to possess the drugs or for aiding and abetting the possession of the drugs. Throughout the interrogation of the driver on the side of the interstate, the passenger said virtually nothing; she did not have keys to the car or the trunk; she did not have any belongings in the trunk where the cocaine was; and the passenger's fingerprints were not found on the cocaine. Even if a jury could believe that the passenger had knowledge of the drugs in the trunk, mere knowledge that the car in which she was a passenger contained cocaine does not make her a conspirator or an aider and abettor.

***United States v. Puryear***, 940 F.2d 602 (10th Cir. 1991) Charged with drug trafficking, the defendant was convicted of the lesser included offense of possession of cocaine base. The jury did not determine the quantity of drugs possessed. Because possession can be either a felony or a misdemeanor under §844, the quantity is an essential element of the offense. In the absence of a jury finding, the defendant can only be sentenced for the misdemeanor offense.

***United States v. Derose,*** 74 F.3d 1177 (11th Cir. 1996) The government initiated a reverse sting, offering to sell marijuana to the defendants. The defendants were given a key to the trunk of a car which contained the marijuana and were told that, if they liked the product, they should drive it to a certain location. The defendant looked into the back of the car, examined the marijuana, and, as he started to walk away, was arrested. This was insufficient to convict the defendant for possession with intent to distribute. The record did not show that the defendants either physically placed marijuana in, or removed marijuana from, the back of the vehicle. The defendant did not drive the car, and, in fact, it was not shown that the key given to the defendant was the ignition key. The defendant never had constructive possession of the marijuana. After he examined the marijuana, he started to walk away. There was no evidence that he approved of the product or actually consummated the transaction.

***United States v. Lopez-Ramirez***, 68 F.3d 438 (11th Cir. 1995) A truck containing cocaine and an unidentified passenger drove to a house in which the defendant lived and backed up to the garage. It was not established that the defendant was the passenger. The driver was seen unloading the cocaine in the garage; the defendant was seen standing in the garage at this time. This evidence was insufficient to convict the defendant of conspiracy to possess the drugs or for possessing the drugs with intent to distribute. Mere association with a conspirator and presence in a vehicle that engages in counter-surveillance maneuvers is not sufficient to establish participation in a conspiracy to distribute cocaine or possession with intent to distribute cocaine. There was no evidence in this case that the defendant was aware of the contents of the container which was unloaded into the garage of the house where she was arrested.

***United States v. Stanley***, 24 F.3d 1314 (11th Cir. 1994) The defendant was a passenger in a car being driven by a drug distributor and which had another occupant who was involved in the distribution of drugs. Drugs that were to be distributed were in the car. This evidence, alone, did not suffice to convict the defendant of either a conspiracy or substantive offense involving the drugs.

***United States v. Clavis***, 956 F.2d 1079 (11th Cir. 1992) The government sought to sustain the defendant's possession conviction on a Pinkerton theory. However, no evidence in the record established defendant's membership in the conspiracy at the time that the witness testified that drugs were found in the house. Defendant's conviction for possession could not be sustained. The evidence with respect to another defendant was also insufficient. This defendant was in jail at the time the drugs

were found in a house he had previously resided in. He could not be found guilty of constructive possession and could not be found guilty on a Pinkerton theory, either.

***United States v. Vidal-Hungaria***, 794 F.2d 1503 (11th Cir. 1986) The evidence was not sufficient in this case to convict the crewmembers of a vessel of conspiracy to possess marijuana with intent to distribute. The vessel was a large cargo ship that also carried substantial legitimate cargo. The marijuana was stored in hidden sealed compartments. There was no evidence that the crew participated in the loading of marijuana and no residue was found on articles of clothing or bedsheets taken from the crew quarters. No crewmembers made any inculpatory statements, and no attempt was made by the vessel to elude the Coast Guard when the ship was first approached.

***United States v. Fiallo-Jacome***, 784 F.2d 1064 (11th Cir. 1986) The defendant was convicted on two counts (among others) of possession of a controlled substance. Both counts involved cocaine and one count involved a lengthy period of time which included the date alleged in the second count. This constitutes double punishment for the same offense since there was no evidence that there were separate possessions.

***United States v. Lucas***, 67 F.3d 956 (D.C. Cir. 1995) An apartment was searched, and drugs and a gun were found in various places. The defendant had been the tenant in the apartment several years earlier but had sub-let the apartment to his relatives. His fingerprint was found on a shoebox which contained drugs, but the government witnesses conceded that fingerprints remained on objects an indefinite period of time. There was no dispute that the defendant had not lived in the apartment for several years. The D.C. Court of Appeals concluded, “There can be no doubt that the evidence was insufficient to prove [defendant’s] knowledge of drugs in the house.” The Court also decried the fact that the defendant spent nearly four years in prison awaiting this decision.

***United States v. Stephens***, 23 F.3d 553 (D.C .Cir. 1994) The police observed one defendant sell another defendant approximately 6 grams of crack cocaine. The purchaser was arrested and was also found in possession of just over $500. Both the seller and the purchaser were convicted of possession with intent to distribute cocaine within 1,000 feet of a school in violation of 21 U.S.C. §860(a). The evidence was insufficient with respect to the purchaser. The money was apparently the money that the purchaser intended to pay for the 6 grams of cocaine he had just purchased. Moreover, the cocaine he possessed was not broken down; it was one rock and was not packaged for further distribution. Finally, in order to infer an intent to distribute based solely on the quantity possessed, the quantity possessed must significantly exceed that necessary for personal use.

***United States v. Teffera***, 985 F.2d 1082 (D.C. Cir. 1993) Though the defendant arrived in D.C. with a person who was carrying crack cocaine in his pocket, this evidence did not support defendant’s conviction of possessing cocaine. It is not a crime to travel with someone who is carrying drugs, even if the person is aware that his companion is in possession of contraband. “Mere negative acquiescence in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting.”

***DRUGS (Precursor Sales)***

***United States v. Munguia***, 704 F.3d 596 (9th Cir. 2012) The defendant was charged with possessing pseudoephedrine knowing or having reasonable cause to believe it would be used to manufacture meth. 21 U.S.C. § 841(c)(2). The Ninth Circuit holds that “reasonable cause to believe” is to be applied in a subjective, not an objective, manner. Thus, the question is whether this defendant had reasonable cause to believe that the listed chemical was destined to be used to manufacture meth, not whether a reasonable person would have cause to believe this.

***United States v. Truong***, 425 F.3d 1282 (10th Cir. 2005) The defendant worked at a Texaco station and sold pseudoephedrine pills to customers. He sold the pills in large quantities and often was paid in cash. He also purchased the pills from a man he could not identify who allowed him to pay for the pills after Truong sold them. The statutes, 21 U.S.C. § 841(c)(2), §843(6) require proof that the defendant knew or had reasonable cause to believe that the precursor was being purchased to be used to manufacture methamphetamine. The Tenth Circuit holds that the mens rea requirement requires proof that the defendant, himself, knew what the pseudoephedrine was being purchased for, not that a reasonable person would know. While the defendant may have known that the purchasers were “up to no good” there was insufficient evidence that he knew that their intention was to manufacture methamphetamine. Even evidence that the defendant attempted to hide the fact of his sales does not satisfy the mens rea requirement.

***DRUGS (School Yard / Playground)***

***United States v. Guzman-Montanez***, 756 F.3d 1 (1st Cir. 2014) While the government proved with sufficient evidence that the location of the drug transaction was within 1,000 feet of a school, the government failed to offer sufficient evidence that the defendant knew that the transaction occurred in close proximity to the school. No pictures of the scene were shown to the jury so the jury could draw the conclusion that the defendant would have seen the school. Nor did anybody testify that the defendant would have driven right past the school on the way to the drug transaction location.

***United States v. Sepulveda-Hernandez***, 752 F.3d 22 (1st Cir. 2014) The government offered insufficient evidence that the location where the defendant committed a drug offense (a basketball court) was primarily used by minors. Thus, the conviction under 21 U.S. C. §860(a), which doubles the maximum sentence for committing a drug crime within 100 feet of a public or private youth center was reversed.

***United States v. Martin***, 544 F.3d 456 (2d Cir. 2008) In a prosecution under 21 U.S.C. § 860, the government is not required to prove that the defendant knew that he was within 1,000 feet of a public school, or that he intended to distribute drugs within 1,000 feet of a public school. As long as the government proves that the defendant was aware that he was in possession of drugs and that he intended to distribute the drugs, the mens rea element of the offense has been established.

***United States v. Rojas Alvarez***, 451 F.3d 320 (5th Cir. 2006) Though the government proved that the defendant participated in drug sales that occurred in proximity to a park, there was no evidence offered that the park contained at least three child play apparatus, such as swing sets, sliding boards, etc. The existence of such apparatus is a definitional requirement of a "playground" pursuant to 18 U.S.C. § 869(e)(1).

***United States v. Jackson***, 443 F.3d 293 (3rd Cir. 2006) Possession with intent to distribute drugs is a lesser included offense of possession with intent to distribute drugs within 1,000 feet of a school and a defendant cannot be convicted and sentenced for both offenses.

***United States v. Carpenter***, 422 F.3d 738 (8th Cir. 2005) The crime of manufacturing methamphetamine is a lesser included offense of manufacturing methamphetamine within 1,000 feet of a school and consecutive sentences may not be imposed for these two offenses.

***United States v. Fenton***, 367 F.3d 14 (1st Cir. 2004) The offense of distribution of a controlled substance is a lesser included offense of distribution of a controlled substance within 1,000 feet of a school.

***United States v. Soler***, 275 F.3d 146 (1st Cir. 2002). The 1,000 feet must be measured from the school to the actual site of the drug deal, not just the curtilage, or outer wall of the building in which the drug deal occurred. In this case, the evidence established that it was 963 feet from the door of the house where the drug deal occurred to the school property. This evidence was insufficient. See also United States v. Applewhite, 72 F.3d 140 (D. C. Cir. 1995).

***United States v. Chandler***, 125 F.3d 892 (5th Cir. 1997) Section 860 is not simply a sentence enhancer, but rather, is a separate substantive offense. Therefore, sentencing under § 860 can only occur where the defendant is convicted of that offense. Moreover, the guideline applicable to § 860 offenses (§ 2D1.2) does not apply even if a § 841 offense occurs within 1,000 feet of a school, as long as there is no conviction for a § 860 offense.

***DRUGS (Use of Juvenile)***

***United States v. Lombardi***, 138 F.3d 559 (5th Cir. 1998) The defendant was a knowing participant in a drug transaction, and he knowingly aided and abetted the drug offense, but the evidence did not establish that he knew that a juvenile was involved in the venture. The conviction for knowingly and intentionally employing, hiring, using, persuading, inducing, enticing, or coercing a juvenile to commit a drug offense was not supported by this evidence. To be guilty of aiding and abetting an offense (i.e., using a juvenile), the defendant must not only knowingly participate in the drug offense, but also must knowingly participate in the offense of using a juvenile.

***DRUGS (Food, Drug and Cosmetic Act Violations) SEE ALSO: DRUGS (Doctors)***

***United States v. Caronia,*** 703 F.3d 149 (2d Cir. 2012) The Second Circuit holds that prosecutions based on "off-label" promotion violates the First Amendment. The defendants were charged with promoting the off-label use of certain drugs (i.e., promoting the use of a drug that was approved by the FDA for one purpose, but advocating its use for another purpose). While it is perfectly legal for a doctor to prescribe a drug approved for a purpose other than the use for which the FDA approved the drug, it is not legal for the drug manufacturer to promote the drug's use for any purpose other than the approved purpose. The Second Circuit held that this violates the First Amendment.

***United States v. Smith***, 573 F.3d 639 (8th Cir. 2009) On-line pharmacy prosecution. Discussion of relationship between doctor's reasonable exercise of judgment and the mis-branding regulations in 21 C.F.R. § 1306 and other issues related to on-line pharmacies.

***United States v. Goldberg***, 538 F.3d 280 (3rd Cir. 2008) The defendant was a veterinarian who sold drugs to animal owners, contending that they qualified as "vets" under state law and could receive drugs that he sold to them. The decision contains lengthy analyses of § 331(k) (misbranding) offenses. The court concluded that the defendant was guilty of misbranding, but only a misdemeanor, because there was no intent to defraud. He did what he did openly and without deception.

***United States v. Geborde***, 278 F.3d 926 (9th Cir. 2002) Prior to the time that GHB was outlawed as a controlled substance, the defendant manufactured the drug and gave it to a minor, who died. The government prosecuted him for violating 21 U.S.C. § 331(p), operating an unregistered drug manufacturing facility. This is a misdemeanor, unless the government proves an intent to defraud (i.e., an intent to defraud by failing to register), in which case the defendant may be prosecuted for a felony. There was no proof of this intent, however, and the defendant's felony conviction was reversed. In addition, the government charged the defendant with a violation of 21 U.S.C. § 331(k), which makes it a federal crime to misbrand a drug that is "held for sale." However, the drug in this case was not "held for sale" and the convictions on these counts, too, were reversed.

***United States v. Watkins***, 278 F.3d 961 (9th Cir. 2002) The felony offense of misbranding under the Food, Drug and Cosmetic Act (21 U.S.C. § 333(a)(2)) requires proof that the misbranding was "material." It is not enough to simply prove that the statement is false.

***DRUGS (Distribution)***

***United States v. Combs***, 379 F.3d 564 (9th Cir. 2004) The defendant transferred waste material from his methamphetamine lab to another person solely for the purpose of disposing of the material. This conduct does not qualify as the delivery of methamphetamine.

***United States v. Dunmire***, 403 F.3d 722 (10th Cir. 2005) Post-Apprendi, the government is required to prove to the jury that a certain threshold quantity of drugs is involved in an offense. In this case, for example, the government was required to prove that the defendant conspired to distribute at least fifty grams (or, as a lesser included offense, five grams) of crack cocaine. The evidence established that she actually distributed 2.97 grams, but the government argued that the surrounding circumstances established a conspiracy to distribute more. The Tenth Circuit rejected this argument, holding that there was insufficient evidence that the defendant conspired to distribute the quantity that would trigger the higher sentence.

***DRUGS (Identification of Drug)***

***United States v. Brisbane***, 367 F.3d 910 (D. C. Cir. 2004) All forms of cocaine base are not necessarily “crack cocaine.”

## *DUE PROCESS*

***Johnson v. United States***, 135 S. Ct. 2551 (2015) The residual clause of the Armed Career Criminal Act is unconstitutionally vague. The residual clause triggers ACCA sentencing if the defendant, convicted of being a felon in possession of a firearm has three or more previous convictions for a “violent felony,” a term defined to include any felony that “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B). The Court, having struggled with this definition for over a decade, finally decided that it was simply too vague.

***City of Chicago v. Morales***, 119 S. Ct. 1849 (1999) Chicago's anti-gang loitering statute is unconstitutionally vague. The statute made it a crime to disobey a police officer's dispersal order, which must be directed to any person the officer believes to be a gang member or persons standing with such people, if they are loitering in any public place with no apparent purpose. The Court held that the statute was unconstitutionally vague because it failed to provide sufficient guidance to police officers to prevent arbitrary and discriminatory enforcement.

***Lawrence v. Texas***, 123 S. Ct. 2472 (2003) Consensual sodomy between adults in the privacy of their home may not be outlawed.

***Bowers v. Hardwick***, 478 U.S. 186 (1986), was overruled. United States v. Williams, 128 S.Ct. 1830 (2008) The Supreme Court upheld the child pornography pandering provision that had earlier been held unconstitutional by the Eleventh Circuit. The statute, 18 U.S.C. § 2252A(a)(3)(B) makes it a crime to solicit, or to offer to sell or distribute material that is purported to be child pornography. The Court rejected the defendant’s claim that it violates the First Amendment to make it a crime to offer to sell or distribute material as child pornography, if, in fact, the material being offered for sale is not, in fact, child pornography. The Court also rejected a Fifth Amendment vagueness challenge.

***United States v. Lanier***, 520 U.S. 259 (1997) There are three manifestations of the requirement that criminal statutes give “fair warning” of what is outlawed. First, the vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Second, the doctrine insists that any ambiguity in a criminal statute must be resolved in favor of applying the statute only to conduct that is clearly covered. Third, although clarity may be applied by judicial gloss, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.

***Gentile v. State Bar of Nevada***, 501 U.S. 1030 (1991) A state bar rule which prohibits an attorney from making certain extrajudicial statements to the press was void for vagueness.

***United States v. Albertini***, 830 F.2d 985 (9th Cir. 1987) The defendant was a frequent protester for nuclear disarmament at military bases on “open house” days. After one conviction, the Ninth Circuit held that his conduct was protected by the First Amendment. He continued to engage in these protests, in reliance on the Ninth Circuit decision and was again arrested. Subsequently, the United States Supreme Court reversed the decision of the Ninth Circuit. In the subsequent prosecution, the Court held that he had the right to rely on the Ninth Circuit decision and the prosecution was barred. A later Ninth Circuit decision overruled Albertini, on the basis of the Supreme Court decision in United States v. Rodgers, 466 U.S. 475 (1984). United States v. Qualls, 172 F.3d 1136 (9th Cir. 1999).

***DUE PROCESS (Inconsistent Prosecution Theories)***

***Stumpf v. Houk***, 653 F.3d 426 (6th Cir. 2011) On review after remand from the Supreme Court (see below), the Sixth Circuit again holds that the inconsistent prosecution theories tainted the death sentence and the court ordered that the writ be granted with regard to the sentence. NOTE: The Sixth Circuit vacated this decision, Stumpf v. Robinson, 722 F.3d 739 (6th Cir. 2013), holding: Nothing misleading or deceitful happened here. The prosecution did not present a different and incomplete set of facts in support of different theories of culpability for the same crime. Cf. Thompson v. Calderon, 120 F.3d 1045, 1056 (9th Cir.1997) (en banc) (plurality opinion) (“The prosecutor presented markedly different and conflicting evidence at the two trials.”) (emphasis added), vacated on other grounds, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). It did not offer different (and contradictory) testimony from the same witness in Wesley's trial, without acknowledging the contradiction. Cf. Smith v. Groose, 205 F.3d 1045, 1051 (8th Cir.2000) (“[T]he prosecutor chose at Smith's trial to use Lytle's December 2, 1983, statement to secure Smith's conviction and then later, at Cunningham's trial, elected to use Lytle's November 30, 1983, statement to secure

Cunningham's conviction. Lytle's testimony constituted the only evidence of when the murders occurred and was the sole basis for two different convictions on two contradictory theories.”). And it did not omit evidence of Wesley's or Stumpf's guilt or innocence from its presentation. Cf. In re Sakarias, 35 Cal.4th 140, 25 Cal.Rptr.3d 265, 106 P.3d 931, 936–37 (2005) (discussing prosecutor's omission of key evidence in each of two prosecutions of co-defendants, leading to conviction of both).

***United States v. Fulks***, 683 F.3d 512 (4th Cir. 2012) The court discusses but rejects the applicability of the concept of inconsistent prosecution theories as a due process violation.

## *DURESS / COERCION / NECESSITY / JUSTIFICATION*

***Dixon v. United States***, 548 U.S. 1 (2006) Assuming that duress is a defense to possession of a firearm by a convicted felon, or by a person under indictment, it is not unconstitutional to place the burden of proving duress on the defendant.

***United States v. Nwoye***, 824 F.3d 1129 (D.C. Cir. 2016) Trial counsel provided ineffective assistance of counsel by his failure to introduce expert testimony on the subject of battered spouse syndrome (the court actually only decided that the failure to present the defense was prejudicial and remanded to the district court to decide whether counsel acted deficiently). The defendant claimed that she participated in an extortion scheme because her husband beat her and coerced her to engage in the criminal conduct. The failure to present such evidence resulted in the trial court refusing to instruct the jury on the law of duress, because of the absence of any proof of the “no reasonable alternative” prong of the duress defense’s prerequisites. With such evidence, the instruction would have been required. Thus, the defendant was prejudiced by counsel’s failure to present expert testimony on the phenomenon of battered spouse syndrome. This case includes a lengthy review of the battered spouse defense literature.

***United States v. Haischer,*** 780 F.3d 1277 (9th Cir. 2015) The defendant is entitled to present a defense of coercion, as well as a defense that she lacked the mens rea to commit the offense. The defendant in this case claimed that she suffered abuse at the hands of her boyfriend and explained that this was the basis of her coercion defense. The trial court erroneously excluded this evidence on the basis that the defendant did not admit that she committed the offense (i.e., that she knew that she was engaged in a fraudulent scheme).

***United States v. Otis***, 127 F.3d 829 (9th Cir. 1997) The defendant, a Colombian, claimed that he engaged in a money laundering conspiracy in the United States, because members of the Cali Cartel had threatened to kidnap his father if he did not participate. The defendant testified that his father had been kidnapped once before and he reasonably feared for the safety of his family if he did not comply with the Cartel's demands. This evidence supported a duress instruction and the court's failure to instruct the jury on this defense was reversible error.

***United States v. Paul***, 110 F.3d 869 (2d Cir. 1997) Duress is a defense to a charge of possession of ammunition by a convicted felon. In this case, the defendant and another individual were engaged in a fight after a poker game. The other individual had a gun. The defendant obtained possession of the gun and shot out all the bullets into the ground so that when the other fellow regained possession of the weapon, it would be empty. This testimony on the part of the defendant was sufficient to authorize a charge on the law of duress.

***United States v. Paolello***, 951 F.2d 537 (3rd Cir. 1991) Charged with being a felon in possession of a firearm, the defendant requested an instruction on the defense of justification after introducing evidence that he grabbed the gun of a man who was fighting with him just prior to the police catching him with the gun. The trial court erred in failing to charge the jury on this defense. There are four elements to a justification defense in connection with a firearm charge: (1) the defendant was under unlawful and present threat of death or serious bodily injury; (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) he had no reasonable legal alternative to both the criminal act and the avoidance of the threatened harm; and (4) there is a direct causal relationship between the criminal action and the avoidance of the threatened harm.

***United States v. Riffe***, 28 F.3d 565 (6th Cir. 1994) The defendant was an inmate at a state penitentiary. He was prosecuted for smuggling marijuana into the institution. He claimed that he did so because he had been threatened by fellow inmates that if he did not smuggle marijuana into the prison, he would be killed. The trial court erred in refusing to give a jury instruction on the defense of duress. It was not necessary for the defendant to first seek refuge from the prison authorities, because he introduced evidence that this was dangerous, because an investigation would be launched, and he would be injured by the gang members for turning them in to the authorities. The trial court erroneously applied a per se rule that if a legal alternative to violating the law exists, the defendant must utilize that alternative, or the duress defense will be unavailable. See United States v. Bailey, 444 U.S. 394 (1980). Note: In Dixon v. United States, 548 U.S. 1 (2006), the Court held that it is permissible to place the burden of proof on the defendant to prove duress (rather than requiring the government to prove the absence of duress).

***United States v. Banks***, 988 F.2d 1106 (11th Cir. 1993) On retrial following the prior reversal (See 942 F.2d 1576), the trial court instructed the jury that in order to find that the defendant did not obstruct justice by refusing to testify at the grand jury based on his defense of fear of the target, the defendant was required to establish that his fear was genuine and substantiated. This improperly set up a mandatory rebuttable presumption. The government must prove a corrupt motive; the defendant is not required to prove an innocent or non-corrupt motive. Also, the trial court erred in failing to instruct the jury that the defendant must have known or should have known, that the failure to testify would be likely as a natural and probable consequence, to obstruct the grand jury’s investigation.

**United States v. Banks**, 942 F.2d 1576 (11th Cir. 1991) The defendant was convicted of violating §1503 because of his refusal to testify at the grand jury investigating one of his previous drug suppliers. First, the court concludes that the willful refusal to give testimony to the grand jury may amount to obstruction of justice. However, the conviction in this case had to be reversed because of the trial judge's refusal to instruct the jury on the law of "fear of reprisal." The defendant testified that he feared for his safety and the safety of his family if he testified against the supplier. This is a valid defense to obstruction of justice, insofar as it negates the motive element of the offense.

## *EMBEZZLEMENT*

***United States v. Lequire***, 672 F.3d 724 (9th Cir. 2012) An insurance agency collected premiums from customers and at the end of each month was obligated by contract to pay the insurance company the premiums. The contract provided that the entire amount of the premiums that were due was obligated to be paid, regardless of whether the premiums were actually collected. In addition, the contract permitted the agency to commingle the funds during the course of the money with other agency money (i.e., the money was not required to be segregated or held in trust). When the agency failed to remit the premiums, the government alleged that this was embezzlement. The Ninth Circuit reversed, holding that this was a breach of contract, not embezzlement.

## *ENTICING A MINOR FOR SEX*

***United States v. Laureys***, 866 F.3d 432 (D.C. Cir. 2017) Trial counsel provided ineffective assistance of counsel by failing to secure expert testimony in this Internet child enticement case. An expert could have countered the testimony of the detective that anybody who drives to the location for a proposed rendezvous with a child intends to actually have sex with the minor. The expert would have testified that this is not necessarily true and then many men would go to the location intending to have sex with an adult, while continuing to fantasize about having sex with a child.

***United States v. Davis***, 854 F.3d 601 (9th Cir. 2017) The defendant was charged with sexual exploitation of a minor. The indictment alleged that he recruited the child to participate in a sex video, "knowing or in reckless disregard of the fact that the person had not attained the age of 18." The jury instruction, however, the trial court instructed the jury that the knowledge requirement of the offense could be satisfied with roof that "the defendant had a reasonable opportunity to observe "the person]." This amounted to a constructive amendment of the indictment, because it provided the jury a path to conviction that was not alleged in the indictment. See also United States v. Dipentino, 242 F.3d 1090 (9th Cir. 2001).

***United States v. Hite***, 769 F.3d 1154 (D.C. Cir. 2014) Joining every other Circuit, the DC Circuit holds that an enticement prosecution under § 2422(b) does not require that the defendant communicate directly with the child; communicating through an intermediary also constitutes enticement. Nevertheless, the communication with the intermediary must be intended to persuade the child to engage in sex, or to procure the child to have sex with the defendant. Simply communicating with an adult who says that he will "arrange" for a sexual rendezvous with a child is not sufficient. Nor is it sufficient if the communication with the adult is designed only to "cause" the child to have sex with the defendant. Rather, there must be an effort to have the intermediary induce, persuade, entice, or coerce the child to have sex with the defendant.

***United States v. Howard***, 766 F.3d 414 (5th Cir. 2014) The Fifth Circuit upheld the defendant's conviction for attempted enticement of a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b). The defendant communicated with an undercover agent about having sex with the agent's daughter. There were several communications, and the defendant instructed the agent to have sexual contact with the daughter to get her ready (groomed) and also sent a nude photo of himself. However, when the agent suggested that the defendant travel to meet "her" and the daughter, he refused. The Fifth Circuit held that the evidence was sufficient to support an attempt conviction, but just barely and that this case represented the outer limit of what could be prosecuted as an attempt. Id. at 427.

***United States v. Taylor***, 640 F.3d 255 (7th Cir. 2011) 18 U.S.C. § 2422(b) makes it a ten-year felony for anybody who, "using a facility of interstate or foreign commerce knowingly persuades, induces, entices, or coerces and individual who has not attained the age of 18 years, to engage in prostitution, or any sexual activity for which any person can be charged with a criminal offense." The term "sexual activity" is not defined. In this case, the Seventh Circuit concluded that the definition of "sexual act" which applies to crimes under 18 U.S.C. § 2246(2)(D), should apply. The conduct in this case would have amounted to a misdemeanor under Indiana law (i.e., masturbation). The Seventh Circuit determined that it would make no sense to impose a ten-year mandatory minimum sentence for conduct which does not involve a "sexual act," and only meets undefined term "sexual activity" which could even apply to conduct which involves no touching at all.

***United States v. Brookmeyer***, 616 F.3d 120 (2d Cir. 2010) The defendant was charged with violating 18 U.S.C. § 2423, transporting a minor in interstate commerce with intent that the individual engaged in any sexual activity for which any person can be charged with a criminal offense. This statute is the offspring of the original Mann Act, which dealt primarily with transporting prostitutes across state lines. In this case, the defendant was a field hockey coach who was charged with transporting one of his players (a minor) across state lines in connection with a practice and engaging in sexual conduct with her. The Second Circuit reversed the conviction, because there was insufficient evidence to support the government's theory that the defendant caused the defendant to travel across state lines with regard to the trip to the practice (her father drove her to the practice and was available to pick her up the next day, so the defendant was not the cause of her interstate travel). The defendant did eventually drive the minor back home after practice and during the return trip, they engaged in sexual conduct.

However, the evidence established that the sexual conduct occurred prior to the crossing of a state line and in order to be guilty of a § 2423 offense, the defendant must form the intent to engage in sexual conduct before crossing the state line and then engage in the sexual conduct after crossing the state line.

***United States v. Joseph***, 542 F.3d 13 (2d Cir. 2008) The trial court instructed the jury that an enticement offense (18 U.S.C. § 2422(b)) could be found if the defendant made the possibility of having sex with the defendant more appealing. In other words, if the defendant, over the Internet, was communicating with (what he thought was) a young girl and made the possibility of having sex with him appealing, this would constitute enticement. The Second Circuit reversed. "Enticement" is not the same as "making more appealing."

***United States v. Gladish,*** 536 F.3d 646 (7th Cir. 2008) The defendant communicated with a person he believed was a young girl (actually an undercover agent) in an Internet chatroom. He suggested that at some point in the future, they should engage in sex. The Seventh Circuit held that this "hot air" did not qualify as enticement to engage in prohibited sexual activity in violation of 18 U.S.C. § 2422(b). Equating the enticement statute to an attempted crime, the court held that such talk did not involve a "substantial step" toward the commission of the crime. Judge Posner quoted T.S. Elliot: "Between the Conception; And the Creation; Between the Emotion; And the Response; Falls the Shadow."

## *ENTRAPMENT*

***Jacobson v. United States***, 503 U.S. 540 (1992) The evidence in this case established entrapment as a matter of law. Government agents repeatedly, over the course of two years, urged the defendant to order child pornography. When the defendant finally ordered the magazines, the agents arrested him.

***Mathews v. United States***, 485 U.S. 58 (1988) The Court holds that the defendant is entitled to present inconsistent defenses, including "I didn't do it" and "If I did, I was entrapped."

***United States v. Dennis***, 826 F.3d 683 (3rd Cir. 2016) At the urging of the ATF, an informant convinced the defendant to engage in some faux drug robberies. This reverse sting involved repeated efforts to enlist the defendant's help: the informant explained to the defendant that he needed the money to help his mother who had cancer. The informant also told the defendant that they could net more than $1 million. Though the defendant had, in fact, committed crimes with the informant previously and despite the fact that the defendant recruited others to also participate in the robbery, he was entitled to an entrapment instruction and the trial court committed reversible error in declining to instruct the jury on this defense. Regarding predisposition, the defendant's prior crimes did not involve violent crimes, so the threshold for a jury instruction on the entrapment defense was met.

***United States v. Rutgerson***, 822 F.3d 1223 (11th Cir. 2016) Generally, specific acts of good conduct are not admissible as character evidence. However, if a person's character, or trait of character is an essential element of a claim or defense, then specific acts are admissible. F.R.E. 405(b). In this case, the court held that when a defendant asserts an entrapment defense, Rule 405(b) applies, and the defendant is entitled to present specific acts of good conduct (that show an absence of predisposition to commit the crime).

***United States v. Pedrin***, 797 F.3d 792 (9th Cir. 2015) This is another of the stash house sting cases (see, Black, annotated below). The Ninth Circuit upheld the conviction, but Judge Noonan, like Judge Rienhardt in Black, decried the entire operation and the prosecution of the defendant who was nor suspected of having had any involvement in any robberies before he was "invited" to participate in this offense.

***United States v. Barta***, 776 F.3d 931 (7th Cir. 2015) The conduct of the government agent in persisting encouraging the defendant to accept a bribe amounted to entrapment as a matter of law. "The government is supposed to catch criminals do not create them." It is not just the number of contacts between the undercover agent and the defendant that controls. The frequency of the contacts, the continuous offering of "sweeteners" to a bribe that the defendant already turned down, the number of unanswered or unreturned calls – all of these are factors in deciding whether the government's conduct amount to improper inducement. The persistence of the government is what matters.

***United States v. Mayfield***, 771 F.3d 417 (7th Cir. 2014) In this en banc decision, the Seventh Circuit reversed the trial court's pretrial decision (ruling on a government motion in limine) to bar the entrapment defense. In a lengthy decision, the appellate court explained in great detail the relationship between the concepts of predisposition and inducement, noting at one point that even a person who is predisposed can be entrapped. The court also held that when ruling on the availability of the entrapment defense pretrial, the court must assume the truthfulness of the defendant's proffer and not balance it against any competing proffer by the government: the jury must decide if the defendant's evidence of entrapment is valid, and the trial judge may not engage in fact finding based on disputed evidence prior to trial.

***United States v. Kopstein***, 759 F.3d 168 (2d Cir. 2014) Though the defendant did not deny possessing child pornography, he defended against distribution charges on the basis that he was entrapped by the undercover agent to send the images to him. The defendant believed he was chatting with a young girl who repeatedly asked him to send "her" images of child pornography. The defendant finally agreed to do so. The trial court's initial entrapment charge to the jury was appropriate and in conformity with Second Circuit law. The instructions became confusing, however, when the court also instructed the jury that if it found that the defendant did not distribute the pornography, it could find the defendant guilty of the lesser included offense of possession. But this was not correct, because even if the defendant did distribute the pornography, he could be found not guilty based on

entrapment. The confusion was compounded by supplemental instructions that were inconsistent in connection with the burden of proof regarding the initial inducement phase of the entrapment defense.

***United States v. McGill***, 754 F.3d 452 (7th Cir. 2014) The defendant was charged with distributing child pornography. He claimed that he was entrapped by an informant who asked him to give him child pornography on a flash drive. The trial court declined to instruct the jury on the law of entrapment, because there was evidence that the defendant already possessed child pornography, he attended a party at which others shared child pornography, and there was inadequate proof of coercion. The Seventh Circuit reversed: the evidence was sufficient to authorize an entrapment instruction because there was no evidence of predisposition to distribute child pornography prior to the informant's solicitation of the child pornography from the defendant and the informant's persistence in getting the child pornography from the defendant was sufficiently coercive and relentless that an entrapment instruction was authorized. In addition, the informant was a friend of the defendant (who had been arrested) and the government's exploitation of a friend of the defendant to induce the defendant to commit a crime is a relevant factor to consider in deciding whether there was sufficient evidence of coercion.

***United States v. Black***, 750 F.3d 1053 (9 th Cir. 2014) This decision contains a noteworthy dissent to the denial of a request for rehearing en banc. Judge Reinhardt posed the question: "Whether the government may target poor, minority neighborhoods and seek to tempt their residents to commit crimes that might well result in their escape from poverty[?]" He then noted, "These cases force us to consider the continued vitality of the outrageous government conduct doctrine itself." The case involves the use of a CI, who was instructed by the government to go to Phoenix and recruit random people to help rob a nonexistent cocaine stash house. The CI went to a bad part of town and looked for people who looked like bad guys. When the defendant said he was interested, the CI introduced him to the undercover agent who told the defendant about the large quantity of cocaine at the fictitious stash house (thus driving up the Guideline calculation). Judge Reinhardt emphasized numerous problems with this operation, including its inception: The CI was sent to look for "bad guys" in a "bad part of town," i.e., a minority neighborhood. This was an open invitation to racial discrimination. The CI was not told to invite known or suspected criminals to get involved in the stash house robbery. This dissenting opinion contains a wealth of quotable observations, including, "The government verges too close to tyranny when it sends its agents trolling through bars, tempts people to engage in criminal conduct, and locks them up for unconscionable periods of time when they fall for the scheme. . . In this era of mass incarceration, in which we already lock up more of our population than any other nation on Earth, it is especially curious that the government feels compelled to invent fake crimes and imprison people for long periods of time for agreeing to participate in them – people who but for the government's scheme might have ever entered the world of major felonies. Of course, the government also controls the (often extraordinarily long) amount of time that its targets spend in prison after reverse sting operations, as it can specify the amount of drugs involved in the fake conspiracies." Chief Judge Kozinski joined this dissent.

***United States v. Cortes***, 757 F.3d 850 (9th Cir. 2014) The decision in Alleyne v. United States provides that a mandatory minimum sentence may only be triggered if proof of the drug quantity was proven to the jury beyond a reasonable doubt. In this case, the Ninth Circuit holds that a "sentencing entrapment" claim must also be submitted to the jury: thus, if the defendant claims that the amount of drugs was increased by the undercover agent in order to trigger the mandatory minimum and the defendant would not have participated in a transaction of that magnitude, the jury must be instructed on that "defense." In a separate holding the appellate court held that the jury should be instructed that while the amount of profit that a defendant anticipates cannot alone establish the defense of entrapment, if the profit is offered solely by the government, this is a factor that may be considered in deciding whether the government induced the criminal conduct.

***United States v. Pillado***, 656 F.3d 754 (7th Cir. 2011) The trial court erred in failing to instruct the jury on the law of entrapment. The trial court held that there was no evidence of "extraordinary inducement" and that the defendant could have simply "walked away." But these are not the proper standards for evaluating whether a defense entrapment is available. The trial court failed to begin with an analysis of whether there was any evidence of predisposition. Though the entrapment defense is a two-part test, both prongs must be considered in evaluating whether the defense is available. The absence of any predisposition "informs" the inducement inquiry, as well. The purpose of the entrapment defense is to ensure that a person with no predisposition is not transformed into a criminal by the government. A person with no predisposition whatsoever is not required to prove that the government used extraordinary inducement to persuade him to commit a crime. There was sufficient evidence of "persuasion" in the record to support an entrapment instruction in this case.

***United States v. Theagene***, 565 F.3d 911 (5th Cir. 2009) The defendant was entitled to an entrapment instruction in this case involving an allegation of bribing an IRS revenue agent. There was sufficient evidence in the trial to support a jury's determination that the defendant was not predisposed to commit the offense and that the agent encouraged the defendant to bribe him. Evidence of inducement was supplied by a single telephone call in which the agent steered the conversation toward bribery as a solution to the tax delinquency problem. Failing to instruct the jury on this defense was reversible error.

***United States v. Luisi***, 482 F.3d 43 (1st Cir. 2007) The court discusses the concept of vicarious or third-party entrapment. In this case, the government targeted the defendant, Luisi. Efforts by an informant to induce Luisi to commit the crime were unsuccessful, so the middleman utilized the services of another person (a mob boss) to pressure the Luisi to commit the crime. The First Circuit concludes that in this situation, the defendant is entitled to an entrapment instruction. This is not a case in which a pressured defendant employs the services of an unsuspecting but willing participant, in which case the unsuspecting but willing participant could not claim entrapment. In this case, the target of the government's pressure tactics was the defendant, even though the person who ultimately put the pressure on the defendant was not himself acting at the direction of the government.

***United States v. Sandoval-Mendoza***, 472 F.3d 645 (9th Cir. 2006) The trial court erred in barring the defendant from introducing expert medical testimony that the defendant's medical condition (brain damage caused by pituitary tumor) rendered him unusually susceptible to "inducement" in this entrapment-defense case. The fact that doctors disagreed about the defendant's medical condition did not mean that the defendant's expert testimony was inadmissible. Medical testimony that a medical condition renders a person unusually vulnerable to inducement is highly relevant to an entrapment defense and should not have been excluded.

***Bradley v. Duncan***, 315 F.3d 1091 (9th Cir. 2002) The state trial court's failure to instruct the jury on the law of entrapment amounted to a due process violation and the Ninth Circuit ordered that the petitioner's § 2254 petition should have been granted. The defendant helped a decoy who was addicted and going through withdrawal, purchase a small amount of drugs. The Ninth Circuit held that the right to have the jury instructed on a defense provided by state law is protected by the Due Process Clause.

***United States v. Mendoza-Prado***, 314 F.3d 1099 (9th Cir. 2002) When a defendant relies on an entrapment defense, Rule 405 allows him to introduce good character evidence. In this case, the government argued the converse: when the defendant relies on an entrapment defense, the government should be permitted to introduce any prior crime evidence, including unrelated crimes. The Ninth Circuit disagreed: Different inferences are drawn regarding predisposition from evidence of bad character and from evidence of good character. In short, the government is limited to introducing evidence of predisposition to commit a similar offense, not any criminal offense. The defendant, on the other hand, may introduce evidence of general good character.

***United States v. Thomas***, 134 F.3d 975 (9th Cir. 1998) In an entrapment case, the defendant is entitled, pursuant to both Rules 404(b) and 405(b) to introduce evidence of his lack of criminal record – that is, his good character. The defendant's "character" is relevant in an entrapment case on the issue of predisposition.

***United States v. Duran***, 133 F.3d 1324 (10th Cir. 1998) The trial court failed to instruct the jury in connection with the entrapment instruction that the government had the burden of disproving entrapment. That is, in order to convict the defendant who has raises an entrapment defense, the government must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. The failure to instruct the jury on this principle was plain error requiring reversal of the conviction. The trial court also erred in failing to adequately answer jury questions about the status of "agents" (such as nongovernment employees who were acting as informants) in connection with the entrapment defense. The jury repeatedly asked if certain informants who were acting on behalf of the government were "agents" within the definition of the entrapment defense. Failing to answer these questions was reversible error.

***United States v. Sligh***, 142 F.3d 761 (4th Cir. 1998) The jury could have found that an IRS agent repeatedly baited the defendant into paying her a bribe, and that the defendant repeatedly ignored these requests. Given these reasonable inferences, the trial court erred in deciding that no entrapment instruction would be given to the jury.

***United States v. Burt***, 143 F.3d 1215 (9th Cir. 1998) The trial court gave the improper pre-Jacobson entrapment instruction that improperly explained the burden of proof with regard to the element of predisposition.

***United States v. Gamache***, 156 F.3d 1 (1st Cir. 1998) The defendant was charged with violating 18 U.S.C. § 2423(b) – traveling in interstate commerce for the purpose of engaging in a sexual act with a person under the age of 18. This case began with a "sting" operation in which a police officer posed as a "mother" on the internet, seeking a man to "educate" her children about sex. The defendant was clearly on a "different wavelength" than the police, seeking adult companionship. The police officer's artifice, however, induced the defendant to come to meet the undercover officer with children. The trial court erred in failing to instruct the jury on the law of entrapment.

***United States v. Montanez,*** 105 F.3d 36 (1st Cir. 1997) In considering the improper inducement component of an entrapment defense, the jury may consider whether the undercover informant induced the defendant by claiming that she would lose her children if he did not help her acquire cocaine. The trial court in this case erred in failing to instruct the jury specifically on this point, that is, that an appeal to sympathy may amount to improper inducement.

***United States v. Joost***, 92 F.3d 7 (1st Cir. 1996) The defendant was the target of an undercover operation for several months, focusing first on counterfeit slot machine tokens. During the undercover operation, the police, on several occasions asked the defendant to furnish them with a weapon (the defendant was a convicted felon, so his possession of a weapon would be a felony), a request he eventually satisfied. The trial court erred in denying a request to instruct the jury on the law of entrapment. Though the police never used force, or undue persuasion to induce the defendant to obtain the gun, their request persisted for over three months before he finally acquiesced. Also, the police were aware of the defendant's dire financial situation and used that "weakness" to induce him to produce a firearm for them. Finally, the calls from the agents were persistent, constant, and frequent.

***United States v. Rodriguez***, 858 F.2d 809 (1st Cir. 1988) If there is support for the defendant's claim that the government induced the commission of the crimes and the defendant lacked predisposition, the defendant is entitled to a jury instruction on entrapment. In this case, a reasonable juror could have determined that the defendant was entrapped, and the trial court erred in refusing to give a requested entrapment instruction.

***United States v. Bradley***, 820 F.2d 3 (1st Cir. 1987) An informant in jail threatened a cellmate with physical injury if he did not obtain cocaine for him. The cocaine was provided to a guard at the jail who then arrested the defendant. The Court holds that this presents a valid claim of entrapment. However, the individual who supplied the cocaine to the defendant, even though he was aware of the threats on the defendant's life, could not avail himself of the entrapment defense.

***United States v. Khubani***, 791 F.2d 260 (2d Cir. 1986) Whether initial entrapment extends through a series of crimes is a question of fact for the jury.

***United States v. Berkery,*** 889 F.2d 1281 (3rd Cir. 1989) It was reversible error to require the defendant to admit to all elements of a conspiracy before allowing him to argue entrapment to the jury.

***United States v. Fedroff***, 874 F.2d 178 (3rd Cir. 1989) The defendant offered sufficient evidence to permit a jury instruction on the law of entrapment. Though the evidence was weak on the government's coercive efforts to get the defendant to commit the crime, they did "wine and dine" him and otherwise deceive him in an effort to convince him to accept a kickback.

***United States v. Pervez***, 871 F.2d 310 (3rd Cir. 1989) Under the decision in Mathews, it was error to require the defendant to admit to all elements of the offense prior to issuing the jury instruction on the law of entrapment.

***United States v. Bradfield***, 113 F.3d 515 (5th Cir. 1997) In order to have the jury instructed on the defense of entrapment, the defendant must provide, at the least, a basis for a reasonable doubt on the ultimate issue of whether criminal intent originated with the government. The defendant satisfied this standard in this case and the trial court erred in denying his request for an entrapment instruction. The defendant is not required to prove that the government used threats or coercion; he is only required to show that he was not predisposed to commit the offense before first being approached by government agents.

***United States v. Sandoval***, 20 F.3d 134 (5th Cir. 1994) The government failed to rebut the defense of entrapment and the defendant was entitled to be acquitted as a matter of law. The IRS agent approached the defendant about a tax liability. The defendant suggested a "deal." The agent decided that this meant a "bribe" and pursued the request doggedly. At the next meeting, the defendant offered to provide information about other criminals in hope of receiving a reward, but the agent steered the defendant towards something which could benefit her (the agent), commenting that "information is not enough." The agent then specifically asked that the defendant "scratch her back and I'll scratch yours." They later agreed on a cash payoff. This amounted to entrapment as a matter of law. The government failed to show any evidence of predisposition. Although an eager acceptance of an opportunity to commit some illegal act may prove predisposition, Jacobson clarified the boundaries of such substituted proof, rejecting it where significant and persistent government encouragement was required to induce the crime.

***United States v. Kang***, 934 F.2d 621 (5th Cir. 1991) It was reversible error to permit a prosecutor to argue to the jury that hearsay evidence admitted for the sole purpose of explaining an agent's conduct (in initiating an investigation) was substantive evidence of the defendant's predisposition to commit the offense. The evidence was admitted for a limited purpose, and it could not be used for another purpose in the closing argument.

***United States v. Cantu***, 876 F.2d 1134 (5th Cir. 1989) It was error to exclude as hearsay statements made by an informant to the defendant. The statements were offered to demonstrate the defendant's state of mind, and to support his entrapment defense, not for the truth of the matter asserted.

***United States v. Newman***, 849 F.2d 156 (5th Cir. 1988) The defendant raised an entrapment defense and sought to introduce expert testimony as to a mental disease, or subnormal intelligence making him peculiarly susceptible to inducement. The Court holds that such evidence is admissible, however, the defendant in this case failed to make a sufficient proffer and reversal was not required.

***United States v. Robinson***, 887 F.2d 651 (6th Cir. 1989) The trial court erred in requiring the defendant to admit the elements of the offense prior to getting an entrapment instruction.

***United States v. Graham***, 856 F.2d 756 (6th Cir. 1988) The decision in Mathews v. United States is retroactive. Thus, it was reversible error for the trial court to refuse an entrapment instruction solely on the basis that the defendant had not admitted all elements of the offense.

***United States v. Hollingsworth***, 27 F.3d 1196 (7th Cir. 1994)(en banc) Rehearing this entrapment case en banc, the Seventh Circuit again holds that Jacobson requires the government to prove that the defendant was ready, willing, and able to commit the offense in order to rebut the claim of entrapment. Mere willingness, alone, is not sufficient to establish predisposition. The key to Jacobson is the definition of entrapment as being, "the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law." A politician is ready and able to take a bribe; a drug addict is capable of selling drugs. Predisposition in those cases only requires a showing of willingness. But here, the defendants were not ready or capable of being international money launderers without the aid of the government.

***United States v. Hollingsworth***, 9 F.3d 593 (7th Cir. 1993) In a sweeping review of the entrapment defense, the Seventh Circuit holds that the government's burden in defeating an entrapment defense is not satisfied merely by showing that the defendant was willing to commit the crime; rather, the government must prove that the defendant was "ready" to commit the crime – that he was poised and likely to commit the crime. Here, the defendants were inept, incapable international money launderers. The government provided the means and the wherewithal to commit the offense. The court holds that the government "turned a harmless man with impure thoughts into a felon." Relying on Jacobson, the court observed, "The federal government shall not use its resources to increase the criminal population by inducing people to commit crimes who otherwise would not do so. . . [T]he proper use of the criminal law in a liberal society is to regulate potentially harmful conduct for the protection of society, rather than to purify minds and to perfect character. A person who would not commit a crime unless induced to do so by the government is not a threat to society and the criminal law has no proper concern with him, however evil his thoughts or deficient his character." The Seventh Circuit then re-heard the case en banc. See supra.

***United States v. Fusko,*** 869 F.2d 1048 (7th Cir. 1989) The defendant's crime in defrauding her insurer was first suggested by a friend who was an undercover confidential informant for the FBI. She claimed at trial that her friend's persuasion overcame her initial reluctance to commit the offense. This is sufficient to authorize an entrapment instruction.

***United States v. Martinez,*** 122 F.3d 1161 (9th Cir. 1997) Despite being recruited by an undercover informant on several occasions to sell drugs, the defendant resisted. Eventually, however, he acquiesced. The informant taught the defendant how to sell drugs, promised him great wealth and reassured him not to worry about the police. The Ninth Circuit concluded that the defendant established the defense of entrapment as a matter of law.

***United States v. Rameriz-Rangel***, 103 F.3d 1501 (9th Cir. 1996) Numerous decisions have discussed the concept of sentencing entrapment under the Sentencing Guidelines and the Guidelines themselves now provide for cases in which the government supplies more drugs than the defendant could afford in order to increase the base offense level. In this case, however, the sentence was for violating 18 U.S.C. §924(c), using a firearm in connection with a drug offense. The defendant agreed to receive firearms in exchange for drugs, which does amount to a §924(c) violation. What the government supplied, however (and arguably without any knowledge or intent on the part of the defendant) was machine guns, a 924(c) violation which carries a fifteen-year sentence, rather than the five year sentence for a §924(c) violation involving a normal gun. The court holds that the lower court should determine whether the defendant negotiated for or knew that machine guns would be supplied. If not, then only a five-year sentence should be imposed.

***United States v. Reece***, 60 F.3d 660 (9th Cir. 1995) The trial court failed to instruct the jury properly on the entrapment defense. The instruction failed to explain that the jury could convict the defendant only if the government proved beyond a reasonable doubt "that the defendant was disposed to commit the criminal act prior to first being approached by government agents."

***United States v. Sterner***, 23 F.3d 250 (9th Cir. 1994) The trial court instructed the jury on the law of entrapment as follows: "Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and as a matter of policy, the law forbids his conviction in such a case. On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be favorable opportunity is not entrapment." This was reversible error. The use of the term "already" in the second sentence is ambiguous and does not adequately advise the jury that the predisposition must exist prior to the inducement offered by the government. The jury could have erroneously believed that even if the defendant was not initially disposed to commit the crime, he could develop such a disposition during the later course of interacting with the government informant and still be guilty.

***United States v. Lessard***, 17 F.3d 303 (9th Cir. 1994) As in the Mkhsian case, the trial court did not make it clear that if the defendant was initially entrapped, then his continued participation in the scheme would be tainted by the same entrapment. That is, "a defendant who is initially entrapped by the government cannot then become unentrapped during the same course of conduct." The government must prove that the predisposition existed prior to the initial government involvement. The jury must be clearly instructed that if the defendant was not initially disposed to commit the crime, it would still be entrapment if he later developed such a disposition during the later course of interacting with the government informant.

***United States v. Mkhsian***, 5 F.3d 1306 (9th Cir. 1993) The trial court's entrapment instruction did not clearly explain that the defendant must have been predisposed prior to meeting with the government agents in order to find that he was not entrapped. The court's instruction could have been understood by the jury to mean that if the defendant developed the disposition during his dealings with the agents, he was not entrapped. Under Jacobson, a person has been entrapped if he was not predisposed to commit the offense prior to being approached by the government.

***United States v. Kessee***, 992 F.2d 1001 (9th Cir. 1993) The defendant testified that he had never previously been involved in the sale of cocaine; that he initially refused to sell drugs for the informant; that he eventually consented after he lost his job and needed food for his family. Though he was impeached during cross-examination, and it was evident that he was conversant in the drug trade, it was reversible error to fail to instruct the jury on the law of entrapment. The jury, not the trial judge, must make the credibility decisions whether to accept the defendant's version of the offense.

***United States v. Becerra,*** 992 F.2d 960 (9th Cir. 1993) The trial court erred in refusing to give an entrapment instruction to the jury. The defendant's testimony – claiming that the undercover agent contacted him over forty times in a three-month period to convince him to find cocaine and claiming to be from the New York Mafia – was sufficient to raise the defense.

***United States v. Skarie***, 971 F.2d 317 (9th Cir. 1992) The defendant was entrapped as a matter of law. There was insufficient evidence of predisposition offered by the government – the fact that the defendant admitted to using drugs in the past was not determinative of predisposition – and the proof established that the informant threatened the defendant, as well as her son, in an effort to persuade her to engage in a methamphetamine transaction.

***United States v. Tallmadge***, 829 F.2d 767 (9th Cir. 1987) The defendant was advised by a federally licensed firearms dealer that the defendant could purchase a firearm despite his prior conviction of a felony because the felony conviction was reduced to a misdemeanor. This was incorrect advice. Nevertheless, by the doctrine of entrapment by estoppel, the defendant could not be convicted of possessing a weapon after having been convicted of a felony.

***United States v. Beal***, 961 F.2d 1512 (10th Cir. 1992) Defendant was acquitted on one count of distributing cocaine but convicted of another. He defended both counts on the basis that he was entrapped. The second sale occurred approximately twenty-four hours after the first sale. The trial court's decision to grant a post-verdict motion for judgement of acquittal was

affirmed by the appellate court. The discreet acts of the defendant were part of the same continuum of events motivated by the same governmental influence.

***United States v. Collazo***, 885 F.2d 813 (11th Cir. 1989) In this entrapment case, the trial court improperly advised the jury that a defendant must come forward with evidence that the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it. This is a preliminary legal question which the judge must determine and not a question which is submitted to the jury. The instruction improperly suggested that the defendant had a burden to establish the entrapment defense. Reversal was required.

***United States v. Washington***, 106 F.3d 983 (D.C. Cir. 1997) Though not applicable in this case, the D.C. Circuit holds that in certain circumstances, a defendant is entitled to an instruction on the law of derivative entrapment. This occurs where the government induces one person to commit a crime and that person, not acting knowingly as a government agent, induces another person (the defendant) to commit the crime. Thus, the defendant is induced by someone who is not knowingly acting at the behest of the government. To apply the concept of derivative entrapment, the government must direct the unwitting agent to induce others – specific others.

## *ENTRAPMENT BY ESTOPPEL*

***United States v. Giffen***, 473 F.3d 30 (2d Cir. 2006) The Second Circuit discusses at some length – all of which is dicta – the concept of entrapment by estoppel and the defense of "public authority."

***United States v. Batterjee***, 361 F.3d 1210 (9th Cir. 2004) The defendant was not a citizen and, pursuant to 18 U.S.C. § 922(g)(5)(B) was not permitted to possess a firearm. When he went to a store to buy a gun, the dealer asked certain questions, each of which the defendant answered accurately – including the fact that he was not a citizen – and filled out the required forms accurately, as well. The dealer followed up with certain questions relating to his citizenship answer and then sold him the gun. The dealer did not specifically ask, however, whether the defendant was in the United States on a work visa (which was what disqualified him for possessing a firearm). The Ninth Circuit held that the prosecution was barred under the theory of entrapment by estoppel.

***United States v. Abcasis,*** 45 F.3d 39 (2d Cir. 1995) The defendants claimed that they had been informants for the DEA and engaged in a narcotic smuggling operation, believing that this was authorized by their informant status. The trial court erred in denying their request for an instruction on the law of entrapment by estoppel. In order to be entitled to this instruction, the defendant must show that his reliance on the government agent's statement was reasonable in that "a person sincerely desirous of obeying the law would have accepted the information as true and would not have been put on notice to make further inquiries." In essence, the defendant must show that although he was mistaken, in good faith he believed that his conduct was authorized by the law enforcement agent with whom he was working.

***United States v. Albertini***, 830 F.2d 985 (9th Cir. 1987) The defendant was a frequent protester for nuclear disarmament at military bases on "open house" days. After one conviction, the Ninth Circuit held that his conduct was protected by the First Amendment. He continued to engage in these protests, in reliance on the Ninth Circuit decision and was again arrested. Subsequently, the United States Supreme Court reversed the decision of the Ninth Circuit. In the subsequent prosecution, the Court held that he had the right to rely on the Ninth Circuit decision and the prosecution was barred. A later Ninth Circuit decision overruled Albertini, on the basis of the Supreme Court decision in United States v. Rodgers, 466 U.S. 475 (1984). United States v. Qualls, 172 F.3d 1136 (9th Cir. 1999). United States v. Tallmadge, 829 F.2d 767 (9th Cir. 1987) The defendant was advised by a federally licensed firearms dealer that the defendant could purchase a firearm despite his prior conviction of a felony because the felony conviction was reduced to a misdemeanor. This was incorrect advice. Nevertheless, by the doctrine of entrapment by estoppel, the defendant could not be convicted of possessing a weapon after having been convicted of a felony.

***United States v. Thompson,*** 25 F.3d 1558 (11th Cir. 1994) The defendant was a convicted felon. For several years, he acted as an informant for the government, including the FBI and the ATF. In this prosecution for being a felon in possession of a firearm, he sought to rely on an entrapment by estoppel defense. The trial court incorrectly held that this was not a legal defense to a §922 charge. See e.g., Lewis v. United States, 445 U.S. 55 (1980); United States v. Billue, 994 F.2d 1562 (11th Cir. 1993). Entrapment by estoppel focuses on the actions of the government officials, not the state of mind (or predisposition) of the defendant. Entrapment by estoppel applies when an official tells a defendant that certain conduct is legal, and the defendant believes that official. Because the defense rests on principles of fairness, it may be raised even in strict liability offense cases. Finally, the defendant's proffer was sufficient to justify submitting the evidence to the jury. If there is any basis to support the defense, the jury should have been permitted to hear the testimony and weigh the evidence itself. Even if the defendant's testimony regarding the alleged conduct of the officials authorizing his possession was not credible, as the government asserts and the district court found, it is the jury's, not the district court's, function to determine questions of credibility and assess the defendant's testimony.

***United States v. Hedges***, 912 F.2d 1397 (11th Cir. 1990) 18 U.S.C. §208(a) is a strict liability offense. One who takes government action while having a conflicting financial interest is guilty of the offense even if he has no intent to violate the statute. However, in this case, the conviction had to be reversed because the trial court erred in failing to instruct the jury on the law of entrapment by estoppel. The defendant asked his Standards of Conduct Counselor to counsel him about the transactions in which he was engaged. Entrapment by estoppel applies when an official tells a defendant that certain conduct is legal, and the

defendant believes that official. This defense applies even in cases of strict liability because entrapment does not negate the intent element of an offense, it relies on the principle of fairness.

## *ENVIRONMENTAL CRIMES*

***United States v. Wilson***, 133 F.3d 251 (4th Cir. 1997) The Clean Water Act does not authorize prosecutions where the water being polluted has not been shown to either be navigable or affect interstate commerce. Regulations promulgated pursuant to the Act which outlaw polluting intrastate non-navigable waters that could affect interstate commerce, were not authorized by the Act and are not constitutional.

## *ESCAPE*

***United States v. Burke***, 694 F.3d 1062 (9th Cir 2012) The defendant's failure to return to a residential re-entry center did not amount to the crime of escape under 18 U.S.C. § 751(a).

***United States v. Rosa-Ortiz***, 348 F.3d 33 (1st Cir. 2003) The federal escape statute does not apply to people who are in federal custody solely on the basis of a material witness warrant.

***EVIDENCE (Charts and Summaries)***

***United States v. Adejumo,*** 772 F.3d 513 (8th Cir. 2014) At the beginning of trial, the prosecution exhibited a chart to the jury that portrayed all the defendants and included their nicknames and their "role" in the conspiracy (for example, "Foot Soldier"). The first witness, a government agent, was permitted to summarize each defendant's role in the alleged conspiracy, after which the government was allowed to admit the chart into evidence. The Eighth Circuit found the captions to be particularly offensive. Admitting the chart was error, though harmless.

***United States v. Groysman***, 766 F.3d 147 (2d Cir. 2014) The Second Circuit reversed this health care fraud conviction on the basis of several "egregious" evidentiary errors committed at trial. The defendant was charged with conspiring with a company that supplied durable medical equipment to prepare false invoices. The wholesaler was cooperating and taped many of the conversations, though many were inaudible. The government offered testimony from its case agent for several days at the start of trial. The agent (1) offered inadmissible bolstering testimony by testifying that certain transactions occurred, based only on his interviews of the cooperators – he had no personal knowledge to verify that these transactions occurred; (2) offered a summary chart which was not a summary of voluminous evidence, but simply a recitation of what he was supposedly told by the cooperators, thus violating both the hearsay rules and the bolstering rules and the rule governing the admissibility of summary charts; (3) the use of the agent to summarize the case at the outset was improper because it amounted to opinion testimony. The Second Circuit, as noted above, characterized these evidentiary errors as egregious and supported a plain error standard of review reversal.

***United States v. Moore***, 651 F.3d 30 (D.C. Cir. 2011) The D.C. Circuit joined several other Circuits in holding that it is not proper for the prosecution to begin its presentation with an "overview" witness who explains the overall nature of the crime and the evidence to be presented. The government should present its overview in the opening statement, not through the testimony of a law enforcement witness.

***United States v. Irvin***, 682 F.3d 1254 (10th Cir. 2011) In this mortgage fraud case, the Tenth Circuit held that it was reversible error to allow the government to introduce a chart that purportedly summarized several boxes of "loan files." The defendant complained that the loan files were not admitted or admissible and thus the chart could not be used pursuant to Rule 1006 or Rule 611. Because the government failed to prove that the loan files themselves were admissible as business records, the chart was not admissible. The government's claim that the chart also summarized the testimony of a witness who detailed the fraud was equally unavailing, because Rule 611, which allows that type of pedagogical device, may not be used to circumvent the hearsay rules, or the requirements of the business records exception. The Tenth Circuit also questioned the propriety of using a chart that used labels for the columns of information such as "Summary of Fraud" and "False Statements to Lenders."

***United States v. Meises,*** 645 F.3d 5 (1st Cir. 2011) The government improperly began its presentation of the evidence with a "summary witness" who described the roles of the various defendants on trial. This was improper summary testimony, based on improper opinion testimony.

***United States v. Oros***, 578 F.3d 703 (7th Cir. 2009) Rule 1006, which permits a party to introduce summaries of voluminous records is not a vehicle by which inadmissible evidence may be admitted. In this case, the government attempted to introduce phone records, but did not have a record custodian or a certification of the authenticity of the records. The trial court allowed the government to offer a summary of the phone records. This was error (though harmless) because summaries are only permissible if they relate to admitted evidence. United States v. Garcia-Morales, 382 F.3d 12 (1st Cir. 2004) The trial court erred in permitting the government to call an "overview" witness to begin its case, but the error was harmless.

***United States v. Casas***, 356 F.3d 104 (1st Cir. 2004) The government's case agent, the first witness to testify, was permitted, over objection, to "name the members of the organization" that was involved in drug dealing which, of course, included numerous of the defendants on trial. Some of the agent's testimony was based on what other conspirators told him during their debriefings. This testimony was not admissible as summary evidence, because the underlying facts were not in evidence. In fact, he was offered as an "overview witness" not a summary witness. See also United States v. Griffin, 324 F.3d 330 (5th Cir. 2003). The testimony violated the confrontation clause. The testimony was not proper expert testimony because there was nothing about his

testimony that was the proper scope of expert testimony. With regard to certain defendants, the error was reversible error. In United States v. Flores-De-Jesus, 569 F.3d 8 (1st Cir. 2009), the First Circuit once again condemned this practice, but again found harmless error. The Court stated that if the prosecutors in Puerto Rico continue to ignore the First Circuit decisions on this issue, they will be referred to DOJ and the local bar association for punishment.

***EVIDENCE (Evidence of Civil or Regulatory Violations)***

***United States v. Acevedo***, 882 F.3d 251 (1st Cir. 2018) The defendant, a lawyer, visited a co-defendant who was represented by counsel in a jail and encouraged him to lie (and exculpate the defendant's/lawyer's client). At trial, the court instructed the jury on Rule 4.2 of the Cannons of Professional Conduct, which dictates that a lawyer may not communicate with a represented party about a subject matter of the other client's representation. The trial court instructed the jury on this Rule. The First Circuit held that this was not error. The Rules of Professional Conduct may be considered as some evidence of the defendant's mens rea, or corrupt intent, though a violation of such a rule is not sufficient to convict a defendant of obstruction of justice.

***United States v. Gluk***, 831 F.3d 608 (5th Cir. 2016) The defendants, Gluk and Baker, were charged with financial fraud in connection with their operation of a company. The company (for which Gluk and Baker served as CEO and CFO) allegedly engaged in "channel-stuffing" – basically inflating earnings by creating false sales towards the end of a reporting period. When the crime was first detected, the board hired a private law firm which investigated and determined that the defendants were not engaged in the fraud and were not aware the crime was being committed. One of the defendants was fired because he was not sufficiently vigilant in detecting the fraud. Later, the SEC conducted an investigation and also concluded that the fraud was hidden from Gluk and Baker. Next, the government indicted two other people in the company. They pled, cooperated – claiming that Gluk and Baker were involved – and now these two individuals were identified as being involved in the conspiracy. The question on appeal is whether the law firm report and the SEC findings were admissible evidence on behalf the defendants. The Fifth Circuit held that such evidence is admissible. The appellate court analogized this case to an EEOC case in which the administrative agency's findings are admissible to assist the jury in its decision-making.

***United States v. Munoz-Franco***, 487 F.3d 25, 65 (1st Cir. 2007) This case contains a useful discussion of when the government is permitted to introduce evidence that a defendant's conduct violates a civil or regulatory provision. For example, in a bank fraud case, the defendant's conduct might violate federal banking violations. The court in this case held that the government was permitted to introduce such evidence if the trial court properly limits the jury's consideration of the evidence and carefully explains that the defendant is not on trial for violating regulations or civil rules. See United States v. Stefan, 784 F.2d 1093 (11th Cir. 1986); United States v. Christo, 614 F.2d 486 (5th Cir. 1980).

***United States v. Schnitzer***, 145 F.3d 721 (5th Cir. 1998) In this complicated savings and loan fraud case, the Fifth Circuit upheld the lower court's decision to grant a judgment of acquittal on certain counts. With regard to certain false entry counts, however, the appellate court found sufficient evidence to support the verdict but upheld the lower court's decision granting a new trial on those counts. Among the issues decided by the court was the impropriety of permitting the government to introduce evidence about a violation of a banking regulation to prove that the defendants intended to deceive regulators. The banking regulation was insufficiently related to the supposed false entry to support its admission. The court also upheld the reversal of a misapplication conviction (18 U.S.C. § 657), relying on United States v. Beuttenmuller, 29 F.3d 973 (5th Cir. 1994).

***United States v. DeSantis,*** 134 F.3d 760 (6th Cir. 1998) The defendant was charged with mail fraud. During trial, the government introduced evidence that the defendant's sales practices arguably violated Ohio state law. The appellate court held that in this context, the trial court should have instructed the jury that the violation of state law is not synonymous with mail fraud. Moreover, the intent to violate the state law is not sufficient to establish intent to commit mail fraud.

***EVIDENCE (Defendant's Right To Present Exculpatory Evidence)***

***Holmes v. South Carolina***, 547 U.S. 319 (2006) The United States Supreme Court reversed a South Carolina conviction in which the defendant was barred from introducing certain evidence that implicated another person in the commission of the crime. South Carolina had a rule of evidence that barred certain evidence implicating another perpetrator if the state presented forensic evidence that, if believed, strongly supported a guilty verdict. The Supreme Court unanimously (Justice Alito's first opinion) held that this rule violated the defendant's Due Process rights. See Washington v. Texas, 388 U.S. 14 (1967); Chambers v. Mississippi, 410 U.S. 284 (1973); Crane v. Kentucky, 476 U.S. 683 (1986); Rock v. Arkansas, 483 U.S. 44 (1987).

***United States v. Scheffer***, 523 U.S. 303 (1998) Though a defendant has a constitutional right to introduce evidence in his defense, this is subject to appropriate and rational rules of evidence. In military prosecutions, polygraph evidence is per se inadmissible. The Supreme Court held that this per se ban does not violate the defendants' constitutional rights, because it is neither arbitrary, nor disproportionate.

***Montana v. Egelhoff,*** 518 U.S. 37 (1996) The Due Process Clause places limits on the state's ability to bar evidence, but only when the restriction offends some principle of justice so rooted in traditions and conscience as to be fundamental. Montana's rule which bars a defense based on voluntary intoxication does not offend the Due Process Clause under this standard.

***Taylor v. Illinois***, 484 U.S. 400 (1988) Though the Court held that a defendant may be barred from presenting any alibi evidence because of a willful failure to comply with a state discovery rule requiring pre-trial notice of alibi testimony, the Court canvassed a number of recent decisions which stressed the right of a defendant to present a defense. Among these cases are Crane v. Kentucky, Rock v. Arkansas, Mathews v. United States, and Pennsylvania v. Ritchie. Rock v. Arkansas, 483 U.S. 44 (1987) Prior to trial, the defendant was hypnotized in order to improve her memory. The state had a per se prohibition on witnesses testifying

if their memory had been hypnotically refreshed. The defendant could only testify to matters “remembered and stated” prior to being hypnotized. This rule could not be applied to the defendant. The defendant has a Sixth and Fifth Amendment right to testify and present a defense which was impaired by the state evidentiary rule in this case.

***United States v. Espinoza***, --- F.3d --- (9th Cir. 2018) The test for admitting defense evidence that exculpates the defendant and places blame on another person is simply the test of relevance. In this case, the defendant was charged with smuggling drugs across the border. She sought to introduce evidence that her next-door neighbor may have planted the drugs in her car and she was an unwitting mule, including evidence of the neighbor’s drug-dealing background and deportations. This was relevant evidence and the trial court committed error in excluding the evidence because it did not “substantially connect” the neighbor to the crime.

***United States v. Slatten***, 865 F.3d 767 (D.C. Cir. 2017) This is the Blackwater prosecution relating to the murders committed by military contractors while serving in Iraq. Reversal was required because the trial court refused to sever one defendant’s case which was requested in order to introduce the statement of a co-defendant that was inadmissible in a joint trial. Severance is required under Rule 14 if it is necessary in order to assure that a defendant can introduce evidence that would be inadmissible at a joint trial, and which is essential to the defendant’s right to a fair trial. The statement of the co-defendant exonerated the defendant. Even though the co-defendant would not have testified at defendant’s severed trial, the statement of the co-defendant would have been admissible pursuant to Rule 807, the residual exception to the hearsay rule. The co-defendant’s statements to the authorities investigating the shooting contained equivalent circumstantial guarantees of trustworthiness: the co-defendant was speaking pursuant to a grant of immunity; he was implicating himself; his statements were consistent over time. Because the statement of the co-defendant would have been admissible at a separate trial, the trial court erred in denying the severance motion.

***Kubsch v. Neal,*** 838 F.3d 845 (7th Cir. 2016) The defendant was convicted of a triple murder. He contended that he was not at the location of the crime when the murders occurred. About five days after the killings, a young girl was interviewed on tape by the police and her statements exonerated the defendant. By the time of trial, however, she no longer remembered the events and even after reviewing the taped interview, her recollection was not refreshed. The defense was unavailing in invoking the “past recollection recorded” exception to the hearsay rule, because the witness could not even verify that the recorded statement accurately reflected her observations. The Seventh Circuit held that the recorded interview should have been admitted by the state trial court under the Chambers v. Mississippi 410 U.S. 284 (1973), Dur Process doctrine. See also Green v. Georgia, 442 U.S. 95 (1979) and Crane v. Kentucky, 476 U.S. 683 (1986), cases in which the Supreme Court held that there are cases in which Due Process trumps state evidence rules that would exclude evidence favorable to the defense.

***United States v. Williams***, 836 F.3d 1 (D.C. Cir. 2016) The defendant was charged with second degree murder for his role in a “hazing” incident involving another soldier on a military base. The hazing involved several soldiers beating another soldier (with his consent) for a few minutes. The incident resulted in the death of the hazed. The defendant argued that the victim’s consent was relevant to the defendant’s state of mind. Second degree murder requires the government to prove malice and malice can be proven by showing that a defendant intended to kill or, as the government argued here, that he consciously disregarded an extreme risk of death or serious bodily injury. While it is true that the defendant cannot “blame the victim,” the defense is still entitled to offer evidence that negates his culpable state of mind. The defense counsel argued that the victims’ consent to being hazed was relevant to the determination whether the defendant acted with malice. In closing argument, the prosecutor told the jury that that was entirely erroneous, and that the victim’s consent was not relevant to any issue in the case. After closing argument, the judge declined to issue an instruction that explained that the victim’s consent could be relevant to the issue of malice. The D.C. Circuit reversed the conviction. The victim’s consenting behavior—that is, his “continued, and enthusiastic, statements that he wanted the initiation to continue”—suggested that Williams was not conscious of an extreme risk that Johnson might die or be seriously injured.

***United States v. West***, 813 F.3d 619 (7th Cir. 2016) The defense sought to introduce expert testimony that would have explained that the defendant was a mentally ill person with a low IQ and was suggestible (all for the purpose of explaining that his confession was not reliable). The trial court excluded the expert testimony on the basis that it was just a back doorway of trying to get an insanity defense before the jury. The Seventh Circuit reversed: evidence which shows that a confession is not reliable is admissible and expert testimony is no exception.

***United States v. Gluk,*** 831 F.3d 608 (5th Cir. 2016) The defendants, Gluk and Baker, were charged with financial fraud in connection with their operation of a company. The company (for which Gluk and Baker served as CEO and CFO) allegedly engaged in “channel-stuffing” – basically inflating earnings by creating false sales towards the end of a reporting period. When the crime was first detected, the board hired a private law firm which investigated and determined that the defendants were not engaged in the fraud and were not aware the crime was being committed. One of the defendants was fired because he was not sufficiently vigilant in detecting the fraud. Later, the SEC investigated and also concluded that the fraud was hidden from Gluk and Baker. Next, the government indicted two other people in the company. They pled, cooperated – claiming that Gluk and Baker were involved – and now these two individuals were identified as being involved in the conspiracy. The question on appeal is whether the law firm report and the SEC findings were admissible evidence on behalf the defendants. The Fifth Circuit held that such evidence is admissible. The appellate court analogized this case to an EEOC case in which the administrative agency’s findings are admissible to assist the jury in its decision-making.

***United States v. Makkar***, 810 F.3d 1139 (10th Cir. 2015) The defendant was charged with distribution of an Analogue Drug. That statute requires proof that the defendant knew that the drug was, in fact, an analogue drug, or that the drug had essential the same chemical composition of a listed drug and the same physiological effect. At trial, the defendant sought to introduce evidence that he requested state agents to test the drugs he was testing. The government successfully moved to exclude this evidence on the theory that it was irrelevant to the defendant's guilt. The Tenth Circuit reversed: the evidence was probative of the defendant's knowledge about the chemical composition. After all, if he knew it was illegal, why we would he have it tested by a state law enforcement agency.

***United States v. Litvak***, 808 F.3d 160 (2d Cir. 2015) Litvak was a securities broker who worked for Jefferies & Company and was involved in selling residential mortgage-backed securities ("RMBS"). He was charged with fraud in connection with his sales of RMBS's. There were three categories of misrepresentations: (1) He lied about the cost at which Jefferies acquired certain RMBS in his effort to convince a purchaser to pay more for the same RMBS's; (2) He lied when he said that he was negotiating for the purchase of certain RMBS's at a certain price in his efforts to re-sell the RMBS's, when, in fact, Jefferies already owned the RMBS's at a lower price than the price he was about to pay to purchase the RMBS's; (3) In the process of purchasing RMBS's, he lied about the price at which he had negotiated to re-sell the RMBS's (falsely saying that the price was less than it actually was) and thereby induced the seller to sell the RMBS's to him at a cheaper price to enable Jefferies to make a profit. On the basis of these representations, Litvak was convicted of securities fraud and also making a false statement to the U.S. Treasury which was overseeing certain RMBS sales in connection with TARP. The Second Circuit reversed the false statement count, based on the failure to prove that Litvak's false statements were material. Though the U.S. Treasury was aware and monitored these types of sales, the Treasury made no "decision" that was affected by the price of the sales. The Second Circuit held, however, that the materiality of the false statements to counter-parties was a jury question that could not be decided as a matter of law for purposes of the securities fraud convictions under Rule 10b-5. Litvak argued that the "price" of the RBMS's to Jefferies was not what was important to the counterparties; what mattered was the value. The Second Circuit disagreed, holding that the jury was the proper factfinder on the question of materiality. However, the securities fraud convictions were reversed, because the district court improperly excluded expert testimony offered by Litvak on the topic of materiality. The expert was prepared to testify that a reasonable counterparty would not rely on representations made by Litvak and that they would normally make their own determination of value, rather than relying on Litvak's representation about Jefferies' price in purchasing (or the intended sales price of) the RMBS's. This was the proper subject of expert testimony. Finally, the Second Circuit held that the trial court erred in excluding evidence offered by Litvak that his supervisors permitted these types of sales practices by other brokers, which, according to Litvak, demonstrated his good faith and his lack of intent to defraud. The evidence was relevant to show that Litvak held an honest belief that he was not engaged in improper or illegal conduct. Litvak was retried and convicted of one count. This conviction, too, was reversed. One of the purchasers was permitted to testify that he viewed Litvak as his agent in the sale. This conveyed the impression that Litvak owed a higher duty of honesty to him, and that any misrepresentation would therefore by material. But Litvak was not, in fact, his agent and the Second Circuit held that permitting this evidence was reversible error. United States v. Litvak, 889 F.3d 56 (2d Cir. 2018).

***United States v. Haischer***, 780 F.3d 1277 (9th Cir. 2015) The defendant is entitled to present a defense of coercion, as well as a defense that she lacked the mens rea to commit the offense. The defendant in this case claimed that she suffered abuse at the hands of her boyfriend and explained that this was the basis of her coercion defense. The trial court erroneously excluded this evidence on the basis that the defendant did not admit that she committed the offense (i.e., that she knew that she was engaged in a fraudulent scheme).

***United States v. Bowling***, 770 F.3d 1168 (7th Cir. 2014) The defendant was charged with making a false statement on a firearms form that he filled out in order to purchase a gun. He denied that he was a convicted felon. In fact, he was a convicted felon (a fact that he acknowledged at trial), but he claimed that he was laboring under a mistake of fact when he filled out the form, because when he pled guilty to the predicate offense, he thought it was a misdemeanor offense. He sought to introduce evidence at the false statement trial that the prosecutor in the prior case had communicated an offer to the defense attorney in that case offering a misdemeanor disposition which the lawyer then communicated to the defendant. This, he claimed, was the source of his confusion. Excluding this evidence was reversible error.

***Alvarez v. Ercole***, 763 F.3d 223 (2d Cir. 2014) The state trial court erred in preventing the defense from cross-examining the lead detective about other investigations that were not pursued. The investigation that was not done was not subject to a hearsay objection, because the issue is not the truthfulness of what was told to a police officer conducting the investigation, but whether there were leads that were not followed. Denying the defense, the right to cross-examine the detective violated the Confrontation Clause and was particularly harmful, because the prosecutor arged in closing that the investigation was thorough.

**United States v. Certified Environmental Services, Inc**., 753 F.3d 72 (2d Cir. 2014) Federal and State laws regulate the removal of asbestos from buildings, including OSHA regulations and the Clean Air Act. A company that removes asbestos must comply with various laws regarding the method of removal and a separate "monitoring" company must monitor the air after the removal is accomplished. The defendants in this case (a company and several employees) were involved in monitoring asbestos removal and were charged with not properly monitoring the asbestos removal and submitting false monitoring reports. The defense sought to introduce evidence at trial about certain conversations with officials about their monitoring practices, specifically, whether particular monitoring practices were required if the location was not sufficiently "contained" (i.e., the area where the asbestos was being removed was not fully contained which might result in the monitoring causing more contamination in nearby areas). The government objected that these conversations were hearsay. The trial court's exclusion of this evidence

was reversible error. The evidence relating to the conversations with regulators was not offered to prove the truthfulness of the information provided by the regulators, but to prove that the defendants were acting in good faith when they engaged in certain monitoring practices. The fact that some of the conversations occurred after the criminal conduct did not make the evidence irrelevant, because it was consistent with what the defendants claimed was there long-standing understanding of the monitoring rules.

***United States v. Delgado-Marrero***, 744 F.3d 167 (1st Cir. 2014) The defense sought to introduce evidence to impeach the testimony of a police officer who had participated in undercover activities that involving luring the defendant (a police officer) into corrupt efforts to provide security for a drug deal. The evidence that the defense proffered involved other efforts of the undercover officer to lure police to engage in corrupt activities. This testimony was offered to support the entrapment defense. The trial court excluded the evidence pursuant to Rule 608(b), on the theory that extrinsic acts of misconduct on the part of a witness are not admissible if the evidence is offered to impeach the credibility of the witness. The First Circuit reversed: Rule 608(b) only limits extrinsic evidence that is offered for the sole purpose of attacking the character of the witness. Rule 608(b) does not limit the defendant's right to offer evidence that impeaches the witness for bias, or prior inconsistent statements, or to impeach his trial testimony. Quoting from United States v. Abel, 469 U.S. 45 (1984), the First Circuit wrote, "It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar."

***United States v. Murray***, 736 F.3d 652 (2d Cir. 2013) In rebuttal, the government presented the testimony of a cell tower expert who provided an opinion (albeit somewhat equivocal) about the defendant's location based on the cell tower evidence. The defendant sought to introduce surrebuttal evidence but the trial judge denied his request on the basis that the expert's testimony was not significantly incriminating. The Second Circuit reversed.

***United States v. Evans***, 728 F.3d 953 (9th Cir. 2013) The defendant was charged with various offenses involving his alien status and acquiring a false passport and certain federal benefits. The defendant sought to introduce a birth certificate he received from the State of Idaho. The trial court granted the government's motion in limine excluding the birth certificate on the basis of Rule 403 and Rule 104 and the trial court's conclusion that the birth certificate was fraudulently obtained. The Ninth Circuit reversed: Rule 104 is not a substantive rule of evidence. It simply is the procedure by which other rules of evidence (e.g., privilege, constitutional, hearsay) are enforced. The Rule does not provide an independent basis for the trial court to exclude relevant evidence. The trial court's conclusion that the birth certificate was fraudulently obtained was not a decision that the trial court could make, especially since it was based on the judge's credibility determination of the witnesses. When deciding based on Rule 403, the judge must assume the truthfulness of the proffer regarding the evidence. Excluding the evidence in this case was a constitutional due process violation.

***United States v. Hernandez-Meza***, 720 F.3d 760 (9th Cir. 2013) The trial court erred in this case in permitting the government to re-open the evidence and introduce evidence that was not previously produced to the defense as required by Rule 16. The government protested that the defendant's defense was unexpected (it was revealed when the defendant submitted his proposed requests to charge) and that the additional evidence was needed to refute the newly revealed theory of defense. The Ninth Circuit held that allowing the government to re-open the evidence was reversible error. The fact that the new defense was factually not realistic is not relevant, the defense had the right to raise this defense and to point out the gaps in the government's proof. Judge Kozinski wrote, "[A] criminal defendant, unlike the government, needn't have a good faith belief in the factual validity of a defense. So long as the defendant doesn't perjure himself or present evidence, he knows to be false—and Hernandez–Meza presented no evidence at all—he's entitled to exploit weaknesses in the prosecution's case, even though he may believe himself to be guilty. What matters in satisfying the government's burden of proof in a criminal case is not objective reality nor defendant's personal belief, but the evidence the government presents in court. No competent prosecutor would be surprised, based on what he thinks defendant should know, to find defense counsel poking holes in the government's case. The argument is without merit, yet the government made it before the district court, and again on appeal. The government's failure to produce the evidence in its Rule 16 production was not justified. The Rule requires the production of all documents "material to the preparation of the defense." Information is material even if it simply causes a defendant to completely abandon a planned defense and take an entirely different path. If the defendant in this case knew that the government had this evidence, the defendant may not have relied on this defense. Moreover, a defendant need not spell out his theory of the case in order to obtain discovery. Nor is the government entitled to know in advance specifically what the defense is going to be. Discovery must still be provided pursuant to Rule 16(a)(1)(E)(i). The Ninth Circuit held that the trial judge's summary rejection of the defendant's Rule 16 argument, as well as his unsupported decision to allow the government to re-open the evidence, required that the case be remanded and that a new judge preside over the case.

***United States v. Phillips***, 731 F.3d 649 (7th Cir. 2013) In this en banc decision, the Seventh Circuit held that the defendants should have been permitted to introduce evidence that the defendants (who were charged with making a false statement to a bank in violation of § 1014) were told by their broker that lying in response to certain questions on a loan application form was permissible. Th evidence was relevant to whether the defendants actually knew that their answers were false and whether they believed that answering the questions in that way would "influence" the bank's decision.

***United States v. Garcia***, 729 F.3d 1171 (9th Cir. 2013) The defendant was charged with murder and involuntary manslaughter as a result of his killing a person with whom he was fighting. The defendant sought to introduce evidence that the victim had previously engaged in various acts of violence towards others and the defendant knew of these other incidents. The trial court

erred in excluding this evidence. In a self-defense case, the defendant's knowledge of the victim's prior assaultive behavior is relevant to show his state of mind in shooting the victim. See also United States v. Saenz, 179 F.3d 686 (9th Cir. 1999); United States v. James, 169 F.3d 1210 (9th Cir. 1999).

***Harris v. Thompson***, 698 F.3d 609 (7th Cir. 2012) The trial court's decision to exclude a defense witness who was 6-years old based on the child's competence as a witness violated the defendant's Compulsory Process rights to present evidence in his defense. The child had critical exculpatory evidence and the jury should have been allowed to evaluate the credibility issue. The fact that the child believed in the tooth fairy, Santa Claus and Spiderman did not render him unfit to testify. (Part of the child's apparent confusion about who was "real" and who was not "real" was the way that questions were posed, which drew a distinction between characters in movies that were cartoons, or animated, and characters who were played by live actors). The state trial court violated the state statute that placed the burden of proving incompetency of a witness on the state, rather than proving competence of witness on the party calling the witness, as the court did in this case. In addition, the court held that the trial attorney provided ineffective assistance of counsel in failing to properly litigate the competency issue and to interview and prepare the child to testify. This case contains an encyclopedic review of Compulsory Process cases.

***Cudjo v. Ayers***, 698 F.3d 752 (9th Cir. 2012) The defendant was charged with murder. His brother was a key prosecution witness (his testimony at a preliminary hearing implicating the brother was offered at trial, though he refused to testify at trial). At trial, the defense sought to introduce the testimony of another man who was prepared to testify that the brother had confessed to him that he was the perpetrator, not the defendant. The trial court excluded this testimony because it was too unreliable, despite the fact that it was a statement against penal interest that would be admissible under that exception to the hearsay rules. Based on Chambers v. Mississippi, 410 U.S. 284 (1973), the Ninth Circuit granted the writ.

***Jackson v. Nevada***, 688 F.3d 1091 (9th Cir. 2012) The defendant was charged with raping his ex-girlfriend. He sought to introduce evidence of numerous false allegations of rape (including the testimony of police officers who had responded to earlier claims of rape). The state court excluded this evidence. In part, the exclusion was based on the defendant's failure to comply with a state law requiring pretrial notice of the intent to introduce prior false allegation evidence. See also Holley v. Yarborough, 568 F.3d 1091 (9th Cir. 2009). THE SUPREME COURT REVERSED in Nevada v. Jackson, 133 S. Ct. 1990 (2013). The Court held that the Nevada rule of evidence (comparable to Rule 608(b) FRE) that barred extrinsic evidence of a witness's prior acts of dishonesty was not unconstitutional. The Court also noted that the state rule also permitted such evidence of prior false allegations if the defendant provided pretrial notice, a rule that the Court held was properly enforced in the state courts.

***United States v. Carmen***, 697 F.3d 964 (9th Cir. 2012) Deporting a potentially exculpatory witness prior to providing the defense an opportunity to interview the witness violates the defendant's right to compulsory process and to due process. The defendant, however, is required to show that the government acted in bad faith, a showing that was, in fact, made in this case.

***United States v. Ibisevic***, 675 F.3d 342 (4th Cir. 2012) The defendant carried over $10,000 into an international flight from Dulles Airport heading to Bosnia. An ICE agent who had a Puerto Rican accent questioned the defendant and his mother (the mother spoke no English) about whether they were carrying cash. The defendant responded that they had $5,000.00. During this "questioning" the defendant turned to his mother and translated, "They are asking how much the luggage is worth if it is lost." The defendant and his mother actually had about $40,000 in the luggage, on their persons and in the mother's purse. At trial, the defendant claimed that he did not understand the question and that the mother's testimony (about what the defendant said to the mother) was admissible as a "present sense impression" to show a lack of understanding. The trial court held that this was hearsay and inadmissible. The Fourth Circuit reversed: The defendant's statement was not hearsay (it was not offered for the truth of the matter asserted; it nevertheless would qualify as a present sense impression; and it was important to his defense regarding his lack of understanding that he was making a false statement or knowingly failing to file a currency form in violation of the law.

***United States v. Waters***, 627 F.3d 345 (9th Cir. 2010) The defendant was charged with arson in connection with her activities with an environmental "terrorist" group. After she was first contacted by the FBI, she called her cousin and told him that the FBI might contact him and told him, "I am innocent" and instructed him to "tell them the truth." The first statement "I am innocent" is hearsay and the defendant was properly prohibited from introducing that out-of-court statement. But the second statement, urging her cousin to tell the truth, is not hearsay, because there is no assertion of fact that was being offered. That part of her statement was not hearsay and should have been admitted showing the defendant's lack of guilty mindset. In a separate holding, the Ninth Circuit held that the trial court erred in excluding evidence of a document produced by the defendant that demonstrated her peaceful agenda in promoting change in environmental policies. Excluding this document was particularly an abuse of discretion given the trial court's decision to allow the government to introduce various pro-anarchist and violence-promoting articles that the defendant supposedly gave to a co-conspirator.

***Lunbery v. Hornbeak***, 605 F.3d 754 (9th Cir. 2010) Relying on Chambers v. Mississippi, 410 U.S. 284 (1973), the Ninth Circuit held that excluding evidence that a witness heard another person confess to the murder with which the defendant was charged was reversible error. If, as in this case, the hearsay evidence is reliable and the declarant is unavailable, excluding the evidence under a state rule of evidence violates the federal Due Process Clause.

***United States v. Pineda-Doval***, 614 F.3d 1019 (9th Cir. 2010) This case involves a charge of smuggling illegal aliens resulting in death. The question presented to the Ninth Circuit is whether the defendant's offense "caused" the death of the aliens. The aliens were in the van which the police were chasing. The police placed "spike strips" on the road as part of the pursuit and this resulted in the van crashing, killing numerous illegal aliens in the vehicle. The Ninth Circuit held that excluding evidence of the

policies that governed the use of spike strips was error, because the question of proximate cause was hotly disputed. Harmless error.

***United States v. Stever***, 603 F.3d 747 (9th Cir. 2010) The defendant was charged with growing marijuana on his property. He defended on the basis that Mexican drug organizations must have planted the marijuana on his property. He made a Rule 16 request for any information in the possession of the government about the practice of Mexican drug organizations planting marijuana on private property in this district. The government refused to provide the information. The Ninth Circuit held that the lower court's failure to direct the government to produce this information was reversible error. The error was compounded by the lower court's order directing both parties not to mention anything about Mexican drug organizations, because any such evidence was speculative. The Ninth Circuit held that the defendant is entitled to present evidence of an alternative perpetrator and the lower court may not bar the defendant from presenting his defense.

***Gagne v. Booker***, 606 F.3d 278 (6th Cir. 2010) The Sixth Circuit held that the Michigan State Rape Shield Statute, as construed by the Michigan appellate court, was unconstitutionally applied. The defendant was charged, along with a co-defendant, of raping the defendant's former girlfriend. The defendant sought to introduce evidence (in support of his consent defense) that he and the girl had participated in group sex previously. The Michigan court held that this evidence was barred under the state Rape Shield statute. The Sixth Circuit held that this evidence could not be excluded: the Due Process Clause assures a defendant that he may introduce evidence that is highly relevant and indispensable to the central dispute. REHEARING EN BANC GRANTED 7/20/2010. DECISION OF THE PANEL VACATED AND THE CONVICTION WAS REINSTATED. 680 F.3d 493 (6th Cir. 2012).

***Barbe v. McBride***, 521 F.3d 443 (4th Cir. 2008) The defendant was charged with child sexual assault. An expert testified that the victim exhibited signs of sexual abuse. The defendant sought to introduce evidence that the defendant had been abused by other adults (and the child had made prior accusations about these prior assaults). Relying on the state rape shield statute, the trial court excluded the evidence. The Fourth Circuit granted the writ. Excluding evidence that would provide an alternative explanation for the expert's findings violated the defendant's right to confront the evidence against him. Pursuant to Michigan v. Lucas, 500 U.S. 145 (1991), the trial court must make a case-by-case determination whether the state evidence rule trumps the Sixth Amendment. In this case, the state trial court invoked a per se ban on any evidence of prior sexual activity of the victim.

***Ferensic v. Birkett***, 501 F.3d 469 (6th Cir. 2007) Defense counsel was directed to furnish his expert witness reports to the state two months prior to trial but waited until eleven days before trial to submit the report. The state trial court excluded the evidence. The Sixth Circuit affirmed the district court's granting of a writ of habeas corpus. The exclusion of the evidence in this case operated to deny the defendant the Constitutional right to present a defense. See generally Taylor v. Illinois, 484 U.S. 400 (1988). Less severe sanctions were available to remedy the defense attorney's error that would have protected the defendant's rights. This is especially so, because there was an inadequate showing that the state was prejudiced by the tardy disclosure.

***Christie v. Hollins***, 409 F.3d 120 (2d Cir. 2005) The prior testimony of a defense witness should have been admitted in this case in light of the showing by the defense that diligent efforts had been made to locate the witness and she had not been located.

***United States v. Boulware***, 384 F.3d 794 (9th Cir. 2004) The defendant was charged with tax evasion and related charges. He claimed that the money that he allegedly skimmed from the company (and gave to his girlfriend) was actually legally still owned by the company (and simply being held by the girlfriend) and was therefore not taxable (i.e., there was no transfer of the money for tax purposes from the company to the defendant or the girlfriend). In a state court lawsuit, the state court agreed that the funds were still owned by the company. The trial court in the federal prosecution erred in excluding evidence of the state court judgment. The court also concluded that the state court judgment was not hearsay because under Rule 803(15) it was a statement in a document affecting an interest in property.

***United States v. Hayes,*** 369 F.3d 564 (D. C. Cir. 2004) The government introduced a tape that suggested that the defendant was participating in a cover-up. The defendant responded by offering a tape of a conversation shortly thereafter during which he told the person on the phone, "Just tell the truth." The government persuaded the trial court that this was hearsay. The trial court erred in excluding this testimony. The defendant's statement was not hearsay, because it was not offered to prove the truth of what he said, but rather to show that he instructed others to tell the truth. Harmless error.

***United States v. Stephens***, 365 F.3d 967 (11th Cir. 2004) The defendant was charged with selling methamphetamine to an informant. The transactions were recorded on videotape, but the content of the tapes was hard to discern and did not clearly reveal the defendant handing any drugs to the informant. Nevertheless, the police testified that they searched the informant before he met with the defendant and he had money, but no drugs; and when he returned from the meetings, he had drugs and no money. Prior to trial, the informant died of natural causes. The defendant attempted to offer evidence at trial that the informant was regularly using, buying, and selling drugs during the time period of the undercover work. Defense counsel explained that his theory was that the informant actually hid drugs on his person or in his car before he had the meetings with the defendant, and he was tricking the police into believing that he was actually acquiring the drugs from the defendant. The trial court excluded the evidence, holding that this was an improper method of impeaching the informant – through prior bad acts evidence. The Eleventh Circuit reversed, holding that this evidence was admissible in support of the defendant's theory that the informant had a source of drugs which explained how he had the drugs to give to the agents. The evidence was also admissible under Rule 404(b) – defendant's use of Rule 404(b) – to show the informant's other acts that explained his opportunity to commit the deception perpetrated on the police.

***United States v. Moussaoui***, 365 F.3d 292 (4th Cir. 2004) In this celebrated 9/11 trial of the suspected terrorist, the defendant sought access to witnesses who were in custody of the U.S. military as suspected Al Quaeda terrorists. He sought access to

them to interview them, and to take their depositions pursuant to Rule 15, Fed. R. Crim. P. The Fourth Circuit agreed with the lower court and held that the Compulsory Process Clause, as well as the defendant's due process right to present a defense necessitated granting him access to these witnesses – or, in the alternative, granting some other relief (such as dismissal of the death penalty) if such access was denied as a matter of national security. See also ***United States v. Moussaoui*** 382 F.3d 453 (4th Cir. 2004).

***Chia v. Cambra,*** 360 F.3d 997 (9th Cir. 2004) It is clearly established federal law that when a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation.

***Chambers v. Mississippi***, 410 U.S. 284 (1973). In this case, two DEA agents were murdered during an undercover deal. During the ensuing arrest of one of the perpetrators, the perpetrator was shot. He made several statements, however, some shortly before being wheeled into surgery and others after he was out of surgery. In each of these statements, he revealed who was involved in the murder. The defendant in this case was not named as a member of the conspiracy. At trial, the witness refused to testify. The defendant sought to introduce the witness's statements. The Ninth Circuit held that there were sufficient indicia of trustworthiness associated with these statements to support their admission. Excluding this evidence violated the defendant's due process right to present a defense.

***United States v. Buffalo***, 358 F.3d 519 (8th Cir. 2004) The defendant contended that another man was the perpetrator of the assault with which he was charged. He called the other man to the stand, and he denied being the perpetrator. The defendant then sought to call two other witnesses who were prepared to testify that the other man had confessed to them. The district court excluded the evidence because the "prior inconsistent statements" would have been inadmissible hearsay. Rule 613(b) allows a party to use a prior inconsistent statement to impeach a witness, but if the witness is called to the stand for sole purpose of impeaching him, the "impeachment" is really a subterfuge for admitting the hearsay. Nevertheless, the Eighth Circuit holds that because there are no Confrontation Clause concerns when the defendant (as opposed to the government) seeks to engage in this type of subterfuge, the proper course for the trial court is to employ the Rule 403 balancing test. In this case, because of the unique facts, the Eighth Circuit held that the defendant should have been permitted to introduce the prior inconsistent statement of the witness.

***United States v. Turning Bear***, 357 F.3d 730 (8th Cir. 2004) The trial court erred in excluding a defense witness who was prepared to testify that in her opinion, the child-victim, was untruthful and "didn't always tell the truth." The witness in this case had a basis for forming the opinion (thus qualifying under Rule 701 to offer opinion testimony). Excluding this testimony violated the defendant's constitutional right to offer evidence in his behalf. United States v. Cruz-Garcia, 344 F.3d 951 (9th Cir. 2003) The defense attempted to prove the facts underlying the witness's prior convictions to show that he had the capacity to commit the offenses with which the defendant was charged. The trial court erroneously excluded this evidence. The evidence was admissible under Rule 404(b) to prove the witness's capacity to commit the crime. Indeed, the prosecutor had repeatedly argued that the witness was too stupid to have committed the crime without the defendant's help. The court noted that Rule 404(b) should be more liberally interpreted when the evidence is being offered against a witness, as opposed to the defendant.

***United States v. Alvarez-Farfan,*** 338 F.3d 1043 (9th Cir. 2003) The trial court erred in barring the defendant from introducing evidence of a motel receipt and a debriefing statement that was written by a witness to prove the witness's handwriting. The jury is entitled to make a handwriting comparison.

***Lewis v. Wilkinson***, 307 F.3d 413 (6th Cir. 2002) The Sixth Circuit held that the application of a state rape shied statute in this rape prosecution denied the defendant of his Sixth Amendment right of Confrontation. In the victim's diary, there were various references to her other sexual conduct and the fact that she was apparently viewed by boys as a "nympho." She wrote, "I'm just not strong enough to say no to them. I'm tired of being a whore. This is where it ends." Excluding this evidence was reversible error.

***Franklin v. Henry***, 122 F.3d 1270 (9th Cir. 1997) The defendant was charged in state court with child molestation. The victim had previously accused her mother of acts of sexual abuse similar to those alleged against the defendant. Barring the defendant from introducing this impeaching evidence was error of constitutional proportions requiring that the writ of habeas corpus be granted.

***United States v. Mulder***, 147 F.3d 703 (8th Cir. 1998) Good faith constitutes a complete defense to a charge of fraudulent intent. In this case, the defendant was charged with bank fraud. At trial, he offered a financial statement which appeared to accurately reflect his assets, and which was contained in the bank's lending file. Excluding this document, even though it was internally inconsistent, was reversible error.

***United States v. Lampkin***, 159 F.3d 607 (D.C. Cir. 1998) The trial court repeatedly – and erroneously – instructed the jury that two juvenile witnesses for the government could not be prosecuted by the AUSA, thus negating the defendant's theory that the witnesses were testifying for the government in exchange for not being prosecuted. This erroneous instruction deprived the defense of its ability to mount a defense and was reversible error.

***United States v. Gonzalez-Maldonado***, 115 F.3d 9 (1st Cir. 1997) The court retained a psychiatrist to determine if a co-defendant was competent to stand trial. The co-defendant was declared incompetent, but his recorded statements to undercover officers, statements that incriminated the defendant, were critical evidence for the prosecution. The defense wanted to call the psychiatrist as their witness to establish the mental illness of the co-defendant – a mental illness that led the witness to

exaggerate, according to the psychiatrist. Excluding this testimony was reversible error. The psychiatrist was obviously qualified as an expert and his testimony related directly to the veracity of the declarant (i.e., the recorded statements of the incompetent co-defendant).

***United States v. Mulinelli-Navas***, 111 F.3d 983 (1st Cir. 1997) The defendant, a loan officer at a bank, was charged with making fraudulent loans to car dealers. With respect to one of these counts, the defendant proffered evidence that the dealer was brought to the bank by a senior bank officer and that the defendant may have been negligent in making the loan, but the failure to adequately determine whether the dealer was qualified was due to the fact that he was brought to the bank by the senior officer. Excluding this evidence was reversible error on this count.

***United States v. Shay***, 57 F.3d 126 (1st Cir. 1995) The defendant was accused of attempting to bomb his father's car. He provided a statement to the police admitting his guilt. At trial, the defense sought to introduce evidence from a psychiatrist that the defendant suffered from a mental disorder that causes its victims to make false and grandiose statements without regard to the consequences – pseudologia fantastica. The trial court erred in excluding this evidence. The evidence was admissible under Rule 608(a) because the evidence was admissible opinion evidence relating to the character of a witness; it was admissible under Rule 405 to prove a relevant character trait; and it was admissible under Rule 702 because such expert testimony was necessary to contradict the commonsense notion that people do not generally make untrue inculpatory statements.

***United States v. Biaggi***, 909 F.2d 662 (2d Cir. 1990) If a defendant rejects an offer of immunity in exchange for testifying, and is then prosecuted, this evidence is admissible show defendant's "consciousness of innocence." This evidence is not barred by Rule 410.

***United States v. Bailey***, 834 F.2d 218 (1st Cir. 1987) A defendant was accused of trying to bribe a juror. He attempted to interview other members of the jury panel as a means of probing the character of the juror who made the accusation. The trial court prohibited the defendant from questioning the other jurors. The First Circuit reverses, holding that the defendant had a right to interview these "witnesses." The Court relied on the reasoning of Roviaro v. United States, and its analytical framework for determining whether to disclose the identity of an informant.

***Lyons v. Johnson***, 99 F.3d 499 (2d Cir. 1996) One of two men shot the victim. The defendant and the other man resembled each other, were wearing similar jackets on the day of the shooting and both had gold-capped teeth. At the defendant's trial, he requested permission to "exhibit" the other man to the jury. This request was denied, because (among other reasons) the other man asserted his Fifth Amendment right not to testify. The trial court erred. Moreover, offering the defendant the opportunity to introduce a photograph of the other man was not an adequate substitute.

***Justice v. Hoke***, 90 F.3d 43 (2nd Cir. 1996) The state trial court erred in excluding testimony that would have demonstrated the key state witness's motivation to lie about the defendant. The excluded evidence established that the state witness was a drug dealer for the defendant and had a dispute about money.

***United States v. Doe***, 63 F.3d 121 (2d Cir. 1995) The defendant asked that the court be closed for his testimony, as well as other portions of the trial, so he could relate to the jury the extent of his cooperation with the government, which he claimed supported his "public authority" defense. The trial court denied his request for closure which resulted in the defendant's refusing to reveal this information (for fear that he would be the victim of retaliation). Even though the defendant could not point to a direct threat that he had received, the court of appeals holds that the district court should have more carefully evaluated the defendant's request. A remand was required for more findings.

***United States v. Blum,*** 62 F.3d 63 (2d Cir. 1995) The defendant was charged with creating false logbooks in violation of certain EPA laws. He offered evidence at trial that one of his employees was engaged in a series of thefts at the company and had an independent motive to falsify the logbooks to cover-up his thefts. The trial court erred in excluding this evidence. The evidence was admissible under Rule 404(b) to prove the witness's motive to commit the offense and was probative on the issue of who the actual culprit was who committed the offense.

***United States v. Diallo***, 40 F.3d 32 (2d Cir. 1994) The defendant was arrested smuggling heroin into the country from Africa. He claimed that he thought he was smuggling gold dust. At trial, the defendant sought to introduce expert testimony about the profitability of smuggling gold dust out of Benin, Africa. The trial court erred in excluding this testimony. The trial court held that the expert had never been to Benin, therefore, he was not qualified to offer expert testimony about the economics of smuggling gold dust out of that country. Pursuant to United States v. Onumonu, 967 F.2d 782 (2d Cir. 1992), such expert testimony is relevant. Moreover, though the expert in this case had never been to Benin, he had advised neighboring countries about exporting gold and was aware of the profits to be made by smuggling gold out of Africa, into the United States.

***United States v. Onumonu***, 967 F.2d 782 (2d Cir. 1992) The defendant was caught at the airport with heroin which he ingested in condoms. The defendant claimed that he thought he was smuggling diamonds into the country. He sought to introduce evidence from an expert that Nigerians frequently smuggle diamonds out of the country. The trial court erred in excluding this expert testimony. It was relevant and beyond the ken of the average juror.

***United States v. G.A.F., Corp.,*** 928 F.2d 1253 (2d Cir. 1991) During the second trial of this securities fraud trial, the defense sought to introduce a copy of the bill of particulars which had been provided prior to the first trial. The defense theorized that this would prove that the government at one time believed, and stated, that its proof established something different from what it claimed at the retrial. The Second Circuit held that the trial court erred in excluding this evidence.

***United States v. Vargas***, 920 F.2d 167 (2d Cir. 1990) Though deciding the case on other grounds, the appellate court addressed the question of how a defendant should raise a claim that his attorney refused to call him to testify at trial. Without deciding the question, the court concludes that the defendant's failure to complain at trial does not amount to a waiver of this claim that he was denied the constitutional right to testify.

***Rosario v. Kuhlman***, 839 F.2d 918 (2d Cir. 1988) The defendant perpetuated the testimony of a witness who claimed that the defendant and his purported girlfriend (prosecution witness) were acquainted at the time of the robbery offense. That witness refused to honor the defendant's subpoena and evaded the local police who attempted to secure his presence. The Second Circuit holds that the defendant should have been permitted to use the deposition testimony because of the witness's refusal to appear in court.

***Gilmore v. Henderson***, 825 F.2d 663 (2d Cir. 1987) The state trial court's exclusion of testimony that would have explained the defendant's flight and also contradicted a portion of another witness' testimony was not harmless.

***Virgin Islands v. Mills***, 956 F.2d 443 (3rd Cir. 1992) The trial court was advised that a witness who had previously refused to testify had changed his mind. The judge did not inform the parties of this. The witness never did testify but would have testified in a manner that would have exculpated the defendant. The trial court's actions amounted to a denial of defendant's right to compulsory process. The Court of Appeals analogized the court's actions to the actions of a prosecutor who hides an important defense witness or intimidates a witness who would have testified favorably to the defense.

***United States v. Stevens***, 935 F.2d 1380 (3rd Cir. 1991) The defendant was charged with robbery and sexual assault and attempted to offer the testimony of the victim of a similar crime who did not identify the defendant as his assailant. The defendant's syllogism was as follows: Because of the similarity of the two crimes, one person probably committed both; the defendant did not commit the other crime; therefore, he did not commit the charged offense. The Third Circuit reviewed the case law on this subject from various state courts and concluded that the trial court erred in excluding the evidence. Characterizing the evidence as "reverse Rule 404(b)" evidence, the court held that it is relevant and, assuming the defendant can lay the proper foundation, must be admitted. The court concluded, "Our resolution of this issue is informed by our general belief that a criminal defendant should be able to advance any evidence that, first, rationally tends to disprove his guilt, and second, passes the Rule 403 balancing test. To garner an acquittal, the defendant need only plant in the jury's mind a reasonable doubt."

***United States v. Cavin***, 39 F.3d 1299 (5th Cir. 1994) The defendant, an attorney, was charged with fraud in connection with his efforts to help his client obtain regulatory approval for an insurance company. The attorney sought to offer evidence of the ethical problems involved in representing a client in such regulatory proceedings and also offered evidence of the uncertainties of the regulations in this area. The absence of clear guidance as to what an attorney should do when he becomes aware of his client's fraud was also offered. The trial court erred in excluding this evidence. Such evidence was probative of the defendant's state of mind and thus was probative of his intent to defraud. See United States v. Kelly, 888 F.2d 732 (11th Cir. 1989); United States v. Garber, 607 F.2d 92 (5th Cir. 1979)(en banc).

***United States v. Gaumer***, 972 F.2d 723 (6th Cir. 1992) Pursuant to Cheek, the defendant should have been given an opportunity to read tax protestor articles into the record, as well as portions of the Congressional Record and old Supreme Court decisions in order to show the basis of his belief that he was not obligated to pay taxes.

***United States v. Poindexter***, 942 F.2d 354 (6th Cir. 1991) It was reversible error to preclude the defense attorney from arguing about the lack of fingerprint evidence on the container in which the cocaine was found. The attorney simply wanted to argue that the government's failure to present fingerprint evidence – after it was determined that the container had been "dusted" – was sufficient to raise a reasonable doubt.

***United States v. Roberts***, 887 F.2d 534 (6th Cir. 1989) In defendant's drug prosecution, he sought to introduce psychological testimony that he did not intend to violate the law but was simply attempting to apprehend drug dealers. Though the error was harmless given the strength of the government's case, this evidence should have been permitted.

***United States v. Montgomery***, 100 F.3d 1404 (8th Cir. 1996) When the police opened the defendant's luggage pursuant to a consent search at a train station, they discovered cocaine. The defendant claimed that the shirt in which the cocaine was wrapped did not belong to him and the cocaine must have been placed in his suitcase by his companion (who was not charged). At trial, the government compelled the defendant to try on the shirt, which he did. The defendant sought to compel the companion to try on the shirt, as well. The trial court denied this request. This was error. The companion, a witness, had no Fifth Amendment right to refuse to try on clothing. Even though the witness may have refused to testified, this did not affect the defendant's right to have him try on the shirt in front of the jury.

***United States v. Bear Stops***, 997 F.2d 451 (8th Cir. 1993) The defendant was charged with child sex abuse. The child had previously suffered abuse at the hands of another. The defendant sought to introduce detailed evidence of the prior offense in order to explain why the victim exhibited certain symptoms of a sex abuse victim. Limiting this evidence was reversible error. Such evidence fell within Rule 412's exception for evidence which is "constitutionally required."

***United States v. Morales,*** 108 F.3d 1031 (9th Cir. 1997) The defendant was charged with making false entries in a union ledger. The falsity of the information was not contested at trial. Whether the errors were mistakes or were intentional, however, was disputed. The defendant offered expert accounting testimony that the defendant lacked basic bookkeeping understanding. The trial court committed reversible error in excluding this evidence. Rule 704 prohibits the introduction of expert testimony (psychiatric, or otherwise) on the issue of whether the defendant had the mental state or condition constituting an element of the

crime charged or of a defense thereto. Nevertheless, the testimony offered in this case was not that the defendant did or did not intend to make false entries. Rather, the testimony related to a "predicate" matter: the defendant's understanding of bookkeeping principles.

***United States v. Young***, 86 F.3d 944 (9th Cir. 1996) Generally, a criminal defendant is not entitled to compel the government to grant immunity to a witness. In order to fall under an exception to this rule, defendant must show that: (1) the testimony was relevant; (2) the government distorted the judicial fact-finding process by denying immunity. In this case, a witness was prepared to testify for the defense (if immunized) that he overheard a government witness state that he was going to offer false testimony to inculpate the defendant. The failure to immunize this witness was reversible error.

***United States v. Crosby***, 75 F.3d 1343 (9th Cir. 1996) Someone brutally assaulted the victim. The defendant was charged with the assault but offered evidence that the victim's husband lived in the vicinity, had previously beaten the victim, had previously been arrested for beating the victim, and that the victim had reported that the husband repeatedly beat her. The trial court committed reversible error in excluding this evidence. Fundamental standards of relevancy require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged.

***United States v. Thompson***, 37 F.3d 450 (9th Cir. 1994) The defendant was arrested at the L.A. airport and her suitcase contained several kilos of crack. She claimed that she was an unwitting mule – her friend gave her the suitcase to bring to a person in Cleveland. The government moved in limine to exclude evidence that the government failed to take any fingerprints from inside the suitcase. The trial court erred in granting this motion: Evidence comes in various forms, some stronger and some weaker, and a defendant is entitled to argue to the jury that the government's failure to present a particular type of strong evidence against her – e.g., fingerprints – weakens its case. Where, as here, the defense is lack of knowledge, the absence of fingerprint evidence may be argued in closing argument.

***United States v. Thomas***, 32 F.3d 418 (9th Cir. 1994) The defendant bought fruit from growers and sold it to wholesalers. He kept a percentage and remitted the balance back to the growers. At some point, he decided to start averaging the prices. He would then send a fixed amount to the growers, sometimes paying them more than he actually received, sometimes keeping more than the agreed upon commission. By an agreed upon final accounting, this averaging scheme resulted in losses to him of over $700,000. Nevertheless, the government indicted him for mail fraud. At trial, the government called as witnesses certain growers who were underpaid. The defendant was denied the right to call growers who were overpaid, in order to prove that there was no "scheme to defraud." This was reversible error. Such testimony would have been relevant in establishing the defendant's intent in devising the averaging system. Individuals accused of criminal behavior should be permitted to present, within reason, the strongest case they are able to marshal in their defense. See also United States v. Garvin, 565 F.2d 519 (8th Cir. 1977); United States v. Foshee, 569 F.2d 401 (5th Cir. 1978); United States v. Etheridge, 948 F.2d 1215 (11th Cir. 1991).

***United States v. Blaylock***, 20 F.3d 1458 (9th Cir. 1994) The defendant was charged with being a felon in possession of a firearm. The police testified that when they were called to a domestic disturbance scene, they saw the defendant with a gun and that he ran back inside. The defendant sought to introduce medical records which showed that he was infirm and incapable of "running." The trial court excluded the evidence on the basis of a lack of foundation. The government, however, had stipulated to the authenticity of the documents. On appeal, the government argued that the evidence could have been excluded under Rule 403. This is wrong, however: the evidence tended to show that the defendant could not run, that he needed a cane to walk and that he was limited in his mobility. The evidence was therefore relevant to his defense and should not have been excluded.

***United States v. Rahm***, 993 F.2d 1405 (9th Cir. 1993) At defendant's possession of counterfeit currency trial, she sought to introduce the testimony of an expert who would testify that the defendant "showed a consistent tendency to overlook important details" based on tests the psychiatrist administered. The testimony was improperly excluded by the trial court. Under Rule 12.2, notice of the intended use of expert testimony is required where the expert will testify about a mental condition which bears on the issue of guilt. It is not necessary (as the lower court held) that the expert testify about a "mental disorder." Other mental "conditions" may be the subject of expert testimony. Also, the fact that the expert was somewhat tentative in his testimony (the defendant "could have" failed to notice that the currency was counterfeit), was not a basis for excluding the testimony: it was the test results and the perceptual difficulties they demonstrate which were admissible, not the expert's opinion. This testimony would have been helpful to the jury and was otherwise admissible as expert testimony and its exclusion was reversible error.

***United States v. Word***, 129 F.3d 1209 (11th Cir. 1997) A man and woman were charged with securities fraud and related offenses. They were romantically involved when the offenses occurred, and subsequently were married. The wife sought to offer evidence at their joint trial that she was battered and obeyed her husband's demands without question. The trial court excluded this evidence. The government, however, then argued that the wife had to have guilty knowledge – after all, she was married to the man who orchestrated the fraud – and the jury never learned about the acrimony in their relationship. The combination of allowing the government to make this argument and excluding the defendant's evidence was reversible error.

***United States v. Todd***, 108 F.3d 1329 (11th Cir. 1997) The defendant was charged with embezzlement from an employee pension plan. 18 U.S.C. §664. He sought to introduce evidence that the employees were very well paid and were concerned with the welfare of the company and would have approved the use of their contributions to ensure the continued vitality of the company. The trial court held that this evidence was irrelevant. The appellate court reversed. The defendant's argument that he believed the employees consented to his use of the funds was not contested by the government in the lower court, and was clearly probative of this defense. Moreover, the evidence would have rebutted the government's "motivated by greed" argument.

***United States v. Westcott***, 83 F.3d 1354 (11th Cir. 1996) The Insanity Defense Reform Act, 18 U.S.C. §17 does not bar the defense from introducing evidence of a defendant's mental disease or defect in contexts other than reliance on the insanity defense. If the defendant claims that he lacked the mens rea element of the offense (as opposed to lacking the capacity to form the mens rea element), he may offer expert psychiatric evidence.

***United States v. Thompson***, 25 F.3d 1558 (11th Cir. 1994) The defendant was a convicted felon. For several years, he acted as an informant for the government, including the FBI and the ATF. In this prosecution for being a felon in possession of a firearm, he sought to rely on an entrapment by estoppel defense. The trial court incorrectly held that this was not a legal defense to a §922 charge. See e.g., Lewis v. United States, 445 U.S. 55 (1980); United States v. Billue, 994 F.2d 1562 (11th Cir. 1993). Entrapment by estoppel focuses on the actions of the government officials, not the state of mind (or predisposition) of the defendant. Entrapment by estoppel applies when an official tells a defendant that certain conduct is legal, and the defendant believes that official. Because the defense rests on principles of fairness, it may be raised even in strict liability offense cases. Finally, the defendant's proffer was sufficient to justify submitting the evidence to the jury. If there is any basis to support the defense, the jury should have been permitted to hear the testimony and weigh the evidence itself. Even if the defendant's testimony regarding the alleged conduct of the officials authorizing his possession was not credible, as the government asserts and the district court found, it is the jury's, not the district court's, function to determine questions of credibility and assess the defendant's testimony.

***United States v. Sheffield***, 992 F.2d 1164 (11th Cir. 1993) The trial court committed reversible error in prohibiting the defendant from offering evidence in support of his defense. The defendant was prosecuted for using military base facilities (where he was employed) to make fishing lures for his personal use. He claimed that the base facilities were frequently used to make fishing lures for retirement benefits. This evidence should have been admitted.

***United States v. Harnage***, 976 F.2d 633 (11th Cir. 1992) Though a criminal defendant may utilize collateral estoppel to bar a prosecution or argument of facts necessarily established in prior proceedings or to completely bar subsequent prosecution where one of the facts necessarily determined in the former trial is an essential element of the conviction the government seeks, the government may not collaterally estop a criminal defendant from relitigating an issue decided against him in a different court proceeding. Here, the trial court barred the defendant from asserting the attorney-client privilege concerning some discussions about a planned drug transaction. In a prior case, in another district, this same defense had been rejected by the trial court.

***United States v. Lankford***, 955 F.2d 1545 (11th Cir. 1992) In defense of tax evasion charges, the defendant sought to introduce expert evidence that the money he received could be characterized as a gift rather than a loan. The trial court committed reversible error by excluding this evidence. Such expert testimony is highly relevant to the assessment of whether the defendant willfully violated the tax laws.

***United States v. Ethridge***, 948 F.2d 1215 (11th Cir. 1992) The defendants were charged with mail fraud. They filed false claims to an insurance company in connection with a fire loss. At trial, they sought to introduce evidence that the claimed losses exceeded the policy limits, therefore, even excluding the falsely claimed items, they could not have received more than that to which they were entitled. While this is not a defense to the mail fraud charge, the trial court committed reversible error by excluding the evidence. The evidence tended to show that the defendants did not intentionally try to defraud the insurance company, because the inclusion in the proof of loss of items not in fact lost, would not have netted them any additional money.

***Nichols v. Butler***, 953 F.3d 1550 (11th Cir. 1992) The defendant's attorney insisted that the defendant not testify in his own defense. The attorney threatened to withdraw if the client did testify. This violated the defendant's right to testify and required a new trial. The right to testify at trial cannot be forfeited by counsel, but only by a knowing, voluntary, and intelligent waiver by the defendant himself. The defendant's right to testify in his own defense is a fundamental right.

***Rock v. Arkansas***, 483 U.S. 44 (1987). United States v. Teague, 908 F.2d 752 (11th Cir. 1990) A defendant has the fundamental right to testify in his own defense. This may only be waived personally, not solely through counsel. Thus, if the attorney vetoes the defendant's decision to testify, the defendant may challenge his conviction. After rehearing the case en banc,

***United States v. Teague***, 953 F.2d 1525 (11th Cir. 1992), the Eleventh Circuit re-affirmed the principle that the defendant has a fundamental right to testify, and the right may not be unilaterally waived by his attorney. However, the facts in this case did not show that the defendant's will was overborne. Rather, the attorney urged the defendant not to testify and the defendant agreed. Consequently, there was no ineffective assistance of counsel.

***United States v. Kelly***, 888 F.2d 732 (11th Cir. 1989) A criminal defense attorney was prosecuted for being a member of a conspiracy involving one of his former clients and one of his present clients. The former client was working with the government, unbeknownst to the attorney. In his defense, the attorney sought to introduce his understanding of the Canons of Ethics, which required him not to reveal the statements made by the cooperating individual. The trial court excluded this testimony. This was reversible error. Regardless of whether the Canons of Ethics in fact authorized or required the defendant to act as he did, the evidence was relevant to the state of mind which was the basis of his defense.

***United States v. Calle***, 822 F.2d 1016 (11th Cir. 1987) The defendant attempted to prove that the prosecution's star witness was the kingpin of the drug enterprise for which he was standing trial. The trial court prohibited this testimony, holding that it constituted improper impeachment of the witness. The Eleventh Circuit reverses, holding that an attempt to show that one other than the defendant was guilty of the offense is not impeachment, it is a substantive defense which cannot be limited by the trial court pursuant to the rules governing impeachment.

***United States v. Shyllon***, 10 F.3d 1 (D.C. Cir. 1993) The defendant claimed that the prosecution witnesses had been intimidated by the investigator into testifying against him. In support of this argument, he sought to call a potential prosecution witness, who did not testify for the government, and elicit testimony that the investigator threatened him. The defendant also tried to cross-examine the investigator about his threatening that non-testifying witness. The trial court erroneously excluded the testimony and the cross-examination. If the investigator intimidated the other witness, it would make it more likely that he intimidated the other witnesses; therefore, the testimony was relevant under Rule 401. Harmless error.

***EVIDENCE (Hearsay – Evidence Offered by the Government)***

***Richardson v. Griffin***, 866 F.3d 836 (7th Cir. 2017) The state introduced testimony from an officer concerning what witnesses told him about the identity of the shooter. The state argued that his evidence was introduced to explain the course of the police investigation, not for the truth of the matter asserted. The Seventh Circuit held that this violated the Confrontation Clause and granted the writ.

***United States v. Cummings,*** 858 F.3d 763 (2d Cir. 2017) The defendant, Cummings, was in jail. He allegedly threatened to kill Volcy, another inmate. But Volcy did not hear the threat directly from Cummings. Instead, he was told about the threat by another person (never identified). This presents a double hearsay problem. The out of court statement of Cummings was admissible (statement of a party), but the person who told Volcy that the threat by Cummings was made was not subject to any hearsay exception. The statement was offered for the truth of the matter asserted (i.e., Cummings uttered a death threat). The Second Circuit held that admitting this evidence was reversible error, because death threat evidence is potentially "toxic."

***United States v. Brooks***, 772 F.3d 1161 (9th Cir. 2014) A postal inspector was permitted to repeat what he was told by the supervisor about the identity of the person who was mailing certain parcels. The fact that the supervisor's statements were not repeated verbatim is irrelevant. The content of the supervisor's identification testimony was introduced, and the defendant was not able cross-examine the supervisor. "Out of court statements admitted at trial are statements for the purpose of the Confrontation Clause if, fairly read, they convey to the jury the substance of an out-of-court, testimonial statement of a witness who does not testify at trial." The statements in this case were testimonial because the supervisor knew his statements were being used to further an investigation and would be used to collect information necessary to make out a case against the suspect.

***United States v. Groysman,*** 766 F.3d 147 (2d Cir. 2014) The Second Circuit reversed this health care fraud conviction on the basis of several "egregious" evidentiary errors committed at trial. The defendant was charged with conspiring with a company that supplied durable medical equipment to prepare false invoices. The wholesaler was cooperating and taped many of the conversations, though many were inaudible. The government offered testimony from its case agent for several days at the start of trial. The agent (1) offered inadmissible bolstering testimony by testifying that certain transactions occurred, based only on his interviews of the cooperators – he had no personal knowledge to verify that these transactions occurred; (2) offered a summary chart which was not a summary of voluminous evidence, but simply a recitation of what he was supposedly told by the cooperators, thus violating both the hearsay rules and the bolstering rules and the rule governing the admissibility of summary charts; (3) the use of the agent to summarize the case at the outset was improper because it amounted to opinion testimony. The Second Circuit, as noted above, characterized these evidentiary errors as egregious and supported a plain error standard of review reversal.

***United States v. Haldar***, 751 F.3d 450 (7th Cir. 2014) In a footnote (footnote 1), the Seventh Circuit cautions that the government should rarely be permitted to introduce "course of investigation" evidence, because of the likelihood that it will prompt the law enforcement officer to testify about inadmissible hearsay evidence that is supposedly not introduced for the truth of the matter asserted.

***United States v. Nelson***, 725 F.3d 615 (6th Cir. 2013) An anonymous 9-1-1 caller's description of a person who was seen in possession of a gun should not have been admitted in evidence, because it was hearsay and was not needed to "explain the police offer's conduct" in detaining the defendant.

***United States v. Demmitt***, 706 F.3d 665 (5th Cir. 2013) The defendant's co-conspirator pled guilty and during his plea colloquy, a written factual basis was introduced and signed by the co-conspirator. The factual basis stated that the coconspirator and the defendant conspired to commit the offense. At the defendant's trial, the coconspirator testified. He was asked if he signed the factual basis at his plea colloquy and he acknowledged that he did. There was no effort made by the government to establish that the prior signed statement qualified as a prior inconsistent statement. Instead, the government argued simply that the witness, having acknowledged that he signed the statement previously, adopted the statement and it was not, therefore, hearsay. The Fifth Circuit disagreed and held that admitting into evidence the signed factual basis for the truth of the matter asserted was error.

***Jones v. Basinger***, 635 F.3d 1030 (7th Cir. 2011) The defendant was charged with murder. The key witness for the state testified that he participated in the home invasion with the defendant. That witness was vigorously cross-examined. The prosecution responded by calling the police officer who received a tip from an informant who provided considerable evidence against the defendant, as well as recited what he (the informant) had been told by one of the other participants in the murder. The state argued that this was offered to explain the police officers' investigation and not for the truth of the matter asserted in the informant's statement. The Seventh Circuit held that the evidence was not, in fact, offered for this purpose and was inadmissible hearsay that violated the Confrontation Clause.

***United States v. Holmes***, 620 F.3d 836 (8th Cir. 2010) The issue in this case was whether the defendant lived at a house where drugs and guns were found during the execution of a search warrant. When cross-examining the police officer, the defense attorney asked whether a certain item of evidence was all there was linking the defendant to the house. On re-direct, the prosecutor asked the officer to read the search warrant affidavit at length, which included the statement of a C.I. who did not testify at trial and who linked the defendant to the house. The Eighth Circuit held that this was error on hearsay and Confrontation Clause grounds. The evidence was not offered to "explain the officer's conduct" and the defense attorney's cross-examination did not "open the door" to the rebuttal or waive the defendant's Confrontation Clause guarantee.

***United States v. Gomez***, 617 F.3d 88 (2d Cir. 2010) The police arrested Rivas. The officer told Rivas to call the person who supplied him with all the ecstasy pills. Rivas called the defendant, Gomez. At trial, the government offered this evidence to support the charge that Gomez was the supplier for Gomez. Rivas did not testify at trial. The Second Circuit reversed the conviction, holding that this was hearsay evidence (by inference) that also amounted to a violation of the Confrontation Clause. Even a limiting instruction by the court to the jury cautioning the jury not to consider the evidence for the truth of the matter asserted was not sufficient to cure the error. See also Ryan v. Miller, 303 F.3d 231 (2d Cir. 2002).

***United States v. Kaiser***, 609 F.3d 556 (2d Cir. 2010) The government introduced a hearsay statement and argued that it was not offered for the truth of the matter asserted, but rather to explain the declarant's state of mind and intent or, alternatively, to show the declarant's knowledge. Neither of these arguments was sound, however. In addition, even if there were some non-hearsay basis to admit the testimony, the probative value was outweighed by its prejudicial effect and pursuant to Rule 403 should have resulted in excluding the evidence. Admitting this testimony was not harmless error.

***United States v. Benitez-Avila***, 570 F.3d 364 (1st Cir. 2009) The government offered evidence that the police received a tip that the perpetrator was known as "The Twin." The government acknowledged that this evidence was hearsay (the defendant, of course, was a twin) but offered the evidence to explain why the police focused on the defendant. The First Circuit rejected this "explaining the officer's conduct" exception to the hearsay rule. Whether government agents had a reasonable, good faith basis or investigating the defendant is a completely different question than whether the evidence is sufficient to prove the defendant's guilt. Only if the defendant puts the agents' conduct in issue can such hearsay evidence be offered by the government to rebut a claim that the officer acted unreasonably.

***Taylor v. Cain***, 545 F.3d 327 (5th Cir. 2008) The state offered testimony from an investigating officer about the investigation he performed including the information provided to him by other witnesses to the murder that implicated the defendant as the perpetrator. This constituted inadmissible hearsay that violated the defendant's right of Confrontation.

***United States v. McGee***, 529 F.3d 691 (6th Cir. 2008) The statements of a confidential informant to a police officer providing information about the defendant qualify as testimonial and, in this case, the officer should not have been permitted to testify about what the informant told him, even as "background" or to "explain the officer's conduct." Harmless error.

***United States v. Johnson***, 529 F.3d 493 (2d Cir. 2008) The DEA agent's testimony was replete with improper hearsay, opinion, vouching, and argumentative testimony. The agent testified about the course of the investigation, declaring, "We found out that . . ." and "We determined that . . ." The agent related what co-conspirators told him when they were first arrested, to explain what he did next in the investigation. He then explained what "corroboration" meant and explained what he did and learned to corroborate what he was told by informants and co-conspirators. He further explained that he was skeptical of what informants told him until he corroborated what they said, and he was then able to ensure that the informants told him the truth. While it may be more interesting to a jury to learn how the police conduct investigations, a substantial amount of this testimony was inadmissible. Because defense counsel did not object, the plain error standard applied, and the Second Circuit held that the inadmissible evidence did not meet this standard.

***United States v. Hearn***, 500 F.3d 479 (6th Cir. 2007) Permitting the government to introduce considerable hearsay evidence to "explain the officer's conduct" in keeping the defendant under surveillance, violated the rule against hearsay as well as the defendant's Confrontation Clause rights.

***United States v. Powers***, 500 F.3d 500 (6th Cir 2007) The trial court erred when it permitted the prosecution to elicit evidence about what the confidential informant told the police. The evidence implicated the defendant was not necessary to provide background, or to explain the officers' conduct. Harmless error.

***United States v. Maher***, 454 F.3d 13 (1st Cir. 2006) The fact that the government offers an informant's statements to the police "to explain the officer's conduct" does not eliminate a Confrontation Clause problem. If the point of the inquiry is simply to explain what the officer did, then the officer should simply be asked, "Based on information received did you . . ." Because the defense did not object in this case, however, the error was only reviewed for plain error and was not sufficiently prejudicial to require setting aside the judgment.

***United States v. Arbolaez***, 450 F.3d 1283 (11th Cir. 2006) An officer may not testify about facts that he learned that prompted his efforts to obtain a search warrant. This is hearsay and is not admissible under the theory that it explains the officer's conduct. Even a cautionary instruction does not render the evidence admissible. Harmless error.

***United States v. Baker***, 432 F.3d 1189 (11th Cir. 2005) The trial court erred in permitting an agent to testify about facts he learned from non-testifying people. The government's suggestion that the testimony was admissible to explain the officer's conduct was not a sufficient basis for violating the rules against hearsay.

***United States v. Pugh***, 405 F.3d 390 (6th Cir. 2005) Introducing the out-of-court identification statement of a witness that fingered the defendants as the bank robbery (based on the declarant's viewing of a surveillance tape) violated Crawford. The statement was given by the declarant to a police investigator (thus it was "testimonial") and the statement was offered for the truth of the matter asserted – not, as the government suggested, merely to explain the officer's conduct.

***United States v. Cromer***, 389 F.3d 662 (6th Cir. 2004) During the defendant's cross-examination of a police officer, he asked questions about a CI's description that linked him to drug dealing. On re-direct, the government was permitted to pursue this line of questioning by asking about the specific statements made to the police by the CI. The trial court admitted the hearsay on the basis that the defendant "opened the door." The Sixth Circuit disagreed. While as a matter of evidence law, the defendant may have opened the door, as a matter of constitutional law, he did not forfeit his rights under the Confrontation Clause. The admission of the CI's statement to the police was a clear violation of Crawford. The cross-examination of the police officer amounted to foolish trial strategy, not misconduct that would forfeit the Confrontation Clause rights. Moreover, the government elicited other hearsay from the officer when he was asked about the basis for obtaining a search warrant.

***United States v. Silva***, 380 F.3d 1018 (7th Cir. 2004) On more than occasion during the course of the trial, the government offered evidence that was clearly hearsay (including what informants told the police and the results of drug tests by crime labs) under the theory that the testimony was offered to explain the officers' conduct, not for the truth of the matter asserted in the out of court statement. The Seventh Circuit reversed. The evidence was compounded by the prosecutor's closing argument during which he relied on the hearsay evidence to show that the defendant was guilty.

***United States v. Williams,*** 358 F.3d 956 (D. C. Cir. 2004) The trial court erred in permitting a police officer to testify that he apprehended the defendant based on the report of a non-testifying complaining witness. Explaining the officer's conduct was not necessary; therefore, the non-hearsay purpose of offering this evidence was overshadowed by the prejudicial effect.

***United States v. Chapman***, 345 F.3d 630 (8th Cir. 2003) A missing witness previously assisted the police in catching one of his drug customers. His statements did not qualify under Rule 804(b)(3). The witness, "by casting himself as a mere mule and serving up the repeat buyer, could reasonably assume that he would be minimizing his criminal liability." Therefore, the statement was not sufficiently against his penal interest to satisfy the Confrontation Clause. The court also rejected the government's theory that the statements were admissible to explain the officers' conduct in pursuing the buyer (defendant).

***United States v. Lopez***, 340 F.3d 169 (3rd Cir. 2003) Prison officials searched the defendant's cell and found drugs. During trial, two guards were asked why they conducted the search and they responded, over objection, "Because we received information that the defendant might be carrying drugs on his person in his cell." This was inadmissible hearsay that necessitated reversing the conviction.

***United States v. Marsh***, 144 F.3d 1229 (9th Cir. 1998) The defendants operated a tax shelter scheme that invited people to "untax themselves" by various schemes (none of which, of course, actually untaxed anybody). Many people wrote letters to the defendants, complaining that the scheme did not work. At the defendants' trial, these letters were read to the jury. The government was also permitted to read newspaper editorials into the record (the articles were found in the defendants' property) that decried the fraud perpetrated by tax protestors. The government claimed that this evidence was admissible to prove the defendants' state of mind. However, the jury was not instructed that the letters could not be considered for the truth of the matter asserted.

***United States v. Johnston***, 127 F.3d 380 (5th Cir. 1997) The government improperly asked a series of questions to various law enforcement officers that elicited hearsay responses. For example, one officer was asked what he did after speaking with another law enforcement officer and the witness responded that he re-focused his testimony on the defendant. This testimony was improper hearsay and should not have been admitted "to explain the officer's conduct." Eliciting such testimony over and over again amounted to prosecutorial misconduct.

***United States v. Lovelace***, 123 F.3d 650 (7th Cir. 1997) The police went to a particular location after receiving a tip that the defendant would be there engaged in a cocaine transaction. The defendant was arrested at another location. There was no necessity for introducing evidence of the tip at trial. The defense did not question the police tactics (thereby prompting the government to show that the police were acting on a tip) and there was no other reason that the tip was relevant. Even with a limiting instruction, the admission of this evidence was erroneous. But it was harmless error.

***United States v. Williams***, 133 F.3d 1048 (7th Cir. 1998) After a bank robbery, a confidential informant identified the defendants as the perpetrators. A photo line-up was prepared, and the teller identified the defendant as the perpetrator. At trial, the confidential informant's identification was admitted in evidence to explain the background of the photo line-up. This was inadmissible hearsay and was reversible error.

***United States v. Cass***, 127 F.3d 1218 (10th Cir. 1997) The defendant was charged with falsely claiming that she had been kidnapped. At trial, the case agent was permitted to testify about the various witness statements made to him during the course of investigation. The government argued that the out-of-court declarations were not offered to prove the truth of the matter asserted, but to explain the course of the investigation (in response, in part, to the defendant's opening statement which stressed the inadequacies of the investigation). The Tenth Circuit held that this hearsay evidence was inadmissible. Harmless error.

***United States v. Mazza***, 792 F.2d 1210 (1st Cir. 1986) Police officers were permitted to testify about what their informant told them about the defendant's narcotics activities. The district court allowed the evidence on the theory that the informant's statements explained the subsequent conduct of the law enforcement agents. The First Circuit holds that this is error, albeit

harmless in this case. The probative value of this evidence was far outweighed by the risk that the jury would consider the words of the informant for their truth, not as an explanation of the agent's conduct. Furthermore, coming from the mouth of an agent, the information was more credible than had it come from an informant.

***United States v. Rivera***, 61 F.3d 131 (2d Cir. 1995) The defendant's co-conspirator entered a guilty plea with an attached stipulated statement of a factual basis, which included incriminating evidence about the defendant. At defendant's trial, when the co-conspirator testified for the government, the defense counsel cross-examined the witness and referred to his cooperation agreement and the benefits he obtained by cooperating. The government then introduced the entire plea agreement, with the attached stipulated statement of facts. This was inadmissible hearsay and should not have been admitted under the doctrine of completeness, Fed. R. Evid. 106.

***United States v. Forrester***, 60 F.3d 52 (2d Cir. 1995) An officer testified that the reason he went to a hotel was "narcotics-related" and when asked by the prosecutor, added that a witness had led him to this conclusion. This was inadmissible hearsay. The officer's motivation for going to the hotel was not a relevant issue in the case. On another issue, an officer was asked why he had not included the defendant's name in a report which detailed a cooperating witness's statement. The officer responded that he already knew about the defendant, so there was no need to include this information. The government then asked the agent how he "already knew" about the defendant. The agent then detailed the hearsay statements of other participants. Although this evidence was technically not offered for the truth of the matter asserted (it was offered to explain why the name of the defendant did not appear in the report), it should have been excluded under Rule 403. The probative value of the evidence (in its non-hearsay context) was outweighed by the prejudicial impact the evidence would have.

***United States v. Reyes***, 18 F.3d 65 (2d Cir. 1994) In order to amount to hearsay, the witness does not have to repeat verbatim what was told to him by the out-of-court declarant. Thus, a question such as, "Did your conversation with that person further confirm your suspicion that somebody else was involved in the criminal activity?" if answered affirmatively, amounts to hearsay. In this case, the prosecutor asked numerous such questions, and then explained that the government was only trying to establish the witness' reasons for further investigation, rather than trying to establish the truth of the matter asserted by the declarant. While this was technically correct, the likelihood was sufficiently high that the jury would not follow the limiting instructions but would treat the evidence as proof of the truth of the declaration. Thus, the evidence was inadmissible hearsay. In evaluating offers of evidence "to explain the conduct of the witness" (law enforcement agent), the following questions should be considered: (1) Does the background or state of mind evidence contribute to the proof of the defendant's guilt? (2) If so, how important is it to the jury's understanding of the issues? (3) Can the needed explanation of background or state of mind be adequately communicated by other less prejudicial evidence or by instructions? (4) Has the defendant engaged in a tactic that justifiably opens the door to such evidence to avoid prejudice to the government? In evaluating the potential prejudice, these questions should be considered: (a) Does the declaration address an important disputed issue in the trial? (b) Is the same information shown by other uncontested evidence? (c) Was the statement made by a knowledgeable declarant so that it is likely to be credited by the jury? (d) Will the declarant testify at trial, thus rendering him available for cross-examination? (e) If so, will he testify to the same effect as the out-of-court statement? (f) Is the out-of-court statement admissible in any event as a prior consistent, or inconsistent, statement? (g) Can curative or limiting instructions effectively protect against misuse or prejudice? In this case, virtually every one of these questions was answered by the appellate court in favor of excluding the evidence. Even a limiting instruction was presumed to be insufficient to deal with the potency of the evidence, and the conviction was therefore reversed.

***United States v. Tussa***, 816 F.2d 58 (2d Cir. 1987) An FBI agent was permitted to testify that an unidentified informant had told him that he had seen the defendant leaving a building with a bag under his coat shortly before the heroin was delivered at another site. The admission of the statement was harmful error with respect to two defendants, the one who delivered the bag, and the one who acted as the middleman.

***United States v. Sallins,*** 993 F.2d 344 (3rd Cir. 1993) The government offered evidence of the content of a 911 tape into evidence to put the police officer's conduct "in context." This was inadmissible hearsay and necessitated a new trial. The government's argument that the content of the tape was only offered to explain the officers' conduct did not provide an exception to the hearsay rule: the officers' conduct was not material.

***United States v. Pelullo***, 964 F.2d 193 (3rd Cir. 1992) The government introduced bank wire transfer records for the truth of the matter asserted – that is, to show the movement of money from the bank to the corporation and then diverted to the defendant. The records were not admissible as a business record, because no custodian identified the documents or established the foundation for the admissibility on this theory. No other exception could be used to authorize the admission of the documents. This was reversible error.

***Monachelli v. Warden***, 884 F.2d 749 (3rd Cir. 1989) The out-of-court statements of a co-defendant should not have been admitted at the defendant's trial.

***United States v. Hall***, 989 F.2d 711 (4th Cir. 1993) Defendant's wife made statements to an investigator which implicated the defendant in drug dealing. Prior to trial, however, the wife asserted her marital privilege and refused to testify. The prosecutor, in cross-examining the defendant made repeated references to the wife's statement, even announcing to the jury that his questions were based on the wife's three-page statement. Aside from violating the marital privilege, this amounted to the improper introduction of hearsay. Even a curative instruction, directing the jury to disregard the alleged statements of the wife, did not cure this error.

***United States v. Guadian-Salazar***, 824 F.2d 344 (5th Cir. 1987) A videotaped deposition of two government witnesses who were in prison in Mexico was used at trial despite the fact that the witnesses were released from Mexico within days of their signing of the deposition. They were available for trial and the admission of the deposition constituted reversible error.

***United States v. Arroyo***, 805 F.2d 589 (5th Cir. 1986) Inadmissible hearsay of a co-conspirator was admitted at trial. It was impossible to carve out and surgically isolate those portions of the indictment and subsequent verdict which were tainted by this testimony and consequently the conviction was reversed.

***United States v. Hathaway***, 798 F.2d 902 (6th Cir. 1986) In a fraud prosecution, false statements are never hearsay. As a general rule, a statement offered to prove its falsity is never hearsay under Rule 801(c).

***Gaines v. Thieret***, 846 F.2d 402 (7th Cir. 1988) Prior to a police officer testifying about the defendant's statements about the crime, the State sought to introduce evidence that the defendant's brother had made statements to the police officer incriminating the defendant. This admission of hearsay constituted reversible error in this death penalty case.

***United States v. Montoya***, 827 F.2d 143 (7th Cir. 1987) The DEA agent's testimony concerning the statement by a drug courier suspect implicating the defendant in a cocaine smuggling operation was inadmissible hearsay.

***United States v. Blake***, 107 F.3d 651 (8th Cir. 1997) The trial court erred in permitting the government to offer hearsay statements of a confidential informant that the defendant was a drug dealer for the supposed limited purpose of explaining why the police began their investigation. There was no relevance to why the police began their investigation, so such testimony had no legitimate basis, other than to establish through hearsay that the defendant was a drug dealer.

***United States v. Benson***, 961 F.2d 707 (8th Cir. 1992) Though the error was harmless, the prosecutor should not have read to the jury a statement of the defendant in an FBI case agent report. The report was hearsay and did not qualify under any exception to the hearsay rule.

***Webb v. Lewis***, 44 F.3d 1387 (9th Cir. 1994) The state offered the hearsay statements of a child abuse victim which had been made to a social worker on videotape under the state version of Rule 803(4). This was clearly erroneous, however. The social worker was not a doctor and nothing about her relationship to the child reflected a medical relationship. The social worker's function was to investigate the charges of sexual abuse which had been made against the defendant. The child in no way was seeking medical attention. The videotaped statement was also inadmissible under the residual exception to the hearsay rule. There were inconsistencies in her statements and a lack of spontaneity which indicated that she had been coached by other people prior to the videotaped statement. See Idaho v. Wright, 110 S.Ct. 3139 (1990).

***United States v. Dean***, 980 F.2d 1286 (9th Cir. 1992) Defendant was tried on weapons possession charges. Over objection from the defense, a police officer testified that he was told by another person that the defendant had fired a weapon in his presence. The government argued that this hearsay was admissible to show why the police went to the defendant's house. While it is true that the hearsay statement did explain the officer's conduct, the officer's conduct was not relevant to any issue in the case. Because the defendant's possession of the weapon was disputed, this was reversible error.

***United States v. Tafollo-Cardenas***, 897 F.2d 976 (9th Cir. 1990) The government offered the testimony of a witness who recanted her prior statement which implicated the defendant. The government convinced the trial court to admit the prior statement as substantive evidence. The evidence was not admissible as substantive evidence; because the trial court did not instruct the jury that the prior statement was only admissible for impeachment purposes, the conviction was reversed.

***United States v. Scrima***, 819 F.2d 996 (11th Cir. 1987) The defendant's accountant's testimony as to the defendant's reference to an undisclosed cash hoard was inadmissible hearsay in a prosecution for income tax evasion.

***United States v. Eccleston,*** 961 F.2d 955 (D.C. Cir. 1992) An officer was repeatedly asked, "What else did your investigation reveal?' He responded with the likes of, "They told me they were going to [the defendant's house] to buy crack cocaine." This was clearly inadmissible hearsay – "they" were not co-conspirators and knew they were being interviewed by a police officer – and required reversal of defendant's conviction.

***EVIDENCE (Hearsay – Evidence Offered by the Defendant)***

***United States v. Slatten***, 865 F.3d 767 (D.C. Cir. 2017) This is the Blackwater prosecution relating to the murders committed by military contractors while serving in Iraq. Reversal was required because the trial court refused to sever one defendant's case which was requested in order to introduce the statement of a co-defendant that was inadmissible in a joint trial. Severance is required under Rule 14 if it is necessary in order to assure that a defendant can introduce evidence that would be inadmissible at a joint trial, and which is essential to the defendant's right to a fair trial. The statement of the co-defendant exonerated the defendant. Even though the co-defendant would not have testified at defendant's severed trial, the statement of the co-defendant would have been admissible pursuant to Rule 807, the residual exception to the hearsay rule. The co-defendant's statements to the authorities investigating the shooting contained equivalent circumstantial guarantees of trustworthiness: the co-defendant was speaking pursuant to a grant of immunity; he was implicating himself; his statements were consistent over time. Because the statement of the co-defendant would have been admissible at a separate trial, the trial court erred in denying the severance motion.

***Kubsch v. Neal***, 838 F.3d 845 (7th Cir. 2016) The defendant was convicted of a triple murder. He contended that he was not at the location of the crime when the murders occurred. About five days after the killings, a young girl was interviewed on tape by the police and her statements exonerated the defendant. By the time of trial, however, she no longer remembered the events

and even after reviewing the taped interview, her recollection was not refreshed. The defense was unavailing in invoking the "past recollection recorded" exception to the hearsay rule, because the witness could not even verify that the recorded statement reflected her observations. The Seventh Circuit held that the recorded interview should have been admitted by the state trial court under the Chambers v. Mississippi 410 U.S. 284 (1973), Dur Process doctrine. See also Green v. Georgia, 442 U.S. 95 (1979) and Crane v. Kentucky, 476 U.S. 683 (1986), cases in which the Supreme Court held that there are cases in which Due Process trumps state evidence rules that would exclude evidence favorable to the defense.

***United States v. Certified Environmental Services, Inc.,*** 753 F.3d 72 (2d Cir. 2014) Federal and State laws regulate the removal of asbestos from buildings, including OSHA regulations and the Clean Air Act. A company that removes asbestos must comply with various laws regarding the method of removal and a separate "monitoring" company must monitor the air after the removal is accomplished. The defendants in this case (a company and several employees) were involved in monitoring asbestos removal and were charged with not properly monitoring the asbestos removal and submitting false monitoring reports. The defense sought to introduce evidence at trial about certain conversations with officials about their monitoring practices, specifically, whether particular monitoring practices were required if the location was not sufficiently "contained" (i.e., the area where the asbestos was being removed was not fully contained which might result in the monitoring causing more contamination in nearby areas). The government objected that these conversations were hearsay. The trial court's exclusion of this evidence was reversible error. The evidence relating to the conversations with regulators was not offered to prove the truthfulness of the information provided by the regulators, but to prove that the defendants were acting in good faith when they engaged in certain monitoring practices. The fact that some of the conversations occurred after the criminal conduct did not make the evidence irrelevant, because it was consistent with what the defendants claimed was there long-standing understanding of the monitoring rules.

***Alvarez v. Ercole***, 763 F.3d 223 (2d Cir. 2014) The state trial court erred in preventing the defense from cross-examining the lead detective about other investigations that were not pursued. The investigation that was not done was not subject to a hearsay objection, because the issue is not the truthfulness of what was told to a police officer conducting the investigation, but whether there were leads that were not followed. Denying the defense, the right to cross-examine the detective violated the Confrontation Clause and was particularly harmful, because the prosecutor argued in closing that the investigation was thorough.

***United States v. Feliz***, 794 F.3d 123 (1st Cir. 2015) The defendant tried to suppress his confession on the basis that it was the result of threats made to him about deporting his mother and other family members. At the hearing, the defendant's sister was prepared to testify that she heard the police threaten the defendant's mother (in the defendant's presence). The trial court excluded this as hearsay. This was reversible error. The truthfulness of the threat was not why it was being introduced; what was relevant was whether the threat was made and therefore it was admissible to prove the effect that the threat had on Feliz.

***United States v. Leonard-Allen***, 739 F.3d 948 (7th Cir. 2013) During the defendant's testimony, he was asked why he went to the bank to purchase a CD. His answer was offered to explain his state of mind and to show that he did not have fraudulent intent. The government objected on grounds of hearsay and the trial court sustained the objection. This was reversible error. The evidence was admitted to show the defendant's state of mind, not to prove the truth of the matter asserted by the person who directed him to purchase the CD. In fact, the defendant would have argued that what he was told was not true, but it explained his state of mind when he purchased the CD. Reversible error.

***United States v. Ibisevic***, 675 F.3d 342 (4th Cir. 2012) The defendant carried over $10,000 into an international flight from Dulles Airport heading to Bosnia. An ICE agent who had a Puerto Rican accent questioned the defendant and his mother (the mother spoke no English) about whether they were carrying cash. The defendant responded that they had $5,000.00. During this "questioning" the defendant turned to his mother and translated, "They are asking how much the luggage is worth if it is lost." The defendant and his mother actually had about $40,000 in the luggage, on their persons and in the mother's purse. At trial, the defendant claimed that he did not understand the question and that the mother's testimony (about what the defendant said to the mother) was admissible as a "present sense impression" to show a lack of understanding. The trial court held that this was hearsay and inadmissible. The Fourth Circuit reversed: The defendant's statement was not hearsay (it was not offered for the truth of the matter asserted; it nevertheless would qualify as a present sense impression; and it was important to his defense regarding his lack of understanding that he was making a false statement or knowingly failing to file a currency form in violation of the law.

***United States v. Neadeau***, 639 F.3d 453 (8th Cir. 2011) If a prior statement of a person is offered to prove that the person said something false, it is not hearsay. In this case, the government offered evidence that the defendant's wife, who was a co-defendant at trial, had previously testified that her husband was not a drug dealer and did not own a Chevrolet Blazer and did not visit the Twin Cities in 2009. The government offered this evidence to show that the wife was untruthful, not to prove that the defendant did not own the car or make that trip. (I include this case in this section, because it shows that a party may offer the prior untruthful statements of a person – not necessarily a witness – if the statements are offered to prove that the declarant is a liar).

***United States v. Waters,*** 627 F.3d 345 (9th Cir. 2010) The defendant was charged with arson in connection with her activities with an environmental "terrorist" group. After she was first contacted by the FBI, she called her cousin and told him that the FBI might contact him and, "I am innocent" and "tell them the truth." The first statement "I am innocent" is hearsay and the defendant was properly prohibited from introducing that out-of-court statement. But the second statement, urging her cousin to tell the truth,

is not hearsay, because there is no assertion of fact that was being offered. That part of her statement was not hearsay and should have been admitted showing the defendant's lack of guilty mindset.

***United States v. Mateos***, 623 F.3d 1350 (11th Cir. 2010) Two defendants were prosecuted for health care fraud in connection with their operation of a clinic. One defendant, a nurse, sought to introduce a surreptitious recording of a conversation between her and other people in the clinic during which the other people sought to assure her that the operation of the clinic was lawful and proper. The tape was not offered to prove that the clinic was operated legally, but to show that she was not a knowing conspirator and that she lacked knowledge of the illegal practices. The trial court erroneously excluded the tape on the basis that it was hearsay. Because the tape was not offered to prove the truth of the matter asserted, admitting it was not barred by the hearsay rules.

***Lunbery v. Hornbeak***, 605 F.3d 754 (9th Cir. 2010) Relying on Chambers v. Mississippi, 410 U.S. 284 (1973), the Ninth Circuit held that excluding evidence that a witness heard another person confess to the murder with which the defendant was charged was reversible error. If, as in this case, the hearsay evidence is reliable and the declarant is unavailable, excluding the evidence under a state rule of evidence violates the federal Due Process Clause.

***United States v. Moran***, 493 F.3d 1002 (9th Cir. 2007) Excluding evidence about what the defendant was told by her attorney and CPA about the legitimacy of the tax shelters was reversible error. Such testimony is not hearsay and cannot be excluded pursuant to Rule 403.

***United States v. Hayes***, 369 F.3d 564 (D. C. Cir. 2004) The government introduced a tape that suggested that the defendant was participating in a cover-up. The defendant responded by offering a tape of a conversation shortly thereafter during which he told the person on the phone, "Just tell the truth." The government persuaded the trial court that this was hearsay. The trial court erred in excluding this testimony. The defendant's statement was not hearsay, because it was not offered to prove the truth of what he said, but rather to show that he instructed others to tell the truth. Harmless error.

***Chia v. Cambra***, 360 F.3d 997 (9th Cir. 2004 It is clearly established federal law that when a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation. ***Chambers v. Mississippi***, 410 U.S. 284 (1973). In this case, two DEA agents were murdered during an undercover deal. During the ensuing arrest of one of the perpetrators, the perpetrator was shot. He made several statements, however, some shortly before being wheeled into surgery and others after he was out of surgery. In each of these statements, he revealed who was involved in the murder. The defendant in this case was not named as a member of the conspiracy. At trial, the witness refused to testify. The defendant sought to introduce the witness's statements. The Ninth Circuit held that there were sufficient indicia of trustworthiness associated with these statements to support their admission. Excluding this evidence violated the defendant's due process right to present a defense.

***United States v. Parsons***, 141 F.3d 386 (1st Cir. 1998) The defendant was charged with bank fraud in that he used money designated as a construction loan for personal expenditures. At trial, he proffered testimony that he was told by his attorney that the money the defendant used came from a line of credit, not from the construction loan. This was not inadmissible hearsay, because the evidence was not offered to prove that the money was, in fact, from a line of credit, but rather, to prove that the defendant believed it was derived from a line of credit. Harmless error.

***United States v. Lis***, 120 F.3d 28 (4th Cir. 1997) The defendant was charged with embezzlement. The government relied in part on a "net worth" theory -- that is, she spent more than she legally earned. She claimed that when her husband died, she discovered cash in a suitcase and also in the suitcase was a document showing calculations in her husband's handwriting. The trial court erred in excluding the document on hearsay grounds. Nothing in the document was being offered for the truth of the matter asserted. Indeed, the only matter asserted in the document was a mathematical calculation (adding numbers). The document was offered to corroborate defendant's claim that she found money in the suitcase, and this was not hearsay. Excluding this evidence was reversible error.

***United States v. Detrich,*** 865 F.2d 17 (2d Cir. 1988) The defendant was on trial for importing heroin. He sought to introduce the testimony of a witness who would have testified that the defendant had been tricked by an acquaintance in Asia who had convinced him to carry a suitcase back to his brother for the brother's wedding. The defendant sought to offer this testimony to show that he did not have the intent to import heroin. The statement which the defendant sought to introduce was the brother's statement that he was, in fact, getting married at the relevant time. The trial court erred in excluding this testimony as it would have corroborated the defendant's testimony and enhanced his credibility.

***United States v. Kohan***, 806 F.2d 18 (2d Cir. 1986) It was reversible error for the trial court to exclude evidence of a conversation between a defendant and a co-defendant which was offered to explain the defendant's state of mind. The evidence was not submitted to prove the truth of the co-defendant's statements that the conduct was legitimate, but only to show that statements were made, and the defendant believed them to be true, thus suggesting that he did not have bad intent.

***United States v. Carter***, 801 F.2d 78 (2d Cir. 1986) In this firearms prosecution, the defendant defended on the basis of entrapment. The government was permitted to introduce a tape of the defendant's confederate calling up the law enforcement agent and badgering him to come to a meeting and consummate the deal. The tape was admissible as it demonstrated the state of mind of the defendant and his confederate and disproved the existence of entrapment. The tape was not admitted for the truth of the statements made.

***United States v. Cantu***, 876 F.2d 1134 (5th Cir. 1989) In this drug prosecution, the defendant claimed that he was entrapped. He sought to introduce the statements of the informant who urged him to commit the offense, but the Court ruled the evidence inadmissible on hearsay grounds. However, the statements were not being offered for the truth of the matter asserted, but rather to explain the defendant's conduct. The testimony should have been admitted.

***United States v. Ebens***, 800 F.2d 1422 (6th Cir. 1986) A key witness in this civil rights prosecution had been "coached" in preparation of his testimony. The defense attorney sought to play a tape of this coaching but was prohibited by the trial court which held that this constituted inadmissible hearsay. The Sixth Circuit holds that this is incorrect. The tapes were introduced not to prove the truth of the matter asserted – quite the contrary – they were introduced to show that the witness was influenced by this coaching.

***United States v. Hanson***, 994 F.2d 403 (7th Cir. 1993) In his trial on charges of filing an incomplete tax return, the defendant sought to introduce evidence of a conversation he had with his superior in which his superior told him that certain information did not have to appear on a conflict-of-interest form. The statement of his superior was not offered for the truth of the matter asserted, but to show the defendant's state of mind. Excluding this testimony was error, but harmless.

***Rivera v. Director, Department of Corrections,*** 915 F.2d 280 (7th Cir. 1990) The defendant was convicted of murder, but at his trial was precluded from introducing the confession of his co-defendant who exculpated him. The co-defendant was tried separately and refused to testify at the defendant's trial. Following the rule in Chambers v. Mississippi, the Seventh Circuit holds that the exclusion of this evidence denied the defendant due process in light of the vital nature of this hearsay testimony. The defendant was entitled to a new trial.

***United States v. Norwood***, 798 F.2d 1094 (7th Cir. 1986) The defendant was on trial for knowingly possessing stolen goods. The defendant offered evidence of what was said to him when another person handed him the credit cards. This evidence was admissible to show the defendant's state of mind, and his knowledge as to whether the credit cards were stolen. The trial court erred in excluding the testimony, but it was harmless in this case because the defendant was otherwise able to present his theory through other witnesses.

***EVIDENCE (Rule 104 – Preliminary determination of admissibility)***

***United States v. Evans,*** 728 F.3d 953 (9th Cir. 2013) The defendant was charged with various offenses involving his alien status and acquiring a false passport and certain federal benefits. The defendant sought to introduce a birth certificate he received from the State of Idaho. The trial court granted the government's motion in limine excluding the birth certificate on the basis of Rule 403 and Rule 104 and the trial court's conclusion that the birth certificate was fraudulently obtained. The Ninth Circuit reversed: Rule 104 is not a substantive rule of evidence. It simply is the procedure by which other rules of evidence (e.g., privilege, constitutional, hearsay). The trial court's conclusion that the birth certificate was fraudulently obtained was not a decision that the trial court could make, especially since it was based on the judge's credibility determination of the witnesses. When deciding based on Rule 403, the judge must assume the truthfulness of the proffer regarding the evidence. Excluding the evidence in this case was a constitutional due process violation.

***EVIDENCE (Rule 106 – Rule of Completeness)***

***United States v. Ramos-Caraballo***, 375 F.3d 797 (8th Cir. 2004) During the police officer's testimony, the defense attorney cross-examined him about inconsistencies between his trial testimony and his police report, his testimony at the grand jury and his testimony at a suppression hearing. In re-direct, the prosecutor offered the entire police report, as well as a transcript of the witness's entire grand jury testimony and his suppression hearing testimony. This was improper "rule of completeness" evidence. Only when the evidence offered by the opposing party is taken out of context, is distorted, or otherwise in need of balance, should the balance of the written document be admitted. Harmless error.

***United States v. Awon,*** 135 F.3d 96 (1st Cir. 1998) The government attempted to introduce the entirety of a witness's prior statement implicating the defendant in the charged offense. The evidence was inadmissible under Rule 801(d)(1)(B), because the prior statement was not made prior to the time the witness had a motive to seek leniency. The hearsay was also not admissible pursuant to Rule 106, the Rule of Completeness, because the portions of the statement used by the defendant when cross-examining the witness were not taken out of context, or misleading, or a distortion of the balance of the statement. Harmless error.

***EVIDENCE (Rule 403 – Prejudice versus Relevance)***

***Old Chief v. United States***, 519 U.S. 172 (1997) In a prosecution for being a felon in possession of a firearm, though the nature of the defendant's prior offense is relevant pursuant to the definition of relevance under Rule 401, the defendant's willingness to stipulate that he was a convicted felon obviates the need for this evidence and the trial court, pursuant to Rule 403, should accept the stipulation and bar evidence relating to the nature of the prior offense. The court explained that generally, the availability of alternative methods of proving a relevant fact is something that the district court may consider in evaluating whether evidence should be admitted over a Rule 403 objection. Thus, if evidence is relevant in one respect, but irrelevant and prejudicial in some other respect, the court should consider whether there exists an alternative method of proving the fact that is relevant.

***United States v. Bailey,*** 840 F.3d 99 (3rd Cir. 2016) The defendants were charged with numerous offenses, including a heroin conspiracy and gun charges. One of the gun charges required proof that the gun was used to further the drug conspiracy. There was evidence introduced that a gun was used to murder a rival drug dealer. Evidence of the murder was admissible. But there

was no need to show a video of the murder actually occurring: the graphic video was far more prejudicial than probative. Harmless error.

***United States v. Alvarez-Nunez***, 828 F.3d 52 (1st Cir. 2016) Though this is a sentencing decision, not a Rule 403 case, the court addressed the issue of whether a defendant's music could be a relevant factor at sentencing, and thus may be a case worth noting when the government introduces such things as rap lyrics to prove a defendant's predisposition, etc. The First Circuit held that a defendant's music should not be any more relevant to a sentencing decision than an actor's portrayal of a sadistic character.

***United States v. McElmurry***, 776 F.3d 1061 (9th Cir. 2015) The defendant was charged with possessing and distributing child pornography. Prior to trial, the government announced its intention to offer evidence of a letter written by the defendant several years earlier in which he described his addiction to pornography and his ability to encrypt his computer to avoid law enforcement detection. The district judge denied the defendant's motion in limine, without having actually read the letter, basing his decision solely on the proffer of the government. This was reversible error.

***United States v. Morgan,*** 786 F.3d 227 (2d Cir. 2015) Evidence that the defendant tried to hire a hitman to kill a government witness (informant) was too prejudicial to be probative and should have been excluded at trial pursuant to Rule 403.

***Gumm v. Mitchell***, 775 F.3d 345 (6th Cir. 2014) The prosecutor introduced evidence in a murder trial that the defendant admitted having sex with a horse (and that the horse talked to him) and other evidence of deviant sexual acts that were contained in psychiatric reports. The Sixth Circuit, reviewing the case in habeas, held that this amounted to flagrant prosecutorial misconduct that required setting aside the conviction.

***United States v. Gomez***, 763 F.3d 845 (7th Cir. 2014) (en banc) The Seventh Circuit, sitting en banc, reconstructs the analysis that must be used in deciding whether to admit other crimes evidence. Rather than a strict four-part test, the court insists that the ultimate questions are relevance and unfair prejudice and issues such as similarity and recency are relevant, but not "checklist" items that must be checked: "The extent to which a proffered "other crime, wrong, or act" is close in time and similar to the conduct at issue in the case may have a bearing on its relevance, which is the starting point for all evidence questions, but the importance of testing for similarity and recency will depend on the specific purpose for which the other-act evidence is offered. The proponent of the other-act evidence should address its relevance directly, without the straitjacket of an artificial checklist." Second, the government must explain the legitimate purpose for which the evidence is offered in a way that does not include propensity as part of the reasoning. The trial court must not simply ask whether the other act evidence is being offered for a non-propensity purpose; the court must ask how the evidence establishes an element in a non-propensity way. And, finally, the court must determine whether the non-propensity purpose is a legitimately disputed issue at trial that would make the evidence more probative on that issue than prejudicial. Thus, with general intent crimes, such as drug possession or drug distribution offenses, the mere fact that the defendant enters a not guilty plea does not make his intent an issue that can be proven by the government with Rule 404(b) evidence, unless the defendant expressly disputes his intent at trial. The court emphasized that a carefully crafted case-specific jury instruction should be given to the jury that expressly limits the use of this evidence, emphasizes the burden of proof on the government to prove each element beyond a reasonable doubt, and cautions against using the evidence to prove that the defendant is a bad person.

***United States v. Caldwell,*** 760 F.3d 267 (3rd Cir. 2014) In this trial for possession of a weapon by a convicted felon, the trial court erroneously permitted the government to introduce evidence of the defendant's prior conviction for possession of a weapon by a convicted felon. The defendant denied possessing the weapon. The police testified that they saw the defendant with the gun in his hand. The government argued (and the trial court agreed) that the prior conviction was admissible to prove knowledge and intent. The Third Circuit reversed: the prior conviction did not prove anything about the defendant's intent or knowledge in this case. The defense was that he did not possess the gun at all, so his knowledge or intent was not relevant. In addition, the government argued that the prior conviction was admissible pursuant to Rule 609, because the defendant testified, and the prior conviction was introduced to impeach his credibility. The Third Circuit held that the Rule 403 balancing test weighed in favor of excluding this form of impeachment. This is a significant decision that devotes nearly 20 pages in the published opinion to the inadmissibility of the prior conviction under either the Rule 404(b) or Rule 609 bases.

***United States v. Delgado-Marrero***, 744 F.3d 167 (1st Cir. 2014) The trial court erred in permitting the government to introduce sexual orientation evidence relating to the two defendants. One defendant, a female police officer, was accused of participating in providing corrupt security for a drug deal. She claimed that she was entrapped by the undercover officer who lured her into the corrupt deal by having sex with her. At trial, the government offered evidence that the defendant was a lesbian, and the evidence was offered to rebut her claim that the undercover officer (male) had sex with her. The trial judge commented that in his 67 years of experience, he was not aware that lesbians would have sex with males. The First Circuit held that admitting this evidence was error (and questioned the trial judge's supposed "wisdom" on this point), but the error was deemed not to be prejudicial enough to warrant setting aside the conviction of a co-defendant.

***United States v. Adams***, 722 F.3d 788 (6th Cir. 2013) The government offered hearsay evidence that the defendants were accused of vote buying in prior years in this case that involved allegations of vote-buying. The government suggested that the accusations were offered no for the truth of the matter asserted. The court, citing Justice Cardozo, held that "the reverberating clang of those accusatory words would drown all weaker sounds" and held that admitting the evidence was an abuse of discretion.

***United States v. Evans***, 728 F.3d 953 (9th Cir. 2013) The defendant was charged with various offenses involving his alien status and acquiring a false passport and certain federal benefits. The defendant sought to introduce a birth certificate he received from the State of Idaho. The trial court granted the government's motion in limine excluding the birth certificate on the basis of Rule 403 and Rule 104 and the trial court's conclusion that the birth certificate was fraudulently obtained. The Ninth Circuit reversed: Rule 104 is not a substantive rule of evidence. It simply is the procedure by which other rules of evidence (e.g., privilege, constitutional, hearsay). The trial court's conclusion that the birth certificate was fraudulently obtained was not a decision that the trial court could make, especially since it was based on the judge's credibility determination of the witnesses. When deciding based on Rule 403, the judge must assume the truthfulness of the proffer regarding the evidence. Excluding the evidence in this case was a constitutional due process violation.

***United States v. Ramirez-Fuentes***, 703 F.3d 1038 (7th Cir. 2013) The government elicited testimony that the methamphetamine involved in this case was "Mexican methamphetamine." The Seventh Circuit held that this was reversible error. The testimony prejudiced the defendant, who was Mexican and was unnecessary to decide any issue in the case.

***United States v. Cunningham***, 694 F.3d 372 (3rd Cir. 2012) The trial court committed reversible error by failing to engage in the Rule 403 balancing test prior to sending out child pornography videos to the jury room. Though the jury is permitted to see evidence of the crime, some of the videos in this case were so disturbing that the judge should have withheld them from the jury's view. In fact, the trial judge did not examine the videos before sending them to the jury room, relying instead on a description of the videos. The defendant stipulated that the images on the computer were child pornography.

***United States v. Boros,*** 668 F.3d 901 (7th Cir. 2012) In this internet pharmacy prosecution, the government was permitted to introduce evidence by an expert about how certain drugs are scheduled, why they are prescribed and why a prescription is needed. While this information was interesting and probative background information, it was not relevant to any issue in the case or any of the essential elements of the crime. As such, the probative value was outweighed by the unfair prejudicial impact of the evidence. Harmless error.

***United States v. Loughry***, 660 F.3d 965 (7th Cir. 2011) The defendant was charged with advertising and distributing child pornography. The charges related to a specific website that included images of prepubescent girls posing nude. There were no images of sexual contact. At trial, however, the government was permitted to introduce evidence of other child pornography that was found on the defendant's computer that was not part of the charged offenses and which included videos of sadistic child pornography, including scenes of rape. The Seventh Circuit held that permitting the government to introduce this evidence was reversible error. The evidence was not probative of any issue in the case and even under Rule 414, a rule 403 analysis must be accomplished. Among other errors, the trial court's failure to review the material prior to admitting it was erroneous.

***United States v. Gamory***, 635 F.3d 480 (11th Cir. 2011) The defendant was charged with being the leader of a drug and money laundering operation. Evidence established that he owned a music recording business, as well. During the trial, the government located a video produced by the studio on YouTube. The video referred to drugs and money laundering, but was also replete with references to sex, degradation of women, violence directed at women and law enforcement. The defendant did not appear on the video and there was no evidence that he wrote the lyrics. Admitting the video was improper and should have been excluded pursuant to Rule 403. Harmless error.

***United States v. Tanner***, 628 F.3d 890 (7th Cir. 2010) Defendant was charged with being a member of a drug conspiracy. Several years earlier, he was in possession of a gun at a New Years Eve party. While there may be some limited relevance to his possession of a firearm previously (guns are "tools of the trade of drug dealers") the probative value was outweighed by the unfair prejudicial impact. Harmless error.

***United States v. Waters***, 627 F.3d 345 (9th Cir. 2010) The defendant was charged with arson in connection with the destruction of certain property that was allegedly motivated by environmental concerns. The defendant was alleged to be a member of an environment terroristic group. At trial, the government was permitted to introduce evidence of various articles promoting anarchist ideals that she gave to another conspirator. The Ninth Circuit held that the introduction of a defendant's "reading material" will rarely be admissible to prove the defendant's guilt of a crime. In this case, the evidence should have been excluded. The district court abused its discretion, because the judge failed to read every page of all the articles in order to properly assess the probative value of the evidence.

***United States v. Klebig,*** 600 F.3d 700 (7th Cir. 2009) The defendant was charged with possession of an unlawful unregistered firearm. His home was full of junk. A "breath-taking" amount, according to the Seventh Circuit. Items, including squirrel tails, oil cans, pornography, syringes, chemicals, prescription bottles were everywhere. The government sought to introduce a sign that said, "Nothing in here is worth dying for" and a surveillance system at the house. The government contended that the evidence was admissible to show "knowledge" that the sawed-off shotgun had the characteristics that required it to be registered. The government also argued that the evidence was inextricably intertwined with the crime of possession. The Seventh Circuit disagreed and reversed the conviction. Whatever minimal relevance the evidence had; it was outweighed by its prejudicial effect. In a separate holding, the appellate court held that it was error to permit the government to bring in numerous other guns found at the house (all legal) and to repeatedly emphasize that the "guns were rendered safe" in the courtroom, thus exploiting the jurors' fear of guns. The display of guns in the courtroom served no legitimate purpose.

***United States v. Cooper***, 591 F.3d 582 (7th Cir. 2010) The defendant was charged with distributing heroin. The fact that some of his customers died from the heroin was too prejudicial to be admitted at trial. Though this evidence was surely admissible at sentencing, it was not probative of any issue at trial and therefore should have been excluded under Rule 403. Harmless error.

***United States v. Nobari***, 574 F.3d 1065 (9th Cir. 2009) Eliciting testimony that Mexicans are involved in the drug trade in one way, and Middle Easterners are involved in another aspect, was improper, especially given the government's closing argument that pointed out that the Middle Eastern defendants played precisely the role that was described by the agent. To the extent that the evidence was minimally relevant (for example, there was a taped call where one of the conspirators referred to "the Mexicans"), the evidence should have been excluded pursuant to Rule 403.

***United States v. Al-Moayad***, 545 F.3d 139 (2d Cir. 2008) The defendants were charged with funding a terrorist organization. At trial, the government was permitted to introduce testimony from a victim of the terrorist organizations' bombings. The government also called a person who attended a terrorist training camp. The defendants were not alleged to have had any involvement in the bombings. The Second Circuit reversed the convictions, holding that the probative value of this testimony was outweighed by the unfair prejudicial effect.

***United States v. Parr***, 545 F.3d 491 (7th Cir. 2008) The defendant was charged with committing a terrorist act (threatening to use a weapon of mass destruction against a federal building). At trial, the government offered into evidence "The Anarchist Cookbook". This was improper under Rule 403. Though certain portions could be admitted, allowing the entire book to be sent to the jury during deliberations was an abuse of discretion. Harmless error.

***United States v. Stout***, 509 F.3d 796 (6th Cir. 2007) The district court correctly excluded evidence in this child pornography possession case that the defendant had previously been convicted of videotaping a fifteen-year-old neighbor in the shower. The 404(b) evidence was more lurid than the charged offense and was too prejudicial. The Sixth Circuit affirmed the trial court's decision, relying in large part on Rule 403's balancing requirement.

***United States v. Sine***, 493 F.3d 1021 (9th Cir. 2007) In a prior civil proceeding, a judge made numerous extremely unflattering comments about the defendant, who was a lawyer in that case. When the defendant testified at his criminal trial – as well as other witnesses – the prosecutor confronted him with those observations by the judge. The district court should have excluded this line of cross-examination pursuant to Rule 403 and as hearsay.

***United States v. Moran***, 493 F.3d 1002 (9th Cir. 2007) Excluding evidence about what the defendant was told by her attorney and CPA about the legitimacy of the tax shelters was reversible error. Such testimony is not hearsay and cannot be excluded pursuant to Rule 403.

***United States v. Curtin***, 489 F.3d 935 (9th Cir. 2007) The defendant crossed a state line, according to the government, with the intent to have sex with a minor, with whom he had "chat room" discussions. He defended the charge on the basis that it was all just role playing and he expected to meet an adult woman. In his possession when he was arrested was a "personal digital assistant" (PDA) with numerous stories about men having sex with young girls. The defendant's subjective intent was the focus of the trial. The Ninth Circuit concluded, en banc, that pursuant to Rule 404(b), the contents of the PDA were admissible. However, the lower court failed to undertake the proper Rule 403 analysis and the conviction was therefore reversed. The trial judge failed to read the entirety of the stories that he admitted, relying, instead, on summaries and highlights.

***United States v. Newsom***, 452 F.3d 593 (6th Cir. 2006) The defendant was charged with being a felon in possession of a firearm. Evidence that he had various tattoos, some of which contained vulgar language, and others of which depicted pictures of firearms, should not have been admitted. The government argued that a witness (the defendant's girlfriend) had testified that she had not seen the defendant in possession of a firearm and that the tattoo evidence was relevant to her credibility. The Sixth Circuit disagreed: whether or not the defendant had a tattoo of a firearm was not relevant to the witness's credibility and her testimony that she had never seen the defendant in possession of an actual firearm.

**United States v. Davis**, 449 F.3d 842 (8th Cir. 2006) The trial court erroneously permitted the government to introduce the "face sheet" of a search warrant in order to establish why the police were at a particular house (where they found a gun). Even with a limiting instruction, the unfair prejudice occasioned by admitting the search warrant face sheet outweighed the probative value of the evidence.

***United States v. Mahasin***, 442 F.3d 687 (8th Cir. 2006) The defendant was on trial for various crimes. As the verdict was being read, he jumped the AUSA and assaulted him. When tried for the assault, he offered to stipulate that he was convicted of the other crimes and was sentenced. The trial court agreed with the government that it was not required to accept the stipulation and allowed the government to offer evidence about the prior crimes. This was error. There was nothing probative about the actual crimes for which he was convicted. Harmless error.

***United States v. Quattrone***, 441 F.3d 153 (2d Cir. 2006) The defendant was charged with sending an email to employees directing them to comply with the company's documents retention policy (i.e., it was time to start shredding documents) and that he did so, knowing that the grand jury had just issued a subpoena seeking certain documents. The defendant contended that the email was sent in the midst of various important matters with which he was involved, including a fee dispute with a customer. He introduced emails that documented his attention to the fee dispute during the same time as the document retention email was sent out. During cross-examination of the defendant, the government asked about that fee dispute and then questioned him about whether, in fact, the fee agreement with the customer violated SEC rules, etc. The Second Circuit held that this line of questioning should have been excluded pursuant to Rule 403.

***United States v. Awadallah***, 436 F.3d 125 (2d Cir. 2006) The defendant was charged with committing perjury in the grand jury. He defended on the basis that he was exhausted, confused and intimidated. The government wanted to call grand jurors as witnesses and have them testify about the circumstances of the defendant's testimony, as well as their opinion of the witness's

state of mind (i.e., exhaustion, confused). The trial court entered an order providing that a grand juror witness would be permitted to describe the objectively observable circumstances of the grand jury testimony but would not be permitted to express any opinion about the defendant's state of mind or express any opinion about the defendant's demeanor. The Second Circuit held that this was a proper Rule 403 limitation on the grand jurors' testimony.

***United States v. Weiland,*** 420 F.3d 1062 (9th Cir. 2005) The government should not have been allowed to introduce four prior felony convictions to prove the defendant's status as a felon. One prior conviction would have sufficed.

***United States v. Gonzalez-Flores***, 418 F.3d 1093 (9th Cir. 2003) The defendant was charged with alien smuggling. Evidence that two of the young aliens suffered from heat stroke was unfairly prejudicial. The fact that the aliens suffered heat stroke was not probative of any element of the charged offense. Harmless error.

***United States v. Wesley***, 417 F.3d 612 (6th Cir. 2005) The trial court erred in allowing testimony about the background of a witness's acquaintance with the defendant. The background established that the witness and the defendant met in prison after committing a prior robbery. The prejudice of this evidence outweighed its probative value.

***United States v. Mayes***, 370 F.3d 703 (7th Cir. 2004) The government offered evidence that a government witness had received an anonymous threat that if he testified, he and his kids would be killed. This evidence should not have been admitted, but it was harmless error.

***United States v. Amaya-Manzanares***, 377 F.3d 39 (1st Cir. 2004) The defendant was charged with possession of a forged green card. At trial, the government wanted to introduce evidence that the defendant unlawfully entered the country. The First Circuit (reviewing the case pretrial) carefully analyzed the relevance of such evidence and concluded that though somewhat probative of the defendant's state of mind, the risk of unfair prejudice was substantial. The court observed that the falsity of the green card itself was not proven by the unlawful entry evidence. Only the knowledge element of the false green card charge could be proven by the unlawful entry evidence. Yet, the risk was undeniable that the jury would simply convict the defendant of the green card offense without carefully limiting the proper purpose of the unlawful entry evidence. Ultimately, the First Circuit remanded to the lower court to reconsider the motion in limine under Rule 403.

***United States v. Ellis***, 147 F.3d 1131 (9th Cir. 1998) The defendant was charged with receiving and concealing stolen explosives. The government offered evidence at trial that the defendant had borrowed a copy of The Anarchist Cookbook, which includes chapters on explosives, but also on drugs, sabotage, and the use of lethal weapons. Without deciding whether the government should have been permitted to introduce a redacted portion of the book, the Ninth Circuit reversed the conviction on the grounds that introducing the entire book was reversible error. The defendant was only charged with possessing the stolen explosives; his "intent," therefore was not relevant to any issue in the case. The court also held that offering evidence that the quantity of stolen explosives was sufficient to destroy an office building was reversible error. Again, neither "intent" nor "potential victim impact" were relevant issues in the trial.

***United States v. Merino-Balderrama***, 146 F.3d 758 (9th Cir. 1998) The defendant was found in possession of child pornography. He denied knowing the content of the films, but did not deny being in possession of the films. At trial, he offered to stipulate that the films contained child pornography to avoid having them played to the jury. The trial court held that the government was not required to accept the stipulation. The Ninth Circuit reversed. Considering the issue under the standard of Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644 (1997), the Ninth Circuit reversed the conviction. The offered stipulation was conclusive on the element of the offense for which the government offered the tapes (i.e., the fact that they contained child pornography) and playing the tapes did not increase the evidence on any other relevant question (i.e., whether the defendant was aware of the contents), because there was no evidence that the defendant had ever viewed the tapes.

***People of Territory of Guam v. Shymanovitz,*** 157 F.3d 1154 (9th Cir. 1998) The defendant was charged with molesting and sexually assaulting numerous young boys. The government introduced evidence that he had various sexually explicit homosexual magazines in his house. The government argued that this proved his "intent" and his knowledge that having sex with minors was illegal. But the defense at trial was that he did not engage in the charged conduct. The Ninth Circuit reversed the conviction. "The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described." Introducing homosexual erotica was bound to bias the jury. Moreover, introducing the evidence to prove his "propensity" is precisely what is prohibited by Rule 404(b). The court further noted that literature is filled with criminal behavior, ranging from Lolita to Les Misérables. Finally, possession of these materials did not qualify as a "bad act" and was thus not admissible under any Rule 404(b) theory. See also United States v. Curtin, 489 F.3d 935 (9th Cir. 1007) (en banc) – partially overruling Shymanovitz. In Curtin, the court held that the evidence was admissible under Rule 404(b), but the lower court failed to properly undertake the Rule 403 analysis.

***United States v. Fulmer***, 108 F.3d 1486 (1st Cir. 1997) The defendant was charged with threatening an FBI agent. The defendant had been trying to convince the agent to bring fraud charges against the defendant's relatives, but the agent had declined. The threat was not explicit: the defendant left a phone message that he wanted the agent to "look up" misprision of a felony and then said, "The silver bullets are coming." The defendant claimed that the "silver bullets" referred to the evidence that he was going to produce supporting his contention that his relatives had committed a crime. At trial, the agent testified that this "threat" was received one week after 169 people were killed in the Oklahoma bombing. This was clearly prejudicial and irrelevant evidence. The prosecutor referred to the bombing in both his opening statement and closing argument. Again, this was entirely irrelevant to any issue in the case. The risk of unfair prejudice was substantial, and the conviction was reversed on this basis. The government also invited reversal by having the agent introduce some bullets in evidence (to prove that they are "silvery" in

color), even though they came from the agent's desk drawer and had no connection to the defendant. Finally, it was error to permit the agent to testify that he kept an extra magazine of bullets in his car after receiving the defendant's message.

***United States v. Aguilar-Aranceta***, 58 F.3d 796 (1st Cir. 1995) Though the defendant's prior possession of cocaine was probative of her knowledge that the package she picked up from the post office contained cocaine, the evidence was too prejudicial to be admitted and should have been excluded under Rule 403. The fact that the prior offense also involved the defendant's receipt of a package mailed from Colombia to her post office box contributes to the risk that the jury would unfairly draw the inference that the prior crime proves that the defendant was guilty of the present crime.

***United States v. Copple***, 24 F.3d 535 (3rd Cir. 1994) Though there is no prohibition in a fraud case on calling the victims to testify about their losses, there is no reason to allow the government to overdo it. Testimony that the victims lost their children's college education funds or that the losses affected their health, was unnecessary and not relevant to any issue relating to the defendant's fraudulent intent. The evidence, even if marginally relevant, should have been excluded pursuant to Rule 403. See also United States v. Holloway, 826 F.3d 1237 (10th Cir. 2016).

***United States v. Cortes***, 949 F.2d 532 (1st Cir. 1991) The prosecutor introduced the defendant's identification card which showed that he was a Colombian national. The prosecutor argued that the defendant's heritage linked him to the other Colombian conspirators. This was prejudicial evidence which far outweighed any probative value and required reversal of the conviction. The prosecutor was capitalizing on the preconceived prejudices which the jurors would have about Colombians.

***United States v. Ferreira***, 821 F.2d 1 (1st Cir. 1987) The defendant was on trial for robbery. The trial court admitted into evidence the fact that the defendant was carrying weapons at the time of his arrest. Since the robberies were not armed, the Court of Appeals holds that this is reversible error. The weapons found on the suspect were not relevant to identity or any other issue in the case.

***United States v. Forrester***, 60 F.3d 52 (2d Cir. 1995) An officer was asked why he had not included the defendant's name in a report which detailed a cooperating witness's statement. The officer responded that he already knew about the defendant, so there was no need to include this information. The government then asked the agent how he "already knew" about the defendant. The agent then detailed the hearsay statements of other participants. Although this evidence was technically not offered for the truth of the matter asserted (it was offered to explain why the name of the defendant did not appear in the report), it should have been excluded under Rule 403. The probative value of the evidence (in its non-hearsay context) was outweighed by the prejudicial impact the evidence would have.

***United States v. Harvey***, 991 F.2d 981 (2d Cir. 1993) Defendant was charged with knowing receipt of visual depictions of a minor engaging in sexually explicit conduct. He claimed that he was entrapped, and the government was permitted to introduce evidence of his predisposition. However, the introduction of obscene tapes seized from the defendant which depict adults engaged in acts of bestiality, sexual acts involving human waste and sado-masochism, was unduly prejudicial and necessitated reversal of the conviction.

***Virgin Islands v. Pinney,*** 967 F.2d 912 (3rd Cir. 1992) The defendant was charged with raping a young girl. The government introduced evidence that he raped the girl's sister several years earlier. Though this evidence would have been relevant to prove intent, it was not admissible to prove "course of conduct," because the prior offense occurred so long ago. With regard to the issue of intent, that was not a disputed issue – the only dispute was whether an act of sexual intercourse had occurred at all. Thus, introducing the evidence was reversible error. Under Rule 403, this evidence should have been excluded.

***United States v. Ham***, 998 F.2d 1247 (4th Cir. 1993) Defendant led a Hare Krishna group which engaged in various acts of mail fraud, murder, and trafficking in counterfeit goods. In its case in chief and in rebuttal, the government was improperly permitted to introduce evidence of the acts of child molestation which occurred in the community, as well as the defendant's homosexuality. With regard to the child molestation, it was only shown that defendant was aware of these acts in the community and failed to take adequate steps to stop the practice. The government argued that the evidence was admissible to show the motive for the murder. The theory of the government was that the victim was killed because he published articles alleging that child molestation occurred in the community, proof that such acts did occur was necessary to show motive. The appellate court disagreed. The prejudicial effect outweighed the slight probative value of the truth of the victim's allegations.

***United States v. Riddle***, 103 F.3d 423 (5th Cir. 1997) In this bank fraud prosecution, the government offered, pursuant to Rule 803(8)(B), a bank examiner's reports that detailed the defendants' violations and the condition of the bank. The report also detailed numerous other violations that were not included in the indictment, as well as various other findings and conclusions that were not relevant to the prosecution. Though the report was admissible under Rule 803(8)(B), the court should have excluded substantial portions pursuant to Rule 403.

***United States v. Morris***, 79 F.3d 409 (5th Cir. 1996) The defendant was acquitted of a substantive money laundering charge, but the jury was deadlocked on a conspiracy charge which included, as one of the overt acts, the same money laundering transaction. On retrial, the doctrine of collateral estoppel did not bar introduction of evidence of this transaction as an overt act in the conspiracy. However, the court concluded that the jury would be confused by this limited admissibility of the evidence and decided that pursuant to Rule 403, Fed. R. Evid., the evidence would be excluded. The Fifth Circuit affirmed, concluding that this was within the district court's Rule 403 discretion.

***United States v. Parada-Talamantes,*** 32 F.3d 168 (5th Cir. 1994) The defendant was arrested as a passenger in a van which had false compartments, and which was secreting over 100 pounds of marijuana. Over objection, the government was permitted

to introduce evidence that the defendant's brother sold the van to the driver. This was inadmissible evidence. Evidence of "guilt by association" is typically highly prejudicial and should be excluded. A defendant's guilt may not be proven by showing that he is related to an "unsavory" person.

***United States v. Ebens,*** 800 F.2d 1422 (6th Cir. 1986) The defendant was on trial for violating the civil rights of an individual whom he killed. The trial court permitted the government to introduce evidence that the defendant had uttered racial slurs in the past. The Sixth Circuit holds this to be reversible error as the slurs had not been made in the recent past and had not been made against someone of the same race as the victim.

***United States v. Irvin***, 87 F.3d 860 (7th Cir. 1996) The trial court erred in allowing the government to offer evidence of defendant's membership in the Diablos gang. There was no showing that the gang was involved in drug activity and consequently there was no logical link between defendant's membership in the gang and the charge that he possessed drugs with the intent to distribute.

***United States v. Frasch***, 818 F.2d 631 (7th Cir. 1987) A defendant's statement contained offensive words and highly offensive language and racially derogatory remarks. The trial court should have considered deleting these words from the confession or otherwise minimizing the unfair prejudicial impact of the language. Furthermore, the trial court should have questioned the venire panel using the actual language that the jury would later hear to determine whether that would impact on their ability to decide the case.

***United States v. Roark***, 924 F.2d 1426 (8th Cir. 1991) Throughout the course of the trial, the prosecutor sought to convict the defendant of drug possession and manufacturing by referring repeatedly to the defendant's membership in the Hell's Angels. This was irrelevant to the charges and was prejudicial.

***United States v. Roenigk***, 810 F.2d 809 (8th Cir. 1987) The defendant was on trial for perjury that was allegedly committed at a prior cocaine conspiracy trial of another defendant. At pre-trial, the trial court granted a motion in limine preventing the prosecutor from introducing evidence about the extent of the drug conspiracy which was involved in the earlier trial. The government violated this restriction during trial. Despite the defendant's failure to object to the government's violation of the restriction, the Eighth Circuit holds that it was plain error to admit this evidence. It was highly prejudicial and not relevant and should have been excluded. In essence, the government's presentation of too much evidence constituted reversible error.

***United States v. Ellis***, 147 F.3d 1131 (9th Cir. 1998) The defendant was charged with possessing stolen explosives. The statute does not require any proof that the defendant intended to use the explosives for any purpose. In this trial, the government introduced testimony that the defendant possessed enough explosives to blow up an office building and that he possessed the book "The Anarchist Cookbook." The Ninth Circuit held that this evidence was more prejudicial than probative and required reversing the conviction. The book contained various passages advocating revolution, drug use and sabotage, none of which was relevant to the defendant's alleged possession of stolen explosives. The evidence of the explosive potential of the material was especially prejudicial in light of the recent Oklahoma City bombing and lack of any relevance of "victim impact."

***United States v. Kallin***, 50 F.3d 689 (9th Cir. 1995) In this tax evasion trial, the government elicited testimony from the defendant's daughter that the defendant "dislikes Mexicans." This was irrelevant to any issue in the case and should have been excluded under Rule 403. The admission of the evidence amounted to an abuse of discretion. United States v. Bland, 908 F.2d 471 (9th Cir. 1990) The defendant was prosecuted for being a felon in possession of a firearm. He was initially captured by police pursuant to an arrest warrant. The trial judge improperly told the jury about the basis of the arrest warrant. Though the existence of the warrant was admissible, the underlying offense for which the defendant was being sought at the time of his arrest was highly prejudicial and should have been excluded under Rule 403.

***United States v. Elkins***, 70 F.3d 81 (10th Cir. 1995) Though the court never cited Rule 403, the defendant's conviction was reversed because of the improper admission of evidence that a defense witness was the member of a gang. Such evidence is only admissible if it is shown that the witness belongs to the same gang as the defendant, or if it is shown that the witness was afraid of the defendant. Neither showing was made in this case and therefore the prosecutor's cross-examination of the witness on this topic was reversible error.

***United States v. Church***, 955 F.2d 688 (11th Cir. 1992) Though the error was harmless, the trial court erred in admitting evidence that some four years before the charged murder conspiracy, the defendant had engaged in a conversation with an informant that he would assist in the murder of a prosecutor of another individual. Because the extrinsic offense occurred four years prior to the charged offense, it was not probative of the defendant's state of mind at the time of the charged offense. The evidence, moreover, was likely to prejudice the jury, because it related to the murder of a prosecutor. Under the Rule 403 balancing test, the evidence should not have been admitted. In gauging the question of when a prior offense is too remote, one factor to consider is the nature of the crime: Prior crimes involving deliberate and carefully premeditated intent – such as fraud and forgery – are far more likely to have probative value than prior crimes involving a quickly and spontaneously formed intent – such as assault.

***United States v. Manner***, 887 F.2d 317 (D.C. Cir. 1989) Though relevant on the issue of intent, evidence that a drug defendant sold drugs after the crimes with which he was charged should not have been admitted without an on-the-record finding that the relevance outweighed the prejudicial effect.

***EVIDENCE (Rule 404(a)( – Character Evidence)***

***United States v. De Leon***, 728 F.3d 500 (5th Cir. 2013) The defendant did not testify at trial. The defense called a character witness who was asked if the defendant was a law-abiding person. The prosecutor objected, citing Rule 608(a). The trial court improperly sustained the objection. Rule 404(a) allows the defense to introduce evidence of the defendant's law-abiding trait. This rule applies regardless of whether the defendant testifies. Rule 608(a), on the other hand, only applies to the credibility of a witness (either the defendant, or any other witness), and focuses on the issues of truthfulness, not lawabidingness. Harmless error.

***United States v. Farmer***, 583 F.3d 131 (2d Cir. 2009) Allowing the government to repeatedly refer to the defendant by his nickname, "Murder," in this attempted murder trial violated Rule 404(a) and required reversing the conviction. The prosecutor repeatedly used that nickname – during opening statement, closing argument and during questioning of the witnesses – in a manner that was designed to prejudice the defendant's right to get a fair trial.

***United States v. Yarbrough***, 527 F.3d 1092 (10th Cir. 2008) The trial court erred in excluding good character evidence in this obstruction of justice trial. The fact that the defendant acknowledged committing the acts with which he was charged did not foreclose him from contending that he not act willfully in violation of the law. His reputation for law-abidingness, and his general good character were relevant on this issue.

***United States v. Baldwin***, 418 F.3d 575 (6th Cir. 2005) Profile evidence is inadmissible as evidence of the defendant's guilt of a charged offense. The defendant may offer good character evidence under Rule 404(a), but the government may not offer profile evidence. In limited circumstances, the prosecution may offer profile evidence to demonstrate why a suspect was stopped, but this showing must be relevant to an issue in the case, not just a pretext for admitting the profile evidence. Admitting the evidence in this case was error, but harmless.

***In re Sealed Case***, 352 F.3d 409 (D. C. Cir. 2003) The trial court erred in excluding defendant's evidence relating to his reputation for truthfulness and honesty in the community. Counsel argued that these issues were admissible even though the defendant did not testify, because the issue of his honesty and truthfulness were inherent in the charges (i.e., being a straw purchaser for firearms). Under Rule 404(a), the character trait for lawfulness is pertinent to almost all criminal offenses. Evidence on the specific character traits for truthfulness and honesty is admissible when the defendant is charged with an offense in which fraud or falsehood is one of its statutory elements. (When the defendant testifies, such evidence is also admissible – though this might be pursuant to Rule 608(a), as well). In this case, the charges were akin to charges of fraud, or making false statements. Excluding the evidence in this case was harmless.

***EVIDENCE (Rule 404(b) – Similar Transactions – General Principles)***

***Old Chief v. United States***, 519 U.S. 172 (1997) The Court suggests that it would not be proper to bar the government from introducing Rule 404(b) evidence when a defendant offers to stipulate the fact sought to be proved by the evidence (e.g., knowledge, intent).

***Dowling v. United States,*** 493 U.S. 342 (1990) The collateral estoppel component of the double jeopardy clause does not prohibit the use of conduct that was the subject of a prior acquittal as 404(b) evidence in a subsequent trial.

***Huddleston v. United States***, 485 U.S. 681 (1988) The Supreme Court holds that the only preliminary decision which a trial court must make in admitting 404(b) evidence is whether the government can establish that there is sufficient evidence to support a finding by the jury that the defendant committed a similar act. The government need not establish the defendant's commission of the prior act by a preponderance of the evidence or by any other standard.

***United States v. Green***, 842 F.3d 1299 (11th Cir. 2016) A defendant may enter a plea of nolo contendere pursuant to Rule 11(a)(6), which requires the court to consider the public interest in allowing such a plea: "Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice." Id. The conviction that results following a nolo contendere plea is essentially the same for most purposes, including the conviction's eligibility as the basis for recidivist punishment if the defendant commits another crime, the conviction's use as impeachment pursuant to Rule 609, and the conviction's use for deportation purposes. One exception, however, was found in United States v. Green, 842 F.3d 1299 (11th Cir. 2016). In Green, the government sought to prove that a defendant had a prior conviction for the same offense for which he was on trial pursuant to Rule 404(b). The prior conviction was based on a nolo contendere plea. Citing Rule 803(22), the Green court, after thoroughly analyzing the ins and outs of nolo pleas, held that a conviction based on a nolo plea may not be introduced to prove that the defendant committed a prior similar act.

***United States v. Gomez***, 763 F.3d 845 (7th Cir. 2014) (en banc) The Seventh Circuit, sitting en banc, reconstructs the analysis that must be used in deciding whether to admit other crimes evidence. Rather than a strict four-part test, the court insists that the ultimate questions are relevance and unfair prejudice and issues such as similarity and recency are relevant, but not "checklist" items that must be checked: "The extent to which a proffered "other crime, wrong, or act" is close in time and similar to the conduct at issue in the case may have a bearing on its relevance, which is the starting point for all evidence questions, but the importance of testing for similarity and recency will depend on the specific purpose for which the other-act evidence is offered. The proponent of the other-act evidence should address its relevance directly, without the straitjacket of an artificial checklist." Second, the government must explain the legitimate purpose for which the evidence is offered in a way that does not include propensity as part of the reasoning. The trial court must not simply ask whether the other act evidence is being offered for a non-propensity purpose; the court must ask how the evidence establishes an element in a non-propensity way. And, finally, the court must determine whether the non-propensity purpose is a legitimately disputed issue at trial that would make the evidence

more probative on that issue than prejudicial. Thus, with general intent crimes, such as drug possession or drug distribution offenses, the mere fact that the defendant enters a not guilty plea does not make his intent an issue that can be proven by the government with Rule 404(b) evidence, unless the defendant expressly disputes his intent at trial. The court emphasized that a carefully crafted case-specific jury instruction should be given to the jury that expressly limits the use of this evidence, emphasizes the burden of proof on the government to prove each element beyond a reasonable doubt, and cautions against using the evidence to prove that the defendant is a bad person.

***United States v. Robinson***, 724 F.3d 878 (7th Cir. 2013) The defendant was charged with possession of a firearm by a convicted felon. The defendant stipulated that he had a prior felony conviction. The trial court read the stipulation to the jury, but never cautioned the jury that the stipulation was only admissible for the limited purpose of proving his status in connection with the felon in possession charge. The failure to limit the jury's consideration of the stipulation was reversible error because there was no reason the jury would not have also considered the fact that the defendant was a convicted felon in deciding that it was more likely that he did, in fact, possess the weapon (which he denied).

***United States v. Bailey***, 696 F.3d 794 (9th Cir. 2012) The government may not simply offer a prior civil complaint (in this case an SEC Complaint) in order to prove a prior similar transaction. The government must offer evidence of the actual conduct, not an allegation for which there was no admission. See also United States v. Marshall, 173 F.3d 1312 (11th Cir. 1999) (evidence of prior arrests is not admissible to prove the commission of other acts under Rule 404(b)).

***United States v. Scott***, 677 F.3d 72 (2d Cir. 2012) The defendant was observed by the police taking something from a woman on a street corner and then retrieving something from a hole in a tree and giving it to the woman. The defendant was arrested for possession with intent to distribute. He did not deny that he was the person that the police observed at the scene but claimed that he was engaged in legal conduct and did not participate in a drug transaction. The government offered evidence that they had seen the defendant many times in the past and that they had spoken to him. The trial court admitted this testimony. The Second Circuit reversed the conviction. First, the Second Circuit held that Rule 404(b) is not limited to other crimes or other wrongful conduct. The Rule's limitation also applies to "other acts" and thus the evidence of these prior encounters must have had some relevance other than propensity evidence. Moreover, the "other acts" are not required to be "bad acts" in order to be subject to Rule 404(b). Second the court held that there was no relevance to this testimony, other than creating jury speculation that the defendant was, in fact, involved in other prior encounters with the law enforcement officers. Importantly, the defense was not questioning the officers' identification of the defendant (if that were the defense, then their ability to recognize him and their prior familiarity with him, would be relevant).

***United States v. Green***, 617 F.3d 233 (3rd Cir. 2010) The Third Circuit abandoned the "inextricably intertwined" doctrine in this case. The court held that the doctrine confuses the issues involved in a proper Rule 404(b) analysis. If the evidence is not admissible under Rule 404(b) and it is not, in fact, part of the charged offense, then it will not be held to be admissible under the separate "inextricably intertwined" doctrine. However, offenses that are committed that facilitate the commission of the charged offense, will be admitted.

***United States v. Gorman***, 613 F.3d 711 (7th Cir. 2010) The Seventh Circuit expresses considerable concern about the use of the "inextricably intertwined" evidence doctrine. If the evidence does not in fact relate directly to the charged offense, then it should be required to pass the test under Rule 404(b) and 403, rather than being admitted pursuant to an ill-defined notion of "inextricably intertwined."

***United States v. McCallum***, 584 F.3d 471 (2d Cir. 2009) In addition to deciding that a similar transaction meets one of the permissible purposes outlined in Rule 404(b) and not for a proscribed "propensity" purpose, the trial court must also engage in the Rule 403 balancing test to determine if the prejudicial impact substantially outweighs the legitimate probative value. The trial court failed to articulate that he engaged in the Rule 403 balancing test in this case. The appellate court, however, was able to make that determination based on the evidence in the case and the conviction was affirmed.

***United States v. Newsom***, 452 F.3d 593 (6th Cir. 2006) The Sixth Circuit cautions trial courts not to instruct the jury on a laundry list of permissible reasons that Rule 404(b) evidence may be admitted when, in fact, only one permissible purpose applies. Thus, the court should not instruct the jury that other crime evidence may be admitted establishing motive, when the defendant's motive is not an issue in the case and the other crime evidence has no relevance to any motive. The same applies to accident.

***Gibson v. Ortiz***, 387 F.3d 812 (9th Cir. 2004) The California state jury instruction in this case provided that a prior sexual offense need only be proven by a preponderance of the evidence; and that a prior sexual offense, if proven, could lead to the inference that the defendant committed the charged offense. This violated the due process clause, because it suggested a burden of less than proof beyond a reasonable doubt. The court also held that inconsistent instructions that emphasized the proper burden of proof did not cure the infirmity. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." Francis v. Franklin, 471 U.S. 307, 322 (1985). See also Doe v. Busby, 661 F.3d 1001 (9th Cir. 2011) (relying on Gibson in reversing defendant's conviction). The Ninth Circuit later overruled Gibson v. Ortiz, on the basis that it applied the incorrect AEDPA standard of review. Byrd v. Lewis, 566 F.3d 855 (9th Cir. 2009).

***United States v. Sampson***, 385 F.3d 183 (2d Cir. 2004) Defendant was charged with a drug offense committed in 1998 and another offense committed in 2000. He demonstrated that he would testify at a trial involving the 1998 offense, but not the 2000 offense. The Second Circuit concluded that the events surrounding the 2000 incident would not have been admissible in a trial

involving just the 1998 transaction, because the defendant contended that he was not the person who was involved in the 1998 event – thus his "intent" was not in issue and the 2000 event could not be introduced to prove his intent. Because the evidence of the 2000 offense would not have been admissible under Rule 404(b) and the defendant demonstrated that he had a plausible basis for testifying at a trial involving just the 1998 offense, the failure to sever the counts was reversible error.

***United States v. DeSantis***, 134 F.3d 760 (6th Cir. 1998) The defendant was charged with mail fraud. During trial, the government introduced evidence that the defendant's sales practices arguably violated Ohio state law. The appellate court held that in this context, the trial court should have instructed the jury that the violation of state law is not synonymous with mail fraud. Moreover, the intent to violate the state law is not sufficient to establish intent to commit mail fraud. United States v. Jones, 159 F.3d 969 (6th Cir. 1998) The trial court erred in prohibiting the defendant from stipulating to the prior conviction in this § 922(g)(1) prosecution. See Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644 (1997). Harmless error.

***United States v. Thomas***, 134 F.3d 975 (9th Cir. 1998) In an entrapment case, the defendant is entitled, pursuant to both Rules 404(b) and 405(b) to introduce evidence of his lack of criminal record – that is, his good character. The defendant's "character" is relevant in an entrapment case on the issue of predisposition.

***United States v. Vavages,*** 151 F.3d 1185 (9th Cir. 1998) The defendant was charged with a marijuana offense. The evidence established that a car was stopped and that the occupants fled and marijuana was found in the vehicle. The defendant denied being in the vehicle. He had previously been involved in an offense in which he fled from a car that had marijuana in it. This evidence was inadmissible under Rule 404(b). The question in the present case was whether the defendant was in the car – i.e., identity of the perpetrator. The fact that the defendant previously fled from a car in which there was marijuana did not establish that he was the perpetrator in this case, because the two offenses were not so similar that the jury could reason that whoever committed the first offense was likely to be the person who committed this offense.

***EVIDENCE (Rule 404(b) -- Similar Transactions; Other Offenses – DRUG CASES)***

***United States v. Sheffield***, 832 F.3d 296 (D. C. Cir. 2016) While a prior drug offense may be admissible to prove an element of a charged offense, in this case, the government failed to show the relevant purpose: the prior offense was a decade old and the government only introduced the conviction without any evidence concerning the facts of that case, thus eliminating any proof that the prior conviction was factually relevant to any particular issue in the charged offense.

***United States v. Hall***, 858 F.3d 254 (4th Cir. 2017) The defendant was prosecuted for possession with intent to distribute marijuana, and firearms violations. The government relied on a constructive possession theory and highlighted the defendant's prior convictions for possession and possession with intent to distribute marijuana. The majority opinion exceeds 29 pages in the official reporter in reaching this conclusion and represents the gold standard for excluding prior drug convictions in a drug prosecution.

***United States v. Green-Bowman***, 816 F.3d 958 (8th Cir. 2016) In Judge Bright's dissenting opinion, he explains why improper argument by the prosecutor concerning the proper way to consider Rule 404(b) evidence should have resulted in a reversal of the conviction in this case. This dissenting opinion persuasively shows that when a prosecutor uses a "paralleling" argument, the jury is likely to consider the 404(b) evidence for an improper propensity purpose. In this case, the defendant was charged with possession of a firearm by a convicted felon. He had previously been convicted of the same offense. The prior offense was admitted, to prove "knowledge" that the gun was in the car next to him. In closing argument, the prosecutor argued, "The prior conviction shows what he knows, what happens: When I have a gun, when I run, and when I eventually admit that I had the gun, I get convicted of carrying a weapon. So, what did he do here? He walks away, he lies about even being in the car, an obvious lie. He walks away nonchalantly. The defendant knew – based on the context of what he had done previously and what happened the time previously, it shows what he knew on that day and why he acted the way he did."

***United States v. Carter***, 779 F.3d 623 (6th Cir. 2015) The trial court committed reversible error by admitting prior drug distribution evidence in this case. The defendant was charged with possession of precursors to manufacture methamphetamine and conspiracy to manufacture meth. The prior offense involved a different drug and did not involve any manufacturing conduct.

***United States v. Stacy***, 769 F.3d 969 (7th Cir. 2014) Defendant was charged with manufacturing methamphetamine. Several years earlier, he was convicted of possession of methamphetamine. The trial court erred (though it was harmless) by admitting the prior offense. Other than demonstrating propensity, the evidence of the prior possession served minimal probative purpose in proving any element at issue in the charged offense. The court stressed that the focus of the Rule 403 aspect of the inquiry is whether the supposed limited purpose for which the evidence is being offered by the government is a disputed issue in the case.

***United States v. Chapman***, 765 F.3d 720 (7th Cir. 2014) The defendant was charged with possession with intent to distribute heroin and gun charges. The gun and drugs were found in a bag in a house. The defendant denied having any connection to the bag. The government introduced evidence of the defendant's prior heroin convictions and the circumstances of those offenses. The Seventh Circuit reversed: Proving defendant's knowledge about distribution quantities of drugs was not relevant, because he denied possession of the bag at all. To the extent that the evidence was admissible to prove an element of the offense that was not in dispute (intent to distribute), it was inadmissible pursuant to Rule 403. The Seventh Circuit also held that the defendant should have been permitted to testify that with regard to his prior drug offenses (one of which was offered pursuant to Rule 404(b) and the others pursuant to Rule 609), the defendant should have been permitted to testify that he entered a guilty plea in those prior cases. This testimony was offered as "rehabilitation": when he was guilty, he pled guilty. This was his effort to blunt the force the impeachment evidence.

***United States v. Gomez***, 763 F.3d 845 (7th Cir. 2014) (en banc) The Seventh Circuit, sitting en banc, reconstructs the analysis that must be used in deciding whether to admit other crimes evidence. Rather than a strict four-part test, the court insists that the ultimate questions are relevance and unfair prejudice and issues such as similarity and recency are relevant, but not "checklist" items that must be checked: "The extent to which a proffered "other crime, wrong, or act" is close in time and similar to the conduct at issue in the case may have a bearing on its relevance, which is the starting point for all evidence questions, but the importance of testing for similarity and recency will depend on the specific purpose for which the other-act evidence is offered. The proponent of the other-act evidence should address its relevance directly, without the straitjacket of an artificial checklist." Second, the government must explain the legitimate purpose for which the evidence is offered in a way that does not include propensity as part of the reasoning. The trial court must not simply ask whether the other act evidence is being offered for a non-propensity purpose; the court must ask how the evidence establishes an element in a non-propensity way. And, finally, the court must determine whether the non-propensity purpose is a legitimately disputed issue at trial that would make the evidence more probative on that issue than prejudicial. Thus, with general intent crimes, such as drug possession or drug distribution offenses, the mere fact that the defendant enters a not guilty plea does not make his intent an issue that can be proven by the government with Rule 404(b) evidence, unless the defendant expressly disputes his intent at trial. The court emphasized that a carefully crafted case-specific jury instruction should be given to the jury that expressly limits the use of this evidence, emphasizes the burden of proof on the government to prove each element beyond a reasonable doubt, and cautions against using the evidence to prove that the defendant is a bad person.

***United States v. Lee***, 724 F.3d 968 (7th Cir. 2013) The trial court committed reversible error by admitting a prior cocaine conviction in this drug prosecution. The only purpose for which the evidence was admitted was to show his propensity to commit a drug offense. The government's claim that the evidence was probative of his "knowledge, intent and lack of mistake" were simply surrogates for propensity evidence.

***United States v. Richards***, 719 F.3d 746 (7th Cir. 2013) The defendant was charged with being a member of a drug conspiracy. He denied knowing that he was being used as a drug courier. The government offered Rule 404(b) evidence to show that the defendant was familiar with the drug trade. Admitting this testimony was not error. However, the government during closing argument insisted that the evidence proved that the defendant was, in fact, a drug dealer and therefore, the jury could infer that he was guilty of the charged offense. This was an improper propensity argument that was inconsistent with the limited purpose for which the 404(b) evidence was offered.

***United States v. Smith***, 725 F.3d 340 (3rd Cir. 2013) The defendant's conviction was reversed because the government was improperly permitted to introduce evidence of the defendant's prior drug conviction. Even though the prior conviction involved conduct that occurred on the same street corner, the government failed to identify a proper purpose for the admissibility of the evidence other than an argument that implicitly relied on a theory of "propensity."

***United States v. Davis***, 726 F.3d 434 (3rd Cir. 2013) A defendant's prior simple possession of cocaine was not admissible in this prosecution for possessing with intent to distribute a kilo of cocaine. There was no proof that the drugs were similar in appearance, or form, so the prior possession did not prove that the defendant, in the present case, was aware of what was in the parcel in his car. The Third Circuit canvasses other appellate courts' decisions on this question and joins the majority in concluding that a prior possession offense is not generally admissible in a distribution prosecution.

***United States v. Scott***, 677 F.3d 72 (2d Cir. 2012) In this drug prosecution, the arresting detectives testified that they observed the defendant retrieve something from inside a tree and hand it to a woman after receiving money from her. Then, over objection, they testified that they recognized the defendant, "from many previous encounters they had had with him." The Second Circuit reversed the conviction, holding that this comment was an unmistakable reference to prior encounters the defendant had with the law. This evidence was inadmissible under Rule 404(b).

***United States v. Miller***, 673 F.3d 688 (7th Cir. 2012) The admission of a prior conviction for possession with intent to distribute crack was error in this prosecution for possession with intent to distribute crack. The Seventh Circuit condemns the routine use of other crimes evidence in drug cases and declares that henceforth a rational explanation of how the prior offense establishes a fact in dispute must be made and simple statements such as, "it proves the defendant's intent" will no longer be satisfactory. Here, the drugs were found in proximity to the defendant. He claimed the drugs were not his. The fact that he previously possessed with intent to distribute drugs did not prove his "intent" in this case, because he did not contest that whoever owned the drugs in this case intended to distribute them. He denied that he was the owner of the drugs. The court also stressed the need to engage in the Rule 403 analysis.

***United States v. McBride***, 676 F.3d 385 (4th Cir. 2012) Evidence that a defendant previously sold cocaine to an informant about two years prior to the charged offense of possession with intent to distribute crack cocaine was inadmissible Rule 404(b) evidence. Admitting this evidence was reversible error. There was no logical relevance to the prior crime evidence.

***United States v. Sanders***, 668 F.3d 1298 (11th Cir. 2012) Introducing evidence of a minor marijuana sale that occurred twenty-two years prior to the major cocaine smuggling operation that was the focus of this prosecution was error under Rule 404(b). The amount of marijuana was so small (i.e., the criminal behavior was relatively insignificant) and the remoteness in time was so significant, that any probative value was nonexistent. The court concluded, however, that admitting the evidence was harmless error.

***United States v. Santini***, 656 F.3d 1075 (9th Cir. 2011) The defendant was caught at the border bringing marijuana into the country. He claimed that because of a brain injury, he was subject to being tricked and presented a psychiatrist to support the

defense. The prosecutor also presented an expert witness who testified that based on his review of the defendant's "rap sheet" this defense was invalid, because he had run-ins with the law prior to the injury. The Ninth Circuit reversed the conviction: the rap sheet was unreliable and did not distinguish arrests from convictions and was otherwise not probative of the defendant's state of mind in connection with the present case. The government's argument that the evidence was admissible to explain the expert's opinion was also unavailing, because pursuant to Rule 702, the expert must base his opinions on reliable information.

***United States v. Powell***, 652 F.3d 702 (7th Cir. 2011) Evidence of a prior drug sale in a case alleging distribution of drugs is rarely admissible as Rule 404(b) evidence, because the issue of intent is rarely an issue in a drug distribution case. Harmless error in this case.

***United States v. Tanner***, 628 F.3d 890 (7th Cir. 2010) Defendant was charged with being a member of a drug conspiracy. Several years earlier, he was in possession of a gun at a New Year's Eve party. While there may be some limited relevance to his possession of a firearm previously (guns are "tools of the trade of drug dealers" the probative value was outweighed by the unfair prejudicial impact). Harmless error.

***United States v. Johnson***, 617 F.3d 286 (4th Cir. 2010) The fact that a defendant may have been involved in drug activity in the past does not in and of itself provide a sufficient nexus to the charged conduct where the prior activity is not related in time, manner, place, or pattern of conduct. The prior drug episodes in this case occurred nearly five years before the charged conspiracy allegedly began. There was no link to the current members of the conspiracy. This was not harmless error in this case and required reversal of the conviction.

***United States v. Jenkins***, 593 F.3d 480 (6th Cir. 2010) The defendant was arrested in a house which contained ample quantities of guns and drugs. During his trial, the government offered evidence that the defendant was convicted of possession with intent to distribute marijuana at the same location in 1998, eight years prior to the events in this case. The government argued that the evidence was admissible to prove knowledge and intent. The Sixth Circuit reversed the conviction. Though knowledge and intent are generally relevant in any drug case, neither issue was really contested in this case. Even if the evidence was probative on either of these issues, it was "microscopic" at best and under Rule 403, the judge should have excluded the evidence.

***United States v. Conner***, 583 F.3d 1011 (7th Cir. 2009) Though upholding the admissibility of other drug offenses pursuant to Rule 404(b), the Seventh Circuit rejected the lower court's use of the "inextricably intertwined" theory.

***United States v. Davis,*** 547 F.3d 520 (6th Cir. 2008) The trial court admitted evidence of a prior marijuana transaction in this crack cocaine conspiracy and distribution prosecution. The trial court erroneously instructed the jury on the proper consideration of this evidence. The evidence could not reasonably have been considered as "preparation" evidence, because the prior marijuana offense was not undertaken in preparation of the crack offense. Nor was the evidence admitted a part of a "pattern." Perhaps the evidence was admissible to show the defendant's intent in committing the charged conduct, but that was not the basis upon which the evidence was actually admitted and that was not the limiting instruction provided to the jury.

***United States v. Taylor***, 522 F.3d 731 (7th Cir. 2008) The arresting officer was asked how he knew the defendant and he responded that he knew him based on his experience as a gang and narcotics officer. This was improper 404(b) evidence that was not necessary, or admissible. Judge Posner debunks the government's argument that the evidence was "inextricable intertwined," a phrase that Judge Posner described as "unhelpfully vague" in explaining why evidence was admissible. In the end, however, the court held that the inadmissible evidence was harmless error.

***United States v. Simpson***, 479 F.3d 492 (7th Cir. 2007) The defendant's statement to the police that he had previously sold crack cocaine was not admissible in this crack cocaine case because it was nothing other than mere propensity evidence. The government's claim that it established the "identity" of the perpetrator was rejected by the Seventh Circuit – there was nothing unusual about the defendant's offense and there were surely many other crack dealers in the neighborhood. The evidence did not meet the standard for admission under Rule 404(b) and was more unfairly prejudicial than probative of the identity of the perpetrator in this case. The Seventh Circuit also rejected the government's "intricately related" theory of admissibility. The error was reviewed under a plain error standard because counsel did not object to the defendant's statement. Reversible plain error.

***United States v. Baker***, 432 F.3d 1189 (11th Cir. 2005) The Eleventh Circuit held that various acts of violence that the government was permitted to introduce against several defendants in this massive drug trial should not have been admitted. Harmless error, however, with regard to all but two defendants. The admission of improper Rule 404(b) evidence against those two defendants was reversible error. The court noted, moreover, "If intent is undisputed by the defendant, the evidence is of negligible probative weight compared to its inherent prejudice and is therefore uniformly inadmissible." 432 F.3d at 1205. United States v. Matthews, 411 F.3d 1210 (11th Cir. 2005) REHEARING GRANTED AND THIS DECISION WAS VACATED in December, 2005. 431 F.3d 1296 The Eleventh Circuit initially decided – in an opinion that was withdrawn – that a decade-old drug conviction should not have been admitted in this cocaine conspiracy trial. The defendant was charged with his participation in a massive cocaine conspiracy. The evidence against him, however, was primarily comprised of the testimony of alleged co-conspirators. The defense was that they were all liars. The government introduced evidence of a 1991 drug arrest and argued that the evidence was admissible to prove the defendant's "intent." The Eleventh Circuit initially reversed. The issue in the case was whether the defendant was, in fact, involved in the drug sales, not whether he had the requisite intent. The suggestion that "intent" is always an issue was not persuasive. The court found that it was impossible for a jury to properly consider the evidence for the limited purpose offered by the government (i.e., the defendant was engaged in the drug deals, and only his intent was an issue, and the prior offense was probative of his intent – that line of reasoning was, in the opinion of Judge Tjoflat,

“preposterous”). This opinion contains a lengthy analysis of Rule 404(b) evidence in the context of a drug prosecution and was sure to be the leading case in this area of the law – until it was withdrawn.

***United States v. Jones***, 389 F.3d 753 (7th Cir. 2004) The trial court erred (though it was harmless) in admitting evidence of two prior drug convictions in this prosecution for possession with intent to distribute cocaine. The only logical relevance of the prior convictions was proof of propensity to deal in drugs. This is the prohibited purpose. Harmless error.

***United States v. Ramirez-Robles***, 386 F.3d 1234 (9th Cir. 2004) Evidence of defendant’s prior conviction for possession of a user quantity of methamphetamine was improperly admitted in this distribution of methamphetamine case. Harmless error.

***United States v. Sampson***, 385 F.3d 183 (2d Cir. 2004) Defendant was charged with a drug offense committed in 1998 and another offense committed in 2000. He demonstrated that he would testify at a trial involving the 1998 offense, but not the 2000 offense. The Second Circuit concluded that the events surrounding the 2000 incident would not have been admissible in a trial involving just the 1998 transaction, because the defendant contended that he was not the person who was involved in the 1998 event – thus his “intent” was not in issue and the 2000 event could not be introduced to prove his intent. Because the evidence of the 2000 offense would not have been admissible under Rule 404(b) and the defendant demonstrated that he had a plausible basis for testifying at a trial involving just the 1998 offense, the failure to sever the counts was reversible error.

***United States v. Jenkins***, 345 F.3d 928 (6th Cir. 2003) The defendant received an express mail package that the police believed contained drugs. The package was delivered to the defendant’s house and shortly thereafter she was approached by the police and questioned. She denied knowing what was in the package, claiming that she was paid $50 to receive it for someone else. The police “told” her it contained drugs and she responded, “Yeah” but again denied knowing what was in the package. The government offered evidence that she admitted to being a crack cocaine user, though she denied that it came from the person to whom the package was ultimately destined. The trial court committed error in admitting the statement that she used crack cocaine. The use of cocaine is not sufficiently probative of her intent to participate in the possession with intent to distribute cocaine. The court also concluded that the evidence was insufficient to support the conviction.

***United States v. Garcia***, 291 F.3d 127 (2d Cir. 2002) The government offered a twelve-year old prior conviction for selling two grams of cocaine for the purpose of proving that the defendant knew that the phone conversation had had with an informant was in code for a multi-kilogram cocaine transaction. The Second Circuit held that there was no showing that the prior deal established his knowledge of the code that was used by the informant.

***United States v. Haywood,*** 280 F.3d 715 (6th Cir. 2002) The defendant was charged with selling 18 grams of crack to an informant. He was arrested a year after the supposed transaction. In the meantime, in an unrelated incident, he was found to be in possession of a small amount of cocaine. The Sixth Circuit holds that the trial court reversibly erred in admitting the evidence relating to the episode of simple possession.

***United States v. Millard***, 139 F.3d 1200 (8th Cir. 1998) The defendants, husband and wife, were charged in a methamphetamine conspiracy. The government introduced two prior convictions against both defendants. This was error (harmless as to the husband, reversible as to the wife). The only reason to admit this evidence was to show the defendants' "propensity" to commit a drug offense and this is precisely what Rule 404(b) prohibits.

***United States v. Eggleston***, 165 F.3d 624 (8th Cir. 1999) The defendant was charged with possessing, with intent to distribute, crack cocaine that was found in the trunk of his car. His defense was that the drugs belonged to a passenger, and he did not know the drugs were in his car. The government introduced evidence of a six-year-old drug conviction. The Eighth Circuit held that this evidence was inadmissible, though it was harmless error. If the defendant claimed that he did not know what drugs were, or that he thought the substance was foot powder, his prior conviction would be probative of his knowledge. But because his defense was that the drugs were not his, the prior drug conviction was only probative of his propensity to commit the crime, which is a prohibited purpose.

***United States v. Vavages***, 151 F.3d 1185 (9th Cir. 1998) The defendant was charged with a marijuana offense. The evidence established that a car was stopped and that the occupants fled and marijuana was found in the vehicle. The defendant denied being in the vehicle. He had previously been involved in an offense in which he fled from a car that had marijuana in it. This evidence was inadmissible under Rule 404(b). The question in the present case was whether the defendant was in the car – i.e., identity of the perpetrator. The fact that the defendant previously fled from a car in which there was marijuana did not establish that he was the perpetrator in this case, because the two offenses were not so similar that the jury could reason that whoever committed the first offense was likely to be the person who committed this offense.

***United States v. Falls***, 117 F.3d 1075 (8th Cir. 1997) The government offered evidence that the defendant was involved in drug transactions on a large scale prior to his participation in the charged conspiracy. The government's theory -- this evidence proved that he participated in the charged conspiracy -- is exactly the theory prohibited by Rule 404(b). Admitting this evidence was error, but harmless.

***United States v. Jones***, 28 F.3d 1574 (11th Cir. 1994) Though the error was harmless, the trial court erred in permitting the government to introduce evidence of gambling activity at a particular house, as well as the defendant’s prior gambling conviction in this drug/firearm prosecution. The government offered the proof on this theory: the defendant is a convicted gambler; gambling paraphernalia was found at the house where the drugs were found; therefore, the drugs belonged to the defendant. Among other problems with this theory, the government failed to establish that the gambling paraphernalia found at the house was sufficiently similar to the type of gambling for which the defendant was previously convicted. Also, the evidence did not satisfy the Rule 403

balancing test. Where, as here, the government has a strong case without the extrinsic offense, then the prejudice to the defendant will more likely outweigh the marginal probative value. If the government can do without the evidence, fairness dictates that it should; but if the evidence is essential to obtain a conviction, it may come in.

***United States v. Simpson***, 992 F.2d 1224 (D.C. Cir. 1993) The defendant was stopped on suspicion of committing a rape. He was frisked and was found in possession of Dilaudid and cocaine. He contended that he was framed by the frisking officer. The AUSA questioned the defendant at trial about his knowledge of Dilaudid. He testified that he had had Dilaudid before but did not know much about packaging of the drug. The trial court then permitted the government to introduce evidence of the defendant's prior conviction for possessing Dilaudid. This was reversible error. No valid 404(b) purpose was offered for admitting this evidence.

***United States v. Manner***, 887 F.2d 317 (D.C. Cir. 1989) Though relevant on the issue of intent, evidence that a drug defendant sold drugs after the crimes with which he was charged, should not have been admitted without an on-the-record finding that the relevance outweighed the prejudicial effect.

***EVIDENCE (Rule 404(b) – Similar Transactions – Non-Drug Cases)***

***United States v. Steiner***, 815 F.3d 128 (3rd Cir. 2016) The trial court erred in permitting the government to introduce evidence of an outstanding arrest warrant for the defendant. The government claimed that this evidence was necessary to explain why the police went to the scene where he was arrested and also explained the "back story." Neither explanation was accurate or sufficient to support the introduction of the evidence. Harmless error. This decision was re-affirmed following remand from the United States Supreme Court on a sentencing issue. 847 F.3d 103 (3rd Cir. 2017).

***United States v. Gibbs***, 797 F.3d 416 (6th Cir. 2015) The defendant was charged with possession of ammunition by a convicted felon. The ammunition shells were related to a prior shooting. The government introduced evidence of another shooting in which the defendant participated. This was improper Rule 404(b) evidence. The other drive-by shooting was not inextricably intertwined with the charged offense and was otherwise not admissible for a permissible purpose.

***United States v. Martin***, 796 F.3d 1101 (9th Cir. 2015) The defendant was charged with federal tax evasion. Many years earlier, she had been audited by state tax authorities and been found to have taken improper deductions. The trial court committed reversible error in admitting the prior state audit results. When a prior act is introduced to prove "knowledge," the government must prove a logical connection between the knowledge gained as a result of the commission of the prior act and the knowledge at issue in the charged act. The error was made even more harmful in this case by the prosecutor's closing argument when he argued that the prior conduct showed that the defendant was a dishonest person. This is an impermissible propensity argument.

***United States v. Briley***, 770 F.3d 267 (4th Cir. 2014) The defendant was charged with reckless conduct (publicly engaging in sexual activity in a national park) and assault, which was the result of his encounter with the police who were arresting him for the reckless conduct. At trial, the government offered evidence that not long after the charged offense, the defendant once again visited the park and was about to engage in sex in his vehicle. The encounter with the police the second time was uneventful. The evidence should not have been admitted, because it was only marginally relevant to his conduct in the earlier incident, it was primarily just propensity evidence.

***United States v. Gutierrez-Mendez***, 752 F.3d 418 (5th Cir. 2014) The defendant was charged with human trafficking. Two years prior to the events in this case, he had been stopped on the road with two illegal aliens in his vehicle. The Fifth Circuit held that the government failed to meet the threshold Huddleston test that the prior event had even occurred. There was insufficient proof that the prior offense involved the knowing harboring of illegal aliens. Thus, it could not be relevant to proving the intent (or knowledge) that the defendant committed the offense of human trafficking as charged in this prosecution.

***United States v. Caldwell***, 760 F.3d 267 (3rd Cir. 2014) In this trial for possession of a weapon by a convicted felon, the trial court erroneously permitted the government to introduce evidence of the defendant's prior conviction for possession of a weapon by a convicted felon. The defendant denied possessing the weapon. The police testified that they saw the defendant with the gun in his hand. The government argued (and the trial court agreed) that the prior conviction was admissible to prove knowledge and intent. The Third Circuit reversed: the prior conviction did not prove anything about the defendant's intent or knowledge in this case. The defense was that he did not possess the gun at all, so his knowledge or intent was not relevant. In addition, the government argued that the prior conviction was admissible pursuant to Rule 609, because the defendant testified and the prior conviction was introduced to impeach his credibility. The Third Circuit held that the Rule 403 balancing test weighed in favor of excluding this form of impeachment. This is a significant decision that devotes nearly 20 pages in the published opinion to the inadmissibility of the prior conviction under either the Rule 404(b) or Rule 609 bases.

***United States v. Brown***, 765 F.3d 278 (3rd Cir. 2014) In a trial for possession of a firearm by a convicted felon, a prior conviction for engaging in a straw purchase was improperly admitted under Rule 404(b). In the charged offense, the defendant was in a car and the weapon was found under the seat. The fact that he illegally purchased a gun six years earlier was not relevant to whether he knowingly possessed the gun in the car. One of the government's arguments for admissibility was to show that the defendant knew what a gun was. The court dispatched this theory of admissibility summarily.

***United States v. Smith***, 725 F.3d 340 (3rd Cir. 2013) The defendant was standing on a street corner when federal agents were conducting surveillance nearby. The defendant left, but then returned and was seen walking towards the agents with a gun in his hand. He was arrested. He was charged with possession of a weapon by a convicted felon and with assault of a federal officer. He claimed that he retrieved the gun in self-defense (there had been a shooting at that intersection recently) and never had the

intent to assault the officers. The trial court permitted the government to introduce evidence that two years earlier, the defendant had sold drugs on that street corner. Admitting this evidence was reversible error. The district engaged in precisely the logic that Rule 404(b) forbids (i.e., the defendant previously was selling drugs at that location, so it is more likely that that is what he was doing that day). Though "motive" is a legitimate basis for introducing evidence, the government cannot use the prior offense to show that he was engaged in the same conduct again, which was the motive for committing the charged offense. The prior offense must itself provide the motive. In short, the chain of logic may not include a link that explains that "if he did it before, he is likely to have done it again (i.e., propensity)." The prior offense also did not qualify as a "common scheme or plan" because that principle applies when the uncharged crime and the charged crime are parts of a single series of events. Finally, the Third Circuit noted that the fact that the prior offense (drug dealing) was not the same as the charged offense (possession of a weapon and assault) is not what matters. Rule 404(b) is not limited to prohibiting evidence of "similar" crimes; it applies to any crime that is admitted, other than the crime with which the defendant is charged.

***United States v. Mack***, 729 F.3d 594 (6th Cir. 2013) At the time the government introduced the defendant's prior conviction for a prior robbery, there was insufficient evidence that he was, in fact, the perpetrator of the prior offense. All that was introduced was a copy of a judgment of conviction from a state court that had the same name as the defendant. Only when the defendant testified and admitted that he had that prior conviction was there sufficient information that he was the perpetrator and, of course, had the evidence not been admitted during the government's case, he never would have addressed the topic during his testimony. In addition, the evidence of the prior robbery was insufficiently similar to justify its admission under Rule 404(b). The defendant's charge in this case involved luring delivery drivers to vacant homes, stealing cell phones and carjackings. The prior offense was a typical street robbery. Admitting the evidence, however, was harmless error.

***United States v. Hamilton***, 723 F.3d 542 (5th Cir. 2013) The defendant was charged with possession of a firearm by a convicted felon. The gun was found after the police followed the defendant from an apartment complex and stopped him and later found that the gun had been thrown from the vehicle shortly before it was stopped. At trial, the government offered evidence that the defendant had been a member of a gang. This was reversible error. There was no proof that the defendant was currently a member of a gang and absent that proof, the fact that he was formerly a gang member was prejudicial and not sufficiently probative.

***United States v. Adams***, 722 F.3d 788 (6th Cir. 2013) At the defendants' vote-buying trial, the government introduced evidence that numerous defendants were associated with drug dealers and that many of the co-conspirators had been involved in drug dealing. The government's theory that this was admissible "background" evidence, or otherwise admissible under Rule 404(b) was rejected by the Sixth Circuit and the conviction was reversed. The appellate court also held that it was reversible error to admit a television "documentary" that discussed drug dealing in the county and suggested that the votebuying scandal was somehow related.

***United States v. Moore***, 709 F.3d 287 (4th Cir. 2013) The defendant was charged with carjacking, using a revolver to perpetrate the offense. The government was permitted to offer evidence at trial that the defendant possessed a semiautomatic firearm. This was error. The possession of one type of firearm is not probative that the defendant actually possessed another firearm that was used to commit the offense.

***United States v. Qin***, 688 F.3d 257 (6th Cir. 2012) The defendant was charged with theft of trade secrets from GM. Previously (according to the government), he stole property from another employer. The Sixth Circuit affirmed the lower court's decision excluding the evidence as too prejudicial and not sufficiently probative.

***United States v. Clay***, 667 F.3d 689 (6th Cir. 2012) The defendant was charged with carjacking. The victim died before trial (unrelated to the carjacking) and another witness was unable to identify the defendant. The government introduced evidence that several years earlier, the defendant assaulted a girl on the side of the road and knocked her unconscious. Admitting this evidence was reversible error. The government reasoned that the prior assault showed that the defendant had the specific intent to cause the carjacking victim serious bodily harm or death. The Sixth Circuit held that the government's argument was simply "propensity evidence" using different words. The government also introduced evidence that the defendant had stolen a gun from another car. There was no proof that this was the gun used and the theft from the other car was not logically related to the charged carjacking. Introducing the gun theft was also reversible error. Rehearing en banc was denied at 677 F.3d 753.

***United States v. Curley***, 639 F.3d 50 (2d Cir. 2011) The defendant was charged with interstate stalking. Many years earlier, the defendant's brother had assaulted the victim (the defendant's wife). The Second Circuit held that admitting the defendant's brother's assault of the victim was reversible error, even though it may have contributed to the victim's fear of the defendant himself. The Second Circuit also found it to be reversible error that fourteen months after the stalking incident, the defendant was stopped in a car and was found to be in possession of firearms, guns, a bullet proof vest, a ski mask, and a will. There was too much speculation involved in linking the defendant's conduct when he was stopped to the stalking incident.

***United States v. Fawbush***, 634 F.3d 420 (8th Cir. 2011) The defendant was charged with molesting two young children. Evidence that he had previously molested his own daughters was improperly admitted as Rule 404(b) evidence in this case. In fact, even if there had been some relevance, the evidence would have been excludable pursuant to Rule 403 because of the highly inflammatory nature of the evidence (including the fact that one of his daughters fathered his child).

***United States v. Wilson***, 624 F.3d 640 (4th Cir. 2010) In order to introduce Rule 404(b) evidence in the Fourth Circuit, the evidence must be "necessary" to prove an element of the charged offense. In this kidnapping case, evidence of a prior drive-by shooting was not necessary to prove an element of the kidnapping charge. Harmless error.

***United States v. Corsmeier***, 617 F.3d 417 (6th Cir. 2010) The defendant was charged with being part of a mortgage fraud conspiracy. On several occasions, brokers would give her small quantities of cocaine. The government argued that this evidence was admissible pursuant to Rule 404(b) to show her motive to engage in the fraudulent conduct. The trial court admitted the evidence on this theory. The Sixth Circuit held that this was error. First, the defendant engaged in the same fraudulent conduct with another broker who did not provide cocaine, so the motive theory was not particularly persuasive. Second, the prejudicial impact of this evidence far outweighed what little probative value it had. The evidence showed that the defendant was the kind of person who was willing to break the law and her entire defense was that she did not knowingly participate in the fraud scheme, because she was a successful businesswoman. This is the type of propensity evidence that is inadmissible under Rule 404(b).

***United States v. Phaknikone***, 605 F.3d 1099 (11th Cir. 2010) A picture of the defendant on his MySpace page holding a gun, and which referred to him by the name “Trigga FullyLoaded” was not admissible in his bank robbery trial. Harmless error.

***United States v. Klebig***, 600 F.3d 700 (7th Cir. 2009) The defendant was charged with possession of an unlawful unregistered firearm. His home was full of junk. A “breath-taking” amount, according to the Seventh Circuit. Items, including squirrel tails, oil cans, pornography, syringes, chemicals, prescription bottles were everywhere. The government sought to introduce a sign that said, “Nothing in here is worth dying for” and a surveillance system at the house. The government contended that the evidence was admissible to show “knowledge” that the sawed-off shotgun had the characteristics that required it to be registered. The government also argued that the evidence was inextricably intertwined with the crime of possession. The Seventh Circuit disagreed and reversed the conviction. Whatever minimal relevance the evidence had; it was outweighed by its prejudicial effect.

***United States v. Williams***, 585 F.3d 703 (2d Cir. 2009) The defendant was arrested outside an apartment after being chased by the police and charged with being a felon in possession of a firearm. The gun that was found was in a garbage can near where he was arrested, and an officer testified that he saw what he believed to be a gun in the defendant’s pocket as he was fleeing in the direction of where he was eventually arrested. Later the police searched the apartment where it was believed that he had previously been. Inside the apartment were numerous firearms and ammunition, which the trial court permitted the government to introduce as “background” or “to complete the story” or “opportunity.” The Second Circuit reversed the conviction. The evidence was not relevant or admissible for any of these purposes and was inadmissible bad character evidence, at best.

***United States v. Comanche,*** 577 F.3d 1261 (10th Cir. 2009) The defendant was charged with assault with a dangerous weapon (a box-cutter) on Indian Territory. He claimed that he acted in self-defense. The government offered evidence of two prior aggravated battery convictions involving sharp instruments. This was error. The prior offenses served no purpose other than to show the defendant’s violent propensity. There was no showing that he claimed self-defense in the other cases. The government also introduced the evidence pursuant to Rule 609. However, this, too, was error, because the Rule 609 only authorizes the introduction of evidence of the fact of conviction, not the details of the prior convictions. ***United States v. Morena***, 547 F.3d 191 (3rd Cir. 2008) Throughout the course of this firearm possession prosecution, the prosecutor repeatedly asked witnesses about the defendant’s drug use. There was no relevance of the drug use, and the trial court repeatedly told the prosecutor to avoid this topic. The Third Circuit reversed the conviction, condemning the prosecutor’s behavior as governmental misconduct.

***United States v. Reyes***, 542 F.3d 588 (7th Cir. 2008) The government offered evidence that the defendant and his confederates had participated in certain prior burglaries. The evidence of these prior offenses, however, was quite vague (even though the co-conspirators testified briefly about these prior events). This is one of the rare cases in which the appellate court holds that there was insufficient evidence that the defendant committed the similar transaction. Harmless error.

***United States v. Stout,*** 509 F.3d 796 (6th Cir. 2007) The district court correctly excluded evidence in this child pornography possession case that the defendant had previously been convicted of videotaping a fifteen-year-old neighbor in the shower. The 404(b) evidence was more lurid than the charged offense and was too prejudicial. The Sixth Circuit affirmed the trial court’s decision.

***United States v. Jones,*** 484 F.3d 783 (5th Cir. 2007) The defendant was charged with being a felon in possession of a firearm. The government sought to introduce a prior conviction for being a felon in possession of a firearm. The trial court erred in admitting the prior offense. The defendant was found in actual possession of the firearm in this case, so there was no probative value in introducing the prior conviction as far as his intent, or knowledge are concerned. See also United States v. Linares, 367 F.3d 941 (D.C. Cir. 2004).

***United States v. Sumlin***, 489 F.3d 683 (5th Cir. 2007) The defendant was stopped on the highway by a drug interdiction officer. Numerous characteristics of the car suggested to the officer that the defendant was involved in drug smuggling. No drugs were found, however. A gun was found. The defendant was prosecuted for possession of a firearm by a convicted felon. At considerable length, the officer explained to the jury why the defendant was a suspected drug smuggler, including features of the car that suggested that the defendant was involved in drug dealing. The Fifth Circuit reversed: The government failed to satisfy the requirement that the extrinsic offense ever occurred, consequently, the evidence of the officer’s conjecture was inadmissible.

***United States v. Rendon-Duarte***, 490 F.3d 1142 (9th Cir. 2007) Evidence that the defendant previously possessed weapons was inadmissible Rule 404(b) evidence in this prosecution for possessing a weapon by a convicted felon. Harmless error.

***United States v. Ortiz***, 474 F.3d 976 (7th Cir. 2007) The trial court probably erred in permitting the government to introduce evidence that the defendant and the informant were formerly engaged in an armed robbery together for the purpose of explaining their conversations relating to the charged offense of possessing a weapon by a convicted felon. The government argued that

they had developed a code and that their prior involvement in the robber offense was necessary to explain the code. The Seventh Circuit held that admitting the evidence was a “close question” but that it was clearly harmless.

***United States v. Curtin***, 489 F.3d 935 (9th Cir. 2007) The defendant crossed a state line, according to the government, with the intent to have sex with a minor, with whom he had “chat room” discussions. He defended the charge on the basis that it was all just role playing and he expected to meet an adult woman. In his possession when he was arrested was a “personal digital assistant” (PDA) with numerous stories about men having sex with young girls. The defendant’s subjective intent was the focus of the trial. The Ninth Circuit concluded, en banc, that pursuant to Rule 404(b), the contents of the PDA were admissible. However, the lower court failed to undertake the proper Rule 403 analysis and the conviction was therefore reversed. The trial judge failed to read the entirety of the stories that he admitted, relying, instead, on summaries and highlights.

***United States v. Johnson***, 439 F.3d 884 (8th Cir. 2006) The defendant was charged with knowingly possessing child pornography. He denied knowingly possessing the pornography, pointing out that many of the images on his computer had never been viewed. At trial, the government introduced evidence of written material that was included on the computer involving child rape. The Eighth Circuit reversed the conviction, relying in part on its earlier decision in United States v. Heidebur, 122 F.3d 577 (8th Cir. 1997). In Heidebur, the court held that it was error to admit evidence that the defendant abused his child in a trial for possessing child pornography. Such evidence is nothing more than inadmissible propensity evidence. In this case, admitting the evidence of the written material relating to child rape was reversible error.

***United States v. Owens***, 424 F.3d 649 (7th Cir. 2005) Evidence that a defendant previously robbed a bank was improperly admitted in this bank robbery trial. Based on the defendant’s defense, the prior robbery did not refute the defense offered by the defendant. For example, the defendant did not claim that he was a mere “pawn” in the charged offense (thus making the prior offense probative of his actual role in the charged offense). Moreover, because bank robbery is a general intent crime, the prior offense did not establish the defendant’s mens rea for the charged offense.

***United States v. Fleck***, 413 F.3d 883 (8th Cir. 2005) The police went to the defendant’s house as part of an insurance fraud investigation. While there, the police found guns and the defendant was charged with possession of a weapon by a convicted felon. The trial court erred in permitting the government to introduce evidence of the insurance fraud information “to explain the officer’s conduct” or to explain the circumstances of more fully “the crime.” Neither reason justified introducing the evidence.

***United States v. Griffin***, 389 F.3d 1100 (10th Cir. 2004) The trial court erred in permitting the government to offer evidence from the defendant’s probation officer that the defendant knew that he was not permitted to possess a firearm. The defendant was on trial for being a felon in possession of a firearm. There is no requirement that the government prove that the defendant knew he was not permitted to possess a firearm. Thus, the evidence was irrelevant, and the probation officer should not have been permitted to recite all the terms and conditions of the defendant’s probation. Harmless error.

***Gibson v. Ortiz***, 387 F.3d 812 (9th Cir. 2004) The California state jury instruction in this case provided that a prior sexual offense need only be proven by a preponderance of the evidence; and that a prior sexual offense, if proven, could lead to the inference that the defendant committed the charged offense. This violated the due process clause, because it suggested a burden of less than proof beyond a reasonable doubt. The court also held that inconsistent instructions that emphasized the proper burden of proof did not cure the infirmity. “Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.” Francis v. Franklin, 471 U.S. 307, 322 (1985). See also Doe v. Busby, 661 F.3d 1001 (9th Cir. 2011). The Ninth Circuit later overruled Gibson v. Ortiz, on the basis that it applied the incorrect AEDPA standard of review. Byrd v. Lewis, 566 F.3d 855 (9th Cir. 2009).

***United States v. Linares***, 367 F.3d 941 (D.C. Cir. 2004) The defendant was charged with being a felon in possession of a firearm. He denied ever possessing the gun. The government introduced evidence that he possessed (and threw down) a gun several years earlier in Connecticut. This evidence was not admissible to prove knowledge, or lack of mistake (because, though knowledge is an element of the offense of possession, there was no issue in this case that he “unknowingly” or “mistakenly” possessed the firearm and the previous conduct would not be relevant to prove that he knowingly possessed the weapon in this case); or to prove intent – because intent is not an element of a possession offense. The defendant must know that he possesses the weapon, but there is no additional “intent” element of the offense. Given the overwhelming evidence, however, erroneously admitting this evidence was harmless.

***United States v. Moore***, 375 F.3d 259 (3rd Cir. 2004) Defendant was charged with arson and possession of a weapon by a convicted felon. Throughout the trial, the prosecutor introduced various “bad acts” evidence that had no bearing whatsoever on the charged offenses, including domestic abuse and drug dealing. No objection was raised by the defense attorney. Then, in closing argument, the prosecutor labeled the defendant a terrorist. Again, no objection. The Third Circuit held that the prosecutor’s behavior amounted to plain error and reversed the conviction, noting, “There was a serious break down here.”

***United States v. Jackson***, 339 F.3d 349 (5th Cir. 2003) In this conspiracy case (interstate transportation of stolen jewelry), the government was permitted to introduce evidence that the defendant had a prior conviction for theft of watches. The government argued that this established the defendant’s state of mind. The Fifth Circuit concluded that the evidence was admissible to prove the state of mind element of the conspiracy offense, but that the probative value was outweighed by its prejudicial effect (Rule 403). The defendant’s defense at trial was that the government had the wrong guy. Thus, while the government was still required to prove that the defendant had the requisite state of mind, the importance of the evidence on this issue was considerably

diminished in light of the defense raised by the defendant. The trial court also erred in permitting the government to introduce evidence that the defendant was on parole.

***United States v. Thomas***, 321 F.3d 627 (7th Cir. 2003) The defendant was tried for possessing a firearm by a convicted felon. Introducing evidence that he had two prior state court gun convictions and that he had a tattoo of two guns on his forearms was error. This was improper propensity evidence.

***United States v. Latouf***, 132 F.3d 320 (6th Cir. 1997) The defendant was charged with conspiring to burn down her restaurant to collect the insurance proceeds. The government offered evidence that the defendant had previously made comments to two employees that she would pay someone $5,000 to burn her house down. The Sixth Circuit concluded that the probative value of this evidence was outweighed by its prejudicial impact. The defendant's financial motive for burning the restaurant was abundantly established by other evidence, so the Rule 404(b) evidence was not necessary to show financial motive. Harmless error.

***People of Territory of Guam v. Shymanovitz,*** 157 F.3d 1154 (9th Cir. 1998) The defendant was charged with molesting and sexually assaulting numerous young boys. The government introduced evidence that he had various sexually explicit homosexual magazines in his house. The government argued that his proved his “intent” and his knowledge that having sex with minors was illegal. But the defense at trial was that he did not engage in the charged conduct. The Ninth Circuit reversed the conviction. “The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described.” Moreover, introducing the evidence to prove his “propensity” is precisely what is prohibited by Rule 404(b). The court further noted that literature is filled with criminal behavior, ranging from Lolita to Les Misérables. Finally, possession of these materials did not qualify as a “bad act” and was thus not admissible under any Rule 404(b) theory. See also United States v. Curtin, 489 F.3d 935 (9th Cir. 1007) (en banc) – partially overruling Shymanovitz. In Curtin, the court held that the evidence was admissible under Rule 404(b), but the lower court failed to properly undertake the Rule 403 analysis.

***United States v. Mills***, 138 F.3d 928 (11th Cir. 1998) The trial court erred in admitting evidence that the defendant had committed a similar crime previously. The defendant was charged with violating 18 U.S.C. § 1001, as part of a Medicaid fraud scheme. The government introduced evidence that she had lied to U.S. Customs about a jewelry purchase upon returning to the United States from overseas travel. The government's theory was that she was the type of person who would lie to the government. This is precisely what is forbidden by Rule 404(b) – that is, propensity evidence. Harmless error.

***United States v. Utter***, 97 F.3d 509 (11th Cir. 1996) The defendant’s business burned down. Evidence was introduced by the government that one of the defendant’s residential tenants was behind in her rent and the defendant threatened to burn her property if she did not pay up. This evidence was inadmissible. The government also introduced evidence of a fire at the defendant’s residence in Kentucky. The government failed to show that that fire was caused by arson, or that the defendant was the perpetrator. Reversible error.

***United States v. Gonzalez***, 975 F.2d 1514 (11th Cir. 1992) The trial court committed reversible error in failing to give a limiting instruction to the jury relating to 404(b) evidence. Defendant was charged with a conspiracy to engage in money laundering. Substantial evidence was introduced relating to events which occurred prior to the time of the conspiracy as set forth in the indictment. The failure to instruct the jury about the limited relevance of such evidence seriously prejudiced the defense. The trial court should have instructed the jury that the evidence of similar transactions may not be the basis of the conviction, though such evidence could be considered as to issues of knowledge and intent.

***United States v. Hines***, 955 F.2d 1449 (11th Cir. 1992) It was reversible error to allow the government to introduce mug shots of the defendant in an effort to show that the complainant had previously identified the defendant as the perpetrator. The use of the mug shots impermissibly showed that the defendants were previously in custody and were “known criminals.” United States v. Church, 955 F.2d 688 (11th Cir. 1992) Though the error was harmless, the trial court erred in admitting evidence that some four years before the charged murder conspiracy, the defendant had engaged in a conversation with an informant that he would assist in the murder of a prosecutor of another individual. Because the extrinsic offense occurred four years prior to the charged offense, it was not probative of the defendant’s state of mind at the time of the charged offense. The evidence, moreover, was likely to prejudice the jury, because it related to the murder of a prosecutor. Under the Rule 403 balancing test, the evidence should not have been admitted. In gauging the question of when a prior offense is too remote, one factor to consider is the nature of the crime: Prior crimes involving deliberate and carefully premeditated intent – such as fraud and forgery – are far more likely to have probative value than prior crimes involving a quickly and spontaneously formed intent – such as assault.

***United States v. Philibert***, 947 F.2d 1467 (11th Cir. 1991) The defendant was charged with making a threatening phone call. The prosecutor should not have been allowed to introduce evidence that several weeks before the threat, the defendant had purchased guns and ammunition. The error was exacerbated by the prosecutor’s presentation of the guns to the jury, including a Thompson machine gun.

***United States v. Lequire***, 943 F.2d 1554 (11th Cir. 1991) The improper questions posed by the prosecutor which inevitably elicited evidence of the defendant’s prior indictments and convictions were grounds for reversal. Curative instructions from the trial judge were not adequate to cure the error.

***United States v. Lail,*** 846 F.2d 1299 (11th Cir. 1988) The defendant was charged with bank robbery. The government introduced evidence of another armed robbery which occurred close to the same time as the charged armed robbery. The

defendant's case rested on his presentation of alibi witnesses. The Eleventh Circuit holds that the 404(b) evidence was not admissible. The uncharged bank robbery was not sufficiently similar to the charged crime to admit such evidence to establish identity. In order to admit uncharged crimes on the basis of identity, there must be sufficient similarity that the perpetrator virtually left his "signature." Here, the mere fact that in both cases the robber acted alone with a gun and without a disguise is not sufficient to constitute sufficient similarity to admit the evidence under the identity rule. Furthermore, there were sufficient dissimilarities between the charged and uncharged crime that the evidence should have been excluded.

***United States v. Rhodes***, 886 F.2d 375 (D.C. Cir. 1989) It was plain error to permit the government to introduce evidence of fraudulent checks which were in no way connected to the indicted offenses involving bank fraud and forgery.

***EVIDENCE (Rule 404(b) – Similar Transactions – Defendant's Use of 404(b) Evidence)***

***United States v. Garcia***, 729 F.3d 1171 (9th Cir. 2013) The defendant was charged with murder and involuntary manslaughter as a result of his killing a person with whom he was fighting. The defendant sought to introduce evidence that the victim had previously engaged in various acts of violence towards others and the defendant knew of these other incidents. The trial court erred in excluding this evidence. In a self-defense case, the defendant's knowledge of the victim's prior assaultive behavior is relevant to show his state of mind in shooting the victim. See also United States v. Saenz, 179 F.3d 686 (9th Cir. 1999); United States v. James, 169 F.3d 1210 (9th Cir. 1999).

***United States v. Parkes***, 668 F.3d 295 (6th Cir. 2012) The defendant, a customer of a small Tennessee bank, was charged with participating in bank fraud. His company had large debts to the bank, in fact, the debts exceeded the lending limits permitted by the bank and the FDIC. The president of the bank altered the books to make it look like the loans were actually to several different unrelated companies (some of which were non-existent), so that it did not appear on the books as an outsized loan to the defendant. The defendant sought to introduce evidence that the president had altered the books of the bank to falsify the amount of loans by other customers, as well (customers who were not aware that this was occurring). The trial court improperly excluded this evidence. This evidence was offered to show that the president had the means and the motive to commit the crime with which the defendant was charged. The fact that the 404(b) evidence would also show the president's propensity to commit this crime did not automatically disqualify the admissibility of the evidence.

***United States v. Wright***, 625 F.3d 583 (9th Cir. 2010) The defendant was charged with possession of child pornography on his computer. He defended on the basis that his roommate downloaded the child pornography on the defendant's computer. The roommate did not testify at trial. The defendant sought to introduce evidence that the roommate was computer-savvy, and that he had an interest in young boys. The Ninth Circuit held that such evidence was admissible pursuant to Rule 404(b) and that the limitations on Rule 404(b) evidence when introduced against the defendant are more relaxed when introduced against a person (witness, or non-witness) other than the defendant. Because the issue was not properly litigated in the trial court, the plain error standard applied, and the appellate court concluded that the error in excluding the evidence did not rise to the level of plain error.

***United States v. Montelongo***, 420 F.3d 1169 (10th Cir. 2005) The defendant was convicted of transporting marijuana in a truck. The owner of the truck also owned other trucks and another of the trucks was also found to have been carrying marijuana. When the owner testified, the defendant sought to cross-examine him about the other incident (to suggest that the owner was using the trucks to haul marijuana, unbeknownst to the drivers). Barring this cross-examination was reversible error. The defendant was permitted under Rule 404(b) to show the other incident to prove his innocence.

United States v. Stephens, 365 F.3d 967 (11th Cir. 2004) The defendant was charged with selling methamphetamine to an informant. The transactions were recorded on videotape, but the content of the tapes was hard to discern and did not clearly reveal the defendant handing any drugs to the informant. Nevertheless, the police testified that they searched the informant before he met with the defendant and he had money, but no drugs; and when he returned from the meetings, he had drugs and no money. Prior to trial, the informant died of natural causes. The defendant attempted to offer evidence at trial that the informant was regularly using, buying, and selling drugs during the time period of the undercover work. Defense counsel explained that his theory was that the informant actually hid drugs on his person, or in his car before he had the meetings with the defendant, and he was tricking the police into believing that he was actually acquiring the drugs from the defendant. The trial court excluded the evidence, holding that this was an improper method of impeaching the informant – through prior bad acts evidence. The Eleventh Circuit reversed, holding that this evidence was admissible in support of the defendant's theory that the informant had a source of drugs which explained how he had the drugs to give to the agents. The evidence was also admissible under Rule 404(b) – defendant's use of Rule 404(b) – to show the informant's other acts that explained his opportunity to commit the deception perpetrated on the police.

***United States v. Cruz-Garcia***, 344 F.3d 951 (9th Cir. 2003) The defense attempted to prove the facts underlying the witness's prior convictions to show that he had the capacity to commit the offenses with which the defendant was charged. The trial court erroneously excluded this evidence. The evidence was admissible under Rule 404(b) to prove the witness's capacity to commit the crime. Indeed, the prosecutor had repeatedly argued that the witness was too stupid to have committed the crime without the defendant's help. The court noted that Rule 404(b) should be more liberally interpreted when the evidence is being offered against a witness, as opposed to the defendant.

***United States v. Cohen***, 888 F.2d 770 (11th Cir. 1989) The Eleventh Circuit holds that Rule 404(b) may be used by the defendant in an effort to introduce evidence of a witness' prior bad acts. Thus, if a witness' prior criminal acts or misconduct would provide a motive or demonstrate a modus operandi or demonstrate a capacity (as here) to commit a crime without the aid

of the defendants, such evidence may be admissible without regard to the rules of impeachment embodied in Rules 608 and 609.

***EVIDENCE (Rule 404(b) – Notice Requirement)***

***United States v. Carrasco***, 381 F.3d 1237 (11th Cir. 2004) The trial court erred in permitting the government to offer Rule 404(b) evidence without providing the required notice to the defendant prior to trial. The error was prejudicial and required setting aside the verdict.

***EVIDENCE (Rule 405 – Character Evidence)***

***United States v. Rutgerson***, 822 F.3d 1223 (11th Cir. 2016) Generally, specific acts of good conduct are not admissible as character evidence. However, if a person's character, or trait of character is an essential element of a claim or defense, then specific acts are admissible. F.R.E. 405(b). In this case, the court held that when a defendant asserts an entrapment defense, Rule 405(b) applies, and the defendant is entitled to present specific acts of good conduct (that show an absence of predisposition to commit the crime).

***United States v. Thomas***, 134 F.3d 975 (9th Cir. 1998) In an entrapment case, the defendant is entitled, pursuant to both Rules 404(b) and 405(b) to introduce evidence of his lack of a criminal record – that is, his good character. The defendant's "character" is relevant in an entrapment case on the issue of predisposition.

***EVIDENCE (Rule 408 – Civil Settlement Negotiations)***

***United States v. Davis***, 596 F.3d 852 (D.C. Cir. 2010) A defendant's offer to repay money to the organization for which he worked – in order to "make the situation go away" – was not admissible evidence in an embezzlement trial. The government offered the evidence as "consciousness of guilt" which is precisely what Rule 408 prohibits.

***United States v. Arias,*** 431 F.3d 1327 (11th Cir. 2005) Rule 408 applies in both civil and criminal cases.

**United States v. Bailey,** 327 F.3d 1131 (10th Cir. 2003) Evidence of a civil settlement is not admissible in a criminal case. In this case, the government improperly introduced evidence of a settlement the defendant reached in a civil action brought by the defrauded victims of the criminal offense. Other Circuits have held that Rule 408 only applies in civil cases.

***EVIDENCE (Rule 410 and Fed.R.Crim.P. 11(f))***

***United States v. Mezzanatto,*** 513 U.S. 196 (1995) The protection provided by Rule 410, Fed. R. Evid. and Rule 11(e)(6) Fed. R. Crim.P. (now located at Rule 11(f)) can be waived by the defendant. Thus, a defendant may engage in plea negotiations and agree to the government's terms that the statements he made during the course of these discussions could, in the event a plea was not entered, be used for impeachment purposes at trial. This would be a valid waiver of the protection provided by Rule 410.

***United States v. Escobedo***, 757 F.3d 229 (5th Cir. 2014) The defendant's plea agreement provided that the defendant would waive his rights under Rule 410 / Rule 11(f) if he failed to comply with the terms of the plea agreement. The defendant tendered his plea, but later withdrew the plea. The Fifth Circuit held that the plea agreement was ambiguous whether this triggered the Rule 410 waiver, because he did not fail to comply with the plea agreement, he simply withdrew his plea, which he was entitled to do. Therefore, at his trial, introducing his withdrawn plea and related statements was improper.

***United States v. Nelson***, 732 F.3d 504 (5th Cir. 2013) The defendant entered into a plea – later withdrawn – that contained an express waiver of his rights under Rule 410 to exclude evidence of his statements in the event he withdrew. At his trial, the government sought to introduce not only his statements, but also his then-attorney's testimony about the circumstances surrounding the preparation of the factual basis. This violated the attorney-client privilege. The defendant's waiver regarding the use of his statements did not also waive the attorney-client privilege.

***United States v. Oluwanisola,*** 605 F.3d 124 (2d Cir. 2010) The defendant signed a proffer agreement that provided that the government could introduce the defendant's statements as substantive evidence to rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf the defendant at any stage of the criminal prosecution. The defense counsel, in opening statement, suggested that the government would fail to prove certain elements of the offense. During cross-examination of a witness, the attorney questioned the witness about certain dates that he made observations. The district court held that both of these events triggered the waiver provision. The Second Circuit disagreed. Simply challenging the sufficiency of the evidence in general, or questioning a witness about certain dates, did not allow the government to introduce the defendant's statements that were subject to the proffer agreement.

***United States v. Newbert***, 504 F.3d 180 (1st Cir. 2007) If a defendant withdraws his guilty plea based on newly discovered evidence of his innocence, the government may not invoke the "breach the plea agreement" penalties (such as various rights waivers, including a waiver of Rule 410) that would apply in other situations when the defendant breaches a plea agreement.

***United States v. Nguyen***, 465 F.3d 1128 (9th Cir. 2006) A nolo contendere plea is not admissible; nor is a conviction resulting from a nolo plea.

***United States v. Ventura-Cruel***, 356 F.3d 55 (1st Cir. 2003) The defendant entered into a plea agreement and entered his plea. However, his debriefings went poorly, and the court ultimately withdrew the guilty plea, because the court concluded that based on the defendant's statements, there was no longer a factual basis for the plea. During the ensuing trial, the government introduced a letter written by the defendant during the debriefings (it was essentially the "acceptance of responsibility" letter) that was incriminating. The First Circuit held that admitting this letter was reversible error. Technically, Fed. R. Evid. 410 did not

apply, because the defendant's statement was not anticipatory to, or part of, the plea negotiation process. The court concluded that allowing the government to use the statement gave them the benefit of the bargain while depriving the defendant of the benefit of the bargain. See also United States v. Escamilla, 975 F.2d 568 (9th Cir. 1992).

***United States v. Velez***, 354 F.3d 190 (2d Cir. 2004) The defendant's proffer agreement provided that any statement he made could be used by the government if any testimony at trial was inconsistent with the defendant's admissions. The Second Circuit upheld this proffer agreement. See United States v. Mezzanatto, 513 U.S. 196 (1995) (upholding waiver of voluntary and knowing waiver of Rule 410 protection).

***United States v. Millard***, 139 F.3d 1200 (8th Cir. 1998) During the course of trial, the government offered considerable evidence about the defendants' efforts to negotiate a deal and cooperate. This evidence violated Rule 410 and was reversible error with respect to one defendant, though harmless with regard to another.

***United States v. Biaggi***, 909 F.2d 662 (2d Cir. 1990) If a defendant rejects an offer of immunity in exchange for testifying, and is then prosecuted, this evidence is admissible to show defendant's "consciousness of innocence." This evidence is not barred by Rule 410.

***United States v. Serna***, 799 F.2d 842 (2d Cir. 1986) During the course of plea negotiations, a co-defendant stated that the defendant was the "wrong man." These statements were made to a law enforcement agent, but the law enforcement agent was acting under the government attorney's authority in questioning the co-defendant about his cooperation. The defendant sought to introduce this evidence at a joint trial. This evidence was inadmissible at a joint trial because the statement was not admissible against the co-defendant pursuant to Rule 11(e)(6).

***United States v. Acosta-Ballardo***, 8 F.3d 1532 (10th Cir. 1993) Under Rule 11(e)(6), statements made during plea negotiations are inadmissible, even for impeachment purposes, at trial.

***EVIDENCE (Rule 412 – Rape Shield Statute)***

***Gagne v. Booker,*** 606 F.3d 278 (6th Cir. 2010) The Sixth Circuit held that the Michigan State Rape Shield Statute, as construed by the Michigan appellate court, was unconstitutionally applied. The defendant was charged, along with a co-defendant, of raping the defendant's former girlfriend. The defendant sought to introduce evidence (in support of his consent defense) that he and the girl had participated in group sex previously. The Michigan court held that this evidence was barred under the state Rape Shield statute. The Sixth Circuit held that this evidence could not be excluded: the Due Process Clause assures a defendant that he may introduce evidence that is highly relevant and indispensable to the central dispute. REHEARING EN BANC GRANTED 7/20/2010. DECISION OF THE PANEL VACATED AND THE CONVICTOIN WAS REINSTATED. 680 F.3d 493 (6th Cir. 2012).

***Barbe v. McBride***, 521 F.3d 443 (4th Cir. 2008) The defendant was charged with child sexual assault. An expert testified that the victim exhibited signs of sexual abuse. The defendant sought to introduce evidence that the victim had been abused by other adults (and the child had made prior accusations about these prior assaults). Relying on the state rape shield statute, the trial court excluded the evidence. The Fourth Circuit granted the writ. Excluding evidence that would provide an alternative explanation for the expert's findings violated the defendant's right to confront the evidence against him. Pursuant to Michigan v. Lucas, 500 U.S. 145 (1991), the trial court must make a case-by-case determination whether the state evidence rule trumps the Sixth Amendment. In this case, the state trial court invoked a per se ban on any evidence of prior sexual activity of the victim.

***Lewis v. Wilkinson***, 307 F.3d 413 (6th Cir. 2002) The Sixth Circuit held that the application of a state rape shield statute in this rape prosecution denied the defendant of his Sixth Amendment right of Confrontation. In the victim's diary, there were various references to her other sexual conduct and the fact that she was apparently viewed by boys as a "nympho." She wrote, "I'm just not strong enough to say no to them. I'm tired of being a whore. This is where it ends." Excluding this evidence was reversible error.

***United States v. Bear Stops***, 997 F.2d 451 (8th Cir. 1993) The defendant was charged with child sex abuse. The child had previously suffered abuse at the hands of another. The defendant sought to introduce detailed evidence of the prior offense in order to explain why the victim exhibited certain symptoms of a sex abuse victim. Limiting this evidence was reversible error. Such evidence fell within Rule 412's exception for evidence that is "constitutionally required." United States v. Platero, 72 F.3d 806 (10th Cir. 1995) The defendant was charged with sexually assaulting the victim. He sought to cross-examine the victim about the relationship she had with another man (not her husband) a la Olden v. Kentucky, 488 U.S. 227 (1988). The trial court determined that there was insufficient evidence of such a relationship and barred the testimony pursuant to Rule 412. This was error. If a jury could believe that such a relationship existed, the defendant must be allowed to probe this topic. The judge may not make a preliminary factual finding barring the testimony if there is evidence that would support the jury's determination. See Huddleston v. United States, 485 U.S. 681 (1988).

***EVIDENCE (Rules 413 and 414 – Evidence of Similar Crimes in Sexual Assault and Child Molestation Cases***)

***United States v. Courtright***, 632 F.3d 363 (7th Cir. 2011) Rule 413 liberalizes the admission of other sexual misbehavior of the defendant in a case in which he is "accused" of a sexual assault offense. What does "accused" mean? The Seventh Circuit holds that Rule 413 only applies when the defendant is charged with a sexual assault offense, not simply where the government intends to introduce evidence of an accused's sexual assault behavior. The trial court in this case admitted evidence of a defendant's prior sexual assault of a minor girl. This case involved an allegation of production of child pornography. Admitting the prior offense conduct was not proper pursuant to Rule 413. Harmless error.

***United States v. Blue Bird***, 372 F.3d 989 (8th Cir. 2004) Various prior acts of the defendant did not qualify as prior sexual acts under Rule 413. Standing in the young girl's doorway and making sexually suggestive remarks, for example, do not qualify; nor does kissing fall under the definition of a sexual act. Admitting this evidence was not harmless error.

***United States v. Guadia***, 135 F.3d 1326 (10th Cir. 1998) Rule 413 is subject to Rule 403's balancing test.

***United States v. Castillo***, 140 F.3d 874 (10th Cir. 1998) Rule 403's balancing test applies to Rule 414.

***United States v. Enjady,*** 134 F.3d 1427 (10th Cir. 1998) Rule 413 is constitutional. The court also concludes that Rule 403 applies to evidence introduced pursuant to Rule 413. Thus, evidence of a defendant's prior sexual misconduct is subject to the Rule 403 balancing test: is the evidence more probative than unfairly prejudicial.

***EVIDENCE (Rule 605 – Judicial Testimony) SEE ALSO: JUDICIAL MISCONDUCT***

***United States v. Blanchard***, 542 F.3d 1133 (7th Cir. 2008) During a suppression hearing, the judge made certain comments and questioned a witness in a manner which revealed the judge's credibility determination about the witness – that is, that he was lying to protect the defendant (his father). At trial, the witness recanted his defense favorable testimony and provided testimony that directly implicated the defendant. The defense attorney sought to show that the witness changed his testimony because of threats from the prosecutor. The prosecutor responded by showing that it was the judge who initially challenged the credibility of the witness. The dialogue between the judge and the witness at the suppression hearing was introduced to rebut the defense attorney's theory. This was error. Admitting the judge's statements was not permissible.

***United States v. Nickl,*** 427 F.3d 1286 (10th Cir. 2005) During the defendant's cross-examination of the supposed principal in the crime with which the defendant was charged, the defendant suggested that the witness pled guilty without a factual basis. The judge interrupted and instructed the jury that they could assume that the principal actually committed the crime, based on the plea agreement and the factual basis that he, the judge, had accepted. This violated Rule 605's prohibition on judicial testimony.

***EVIDENCE (Rule 606(b)) SEE ALSO: JUROR MISCONDUCT / EXTRINSIC EVIDENCE / ISSUES DURING DELIBERATIONS***

***Pena-Rodriguez v. Colorado***, 137 S. Ct. 855 (2017) The Supreme Court held that where a juror during deliberations makes a clear statement that indicates he or she relied on racial stereotypes to convict a defendant, the right to a jury trial under the Sixth Amendment requires that the trial court inquire into the circumstances of the statements, the effect it had on other jurors and whether the statements had an impact on the verdict. FRE 606, which generally bars any evidence about the contents of the deliberations must yield to the constitutional right to a fair trial in this situation.

***Warger v. Shauers***, 135 S. Ct. 521 (2015) During deliberations in this civil case, one juror told the others about an experience his daughter had in a car wreck and this information was inconsistent with the juror's claims of lack of bias during voir dire. After trial, another juror revealed this disclosure, which occurred during deliberations, in an affidavit. The Supreme Court held that the affidavit was inadmissible pursuant to Rule 606(b) as inadmissible jury deliberation evidence.

***United States v. Lawson***, 677 F.3d 629 (4th Cir. 2012) During deliberations, a juror consulted Wikipedia and looked up the term "sponsorship" that was at the heart of the criminal prosecution in this case. She shared with the other jurors the definition. The Fourth Circuit held that the conviction had to be reversed, because the government could not overcome the presumption of prejudice. The court's opinion includes a lengthy discussion of the scope of permissible testimony of jurors under Rule 606(b) and the burden on the government to establish a lack of prejudice, as well as the presumption of prejudice.

***United States v. Blitch***, 622 F.3d 658 (7th Cir. 2010) During the course of jury selection, jurors became concerned for their safety. The judge declined the defense request to question the jurors individually, but simply advised the jurors as a group not to be concerned for their safety. This was insufficient and the conviction was reversed. The trial court must do more than the judge did in this case to ensure a fair jury which does not start a trial with fear of the defendants. Rule 606 did not bar inquiry into this juror misconduct and the government was not permitted to question individual jurors to probe the significance of the extraneous information on the deliberations.

***United States v. Villar***, 586 F.3d 76 (1st Cir. 2009) A judge who learns of possible juror prejudice in the jury room (racial prejudice, for example), is not powerless to conduct an inquiry. Though Rule 606(b) does not allow questioning of the jury to impeach the verdict, the judge may inquire – assuming there is a sufficient foundation for doing so – whether ethnically biased statements were made during deliberations and, if so, whether these comments affected the outcome of the trial. The authority to conduct such an inquiry is based on the Fifth Amendment Due Process Clause and the Sixth Amendment right to a trial by an impartial jury.

***United States v. Awadallah***, 436 F.3d 125 (2d Cir. 2006) The defendant was charged with committing perjury in the grand jury. He defended on the basis that he was exhausted, confused, and intimidated. The government wanted to call grand jurors as witnesses and have them testify about the circumstances of the defendant's testimony, as well as their opinion of the witness's state of mind (i.e., exhaustion, confused, etc). The trial court entered an order providing that a grand juror witness would be permitted to describe the objectively observable circumstances of the grand jury testimony but would not be permitted to express any opinion about the defendant's state of mind or express any opinion about the defendant's demeanor. The Second Circuit held that this was a proper Rule 403 limitation on the grand jurors' testimony. The trial court also relied on Rule 606(b), but the Second Circuit did not discuss this alternative basis for limiting the testimony of the grand jurors.

***EVIDENCE (Rule 608(a) – Opinion testimony relating to witness's truthfulness***)

***United States v. De Leon***, 728 F.3d 500 (5th Cir. 2013) The defendant did not testify at trial. The defense called a character witness who was asked if the defendant was a law-abiding person. The prosecutor objected, citing Rule 608(a). The trial court improperly sustained the objection. Rule 404(a) allows the defense to introduce evidence of the defendant's law-abiding trait. This rule applies regardless of whether the defendant testifies. Rule 608(a), on the other hand, only applies to the credibility of a witness (either the defendant, or any other witness), and focuses on the issues of truthfulness, not law abidingness. Harmless error.

***United States v. Turning Bear***, 357 F.3d 730 (8th Cir. 2004) The trial court erred in excluding a defense witness who was prepared to testify that in her opinion, the child-victim, was untruthful and "didn't always tell the truth." The witness in this case had a basis for forming the opinion (thus qualifying under Rule 701 to offer opinion testimony). Excluding this testimony violated the defendant's constitutional right to offer evidence in his behalf.

***United States v. Shay***, 57 F.3d 126 (1st Cir. 1995) The defendant was accused of attempting to bomb his father's car. He provided a statement to the police admitting his guilt. At trial, the defense sought to introduce evidence from a psychiatrist that the defendant suffered from a mental disorder that causes its victims to make false and grandiose statements without regard to the consequences – pseudologia fantastica. The trial court erred in excluding this evidence. The evidence was admissible under Rule 608(a) because the evidence was admissible opinion evidence relating to the character of a witness; it was admissible under Rule 405 to prove a relevant character trait; and it was admissible under Rule 702 because such expert testimony was necessary to contradict the commonsense notion that people do not generally make untrue inculpatory statements.

***United States v. Dotson***, 799 F.2d 189 (5th Cir. 1986) Government agents were permitted to testify that in their opinion, the defendant's witnesses were untruthful and should not be believed by the jury. The agents had only minimal contact with any of these witnesses prior to trial. Though it is not per se improper for an agent to testify about the veracity of a witness, there must be some foundation and proof that the agent has a basis upon which to form this opinion. No such foundation was established, and it was reversible error to permit the testimony.

***EVIDENCE (Rule 608(b) – Impeachment through prior bad acts)***

***United States v. Demarco***, 784 F.3d 388 (7th Cir. 2015) If a witness testifies to a certain fact, the defense may offer evidence that the witness made an inconsistent statement previously (Rule 613). To prove the inconsistent statement, the proponent of the evidence may ask the person who heard the inconsistent statement what the witness had previously said. This is precisely what Rule 613 envisions. In this case, the trial court held that offering the inconsistent statement through the other witness was barred by Rule 608(b)'s limitation on extrinsic evidence. This was error. While Rule 608(b) prohibits the use of extrinsic evince to prove the witness's prior bad act (where the bad act itself is the impeaching evidence), it does not prohibit the introduction of prior inconsistent statements that are expressly authorized by Rule 613.

***United States v. Abair***, 746 F.3d 260 (7th Cir. 2014) The prosecutor improperly cross-examined the defendant in a manner that assumed her culpability for false statements on a tax return and on a student financial aid application. This was improper Rule 608(b) impeachment. When the defendant denied making the false statement, which should have concluded the Rule 608(b) inquiry, the prosecutor pressed on, assuming the defendant's guilt of the false statement without sufficient foundation. The government failed to offer sufficient reason to believe that the tax return and financial aid application had any bearing on the defendant's truthfulness.

***United States v. Delgado-Marrero***, 744 F.3d 167 (1st Cir. 2014) The defense sought to introduce evidence to impeach the testimony of a police officer who had participated in undercover activities that involved luring the defendant (a police officer) into corrupt efforts to provide security for a drug deal. The evidence that the defense proffered involved other efforts of the undercover officer to lure police to engage in corrupt activities. This testimony was offered to support the entrapment defense. The trial court excluded the evidence pursuant to Rule 608(b), on the theory that extrinsic acts of misconduct on the part of a witness are not admissible if the evidence is offered to impeach the credibility of the witness. The First Circuit reversed: Rule 608(b) only limits extrinsic evidence that is offered for the sole purpose of attacking the character of the witness. Rule 608(b) does not limit the defendant's right to offer evidence that impeaches the witness for bias, or prior inconsistent statements, or to impeach his trial testimony. Quoting from United States v. Abel, 469 U.S. 45 (1984), the First Circuit wrote, "It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar."

***United States v. Woodard***, 699 F.3d 1188 (10th Cir. 2012) The trial court erred in barring the defendant from cross-examining a law enforcement officer about a prior judge's determination that the officer was not credible. This method of impeachment is permitted under Rule 608(b). The factors the court should consider in exercising its discretion are as follows: (1) whether the prior finding involved a determination of the officer's credibility generally, or just in that case; (2) whether the prior testimony involved a subject matter similar to the subject matter in the instant case; (3) whether the prior "lie" was in a judicial proceeding or some other forum; (4) whether the prior lie was about a significant matter; (5) how much time had elapsed between the two proceedings; (6) whether the witness had a motive to lie in the prior proceeding and whether the same motive existed in this proceeding; (7) whether any explanation offered by the witness in the prior proceeding was plausible. The holding in this case is not limited to prior testimony of law enforcement officers but applies to any witness.

***United States v. White***, 692 F.3d 235 (2d Cir. 2012) Based on Cedeno, which was decided after the trial was held in this case, the Second Circuit held that it was reversible error to exclude evidence of a prior judicial finding that a government witness was not credible. The prior judicial finding involved the law enforcement officer's testimony at a suppression hearing which the judge,

in that case, refused to credit. The appellate court also held that excluding evidence of the government's initial charging decision was also reversible error. The defendant was an occupant of a vehicle with four women. Three guns were found in the car. One of the guns was allegedly found in the defendant's pocket. The women, however, were initially charged with possessing all the guns, including the gun allegedly found in the defendant's pocket. Subsequently, the government changed its charging decision. The appellate court held that the defendant should have been permitted to introduce evidence about the initial arrest of the women for that gun.

***Jackson v. Nevada***, 688 F.3d 1091 (9th Cir. 2012) The defendant was charged with raping his ex-girlfriend. He sought to introduce evidence of numerous false allegations of rape (including the testimony of police officers who had responded to earlier claims of rape). The state court excluded this evidence. In part, the exclusion was based on the defendant's failure to comply with a state law requiring pretrial notice of the intent to introduce prior false allegation evidence. See also Holley v. Yarborough, 568 F.3d 1091 (9th Cir. 2009). THE SUPREME COURT REVERSED in Nevada v. Jackson, 133 S. Ct. 1990 (2013). The Court held that the Nevada rule of evidence (comparable to Rule 608(b) FRE) that barred extrinsic evidence of a witness's prior acts of dishonesty was not unconstitutional. The Court also noted that the state rule also permitted such evidence of prior false allegations if the defendant provided pretrial notice, a rule that the Court held was properly enforced in the state courts.

***United States v. Cedeno***, 644 F.3d 79 (2d Cir. 2011) The trial court erred – though it was harmless error – in barring the defense from questioning a prosecution witness about a prior judicial finding that the witness was not credible. The witness's prior testimony can be viewed as prior conduct that comes within the scope of Rule 608(b). See also, United States v. Terry, 702 F.2d 299, 316 (2d Cir. 1983).

***United States v. Ramirez***, 609 F.3d 495 (2d Cir. 2010) Generally, Rule 608(b) provides that impeachment by questioning a witness about a prior bad act can only be accomplished by means of cross-examination and extrinsic evidence is not permitted. In this case, the Second Circuit notes an exception to this rule: if the witness, on direct testifies to some fact ("I never previously dealt in drugs"), the opposing party may introduce evidence to contradict the testimony of the witness. This is known as "impeachment by contradiction." This doctrine is not so clearly applicable in a situation where a defendant, on cross-examination, asserts a fact that the government then seeks to disprove through extrinsic evidence. Noting that the rule is not clear in this situation, the Second Circuit holds that the defendant in this case, during cross-examination, did not make an assertion that deserved rebuttal through extrinsic evidence.

***United States v. McGee***, 408 F.3d 966 (7th Cir. 2005) The defendant testified at trial and on cross examination, he stated that he did not routinely lie to people to get out of trouble. The prosecution then played a taped phone call (made at the jail where he was held) between the defendant and his employer during which the defendant made up an elaborate lie about his absence from work. This violated the provision in Rule 608(b) which bars the use of extrinsic evidence. The tape was not admissible as a Rule 613 prior inconsistent statement, because the tape was not inconsistent with specific trial testimony; rather, it was offered to prove the defendant's lack of credibility, that is, Rule 608(b) other bad act impeachment evidence. Harmless error.

***United States v. Dawson***, 434 F.3d 956 (7th Cir. 2006) The defense sought to cross-examine a witness by making reference to another judge's credibility finding regarding the witness's denial of having committed a prior bad act. The government sought to bar this cross-examination on the theory that it amounted to introducing extrinsic evidence of the witness's prior bad act. The Seventh Circuit disagreed and held that this form of cross-examination was not barred by Rule 608(b)'s no extrinsic evidence rule.

***United States v. DeSantis***, 134 F.3d 760 (6th Cir. 1998) The defendant was charged with fraud offenses. He was asked during his testimony about why a liquor license was revoked. He answered in a way that prompted the prosecutor to request that he read the state court of appeals decision revoking his license. This was error. While Rule 608(b) permits a party to question a witness about prior bad acts, the Rule does not allow extrinsic evidence of the prior misconduct. In this case, the state court of appeals decision amounted to extrinsic evidence of the bad act. The fact that the court of appeals decision was not actually admitted in evidence is not relevant. Requiring the defendant to read the decision while on the witness stand was error.

***United States v. Sullivan***, 803 F.2d 87 (3rd Cir. 1986) The prosecutor was permitted to cross-examine a defendant about other bad acts not amounting to criminal convictions for the purpose of impeachment. Specifically, the witness was asked about inaccuracies in his federal income tax returns and financial disclosure statements. The Sixth Circuit holds that credibility of the witness/defendant was crucial to the case and the government was permitted to test his credibility with this other evidence of misconduct relating to truthfulness. Presumably, what's good for the goose is good for the gander.

***United States v. Bernal-Obeso,*** 989 F.2d 331 (9th Cir. 1993) Just prior to trial, the government alerted the defense that an informant had killed two people several years earlier but had never been charged with a crime. The defense learned that the informant had in fact pled guilty to two counts of manslaughter and asked the court to permit the defense additional time to determine the background, and also asked to be permitted to ask the informant why he lied to the DEA about his background. Both requests were denied by the trial court. The Ninth Circuit reversed. "We expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery (by informants) including turning over, as Giglio requires, all material information casting a shadow on an informant's credibility." The defendant should be permitted to question the informant, pursuant to Rule 608(b), about his lying to the DEA regarding his criminal record.

***United States v. Morales-Quinones,*** 812 F.2d 604 (10th Cir. 1987) The defendant may impeach a government witness by cross-examining him about specific instances of conduct not resulting in conviction if the conduct is probative of the witness' character, truthfulness, or untruthfulness.

***EVIDENCE (Rule 609 – Impeachment through prior conviction)***

***United States v. Chapman***, 765 F.3d 720 (7th Cir. 2014) The defendant was charged with possession with intent to distribute heroin and gun charges. The gun and drugs were found in a bag in a house. The defendant denied having any connection to the bag. The government introduced evidence of the defendant's prior heroin convictions and the circumstances of those offenses. The Seventh Circuit reversed: Proving defendant's knowledge about distribution quantities of drugs was not relevant, because he denied possession of the bag at all. To the extent that the evidence was admissible to prove an element of the offense that was not in dispute (intent to distribute), it was inadmissible pursuant to Rule 403. The Seventh Circuit also held that the defendant should have been permitted to testify that with regard to his prior drug offenses (one of which was offered pursuant to Rule 404(b) and the others pursuant to Rule 609), the defendant should have been permitted to testify that he entered a guilty plea in those prior cases. This testimony was offered as "rehabilitation": when he was guilty, he pled guilty. This was his effort to blunt the force the impeachment evidence.

***United States v. Caldwell,*** 760 F.3d 267 (3rd Cir. 2014) In this trial for possession of a weapon by a convicted felon, the trial court erroneously permitted the government to introduce evidence of the defendant's prior conviction for possession of a weapon by a convicted felon. The defendant denied possessing the weapon. The police testified that they saw the defendant with the gun in his hand. The government argued (and the trial court agreed) that the prior conviction was admissible to prove knowledge and intent. The Third Circuit reversed: the prior conviction did not prove anything about the defendant's intent or knowledge in this case. The defense was that he did not possess the gun at all, so his knowledge or intent was not relevant. In addition, the government argued that the prior conviction was admissible pursuant to Rule 609, because the defendant testified, and the prior conviction was introduced to impeach his credibility. The Third Circuit held that the Rule 403 balancing test weighed in favor of excluding this form of impeachment. This is a significant decision that devotes nearly 20 pages in the published opinion to the inadmissibility of the prior conviction under either the Rule 404(b) or Rule 609 bases.

***United States v. Commanche,*** 577 F.3d 1261 (10th Cir. 2009) The defendant was charged with assault with a dangerous weapon (a box-cutter) on Indian Territory. He claimed that he acted in self-defense. The government offered evidence of two prior aggravated battery convictions involving sharp instruments. This was error. The prior offenses served no purpose other than to show the defendant's violent propensity. There was no showing that he claimed self-defense in the other cases. The government also introduced the evidence pursuant to Rule 609. However, this, too, was error, because the Rule 609 only authorizes the introduction of evidence of the fact of conviction, not the details of the prior convictions.

***United States v. Osazuwa***, 564 F.3d 1169 (9th Cir. 2009) When a witness (including the defendant) is being cross-examined about a prior conviction, the fact of the conviction is the scope of the proper cross-examination. The cross- examination of the witness is controlled by Rule 609, not 608, if there is a conviction. Under Rule 609, the attorney may not ask the witness questions about the circumstances relating to the prior offense.

***United States v. Rogers***, 542 F.3d 197 (7th Cir. 2008) Rule 609 permits impeachment by means of a prior conviction if the prior conviction is no more than ten years old, measured by the date from the witness's release from confinement. The Seventh Circuit concludes that "release from confinement" refers to prison, not release from probation or parole. Allowing the defendant to be impeached with his prior conviction (for which he was released from prison more than ten years prior to trial) was harmless error.

***United States v. Estrada***, 430 F.3d 606 (2d Cir. 2005) The trial court permitted the defense to cross-examine a government witness and elicit testimony that he had a prior felony conviction. The defense was not permitted to elicit testimony about the nature of the prior conviction, however – not even the name of the offense. This was error. Rule 609 permits the cross-examiner to elicit testimony about the specific felony that the witness has on his record.

***United States v. Johnson***, 388 F.3d 96 (3rd Cir. 2004) Evidence of the defendant's prior purse snatching conviction was inadmissible to impeach him in this trial for carjacking and using a firearm in connection with a crime of violence. The trial court failed to conduct the necessarily balancing test required by Rule 609(a)(1). A remand was appropriate for the trial court to conduct the balancing test, without having to conduct a new trial, if the court decides that the evidence was admissible under the proper standard.

***United States v. Tse***, 375 F.3d 148 (1st Cir. 2004) The balancing test implicit in Rules 609 and 403 regarding the admissibility of prior convictions is different when the defendant testifies and when prosecution witnesses testify. Greater protection is provided to the defendant under the balancing test required under Rule 609. In this case, both a government witness and the defendant had a prior conviction for assault and battery on a police officer. With regard to the defendant qua witness, the test is embodied in Rule 609 and states that the probative value of admitting this evidence must outweigh its prejudicial effect to the accused. With regard to a witness, the question is whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion or misleading the jury (i.e., the Rule 403 standard).

***United States v. Fisher***, 106 F.3d 622 (5th Cir. 1997) The defendant was held in contempt by a state court prior to this federal criminal prosecution. During the federal trial, the government obtained a ruling that the defendant could be impeached with this contempt conviction. The defendant testified and the defense lawyer, on direct, elicited testimony about this prior conviction. The defendant was convicted. Thereafter, the state appellate court reversed the contempt conviction, on the basis that he had been provided inadequate notice of the charges. The Fifth Circuit concludes that this taints the federal conviction. The fact that the defendant brought the topic up did not amount to a waiver of the issue, since the government had already obtained a ruling that it could raise the issue on cross-examination of the defendant. This decision was subsequently OVERRULED in Ohler v. United States, 529 U.S. 753 (2000).

***United States v. Livingston***, 816 F.2d 184 (5th Cir. 1987) A prior conviction for writing a check without sufficient funds which is more than ten years old is inadmissible for purposes of impeachment. In this case, the defendant was attempting to impeach a government witness with this prior conviction.

***United States v. Scisney***, 885 F.2d 325 (6th Cir. 1989) Though the error was harmless, it was improper to admit evidence of a prior shoplifting conviction in the defendant's bank robbery prosecution. A shoplifting conviction is not the type of offense involving dishonesty or false statements anticipated by Rule 609(a)(2).

***United States v. Robinson***, 8 F.3d 398 (7th Cir. 1993) When a defendant is impeached with a prior conviction under Rule 609, it is not proper for the government to inquire into the specifics of the offense – all that is relevant is the fact of the conviction (the date, the nature of the offense, and the fact of conviction). Harmless error in this case. The prosecutor also improperly asked the defendant about other frauds he committed, knowing that he had no factual predicate for the question. Again, though, harmless error.

***United States v. Cameron***, 814 F.2d 403 (7th Cir. 1987) A witness may not be cross-examined about a prior conviction for possession of a switchblade. Possession of a weapon is not a crime of dishonesty. In this case, the defendant was attempting to cross-examine a prosecution witness.

***United States v. Palmer***, 3 F.3d 300 (9th Cir. 1993) After his arraignment on charges of growing marijuana, the defendant stated that he did not want to make a deal, because he had "been through this before." In fact, the defendant had a prior marijuana conviction. This statement was not admissible under Rule 609, however, because that Rule requires evidence of a conviction, not simply evidence that the defendant had "been through this before."

***United States v. Brackeen***, 969 F.2d 827 (9th Cir. 1992) Bank robbery is not a crime involving dishonesty and therefore cannot be used to impeach a witness under Rule 609. In this case, the witness was the defendant. It was improper for the government to impeach the defendant's testimony with this prior robbery conviction. The court noted that the Eleventh Circuit reached a consistent result in United States v. Farmer, 923 F.2d 1557 (11th Cir. 1991)("It is established in this Circuit that crimes such as theft, robbery, or shoplifting do not involve dishonesty or false statement within the meaning of Rule 609(a)(2)").

***United States v. Albers,*** 93 F.3d 1469 (10th Cir. 1996) The trial court erred when it permitted the government to ask the defendant specifics of his prior convictions. Only the fact of the conviction, the nature of the offense, and the sentence, but not the specifics of the crime, may be probed.

***United States v. Burston***, 159 F.3d 1328 (11th Cir. 1998) The district court erred – though harmlessly – in restricting the defense from cross-examining the government's witness about his numerous prior felony convictions. The witness had four prior felony convictions for theft, aggravated assault, and armed robbery. The trial court limited the defense to asking simply if the witness had a prior felony conviction, without even specifying the number or nature of the offenses. This was an improper limitation on the defendant's right to present evidence pursuant to Rule 609 to impeach the witness.

***EVIDENCE (Rule 613 – Prior Inconsistent Statement)***

***United States v. Pridgen***, 518 F.3d 87 (1st Cir. 2008) A government witness described the person who she saw shooting a gun. On cross-examination, she testified that she could not remember giving an inconsistent statement to the defense attorney's investigator. Having laid the proper foundation (giving the witness an opportunity to explain the inconsistent statement), the defense then sought to introduce extrinsic evidence of the prior inconsistent statement. The trial court erroneously excluded this evidence. Harmless error.

***United States v. Ramos-Caraballo***, 375 F.3d 797 (8th Cir. 2004) During the police officer's testimony, the defense attorney cross-examined him about inconsistencies between his trial testimony and his police report, his testimony at the grand jury and his testimony at a suppression hearing. In re-direct, the prosecutor offered the entire police report, as well as a transcript of the witness's entire grand jury testimony and his suppression hearing testimony. This was improper "rule of completeness" evidence. Only when the evidence offered by the opposing party is taken out of context, is distorted, or otherwise in need of balance, should the balance of the written document be admitted. Harmless error.

***United States v. Buffalo***, 358 F.3d 519 (8th Cir. 2004) The defendant contended that another man was the perpetrator of the assault with which he was charged. He called the other man to the stand, and he denied being the perpetrator. The defendant then sought to call two other witnesses who were prepared to testify that the other man had confessed to them. The district court excluded the evidence because the "prior inconsistent statements" would have been inadmissible hearsay. Rule 613(b) allows a party to use a prior inconsistent statement to impeach a witness, but if the witness is called to the stand for sole purpose of impeaching him, the "impeachment" is really a subterfuge for admitting the hearsay. Nevertheless, the Eighth Circuit holds that because there are no Confrontation Clause concerns when the defendant (as opposed to the government) seeks to engage in this type of subterfuge, the proper course for the trial court is to employ the Rule 403 balancing test. In this case, because of the unique facts, the Eighth Circuit held that the defendant should have been permitted to introduce the prior inconsistent statement of the witness.

***United States v. Vaughn***, 370 F.3d 1049 (10th Cir. 2004) In some circumstances, an omission may rise to the level of an inconsistency. Flat contradictions are not the only test for inconsistency. Omissions of fact may be relevant to the process of testing credibility of a witness' trial testimony. Under certain circumstances, a witness's prior silence regarding critical facts may constitute a prior inconsistent statement where failure to mention those matters conflicts with that which is later recalled. Harmless error.

***United States v. Trzaska***, 111 F.3d 1019 (2d Cir. 1997) During the defendant's case-in-chief, the defense elicited from the defendant's son a statement that the defendant had made. The statement was introduced without objection. On rebuttal, the government offered what it considered to be a prior inconsistent statement that was inculpatory. The Second Circuit reversed: the statement offered by the government was certainly inculpatory, but it was not inconsistent with the statement offered by the defense. (The government could not offer the statement in its case in chief, because it was illegally obtained, and thus could only be offered if it impeached a statement by the defendant). Because the statement offered by the government was not inconsistent, it was not admissible.

***United States v. Strother***, 49 F.3d 869 (2d Cir. 1995) Under certain circumstances, a witness's prior silence regarding critical facts may constitute a prior inconsistent statement where the failure to mention those matters conflicts with that which is later recalled. Also, statements need not be diametrically opposed to be inconsistent. In this case, the defendant was charged with a §1344 bank fraud violation in that he requested a bank employee to pay a check which he could not cover. He claimed that he asked the employee to "hold" the check, not pay it. Three bank memoranda prepared either by the employee, or by someone else reporting what the employee said, did not indicate that the defendant told the defendant to pay the check. With regard to one of the memoranda – the one prepared by the other employee reporting what the first employee said – this represented a prior inconsistent statement, because the primary witness "subscribed" to the memorandum, signing it and agreeing that it was accurate. Finally, the fact that the witness was cross-examined about the document did not cure the error. Extrinsic evidence of a prior inconsistent statement is more persuasive to a jury than a witness's acknowledgment of inconsistencies in a prior statement.

***United States v. Ince***, 21 F.3d 576 (4th Cir. 1994) At trial, a witness who had earlier stated that the defendant had confessed to her, stated that she had no memory of that earlier confession. The government then introduced evidence – purportedly under Rule 613, simply for impeachment purposes – that the witness had told an officer that the defendant had confessed to her. Even though the trial court cautioned the jury that this was impeachment evidence, not substantive evidence of guilt, this was reversible error. The government may not call a witness to the stand for the sole purpose of impeaching her with otherwise inadmissible hearsay evidence. "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440 (1949)(Jackson, J., concurring).

***United States v. Young***, 86 F.3d 944 (9th Cir. 1996) In order for the defense to offer a prior inconsistent statement of a government witness, it is not necessary that the witness be directly confronted with the statement before the inconsistent statement is offered. All that is required is that the government have the opportunity to re-call the witness if it wants to refute, or explain, the prior inconsistent statement. Here, the defense asked the witness whether he was ever at the location where his prior statement was heard by another witness (the witness said that he was going to frame the defendant). On the basis of denying that he was at the location where he was overheard making this remark, the defendant was entitled to offer the testimony of the person who heard the witness make the remark.

***United States v. Gomez-Gallardo***, 915 F.2d 553 (9th Cir. 1990) The government called a witness for the sole purpose of impeaching him with testimony which otherwise would have been inadmissible. "The maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer by which the party is surprised. Impeachment is not permitted where it is employed as a guise for submitting to the jury substantive evidence that is otherwise unavailable."

***United States v. Tafollo-Cardenas***, 897 F.2d 976 (9th Cir. 1990) The government offered the testimony of a witness who recanted her prior statement which implicated the defendant. The government convinced the trial court to admit the prior statement as substantive evidence. The evidence was not admissible as substantive evidence; because the trial court did not instruct the jury that the prior statement was only admissible for impeachment purposes, the conviction was reversed.

***United States v. Mitchell***, 113 F.3d 1528 (10th Cir. 1997) The defendant questioned a witness about her forgetfulness. She denied being forgetful. The defense then showed her a report of her psychologist which related her statement that she had a problem with forgetfulness. She could not remember making this statement to the psychologist. The trial court prohibited the defense from introducing extrinsic evidence of the inconsistent statement. This was error, though harmless.

***United States v. Sheffield***, 992 F.2d 1164 (11th Cir. 1993) A witness may be cross-examined about a prior failure to make a statement consistent with the statement made at trial. That is, a prior failure to implicate the defendant is the proper subject of cross-examination.

***United States v. Foster***, 982 F.2d 551 (D.C. Cir. 1993) A police officer was a witness to several drug sales by the defendant. At the preliminary hearing, the officer made no mention of seeing the defendant give the proceeds to anybody. When the defendant was arrested, he had no cash on him. At trial, however, the police officer testified that he observed the defendant give the sales proceeds to another individual after each sale. The defense sought to cross-examine the officer about why he did not testify about this at the preliminary hearing. The trial court's ruling curtailing this topic of cross-examination was reversible error. Moreover, even though the officer's written report was introduced – and it, too, was silent about where the proceeds went – the defense should have been permitted to question the officer about his prior sworn testimony.

***United States v. Stock***, 948 F.2d 1299 (D.C. Cir. 1991) The defendant sought to impeach a police officer with a prior statement of his which did not contain the same allegations as his courtroom testimony. Prior statements that omit details covered at trial are inconsistent if it would have been "natural" for the witness to include them in the earlier statement. The judge's error in

denying this cross-examination prevented defense counsel from arguing that the officer had a poor memory or was fabricating parts of his story in order to ensure a conviction. Harmless error.

***United States v. Johnson***, 802 F.2d 1459 (D.C. Cir. 1986) The defendant was on trial for a narcotics violation. A witness arrested during the transaction stated that the defendant was the kingpin in the operation. At a subsequent preliminary hearing, the witness denied that the defendant had any participation in the conspiracy. At trial, the government called that witness knowing that he would not testify, for the sole purpose of introducing his prior inconsistent statements. The Court of Appeals holds that it is error, but not reversible because of the overwhelming evidence in this case. The court ruled: "Neither Rule 613(b) nor Rule 607 is authority for allowing the government to use impeachment by a prior inconsistent statement as a 'mere subterfuge' to get otherwise inadmissible hearsay statements before the jury."

***EVIDENCE (Rule 701 – Opinion Testimony)***

***United States v. Glover***, 872 F.3d 625 (D.C. Cir. 2017) Trial counsel's performance was deficient based on his failure to object to improper opinion testimony offered by the government agent about the meaning of certain code words in the clandestinely recorded conversations of the conspirators. The deficient performance, however, was not prejudicial.

***United States v. Natal***, 849 F.3d 530 (2d Cir. 2017) Testimony about historical cell site location analysis requires expertise and presenting the cell site evidence through a non-expert is error. The evidence may not be introduced simply through the business records exception: it requires an expert to explain how cell towers relate to the handset and how the handset changes connections from one tower to the next and the various factors that affect the analysis of where a handset is located at the time it is communicating with a particular tower.

***United States v. Jackson***, 849 F.3d 540 (3rd Cir. 2017) The government should not have introduced testimony from a case agent about the meaning of certain recorded conversations pursuant to Rule 701 (opinion testimony). Many of the conversations did not require opinion testimony to explain or elucidate. Opinion testimony is admissible if the testimony would be "helpful" to the jury to understand the events that the witness is describing.

***United States v. Fulton***, 837 F.3d 281 (3rd Cir. 2016) It was error (though not plain error) to permit an FBI agent to testify that another person could not have been the armed robber, because his cell phone records revealed that he was on his phone when the robbery occurred. The agent's opinion was not needed to clarify or explain a concept that the jurors could not have understood from the cell phone records.

***United States v. Williams***, 827 F.3d 1134 (D.C. Cir. 2016) The trial court erred in permitting a police officer to testify about his opinion of the meaning of certain intercepted phone calls. The prosecutor asked in general terms, "Based on your investigation in this case, do you have an opinion of what a particular call involved?" to which the agent responded, "The defendant had a customer ready to purchase cocaine that he wanted to buy from the other person on the phone." This was improper lay opinion testimony. There was an insufficient factual foundation for the question, and thus no way for the jury to determine whether the agent's opinion was based on specific evidence that provided him a basis to form an opinion. In fact, the agent's personal opinion may have been based on facts that were not presented to the jury. The agent's testimony was not offered as expert testimony. The reversal of one defendant's conviction was warranted based on this inadmissible evidence. The court relied principally on the earlier decision in Hampton, discussed below.

***United States v. Groysman***, 766 F.3d 147 (2d Cir. 2014) The Second Circuit reversed this health care fraud conviction on the basis of several "egregious" evidentiary errors committed at trial. The defendant was charged with conspiring with a company that supplied durable medical equipment to prepare false invoices. The wholesaler was cooperating and taped many of the conversations, though many were inaudible. The government offered testimony from its case agent for several days at the start of trial. The agent (1) offered inadmissible bolstering testimony by testifying that certain transactions occurred, based only on his interviews of the cooperators – he had no personal knowledge to verify that these transactions occurred; (2) offered a summary chart which was not a summary of voluminous evidence, but simply a recitation of what he was supposedly told by the cooperators, thus violating both the hearsay rules and the bolstering rules and the rule governing the admissibility of summary charts; (3) the use of the agent to summarize the case at the outset was improper because it amounted to opinion testimony. The Second Circuit, as noted above, characterized these evidentiary errors as egregious and supported a plain error standard of review reversal.

***United States v. Miller***, 738 F.3d 361 (D.C. Cir. 2013) The FBI agent should not have been permitted to offer opinion testimony about the meaning of telephone calls and about the overall course of the investigation.

***United States v. Freeman***, 730 F.3d 590 (6th Cir. 2013) The government was improperly permitted to offer lay opinion testimony from an FBI agent who testified about his interpretation of phone calls from two conspirators who were involved in a murder for hire. Throughout his testimony, the agent testified that his basis for his opinion testimony was what he and his colleagues learned during the course of the investigation. His testimony also implied that he knew additional information that the jury did not know that allowed him to reach these conclusions. Finally, some of the conversations being "interpreted" by the agent needed not interpretation or explanation, such as explaining the term "situation" and other easily understood statements of the people talking on the phone.

***United States v. Haynes,*** 729 F.3d 178 (2d Cir. 2013) A police officer was permitted to offer testimony about how a gas tank works (i.e., how the fuel gauge reflects the amount of fuel in the tank), which was relevant to whether the defendant was aware that drugs were hidden in the fuel tank. The testimony should not have been admitted as opinion testimony. The testimony

should only have been offered as expert testimony after the discovery rules and the witness's expertise was proven. Another witness – the government's expert witness – was improperly permitted to offer expert testimony that the defendant was aware that there were drugs in the gas tank. This testimony was inadmissible pursuant to Rule 704(b), which prohibits expert testimony on a defendant's mental state at the time of a crime.

**United States v. Hampton**, 718 F.3d 978 (D.C. Cir. 2013) The testimony of an FBI agent, interpreting and explaining recorded phone conversations of the defendants was inadmissible and admitting this testimony was reversible error. The government offered the testimony as lay opinion testimony, with the agent explaining that he formed his opinion about the meaning of the conversations based on having listened to countless hours of the conspirators' conversations.

***United States v. Fenzl***, 670 F.3d 778 (7th Cir. 2012) In this fraud case (which essentially involved an unusual bid-rigging scheme), the government called a City Investigator to testify whether the Procurement Department would have awarded the contract to the defendant if it had known of the misrepresentation that was made in a certification document. The Seventh Circuit held that allowing this testimony was reversible error. It was not proper "opinion" testimony as claimed by the government, because the investigator was not offering an opinion based on something that he observed.

***United States v. Vazquez-Rivera***, 665 F.3d 351 (1st Cir. 2011) This was a child pornography in which the question at trial was whether the defendant was the person who was on the computer engaging in a chat with undercover agents and who knowingly possessed the illegal images. The defendant contended that other people in the house may have been the guilty party. At trial, the government called the lead agent to testify, and she testified that "we" concluded that the defendant was the perpetrator. This type of question was asked repeatedly during the agent's testimony. This was plain error. First, it offered the opinion testimony of other unidentified agents (i.e, "'we' concluded"); second, it was the agent's opinion, based on the same disputed testimony that the jury heard and was not helpful to the jury's decision-making process and was therefore not admissible pursuant to Rule 701.

***United States v. Meises,*** 645 F.3d 5 (1st Cir. 2011) The government improperly began its presentation of the evidence with a "summary witness" who described the roles of the various defendants on trial. This was improper summary testimony, based on improper opinion testimony.

***United States v. Goodman***, 633 F.3d 963 (10th Cir. 2011) The defendant relied on the insanity defense in this armed robbery case. The trial court barred the defense from introducing evidence of his combat experiences and his mental health around the time of his army experience. He had received extensive treatment for mental illness after returning from Iraq and clearly suffered from mental illness as a result of his combat experience. Limiting the "lay" witness testimony to his behavior at the time immediately surrounding the time of the robberies was reversible error. The defendant's mental health a few years prior to the armed robberies was not irrelevant to his insanity defense. In addition, the trial court erred in barring the defense to offer lay "opinion" testimony about the defendant's mental condition. Rule 704(a) specifically allows testimony in the form of an opinion that embraces an ultimate issue to be decided by the trier of fact. Rule 704(b), however, provides an exception for experts, who are not permitted to offer opinions as to the state of mind of a criminal defendant if that mental state is an element of the crime of which the defendant is accused.

***United States v. Jadlowe***, 628 F.3d 1 (1st Cir. 2010) A police officer was improperly permitted to testify that in her opinion, the video of the perpetrator of the crime was the defendant (she compared the video with a recent driver's license photo). There was no reason to introduce this opinion testimony because the jury could have performed the same comparison. Harmless error.

***United States v. Johnson***, 617 F.3d 286 (4th Cir. 2010) The government offered the testimony of a DEA agent to "interpret" and explain the meaning of wiretapped phone calls. The agent was never tendered as an expert. The testimony was not properly admitted as opinion testimony under Rule 701, because the agent did not observe the events about which he was testifying. Even if he had been tendered as an expert, the government did not offer any evidence explaining the agent's "methodology or guiding principles that would enable him to decode the wiretapped phone calls in this case."

***United States v. Mejia***, 545 F.3d 179 (2d Cir. 2008) The government offered the testimony of an expert in this gang case. The expert testimony about the structure of the gang, its history and various other matters that was inadmissible because (1) the testimony was not based on any data or information that was the proper subject of expert testimony; (2) the testimony included the expert's lay opinion, rather than expert opinion; (3) the expert simply repeated some things he was told by co-conspirators and was therefore testimonial hearsay in violation of Crawford. Reversible error.

***United States v. Garcia-Ortiz***, 528 F.3d 74 (1st Cir. 2008) The victim of an armed robbery was shown a picture of the defendant and another person. The victim identified the other person as the perpetrator. At trial, an FBI agent was permitted to offer his opinion that the person who was incorrectly identified actually resembled the defendant. This was improper opinion testimony, because the subject matter of the testimony was not beyond the jury's purview. Harmless error.

***United States v. Johnson,*** 529 F.3d 493 (2d Cir. 2008) The DEA agent's testimony was replete with improper hearsay, opinion, vouching, and argumentative testimony. The agent testified about the course of the investigation, declaring, "We found out that . . ." and "We determined that . . ." The agent related what co-conspirators told him when they were first arrested, to explain what he did next in the investigation. He then explained what "corroboration" meant and explained what he did and learned to corroborate what he was told by informants and co-conspirators. He further explained that he was skeptical of what informants told him until he corroborated what they said, and he was then able to ensure that the informants told him the truth. While it may be more interesting to a jury to learn how the police conduct investigations, a substantial amount of this testimony was inadmissible.

Because defense counsel did not object, the plain error standard applied, and the Second Circuit held that the inadmissible evidence did not meet this standard.

***United States v. Wantuch,*** 525 F.3d 505 (7th Cir. 2008) It was improper to permit one witness to offer his opinion about the defendant's knowledge that what they were doing was illegal. While the testimony may have been based on the witness's perception, the testimony was unhelpful to the jury under Rule 701(b). The jury was equally capable of inferring that the defendant was conscious of the wrongfulness of his conduct. Harmless error.

***United States v. Oriedo***, 498 F.3d 593 (7th Cir. 2007) Having failed to provide expert notice pursuant to Rule 16, the government sought to introduce an agent's opinion about why baggies would be found in a drug dealer's house as lay opinion testimony. The Seventh Circuit held that allowing the agent to testify about his opinion was erroneous, harmless.

***United States v. Kaplan***, 490 F.3d 110 (2d Cir. 2007) The trial court erred in permitting a co-conspirator to testify that in his opinion, the defendant was a knowing participant in the fraud conspiracy. In a lengthy decision reviewing Rule 701's requirements, the Second Circuit concluded that the witness, who based his "opinion" on the defendant's intelligence and experience, as opposed to his own observations, could not offer opinion testimony under Rule 701.

***United States v. Perkins***, 470 F.3d 150 (4th Cir. 2006) The defendant was charged with using excessive force against an arrestee. At trial, several officers were asked a hypothetical question about whether certain force would be appropriate in circumstances such as those that the testimony in this case described. This was improper lay "opinion" testimony and would only be permissible as expert opinion.

***United States v. Van Eyl***, 468 F.3d 428 (7th Cir. 2006) The prosecutor's closing argument advanced a theory of guilt that had previously been rejected by the trial court. The trial court acted within its discretion in granting a new trial. The prosecutor repeatedly referred to various witnesses' lay opinion that the defendant's conduct in this complex fraud trial was fraudulent. The prosecutor repeatedly referred to witnesses' testimony that it did not take a CPA to tell the difference between right and wrong. The trial court had initially granted a motion in limine barring such opinion testimony from being offered by the government.

***United States v. Garcia***, 413 F.3d 201 (2d Cir. 2005) A DEA agent may not testify, either as an expert, or as a matter of his lay opinion, about the defendant's role in the conspiracy based on the totality of his experience. When an agent testifies as a matter of lay opinion, the opinion must be based on his personal observations, not his evaluation of all the evidence, or the totality of the investigation. This opinion explains in some detail the requirements for lay opinion testimony and concludes that the government satisfied none of the requirements for offering lay opinion testimony.

***United States v. Dixon***, 413 F.3d 540 (6th Cir. 2005) A man attempted to extort money from a bank and surveillance photos recorded his actions. The government offered the testimony of three witnesses who identified the defendant as the person in the surveillance photos, his son and two ex-wives. The evidence was not admissible pursuant to Rule 701, because the witnesses' testimony was not likely to aid the jury. The witness's acknowledged that they had not seen the defendant at the time of the crime and the video was of sufficiently good quality that the jury could make its own determination without the aid of the witnesses' opinions. One ex-wife, moreover, had a tumultuous abusive relationship with the defendant and allowing her to testify would require exploring all these otherwise inadmissible matters (i.e., the defense would be required to cross-examine her about these allegations) thereby diminishing the value of her identification testimony.

***United States v. Grinage***, 390 F.3d 746 (2d Cir. 2004) The Second Circuit reverses this conviction on the basis that an agent was permitted to testify about the meaning of wiretapped phone calls. The government argued that the agent was not qualified as an expert and did not purport to translate coded calls but was simply offering opinion testimony based on a review of all the calls. The Second Circuit rejects these arguments. An agent may not offer his opinion of "all the calls" and ask the jury to accept that interpretation. Moreover, the agent was basing his testimony on more than simply his having listened to the calls; he testified that he based his opinion also on his knowledge of "the entire investigation." Reversible error.

***United States v. Hitt***, 164 F.3d 1370 (11th Cir. 1999) The defendant was charged with filing false claims with the Veterans Administration. The prosecutor asked witnesses questions such as, "If the defendant claimed that he had quit his job in March of 1979, is that correct or incorrect?" and "If he claimed that he lost total use of his right hand to his disabilities, is that true or false?" These questions were improper, because they sought the opinion testimony of the witnesses that focused on the very question being asked of the jury. These questions amounted to nothing more than lawyer argument – the prosecutor's summation to the jury in advance. Harmless error.

***United States v. Garcia***, 291 F.3d 127 (2d Cir. 2002) An informant recorded a call with the defendant in which the informant used code to discuss a multi-kilogram drug deal. At trial, the informant was permitted to offer his opinion that the defendant understood the code. This was error. There was no foundation offered to show that he had a basis for testifying about another person's state of mind. There was no showing that they spoke in code before, that the code was common, or that the witness and the defendant had previously discussed using a code.

***United States v. Casas***, 356 F.3d 104 (1st Cir. 2004) The government was improperly permitted to start the trial with a "summary" witness who provided an "overview" of the case. The agent offered testimony that was not based on his first-hand knowledge of the facts and amounted to conclusions regarding the conspiracy and its members. In addition, some of these conclusions were based on information he learned from cooperating witnesses who did not testify at trial. See also United States v. Flores-De-Jesus, 569 F.3d 8 (1st Cir. 2009).

***United States v. Forrester***, 60 F.3d 52 (2d Cir. 1995) A witness claimed that she told the agent about the defendant's participation in the drug conspiracy and also identified a photograph of the defendant for the agent. The agent then testified that he did not remember the witness saying this or identifying the defendant. Nevertheless, when asked by the prosecutor, the agent gave his opinion that nothing the witness said in court was inconsistent with her statement at the time of the initial interview. The prosecutor claimed that this opinion testimony was admissible "to aid the jury" under Rule 701.

This was erroneous. Far from being "helpful," the agent's testimony invaded the traditional province of the jury.

***United States v. Riddle***, 103 F.3d 423 (5th Cir. 1997) Under Rule 701, lay opinion testimony must be based on personal perception and must be one that a normal person would form from those perceptions. In this case, a bank examiner exceeded these bounds by testifying about his opinion of prudent bank practices, as well as the legal requirements governing certain bank practices. He also asserted that in this case, the violation of these rules resulted in a bank failure.

***United States v. Dotson***, 799 F.2d 189 (5th Cir. 1986) Three government agents who had only minimal contact with the defendants' witnesses were permitted to testify that in their opinion, the defendant and his witnesses were untruthful and should not be believed by the jury. While the Court holds that this is not impermissible per se, in this case the agents had no basis on which to offer this opinion testimony.

***Cooper v. Sowders***, 837 F.2d 284 (6th Cir. 1988) It was improper for a police officer to offer his opinion that the evidence in the case against other suspects was insufficient to justify their arrest.

***EVIDENCE (Rule 702 – Expert Testimony) SEE ALSO: EXPERT TESTIMONY***

***United States v. Mitchell***, 365 F.3d 215 (3rd Cir. 2004) In a forty-page opinion, the Third Circuit evaluates the admissibility of fingerprint evidence under the Daubert and Kumho Tire standards and ultimately concludes that such evidence passes Daubert muster and was properly admitted in this case.

***United States v. Abreu***, 406 F.3d 1304 (11th Cir. 2005) The Eleventh Circuit concludes that fingerprint evidence meets the Daubert standard.

***EVIDENCE (Rule 801(d)(1)(A) -- Inconsistent Statement in Sworn Testimony)***

***United States v. Gajo***, 290 F.3d 922 (7th Cir. 2002) A witness's prior sworn testimony may be admitted if the witness claims a lack of memory about a subject. In this case, the witness's prior grand jury testimony was admitted when he claimed not to remember whether the defendant spoke in English during a particular conversation.

***United States v. Bomski,*** 125 F.3d 1115 (7th Cir. 1997) Where testimony is offered pursuant to Rule 801(d)(1)(A), it is accepted for the truth of the matter asserted, not simply for impeachment. Thus, where a party introduces the prior sworn testimony of a witness for the purpose of showing a prior inconsistent sworn statement, the prior statement may be considered for the truth of the matter asserted.

***EVIDENCE (Rule 801(d)(1)(B) – Prior Consistent Statements)***

***Tome v. United States***, 513 U.S. 150 (1995) In order to introduce a prior consistent statement under Rule 801(d)(1)(B), the statement must have been made prior to the time that the alleged incentive to fabricate occurred. A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive. Statements which were made after the motive to fabricate arose do not rebut the charge of recent fabrication. Thus, such statements are not admissible because they amount to hearsay. On remand, the Tenth Circuit concluded that the error in admitting the testimony was not harmless and required a new trial. 61 F.3d 1446 (10th Cir. 1995).

***United States v. Moreno***, 809 F.3d 766 (3rd Cir. 2016) The defense cross-examined the government's cooperating witness about his expectation of receiving a benefit based on his cooperation, which the witness acknowledged. On re-direct, the prosecutor had the witness read portions of his interviews with the law enforcement agent, purportedly as prior consistent statements. Introducing these out of court statements violated the Confrontation Clause. Harmless error.

***Jones v. Cain,*** 600 F.3d 527 (5th Cir. 2010) A witness to a murder provided recorded statements to the police prior to his death from unrelated causes. He also testified at a suppression hearing prior to this death. His testimony at the suppression hearing was admissible because it was prior sworn testimony. His statements to the police, however, were not admissible. The state argued that the statements to the police were not offered for the truth of the matter asserted, but this was clearly belied by the record. The statements were not merely used to "shore up the witness's credibility" or to "explain the investigators' conduct." The state also argued that the statements qualified as prior consistent statements (i.e., consistent with the suppression hearing testimony) and thus were admissible under a firmly rooted hearsay exception. However, these statements were not made prior to the time that the supposed motive to fabricate arose (i.e., a motive to shift responsibility for the murder from himself to the defendant).

***United States v. Al-Moayad***, 545 F.3d 139 (2d Cir. 2008) The government improperly admitted an informant's hand-written notes that he authored after meeting with a government agent. The notes were not written prior to the time the motive to fabricate arose and, consequently, did not meet the prerequisite for admissibility.

***United States v. Gonzalez,*** 533 F.3d 1057 (9th Cir. 2008) Certain hearsay was admitted under the theory that it represented a prior consistent statement. The proper predicate for such evidence was not offered. Harmless error.

***United States v. Bercier***, 506 F.3d 625 (8th Cir. 2007) The sexual abuse victim's prior statements implicating the defendant were not admissible as prior consistent statements, because the statements were not made prior to the alleged time of the fabrication. The statements were not admissible under the medical diagnosis exception, Rule 802(4), because statements that identify a perpetrator of a sexual assault are not made for purposes of medical diagnosis. See also United States v. Kenyon, 397 F.3d 1071 (8th Cir. 2005).

***United States v. Kenyon***, 397 F.3d 1071 (8th Cir. 2005) Admitting prior consistent statements of the child abuse victim was reversible error, because the statements were not made prior to the time that the defendant claimed she fabricated the charges as required by Tome v. United States, 513 U.S. 150 (1995).

***United States v. Awon***, 135 F.3d 96 (1st Cir. 1998) The witness's prior statement implicating the defendant was made after he had the motive to seek leniency for his participation in the crime. Therefore, the out-of-court statement was not admissible under Rule 801(d)(1)(B).

***United States v. Forrester***, 60 F.3d 52 (2d Cir. 1995) A witness's hand-written statement which was prepared after her arrest (and after her motive to lie arose) was not admissible under Rule 801(d)(1)(B).

***United States v. Acker***, 52 F.3d 509 (4th Cir. 1995) The trial court clearly erred in allowing an FBI agent to recite what a key government witness had said to him previously under the prior consistent statement rule, Fed. R. Evid. 801(d)(1)(B). The prior statement was made by the witness five months after he had been arrested for participation in a bank robbery for which the defendant was now being tried. The trial court simply held that the prior statement was "corroborative" of the testimony and was therefore admissible. Not only is this not a valid basis for introducing the out-of-court declaration, in this case, the other requirement of 801(d)(1)(B) was not satisfied – that is, the prior statement did not rebut a charge of recent fabrication, because the statement was not made prior to the time that a motive to lie arose.

***United States v. Bolick***, 917 F.2d 135 (4th Cir. 1990) The use of prior consistent statements to rehabilitate a witness is only permissible if the witness has been impeached. In this case the government introduced a prior consistent statement without the defendant's having first impeached the witness. This was reversible error. The fact that the trial court gave a limiting instruction to the jury was not sufficient. The limiting instruction failed to advise the jury that they could consider the prior statements only if the declarant was subsequently impeached by the defense counsel.

***United States v. Dotson,*** 821 F.2d 1034 (5th Cir. 1987) The police report contained an officer's statement relating what he was told by a government witness to the effect that the witness had carried marijuana for the defendant. This was inadmissible to strengthen the witness' credibility even though the witness' statement would have qualified as a prior consistent statement. The officer's statement about what the witness stated was not admissible.

***United States v. Collicott***, 92 F.3d 973 (9th Cir. 1996) The government's introduction of a witness's prior statements to a law enforcement officer was error. The government's justification – that the statement to the officer was admissible because the defense asked the officer about other statements made by the witness to the officer – was unavailing, because the defendant was properly seeking to impeach the witness on an unrelated matter.

*United States v. Moreno*, 94 F.3d 1453 (10th Cir. 1996) After a co-defendant pled guilty, he testified against the defendant. To rehabilitate the witness's credibility, the government called that witness's lawyer who was asked whether the witness (his client) had implicated the defendant prior to the witness's decision to plead guilty. This was error. The witness's statements to his lawyer did not pre-date his motive to fabricated evidence against the defendant, and thus was not admissible as a prior consistent statement. The witness's motive to fabricate arose as soon as he was arrested. Harmless error.

***United States v. Albers***, 93 F.3d 1469 (10th Cir. 1996) The trial court erred in permitting the introduction of out-of-court statements of witnesses on the theory that they were prior consistent statements. In both instances, the statements were made after the motivation to falsify testimony arose. Thus, the statements did not satisfy the "pre-motive" prong of Rule 801(d)(1)(B) and United States v. Tome, 115 S. Ct. 696 (1995).

***United States v. Pendas-Martinez***, 845 F.2d 938 (11th Cir. 1988) The defendant's conviction was reversed because the government introduced evidence of a Coast Guard officer's report under the erroneous theory that it was admissible to rehabilitate a witness as a prior consistent statement. However, the Eleventh Circuit held that the officer's credibility was not challenged, and the report was not admissible under 801(d)(1)(B). The court holds that "It is an abuse of discretion to admit into evidence and send to the jury room government agent case summaries which constitute a written summary of the government's theory of the case."

***EVIDENCE (Rule 801(d)(2)(B) – Adopted Admissions)***

***United States v. Lafferty***, 503 F.3d 293 (3rd Cir. 2007) If a defendant invokes his Miranda right to remain silent, her subsequent failure to deny an accusation, either by the police, or a co-defendant who is in the interrogation room, may not be introduced against the defendant as an adopted admission.

***United States v. Williams***, 445 F.3d 724 (4th Cir. 2006) The defendant's friend thought he was acting oddly and asked, "Did you kill somebody or what?" The defendant did not respond, "He was blank." The government argued that the defendant's non-response was an adopted admission of the friend's statement. The Fourth Circuit disagreed. If someone questions the defendant, "Why did you rob the bank?" the failure to respond by denying that he robbed the bank could be treated as an adopted admission. But the question in this case was not so accusatory, so there was no admission by failing to respond.

***United States v. Hove,*** 52 F.3d 233 (9th Cir. 1995) A suspect's refusal to testify before a grand jury cannot amount to an admission by silence under Rule 801(d)(2)(B). Also, an agent's accusation which is not denied by a suspect (who responded that he wanted to investigate the matter) was not an admission by silence. Instructing the jury that they could infer an admission by the defendant's silence was an abuse of discretion on the part of the trial court.

***United States v. Joshi***, 896 F.2d 1303 (11th Cir. 1990) Undercover officers were introduced to the defendant by a co-conspirator; the coconspirator stated that the defendant was a longtime friend and partner in the smuggling operations. The defendant simply nodded. The government introduced this nod under Rule 801(d)(2)(B). When a statement is offered as an adoptive admission, two criteria must be met: First, the statement must be such that an innocent defendant would normally be induced to respond; Second, there must be sufficient foundational facts from which the jury could infer that the defendant "heard, understood, and acquiesced in the statement." Though this is a close case, the court finds that the evidence was admissible here. The court notes, however, that the prosecution should first provide some evidence of the two foundational prerequisites before introducing the adoptive admissions, and not rely on "linking it up" in the future.

***EVIDENCE (Rule 801(d)(2)(D) – Statement of party's agent)***

***United States v. Bonds***, 608 F.3d 495 (9th Cir. 2010) Barry Bonds' trainer brought a vial of blood to BALCO and identified the sample as coming from Bonds. The trainer has refused to testify at Bonds' trial, despite having been held in contempt. The government wants to introduce his statement to the BALCO employee as a statement of the defendant's agent, and thus introduce the hearsay identification testimony through Rule 801(d)(2)(D). The Ninth Circuit, in this pretrial ruling, held that the trainer did not qualify as an "agent" under the rule.

***United States v. Jung***, 473 F.3d 837 (7th Cir. 2007) The statements of a defendant's attorney may, in certain circumstances, be admissible against the defendant. However, in this case, the attorney was talking to victims and trying to placate them and be cooperative. The statements were not part of the attorney's "investigative" efforts. The Seventh Circuit held that in this situation, the statements should not have been admitted pursuant to Rule 801(d)(2)(D).

***United States v. Amato***, 356 F.3d 216 (2d Cir. 2004) During the pretrial detention hearing, defense counsel made a proffer that he had advised the defendant to locate a witness as part of the defense preparation. At trial, however, the defendant denied participating in any effort to contact the witness (he no longer had the attorney who represented him at the detention hearing). The attorney's statement was then offered by the government. This was permissible pursuant to Rule 801(d)(2)(D).

***United States v. Ford***, 435 F.3d 204 (2d Cir. 2006) The appellate court discussed the rule governing the admission of a prosecutor's out-of-court statement as Rule 801(d)(2)(D) evidence. The evidence was not admissible in this case. To be admissible, the court must be satisfied that the prior argument involved an assertion of fact inconsistent with similar assertions in a subsequent trial. Second, the court must determine that the statements of counsel were such as to be the equivalent of testimonial statements made by the client. Last, the district court must determine by a preponderance of the evidence that the inference that the proponent of the statements wishes to draw is a fair one and that an innocent explanation for the inconsistency does not exist.

***United States v. Valencia***, 826 F.2d 169 (2d Cir. 1987) The defense attorney engaged in conversations with the prosecutor prior to a bail hearing. The attorney made these statements on the basis of what he had been told by his client. The Second Circuit ruled that the evidence is inadmissible: The defendant's interest in keeping his chosen attorney and in assuring uninhibited discussion between his attorney and the prosecutor and in avoiding risks to his privilege against self-incrimination outweigh the government's claim to the evidence on an agency theory.

***United States v. Harris***, 914 F.2d 927 (7th Cir. 1990) An attorney may be an agent of his client under Rule 801(d)(2)(D). Nevertheless, the trial court should exercise caution in admitting such statements. The attorney in this case was interviewing a witness to an armed robbery. The attorney showed two pictures of the defendant's brother to the witness, hoping that the witness would identify the brother as the perpetrator. When the witness testified, she related these events to the jury. The conduct of the initial counsel (this attorney did not represent the defendant at trial) was admissible under 801(d)(2)(D).

***United States v. Garbett***, 867 F.2d 1132 (8th Cir. 1989) The police were searching the defendant's house during which time his attorney stated, "Al wouldn't mind" if the officers used the stereo. The evidence was offered to prove that the residence was, in fact, Al's. This was error since the attorney was not acting within the scope of his agency. However, the error was harmless.

***United States v. Amelia***, 637 F. Supp. 1205 (D. Mass. 1986) A taxpayer granted a power of attorney to his attorney to deal with the IRS. The power of attorney was executed on a form provided by the IRS. The trial court holds that this form does not create a relationship sufficient to admit all statements by the attorney, as an agent, against the taxpayer in subsequent tax prosecutions.

***EVIDENCE (Rule 801(d)(2)(E) – Co-conspirator statements)***

***United States v. Jackson***, 636 F.3d 687 (5th Cir. 2010) A DEA agent explained how and why drug traffickers keep drug ledgers. A coconspirator's drug ledgers that implicated the defendant were then introduced into evidence under the Business Records exception to the hearsay rule (the co-conspirator did not testify) and as a co-conspirator statement. The Fifth Circuit held that this was error. The agent's testimony did not satisfactorily authenticate the records or establish the necessary foundation that these records were kept in the regular course of business or that they were prepared during the course of the conspiracy. Though a person other than a record custodian may authenticate a business record, the witness must be able to authenticate this business record and not, as here, business records (or drug ledgers) in general. Admitting the ledgers constituted a violation of Confrontation Clause and required that the conviction be reversed. The Fifth Circuit further explained

that the notebooks were inadmissible on Confrontation Clause grounds, because the government failed to prove that they were not testimonial. Because no effort was made to authenticate the notebooks (i.e., how, or when they were written), the introduction of the notebooks became, in essence, the functional equivalent of the author testifying live in court. It is the government's burden to prove that an out-of-court statement is non-testimonial.

***United States v. Turner***, 548 F.3d 1094 (D.C. Cir. 2008) Determining when a conspiracy end is important in numerous contexts, including a defense that the statute of limitations has expired; a claim that a co-conspirator statement was not made during the course of a conspiracy and, as in this case, in deciding which version of the Sentencing Guidelines to apply (i.e., a possible Ex Post Facto claim). In this case, the conspirator forged certain documents that enabled them to receive money as the beneficiary of another person who died. The forgery and receipt of the money occurred in 2001. When questioned by the police about these events in 2006, the conspirators lied. The D. C. Circuit held that the conspiracy ended in 2001 when the objects of the conspiracy were achieved. See generally Grunewald v. United States, 353 U.S. 391 (1957); Krulewitch v. United States, 336 U.S. 440 (1949); Lutwak v. United States, 344 U.S. 604 (1953).

***United States v. Al-Moayad***, 545 F.3d 139 (2d Cir. 2008) The defendant was charged with providing material support to a terrorist organization. The government introduced an application form for another person to enroll in a terrorist training camp and the form indicated that the defendant had sponsored the applicant. The government offered the form under Rule 801(d)(2)(E). However, there was insufficient information that the defendant was in a conspiracy with the applicant (or even knew him) or that the defendant was in a conspiracy that involved enrolling the applicant in the terrorist training camp.

***United States v. Conrad***, 507 F.3d 424 (6th Cir. 2007) The record was not clear when the co-conspirator hearsay declaration was made. If it was made after the conspiracy ended, it was not made "in furtherance" of the conspiracy and thus was inadmissible. The trial court's failure to make pertinent findings necessitated a remand to enable the trial court to make the necessary findings. In addition, the trial judge held that the government had made a prima facie case of the existence of a conspiracy; the proper standard requires the government to prove the existence of a conspiracy by a preponderance of the evidence.

***United States v. Magluta***, 418 F.3d 1166 (11th Cir. 2005) The defendant bribed a juror in a prior drug prosecution. In this case, the defendant was charged with obstruction of justice based on the bribe to the juror. The government introduced evidence that the juror told an informant (two years after the prior trial) about the bribe. The trial court held that the conspiracy was ongoing and that the statement to the informant was in furtherance of the conspiracy. The Eleventh Circuit disagreed. Following the teaching of Grunewald v. United States, 353 U.S. 391 (1957), the court held that the object of the conspiracy was essentially completed when the juror convinced his colleagues to return a not guilty verdict. Though there was a continuing need to keep the existence of the conspiracy a secret, this did not prolong the existence of the conspiracy for purposes of Rule 801(d)(2)(E).

***United States v. West***, 142 F.3d 1408 (11th Cir. 1998) The trial court erred in admitting a drug ledger as a co-conspirator statement. Though drug ledgers may, in certain circumstances be admissible, in this case, the author was unknown, and the trial court failed to find that the author was a member of the conspiracy or that the entries in the ledger were made in furtherance of the conspiracy. The trial court also plainly erred in instructing the jury that they should determine whether the ledger was composed by a coconspirator. Harmless error.

***United States v. Maliszewski,*** 161 F.3d 992 (D.C. Cir. 1998) Certain statements that were offered under Rule 801(d)(2)(E) were not shown to have been made in furtherance of the conspiracy but amounted to nothing more than idle chatter between a husband and wife. Harmless error. The statements were still admissible under Rule 804(b)(3), because the declarant was dead and the statements were against his interest.

***United States v. Serrano****,* 870 F.2d 1 (1st Cir. 1989) At a deposition, a co-defendant made statements that the defendant had knowledge of, and complicity in, the fraudulent scheme that was the subject of this criminal prosecution. The statement at the deposition was not in furtherance of, or during the course of, the conspiracy and was not admissible under Rule 801(d)(2)(E). Even if the statement constituted an act of concealment, the statement was not admissible. United States v. Tellier, 83 F.3d 578 (2d Cir. 1996) In Bourjaily v. United States, 483 U.S. 171 (1987), the Supreme Court held that the trial court may consider the out-of-court co-conspirator declaration which the government seeks to admit in deciding whether there was a conspiracy – a predicate for the admissibility of the statement before the jury. However, the Court also cautioned that such hearsay statements are presumptively unreliable and, therefore, while they may be considered in deciding whether there was a conspiracy involving the declarant and the defendant, there must be some independent corroborating evidence of the defendant's participation in the conspiracy. No such corroborating evidence existed in this case. Consequently, the hearsay statement implicating the defendant should not have been admitted and the conviction was reversed. The reversal of the conspiracy conviction also necessitated reversing the separate Hobbs Act conviction because of the prejudicial spillover effect.

***United States v. Urbanik,*** 801 F.2d 692 (4th Cir. 1986) One co-conspirator told another that his supplier had enormous physical prowess. The government sought to introduce these statements to establish that the supplier was a member of the conspiracy at the time of the conversation. The Fourth Circuit holds that these statements were not "in furtherance of" the conspiracy and, thus, were inadmissible hearsay.

***United States v. El-Zoubi,*** 993 F.2d 442 (5th Cir. 1993) Adel and El-Zoubi were co-conspirators in an arson offense. Prior to setting the fire, Adel told a neighbor in the shopping center that he was sick of it all and was going to burn the shop down. At El-Zoubi's trial, this was inadmissible hearsay. The neighbor was not part of the conspiracy, and the statement made to him was not in furtherance of the conspiracy.

***United States v. McConnell***, 988 F.2d 530 (5th Cir. 1993) The government failed to prove that the conspirator's statement was made in furtherance of the conspiracy. Admitting the hearsay statement was reversible error. There was no explanation of the context in which the statement was made and no other explanation of how the statement implicating the defendant furthered the conspiracy.

***United States v. Greer***, 939 F.2d 1076 (5th Cir. 1991) Though the error was harmless, the trial court should not have allowed the government to introduce the statement of "a skinhead" that all blacks and Jews should be eliminated. There was no proof that the police officer to whom this statement was made knew which person made the statement. Therefore, there was no way to determine if a co-conspirator made the statement.

***United States v. Arroyo***, 805 F.2d 589 (5th Cir. 1986) After the government failed to prove up its conspiracy, the trial judge granted a new trial after concluding that no instruction could cure the error of admitting the co-conspirator's statements.

***United States v. Scartz***, 838 F.2d 876 (6th Cir. 1988) Though prior Sixth Circuit cases held that "only slight evidence" was needed to place the defendant in a conspiracy prior to admitting co-conspirator statements, the proper standard is a preponderance of the evidence. The "slight evidence" rule refers only to the nature and extent of the defendant's involvement in the conspiracy, not to the initial question of membership.

***United States v. Santos***, 20 F.3d 280 (7th Cir. 1994) Statements by a co-conspirator to an IRS agent were not made in furtherance of the conspiracy and were not admissible under Rule 801(d)(2)(E). Mere idle chatter, narrative statements of past events, and superfluous casual conversations are not statements in furtherance of a conspiracy. Harmless error.

***United States v. Mahkimetas,*** 991 F.2d 379 (7th Cir. 1993) An undercover police officer testified about what she was told by the person who helped set up a drug deal. These statements identified the defendant as the person who would be the supplier. At the time of this conversation, there were only two people involved in the transaction:"the person who was the declarant and the undercover agent. The defendant/supplier had not yet been contacted. Because the out-of-court statements of the person who was going to arrange the deal were made to an undercover agent and there were no other conspirators at that time, there could not have been a conspiracy. "Rule 801(d)(2)(E) is not brought into play by the sound of just one lawbreaker's hand clapping." If the supplier were already in the conspiracy, the result would be different. The admission of the hearsay in this case was not reversible error.

***United States v. Johnson***, 927 F.2d 999 (7th Cir. 1991) The statements of one co-conspirator to another were not "in furtherance" of the conspiracy and were inadmissible under Rule 801(d)(2)(E). The statement was an offhand admission of culpability but was not designed to encourage the other conspirator to pursue the conspiratorial objectives. Harmless error.

***United States v. Shoffner***, 826 F.2d 619 (7th Cir. 1987) The Seventh Circuit rules that the preferable procedure is to require the government to preview its evidence of a conspiracy prior to admitting statements under Rule 801(d)(2)(E).

***United States v. Alonzo,*** 991 F.2d 1422 (8th Cir. 1993) After a co-conspirator's arrest, he revealed to the police the source of the cocaine he was in possession of at the time of his arrest. The source was the defendant. This hearsay evidence was not admissible under Rule 801(d)(2)(E) because the declarant was not making the statements during his participation in the conspiracy nor in furtherance of the conspiracy. The evidence was prejudicial and required a new trial. The declarant did not testify at trial.

***United States v. Whalen***, 844 F.2d 529 (8th Cir. 1988) Defendant's mother advised the defendant not to speak to the police and had told someone she had wiped the murder weapon clean. The government sought to introduce the mother's statement that she had wiped the murder weapon clean as a co-conspirator statement. The Court held that there was insufficient evidence to establish the existence of a conspiracy between the mother and the defendant; the statements were, therefore, inadmissible hearsay.

***United States v. Wood***, 834 F.2d 1382 (8th Cir. 1987) A cooperating witness' statement to his wife that he was putting radios in boats used by the defendant for drug smuggling was not admissible under 801(d)(2)(E). The statement was made merely to inform the wife about the co-conspirator's activities and was not in furtherance of the conspiracy.

***United States v. Chan Lai,*** 944 F.2d 1434 (9th Cir. 1991) Records and ledgers of drug transactions were admitted for the truth of the matter contained in the records. In order to be admitted, the government would have to show that the requirements of Rule 801(d)(2)(E) were satisfied. A remand for this inquiry was appropriate.

***United States v. Vowiell***, 869 F.2d 1264 (9th Cir. 1989) Four days after escape, the defendant told a third party to tell a witness to get other prisoners out of town. This statement was not made during the course of the conspiracy and was not admissible as a co-conspirator statement.

***United States v. Silverman***, 861 F.2d 571 (9th Cir. 1988) Interpreting the United States Supreme Court's decision in Bourjaily, the Ninth Circuit holds that evidence of the defendant's participation in a conspiracy must be established by independent corroborating evidence which is "fairly incriminating" in itself. Although the co- conspirator statement may be considered in making this evaluation, because of the inherently unreliable nature of such statements, more than "wholly innocuous" conduct by the defendant must be shown to render the co-conspirator statements admissible. In this case, the government failed to introduce sufficient evidence of the defendant's participation in the conspiracy.

***United States v. Perez***, 989 F.2d 1574 (10th Cir. 1993) At a time prior to the commencement of the conspiracy, and in a manner which in no way facilitated or furthered the conspiracy, one person, who later became a co-conspirator, told another that the

defendant distributed a lot of cocaine to him. This was inadmissible under Rule 801(d)(2)(E) and was reversible error. The Court of Appeals rejected the government's contention that Bourjaily somehow changed the standard for admissibility of such evidence. While Bourjaily did hold that the statement itself could be considered in ascertaining whether there was a conspiracy, the Court did not change the ultimate question, which is whether the statement was made during the scope of, and in furtherance of, the conspiracy.

***United States v. Wolf***, 839 F.2d 1387 (10th Cir. 1988) A witness testified that the defendant's wife stated that the defendant hit a child in the stomach. This was merely narrative and was not admissible against the defendant under the coconspirator exception to the hearsay rule. The statement did not further the alleged conspiratorial objectives of abusing a child or of covering up abuse. The evidence was harmless in this case.

***United States v. Garcia***, 13 F.3d 1464 (11th Cir. 1994) Statements made by one co-conspirator prior to the time that the defendant becomes a member of the conspiracy are not admissible against that defendant. Where there are multiple conspiracies, it is error to admit a statement that merely advances some other conspiracy not involving the defendant against whom it is admitted.

***United States v. Blakey***, 960 F.2d 996 (11th Cir. 1992) The hearsay statement of a co-conspirator was not made in furtherance of the conspiracy and admitting it at trial was reversible error. The statement was made by a co-conspirator to an investigator who was investigating the offense. The co-conspirator pointed the finger of blame at the defendant. This did not advance the goal of the conspiracy, even though the declarant's identification of the defendant was not entirely accurate, and the government argued that the declarant was trying to mislead the investigator.

***United States v. Christopher***, 923 F.2d 1545 (11th Cir. 1991) Co-conspirator hearsay statements were inadmissible for two reasons. First, it was never clearly established who made the statement that the witness testified "was made by one of the sons." Secondly, the trial court never made a specific finding that one of the sons was a coconspirator at the time the statement was made (assuming the statement was made by that son).

***EVIDENCE (Rule 803(1) – Present Sense Impression)***

***United States v. Ibisevic***, 675 F.3d 342 (4th Cir. 2012) The defendant carried over $10,000 into an international flight from Dulles Airport heading to Bosnia. An ICE agent who had a Puerto Rican accent questioned the defendant and his mother (the mother spoke no English) about whether they were carrying cash. The defendant responded that they had $5,000.00. During this "questioning" the defendant turned to his mother and translated, "They are asking how much the luggage is worth if it is lost." The defendant and his mother actually had about $40,000 in the luggage, on their persons and in the mother's purse. At trial, the defendant claimed that he did not understand the question and that the mother's testimony (about what the defendant said to the mother) was admissible as a "present sense impression" to show a lack of understanding. The trial court held that this was hearsay and inadmissible. The Fourth Circuit reversed: The defendant's statement was not hearsay (it was not offered for the truth of the matter asserted); it nevertheless would qualify as a present sense impression; and it was important to his defense regarding his lack of understanding that he was making a false statement or knowingly failing to file a currency form in violation of the law.

***United States v. Green***, 556 F.3d 151 (3rd Cir. 2009) The defendant was charged with selling drugs to an informant. There was a sketchy video of the transaction, but the identity of the seller was not certain. The informant testified at trial that it was not the defendant. The government later introduced a signed statement made by the informant fifty minutes after the videotaped transaction that identified the defendant as the seller. The government argued that it qualified as a "present sense impression" and thus was not hearsay. (The government did not try to impeach the informant during cross-examination with the prior statement as a prior inconsistent statement). The Third Circuit held that Rule 803(1) did not apply in this situation, because the informant's statement was not made contemporaneous with his observations. Fifty minutes does not qualify as "immediately after" or contemporaneous. Moreover, the informant was responding to questions from the DEA when he made the statement, not simply reciting what he was then observing.

***Brown v. Keane***, 355 F.3d 82 (2d Cir. 2004) The state offered evidence that a 911 caller reported that two men were in front of a bar shooting. The state offered the tape under the "present sense impression" exception to the hearsay rule. The federal district court, on habeas review, concluded that it was not certain that the caller was actually witnessing the shooting; it was possible the caller had earlier seen the two men, and then heard shooting and assumed that the men were involved in the shooting. The lower court concluded, however, that the present sense impression exception to the hearsay rule was "firmly rooted" and therefore the evidence should be admitted, despite the fact that there was an absence of a particularized guarantee of trustworthiness. The Second Circuit reversed: First, the court concluded that the tape did not qualify as a present sense impression for the same reason that the lower court found a lack of trustworthiness – there was no proof that the caller was actually describing events that he was contemporaneously witnessing. The court also rejected the theory that the caller's statement qualified as an "excited utterance." Again, however, excitement without contemporaneous observation does not qualify under that hearsay exception.

***United States v. Mitchell***, 145 F.3d 572 (3rd Cir. 1998) Two men robbed a cash-checking store and fled in a getaway car driven by a third man. Later, the police received a tip as to where the getaway car could be found. When they went to that location, there was an anonymous note for the police that stated, "Light green ZPJ-254. They changed cars; this is the other car." Based on this information the police found the defendant, who was associated with the license plate ZPJ-254. At trial this note was introduced by the government on three theories: present sense impression, excited utterance, and residual hearsay exception.

The Third Circuit rejected each theory and reversed the conviction. There was no proof that the author of the note actually witnessed what he described (for example, he may have been simply reciting what he had been told). Also, there was no proof that the author wrote the note at the time he was observing the event (if he did observe the event). The appellate court also held that there were no circumstantial guarantees of trustworthiness – particularly because the author of the note was never learned.

***EVIDENCE (Rule 803(2) -- Excited Utterance)***

***United States v. Taveras***, 380 F.3d 532 (1st Cir. 2004) The evidence offered by the government did not qualify as a spontaneous declaration or an excited utterance. The declarant's statement was made hours after the incident about which she was making the statement that was offered by the government.

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***EVIDENCE (Rule 803(3) – State of Mind)***

***United States v. Samaniego***, 345 F.3d 1280 (11th Cir. 2003) An apology can be admitted under the "state of mind" exception to the hearsay rule. However, while the statement, "I'm sorry" may reflect the declarant's state of mind, the reason assigned to the apology is not generally covered. Thus, "I'm sorry for stealing your property" is not admissible under Rule 803(3).

***United States v. Delvecchio***, 816 F.2d 859 (2d Cir. 1987) The government introduced the testimony of a DEA agent who was told by an informant that he was going to set up a meeting with Delvecchio and Amen. The DEA agent subsequently witnessed the transaction but could not identify Delvecchio. The government introduced testimony of the DEA agent concerning what he had been told by the informant to establish that Delvecchio was the other person there. The Second Circuit reverses: Rule 803(3) cannot be used to establish a fact which is in the mind of a declarant that is being used to establish the actions of a non-declarant unless there is "independent evidence which connects the declarant's statement with the non-declarant's activities."

***United States v. Peak***, 856 F.2d 825 (7th Cir. 1988) A defendant made statements during a telephone conversation with a co-defendant which illustrated his state of mind with regard to his involvement in a conspiracy to possess with intent to distribute cocaine: the defendant, during the course of this conversation, indicated a willingness to join the co-defendant in an attempt to "capture" the perpetrators of the crime, as opposed to wanting to participate in the planned drug deal. The defendant offered this evidence to show his state of mind – that is, that he was not conspiring to participate in the drug deal. The evidence should have been admitted under the state of mind exception to the hearsay rule.

***United States v. Tome***, 61 F.3d 1446 (10th Cir. 1995) Statements of a child abuse victim to a babysitter identifying her assailant were not admissible under Rule 803(3). That rule, which encompasses statements of a declarant's then existing state of mind, emotion, sensation, or physical condition does not allow for statements identifying an alleged abuser, because that reflects the declarant's memory of an event, and the rule specifically does not include a statement of memory.

***EVIDENCE (Rule 803(4) – Statement Made for Medical Diagnosis)***

***United States v. Bercier***, 506 F.3d 625 (8th Cir. 2007) The sexual abuse victim's prior statements implicating the defendant were not admissible as prior consistent statements, because the statements were not made prior to the alleged time of the fabrication. The statements were not admissible under the medical diagnosis exception, Rule 802(4), because statements that identify a perpetrator of a sexual assault are not made for purposes of medical diagnosis. See also United States v. Kenyon, 397 F.3d 1071 (8th Cir. 2005).

***Olesen v. Class***, 164 F.3d 1096 (8th Cir. 1999) The defendant was convicted of sexual assault of three children. One child did not testify; a doctor testified, however, that the child told the doctor that the defendant was the perpetrator. This evidence was

admitted under the state law analog to Rule 803(4). The Eighth Circuit held that the identity of the perpetrator was not shown to be necessary for medical diagnosis or treatment and the admission of the hearsay violated the defendant's right of confrontation.

***Ring v. Erickson***, 983 F.2d 818 (8th Cir. 1992) A child sex abuse victim made an out-of-court statement to a doctor. This was not admissible under the state analogy to Rule 803(4), because the child was not seeking medical help and, in fact, did not even know she was talking to a doctor. Both of these criteria underlie the rationale for the exception, which is that the patient is motivated to tell the truth to a treating physician. Admitting the evidence in this case violated the confrontation clause.

***Webb v. Lewis***, 44 F.3d 1387 (9th Cir. 1994) The state offered the hearsay statements of a child abuse victim which had been made to a social worker on videotape under the state version of Rule 803(4). This was clearly erroneous, however. The social worker was not a doctor and nothing about her relationship to the child reflected a medical relationship. The social worker's sole function was to investigate the charges of sexual abuse which had been made against the defendant. The child in no way was seeking medical attention. The videotaped statement was also inadmissible under the residual exception to the hearsay rule. There were inconsistencies in her statements and a lack of spontaneity which indicated that she had been coached by other people prior to the videotaped statement. See Idaho v. Wright, 110 S.Ct. 3139 (1990).

***People of Territory of Guam v. Ignacio***, 10 F.3d 608 (9th Cir. 1993) A child's statement to a social worker identifying the person who molested her was not admissible under Rule 803(4), because the inquiry was for the purpose of ensuring the child's safety, not for the purpose of treatment or diagnosis. Harmless error.

***United States v. Tome,*** 61 F.3d 1446 (10th Cir. 1995) Statements of a child abuse victim to a social worker were not admissible under Rule 803(4), because the statements were not made for the purpose of diagnosis or treatment. The caseworker stated that she was an investigator and provided no treatment to the victim.

***EVIDENCE (Rule 803(6) – Business Records)***

***United States v. Esparza***, 791 F.3d 1067 (9th Cir. 2015) The defendant was arrested at the border, driving a car that had marijuana hidden in various compartments. He claimed that he had borrowed the car from a friend. At trial, the government introduced a Department of Motor Vehicles Form that was signed by the previous owner of the vehicle that declared that she had sold the car to the defendant six days prior to the arrest. The DMV form had been sent to the previous owner with an accompanying letter that explained that the car had been seized with drugs. The previous owner sent in the form, aware that there was a criminal investigation. The form, therefore, was testimonial. It was not a routine business record, though it was in the DMV files, because it was not created by an agency employee in the routine course of business and because of the criminal investigation, the previous owner had a motive to disassociate herself from the vehicle.

***United States v. Blechman***, 657 F.3d 1052 (10th Cir. 2011) Records from AOL and PACER were admitted at trial and these records included certain "user-identifying" information that was inputted by the user, not by the companies and there was no effort by the companies to verify the information. This evidence was not admissible under the business records exception. Only when the business which accepts the outsider's information tries to assure reliability, or to verify the accuracy of the information, is the business records exception available in this situation. Harmless error.

***United States v. Jackson***, 636 F.3d 687 (5th Cir. 2010) A DEA agent explained how and why drug traffickers keep drug ledgers. A coconspirator's drug ledgers that implicated the defendant were then introduced into evidence under the Business Records exception to the hearsay rule (the co-conspirator did not testify) and as a co-conspirator statement. The Fifth Circuit held that this was error. The agent's testimony did not satisfactorily authenticate the records or establish the necessary foundation that these records were kept in the regular course of business or that they were prepared during the course of the conspiracy. Though a person other than a record custodian may authenticate a business record, the witness must be able to authenticate this business record and not, as here, business records (or drug ledgers) in general. Admitting the ledgers constituted a violation of Confrontation Clause and required that the conviction be reversed. The Fifth Circuit further explained that the notebooks were inadmissible on Confrontation Clause grounds, because the government failed to prove that they were not testimonial. Because no effort was made to authenticate the notebooks (i.e., how, or when they were written), the introduction of the notebooks became, in essence, the functional equivalent of the author testifying live in court. It is the government's burden to prove that an out-of-court statement is non-testimonial.

***United States v. Marguet-Pillado***, 560 F.3d 1078 (9th Cir. 2009) The contents of the INS "A" file did not all qualify as a business record, because the file contained statements made by non-government people about the defendant. It was reversible error to admit this document under either Rule 803(6) or 803(8).

***United States v. Baker***, 538 F.3d 324 (5th Cir. 2008) In this child pornography case, the government introduced a NCMEC report (National Center for Missing and Exploited Children) that identified certain victims in the pornographic files. The government failed to authenticate the report, however, under either Rule 803(6) (Business Record) or Rule 803(8) (Public Report). Though the government may have been able to overcome the hearsay exception, it was still required to authenticate the record as a business, or public record. Various means of authenticating such records are set forth in Rules 901 and 902. But the government did not offer any such proof.

***United States v. Gwathney***, 465 F.3d 1133 (10th Cir. 2006) Western Union sent documents in compliance with a subpoena from the DEA. The records themselves could qualify as a business record, assuming that they were authenticated, and the foundation was laid by a Western Union representative. However, the DEA agent could not lay that foundation and the records could not qualify as a business record of the DEA. Allowing the records into evidence was harmless error.

***United States v. Pelullo,*** 964 F.2d 193 (3rd Cir. 1992) The government introduced bank wire transfer records for the truth of the matter asserted – that is, to show the movement of money from the bank to the corporation and then diverted to the defendant. The records were not admissible as a business record, because no custodian or other qualified witness identified the documents or established the foundation for the admissibility on this theory. No other exception could be used to authorize the admission of the documents. This was reversible error.

***United States v. Casoni,*** 950 F.2d 893 (3rd Cir. 1991) At trial, the government introduced the testimony of a former co-conspirator of the defendant. Then, to corroborate his testimony, the government introduced the testimony of the witness's attorney, who also recited what the witness told him. Then the government offered the attorney's memorandum proffer of what the witness would say, this memorandum had been given to the government in the attorney's pitch to get the witness immunity. The memorandum was offered as a business record of the attorney. Though the attorney's testimony was properly admitted as a prior consistent statement of the witness, the attorney's memorandum was not a proper business record because it lacked trustworthiness usually ascribed to business records. The declarant – the witness – had an interest in minimizing his role in the offense and maximizing the role of the person against whom he was prepared to testify. Also, the attorney, in preparing the memorandum, had the same interest – in his professional capacity – to minimize his client's culpability and maximize the culpability of the defendant. Thus, the witness's statements to the attorney were admissible, but not the attorney's memorandum of the proffer. Harmless error.

***United States v. Versaint***, 849 F.2d 827 (3rd Cir. 1988) The defendant sought to introduce a police report as substantive evidence of a misidentification. The government resisted the offer on the grounds that the report was written one month after the undercover activities in the drug investigation had been conducted. The exclusion of the evidence was reversible error; the report qualified under the records exception to the hearsay rule.

***United States v. Ismoila***, 100 F.3d 380 (5th Cir. 1996) A business record is admissible only if the information on the document is furnished by a person who is providing the information pursuant to the regular course of the business activities. Thus, a business record is not admissible even if it is prepared in the usual course of business, but the information is provided by someone outside the business, such as a customer. Here, the government introduced bank records that contained customers' complaints that their credit cards included unauthorized charges. While the bank's records were prepared in the ordinary course of business, the information provided by the customers did not qualify under Rule 803(6). Nevertheless, the court approved the admission of the evidence under Rule 803(24), the residual exception.

***United States v. Chu Kong Yin***, 935 F.2d 990 (9th Cir. 1991) The defendant was charged with INS fraud because of his false statement on an INS application about his prior criminal record. At trial, the government offered an official Hong Kong record of defendant's conviction. The record was prepared, however, in 1988 and indicated that defendant had a 1981 conviction. This record was properly authenticated under Rule 901 but was nevertheless inadmissible hearsay. It was not a business record, because the author did not report something which he or she witnessed; rather the author's basis of knowledge was unknown. The document was also inadmissible under the public records exception, because, again, the author did not report events to which he or she was a witness. This exception, Rule 803(8), only excuses the appearance of the author, but the testimony of the author would have to be otherwise admissible.

***United States v. McIntyre,*** 997 F.2d 687 (10th Cir. 1993) The government offered motel registration cards for the purpose of showing that the conspirators had been at the hotel on a particular date. The registration cards, however, were hearsay. Though the cards were shown to have been maintained in the regular course of business, the information was obtained from the guest and the guest is not under the "business duty" or compulsion to provide accurate information. If the business employee verified the information, the business record exception might apply; but the government failed to establish that the employee actually verified the information (the guest's identity). Also, the government introduced Western Union wire transfers for the purpose of establishing the identity of both the sender and the recipient. Though Western Union verified recipients, it never verified the identity of the sender. The admission of the transfer records was erroneous with regard to identifying the sender, but not with regard to the identity of the recipient. Finally, this same analysis applied to records of a cellular phone. Again, the identity of the customer as reflected in the records was hearsay, absent evidence that the company verified the customer's identity. These errors were harmless.

***United States v. Bohrer,*** 807 F.2d 159 (10th Cir. 1986) The government sought to introduce an IRS contact card which contained the agent's version of an alleged telephone conversation between the agent and the defendant. This was inadmissible under the "business records" exception. The card was maintained as part of the defendant's IRS file for the specific purpose of prosecuting the defendant. As such, it was not kept in the regular course of business.

***EVIDENCE (RULE 803(8) – Public Records and Reports)***

***United States v. Esparza***, 791 F.3d 1067 (9th Cir. 2015) The defendant was arrested at the border, driving a car that had marijuana hidden in various compartments. He claimed that he had borrowed the car from a friend. At trial, the government introduced a Department of Motor Vehicles Form that was signed by the previous owner of the vehicle that declared that she had sold the car to the defendant six days prior to the arrest. The DMV form had been sent to the previous owner with an accompanying letter that explained that the car had been seized with drugs. The previous owner sent in the form, aware that there was a criminal investigation. The form, therefore, was testimonial. It was not a routine business record, though it was in the DMV files, because it was not created by an agency employee in the routine course of business and because of the criminal investigation, the previous owner had a motive to disassociate herself from the vehicle.

***United States v. Marguet-Pillado***, 560 F.3d 1078 (9th Cir. 2009) The contents of the INS "A" file did not all qualify as a business record, because the file contained statements made by non-government people about the defendant. It was reversible error to admit this document under either Rule 803(6) or 803(8).

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***EVIDENCE (RULE 803(15) -- statement in a document affecting an interest in property)***

***United States v. Boulware,*** 384 F.3d 794 (9th Cir. 2004) The defendant was charged with tax evasion and related charges. He claimed that the money that he allegedly skimmed from the company (and gave to his girlfriend) was actually legally still owned by the company (and simply being held by the girlfriend) and was therefore not taxable (i.e., there was no transfer of the money for tax purposes from the company to the defendant or the girlfriend). In a state court lawsuit, the state court agreed that the funds were still owned by the company. The trial court in the federal prosecution erred in excluding evidence of the state court judgment. The court also concluded that the state court judgment was not hearsay because under Rule 803(15) it was a statement in a document affecting an interest in property.

***EVIDENCE (Rule 803(18) – Learned Treatise)***

***United States v. Martinez,*** 588 F.3d 301 (6th Cir. 2009) During the direct or cross-examination of an expert witness, the witness may refer to statements in a learned treatise. Portions of the treatise may be read into evidence, though the treatise itself is not admissible. The portion of the treatise is admissible for the truth of the matter asserted and Rule 803(18) exempts the statements from the hearsay rule. In this case, during the testimony of the expert, the government introduced a videotape of an expert describing a medical procedure. The Sixth Circuit held that a videotaped interview of the expert did not qualify under Rule 803(18).

***EVIDENCE (Rule 803(24) – Residual Exception – NOW Rule 807)***

***Rivers v. United States***, 777 F.3d 1306 (11th Cir. 2015) Rule 807, the residual exception to the hearsay rule, focuses on the reliability of the declarant, not the witness who is in court reciting what the declarant said out of court. In this case, the defendant claimed that his trial attorney provided ineffective assistance of counsel. The trial attorney had died prior to the § 2255 hearing. Another attorney was called to the standby the prosecutor and he recited what the trial attorney had told him. The trial court in the § 2255 hearing held that the testifying attorney was reliable. This misses the point, however. What matters is the reliability of the declarant – the attorney who represented the defendant at trial. And his reliability, in regard to his preparation of the case for trial, was not inherently reliable.

***United States v. Mitchell***, 145 F.3d 572 (3rd Cir. 1998) Two men robbed a cash-checking store and fled in a getaway car driven by a third man. Later, the police received a tip as to where the getaway car could be found. When they went to that location, there was an anonymous note for the police that stated, "Light green ZPJ-254. They changed cars; this is the other car." Based on this information the police found the defendant, who was associated with the license plate ZPJ-254. At trial this note was introduced by the government on three theories: present sense impression, excited utterance, and residual hearsay exception. The Third Circuit rejected each theory and reversed the conviction. There was no proof that the author of the note actually witnessed what he described (for example, he may have been simply reciting what he had been told). Also, there was no proof that the author wrote the note at the time he was observing the event (if he did observe the event). The appellate court also held that there were no circumstantial guarantees of trustworthiness – particularly because the author of the note was never learned.

***EVIDENCE (Rule 804(a) – Definition of Unavailability)***

***United States v. Tirado-Tirado***, 563 F.3d 117 (5th Cir. 2009) The government's deportation of the witness foreclosed its ability to claim that it made a good faith effort to obtain the witness's presence in court. Thus, the use of a prior video-taped deposition of the witness could not be used at trial.

***United States v. Yida***, 498 F.3d 945 (9th Cir. 2007) If the government deports a witness, it cannot then claim that the witness is "unavailable" and attempt to use the witness's testimony from a prior trial pursuant to Rule 804(b)(1): "Implicit in the duty to use reasonable means to procure the presence of an absent witness (Rule 804(a)(5)) is the duty to use reasonable means to prevent a present witness from becoming absent."

***United States v. Foster***, 128 F.3d 949 (6th Cir. 1997) An alleged co-conspirator testified at the grand jury, under a grant of immunity, that the defendant was not in any way involved with any drug dealing. The witness could not be found at trial, however – possibly because of threats made by the prosecutor to the witness's attorney about the dangers of testifying perjuriously. The trial judge erred in denying the defendant's request to introduce the witness's grand jury testimony. With regard to the unavailability requirement, the defense attorney's late effort to secure the witness's presence was explained in part by the government's tardy disclosure of the grand jury transcripts to the defense.

***EVIDENCE (Rule 804(b)(1) – Prior Testimony)***

***United States v. Sklena***, 692 F.3d 725 (7th Cir. 2012) The defendant sought to introduce the prior testimony of his deceased partner that was given during a CFTC deposition. The government argued the DOJ was not the "same party" as the CFTC and therefore Rule 804(b)(1) did not authorize the prior testimony. The Seventh Circuit disagreed. The CFTC had the same motive to cross-examine the witness in the CFTC proceeding as the prosecutors in the criminal case and the CFTC, a governmental agency, can be considered to be the "same party" for purposes of Rule 804(b)(1) as the Department of Justice. Therefore the prior testimony was admissible.

***United States v. Duenas***, 691 F.3d 1070 (9th Cir. 2012) The defendant was charged with being a member of a drug conspiracy. A law enforcement officer testified at a hearing that was focused on the admissibility of the defendant's post-arrest statement. The officer was killed by a drunk driver prior to trial. The Ninth Circuit held that the defendant did not have a "similar motive and opportunity" to question the officer at the earlier hearing and his testimony from that hearing should not have been admitted at the trial. At the suppression hearing, the question was whether the defendant's statements were voluntarily given and whether his statement was obtained in violation of Miranda, while at the trial, the defendant would have questioned the officer about the contents of the statement.

***Cross v. Hardy,*** 632 F.3d 356 (7th Cir. 2011) In the first state trial, the victim testified that the defendant raped her. The jury failed to reach a verdict. The "victim" could not be found prior to the second trial, so her testimony was simply read to the jury at the second trial. The Seventh Circuit held that the state failed to exercise sufficient due diligence to locate the victim and using her prior testimony violated the defendant's Confrontation Clause rights. "Given the importance of A.S.'s testimony, the state was obligated to exert great effort to locate her . . . If there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation." THE SUPREME COURT REVERSED ON AEDPA-DEFERENCE GROUNDS.

***United States v. McFall***, 558 F.3d 951 (9th Cir. 2009) The defendant sought to introduce the grand jury testimony of a witness on the theory that his prior testimony was subjected to the cross-examination of the government and was thus admissible under Rule 804(b)(1). Though the government may not have had the exact same motive in cross-examining the witness at the grand jury, the trial court erred in excluding the testimony. The Ninth Circuit rejected the stricter rule followed by the Second Circuit in United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993), which requires a virtually identical interest, as opposed to "similar" motive in cross-examining the witness during the prior proceeding.

***United States v. Yida***, 498 F.3d 945 (9th Cir. 2007) If the government deports a witness, it cannot then claim that the witness is "unavailable" and attempt to use the witness's testimony from a prior trial pursuant to Rule 804(b)(1): "Implicit in the duty to use reasonable means to procure the presence of an absent witness (Rule 804(a)(5)) is the duty to use reasonable means to prevent a present witness from becoming absent."

***United States v. Omar***, 104 F.3d 519 (1st Cir. 1997) Under certain circumstances, the defense may offer the grand jury testimony of a witness who is unavailable for trial. This requires a showing that the government had the same motive during the grand jury to cross-examine the witness as it would have at trial. The government in this case did not have the same motive, so the evidence was properly excluded.

***United States v. Salerno***, 937 F.2d 797 (2d Cir. 1991) Rule 804(b)(1) provides that if a witness is unavailable, his prior sworn testimony is admissible, assuming that the party against whom the testimony is introduced had an opportunity and a similar motive to cross-examine the witness. Here, the defense sought to introduce the exculpatory grand jury testimony of two witnesses. The witnesses relied on their Fifth Amendment rights at trial and refused to testify, thus, they were unavailable; also, the government refused to grant the witnesses immunity. The issue on appeal was whether the government had a "similar motive" when the witnesses were "cross-examined" at the grand jury? While the court agrees that the government had no motive to cross-examine the witnesses at the grand jury (the government contended that the witnesses were known to be committing perjury), because the government "procured" the witnesses' unavailability by refusing to grant them immunity at trial, this requirement would be relaxed. Where, as here, the unavailability of a witness can be remedied by the party against whom the testimony is being offered (as opposed, for example, to cases in which the witness is dead), that party cannot complain that it did not have a similar motive in the prior proceeding to cross-examine the witness. The United States Supreme Court reversed: the Rule specifically requires that the party against whom the testimony is offered must have had a similar motive to cross-examine the witness at the earlier proceeding. The Second Circuit then again considered the case, 974 F.2d 231, and again reversed the conviction, concluding that the prosecutor did have the same motive to cross-examine the witnesses at the grand jury as he had at trial. The government had a meaningful opportunity to cross-examine the witnesses at the grand jury and, in fact, did cross-examine the witnesses in that forum. The Second Circuit then reconsidered the case again, en banc, United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1997), and held that the government did not have a similar motive during the grand jury to develop the cross-examination and therefore, the hearsay testimony was not admissible. The en banc court held as follows: "We do not accept the position that the test of similar motive is simply whether at the two proceedings the questioner takes the same side of the same issue. If a fact is critical to a cause of action at a second proceeding but the same fact was only peripherally related to a different cause of action at a first proceeding, no one would claim that the questioner had a similar motive at both proceedings to show that the fact had been established or disproved." This applies to the grand jury testimony.

***United States v. Foster***, 128 F.3d 949 (6th Cir. 1997) An alleged co-conspirator testified at the grand jury, under a grant of immunity, that the defendant was not in any way involved with any drug dealing. The witness could not be found at trial, however – possibly because of threats made by the prosecutor to the witness's attorney about the dangers of testifying perjuriously. The

trial judge erred in denying the defendant's request to introduce the witness's grand jury testimony. With regard to the unavailability requirement, the defense attorney's late effort to secure the witness's presence was explained in part by the government's tardy disclosure of the grand jury transcripts to the defense.

***United States v. Flenoid,*** 949 F.2d 970 (8th Cir. 1991) The trial court erred in refusing to allow defendant to introduce the testimony of a witness from one of the prior mistrials. The witness had been cross-examined by the government and the defendant made an adequate showing that the witness could not be located.

***United States v. Curbello,*** 940 F.2d 1503 (11th Cir. 1991) The trial court failed to demonstrate that the declarant was "unavailable" thus justifying the use of his out-of-court statement against penal interest. The only proof of unavailability was the statement of the prosecutor that the declarant was in prison in the Bahamas. This is not sufficient to prove unavailability: The government must show that it could not procure the declarant's attendance by process or other reasonable means. The government had to show that efforts were made to contact the Bahamian government about extradition or other means of procuring the witness's attendance. The government failed to show that a deposition or letters rogatory were not practical.

***EVIDENCE (Rule 804(b)(3) -- Statement Against Interest)***

***Lilly v. Virginia,*** 527 U.S. 116, 119 S. Ct. 1887 (1999). The Supreme Court reversed this state court murder conviction on the grounds that the state was permitted to introduce the statement of a co-defendant that implicated the defendant. The co-defendant was not tried with the defendant (thus, this was not a Bruton situation) and he invoked his Fifth Amendment right not to testify. In his out-of-court statement, he admitted some participation in the crime spree, but implicated the defendant (his brother) in the murder. The state argued that this was admissible under the state exception to the hearsay rule for statements against the declarant's penal interest. The Supreme Court held that the statement implicating the defendant in the murder was not sufficiently against the declarant's penal interest to be admitted. The admission of this testimony violated the Confrontation Clause of the Sixth Amendment.

***Williamson v. United States***, 512 U.S. 594 (1994) Only the actual inculpatory portions of an out-of-court statement "against penal interest" may be admitted in evidence, not the other portions of a narrative statement.

***United States v. Ocasio-Ruiz***, 779 F.3d 43 (1st Cir. 2015) The defendant was charged with carjacking. He sought to introduce at trial the statement of another man, since deceased, that he made to his mother, that he was the sole perpetrator of the offense. The defendant argued that this statement of the deceased to his mother was a statement against interest that was corroborated by the fact that the statement was made to the declarant's mother. The First Circuit held that excluding this evidence was reversible error.

***United States v. Hatfield***, 591 F.3d 945 (7th Cir. 2010) The trial court erred in excluding testimony that a third party admitted (in an out-of-court statement recorded in a police report) that he committed the crime that the defendant in this case was facing. There was no evidence that the confessor knew the defendant and there were circumstances corroborating the confessor's admission. The out-of-court statement was obviously against the declarant's penal interest and there were sufficient indications of the trustworthiness of the statement.

***United States v. Rodriguez-Martinez,*** 480 F.3d 303 (5th Cir. 2007) A drug purchaser's statement to the police that the defendant was his supplier may have been against his interest, but it also violated the defendant's Confrontation Clause rights and admitting the statement was reversible error.

***Stallings v. Bobby***, 464 F.3d 576 (6th Cir. 2006) Allowing the state to introduce a co-conspirator's statement that implicated the defendant violated the defendant's Confrontation Clause rights.

***United States v. Jones***, 371 F.3d 363 (7th Cir. 2004) The defendant's co-codefendant confessed to the crime with which he was charged, but then became a fugitive prior to trial. The government offered the co-conspirator's confession at trial, though all references to the defendant were redacted. The Seventh Circuit held that the statement should not have been admitted. First, because the declarant was not at trial, the statement was obviously only used against the defendant, thus, redacting the defendant's name did not satisfy the Bruton concerns. Second, according to Crawford v. Washington, this statement could not be admitted without violating the defendant's right of confrontation.

***United States v. Chapman***, 345 F.3d 630 (8th Cir. 2003) A missing witness previously assisted the police in catching one of his drug customers. His statements did not qualify under Rule 804(b)(3). The witness, "by casting himself as a mere mule and serving up the repeat buyer, could reasonably assume that he would be minimizing his criminal liability." Therefore, the statement was not sufficiently against his penal interest to satisfy the Confrontation Clause. The court also rejected the government's theory that the statements were admissible to explain the officers' conduct in pursuing the buyer (defendant).

***Forn v. Hornung***, 343 F.3d 990 (9th Cir. 2003) The out of court statements of the accomplice / declarant did not qualify as statements against interest under the Lilly standard.

***Hill v. Hofbauer***, 337 F.3d 706 (6th Cir. 2003) Following the decision in Lilly, the Sixth Circuit held that a statement by a coconspirator, even if it incriminates the declarant, is inherently unreliable and inadmissible pursuant to the Confrontation Clause.

***United States v. Price***, 134 F.3d 340 (6th Cir. 1998) The trial court erred in excluding evidence offered by the defense regarding a coconspirator's statements against penal interest. The declarant was unavailable (he was a fugitive at the time of trial). With regard to the condition that there are corroborating circumstances, the issue is whether there are circumstances that indicate the

trustworthiness of the statement itself, not whether there are circumstances that corroborate the content of the declaration. Among circumstances that may corroborate a statement against penal interest are: (1) the statement is made after receiving Miranda warnings; (2) the declarant and the party offering the statement do not have a close relationship; (3) the absence of any indication that the statement was made in an effort to curry favor with law enforcement. The error in excluding this evidence was harmless.

***Crespin v. New Mexico***, 144 F.3d 641 (10th Cir. 1998) Admitting the co-conspirator's statement that implicated the defendant was erroneous. The state's theory that the statement was "against the declarant's penal interest" did not survive appellate habeas scrutiny. The Tenth Circuit held that the state courts failed to properly apply the "indicia of reliability" test. The court reiterated the "time-honored" principle that "a codefendant's confession inculpating the accused is inherently unreliable."

***United States v. Castelan***, 219 F.3d 690 (7th Cir. 2000) Pursuant to Williamson v. United States, 512 U.S. 594 (1994), the trial court must evaluate a witness's out-of-court statement line-by-line in determining whether it is admissible under Rule 804(b)(3). The fact that the statement, taken as a whole is incriminating is not sufficient to overcome the Confrontation Clause concerns. Here, the court failed to undertake this analysis and the fact that the police told the co-defendant that he could help himself by cooperating further reduced the reliability of the statement. Harmless error.

***United States v. Barone***, 114 F.3d 1284 (1st Cir. 1997) At great length, the First Circuit reviews the law regarding the admissibility of statements against penal interest pursuant to Rule 804(b)(3), concluding, in the end, that the vast majority of evidence offered by the government was admissible.

***United States v. Boyce***, 849 F.2d 833 (3rd Cir. 1988) A co-defendant was arrested, and his subsequent statement was offered in evidence at trial under the statement against interest exception to the hearsay rule. The record, however, failed to reveal the circumstances surrounding the arrest and interrogation. It was equally plausible that the co-defendant was motivated by a desire to curry favor with the FBI agent. The statement was inadmissible under 804(b)(3).

***United States v. Flores***, 985 F.2d 770 (5th Cir. 1993) Defendant's co-defendant testified at the grand jury, implicating both himself and the defendant in the drug conspiracy. The government offered this hearsay against the defendant, relying on the "against penal interest" exception to the hearsay rule – 804(b)(3). Pursuant to Idaho v. Wright, corroborating evidence may not be considered in determining whether a statement may be admitted under the Confrontation Clause where, as here, the statement is presumed to be unreliable. The circumstantial guarantees of trustworthiness must exist in the circumstances of the statement itself. Mere corroboration is not itself sufficient to overcome the Confrontation Clause hurdle. Also, the "against penal interest exception," though a "firmly rooted exception," does not qualify all hearsay statements as inherently reliable. This is particularly true where, as here, the statement is not only against the penal interest of the speaker, but also against the penal interest of the party objecting to the admissibility of the statement.

***United States v. Hazelett***, 32 F.3d 1313 (8th Cir. 1994) A woman was arrested on a bus and found to be in possession of cocaine. She agreed to cooperate and implicated herself (as the courier) and the defendant as the supplier. She disappeared before trial. The government sought to introduce her earlier statements under Rule 804(b)(3) – statements against her penal interest. An unavailable declarant's lengthy narrative is not admissible under 804(b)(3) merely because some portion of the narrative subjects the declarant to criminal liability.

***Williamson v. United States***, 114 S. Ct. 2431 (1994). The declarant's statements which implicated the defendant were not sufficiently against the declarant's penal interest to be admissible. This statement, which was made after the declarant was arrested in possession of a substantial quantity of cocaine, is a good example of a declarant possibly motivated by the very natural desire to curry favor from the arresting officers and the desire to alleviate culpability by implicating others. In short, pointing the finger at the defendant may well have been an effort to minimize culpability, the opposite motivation which is the basis for the 804(b)(3) exception to the hearsay rule.

***United States v. Beydler***, 120 F.3d 985 (9th Cir. 1997) When the declarant's out-of-court statement (made against his penal interest) is made during the course of the declarant's effort to secure a deal, the statement will generally not be admissible under Rule 804(b)(3).

***United States v. Paguio,*** 114 F.3d 928 (9th Cir. 1997) The defendant was charged with bank fraud. His father made a statement to defendant's attorney and paralegal that he was responsible for the crime. The father was a fugitive at the time of trial. The defendant sought to introduce the statement pursuant to Rule 804(b)(3). The trial court permitted the defense to offer part of the father's statement (the part in which he inculpated himself), but not the part that exculpated his son, the defendant. This was reversible error. Unlike in Williamson, the portion of the statement being excluded was not self-exculpatory of the declarant. The excluded portion – exonerating the son – was simply another way of inculpating the declarant and was thus admissible under Rule 804(b)(3).

***United States v. Costa***, 31 F.3d 1073 (11th Cir. 1994) The government offered the confession of a co-defendant (who was not on trial with the defendant) which implicated both the defendant on trial, and the co-defendant, himself. The government relied on Rule 804(b)(3). The court reversed: even though the statement might appear to be against the declarant's penal interest, the part of the statement implicating the defendant was not sufficiently against the declarant's penal interest to be admissible under this theory. Under Bruton, such statements must be excluded. The declarant's statement was made while he was in custody, and after he was told by the AUSA that if he did not provide substantial assistance, he would face life in prison.

***United States v. Curbello,*** 940 F.2d 1503 (11th Cir. 1991) The trial court failed to demonstrate that the declarant was "unavailable" thus justifying the use of his out-of-court statement against penal interest. The only proof of unavailability was the statement of the prosecutor that the declarant was in prison in the Bahamas. This is not sufficient to prove unavailability: The government must show that it could not procure the declarant's attendance by process or other reasonable means. The government had to show that efforts were made to contact the Bahamian government about extradition or other means of procuring the witness's attendance. The government failed to show that a deposition or letters rogatory were not practical.

**United States v. Gabay**, 923 F.2d 1536 (11th Cir. 1991) Rule 804(b)(3) permits the introduction of an unavailable witness's out-of-court statements if the statements were contrary to the penal interest of the declarant. Here, the statements were made by a person who was deceased at the time of trial. The statements amounted to a confession of complicity in the counterfeiting venture for which the defendant was being tried. The fact that the declarant had been immunized prior to making the prior statements did not change the result – the statements were still against the penal interest of the declarant.

***EVIDENCE (Rule 804(b)(5) – Forfeiture by Wrongdoing)***

***Giles v. California***, 554 U.S. 353 (2008) The forfeiture-by-wrongdoing exception to the hearsay rule can be invoked only if there is proof that the defendant caused the declarant's unavailabity with the intent of silencing the witness.

***Jensen v. Clements,*** 800 F.3d 892 (7th Cir. 2015) The victim wrote a letter saying that she thought her husband was going to kill her. Two weeks later she was murdered. The letter was not admissible under the forfeiture-by-wrongdoing exception to the hearsay rule, because the defendant did not kill the victim to prevent her from being a witness in a case.

***United States v. Leal-Del Carmen***, 697 F.3d 964 (9th Cir. 2012) Deporting a potentially exculpatory witness prior to providing the defense an opportunity to interview the witness violates the defendant's right to compulsory process and to due process. The defendant, however, is required to show that the government acted in bad faith, a showing that was, in fact, made in this case, because the government had interviewed the witness prior to deporting him. The Ninth Circuit held that once the government is aware that a witness has exculpatory evidence, the government must alert the defense. If defense counsel has not yet been appointed or retained, the government may not deport the witness until after counsel is appointed or retained and given an opportunity to preserve the testimony. The Ninth Circuit also held that the trial court should have permitted the defendant to introduce the witness's statement to the border agent prior to being deported. The out-of-court declaration was admissible pursuant to Rule 804(b)(6) – the forfeiture by wrongdoing hearsay exception – because the government rendered the witness unavailable. Finally, the appellate court held that the defendant was entitled to a "missing witness" instruction that would have advised the jury that the failure of a party to produce a material witness who could elucidate matters under investigation gives rise to a presumption that the testimony of that witness would be unfavorable to that party if the witness is peculiarly within the party's control. The deported witness could have been paroled back into the country, but only the government could produce the witness under that procedure. "For the government to say that it isn't responsible for her absence because it no longer knows where to find her comes close to the classic definition of chutzpah."

***Perkins v. Herbert***, 596 F.3d 161 (2d Cir. 2010) The state trial court concluded that the defendant procured a witness's unavailability and therefore, the hearsay statement of the witness was admissible. The factual finding of the trial court, however, was not supported by sufficient evidence and the admission of the witness's grand jury testimony violated the Confrontation Clause. Harmless error.

***United States v. Rodriguez-Marrero***, 390 F.3d 1 (1st Cir. 2004) The government offered the testimony of a witness who recited what a cooperating witness had told him. The government argued that the cooperating witness's death (he was murdered) rendered the evidence admissible, because the statements were reliable and because the defendant "acquiesced" in his murder, though he was not directly responsible for the murder. The First Circuit held that Crawford v. Washington barred this evidence on Confrontation Clause grounds, and that Rule 804(b)(5) did not apply, because the lower court made no findings that would support the conclusion that the defendant was responsible (in the conspiratorial sense) for the murder of the witness, as opposed to simply being aware of the order from others that the witness was to be killed.

***EVIDENCE (Rule 806 – Impeaching Declarant)***

***Blackston v. Rapelje***, 780 F.3d 340 (6th Cir. 2014) If the state introduces a prosecution witness's prior sworn testimony at defendant's trial, the defense is entitled to introduce evidence that the witness recanted that testimony. This is implicit in the right to confront one's accusers. The prior sworn testimony in this case occurred at the defendant's first trial. After that trial, two of the principal witnesses recanted. At the retrial, the two witnesses refused to testify, and the state was permitted to read their testimony from the first trial. The defense was prohibited from impeaching their testimony with the recantations. This error required granting a writ of habeas corpus.

***Vasquez v. Jones***, 496 F.3d 564 (6th Cir. 2007) The state trial court's decision to bar the defense from introducing impeachment evidence relating to a hearsay declarant's criminal record violated the Confrontation Clause. The right to offer evidence of a witness's criminal record to demonstrate his lack of credibility is a core principle of the Confrontation Clause and applies with equal force to a "witness" who does not appear at trial but whose out-of-court statements are offered through a hearsay exception.

***United States v. Jackson***, 345 F.3d 59 (2d Cir. 2003) Brady applies to information about declarants who do not testify, but whose out-of-court statements are introduced in evidence.

***United States v. Grant***, 256 F.3d 1146 (11th Cir. 2001) The government offered considerable co-conspirator hearsay evidence, but very few statements actually implicated the defendant, though the statements did indicate that the declarant had a partner. The defendant had acquired an affidavit from the co-conspirator declarant that completely exonerated the defendant and stated that the defendant was not the declarant's partner. The Eleventh Circuit held that excluding the affidavit was reversible error. The fact that the affidavit statements were not specifically inconsistent with a particular statement attributed to him at trial is not the test. Rather, Rule 806 states that any evidence is admissible "which would be admissible … if [the] declarant had testified as a witness" from the stand. The statements contained in the affidavit would be admissible to impeach the declarant, had he been a witness for the government at trial. The court noted that the affidavit statements would not be admissible for the truth of the matter asserted, but only as impeachment.

***United States v. Gonzalez-Maldonado***, 115 F.3d 9 (1st Cir. 1997) The court retained a psychiatrist to determine if a co-defendant was competent to stand trial. The co-defendant was declared incompetent, but his recorded statements to undercover officers, statements that incriminated the defendant, were critical evidence for the prosecution. The defense wanted to call the psychiatrist as their witness to establish the mental illness of the co-defendant – a mental illness that led the witness to exaggerate, according to the psychiatrist. Excluding this testimony was reversible error. The psychiatrist was obviously qualified as an expert and his testimony related directly to the veracity of the declarant (i.e., the recorded statements of the incompetent co-defendant).

***United States v. Wali***, 860 F.2d 588 (3rd Cir. 1988) The government offered evidence of a co-conspirator's statement which incriminated the defendant. In response, the defense offered prior inconsistent statements of the co-conspirator under Rule 806. The trial court erred in excluding this testimony. Once the prosecution introduces statements in which the co-conspirator inculpated the defendant, inconsistent statements in which the same co-conspirator exculpated the defendant can be admitted under Rule 806 without any need for cross-examination and regardless of whether the declarant could have been deposed. Furthermore, the declarant need not be given an opportunity to examine or explain or deny the inconsistent statement.

***United States v. Moody***, 903 F.2d 321 (5th Cir. 1990) It was reversible error to preclude the defense attorney from impeaching the veracity of hearsay declarants whose statements formed the basis of the government's prosecution of the defendant for mail and wire fraud.

***Brown v. Dugger***, 831 F.2d 1547 (11th Cir. 1987) A police officer testified about the statements of a third party. Defense counsel sought to cross-examine that officer in a way to demonstrate bias on the part of that third party declarant. The trial court prohibited this mode of cross-examination of the officer. This was error of constitutional dimensions and required reversal.

***EVIDENCE (Rule 807 – Residual Exception)***

***United States v. Slatten***, 865 F.3d 767 (D.C. Cir. 2017) This is the Blackwater prosecution relating to the murders committed by military contractors while serving in Iraq. Reversal was required because the trial court refused to sever one defendant's case which was requested in order to introduce the statement of a co-defendant that was inadmissible in a joint trial. Severance is required under Rule 14 if it is necessary in order to assure that a defendant can introduce evidence that would be inadmissible at a joint trial, and which is essential to the defendant's right to a fair trial. The statement of the co-defendant exonerated the defendant. Even though the co-defendant would not have testified at defendant's severed trial, the statement of the co-defendant would have been admissible pursuant to Rule 807, the residual exception to the hearsay rule. The co-defendant's statements to the authorities investigating the shooting contained equivalent circumstantial guarantees of trustworthiness: the co-defendant was speaking pursuant to a grant of immunity; he was implicating himself; his statements were consistent over time. Because the statement of the co-defendant would have been admissible at a separate trial, the trial court erred in denying the severance motion.

***Rivers v. United States,*** 777 F.3d 1306 (11th Cir. 2015) The residual exception to the hearsay rule, Rule 807, was designed to be used rarely, in exceptional circumstances, when exceptional guarantees of trustworthiness exist and when high degrees of proactiveness and necessity are present. At the heart of a Rule 807 determination is the trustworthiness of the declarant's out of court statement, not the credibility or reliability of the witness who, in court, is reciting what the declarant said. The witness who is reciting what was said can be cross-examined in court and his memory of the declarant's statement can be challenged and the jury (or judge) can evaluate the credibility and memory of the witness. Rule 807, however, focuses on the out-of-court declarant's credibility and the trustworthiness of what the declarant said. The declarant is not available to be cross-examined, so there must be circumstantial guarantees of trustworthiness that instill in that out-of-court statement reliability. One factor that the court may consider is whether there is corroborating evidence that supports the out-of-court statement. But the corroborating evidence must be "extraordinarily strong before it will render the hearsay evidence sufficiently trustworthy to justify its admission."

***Christie v. Hollins***, 409 F.3d 120 (2d Cir. 2005) The prior testimony of a defense witness should have been admitted in this case in light of the showing by the defense that diligent efforts had been made to locate the witness and she had not been located.

***United States v. Brothers Const. Co. of Ohio***, 219 F.3d 300 (4th Cir. 2000) Grand jury testimony of an unavailable witness should not have been admitted under the residual exception to the hearsay rules, Rule 804(b)(5). Harmless error.

***United States v. Canan***, 48 F.3d 954 (6th Cir. 1995) In Williamson v. United States, 114 S.Ct. 2431 (1994), the Supreme Court held that in order to introduce a hearsay statement under Rule 804(b)(3), the district court must go through the statement line-by-line to determine if the statements are against the declarant's penal interest. In this case, the Sixth Circuit holds that the same inquiry must be undertaken when out-of-court statements are introduced pursuant to Rule 804(b)(5). Thus, the

"circumstantial guarantees of trustworthiness" must be found in each assertion of the hearsay statement. The district court should review the statement "sentence by sentence" in order to comply with the confrontation clause and Rule 804(b)(5).

***United States v. Gomez-Lemos***, 939 F.2d 326 (6th Cir. 1991) The grand jury testimony of a co-conspirator was not admissible under Rule 804(b)(5). Even though the testimony was corroborated by other witnesses, the presence of corroboration does not satisfy the requirement for other "indicia of reliability."

***Idaho v. Wright***, 110 S. Ct. 3139 (1990)(indicia of reliability must come from surrounding circumstances of the statement).

***United States v. York,*** 852 F.2d 221 (7th Cir. 1988) The government introduced statements by a fourteen-year-old to a probation officer. The fourteen-year-old was describing events that occurred five years earlier. The probation officer to whom the fourteen-year-old had made these statements made no transcript of the interview; thus, preventing the Court from determining whether there were leading questions or other suggestive means of eliciting the statements of the child. The evidence was inadmissible under the residual exception to the hearsay rule.

***United States v. Harbin***, 112 F.3d 974 (8th Cir. 1997) The government offered the grand jury testimony of a witness who was supposedly unavailable to testify, because she could not be located. However, the government failed to offer sufficient proof that it had made efforts to locate the witness. The government may not rely on general statements that "we can't find her" or "she is avoiding service of a subpoena."

***United States v. Lang,*** 904 F.2d 618 (11th Cir. 1990) An unavailable witness' grand jury testimony which lacks circumstantial guarantees of trustworthiness is not admissible under Rule 804(b)(5). Although the Eleventh Circuit has not adopted a per se rule excluding grand jury testimony, in three reported decisions, this testimony has not been admitted under Rule 804(b)(5), United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977); United States v. Thevis, 665 F.2d 616 (5th Cir. 1982); United States v. Fernandez, 892 F.2d 976 (11th Cir. 1989).

***United States v. Fernandez***, 892 F.2d 976 (11th Cir. 1989) The government introduced the grand jury testimony of a witness who died prior to trial. The witness' death was of natural causes unrelated to the defendants. In a lengthy review of Rule 804(b)(5), the Eleventh Circuit concludes that such testimony is not admissible absent an extraordinary showing of trustworthiness.

***EVIDENCE (Rule 901 – Authentication***)

***United States v. Alvirez***, 831 F.3d 1115 (9th Cir. 2016) Everything you wanted to know about authenticating a Certificate of Indian Blood in a prosecution of an Indian (allegedly) for assault. The Ninth Circuit discusses the provision in FRE 902(1) and FRE 902(2) dealing with authentication of domestic public documents in the context of an Indian Tribe document.

***United States v. Vayner***, 769 F.3d 125 (2d Cir. 2014) The defendant was charged with sending a fake birth certificate through email. He defended on the basis that that was not his email address. The government offered a printout of a Russian social media website page (akin to Facebook) without submitting sufficient evidence to authenticate that this was what the government claimed it was (i.e., the defendant's profile page). That page identified the defendant as using the email address that was the focus of the prosecution. Because the government failed to sufficiently authenticate the profile page on the social media website and this was the principal evidence used to link the defendant to the email address, the conviction was reversed.

***United States v. Jones***, 600 F.3d 847 (7th Cir 2010) Rule 901(b)(5) allows voice identification of a voice on an audiotape by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker. In this case, the law enforcement officer identified the defendant's voice on a wiretap by comparing it to the defendant's voice which he heard on a couple occasions and by overhearing a conversation between the defendant and his attorney for fifteen minutes during a break in the trial. The Seventh Circuit held that the former basis (hearing the defendant speak briefly in court during a pretrial proceeding) was minimally sufficient. But the latter basis (eavesdropping on a conversation between the defendant and his attorney should not have been admitted, because the attorney could not rebut this claim because he was trial counsel and could not refute the agent's conversation about the length of time that he and his client were talking and whether the defendant was whispering.

***United States v. Chin***, 371 F.3d 31 (2d Cir. 2004) The defendant offered credit card receipts into evidence to establish his alibi – that he was in New York, not China at the time the crimes allegedly occurred. The companies that prepared the receipts had destroyed the originals. But the defendant offered his copies, with a handwriting expert that identified his signature, to establish their authenticity. The Second Circuit held that the proponent of evidence is not required to rule out all possibility that the evidence is not authentic; the proponent is only obligated to cross an initial threshold that the evidence is what it purports to be. While it was possible that the defendant's wife purchased the items and brought the receipts home unsigned; and while government witnesses to place the defendant in China at the time the receipts were purportedly produced, these were matters that went to the weight, not the admissibility, of the evidence. Excluding the evidence was reversible error.

***EVIDENCE (Rule 1002 – Best Evidence Rule)***

***United States v. Bennett***, 363 F.3d 947 (9th Cir. 2004) The best evidence rule provides that the original of a writing, recording, or photograph is required to prove the contents thereof. Rule 1002, Fed. R. Evid. Whether the rule applies depends on whether the proponent is attempting to prove the content of the writing, recording or photograph. A tape recording of a conversation is not the best evidence of the conversation if one of the participants testifies. Similarly, a witness may identify a photograph as an accurate depiction of a certain scene, or event that he saw. In this case, however, the government established that the defendant

had navigated his boat through international waters (and thus was guilty of importation of drugs) by relying on a GPS system that provided “back-tracking.” But the GPS was not introduced in evidence. An agent simply testified about what the GPS “revealed.” This violated the best evidence rule. The agent did not have independent knowledge of the fact and was relying entirely on the GPS “recording.”

## *EX POST FACTO*

***Smith v. Doe***, 123 S. Ct. 1140 (2003) The Alaska sex offender registration statute does not offend the Ex Post Facto Clause, even though the registration requirement is imposed on offenders whose offenses were committed prior to the enactment of the registration law. The registration law is civil in nature, not punitive, so the Clause does not apply.

***California Department of Corrections v. Morales***, 514 U.S. 499 (1995) California changed the procedure for conducting parole hearings for certain individuals, allowing the Board to conduct hearings once every three years. When the defendant committed his crime, hearings were required to be held annually. The Supreme Court holds that this change in Parole Board practice did not violate the Ex Post Facto Clause. Note that this effectively overrules certain cases annotated below: Akins v. Snow and Roller v. Cavanaugh.

***Collins v. Youngblood***, 497 U.S. 37 (1990) The definition of an ex post facto law is one that: (1) Punishes as a crime an act previously committed, which was innocent when done; (2) Makes more burdensome the punishment for a crime, after its commission; or (3) Deprives one charged with a crime of any defense available according to law at the time when the act was committed. Previous decisions which also held that legislation was ex post facto if it deprived an accused of a “substantial protection” under law existing at the time of the crime are no longer valid.

***Hughey v. United States***, 495 U.S. 411 (1990) Amendments to the Victim Witness Protection Act expanding the scope of restitution could not be applied to defendants whose conduct occurred prior to the enactments.

***Miller v. Florida***, 482 U.S. 423 (1987) The State of Florida changed the sentencing guidelines after the conduct which led to the defendant’s conviction. The Supreme Court holds that the change in sentencing guidelines represented an illegal ex post facto law. See also Peugh v. United States, 133 S. Ct. 2072 (2013) (applying Miller to the federal Sentencing Guidelines, post-Booker).

***Young v. United States*** CIV ACTION 1:18CV166 (N.D.W. Va. Jul. 23, 2021) Because of their central role in sentencing, changes made to the Sentencing Guidelines between when a crime was committed and when a defendant is sentenced can amount to an “ex post facto law” - specifically, “there is an ex post facto violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense.” United States v. Abed, 2021 WL 2655324 @ *4 (4th Cir. June 29, 2021(citing Peugh, 569 U.S. at 533). When Young committed his offenses of conviction in October 2006, the 2005 manual was in effect.

***Lancaster v. Metrish***, 683 F.3d 740 (6th Cir. 2012) The Michigan Supreme Court’s decision holding that diminished capacity was not a defense under Michigan law, though based on the enactment of a prior statute, could not be applied to defendant. This interpretation of the law was novel and not consistent with a long line of prior decisions and therefore, it would violate Due Process to apply this new rule to the defendant’s conduct, which occurred prior to the Michigan Court’s decision. THE SUPREME COURT REVERSED: Metrish v. Lancaster, 133 S. Ct. 1781 (2013).

***Magwood v. Warden, Alabama Dept. of Corrections***, 664 F.3d 1340 (11th Cir. 2011) The novel interpretation of Alabama’s aggravating circumstance law (which renders certain murders to be death-eligible), amounted to a “fair-warning” violation, which essentially provides that a defendant must have fair warning of the elements of a criminal offense and a novel interpretation of the law by an appellate court after the defendant’s conduct occurs that renders the conduct illegal, is a Due Process violation (not unlike an Ex Post Facto violation). See Rogers v. Tennessee, 532 U.S. 451 (2001); Bouie v. Cuity of Columbia, 378 U.S. 347 (1964).

***Norderstedt v. Nixon***, 465 F.3d 843 (8th Cir. 2006) The Missouri Supreme Court’s modification of the law of sodomy (eliminating the element of “physical force that overcomes reasonable resistance” by holding that the incapacitation of the victim is sufficient, as in cases where the sexual conduct occurs while the defendant is asleep), violated the ex post facto clause, according to the panel opinion. The panel opinion held that this construction of the law was not the prevailing law when the defendant committed the offense. See Bouie v. City of Columbia, 378 U.S. 347 (1964); Rogers v. Tennessee, 532 U.S. 451 (2001). The en banc court reversed, holding that the Missouri Supreme Court’s decision did not amount to a due process violation because the law was not “changed” by the decision in petitioner’s case. 505 F.3d 832 (8th Cir. 2007) en banc.

***Dyer v. Bowlen***, 465 F.3d 280 (6th Cir. 2006) The Sixth Circuit reviews the Supreme Court precedent regarding the ex post facto implications of changes in the rules governing parole, and concludes that a remand for an evidentiary hearing is necessary to ascertain the practical effects of the change in Tennessee’s parole statute. See Cal. Dept. of Corrections v. Morales, 514 U.S. 499 (1995); Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891 (1997); Weaver v. Graham, 450 U.S. 24 (1981); Garner v. Jones, 529 U.S. 244 (2000).

***Clark v. Brown***, 450 F.3d 898 (9th Cir. 2006) The state appellate court’s reinterpretation of the felony murder statute in California, and the retroactive application of that interpretation (thus making the defendant death-eligible) violated the defendant’s due process rights.

***Fletcher v. Reilly***, 433 F.3d 867 (D. C. Cir. 2006) The habeas petitioner stated a colorable ex post facto claim, based on his allegation that the change in parole guidelines amounted to an ex post facto violation. Some of the factors that applied under the former regime were no longer applicable, thus leading to the likelihood that the defendant would serve a longer sentence.

***Williams v. Roe***, 421 F.3d 883 (9th Cir. 2005) When the defendant committed his crime, state law provided that if the defendant was convicted of two offenses based on the same conduct, the judge could impose sentence under either offense. When sentenced, the law provided that the judge was required to sentence the defendant pursuant to the section carrying the greater punishment. Applying the new law violated the Ex Post Facto clause.

***Richey v. Mitchell***, 395 F.3d 660 (6th Cir. 2005) Although a statute may be made clear by judicial gloss, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. See also United States v. Lanier, 520 U.S. 259 (1997).

***Hunter v. Ayers***, 336 F.3d 1007 (9th Cir. 2003) Application of amended prison regulations that denied the defendant restoration of good time credits violated his rights under the ex post facto clause. Previously, he could have good time credits restored even if the credits were previously withheld based on misconduct. Under the new system, once good time credits were lost, they could not be restored.

***Himes v. Thompson***, 336 F.3d 848 (9th Cir. 2003) Changes in the state parole regulations resulted in a considerable increase in the amount of time that the defendant would have to serve following revocation of his parole. This violated his rights under the ex post facto clause.

***United States v. Edwards***, 162 F.3d 87 (3rd Cir. 1998) Applying the Mandatory Victims Restitution Act (MVRA) in setting restitution in this case violated the Ex Post Facto Clause, because the conduct occurred prior to the enactment of the MVRA in 1996.

***Pyler v. Moore***, 129 F.3d 728 (4th Cir. 1997) South Carolina amended its mandatory furlough procedure which, prior to amendment, required that all non-life sentence inmates receive a furlough six months prior to the expiration of their sentence. The amendment limited the inmates who could qualify for the furlough. The amendment violated the ex post facto clause. The fact that the furlough program was initially conceived as a remedy for prison overcrowding does not alter the ex post facto analysis. See Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891 (1997).

***United States v. Siegel***, 153 F.3d 1256 (11th Cir. 1998) The Mandatory Victims Restitution Act of 1996 substantially revised the rules governing the imposition of restitution that had been embodied in the Victim and Witness Protection Act of 1982. The MVRA, to the extent that it increases the mandatory amount of restitution, could not be applied to offenses occurring before its enactment. \

***United States v. Torres***, 901 F.2d 205 (2d Cir. 1990) The defendants were sentenced under the “Super Kingpin” statute which requires a life sentence for the principal administrator or organizers of a CCE enterprise. This was improper because the statute was not in effect during the time that the defendants acted in this super supervisory capacity.

***Roller v. Cavanaugh***, 984 F.2d 120 (4th Cir. 1993) Relying in large part on Akins v. Snow, the Fourth Circuit holds that an amendment increasing the length of time between parole reconsiderations from every year to every two years is an unconstitutional ex post facto law when applied to prisoners whose crimes were committed before the amendment. But see Morales, 514 U.S. 499, discussed above, which implicitly overruled this holding.

***United States v. Parriett***, 974 F.2d 523 (4th Cir. 1992) 18 U.S.C. §3583(g) provided that a person on supervised release who is found in possession of drugs will automatically have one-third of his term of supervised release revoked. The defendant committed the offense in this case in August 1988. §3583(g) was enacted effective December 1988. The defendant entered his guilty plea in May 1989; began his period of supervised release in 1990; and was found in possession of drugs in 1991. The Ex Post Facto Clause barred the application of §3583(g). Though the conduct giving rise to revocation occurred after the enactment of the section, the conduct for which the defendant was serving the term of supervised release occurred prior to the enactment of the section. Moreover, the fact that the court could have revoked the same amount of time under the old law is irrelevant for ex post facto concerns.

***Kellogg v. Shoemaker***, 46 F.3d 503 (6th Cir. 1995) The state adopted a new rule which mandated parole revocation, without regard to mitigating circumstances, for all parolees who committed a felony while paroled. Under the old law, mitigating circumstances could be considered to preclude revocation. With regard to defendants who committed their initial crime prior to the promulgation of this new rule, this violated the Ex Post Facto Clause.

***Williams v. Lee***, 33 F.3d 1010 (8th Cir. 1994) While the defendant was in prison, the legislature amended the law and permitted the parole board to reduce good time credits if a parolee violated the terms of his parole. The defendant was then paroled and violated the terms. The new good time forfeiture legislation could not be applied to him. Even though he was aware of the change in the law when he was paroled, and thus was aware of the consequences of violating the terms of his parole, this did not alter the ex post facto nature of the legislation.

***Parton v. Armontrout***, 895 F.2d 1214 (8th Cir. 1990) A new parole eligibility statute which requires all sex offenders to complete treatment and rehabilitation programs suffered from a violation of the Ex Post Facto Clause. The program was applied to inmates whose crime was committed before implementation of the new requirement.

***United States v. $814,254.76 in U.S. Currency (Banamex),*** 51 F.3d 207 (9th Cir. 1995) 18 U.S.C. §981 provides that the government may seize funds in a bank account which represent the proceeds of some form of money laundering activity. That law was in effect when the government seized money in a bank account which was not the proceeds of money laundering activity, even though the account itself had been involved in laundering funds. After the seizure, Congress enacted 18 U.S.C. §984 which permits the seizure of untainted funds (such as the funds in this case) which are in an account which was involved in money laundering activity. The question is whether the new law applies to money which was seized before the law was enacted. The Ninth Circuit holds that the new law does not apply, and the funds must be returned. Because §984 attaches new legal consequences to actions which occurred prior to its enactment, it would have to be shown that Congress specifically intended this result before the court would apply the new statute to conduct occurring before its enactment.

***United States v. DeSalvo***, 41 F.3d 505 (9th Cir. 1994) According to Hughey v. United States, 495 U.S. 411 (1990), interpreting the pre-1990 version of the VWPA, restitution could only be ordered for the loss caused by the specific conduct that is the basis of the offense of conviction. In 1990 however, Congress amended the statute, 18 U.S.C. §3663(a)(2), to broaden the availability of restitution: “For the purpose of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.” This new provision, however, cannot be applied to offenses which occurred prior to the 1990 amendment. To do so would violate the Ex Post Facto Clause.

***Nulph v. Faatz***, 27 F.3d 451 (9th Cir. 1994) The state of Oregon violated the Ex Post Facto Clause by applying a new parole eligibility formula to prisoners whose crimes were committed prior to the enactment of the new rule.

***Flemming v. Oregon Board of Pardons and Paroles,*** 998 F.2d 721 (9th Cir. 1993) A regulation which reduced the amount of time that could be subtracted from a sentence violated the Ex Post Facto Clause. The fact that the sentence reduction was only discretionary under the old regime is not consequential. There was no possibility for reduction under the new regulation, therefore, the new regulation impacted negatively on the prisoner. The loss of the opportunity for relief was a substantial hardship covered by the Ex Post Facto Clause.

***United States v. Reed***, 924 F.2d 1014 (11th Cir. 1991) The RICO Act was amended to provide for the forfeiture of substitute assets in the event that forfeitable assets were transferred prior to the time the government had the ability to seize the property from the defendant. This section was applicable to transfers which occurred prior to the enactment of the substitute asset forfeiture section.

## *EXAMINATION OF PHYSICAL EVIDENCE*

***Ilinois v. Fisher***, 540 U.S. 544 (2004) The defendant was arrested on drug charges and the state crime lab confirmed that the substance was cocaine. The defendant filed a discovery demand, but then became a fugitive. Ten years later he was re-captured and demanded the right to test the substance. In the meantime, it had been destroyed. This did not violate the defendant’s due process rights, because there was no showing of bad faith on the part of the state, even though there was a specific discovery request by the defendant.

***EXPERT TESTIMONY (Expert Evidence Offered by the Defendant)***

***Daubert v. Merrell Dow Pharmaceuticals***, 509 U.S. 579 (1993) Frye is dead in the federal courts. The Federal Rules of Evidence superseded the common law rule of Frye and established a new test for the admissibility of scientific evidence in federal courts pursuant to Rule 702: the evidence must amount to “scientific knowledge” and must assist the trier of fact to understand or determine a fact in issue. The questions are whether the theory has been tested; whether the theory has been subject to peer review and publication; the known or potential rate of error; and finally, the court may consider the acceptance in the community of the theory – the old Frye standard.

***United States v. Odeh***, 815 F.3d 968 (6th Cir. 2016) The defendant was prosecuted for making a false statement on her naturalization documents when she denied having been arrested, prosecuted, and convicted of a felony. In fact, she had been convicted of a bombing in Israel and spent time in prison. She offered the testimony of an expert on PTSD who was prepared to testify that the effects of her imprisonment and the PTSD could have affected her ability to know what was false or truthful. Excluding this testimony was error.

***United States v. West***, 813 F.3d 619 (7th Cir. 2016) The defense sought to introduce expert testimony that would have explained that the defendant was a mentally ill person with a low IQ and was suggestible (all for the purpose of explaining that his confession was not reliable). The trial court excluded the expert testimony on the basis that it was just a back doorway of trying to get an insanity defense before the jury. The Seventh Circuit reversed: evidence which shows that a confession is not reliable is admissible and expert testimony is no exception.

***United States v. Litvak***, 808 F.3d 160 (2d Cir. 2015) Litvak was a securities broker who worked for Jefferies & Company and was involved in selling residential mortgage-backed securities (“RMBS”). He was charged with fraud in connection with his sales of RMBS’s. There were three categories of misrepresentations: (1) He lied about the cost at which Jefferies acquired certain RMBS in his effort to convince a purchaser to pay more for the same RMBS’s; (2) He lied when he said that he was negotiating for the purchase of certain RMBS’s at a certain price in his efforts to re-sell the RMBS’s, when, in fact, Jefferies already owned the RMBS’s at a lower price than the price he was about to pay to purchase the RMBS’s; (3) In the process of purchasing RMBS’s, he lied about the price at which he had negotiated to re-sell the RMBS’s (falsely saying that the price was less than it

actually was) and thereby induced the seller to sell the RMBS's to him at a cheaper price to enable Jefferies to make a profit. On the basis of these representations, Litvak was convicted of securities fraud and also making a false statement to the U.S. Treasury which was overseeing certain RMBS sales in connection with TARP. The Second Circuit reversed the false statement count, based on the failure to prove that Litvak's false statements were material. Though the U.S. Treasury was aware and monitored these types of sales, the Treasury made no "decision" that was affected by the price of the sales. The Second Circuit held, however, that the materiality of the false statements to counterparties was a jury question that could not be decided as a matter of law for purposes of the securities fraud convictions under Rule 10b-5. Litvak argued that the "price" of the RBMS's to Jefferies was not what was important to the counterparties; what mattered was the value. The Second Circuit disagreed, holding that the jury was the proper factfinder on the question of materiality. However, the securities fraud convictions were reversed, because the district court improperly excluded expert testimony offered by Litvak on the topic of materiality. The expert was prepared to testify that a reasonable counterparty would not rely on representations made by Litvak and that they would normally make their own determination of value, rather than relying on Litvak's representation about Jefferies' price in purchasing (or the intended sales price of) the RMBS's. This was the proper subject of expert testimony. Finally, the Second Circuit held that the trial court erred in excluding evidence offered by Litvak that his supervisors permitted these types of sales practices by other brokers, which, according to Litvak, demonstrated his good faith and his lack of intent to defraud. The evidence was relevant to show that Litvak held an honest belief that he was not engaged in improper or illegal conduct.

***United States v. Hite***, 769 F.3d 1154 (D. C. Cir. 2014) The defendant was charged with enticing a minor for unlawful sex. He provided pretrial notice of the intent to introduce expert testimony that the defendant is not a pedophile and about the phenomenon of role-play on the Internet. The trial court held that the notice was deficient because it did not explain the legal basis for introducing this testimony. There is no requirement in the Expert Notice provision of Rule 16 that the party offer the legal basis for introducing the expert testimony; the trial court erred, therefore, in excluding the testimony based on any deficiency in the notice. In addition, the testimony was inadmissible, because it was relevant to the defendant's intent in communicating about having sex with the child. While the expert may not testify directly about the defendant's intent, he can offer the type of expert testimony that was offered in this case.

***United States v. Christian***, 749 F.3d 806 (9th Cir. 2014) Prior to a related state court trial, the defendant was examined by a doctor who was asked to assess the defendant's competence to stand trial and the doctor concluded that the defendant was not competent. In the defendant's federal criminal trial, he sought to call the same doctor to testify about the defendant's defense of diminished capacity. The doctor testified that his competence examination was sufficient to support his conclusion about the defendant's diminished capacity, but the trial judge held that the two standards are different and therefore, having only evaluated the defendant for purposes of determining his competence, the expert could not offer any opinion about diminished capacity. The Ninth Circuit reversed. The doctor should have been permitted to testify and explain why his examination was sufficient to enable him to formulate an opinion on the subject of the defendant's diminished capacity.

***United States v. Joseph***, 542 F.3d 13 (2d Cir. 2008) The Second Circuit remanded this case for trial for reasons other than an expert witness issue. However, the appellate court urged the district court to reconsider its decision excluding a defense expert. The defendant was charged with enticing a child over the Internet to engage in prohibited sexual conduct. The defendant offered an expert who would testify about sexual fantasies and role-playing on the Internet. The court suggested that testimony about human behavior that is not familiar to the jury is an acceptable subject of expert testimony. United States v. Gladish, 536 F.3d 646 (7th Cir. 2008) In this child enticement prosecution, the defense sought to introduce the testimony of an expert who would have testified that the defendant would engage in conversations with young girls on the Internet and suggest meeting to have sex, but would never follow through. The defendant suffered from a character pathology that led him to be afraid of rejection. The Seventh Circuit held that the trial court should have admitted this testimony. (In fact, the appellate court ultimately ruled that the evidence was insufficient to convict the defendant of enticement, because his chat on the Internet suggesting that in the future they should meet, without ever planning any actual meeting, did not constituted enticement). United States v. Safavian, 528 F.3d 957 (D.C. Cir. 2008) The defendant was the chief of staff of the GSA. He went on a golf trip with a lobbyist. Later he was asked about this venture and failed to reveal that the lobbyist was trying to engage in certain business transactions with the GSA (i.e., buying government property). He was prosecuted for obstruction of justice and making a false statement because of his failure to reveal that he was "doing business" with the lobbyist. He sought to introduce expert testimony about what it meant, in the "industry" to be "doing business" with a lobbyist. The trial court held that expert testimony on this issue was not admissible. The D.C. Circuit reversed. The term "doing business" is, in fact, a term of art that had a definition that would not necessarily be known to a lay jury. Experts were prepared to testify that "doing business" with the GSA required the existence of a contract, not simply discussions about the possibility of buying or selling property. United States v. Nacchio, 555 F.3d 1234 (10th Cir. 2009) The defendant was charged with insider trading. He filed notice pursuant to Rule 16 of his intent to introduce expert testimony from an economist who would offer testimony about trading patterns of the defendant and the economic consequences of the defendant's trades. The trial court held that the notice was deficient (because the notice did not specifically detail the expert's "methodology") and even if the notice was sufficient, the subject matter was not the proper subject of expert testimony. The Tenth Circuit reversed on both grounds. With regard to the notice issue, the Tenth Circuit held that the defendant is required to provide notice of the subject matter of the expert's testimony, as well as the bases and reasons of that opinion; but the notice is not required to include the "methodology." Nor is the report required, on its face, to set forth a prima facie basis for complying with Daubert. A Daubert inquiry may or may not be necessary, but the defendant is not required to spell out his Daubert presentation in the Rule 16 notice. Thus, the failure to provide a detailed explanation of the expert's methodology was not a basis

for excluding the testimony. When the case was reviewed en banc, the Tenth Circuit did not question this aspect of the panel opinion. The en banc Court, however, held that the district court did not, ultimately, reject the defendant's expert on the basis of a notice deficiency, but rather, excluded the expert after concluding that the defendant failed to satisfy the Daubert standard of admissibility. The trial court did not err in this respect. Thus, the conviction was affirmed.

***United States v. Cohen***, 510 F.3d 1114 (9th Cir. 2007) The trial court erred in barring the defendant from introducing evidence from a psychiatrist about his narcissistic personality disorder that made him more susceptible to believe that he was not required to obey the tax laws. Though Rule 704 bars the defense from introducing evidence from an expert that states an opinion or inference as to whether the defendant did not have the mental state or conditions constituting an element of the crime charged, in this case, the diagnosis would still require the jury to determine whether the defendant had the requisite state of mind to violate the tax laws. See also United States v. Finley, 301 F.3d 1000 (9th Cir. 2002) (evidence of defendant's delusional personality disorder was admissible to prove that defendant did not appreciate that certain documents were fraudulent).

***United States v. Sandoval-Mendoza***, 472 F.3d 645 (9th Cir. 2006) The trial court erred in barring the defendant from introducing expert medical testimony that the defendant's medical condition (brain damage caused by pituitary tumor) rendered him unusually susceptible to "inducement" in this entrapment-defense case. The fact that doctors disagreed about the defendant's medical condition did not mean that the defendant's expert testimony was inadmissible. Medical testimony that a medical condition renders a person unusually vulnerable to inducement is highly relevant to an entrapment defense and should not have been excluded.

***United States v. Brownlee***, 454 F.3d 131 (3rd Cir. 2006) The trial court erred in preventing the defendant from introducing expert testimony on the fallibility of eyewitness testimony. Though the defendant was permitted to introduce the expert testimony on certain subjects relating to this subject, the trial court prohibited the expert from testifying about the lack of "confidence-accuracy correlation." In other words, a witness's assertion that she is confident of her identification of the defendant does not correlate to the accuracy of the identification.

***United States v. Henderson***, 409 F.3d 1293 (11th Cir. 2005) A district court may reject the admissibility of polygraph evidence under the Daubert standard, despite the earlier ruling by the same court that such evidence may be admitted. United States v. Piccinonna***,*** 885 F.2d 1529 (11th Cir. 1989).

***Howard v. Walker***, 406 F.3d 114 (2d Cir. 2005) A co-conspirator's statement to the police was excluded on Bruton grounds. However, an expert witness for the state relied on that statement in reaching her conclusion that the victim's death was caused by conduct of the conspirators. Though an expert may generally rely on inadmissible evidence in reaching a conclusion, including hearsay, that rule assumes that an expert will carefully analyze the basis of his opinion and that the trial court will conduct a sufficient Daubert hearing to ensure the reliability of the expert's underlying data from which she draws her conclusion. In this case, the unreliable statements of the co-conspirator were not reliable, and the expert's opinion was therefore improperly admitted. The error was compounded by the state trial court's ruling that if the defense cross-examined the witness about her conclusions, the inadmissible Bruton statement would be admitted. A defendant cannot be compelled to sacrifice one right – the Sixth Amendment right to cross-examine witnesses – to protect another right – i.e., the right of Confrontation embodied in the Bruton doctrine.

***Simmons v. United States***, 390 U.S. 377 (1968). The final error in the state trial was the ruling by the trial court that if the defendant called his own expert, the state would be permitted to cross-examine the defense expert with the inadmissible Bruton statement.

***United States v. Frazier***, 387 F.3d 1244 (11th Cir. 2004) In this en banc decision, the Eleventh Circuit thoroughly reviews the law regarding the admissibility of expert testimony and the application of Daubert to testimony offered by an expert on a matter of his expertise. In this case – which is ultimately resolved in favor of the government – the trial court excluded testimony from the defendant's expert (a forensic investigator) about what "would have been expected" had the defendant and the victim had sexual intercourse in a car. The victim claimed to have been raped in the car; the defendant claimed that they did not have sex. There was no physical evidence found in the car (such as pubic hair, or seminal fluid). The en banc decision decided that this was not an abuse of discretion. On the other hand, the government was permitted at trial to introduce testimony from its expert that scientific research established that there was frequently no "transference" of pubic hair in cases of sexual assault. Though the decision focuses on the specific testimony being offered by the different experts (the defendant's expert based his conclusion on vague "what he expected" standard, while the government's expert had scientific studies that revealed actual statistics), the decision thoroughly reviews the type of Daubert analysis required by the trial court before offering what might be described as "junk" expert testimony.

***United States v. Vesey***, 338 F.3d 913 (8th Cir. 2003) The defense offered the testimony of an expert (a drug dealer and confidential informant) about the normal ways that drug dealers operate. Excluding this evidence was improper, though harmless. The expert was prepared to testify that drug dealers do not deal from their homes.

***United States v. Finley***, 301 F.3d 1000 (9th Cir. 2002) The trial court erred in excluding defense expert testimony relating to a delusional personality that explained how the defendant could believe that certain financial documents were valid. The court held that there are times when expert testimony is important when an issue appears to be within the parameters of a layperson's common sense, but in actuality, is beyond their knowledge.

***United States v. Frost,*** 125 F.3d 346 (6th Cir. 1997) Rule 704(b) would bar the defense from introducing evidence from an expert that the defendant lacked the intent to commit fraud in a mail fraud prosecution. In this case, however, the defense sought to offer evidence that the defendant did not engage in billing practices in a deceptive manner. This evidence would not be barred by Rule 704(b).

***United States v. Gonzalez-Maldonado,*** 115 F.3d 9 (1st Cir. 1997) The court retained a psychiatrist to determine if a co-defendant was competent to stand trial. The co-defendant was declared incompetent, but his recorded statements to undercover officers, statements that incriminated the defendant, were critical evidence for the prosecution. The defense wanted to call the psychiatrist as their witness to establish the mental illness of the co-defendant – a mental illness that led the witness to exaggerate, according to the psychiatrist. Excluding this testimony was reversible error. The psychiatrist was obviously qualified as an expert and his testimony related directly to the veracity of the declarant (i.e., the recorded statements of the incompetent co-defendant).

***United States v. Shay***, 57 F.3d 126 (1st Cir. 1995) The defendant was accused of attempting to bomb his father's car. He provided a statement to the police admitting his guilt. At trial, the defense sought to introduce evidence from a psychiatrist that the defendant suffered from a mental disorder that causes its victims to make false and grandiose statements without regard to the consequences – pseudologia fantastica. The trial court erred in excluding this evidence. The evidence was admissible under Rule 608(a) because the evidence was admissible opinion evidence relating to the character of a witness; it was admissible under Rule 405 to prove a relevant character trait; and it was admissible under Rule 702 because such expert testimony was necessary to contradict the commonsense notion that people do not generally make untrue inculpatory statements.

***United States v. Onumonu***, 967 F.2d 782 (2d Cir. 1992) The defendant was caught at the airport with heroin that he ingested in condoms. The defendant claimed that he thought he was smuggling diamonds into the country. He sought to introduce evidence from an expert that Nigerians frequently smuggle diamonds out of the country. The trial court erred in excluding this expert testimony. It was relevant and beyond the ken of the average juror.

***United States v. Velasquez***, 64 F.3d 844 (3rd Cir. 1995) The trial court allowed the government to introduce testimony from a handwriting expert, but then denied the defendant's offer of proof from an expert which challenged this "science." This was reversible error.

***United States v. Riddle***, 103 F.3d 423 (5th Cir. 1997) The trial court erred in excluding the expert legal testimony offered by the defense regarding the law governing bank practices and regulations. The evidence was offered to counter the lay opinion testimony offered by the government that asserted that the defendant's practices were unlawful and caused the bank's failure.

***United States v. Newman***, 849 F.2d 156 (5th Cir. 1988) A defendant may introduce expert testimony on his psychological susceptibility to inducement in connection with his defense of entrapment.

***United States v. Lueben***, 816 F.2d 1032 (5th Cir. 1987) In this mail fraud prosecution, the defendant offered expert testimony on the materiality of the statements, that is, whether the false statements would have had any bearing on the lender's decision to make the requested bank loans. The trial court prohibited the introduction of the expert opinion. The court holds that expert testimony on this issue is admissible and does not constitute impermissible expert testimony about a legal conclusion.

***United States v. Hall***, 93 F.3d 1337 (7th Cir. 1996) The trial court erred in excluding testimony from experts about the defendant's mental condition that led him to be susceptible to confessing to crimes he did not commit in an effort to please his interrogators. The proffered expert testimony satisfied the Daubert standards.

***Arcoren v. United States***, 929 F.2d 1235 (8th Cir. 1991) The battered women syndrome is an appropriate subject of expert testimony in federal court.

***United States v. Morales***, 108 F.3d 1031 (9th Cir. 1997) The defendant was charged with making false entries in a union ledger. The falsity of the information was not contested at trial. Whether the errors were mistakes or were intentional, however, was disputed. The defendant offered expert accounting testimony that the defendant lacked basic bookkeeping understanding. The trial court committed reversible error in excluding this evidence. Rule 704 prohibits the introduction of expert testimony (psychiatric, or otherwise) on the issue of whether the defendant had the mental state or condition constituting an element of the crime charged or of a defense thereto. Nevertheless, the testimony offered in this case was not that the defendant did or did not intend to make false entries. Rather, the testimony related to a "predicate" matter: the defendant's understanding of bookkeeping principles.

***United States v. Amador-Galvan,*** 9 F.3d 1414 (9th Cir. 1993) Whether an expert should be permitted to testify on the issue of the reliability of eyewitness testimony should be evaluated under the standard set forth in Daubert v. Merrell Dow Pharmaceuticals 113 S. Ct. 2786 (1993). A remand was required in this case to apply the proper standard.

***United States v. Rahm***, 993 F.2d 1405 (9th Cir. 1993) At defendant's trial for possession of counterfeit currency, she sought to introduce the testimony of an expert who would testify that the defendant "showed a consistent tendency to overlook important details" based on tests the psychiatrist administered. The testimony was improperly excluded by the trial court. Under Rule 12.2, notice of the intended use of expert testimony is required where the expert will testify about a mental condition which bears on the issue of guilt. It is not necessary (as the lower court held) that the expert testify about a "mental disorder." Other mental "conditions" may be the subject of expert testimony. Also, the fact that the expert was somewhat tentative in his testimony (the defendant "could have" failed to notice that the currency was counterfeit), was not a basis for excluding the testimony: it was the

test results and the perceptual difficulties they demonstrate which were admissible, not the expert's opinion. This testimony would have been helpful to the jury and was otherwise admissible as expert testimony and its exclusion was reversible error.

***United States v. Langford***, 802 F.2d 1176 (9th Cir. 1986) The court holds that expert testimony on the reliability of eyewitness identification is not admissible. In a lengthy dissent, Judge Ferguson reviews the case law throughout the country on the admissibility of this evidence. The trend in other courts, concludes Judge Ferguson, is to admit this testimony where the circumstances suggest that the jury may not be aware of the causes of honest misidentification.

***United States v. Lankford***, 955 F.2d 1545 (11th Cir. 1992) In defense of tax evasion charges, the defendant sought to introduce expert evidence that the money he received could be characterized as a gift rather than a loan. The trial court committed reversible error by excluding this evidence. Such expert testimony is highly relevant to the assessment of whether the defendant willfully violated the tax laws.

***EXPERT TESTIMONY (Expert Evidence Offered by the Government)***

***United States v. Oti***, 872 F.3d 678 (5th Cir. 2017) A government expert should not have been permitted to testify as an expert that "security guards" hired by a pill mill were using or carrying firearms in furtherance of a drug trafficking offense, because this was an improper expert opinion on the law. Harmless error.

***United States v. Haines,*** 803 F.3d 713 (5th Cir. 2015) Another case that explores the issues that arise when a law enforcement officer testifies as both an expert witness on topics relating to drug trafficking organizations and drug code, and then also offers opinion testimony about what was meant by recorded phone calls between conspirators. The Fifth Circuit holds that the witness crossed the line and the trial court, in some instances, failed to properly instruct the jury, but the error was harmless.

***United States v. Richter,*** 796 F.3d 1173 (10th Cir. 2015) The government permitted, over objection to call a witness who was an employee of a state agency that regulated the activity involved in this case (environmental waste) who offered his opinion that the defendant's activity was covered by the regulations. The witness was not identified as an expert, but he summarily provided his expert opinion. The government's use of the witness's testimony was simultaneously compelling and incorrect. This was reversible error.

***United States v. Garcia***, 793 F.3d 1194 (10th Cir. 2015) If an expert merely parrots testimonial hearsay from a gang member when the expert offers opinion about the activities of the gang, this violates the Confrontation Clause. Though an expert may rely on hearsay, the expert must exercise independent judgment in assessing and using the hearsay and not simply repeat what he is told by other gang members. Harmless error in this case.

***United States v. Vera***, 770 F.3d 1232 (9th Cir. 2014) This is a lengthy decision that explains what the government may and may not accomplish with expert testimony in gang and drug cases. The government was permitted to introduce expert testimony on issues of gang culture and structure, but improperly admitted expert testimony on drug jargon that purported to translate wiretapped calls. Regarding the coded language expert testimony, there is a difference between an expert who explains and translates commonly used terms and one who explains what terms mean in this case which were encountered for the first time by the expert. If the expert is explaining certain jargon that he has encountered for the first time in this case, he must explain the methodology by which he has reached his conclusions. The jury, moreover, must be instructed about the differences between an expert testifying based on his experience with certain terms and his lay opinion testimony based on his familiarity with the people and conversations involved in this case. For example, the agent was asked to explain the statement, "get one and cook it" referred to one ounce of crack cocaine. That is lay opinion testimony, not an expert's opinion about common drug jargon. The jury should have been instructed that such testimony does not come with the imprimatur of the agent's expertise.

***United States v. Groysman,*** 766 F.3d 147 (2d Cir. 2014) The Second Circuit reversed this health care fraud conviction on the basis of several "egregious" evidentiary errors committed at trial. The defendant was charged with conspiring with a company that supplied durable medical equipment to prepare false invoices. The wholesaler was cooperating and taped many of the conversations, though many were inaudible. The government offered testimony from its case agent for several days at the start of trial. The agent (1) offered inadmissible bolstering testimony by testifying that certain transactions occurred, based only on his interviews of the cooperators – he had no personal knowledge to verify that these transactions occurred; (2) offered a summary chart which was not a summary of voluminous evidence, but simply a recitation of what he was supposedly told by the cooperators, thus violating both the hearsay rules and the bolstering rules and the rule governing the admissibility of summary charts; (3) the use of the agent to summarize the case at the outset was improper because it amounted to opinion testimony. The Second Circuit, as noted above, characterized these evidentiary errors as egregious and supported a plain error standard of review reversal.

***United States v. Medina-Copete***, 757 F.3d 1092 (10th Cir. 2014) The defendant, an alleged drug courier, was extremely nervous when she was stopped by the state police. She started reciting a prayer. The government introduced expert testimony from a law enforcement officer who also professed to have expertise in various Mexican shrines of drug traffickers. He testified that the prayer recited by the defendant was an indication that she was a drug courier based on the content of the prayer. The Tenth Circuit reversed the conviction based on this improper testimony linking a religious icon to drug traffickers.

***United States v. Garcia***, 752 F.3d 382 (4th Cir. 2014) Allowing an FBI agent to testify as a fact witness and also as an expert on slang interpretation was reversible error in this case. The problem is that having cloaked the witness with "expert" status, the witness's fact testimony is given special credence. In addition, the "expertise" in this case was derived from talking to other people in this investigation, which creates hearsay and Confrontation Clause problems. The agent testified that she "confirmed"

her understanding of certain codes by talking to arrested co-conspirators. Additionally, the expert would simply recite what actually occurred during the course of the investigation (for example, the seizure of a certain quantity of drugs) and then explain that this seizure was the basis for her expert opinion that a previous conversation related to the transaction that was the subject of the seizure. This is not expert testimony, but simply argument. Finally, the expert provided no basis for many of her expert "de-coding" opinions. She did not explain that the same code was used in another conspiracy she investigated, or from her experience in other cases, or from some other training. For example, she stated that "590" meant "590 grams of heroin" or "2" meant $200.00.

***United States v. Hill,*** 749 F.3d 1250 (10th Cir. 2014) After the defendant's statement was played in court, the government called an "expert" FBI agent who had training in determining if a person was being truthful or not and he offered his expert opinion that the defendant was not being truthful. Among other reasons, the agent found the defendant lacked credibility because he said, "I swear to God" and other statements that showed that he invoked his belief system, rather than relying on facts to support his protestations of innocence. The Tenth Circuit held that this was reversible error even in the absence of an objection by the defense attorney. Juries are tasked with making credibility decisions, not government experts.

***United States v. Ramirez-Fuentes,*** 12-1494 (7th Cir. 2013) The government elicited testimony that the methamphetamine involved in this case was "Mexican methamphetamine." The Seventh Circuit held that this was reversible error.

***United States v. Haynes***, 729 F.3d 178 (2d Cir. 2013) A police officer was permitted to offer testimony about how a gas tank works (i.e., how the fuel gauge reflects the amount of fuel in the tank), which was relevant to whether the defendant was aware that drugs were hidden in the fuel tank. The testimony should not have been admitted as opinion testimony. The testimony should only have been offered as expert testimony after the discovery rules and the witness's expertise was proven. Another witness – the government's expert witness – was improperly permitted to offer expert testimony that the defendant was aware that there were drugs in the gas tank. This testimony was inadmissible pursuant to Rule 704(b), which prohibits expert testimony on a defendant's mental state at the time of a crime.

***United States v. Hampton***, 718 F.3d 978 (D.C. Cir. 2013) The testimony of an FBI agent, interpreting and explaining recorded phone conversations of the defendants was inadmissible and admitting this testimony was reversible error. The government offered the testimony as lay opinion testimony, with the agent explaining that he formed his opinion about the meaning of the conversations based on having listened to countless hours of the conspirators' conversations.

***United States v. Santini***, 656 F.3d 1075 (9th Cir. 2011) The defendant was caught at the border bringing marijuana into the country. He claimed that because of a brain injury, he was subject to being tricked and presented a psychiatrist to support the defense. The prosecutor also presented an expert witness who testified that based on his review of the defendant's "rap sheet" this defense was invalid, because he had run-ins with the law prior to the injury. The Ninth Circuit reversed the conviction: the rap sheet was unreliable and did not distinguish arrests from convictions and was otherwise not probative of the defendant's state of mind in connection with the present case. The government's argument that the evidence was admissible to explain the expert's opinion was also unavailing, because pursuant to Rule 702, the expert must base his opinions on reliable information.

***United States v. Morin***, 627 F.3d 985 (5th Cir. 2010) The government's expert offered improper expert testimony about drug courier profile evidence in certain respects. The expert "interpreted" a surveillance video and testified that her interpretation of the events was typical of how drug conspirators operate.

***United States v. Gonzalez-Rodriguez***, 621 F.3d 354 (5th Cir. 2010) A DEA agent should not have been allowed to testify as an expert about the methods drugs are brought into the United States from Mexico. To some extent, the testimony violated Rule 704(b)'s prohibition on testimony about the mental state of the defendant. The court noted that testimony about a drug courier's profile was improper because profile evidence is inadmissible. (e.g., "drug couriers generally have no criminal record"). The implication – "the defendant must be a culpable drug courier because he has no criminal record" – was illogical. Harmless error.

***United States v. Johnson***, 617 F.3d 286 (4th Cir. 2010) The government offered the testimony of a DEA agent to "interpret" and explain the meaning of wiretapped phone calls. The agent was never tendered as an expert. The testimony was not properly admitted as opinion testimony under Rule 701, because the agent did not observe the events about which he was testifying. Even if he had been tendered as an expert, the government did not offer any evidence explaining the agent's "methodology or guiding principles that would enable him to decode the wiretapped phone calls in this case."

***United States v. Cooks***, 589 F.3d 173 (5th Cir. 2009) The government used an FDIC investigator as an expert in the area of mortgage fraud. Though the agent had some training in fraud investigation, he had no specialized training in the area of mortgage fraud and had never previously testified as an expert in this field. Qualifying the agent as an expert was erroneous, but harmless error.

***United States v. Martinez***, 588 F.3d 301 (6th Cir. 2009) During the direct or cross-examination of an expert witness, the witness may refer to statements in a learned treatise. Portions of the treatise may be read into evidence, though the treatise itself is not admissible. The portion of the treatise is admissible for the truth of the matter asserted and Rule 803(18) exempts the statements from the hearsay rule. In this case, during the testimony of the expert, the government introduced a videotape of an expert describing a medical procedure. The Sixth Circuit held that a videotaped interview of the expert did not qualify under Rule 803(18).

***United States v. Mejia***, 545 F.3d 179 (2d Cir. 2008) The government offered the testimony of an expert in this gang case. The expert offered testimony about the structure of the gang, its history and various other matters that was not admissible because

(1) the testimony was not based on any data or information that was the proper subject of expert testimony; (2) the testimony included the expert's lay opinion, rather than expert opinion; (3) the expert simply repeated some things he was told by co-conspirators and was therefore testimonial hearsay in violation of Crawford. Reversible error.

***Ege v. Yukins,*** 485 F.3d 364 (6th Cir. 2007) Bite mark evidence offered by the state in this trial had no foundation and should not have been admitted. The expert for the state testified that nobody else in the Detroit Metropolitan area had similar "dentition." Without any foundation for this expert testimony the evidence was inadmissible and was a violation of the defendant's right to due process. Chambers v. Mississippi, 410 U.S. 284 (1973).

***United States v. White***, 492 F.3d 380 (6th Cir. 2007) Testimony offered by employees of Medicare fiscal intermediaries about the mechanics of Medicare reimbursement, as well as defining "related-party transactions" and "reasonable costs" qualified as "expert testimony." The government did not qualify these witnesses as experts and failed to provide the required Rule 16 discovery regarding their testimony. Harmless error.

***United States v. Ibarra***, 493 F.3d 526 (5th Cir. 2007) The government asked its agent about the notion that a driver of a truck would not know that his truck contained a large quantity of cocaine. The agent testified that in his experience, he had never seen a courier entrusted with an amount of cocaine that size ($4 million) without the courier knowing that he was carrying something illegal. The Fifth Circuit held that this was improper expert testimony (not beyond the knowledge of a typical juror, and thus not in need of expert analysis) and was reversible error in this case.

***United States v. Ganier***, 468 F.3d 920 (6th Cir. 2006) A government computer expert who utilized a forensic program to mine information from the defendant's computer qualified as an expert whose testimony was subject to Rule 16(a)(1)(G). Though the expert relied on a forensic tool that was available to the public, the testimony was nevertheless of an expert nature and was therefore covered by the Rule.

***United States v. Lopez-Medina***, 461 F.3d 724 (6th Cir. 2006) It was reversible error for the trial court to fail to instruct the jury about the dual role of the government's case agents as both expert witnesses and fact witnesses. As experts, the agents testified that the defendant's conduct was consistent with the actions of someone conducting counter-surveillance and that certain scraps of paper were drug ledgers and that other evidence was "drug wrapping" material.

***United States v. Garcia***, 413 F.3d 201 (2d Cir. 2005) A DEA agent may not testify, either as an expert, or as a matter of his lay opinion, about the defendant's role in the conspiracy based on the totality of his experience. When an agent testifies as a matter of lay opinion, the opinion must be based on his personal observations, not his evaluation of all the evidence, or the totality of the investigation. This opinion explains in some detail the requirements for lay opinion testimony and concludes that the government satisfied none of the requirements for offering lay opinion testimony.

***Howard v. Walker***, 406 F.3d 114 (2d Cir. 2005) A co-conspirator's statement to the police was excluded on Bruton grounds. However, an expert witness for the state relied on that statement in reaching her conclusion that the victim's death was caused by conduct of the conspirators. Though an expert may generally rely on inadmissible evidence in reaching a conclusion, including hearsay, that rule assumes that an expert will carefully analyze the basis of his opinion and that the trial court will conduct a sufficient Daubert hearing to ensure the reliability of the expert's underlying data from which she draws her conclusion. In this case, the unreliable statements of the co-conspirator were not reliable, and the expert's opinion was therefore improperly admitted. The error was compounded by the state trial court's ruling that if the defense cross-examined the witness about her conclusions, the inadmissible Bruton statement would be admitted. A defendant cannot be compelled to sacrifice one right – the Sixth Amendment right to cross-examine witnesses – to protect another right – i.e., the right of Confrontation embodied in the Bruton doctrine. Simmons v. United States, 390 U.S. 377 (1968).

***United States v. Miller***, 395 F.3d 452 (D.C. Cir. 2005) Though finding no error, the D.C. Circuit in this case cautioned that when questioning an expert on the practices of drug organizations, the questions should not be phrased in such a way as to amount to a carbon copy of the evidence at trial. Additionally, the expert should carefully explain that he is testifying about his knowledge of drug organizations in general, not the particular drug organization on trial, in order to eliminate the possibility that the jury will conclude that the "expert" has reached a decision about the case on trial.

***United States v. Abreu***, 406 F.3d 1304 (11th Cir. 2005) The Eleventh Circuit concludes that fingerprint evidence meets the Daubert standard.

***United States v. Grinage***, 390 F.3d 746 (2d Cir. 2004) The Second Circuit reverses this conviction on the basis that an agent was permitted to testify about the meaning of wiretapped phone calls. The government argued that the agent was not qualified as an expert and did not purport to translate coded calls but was simply offering opinion testimony based on a review of all the calls. The Second Circuit rejects these arguments. An agent may not offer his opinion of "all the calls" and ask the jury to accept that interpretation. Moreover, the agent was basing his testimony on more than simply his having listened to the calls; he testified that he based his opinion also on his knowledge of "the entire investigation." Reversible error.

***United States v. Frazier***, 387 F.3d 1244 (11th Cir. 2004) In this en banc decision, the Eleventh Circuit thoroughly reviews the law regarding the admissibility of expert testimony and the application of Daubert to testimony offered by an expert on a matter of his expertise. In this case – which is ultimately resolved in favor of the government – the trial court excluded testimony from the defendant's expert (a forensic investigator) about what "would have been expected" had the defendant and the victim had sexual intercourse in a car. The victim claimed to have been raped in the car; the defendant claimed that they did not have sex. There was no physical evidence found in the car (such as pubic hair, or seminal fluid). The en banc decision decided that this was not

an abuse of discretion. On the other hand, the government was permitted at trial to introduce testimony from its expert that scientific research established that there was frequently no “transference” of pubic hair in cases of sexual assault. Though the decision focuses on the specific testimony being offered by the different experts (the defendant’s expert based his conclusion on vague “what he expected” standard, while the government’s expert had scientific studies that revealed actual statistics), the decision thoroughly reviews the type of Daubert analysis required by the trial court before offering what might be described as “junk” expert testimony.

***Earls v. McCaughtry,*** 379 F.3d 489 (7th Cir. 2004) The defendant was charged with molesting a six-year-old child. There were no witnesses to the events and no physical evidence corroborating the child’s statements. A social worker who interviewed the child and testified as an expert said that she believed the child. This was inadmissible evidence and the attorney’s failure to object amounted to ineffective assistance of counsel. In addition, during the videotape of the child prepared by the social worker, the social worker told the child that she believed her, and the defendant should not have done that to her. The attorney’s failure to redact the tape was ineffective assistance of counsel.

***United States v. Dukagjini***, 326 F.3d 45 (2d Cir. 2003) The government should not be permitted to use a fact witness, such as a case agent, to also offer expert testimony. In this case, the case agent, who testified as a fact witness, also offered expert testimony about drug jargon. A considerable amount of his “expert” testimony was based on his consideration of the evidence in this case, as opposed to his former experience and knowledge. One problem with this procedure is that juries will add undue weight to the witness’s fact testimony. Harmless error.

***United States v. Mitchell***, 365 F.3d 215 (3rd Cir. 2004) In a forty-page opinion, the Third Circuit evaluates the admissibility of fingerprint evidence under the Daubert and Kumho Tire standards and ultimately concludes that such evidence passes Daubert muster and was properly admitted in this case.

***United States v. Casas***, 356 F.3d 104 (1st Cir. 2004) The government’s case agent, the first witness to testify, was permitted, over objection, to “name the members of the organization” that was involved in drug dealing (which, of course, included numerous of the defendants on trial). Some of the agent’s testimony was based on what other conspirators told him during their debriefings. This testimony was not admissible as summary evidence, because the underlying facts were not in evidence. In fact, he was offered as an “overview witness” not a summary witness. See also United States v. Griffin, 324 F.3d 330 (5th Cir. 2003). The testimony violated the confrontation clause. The testimony was not proper expert testimony because there was nothing about his testimony that was the proper scope of expert testimony. With regard to certain defendants, the error was reversible error. See also United States v. Flores-De-Jesus, 569 F.3d 8 (1st Cir. 2009).

***United States v. Cruz***, 363 F.3d 187 (2d Cir. 2004) The defendant was asked by a drug dealer to “watch his back” while he finished a deal. A DEA agent testified as an expert (and also as a fact witness) that “watch his back” was drug code for act as surveillance during a drug deal. The Second Circuit held that trial court erred in admitting this expert testimony. The agent was not able to explain why the slang term referred to a drug deal, as opposed to some other criminal (or for that matter, innocent) conduct. The court stressed the dangers inherent in allowing an agent to testify as both an expert and a fact witness. See also United States v. Dukagjini, 326 F.3d 45 (2d Cir. 2003). The court reversed the conviction, holding that the evidence was insufficient, even considering the agent’s expert testimony.

***United States v. Mendoza-Medina***, 346 F.3d 121 (5th Cir. 2003) Though it was harmless error, the trial court should not have permitted the government to use a DEA agent to testify as an expert witness about matters regarding the methods by which drug couriers do their work. Testimony such as “they bring their families along to disguise their mission” and “drug dealers don’t trust unwitting couriers” and similar words of wisdom were not the proper subject of expert testimony. See also United States v. Gutierrez-Farias, 294 F.3d 657 (5th Cir. 2002); United States v. Ramirez-Velasquez, 322 F.3d 868 (5th Cir. 2003).

***United States v. Williams***, 343 F.3d 423 (5th Cir. 2003) In this civil rights prosecution (a law enforcement officer shooting a suspect), the government called other officers to testify that the shooting was not reasonable. This was error, because the question of reasonableness was a legal question, and an expert may not offer an opinion about the law. Harmless error.

***United States v. Pablo Varela-Rivera***, 279 F.3d 1174 (9th Cir. 2002) The trial court committed reversible error in allowing the government to introduce DEA expert testimony regarding the structure of drug trafficking operations, as well as their modus operandi and the fees paid to couriers. Such evidence is not admissible in a case, such as this case, where the defendant is not charged with being a member of a conspiracy. See also United States v. Vallejo, 237 F.3d 1008, 246 F.3d 1150 (9th Cir. 2001); United States v. McGowan, 274 F.3d 1251 (9th Cir. 2001).

***United States v. Hermanek***, 289 F.3d 1076 (9th Cir. 2002) If an expert testifies about the use of code words, even though he has not heard the words used that way before, the government must satisfy the requirements of Daubert. It appeared that in this case, the agent concluded that the various references to “watches” and “cookies” in the taped conversations were actually references to drugs, based simply on the agent’s belief that the participants in the calls were drug dealers. Such circular logic does not satisfy Rule 702. Harmless error.

***Snowden v. Singletary***, 135 F.3d 732 (11th Cir. 1998) Permitting an expert witness to testify that 99.5% of children tell the truth in child abuse cases was a denial of fundamental fairness and in the circumstances of this case, where the child's credibility was the central issue, required setting aside the conviction.

***United States v. Cruz***, 981 F.2d 659 (2d Cir. 1992) Expert testimony in this case was improper for two reasons: (1) the expert testified that the area of the drug transaction was heavily Hispanic and “drug-inundated.” Because all the defendants were

Hispanic, this was improper and prejudicial; (2) the defendant claimed he was not on the scene; the expert testified that the conduct of the defendant as described by witnesses was characteristic of a drug broker. This amounted to improper bolstering of the witness's testimony and was not the proper subject of expert testimony. Any juror who watches TV, movies, or the news, knows that drug dealers attempt to hide their identity.

***United States v. Boissoneault***, 926 F.2d 230 (2d Cir. 1991) The trial court should not have allowed an agent to conclude that all the physical evidence in the case suggested that the defendant was involved in the street level distribution of cocaine. Such a conclusion was not beyond the ken of the jury. Furthermore, even assuming the admissibility of this testimony, the evidence was insufficient to support a conviction of possession with intent to distribute. The defendant was arrested after a traffic stop. He had none of the typical paraphernalia of a distributor. He had a ledger (which the agent described as a drug account receivable ledger), $1,460 in cash and 5 grams of cocaine. Only a possession offense could be upheld.

***United States v. Castillo***, 924 F.2d 1227 (2d Cir. 1991) A narcotics officer's expert testimony about the practices of drug dealers led to a reversal of this conviction. The officer testified that drug dealers often force customers to ingest cocaine, at gunpoint, in order to ensure that the customer is not an undercover agent. Such matters are not beyond the ken of the jury and are thus not the appropriate subject of expert testimony under Rule 702.

***United States v. Scop***, 856 F.2d 5 (2d Cir. 1988) A defendant's perjury prosecution was based on answers he gave to questions which contained the term "manipulation." At trial, the government was permitted to offer expert testimony on the definition of the word "manipulation." It was error to admit this testimony and the perjury conviction could not stand. The Court dealt with other issues relating to the improper expert testimony at 846 F.2d 135. United States v. Scop, 846 F.2d 135 (2d Cir. 1988) The Second Circuit reversed a conviction because a witness gave expert testimony couched in terms of legal conclusions. The expert testified, in language of the criminal code, that the defendants were "direct" and "material" participants in a "fraudulent" and "manipulative" scheme to artificially inflate stock prices. The court holds that this is improper expert testimony. An expert may, for example, give an opinion that a defendant participated in a drug transaction, but an expert may not testify that the defendant possessed heroin with intent to sell. The trial court also erred in admitting a prosecution expert witness to give his opinion as to the credibility of other prosecution witnesses.

***United States v. Armendariz-Mata,*** 949 F.2d 151 (5th Cir. 1991) The DEA agent's "expert" testimony that the defendant was a "knowledgeable drug trafficker" was not proper under Rule 702: this testimony was totally unnecessary to the jury and did not help them understand the issues.

***Cooper v. Sowders***, 837 F.2d 284 (6th Cir. 1988) The Sixth Circuit condemns a police officer's testimony that, in his opinion, the other suspects in the case were not linked to the crime. There was nothing scientific, technical, or specialized about the officer's testimony.

***United States v. Quigley***, 890 F.2d 1019 (8th Cir. 1989) The trial court erred in permitting the government to introduce expert testimony about the characteristics of a typical drug courier. The government used such evidence to argue that the defendant, who possessed a kilogram of cocaine in his car, intended to distribute it. The evidence in this case was not used to explain or justify an investigative stop, but as substantive evidence that because he fit the profile, he therefore intended to distribute what was in his possession.

***United States v. Roy***, 843 F.2d 305 (8th Cir. 1988) It was error, although harmless, to permit a law enforcement officer to give his opinion as to the truthfulness of the defendant's accomplices' testimony. Human lie detectors are not permissible in court.

***United States v. Figueroa-Lopez***, 125 F.3d 1241 (9th Cir. 1997) Testimony of law enforcement officers that the defendant's actions were consistent with those of experienced drug traffickers was improperly admitted in this drug prosecution as lay opinion testimony. The witness was not qualified as an expert.

***United States v. Blackstone***, 56 F.3d 1143 (9th Cir. 1995) The defendant was charged with being a felon in possession of a firearm. The gun was found in his truck. Also found in the truck was a methamphetamine recipe. The government was permitted to offer expert testimony from a DEA agent to the effect that guns and meth labs go together. This was error. Not only should the expert testimony not have been admitted, but the recipe also itself was not admissible because its probative value was outweighed by its prejudicial impact.

***United States v. Gillespie,*** 852 F.2d 475 (9th Cir. 1988) The government failed to qualify its expert testimony under the Frye test in this trial involving allegations of child sex abuse. The expert testified that the child's behavior with anatomically correct dolls demonstrated that she had been abused by a man and not a woman. The trial court erred in holding that testimony relating to a child's behavior with anatomically correct dolls does not constitute expert opinion. Also, the court held that it is error to permit an expert to testify that the defendant exhibited characteristics typical of child molesters.

***United States v. Messner***, 107 F.3d 1448 (10th Cir. 1997) In this bankruptcy fraud trial, the trial court erred in permitting the government to introduce expert legal testimony about a bankrupt's duty to disclose assets. Harmless error.

***United States v. Zimmerman***, 943 F.2d 1204 (10th Cir. 1991) The defendant, an attorney, was charged with conspiracy to commit bankruptcy fraud. The government offered the statements of two bankruptcy judges, made in the course of the bankruptcy proceedings, to the effect that the attorney was either negligent, or was part of a conspiracy. This was inadmissible and necessitated reversal of the conviction.

***United States v. Boyd***, 55 F.3d 667 (D.C. Cir. 1995) Pursuant to Rule 704(b), an expert witness may not testify whether a defendant has the requisite state of mind to satisfy an element of the offense. In this case, the defendant, who was conversing with another individual, was seen holding a bag which contained 5 grams of crack cocaine. When the police approached him, he ran and threw the bag under a truck. A law enforcement officer was posed these facts in the form of a hypothetical, and he opined that the defendant possessed the cocaine "with intent to distribute it." This violated Rule 704(b).

***United States v. Mitchell***, 996 F.2d 419 (D.C. Cir. 1993) An officer was asked what the defendant intended in light of his arrest in possession of nine individually wrapped bags of cocaine. The officer responded that in his opinion, the defendant intended to distribute the cocaine. This violated Rule 704(b) which outlaws the use of expert testimony about the defendant's mental state relating to an element of the offense. Because defense counsel did not object on these grounds, however, this was not reversible error.

***United States v. Doe,*** 903 F.2d 16 (D.C. Cir. 1990) The conviction of two Jamaican drug dealers was reversed because of the improper testimony of police detectives that persons of Jamaican descent were "taking over the distribution of drugs in D.C." This testimony was unfairly prejudicial and outweighed any probative value under Rule 403. Furthermore, the prosecutor repeatedly referred to the defendants as "the Jamaicans" which created a potential for prejudice on the part of the jurors.

## *EXPUNGEMENT OF CRIMINAL RECORD*

***United States v. Coloian***, 480 F.3d 47 (1st Cir. 2007) Everything you wanted to know about the court's jurisdiction to entertain a motion to expunge a criminal record following acquittal. In the First Circuit, at least, the court does not have ancillary jurisdiction to expunge a record. The court notes that other Circuits find that it is within the power of the court to grant such relief. See, e.g., United States v. Flowers, 389 F.3d 737 (7th Cir. 2004); United States v. Schnitzer, 567 F.2d 536 (2d Cir. 1977); Livingston v. Dept. of Justice, 759 F.2d 74 (D.C. Cir. 1985); United States v. Linn, 513 F.2d 925 (10th Cir. 1975).

## *EXTORTION SEE: HOBBS ACT; MAILING THREATENING LETTERS*

***United States v. Carlson***, 787 F.3d 939 (8th Cir. 2015) In order to be guilty of sending an extortionate letter in violation of 18 U.S.C. § 876, the defendant must intend to extort money from a natural person, not a corporate entity.

***United States v. Coss***, 677 F.3d 278 (6th Cir. 2012) A thorough discussion of the law of extortion. This case considers whether the threat must be inherently illegal, or is it sufficient that the threat is inherently wrongful? The court decides that the latter is sufficient. The Sixth Circuit reviews various decisions around the country, as well as scholarly writings, about what amounts to extortion, given the fact that in various circumstances, what the "extorter" is threatening to do is, in and of itself, not unlawful. As the court noted, "The law of extortion has always recognized the paradox that extortion often criminalizes the contemporaneous performance of otherwise independently lawful acts."

***United States v. Havelock***, 664 F.3d 1284 (9th Cir. 2012) The statute that makes it a federal crime to mail a threatening communication to another person – 18 U.S.C. § 876(c) – requires that the mailing be to a person, not to an institution, or a company.

## *EXTORTIONATE EXTENSIONS OF CREDIT*

***United States v. Didonna,*** 866 F.3d 40 (1st Cir. 2017) The defendant's demand to the victim to "come up with an offer of what he thought would be appropriate payment for defendant's silence" was not an attempt to collect an extension of credit and could not be prosecuted pursuant to 18 U.S.C. § 894.

***United States v. Dzhanikyan***, 808 F.3d 97 (1st Cir. 2015) Under 18 U.S.C. § 894(a)(1), it is a crime to knowingly participate in any way, or conspire to do so, in the use of any extortionate means … to collect or attempt to collect any extension of credit." The statute then defines "to extend credit" as "to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred." § 891(1). In cases that involve something other than a traditional loan, there must be more than simply evidence of a demand for immediate payment of a debt. There must be sufficient indicia of an agreement to conclude that an agreement to defer payment of the debt existed. In this case, one person gave money to a second person with which the second person was supposed to buy oxycodone pills. The second person did not return the money or the pills to the first person. There was no evidence to prove that the first person tacitly agreed to give the second person more time to pay the money back. Thus, the subsequent extortionate means to collect the money was not an offense covered by § 894.

***United States v. Allen***, 127 F.3d 260 (2nd Cir. 1997) 18 U.S.C. § 892 outlaws, in part, an extortionate extension of credit, which is defined as any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person. In this case, the defendant made a loan to an undercover agent. The defendant accepted collateral and the agent repaid the loan. The agent then borrowed money again and discussed with the defendant the difficulties the defendant must have in collecting sometimes. The two laughed about this and the defendant explained that that was why he required collateral and further explained that sometimes he took a loss, but his gains exceeded his losses. Then, when prompted by the agent, and not in connection with the pending transaction, the defendant stated that he once beat up someone. This evidence was not sufficient to support a conviction. The agent could not reasonably have had an understanding that if he did not repay the loan, he was subject to being beaten up based on this contrived conversation that he

instigated. Regardless of the usurious interest rate and the unenforceability of the loan in court (factors that triggered a permissive presumption of extortion), this evidence was not sufficient.

## *EXTRADITION*

***Martinez v. United States***, 793 F.3d 533 (6th Cir. 2015) The U.S. treaty with Mexico provides that "Extradition shall not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become barred by lapse of time according to the laws of the requesting or requested Party." This provision in the treaty required the district court to decide whether the defendant's prosecution for second degree murder in Mexico would be barred under either the U.S. statute of limitations, or the Speedy Trial Clause of the Sixth Amendment.

***United States v. Anderson,*** 472 F.3d 662 (9th Cir. 2006) The defendant was extradited from Costa Rica to face charges of mail fraud, wire fraud and tax offenses. He was also indicted for money laundering. He claimed in the appellate court that his conviction on these counts violated the principles of dual criminality and specialty. In essence, he claimed that money laundering is not a crime in Costa Rica – unless it is connected to drug dealing (the dual criminality claim); and that the extradition process did not permit the U.S. to try the defendant for money laundering based on fraud offenses. The Ninth Circuit remanded the case to the District Court to review these claims.

## *EXTRATERRITORIAL APPLICATION OF LAWS*

***United States v. Bellaizac-Hurtado***, 700 F.3d 1245 (11th Cir. 2012) Article I, § 8, cl. 10 contains three separate provisions that empower Congress to write criminal laws extraterritorially: (1) the power to define and punish piracies; (2) the power to define and punish felonies committed on the high seas, and (3) the power to define and punish offenses against the law of nations. In this case, the court held that the offense of drug trafficking (an offense which in this case occurred in Panamanian waters) was not an offense that qualified as an offense "against the law of nations" and therefore was outside the scope of Congressional authority to enact. The court held that 46 U.S.C. § 70503, therefore, was unconstitutional.

***United States v. Weingarten,*** 632 F.3d 60 (2d Cir. 2011) 18 U.S.C. § 2423(b) makes it a crime to travel in foreign commerce to engage in illicit sexual conduct with a minor. The Second Circuit held that travel that has no connection to the United States, however, does not qualify. Thus, travel by an American citizen between two foreign countries would not be subject to § 2423.

***United States v. Lopez-Vanegas***, 493 F.3d 1305 (11th Cir. 2007) Though the courts have applied the drug laws extraterritorially, there are limits. In this case, the defendants, while in Florida, discussed transporting cocaine from Colombia to France for distribution throughout Europe. There was no intention that the drugs ever come to (or through) the United States. The Eleventh Circuit held that the defendants could not be convicted in the United States of conspiracy to possess with intent to distribute cocaine. See also United States v. Benbow, 539 F.3d 1327 (11th Cir. 2008) (in a case somewhat similar to Lopez-Vanegas, it was reversible error to fail to instruct the jury that the government was required to prove that the defendant conspired to either possess or distribute the drugs in the United States).

## *EYEWITNESS IDENTIFICATION*

***United States v. Jernigan***, 492 F.3d 1050 (9th Cir. 2007) In this en banc decision, the Ninth Circuit held that it was a Brady violation for the government to fail to reveal that after the defendant's arrest, nearby banks had been robbed by a woman whose description bore a physical resemblance to the defendant. This case contains a useful discussion of the fallibility of eyewitness identification.

## *FAIR TRIAL / FREE PRESS SEE ALSO: PUBLIC TRIAL*

***United States v. Kravetz***, 706 F.3d 47 (1st Cir. 2013) Sentencing memoranda and good character letters that are submitted in support of a lenient sentence should not normally be filed under seal and should be accessible to the press. The district court, however, does have the authority to seal certain portions of these submissions, such as medical records.

***United States v. Wecht,*** 484 F.3d 194 (3rd Cir. 2007) The district court intended to enforce a local rule that barred attorneys from communicating with the press on various subjects. Relying on Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), the Third Circuit exercised its supervisory power to modify the Local Rule and provide that it only prohibits speech that is substantially likely to materially prejudice ongoing criminal proceedings. In a separate holding, the court held that certain material that was filed in camera in connection with Brady / Giglio requests would be made available to the press. The court engaged in a lengthy analysis of when the press may gain access to information that is furnished to the court or counsel as part of discovery and determined that the adverse information relating to a government witness was part of the public record.

***Guzman v. Scully,*** 80 F.3d 772 (2d Cir. 1996) The prosecutor advised the court that four spectators were known to the government's witness to be related, or friendly with a defense witness and the government witness felt intimidated by their presence in the courtroom. Based on this representation and over the objection of the defense and without making any further inquiry, the trial court excluded the spectators during the balance of the witness's testimony. This violated the defendant's right to a public trial. The Second Circuit granted a writ of habeas corpus based on this constitutional violation.

***United States v. Doe***, 63 F.3d 121 (2d Cir. 1995) The defendant asked that the court be closed for his testimony, as well as other portions of the trial so he could relate to the jury the extent of his cooperation with the government, which he claimed supported his "public authority" defense. The trial court denied his request for closure which resulted in the defendant's refusing

to reveal this information (for fear that he would be the victim of retaliation). Even though the defendant could not point to a direct threat that he had received, the court of appeals holds that the district court should have more carefully evaluated the defendant's request. A remand was required for more findings.

***Vidal v. Williams***, 31 F.3d 67 (2d Cir. 1994) The state trial court erred in permitting an undercover police officer to testify with the courtroom cleared to protect his identity. Even the defendant's parents were ordered to leave the courtroom. There was no evidence that the defendant's parents were at all inclined to harm the officer, or that they ever would have encountered the officer in their outside lives. The trial court made no effort to consider alternatives to clearing the courtroom entirely.

***United States v. Cojab***, 996 F.2d 1404 (2d Cir. 1993) Though the court did not reveal why closure was required in this case, after a review of the historical precedents involving the conflicting interests of the press in keeping proceedings open and the defendant's guarantee of a fair trial, the court concludes that closure was appropriate in this pretrial proceeding. Application of New York Times Co., 878 F.2d 67 (2d Cir. 1989) The trial court offered insufficient justification for barring defense counsel from speaking to members of the press during the course of the trial. The trial judge relied on his experience in other trials rather than in any conduct which had tainted the pending proceedings.

***United States v. Antar***, 38 F.3d 1348 (3rd Cir. 1994) After trial, the judge sealed the entire voir dire and other information in the record which could identify the jurors. No findings were made about the need to restrict the press access to the jurors' identities. This was error.

***United States v. A.D.,*** 28 F.3d 1353 (3rd Cir. 1994) The Federal Juvenile Delinquency Act, 18 U.S.C. 5031, et seq., permits, but does not require, that juvenile hearings be closed. In each case, the trial judge should weigh the benefits to an open trial, against the benefits of confidentiality and determine whether the proceedings should be open to the public.

***In re Baltimore Sun Co.,*** 886 F.2d 60 (4th Cir. 1989) A newspaper has a limited right to examine a search warrant affidavit after the warrant has been executed and before indictment. This right is not grounded in the First Amendment, but in the common law which confirmed a qualified right of access to inspect and copy affidavits in such circumstances.

***In re The Charlotte Observer,*** 882 F.2d 850 (4th Cir. 1989) The magistrate violated the First Amendment in precluding the press and public from attending a hearing on a motion for change of venue. United States v. Soussoudis, 807 F.2d 383 (4th Cir. 1986) The Fourth Circuit holds that plea and sentencing proceedings, just as any other court proceeding, are presumptively open to the public and the press.

***In re Petitions of Memphis Pub. Co.,*** 887 F.2d 646 (6th Cir. 1989) Absent any finding of fact to support the conclusion that a defendant's right to a fair trial might be undermined, it is improper to close the voir dire proceedings of a trial. The court employed a "white noise" device which precluded each juror from hearing the responses of another juror. The effect was also to preclude the press from hearing the voir dire. This violated the First Amendment.

***United States v. Ford***, 830 F.2d 596 (6th Cir. 1987) The Sixth Circuit reverses the trial court's order which imposed a gag order on Congressman Harold Ford in his prosecution in Knoxville. The Sixth Circuit holds that such a gag order is proper only where there is a clear and present danger that an exercise of free speech rights will interfere with the rights of the parties to a fair trial. No such showing had been made in this case. "While permitting the defendant to defend himself publicly may somewhat disadvantage the government, that is simply an artifact of our system that the government must tolerate."

***In re Search Warrant (McDonald Douglas Corp.),*** 855 F.2d 569 (8th Cir. 1988) Though the public had a right of access to the search warrants and supporting affidavits, a balancing test must be utilized in any given case in which closure, or the sealing of documents is necessary. For example, the existence of an on-going investigation may necessitate at least a temporary sealing of the documents. Oregonian Publishing Co. v. U.S. District Court (Wolsky), 920 F.2d 1462 (9th Cir. 1990) The press has the right to examine plea agreements unless an overriding right or interest can be shown to overcome this presumptive First Amendment right.

***Seattle Times Company v. United States District Court***, 845 F.2d 1513 (9th Cir. 1988) The Ninth Circuit holds that the public has a qualified right of access to detention hearing proceedings and to documents filed in connection with those proceedings. The court holds that it was improper to seal documents in a case involving the woman charged with lacing pain relief capsules with cyanide.

***Davis v. Reynolds***, 890 F.2d 1105 (10th Cir. 1989) It is not necessary that a defendant show any prejudice by the closure of the courtroom during a witnesses' testimony in order to be entitled to a new trial. In this case, the trial court failed to articulate specific reviewable findings adequate to support the court's decision to eliminate spectators during the testimony of a minor rape victim. This violation of the defendant's right to a public trial necessitated a retrial.

***United States v. Noriega***, 917 F.2d 1543 (11th Cir. 1990) The Eleventh Circuit upholds Judge Hoeveler's decision prohibiting the broadcast of recorded conversations between Noriega's attorney and Noriega. The trial court directed CNN not to broadcast the tapes in response to Noriega's Petition for Injunctive Relief. It is the trial judge's primary responsibility to govern judicial proceedings so as to ensure that the accused receives a fair, orderly trial comporting with fundamental due process. This includes the right to restrain press access to information and to enjoin publication of information which the media has obtained.

***Washington Post v. Robinson***, 935 F.2d 282 (D.C. Cir. 1991) The newspaper has the right to have access to plea agreements. Though there may be circumstances in which such pleadings may have to be filed under seal, there must be a public record made of the sealing of the plea agreement.

## *FALSE STATEMENTS / FALSE CLAIMS SEE ALSO: MATERIALITY*

***United States v. Stacks***, 821 F.3d 1038 (8th Cir. 2016) The defendant applied for an SBA loan and later renewed the application. On the renewal form, a question was asked whether there was a substantial adverse change from the initial application and gave, as examples, liens, bankruptcies, arrests. The defendant did not disclose that he had additional loans, and a larger balance due to suppliers. The district court granted a post-trial judgment of acquittal, because the information that was not disclosed was not similar to the types of adverse changes described in the loan application and the changes in his circumstance that were not disclosed were not necessarily "substantial adverse changes."

***United States v. Bankston***, 820 F.3d 215 (6th Cir. 2016) The defendant wrote a letter to the judge in her case complaining that the government had planted evidence in her house. Among other offenses, she was charged with a § 1001 violation based on this letter. However, § 1001 does not apply to conduct committed by a party to litigation during the course of the litigation.

***United States v. Litvak,*** 808 F.3d 160 (2d Cir. 2015) Litvak was a securities broker who worked for Jefferies & Company and was involved in selling residential mortgage-backed securities ("RMBS"). He was charged with fraud in connection with his sales of RMBS's. There were three categories of misrepresentations: (1) He lied about the cost at which Jefferies acquired certain RMBS in his effort to convince a purchaser to pay more for the same RMBS's; (2) He lied when he said that he was negotiating for the purchase of certain RMBS's at a certain price in his efforts to re-sell the RMBS's, when, in fact, Jefferies already owned the RMBS's at a lower price than the price he was about to pay to purchase the RMBS's; (3) In the process of purchasing RMBS's, he lied about the price at which he had negotiated to re-sell the RMBS's (falsely saying that the price was less than it actually was) and thereby induced the seller to sell the RMBS's to him at a cheaper price to enable Jefferies to make a profit. On the basis of these representations, Litvak was convicted of securities fraud and also making a false statement to the U.S. Treasury which was overseeing certain RMBS sales in connection with TARP. The Second Circuit reversed the false statement count, based on the failure to prove that Litvak's false statements were material. Though the U.S. Treasury was aware and monitored these types of sales, the Treasury made no "decision" that was affected by the price of the sales. The Second Circuit held, however, that the materiality of the false statements to counterparties was a jury question that could not be decided as a matter of law for purposes of the securities fraud convictions under Rule 10b-5. Litvak argued that the "price" of the RBMS's to Jefferies was not what was important to the counterparties; what mattered was the value. The Second Circuit disagreed, holding that the jury was the proper factfinder on the question of materiality. However, the securities fraud convictions were reversed, because the district court improperly excluded expert testimony offered by Litvak on the topic of materiality. The expert was prepared to testify that a reasonable counterparty would not rely on representations made by Litvak and that they would normally make their own determination of value, rather than relying on Litvak's representation about Jefferies' price in purchasing (or the intended sales price of) the RMBS's. This was the proper subject of expert testimony. Finally, the Second Circuit held that the trial court erred in excluding evidence offered by Litvak that his supervisors permitted these types of sales practices by other brokers, which, according to Litvak, demonstrated his good faith and his lack of intent to defraud. The evidence was relevant to show that Litvak held an honest belief that he was not engaged in improper or illegal conduct.

***United States v. Rahman***, 805 F.3d 822 (7th Cir. 2015) The same principles that apply in a perjury prosecution also apply in a false statement prosecution. If the defendant's statement is literally true, then it is not "false" and the fact that it might have been nonresponsive to a question posed to him by a government agent or was misleading does not make it "false." The conviction in this case was reversed based on this principle.

***United States v. Bowling***, 770 F.3d 1168 (7th Cir. 2014) The defendant was charged with making a false statement on a firearms form that he filled out in order to purchase a gun. He denied that he was a convicted felon. In fact, he was a convicted felon (a fact that he acknowledged at trial), but he claimed that he was laboring under a mistake of fact when he filled out the form, because when he pled guilty to the predicate offense, he thought it was a misdemeanor offense. He sought to introduce evidence at the false statement trial that the prosecutor in the prior case had communicated an offer to the defense attorney in that case offering a misdemeanor disposition which the lawyer then communicated to the defendant. This, he claimed, was the source of his confusion. Excluding this evidence was reversible error.

***United States v. Hale***, 762 F.3d 1214 (10th Cir. 2014) At the meeting of creditors in a bankruptcy case, the defendant was asked, "To your best knowledge and belief, is the information contained in your petition, statements, schedules, and related bankruptcy documents true, complete, and accurate?" There is an ambiguity in this question because it is not clear if the truthfulness of the answer is measured at the time the statement was made (i.e., the bankruptcy schedules were filed) or at the time of the creditors' meeting. In this case, the ambiguity was important, because the defendant learned after filing the schedules that one of the assets was worth substantially more than what he had listed on the schedule. Because of this ambiguity, the defendant could not be convicted of making a false statement in a bankruptcy proceeding.

***United States v. Ashurov***, 726 F.3d 395 (3rd Cir. 2013) It is a crime under 18 U.S.C. §1546, to knowingly making a false statement under oath a document required by the immigration laws. It is also a crime "to knowingly present any such document which contains any such false statement." This latter section is ambiguous regarding whether the document must be under oath. The word "such" suggests that the document must be under oath, but that second law only refers to a "false statement" being contained in the document. The Third Circuit, applying the Rule of Lenity, holds that the latter provision also requires proof that the document was made under oath.

***United States v. White Eagle***, 721 F.3d 1108 (9th Cir. 2013) Merely failing to reveal another person's crime is not sufficient to support a false statement offense under § 1001. The fact that the defendant made a statement about another person's conduct

(a partial disclosure) and omitted to reveal that the other person had committed an offense is not a “silent statement” that supports a conviction. See also United States v. Safavian, 528 F.3d 957 (D.C.Cir. 2008).

***United States v. Phillips***, 731 F.3d 649 (7th Cir. 2013) In this en banc decision, the Seventh Circuit held that the defendants should have been permitted to introduce evidence that the defendants (who were charged with making a false statement to a bank in violation of § 1014) were told by their broker that lying in response to certain questions on a loan application form was permissible. Th evidence was relevant to whether the defendants actually knew that their answers were false and whether they believed that answering the questions in that way would “influence” the bank’s decision.

***United States v. Castro***, 704 F.3d 125 (3rd Cir. 2013) The defendant was convicted of making a false statement when he said that he had not received money from the bribe payor. He later entered a guilty plea to related charges and signed an appeal waiver. With regard to the false statement conviction, what he said was actually true (unbeknownst to him), because the money was paid by a government agent posing as a confederate of the bribe payer. The Third Circuit held that the conviction for making a false statement could not be sustained, because what the defendant said was true and, moreover, it would be a manifest injustice to enforce the appeal waiver on this count of the conviction.

***United States v. Kurlemann***, 736 F.3d 439 (6th Cir. 2013) A material omission on a bank loan application is not a “false statement” under 18 U.S.C. § 1014. A material omission may amount to fraud, but § 1014 only prohibits false statements, not fraud. United States v. Alexander, 679 F.3d 721 (8th Cir. 2012) In order to succeed in a § 1014 false statement prosecution, the government must establish that the victim financial institution was FDIC insured. In this case, the government proved that Bank of America was FDIC insured, but not that Bank of America, N.A. or Bank of America Mortgage was FDIC insured or that the latter two institutions were subsidiaries of Bank of America so that they qualified under § 1014.

***United States v. Fontenot***, 665 F.3d 640 (5th Cir. 2011) The defendant, a state politician, “borrowed” money from two businessman. The loan was in cash and was illegal under state campaign finance laws. Later, the defendant filled out a loan application at a bank and failed to reveal this “debt” and was prosecuted for making a false statement under both § 1001 and § 1014. The Fifth Circuit held that omitting to mention an illegal debt was not a false statement. If the debt is unenforceable, it does not qualify as “debt” as that term is generally understood.

***United States v. Spurlin,*** 664 F.3d 954 (5th Cir. 2011) Because of some ambiguity in the question on the form that the defendant allegedly answered inaccurately, a false statement conviction could not be sustained.

***United States v. Smith***, 641 F.3d 1200 (10th Cir. 2011) Venue for a false statement prosecution is where the statement was made. In this case, the government sought to prosecute the defendant in the jurisdiction that was the subject matter of the false statement. The government argued that there was a ‘substantial contacts” test for venue. The Tenth Circuit rejected this theory.

***United States v. Ford***, 639 F.3d 718 (6th Cir. 2011) The defendant did not disclose his financial relationship with certain entities on his state disclosure forms (he was a state senator). The Sixth Circuit holds that these “false statements” were not within the jurisdiction of a federal agency and therefore could not form the basis for a § 1001 violation. The fact that the subject matter of the non-disclosure was an entity that received federal funding, did not make the false statement within the jurisdiction of a federal agency.

***United States v. Goyal***, 629 F.3d 912 (9th Cir. 2010) The defendant was charged with securities fraud in connection with the method by which he accounted for certain sales. According to the government, the method violated GAAP. The proof at trial, however, failed to prove that materiality of the misrepresentations that were made on the financial statements. The court also reversed the counts of the indictment dealing with lying to auditors. The basis of the reversal on these counts, in part, was the failure to prove that the defendant had a culpable state of mind (i.e., willful and knowing deception).

***United States v. Saybolt***, 577 F.3d 195 (3rd Cir. 2009) A prosecution under 18 U.S.C. § 286 for conspiring to defraud the government by submitting a false, fraudulent, or fictitious claim to the government requires proof that the defendants conspire to submit a materially false statement. On the other hand, § 287 which simply outlaws submitting a false claim, does not require proof of materiality.

***United States v. Hayes***, 574 F.3d 460 (8th Cir. 2009) Though the government proved that the form sent to the government agency in connection with the defendant’s home health care agency contained a false statement, there was insufficient evidence that the defendant knew the false statement was submitted to the agency. The form was filled out by a co-conspirator.

***United States v. Ali***, 557 F.3d 715 (6th Cir. 2009) The defendant was charged with making a false statement on a naturalization document. He had been married to a Canadian woman and then, prior to the divorce being finalized, he married a woman in Georgia. He answered a question on a naturalization form that he had never been married to two women at the same time. The defendant claimed that he could not be guilty of making a false statement because a bigamous marriage, under Georgia law, was void ab initio, therefore he was never actually married to the woman in Georgia. The government moved to bar this defense on the theory that it represented a “mistake of law” defense. The Sixth Circuit disagreed, holding that if the defendant in fact believed that he was not married, based on the void ab initio principle, then he was not guilty of knowingly making a false statement.

***United States v. Safavian***, 528 F.3d 957 (D.C. Cir. 2008) The defendant was formerly the chief of staff of the Government Services Administration. He was considering taking a golfing trip with a lobbyist, Jack Abramoff, and solicited an ethics opinion about whether it was permissible for him to go on the trip. He omitted to tell the ethics officer that Abramoff was arguably doing business, or seeking to do business, with the GSA. This failure to include the pertinent facts in his ethics inquiry could not form

the basis for a false statement prosecution under 18 U.S.C. § 1001(a)(1). When it comes to a “concealment” false statement, the government must prove that the defendant had a duty to disclose the facts that were concealed. No such duty existed in this case, where the defendant was voluntarily seeking an ethics opinion.

***United States v. Manning,*** 526 F.3d 611 (10th Cir. 2008) When a defendant provides false information to a probation officer in connection with the preparation of a presentence report, he may be prosecuted for a § 1001 violation. Though the report is furnished by the probation officer to the court, this kind of statement does not qualify as a “statement, representation, writing or document submitted to a judge,” and thus does not qualify for the § 1001(b) exception to the coverage of the statute. The probation officer is not the equivalent of a courier, who merely transmits the statement to the judge.

***United States v. Robison***, 505 F.3d 1208 (11th Cir. 2007) The defendant’s false statement conviction was reversed. The allegation was that he submitted an environmental report to the EPA certifying that it was true, when, in fact, the report contained false information. However, the certification only stated that he knew that the reports was prepared by a competent person and that he was told by that person that it was accurate. The government introduced no evidence that the reports were not prepared by a qualified person, or that the qualified person did not tell the defendant that the reports were accurate.

***United States v. Horvath,*** 492 F.3d 1075 (9th Cir. 2007) The defendant made a false statement to a probation officer in connection with a presentence interview. The Ninth Circuit holds that conduct is encompassed within the exception for statements made by a party to a judge or magistrate. 18 U.S.C. § 1001(b). See also the various opinions filed in connection with the denial of the government’s request for rehearing, en banc, 522 F.3d 904 (2008). United States v. Jiang, 476 F.3d 1026 (9th Cir. 2007) The evidence was insufficient to support the defendant’s conviction. Because of the uncertainty regarding the nature of the questions asked by the law enforcement officer and the answers given by the defendant about his export of amplifiers, a conviction could not be sustained. At best, the exchange was ambiguous.

***United States v. Hoover***, 467 F.3d 496 (5th Cir. 2006) The trial court’s jury charge improperly expanded the indictment by offering a theory by which the jury could find that the statement made by the defendant was false, in a manner different than the manner set forth in the indictment. The indictment alleged that he made a false statement about how many people complained to him about a financing arrangement of his car dealership. Specifically, the indictment said that “he knew the statement was false because “more than one person told him about the ‘double floor planning.’” The jury was instructed, however, that he could be found guilty if he knew the statement, he made to the police was false, but did not limit the basis upon which he knew it was false. The Sixth Circuit held that, pursuant to Strone v. United States, 361 U.S. 212 (1960), if the government chooses to specifically charge the manner in which the defendant’s statement is false, the government should be required to prove that it is untruthful for that reason.

***United States v. Cacioppo***, 460 F.3d 1012 (8th Cir. 2006) The defendants were prosecuted for making a false statement in connection with ERISA reports, 18 U.S.C. §1027. The trial court erroneously instructed the jury that a conviction could be predicated on a finding that the defendant recklessly disregarded whether his statement was false, or not. The statute requires proof of “knowing” false statements and reckless disregard for the truthfulness of a statement is not the same as knowing that a statement is false.

***United States v. Stewart***, 420 F.3d 1007 (9th Cir. 2005) Repeating the same false statement to a law enforcement officer on two separate occasions does not constitute two separate crimes of violating § 1001, if the second false statement did not independently impair a government investigation. United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) The defendants were charged with making false statements (and failing to make mandatory disclosures) in connection with mine safety reporting requirements. One count of the indictment was deficient, because it failed to properly identify the specific failure to report that is required by the regulations. A judgment of acquittal was also appropriate on that count.

***United States v. Bruno***, 383 F.3d 65 (2d Cir. 2004) The conspirators could not have envisioned those six years after they participated in a murder, one of their confederates would lie to investigators about the crime. Under a Pinkerton theory, a conviction for making a false statement could not be sustained.

***United States v. Blankenship***, 382 F.3d 1110 (11th Cir. 2004) The defendants submitted contracts and equipment leases to the government to demonstrate the bona fides of the parties’ relationship (in order to qualify for a government contract). Actually, the parties did not intend to have that relationship, but submitted the documents in order to win the contract. The Eleventh Circuit concluded that this conduct does not amount to a false statement under § 1001. A contract is not a “false statement” unless it is fraudulent, or actually contains false statements of fact. A contract like the one at issue in this case is not like a guarantee that a party never intended to honor (which could constitute a false statement). A contract can be breached without any criminal culpability. The existence of the contract was not actually disputed, even if the parties never intended to comply with its terms or sue the other party for breaching the contract. In a separate holding, the court held that other false statements made by one of the defendants did not fall within the jurisdiction of a federal agency and therefore could not be the basis for a § 1001 prosecution.

***United States v. Karaouni***, 379 F.3d 1139 (9th Cir. 2004) 18 U.S.C. § 911 makes it a crime to falsely claim to be a U.S. citizen. On an I-9 employment form, the defendant checked a box indicating that he was a U.S. “national.” Checking the box did not violate § 911. Though all citizens are nationals, not all nationals are citizens.

***United States v. Finn***, 375 F.3d 1033 (10th Cir. 2004) The defendant was a law enforcement agent with HUD. His car was towed and despite his efforts to bully the towing company to release his car, the company refused to release the car without

being paid. He eventually enlisted the aid of a colleague to drive the car off the lot, running through a fence. When he realized that there would be trouble, he had the friend take some petty cash from the HUD office and reimburse the towing company. On the government expenditure form and receipt, the defendant crossed out the phrase “damage to fence” and added the word “storage.” The Tenth Circuit concludes that changing the term “damage to fence” to “storage” was not a materially false statement.

***United States v. McBride***, 362 F.3d 360 (6th Cir. 2004) The defendant was charged with violating the false claim statute (18 U.S.C. § 287) by writing a bad check to cover his girlfriend’s tax liability. A bad check written to the government to pay for a liability is not a false claim.

***United States v. McNeil***, 362 F.3d 570 (9th Cir. 2004) A false statement in a CJA-23 (financial affidavit used to support appointment of counsel in criminal case) is not covered by § 1001. The false statement statute expressly exempts statements made during the course of judicial proceedings and an application to have appointed counsel and the accompanying financial affidavit is covered by the judicial proceeding exemption.

***United States v. Dunne***, 324 F.3d 1158 (10th Cir. 2003) Making a false statement is not a continuing offense for statute of limitations purposes.

***United States v. Pickett***, 353 F.3d 62 (D. C. Cir. 2004) In order to qualify as a criminal false statement under 18 U.S.C. § 1001(c), a false statement to the legislative branch must be in connection with an investigation or review of a committee, subcommittee, commission, or office of Congress. Alleging this element of the offense is essential in an indictment. In this case, the defendant (a Capitol security guard) made a “bad joke” – he left some “sugar substitute” on a desk near the entrance to the Capitol and suggested that it was anthrax. Based on the note he left next to the substance, the U.S. Attorney charged him with making a false statement in a matter involving the legislative branch. The D.C. Circuit held that the fake note was not the proper subject of a § 1001 prosecution.

***United States v. Baird***, 134 F.3d 1276 (6th Cir. 1998) The defendant was charged with making a false statement to the government in an effort to obtain a progress payment on a government construction project. The defendant submitted a claim for payment based on "incurred costs," though the defendant had not yet paid for the product for which he was requesting a progress payment. Because of the confusion over the definition of the term "incurred costs," the trial court should have instructed the jury on this aspect of the charge.

***United States v. Brown***, 151 F.3d 476 (6th Cir. 1998) The Sixth Circuit holds that a statement that is impliedly false may be prosecuted under 18 U.S.C. § 1001. In this case, the principal defendant’s conviction was sustained on this theory. The second defendant, however, was not shown to have shared in the lead defendant’s criminal intent and her conviction was reversed. The defendants, who were employed by the Detroit housing authority filled out various HUD forms indicating that certain people were “eligible” to participate in a low-income housing program. While those people were technically “eligible” (i.e., they had low income), they were not taken off the waiting list in the proper order and, in certain instances, had actually bribed the lead defendant to gain acceptance in the program. The second defendant was not shown to have had any knowledge of the waiting list, or the significance of the list in determining actual eligibility.

***United States v. Whiteside***, 285 F.3d 1345 (11th Cir. 2002) The defendants’ convictions were reversed on sufficiency grounds. The defendants were charged with making false statements in connection with Medicare reimbursement cost reports and conspiracy to defraud the government. In the reimbursement cost reports, the defendants reported that part of their hospital’s annual costs included certain interest payments on a note that represented a capital expenditure. According to the government, these interest payments should not have been reported as a capital expenditure. The jury convicted the defendants. The Eleventh Circuit held that it was far from clear what the appropriate definition of a “capital expenditure” is in the context of interest payments for the note. Consequently, as a matter of law, the defendants could not be found guilty of making a false statement. The court held that, “In a case where the truth or falsity of a statement centers on an interpretive question of law, the government bears the burden of proving beyond a reasonable doubt that the defendant’s statement is not true under a reasonable interpretation of the law.” Id. 285 F.3d at 1351.

## *FEDERAL OFFICER REMOVAL STATUTE*

***State of Texas v. Kleinert,*** 855 F.3d 305 (5th Cir. 2017) A person acting in his capacity as a federal officer may not be prosecuted in state court for such conduct. A defendant charged in state court may ask to “remove” the prosecution to federal court. 28 U.S.C. § 1442(a)(1). The defendant must show that he has a colorable federal defense to the conduct in order win the removal motion. The elements for removal were established in this case.

### *FIFTH AMENDMENT SEE ALSO: Confessions Closing Argument (Comment on Defendant’s Failure to Testify) Post Arrest Silence*

***United States v. Hubbell***, 530 U.S. 27 (2000) The subpoena served on the defendant required him to produce various documents that fit into several categories, such as “documents that reflect all income.” The defendant sought and was given use immunity. Nevertheless, the government used these documents to obtain an indictment. The United States Supreme Court held that the indictment had to be dismissed. The act of producing the documents and corresponding authentication that these documents were responsive to the subpoena was “used” against the defendant. The Court observed that providing

documentation in response to the broad categories requested was tantamount to answering a series of interrogatories about the sources and amount of income received by the defendant.

***Mitchell v. United States***, 119 S. Ct. 1307 (1999) A defendant has a Fifth Amendment right to remain silent at sentencing and this may not be used against her. In this case, the defendant entered a guilty plea and the amount of drugs which would be attributed to her at sentencing was left open. At sentencing, the government introduced evidence relating to the drug quantity and the defendant did not respond. The trial court expressly considered the defendant's silence against her. The Supreme Court reversed: a defendant has a right to remain silent and this may not be used to her detriment. Salinas v. Texas, 133 S. Ct. 2174 (2013) The defendant was interviewed by the police and agreed to answer questions. During the questioning, the police asked him whether shotgun shells found at the scene would match his shotgun. The defendant did not respond. The state introduced this “failure to respond” at trial and argued that the defendant’s silence was evidence of his guilt. In a 5-4 decision, the United States Supreme Court held that a defendant’s non-custodial silence was admissible at trial and could be used to draw an inference of guilt, assuming the defendant does not affirmatively assert his Fifth Amendment right against self-incrimination. ‘

***United States v. Apple Mac-Pro Computer***, 851 F.3d 238 (3rd Cir. 2017) Pursuant to a search warrant, the police seized the defendant’s computers and external hard drives. The hard drives were encrypted, and the defendant did not voluntarily provide the password. The police had sufficient information to establish that the hard drives contained child pornography, including an interview a with family members who had viewed child pornography on the computer, as well as certain forensic information. The Magistrate then ordered the defendant to produce the password. He refused, claiming a Fifth Amendment right to decline to provide the information. The Third Circuit upheld the contempt order. Because of the “foregone conclusion” doctrine, the defendant could not assert the “act of production” component of the Fifth Amendment. The court distinguished In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011, 670 F.3d 1335 (11th Cir. 2012), because in that case, the government was not shown to have known what the contents of the computers were – the foregone conclusion doctrine did not apply.

***United States v. Von Behren***, 822 F.3d 1139 (10th Cir. 2016) A condition of supervised release required the defendant to submit to a polygraph test regarding his sexual activities (he had been convicted of possession and distributing child pornography). He asserted a Fifth Amendment right to refuse to answer the polygraph questions. The Tenth Circuit held that he had a Fifth Amendment right to refuse to answer the questions. The answers could incriminate him, and the condition of supervised release amounted to “compulsion.” United States v. Cabrera, 811 F.3d 801 (6th Cir. 2016) At sentencing, the trial court decried the “fantastical” defense that the defense offered at trial and the fact that the defendant did not testify in his own defense. (The defense was that the undercover tapes were manipulated by the government). Relying on the fact that the defendant did not testify at trial (or in support of his defense at any time) and on the fact that the defense was “fantastical” violated both the Fifth and Sixth Amendments. The defendant may not be punished for not testifying and his right to challenge the government’s case (and the reliability or authenticity of its evidence) may not be the basis for an increased sentence.

***United States v. Okatan***, 728 F.3d 111 (2d Cir. 2013) When confronted by the police – but not while in custody – the defendant answered a few questions, but then invoked his right to counsel. Repeatedly during trial, the government highlighted the fact that when questioned by the police, the defendant invoked his right to counsel. This occurred during the examination of the interrogating officer and during closing argument. This was reversible error. Unlike the situation in Salinas v. Texas, the defendant in this case did not simply remain silent in response to questions, here, the defendant affirmatively asserted his right to counsel. Using that express assertion of the privilege to remain silent (which, in this context was the same as the invocation of the right to counsel), as evidence of guilt, violates the Fifth Amendment rights of the defendant, even post-Salinas.

***McKune v. Lile***, 536 U.S. 24 (2002) A Kansas prison regulation requires a sex offender to fully admit all of his sexual history in order to retain certain privileges and to stay in a less secure facility. The Supreme Court held that this provision does not violate the Self-Incrimination Clause in light of the consequences of the failure to “confess.”

***Doe v. United States***, 487 U.S. 201 (1988) The Supreme Court holds that the government may require a suspect to sign forms requiring an offshore bank to release information to the grand jury. Because the act of signing such forms is not “testimonial” it does not violate the defendant’s Fifth Amendment rights.

***United States v. Balsys***, 118 S. Ct. 2218 (1998) A defendant may not rely on the Fifth Amendment privilege against self-incrimination if the only threat of prosecution exists in a foreign country.

United States v. Bahr, 730 F.3d 963 (9th Cir. 2013) While on probation from a prior state sex offense, the defendant was required to take a polygraph (during which he confessed to certain sex offenses) and to fill out a “workbook” (in which he confessed to several sex offenses). Following his federal prosecution for a new offense, the probation officer provided this information to the sentencing judge. The Ninth Circuit held that the statements made by the defendant during the period of probation were “compelled self-incrimination” and should have been suppressed from the federal case on Fifth Amendment grounds. Even though he did not refuse to answer questions during his period of probation, the Fifth Amendment protection is “self-executing” and having been compelled to answer the questions (even without any objection on his part), the government was precluded from using this information in a subsequent proceeding. See Minnesota v. Murphy, 465 U.S. 420 (1984).

***United States v. Bright***, 596 F.3d 683 (9th Cir. 2010) In the context of an IRS summons enforcement proceeding, the Ninth Circuit reviews the law concerning the Fifth Amendment in the context of a subpoena to produce documents. With respect to certain credit card records, the court concludes that the “foregone conclusion” exception to Hubbell applied, but with respect to other credit card records, the government did not establish that it was aware of the records, or the defendants’ possession of the

records, prior to the issuance of the summons and therefore the taxpayers were entitled to assert the Fifth Amendment to resist production of these records.

***United States v. Ponds***, 454 F.3d 313 (D.C. Cir. 2006) The grand jury was investigating an attorney in connection with his receipt of attorney's fees from a particular client – specifically, his receipt of a car as a fee. A grand jury subpoena was issued, seeking any and all documents relating to the receipt of the car, documents relating to the fees paid by that client, documents relating to the attorney's sister, documents relating to any other cars provided to the attorney by the client, and any documents relating to the client's mother. The attorney sought and received "act of production" immunity. Nevertheless, he was indicted. The D.C. Circuit concluded that the trial court did not conduct a sufficiently rigorous Kastigar hearing. The trial court concluded that Fisher controlled, rather than Hubbell, because the government obtained only pre-existing documents in defined categories. The D.C. Circuit disagreed, holding that the document requests were sufficiently broad that they came within the Hubbell decision that bars the use of documents that are authenticated and categorized by the immunized target.

***United States v. Saechao,*** 418 F.3d 1073 (9th Cir. 2005) A condition of probation that required the probationer to answer all reasonable questions of the probation officer truthfully violated his Fifth Amendment rights. In contrast to Minnesota v. Murphy, 465 U.S. 420 (1984), in this situation, the defendant would be penalized if he failed to answer the probation officer's questions, while in Murphy, the defendant was simply required to be honest whenever he did answer questions.

***De LiSi v. Crosby***, 402 F.3d 1294 (11th Cir. 2005) A witness who waives his Fifth Amendment privilege with regard to a topic in a judicial proceeding, may not later invoke the privilege, even in a separate legal proceeding, on the same topic. In this case, a prosecution witness previously waived his Fifth Amendment rights regarding possible charges of tax evasion. When cross-examined by the defendant at the defendant's trial, the trial court erred in permitting the witness to invoke his Fifth Amendment rights. Harmless error.

***United States v. Antelope***, 395 F.3d 1128 (9th Cir. 2005) The incarceration of a probationer who refused to disclose information about sex crimes for which he had not been prosecuted violated his Fifth Amendment rights. The consequences of refusing to reveal this information distinguished this case from McKune v. Lile, supra.

***Doe v. United States***, 383 F.3d 905 (9th Cir. 2004) The subpoena to the defendant was so broad that it violated his Fifth Amendment right against compelled self-incrimination. Relying on Fisher and Hubbell, the Court held that the defendant was being required to authenticate (by his act of production) the existence of various documents. Therefore, holding the defendant in contempt for failing to comply with the grand jury subpoena was improper. The court specifically rejected the "foregone conclusion" exception to "act of production" immunity.

***United States v. Kennedy***, 372 F.3d 686 (4th Cir. 2004) The AUSA improperly advised the defendant that when he appeared at the grand jury, he had no right to plead the Fifth, because he had already been convicted of drug charges about which he was being questioned (his case was still on appeal). The defendant's answers led to a perjury prosecution. While condemning the misconduct of the AUSA, the Fourth Circuit holds that the erroneous advice did not provide a defense to the perjury charges.

***Ketchings v. Jackson***, 365 F.3d 509 (6th Cir. 2004) The trial court improperly considered the defendant's failure to admit his guilty at sentencing. In short, the trial judge stated that the defendant's failure to admit his guilt suggested to the court that he could not be easily rehabilitated and increased his sentence accordingly. This violated the principle set forth in Mitchell v. United States and required that a writ be granted unless a new sentencing hearing was conducted by a different judge.

***United States v. Burgos***, 276 F.3d 1284 (11th Cir. 2001) Though this decision is in the Sentencing Guidelines context, the court holds that a defendant may not be penalized for refusing to cooperate with the government in a criminal investigation unrelated to the offense for which the defendant is to be sentenced. In this case, the trial court sentenced the defendant to the high end of the guideline range because of her refusal to cooperate in an investigation of her husband. This violated her Fifth Amendment rights.

***United States v. Vavages***, 151 F.3d 1185 (9th Cir. 1998) A defense witness (the defendant's wife) refused to testify in support of her husband's alibi defense because she had been threatened by the prosecutor with a perjury prosecution if she did. She could not invoke a blanket Fifth Amendment refusal to testify on this basis. Fear of a perjury prosecution for the expected testimony is not a basis for refusing to testify, because truthful testimony may not be prosecuted as perjury. The principal reason for reversing the defendant's conviction in this case, however, was the misconduct of the prosecutor for threatening the witness in the first place.

***United States v. McLaughlin***, 126 F.3d 130 (3rd Cir. 1997) When a grand jury subpoena is served on a corporation for corporate records, neither the corporation, nor the custodian may assert the Fifth Amendment privilege.

***Braswell v. United States***, 487 U.S. 99 (1988). The flip side of this, however, is that if the custodian produces certain records (or fails to produce certain records), this fact may not be used against the custodian personally in a trial against that individual. Here, the custodian (the defendant) failed to produce certain records and the government argued to the jury that the failure to produce these records was evidence of his guilty state of mind. This was reversible error.

***United States v. Gravatt***, 868 F.2d 585 (3rd Cir. 1989) The defendant, charged with tax evasion, refused to fill out a financial affidavit in his efforts to obtain a court appointed counsel. The Third Circuit held that it was error to require the defendant to complete the form. Rather, the Court should have provided the defendant a right to fill out the form for an in-camera review, or the defendant should have been granted immunity for purposes of obtaining an attorney.

***United States v. Sharp***, 920 F.2d 1167 (4th Cir. 1990) The IRS was investigating the defendant because of his failure to file tax returns for a number of years. The defendant refused to answer questions when he received an IRS summons. The trial court erred in directing the defendant to respond to the civil inquiries. The fact that it was the civil division does not alter the incriminating nature of the information sought. The trial court indicated that the questions should be answered and if he was prosecuted, the court could then protect his rights by dismissing the indictment or suppressing the evidence. This was not a proper method of preserving Fifth Amendment rights.

***In re Hitchings***, 850 F.2d 180 (4th Cir. 1988) A witness testified under a grant of immunity at a grand jury proceeding. At trial, she asserted her Fifth Amendment privilege, but answered that she had testified truthfully at the grand jury. This one answer did not constitute a waiver of her Fifth Amendment rights.

***United States v. Grable***, 98 F.3d 251 (6th Cir. 1996) A taxpayer has the right to assert the "act of production" Fifth Amendment privilege in response to an IRS summons enforcement proceeding. The defendant's failure to file tax returns for two years presented enough of a risk of possible incrimination to support the invocation of the privilege against self-incrimination.

***United States v. Troescher***, 99 F.3d 933 (9th Cir. 1996) A defendant may refuse to answer questions, or produce documents, in reliance on the Fifth Amendment, even if the only threat of prosecution is for a tax offense.

***United States v. Safirstein***, 827 F.2d 1380 (9th Cir. 1987) During sentencing, the trial court noted that the defendant failed to cooperate, and this indicated a lack of remorse. The judge indicated that he would rely on this factor in sentencing the defendant. The Ninth Circuit reverses holding that this constitutes a violation of the defendant's Fifth Amendment privilege against self-incrimination.

***United States v. Paris***, 827 F.2d 395 (9th Cir. 1987) A co-defendant of the defendant on trial was promised leniency and promised that a conspiracy charge would be dropped if he would cooperate at the defendant's trial. He was called as a witness at the defendant's trial but pled the Fifth Amendment because he had not yet been sentenced. The Ninth Circuit held that the witness could rely on the Fifth Amendment until such time as the conspiracy charge was, in fact, dropped and his sentence imposed on the substantive count.

***United States v. Hardwell***, 80 F.3d 1471 (10th Cir. 1996) A defendant's financial affidavit that is completed in an effort to secure appointed counsel after being indicted may not be used by the government at trial to prove that the defendant has no legitimate income. Using this affidavit penalizes the defendant's right to secure appointed counsel and, pursuant to Simmons v. United States, 390 U.S. 377 (1968), the defendant's right to counsel cannot be conditioned on providing incriminating information to the government.

***United States v. Kuku***, 129 F.3d 1435 (11th Cir. 1997) A witness may assert the Fifth Amendment privilege after he has pled guilty to a criminal offense but before being sentenced.

***United States v. Gecas***, 120 F.3d 1419 (11th Cir. 1997) A person may not refuse to incriminate himself on the basis of a perceived threat of prosecution in a foreign country.

***United States v. Argomaniz***, 925 F.2d 1349 (11th Cir. 1991) The Fifth Amendment privilege can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory, or adjudicatory. A taxpayer may invoke this privilege in response to requests for information in an IRS investigation. There can exist a legitimate fear of criminal prosecution while an IRS investigation remains in the civil stage before formal transfer to the criminal division.

***In re Grand Jury Investigation (Heller),*** 921 F.2d 1184 (11th Cir. 1991) The grand jury subpoenaed an attorney's trust account records during an investigation of the attorney for tax offenses. The attorney attempted to thwart the appearance of his secretary on Fifth Amendment grounds. However, because the Fifth Amendment is personal, it could not be asserted vicariously through the secretary. In a footnote, the Court also considered the argument that "personal papers" can never be covered by the Fifth Amendment. This argument, advanced by the government, was premised on the holding in Andresen v. Maryland, 427 U.S. 463 (1976), and represents a repudiation of the privacy-based rationale of the Fifth Amendment represented by Boyd v. United States, 116 U.S. 616 (1886). The theory of Andresen is that once one's thoughts are reduced to writing, their compelled production is not self-incrimination. The court, while reviewing this argument, does not render a final verdict on this point.

***Matire v. Wainwright***, 811 F.2d 1430 (11th Cir. 1987) During closing argument, the prosecutor referred to the defendant's silence after having been warned of his Miranda rights. The government argued that evidence of post-arrest silence was probative on the defendant's insanity defense. The Eleventh Circuit reverses on the basis of this Fifth Amendment violation.

***United States v. Dean***, 989 F.2d 1205 (D.C. Cir. 1993) Defendant was the assistant to HUD Secretary Pierce who was under investigation by an Independent Counsel. She was subpoenaed to produce all documents in her possession relating to her work at HUD. She resisted but was ultimately ordered to do so by the district court. At trial, the government sought to introduce the records and the fact that she produced them pursuant to a subpoena. The "act of production" doctrine, however, applied in this situation. Though the defendant was the custodian of "government records," just as the custodian of business records may insist on being immunized before being compelled to produce documents – with regard to evidence of the act of production (as opposed to the contents of the documents) – a government custodian has that same right. This case contains a good discussion of the act of production doctrine, as well as the "required records" exception which provides that records which must be maintained are not subject to the "act of production" doctrine. The required records exception does not apply in this case because the records being subpoenaed were not required to be maintained by the government.

***United States v. Lugg***, 892 F.2d 101 (D.C. Cir. 1989) A witness retains the Fifth Amendment right not to testify, even after the witness enters a guilty plea, and even though the witness entered into a plea agreement which required truthful testimony. The witnesses had not yet been sentenced and other charges which were to be dropped in accordance with the plea agreement, had not yet been dismissed.

***FIFTH AMENDMENT (Immunity and Proffers)***

***United States v. Allen***, 864 F.3d 63 (2d Cir. 2017) The Fifth Amendment prohibition on the use of compelled testimony in criminal proceedings applies even when a foreign government compels a foreigner to answer questions, which are then used in a prosecution of the foreigner in an American court. In this case, the foreigner (British citizen) was given use immunity, but not derivative use immunity and compelled to answer questions by British authorities. He was later prosecuted in New York. One of the witnesses against him had reviewed the defendant's answers to the British interrogation and his testimony was affected by his review of those statements. The Second Circuit held that the Fifth Amendment applied, that the government was required to satisfy the Kastigar requirement to prove that the witness's testimony was not affected by his review of the defendant's compelled testimony, and that the witness's simple assurance that his testimony was not affected, was insufficient to satisfy the Kastigar burden. The Second reversed the conviction and also held that the witness's testimony at the grand jury also violated the defendants' Fifth Amendment rights and necessitated dismissing the indictment.

***United States v. Rosemond***, 841 F.3d 95 (2d Cir. 2016) The defendant was a member of a gang which killed a rival gang member. The defendant was arrested and signed a proffer agreement that provided the government would not use any of statements made during his proffer sessions against him, except that they could be used "as substantive evidence to rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf of him at any stage of a criminal prosecution." During one proffer session, the defendant said he understood that as a result of the actions he took with others the victim would be killed. The defendant did not plead guilty and proceeded to trial. A co-conspirator testified and the defendant's attorney cross-examined him about his belief that the victim would be shot, but not killed. The attorney also asked if the defendant had ever instructed the witness to kill the victim. The district court held that this questioning triggered the proffer waiver provision. That trial ended in a hung jury. Prior to the retrial, the court re-affirmed its ruling and instructed defense counsel that if he argued that this was a "mere shooting" and not a murder, the waiver would apply. The Second Circuit reversed. The defendant is entitled to draw the jury's attention to the lack of evidence presented by the prosecution without waiving the provisions of a proffer agreement. The appellate court provided a list of matters that do not trigger a waiver, including arguing the absence of proof beyond a reasonable doubt; pleading not guilty; cross-examining a police officer about inconsistencies in his reports; the absence of corroborating evidence supporting the prosecution's theory of the case; cross-examining a witness to expose problems with his credibility.

***United States v. Mark***, 795 F.3d 1102 (9th Cir. 2015) The defendant was interviewed by the FBI and after demonstrating his cooperation was granted informal immunity by the AUSA. He participated in a phone conference with the prosecutors in preparation for another trial. Later, the government claimed that he refused to cooperate in a subsequent phone conference which prompted the government to issue a target letter. The defendant's motion to dismiss was denied. The defendant was tried and convicted, after which the defendant requested reconsideration of his Motion to Dismiss based on his cell phone records that showed that no phone call ever occurred in which he failed to cooperate. The government had no notes or memo of the uncooperative phone call and the FBI agent testified that he did not remember the call that the prosecutors asserted was the basis for the breach of the immunity agreement. The Ninth Circuit held that the Motion to Reconsider should have been granted and the indictment must be dismissed based on the government's failure to prove that any breach occurred.

***United States v. Melvin***, 730 F.3d 29 (1st Cir. 2013) The defendant gave a statement during a proffer session. It was agreed that his statement could not be used against him at trial under the typical proffer conditions. At trial, an agent was permitted to identify the defendant's voice on recorded wiretaps and said he knew the voice from the proffer session. The First Circuit held that this violated the terms of the proffer agreement.

***United States v. Jimenez-Bencevi***, 788 F.3d 7 (1st Cir. 2015) The defendant gave an immunized proffer admitting that he shot the victim. He then went to trial. The defendant sought to call an expert to the stand who would have testified that based on surveillance videos, he could determine that the shooter was taller than the defendant. The trial judge, invoking Daubert held that he would not allow the expert to testify unless he was first provided a copy of the immunized proffer. The judge further held that the expert would not be allowed to testify to a "fact" that the court knew was untrue. The First Circuit held that this was reversible error. The immunity agreement barred the "trial court's use" of the statement, just as it barred the prosecutor's use of the statement.

***In re: Grand Jury Subpoena Duces Tecum Dated March 25, 2011***, 670 F.3d 1335 (11th Cir. 2012) Based on Hubbell, the Eleventh Circuit held that a defendant who has received "act of production" immunity to compel him to decrypt a computer may not have the decrypted computer then "used" against him, because the contents of the computer – the decrypted files – represent the indirect use of the immunized statement. In short, the court held that once "act of production" immunity is given to the defendant, the contents of the documents or computer files that are produced may not be used against him, because the contents represent the fruits of his immunized testimony. This case was examined in United States v. Apple Mac-Pro Computer, 851 F.3d 238 (3rd Cir. 2017) where the Third Circuit held that the Fifth Amendment did not apply when the government demands a password, if it is a foregone conclusion that the computer contains contraband. The Third Circuit held that the government in the Eleventh Circuit case did not make a showing that the contents of the computer were known to the police.

***United States v. Hill***, 643 F.3d 807 (11th Cir. 2011) The defendant signed a proffer agreement that provided "Anything related to the proffer cannot and will not be used against [the defendant] in any Government case-in-chief. . . [T]he government is completely free to pursue any and all investigative leads derived in any way from the proffer." These two sentences are inconsistent, because the "related to" language in the first sentence suggests a Kastigar-like derivative use immunity, while the second sentence reflects a standard "use immunity" proffer agreement that would allow the government to introduce evidence derived from the debriefing. The Eleventh Circuit concluded that the proffer agreement in this case must be interpreted as a Kastigar use and derivative use immunity agreement and the matter was remanded to the district court for a full evidentiary hearing on whether the government's case was built entirely independent of any information obtained, or derived from, the immunized cooperation of the defendant.

***United States v. Harper***, 643 F.3d 135 (5th Cir. 2011) The defendant entered into a plea agreement that included a U.S.S.G. § 1B1.8 use immunity provision that barred the government from using his debriefing statements at sentencing. The PSR calculated the drug quantity at 18 kilograms of crack cocaine. The defendant objected, claiming that the information was unreliable. The government responded, stating the information was accurate and was consistent with the defendant's debriefing. The defendant objected to the government's argument, claiming a violation of the plea agreement. At sentencing, the court heard testimony from different witnesses that the quantity involved was 18 kilograms of crack and there was no evidence of the defendant's debriefing that was introduced. The defendant maintained that the government's written response to the defendant's objections constituted a violation of the immunity agreement, notwithstanding the fact that no evidence of the debriefing was introduced at the sentencing hearing. The Fifth Circuit agreed, reversed the judgment of the trial court, and remanded for sentencing before a new judge. The Fifth Circuit held that the defendant's insistence that the information in the PSR was unreliable was not a "false statement" that justified breaching the immunity agreement.

***United States v. Slough***, 641 F.3d 544 (D. C. Cir. 2011) This is the Blackwater case involving the statements of various members of the Blackwater team who were involved in numerous civilian deaths in Iraq. The defendants made statements that were covered by Garrity v. New Jersey, 385 U.S. 493 (1967), and claimed that their indictments were, in fact, tainted by those statements. A Kastigar hearing was held, and the district court agreed. See United States v. North, 920 F.2d 940 (D.C. Cir. 1990). The D. C. Circuit reverses: for the most part, the court criticized the lower court's methodology and remanded for additional fact-finding. But the appellate court also held that it is not a Kastigar violation if all that is shown is that the prosecutor was "motivated" to proceed based on the immunized statement. "Use" of an immunized statement requires more than simply motivation to continue.

***United States v. Oluwanisola***, 605 F.3d 124 (2d Cir. 2010) The defendant signed a proffer agreement that provided that the government could introduce the defendant's statements as substantive evidence to rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf the defendant at any stage of the criminal prosecution. The defense counsel, in opening statement, suggested that the government would fail to prove certain elements of the offense. During cross-examination of a witness, the defense attorney questioned the witness about certain dates he made observations. The district court held that both of these events triggered the waiver provision. The Second Circuit disagreed. Simply challenging the sufficiency of the evidence in general, or questioning a witness about certain dates, did not allow the government to introduce the defendant's statements that were subject to the proffer agreement. See also United States v. Barrow, 400 F.3d 109 (2d Cir. 2005).

***United States v. Al-Esawi***, 560 F.3d 888 (8th Cir. 2009) The defendant signed a proffer agreement and provided a statement to the government. Settlement discussions were not successful, and he proceeded to trial. The agreement stated that the defendant's statements could be used at trial if he provided testimony that contradicted his statements, or if the defense presented evidence that contradicted his statements. The prosecutor, however, introduced the statements in its case-in-chief. This was error. The statements were not admissible until after the defendant offered inconsistent evidence.

***United States v. Ponds***, 454 F.3d 313 (D.C. Cir. 2006) The grand jury was investigating an attorney in connection with his receipt of attorney's fees from a particular client – specifically, his receipt of a car as a fee. A grand jury subpoena was issued, seeking any and all documents relating to the receipt of the car, documents relating to the fees paid by that client, documents relating to the client's sister, documents relating to any other cars provided to the attorney by the client, and any documents relating to the client's sister and mother. The attorney sought and received "act of production" immunity. Nevertheless, he was indicted. The D.C. Circuit concluded that the trial court did not conduct a sufficiently vigorous Kastigar hearing. The trial court concluded that Fisher controlled, rather than Hubbell, because the government obtained only pre-existing documents in defined categories. The D.C. Circuit disagreed, holding that the documents were sufficiently broad that they came within the Hubbell decision that bars the use of documents that are authenticated and categorized by the immunized target.

***United States v. Farmer***, 543 F.3d 363 (7th Cir. 2008) The defendant's U.S.S.G. § 1B1.8 proffer agreement provided that any information he provided during his proffer agreement debriefing would not be used to enhance his guideline level. Though there were inconsistent paragraphs in the proffer agreement (e.g., anything he said could be furnished to the probation department), the § 1B1.8 provision barred the government from using the information to set the drug quantity base offense level.

***United States v. Copeland***, 381 F.3d 1101 (11th Cir. 2004) The defendant signed a plea agreement that obligated the government not to bring any additional charges based on information that he provided to the government. Thereafter, the defendant was charged with firearms offenses that significantly increased his sentence. He challenged the firearms charges on the basis that the parties intended that conduct to be covered by the plea agreement. The government disputed this contention.

The Eleventh Circuit held that plea agreements must be viewed against the background of the negotiations and should not be interpreted to directly contradict an oral understanding. The court must also consider whether the government's actions are inconsistent with what the defendant reasonably understood when he entered his guilty plea. In this case, there was ambiguity in the plea agreement, because it was not clear whether the defendant had to have already provided the information (that was considered immunized) or whether he could provide the information after the plea agreement was signed. The opinion also discusses the concept that a plea agreement that envisions being debriefed creates an obligation on the part of the government to actually conduct a debriefing. See United States v. Ringling, 988 F.2d 504 (4th Cir. 1993) and United States v. Laday, 56 F.3d 24 (5th Cir. 1995). Ultimately, the court remanded the case to the lower court for further inquiry into the defendant's reasonable belief at the time he signed the plea agreement.

***Taylor v. Singletary***, 148 F.3d 1276 (11th Cir. 1998) Though an informal grant of immunity is fully enforceable, if the federal government simply agrees not to use a defendant's incriminating statement against him, this will not bar a state from using this information if the testimony was not, in fact, compelled. In other words, to ensure that a witness's statements are not used against him, the witness's statements must either be compelled and immunized, or the agreement must explicitly bind all sovereigns.

***United States v. Castaneda***, 162 F.3d 832 (5th Cir. 1998) The defendant entered into an oral transactional immunity agreement that obligated him to "tell everything he knew" about corrupt practices connected with DUI prosecutions in Brownsville, Texas. The government later indicted the defendant, contending that he did not fulfill his obligation. The Fifth Circuit reversed the conviction: the government failed to prove by a preponderance of the evidence that the defendant materially breached. A breach is not material unless the non-breaching party is deprived of the benefit of the bargain. In this case, the defendant provided considerable information about the corruption scheme. Though the defendant omitted to tell the government certain things, the government received the benefit of its bargain, and the relatively insignificant omissions were not sufficient to constitute a breach of the agreement.

***United States v. Lopez***, 219 F.3d 343 (4th Cir. 2000) The defendant entered into a proffer agreement with the government but never consummated the deal and eventually went to trial. At sentencing, the government used the amounts of drugs he admitted having sold in calculating his sentence. However, none of the conditions precedent to using the information he provided occurred. Therefore, using the information he provided subject to the proffer agreement was improper.

***United States v. Conway***, 81 F.3d 15 (1st Cir. 1996) Pursuant to U.S.S.G. §1B1.8, the defendant agreed to provide information to the government in exchange for which the government agreed not to use this information to increase the sentence. The court, however, considered this information in deciding not to grant a downward departure pursuant to §5K1.1. This violated the terms of the immunity agreement as explained to the defendant during the initial plea colloquy.

***United States v. Pelletier***, 898 F.2d 297 (2d Cir. 1990) The government violated its agreement not to use the defendant's immunized grand jury testimony. The immunized testimony was used at a subsequent grand jury proceeding which indicted the defendant and later was used at the defendant's trial.

***United States v. Harris***, 973 F.2d 333 (4th Cir. 1992) The immunity conferred by §6002 prevents the government from even altering its investigatory strategy as a result of the immunized statement. Even focusing on a new witness is barred. The government's mere representations that there was an independent, non-tainted source for the information, is alone not sufficient. The government failed to make the necessary Kastigar showing in this case.

***United States v. Palumbo,*** 897 F.2d 245 (7th Cir. 1990) Informal use and derivative use immunity grants are fully enforceable. In this case, the government failed to satisfy its Kastigar burden of proving that the indictment of the defendant was based on independent evidence from his immunized debriefing. Though the government had ample evidence, apart from the proffer, demonstrating that the defendant was involved in operations relating to the marijuana distribution scheme, the evidence was not so clear that the defendant was knowingly in the marijuana operation. That is, the prior information known to the police was that the defendant leased certain docks which were used to off-load marijuana. There was no knowledge, apart from the defendant's proffer, that he knew the dock was to be used to off-load marijuana.

***United States v. Abanatha***, 999 F.2d 1246 (8th Cir. 1993) A pre-sentence report may not include information which was obtained from the defendant as part of an immunized statement. The Fifth Amendment applies to sentencing and therefore, an immunized statement may not be used against the defendant.

***United States v. Garrett***, 797 F.2d 656 (8th Cir. 1986) The defendant testified before a grand jury under a grant of immunity. That same grand jury ultimately indicted the defendant. Though the defendant claims that the same grand jury may never indict a defendant who has appeared under a grant of immunity, the Eighth Circuit disagrees, holding that the trial court must conduct an evidentiary hearing to determine whether the indictment rests on evidence totally apart from the immunized testimony.

***United States v. Young***, 86 F.3d 944 (9th Cir. 1996) Generally, a criminal defendant is not entitled to compel the government to grant immunity to a witness. In order to fall under an exception to this rule, defendant must show that: (1) the testimony was relevant; (2) the government distorted the judicial fact-finding process by denying immunity. In this case, a witness was prepared to testify for the defense (if immunized) that he overheard a government witness state that he was going to offer false testimony to inculpate the defendant.

***United States v. Westerdahl***, 945 F.2d 1083 (9th Cir. 1991) Though the government cannot be forced to confer immunity on a defense witness, the failure to do so can, in certain circumstances, amount to prosecutorial misconduct. This would be the case where the failure to do so intentionally distorts the fact-finding process.

***United States v. Plummer***, 941 F.2d 799 (9th Cir. 1991) In an informal letter, the government offered the defendant an opportunity to be interviewed by government agents. There was no explicit statement regarding immunity in the letter. The letter simply said that any statements by the defendant "would not be used in any subsequent prosecution" of the defendant. The trial court held that direct use immunity was implicitly granted by the letter. The appellate court decided that direct and indirect (derivative) use immunity was implicitly granted by the letter.

***United States v. Holloway***, 74 F.3d 249 (11th Cir. 1996) The two defendants in this case were previously claimants in a civil forfeiture case. When they appeared to be deposed, they were confronted not only by the AUSA, but also a criminal investigator from Customs. The claimants' attorney refused to proceed, commenting that he would not let his clients say something that could be used against them. The civil forfeiture AUSA responded, "We're not going anywhere criminally with this thing . . . this is a civil case and I want to take their deposition and [the agent] is only here to help me." The court held that this amounted to a grant of immunity and anything the defendants said, and any records they produced could not be used against them. Because the records and their civil deposition testimony were introduced at the grand jury, the indictment was dismissed.

***United States v. Schmidgall***, 25 F.3d 1523 (11th Cir. 1994) The defendant gave an immunized statement to several investigators. One of the investigators' notes were reviewed briefly by another agent. The latter agent eventually became the lead case agent in the defendant's prosecution. The government failed to show that the investigator who briefly reviewed the notes of the immunized debriefing did not use that information in framing questions to other witnesses in his investigation of the defendant. The investigator could show that all the information which he presented to the grand jury was derived from the interview of other witnesses. But the interviews of these other witnesses may have been influenced by the immunized statements of the defendant. Also, the government failed to prove that the investigator's conversations with other agents – including agents who participated in the initial immunized debriefing – did not involve tainted information.

***United States v. Hampton***, 775 F.2d 1479 (11th Cir. 1985) The government had the burden of establishing that all of the evidence presented to the grand jury and ultimately all of the evidence to be utilized at trial was derived from legitimate, independent sources, as opposed to the state immunized testimony of the defendant. Mere denials by the prosecutor and other government agents are generally insufficient to meet the government's burden, even if made in good faith. Neither speculation nor conclusory denials of use or derivative use by government officials will substitute for the affirmative showing of an independent source required for each and every item of evidence presented to the indicting grand jury. "A previously immunized defendant is not dependent for the preservation of his rights upon the integrity and good faith of prosecuting authorities." Moreover, the government's burden is not limited to such "negation of taint;" rather, the government must go further and affirmatively prove legitimate independent sources for its evidence and affirmatively establish that none of the evidence presented to the grand jury was derived directly or indirectly from the immunized testimony. Also, where the testimony of an immunized witness, or the fruits of that testimony, enable the government to build a case against his co-conspirator, who consequently strikes a plea bargain with prosecutors and agrees to testify against the immunized witness, the testimony of the co-conspirator must be deemed to have been indirectly derived from the testimony of the immunized witness in violation of Kastigar. See United States v. Kurzer, 422 F.Supp. 487 (S.D.N.Y. 1976).

***United States v. Poindexter***, 951 F.2d 369 (D.C. Cir. 1991) Poindexter's immunized testimony was "used" by Oliver North to refresh his recollection when he testified at Poindexter's trial. North testified that he did not know what he remembered from the event itself, as opposed to what he remembered simply by having his recollection refreshed by Poindexter's Congressional testimony. Such "use" of the immunized testimony was improper.

***United States v. North***, 920 F.2d 940 (D.C. Cir. 1990) Oliver North's conviction was potentially tainted by the use of his immunized testimony before the Iran-Contra Committee of Congress. The trial court must convene a "line-by-line" and "item-by-item" inquiry into whether the testimony of grand jury witnesses or trial witnesses was affected by North's testimony. The appellate court holds that witnesses may not "refresh their memories" with immunized testimony. Rehearing the case, 920 F.2d 940, the court reached the same result. The court emphasized that insulating the prosecutor from exposure does not automatically prove that immunized testimony was not used against the defendant. "Kastigar is violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of how or by whom he was exposed to that compelled testimony." The court also holds that the inquiry into the improper use of immunized testimony includes an inquiry into whether the grand jury improperly had before it immunized testimony. There is a distinction between presenting to the grand jury statements which were improperly obtained (such as a forced or un-Mirandized confession) and presenting Kastigar tainted testimony to the grand jury. In the latter case, the grand jury is considering evidence which was derived on the "promise" of the prosecutor that such use would never be made of the testimony.

***United States v. Rinaldi***, 808 F.2d 1579 (D.C. Cir. 1987) The Court of Appeals holds that in order to determine whether evidence has been obtained in violation of a grant of use immunity or whether it is derived from an independent source requires the Court to make specific findings on the independent nature of the proposed evidence.

***FIFTH AMENDMENT (Defense Witness Immunity)***

***United States v. Straub,*** 538 F.3d 1147 (9th Cir. 2008) The refusal of the government to offer immunity to the only witness who could provide testimony that would impeach the testimony of the government's immunized witness violated due process. A

prosecutor's refusal to grant use immunity to a defense witness violates the defendant's right to a fair trial when the witness's testimony would have been relevant and the prosecution refused to grant the witness use immunity with the deliberate intention of distorting the fact-finding process. The defendant can satisfy the second showing if he can show that the government caused the witness to invoke his Fifth Amendment right or by proving that the selective denial of immunity had the effect of distorting the fact-finding process. The Ninth Circuit emphasized that the effect, and not necessarily the intent of the prosecution in refusing to grant immunity to the witness, is the proper focus. The defendant made a sufficient showing in this case. See also United States v. Wilkes, 662 F.3d 524 (9th Cir. 2011) (remanding case to trial court to apply the Straub analysis).

***United States v. Quinn***, 728 F.3d 243 (3rd Cir. 2013) Over thirty years ago, the Third Circuit had held that in limited circumstances, the trial court could grant immunity to a defense witness if the testimony of the witness was "clearly exculpatory and essential to the defense case and ... the government has no strong interest in withholding use immunity.

***Government of the Virgin Islands v. Smith***, 615 F.2d 964 (3rd Cir 1980). In this en banc decision, the Third Circuit overruled Smith, but held that if the government refuses to immunize a defense witness in a situation where the testimony of that witness is clearly exculpatory and essential testimony and there is no countervailing reason to refuse to immunize that witness, the trial court may decide to dismiss the prosecution on the basis of prosecutorial misconduct, a due process violation.

***FIFTH AMENDMENT (Foregone Conclusion Doctrine)***

***United States v. Greenfield***, 831 F.3d 106 (2d Cir. 2016) The IRS issued a summons to the defendant seeking all financial accounts pertaining to his ownership and management of offshore entities that he controlled. The defendant claimed privilege based on the act of production doctrine. The IRS claimed that the foregone conclusion doctrine applied, because the existence and authenticity of the documents it sought were not unknown and therefore, the act of production privilege did not apply. Fisher v. United States, 425 U.S. 391 (1976). The Second Circuit agreed with the defense and upheld his assertion of the Fifth Amendment privilege. Excellent discussion of Fisher, Hubbell, and the foregone conclusion doctrine.

***FIFTH AMENDMENT (Required Records Doctrine)***

***In re Grand Jury Subpoena***, 696 F.3d 428 (5th Cir. 2012) A subpoena that required the production of any records of a foreign bank account – records were required to be kept by Treasury Department regulations – fell within the Required Records Exception to the Fifth Amendment.

***In re M.H.,*** 648 F.3d 1067 (9th Cir. 2011) A thorough review of the Required Records Doctrine which provides that the government may subpoena records from a person and demand compliance with the subpoena – despite a claim of self-incrimination privilege – on the basis that the person was required by law to maintain the records, such as records relating to the existence of foreign bank accounts.

## *FINGERPRINT EVIDENCE*

***United States v. Strayhorn***, 743 F.3d 917 (4th Cir. 2014) Evidence that a defendant's fingerprint was on a movable item located at the crime scene (in this case, duct tape), is not sufficient to conviction the defendant of perpetrating a crime at that location, unless some other evidence links the defendant to the crime, or there is proof that the fingerprints were imprinted at the time the offense was committed.

***United States v. Vargas***, 471 F.3d 255 (1st Cir. 2006) The First Circuit approves the use of fingerprint evidence following a Daubert hearing.

***United States v. Abreu***, 406 F.3d 1304 (11th Cir. 2005) The Eleventh Circuit concludes that fingerprint evidence meets the Daubert standard.

***United States v. Mitchell***, 365 F.3d 215 (3rd Cir. 2004) In a forty-page opinion, the Third Circuit evaluates the admissibility of fingerprint evidence under the Daubert standard and ultimately concludes that such evidence passes Daubert muster and was properly admitted in this case.

***FIREARMS (Armed Career Criminal Act***)

***Johnson v. United States***, 135 S. Ct. 2551 (2015) The residual clause of the Armed Career Criminal Act is unconstitutionally vague. The residual clause triggers ACCA sentencing if the defendant, convicted of being a felon in possession of a firearm has three or more previous convictions for a "violent felony," a term defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The Court, having struggled with this definition for over a decade, finally decided that it was simply too vague.

***Welch v. United States***, 136 S. Ct. 1257 (2016) Johnson, noted above, will be given full retroactive effect to cases on § 2255 review.

***Shepard v. United States***, 544 U.S. 13 (2005) In order to determine whether a defendant's prior conviction – which was obtained as a result of a guilty plea – qualifies as a predicate under the Armed Career Criminal Act, the sentencing court is limited to reviewing the sentencing documents and the plea colloquy. The court may not also consider police reports to determine whether a prior state conviction for burglary. This holding is essentially the same as Taylor v. United States, 495 U.S. 575 (1990), but applies that holding to cases involving prior guilty plea convictions.

***Descamps v. United States***, 133 S. Ct. 2276 (2013) If a statute contains alternative ways of committing an offense, then the "modified categorical approach" allows the court to examine a certain limited number of sources to determine which alternative

means of committing the offense was involved in the prior offense. But if the statute of conviction simply omits an element that would otherwise qualify the offense as a violent felony, then the modified categorical approach does not apply, even if the government could prove that the actual conduct of the defendant in the prior offense would qualify as a violent felony.

***Mathis v. United States***, --- S. Ct. ---- (2016) If a state statute provides alternative means for committing one element of a crime, and one of the alternative means would not qualify as a violent felony, then that offense may not be used as a predicate offense and the government may not rely on Shepard documents to prove that the offense did not involve the non-violent felony alternative. In other words, the state offense is categorically not eligible as a predicate. In this case, the state statute provided that the offense of burglary involved breaking and entering into a structure and then defined a structure to include a watercraft or a motor vehicle. That statute was not subject to the modified categorical approach, because the "watercraft" and "motor vehicle" were not separate elements but were different factual means by which the "structure" element could be satisfied.

***Johnson v. United States***, 130 S. Ct. 1265 (2010) Battery by touching is not a violent felony for purposes of the Armed Career Criminal Act.

***United States v. King***, 853 F.3d 267 (6th Cir. 2017) This is a helpful case on the topic of how to determine if prior offenses were separate for purposes of determining if the defendant has sufficient predicate felonies. The court of appeals in this case held that the information presented by the government was not sufficient to prove that the priors were separate.

***United States v. Jenkins,*** 849 F.3d 390 (7th Cir. 2017) Kidnapping (18 USC § 1201(a)) is not a crime of violence for purposes of § 924(c). Kidnapping does not have "force" as an essential element of the offense.

***United States v. Esprit***, 841 F.3d 1235 (11th Cir. 2016) The Florida burglary statute is indivisible, because a jury is not required to reveal what "structure" (if any), the defendant entered. The statute also defines the crime of burglary as entering the curtilage of a house. Thus, this indivisible statute is not generic burglary and is not divisible, so a conviction for Florida burglary may never serve as a predicate for an ACCA enhanced sentence.

***United States v. McCloud***, 818 F.3d 591 (11th Cir. 2016) The information that was available to the sentencing judge – Shepard approved documents – did not establish that the defendant's three prior armed robberies were committed on separate occasions and therefore the defendant could not be sentenced as an Armed Career Criminal.

***United States v. Braun***, 801 F.3d 1301 (11th Cir. 2015) In this post-Johnson decision, the Eleventh Circuit holds that the Florida crimes of battery against a pregnant woman and battery against a police officer are not categorically crimes of violence under the elements clause. Though the crimes are divisible (Descamps), the Shepard approved documents in the defendant's cases did not establish that his offense was committed under the violent crime prong of the state offenses. Brown v. Rios, 696 F.3d 638 (7th Cir. 2012) The Illinois crimes of compelling a person to become a prostitute and committing a felony while armed, are not crimes of violence under the ACCA.

***Jones v. United States***, 689 F.3d 621 (6th Cir. 2012) Reckless homicide under Kentucky law is not a crime of violence.

***United States v. Farrell***, 672 F.3d 27 (1st Cir. 2012) In 1980, the defendant was convicted of "breaking and entering" in Massachusetts. Though it was not entirely clear what state statute was the basis for the conviction, the First Circuit held that the government failed to prove that it was a qualifying ACCA predicate offense.

***United States v. Owens***, 672 F.3d 966 (11th Cir. 2012) Second degree rape and second-degree sodomy under Alabama law are not violent felonies. Neither crime requires the use of force (both crimes are the equivalent of statutory rape which can be entirely consensual – as a practical, even if not legal, matter – and neither offense has an element of force in the statutory elements.

***United States v. Harris***, 608 F.3d 1222 (11th Cir. 2010) A Florida conviction for sexual battery of child under the age of sixteen does not constitute a violent felony.

***United States v. Alston***, 611 F.3d 219 (4th Cir. 2010) Defendant's prior conviction under Maryland law for second degree assault did not qualify as a violent felony. Though the facts proffered by the prosecutor at the plea colloquy satisfied the Johnson standard, the defendant did not agree to those facts as part of his Alford plea and there was no other basis to conclude that the prior offense was a violent felony.

***United States v. Furqueron***, 605 F.3d 612 (8th Cir. 2010) The Minnesota crime of fleeing a peace officer in a motor vehicle is not a crime of violence.

***United States v. McGill***, 618 F.3d 1273 (11th Cir. 2010) Possession of a sawed-off shotgun is not an offense that triggers the Armed Career Criminal Act.

***United States v. Johnson***, 601 F.3d 869 (8th Cir. 2010) A Minnesota conviction for fleeing a police officer in a motor vehicle is not a "violent felony" under the Armed Career Criminal Act.

***United States v. Tucker***, 603 F.3d 260 (4th Cir. 2010) The record did not suffice to prove that defendant's prior offenses were committed on separate occasions.

***United States v. Bethea***, 603 F.3d 254 (4th Cir. 2010) A South Carolina conviction or escape does not qualify as a violent felony.

***United States v. Sneed***, 600 F.3d 1326 (11th Cir. 2010) In order to determine if the defendant has three prior felony convictions, the sentencing court may not rely on police reports to determine if the three prior felonies were "separate." Under Shepard v.

United States, 544 U.S. 13 (2005), the court may not rely on police reports to determine either the nature of the prior offenses, or the "separateness" of prior offenses.

***United States v. Whitson***, 597 F.3d 1218 (11th Cir. 2010) A prior conviction for a conspiracy offense that does not require the commission of an overt act does not qualify as a violent felony that will trigger career offender sentencing. Under the definition of "violent felony" set forth in Begay v. United States, 553 U.S. 137 (2008) (construing the identical provision in the Armed Career Criminal Act) – an offense must require, as an element of the offense, purposeful, violent, and aggressive conduct – a conspiracy, without the commission of an overt act does not qualify.

**United States v. Goodpasture**, 595 F.3d 670 (7th Cir. 2010) A California conviction for lewd or lascivious act involving a person under the age of 14 does not qualify as a violent felony, because the state law does not require that the child was harmed in any way, or that force or fraud was used in the commission of the crime.

***United States v. Rivers***, 595 F.3d 558 (4th Cir. 2010) A South Carolina conviction for failure to stop for a blue light (i.e., a law enforcement officer attempting to stop the defendant on the highway) does not qualify as a violent felony.

***United States v. Christensen***, 559 F.3d 1092 (9th Cir. 2009) A prior conviction in the state of Washington for the offense of statutory rape is not a categorically a violent felony.

***United States v. Gordon***, 557 F.3d 623 (8th Cir. 2009) A prior conviction for first degree child endangerment did not qualify as a violent felony.

***United States v. Esparza-Herrera***, 557 F.3d 1019 (9th Cir. 2009) A conviction under Arizona law for aggravated assault did not qualify as a crime of violence.

***United States v. Walker***, 555 F.3d 716 (8th Cir. 2009) A prior conviction under Minnesota law for auto theft did not qualify as a violent felony under the Armed Career Criminal Act.

***United States v. Thornton***, 554 F.3d 443 (4th Cir. 2009) A conviction for statutory rape under Virginia law does not qualify as a violent felony. The state law expressly provides that the offense involves no force. The fact that sexually transmitted diseases and other injuries may result from the commission of this offense, this is not the type of inquiry that Begay permits in deciding what qualifies as a violent felony.

***United States v. Smith***, 544 F.3d 781 (7th Cir. 2008) A prior conviction in Indiana for criminal recklessness were not violent felonies for purposes of the Armed Career Criminal Act.

***United States v. Rosa***, 507 F.3d 142 (2nd Cir. 2007) The information properly considered by the district court did not support the conclusion that the defendant's prior juvenile "conviction" for robbery in the first degree qualified as a violent felony.

***United States v. Amos***, 501 F.3d 524(6th Cir. 2007) Possession of a sawed-off shotgun is not a crime of violence that may serve as a predicate for an Armed Career Criminal Act sentence. Six other Circuits have reached a contrary conclusion on this question.

***United States v. Flores***, 477 F.3d 431 (6th Cir. 2007) Carrying a concealed weapon is not a predicate crime of violence of purposes of the Armed Career Criminal Act.

***United States v. Fuller***, 453 F.3d 274 (5th Cir. 2006) The government failed to prove that two burglaries were separate offenses. The defendant testified that he and a friend simultaneously entered two different dwellings, that resulted in two felony burglary convictions. The record did not disestablish this contention and an Armed Career Criminal Act enhancement should not have been applied.

***United States v. Pressley***, 359 F.3d 347 (4th Cir. 2004) In order to qualify as a "prior conviction" under the Armed Career Criminal Act, the previous conviction must have occurred prior to the commission of the instant gun offense. The Fourth Circuit held that the plain text of 18 U.S.C. § 924(e)(1) dictated this result. See also United States v. Richardson, 166 F.3d 1360 (11th Cir. 1999).

***United States v. Melton***, 344 F.3d 1021 (9th Cir. 2003) The defendant's conviction for burglary in Virginia did not qualify as a categorical ACCA predicate offense. No additional documentation of the nature of the offense was offered to the district court to determine whether the offense qualified under the standard set forth in Taylor v. United States, 495 U.S. 575 (1990).

***FIREARMS (Explosives)***

***United States v. Graham***, 691 F.3d 153 (2d Cir. 2012) 18 U.S.C. § 844(h)(i) makes it a crime to use an explosive to commit a felony. The Second Circuit held that a .9-millimeter cartridge discharged from a semiautomatic pistol does not constitute an explosive.

***United States v. Hull***, 456 F.3d 133 (3rd Cir. 2006) 18 U.S.C. § 842(p)(2)(A) makes it a crime to distribute information about explosives with the intent that the explosives would be used in a crime of violence. The Third Circuit holds that it is not a violation of this section to simply teach someone how to make a pipe bomb, since the mere fact of making or possessing a pipe bomb is not a "crime of violence." The term "crime of violence" is defined at 18 U.S.C. § 16 and was construed in Leocal v. Ashcroft, 543 U.S. 1 (2004). The mere possession of a pipe bomb does not involve the use of force. of being a felon in possession of a firearm. The Supreme Court disagreed. The restriction on the defendant's use of handguns "triggered" the "unless" clause in §921(a)(20) – "unless such restoration of civil rights expressly provides that the person may not possess firearms." Thus, he could be convicted of being a felon in possession of a firearm, even though the firearm he possessed was a rifle.

***United States v. Hayes***, 555 U.S. 1079 (1999) It is not necessary that the domestic relationship between the defendant and the victim be an essential element of an offense under state law in order to qualify under 18 U.S.C. § 922(g)(9). That relationship must be proven at trial, but is not required to be an essential element of the offense.

***United States v. Giannukos***, 908 F.3d 649 (10th Cir. 2018) The defendant was charged with possession of a firearm by a convicted felon. The gun was found in a bedroom that he shared with his girlfriend. The trial court instructed the jury that constructive possession can be proven as follows: "A person who, although not in actual possession, knowingly has the power at a given time to exercise dominion or control over an object, either directly or through another person or persons, is then in constructive possession of it.: This instruction omitted the critical element that the defendant must actually "intend" to exercise control over the weapon. This was reversible error in this case. See also United States v. Benford, 875 F.3d 1007 (10th Cir. 2017).

***United States v. Ramos***, 852 F.3d 747 (8th Cir. 2017) The government executed a search warrant at an apartment where the defendant lived. There were two bedrooms in the apartment. In both bedrooms, there were men's clothes in the closet. In one of the bedrooms there was also women's clothes in the closet. In the bedroom that had the closet with both men's and women's clothes, under the mattress there was a pink vibrator and a gun. This evidence was not sufficient to convict the man of possession of the gun. While a conviction for possession may be based on joint possession, there must be proof that the defendant knows the gun is present. Here, the proof did not establish that the defendant slept in that room, or that he was aware the gun was present.

***United States v. Pauler***, 857 F.3d 1073 (10th Cir. 2017) A person convicted of a municipal domestic abuse case is not subject to § 922(g)(9)'s gun possession prohibition. Only state cases trigger the prohibition. United States v. Simpson, 845 F.3d 1039 (10th Cir. 2017) In the Tenth Circuit, constructive possession requires not only proof that the defendant knew about the guns (or drugs), but also that the defendant intended to exercise control over the items. The failure to include the requirement of intent amounted to plain error for some of the firearm counts of conviction in this case.

***United States v. Ways***, 832 F.3d 887 (8th Cir. 2016) Ammunition found in the basement of a home where the defendant's daughter and girlfriend lived was not sufficiently shown to have been possessed by the defendant and his conviction for possession of the ammunition by a convicted felon was reversed. Though the defendant was obviously connected to the house and was present at different times, this evidence was insufficient to support the conviction.

***FIREARMS (Possession by Prohibited Person)*** Note: 18 U.S.C. § 922(g) outlaws the possession of a firearm by numerous categories of "prohibited persons," including convicted felons, illegal aliens, drug users, and people convicted of domestic violence misdemeanors. This section deals with convicted felons (and domestic violence offenders) and general principles of possession, multiplicity, and other frequently litigated topics under § 922(g). Issues relating to illegal aliens and drug users are addressed in the next sections.

***Dixon v. United States***, 548 U.S. 1 (2006) Assuming that duress is a defense to possession of a firearm by a convicted felon, or by a person under indictment, it is not unconstitutional to place the burden of proving duress on the defendant.

***United States v. Castleman***, 134 S. Ct. 1405 (2014) 18 U.S.C. § 922(g)(9), applies to misdemeanor offenses of domestic violence that require an element of force. However, the force need include nothing more than an offensive touching and does not require injury, or violent conduct.

***Small v. United States***, 544 U.S. 385 (2005) A felony conviction from a foreign country may not serve as the predicate for a conviction for possession by a convicted felon.

***Old Chief v. United States***, 519 U.S. 172 (1997) In a prosecution for being a felon in possession of a firearm, though the nature of the defendant's prior offense is relevant pursuant to the definition of relevance under Rule 401, the defendant's willingness to stipulate that he was a convicted felon obviates the need for this evidence and the trial court, pursuant to Rule 403, should accept the stipulation and bar evidence relating to the nature of the prior offense.

***Beecham v. United States***, 511 U.S. 368 (1994) If a person has been convicted of a federal offense, in order to have his civil rights restored for purposes of Section 921(a)(20), it is not sufficient that the state in which the crime was committed restore the defendant's rights. Rather, the civil rights must have been restored by the federal government.

***Caron v. United States***, 118 S. Ct. 2007 (1998) In order to be found guilty of being a felon in possession of a firearm – 18 U.S.C. §922(g)(1) – the defendant must have been previously convicted of an offense carrying a sentence of more than one year imprisonment. However, if the predicate conviction was from a state court, then the defendant may defend on the basis that, under that state's law, he has had his civil rights restored, unless such restoration of civil rights expressly provides that the person may not possess firearms. 18 U.S.C. §921(a)(20). In this case, the defendant's right to possess firearms had been partially restored: he was allowed to possess rifles, but not handguns. The trial court held that this still was a restoration of rights, and that the defendant could not be convicted of being a felon in possession of a firearm. The Supreme Court disagreed. The restriction on the defendant's use of handguns "triggered" the "unless" clause in §921(a)(20) – "unless such restoration of civil rights expressly provides that the person may not possess firearms." Thus, he could be convicted of being a felon in possession of a firearm, even though the firearm he possessed was a rifle.

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***United States v. Pauler***, 857 F.3d 1073 (10th Cir. 2017) A person convicted of a municipal domestic abuse case is not subject to § 922(g)(9)’s gun possession prohibition. Only state cases trigger the prohibition.

***United States v. Simpson***, 845 F.3d 1039 (10th Cir. 2017) In the Tenth Circuit, constructive possession requires not only proof that the defendant knew about the guns (or drugs), but also that the defendant intended to exercise control over the items. The failure to include the requirement of intent amounted to plain error for some of the firearm counts of conviction in this case.

***United States v. Ways***, 832 F.3d 887 (8th Cir. 2016) Ammunition found in the basement of a home where the defendant’s daughter and girlfriend lived was not sufficiently shown to have been possessed by the defendant and his conviction for possession of the ammunition by a convicted felon was reversed. Though the defendant was obviously connected to the house and was present at different times, this evidence was insufficient to support the conviction.

***United States v. Ford***, 821 F.3d 63 (1st Cir. 2016) If a defendant is charged with aiding and abetting another person’s illegal possession of a firearm based on the other person’s felony record, the government must prove that the defendant knew the other person had a felony record, not just that she had “reason to know.” In this case, the defendant was the wife of the felon, but the trial court failed to properly instruct the jury that the government was required to prove that she knew that his prior record involved a felony conviction.

***United States v. Burleson***, 815 F.3d 170 (4th Cir. 2016) Between 1964 and 1985, the defendant had several state felony convictions. When he was paroled in 1988, his civil rights were restored to vote and serve on a jury. Pursuant to state law, in 1993, his rights under state law to possess a gun were restored. In 1995, the state passed a law that retroactively deprived the defendant of the right to possess a firearm based on his prior state convictions. The Fourth Circuit held that the defendant could not be prosecuted for possessing a firearm as a convicted felon under federal law. The federal statute, 18 U.S.C. § 921(a)(20), allows a previously convicted felon to possess a firearm, if, under state law, his civil rights were restored, including the right to possess a firearm. That occurred in 1993. The fact that the state later “reneged” did not alter this result.

***United States v. Carter***, 752 F.3d 8 (1st Cir. 2014) This case considers whether a prior conviction of simple assault under Maine law qualifies as a prior misdemeanor offense of domestic violence according to 18 U.S.C. §922(g)(9). In particular, because the state assault offense can be accomplished through reckless conduct, the court considered whether a “reckless” assault can qualify as a prior crime that involves the “use of force.” The First Circuit then considered what documents associated with the prior offense may be considered in deciding whether the prior crime was committed through the use of force, or recklessly. A remand was necessary to further develop the record.

***United States v. Bloch***, 718 F.3d 638 (7th Cir. 2013) The simultaneous possession of more than one firearm only supports one count of possession of a firearm by a convicted felon, even if more than one firearm is possessed and even if there is more than one prior conviction, or reason that the defendant is prohibited from possessing the firearm. Charging the defendant with two counts under 18 U.S.C. § 922(g) was multiplicitous.

***United States v. Benjamin***, 711 F.3d 371 (3rd Cir. 2013) The defendant was twice found in possession of a firearm. He was a convicted felon. He was charged (and convicted) of two counts of possession of a firearm by a convicted felon The Third Circuit, joining the decisions of various other Circuits, held that possession of a firearm is a continuing offense and cannot be prosecuted in several counts, unless there is proof that the possession was not continuous, including constructively.

***United States v. Griffin***, 684 F.3d 691 (7th Cir. 2012) The defendant was released from prison and went to live with his parents. His father, an avid hunter, had numerous firearms, including revolvers and shotguns in the house. While executing a search warrant that was designed to locate the defendant’s brother, the police found the guns. The defendant was convicted of possession by a convicted felon. The Seventh Circuit reversed the conviction: there was insufficient evidence that the defendant actually or constructively possessed any of the firearms in the house. The court cited decisions from numerous Circuits that require proof of a substantial connection between a defendant and the contraband when the proof is limited to the defendant’s occupancy of a house that contains the contraband and others live in the same house.

***United States v. Mahin***, 668 F.3d 119 (4th Cir. 2012) A defendant may not be convicted and sentenced for the simultaneous possession of ammunition and a firearm under § 922(g)(8).

***United States v. Rehlander,*** 666 F.3d 45 (1st Cir. 2012) The law that makes is a crime for a person who has been committed to a mental institution to possess a firearm (18 U.S.C. § 922(g0(4)) does not apply to a person who was subject to a temporary involuntary emergency hospitalization attended only by an ex parte hearing.

***United States v. Sanchez***, 639 F.3d 1201 (9th Cir. 2011) A prior restraining order must explicitly must do more than simply state "no contact" in order to trigger the prohibition on possession of firearm pursuant to 18 U.S.C. § 922(g)(8). The court order must restrain the defendant from the threatened use of physical force against the intimate partner or child.

***United States v. Sistrunk***, 622 F.3d 1328 (11th Cir. 2010) The defense of entrapment is available in a case of being a felon in possession of a firearm. The fact that the offense is essentially strict liability does not contradict the notion that the government may have entrapped the defendant to commit the offense. The evidence in this case, however, was not sufficient to establish an entrapment defense.

***Gov't of Virgin Islands v. Lewis***, 620 F.3d 359 (3rd Cir. 2010) A defendant is entitled to an instruction on the defense of justification in a case involving possession of a firearm by a conviction felon if he can show an imminent threat to the life of the defendant; the defendant did not place himself in the position where his life would be endangered; the absence of reasonable legal alternative to the threat; and that the possession of the firearm did not last longer than necessary. In this case, the defendant satisfied the first three tests, but he kept the gun longer than necessary, so the trial court properly refused to instruct the jury on the law of justification.

***United States v. Coleman***, 609 F.3d 699 (5th Cir. 2010) Certain offenses do not qualify as predicate offenses under the felon in possession of a firearm statute, specifically, offenses involving antitrust violations, unfair trade practices, and "other similar offenses relating to the regulation of business practices." 18 U.S.C. § 921 (a)(20)(A). In evaluating the defendant's prior offense in this case, the trial judge viewed a § 371 conspiracy conviction as categorically not included within the definition of "similar offenses relating to the regulation of business practices." This was incorrect, when the prior offense involves a § 371 conspiracy, the focus must be on the underlying object of the conspiracy.

***United States v. Katz,*** 582 F.3d 749 (7th Cir. 2009) The evidence was insufficient to prove that the defendant was in possession (either actually, or constructively) of the firearm that he was alleged to have possessed after having been convicted of a felony.

***United States v. Dooley***, 580 F.3d 682 (8th Cir. 2009) The police found a gun in the vehicle that the defendant was driving. The defendant denied knowing the gun was in the car. The court, at the request of the government, instructed the jury that "A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a firearm, or over a vehicle in which the firearm is located, is then in constructive possession of the firearm." This was reversible error. Being in possession of the vehicle (actually, or constructively) does not automatically equate to possession of all the contents of the vehicle.

***United States v. Ricks***, 573 F.3d 198 (4th Cir. 2009) The defendant was entitled to rely on a justification defense in this § 922(g) prosecution. The defendant's roommate came home, armed with a gun, and was acting erratically. The defendant removed the gun from the roommate's possession and placed the gun out of his reach. The trial court's failure to instruct the jury on the justification defense was reversible error.

***United States v. Coleman***, 552 F.3d 853 (D.C. Cir. 2009) The defendant was charged with being a felon in possession of a firearm. He offered to stipulate that he was a felon. During voir dire, the judge read the indictment to the jury, including the portion that alleged that defendant had a prior conviction for a crime of violence, that is, robbery with a deadly weapon. Though the defendant did not object, this amounted to plain error and required setting aside the verdict.

***United States v. Tann***, 577 F.3d 533 (3rd Cir. 2009) Convictions for both possession of a firearm and possession of ammunition for that firearm violate the double jeopardy clause. See Bell v. United States, 349 U.S. 81 (1955) (transporting two women across state lines in violation of Mann Act is only one offense).

***United States v. White***, 552 F.3d 240 (2d Cir. 2009) The Second Circuit – like other Circuits – has not yet decided whether "necessity" or "fleeting possession" or "innocent possession" are defenses to a charge under § 922(g). (The court does indicate that "fleeting possession" is a recognized defense, though it can only "imagine" scenarios in which it would be a successful defense). The court reviews the body of law that has developed in other Circuits and concludes that even if there were such defenses, the defendant did not qualify in this case for an instruction on any of these defenses.

***United States v. Bailey***, 553 F.3d 940 (6th Cir. 2009) There was insufficient evidence to prove that the defendant had constructive possession of a firearm found beneath his seat in the car he was driving. Even when the prosecution relies on a theory of constructive possession, there must be proof that the defendant knew of the presence of the gun. Though he attempted to elude the police when they tried to apprehend him, this could be explained by the fact that he had drugs in his pocket and did not prove that he knew the gun was in the car.

***United States v. Hope***, 545 F.3d 293 (5th Cir. 2008) The defendant was arrested in possession of a firearm. It was determined that the same firearm had been used by the defendant the previous day to commit a robbery. There was no evidence that he ever relinquished control of the firearm. This evidence could not support two counts of possession of a firearm by a convicted felon.

***United States v. Howell***, 531 F.3d 621 (8th Cir. 2008) The defendant's prior state "third degree assault" conviction did not qualify as a "misdemeanor crime of domestic violence" because the state law did not require as an element either the use or attempted use of physical force, or the threatened use of a deadly weapon.

***United States v. Baker***, 523 F.3d 1141 (10th Cir. 2008) (McConnell, dissenting from denial of rehearing en banc) Judge McConnell makes a compelling case why "transitory possession" should be viewed as a defense to a charge of unlawfully possessing a firearm or ammunition. For example, if a convicted felon sees some ammunition on a playground full of children and he picks up the ammunition and brings it immediately to the nearest police station, his conduct should be beyond the scope of the criminal law, perhaps through the invocation of a justification defense. However, Judge McConnell's view is limited to his dissent from the denial of the defendant's petition for rehearing en banc. Apparently, only the D.C. Circuit has adopted this view.

***United States v. Mason***, 233 F.3d 619 (D.C. Cir. 2000). United States v. Hays, 526 F.3d 674 (10th Cir. 2008) A prior conviction for a domestic battery does not invoke § 922(g)(n) unless the offense requires more than a de minimums touching. There must be more than a simple rude touching in order to qualify. (Note that the Eleventh Circuit, among others, disagrees with this position. United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006)).

***United States v. Parker***, 508 F.3d 434 (7th Cir. 2007) A defendant who possesses one firearm may not be convicted of both being a felon in possession of a firearm and being a drug user in possession of a firearm. Two convictions for this one offense are multiplicitous.

***United States v. Hollis***, 506 F.3d 415 (5th Cir. 2007) A defendant may not be convicted of both being a felon in possession of a firearm and for being a fugitive in possession of a firearm. This would be multiplicitous.

***United States v. Grubbs***, 506 F.3d 434 (6th Cir. 2007) A gun was found in a house where the defendant was a transient occupant. The evidence was insufficient to find him guilty of possessing the weapon. Though another witness testified that the defendant was seen in possession of a weapon that "looked like the gun" that was found in the house, this testimony was not sufficient to sustain the conviction.

***Parker v. Renico***, 506 F.3d 444 (6th Cir. 2007) The evidence was insufficient to sustain a state court conviction of the defendant of the offense of possessing a firearm by a convicted felon. The defendant was a passenger in a car occupied by three others. Guns were found in the car after a high-speed chase, but no gun was found in the immediate proximity of the defendant.

***United States v. Baker***, 508 F.3d 1321 (10th Cir. 2007) The Tenth Circuit ultimately rejects the notion that a defendant's explanation of why he possessed a weapon is a defense to a charge of possession by a convicted felon. Absent a viable necessity defense (no legal option), a defendant's decision to possess a weapon, even if only briefly, cannot be defended on the basis that the defendant had a good explanation for possessing the weapon briefly. A dissenting opinion suggested that the law should provide for a justification defense.

***United States v. Mooney,*** 497 F.3d 397 (4th Cir. 2007) Trial counsel was ineffective in advising the defendant that he should plead guilty in this felon-in-possession case, because there was no justification defense available. The defendant seized the gun from his wife, who was threatening him, and promptly went to the police who were at his place of employment and gave them the weapon.

***United States v. Ankeny***, 502 F.3d 829 (9th Cir. 2007) The possession of several weapons by a convicted felon only amounts to one offense of possession of a weapon by a convicted felon unless the government proves that the weapons were acquired or stored at different times and places. The failure to prove this during the entry of the guilty plea required that the counts merged and all, but one count should have been dismissed.

***United States v. Nobriga***, 474 F.3d 561 (9th Cir. 2006) The defendant was charged with violating 18 U.S.C. § 921(a)(33)(A)(ii) – possession of a weapon by a person with a conviction for domestic violence. The Ninth Circuit held that the defendant's conviction for domestic violence may have involved the reckless use of force which cannot qualify as the use of force under federal law and therefore cannot serve as the predicate offense for a domestic violence misdemeanant in possession prosecution.

***United States v. Gardner***, 488 F.3d 700 (6th Cir. 2007) Though intuition might lead one to conclude that to be prosecuted as an aider and abettor, the defendant is not required to have as much of a culpable state of mind as the principal, in certain situations, just the opposite is true. Consider the offense of possession of a firearm by a convicted felon. If one is charged with being a felon in possession of a firearm, the defendant may not defend on the basis that he did not know that he was a felon. An aider and abettor, however, must be proven to have actually known that the person who he aided in the possession was a felon. See also United States v. Xavier, 2 F.3d 1281 (3d Cir. 1993).

***United States v. Groves***, 470 F.3d 311 (7th Cir. 2006) The defendant was convicted of being a felon in possession of a firearm (a shotgun). The police never recovered the shotgun, but a neighbor testified that he saw the defendant with the weapon. At trial, in order to prove that the gun had traveled in interstate commerce, the prosecutor asked the expert whether any major shotgun manufacturers were located in Indiana. There are not, and, consequently, the expert opined that if the defendant possessed a shotgun in Indiana, it had to have traveled in interstate commerce. The Seventh Circuit reversed. There was no definition of what a "major manufacturer" of shotguns was, and consequently, there was insufficient proof that the defendant's shotgun did, in fact, travel in interstate commerce.

***United States v. Johnson***, 459 F.3d 990 (9th Cir. 2006) The Ninth Circuit considers – and rejects – the concept of "innocent" and "transitory possession" defense to a charge of being a felon in possession of a firearm. The court canvasses the law around the country, noting that in at least one Circuit, the defense is available: United States v. Mason, 233 F.3d 619 (D.C. Cir. 2004).

***United States v. Chenowith***, 459 F.3d 635 (5th Cir. 2006) The defendant's restoration of civil rights under Ohio law was sufficient to restore to him the right to possess a firearm. The determination of whether a restoration of civil rights is sufficient, the court first determines whether § 921(a)(20) is satisfied (essentially all civil rights were restored); and whether the restoration order specifically exempted guns from its restoration.

***United States v. Allen***, 449 F.3d 1121 (10th Cir. 2006) Insanity is a viable defense to a charge of being a felon in possession of a firearm, even though the offense is a general intent crime.

***United States v. Simpson***, 442 F.3d 737 (9th Cir. 2006) Because the defendant had his civil rights restored and was not classified as a convicted felon under Arizona state law, he could not be convicted under § 922(g)(1).

***United States v. Richardson***, 439 F.3d 421 (8th Cir. 2006)(en banc) A defendant who satisfies more than one criterion that disqualifies him from possessing a weapon, but who only possesses one weapon, is only guilty of one offense. In this case, the defendant was a convicted felon and a drug user. Though it is a crime for a felon to possess a weapon and a crime for a drug user to possess a firearm, because he only possessed one weapon, he was only guilty of one offense.

***United States v. Weiland***, 420 F.3d 1062 (9th Cir. 2005) The trial court erred in permitting the government to introduce four prior felony convictions in this prosecution for felon in possession of a firearm. Though there was no stipulation of the defendant's status, it was prejudicial to introduce four priors, including the nature of the specific offenses.

***United States v. Jones***, 403 F.3d 604 (8th Cir. 2005) Trial counsel was ineffective in failing to challenge the indictment as multiplicitous. The defendant was charged in one count of the indictment with being a felon in possession of a firearm in August and another count of being a felon in possession of the same firearm in October. The crime, however, outlaws the continued possession of the weapon and this cannot be multiplied by however many days, or hours, the gun is possessed as a separate crime.

***United States v. Chambers***, 408 F.3d 237 (5th Cir. 2005) The indictment alleged that the defendant possessed "rounds" (i.e., bullets) that had traveled in interstate commerce. The rounds were actually manufactured in the same state where they were found in possession of the defendant. The government argued that components of the rounds had traveled in interstate commerce prior to the manufacture of the completed rounds. This amounted to an amendment of the indictment. The evidence was insufficient to support a conviction on these counts of the indictment and the conviction was reversed.

**United States v. Gunn**, 369 F.3d 1229 (11th Cir. 2004) Though the convictions of other defendants for using a gun during a violent crime and possessing a gun by a convicted felon were supported by the evidence, with respect to one defendant, though he was aware of other participants' possession of firearms, he was not in constructive possession of any gun and his conviction of possession by a convicted felon, therefore, could not be sustained. The § 924(c) counts could be sustained on the basis that a coconspirator possessed a gun during the violent crime. A felon-in-possession prosecution, however, requires proof of actual or constructive possession.

***United States v. Allen***, 383 F.3d 644 (7th Cir. 2004) Proof that is limited to offering an abstract of judgment (i.e., a prior conviction) that names a person with the same name as the defendant does not establish that the defendant has a prior felony conviction. There must be some other identifying proof that establishes that the defendant is the person with the felony conviction.

***United States v. Walters***, 359 F.3d 340 (4th Cir. 2004) A juvenile conviction is not a conviction under Virginia state law and cannot be the predicate for a felon in possession of a firearm offense.

***United States v. Gayle***, 342 F.3d 89 (2d Cir. 2003) A felony record in a foreign country does not qualify under 18 U.S.C. § 922(g)(1) as a qualifying felony conviction. Other Circuits, including the Third, Fourth and Sixth have held that foreign felony convictions do qualify.

***United States v. Jackson***, 368 F.3d 59 (2d Cir. 2004) A certified copy of a conviction of a person with the same name as the defendant is not sufficient proof, alone, to establish that the defendant is a convicted felon. The defendant did not dispute that he was the person named in the record during the evidentiary portion of the trial, but he did raise the question during the closing argument and again on appeal. The Second Circuit held that the evidence was insufficient to support his conviction.

***United States v. Rawlings***, 341 F.3d 657 (7th Cir. 2003) The defendant was the driver for a couple armed bank robbers. He was aware that they possessed guns when the other two exited the car to rob the bank, though there was no evidence that he was aware of their possession of the guns before that time. The trial court instructed the jury that possession had to be "knowing" but did not instruct the jury on the concept of constructive possession, or Pinkerton. In a decision by Judge Posner, the court held that the evidence was insufficient to prove the defendant's conviction of possession of a firearm by a convicted felon. The problem, according to Judge Posner was not the instructional error, there was simply insufficient proof that the defendant was, in fact, in either actual or constructive possession of the firearms that his co-defendants possessed. There was no evidence that he purchased the guns, gave them to the conspirators, or encouraged them to be armed. No other evidence suggested that he exercised dominion or control over the guns. With regard to Pinkerton, that concept enables a person to be convicted of an offense committed by someone else in the conspiracy, but it does not authorize the finding of specific elements of some other

offense (such as the possession of a weapon) based on a conspirator's conduct. Thus, the defendant, on a Pinkerton theory, could be found guilty of other offenses of the conspirators, but not, on that theory, of their possession of a firearm.

***United States v. Belless,*** 338 F.3d 1063 (9th Cir. 2003) 18 U.S.C. § 922(g)(9) makes it a crime to possess a firearm if one has a misdemeanor conviction involving domestic violence. The term is defined at 18 U.S.C. § 921(a)(33)(A)(ii). The prior conviction in this case did not qualify. The state statute only required the unlawful touching in a rude, insolent, or angry manner, whereas the federal statute requires that the statute involve the use or attempted use of physical force. The court noted that President Nixon's behavior when confronting Krushchev would qualify as "rude and insolent" and this did not amount to the type of behavior Congress sought to make a predicate offense (even if committed by spouses upon one another). This decision was later overruled in United States v. Castleman, 134 S. Ct. 1405 (2014).

***United States v. Daniel***, 134 F.3d 1259 (6th Cir. 1998) The trial court erred, but it was harmless error, in permitting the government to introduce evidence relating to the nature of the defendant's prior conviction, despite the defendant's willingness to stipulate that he was a convicted felon. The court also erred in failing to strike the allegations of the prior specific crimes from the indictment.

***United States v. Cunningham***, 133 F.3d 1070 (8th Cir. 1998) The trial court erred when it permitted the government to offer evidence of the nature of three prior felonies after he had offered to stipulate to his status as a felon for purposes of the felon-in-possession-of-a-firearm count. The error, however, was harmless.

***United States v. Gonzalez***, 122 F.3d 1383 (11th Cir. 1997) The defendant was indicted in Puerto Rico on drug charges and was later found in possession of a firearm when arrested in Florida. There was no evidence presented by the government that the defendant committed the indicted offense while physically in Puerto Rico, or that he fled Puerto Rico. The evidence established nothing more than that the defendant had a pending charge in Puerto Rico, and he was located in Florida. This does not establish that he was a fugitive. His conviction under 18 U.S.C. § 922(g)(2) was reversed.

***United States v. Dunford***, 148 F.3d 385 (4th Cir. 1998) A person who is disqualified from possessing a firearm by more than one subsection of 18 U.S.C. § 922(g) (e.g., felon, drug user, fugitive, illegal alien), may only be convicted of one offense for each possession of a weapon. Moreover, a person who simultaneously possessed more than one gun, as well as ammunition, may only be prosecuted for one count of possessing a firearm by a convicted felon (and drug user). This rule applies unless the government proves that the weapons were stored in different places or acquired at different times.

***FIREARMS (Possession By Illegal Alien)***

***United States v. Elrawy,*** 448 F.3d 309 (5th Cir. 2006) The evidence did not support the defendant's conviction of being an alien admitted under a nonimmigrant visa who possessed a firearm. 18 U.S.C. § 922(g)(5)(B). The defendant, at the time he possessed the firearm, was not admitted under a nonimmigrant visa, because the visa had expired. (He could be prosecuted, however, for being an illegal alien in possession of a firearm).

***United States v. Lucio***, 428 F.3d 519 (5th Cir. 2005) The defendant entered the county unlawfully, but had applied for adjustment of his status, during which time he was prepared to remain in the country and work. Given this status, he was not "unlawfully" in the country and could not be found guilty of violating § 922(g)(5).

***United States v. Orellana***, 405 F.3d 360 (5th Cir. 2005) 18 U.S.C. § 922(g)(5) makes it a crime for a person who is illegally or unlawfully in the United States to possess a firearm. A person who entered the country unlawfully, but who then obtained "temporary protected status" does not qualify as a person unlawfully or illegally in the country.

***United States v. Lopez-Perera***, 438 F.3d 932 (9th Cir. 2006) An illegal alien was stopped at the border and arrested for trying to enter the country illegally. He possessed a firearm. He could not be prosecuted under § 922(g)(5)(A), because he never "entered" the country.

***FIREARMS (Possession by Drug User***)

***United States v. Augustin***, 376 F.3d 135 (3rd Cir. 2004) The evidence was insufficient to convict the defendant of being a drug user in possession of a firearm, in violation of 18 U.S.C. § 922(g)(3). The evidence only established that he had smoked marijuana prior to possessing the weapon. No other evidence was introduced in connection with his drug use. At a minimum, the government must present evidence that the defendant is a regular user of drugs to obtain a conviction under this statute.

***United States v. Herrera***, 289 F.3d 311 (5th Cir. 2002) 18 U.S.C. § 922(g)(3) makes it a crime to possess a firearm if the defendant is an unlawful user of or addicted to any controlled substance. The Fifth Circuit defined "is an unlawful user" to mean a person who uses narcotics so frequently and, in such quantities, as to lose the power of self-control. In other words, an "unlawful user" is a person who is just short of addiction. The court reached this result by invoking the Rule of Lenity. This decision was reheard en banc and the conviction was affirmed because the defendant did not properly articulate his objection to the sufficiency of evidence in his Rule 29 motion. 313 F.3d 882 (5th Cir. 2002).

***FIREARMS (Miscellaneous)***

***McDonald v. Chicago,*** 130 S. Ct. 3020 (2010) The Second Amendment, which provides the right to bear arms, applies to the states through the Fourteenth Amendment (according to four Justices) and applies to the states through the Privileges and Immunities Clause (according to Justice Thomas).

***Abramski v. United States***, 134 S. Ct. 2259 (2014) Prosecuting a "straw purchaser" – someone who buys a gun for someone else, while stating on the form that the gun is being purchased for himself – is permissible. 18 U.S.C. § 922(a)(6). A prosecution is appropriate, even if the person for whom the gun is actually being purchased could have legally purchased the gun.

***United States v. Fernandez-Jorge***, 894 F.3d 36 (1st Cir. 2018) A required element of the offense of possessing a firearm in a school zone, is that the defendant knew he was in a school zone. Though the convictions of several defendants in this case were affirmed, with respect to one defendant, who did not live in the community, there insufficient evidence that he was aware of the proximity to the school. The First Circuit reversed all defendants' convictions who were prosecuted on an aiding and abetting theory, because the jury instruction did not comply with Rosemond: The instruction did not require that the aider and abettor knew the crime was to occur within a school zone.

***United States v. White***, 863 F.3d 784 (8th Cir. 2017) The Eighth Circuit holds that, pursuant to Staples, the government is required to prove that the defendant knows the characteristic of the firearm that makes it subject to the National Firearms Act.

***United States v. Montoya-Gaxiola,*** 796 F.3d 1118 (9th Cir. 2015) The defendant was charged with possession of a sawed-off shotgun. Pursuant to Staples v. United States, the government was required to prove that the defendant knew the characteristics of the firearm that brought it within the scope of the registration act. The jury instruction did not explain the proper mens rea element.

***United States v. Fries***, 725 F.3d 1286 (11th Cir. 2013) The defendant was charged with violating 18 U.S.C. §922(a)(5), which makes it a crime to sell a firearm to a person in another state unless either the seller or purchaser is a licensed firearms dealer. The purchaser in this case was an undercover ATF agent. There was no evidence at trial that the agent was not a licensed firearms dealer. Because this is an essential element of the offense, the conviction was set aside, even though the defendant did not move for a directed verdict.

***United States v. Baird***, 712 F.3d 623 (1st Cir. 2013) The defendant purchased a firearm from another person. Several days later, he determined that the gun was stolen and returned it to the seller shortly thereafter. He requested an instruction on the defense of "innocent possession." Because the evidence was sufficient to support this requested instruction and the content of the instruction was integral to his defense (and not covered by other instructions), the trial court's refusal to give the instruction was reversible error.

***United States v. Haile***, 685 F.3d 1211 (11th Cir. 2012) Two firearms statutes were involved in this case: possessing a firearm with an obliterated serial number and possession of a machine gun in connection with a drug offense. The Eleventh Circuit held that the machine gun offense did not require proof that the defendant knew that the weapon was a machine gun (thus, he could receive a mandatory 30-year sentence, even if he only knew it was a weapon, but did not know it had automatic capability). With regard to the obliterated serial number offense, however, the court held that knowledge that the serial number is obliterated or altered is an essential element of the offense.

***United States v. Crooker***, 608 F.3d 94 (1st Cir. 2010) A silencer that was made for an air gun is not a "firearm."

***United States v. Ayala-Garcia,*** 574 F.3d 5 (1st Cir. 2009) The defendant was charged with possession of a stolen firearm. 18 U.S.C. § 922(j). There was no evidence relating to the method by which the defendant acquired the gun. He was seen giving it to another conspirator, and the circumstances of that transaction were suspicious, but this did not satisfy the government's burden of proving that he knowingly possessed a stolen weapon.

***United States v. Zalapa***, 509 F.3d 1060 (9th Cir. 2007) The possession of a short-barreled machine gun violates two separate provisions of the registration act, 26 U.S.C. §5861. However, only one conviction and one sentence can be imposed for the possession of one weapon, regardless of the number of ways in which its possession if a violation of the registration law.

***United States v. Introcaso***, 506 F.3d 260 (3rd Cir. 2007) Firearms, such as short-barreled shotguns, that were manufactured prior to 1900, are not covered by the registration act, if the ammunition designed for that weapon is not being manufactured, nor is readily available. The government argued in this case that the ammunition designed for that weapon is not being manufactured, but regular (and easily available) twelve-gauge shells worked with this particular gun. The Third Circuit held that the statute was ambiguous – it was not clear if the exemption only applied if the ammunition originally designed for the weapon was not available, or if any ammunition that could be used with the weapon was not available. Applying the Rule of Lenity, the court held that the conviction could not be sustained.

***United States v. Nieves-Castanos***, 480 F.3d 597 (1st Cir. 2007) Though the defendant was obviously in possession of a machine gun that was in a golf bag in her apartment, and that she knew a weapon was in the golf bag, the government failed to prove that she knew the gun was a machine gun, that is, that the weapon had the characteristics that brought the gun within the statutory definition of a machine gun. The defendant exhibited a guilty knowledge that regarding her possession of the weapon, but this guilty knowledge, itself, was not sufficient to establish that she knew it was a machine gun.

***United States v. Michel***, 446 F.3d 1122 (10th Cir. 2006) The defendant had a shotgun in his car that was 17 ½ inches long. A sawed-off shotgun is one with a barrel that is less than 18 inches long. Though the evidence was sufficient to prove that the defendant knowingly possessed the firearm, it was not sufficient to prove that he knowingly possessed a sawed-off shotgun. The defendant was a passenger in a car and the shotgun was in the backseat. There was no evidence that he ever personally touched the gun.

***United States v. Johnson***, 381 F.3d 506 (5th Cir. 2004) The defendant was charged with possession of a firearm with an obliterated serial number. The Fifth Circuit held that the evidence was insufficient to prove that the defendant was aware that the gun had this characteristic.

***United States v. Hammond***, 371 F.3d 776 (11th Cir. 2004) The defendant was charged with manufacturing a firearm without obtaining a license. A firearm is defined as a destructive device, including any explosive device. However, only explosive devices that are designed for use as a weapon, qualify. 26 U.S.C. § 5845(f). Thus, a device that explodes is not necessarily a destructive device. The device in this case was made of cardboard and there were no projectiles that would have been expelled had the device been detonated. Nor was there any other evidence that the device could be used as a weapon. Rather, the device was more akin to a firecracker. The district court properly granted a judgment of acquittal.

***United States v. Haywood***, 363 F.3d 200 (3rd Cir. 2004) A charge that the defendant possessed a firearm with an obliterated serial number (18 U.S.C. § 922(k)), requires proof that that the firearm had an obliterated serial number and proof that the defendant knew the firearm had an obliterated serial number. The trial court erred in this case by instructing the jury that the defendant need only have been shown to know that he was in possession of the firearm. The defendant was also charged with possessing a firearm in or near a school zone (18 U.S.C. § 922(q)(2)(A)). This charge, too, requires proof that the defendant knew that he was in a school zone.

***United States v. Batterjee***, 361 F.3d 1210 (9th Cir. 2004) The defendant was not a citizen and, pursuant to 18 U.S.C. § 922(g)(5)(B) was not permitted to possess a firearm. When he went to a store to buy a gun, the dealer asked certain questions, each of which the defendant answered accurately – including the fact that he was not a citizen – and filled out the required forms accurately, as well. The dealer followed up with certain questions relating to his citizenship answer and then sold him the gun. The dealer did not specifically ask, however, whether the defendant was in the United States on a work visa (which was what disqualified him for possessing a firearm). The Ninth Circuit held that the prosecution was barred under the theory of entrapment by estoppel.

***United States v. Collins***, 350 F.3d 773 (8th Cir. 2003) The defendant was charged under 18 U.S.C. § 922(d)(3) with disposing a firearm to a person that was known to be an unlawful user of controlled substances. The trial court instructed the jury that the offense could be proven if the defendant knew or had reasonable cause to believe there was a risk that the recipient would unlawfully use a controlled substance while in possession of the firearms. This amounted to an improper amendment of the indictment. The government is required to prove that the defendant knew or had reasonable cause to believe that the recipient was an unlawful user of a controlled substance.

**United States v. McCullough,** 348 F.3d 620 (7th Cir. 2003) Defendant was charged with willfully selling firearms without recording the name, age, and residence of the buyer. 18 U.S.C. § 922(b)(5). At trial, he requested a jury instruction on the lesser record keeping offense. 18 U.S.C. § 922(m). Because it is impossible to violate § 922(b)(5) without also violating § 922(m), the trial court should have given the lesser included instruction. The fact that it is possible to commit record keeping violation without committing the greater offense (for example, by making some other false entry that does not relate to the buyer's name, age, or residence) does not mean that the record keeping offense is not a lesser included offense. Moreover, the lesser offense requires proof that the defendant acted knowingly, while the greater offense requires proof that the defendant acted willfully. This does not preclude the record keeping offense from being characterized as a lesser offense of the false recording offense. The failure to instruct the jury on the lesser offense was reversible error.

***United States v. Jackson***, 124 F.3d 607 (4th Cir. 1997) The trial court erred in failing to instruct the jury that the defendant, charged with possessing an unregistered firearm, had to be shown to have known the characteristics of his sawed-off shotgun that made it a firearm subject to the requirements of the Firearm Act. See Staples v. United States, 511 U.S. 600 (1994). The failure to instruct the jury consistent with Staples, however, was not plain error.

***United States v. Polk***, 118 F.3d 286 (5th Cir. 1997) 18 U.S.C. § 922(a)(6) makes it a federal crime to provide false information to a licensed firearm dealer in connection with the purchase of a weapon, in an attempt to deceive the dealer with respect to any fact material to the lawfulness of the sale. The Fifth Circuit has previously held that a straw purchaser who buys a weapon on behalf of someone who may not legally purchase the weapon violates this law.

***United States v. Ortiz-Loya,*** 777 F.2d 973 (5th Cir. 1985). Here, however, the "straw" purchaser was not purchasing the gun for someone who was not legally allowed to purchase the gun. Rather, he was buying it for the other person simply because the other person did not want it known that he was the actual purchaser. Thus, the "false statement" was not material to the lawfulness of the sale, because the actual purchaser could lawfully purchase the weapon. The § 922(a)(6) conviction was reversed. NOTE: This decision was overruled in Abramski v. United States, 134 S. Ct. 2259 (2014).

***United States v. Spinner,*** 152 F.3d 950 (D.C. Cir. 1998) The evidence did not support a conviction for possessing a semi-automatic assault weapon. 18 U.S.C. § 921(a)(30)(B), because the expert who described the weapon that was seized from the defendant did not describe it in the terms of the statute. The fact that the jury could look at the weapon and determine that it had the necessary characteristics did not convince the court to uphold the verdict, because there was no "testimonial guidance" about what feature of the gun the jury should consider and the definition of an assault weapon in the jury instructions would not have provided sufficient information to the jury to determine whether the weapon qualified. Finally, the D.C. Circuit also concluded that there was insufficient evidence to prove that the defendant knew the characteristic of the gun that brought it within the definition of an assault weapon. Staples v. United States, 511 U.S. 600 (1994).

***FIREARM OFFENSES (Use of Firearm . . . § 924(c) )***

***Abbott v. United States***, 131 S. Ct. 18 (2010) In a unanimous opinion, the Court rejects the Second Circuit decision in Whitley and holds that the § 924(c) consecutive sentence provision applies even if there is another mandatory minimum provision in a related offense, such as the underlying drug offense.

***Watson v. United States***, 128 S. Ct. 579 (2007) A person who sells drugs in exchange for a gun does not “use” the firearm during and in relation to a drug offense. Smith v. United States, 508 U.S. 223 (1993) If a defendant "uses" a gun as barter for the purchase of cocaine, this qualifies as "use" "in relation to" a drug trafficking crime.

***United States v. Rodriguez-Moreno***, 119 S. Ct. 1239 (1999) A §924(c) offense can be tried in any district where the underlying crime of violence occurred, even if the gun is not possessed, or used in that district. In this case, the defendant kidnapped the victim and carried him through various states. In one state, Maryland, the defendant possessed a gun in connection with the kidnapping. The defendant was tried in New Jersey, however, one of the states in which the kidnapping occurred, but not in which the defendant ever possessed the gun. The Court holds that venue was proper in New Jersey.

***Dean v. United States***, 129 S. Ct. 1849 (2009) If a defendant uses a gun during and in relation to a crime of violence, he will receive a 5- year mandatory minimum sentence. If the gun is brandished, the sentence increases to 7 years. And if the firearm is discharged, the sentence is 10 years. What if the gun discharges by accident? In this case, the Supreme Court holds that the 10-year sentence applies, even if the gun is accidentally discharged. There is no requirement that the defendant intend to discharge the firearm.

***United States v. O’Brien***, 130 S. Ct. 2169 (2010) Different mandatory minimum sentences apply in §924(c) offenses, depending on what kind of firearm is used. Thus, for example, if the § 924(c) offense is committed with a machine gun, then a thirty-year mandatory minimum sentence applies. In this case, the Supreme Court held that the type of firearm used is an essential element of the offense, not simply a sentencing factor. Therefore, the type of weapon used must be proved to the jury beyond a reasonable doubt in order for the higher mandatory minimum sentence to apply.

***United States v. Salas***, 889 F.3d 681 (10th Cir. 2018) In order to be convicted of a § 924(c) offense, the underlying crime must be a drug offense or a “crime of violence.” As with the Armed Career Criminal Act and several other laws, the courts have struggled to make sense of the term “crime of violence” despite the definitions that are in the statutes. In § 924(c)(3)(B), the offense is defined as either a felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another” or a felony “that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” The second clause was the focus of this case. The second clause (“a substantial risk that physical force against the person of another may be used”), is also found in 18 U.S.C. § 16(b). The United States Supreme Court, in an immigration case, held that §16(b) is unconstitutionally vague for the same reason that the Armed Career Criminal Act’s “residual clause” was declared vague in Johnson v. United States, 135 S. Ct. 2551 (2015). Sessions v Dimaya, 138 S. Ct. 1204 (2018). Based on Dimaya, the Tenth Circuit in this case held that § 924(c)(3)(B) is unconstitutionally vague and the defendant’s conviction of the § 924(c) offense was reversed.

***United States v. Gonzales***, 841 F.3d 339 (5th Cir. 2016) 18 U.S.C. §924(c) makes it a crime to use and carry a firearm during a drug trafficking offense. 18 U.S.C. § 924(j) makes it a crime to commit murder with a firearm in relation to a drug trafficking offense. A defendant cannot be convicted and sentenced for both offenses. The § 924(c) offense is a lesser included offense of the murder offense.

***United States v. Jenkins***, 849 F.3d 390 (7th Cir. 2017) Kidnapping (18 USC § 1201(a)) is not a crime of violence for purposes of § 924(c). Kidnapping does not have “force” as an essential element of the offense.

***United States v. Prado***, 815 F.3d 93 (2d Cir. 2016) The trial court’s instruction on the law of aiding and abetting in this prosecution for a 924(c) violation was plainly erroneous in light of Rosemond v. United States. The instruction focused on the defendant’s aiding and abetting the underlying crime, without addressing the necessary intent to aid and abet the use of a firearm.

***United States v. Vichitvongsa***, 819 F.3d 260 (6th Cir. 2016) The defendant used a firearm in the commission of a home invasion which was alleged to have furthered two conspiracies: Hobbs Act and drugs. This only supports one § 924(c) conviction.

**United States v. Fuertes**, 805 F.3d 485 (4th Cir. 2015) The defendant was charged with a § 924(c) violation in connection with the offense of sex trafficking by force, fraud, or coercion. 18 U.S.C. § 1591(a). In order to be convicted of a § 924(c) offense, the underlying crime must be a crime of violence, which is defined in § 924(c)(3) as an offense which requires the use of force as an element, or which, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. The Fourth Circuit held that the crime is “indivisible” under the Descamps v. United States, 133 S. Ct. 2276 (2013) standard, and because the offense can be committed by “fraud” (which is not “force”), the offense does not categorically qualify as a crime of violence. Nor is the offense of sex trafficking by its nature, an offense that involves a substantial risk of physical force. Therefore, a § 924(c) conviction may not be based on the use of a weapon in connection with a sex trafficking offense.

***United States v. Henry***, 797 F.3d 371 (6th Cir. 2015) The defendant was convicted of a 924(c) violation in connection with an armed robbery based on his aiding and abetting the principal perpetrator. The jury instruction, however, did not comply with Rosemond. The instruction failed to require that the government prove that the defendant intended to aid and abet the armed robbery with knowledge that the principal would use a firearm in connection with the armed robbery.

***United States v. Rodriguez-Martinez***, 778 F.3d 367 (1st Cir. 2015) The defendant was a passenger in a car. When the car was pulled over, the defendant got out, walked to the corner, and made a phone call. Drugs were found in the possession of the driver. The defendant was visibly nervous. A gun was found in the possession of the defendant. The First Circuit held that this evidence was insufficient to convict the defendant of aiding and abetting the possession with intent to distribute the drugs. His nervousness did not prove that he knew the driver was in possession of drugs and may just as well have reflected his concern about his own possession of the firearm. In addition, the court reversed the driver's conviction of possessing a firearm in furtherance of a drug offense (the gun was possessed by the passenger). Because there was insufficient evidence that the driver, who possessed the drugs, knew that the passenger possessed a gun, he could not be convicted of the § 924(c) offense.

***United States v. Rentz,*** 777 F.3d 1105 (10th Cir. 2015) In order to be prosecuted for more than one § 924(c) offense, there must be proof that the defendant "used" a gun on separate occasions, not just that he committed two crimes while using a gun.

***United States v. Campbell***, 775 F.3d 664 (5th Cir. 2014) In order to be found guilty of more than one § 924(c) count, the defendant must have possessed a different gun, even if more than one predicate offense was proven.

***United States v. Carr***, 761 F.3d 1068 (9th Cir. 2014) The defendant participated in a meeting with other conspirators during which they discussed robbing a credit union. There was no discussion of using guns and no guns were displayed or visible at the meeting. This defendant did not go into the credit union and was not the getaway driver, though he was parked nearby. The district court found that there was sufficient evidence that the defendant was a member of the conspiracy to rob the credit union, but the evidence was insufficient to prove that he knew that guns would be used, even under the Pinkerton doctrine. The Ninth Circuit affirmed.

***United States v. Thomas***, 627 F.3d 534 (4th Cir. 2010) The decision in Watson v. United States regarding selling drugs in exchange for guns (i.e., that this does not constitute the "use" of a firearm in a drug offense) amounts to a new substantive rule that applies retroactively, including on § 2255 review.

***United States v. Diaz***, 592 F.3d 467 (3rd Cir. 2010) There can only be one § 924(c) conviction for each count of conviction of a drug offense. Thus, if there is only one drug offense set forth in the indictment, there can only be one § 924(c) conviction, even if more than one gun is possessed, and even if a gun is possessed on more than one occasion during the course of a drug conspiracy.

***United States v. Maye,*** 582 F.3d 622 (6th Cir. 2009) The defendant was charged with possession of a firearm in furtherance of a drug offense. The plea colloquy (the factual basis) established only that he possessed a firearm and that he also committed a drug offense. There was no suggestion that the gun was possessed to advance or promote the commission of the underlying drug offense. The factual basis was inadequate and the defendant's questioning of the plea at the time of his sentencing demonstrated that he did not voluntarily enter the plea (and that neither the defense attorney, nor the judge knew the elements of the offense).

***United States v. Rush-Richardson***, 574 F.3d 906 (8th Cir. 2009) The defendant was charged with possessing a firearm in furtherance of a drug trafficking offense, but the jury instruction defined the crime in the language that applies to possession of a firearm during and in relation to a drug trafficking offense. The "in furtherance" offense requires a greater relationship between the possession of the weapon and the drug crime than the "during and in relation" offense. See also United States v. Brown, 560 F.3d 754 (8th Cir. 2009).

***United States v. Serafin***, 562 F.3d 1105 (10th Cir. 2009) The defendant was charged with possessing a firearm in furtherance of a crime of violence. The crime of violence that was alleged was the possession of another weapon, an unregistered assault rifle. The Tenth Circuit held that the possession of the unregistered assault rifle is not a crime of violence and therefore the possession of the other weapon could not constitute a § 924(c) offense. United States v. Hunter, 558 F.3d 495 (6th Cir. 2009) The indictment charged the defendant with possession of a weapon during and in relation and in furtherance of a drug offense. The phrase "during a drug offense" is a meaningless allegation in the context of §924(c) and the indictment was therefore defective, as were the jury instructions defining the offense.

***United States v. Bailey***, 553 F.3d 940 (6th Cir. 2009) There was insufficient evidence to prove that the defendant had constructive possession of a firearm found beneath his seat in the car he was driving. Even when the prosecution relies on a theory of constructive possession, there must be proof that the defendant knew of the presence of the gun. Though he attempted to elude the police when they tried to apprehend him, this could be explained by the fact that he had drugs in his pocket and did not prove that he knew the gun was in the car.

***United States v. Castano***, 543 F.3d 826 (6th Cir. 2008) There are two separate § 924(c) offenses. One offense makes it a crime to use or carry a firearm during and in relation to a crime of violence or a drug trafficking crime. The other offense makes it a crime to possess a firearm in furtherance of a crime of violence or a drug trafficking crime. In this case, the defendant was charged with carrying a firearm during an in relation to a drug trafficking crime, but the jury instructions repeatedly referred to "possessing" a firearm. The error in defining the elements of the offense was plain error. See also United States v. Combs, 369 F.3d 925 (6th Cir. 2004); and United States v. Savoires, 430 F.3d 376 (6th Cir. 2005).

***United States v. O'Brien***, 542 F.3d 921 (1 st Cir. 2008) The type of weapon that is "used" in a § 924(c) offense is an element of the offense, not just a sentencing factor. The type of weapon that is used directly affects the range of sentences that must be imposed. Thus, for example, if the weapon is a machine gun, or an assault weapon, the sentence is considerably longer than if the weapon is a simple revolver. This decision is inconsistent with the decisions from most other Circuits.

***United States v. Huntley***, 523 F.3d 874 (8th Cir. 2008) Because the jury was improperly instructed regarding the possibility of convicting the defendant for using a firearm, by virtue of having received a firearm in exchange of drugs, the conviction was reversed.

***United States v. Kirk***, 528 F.3d 1102 (8th Cir. 2008) Based on Watson, the defendant's § 924(c) conviction was vacated. Trading drugs to acquire a gun does not amount to using a gun.

***United States v. Pruett***, 523 F.3d 863 (8th Cir. 2008) In light of the Supreme Court decision in Watson, the defendant's § 924(c) conviction, based on his having received a gun in exchange for methamphetamine could not be sustained.

***United States v. Cunningham***, 517 F.3d 175 (3rd Cir. 2008) The evidence proved the defendant's constructive possession of drugs being carried in a bag by his co-conspirator but did not establish his constructive possession of a weapon that was also in the bag. No evidence was introduced that the defendant knew what was in the bag (other than the drugs).

***United States v. Korey***, 472 F.3d 89 (3rd Cir. 2007) The defendant was charged with using a firearm during and in relation to a conspiracy to distribute cocaine. A correct instruction on the law of conspiracy to distribute cocaine was required. The evidence established that the defendant was asked by a cocaine dealer to kill someone, in exchange for which the dealer would pay the defendant with cocaine. The district court judge instructed the jury that if they found that the defendant agreed to accept cocaine in payment for killing the victim, that is a conspiracy to distribute cocaine. This was erroneous. This instruction failed to explain correctly that a conspiracy to distribute cocaine requires proof of a "unity of purpose" between the conspirators to distribute cocaine and this instruction did not include that concept. Merely accepting payment in the form of cocaine is not the same as sharing a purpose with the dealer to distribute cocaine. Reversible error.

***United States v. James***, 468 F.3d 245 (5th Cir. 2006) When the government files a motion pursuant to USSG 5K1.1 and 18 USC § 3553(e), the mandatory minimum sentence of 18 USC § 924(c) is eliminated.

***United States v. Ruiz***, 462 F.3d 1082 (9th Cir. 2006) The evidence was insufficient to link the defendant to any of the firearms found throughout the house where methamphetamine was being manufactured. A § 924(c) conviction could not be sustained. While Pinkerton liability is permissible for a § 924(c) prosecution, there was no evidence linking any conspirator to the guns found at the premises.

***United States v. Palmer***, 456 F.3d 484 (5th Cir. 2006) An appeal waiver that provides that there will be no appeal of the sentence does not preclude an appeal that targets the legitimacy of the guilty plea. In this case, the factual basis for the offense of possession of a firearm in furtherance of a drug trafficking crime was insufficient. At the plea colloquy, the defendant acknowledged possessing the weapon and stated that he possessed it to "protect myself" but denied that he dealt drugs out of his apartment, which was where the gun was found.

***United States v. Thompson***, 454 F.3d 459 (5th Cir. 2006) The evidence was sufficient to prove that the defendant aided and abetted a bank robbery and that he was the getaway driver. The evidence did not sufficiently prove, however, that he was aware that his colleague would use a gun during the course of the robbery and, consequently, his conviction under § 924(c) was reversed.

***United States v. Brown***, 449 F.3d 154 (D.C. Cir. 2006) The law provides for three statutory sentencing ranges in a § 924(c) case, depending on whether the gun is "used," brandished, or discharged. The D.C. Circuit holds that if the gun is accidentally fired, this does not trigger the "discharge" higher range. See also United States v. Dare, 425 F.3d 634 (9th Cir. 2006). In short, the statute contains an implicit intent requirement. This case was subsequently OVERRULED by Dean v. United States, 556 U.S. 568 (2009).

***United States v. Rios***, 449 F.3d 1009 (9th Cir. 2006) Evidence that the defendant possessed a sawed-off shotgun at his house in close proximity to various drug related documents, including a price list and other documents was not sufficient to support a § 924(c) conviction in the absence of evidence that he possessed drugs at the residence, or sold drugs at the residence.

***United States v. Wallace***, 447 F.3d 184 (2d Cir. 2006) The defendant used a firearm to commit a drive-by shooting that was prompted by a dispute involving his drug empire. The government charged the defendant with two § 924(c) violations: using the gun in connection with the drive-by shooting and using the gun in connection with the drug conspiracy. The Second Circuit held that only one § 924(c) conviction could be sustained based on one use of the gun.

***United States v. Savoires***, 430 F.3d 376 (6th Cir. 2005) 18 U.S.C. § 924(c) sets forth two different crimes: (1) using or carrying a firearm during an in relation to a drug trafficking crime; and (2) possessing a firearm in furtherance of a drug trafficking crime. These two separate offenses may not be set forth in one count of the indictment.

***United States v. Zhou***, 428 F.3d 361 (2d Cir. 2005) In a §924(c) firearm prosecution, the evidence of the underlying felony must establish its commission beyond a reasonable doubt, because the commission of the underlying felon is an essential element of the firearm offense. Nevertheless, it is not necessary that the defendant actually be convicted of the predicate offense.

***United States v. Groce,*** 398 F.3d 679 (4th Cir. 2005) If a gun is brandished, a mandatory seven-year sentence is required by 18 U.S.C. § 924(c)(1)(A)(ii). In this case, the defendant told the bank teller that he had a gun and later a gun was found in the defendant's purse. This evidence was insufficient to invoke the "brandishing" mandatory minimum. A remand for further fact-finding was necessary in order to determine whether this sentencing enhancement applied.

***United States v. Harris***, 397 F.3d 404 (6th Cir. 2005) Apprendi requires that in order to invoke higher mandatory minimum sentences based on the type of gun possessed by the defendant, the government must allege the type of gun in the indictment.

The Court distinguished Harris v. United States, 536 U.S. 545 (2002), which held that whether the defendant “brandished” or “discharged” a weapon is a sentencing factor that is not subject to Apprendi. Harris was later overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013).

***United States v. Mann***, 389 F.3d 869 (9th Cir. 2004) The defendants were arrested at a campsite where they were manufacturing methamphetamine. Inside a locked safe in the truck were guns. The government failed to prove that the guns were possessed in furtherance of a drug trafficking offense. The fact that the gun was illegal (a pen gun) and that the defendant was felon who could not possess a gun did not prove that the gun was used in furtherance of a drug offense.

***United States v. Montano***, 398 F.3d 1276 (11th Cir. 2004) Limiting Smith, the Eleventh Circuit holds that if the defendant provides the drugs in exchange for a gun, this does not constitute using the gun in connection with a drug offense. Smith involved a defendant who provided the gun in exchange for drugs. This case involves providing the drugs in exchange for the gun. The former defendant “used” the gun in a drug offense, the latter defendant did not. In this case, the gun was actually to be provided by an undercover agent and the gun was never, in fact, produced by the agent or possessed by the defendant.

***United States v. Bradley,*** 381 F.3d 641 (7th Cir. 2004) The defendant entered a guilty plea to carrying a firearm in connection with a drug offense. The factual basis offered by the government recited that the defendant carried the gun in a car that was transporting marijuana. The indictment, however, alleged that he carried the gun in connection with a cocaine offense. The defendant then moved to withdraw the plea on the basis of this variance. The trial court erred in denying the defendant the right to withdraw the plea.

***United States v. Combs***, 369 F.3d 925 (6th Cir. 2004) In the 1998 amendment to § 924(c), Congress intended to create two separate violations: (1) using or carrying a firearm during and in relation to a drug trafficking crime; and (2) possessing a firearm in furtherance of a drug trafficking crime. “Use” requires active employment of the firearm by the person committing the drug offense. “In furtherance” requires proof that the firearm was possessed to advance or promote the commission of the underlying drug trafficking crime. An example of “use” without “in furtherance” would be if a buyer of drugs stole a gun from his dealer’s house during a drug deal. Thus, the two crimes are, in fact, conceptually different. The indictment in this case mismatched the elements of these two offenses. The indictment charged the defendant with “possessing a weapon during and in relation to a drug offense.” The indictment was fatally defective because it failed to allege the elements of an offense. In addition, with regard to a separate count, though the indictment properly alleged the elements of the possession offense, the jury instructions improperly “amended” the indictment by setting forth elements from the “use” prong of the statute (during and in relation to a drug offense) rather than the “possession” prong (in furtherance). The conviction on this count, therefore, had to be reversed.

***United States v. Reynolds***, 367 F.3d 294 (5th Cir. 2004) The defendant was charged with robbing three banks. The victims never witnessed his possession of a firearm, however. When he was arrested, he made the statement that he “always had that gun with him” and that he “never intended on using the gun either on a victim teller or on the police but on himself in the event that he got caught.” These uncorroborated confessions by the defendant were not sufficient to sustain a §924(c) conviction.

***United States v. Cartwright***, 359 F.3d 281 (3rd Cir. 2004) The evidence was insufficient to prove that the defendant was a knowing “lookout” for a drug transaction (as opposed to some other offense) and therefore his convictions for being a member of a drug conspiracy and for aiding and abetting the drug offense were reversed on sufficiency grounds. The government failed to prove that the defendant knew specifically that the illegal activity in which he was participating involved drugs rather than some other form of contraband. The court notes several other Third Circuit cases that have overturned drug conspiracy and aiding and abetting convictions because of the absence of evidence that the defendant agreed to participate in the specific crime alleged in the indictment. Because the defendant’s § 924(c) conviction required proof that he knew that he was engaged in a drug offense, that conviction was reversed, as well. (NOTE: The Third Circuit later issued an opinion questioning whether this case utilized the proper standard of review, United States v. Caraballo-Rodriguez, 726 F.3d 418 (3rd Cir. 2013).

***United States v. Walters***, 351 F.3d 159 (5th Cir. 2003) The defendant delivered a home-made bomb to a military base. Two counts of the indictment charged that he (1) used the bomb to assault a federal officer and (2) used a bomb to damage a federal building. At sentencing, the court relied on the second conviction to impose a mandatory life sentence. This was error. There was only one bomb, which detonated only once. Relying on Phipps, the Fifth Circuit held that only conviction could be sustained for this offense. United States v. Phipps, 319 F.3d 177 (5th Cir. 2003) The defendants used a gun to commit a carjacking and kidnapping. Only one § 924(c) conviction is supported by this evidence. In this case, the gun was only used once, during the commission of the multiple crimes.

***United States v. Garcia-Torres***, 280 F.3d 1 (1st Cir. 2002) Though the evidence was sufficient to prove that the defendant participated in a kidnapping and murder, there was insufficient proof that he was aware that the crimes were designed to further (or were in any way related to) his colleagues’ drug enterprise. He could not be convicted of conspiracy of possession with intent to distribute cocaine. For the same reason, he could not be convicted of a § 924(c) count where there is insufficient proof of his participation in the underlying drug offense.

***United States v. Canady***, 126 F.3d 352 (2d Cir. 1997) At the time the defendant was arrested, he was sitting on a chair that had two pistols hidden under the cushions. This evidence did not suffice to establish either that the defendant "used" or "carried" the weapons in connection with the drug offense. However, there was additional evidence that the defendant had carried the weapon earlier, so the conviction could be supported on that basis.

***United States v. Tolliver***, 116 F.3d 120 (5th Cir. 1997) Bailey held that § 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense. The mere possession of firearms for the protection of, or to embolden, an offender is not enough to constitute "use" under §924(c)(1).

***United States v. Mount***, 161 F.3d 675 (11th Cir. 1998) The government failed to prove that the defendant "used" the firearm as defined in Bailey. Moreover, though the gun was found in the defendant's house, this did not establish that he "carried" the firearm in connection with a drug offense. There was no showing that the gun was transported at any time during and in relation to the underlying drug offense.

***United States v. Kubosh***, 120 F.3d 47 (5th Cir. 1997) The trial court's pre-Bailey instruction was plain error.

***United States v. Polk***, 118 F.3d 286 (5th Cir. 1997) The defendant carried a shotgun with him while he negotiated with undercover agents for the purchase of explosives that he planned to use to blow up federal buildings. The underlying crimes were "attempt" crimes that did not mature into an "attempt" until after the discussion occurred during which the defendant possessed the weapon. Thus, the possession of the weapon was not "in relation to" a crime of violence.

***United States v. Westmoreland***, 122 F.3d 431 (7th Cir. 1997) An undercover agent gave a gun to the defendant in exchange for cocaine that was provided by the defendant. This does not amount to "use" of the gun by the defendant.

***Under Smith v. United States***, 508 U.S. 223 (1993), if the defendant trades a gun for drugs, he has "used" the gun, but when he receives a gun from an undercover agent, he has not "used" the gun, according to the Seventh Circuit. (The court notes that if the defendant received the gun in exchange for drugs from a co-defendant, not an undercover agent, he could be found to have aided and abetted the co-defendant's use of the gun. But the court chose not to decide this question).

***United States v. Perez,*** 129 F.3d 1340 (9th Cir. 1997) When the police went to one defendant's apartment to arrest him, he was sitting on the couch. When he stood up, a gun was discovered where he had been sitting. This does not satisfy Bailey's standard for use of a gun. With regard to another defendant, the indictment charged him with using three guns. The sentence would be dramatically different if the defendant used an assault weapon, versus a pistol. In this situation, the trial court must submit a special verdict form to the jury to determine which gun(s) they unanimously agreed the defendant used.

***United States v. Sheppard***, 149 F.3d 458 (6th Cir. 1998) Defendant's § 924(c) "carrying a firearm" conviction was predicated on proof that cocaine and a gun was found in a bedroom when the defendant was arrested, coming out of the bathroom. The government argued that he must have carried the gun into the bedroom at some point in time. The court rejected this argument and found that the evidence was insufficient as a matter of law to support a "carrying" conviction under §924(c).

***United States v. Schmalzried***, 152 F.3d 354 (5th Cir. 1998) The government conceded that the defendant's possession of a firearm did not qualify as "use" under Bailey. The government argued, however, that the gun was carried in connection with a drug offense. However, in order to qualify under the "carry" prong of § 924(c), the gun must have been carried in connection with the commission of the drug offense.

***Smith v. United States***, 508 U.S. 223 (1993). It is not enough that the firearm be connected with the offense – the "carrying" of the firearm must also be related to the offense. United States v. Sanders, 157 F.3d 302 (5th Cir. 1998) Evidence that a firearm was found under a porch three feet from where cocaine was hidden does not establish a § 924(c) "carry" offense. (This case involves a remand of a §2255 petition for further proceedings where the defendant claimed actual innocence after having entered a guilty plea).

## *FIRST AMENDMENT*

***United States v. Alvarez***, 132 S. Ct. 2537 (2012) The Stolen Valor Act, 18 U.S.C. § 704(b) violates the First Amendment. The law makes it a crime to falsely claim to have been awarded military awards. The law focuses on the content of speech and therefore must fit within one of the limited categories of speech that may be prohibited.

***Holder v. Humanitarian Law Project***, 130 S. Ct. 2705 (2010) The Supreme Court upheld the "material support for terrorist organizations" law, 18 U.S.C. § 2339B. The statute makes it a crime to provide material support – including money, services, or personnel – to a designated terrorist organization. Even if the supports is designated for humanitarian aid, or consists of medical supplies, the law outlaws providing this type of material support. The government successfully persuaded the court that providing "humanitarian assistance" allows the terrorist organization to spend its resources on other projects, rather than having to pay for medical supplies; thus, providing any kind of support does, in fact, aid the terrorists' dangerous activities. The Court held that the law does not violate the First Amendment's association, or free speech guarantees and is not unconstitutionally vague.

***United States v. Williams***, 128 S. Ct. 1830 (2008) The Supreme Court upheld the child pornography pandering provision that had earlier been held unconstitutional by the Eleventh Circuit. The statute, 18 U.S.C. § 2252A(a)(3)(B) makes it a crime to solicit, or to offer to sell or distribute material that is purported to be child pornography. The Court rejected the defendant's claim that it violates the First Amendment to make it a crime to offer to sell or distribute material as child pornography, if, in fact, the material being offered for sale is not, in fact, child pornography. The Court also rejected a Fifth Amendment vagueness challenge.

***Ashcroft v. Free Speech Coalition***, 535 U.S. 234 (2002) The Supreme Court holds that the "virtual" pornography provision contained in the 1996 Child Pornography Prevention Act is unconstitutional. This provision is not intrinsically related to the protection of children or to the sexual abuse of children, because, by definition, no children are involved in the production of the

images. In addition, the statute is defective because it does not incorporate the community standards test of obscenity requiring that the artistic merit of a work be judged considering the work as a whole.

***Ashcroft v. American Civil Liberties Union***, 535 U.S. 564 (2002) The Child Online Protection Act is not unconstitutionally overbroad just because it uses community standards test to regulate speech on the World Wide Web.

***Virginia v. Black***, 123 S. Ct. 1536 (2003) A state may outlaw cross-burning, as long as an essential element of the offense is the intent to intimidate any person or group of persons. Cross-burning, per se, however, is protected First Amendment expression.

***Church of Lukumi Babalu Aye Inc. v. Hialeah, Fla.,*** 508 U.S. 520 (1993) A local ordinance which banned the cruel or ritualistic killing of animals – but which exempted killing for purposes of food consumption – violated the First Amendment in light of the discriminatory use of the ban against religious activity. The ordinance virtually banned activity, which was prompted by a religious motivation, but permitted the same conduct if it was not prompted by a religious motivation.

***Wisconsin v. Mitchell***, 508 U.S. 476 (1993) A statute which enhanced penalties if the crime was motivated by the race, religion or other protected status of the victim did not violate the First Amendment.

***R.A.V. v. City of St. Paul***, 505 U.S. 377 (1992) A city ordinance of St. Paul prohibited the display of a symbol which one knows or has reason to know "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender." This statute was unconstitutionally content based.

***Dawson v. Delaware***, 503 U.S. 159 (1992) At the defendant's death penalty trial, evidence of his membership in a white racist organization was introduced. His affiliation with this group had nothing to do with the crime. The introduction of this evidence violated the defendant's First Amendment rights.

***Simon & Schuster v. New York***, 502 U.S. 105 (1991) New York's "Son of Sam" law which requires that publishers turn over proceeds of a convict's book to an escrow account for the benefit of any victim is a violation of the First Amendment.

***Gentile v. State Bar of Nevada***, 501 U.S. 1030 (1991) A state bar rule which prohibits an attorney from making certain extrajudicial statements to the press was void for vagueness.

***Barnes v. Glen Theatre, Inc***., 501 U.S. 560 (1991) The First Amendment does not prohibit cities from banning non-obscene nude dancing.

***United States v. Kokinda***, 497 U.S. 720 (1990) The defendants were convicted of solicitation on posted premises. The Supreme Court upholds the conviction. Although solicitation is a recognized form of speech, the government may regulate such activity on its property to an extent determined by the nature of the relevant forum.

***United States v. Eichman***, 496 U.S. 310 (1990) The Federal Flag Protection Act of 1989, 18 U.S.C. §700, is unconstitutional. The defendants' act of burning the flag constituted expressive conduct which enjoyed First Amendment protection. Employment Division State of Oregon v. Smith, 494 U.S. 872 (1990) The Free Exercise Clause permits the State to prohibit sacramental peyote use and may deny unemployment benefits to persons discharged for using peyote. See Francis v. Mineta, 505 U.S. 266 for future developments in this area. Also, see 42 USC § 2000bb, enacted three years after Smith.

***FW/PBS, Inc. v. City of Dallas***, 493 U.S. 215 (1990) It is a violation of the First Amendment to create a licensing scheme for sexually oriented businesses that neither requires a prompt judicial review of the municipality's licensing decision nor provides for the municipality to decide within a specified and reasonable time.

***Sable Communications of California v. F.C.C.,*** 492 U.S. 115 (1989) The Supreme Court holds that the statute which prohibits "Dial-a-Porn" is constitutional insofar as it applies to "obscene" messages, but not insofar as it applies to "indecent" messages.

***Texas v. Johnson***, 491 U.S. 397 (1989) The Supreme Court holds that the Texas flag desecration crime did not pass First Amendment muster.

***United States v. Stevens***, 130 S. Ct. 1577 (2010) The statute (18 U.S.C. § 48) that criminalized the making, sale, or possession of certain "depictions of animal cruelty" was so overbroad that it violated the First Amendment on its face.

***United States v. Alvarez-Nunez***, 828 F.3d 52 (1st Cir. 2016) Though this is a sentencing decision, and only peripherally a First Amendment case, the court addressed the issue of whether a defendant's music could be a relevant factor at sentencing, and thus may be a case worth noting when the government introduces such things as rap lyrics to prove a defendant's predisposition, etc. The First Circuit held that a defendant's music should not be any more relevant to a sentencing decision than an actor's portrayal of a sadistic character.

***United States v. Swisher***, 811 F.3d 299 (9th Cir. 2016) The reasoning in United States v. Alvarez, noted above, which invalidated a statute prohibiting lying about being awarded military medals, also applies to a statute that criminalizes the unauthorized wearing of such medals.

***United States v. Caronia***, 703 F.3d 149 (2d Cir. 2012) The Second Circuit holds that prosecutions based on "off-label" promotion violates the First Amendment. The defendants were charged with promoting the off-label use of certain drugs (i.e., promoting the use of a drug that was approved by the FDA for one purpose, but advocating its use for another purpose). While it is perfectly legal for a doctor to prescribe a drug approved for a purpose other than the use for which the FDA approved the drug, it is not legal for the drug manufacturer to promote the drug's use for any purpose other than the approved purpose. The Second Circuit held that this violates the First Amendment.

***United States v. Marcavage***, 609 F.3d 264 (3rd Cir. 2010) The defendant's citation for violating a "verbal permit" to conduct his abortion protest at a certain location (other than the public forum he had chosen) violated the First Amendment.

***United States v. Alvarez,*** 617 F.3d 1198 (9th Cir. 2010) The Stolen Valor Act, 18 U.S.C. § 704(b), (c) makes it a crime to falsely represent oneself either verbally, or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces. The Ninth Circuit held that this statute violates the First Amendment, because it does not require any fraudulent intent or anything more than a simple false statement. Merely telling a lie cannot, without more, be a criminal offense. Affirmed by the Supreme Court, as noted above.

***United States v. Stevens***, 533 F.3d 218 (3rd Cir. 2008) The defendant was charged with selling visual depictions of animal cruelty (dog fighting). The Third Circuit concluded that the defendant's conduct was protected by the First Amendment and the statute which the defendant allegedly violated, 18 U.S.C. § 48, is unconstitutional.

***Chaker v. Crogan***, 428 F.3d 1215 (9th Cir. 2005) A California state law makes it a crime to file a false allegation of misconduct against a police officer. It is not a crime, however, to file a false report in support of a police officer. The Ninth Circuit holds that this "viewpoint" discrimination violates the First Amendment thus invalidating the criminal provision.

***Cooper v. Dillon***, 403 F.3d 1208 (11th Cir. 2005) A Florida state law that makes it a crime to disclose information obtained in an internal investigation of a law enforcement officer violates the First Amendment.

***United States v. Cassel***, 408 F.3d 622 (9th Cir. 2005) The defendant was charged with interfering with a sale of federal land by intimidation (18 U.S.C. § 1860). He defended on First Amendment grounds. The Ninth Circuit held that the government must prove that the defendant subjectively intended to intimidate the victim. Absent this requirement, the First Amendment would bar a prosecution. The trial court's failure to properly instruct the jury on this element – subjective intent to intimidate – was harmful error.

***American Civil Liberties Union v. Ashcroft***, 322 F.3d 240 (3rd Cir. 2003) On remand from the Supreme Court (535 U.S. 564) which upheld certain portions of the "Child Online Protection Act" 47 U.S.C. § 231, the Third Circuit found other provisions unconstitutional. First, because the Internet has no geographical limits, the Act is too broad in invoking "community standards" for determining what constitutes pornography. Second, the Act's definition of "material harmful to minors" fails to allow for an evaluation of the material in context, thus the "taken as a whole" definition fails to meet First Amendment strictures. See also American Civil Liberties Union v. Mukasey, 534 F.3d 181 (3rd Cir. 2008).

## *FLIGHT EVIDENCE*

***United States v. Al-Sadawi***, 432 F.3d 419 (2d Cir. 2005) The trial court improperly permitted the government to introduce evidence that the defendant's wife purchased plane tickets out of the country for herself and the defendant. There was no evidence linking the defendant to his wife's activity and mere speculation of flight is not a sufficient predicate for introducing the evidence.

## *FOOD AND DRUG ACT VIOLATIONS*

***United States v. Farinella***, 558 F.3d 695 (7th Cir. 2009) The defendant was charged with wire fraud and introducing misbranded food in interstate commerce in violation of 21 U.S.C. § 331(a). The defendant purchased a million bottles of salad dressing that had a label that stated, "best when purchased by" a certain date and then pasted another label over that label that extended the date by approximately one year. The government contended at trial that the salad dressing "expired" on the original date, but this was not true. The "best when purchased by" date was not an expiration date. The salad dressing did not expire and was not rancid or unhealthy if purchased after the "best when purchased by" date. There was no evidence introduced at trial what was meant by "best when purchased by" or whether this was a decision made by the manufacturer to generate sales quicker (as opposed to having anything to do with the quality of the food).

## *FORCED LABOR*

***United States v. Toviave***, 761 F.3d 623 (6th Cir. 2014) Requiring children to perform household chores, even if it is accompanied by instances of child abuse, does not constitute the crime of forced labor in violation of 18 U.S.C. § 1589.

***FORFEITURE (Attorney's Fees)***

***Caplin & Drysdale v. United States***, 491 U.S. 617 (1989) Attorney's fees are forfeitable.

***United States v. Monsanto***, 491 U.S. 600 (1989) Attorney's fees are forfeitable.

***Luis v. United States***, 136 S. Ct. 1083 (2016) The government may not seize assets prior to trial that are only subject to forfeiture on the basis of the "substitute asset" provision of the forfeiture laws if the money is needed to pay for an attorney. Thus, pursuant to Kaley, the government may seize proceeds prior to trial and hold them pending the completion of trial, the government may not seize substitute assets that are not traceable to the criminal conduct prior to trial.

***Kaley v. United States***, 134 S. Ct. 1090 (2014) In this case, the Supreme Court reviewed an Eleventh Circuit decision that addressed whether a defendant was entitled to challenge a pretrial restraint of his assets if the assets were necessary to retain counsel. The Court concluded that a defendant does have the right to challenge whether the restrained assets represented proceeds of the conduct that is the subject of the indictment, but a defendant does not have the right to challenge whether there

is probable cause to believe that the defendant engaged in the illegal conduct or, whether the conduct was illegal. Because the grand jury already has decided the question of probable cause, no further inquiry into the legality of the conduct is required or permitted. Again, however, the defendant is permitted to challenge whether the restrained assets were derived from that conduct.

***United States v. Kahn,*** --- F.3d --- (10th Cir. 2018) Refining its earlier decision in United States v. Jone, discussed below, the Tenth Circuit held that a defendant could challenge a pre-hearing seizure of assets that are necessary to retain counsel (even if they are traceable to the alleged illicit conduct) even if there has not been a showing that the defendant has "no" other assets. That language, in Jones, was taken too literally. The question is whether the defendant has sufficient other assets to hire retain counsel, not whether he has any other assets.

***United States v. Marshall***, 872 F.3d 213 (4th Cir. 2017) Seeking to extend the rationale of Luis, the defendant in this case sought to use assets that were subject to a substitute asset forfeiture order to retain appellate counsel. The Fourth Circuit held that once the defendant was convicted, the substitute assets that were needed to satisfy the forfeiture judgment were no longer "his" money and could not be used to retain private appellate counsel.

***United States v. Chamberlain***, 867 F.3d 459 (4th Cir. 2017) Joining various other Circuits, the Fourth Circuit holds that the government may not seize substitute assets prior to trial. United States v. Chittenden, 848 F.3d 188 (4th Cir. 2017) In Luis, discussed above, the Supreme Court held that substitute assets may not be seized pretrial if the funds are needed to hire an attorney. (Substitute assets are assets of the defendant that are not traceable to the alleged illicit conduct but will be needed to pay any judgment in the event of a conviction and forfeiture judgment). The Supreme Court did not answer the question whether substitute assets may be seized pretrial if the money is not needed for an attorney. Most Circuits (as discussed below in the topic Forfeiture (Seizures)) had held that substitute assets may not be seized pretrial based on the statutory interpretation of the substitute asset provision. 21 U.S.C. § 853(p). The Fourth Circuit, however, before Luis was decided held that substitute assets may be seized pretrial. In this post-Luis decision, the court reiterated that substitute assets may be seized pretrial if the money is not needed to retain counsel of choice. But see Chamberlain, discussed above.

***United States v. Watts***, 786 F.3d 152 (2d Cir. 2015) The defendant's attorney took an assignment of the defendant's interest in certain bank accounts prior to trial. At the time, the district court had conducted a hearing and determined that the government had not established in a pretrial hearing that some of the money in the account was subject to forfeiture. After the hearing, however, the money remained in an account of the court in order to resolve competing claims to the money. At trial, the jury determined that all the money was subject to forfeiture. The Second Circuit held that the attorney was arguably a bona fide purchaser for value who had a valid claim to the money in a post-trial ancillary proceeding pursuant to 21 U.S.C. § 853(n). The court reviews at some length various issues relating to the "relation back" principle, as well as New York fraudulent conveyance law.

***United States v. Bonventre***, 720 F.3d 126 (2d Cir. 2013) The Second Circuit recognizes a defendant's right to challenge a pretrial seizure of funds if the defendant needs the funds to hire an attorney. The procedure authorized by United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991), requires that the court determine whether there is probable cause to believe that the defendant committed the crimes that provide the basis for the forfeiture and that the contested funds are properly forfeitable. In this case, the seizure occurred in a civil forfeiture action. The Second Circuit held that the same procedure applies where the assets are tied up in a civil case. However, the court also held that the defendant must make a showing that the money is needed to hire counsel and must do so with some proof, not a simple claim that the money is needed. In addition, the court held that the defendant is not required to make a preliminary showing that the money was illegitimately restrained. That is part of the Monsanto hearing and is not a showing that the defendant must make in order to trigger a hearing.

***United States v. E-Gold Ltd***., 521 F.3d 411 (D.C. Cir. 2008) If the government seizes a defendant's assets prior to trial, the defendant is entitled to a post-seizure adversarial hearing to contest the probable cause that they committed the underlying offense and that the assets are subject to forfeiture if the money is needed to hire an attorney. This case includes an extensive discussion of the forfeiture / attorney's fees issues that arise in a criminal forfeiture case. This decision did not survive Kaley v. United States, 134 S. Ct. 1090 (2014).

***United States v. Jarvis,*** 499 F.3d 1196 (10th Cir. 2007) Placing a Lis pendens on property that the government claimed it would seek to forfeit as "substitute assets" was not proper under New Mexico law. Under New Mexico law, a Lis pendens is only appropriate if the real estate itself is the focus of the action and the party claims a present interest in the property. Substitute assets, however, are only recoverable as part of a money judgment against the defendant. The forfeiture component of the criminal case does not constitute an action "affecting title" to the property, which is required in order to file a Lis pendens under New Mexico law. The Tenth Circuit also notes that the pretrial seizure of substitute assets is not permissible under the criminal forfeiture provisions. Note that this issue was litigated pretrial in connection with the defendant's efforts to sell the property in order to raise money to pay attorney's fees.

***United States v. Bailey***, 419 F.3d 1208 (11th Cir. 2005) F. Lee Bailey accepted money from his client and disbursed some of it to other lawyers and kept the balance for his fee. The government filed a forfeiture action against the money and the Eleventh Circuit had previously held that the money was subject to forfeiture – but it was gone. In the earlier opinion, the court had suggested that Bailey could be sued for conversion, based on the theory that the "relation back" doctrine meant that the money was forfeitable to the government when it was unlawfully obtained by the criminal. The government took the hint and sued Bailey for conversion. On appeal from that case, the Eleventh Circuit held that the government could not rely on a conversion theory.

The central question (under Florida law) is whether the government had a right of immediate possession of the asset that was allegedly converted when the act of conversion occurred. Despite the relation back doctrine, the government did not have the right to immediate possession of the money at the time that Bailey spent the money. The government's right of possession did not accrue until after the forfeiture judgment was entered.

***United States v. Saccoccia***, 354 F.3d 9 (1st Cir. 2003) The government could not seize attorney's fees that had been paid and spent by the attorneys as substitute assets in this RICO case. The district court concluded that the attorneys did not know the money represented proceeds of money laundering until after the client was convicted. The government argued that the attorneys' knowing violation of a pre-trial restraint of the defendant's assets justified entering a judgment against the lawyers. With regard to substitute assets, the First Circuit wrote that the forfeiture statute does not provide an avenue through which the government may reach a third party's untainted assets as a substitute for tainted assets which the third party had already transferred prior to the date of forfeiture. Back in the District Court, the lower court held the lawyers in contempt (civilly) until they returned the money. 342 F.Supp.2d 25 (2004). But on appeal, the First Circuit reversed the contempt order, concluding that the freeze order did not unambiguously block the lawyers from accepting the fees. 433 F.3d 19 (1st Cir. 2005).

***United States v. Melrose East Subdivision***, 357 F.3d 493 (5th Cir. 2004) The government is only required to establish probable cause in order to obtain a pretrial order enjoining the sale or disposal of assets seized for civil forfeiture under 18 U.S.C. § 983(j)(1)(A). The claimant unsuccessfully argued that the government was required to establish the forfeitability of the assets by a preponderance of the evidence. The probable cause standard applies even when the claimant contends that he needs the assets to retain an attorney. The court also noted that most Circuits (though not the Eleventh) have held that some type of pre-trial post seizure hearing may be appropriate to determine whether restrained assets are needed to pay attorney's fees.

***United States v. Michelle's Lounge***, 126 F.3d 1006 (7th Cir. 1997) A post-seizure hearing should be held when money is seized and frozen (pre-judgment) under the forfeiture laws to determine if money should be released to enable the claimant / defendant to hire criminal counsel.

***United States v. Kirschenbaum***, 156 F.3d 784 (7th Cir. 1998) The defendant was indicted on charges of fraud and money laundering related to his alleged Medicare fraud. The indictment sought the forfeiture of $31 million in various accounts. The trial court ordered the freezing of accounts containing $20 million. The Seventh Circuit reached the following conclusions: (1) Protective orders entered pursuant to 18 U.S.C. § 982(b)(1) are immediately appealable; (2) property that is alleged to be involved in (or traceable to) money laundering is subject to pre-trial seizure. The Court of Appeals held that the pre-trial seizure provisions are not limited to drug offenses. When § 982(b)(1) states that pre-trial seizure procedures are governed by 21 U.S.C. §853(e), this refers to the procedure by which seizures should be handled – it is not a limitation on what can be seized. (3) If the restrained money was needed to retain an attorney, a post-indictment hearing may be required (and a pre-indictment hearing is statutorily required) though the defendant made an inadequate showing in this case. (4) The court declined to decide whether there was a Due Process right to a post-seizure hearing. The court noted numerous decisions in other Circuits that ruled both ways on this topic: United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985); United States v. Roth, 77 F.3d 1525 (7th Cir. 1996); United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991); United States v. Bissell, 866 F.2d 1343 (11th Cir. 1989). (5) The restraint on the defendant's wife's property was the proper subject of an appeal and was not proper. The wife was not a party in the district court and could not be restrained from transferring her own assets.

***United States v. Jones***, 160 F.3d 641 (10th Cir. 1998) The defendant was indicted for health care fraud, 18 U.S.C. § 1347, and the indictment alleged that certain real and personal property was subject to forfeiture, pursuant to 18 U.S.C. § 982(a)(6). Post-indictment, the government moved to freeze certain assets – $1.5 million – pursuant to 21 U.S.C. § 853(e)(1)(A). The district court denied the defendant's motion for a pretrial hearing. The defendant argued that the Due Process Clause of the Fifth Amendment required a pre-trial hearing at which the government must establish probable cause to believe that defendants committed health care fraud and the assets named in the indictment are traceable to the offense. The Tenth Circuit holds that in certain situations, the defendant is entitled to a post restraint, pre-trial hearing. The defendant must first demonstrate to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family. The defendant must also establish prima facie showing of a bona fide reason to believe the grand jury erred in determining that the restrained assets constituted or were derived, directly or indirectly, from gross proceeds traceable to the commission of the health care offense. A recent decision, United States v. Kahn, --- F.3d --- (10th Cir. 2018), relied on Jones and is discussed above.

***United States v. Monsanto***, 924 F.2d 1186 (2d Cir. 1991) On remand from the United States Supreme Court, the en banc Second Circuit concludes that if a criminal defendant's assets are frozen pre-trial, the defendant is entitled to an evidentiary hearing pretrial to determine if there is a basis to continue the restraint as to assets which the defendant needs to retain counsel. But see Kaley, supra.

***United States v. One 1973 Rolls Royce***, 43 F.3d 794 (3rd Cir. 1994) A reputed drug dealer gave his attorney a Rolls Royce in payment of part of the fee (actually, to reimburse the attorney for expenses incurred at a victory party). The attorney was unaware of the car's use to facilitate drug transactions at the time the car was being used for that purpose, though he was arguably aware of that at the time he received the car. The court first held that in determining whether the claimant had knowledge, a willful blindness standard could be used, which is a subjective test, focusing on the claimant's actual knowledge, or efforts to remain ignorant. The mere fact that the claimant is aware that the defendant is a drug dealer would not be enough, in and of itself, to establish that the claimant was willfully blind to the forfeitability of the car. The car in this case was seized

pursuant to §881(a)(4)(C) – a conveyance used to facilitate drug trafficking. The innocent owner defense for conveyances (§881(a)(4)(C)), like the innocent owner defense for real property (§881(a)(7)), allows a claimant to show that he was either unaware of the criminal activity, or did not consent to it. The Third Circuit concludes that, pursuant to 92 Buena Vista Avenue, even if the lawyer knew when he received the car that it was tainted, this would not support a forfeiture, because he was not aware of, and did not consent to, the illegal acts at the time they occurred. NOTE: The Eleventh Circuit rejected the holding in this case in United States v. One Parcel of Real Estate Located at 6640 S.W. 48th Street, Miami, Fla., 41 F.3d 1448 (11th Cir. 1995), where, like here, the claimant was an attorney who received the tainted property, knowing the property was forfeitable when he received it, but not knowing about the offense which tainted the res when the offense occurred.

***United States v. Michelle's Lounge***, 39 F.3d 684 (7th Cir. 1994) The defendant was facing criminal charges and a civil forfeiture proceeding was also pending. The forfeiture case tied up all of the defendant's assets. The Seventh Circuit holds that in such cases, the defendant is entitled to a prompt post-seizure hearing to determine whether there is probable cause to seize the assets, thus depriving the defendant of the means to retain counsel. The government cannot rely simply on the indictment to establish probable cause, or rely on an ex parte showing to the court. Moreover, the failure to conduct such a hearing is subject to appellate review under the collateral order doctrine. Kaley overruled this decision.

***United States v. De Ortiz***, 910 F.2d 376 (7th Cir. 1990) Prior to the defendant's conviction, he assigned to his attorney his bail money. After the conviction, the government sought to forfeit this money. The defense attorney was entitled to a hearing to determine whether the money was in fact forfeitable and whether he had a legitimate claim to the money. The fact that the defendant himself declared the money to be forfeitable does not make it so.

***United States v. Unimex, Inc.,*** 991 F.2d 546 (9th Cir. 1993) It is essential that a corporation have counsel at trial, for a corporation cannot appear pro se. Here, there was no counsel for the corporation and the government virtually assured this by forfeiting all of the corporation's assets prior to trial. The district court did not appoint an attorney for the corporation; indeed, there is no Sixth Amendment right to appointed counsel (because there is no risk of jail time); and the Criminal Justice Act does not apply to corporations. In this situation, Caplin & Drysdale and Monsanto do not apply. The seizure of all the corporate assets deprived the corporation of the ability to retain counsel and there was no other means to defend itself at trial.

***United States v. Noriega***, 746 F. Supp. 1541 (S.D. Fla. 1990) If assets of the defendant are needed in order to retain counsel of choice, the government must prove the forfeitability of the money at an adversarial hearing. The government violated the defendant's rights in this case by persuading foreign governments to freeze bank accounts containing millions of dollars without affording the defendant the right to a hearing to contest the forfeitability of these funds. United States v. All Funds on Deposit in Any Accounts…, 767 F. Supp. 36 (E.D.N.Y. 1991) As in the context of criminal forfeiture, if a criminal defendant has his assets tied up in an §881 action, he has the right to a probable cause hearing if the assets are needed to retain counsel. The Court relied on the Monsanto decision issued by the Second Circuit after remand from the United States Supreme Court.

***FORFEITURE (Criminal Procedure)***

***Honeycutt v. United States***, 137 S. Ct. 1626 (2017) The federal forfeiture law requires a defendant to forfeit "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" certain drug offenses. In an 8-0 decision, the Court held that this limits any individual defendant's exposure to the amount of money he or she received, not the total amount of proceeds enjoyed by other conspirators. There is no joint and several liability under this provision.

***United States v. Marshall***, 872 F.3d 213 (4th Cir. 2017) Seeking to extend the rationale of Luis, the defendant in this case sought to use assets that were subject to a substitute asset forfeiture order to retain appellate counsel. The Fourth Circuit held that once the defendant was convicted, the substitute assets that were needed to satisfy the forfeiture judgment were no longer "his" money and could not be used to retain private appellate counsel.

***United States v. Burns***, 843 F.3d 679 (7th Cir. 2016) Under 18 U.S.C. § 981(a)(2)(A), the court may order the forfeiture of "proceeds" and under § 981(a)(2)(B), the court may order the forfeiture of profits. In either case, however, the forfeiture is limited to what the defendant received, not what the victim lost.

***United States v. Cosme***, 796 F.3d 226 (2d Cir. 2015) The government seized various bank accounts and stock brokerage accounts in the process of initiating a civil forfeiture case. No warrant was obtained from the court; the seizure of the accounts was accomplished simply by sending a letter to the bank and brokerage houses. Subsequently, the government obtained an indictment against the defendant and listed the accounts in the Bill of Particulars as assets subject to criminal forfeiture. The government acknowledged, however, that the specific assets were not identified in the indictment and subject to a vote of the grand jury (thus Kaley did not apply). The Second Circuit holds that the continued seizure of the money without any warrant having been issued (and absent any exigent circumstances) violated the Fourth Amendment.

***United States v. Watts***, 786 F.3d 152 (2d Cir. 2015) The defendant's attorney took an assignment of the defendant's interest in certain bank accounts prior to trial. At the time, the district court had conducted a hearing and determined that the government had not established in a pretrial hearing that some of the money in the account was subject to forfeiture. After the hearing, however, the money remained in an account of the court in order to resolve competing claims to the money. At trial, the jury determined that all the money was subject to forfeiture. The Second Circuit held that the attorney was arguably a bona fide purchaser for value who had a valid claim to the money in a post-trial ancillary proceeding pursuant to 21 U.S.C. § 853(n). The court reviews at some length various issues relating to the "relation back" principle, as well as New York fraudulent conveyance law.

***United States v. Beltramea***, 785 F.3d 287 (8th Cir. 2015) The government failed to present sufficient evidence to demonstrate a nexus between the specific property the government sought to forfeit in this criminal forfeiture case and the underlying fraud and money laundering offenses. Even though the defendant signed the preliminary order of forfeiture, the court has the obligation to find a sufficient nexus. The forfeitures in this case (properties) were based on 18 USC § 981(a)(1)(C); § 982(a)(1); and 28 USC § 2461(c).

***United States v. Mahaffy***, 693 F.3d 113 (2d Cir. 2012) The definition of "proceeds" differs in a criminal forfeiture proceeding depending on whether the crime involved the sale of a lawful product in an unlawful manner, versus the sale of an unlawful product. 18 U.S.C. § 981(a)(2). In this case, the defendants were charged with selling securities with the improper use of confidential information. The Second Circuit concluded that this constituted the sale of a lawful product in an unlawful manner, which means that the forfeiture was limited to the profit, as opposed to gross proceeds.

***United States v. Shakur***, 691 F.3d 979 (8th Cir. 2012) Because the trial court failed to enter a preliminary order of forfeiture, as required by Rule 32.2(b), the final forfeiture order could not be entered.

***Kaley v. United States***, 134 S. Ct. 1090 (2014) In this case, the Supreme Court reviewed an Eleventh Circuit decision that addressed whether a defendant was entitled to challenge a pretrial restraint of his assets if the assets were necessary to retain counsel. The Court concluded that a defendant does have the right to challenge whether the restrained assets represented proceeds of the conduct that is the subject of the indictment, but a defendant does not have the right to challenge whether there is probable cause to believe that the defendant engaged in the illegal conduct or, whether the conduct was illegal. Because the grand jury already has decided the question of probable cause, no further inquiry into the legality of the conduct is required or permitted. Again, however, the defendant is permitted to challenge whether the restrained assets were derived from that conduct.

***United States v. E-Gold Ltd***., 521 F.3d 411 (D.C. Cir. 2008) If the government seizes a defendant's assets prior to trial, the defendant is entitled to a post-seizure adversarial hearing to contest the probable cause that he committed the underlying offense and that the assets are subject to forfeiture if the money is needed to hire an attorney. This case includes an extensive discussion of the forfeiture / attorney's fees issues that arise in a criminal forfeiture case. This decision did not survive Kaley v. United States, 134 S. Ct. 1090 (2014).

***United States v. Silvious***, 512 F.3d 364 (7th Cir. 2008) Though 18 U.S.C. § 982 limits the federal crimes for which criminal forfeiture is an available remedy, a separate statute, 28 U.S.C. § 2461(c) permits criminal forfeiture in any case in which civil forfeiture is an available remedy. Therefore, because the civil forfeiture statutes provide for forfeiture in mail fraud cases, criminal forfeiture is also available, pursuant to 28 U.S.C. § 2461, even though mail fraud is not one of the listed offenses in 18 U.S.C. § 982 (unless the offense involved a financial institution).

***United States v. Capoccia***, 503 F.3d 103 (2d Cir. 2007) Where an indictment charges the defendant with substantive offenses, but does not allege a "scheme," enterprise or conspiracy, the forfeiture is limited to the assets involved in the charges. In this case, the crimes were interstate transportation of stolen property, which does not involve a "scheme" which could otherwise broaden the scope of the forfeiture.

***United States v. Jarvis***, 499 F.3d 1196 (10th Cir. 2007) Placing a Lis pendens on property that the government claimed it would seek to forfeit as "substitute assets" was not proper under New Mexico law. Under New Mexico law, a Lis pendens is only appropriate if the real estate itself is the focus of the action and the party claims a present interest in the property. Substitute assets, however, are only recoverable as part of a money judgment against the defendant. The forfeiture component of the criminal case does not constitute an action "affecting title" to the property, which is required in order to file a Lis pendens under New Mexico law. The Tenth Circuit also notes that the pretrial seizure of substitute assets is not permissible under the criminal forfeiture provisions. Note that this issue was litigated pretrial in connection with the defendant's efforts to sell the property in order to raise money to pay attorney's fees.

***United States v. Arbolaez,*** 450 F.3d 1283 (11th Cir. 2006) The trial court erred in barring the defendant from introducing evidence or making a closing argument during the forfeiture phase of this case.

***United States v. Razmilovic***, 419 F.3d 134 (2d Cir. 2005) 28 U.S.C. § 2461(c) allows for criminal forfeitures in certain cases in which the civil forfeiture of property is authorized in connection with a violation of a federal law, but there is no specific statutory provision made for criminal forfeiture upon conviction. When criminal forfeiture is sought pursuant to this unusual procedure, the government may not seek pretrial restraint of the assets pursuant to § 853(e).

***United States v. Nava***, 404 F.3d 1119 (9th Cir. 2005) In this criminal forfeiture action, the jury reached a special verdict that required the defendant to forfeit to the government his interest in certain properties. The defendant's daughter claimed that the properties were hers and she was an innocent owner. The Ninth Circuit held that the daughter did, in fact, have legal title, despite the fact that she did not pay for the property when it was given to her by her grandmother. In answering this question, the focus is on state law. The fact that the defendant occasionally paid the taxes on the property and used it for illegal purposes did not operate to vest title in him. Therefore, the property was not subject to in persona forfeiture.

***United States v. Swanson***, 394 F.3d 520 (7th Cir. 2005) The Seventh Circuit limited the scope of criminal forfeiture, holding that "money put at risk" is not subject to forfeiture. Only actual gains are forfeitable. Even if the victim lost money as a result of the defendant's conduct, this does not necessarily translate into a forfeiture amount. Loss to the victim is essential to a calculation of restitution (or setting a base offense level), but only gain to the defendant can be the measure of forfeiture.

***United States v. Iacaboni***, 363 F.3d 1 (1st Cir. 2004) Payments of gambling winnings to the bettors constituted a money laundering financial transaction and the amount of these payments could be forfeited. However, the court erred in forfeiting additional money that may have been a financial transaction that concealed the money, because the money laundering charge only alleged "promotion prong" money laundering and therefore, a financial transaction that concealed the nature, source, or ownership of the money could not be forfeited. This would improperly amend the indictment.

***United States v. Vondette***, 352 F.3d 772 (2d Cir. 2003) IRAs are subject to criminal forfeiture, even as substitute assets.

***United States v. McHan***, 345 F.3d 262 (4th Cir. 2003) The defendant transferred assets to his wife and children after he committed the criminal offense, but prior to indictment. The Fourth Circuit held that his property may be seized as a substitute asset. The wife and children argued that substitute assets can be seized only if they are transferred after the forfeiture judgment is entered, or, at the latest, after the defendant is indicted. The Fourth Circuit disagreed, holding that the relation-back doctrine applies to substitute assets as well as tainted assets. The Fourth Circuit also rejected a Due Process challenge that focused on the pre-hearing "preliminary order of forfeiture" which ties up property before a third-party claimant has notice, or a right to be heard. The Court also rejected the claimant's Seventh Amendment argument that they were entitled to a jury trial. Finally, the court addressed various specific challenges to the forfeiture of particular parcels and rejected each challenge.

***United States v. Pantelidis***, 335 F.3d 226 (3rd Cir. 2003) In the unusual posture of this case, the claimant had a right to appeal the trial court's denial of his Rule 41(g) motion for return of seized property. The money that was seized constituted "substitute assets" under the forfeiture law and, therefore, were not actually part of a pending criminal case. Thus, the decision to deny the return of the money was independent of the criminal case and amounted to a final order for appellate jurisdiction purposes.

***United States v. Gotti***, 155 F.3d 144 (2d Cir. 1998) A post-indictment pre-trial seizure is not authorized for substitute assets under 18 U.S.C. § 1963(d)(1)(A), because the pre-trial seizure provision only authorizes the seizure of proceeds, or property affording a source of interest over the enterprise. The substitute asset provision, § 1963(m) does not define a species of proceeds, but, rather, property that may be seized, posttrial, in the event that proceeds are not available.

***United States v. Kirschenbaum,*** 156 F.3d 784 (7th Cir. 1998) The defendant was indicted on charges of fraud and money laundering related to his alleged Medicare fraud. The indictment sought the forfeiture of $31 million in various accounts. The trial court ordered the freeze of accounts containing $20 million. The Seventh Circuit reached the following conclusions: (1) Protective orders entered pursuant to 18 U.S.C. § 982(b)(1) are immediately appealable; (2) property that is alleged to be involved in (or traceable to) money laundering is subject to pre-trial seizure. The Court of Appeals held that the pre-trial seizure provisions are not limited to drug offenses. When § 982(b)(1) states that pre-trial seizure procedures are governed by 21 U.S.C. §853(e), this refers to the procedure by which seizures should be handled – it is not a limitation on what can be seized. (3) If the restrained money was needed to retain an attorney, a post-indictment hearing may be required (and a pre-indictment hearing is statutorily required) though the defendant made an inadequate showing in this case. (4) The court declined to decide whether there was a Due Process right to a post-seizure hearing. The court noted numerous decisions in other Circuits that ruled both ways on this topic: United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985); United States v. Roth, 77 F.3d 1525 (7th Cir. 1996); United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991); United States v. Bissell, 866 F.2d 1343 (11th Cir. 1989). (5) The restraint on the defendant's wife's property was the proper subject of an appeal and was not proper. The wife was not a party in the district court and could not be restrained from transferring her own assets. United States v. Jones, 160 F.3d 641 (10th Cir. 1998) The defendant was indicted for health care fraud, 18 U.S.C. § 1347 and the indictment alleged that certain real and personal property was subject to forfeiture, pursuant to 18 U.S.C. § 982(a)(6). Post-indictment, the government moved to freeze certain assets – $1.5 million – pursuant to 21 U.S.C. § 853(e)(1)(A). The district court denied the defendant's motion for a pretrial hearing. The defendant argued that the Due Process Clause of the Fifth Amendment required a pre-trial hearing at which the government must establish probable cause to believe that defendants committed health care fraud and the assets named in the indictment are traceable to the offense. The Tenth Circuit holds that in certain situations, the defendant is entitled to a post restraint, pre-trial hearing. The defendant must first demonstrate to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family. The defendant must also establish prima facie showing of a bona fide reason to believe the grand jury erred in determining that the restrained assets constituted or were derived, directly or indirectly, from gross proceeds traceable to the commission of the health care offense.

***FORFEITURE (Extent of Forfeiture; Proportionality; Excessive Fine)***

***Austin v. United States,*** 509 U.S. 602 (1993) The Eighth Amendment applies to civil forfeiture proceedings under 21 U.S.C. §881. The Eighth Amendment is not limited to criminal cases – it applies to any form of punishment and civil forfeiture amounts to punishment.

***Alexander v. United States***, 509 U.S. 544 (1993) Pursuant to 18 U.S.C. §1963, the RICO in persona forfeiture procedure, the forfeiture of defendant's entire adult entertainment inventory (including constitutionally protected material) was not violative of the First Amendment. However, the in-persona nature of the forfeiture proceeding must pass muster under the excessive fines clause of the Eighth Amendment.

***United States v. Bajakajian***, 118 S. Ct. 2028 (1998) The defendant was arrested as he was about to depart from the L.A. airport on a flight to Italy. He was found to be in possession of $357,144 in currency which he failed to report. Reporting the transfer of currency in excess of $10,000 across the border is required by the currency transaction laws, 31 U.S.C. §5316(a)(1)(A). In addition to prosecuting the defendant for making a false statement and for the currency transaction violation, the government also sought to forfeit the entire amount of money pursuant to 18 U.S.C. §982(a)(1), which provides that all property "involved in

the offense" shall be forfeited. The defendant contested the forfeiture on Eighth Amendment grounds and the Supreme Court agreed. First, the Court concluded that the forfeiture in this case amounted to a "fine" for Eighth Amendment purposes. Section 982 forfeitures are punitive and are imposed as part of the sentence following conviction for the underlying offense. Second, the Court decided that in analyzing whether a forfeiture amounts to an Excessive Fine, the appropriate analysis is simply the "proportionality test": The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. A fine is excessive if it is grossly disproportional to the gravity of a defendant's offense. In this case, the fine was disproportional, because the money was not proceeds of any criminal offense, nor intended to be used for a criminal offense, but was simply not properly reported – an information-gathering offense. A fine in the amount of $357,144, for failing to properly fill out a form is grossly disproportionate to the offense.

***Honeycutt v. United States***, 137 S. Ct. 1626 (2017) The federal forfeiture law requires a defendant to forfeit "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" certain drug offenses. In an 8-0 decision, the Court held that this limits any individual defendant's exposure to the amount of money he or she received, not the total amount of proceeds enjoyed by other conspirators. There is no joint and several liability under this provision.

***United States v. Courtney***, 816 F.3d 681 (10th Cir. 2016) The defendant was convicted of wire fraud based on fraudulent mortgage loan applications. The question posed on appeal was whether the mortgage payments that were made should be deducted from the amount of the forfeiture. The government argued that pursuant to 21 U.S.C. § 853, the amount of the forfeiture should be the "proceeds" of the crime (the entire amount of the loans); the defendant argued that pursuant to 18 U.S.C. § 981(a)(2)(C), the amount of the forfeiture must be reduced by the amount of money the bank received in mortgage payments. The Tenth Circuit held that the defendant's argument prevailed.

***United States v. Viloski***, --- F.3d --- (2d Cir. 2016) In evaluating whether a forfeiture runs afoul of the Eighth Amendment, the court should consider whether the forfeiture will deprive the claimant of the ability to make a living. In contrast to decisions from other Circuits the Second Circuit held that factors other than the amount of the forfeiture and the claimant's relationship to the crime may be considered.

***United States v. Abair***, 746 F.3d 260 (7th Cir. 2014) Though not issuing a conclusive holding, the Seventh Circuit observed that the forfeiture of the defendant's house based on a conviction for structuring offenses was disproportionate to the offense. There was no need to decide this question because the conviction was reversed on other grounds.

***United States v. Mahaffy***, 693 F.3d 113 (2d Cir. 2012) The definition of "proceeds" differs in a criminal forfeiture proceeding depending on whether the crime involved the sale of a lawful product in an unlawful manner, versus the sale of an unlawful product. 18 U.S.C. § 981(a)(2). In this case, the defendants were charged with selling securities with the improper use of confidential information. The Second Circuit concluded that this constituted the sale of a lawful product in an unlawful manner, which means that the forfeiture was limited to the profit, as opposed to gross proceeds.

***United States v. Contorinis***, 692 F.3d 136 (2d Cir. 2012) In a criminal forfeiture proceeding, a defendant may not be ordered to forfeit funds never acquired by him or someone working in concert with him. Though an order of forfeiture may apply to funds no longer in the defendant's control, at some point, the funds must have been in his control, or the control of someone with whom the defendant was working.

***United States v. Seher,*** 562 F.3d 1344 (11th Cir. 2009) The trial court erred in ordering the forfeiture of a certain bank account based on the defendants' CTR and money laundering convictions, without a showing that those accounts were involved in the offenses of conviction.

***United States v. Levesque***, 546 F.3d 78 (1st Cir. 2008) The First Circuit holds that the Excessive Fines Clause analysis requires the court to determine whether a forfeiture order will deprive the defendant of her livelihood. The court remands the case to the district court to re-evaluate the Eighth Amendment claim in this case, in which the court imposed a multi-million money judgment on the defendant, a mule who regularly transported marijuana for the conspiracy, but made little profit, herself.

***Von Hofe v. United States***, 492 F.3d 175 (2d Cir. 2007) A civil forfeiture action was brought against the house of the claimant and her husband. Both had been convicted in state court of using the house to cultivate marijuana, but the evidence against the wife/claimant was limited to her knowledge that marijuana was being grown for personal use of the husband. The Second Circuit held that forfeiting the entire interest of the wife violated the Eighth Amendment. She was not aware of any distribution activities and her knowledge of personal use cultivation did not support the forfeiture of her entire interest. See generally United States v. Bajakajian, 524 U.S. 321, 118 S.Ct. 2028 (1998); Austin v. United States, 509 U.S. 602 (1993). This case contains a lengthy analysis of the factors that the court should consider in evaluating an Excessive Fine claim in an in-rem forfeiture case.

***United States v. $100,348 in U.S. Currency***, 354 F.3d 1110 (9th Cir. 2004) The defendant was arrested at the airport and charged with failing to report the transportation of the currency that was the subject of this forfeiture action. He claimed that he was a "gratuitous bailee" – he was carrying the money for someone else. The forfeiture proceedings concluded with the trial court deciding that the forfeiture of the entire amount was excessive. The government appealed, arguing that the bailee had not right to contend that it was an excessive fine. The Ninth Circuit upheld the lower court's decision. The Civil Asset Forfeiture Reform Act expressly provides that a claimant may mount an excessive fine defense, and this is not limited by the nature of the claim.

***United States v. 3814 NW Thurman St., Portland, Or.,*** 164 F.3d 1191 (9th Cir. 1999) The government sought to forfeit the defendant's property on the basis that she obtained a mortgage loan in the amount of $322,500 on the property based on

numerous false statements that were submitted to the bank. The Ninth Circuit identified several factors that should be considered in determining whether a forfeiture is excessive: (1) Other related illegal activity; (2) Other penalties – in this regard, the court stressed that the possible Guideline sentence, rather than the statutory sentence should be the focus; (3) Harm caused; (4) Gravity of the offense vs. the amount of the forfeiture. Considering all these factors, the court decided that forfeiture of $200,686 (the increase in equity in the property) was excessive.

***United States v. $273,969.04 U.S. Currency***, 164 F.3d 462 (9th Cir. 1999) A remand was necessary to determine whether the forfeiture of the currency was grossly disproportionate to the gravity of the defendant's offense. See United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028 (1998). The currency was seized from the claimant (along with jewelry and British currency) at the airport. She was charged with failing to comply with monetary transaction reporting requirements.

***FORFEITURE (Innocent Owner Defense)***

***United States v. Salti***, 579 F.3d 656 (6th Cir. 2009) The claimant offered sufficient information to support her claim to the forfeited bank account in Switzerland. In claiming a marital interest in the property, the law of Switzerland governs the decision, since the claimant lived in Switzerland and that is the where the property rights were established.

***United States v. Nava***, 404 F.3d 1119 (9th Cir. 2005) In this criminal forfeiture action, the jury reached a special verdict that required the defendant to forfeit to the government his interest in certain properties. The defendant's daughter claimed that the properties were hers and she was an innocent owner. The Ninth Circuit held that the daughter did, in fact, have legal title, despite the fact that she did not pay for the property when it was given to her by her grandmother. In answering this question, the focus is on state law. The fact that the defendant occasionally paid the taxes on the property and used it for illegal purposes did not operate to vest title in him. Therefore, the property was not subject to in persona forfeiture.

***United States v. Totaro***, 345 F.3d 989 (8th Cir. 2003) In this criminal forfeiture case, the claimant was the wife of the criminal defendant, whose assets were ordered forfeited. The wife claimed that she was title owner of the house, though the mortgage payments and improvements were made with the husband's illegal income. The Eighth Circuit held that this does not present a case of a straw owner. The wife lived on the property and exercised dominion and control over the property, so she was not a straw owner. Because criminal forfeiture is in persona, the government may not seize the wife's interest in the property. In order to determine how much of the property is "hers" the district court should consider the state's divorce law.

***United States v. Leak***, 123 F.3d 787 (4th Cir. 1997) The claimants made dozens of deposits into their bank account in increments less than $10,000. The money in the bank was later used to pay off the mortgage and to finance an addition for their house. The trial court correctly concluded that there was probable cause to support the forfeiture of the house. However, the claimants denied knowing about the currency transaction reporting requirements and this created a genuine issue of material fact as to whether they were innocent owners of the property. The trial court erred in granting summary judgment to the government.

***FORFEITURE (Miscellaneous)***

***United States v. $525,695.24 Seized from JPMorgan Chase,*** 869 F.3d 412 (6th Cir. 2017) Pursuant to 28 U.S.C. § 2466, a defendant who is a fugitive may not avail himself of the courts. The standard for applying the fugitive disentitlement doctrine is as follows: (1) a warrant or similar process must have been issued in a criminal case for the claimant's apprehension; (2) the claimant must have had notice or knowledge of the warrant; (3) the criminal case must be related to the forfeiture action; (4) the claimant must not be confined or otherwise held in custody in another jurisdiction; and (5) the claimant must have deliberately avoided prosecution by (A) purposefully leaving the United States, (B) declining to enter or reenter the United States, or (C) otherwise evading the jurisdiction of a court in the United States in which a criminal case is pending against the claimant. Though the government is not required to prove that the defendant's only intent was to avoid prosecution, in this case, the record was not sufficiently developed in the lower court and a remand for additional evidence was required.

***United States v. Real Prop. Located at 17 Coon Creek Road***, 787 F.3d 968 (9th Cir. 2015) The claimant's failure to answer special interrogatories did not provide an adequate basis for striking his claim. The special interrogatories were essentially discovery requests and did not relate to issues such as standing, or the claimant's right to file a claim in the first place.

***United States v. $28,000.00 U.S. Currency,*** 802 F.3d 1100 (9th Cir. 2015) The seizures in this case were the result of a warrantless (improper) search and un-Mirandized statements of the defendant. The government did not contest these violations, but obstinately and aggressively litigated the forfeiture matter. Awarding attorney's fees to the claimant was appropriate.

***In re Rothstein, Rosenfeldt, Adler, P.A.,*** 717 F.3d 1205 (11th Cir. 2013) A law firm was engaged in a massive Ponzi scheme. Proceeds from the crime were deposited into the law firm's account, along with other "legitimate" fees. The question in this case is whether the government could forfeit the money in the account on the theory that the money in the account was proceeds of the crime. The Eleventh Circuit held that the government did not prove that the money in the account represented proceeds. Though the government could proceed on a substitute asset theory, it could not proceed on a strict proceeds' theory.

***United States v. $999,830.00***, 704 F.3d 1042 (9th Cir. 2012) When a claimant alleges that he has an ownership interest in seized assets, this is sufficient to withstand a motion to dismiss on standing grounds. When a claimant alleges a possessory interest, the claimant the claimant must explain the circumstances of this possession.

***United States v. Mahaffy***, 693 F.3d 113 (2d Cir. 2012) The definition of "proceeds" differs in a criminal forfeiture proceeding depending on whether the crime involved the sale of a lawful product in an unlawful manner, versus the sale of an unlawful

product. 18 U.S.C. § 981(a)(2). In this case, the defendants were charged with selling securities with the improper use of confidential information. The Second Circuit concluded that this constituted the sale of a lawful product in an unlawful manner, which means that the forfeiture was limited to the profit, as opposed to gross proceeds.

***United States v. $186,416.00***, 590 F.3d 942 (9th Cir. 2010) The search that resulted in the seizure of the money in this case was not lawful. The search was conducted pursuant to a state search warrant that alleged a violation of state law. There was, however, no law against medical marijuana in California, so there was no state law violation. The money was then transferred to the federal government for forfeiture. The illegal search, however, was illegal regardless of the venue in which the forfeiture case was tried and the evidence, including the fruits of the illegal search, could not be used in the federal forfeiture case.

***United States v. Wright***, 361 F.3d 288 (5th Cir. 2004) The statute of limitations for filing a Rule 41(g) motion for return of seized property (alleging, for example, insufficient notice prior to forfeiture) is six years from the date the defendant was on reasonable notice about the forfeiture.

***United States v. Vondette***, 352 F.3d 772 (2d Cir. 2003) The government may forfeit money in an IRA. ERISA does not bar a seizure of tainted money that the defendant places in an IRA.

***United States v. $133,735.30*** Seized from U.S.Bancorp Acct. No 32130630, 139 F.3d 729 (9th Cir. 1998) After the government's forfeiture complaint was dismissed, the question was the rate of interest that the government would be required to pay on the funds that it had seized. The Ninth Circuit held that the interest actually earned on the seized funds, which had been deposited into an interest-bearing account, would be disgorged. The trial court had held that interest should be paid at the "prevailing government rate."

***United States v. $515,060.42 in U.S. Currency***, 152 F.3d 491 (6th Cir. 1998) The statute of limitations for a forfeiture action is five years. 19 U.S.C. § 1621. The statute begins to run from the date the government discovers the criminal violation. Even if there is a continuing offense, the period of limitations runs after the government learns of the crime. The limitation also does not start when the asset is seized – it begins before that: when the discovery of the crime occurs. The court decides another question as well: When the government wrongfully seizes money, it must return the money with interest. The court analogized to the seizure of a pregnant cow. If the seizure was improper, the government would be required to return the cow and the calf. The government could not keep the calf. Even if the funds are not placed in an interest-bearing account, the court should calculate an appropriate interest rate.

***United States v. Cunan***, 156 F.3d 110 (1st Cir. 1998) The doctrine of res judicata applies to bar a criminal forfeiture of property which was the subject of a prior civil forfeiture petition that was dismissed with prejudice. Though generally the disposition in a civil case does not generate a res judicata bar to subsequent criminal charges, in the forfeiture context, the proceedings satisfy the “identity” requirement of the doctrine of res judicata. Rather than dismissing the forfeiture case with prejudice, the government should have requested a stay.

***FORFEITURE (Procedure -- Generally)***

***United States v. $196,969.00 U.S. Currency***, 719 F.3d 644 (7th Cir. 2013) Cash was seized in the defendant’s house. In his claim, he asserted that it was his house and everything in it belonged to him. This was a sufficient assertion of an ownership interest to establish his standing to contest the forfeiture.

***United States v. Funds in the Amount of $574,840***, 719 F.3d 648 (7th Cir. 2013) The claimant filed his claim and accompanied the claim with a motion to stay the proceedings because the pendency of criminal proceedings in the state court. The statute, 18 U.S.C. § 981(g)(2), states that a stay shall be granted. The trial court denied the motion to stay and required the claimants to answer interrogatories, after which he dismissed the claims. The Seventh Circuit reversed. The claimant filed a sufficient claim, after which a stay should have been granted.

***United States v. $11,500.00***, 710 F.3d 1006 (9th Cir. 2013) The district court struck the claimant’s claim to the property in this case based on his failure to properly state that his interest was that of a bailee. This was improper. The fact that the money was given to the defendant by his wife (and he was taking it to the jail in order to bail her out after she was arrested on a drug offense), did not negate his claim that he had a possessory interest in the money. Also, the requirement that the claimant state whether his interest is that of a bailee may occur after the filing of the initial claim.

***United States v. $92,203***, 537 F.3d 504 (5th Cir. 2008) The government may not rely on hearsay (unless a recognized hearsay exception exists) in presenting its case in support of forfeiture. When Congress enacted CAFRA in 2000, the decision to elevate the government’s burden to a preponderance of the evidence implicitly recognized that the rules against hearsay would also be enforced. This applies to summary judgment proceedings, as well. Note, however, that the statute expressly provides that the Rules of Evidence do not apply to hearings on motions for Temporary Restraining Orders.

***United States v. $125,938.62***, 370 F.3d 1325 (11th Cir. 2004) The district court abused its discretion in denying the claimants’ request to amend their verified claims. The district court should be wary to not confer the sins of the attorney unto the claimant in a civil forfeiture case, especially when the prejudice to the government, if any, is slight. Amendments should be liberally permitted to add verifications to claims originally lacking them, provided that the amendment would not undermine the goals underlying the time restriction and verification requirement of Rule C. In this case, the government knew the claimants at the time the initial verified complaint was filed and thus the government was not prejudiced.

***United States v. One Piece of Property at 5800 SW 74th Ave, Miami, Fla.,*** 363 F.3d 1099 (11th Cir. 2004) The government moved for summary judgment in this forfeiture case and the claimant failed to respond. Nevertheless, summary judgment should not have been granted in the absence of a showing in the government's motion that there were no contested issues. The government's presentation in this case (which included the deposition of the claimant's girlfriend) demonstrated that there was a dispute as to the legality of the search of the claimant's house and therefore, summary judgment should not have been granted.

***United States v. $8,221,877.16 in U.S. Currency***, 330 F.3d 141 (3rd Cir. 2003) The statute of limitation for the institution of an action to seize substitute assets under 18 U.S.C. § 984 is one year.

***United States v. Estate of Parsons***, 367 F.3d 409 (5th Cir. 2004) During the direct appeal of his conviction, the defendant died. The en banc Fifth Circuit concludes that the criminal forfeiture order, as well as the sentence of restitution abated upon the defendant's death.

***United States v. Certain Real Property Located at Route 1***, 126 F.3d 1314 (11th Cir. 1997) When a claimant fails to comply with the government's discovery requests, the trial court should do what it does in other civil cases: enter an order to compel or take other appropriate action. Fed. R. Civ. P. 37(d). Striking the claim and entering judgment for the government should not be the first step.

***Ikelionwu v. United States***, 150 F.3d 233 (2d Cir. 1998) The trial court improperly dismissed the plaintiff's complaint that sought return of seized property. The trial court dismissed the complaint based on laches. The Second Circuit, however, held that the government failed to show that the plaintiff knew of his right to challenge the forfeiture proceedings. At no time did the government serve notice of the proceedings on the plaintiff. While the plaintiff knew about the seizures, he did not know about the forfeiture proceedings.

***FORFEITURE (Procedure – Notice of Seizure)***

***Dusenberry v. United States***, 534 U.S. 161 (2002) The government satisfied its burden under the Due Process Clause by sending notice of seizure by certified mail to the prison where the defendant was incarcerated. The proper test is whether the notice was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

***Lucas v. United States***, 775 F.3d 544 (2d Cir. 2015) Pursuant to 18 U.S.C. § 982(e)(1), a person may move to reopen a forfeiture proceeding that was closed if the person can show that inadequate notice of the seizure and pending forfeiture was provided to the person.

***United States v. Real Properties Located at 7215 Longboat Drive***, 750 F.3d 968 (8th Cir. 2014) The government seized property that was titled in the name of an LLC. The government knew the LLC had dissolved and that its registered agent had died. The government did not make sufficient efforts to locate the registered agent's estate to provide notice of the pending forfeiture. An attorney contacted the AUSA and informed the AUSA that he might be retained to represent the estate in the forfeiture proceeding. The government did not send notice to the attorney. The Eighth Circuit held that the letter from the attorney did not reflect "actual notice" of the forfeiture proceeding, because the lawyer did not acknowledge that he was actually representing the estate. The government failed to comply with Rule G's notice requirement and thus the untimely filed claim would be given effect.

***Nunley v. Department of Justice***, 425 F.3d 1132 (8th Cir. 2005) Notices sent to the defendant (who was in jail) and to his last known address were not sufficient to put him on notice of the government's forfeiture proceedings.

***Claymore v. United States***, 164 F.3d 569 (10th Cir. 1999) The government failed to provide adequate notice to the claimant of the pendency of the forfeiture proceeding. Prior to the claimant filing a Rule 41(e) motion, the statute of limitations for filing a forfeiture action expired. See 19 U.S.C. § 1621. The Tenth Circuit holds that the statute of limitations should be enforced in this situation. Note that this is a pre-CAFRA case.

***United States v. Ritchie***, 342 F.3d 903 (9th Cir. 2003) When a letter providing personal notice of a forfeiture proceeding is returned undelivered, the DEA must make reasonable additional efforts to provide personal notice of the proceeding.

***Small v. United States,*** 136 F.3d 1334 (D.C. Cir. 1998) The defendant was arrested at Union Station in D.C. and $1,813.10 was seized from him. He was detained in the D.C. jail. A notice of seizure was sent to the defendant's home address; another notice was published in U.S.A. Today, and another notice was sent to the jail, but returned to the DEA undelivered. These attempts at notice were insufficient and the forfeiture proceeding would be reinstated. Sending a notice to the defendant's home, when the government knows the claimant is in jail is insufficient.

***Krecioch v. United States***, 221 F.3d 976 (7th Cir. 2000) After the DEA learned that the defendant was in custody, sending notice of proposed forfeitures to his house was insufficient notice and violated his right to due process.

***Polanco v. U.S. DEA,*** 158 F.3d 647 (2d Cir. 1998) Six years after currency was seized from him, the defendant filed a lawsuit seeking the return of the money. The Second Circuit held that this type of action was governed by the six-year statute of limitations found in 28 U.S.C. § 2401 for lawsuits against the United States. The accrual date was the date on which he learned the money was subject to forfeiture without sufficient notice. This was later than the date of seizure.

***FORFEITURE (Procedure -- Seizure)***

***Florida v. White***, 119 S. Ct. 1555 (1999) Under Florida state law the police are authorized to seize an automobile for forfeiture purposes. (The same law exists with regard to federal forfeitures). In this case, the police observed the defendant, in his vehicle,

involved in a drug transaction, but waited several months before seizing the car from a parking lot at defendant's place of employment. They then performed an inventory search. The Court upheld the warrantless seizure and inventory search even though there were no exigent circumstances and the probable cause to seize the vehicle arose several months earlier.

***United States v. James Daniel Good Real Property***, 510 U.S. 43 (1993) Unless there are exigent circumstances, when the government institutes a civil forfeiture action against real property, it may not seize the property absent notice to the property owner and an opportunity to be heard.

***United States v. Chamberlain***, 867 F.3d 459 (4th Cir. 2017) Joining various other Circuits, the Fourth Circuit holds that the government may not seize substitute assets prior to trial.

***United States v. Cosme***, 796 F.3d 226 (2d Cir. 2015) The government seized various bank accounts and stock brokerage accounts in the process of initiating a civil forfeiture case. No warrant was obtained from the court; the seizure of the accounts was accomplished simply by sending a letter to the bank and brokerage houses. Subsequently, the government obtained an indictment against the defendant and listed the accounts in the Bill of Particulars as assets subject to criminal forfeiture. The government acknowledged, however, that the specific assets were not identified in the indictment and subject to a vote of the grand jury (thus Kaley did not apply). The Second Circuit holds that the continued seizure of the money without any warrant having been issued (and absent any exigent circumstances) violated the Fourth Amendment.

***United States v. Parrett***, 530 F.3d 422 (6th Cir. 2008) The government may not seize or restrain substitute assets in a criminal forfeiture case prior to trial pursuant to 21 U.S.C. § 853(p). The court suggested that state law, however, may support the filing of a Lis pendens.

***Smith v. City of Chicago,*** 524 F.3d 834 (7th Cir. 2008) The Seventh Circuit holds that if property is seized in contemplation of a civil forfeiture proceeding, in certain circumstances, a post-seizure hearing should be held. Due process requires some opportunity to the claimant to contest the validity of the seizure. CERT GRANTED 2/23/09 and decided that the case was moot and vacated the Seventh Circuit decision. 130 S. Ct. 576 (2009). Nevertheless, the Seventh Circuit decision is worth reading for its reasoning.

***United States v. Rutledge***, 437 F.3d 917 (9th Cir. 2006) Criminal forfeiture is now an available tool of the prosecutor in any case in which the assets would be subject to civil forfeiture. 28 U.S.C. § 2461(c). That code provides that criminal forfeiture is permissible in cases in which civil forfeiture of the property in issue is authorized and there is “no specific statutory provision” allowing criminal forfeiture for the charged offense. In this case, this code section supported the pretrial seizure and criminal forfeiture of mail and wire fraud proceeds. However, the Ninth Circuit held that the non-profit corporation that was controlled by the defendant was not itself subject to forfeiture, because of the assets of the corporation were not the proceeds of fraud. Rather, the defendant had “taken control” of the corporation through fraudulent means and had engaged in various schemes to self-deal with the assets of the corporation. The fact that the defendant took control of the corporate assets (i.e., he effectively stole the assets from the membership of the non-profit corporation), this did not make the corporate assets the “proceeds” of his fraud. The Ninth Circuit also held that, pretrial, the defendant could attempt to set aside the government’s seizure of assets if the government could not establish probable cause to support the seizure. THE DECISION IN THIS CASE WAS WITHDRAWN AS MOOT, 448 F.3d 1080.

***United States v. Undetermined Amount of U.S. Currency***, 376 F.3d 260 (4th Cir. 2004) The government contended that the claimants had defrauded the Federal Crop Insurance program and instituted a civil forfeiture proceeding which included seizing various bank accounts and filing a lis pendens on various pieces of property. The claimants sought to release the property prior to trial on the theory that the funds were needed for attorney’s fees and because of hardship. See United States v. Farmer, 274 F.3d 800 (4th Cir. 2001) and 18 U.S.C. § 983(f). The Fourth Circuit held that releasing the funds was not proper and reversed the decision of the trial court which approved limited release of seized funds for purposes of paying attorney’s fees. The various requirements of § 983(f)(1) and (f)(8) must be met in order to order the release of the money. In this case, however, there was no showing that if the funds were released, there would be assets available to satisfy the forfeiture judgment in the end. The availability of other assets which were themselves subject to forfeiture (i.e., real estate) does not satisfy the requirement that there will be no dissipation of the assets prior to judgment. The Fourth Circuit also held that there was insufficient proof of hardship.

***United States v. Bowman***, 341 F.3d 1228 (11th Cir. 2003) The Civil Asset Forfeiture Reform Act of 2000 essentially codified James Daniel Good, by requiring a showing of probable cause and exigent circumstances before real property may be seized without a hearing. If property is seized and at a post-seizure hearing there is evidence of probable cause, but not exigent circumstances, the proper remedy is to pay the rents received between the date of the seizure and the date of the hearing to the owner.

***Krimstock v. Kelly***, 306 F.3d 40 (2d Cir. 2002) In this civil class action lawsuit, claimants challenged New York City’s policy of seizing vehicles under the city forfeiture laws without providing a meaningful hearing to the claimants. The Second Circuit concluded that a hearing should be afforded to people whose cars had been seized in order to determine the likelihood of forfeiture, as well as the availability of other options.

***United States v. Melrose East Subdivision***, 357 F.3d 493 (5th Cir. 2004) The government is only required to establish probable cause in order to obtain a pretrial order enjoining the sale or disposal of assets seized for civil forfeiture under 18 U.S.C. § 983(j)(1)(A). The claimant unsuccessfully argued that the government was required to establish the forfeitability of the assets

by a preponderance of the evidence. The probable cause standard applies even when the claimant contends that he needs the assets to retain an attorney.

***United States v. Land, Winston County***, 163 F.3d 1295 (11th Cir. 1998) It is not proper for the government to post a "No Trespassing" sign on property prior to the time that a hearing was held to determine the validity of a seizure. Such a sign inhibits the owner's right to full occupancy, use, and enjoyment of the property. The appropriate manner for the government to protect its interest in property it seeks to forfeit is to file a lis pendens.

***United States v. 408 Peyton Rd., S.W.***, 162 F.3d 644 (11th Cir. 1998) The government must provide notice and the right to be heard before executing an arrest warrant for property. The failure to provide such notice does not require that the forfeiture proceedings be dismissed, however. Rather, the only remedy is that the government should return any rents received or other proceeds realized from the property during the period of illegal seizure.

***United States v. Gotti***, 155 F.3d 144 (2d Cir. 1998) A post-indictment pre-trial seizure is not authorized for substitute assets under 18 U.S.C. § 1963(d)(1)(A), because the pre-trial seizure provision only authorizes the seizure of proceeds, or property affording a source of interest over the enterprise. The substitute asset provision, § 1963(m) does not define a species of proceeds, but, rather, property that may be seized, posttrial, in the event that proceeds are not available.

***United States v. Kirschenbaum,*** 156 F.3d 784 (7th Cir. 1998) The defendant was indicted on charges of fraud and money laundering related to his alleged Medicare fraud. The indictment sought the forfeiture of $31 million in various accounts. The trial court ordered the freeze of accounts containing $20 million. The Seventh Circuit reached the following conclusions: (1) Protective orders entered pursuant to 18 U.S.C. § 982(b)(1) are immediately appealable; (2) property that is alleged to be involved in (or traceable to) money laundering is subject to pre-trial seizure. The Court of Appeals held that the pre-trial seizure provisions are not limited to drug offenses. When § 982(b)(1) states that pre-trial seizure procedures are governed by 21 U.S.C. §853(e), this refers to the procedure by which seizures should be handled – it is not a limitation on what can be seized. (3) If the restrained money was needed to retain an attorney, a post-indictment hearing may be required (and a pre-indictment hearing is statutorily required) though the defendant made an inadequate showing in this case. (4) The court declined to decide whether there was a Due Process right to a post-seizure hearing. The court noted numerous decisions in other Circuits that ruled both ways on this topic: United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985); United States v. Roth, 77 F.3d 1525 (7th Cir. 1996); United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991); United States v. Bissell, 866 F.2d 1343 (11th Cir. 1989). (5) The restraint on the defendant's wife's property was the proper subject of an appeal and was not proper. The wife was not a party in the district court and could not be restrained from transferring her own assets.

***United States v. Jones***, 160 F.3d 641 (10th Cir. 1998) The defendant was indicted for health care fraud, 18 U.S.C. § 1347 and the indictment alleged that certain real and personal property was subject to forfeiture, pursuant to 18 U.S.C. § 982(a)(6). Post-indictment, the government moved to freeze certain assets – $1.5 million – pursuant to 21 U.S.C. § 853(e)(1)(A). The district court denied the defendant's motion for a pretrial hearing. The defendant argued that the Due Process Clause of the Fifth Amendment required a pre-trial hearing at which the government must establish probable cause to believe that defendants committed health care fraud and the assets named in the indictment are traceable to the offense. The Tenth Circuit holds that in certain situations, the defendant is entitled to a post restraint, pre-trial hearing. The defendant must first demonstrate to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family. The defendant must also establish prima facie showing of a bona fide reason to believe the grand jury erred in determining that the restrained assets constituted or were derived, directly or indirectly, from gross proceeds traceable to the commission of the health care offense.

***FORFEITURE (Standing)***

***United States v. $31,000.00 in U.S. Currency,*** 872 F.3d 342 (6th Cir. 2017) The claimant asserted sufficient Article III and statutory standing by claiming ownership of the seized currency.

***United States v. $17,900.00***, 859 F.3d 1085 (D.C. Cir. 2017) Amtrak police located a backpack that had $17,900 in cash and a notebook with the name Peter Rodriguez. The police were able to locate Rodriguez, who said that the backpack was his. Later, his mother and her domestic partner claimed that the money in the backpack was theirs. The story was implausible. Nevertheless, the mother and domestic partner asserted ownership and presented at least some evidence to support their claim. Granting summary judgment to the government on the issue of standing was reversible error.

***United States v. JP Morgan Chase Bank Account***, 835 F.3d 1159 (2d Cir. 2016) The two claimants both established sufficient possessory interest in the funds that were in a seized bank account to resist the government's summary judgment motion. The claimants also established sufficient prudential standing to proceed with their claim.

***United States v. Funds in the Amount of $271,080,*** 816 F.3d 903 (7th Cir. 2016) Cash was seized from the claimants' van. They contested the forfeiture and submitted affidavits declaring that the money represented savings from years of hard work. The district court granted summary judgment, finding that the affidavits were shams and did not sufficiently establish standing. The district court noted that the claimants had previously disavowed any connection with the money. The Seventh Circuit reversed: the factual dispute created by the affidavit was sufficient to avoid summary judgment and to establish standing.

***United States v. Funds in the Amount of $239,400***, 795 F.3d 639 (7th Cir. 2015) Rule G(8)(c)(ii)(B) states that a claimant bears the "burden of establishing standing by a preponderance of the evidence." At the pleading stage, the claimant is only

required to allege standing, not prove standing. At the summary judgment stage, an assertion of ownership coupled with some proof of ownership – including possession – is sufficient to defeat the government's motion for summary judgment.

***United States v. $304,980.00,*** 732 F.3d 812 (7th Cir. 2013) The claimants asserted a claim to the seized currency, though they did not "prove" their ownership of cash (in fact they invoked their Fifth Amendment right in response to the government's interrogatories about ownership). Nevertheless, their claim established their standing to contest the seizure. Whether they would prevail in their claim is a separate matter.

***United States v. $999,830.00***, 704 F.3d 1042 (9th Cir. 2012) When a claimant alleges that he has an ownership interest in seized assets, this is sufficient to withstand a motion to dismiss on standing grounds. When a claimant alleges a possessory interest, the claimant the claimant must explain the circumstances of this possession.

***United States v. $148,840.00***, 521 F.3d 1268 (10th Cir. 2008) Even though a defendant asserted his Fifth Amendment rights regarding the source of the money and the reason for unusual packaging, he still had standing to challenge the forfeiture of the money found in his vehicle. The defendant in this case demonstrated (or at least asserted) an ownership interest in the funds, not simply naked possession. This assertion is sufficient to support constitutional standing to maintain a claim in the forfeiture proceeding.

***United States v. Nava,*** 404 F.3d 1119 (9th Cir. 2005) In this criminal forfeiture action, the jury reached a special verdict that required the defendant to forfeit to the government his interest in certain properties. The defendant's daughter claimed that the properties were hers and she was an innocent owner. The Ninth Circuit held that the daughter did, in fact, have legal title, despite the fact that she did not pay for the property when it was given to her by her grandmother. In answering this question, the focus is on state law. The fact that the defendant occasionally paid the taxes on the property and used it for illegal purposes did not operate to vest title in him. Therefore, the property was not subject to in personam forfeiture.

***United States v. $4,224,958.57***, 392 F.3d 1002 (9th Cir. 2004) Claimants were people who were defrauded out of millions of dollars. The fraudster deposited the money in a Lichtenstein bank account. The U.S. government persuaded the Lichtenstein authorities to send the money to a bank account in the U.S., whereupon the claimants filed their forfeiture claims. Inexplicable, the government argued that the claimants lacked standing to challenge the forfeiture. The Ninth Circuit disagreed, holding that the money was held by the fraudster in constructive trust for the victims / claimants, and this constructive trust continued even after the government repatriated the money.

***United States v. 5208 Los Franciscos Way, L.A., Cal***., 385 F.3d 1187 (9th Cir. 2004) The criminal defendant transferred property to her parents after becoming aware of a criminal investigation and there was no consideration for the transfer, the transferees lacked standing to contest the forfeiture of the property.

***United States v. $515,060.42 in U.S. Currency***, 152 F.3d 491 (6th Cir. 1998) The court explains that standing can be established with a showing that the claimant is the owner of the seized property, or the possessor of the property, but simple possession requires an additional showing, explaining the circumstances by which the claimant came into possession of the asset, in order to prevent mere straw purchasers from asserting a successful claim. In order assert a valid claim, however, the defendant is not required to prove standing at that stage of the proceedings. And in evaluating the sufficiency of proof of standing when the issue is raised by the government, the government's own allegations in the complaint may be considered.

***FORFEITURE (Sufficiency of Evidence to Support Forfeiture)***

***United States v. $11,500 in U.S. Currency***, 869 F.3d 1062 (9th Cir. 2017) The government seized money that the defendant posted for bond, claiming that based on his longstanding drug addiction, it was logical to assume that the money was derived from, or eventually would be used for a drug deal. The Ninth Circuit rejected this basis for forfeiting money that was not linked to any known (or specifically foreseeable) drug deal.

***United States v. Assorted Jewelry Valued of $44,328.00***, 833 F.3d 13 (1st Cir. 2016) An assortment of jewelry valued at over $44,000 was found in close proximity to a brick of cocaine in the defendant's apartment where he apparently lived alone. The defendant eventually entered a guilty plea to being a member of a drug conspiracy. This evidence, alone, did not support the government's motion for summary judgment that the jewelry was purchased with drug proceeds.

***United States v. Funds in the Amount of $271,080***, 816 F.3d 903 (7th Cir. 2016) Cash was seized from the claimants' van. They contested the forfeiture and submitted affidavits declaring that the money represented savings from years of hard work. The district court granted summary judgment, finding that the affidavits were shams and did not sufficiently establish standing. The district court noted that the claimants had previously disavowed any connection with the money. The Seventh Circuit reversed: the factual dispute created by the affidavit was sufficient to avoid summary judgment and to establish standing.

***United States v. Funds in the Amount of $100,120.00***, 730 F.3d 711 (7th Cir. 2013) In this forfeiture case, among other factors, the government relied on a drug dog alert to the currency to establish that the funds that were seized by agents was connected to drug dealing. The government relied on studies that it claimed showed that what drug dogs smelled on currency was only recent contact with cocaine, because the dogs were detecting something that quickly evaporates. The defense introduced contrary evidence, and relied on the generally known contamination theory, that is, that most currency has trace amounts of cocaine. The Seventh Circuit held that this dispute foreclosed granting summary judgment to the government, because the disputed facts regarding what drug dogs alert to required resolution by the trier of fact. The defense also mounted a successful attack on the dog's certification, including demonstrating that during training sessions, the dog could not differentiate between pure cocaine and cutting agents that might be added to cocaine, and that these cutting agents might be present on

money without cocaine. This case includes an excellent primer on methods of challenging drug dog alerts. In addition, the claimant introduced sufficient information to create a disputed fact issue regarding the source of the money (i.e., his legitimate earnings).

***United States v. $48,100.00 in U.S. Currency,*** 756 F.3d 650 (8th Cir. 2014) The claimant was stopped in his RV driving from Colorado to his home in Wisconsin. He had the currency in his possession, as well as a small quantity of marijuana for personal use. The claimant established the source of the money, but the lower court concluded that the government satisfactorily proved that the money was intended to purchase marijuana while the defendant was in Colorado, prior to returning to his home in Wisconsin. The Eighth Circuit reversed: the evidence was insufficient to prove that the money was intended to purchase marijuana while the defendant as in Colorado.

***United States v. Contorinis***, 692 F.3d 136 (2d Cir. 2012) In a criminal forfeiture proceeding, a defendant may not be ordered to forfeit funds never acquired by him or someone working in concert with him. Though an order of forfeiture may apply to funds no longer in the defendant's control, at some point, the funds must have been in his control, or the control of someone with whom the defendant was working.

***United States v. Hodge,*** 558 F.3d 630 (7th Cir. 2009) The defendant ran a massage parlor. Some (or perhaps many) of the customers received prostitution services. Following a conviction, the trial judge forfeited all the assets of the company. No effort was made to determine, however, the extent to which the business was legitimate, and assets were not subject to forfeiture. If the business could survive without the prostitution services, then only the illicit revenue could be forfeited. If the prostitution services were essential to the success of the business, then the entire business could be forfeited.

***United States v. $125, 938.62***, 537 F.3d 1287 (11th Cir. 2008) The government presented sufficient evidence that certain certificates of deposit were purchased with embezzled money. With regard to other cd's, however, the government's only "evidence" was the argument that because the other cd's were purchased with embezzled funds, these cd's were also presumably purchased with embezzled funds. The Eleventh Circuit rejected this argument, "Circumstantial evidence is one thing; speculation another."

***United States v. Jones***, 502 F.3d 388 (6th Cir. 2007) The evidence was insufficient to support the forfeiture of the real property in this case. The claimants were convicted of participation in a drug conspiracy, but there was insufficient evidence that they engaged in any specific drug transactions once they moved to the property that was the subject of the criminal forfeiture. The agent speculated that "he had no reason to believe that they did not continue." This was insufficient evidence to support the forfeiture.

***United States v. Real Property Located at 3234 Washington Ave. North, Minneapolis***, 480 F.3d 841 (8th Cir. 2007) In light of conflicting affidavits about the use of the subject property for drug deals, summary judgment should not have been granted to the government in this forfeiture action. Some witnesses averred that they never saw drugs at the location and other affidavits challenged the credibility of the government's witnesses.

***United States v. Swanson***, 394 F.3d 520 (7th Cir. 2005) The Seventh Circuit condemned a forfeiture judgment in this complicated bank fraud case, because there was insufficient evidence linking all the property being forfeited to the ill-gotten gains generated by the fraud. The government seemed to merge the issue of "fraud loss" under the guidelines, with restitution and forfeiture, each of which has separate and distinct bases. The fact that a "victim" may be entitled to restitution in a certain amount does not automatically mean that the defendant's forfeiture exposure is the same. Similarly, the fact that fraud loss under the guidelines includes certain amounts that qualify as "intended loss" does not mean that that amount of money is forfeitable. The court also questioned the "ink the bottle" theory of forfeiting a bank account – that is, forfeiting an entire account when any forfeitable money is deposited in the account. Except in cases where the entire company is fraudulent or engaged in criminal activity (or where a bank account is used to camouflage tainted assets), the amount of money being forfeited should represent the amount of ill-gotten assets, not the entire bank account into which tainted assets are deposited.

***United States v. $242,484***, 389 F.3d 1149 (11th Cir. 2004) en banc. The Eleventh Circuit held that the evidence was sufficient to support the forfeiture of the currency seized by government agents at the Miami airport. A drug-detecting dog alerted to the money, which was wrapped in plastic and hidden in paper bags in the claimant's backpack. The claimant's inability to provide a detailed explanation where she had been staying or from whom she received the money, was also part of the probable cause calculus. In addition, the mere fact that the claimant was traveling from New York to Miami with over 40 pounds of cash, rather than going to a bank and obtaining a cashier's check (or wiring the money) was another factor that could be considered in evaluating whether there was probable cause.

***United States v. Puche***, 350 F.3d 1137 (11th Cir. 2003) If the defendant commingles forfeitable funds in an account with "clean" money for the purpose of disguising the tainted funds, the entire account is subject to forfeiture on a facilitation theory. Here, the defendants commingled $22,375 into an account that had $1.6 million. Forfeiting the entire account was appropriate and did not violate the Excessive Fines Clause.

***United States v. Bornfield***, 145 F.3d 1123 (10th Cir. 1998) The defendant was an accountant who agreed to deposit cash ($13,000) from two of his clients and then write a check on their behalf to purchase some land. He was prosecuted for money laundering and structuring (he deposited the cash incrementally). He was convicted of money laundering and the jury then ordered that he forfeit $13,000 from his account. The Tenth Circuit held that the forfeiture was improper. Money remaining in the defendant's account was not "involved" in the offense and was not "traceable" to the offense. All the tainted funds went into the

cash in the form of cash and went out in the form of a check to buy the property. The next question is whether other money in the account somehow "facilitated" the offense. There was no effort to disguise the tainted funds in this case. The mere pooling or commingling of tainted and untainted funds in an account does not, without more, render the entire contents of the account subject to forfeiture, unless the account is used to disguise the tainted funds. The substitute asset provision was also unavailable in this case, because in a money laundering case, the use of the substitute asset provision is unavailable if the defendant is the intermediary of tainted funds. 18 U.S.C. § 982(b)(2). Moreover, the jury's verdict ordering forfeiture was void, therefore, there was no basis for ordering the forfeiture of substitute assets.

***United States v. Garcia-Guizar***, 160 F.3d 511 (9th Cir. 1998) The police executed a search warrant at the defendant home and storage locker after he participated in an undercover drug transaction. The police found $43,000 in currency in the storage locker. There was insufficient proof to support the criminal forfeiture of this money. The money may only be criminally forfeited if it represents proceeds of the offenses (three undercover transactions) for which the defendant was indicted and convicted. Money that is "relevant conduct" (in the Guidelines use of the term) is not subject to 21 U.S.C. § 853(a)(1) forfeiture.

## *FORGERY*

***United States v. Powell***, 767 F.3d 1026 (10th Cir. 2014) The defendant stole checks from the mail and deposited them into his bank accounts at several banks. The indictment alleged that the defendant possessed and uttered forged checks "of an organization, the activities of which affecgted interstate commerce . . ." At trial the government alleged that the banks into which the checks were deposited were the "organizations" alleged in the indictment. But the checks were not "of the banks" into which they were deposited.

***United States v. Hunt***, 456 F.3d 1255 (10th Cir. 2006) The federal statute that makes it a crime to utter a forged security, 18 U.S.C. § 513, does not apply to a defendant who has authority to write checks on behalf of her employer, but misuses this authority to steal money from the employer. The statute only applies in situations in which a document purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed.

***United States v. LeCoe***, 936 F.2d 398 (9th Cir. 1991) The defendant forged endorsements on several U.S. Treasury checks, but each check was in an amount less than $500.00. This amounts to several separate misdemeanor offenses. The checks should not be aggregated so as to result in a felony offense because of the sum of the forged checks.

***United States v. Faust***, 850 F.2d 575 (9th Cir. 1988) The defendant signed "Secretary of Transportation" and then his initials next to that signature to endorse a check. No attempt was made to sign the actual secretary of transportation's name. This does not constitute forgery; the use of the defendant's initials next to the payee's title indicated, although falsely, the defendant's status as an agent of the secretary.

***FUNDS FOR EXPERTS See also: Attorney-Client; Right to Counsel (CJA)***

***McWilliams v. Dunn***, 137 S. Ct. 1790 (2017) In this case, the Court held that the basic requirement of Ake had not been satisfied, because a mental health expert who was made available to the defense failed to do anything more than conduct a basic examination of the defendant and write a report. The expert did not assist the defense in evaluating, preparing, and presenting a defense based on the mental health status of the defendant. A remand to the Eleventh Circuit was required to decide whether compliance with Akes' requirement would have made a difference in the death penalty decision.

***United States v. Pete***, 819 F.3d 1121 (9th Cir. 2016) The trial court erred in failing to appoint an expert to evaluate the defendant prior to his sentencing. The defendant was being resentenced after having previously (many years ago), been sentenced as a juvenile to a mandatory life sentence without parole. After Miller v. Alabama, necessitated a re-sentencing, the defendant requested funds to secure a psychological assessment prior to the re-sentencing. Denying this request was error and violated 18 U.S.C. § 3006A(e).

***Conklin v. Schofield***, 366 F.3d 1191 (11th Cir. 2004) The state trial court erred in failing to provide funds to the indigent defendant to secure the assistance of an expert pathologist. (The court assumed, without actually deciding, that Ake applies to experts other than psychiatrists). An expert was necessary to develop the defendant's theory that he acted in self-defense and that the knife wounds inflicted on the victim occurred post-mortem. Nevertheless, the error was harmless.

***United States v. Smith***, 987 F.2d 888 (2d Cir. 1993) The trial court should have granted defendant's request for funds to employ a psychiatrist to help him with his duress or coercion defense. Though the psychiatrist could not testify that defendant was, subjectively, coerced into committing the robbery, expert testimony would have been admissible on certain collateral matters, including sentencing.

***Fuller v. Johnson,*** 114 F.3d 491 (5th Cir. 1997) A request for expert assistance pursuant to 21 U.S.C. §848(q)(relating to habeas challenges to death sentences) and 18 U.S.C. §3006A(e)(1)(relating to expert assistance in trial preparation) should be considered ex parte. The failure to do so, however, was harmless error.

***Starr v. Lockhart***, 23 F.3d 1280 (8th Cir. 1994) The trial court erred in this death penalty trial by denying the defendant's request for funds to retain an expert to aid the defense in preparing and presenting evidence of the defendant's mental retardation. This was virtually the only evidence that the defendant had to offer in mitigation of sentence. The state-ordered psychiatric examination was not a substitute for a defense expert.

***Little v. Armontrout***, 819 F.2d 1425 (8th Cir. 1987) The defendant was confronted at trial by the testimony of the hypnotically enhanced testimony of the victim. Prior to trial, he sought funds to hire an expert to help him challenge that testimony. The trial

court refused the request and the Eighth Circuit reversed on the basis of Ake v. Oklahoma, 470 U.S. 68 (1985). The Eighth Circuit re-affirmed this holding on rehearing, 835 F.2d 1240 (8th Cir. 1987).

***Smith v. McCormick***, 914 F.2d 1153 (9th Cir. 1990) The Ninth Circuit holds that in order to comply with the Ake requirement, with regard to psychiatric assistance, the trial court must appoint a psychiatrist who reports to the defendant, not directly to the court. “The right to psychiatric assistance does not mean the right to place the report of a ‘neutral’ psychiatrist before the court; rather, it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate – including to decide, with the psychiatrist’s assistance, not to present to the court particular claims of mental impairment.”

***Castro v. State of Oklahoma***, 71 F.3d 1502 (10th Cir. 1995) The state trial court erred in denying the defendant’s request for expert psychiatric assistance in preparing the mitigation phase of this death penalty case. The Ake requirement that funds be provided to the defense in preparing the mitigation phase is not limited to cases in which the state offers psychiatric testimony. In any case in which the state, during the sentencing phase, offers evidence, psychiatric or otherwise, of the defendant’s future dangerousness or continuing threat to society, and the indigent defendant establishes the likelihood his mental condition is a significant mitigating factor, he is entitled to Ake assistance.

***Ford v. Gaither, 953 F.2d 1296*** (11th Cir. 1992) The state trial court erred in failing to appoint a psychiatrist to evaluate defendant’s mental state at the time of the murder. Though two psychiatrists had been appointed, one focused only on the defendant’s competence to stand trial, while the other testified that he did not have sufficient time to evaluate the defendant’s sanity at the time of the offense. Ake’s promise of a fundamentally fair trial was not achieved in this case.

***Cowley v. Stricklin***, 929 F.2d 640 (11th Cir. 1991) The defendant had been committed to mental health facilities nineteen times prior to committing the offense charged in a state prosecution. Though the judge allowed the defense to have one 45-minute psychiatric examination, no further requests for psychiatric assistance were granted. Furthermore, the examination allowed by the judge involved a state psychiatrist who furnished his report to both the defense and the prosecution. Ake holds that psychiatric assistance must be made available for the defense. No such help was furnished to the defense. “The right to psychiatric assistance does not mean the right to place the report of a ‘neutral’ psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate.” Finally, the fact that a psychologist volunteered to help the defense – without having had an opportunity to examine the defendant, was not an adequate substitute for a court-financed expert.

***Buttrum v. Black***, 721 F. Supp. 1268 (N.D. Ga. 1989) In the state death penalty prosecution, the prosecutor notified the defendant that he intended to call a private psychologist during the penalty phase of the trial to identify the defendant’s sexual sadism and future dangerousness. The trial court erred in not providing the defendant with funds to employ an independent psychiatrist. Affirmed: 908 F.2d 695.

## *GAMBLING*

***United States v. Bala***, 489 F.3d 334 (8th Cir. 2007) In order to prove a violation of 18 U.S.C. § 1955, the government must prove that the defendant violated a state gambling criminal law. Proving that the defendant violated a state administrative regulation is not sufficient. The evidence was insufficient in this case.

***United States v. Iacaboni,*** 363 F.3d 1 (1st Cir. 2004) Payments of gambling winnings to the bettors constituted a money laundering financial transaction and the amount of these payments could be forfeited. However, the court erred in forfeiting additional money that may have been a financial transaction that concealed the money, because the money laundering charge only alleged “promotion prong” money laundering and therefore, a financial transaction that concealed the nature, source, or ownership of the money could not be forfeited. This would improperly amend the indictment.

***United States v. Truesdale***, 152 F.3d 443 (5th Cir. 1998) The defendant’s gambling conviction was based on the alleged violation of Texas bookmaking laws. However, the evidence established that the bets were all received offshore and thus there could have been no violation of Texas state law.

***United States v. Murray***, 928 F.2d 1242 (1st Cir. 1991) In order to prove that the gambling enterprise involved five or more persons for a period in excess of thirty days, the government does not have to prove that the same five persons were involved for thirty days – there must be proof, however, that five persons were involved at all times during the thirty-day period. In this case, persons who took bets on one or two occasions over a fifty-six-day period were not “participants.” The evidence was insufficient to sustain the conviction. A conspiracy conviction was also reversed because the government failed to establish that the defendant conspired to have five or more persons involved for more than thirty days.

***United States v. Montford***, 27 F.3d 137 (5th Cir. 1994) The defendants sought to avoid the reach of Mississippi gambling statutes by gambling on a boat which traveled outside the three-mile limit. They were prosecuted under the Travel Act for traveling in foreign commerce to accomplish the gambling. They were also prosecuted under 18 U.S.C. §1084. The cruise ship, however, did not travel in foreign commerce because it never traveled to another country, or into another country’s waters.

***United States v. King***, 834 F.2d 109 (6th Cir. 1987) Under 18 U.S.C. §1955(b)(ii), the gambling operation must involve at least five persons. The Sixth Circuit holds that one incidental contact with a bookmaker does not include that person within the group of five. Rather, “regular contacts” among the five individuals are required to establish the offense.

***United States v. Gilley***, 836 F.2d 1206 (9th Cir. 1988) This gambling indictment required the jury to find that five people engaged in a gambling operation which lasted at least thirty days. The trial judge failed to instruct the jury that they had to agree unanimously on the thirty-day durational element of the crime. This failure constituted reversible error.

***GOVERNMENTAL MISCONDUCT SEE ALSO: Brady; Search and Seizure (Good Faith).***

***Illinois v. Fisher***, 540 U.S. 544 (2004) The defendant was arrested on drug charges and the state crime lab confirmed that the substance was cocaine. The defendant filed a discovery demand, but then became a fugitive. Ten years later he was re-captured and demanded the right to test the substance. In the meantime, it had been destroyed. This did not violate the defendant's due process rights, because there was no showing of bad faith on the part of the state, even though there was a specific discovery request by the defendant.

***United States v. Alvarez-Machain***, 504 U.S. 655 (1992) The fact that the DEA forcibly abducted the defendant in Mexico and kidnapped him back to California did not prevent him from being tried in the United States District Court. The forcible abduction of the defendant did not explicitly violate any terms of the treaty between the United States and Mexico. Because there was no violation of any treaty, Ker v. Illinois, 119 U.S. 436 (1886), applies and there was no prohibition on trying the defendant.

***United States v. Bowen***, 799 F.3d 336 (5th Cir. 2015) In a case described by the Fifth Circuit as extraordinary and sui generis, the Fifth Circuit upheld the lower court's decision to reverse the conviction of several police officers in connection with the Hurricane Katrina shootings. Three prosecutors, two from the U.S. Attorney's Office and another from DOJ had anonymously posted numerous posts on a website, posing as citizens of New Orleans, whipping up anger in the community and creating a "carnival atmosphere." The Court compared this to an angry mob outside the courthouse. The impropriety of this conduct was coupled with the US Attorney's office denials that his assistants were involved, while at least one assistant who was involved sat in the courtroom and listened to these claims.

***Gumm v. Mitchell***, 775 F.3d 345 (6th Cir. 2014) The prosecutor introduced evidence in a murder trial that the defendant admitted having sex with a horse (and that the horse talked to him) and other evidence of deviant sexual acts that were contained in psychiatric reports. The Sixth Circuit, reviewing the case in habeas, held that this amounted to flagrant prosecutorial misconduct that required setting aside the conviction.

United States v. Black***, 750 F.3d 1053 (9th Cir. 2014) This decision contains a noteworthy dissent to the denial*** of a request for rehearing en banc. Judge Reinhardt posed the question: "Whether the government may target poor, minority neighborhoods and seek to tempt their residents to commit crimes that might well result in their escape from poverty[?]" He then noted, "These cases force us to consider the continued vitality of the outrageous government conduct doctrine itself." The case involves the use of a CI, who was instructed by the government to go to Phoenix and recruit random people to help rob a nonexistent cocaine stash house. The CI went to a bad part of town and looked for people who looked like bad guys. When the defendant said he was interested, the CI introduced him to the undercover agent who told the defendant about the large quantity of cocaine at the fictitious stash house (thus driving up the Guideline calculation). Judge Reinhardt emphasized numerous problems with this operation, including its inception: The CI was sent to look for "bad guys" in a "bad part of town," i.e., a minority neighborhood. This was an open invitation to racial discrimination. The CI was not told to invite known or suspected criminals to get involved in the stash house robbery. This dissenting opinion contains a wealth of quotable observations, including, "The government verges too close to tyranny when it sends its agents trolling through bars, tempts people to engage in criminal conduct, and locks them up for unconscionable periods of time when they fall for the scheme. . . In this era of mass incarceration, in which we already lock up more of our population than any other nation on Earth, it is especially curious that the government feels compelled to invent fake crimes and imprison people for long periods of time for agreeing to participate in them – people who but for the government's scheme might have ever entered the world of major felonies. Of course, the government also controls the (often extraordinarily long) amount of time that its targets spend in prison after reverse sting operations, as it can specify the quantity of drugs involved in the fake conspiracies." Chief Judge Kozinski joined this dissent. See also United States v. Washington, 869 F.3d 193 (3rd Cir. 2017), which addresses the defendant's right to seek discovery in a selective enforcement claim, as well as the sentencing manipulation issues raised in these cases.

***United States v. Leal-Del Carmen***, 697 F.3d 964 (9th Cir. 2012) Deporting a potentially exculpatory witness prior to providing the defense an opportunity to interview the witness violates the defendant's right to compulsory process and to due process. The defendant, however, is required to show that the government acted in bad faith, a showing that was, in fact, made in this case, because the government had interviewed the witness prior to deporting him. The Ninth Circuit held that once the government is aware that a witness has exculpatory evidence, the government must alert the defense. If defense counsel has not yet been appointed or retained, the government may not deport the witness until after counsel is appointed or retained and given an opportunity to preserve the testimony. The Ninth Circuit also held that the trial court should have permitted the defendant to introduce the witness's statement to the border agent prior to being deported. The out-of-court declaration was admissible pursuant to Rule 804(b)(6) – the forfeiture by wrongdoing hearsay exception – because the government rendered the witness unavailable. Finally, the appellate court held that the defendant was entitled to a "missing witness" instruction that would have advised the jury that the failure of a party to produce a material witness who could elucidate matters under investigation gives rise to a presumption that the testimony of that witness would be unfavorable to that party if the witness is peculiarly within the party's control. The deported witness could have been paroled back into the country, but only the government could produce the witness under that procedure. "For the government to say that it isn't responsible for her absence because it no longer knows where to find her comes close to the classic definition of chutzpah."

***United States v. Hills***, 618 F.3d 619 (7th Cir. 2010) During the prosecutor's closing argument in this multi-defendant case, the prosecutor said, "And you don't really need to worry about that Fifth Amendment protection unless you're worried that you're doing something illegal. They knew perfectly well precisely what they were doing. . . . In this case, they're using the Fifth Amendment not as a shield to protect themselves from incrimination, but as a sword to prevent the IRS from getting the information that they are entitled to." This improper argument amounted to prosecutorial misconduct that required setting aside one defendant's conviction under the plain error standard. See Griffin v. California, 380 U.S. 609 (1965).

***United States v. Liburd***, 607 F.3d 339 (3rd Cir. 2010) The defendant was arrested attempting to smuggle cocaine form the Virgin Islands into the United States. When he went through the TSA checkpoint in the Virgin Islands, two blocks were seen in the Xray scanner and when questioned about the items, he said that they were blocks of cheese. Later, another TSA agent found that the blocks were cocaine. At trial, the defendant claimed that someone must have placed the items in his bag. The government never revealed in discovery that the defendant had made the "cheese statement" and prior to trial told the court unequivocally that no statement of the defendant would be introduced at trial. Repeatedly during trial, however (including opening statement), the prosecutor referred to the cheese statement. This was misconduct and that necessitated granting a new trial. Whether the government was required to make no mention of the cheese statement or not, it agreed to do so, and having agreed to do so, it was obligated to honor that agreement. See also United States v. McKinney, 758 F.2d 1036 (5th Cir. 1985) (Agreements between the government and a defendant to forego the presentation of otherwise admissible evidence are enforceable.).

***United States v. Nobari***, 574 F.3d 1065 (9th Cir. 2009) Eliciting testimony that Mexicans are involved in the drug trade in one way, and Middle Easterners are involved in another aspect, was improper, especially given the government's closing argument that pointed out that the Middle Eastern defendants played precisely the role that was described by the agent. To the extent that the evidence was minimally relevant (for example, there was a taped call where one of the conspirators referred to "the Mexicans"), the evidence should have been excluded pursuant to Rule 403.

***United States v. Reyes***, 577 F.3d 1069 (9th Cir. 2009) In this "combative" trial involving allegations of illegal options back-dating, the defendant, who was a corporate executive who signed corporate financial statements defended on the basis that he thought the Finance Department was aware of the backdating and properly documented the options transactions in the financial statements. Only one person from the Finance Department testified for the government and she testified that she did not know about the backdating. However, the government knew – both through FBI interviews and through a pending SEC lawsuit against other people in the Finance Department – that people in the Finance Department were aware of the backdating. No other people from the Finance Department testified (in part because they asserted the Fifth Amendment right to testify). In closing argument, the defendant argued that other people in the Finance Department knew (though there was no evidence of this at trial). The government then responded that no other people in the Finance Department knew (though the government knew that this was false). The Ninth Circuit held that this amounted to prosecutorial misconduct that necessitated reversing the conviction. "We do not lightly tolerate a prosecutor asserting as a fact to the jury something known to be untrue or, at the very least, that the prosecution had every strong reason to doubt."

***Ferrara v. United States***, 456 F.3d 278 (1st Cir. 2006) Twelve years ago, the defendant entered a guilty plea to a RICO case that charged various predicate offenses, including murder. A key witness for the government provided a statement implicating the defendant in one of the charged murders. Later, however, he recanted and told the AUSA and the case agents that the defendant was not involved in the murder. The AUSA and agents met once again with the witness, and he recanted his recantation. The witness's recantation was never provided to the defense, despite Brady obligations that were ongoing pursuant to the Constitution and Local Rules. The defendant entered a guilty plea, though during the plea colloquy, he never admitted participation in the murder. Years later, the witness's recantation was revealed. The District Court granted § 2255 relief. The First Circuit affirmed, concluding that the government's conduct amounted to a violation of Brady and amounted to gross governmental misconduct.

***Earp v. Ornoski,*** 431 F.3d 1158 (9th Cir. 2005) The petitioner was entitled to an evidentiary hearing on his claim that the state intimidated and threatened a witness he wanted to call at a hearing on his Motion for New Trial. Though the Ninth Circuit made no findings regarding whether this event actually occurred, the defendant proffered an affidavit from the witness, and he was at least entitled to an evidentiary hearing in support of this allegation, which, if true, might entitle him to relief. Chambers v. Mississippi, 410 U.S. 284 (1973); United States v. Vavages, 151 F.3d 1185 (9th Cir. 1998); Webb v. Texas, 409 U.S. 95 (1972); Williams v. Woodford, 384 F.3d 567 (9th Cir. 2004).

***United States v. Wilson***, 390 F.3d 1003 (7th Cir. 2004) The government withdrew a Rule 35 motion for reduction of sentence because the defendant threatened to bring a civil suit against the government unrelated to the criminal case in which he was cooperating (or in which he was presently involved). The Seventh Circuit held that this was "bad faith" and ordered the lower court to consider a reduction in sentence.

***United States v. Rutherford,*** 371 F.3d 634 (9th Cir. 2004) During the defendant's tax evasion trial, several IRS agents sat behind the prosecution table. Post-trial interviews with jurors indicated that some of them felt intimidated by the agents. The lower court held that the defendant had to prove that the government acted with the intent to intimidate the jurors. The Ninth Circuit, however, held that the defendant was only required to prove a prejudicial impact on the jury; the defendant was not required to prove that this was the government's intent. A remand for further development of the record was required. The

defendant should be permitted to introduce evidence regarding the jurors' perceptions of the agents' conduct and any discussions among the jurors concerning the possibility of IRS retaliation if they voted to acquit.

***United States v. Derrick***, 163 F.3d 799 (4th Cir. 1998) The district court dismissed the indictment in this case after deciding that there were discovery abuses and Brady violations. The lower court relied on its supervisory powers. The Fourth Circuit reversed in a lengthy opinion that canvasses the law regarding the propriety of dismissing an indictment based on governmental misconduct in the discovery process. Even with a finding of a "pattern of misconduct" the defendant must still demonstrate prejudice, except, perhaps, in the most extreme circumstances. In this case, the appellate court found insufficient basis for the drastic remedy of dismissal.

***United States v. Gonzales,*** 164 F.3d 1285 (10th Cir. 1999) Although the defense has no right under Rule 16 to interview a witness, it has a right to be free from prosecution interference with a witness' freedom of choice about whether to talk to the defense. In this case, the district court directed the government to provide to the defense "face-to-face" access to its confidential witnesses. The government then misled the court about the government's knowledge of the witness's whereabouts. The Tenth Circuit concludes that excluding the witness's testimony was not an appropriate remedy. Less severe sanctions, including allowing the witness to be deposed, or recommending disciplinary proceedings against the government attorneys should have been considered.

***United States v. Wilson***, 149 F.3d 1298 (11th Cir. 1998) The prosecutor engaged in various instances of misconduct during cross-examination of the defendant. The Eleventh Circuit concluded that this conduct did not warrant a new trial. However, the court reiterated the principle, "That we find an error not to be reversible does not transmute that error into a virtue. The error is still an error. And urging the error upon the trial court still violates the United States Attorney's obligation to the court and to the public." The appellate court invited the trial court to take more aggressive measures, including disciplinary proceedings, contempt citations; fines; and reprimands to curb this type of misconduct.

***United States v. Nolan-Cooper***, 155 F.3d 221 (3rd Cir. 1998) This case contains a primer on the law of governmental misconduct caused by an undercover agent getting under the covers with the target. The single inappropriate act in this case (the agent had sexual intercourse with the target one time over the course of a year-long investigation) was not enough to merit dismissing the indictment.

***Siddiqi v. United States***, 98 F.3d 1427 (2d Cir. 1996) The government shifted its theory of prosecution in this Medicare fraud trial repeatedly during the course of trial, and in post-trial litigation. Its positions were inconsistent during various portions of the case and constantly changed to accommodate the evidence presented by the defense which rebutted the theory du jour. The Second Circuit vacated the conviction.

***United States v. Tarricone,*** 11 F.3d 24, amended by 21 F.3d 474 (2d Cir. 1993) The government possessed a handwriting expert's opinion that the writing on a particular document was not the defendants. At trial, however, the government elicited testimony from more than one witness that the writing was that of the defendant and then argued this matter to the jury. This was prosecutorial misconduct. A remand was necessary to determine if the false testimony could have affected the jury's verdict.

***United States v. Cuervelo***, 949 F.2d 559 (2d Cir. 1991) A DEA agent was alleged by the defendant to have seduced her and had sex with her on at least fifteen occasions. He also allegedly bought her clothes and jewelry. The DEA agent denied this. The District Court decided that no hearing was necessary, because even if the facts were as alleged by the defendant, there was no basis to dismiss the indictment. The Second Circuit remanded for a hearing. The court reviewed several cases in which informants engaged in sex with defendants (U.S. v. Miller, 891 F.2d 1265 (7th Cir. 1989); U.S. v. Shoffner, 826 F.2d 619 (7th Cir. 1987); U.S. v. Simpson, 813 F.2d 1462 (9th Cir. 1987)) but considered this case a matter of first impression in light of the DEA agent's alleged misconduct. The court concludes that a hearing is necessary. It was not clear if sex was used by the DEA agent to promote the defendant's participation in the conspiracy, as opposed to his having only acquiesced to having sex with the defendant. It was also unclear who allegedly initiated the sexual conduct. Before deciding whether the indictment should be dismissed for outrageous misconduct, these questions had to be answered.

***United States v. Wallach,*** 935 F.2d 445 (2d Cir. 1991) The government should have known that one of its witnesses was committing perjury and therefore, the defendants' convictions in this case were reversed. This is not a case in which the government knowingly introduced perjured testimony; rather, the court finds that the government should have known that the witness was lying when on cross-examination, he denied being a compulsive gambler. This witness was the "centerpiece" of the government's case, and the government should have further investigated his claims about not being a gambler.

***United States v. Nolan-Cooper***, 155 F.3d 221 (3rd Cir. 1998) The court set forth the analysis that should be undertaken when an undercover agent goes undercover with a target – that is, engages in sexual conduct with the target. In this case, the sexual conduct occurred at the conclusion of a lengthy sting operation and was not planned by the agents to further the target's criminal conduct. This did not amount to a due process violation.

***United States v. Voigt***, 89 F.3d 1050 (3rd Cir. 1996) The Third Circuit thoroughly reviewed the principles governing a claim of outrageous governmental misconduct. First, the court noted that these types of claims are not limited to cases in which the government has initiated criminal conduct (i.e., the extreme entrapment-type cases). In this case, the defendant's claim focused on the government's use of an attorney who was employed by the defendant, to obtain information, including recorded conversations with the defendant, and assorted documents. The court also held that the trial court, which denied the motion, should have conducted a pretrial evidentiary hearing to further develop the record. However, after trial, the facts were sufficiently

developed to support the rejection of the claim. The attorney – who was ultimately indicted, as well – initially approached FBI agents and reported that her employer was engaged in an advance fee loan scheme involving millions of dollars. She reported that she was not employed to provide legal advice, but rather, contacted potential banks and other parties. She became a confidential informant, but continued to work for the defendant, and was at times engaged in the fraudulent conduct without the knowledge of the government and without their consent. Because the government took several precautions during the course of the investigation to prevent the disclosure of any attorney-client privileged information and never affirmatively sought to intrude on the relationship and because the attorney was not acting principally as the defendant's attorney (and certainly was not involved as the attorney for the defendant in the criminal case itself), the outrageous misconduct claim was properly rejected.

***United States v. Weddell***, 800 F.2d 1404 (5th Cir. 1986) FBI agents subpoenaed the defendant's wife and kept her in a hotel room for a day during the time that she wanted to go to the defendant's trial. At the end of the day, she was brought to the courthouse and because of her fatigue was unable to testify on behalf of her husband. The court calls the government's conduct "highly irresponsible" but remanded for further development of the record prior to deciding whether the conviction of the husband should be reversed (The remand order was modified at 804 F.2d 1343). The court also criticizes the government's failure to advise the wife that she had no duty to talk to them.

***United States v. Catton***, 89 F.3d 387 (7th Cir. 1996) The conviction in this case was reversed, because a government agent lied on the stand (he claimed to have talked to a third party about critical evidence the day before, when, in fact, he had one of his agents ask the witness to fax information to the government's case agent) and the prosecutor, in closing argument, misstated the evidence on a crucial point.

***United States v. LA Fuente***, 991 F.2d 1406 (8th Cir. 1993) The practice of using trial subpoenas to compel witnesses to attend pretrial conferences is improper under Rule 17 of the Fed. R. Crim. P. The government admittedly did so. To determine if a new trial is required, the case would be remanded to the trial court to determine what prejudicial effect this procedure had on the defendant. The defendant argued that witnesses were improperly brought together to eliminate any discrepancies in their testimony.

***United States v. McBride***, 862 F.2d 1316 (8th Cir. 1988) During the final argument, the government referred to counts which had been dismissed, asked irrelevant questions of the defendant's former girlfriend, and sought to impeach a defendant's witness without factual basis. These errors require the granting of a new trial.

***United States v. Young,*** 17 F.3d 1201 (9th Cir. 1994) The defendant was arrested at a house where a methamphetamine lab was located. Other than his presence at the scene, the strongest evidence linking him to the crime was the discovery of notebooks in his truck with directions how to set up a lab. At trial, he explained that a resident of the house had thrown the books into the back of the truck. A law enforcement officer, however, testified that the notebooks were found by another officer taped underneath the dashboard. After the defendant was convicted, the officer who discovered the notebooks heard about this testimony and revealed that the notebooks were actually found in the back of the pickup and claimed that she told the AUSA this during the trial before the other officer testified. Regardless of whether the AUSA purposefully introduced perjured testimony, or did so in good faith, a new trial was required. If the use of the perjured testimony was knowing, then the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. If the government unwittingly presents false evidence, a defendant is entitled to a new trial if there is a reasonable probability that without the evidence the result of the proceeding would have been different.

***United States v. Kojayan***, 8 F.3d 1315 (9th Cir. 1993) Three people were caught smuggling drugs. Two defendants went to trial, while the third provided information to the government. The cooperating individual did not testify. During closing argument, the prosecutor argued that the third individual could not be compelled to testify. This was not true; the witness had signed a cooperation agreement and the government withheld this from the defense and the jury. This type of misconduct on the part of the government necessitated reversing the conviction. The government made this argument in response to the defendant's argument that the government failed to call the cooperating individual, and therefore the witness probably had nothing to say that was favorable to the government. The government's response was untrue and thus unfairly undercut the defendants' argument.

***United States v. Cooper***, 983 F.2d 928 (9th Cir. 1993) The DEA busted a home laboratory, believing that methamphetamine was being produced. Immediately after the equipment was seized, the defendant contacted the DEA and explained that it was not Meth, but an AIDS cure which the defendants were manufacturing. The DEA said the equipment was being kept for evidence, but the agents actually knew that the equipment was being destroyed. An expert for the defense testified that if the lab was configured as described by the defense, then methamphetamine could not have been the product. Because of the exculpatory nature of the destroyed evidence, as well as the bad faith conduct of the government, the only appropriate remedy was the dismissal of the indictment.

***United States v. Westerdahl,*** 945 F.2d 1083 (9th Cir. 1991) Though the government cannot be forced to confer immunity on a defense witness, the failure to do so can, in certain circumstances, amount to prosecutorial misconduct. This would be the case where the failure to do so intentionally distorts the fact-finding process.

***Cuffle v. Goldsmith***, 906 F.2d 385 (9th Cir. 1990) Following his murder conviction, the defendant was told by agents of the state that he should discharge his attorney and withdraw his appeal because if he succeeded on his appeal, he would be subject to the death penalty. This represents misconduct on the part of the state and his appeal to the state court would be reinstated.

***United States v. Wilson***, 149 F.3d 1298 (11th Cir. 1998) The prosecutor repeatedly suggested that the defendant was a "major drug dealer" even though he was only charged with one relatively minor sale of crack. Also, on cross-examination of the defendant, the prosecutor improperly asked about other offenses committed by the defendant. This amounted to prosecutorial misconduct, but reversal of the conviction was not required. The appellate court noted, however, that lower courts should employ other means of correcting prosecutorial abuses, such as: (1) contempt citations; (2) fines; (3) reprimands; (4) suspension from the court's bar; (5) removal or disqualification from office; and (6) recommendations to bar associations to take disciplinary action. The court concluded that district courts are encouraged to remain vigilant and consider more fully such sanctions in cases of persistent or flagrant misconduct by prosecutors.

***United States v. Crutchfield***, 26 F.3d 1098 (11th Cir. 1994) The government engaged in serious prosecutorial misconduct which necessitated reversing the conviction. Among the tactics which were condemned were (1) engaging in totally irrelevant inquiries of government witnesses in the specialized area of reptiles, for the purpose of demonstrating to the jury the prosecutor's own expertise in the area; (2) introducing improper bad character evidence against the defendants; (3) implying that one of the defendant's witnesses was involved in marijuana smuggling; (4) frequent disobedience of trial court's rulings.

***United States v. Eyster***, 948 F.2d 1196 (11th Cir. 1991) On cross-examination, a government witness indicated that certain counts of the indictment to which he pled guilty were false – he was not guilty of the charges to which he pled guilty. On re-direct, the prosecutor suggested that there was a typographical error in the plea agreement and thus, the witness only pled guilty to the charges which he was, in fact, guilty of. This re-direct was erroneous: there was no typographical error. The prosecutor's questions were based on evidence not in the record and amounted to improper bolstering of the witness. This was reversible error. In assessing whether this was grounds for reversal, the court noted that "the government's reference to a typographical error was ultimately an outright falsehood designed to mitigate [the witness'] willful perjury."

***United States v. Eason,*** 920 F.2d 731 (11th Cir. 1990) The government engaged in misconduct by introducing evidence of a co-conspirator's conviction for the offense for which the defendant was being tried. The Eleventh Circuit recites dozens of cases from the Southern District of Georgia in which the court found that the United States Attorney either engaged in misconduct or erroneously introduced evidence. The court reminded the prosecutors that they have a duty to properly advise the court of the Rules of Evidence, and not, as here, mislead the court as to the admissibility of certain evidence. The court also cites the famous passage from Berger v. United States, relating to the duty of a United States Attorney to seek justice, not a conviction.

***United States v. Espinosa-Hernandez***, 918 F.2d 911 (11th Cir. 1990) A critical witness for the government in this drug prosecution was a customs agent. The government had also used an informant who was controlled by that agent, but who was not available at the time of trial. After the defendant was convicted, he filed a motion for new trial and a request for additional discovery relating to the customs agent's impending charges of lying on his employment application, participation in the escape of an informant from custody, and distribution of drugs. Additionally, the defendant sought discovery concerning the agent's participation in rendering the informant unavailable at trial. The trial court erred in not affording the defendant an opportunity to take additional post-trial discovery.

***United States v. Heller***, 830 F.2d 150 (11th Cir. 1987) The government substantially interfered with the defendant's due process rights in this tax evasion case by advising his accountant that if he did not cooperate with the government, he might find himself to be a co-defendant. Shortly after this warning was issued, the accountant advised the government that he would provide testimony against the defendant. The accountant then falsely testified that the defendant concealed facts from him, the accountant, and that the accountant had not heard of the defendant's method of accounting and that he did not approve of this method. This was all a fabrication on the part of the accountant who had earlier made statements indicating that he was aware not only of the defendant's accounting methods but had approved them. Conviction reversed.

***United States v. Ballivian***, 819 F.2d 266 (11th Cir. 1987) Prior to sentencing, an assistant United States attorney who was not involved with this prosecution sent a letter to the judge purporting to describe the activities of the defendant and his family in an extensive money laundering operation. This was an improper ex parte communication. The case was reassigned to another district judge who had not received that letter but who was provided with a sentencing memorandum in a proper manner.

***Brown v. Wainwright***, 785 F.2d 1457 (11th Cir. 1986) The State knowingly introduced false testimony relating to a witness' tentative plea agreement. In granting habeas relief, the Eleventh Circuit holds that the proper legal standard is not whether the defendant can prove that the correction of the false testimony "probably would have resulted in an acquittal." Rather, where, as here, the State intentionally uses false testimony, a new trial is required if the false testimony "could in any reasonable likelihood have affected the judgment of the jury."

***United States v. Richardson***, 161 F.3d 728 (D.C. Cir. 1998) The prosecutor was black; the jurors were black; the defendant was black, and the eyewitness was black. The defense attorney was white. The defense was misidentification. In closing argument, the defense attorney argued vigorously that the eyewitness may have confused the defendant with someone else who may have been the perpetrator. The prosecutor responded that the jury should not fall prey to the "we all look alike" argument. The prosecutor repeated that "we all don't look alike." Then, in response to the defendant's argument that the eyewitness was only 17, and therefore able to make a mistake, the prosecutor responded that in the defense attorney's world, perhaps 17-year-olds have not come of age, but in this world, they are grownups. Both of these arguments played on racial prejudice and amounted to plain error necessitating reversal of the conviction, even without there having been any objection by defense counsel.

***United States v. Doe***, 903 F.2d 16 (D.C. Cir. 1990) The repeated references to the defendants as “the Jamaicans” and statements that “the Jamaicans” were an undesirable force in the District of Columbia, and that “what’s happening in Washington, D.C. is that Jamaicans are coming in; they are taking over the retail sale of crack in Washington, D.C. . . . “amounts to an improper reference to the race or ancestry of the defendants and requires reversal of the conviction.

***United States v. Horn***, 811 F. Supp. 739 (D.N.H. 1992) Discovery in this massive bank fraud prosecution was being maintained at an independent document management firm. The defense was allowed to review documents at that location and to make copies. Unbeknownst to the defense, however, whenever the employees made a copy of a document for the defense, an extra copy was made for the government. The defense learned about this and moved to seal the government’s copies. Prior to a hearing on this motion, the government made an extra copy of their set of the defendant’s documents. The lower court held that this amounted to serious governmental misconduct, violating the defendant’s right to due process, to the effective assistance of counsel and also violated the work product doctrine. The appellate court agreed with this assessment but reversed the lower court’s award of attorney’s fees and costs. 29 F.3d 754 (1st Cir. 1994).

***GOVERNMENTAL MISCONDUCT (Selective Prosecution)***

***United States v. Armstrong***, 517 U.S. 456 (1996) A defendant is not entitled to discovery from the government on the issue of selective prosecution, pursuant to Rule 16(a)(1)(C), because that rule only allows for discovery of information which is relevant to a defense to the government’s case-in-chief, not a selective prosecution claim.

***United States v. Sellers***, 906 F.3d 848 (9th Cir. 2018) The Ninth Circuit concludes that the strict standard for authorizing discovery in a selective prosecution claim (i.e., the Armstrong standard), does not apply in a selective enforcement, reverse-sting case. The Ninth Circuit joined the Seventh and Third Circuits in this holding: United States v. Davis, 793 F.3d 712 (7th Cir. 2015); United States v. Washington, 869 F.3d 193 (3rd Cir. 2018). The Ninth Circuit did not decide what the standard for allowing discovery is in every case but said that the trial court should permit discovery if there is some showing of selective enforcement.

***United States v. Washington***, 869 F.3d 193 (3rd Cir. 2017) The defendant was entitled to engage in discovery to support his view that the sting operation that he was induced to join focused on minorities. The Third Circuit noted that there is a difference between a selective prosecution claim (which focuses on the prosecutors) and a selective enforcement claim (which focuses on law enforcement). Discovery is not as limited in a selective enforcement claim, because there are unlikely to be any records of similarly situated defendant, as in the case of a selective prosecution claim.

***United States v. Jones***, 159 F.3d 969 (6th Cir. 1998) When the police went to the defendant’s house to make the arrest, they wore t-shirts with the picture of the defendant on the front and his wife (another target) on the back with derogatory statements. Just prior to trial, one of the officers sent a post card of an African American woman with bananas on her head to the defendant in jail. Based on this outrageous conduct – and proof that a disproportionate number of African Americans were referred to federal court for crack cocaine prosecution – the Sixth Circuit found that the defendant had established a prima facie case of intentional racial discrimination. The trial court erred in failing to allow the defendant to take discovery in pursuit of this claim.

***GOVERNMENTAL MISCONDUCT (Vindictive Prosecution)***

***United States v. Dvorin,*** 817 F.3d 438 (5th Cir. 2016) While the defendant’s conviction was pending for bank fraud, the government conceded that there was a Brady violation and requested that the conviction be vacated, and a new trial ordered. When the case was remanded, a new prosecution team added a forfeiture count to the indictment. After the defendant was convicted a second time, he claimed that this was a vindictive prosecution (or a vindictive addition to the indictment). The Fifth Circuit held that the government failed to rebut the presumption of vindictiveness.

***United States v. La Deau***, 734 F.3d 561 (6th Cir. 2013) The defendant was initially charged with possession of child pornography. The trial court suppressed a confession which prevented the government from proving that the defendant actually possessed the images. The government then opted to prosecute him on a conspiracy charge. This was permissible. However, rather than conspiracy to possess the child pornography, the government charged the defendant with conspiracy to receive pornography, which carried a mandatory minimum sentence (that did not apply to the conspiracy to possess offense). The Sixth Circuit held that this triggered a presumption of vindictiveness and ordered that the indictment be dismissed.

***United States v. Jenkins***, 504 F.3d 694 (9th Cir. 2007) The defendant was stopped crossing the border into the United States and acknowledged that she was involved in alien smuggling. During another entry, she was caught with marijuana in the vehicle, but denied knowing anything about the marijuana. She was tried for marijuana smuggling and was acquitted. Thereafter, the government brought charges against her for alien smuggling. She claimed that this was a vindictive prosecution, because the government knew about the alien smuggling facts before it brought the marijuana charges and thus, there was a clear appearance, which was not rebutted, that the alien charges were brought vindictively, because of her acquittal in the marijuana case. The Ninth Circuit held that this was a vindictive prosecution and directed that the charges be dismissed.

***GRAND JURY (Attorney /Client Privilege)***

**In re Grand Jury Subpoena,** 909 F.3d 26 (1st Cir. 2018) At least in some circumstances, the attorney-client privilege applies to government employees and government attorneys. In this case, the apparent target of the grand jury subpoena was not a government employee, so the privilege applied to communications between an employee and the government lawyer.

***In re Grand Jury Matter #3***, 847 F.3d 157 (3rd Cir. 2017) In order for work product or attorney client privileged communications to be stripped of the privilege on the basis of the crime-fraud exception, the defendant must engage in some overt act of fraud or

criminality and not simply muse about using the information to commit a crime. In this case, the document was submitted to the grand jury which returned an indictment and later a second grand jury returned a superseding indictment. Nevertheless, because the government conceded that the grand jury was still investigating the defendant, the district court had jurisdiction to consider the privilege issue.

***United States v. Gorski***, 807 F.3d 451 (1st Cir. 2015) The Perlman doctrine authorized a direct appeal of a company which challenged the issuance of a subpoena to its law firm and which the lower court held would be enforced pursuant to the crime fraud exception. Because the client could not be held in contempt and thereby bring an appeal prior to the disclosure of the documents (the client was not the recipient of the subpoena and therefore could not be held in contempt for failure to comply), the Perlman doctrine permitted the client to appeal the crime-fraud determination.

***In re Grand Jury Subpoena***, 745 F.3d 681 (3rd Cir. 2014) This case contains a thorough primer on the procedures that are appropriate when the government seeks to pierce the attorney-client privilege by invoking the crime-fraud exception. The procedure – proceeding in camera before a trial judge ex parte – is appropriate. An immediate appeal under the Perlman doctrine is appropriate when, as here, the information is in the possession of the attorney, who would otherwise have no reason to risk being held in contempt in order to protect his client's privilege; thus, the client may appeal, rather than having to wait for the attorney to be held in contempt and relying on the attorney's decision to appeal. On the merits, the Third Circuit held that crime fraud exception applies only if the client was in the process of committing a crime, or contemplating committing a crime when the attorney was consulted. It does not apply if the attorney is consulted and later the client decides to commit a crime or fraud.

***In re Grand Jury,*** 705 F.3d 133 (3rd Cir. 2012) When a grand jury subpoena is issued to a corporation for certain documents, or to an attorney for the corporation who is in possession of certain of the corporate documents the attorney must suffer the consequences of contempt in order to perfect an appeal of an Order by the district court that the attorney-client privilege does not apply. The Order requiring the attorney to produce the records is not directly appealable. The exception recognized in Perlman v. United States, 247 U.S. 7 (1918), only applies to a third-party custodian who has no interest in being held in contempt. In that situation, the client has the right to appeal the Order, because the custodian has no interest in perfecting an appeal and the client is not subject to contempt, so the client must be afforded the opportunity to appeal without the custodian, or the client first being held in contempt. In the situation with an attorney custodian, however, the client can simply insist that the documents be returned to the client and the client can then refuse to produce the documents, be held in contempt and appeal. With respect to Orders directed at former employees (including former in-house counsel), the corporation may appeal, because the corporation may not require former employees to return documents to the corporation. Finally, the Third Circuit held that Mohawk did not eliminate the Perlman rule, at least in the context of grand jury subpoenas. The Third Circuit, having disposed of the jurisdictional issue, then reached the merits of the crime fraud exception issue, as it related to the former employees and concluded that a sufficient showing was made by the government to invoke the crime fraud exception.

***United States v. Ponds***, 454 F.3d 313 (D.C. Cir. 2006) The grand jury was investigating an attorney in connection with his receipt of attorney's fees from a particular client – specifically, his receipt of a car as a fee. A grand jury subpoena was issued, seeking any and all documents relating to the receipt of the car, documents relating to the fees paid by that client, documents relating to the attorney's sister, documents relating to any other cars provided to the attorney by the client, and any documents relating to the client's mother. The attorney sought and received "act of production" immunity. Nevertheless, he was indicted. The D.C. Circuit concluded that the trial court did not conduct a sufficiently rigorous Kastigar hearing. The trial court concluded that Fisher controlled, rather than Hubbell, because the government obtained only pre-existing documents in defined categories. The D.C. Circuit disagreed, holding that the subpoenaed documents were sufficiently broad that they came within the Hubbell decision that bars the use of documents that are authenticated and categorized by the immunized target.

***In re Grand Jury Subpoenas*** 04-124-03, 454 F.3d 511 (6th Cir. 2006) When a grand jury issues a subpoena to a person or entity that holds documents that arguably are privileged, the holder of the privilege (i.e., the target of the grand jury investigation) has the right to review the documents and assert the privilege. The government in this case argued that the government, through the use of a taint team, should do the initial privilege review. The Sixth Circuit held that the privilege takes precedence over the grand jury's power to investigate and subpoena records.

***In re Grand Jury Subpoena***, 445 F.3d 266 (3d Cir. 2006) The attorney communicated with the corporate client representative, advising her about a subpoena duces tecum. The crime fraud exception applied to this communication, because the government claimed that the client made decisions about shredding documents and deleting emails (or at least not preventing the deletion of documents) based on this communication. This case contains a lengthy analysis of the crime fraud exception to the attorney client privilege.

***United States v. Bergeson***, 425 F.3d 1221 (9th Cir. 2005) A defendant jumped bail. His attorney, Ms. Bergeson, was subpoenaed to testify at the grand jury about whether she had told her attorney about the trial date. The trial court held that the information was not privileged, but the subpoena would be quashed as unreasonable and oppressive, because compliance with the subpoena would destroy the attorney-client relationship. The government had other evidence of the defendant's knowledge of the trial date (from the defendant's mother and an earlier pleading filed by counsel indicating that the defendant agreed to a continuance). The Ninth Circuit affirmed, holding that the trial court did not abuse its discretionary authority under Rule 17(c)(2).

***In re Grand Jury Subpoenas***, 123 F.3d 695 (1st Cir. 1997) When the grand jury issues a subpoena to a law firm for records relating to a client, if the trial court denies a motion to quash on attorney / client privilege grounds, the company may immediately

appeal and need not wait until the law firm is held in contempt. Turning to the merits of this appeal, the First Circuit concluded that billing records may, in some circumstances, contain attorney / client privileged information where, for example, the bill reveals the nature of the work performed by the attorney. The record was too sparse in this case, however, to make this determination and a remand for further development of the facts was necessary.

***In re Grand Jury Subpoenas***, 144 F.3d 653 (10th Cir. 1998) Generally, any privilege resulting from communications between corporate officers and corporate attorneys concerning matters within the scope of the corporation's affairs and the officers' duties belongs to the corporation and not to the officers. There are exceptions, however: First, the officer must show he approached counsel for the purpose of seeking legal advice. Second, he must demonstrate that when he approached counsel, he made it clear that he was seeking legal advice in his individual rather than in his corporate capacity. Third, he must demonstrate that counsel saw fit to communicate with him in his individual capacity, knowing that a possible conflict could arise. Fourth, he must prove that his conversations with counsel were confidential. Fifth, he must show that the substance of his conversations with counsel did not concern matters within the general affairs of the company. See also United States v. International Bhd. Of Teamsters, 119 F.3d 210, 215 (2d Cir. 1997); In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 123 (3rd Cir. 1986); In re Grand Jury Investigation, 575 F.Supp. 777, 780 (N.D. Ga. 1983). The officer met this standard in this case. A related decision appears at In re Grand Jury Proceedings, 156 F.3d 1038 (10th Cir. 1998) (holding that intervenor established that his conversations with counsel focused on his personal exposure to jail time, even though it related to his employment in the corporation).

***In re Grand Jury Proceedings***, 220 F.3d 568 (7th Cir. 2000) There is no accountant-client privilege. However, where an attorney hires an accountant and the accountant is acting as an agent of an attorney for the purpose of assisting with the provision of legal advice, the attorney-client privilege applies. If what is sought is not legal advice but only accounting service, or if the advice sought is the accountant's rather than the lawyer's, no privilege exists. The preparation of tax returns is an accounting service, not the provision of legal advice. Documents used in both preparing tax returns and litigation are not privileged. An assertion of privilege must be evaluated by the court on a document-by-document basis. In this case, the trial court made inadequate findings of fact to enable meaningful appellate review of the document-by-document findings by the judge.

***In re Grand Jury Proceedings***, 219 F.3d 175 (2d Cir. 2000) A corporation was being investigated for illegal firearms sales. The corporation explicitly sought to enforce the attorney-client privilege. An officer of the corporation, however, testified at the grand jury about certain dealings of the corporation and procedures that the corporation adopted in light of counsel's advice; and the corporation's in-house counsel also testified, but refused to disclose certain notes that were taken by his assistant during a meeting about which he testified (claiming that this was work product). The government claimed that the corporation waived both the attorney-client and the work product privileges. The Second Circuit held that waiver may be found where the privilege holder asserts a claim that in fairness requires examination of protected communications. Fairness comes into play when a party attempts to use the privilege both as a sword and as a shield. In other words, a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party. A quintessential example of waiver is the advice of counsel defense. Circumstances may also dictate that there has been a partial waiver. The issue is more complicated in the context of corporate entities, because, as here, the corporation may assert the privilege, but an officer – acting in an individual capacity – may inadvertently (or, for that matter, intentionally) waive the privilege. This case contains a thorough review of the jurisprudence of waiver and corporate attorney-client privilege and work product privilege issues.

***Whitehouse v. United States District Court for District of Rhode Island,*** 53 F.3d 1349 (1st Cir. 1995) The District Court did not exceed its authority in issuing a local rule which adopted the ABA ethics rule requiring judicial approval before a subpoena is issued to an attorney seeking information about a client.

***United States v. Klubock,*** 832 F.2d 664 (1st Cir. 1987) The First Circuit divides three to three thereby affirming the district court decision which upheld a rule which requires federal prosecutors to seek permission from the court prior to issuing a subpoena to a lawyer. The rule was adopted by the district court for the District of Massachusetts as a local rule.

***In re Grand Jury Subpoenas Duces Tecum***, 798 F.2d 32 (2d Cir. 1986) The government sought to pierce the attorney/client privilege by relying on the crime fraud exception. The affidavit supplied by the government, however, merely showed that the client corporation was communicating with its attorney at the same time that it was engaged in criminal activity. However, there was no probable cause to establish that the communication with the counsel was intended to facilitate or conceal the criminal activity. The privilege withstood the government's attempt to elicit the information.

***In re Grand Jury Subpoena (DeGeurin***), 913 F.2d 1118 (5th Cir. 1990) Although the Fifth Circuit held that the attorney/client privilege did not preclude issuing a subpoena to the defendant's attorney, it nevertheless upheld quashing the subpoena under Rule 17(c) on the grounds that it was unreasonably burdensome when issued because the client was facing imminent prosecution and the attorney would have been distracted from his representation.

***In re Antitrust Grand Jury Advance Publications, Inc.,*** 805 F.2d 155 (6th Cir. 1986) In order to apply the crime / fraud exception to the attorney/client privilege, a trial court must conduct an in camera ex parte hearing. The trial court must then distill what documents were subject to the crime fraud exception and may not simply authorize the disclosure of all documents and communications between the attorney and the client. The Sixth Circuit also held that the government must make prima facie showing of the crime or fraud and must also demonstrate the relationship between the fraud and the particular communication which the government seeks to compel disclosed. The court emphasizes that the crime/fraud exception only applies to those

particular communications intended to further the crime or fraud, and the trial court must make an in-camera review of each and every document.

***In the Matter of Grand Jury Proceeding (Cherney),*** 898 F.2d 565 (7th Cir. 1990) A member of a drug conspiracy consulted with a lawyer and asked the attorney to represent a co-defendant. This client, who paid the fee for the co-defendant, was never himself indicted. The government asked the attorney who the client was who acted as the beneficiary of the other defendant. The attorney moved to quash the subpoena, the District Court granted the motion and the Seventh Circuit affirmed.

***Ralls v. United States***, 52 F.3d 223 (9th Cir. 1995) The attorney was paid by an individual to represent the defendant at a bond hearing and at an initial appearance. The government subpoenaed the attorney to the grand jury to disclose the identity of the fee-payor. The Ninth Circuit holds that the information was privileged in this case: "An examination of [the attorney's] sealed affidavit leaves no doubt that the fee arrangements and the fee-payor's identity are inextricably intertwined with confidential communications and fall within the attorney-client privilege." In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826 (9th Cir. 1994).

***United States v. Zolin,*** 491 U.S. 554 (1989), requires a district court to conduct a two-step analysis in deciding whether the crime-fraud exception applies to certain documents: First, the court must require a showing of a factual basis adequate to support a good faith belief by a reasonable person that in camera review of the material may reveal evidence to establish the claim that the crime-fraud exception applies. At this stage, only evidence presented by the party seeking in camera review must be considered. Second, the court must make a discretionary decision whether to order in camera review in light of the facts and circumstances of the particular case, including, among other things, the volume of the materials the district court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through in camera review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply. At this stage, the party resisting disclosure may introduce evidence. In this case the trial court erred in ordering the disclosure of documents from the attorney which were generated after the crime or fraud was completed.

***In re Grand Jury Subpoena (Horn),*** 976 F.2d 1314 (9th Cir. 1992) Despite the fact the subpoena disclaimed any attempt to require the production of privileged information, because of the breadth of the request, it was unenforceable. The subpoena sought all financial information relating to sixteen of the attorney's clients, without narrowing the specific financial information requested. "All financial information" would include retainer agreements which would set forth the nature of the work performed, as well as the strategy of the attorney.

***In re Grand Jury Investigation (U.S. v. Corporation),*** 974 F.2d 1068 (9th Cir. 1992) In response to a grand jury subpoena, the corporation submitted a log to the court, documenting the privileged nature of the documents sought by the government. In addition, the Corporation submitted affidavits which further demonstrated the privileged nature of the communications contained in the documents. Moreover, the government failed to meet the threshold of United States v. Zolin, 491 U.S. 554 (1989), to establish that the documents fell within the crime-fraud exception.

***United States v. Perry***, 857 F.2d 1346 (9th Cir. 1988) Just five days prior to trial, the government served a grand jury subpoena on the indicted defendant's attorney seeking unprivileged information about the lawyer's fee. This does not constitute a per se violation of the defendant's Sixth Amendment right to effective assistance of counsel. However, the Court characterized the government's conduct as "clearly wrongful." The timing and circumstances of the issuance of the subpoena strongly suggest an improper motive. Nevertheless, because no motion to quash was made, the sole question is whether the issuance of a subpoena rendered the attorney ineffective.

***United States v. Anderson***, 906 F.2d 1485 (10th Cir. 1990) The Tenth Circuit upholds the subpoena issued to criminal defendants' attorneys for fee information. The purpose of the subpoena was to determine whether the defendants had paid the fees for members of the "crew."

***In re Grand Jury Proceedings 90-2 (Garland),*** 946 F.2d 746 (11th Cir. 1991) The last link exception survives in the Eleventh Circuit. The attorney was subpoenaed to the grand jury to reveal the identity of the client who asked the attorney to find another lawyer for his "friend" who had just been arrested. The attorney refused to identify the client. The attorney was held in contempt. The Eleventh Circuit reversed. This is a case in which the disclosure of the name would be the last link of incriminating evidence against the client. What he told the attorney was already known to the prosecutor – only his identity remained confidential. And so, it should remain, the Eleventh Circuit decided. United States v. Frazier, 944 F.2d 820 (11th Cir. 1991) The defendant was charged with lying to the grand jury in an effort to protect her employer. The prosecutor was permitted to point out to the jury that the defendant's lawyer had been hired and paid for by her employer. The appellate court held that this was admissible evidence. This case shows that the identity of the fee-payor can be admissible evidence which is used to incriminate the defendant. The case is worth noting when attorneys object to being compelled to reveal fee information to the government or the grand jury.

***In re Federal Grand Jury Proceedings, 89-10 (MIA),*** 938 F.2d 1578 (11th Cir. 1991) An attorney was subpoenaed to produce memoranda to the grand jury which was investigating one of his clients. The memoranda memorialized prior conversations between the attorney and the client which arguably came within the crime-fraud exception to the privilege. However, the memoranda themselves were not prepared during the course of the client's crime. That is, though the initial communication between the attorney and the client were not privileged, the attorney's subsequent communication with the client, which referred to those prior conversations, was privileged. "The attorney-client privilege protects communications rather than information . . . Thus, although communications otherwise covered by the attorney client privilege lose their privileged status when used to further a crime or fraud, post-crime repetition or discussion of such earlier communications, made in confidence to an attorney, may still be privileged even though those earlier communications were not privileged because of the crime-fraud exception."

***In re Grand Jury Proceedings 88-9 (Newton),*** 899 F.2d 1039 (11th Cir. 1990) There isn't much left to the "last link" doctrine in the Eleventh Circuit. In this case, the Court upholds a subpoena to an attorney seeking fee information about an unindicted suspect who allegedly paid the fees of an indicted defendant. The specific information sought was the identity of the person on whose behalf a cashier's check had been issued to the attorney.

***In re Sealed Case,*** 29 F.3d 715 (D.C. Cir. 1994) An individual who had been engaged in illegal transactions with Libya sought counsel from an attorney. No grand jury had been empaneled to investigate the individual's transactions at that time. Nevertheless, the work product doctrine covered these conversations because the doctrine applies to work performed, "with an eye toward litigation." In determining whether the materials in the lawyer's files are protected by the work product privilege, the testing question is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. The privilege may be asserted not only by a lawyer, but also by his client. The lawyer also claimed that the conversations with the client were covered by the "common interest privilege." In additional to the joint defense privilege, there is also a "common interest privilege." This privilege protects communications between a lawyer and two or more clients regarding a matter of common interest. See In re Auclair, 961 F.2d 65 (5th Cir. 1992)(privilege applies if persons consult an attorney together as a group with common interests seeking common representation). In such cases, one client cannot unilaterally waive the privilege.

***In re Grand Jury Subpoena (DeGuerin),*** 752 F. Supp. 239 (S.D. Tex. 1991) After remand from the Fifth Circuit, the District Court again allowed the attorney to claim the privilege and refuse to disclose the identity of the fee-payor because the fee-payor was the attorney's client, and the fee arrangements were part of their confidential communications. Back in the Fifth Circuit, the appellate court affirmed at 926 F.2d 1423 (5th Cir. 1991). Because the fee payor was also a client, his identity did not have to be divulged.

***GRAND JURY (Generally)***

***Braswell v. United States***, 487 U.S. 99 (1988) A federal grand jury issued a subpoena to petitioner as the president of two corporations requiring him to produce the corporations' records. There was no requirement that the petitioner testify. The Supreme Court holds that the custodian of corporate records may not resist a subpoena for such records on the ground that the act of production will incriminate him in violation of the Fifth Amendment. Had the defendant conducted his business as a sole proprietorship, under United States v. Doe, he could rely on the "act of production" privilege. However, as the president of a corporation, he may not.

***United States v. Williams***, 504 U.S. 36 (1992) The government is under no obligation to introduce exculpatory evidence to the grand jury – not even if the evidence substantially negates the defendant's guilt.

***Kilpatrick v. United States***, 487 U.S. 250 (1988) On the basis of various irregularities and misconduct at the grand jury, the district court dismissed the indictment against the defendants. The Supreme Court reversed, holding that absent any evidence of prejudice, governmental misconduct does not give rise to dismissal of an indictment. In order to determine if prejudice has been established, the defendant must establish that the "violation substantially influenced the grand jury's decision to indict." Because there were no allegations of constitutional errors at the grand jury, just procedural irregularities, the indictment should not have been dismissed in this case.

***United States v. Mechanik,*** 475 U.S. 66 (1986) Irregularities in the grand jury may be rendered harmless by the subsequent conviction of the defendant at trial. Butterworth v. Smith, 494 U.S. 624 (1990) The Supreme Court finds a Florida statute which barred witnesses from disclosing their grand jury testimony to be unconstitutional. The unanimous decision held that at least in situations where the grand jury's term has ended, the interests advanced by the law are insufficient to overcome the witness' First Amendment right to make a truthful statement of information he acquired on his own.

***Midland Asphalt Corp. v. United States***, 489 U.S. 794 (1989) The defendant sought to dismiss his indictment on the grounds that the prosecutor had provided information from his grand jury to the court and parties in a separate criminal case. The Supreme Court, in this unanimous decision, holds that this motion is not subject to immediate appeal under §1291. The defendant's contention that he has a right not to be tried at all, not simply to be convicted, finds no support in the grand jury clause of the Fifth Amendment or Rule 6(e). If a violation of the secrecy rules is to be remedied, it can be remedied after trial and final judgment has been entered.

***Woodfox v. Cain***, 772 F.3d 358 (5th Cir. 2014) The district court's conclusion that the petitioner established that the state trial judges acted in a discriminatory manner in choosing grand jury foremen was supported by the evidence and affirmed on appeal.

***In re Grand Jury***, 566 F.3d 12 (1st Cir. 2009) A witness has a right to review his prior grand jury testimony if he shows a particularized need to do so. A prosecutor's threats and comments about a possible perjury prosecution may provide a sufficient basis to require the disclosure of the witness's prior testimony prior to having to testify again. The First Circuit noted that this only applies to allowing the witness to review his testimony; the witness is not entitled to a transcript of his prior testimony.

***In re: Grand Jury***, 490 F.3d 978 (D.C. Cir. 2007) Witnesses before the grand jury appeared several years ago, and then were "invited back" to give further testimony. They requested an opportunity to review their prior testimony. The D.C. Circuit held that a grand jury witness has a strong interest in reviewing the transcripts of his own grand jury testimony and the government's interest in grand jury secrecy is not as strong. On a case-by-case basis, the court should determine whether the witness's attorney should be entitled to review the transcript. This holding only authorizes the witness to review the transcript and not to obtain a copy.

***In re Grand Jury***, 566 F.3d 12 (1st Cir. 2009) This case arrives at virtually the same holding as the D.C. Circuit in the case above: the witness has the right to review his grand jury transcript, though this does not necessarily allow him to make copies or to allow his attorney to see the transcript.

***United States v. Bergeson***, 425 F.3d 1221 (9th Cir. 2005) A defendant jumped bail. His attorney, Ms. Bergeson, was subpoenaed to testify at the grand jury about whether she had told her attorney about the trial date. The trial court held that the information was not privileged, but the subpoena would be quashed as unreasonable and oppressive, because compliance with the subpoena would destroy the attorney-client relationship. The government had other evidence of the defendant's knowledge of the trial date (from the defendant's mother and an earlier pleading filed by counsel indicating that the defendant agreed to a continuance). The Ninth Circuit affirmed, holding that the trial court did not abuse its discretionary authority under Rule 17(c)(2).

***United States v. Downer***, 143 F.3d 819 (4th Cir. 1998) After the defendant was convicted by a jury of aggravated sexual abuse, the court realized that the definition of the offense given to the jury violated the Ex Post Facto Clause, because the offense, as defined, did not exist at the time of the alleged conduct. The trial court then entered judgment on a lesser included offense. The Fourth Circuit reversed: entering judgment on the lesser offense, which was not the subject of the indictment, violated the Grand Jury Clause.

***In re Grand Jury Subpoena Dated December 17, 1996***, 148 F.3d 487 (5th Cir. 1998) A motion to quash a grand jury subpoena is not moot simply because the documents sought in the subpoena have already been produced. The court still can remedy the error by requiring the return of the documents, or the destruction of the documents.

***United States v. McLaughlin***, 126 F.3d 130 (3rd Cir. 1997) When a grand jury subpoena is served on a corporation for corporate records, neither the corporation, nor the custodian may assert the Fifth Amendment privilege.

***Braswell v. United States***, 487 U.S. 99 (1988). The flip side of this, however, is that if the custodian produces certain records (or fails to produce certain records), this fact may not be used against the custodian personally in a trial against that individual. Here, the custodian (the defendant) failed to produce certain records and the government argued to the jury that the failure to produce these records was evidence of his guilty state of mind. This was reversible error.

***In re Trial Subpoena Duces Tecum (Ellwest Stereo Theatres),*** 927 F.2d 244 (6th Cir. 1991) A record custodian may be compelled to authenticate records which are brought under compulsion of a subpoena (in this case, a trial subpoena). Unlike in Cursio v. United States, 354 U.S. 118 (1957), where the custodian was asked about missing records, the custodian in this case was simply asked to identify the records which were produced.

***In re Grand Jury Proceedings, Subpoenas for Documents***, 41 F.3d 377 (8th Cir. 1994) Records which belonged to the defendants, and which were prepared in their personal capacity, or as sole proprietors, were subpoenaed from their lawyer and accountant. The records in the possession of the accountant were given to him by the attorney. The question of whether the Fifth Amendment applies in this circumstance is decided under the following principle: When material has been transferred from a client to an attorney for the purpose of seeking legal advice and the subpoena is directed to the attorney, the proper inquiry is whether the subpoena, if directed to the client himself, would require compelled testimonial self-incrimination. In this case, moreover, the defendant did have the "act of production" privilege. By producing the documents in compliance with the subpoena, the defendants would be vouching for the genuineness of the documents.

***In re Grand Jury Proceedings (Mora v. U.S***.), 71 F.3d 723 (9th Cir. 1995) The collective entity doctrine (i.e., the Fifth Amendment may not be invoked by a corporation or other collective entity) does not apply to a former employee of a collective entity who is no longer acting on behalf of the entity.

***In re Grand Jury Subpoena Dated April 9, 1996***, 87 F.3d 1198 (11th Cir. 1996) A custodian may not be forced to give testimony about the whereabouts of records not in her possession if she asserts the Fifth Amendment.

***In re Grand Jury Subpoena Dated November 12, 1991 (Paul),*** 957 F.2d 807 (11th Cir. 1992) The defendant, the former Chairman of a failed savings and loan, was subpoenaed to bring various corporate records which were in his possession. He was no longer affiliated with the corporation at the time he received the subpoena. Nevertheless, pursuant to Braswell v. United States, 487 U.S. 99 (1988), he could not resist compliance with the subpoena on Fifth Amendment grounds.

***United States v. Dean***, 989 F.2d 1205 (D.C. Cir. 1993) Defendant was the assistant to HUD Secretary Pierce who was under investigation by an Independent Counsel. She was subpoenaed to produce all documents in her possession relating to her work at HUD. She resisted but was ultimately ordered to do so by the District Court. At trial, the government sought to introduce the records and the fact that she produced them pursuant to a subpoena. The "act of production" doctrine, however, applied in this situation. Though the defendant was the custodian of "government records," just as the custodian of business records may insist on being immunized before being compelled to produce documents – with regard to evidence of the act of production (as opposed to the contents of the documents) – a government custodian has that same right. This case contains a good discussion of the act of production doctrine, as well as the "required records" exception which provides that records which must be maintained are not subject to the "act of production" doctrine. The required records exception does not apply in this case because the records being subpoenaed were not required to be maintained by the government.

***In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991 (Continental Holdings),*** 945 F.2d 1221 (2d Cir. 1991) In a bankruptcy civil suit, certain depositions were filed under seal. A prosecutor sought access to the depositions by means of a grand jury subpoena. The Second Circuit concluded that the government had to establish either a compelling need or the impropriety of the civil protective order.

***In re Grand Jury***, 111 F.3d 1066 (3rd Cir. 1997) Individuals who had been illegally wiretapped (by another private party) had standing to challenge the government's effort to obtain the wiretaps to present to the grand jury. 18 U.S.C. §2515 expressly provides that no illegally obtained wiretap may be used in any proceeding – and this includes the grand jury.

***United States v. Bolton***, 893 F.2d 894 (7th Cir. 1990) An indictment returned by a grand jury which was sitting beyond its properly extended term must be dismissed.

***United States v. North***, 920 F.2d 940 (D.C. Cir. 1990) Oliver North's conviction was potentially tainted by the use of his immunized testimony before the Iran-Contra Committee of Congress. The trial court must convene a "line-by-line" and "item-by-item" inquiry into whether the testimony of grand jury witnesses or trial witnesses was affected by North's testimony. The appellate court holds that witnesses may not "refresh their memories" with immunized testimony. Rehearing the case, 920 F.2d 940, the court reached the same result. The court emphasized that insulating the prosecutor from exposure does not automatically prove that immunized testimony was not used against the defendant. "Kastigar is violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of how or by whom he was exposed to that compelled testimony." The court also holds that the inquiry into the improper use of immunized testimony includes an inquiry into whether the grand jury improperly had before it immunized testimony. There is a distinction between presenting to the grand jury statements which were improperly obtained (such as a forced or un-Mirandized confession) and presenting Kastigar tainted testimony to the grand jury. In the latter case, the grand jury is considering evidence which was derived on the "promise" of the prosecutor that such use would never be made of the testimony.

***In re Sealed Motion***, 880 F.2d 1367 (D.C. Cir. 1989) A witness before the grand jury who was named in an independent counsel's report is entitled to a transcript of his testimony. Legislative history of the Ethics in Government Act reveals Congress' awareness of the necessity of protecting individuals who are named in such reports.

***In re Grand Jury Subpoenas (Nash),*** 858 F. Supp. 132 (D. Ariz. 1994) The government issued a subpoena requesting fee information from the defendants' attorneys. The defendants had already been indicted and were awaiting trial. The government contended that the information was not being sought for evidentiary purposes in the pending case, but for possible new tax charges. Of course, the grand jury may not be used by the government for pretrial criminal discovery. Because the dominant purpose of these subpoenas was to uncover evidence for trial, compliance with the subpoenas would be delayed until after judgment was entered in the pending criminal case.

***Westin v. McDaniel***, 760 F.S upp. 1563 (M.D. Ga. 1991) The district court enjoined a state grand jury probe into the conduct of an attorney who allegedly identified an undercover agent in a public place, thereby spoiling her undercover role. After his first arrest, the case against the attorney was dismissed. The federal court enjoined a new grand jury investigation. Younger v. Harris did not apply, because there was no pending criminal case. The Eleventh Circuit affirmed: 949 F.2d 1163.

***United States v. Gillespie***, 666 F. Supp. 1137 (N.D. Ill. 1987) The grand jury lacks authority to return an indictment after the expiration of its term. The court could not salvage this invalid indictment by a Nunc Pro Tunc order purporting to extend the term.

***In re Grand Jury Subpoenas***, 659 F. Supp. 628 (D. Md. 1987) A protective order was issued in a civil case which barred disclosure of the depositions which were being taken in the case. Despite this protective order, the United States Attorney subpoenaed all depositions to a sitting grand jury. The Court held that this was proper, noting that a grand jury is not limited by a civil protective order. The Court notes that the civil parties could have asserted the Fifth Amendment right against self-incrimination but simply relying on the protective order was not sufficient. The Fourth Circuit affirmed, holding that in order to invoke the Fifth Amendment rights, a witness must assert them and not rely on a civil protective order. 42 Crim. L. Rep. 2317. In re Grand Jury Proceedings (PHE., Inc.), 640 F. Supp. 149 (E.D.N.C. 1986) A corporation's shareholders and directors could intervene in a grand jury proceeding to challenge as abusive the issuance of grand jury subpoenas requiring all the corporation's employees to appear at the same time on the same day, which was derived on the "promise" of the prosecutor that such use would never be made of the testimony.

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***In re Grand Jury Proceedings (PHE., Inc.),*** 640 F. Supp. 149 (E.D.N.C. 1986) A corporation's shareholders and directors could intervene in a grand jury proceeding to challenge as abusive the issuance of grand jury subpoenas requiring all the corporation's employees to appear at the same time on the same day.

***GRAND JURY (Subpoenas)***

***United States v. Hubbell***, 530 U.S. 27 (2000) The subpoena served on the defendant required him to produce various documents that fit into several categories, such as "documents that reflect all income." The defendant sought and was given use immunity. Nevertheless, the government used these documents to obtain an indictment. The United States Supreme Court held that the indictment had to be dismissed. The act of producing the documents and corresponding authentication that these documents were responsive to the subpoena was "used" against the defendant. The Court observed that providing documentation in response to the broad categories requested was tantamount to answering a series of interrogatories about the sources and amount of income received by the defendant.

***United States v. R. Enterprises Inc.,*** 498 U.S. 292 (1991) The government can obtain enforcement of a grand jury subpoena without having to demonstrate either relevance or the admissibility of evidence. The only limitation would be if the court determines that there is "no reasonable possibility" that the materials subpoenaed would yield something relevant to the criminal investigation.

***In re Grand Jury Subpoena, LK-15-029***, 828 F.3d 1083 (9th Cir. 2016) The grand jury subpoena in this case was too broad, even under the R Enterprises standard. The subpoena required the production of all archived emails of the former Governor of Oregon, without any limitation. The government acknowledged that the emails would include personal emails between the Governor and his family, or doctors, or private counsel. The failure of the government to include any list of categories of emails that were sought rendered the subpoena too broad. Emails, in particular, are to be treated as "private papers" which are expressly included in the Fourth Amendment. "[E]mails are to be treated as closed, addressed packages for expectation-of-privacy purposes."

***United States v. Punn***, 737 F.3d 1 (2d Cir. 2013) After the trial court refuses to quash a subpoena on the basis that the subpoena was issued in connection with a pending case and not as a legitimate grand jury investigation, there is no right to interlocutory review. The Second Circuit declined to decide whether the absence of a right to appeal also applied to challenges based on attorney-client privilege, post-Mohawk.

***In re Grand Jury***, 705 F.3d 133 (3rd Cir. 2012) When a grand jury subpoena is issued to a corporation for certain documents, or to an attorney for the corporation who is in possession of certain of the corporate documents the attorney must suffer the consequences of contempt in order to perfect an appeal of an Order by the district court that the attorney-client privilege does not apply. The Order requiring the attorney to produce the records is not directly appealable. The exception recognized in Perlman v. United States, 247 U.S. 7 (1918), only applies to a third-party custodian who has no interest in being held in contempt. In that situation, the client has the right to appeal the Order, because the custodian has no interest in perfecting an appeal and the client is not subject to contempt, so the client must be afforded the opportunity to appeal without the custodian, or the client first being held in contempt. In the situation with an attorney custodian, however, the client can simply insist that the documents be returned to the client and the client can then refuse to produce the documents, be held in contempt and appeal. With respect to Orders directed at former employees (including former in-house counsel), the corporation may appeal, because the corporation may not require former employees to return documents to the corporation. Finally, the Third Circuit held that Mohawk did not eliminate the Perlman rule, at least in the context of grand jury subpoenas. The Third Circuit, having disposed of the jurisdictional issue, then reached the merits of the crime fraud exception issue, as it related to the former employees and concluded that a sufficient showing was made by the government to invoke the crime fraud exception.

***Armstrong v. Guccione***, 470 F.3d 89 (2d Cir. 2006) Although a corporate custodian is not entitled to raise the Fifth Amendment as a shield to the production of corporate records and property, Braswell established a "mitigating evidentiary privilege" to reduce the risk that the custodian's act of production would be attributed to him personally. Thus, "in a criminal prosecution against the custodian, the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's documents were delivered by ... the custodian." Braswell v. United States, 487 U.S. 99 (1988). See also In re Twelve Grand Jury Subpoenas, 908 F.3d 525 (9th Cir. 2018) (document custodian may not assert Fifth Amendment privilege, but jury may not be told who produced (or failed to produce) the records in response to a grand jury subpoena to the corporation; this is the rule, even if corporate entity is closely held and it is obvious to the jury who had control over the records).

***United States v. Bergeson***, 425 F.3d 1221 (9th Cir. 2005) A defendant jumped bail. His attorney, Ms. Bergeson, was subpoenaed to testify at the grand jury about whether she had told her attorney about the trial date. The trial court held that the information was not privileged, but the subpoena would be quashed as unreasonable and oppressive, because compliance with the subpoena would destroy the attorney-client relationship. The government had other evidence of the defendant's knowledge

of the trial date (from the defendant's mother and an earlier pleading filed by counsel indicating that the defendant agreed to a continuance). The Ninth Circuit affirmed, holding that the trial court did not abuse its discretionary authority under Rule 17(c)(2).

***Doe v. United States***, 383 F.3d 905 (9th Cir. 2004) The subpoena to the defendant was so broad that it violated his Fifth Amendment right against compelled self-incrimination. Relying on Fisher and Hubbell, the Court held that the defendant was being required to authenticate (by his act of production) the existence of various documents. Therefore, holding the defendant in contempt for failing to comply with the grand jury subpoena was improper. The court specifically rejected the "foregone conclusion" exception to "act of production" immunity.

***GUILTY PLEAS (Advice of Possible Sentence and Consequence of Plea)***

***Padilla v. Kentucky***, 130 S. Ct. 1473 (2010) The failure to advise a defendant about the deportation consequences of entering a plea in a felony drug case amounted to ineffective assistance of counsel. The Court held that in certain situations, the failure to provide any advice constitutes ineffective assistance – especially where the consequence of a plea is easy to determine and is "automatic" – while in other cases, it is required at a minimum that counsel advise the defendant that there may be immigration consequences and that the defendant should seek advice from an immigration law attorney. In other words, to be effective, an attorney may be required to actually provide accurate advice if the immigration consequences are clear; and at a minimum, should warn the defendant of possible consequences if the result of entering a plea is not so clear. The Court held that the right to effective assistance of counsel is not violated only when counsel provides erroneous advice.

***United States v. Dominguez Benitez***, 542 U.S. 74 (2004) If a trial court fails to advise the defendant that he will not have the right to withdraw his plea if the court rejects the government's recommendation (as required by Rule 11), and the defendant does not object to this Rule 11 violation, the plain error standard applies. Moreover, in order to set aside the guilty plea under this standard, the defendant must show that he would not have entered a guilty plea had the trial court properly advised him. In other words, there must be a prejudicial "effect" of the trial court's error; and absent a finding that the defendant would not have entered a guilty plea had he been properly advised, there can be no such showing.

***United States v. Johnson,*** 850 F.3d 515 (2d Cir. 2017) The defendant entered a guilty plea to a charge that carried a mandatory minimum sentence of life imprisonment. The judge asked the prosecutor to explain the various guideline calculations, which resulted in a sentence in the twenty-year range and the prosecutor then said, "but that is trumped by the statutory mandatory minimum life sentence." The judge did not ask the defendant if he understood that. The judge then advised the defendant about the period of supervised release. The judge also explained how the guidelines worked and that the judge was not bound by the guidelines all of which was irrelevant, given the mandatory life sentence. After the plea was entered, trial counsel filed a sentencing memorandum that explained the guideline calculation and failed to recognize the statutory mandatory minimum. The Second Circuit vacated the plea and concluded that the record demonstrated that the defendant did not, in fact, understand the consequences of his plea. The Second Circuit also noted that there was no reason for the defendant to enter a guilty plea in this case, because he received absolutely no benefit: "The only to insurance that such a seemingly irrational plea is made knowingly is to tell the defendant clearly and unambiguously that the judge will have no discretion at sentencing, and that accepting the plea will result in no less than the mandatory sentence." The court ordered a remand to a different judge.

***United States v. Monie***, 858 F.3d 1029 (6th Cir. 2017) When he entered a guilty plea, the defendant was told the maximum sentence for the Armed Career Act count was ten years, while in fact, it was a mandatory minimum 15 years. The defendant adequately showed that absent this misinformation, he would not have entered a guilty plea.

***United States v. Swaby***, 855 F.3d 233 (4th Cir. 2017) Prior to entering a guilty plea to trafficking in counterfeit goods, the defendant was not warned by his trial counsel that this offense would make him categorically deportable because the offense was an aggravated felony. Even though the trial judge advised the defendant during the plea colloquy in general terms about the possibility of immigration consequences, the defense counsel's failure to advise the defendant amounted to ineffective assistance of counsel and the plea was not voluntary. As for prejudice, the defendant established that he would have gone to trial if he had known the consequences of entering the guilty plea.

***United States v. Batamula***, 788 F.3d 166 (5th Cir. 2015) If an attorney fails to advise a defendant of deportation consequences, the defendant may challenge the validity of the plea (and the attorney's ineffective assistance), even if the trial judge, during the Rule 11 colloquy, provides that advice.

***United States v. Avila***, 733 F.3d 1258 (10th Cir. 2013) The defendant litigated a Motion to Suppress and lost. He tried to enter a conditional plea, reserving the right to appeal the Fourth Amendment issue, but the government rejected this offer. The defendant then entered an unconditional plea. During the plea colloquy, the judge said that he had the right to appeal. The advice by the court did not explain that the guilty plea negated his right to appeal various issues, including the fouth amendment issue. This rendered the plea involuntary. The court should have advised the defendant that he had the right to appeal his sentence and perhaps certain other issues, but not the fourth amendment issue.

***United States v. Akinsade***, 686 F.3d 248 (4th Cir. 2012) The defendant's attorney told the defendant he would not be deported. The judge told the defendant at sentencing that he "could" be deported. Actually, the offense mandated deportation. The Fourth Circuit held that the attorney's bad advice was grounds to grant coram nobis relief 12 years after the plea was entered. See also Doe v. United States, 915 F.3d 905 (2d Cir. 2019).

***United States v. Carreon-Ibarra***, 673 F.3d 358 (5th Cir. 2012) During the plea colloquy, the defendant was advised that he faced a sentence of 5 years to life on a gun charge. The PSR revealed that the gun was a machinegun, mandating a 30-year

mandatory minimum sentence. The defendant sought to withdraw his plea. The trial court erred in refusing to allow him to withdraw, given the inaccurate advice about the existence of a mandatory minimum sentence.

***United States v. Ortiz-Garcia***, 665 F.3d 279 (1st Cir. 2011) The trial court failed to properly advise the defendant of the possible maximum sentence that he faced. This rendered the plea and the appeal waiver void.

***Tovar Mendoza v. Hatch***, 620 F.3d 1261 (10th Cir. 2010) The trial attorney's grossly inaccurate statement to the defendant about the amount of time he would be required to serve if he pled guilty amounted to ineffective assistance of counsel and rendered the guilty plea involuntary. Defense counsel told the defendant his sentence would be three years. The sentence imposed was 25 years.

***United States v. Self***, 596 F.3d 245 (5th Cir. 2010) If the district court does not intend to adhere to the terms of a binding plea agreement that was entered pursuant to Rule 11(c)(1)(C), the court must clearly state that the court rejects the plea agreement in toto. In this case, the trial court advised the defendant that the court would accept the plea except as to the sentence on one of the counts. The court may not accept a binding plea in part. This should have been more accurately explained to the defendant so that he could have decided whether to withdraw his plea.

***United States v. Gray***, 581 F.3d 749 (8th Cir. 2009) Because the judge failed to correctly advise the defendant of the possible maximum sentence he faced, the guilty plea was defective. The fact that the judge ultimately imposed a sentence below the amount that he advised the defendant was the maximum sentence did not cure the error.

***United States v. Rivera-Maldonado,*** 560 F.3d 16 (1st Cir. 2009) Erroneously advising a defendant that the term of supervised release is three years, when it is actually life amounts to plain error and the guilty plea was set aside, even though there was no objection at the time of sentencing.

***Jamison v. Klem***, 544 F.3d 266 (3rd Cir. 2008) Failing to advise a defendant of a mandatory minimum five-year sentence rendered a state court guilty plea invalid, even though the defendant was aware of the twenty-year sentence that he was exposed to by entering a guilty plea.

***United States v. Hairston***, 522 F.3d 336 (4th Cir. 2008) When the defendant entered a guilty plea, he acknowledged that he faced 0 – 10 years on the possession of a firearm by a convicted felon count, plus a mandatory minimum 5 consecutive for a § 924(c) count and a mandatory minimum consecutive 25 years for a second § 924(c) count. In short, he envisioned a thirty-year sentence. The defense attorney, the court and the prosecutor overlooked that that the first count would be treated as an armed career criminal act count, requiring fifteen years, not 0 – 10. Thus, the defendant was sentenced to 45 years. The inaccurate advice tainted the guilty plea and necessitated remanding the case to give the defendant the opportunity to re-plead on all counts.

***United States v. Sura***, 511 F.3d 654 (7th Cir. 2007) The district court's failure to inquire about and advise the defendant of the consequences of the appeal waiver as required by Rule 11(b)(1)(N) was plain error that negated the voluntariness of the guilty plea.

***United States v. Benz***, 472 F.3d 657 (9th Cir. 2006) In this Assimilative Crimes Act case (driving under a suspended license) the mandatory minimum sentence was ten days in jail. Failing to advise the defendant of this mandatory minimum at the time the guilty plea was entered was error that resulted in setting aside the plea.

***Hanson v. Phillips***, 442 F.3d 789 (2d Cir. 2006) The state court's plea colloquy was insufficient to satisfy the standard of Boykin v. Alabama, 395 U.S. 238 (1969). The advice about his right to go to trial was insufficient; the defendant's express waiver of his right to go to trial was insufficiently demonstrated.

***United States v. Adams***, 432 F.3d 1092 (9th Cir. 2006) The trial court's failure to advise the defendant that there would be a mandatory fine rendered the guilty plea invalid. Even though the defendant was told about the possible maximum fine, he was not told that U.S.S.G. § 5E1.2(a) required the imposition of a fine. (The dissent predicts that this case would be rendered obsolete by Booker's holding that the Guidelines are advisory).

***United States v. Gonzalez***, 420 F.3d 111 (2d Cir. 2005) The defendant pled guilty to a drug conspiracy indictment that alleged that he possessed with intent to distribute at least 50 grams of crack. During the plea colloquy, he denied possessing considerably more. At sentencing, the judge found that he possessed an amount that triggered a mandatory minimum twenty-year sentence. The factual basis for the plea, and the voluntariness of the plea, was inadequately established.

***United States v. Murdock***, 398 F.3d 491 (6th Cir. 2005) If a trial judge fails to expressly discuss an appeal waiver with a guilty-pleading defendant (a violation of Rule 11(b)(1)(N)), the provision is subject to plain error review that is more relaxed than the plain error standard required by Dominguez-Benitez and Vonn. This is because the defendant is only seeking review, not overturning his conviction.

***United States v. Rodriguez-Gonzales***, 386 F.3d 951 (10th Cir. 2004) The defendant entered a guilty plea, but on the record, informed the court that he intended to preserve his Motion to Suppress for § 2255 review. This is not a legal possibility, however, since fourth amendment claims may not be reviewed in a § 2255 proceeding and a guilty plea waives non-jurisdictional defects. This was not a valid knowing and voluntary plea, because the defendant did not correctly understand the consequences of his plea.

***United States v. White***, 366 F.3d 291 (4th Cir. 2004) The defendant entered into a guilty plea but claimed in a § 2255 petition that he was orally assured by his attorney and the AUSA that he could appeal the denial of the suppression motion. Both parties

in the § 2255 proceeding agreed that defense counsel made this assurance. Both parties also agreed that this rendered the plea involuntary, because the defendant did not understand the consequences of his plea. The Fourth Circuit held that the trial court should have conducted a full evidentiary hearing to determine if the government did, in fact, orally assure the defendant that he could enter a conditional plea.

***United States v. Harrington***, 354 F.3d 178 (2d Cir. 2004) The trial court's inaccurate statement about the mandatory minimum sentence (stating that there was one, despite the fact that there wasn't because of an Apprendi defect in the indictment) and incorrect statement about the mandatory restitution (failing to mention restitution), rendered the plea defective.

***United States v. Martinez***, 277 F.3d 517 (4th Cir. 2002) Though it was not plain error, the trial court erred in failing to comply with the Rule 11 requirements that the trial court advise the defendant correctly about the applicability of the mandatory minimum and the statutory maximum sentence (the advice that was given was erroneous, in light of Apprendi); and in failing to advise the defendant that he would not be permitted to withdraw his plea.

***United States v. Couto***, 311 F.3d 179 (2d Cir. 2002) Trial counsel affirmatively misled the defendant into believing there were things that could be done to avoid deportation (when, in fact, there were none). This affirmative misrepresentation is different than a failure to advise the defendant of collateral consequences of a plea.

***United States v. Toothman***, 137 F.3d 1393 (9th Cir. 1998) The defendant was misinformed during the plea colloquy about the sentencing guideline range for his offense. Though the actual guideline range was not a subject of the plea agreement, and the defendant was advised that sentencing was a matter that would be determined by the judge and that if the guideline range had been inaccurately predicted by the attorneys, the plea could not be withdrawn, the advice given to the defendant by the court and the prosecutor about the guideline range was completely erroneous. Therefore, the plea was not voluntary.

***United States v. Gigot***, 147 F.3d 1193 (10th Cir. 1998) Both the plea agreement and the in-court recitation of the possible sentence was incorrect. At no time was the defendant explicitly informed of the elements of the charges against her. The failure of the trial court to advise the defendant of the elements of the offenses and the correct penalties mandated reversal of the conviction.

***United States v. Thorne***, 153 F.3d 130 (4th Cir. 1998) When the defendant entered his guilty plea, the trial court failed to advise him of the supervised release term and the nature of supervised release. The assistant United States Attorney reminded the court that a term of supervised release was mandatory (in fact, this provision was contained in the plea agreement), but the trial judge failed to ask the defendant, after the AUSA said this, whether he still wanted to enter a plea, and the court never advised the defendant what supervised release meant.

***Thompson v. United States***, 111 F.3d 109 (11th Cir. 1997) A district court must advise the defendant, after sentencing, of his right to appeal, and the court's failure to do so will require the court to re-sentence the defendant, even if it is shown through independent evidence that the defendant was aware of his right to appeal. This decision did not survive the Supreme Court's decision in Peguero v. United States, 119 S. Ct. 961 (1999).

***United States v. Siegel***, 102 F.3d 477 (11th Cir. 1996) The trial court failed to explain to the defendant that his guilty plea to certain §924(c) counts involved mandatory sentences that were required to be served consecutively to other sentences being imposed. This was a reversible Rule 11 violation.

***Finch v. Vaughn***, 67 F.3d 909 (11th Cir. 1995) The defendant was on parole from a federal sentence when he was arrested by state agents on a drug charge. At the beginning of his state trial, he entered into a plea agreement which provided that he would plead guilty in exchange for receiving a ten-year sentence to run concurrent with his federal parole violation sentence. After the plea was entered, the federal government declined to revoke his parole, returning him to state custody. The government indicated that his federal parole would be revoked after he served his state sentence. Because it was clearly the defendant's view that the sentences would run concurrently, this amounted to an involuntary plea of guilty. A voluntary plea requires an awareness of the consequences of the plea. Moreover, his counsel rendered ineffective assistance of counsel.

***United States v. Hourihan***, 936 F.2d 508 (11th Cir. 1991) The trial court failed to advise the defendant that his mandatory minimum sentence for this marijuana offense was five years' incarceration. Advising the defendant that he was facing a maximum of five to forty was erroneous. The court also advised that the Guideline range was 63 to 78 months; this, however, did not correctly note that there was a five-year statutory mandatory minimum sentence. The incorrect guilty plea advice required vacating the plea. This decision pre-dates United States v. Dominguez Benitez, 542 U.S. 74 (2004).

***GUILTY PLEA (Conditional Plea)***

***United States v. Lustig***, 830 F.3d 1075 (9th Cir. 2016) If the appellate court reverses the decision of the trial court that was preserved as part of a conditional plea, the defendant/appellant then must show that had the decision been reached in his favor in the lower court, he would not have entered the plea. He is not required to prove that he would have been acquitted at trial.

***United States v. Fitzgerald***, 820 F.3d 107 (4th Cir. 2016) Rule 11(a)(2) permits a defendant to enter a conditional guilty plea that permits the defendant to appeal a pretrial ruling such as a ruling on a motion to suppress. The reservation of the right to appeal should be in writing, but this requirement may be satisfied by an unequivocal record made at the time the plea is entered. The rule also requires the consent of the government and the court. These two requirements must be unequivocal and clear on the record (a silent record is not sufficient). In this case, the prosecutor said nothing during the entry of the plea, during which time both the defense counsel and the judge acknowledged the right to appeal the decision on the motion to suppress. The

appellate court held that the right to appeal was not preserved. However, because of the obvious impact this had on the voluntariness of the plea, the court permitted the defendant to withdraw his plea.

***GUILTY PLEAS (Factual Basis and Advice of Nature of Charges)***

***Bradshaw v. Stumpf***, 545 U.S. 175 (2005) If the defense counsel tells the court, on the record, that he has explained the nature of the charges to the defendant and the defendant acknowledges this, there is no requirement – in the Constitution – that the trial judge personally explain the nature of the charges or the elements of the offense to the defendant on the record.

***United States v. Carillo***, 860 F.3d 1293 (10th Cir. 2017) The trial court failed to comply with Rule 11(b)(1)(G) (explaining the nature of the charges) or Rule 11(b)(3) (providing a factual basis). This was plain error requiring that the conviction be set aside.

***United States v. Nickle***, 816 F.3d 1230 (9th Cir. 2016) The defendant admitted during the plea colloquy that he conspired to possess with intent to distribute a controlled substance in the district in a quantity at least 50 grams. The judge rejected the plea, stating that he wanted more facts. The trial judge erred. The judge's discretion to reject a non-binding plea is limited; the court can ensure that the defendant understands his rights and that the plea is knowing and voluntary; and can insist on a factual basis, but only to the extent that the defendant acknowledges the facts that compromise the elements of the offense. Demanding more details is not permissible.

***United States v. Figueroa-Ocasio,*** 805 F.3d 360 (1st Cir. 2015) There was no plea agreement that preceded the defendant's entry of the guilty plea and thus, the plea colloquy was all that evidenced the defendant's understanding of the indictment, the elements of the offenses and the consequences of entering the plea. Yet, the plea colloquy was inadequate to achieve these objectives. The court was not accurate in its description of the mens rea for the offense: at one point, for the charge of possessing a stolen weapon, the court simply said that the defendant had to know that there was a possibility that the gun was stolen. The court also failed to adequately explain aiding and abetting liability. The First Circuit held that the plea had to be vacated and the case remanded to a different judge for consideration of the proposed plea.

***United States v. Fard***, 775 F.3d 939 (7th Cir. 2015) The fact that a defendant is an educated businessman does not excuse the trial court's failure to explain the nature of the charges and ensure that the defendant understands concepts such as "intent to defraud" and "fraudulent scheme." In this case, the defendant was educated, but English was not his native language. The defense counsel answered most of the judge's questions during the plea colloquy. He sought to withdraw his plea on the basis that he did not understand the nature of the charges. The Seventh Circuit held that the defendant was entitled to withdraw his plea based on the trial court's failure to explain the concepts of fraud and the nature of the crime to which he was pleading guilty.

***United States v. Hogg***, 723 F.3d 730 (6th Cir. 2013). The defendant was charged with possession with intent to distribute fifty grams or more of crack. He entered a guilty plea to the lesser offense of possession with intent to distribute more than five grams of crack. The law at the time the plea was entered set a five-year mandatory minimum. The trial judge correctly explained the law as it existed at the time of the plea colloquy. However, the Supreme Court later held that the Fair Sentencing Act applied retroactively, and that the mandatory minimum did not apply to a charge of possession of at least five grams of crack. The defendant filed a motion to withdraw his guilty plea based on the incorrect statement of the mandatory minimum. The fact that the judge correctly cited the law at the time of the plea is not what matters. The defendant correctly predicted that the mandatory minimum would be retroactively lowered (based on the Dorsey decision) and the incorrect statement of the mandatory minimum (in hindsight) required that the defendant be permitted to withdraw his plea.

***United States v. Culbertson***, 670 F.3d 183 (2d Cir. 2012) In order to trigger a mandatory minimum sentence based on drug type and quantity, the factual basis that is presented at the guilty plea proceeding must identify the drug type and quantity. Moreover, while the prosecutor's statement of the type and quantity is the first step in this process, if the defendant contests that quantity, the factual basis for the plea will be insufficient. In this case, the government asserted that the quantity was five kilograms and the defendant stated that it was only three kilograms. This was not a sufficient basis to accept a plea with a ten-year mandatory minimum sentence.

***United States v. Heid,*** 651 F.3d 850 (8th Cir. 2011) The defendant was the mother of a drug dealer. When her son was in jail, she agreed to help him post bond. She retrieved several thousand dollars that she acknowledged was derived from drug dealing and gave the money to bondsmen to post the bond. She was indicted for conspiracy to launder money, with the object of the conspiracy being a § 1956(a)(1)(B)(i) violation (i.e., concealment money laundering). She entered a guilty plea with the factual basis essentially including no more facts than recited above. She later moved to withdraw her plea on the basis that the factual basis was insufficient to set forth a crime (i.e., there was no evidence of an intent, or an agreement, to conceal the proceeds). The Eighth Circuit held that the trial court erred in failing to grant the motion to withdraw the plea.

***United States v. Szymanski***, 631 F.3d 794 (6th Cir. 2011) The defendant entered a guilty plea to receiving child pornography under 18 U.S.C. § 2252(a)(2). However, during the plea colloquy, it was not made clear to the defendant that the scienter requirement of the statute required that he know when he received the pornography that it included images of children engaged in sexual activity. See United States v. X-Citement Video, Inc., 513 U.S. 64 (1994). This defect in the plea necessitated setting aside the guilty plea.

***United States v. Garcia-Paulin***, 627 F.3d 127 (5th Cir. 2010) A prosecution under 8 U.S.C. § 1324(a)(1)(A)(i) for bringing an illegal alien into the country requires some proof that the defendant participated in bringing the alien into the country. Simply providing a phony stamp for his passport that would have assisted him in getting a job was not sufficient evidence to prosecute the defendant under this statute. In this case, the defendant entered a guilty plea and the Fifth Circuit concluded that that factual

basis for the plea was insufficient, because the only facts offered to support the defendant's guilt related to his providing the fraudulent documents that were needed to assist the alien to enter the county.

***United States v. Garcia***, 587 F.3d 509 (2d Cir. 2009) The fact that the defendant, a truck driver, accepted dirty money and then transported it in a hidden manner, and that he knew the recipients of the money would not report the money on their income taxes, was not sufficient, under the Cuellar decision, to establish a factual basis for a guilty plea to a money laundering charge. The key to concealment money laundering under § 1956(a)(1)(B)(i) is proof that the purpose of the transaction was to conceal the funds, not just that the effect of the transaction was concealment. Not reporting the money as income is not the same as "concealing" the source, location, or ownership of the money. Accepting a guilty plea based on the factual basis in this case was plain error.

***United States v. Maye***, 582 F.3d 622 (6th Cir. 2009) The defendant was charged with possession of a firearm in furtherance of a drug offense. The plea colloquy (the factual basis) established only that he possessed a firearm and that he also committed a drug offense. There was no suggestion that the gun was possessed to advance or promote the commission of the underlying drug offense. The factual basis was inadequate and the defendant's questioning of the plea at the time of his sentencing demonstrated that he did not voluntarily enter the plea (and that neither the defense attorney, nor the judge knew the elements of the offense).

***Hicks v. Franklin,*** 546 F.3d 1279 (10th Cir. 2008) The defendant entered a guilty plea to second degree murder under Oklahoma law. During the plea colloquy, he admitted engaging in a dangerous activity (manufacturing methamphetamine) but was reluctant to acknowledge that he intended to kill the victim (his wife) as a result of the manufacturing process. The state trial court failed to explain an essential element of the second-degree murder offense: that the defendant must act with a depraved mind in extreme disregard for human life. The failure to explain this element of the offense rendered the guilty plea defective as a matter of federal constitutional law. See Henderson v. Morgan, 426 U.S. 637 (1976) (failure to properly advise the defendant of the intent element of an offense renders a guilty plea defective).

***United States v. Mastrapa***, 509 F.3d 652 (4th Cir. 2007) The defendant transported drugs into an apartment. He claimed that he did not know what was in the packages but entered a guilty plea. The factual basis recited by the prosecutor and accepted by the court failed to state that the defendant knew what was in the packages and the defendant did not acknowledge, on the record that he knew what was in the packages. The guilty plea therefore lacked a factual basis and was set aside by the Fourth Circuit.

***United States v. McCreary-Redd***, 475 F.3d 718 (6th Cir. 2007) The trial court failed to elicit a factual basis or assure that the defendant understood the nature of the charges. The defendant was charged with possession with intent to distribute cocaine (he was arrested with three grams of cocaine). The "with intent" element was debatable and neither the factual basis, nor the explanation of the charges to the defendant during the guilty plea provided any assurance that the defendant was aware of this aspect of the charge to which he was entering his guilty plea. Though there was no objection during the entry of the plea, this violation of Rule 11 constituted plain error.

***United States v. Adams***, 448 F.3d 492 (2d Cir. 2006) The factual basis of the plea focused entirely on the defendant's role in a marijuana conspiracy. The plea did not support a sentence that focused on his participation in a cocaine conspiracy. The court also held that the "appeal waiver" did not bar a challenge to the underlying plea.

***United States v. Monzon,*** 429 F.3d 1268 (9th Cir. 2005) The Rule 11 colloquy failed to establish a factual basis for the defendant's § 924(c) conviction. During the colloquy, in fact, the defendant denied that the gun he possessed had anything to do with the drugs which were in his house.

***United States v. Gonzalez***, 420 F.3d 111 (2d Cir. 2005) The defendant pled guilty to a drug conspiracy that alleged that he possessed with intent to distribute at least 50 grams of crack. During the plea colloquy, he denied possessing considerably more. At sentencing, the judge found that he possessed an amount that triggered a mandatory minimum twenty-year sentence. The factual basis for the plea, and the voluntariness of the plea, was inadequately established.

***United States v. Reasor,*** 418 F.3d 466 (5th Cir. 2005) Forged checks that were written on the bank account of a church were not sufficiently connected to interstate commerce to support a federal prosecution for forgery. There were insufficient facts stated during the guilty plea proceeding those the church's activities were "in" or that they "affected" interstate commerce. The factual statement at the guilty plea proceeding was therefore insufficient to support the plea.

***United States v. Bradley***, 381 F.3d 641 (7th Cir. 2004) The defendant entered a guilty plea to carrying a firearm in connection with a drug offense. The factual basis offered by the government recited that the defendant carried the gun in a car that was transporting marijuana. The indictment, however, alleged that he carried the gun in connection with a cocaine offense. The defendant then moved to withdraw the plea on the basis of this variance. The trial court erred in denying the defendant the right to withdraw the plea. ***United States v. Villalobos***, 333 F.3d 1070 (9th Cir. 2003) The defendant must be advised during the guilty plea colloquy that the government would be required to prove beyond a reasonable doubt any drug quantity triggering a mandatory minimum sentence if the defendant had gone to trial.

***United States v. Minore,*** 292 F.3d 1109 (9th Cir. 2002) As part of the plea colloquy, the court should explain to the defendant that the government would have to prove drug quantity beyond a reasonable doubt in order to trigger an enhanced sentence if the case were to go to trial.

***United States v. Gobert***, 139 F.3d 436 (5th Cir. 1998) During the plea colloquy, the prosecutor stated only that a gun was found in the codefendant's car. This statement, alone, was not sufficient to create a factual basis for a § 924(c) gun violation. There

was insufficient information provided in the prosecutor's statement to establish that the gun was carried by the defendant, or that it was carried in connection with a drug offense.

***United States v. Brown***, 117 F.3d 471 (11th Cir. 1997) The defendant pled guilty to a CTR violation but explained at sentencing that he did not know that his conduct violated the law. After the plea was entered, the Supreme Court decided Ratzlaf v. United States, 510 U.S. 135 (1994), holding that the defendant must have known that his conduct was unlawful in order to violate the CTR law. The defendant then filed a § 2255 petition to vacate his sentence. The Eleventh Circuit agreed that because the defendant was misinformed about the elements of the offense when he entered the guilty plea, the guilty plea was constitutionally inadequate.

***United States v. Gigot***, 147 F.3d 1193 (10th Cir. 1998) Both the plea agreement and the in-court recitation of the possible sentence were incorrect. At no time was the defendant explicitly informed of the elements of the charges against her. The failure of the trial court to advise the defendant of the elements of the offenses and the correct penalties mandated reversal of the conviction.

***United States v. Odedo***, 154 F.3d 937 (9th Cir. 1998) The plea colloquy in this case did not satisfy the requirements of Rule 11(c)(1), because the court failed to advise the defendant about the nature of the charges to which he was entering his guilty plea. The decision in this case predates United States v. Vonn, 535 U.S. 55 (2002).

***United States v. Suarez***, 155 F.3d 521 (5th Cir. 1998) When the court initially read the charge to the defendant (possession with intent to distribute), the defendant balked and said, “I am only guilty of possession.” This was never adequately cleared up and proceeding with the guilty plea was a violation of Rule 11(c)(1).

***United States v. Abernathy***, 83 F.3d 17 (1st Cir. 1996) Defendant was charged with possession of a weapon with an obliterated serial number. At the guilty plea, the government and the court advised the defendant that the government was not required to prove that the defendant had actual knowledge that the weapon had this characteristic. This was erroneous and the defendant should have been allowed to withdraw his plea.

***United States v. Ribas-Dominicci***, 50 F.3d 76 (1st Cir. 1995) In deciding whether to permit a defendant to withdraw a guilty plea, prior to sentencing, Rule 32(d) directs the court to grant the motion if there is a showing of a fair and just reason. One such reason would be a showing that there was a core violation of Rule 11. A core violation would include an improper description of the mens rea element of the offense. Here, the court instructed the defendant that he could be found guilty of the theft offense only if he acted willfully – that is “the government has to prove that at some point in time you had some reasonable understanding that what you were about to do and actually did was wrong, was marginal conduct, was questionable . . . In other words, that you had a – had or should have had a pretty good understanding that this was wrong and against the law.” This was an inaccurate statement of the willfulness requirement of the theft offense. See Morissette v. United States, 342 U.S. 246 (1952). Consequently, when the defendant moved to withdraw the plea prior to sentencing, the trial court erred in denying the motion.

***United States v. Medina-Silverio***, 30 F.3d 1 (1st Cir. 1994) The defendant was asked to sign a form which contained the typical information in a plea colloquy. The judge then asked the defendant in open court if he would change any of the answers. This does not comply with Rule 11’s requirement of a direct interrogation of the defendant about his understanding of the proceedings.

***Montgomery v. United States***, 853 F.2d 83 (2d Cir. 1988) At the guilty plea proceeding, the defendant acknowledged conspiring with a government informant and a government agent in a conspiracy to distribute heroin. This does not constitute a sufficient factual basis in light of the requirement that there be at least one other person with whom the defendant legitimately conspired, other than government employees.

***United States v. Shacklett***, 921 F.2d 580 (5th Cir. 1991) The trial court never read the charge aloud and never explained the essential elements. The guilty plea had to be vacated in this circumstance. The mere fact that the defendant had been given a copy of the information and acknowledged going over it with his lawyer is not a substitute for Rule 11’s requirement.

***United States v. Bernal***, 861 F.2d 434 (5th Cir. 1988) The trial judge failed to engage in any discussion with the defendant about the nature of the charges to which he was pleading guilty. This was not a case of a merely inadequate discussion, but a total failure to ensure that there was a factual basis for the plea. Automatic reversal is required in this situation.

***United States v. Tunning***, 69 F.3d 107 (6th Cir. 1995) The defendant entered a guilty plea to a charge of credit card fraud but refused to acknowledge the factual basis. The government failed to set forth a sufficient factual basis for the plea. Specifically, the government did not offer any evidence that the defendant obtained the credit card with intent to defraud. A mere statement by the prosecutor that he could prove an intent to defraud, without offering any evidence in support of this proposition, does not satisfy the factual basis requirement. In short, in cases where the defendant pleads guilty but refuses to admit conducting the demonstrates a factual basis for the plea (such as in an Alford plea), if the government undertakes to establish the factual basis by reciting what facts it would have proven at trial, the prosecutor must also identify the evidence it has to prove those facts. The appropriate remedy is for the prosecutor to be given another chance to reveal the factual basis. The defendant would not be given an opportunity to re-plead.

***United States v. Lowery***, 60 F.3d 1199 (6th Cir. 1995) Rule 11(c)(1) requires that the court determine whether the defendant understands the nature of the charges before accepting a guilty plea. In this case, the defendant entered a guilty plea to a bank robbery charge, including a count that he possessed a weapon in connection with that crime. At the re-arraignment, the court did not read the indictment, or the firearm count to the defendant. At the time of sentencing, the defendant expressed confusion

about his culpability for the weapon since he did not possess the weapon. The trial court never explained the concept of aiding and abetting to the defendant, insisting that he either withdraw his guilty plea, or be sentenced. This was erroneous. At no time did the court assure that the defendant understood the nature of the charges. While the government could show that the defendant knew that he was pleading guilty to aiding and abetting the actual robber commit the crime, there was no evidence that the defendant understood the nature of the charge.

***United States v. Syal***, 963 F.2d 900 (6th Cir. 1992) The trial court's failure to explain the elements of a wire fraud count and the failure to disclose the mandatory term of supervised release negated the validity of the guilty plea. The fact that the defendant had an experienced lawyer and that he was well educated, is no substitute for a proper Rule 11 proceeding.

***United States v. Goldberg***, 862 F.2d 101 (6th Cir. 1988) In a lengthy opinion setting forth the requirements of a "factual basis" before the entry of a guilty plea under Rule 11(f), the Sixth Circuit holds that the trial court improperly inferred a factual basis which was not present in the record.

***United States v. Van Buren***, 804 F.2d 888 (6th Cir. 1986) The factual basis for the conspiracy/guilty plea was not established. Though the indictment was read to the defendant, at no time was an inquiry made of the defendant whether he understood what it meant to be part of a conspiracy and whether he in fact acted in furtherance of that conspiracy. Failure to pose these questions to the defendant required setting aside the plea.

***United States v. Longoria,*** 113 F.3d 975 (9th Cir. 1997) The trial court failed to adequately inform the defendant of the nature of the charges to which he was entering his guilty plea. This was a violation of Rule 11 that necessitated setting aside the judgment.

***United States v. Smith***, 60 F.3d 595 (9th Cir. 1995) The trial court failed to inform the defendant of the nature of the charges prior to accepting the guilty plea. Even though the defendant waived reading of the indictment, this was a violation of Rule 11(c) and required that the guilty plea be set aside. The fact that the defendant admitted that he committed the facts underlying the indictment is not the same as being informed of the nature of the charges – to be voluntary, the defendant must understand the law in relation to the facts.

***United States v. Bruce,*** 976 F.2d 552 (9th Cir. 1992) The guilty plea in this case was void for two reasons: (1) the trial judge participated in the plea bargaining; (2) the trial judge failed to correctly explain the nature of the charges during the plea colloquy. The judge discussed the proposed plea with the defendants at length – on the record – and suggested that in light of the fact that they were parents, he thought it was a good idea to accept the plea. He suggested that this was far better than the life sentence the defendants were facing if convicted. Such discussions and participation in the plea negotiation is barred by Rule 11(e)(1). Though the judge's advice was sound and compassionate, Rule 11(e)(1) has no exceptions. The plea was also defective because the judge simply advised the defendant that the charge was conspiracy to manufacture methamphetamine. This does not adequately set forth the elements of the offense. Moreover, the defendant was actually pleading to aiding and abetting a conspiracy to possess with intent to distribute methamphetamine.

***United States v. Bigman,*** 906 F.2d 392 (9th Cir. 1990) The defendant challenged his guilty plea on the grounds that he was not adequately advised of the intent element of the offense. The defendant was prosecuted for murder and pled guilty. This issue should have been more fully developed at the trial court and a remand was necessary to determine whether the defendant, in fact, knowingly and voluntarily entered a guilty plea.

***United States v. Keiswetter***, 860 F.2d 992 (10th Cir. 1988) The failure to adequately set forth the factual basis for the district court's belief that there was evidence of all the elements of the crime of conversion required remand to enable the defendant to re-plead. In its en banc consideration, the Court further concludes that the only remedy is to vacate the plea. A partial remand to permit the trial court to clarify its factual finding is not an appropriate remedy. Re-affirmed en banc: 866 F.2d 1301 (10th Cir. 1989).

***United States v. Quinones***, 97 F.3d 473 (11th Cir. 1996) The trial court erred in failing to explain to the defendant the elements of a §924(c) offense. This amounted to plain error.

***United States v. Dewalt***, 92 F.3d 1209 (D.C. Cir. 1996) The defendant was charged with possessing a sawed-off shotgun with a barrel length of less than 18 inches. At the plea colloquy, the district court failed to advise the defendant of the nature of the charges – specifically, the requirement that the defendant was aware that the weapon that he possessed was illegal. This proceeding violated Rule 11(c)(1) and required that the conviction be set aside.

***United States v. Ford***, 993 F.2d 249 (D.C. Cir. 1993) After entering a guilty plea, but before sentencing, the defendant moved to withdraw his plea. He asserted his innocence, claiming that the drugs and gun found in a room belonged to his brother, not him. The trial court abused its discretion in denying the defendant's motion to withdraw the plea. The government's proof failed to establish the defendant's possession of the gun other than his proximity to the gun. At the plea colloquy, the government did not establish the factual basis for the gun count and the court failed to adequately inform the defendant of the elements of the offenses to which he was entering his plea.

***GUILTY PLEAS (Miscellaneous) SEE ALSO: PLEA AGREEMENTS***

***United States v. Doyle***, 857 F.3d 1115 (11th Cir. 2017) The failure to afford the defendant an opportunity for allocution at sentencing required that the case be remanded to give the defendant the opportunity to do so. The Rules are mandatory: the court must address the defendant personally and invite the defendant to make a statement, Rule 32(i)(4)(a)(ii), and even if the defense does not object to the failure to comply with the Rule, the error constitutes plain error.

***United States v. Bustamante-Conchas***, 850 F.3d 1130 (10th Cir. 2017) The trial court erred in failing to afford the defendant the right of allocution prior to sentencing. Plain error is established by the failure to address the defendant and to afford the defendant an opportunity to allocate.

***United States v. Palacios***, 844 F.3d 527 (5th Cir. 2016) The trial court's failure to give the defendant an opportunity to allocate prior to sentencing was plain error requiring a remand for a new sentencing hearing. The court reviewed the various factors that govern whether the error requires a remand, such as the defense attorney's recitation of facts warranting a lesser sentence, the defendant's opportunity to speak during the sentencing hearing, albeit not during the time that allocution is appropriate, and the defendant's proffer in the appellate court concerning what he wanted to tell the judge that merited consideration in imposing sentence.

***United States v. Green***, 842 F.3d 1299 (11th Cir. 2016) A defendant may enter a plea of nolo contendere pursuant to Rule 11(a)(6), which requires the court to consider the public interest in allowing such a plea: "Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice." Id. The conviction that results following a nolo contendere plea is essentially the same for most purposes, including the conviction's eligibility as the basis for recidivist punishment if the defendant commits another crime, the conviction's use as impeachment pursuant to Rule 609, and the conviction's use for deportation purposes. One exception, however, was found in United States v. Green, 842 F.3d 1299 (11th Cir. 2016). In Green, the government sought to prove that a defendant had a prior conviction for the same offense for which he was on trial pursuant to Rule 404(b). The prior conviction was based on a nolo contendere plea. Citing Rule 803(22), the Green court, after thoroughly analyzing the ins and outs of nolo pleas, held that a conviction based on a nolo plea may not be introduced to prove that the defendant committed a prior similar act.

***United States v. Nickle,*** 816 F.3d 1230 (9th Cir. 2016) The defendant admitted during the plea colloquy that he conspired to possess with intent to distribute a controlled substance in the district in a quantity at least 50 grams. The judge rejected the plea, stating that he wanted more facts. The trial judge erred. The judge's discretion to reject a non-binding plea is limited; the court can ensure that the defendant understands his rights and that the plea is knowing and voluntary; and can insist on a factual basis, but only to the extent that the defendant acknowledges the facts that compromise the elements of the offense. Demanding more details is not permissible. The Ninth Circuit held that the defendant must be given the option of re-pleading or having a new trial.

***United States v. Moreno***, 809 F.3d 766 (3rd Cir. 2016) The prosecution may not cross-examine a defendant after the defendant offers his testimony in allocution prior to imposition of the sentence.

***United States v. Vanderwerff***, 788 F.3d 1266 (10th Cir. 2015) The trial court's rejection of the plea agreement on the basis that it included an appeal waiver was error.

***United States v. Edmond,*** 780 F.3d 1126 (11th Cir. 2015) The defendant pled guilty to a crime that was not the crime set forth in the indictment. This violated the Grand Jury Clause of the Constitution and required setting aside the conviction, even though it was not raised until noticed by the appellate court.

***United States v. Paladino***, 769 F.3d 197 (3rd Cir. 2014) Even if there is a stipulated sentence in a plea agreement, the defendant must be given the opportunity to allocate. The judge retains the authority to sentence the defendant below the stipulated sentence.

***United States v. Adame-Hernandez***, 763 F.3d 818 (7th Cir. 2014) When a judge accepts a guilty plea that is part of a binding, 11(c)(1)(C) plea, but defers accepting the agreement, if the court later decides to reject the agreement, all that the court may do is offer the defendant the opportunity to withdraw the plea. The district court is not authorized to withdraw or otherwise negate the plea. Here, after rejecting he plea agreement, the court withdrew the plea itself.

***United States v. Arqueta-Ramos***, 730 F.3d 1133 (9th Cir. 2013) Mass guilty plea proceedings violate the requirement in Rule 11 that the court "address the defendant personally in open court." While the court may advise more than one defendant at a time about the rights that are being waived by entering a guilty plea, each defendant must individually be questioned about his or her understanding of the rights and the voluntariness of any waiver of the rights that occurs upon the entry of a guilty plea.

***United States v. Lewis***, 633 F.3d 262 (4th Cir. 2011) The plea agreement in this case contained language that indicated that it was a "binding" plea agreement (Rule 11(c)(1)(C)), because it said that the sentence "shall run concurrent" with a state sentence currently being served, rather than "the government would recommend that the sentence run concurrent" with the state sentence. Other parts of the plea agreement stated that the government "would recommend" certain Guideline decisions. The court's colloquy with the defendant at the plea was also ambiguous. The Fourth Circuit holds that the judge should have treated this portion of the plea as binding and given the defendant the right to withdraw the plea.

***United States v. Frownfelter***, 626 F.3d 549 (10th Cir. 2010) The defendant entered a guilty plea to a charge that was, as a matter of law, a misdemeanor. The judge, the prosecutor, and the defendant, however, believed it was a felony. After the plea was entered and the defendant was sentenced, the government acknowledged that it was actually a misdemeanor and urged the court to simply vacate the plea under the contractual theories of "mutual mistake" or "frustration of purpose." The Tenth Circuit rejected the government's theory and ordered the district court to vacate the sentence and re-sentence the defendant to a misdemeanor sentence consistent with the charge to which he pled guilty.

***United States v. Mancinas-Flores***, 588 F.3d 677 (9th Cir. 2009) During the plea colloquy, the judge asked the defendant if was guilty. The defendant's response was that there were no fingerprints connecting him to the crime. The judge asked again if the

defendant was pleading guilty because he was guilty, to which the defendant responded, “Well, I’m really not guilty.” The judge promptly ordered that a jury be brought upstairs and commenced the trial. On appeal, the defendant claimed that rejecting his plea agreement was an abuse of discretion. The Ninth Circuit agreed, holding that the judge failed to set forth the factual reason for rejecting the plea. In addition, the judge never explained the charges to the defendant, so his protestation of innocence may have reflected his lack of understanding of the charges. A remand to permit the defendant to enter a guilty plea pursuant to the plea agreement was ordered.

***United States v. Self,*** 596 F.3d 245 (5th Cir. 2010) If the district court does not intend to adhere to the terms of a binding plea agreement that was entered pursuant to Rule 11(c)(1)(C), the court must clearly state that the court rejects the plea agreement in toto. In this case, the trial court advised the defendant that the court would accept the plea except as to the sentence on one of the counts. The court may not accept a binding plea in part. This should have been more accurately explained to the defendant so that he could have decided whether to withdraw his plea.

***United States v. Roblero-Solis,*** 588 F.3d 692 (9th Cir. 2009) The practice of advising 40 or 50 defendants at a time of the Rule 11 rights and procedures is not permissible, even if the actual entry of the guilty plea and factual basis is handled on an individual basis. There is no practical way that even the most conscientious judge can be assured that 40 or more defendants (some of whom do not speak English) are fully understanding the rights that are being waived when a plea is entered.

***United States v. McIntosh***, 580 F.3d 1222 (11th Cir. 2009) The defendant entered a guilty plea to certain charges and the court unconditionally accepted the plea. Prior to sentencing, the government moved to dismiss the indictment because of an error in a date and presented a second indictment which corrected the error. The defendant objected, claiming that jeopardy had attached. The defendant then conditionally entered a plea to the second indictment. The Eleventh Circuit held that jeopardy had attached, and the defendant could not be prosecuted under the second indictment for the same offense.

***In re Gallaher***, 548 F.3d 713 (9th Cir. 2008) The defendant, with the consent of the government tendered a conditional plea that would have enabled him to appeal a certain pretrial ruling. Rule 11(a)(2). The district court judge deferred ruling on whether he would agree to accept the conditional plea until after he reviewed the PSR. He reviewed the PSR, but then rejected the conditional plea. Because a PSR may only be reviewed by a judge after a plea has been accepted (unless the defendant consents otherwise), Rule 32(e)(1), the case would have to be re-assigned to a different district court judge.

***In re Morgan,*** 506 F.3d 705 (9th Cir. 2007) A district court judge may not summarily reject all plea agreements that contain a recommendation by the prosecution as a matter of policy. The district court must make an individualized decision regarding any plea agreement and whether to accept or reject the agreement and cannot establish his own policy of rejecting all government recommendations that are contained in a plea agreement.

***United States v. Rea-Beltran***, 457 F.3d 695 (7th Cir. 2006) The trial court repeatedly rejected the defendant’s attempt to enter a guilty plea, based on the defendant’s apparent lack of understanding of the proceedings, his statement that he did not want to forego certain pretrial motions and his statement that he did not know that he entered the country illegally. The defendant did, however, repeatedly attempt to plead guilty. The Seventh Circuit held that the trial court erroneously refused to accept the tendered plea. With regard to the defendant’s statement that he did not know that he was committing a crime, this did not amount to a protestation of innocence, because the defendant’s knowledge of the prohibition was not an element of the offense.

***Ferrara v. United States***, 456 F.3d 278 (1st Cir. 2006) Twelve years ago, the defendant entered a guilty plea to a RICO case that charged various predicate offenses, including murder. A key witness for the government provided a statement implicating the defendant in one of the charged murders. Later, however, he recanted and told the AUSA and the case agents that the defendant was not involved in the murder. The AUSA and agents met once again with the witness, and he recanted his recantation. The witness’s recantation was never provided to the defense, despite Brady obligations that were ongoing pursuant to the Constitution and Local Rules. The defendant entered a guilty plea, though during the plea colloquy, he never admitted participation in the murder. Years later, the witness’s recantation was revealed. The District Court granted § 2255 relief. The First Circuit affirmed, concluding that the government’s conduct amounted to a violation of Brady and amounted to gross governmental misconduct.

***In re: Vasquez-Ramirez***, 443 F.3d 692 (9th Cir. 2006) A trial court does not have the authority to reject the entry of a guilty plea. The court can reject the plea agreement, but not a plea of guilty. An unconditional guilty plea must be accepted. Rule 11(a)(1), Fed. R. Crim. P.

***United States v. Hodge,*** 412 F.3d 479 (3rd Cir. 2005) In a case involving a package deal, the parties must reveal this to the district court judge. Thus, where one defendant’s plea is accepted by the government under the condition that other defendants enter pleas, as well, the trial court must take “special care” in determining the voluntariness of the pleas of all defendants. See generally Bordenkircher v. Hayes, 434 U.S. 357 (1977).

***United States v. Howard***, 381 F.3d 873 (9th Cir. 2004) The defendant offered proof in his § 2255 petition that he was under the influence of a powerful narcotic drug (painkiller) at the time he entered his guilty plea and that his attorney was aware of this. The district court erred in not conducting an evidentiary hearing to inquire into the factual support for this claim.

***United States v. Bennett***, 332 F.3d 1094 (7th Cir. 2003) Where a plea agreement is part of a package deal involving other defendants, or third parties, the trial court should be apprised of the existence of this “package” and should ensure that the plea has been entered into voluntarily by the defendant.

***United States v. Gibson***, 356 F.3d 761 (7th Cir. 2004) Shortly after the trial began, the defendant entered into a binding plea agreement that provided for a 262-month sentence. Unfortunately, the attorneys for the government and the defense agreed that this would be achieved by pleading to one count – a § 371 count – that only carried a five-year maximum sentence. The appellate court held that the plea would be vacated, and the case remanded for further proceedings.

***United States v. Stubbs***, 279 F.3d 402 (6th Cir. 2002) Defendant was charged with conspiring to possess firearms in connection with a drug offense (18 U.S.C. §924(o)) but entered a guilty plea to possessing a firearm in connection with a drug offense (§ 924(c)). This tainted the guilty plea and as a matter of law it could not have been a knowing and voluntary plea. Not only do these statutes have different elements (one is a conspiracy, the other is a substantive offense), but they also have different sentence provisions. Finally, the court held that an appeal waiver did not apply. Here, the plea agreement itself was invalid, not just the sentence.

***GUILTY PLEAS (Right to Withdraw)***

***United States v. Dominguez Benitez,*** 542 U.S. 74 (2004) If a trial court fails to advise the defendant that he will not have the right to withdraw his plea if the court rejects the government's recommendation (as required by Rule 11), and the defendant does not object to this Rule 11 violation, the plain error standard applies. Moreover, in order to set aside the guilty plea under this standard, the defendant must show that he would not have entered a guilty plea had the trial court properly advised him. In other words, there must be a prejudicial "effect" of the trial court's error; and absent a finding that the defendant would not have entered a guilty plea had he been properly advised, there can be no such showing.

***United States v. Hyde***, 520 U.S. 670 (1997) When a guilty plea is entered pursuant to Rule 11(e)(1)(A), the government generally agrees to dismiss certain counts as part of the plea agreement. The court then will accept the guilty plea and delay accepting the agreement until after the pre-sentence report is completed. Between the time that the plea is entered, and the court decides whether to accept the agreement, the defendant may only withdraw the guilty plea if he can demonstrate a "fair and just reason" pursuant to Rule 32(e). If the court decides to reject the agreement, however, the defendant must be afforded an opportunity to withdraw the plea. Rule 11(e)(2).

***United States v. Andrews***, 857 F.3d 734 (6th Cir. 2017) The defendant entered a Rule 11(c)(1)(C) plea. The judge expressly stated at the time the plea was entered that he would await the preparation of the PSI prior to accepting the plea. The defendant thereafter moved to withdraw the plea pursuant to Rule 11(d)(1). The defendant had a right to withdraw the plea and denying his motion to withdraw the plea was error. The court noted that had the district court "provisionally" or "preliminarily" accepted the 11(c)(1)(C) plea, the result might be different, thus triggering the Rule 11(d)(2) "fair and just reason" for withdrawing a plea standard.

***United States v. Davila-Ruiz***, 790 F.3d 249 (1st Cir. 2015) If a defendant enters a guilty plea before a Magistrate, he has the right to withdraw the plea until the time that it is accepted by the district court judge following the issuance of a Report and Recommendation by the Magistrate.

***United States v. Symington***, 781 F.3d 1308 (11th Cir. 2015) The government and the defendant entered into a plea agreement that stated that the maximum sentence was ten years. This agreement reflected the misunderstanding of the defense and the government that the Armed Career Criminal Act did not apply. In fact, the ACCA did apply. When the plea was entered, the trial court explained that the court was not bound by the agreement of the parties but stated that he could impose a sentence as long as ten years. After the court applied the ACCA and sentenced the defendant to fifteen years, the Eleventh Circuit held that the trial court was not permitted to impose a sentence of ten years, because that would be an illegal sentence the trial court abused its discretion in denying the defendant's motion to withdraw his plea.

***United States v. Fard***, 775 F.3d 939 (7th Cir. 2015) The fact that a defendant is an educated businessman does not excuse the trial court's failure to explain the nature of the charges and ensure that the defendant understands concepts such as "intent to defraud" and "fraudulent scheme." In this case, the defendant was educated, but English was not his native language. The defense counsel answered most of the judge's questions during the plea colloquy. He sought to withdraw his plea on the basis that he did not understand the nature of the charges. The Seventh Circuit held that the defendant was entitled to withdraw his plea based on the trial court's failure to explain the concepts of fraud and the nature of the crime to which he was pleading guilty.

***United States v. Adame-Hernandez***, 763 F.3d 818 (7th Cir. 2014) When a judge accepts a guilty plea that is part of a binding, 11(c)(1)(C) plea, but defers accepting the agreement, if the court later decides to reject the agreement, all that the court may do is offer the defendant the opportunity to withdraw the plea. The district court is not authorized to withdraw or otherwise negate the plea. Here, after rejecting he plea agreement, the court withdrew the plea itself.

***United States v. Urias-Marrufo,*** 744 F.3d 361 (5th Cir. 2014) Soon after entering a guilty plea, the defendant obtained new counsel and promptly filed a motion to withdraw the guilty plea on the grounds that her former counsel had not informed her that deportation was a virtual certain consequence of the guilty plea. The Fifth Circuit held that this was a valid basis for moving to withdraw the guilty plea and the lower court's holding that Padilla only applied to §2255 proceedings were erroneous.

***United States v. Benard***, 680 F.3d 1206 (10th Cir. 2012) The defendant was stopped on the road on suspicion that he was involved in a drug transaction. Eventually, he was arrested. He was asked, "Will I find anything in the car when I search it?" The defendant responded that there was a gun in the car. The question qualified as "interrogation" and was not subject to the public safety exception. Because this appeal followed a conditional guilty plea, the proper remedy was to remand the case and allow the defendant to withdraw his plea if he chooses to do so.

***United States v. Heid***, 651 F.3d 850 (8th Cir. 2011) The defendant was the mother of a drug dealer. When her son was in jail, she agreed to help him post bond. She retrieved several thousand dollars that she acknowledged was derived from drug dealing and gave the money to bondsmen to post the bond. She was indicted for conspiracy to launder money, with the object of the conspiracy being a § 1956(a)(1)(B)(i) violation (i.e., concealment money laundering). She entered a guilty plea with the factual basis essentially including no more facts than recited above. She later moved to withdraw her plea on the basis that the factual basis was insufficient to set forth a crime (i.e., there was no evidence of an intent, or an agreement, to conceal the proceeds). The Eighth Circuit held that the trial court erred in failing to grant the motion to withdraw the plea.

***United States v. Mendez-Santana,*** 645 F.3d 822 (6th Cir. 2011) A defendant has a right to withdraw a guilty plea under Rule 11 if the trial court defers accepting the plea. In this case, the trial judge expressly said that he was going to "hold off" on accepting the guilty plea because of the absence of a plea agreement and questions about the underlying facts. The defendant thereafter attempted to withdraw his plea, which he had an unqualified right to do. Denying his motion was error.

***United States v. Tyerman***, 641 F.3d 936 (8th Cir. 2011) The defendant and the government entered into a Rule 11(c)(1)(C) "binding" plea agreement and the defendant was expressly told at the time he entered the plea that he could withdraw the plea if the court did not accept the agreement. The trial judge did not accept the plea at the time the plea was entered, repeatedly stating that he was deferring making that decision until after he read the PSR. Prior to sentencing, the defendant announced that he wished to withdraw the plea. When he made this announcement, the court had not yet accepted the plea. The Eighth Circuit held that the defendant had the right to withdraw the plea, even though the trial judge promptly stated that he would accept the plea.

***United States v. Bonilla***, 637 F.3d 980 (9th Cir. 2011) The defendant was aware of the possible deportation consequences of entering a plea, but counsel failed to give him advice – that is, that deportation was a certainty. In fact, the attorney was not aware that the defendant was not a citizen. The Ninth Circuit held that the defendant should have been allowed to withdraw his plea: "A defendant demonstrates a 'fair and just reason' for withdrawing a guilty plea in circumstances in which the proper legal advice could have at least plausibly motivated a reasonable person in the defendant's position not to have pled guilty."

***United States v. Lewis***, 633 F.3d 262 (4th Cir. 2011) The plea agreement in this case contained language that indicated that it was a "binding" plea agreement (Rule 11(c)(1)(C)), because it said that the sentence "shall run concurrent" with a state sentence currently being served, rather than "the government would recommend that the sentence run concurrent" with the state sentence. Other parts of the plea agreement stated that the government "would recommend" certain Guideline decisions. The court's colloquy with the defendant at the plea was also ambiguous. The Fourth Circuit holds that the judge should have treated this portion of the plea as binding and given the defendant the right to withdraw the plea.

***United States v. Self***, 596 F.3d 245 (5th Cir. 2010) If the district court does not intend to adhere to the terms of a binding plea agreement that was entered pursuant to Rule 11(c)(1)(C), the court must clearly state that the court rejects the plea agreement in toto. In this case, the trial court advised the defendant that the court would accept the plea except as to the sentence on one of the counts. The court may not accept a binding plea in part. This should have been more accurately explained to the defendant so that he could have decided whether to withdraw his plea.

***United States v. Thompson-Riviere***, 561 F.3d 345 (4th Cir. 2009) The trial court erred in denying the defendant the right to withdraw his guilty plea prior to sentencing. The defendant entered a guilty plea to an illegal re-entry case. Prior to sentencing, a DNA test demonstrated that he may have been the child of an American, which means that he could not be guilty. Based on the possibility of legal innocence, the trial court abused its discretion in denying the motion.

***United States v. Arami***, 536 F.3d 479 (5th Cir. 2008) A defendant has an absolute right to withdraw a guilty plea prior to the time that the district court accepts the plea. Rule 11(d)(1). In this case, the plea was entered before a Magistrate and before the district court accepted the plea, the defendant sought to withdraw it. Denying his request was plain error.

***United States v. McTiernan***, 546 F.3d 1160 (9th Cir. 2008) If a defendant seeks to withdraw a guilty plea based on a claim that his attorney failed to alert him that incriminating evidence might have been suppressed had a motion been filed, a hearing on this claim should be held. This type of claim can qualify as a "fair and just reason for requesting withdrawal." Fed. R. Crim. P. 11(d)(2)(B).

***United States v. Newbert***, 504 F.3d 180 (1st Cir. 2007) If a defendant withdraws his guilty plea based on newly discovered evidence of his innocence, the government may not invoke the "breach the plea agreement" penalties (such as various rights waivers, including a waiver of Rule 410) that would apply in other situations when the defendant breaches a plea agreement.

***United States v. Segarra-Rivera***, 473 F.3d 381 (1st Cir. 2007) Based on the defendant's pro se statements regarding the inappropriate pressure that counsel placed on him before he relented and signed his guilty plea, there was at least a colorable basis for inquiring into a possible conflict of interest before actually conducting a hearing on the issue of the defendant's Motion to Withdraw his Guilty Plea.

***United States v. Morris***, 470 F.3d 596 (6th Cir. 2006) In this most unusual case, the federal district court acted properly in dismissing the federal indictment because of a breach of the state prosecutor's agreement to permit the defendant to plead to a state charge. Among other factors the court considered was the fact that the federal prosecutor participated in the state prosecution and plea negotiations.

***United States v. Davis***, 428 F.3d 802 (9th Cir. 2005) When a defendant seeks to withdraw a guilty plea based on bad advice from his attorney, Rule 11(d)(2)(B) – formerly Rule 32(e) – does not require that the defendant prove that but for the bad advice,

he would not have entered the guilty plea. That would be the standard post sentencing. After the plea is entered, yet before sentencing, the “fair and just reason” standard in the Rule is less rigorous than the post-sentencing standard. In this case, withdrawal was justified based on the defense attorney’s mischaracterization of the possible sentence.

***United States v. Garcia***, 401 F.3d 1008 (9th Cir. 2005) The defendant’s presentation of newly discovered evidence that contradicted evidence of his guilt was a fair and just reason that supported his withdrawal of his guilty plea. When he entered his plea, he entered an Alford-type plea. The Ninth Circuit noted that the newly discovered evidence need not be so persuasive that there is a reasonable probability that the defendant would not be convicted at trial. The court also held that it is not necessary for a defendant to claim actual innocence in order to be entitled to withdraw his guilty plea.

***United States v. Patterson***, 381 F.3d 859 (9th Cir. 2004) Fallout from the decision in Ellis, which is annotated below: The defendant in this case entered a guilty plea pursuant to Rule 11(b)(1)(B). The amount of marijuana plants was acknowledged by the government and the defense to be in dispute and would require a hearing at sentencing. After the plea was entered, Apprendi was decided and the government acknowledged that the number of plants became an element of the offense. The district court vacated the plea. The Ninth Circuit held that this was impermissible. Once the plea was entered, only the defendant has the power to withdraw the plea; the court may reject the plea agreement, but it cannot vacate the guilty plea, itself. Vacating the plea in this case violated the Double Jeopardy Clause.

***United States v. Bradley***, 381 F.3d 641 (7th Cir. 2004) The defendant entered a guilty plea to carrying a firearm in connection with a drug offense. The factual basis offered by the government recited that the defendant carried the gun in a car that was transporting marijuana. The indictment, however, alleged that he carried the gun in connection with a cocaine offense. The defendant then moved to withdraw the plea on the basis of this variance. The trial court erred in denying the defendant the right to withdraw the plea.

***United States v. Lopez Ramirez***, 385 F.3d 245 (2d Cir. 2004) Pursuant to Rule 11, a defendant who enters a non-binding plea agreement may not withdraw the plea, absent a fair and just reason. This case answers the unusual question, “Can a defendant maintain his guilty plea, but withdraw from the agreement?” The court holds that this is permissible, and the trial court should evaluate the defendant’s request under a similar “fair and just reason” approach.

***Waucaush v. United States***, 380 F.3d 251 (6th Cir. 2004) The defendant entered a guilty plea to a RICO charge and was sentenced to life. Subsequent developments in the U.S. Supreme Court in other cases cast considerable doubt on the sufficiency of the interstate commerce proof in this case. The Sixth Circuit held that the defendant could challenge his guilty plea based on the change in the law, because the “new” law was sufficient to establish that the defendant was “actually innocent” of the charged offense.

***United States v. Ortega-Ascanio,*** 376 F.3d 879 (9th Cir. 2004) After the defendant entered his guilty plea to a charge of illegal re-entry (but before sentencing), the United States Supreme Court issued its decision in INS v. St. Cyr, 533 U.S. 289 (2001), which held that certain prior orders of deportation were invalid. The Ninth Circuit held that this intervening Supreme Court decision provided a “fair and just” reason for withdrawing the plea.

***Ellis v. U.S. District Court,*** 356 F.3d 1198 (9th Cir. 2004) (en banc) When a trial court accepts a guilty plea, but subsequently rejects the plea agreement, the ball is then in the defendant’s court as to whether he wishes to withdraw his plea or go forward with sentencing, without the plea agreement in place. The trial court may not simply vacate the guilty plea and proceed to trial. See Rule 11(c)(5), Fed. R. Crim. P. The court reached this conclusion after reviewing the analysis of the Supreme Court in United States v. Hyde, 520 U.S. 670 (1997), which also explained that a trial judge may accept a guilty plea and defer acceptance of the plea agreement; but if the agreement is rejected, then the defendant must be given an opportunity to withdraw the plea. The Ellis court also held that upon remand, the case would be assigned to a different judge.

***United States v. Ventura-Cruel***, 356 F.3d 55 (1st Cir. 2003) The defendant entered into a plea agreement and entered his plea. However, his debriefings went poorly, and the court ultimately set aside the guilty plea, because the court concluded that based on the defendant’s statements, there was no longer a factual basis for the plea. During the ensuing trial, the government introduced a letter written by the defendant during the debriefings (it was essentially the “acceptance of responsibility” letter) that was incriminating. The First Circuit held that admitting this letter was reversible error. Technically, Fed. R. Evid 410 did not apply, because the defendant’s statement was not anticipatory to, or part of, the plea negotiation process. The court concluded that allowing the government to use the statement gave them the benefit of the bargain while depriving the defendant of the benefit of the bargain. See also United States v. Escamilla, 975 F.2d 568 (9th Cir. 1992).

***United States v. Head***, 340 F.3d 628 (8th Cir. 2003) Pursuant to Rule 11(d), which replaced Rule 32(e) in December 2002 in governing withdrawals of pleas, a plea may be withdrawn before the court accepts the plea, for any reason or for no reason.

***United States v. Couto,*** 311 F.3d 179 (2d Cir. 2002) The trial court denied the defendant’s motion to withdraw her guilty plea, relying in part on possible evidence to be offered by the government. This was an inappropriate basis for denying relief pursuant to Rule 32(e).

***United States v. Reyes***, 313 F.3d 1152 (9th Cir. 2002) The defendants entered binding Rule 11(e)(1)(C) pleas. They failed to live up to their cooperation obligations, however. In this situation, the defendants must be afforded the right to withdraw their pleas prior to sentencing. The trial court may not simply exceed the agreed-upon sentence limit. The trial judge is not empowered to unilaterally modify a Rule 11(e)(1)(C) binding plea agreement.

***United States v. Alvarez-Tautimez***, 160 F.3d 573 (9th Cir. 1998) Two defendants were arrested for smuggling marijuana. Alvarez entered a guilty plea, but the court had not yet accepted the plea. Thereafter, the co-defendant won his motion to suppress – a motion that would have succeeded for Alvarez, as well. The government had already indicated that it would not appeal the co-defendant's successful motion. Nevertheless, Alvarez's counsel did not move to withdraw the guilty plea and re-assert a Motion to Suppress. This was ineffective assistance of counsel. Because the court had not accepted the guilty plea yet, the defendant was entitled to withdraw the plea. The case would then have been dismissed.

***United States v. Shaker***, 279 F.3d 494 (7th Cir. 2002) The defendant entered a guilty plea and the district court explicitly stated that the court was deferring accepting the guilty plea and plea agreement until after the court reviewed the presentence report. When the PSR was issued, the defendant, disappointed in some of its findings, moved to withdraw the guilty plea. The Seventh Circuit held that he had an absolute right to do so, because the trial court deferred accepting the plea. The requirement that there be a fair and just reason is not applicable when the district court has not accepted the guilty plea.

***United States v. Ribas-Dominicci***, 50 F.3d 76 (1st Cir. 1995) In deciding whether to permit a defendant to withdraw a guilty plea, prior to sentencing, Rule 32(d) directs the court to grant the motion if there is a showing of a fair and just reason. One such reason would be a showing that there was a core violation of Rule 11. A core violation would include an improper description of the mens rea element of the offense. Here, the court instructed the defendant that he could be found guilty of the theft offense only if he acted willfully – that is "the government has to prove that at some point in time you had some reasonable understanding that what you were about to do and actually did was wrong, was marginal conduct, was questionable . . . In other words, that you had a – had or should have had a pretty good understanding that this was wrong and against the law." This was an inaccurate statement of the willfulness requirement of the theft offense. See Morissette v. United States, 342 U.S. 246 (1952). Consequently, when the defendant moved to withdraw the plea prior to sentencing, the trial court erred in denying the motion.

***United States v. DeBusk***, 976 F.2d 300 (6th Cir. 1992) The failure to advise the defendant that if the court did not accept the recommendation, the defendant would not be permitted to withdraw his plea was harmful error. The court had advised the defendant that he would be permitted to withdraw his plea if the court rejected the plea agreement. The plea called for the prosecutor to recommend probation. The judge imposed a one-year sentence and explained that he accepted the plea agreement, that is, he considered the government's recommendation, but he felt a one-year sentence was more appropriate. Though the court is not obligated to permit a defendant to withdraw his plea if a sentence is longer than expected or longer than recommended by the prosecutor, the misleading advice given to the defendant by the court at the time of the plea required that the defendant be permitted to withdraw his plea in this case. The court's contradictory advice that he was not "bound by the recommendation" was not a cure for the incorrect advice.

***United States v. Kemper***, 908 F.2d 33 (6th Cir. 1990) The trial court properly rejected a plea agreement where the pre-sentence report showed that the stipulated drug quantity was inaccurate. However, once rejecting a plea agreement, the trial court should have afforded the defendant the right to withdraw his plea, rather than simply imposing sentence.

***United States v. Groll,*** 992 F.2d 755 (7th Cir. 1993) After tendering a guilty plea, the defendant moved to withdraw the plea, arguing that she was entrapped and that the pistol with which she was charged was not hers. The district court denied the motion to withdraw without reason. The Seventh Circuit reversed: the record in this case established a colorable claim of entrapment based on the repeated calls of the informant to the defendant to engage in a marijuana transaction. In denying a motion to withdraw a guilty plea, the district court must make findings as to why the defense now being asserted would not be available to the defense at trial.

***United States v. Chan***, 97 F.3d 1582 (9th Cir. 1996) When a defendant enters a "B"-type agreement, that is, a plea agreement which includes a non-binding recommendation by the government, the district court should caution the defendant that the court is not bound by the recommendation and the defendant will not be allowed to withdraw the plea if the recommendation is rejected. The court failed to caution the defendant about this principle during the acceptance of the plea, but it was harmless error in this case, because the court did accept the recommendation.

***United States v. Washman***, 66 F.3d 210 (9th Cir. 1995) The defendant entered into a binding plea agreement pursuant to Rule 11(e)(1)(c). Prior to the time that the district court accepted the plea, (but after the magistrate agreed to recommend that the plea be accepted by the district court) the defendant moved to withdraw the plea. Denying this motion was improper. Prior to the time the plea is accepted by the district court, the defendant has a right to withdraw from the agreement.

***United States v. Scott***, 884 F.2d 1163 (9th Cir. 1989) The defendant moved to dismiss an indictment which had been returned against him. He subsequently pled guilty to a substituted information, conditioned on his right to appeal the denial of his motion to dismiss. The defendant should be provided an opportunity to withdraw his guilty plea in order to perfect his appeal of the invalid indictment.

***United States v. Kummer,*** 89 F.3d 1536 (11th Cir. 1996) Even where a plea is taken pursuant to Rule 11(e)(1)(B) – which involves the government making a non-binding recommendation without the defendant retaining the right to withdraw the plea – if the court, when it takes the plea, advises the defendant that he could withdraw the plea if the recommendation were not followed, the defendant must be given that opportunity.

***United States v. Bell***, 22 F.3d 274 (11th Cir. 1994) The defendant was charged with violating 18 U.S.C. §664, which outlaws embezzling money from a fund covered by ERISA. Many of the counts, including portions of the conspiracy count, alleged that the defendant embezzled money from a fund which was not, in fact, covered by ERISA. After the defendant entered a guilty plea,

he sought to withdraw the plea based on this defect in the indictment. The trial court erred in denying the defendant's motion to withdraw the plea.

***United States v. Idowu,*** 105 F.3d 728 (D.C. Cir. 1997) The defendant was charged with unlawful presence in the United States within five years of being deported. 8 U.S.C. §1326. Arguably, he was permitted to be present, pursuant to a statute which allows a deported alien to re-enter, 8 U.S.C. §1182(a). Whether this was a viable defense or not, the defendant, after having entered a guilty plea, should have been allowed to withdraw the plea to mount this defense.

***United States v. Ford***, 993 F.2d 249 (D.C. Cir. 1993) After entering a guilty plea, but before sentencing, the defendant moved to withdraw his plea. He asserted his innocence, claiming that the drugs and gun found in a room belonged to his brother, not him. The trial court abused its discretion in denying the defendant's motion to withdraw the plea. The government's proof failed to establish the defendant's possession of the gun other than his proximity to the gun. At the plea colloquy, the government did not establish the factual basis for the gun count and the court failed to adequately inform the defendant of the elements of the offenses to which he was entering his plea.

***GUILTY PLEAS (Voluntariness; Adequacy of Waiver of Rights)***

***Godinez v. Moran***, 509 U.S. 389 (1993) Despite language in precedents to the contrary, the standard for assessing the competence of a defendant to enter a guilty plea is the same as for assessing the defendant's competence to stand trial: whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him. Moreover, the defendant's capacity to waive the assistance of counsel is measured by the same standard – the ability to understand the nature of the proceeding and to waive the right to counsel with an understanding of what is being waived.

***United States v. Yang Chia Tien***, 720 F.3d 464 (2d Cir. 2013) The defendant's responses to the court's questions during the plea colloquy showed that he did not understand the court's questions, he was taking medications that clearly affected his ability to understand and that his understanding of English was minimal (and the Interpreter provided inadequate translations). The defendant's motion to withdraw his guilty plea should have been granted.

***United States v. Fisher,*** 711 F.3d 460 (4th Cir. 2013) The defendant entered a guilty plea to drug charges. The principal evidence against him was derived from a search which was based on the affidavit of a DEA Agent. A year later, the DEA agent was convicted of perpetrating various lies in connection with his conduct as an agent and acknowledged that the affidavit that was used in Fisher's case was based on false evidence. The Fourth Circuit held that this disclosure vitiated the voluntariness of the guilty plea. The government has a duty not to engage in misconduct that induces a guilty plea. Brady v. United States, 397 U.S. 742 (1970). That Brady decision (not to be confused with Brady v. Maryland), requires: (1) governmental misconduct and (2) the misconduct induced the guilty plea. Both showings were made in this case.

***United States v. Smith***, 640 F.3d 580 (4th Cir. 2011) If a defendant claims that his lawyer was so deficient that it amounted to no counsel at all, this can taint a guilty plea. Though a guilty plea generally waives all non-jurisdictional defects, this doctrine does not bar a challenge to the right to counsel, because this affects the voluntariness of the plea.

***United States v. Gonzalez***, 420 F.3d 111 (2d Cir. 2005) The defendant pled guilty to a drug conspiracy that alleged that he possessed with intent to distribute at least 50 grams of crack. During the plea colloquy, he denied possessing considerably more. At sentencing, the judge found that he possessed an amount that triggered a mandatory minimum twenty-year sentence. The factual basis for the plea, and the voluntariness of the plea, was inadequately established.

***United States v. Arellano-Galllegos***, 387 F.3d 794 (9th Cir. 2003) At no time during the plea colloquy did the court advise the defendant about the appeal waiver. The appeal waiver would not be enforced.

***United States v. Martinez-Molina***, 64 F.3d 719 (1st Cir. 1995) The defendants entered a guilty plea as part of a package deal. The written plea agreements indicated that the defendants were entering their pleas without any compulsion or threats. At the plea proceeding, however, the court only asked if the defendants were compelled by the government or any agent of the government to enter the plea. This was an inadequate inquiry: Because package-deal plea agreements increase the risk that one defendant will coerce another to plead guilty, the district court is obligated to ascertain carefully whether the defendants were in fact entering their pleas without compulsion.

***United States v. Parra-Ibanez***, 951 F.2d 21 (1st Cir. 1991) The trial court committed harmful error in failing to follow-up on information that the defendant, at the time he entered his plea, was under the influence of medication.

***United States v. Hansel***, 70 F.3d 6 (2d Cir. 1995) The defendant pled guilty to two counts of the indictment which were barred by the statute of limitations. Though the guilty plea amounts to a waiver of the issue on appeal, he received ineffective assistance of counsel and the guilty plea was therefore not knowing and voluntary and the convictions on those counts would be set aside.

***United States v. Rossillo***, 853 F.2d 1062 (2d Cir. 1988) The defendant acknowledged taking medication for a heart condition at the time he entered his guilty plea. The trial court erred in failing to fully explore the nature of the medication to determine whether the defendant's waiver of his rights was voluntary and knowing in light of the influence of the drug.

***Heiser v. Ryan,*** 951 F.2d 559 (3rd Cir. 1991) A threat by a defendant's attorney to withdraw from the case if the defendant did not plead guilty may render a guilty plea involuntary. This is true notwithstanding the mitigating effect of an attorney's assurance that new counsel would be appointed if the defendant insisted on proceeding to trial.

***United States v. Cole***, 813 F.2d 43 (3rd Cir. 1987) The defendant admitted at the taking of his plea that he had ingested drugs the previous night. The trial judge made no further inquiry on the matter but accepted the plea. The Third Circuit holds that the plea must be vacated.

***United States v. DeBusk,*** 976 F.2d 300 (6th Cir. 1992) The failure to advise the defendant that if the court did not accept the recommendation, the defendant would not be permitted to withdraw his plea was harmful error. The court had advised the defendant that he would be permitted to withdraw his plea if the court rejected the plea agreement. The plea called for the prosecutor to recommend probation. The judge imposed a one-year sentence and explained that he accepted the plea agreement, that is, he considered the government's recommendation, but he felt a one-year sentence was more appropriate. Though the court is not obligated to permit a defendant to withdraw his plea if a sentence is longer than expected or longer than recommended by the prosecutor, the misleading advice given to the defendant by the court at the time of the plea required that the defendant be permitted to withdraw his plea in this case. The court's contradictory advice that he was not "bound by the recommendation" was not a cure for the incorrect advice.

***Estock v. Lane,*** 842 F.2d 184 (7th Cir. 1988) The defendant established that he was not competent at the time he entered his plea of guilty on rape charges. Six days prior to the entry of the plea, the defendant had attempted suicide; psychiatric evaluations described the defendant as paranoid personality and borderline psychotic.

***United States v. Kennell,*** 15 F.3d 134 (9th Cir. 1994) At the plea colloquy, the trial court failed to inquire if the defendant realized that the court was not bound by the government's recommendation and that he would not be allowed to withdraw his guilty plea, as required by Rule 11(e)(2). The trial court did not accept the government's recommendation, sentencing the defendant to nearly four times the recommended time. Even though the plea agreement stated that the government's recommendation was nothing more than that, the trial court's failure to advise the defendant of the irrevocability of his plea was not harmless error and the case was remanded to enable the defendant to re-plead, or to sentence the defendant according to the bargain.

***United States v. Caro***, 997 F.2d 657 (9th Cir. 1993) Whenever a plea agreement with multiple defendants is offered as a "package deal" – all plead, or the deal is off – the district court must make additional inquiries as part of the Rule 11 colloquy to ensure that there has not been any coercion between the defendants. Though such agreements are permissible, there is inherent risk that a defendant who perceives that he is getting a good deal will influence other defendants to get on board. The district court in this case did not adequately address this potential problem.

***United States v. Anderson***, 993 F.2d 1435 (9th Cir. 1993) At arraignment, the trial judge cautioned the defendant that no deals would be accepted after that date and expressed a desire to expedite the proceedings. Prior to this arraignment, a plea agreement had been reached by the defendant and the government, but a change of counsel led to canceling this agreement. The trial judge was clearly frustrated by the turn of events. The judge's comments about trying the case right away, coupled with his comments about accepting no negotiated plea after that date was overly coercive and rendered the subsequent plea involuntary – even though the court did accept a plea to two counts and dismissed the other twenty-eight counts. Note that Davila expressly overruled Anderson on the basis of Anderson's automatic reversal holding.

***United States v. Cortez***, 973 F.2d 764 (9th Cir. 1992) Just prior to trial, the defendant moved for a continuance, arguing that he wanted to perfect a selective prosecution motion. Both the government and the trial court explained to the defendant that this could be raised post-trial. On the day set for the trial to begin, the defendant entered a guilty plea and later, before sentencing, filed his selective prosecution motion. Though the plea was not conditional under Rule 11(a)(2), because of the assurances of his trial counsel, the government, and the trial judge, that the issue could be raised after trial, the plea was not knowing and voluntary, because the defendant did not realize he was waiving this defense. In this case, the affirmative misrepresentations of the government and the trial court made the difference.

***United States v. Graibe,*** 946 F.2d 1428 (9th Cir. 1991) The defendant pled guilty knowing that the government was going to make a recommendation. The trial judge, however, did not advise the defendant that the plea could not be withdrawn if the recommendation was not followed. The proper way to analyze whether this was grounds to void the plea is to place the burden on the government to prove that the defendant knew that he could not withdraw the plea.

***United States v. Whalen***, 976 F.2d 1346 (10th Cir. 1992) Defendant contended that his guilty plea was not voluntary because the government (he claimed) threatened to prosecute his wife if he did not enter a guilty plea. The Supreme Court has cautioned that, "Adverse or lenient treatment for some person other than the accused might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider."

***Bordenkircher v. Hayes,*** 434 U.S. 357 (1978). Nevertheless, such plea agreements are permissible, but the trial court, in accepting such a plea, should be made aware, and should make inquiry into the circumstances. A hearing on this habeas petition was needed to enable the trial judge to inquire into the voluntariness of the plea, in light of the defendant's contention that such a threat was made. See Martin v. Kemp, 760 F.2d 1244 (11th Cir. 1985)(statement at plea that the plea was voluntary does not bar later habeas petition challenging voluntariness in light of threat to third party).

***United States v. Estrada***, 849 F.2d 1304 (10th Cir. 1988) The defendant claimed that a prosecutor threatened to file charges against him which had no basis and that the defense counsel threatened to withdraw from the case unless the defendant pled guilty. The defendant further claimed that the prosecutor and defense promised a light sentence if the defendant would cooperate. A hearing was required to inquire into this claim.

***United States v. Pierre***, 120 F.3d 1153 (11th Cir. 1997) If a defendant believes that he is entering a conditional guilty plea pursuant to Fed. R. Crim. P. 11(a)(2), but for some reason the appellate issue has not been preserved properly, then the plea has not been entered voluntarily and knowingly.

***United States v. Corbitt***, 996 F.2d 1132 (11th Cir. 1993) At the scheduled change of plea hearing, one defendant's attorney asked for more time. The judge responded that all pleas must be submitted by noon that day. He also advised the attorneys and the defendants that if the defendants were convicted, he generally gave "high sentences." The plea agreements were tendered that day. The Eleventh Circuit reversed: the judge's comments violated Rule 11(e)(1) which strictly outlaws any judicial participation in plea negotiations, which would include the judge's threat that when defendants were convicted, he gave high sentences. The case would be remanded to the district court for assignment to a different judge and to permit the defendant to withdraw his plea. The automatic reversal rule was abolished in United States v. Davila, 133 S. Ct. 2139 (2013).

***United States v. Zickert***, 955 F.2d 665 (11th Cir. 1992) At the time defendant's guilty plea was entered, he was not informed that he had no right to withdraw his plea of guilty if the court refused to impose the sentence recommended by the government. This was reversible error, requiring that the defendant be allowed to re-plead. Even though the court advised the defendant that the court was not bound by the recommendation, this did not properly advise the defendant that he would not be permitted to withdraw his plea if the recommendation was not accepted.

## *HANDWRITING EVIDENCE*

***United States v. Samet***, 466 F.3d 251 (2d Cir. 2006) A witness may not identify a person's handwriting if the witness only gains his knowledge in anticipation of litigation. However, a law enforcement officer may rely on the knowledge he gained during the course of the investigation to form his opinion.

***United States v. Alvarez-Farfan***, 338 F.3d 1043 (9th Cir. 2003) The trial court erred in barring the defendant from introducing evidence of a motel receipt and a debriefing statement that was written by a witness to prove the witness's handwriting. The jury is entitled to make a handwriting comparison.

## *HARBORING A FUGITIVE*

***United States v. Strain***, 396 F.3d 689 (5th Cir. 2005) Venue in this fugitive harboring case was not proper in the Western District of Texas. The defendant was aware that there was a warrant for the fugitive, there was no act of harboring that occurred in the district where the trial was conducted. The mere failure to disclose a witness's whereabouts does not constitute harboring a fugitive. There must be some affirmative act of concealment or aiding the fugitive in his fugitivity.

## *HATE CRIME*

***United States v. Miller***, 767 F.3d 585 (6th Cir. 2014) In order to be guilty of violating the Matthew Shepard and James Byrd Hate Crimes Prevention Act (18 U.S.C. § 249), the victim's status must be the "but for" cause for the defendant's criminal act. The trial court in this case instructed the jury that the victim's religion must be a "significant motivating factor" for the commission of the crime. This is not the correct standard.

## *HEALTH CARE FRAUD*

***United States v. Willner***, 795 F.3d 1297 (11th Cir. 2015) This case involved a health care fraud conspiracy in which recruiters were paid to send ineligible patients to a facility that was supposedly performing sleep studies. The patients were not eligible, they were kept as long as Medicare would pay, then they were discharged and often then re-admitted so that more fraudulent billings could occur. The evidence was sufficient to support the conviction of most of the defendants who were involved in this scheme. However, one doctor, Dr. Abreu, was not shown to have had knowledge of the scheme and her conviction was reversed on sufficiency grounds.

***United States v. Lopez-Diaz***, 794 F.3d 106 (1st Cir. 2015) The evidence did not support defendant's health care fraud conviction. The defendant knowingly supplied certain patient information to his brother, but unbeknownst to him, the brother was using the information to defraud Medicare. The evidence did not support the defendant's conviction under either a conspiracy or aiding and abetting theory. Even a willful blindness instruction did not support the theory that the defendant knew that his brother was using the information improperly to defraud Medicare.

***United States v. Rufai,*** 732 F.3d 1175 (10th Cir. 2013) While the defendant's conduct aided the principal's health care fraud offense, the evidence was insufficient to show that the defendant was aware of the crime and thus he could not be convicted of aiding and abetting the health care fraud crime. Innocent explanations for his conduct were too reasonable to allow the government to convict based on alternative theories that supported the argument that he "must have known" about the principal's crime.

***United States v. Medina***, 485 F.3d 1291 (11th Cir. 2007) It is a federal crime to solicit or pay kickbacks in connection with certain health care related transactions. For example, a medical equipment supplier may not pay a kickback to a patient or a doctor to use his equipment that is covered by Medicare. 42 U.S.C. § 1320a7b(b)(2)(A). Every violation of this anti-kickback provision, however, does not amount to health care fraud under 18 U.S.C. § 1347. Fraud requires proof of a false statement or some other kind of fraud. In this case, the court reversed the health care fraud convictions of most of the defendants because their kickback violations were not accompanied with any fraudulent conduct. The equipment was, in fact, supplied and Medicare

was not over-billed. One defendant, however, submitted a form that falsely stated that she complied with all Medicare rules (including the anti-kickback provision) when she knew that she was violating that provision. Her fraud conviction was sustained.

***United States v. Jones***, 471 F.3d 478 (3rd Cir. 2006) The defendant was a clerk at a methadone clinic. She stole cash from the clinic that was paid by patients. This does not constitute a § 1347 offense, because the theft did not amount to "fraud." The defendant made no "misrepresentations by the employee in connection with the delivery of, or payment for, health care benefits, items, or services."

***United States v. Miles***, 360 F.3d 472 (5th Cir. 2004) The defendants paid a public relations firm to deliver literature and business cards to local medical offices. The firm was paid a set amount for each Medicare patient who became a client of the defendant's company as a result of the firm's work. This did not violate 42 U.S.C. § 1320a-7b(b)(2)(A). Because the public relations firm did not "refer" patients to the defendant's company, the statute did not apply.

***United States v. Starks***, 157 F.3d 833 (11th Cir. 1998) The defendant was charged with violation of the Medicare Antikickback Statute, 42 U.S.C. § 1320a-7b(b). The court concluded that the "willful" requirement was properly explained to the jury in these terms: "The word "willfully," as that term is used from time to time in these instructions, means the act was committed voluntarily and purposely, with the specific intent to do something the law forbids, that is with a bad purpose, either to disobey or disregard the law." The defendant sought a "Ratzlaf" instruction that would have required the jury to find that the defendant was aware of the actual law he was violating. Based on Bryan v. United States, 118 S. Ct. 1939 (1998), however, the court concluded that the government was only required to prove that the defendant was aware that he was violating the law – not that he was aware of the specific law that he was violating.

## *HOBBS ACT*

***Taylor v. United States***, --- S. Ct. --- (2016) Proof that a defendant engaged in a robbery of marijuana and money from the victim is sufficient to establish an interstate nexus for Hobbs Act purposes.

***Ocasio v. United States***, 136 S. Ct. 1423 (2016) In a conspiracy prosecution, it is not necessary that the government prove that all conspirators were capable of committing the offense. What matters is that the conspirators agree that the offense will be committed by someone. In Ocasio, the Court held that a police officer and a shop owner could conspire that the two would conspire to violate the Hobbs Act through the commission of the crime of "color of official right" extortion: the shop owner would pay money to the police officer to refer business to the shop owner. Even though the shop owner could not commit the offense himself, he could conspire to commit the offense.

***Scheidler v. National Organization for Women, Inc.,*** 537 U.S. 393 (2003) One of the predicate acts in this civil RICO case was a Hobbs Act violation. The plaintiffs claimed that abortion protesters were engaged in Hobbs Act extortion. The Supreme Court held that the conduct in which the protesters engaged did not amount to extortion, because they were not attempting to obtain "property" from the targets of the protests.

***Evans v. United States***, 504 U.S. 255 (1992) In order to make out a Hobbs Act violation under the "color of official right" prong, there is no need to prove that any force or threat of force was used. Nor need the defendant make a demand for payment. In short, the passive receipt of a bribe is sufficient.

***McCormick v. United States***, 500 U.S. 257 (1991) In order for a campaign contribution to amount to a violation of the Hobbs Act, there must be proof of an explicit quid pro quo.

***Ocasio v. United States***, 136 S. Ct. 1423 (2016) The defendant was a police officer who accepted bribes from a car repair shop to which he referred car accident victims. He was prosecuted under the Hobbs Act – extortion – for receiving money, with the consent of the car repair shop owner, under color of official right. The charge alleged that he conspired with the owner to violate the law. The officer claimed that he could not "conspire" with the person who was allegedly the victim of the extortion. The Supreme Court disagreed, holding that the defendant and the car repair shop owner did, in fact, conspire to commit the Hobbs Act violation, which essentially criminalizes the payment of bribes in this context.

***United States v. Burhoe***, 871 F.3d 1 (1st Cir. 2017) The defendants' convictions for extortion, based on their conduct pressuring employers to hire Teamsters, rather than non-union workers, were reversed because of the insufficient evidence of unlawful extortion. There is nothing improper about union officials urging or pressuring employers to hire union workers. It would be a crime if the defendants were "featherbedding" which means requiring employers to hire employees who will perform no work. But urging employers to hire union workers even when the employer does not want, or need, workers is not a crime. The evidence in this case did not show that the defendants were urging the employers to hire fictitious workers. This case contains a thorough analysis of the relationship between the Hobbs Act and the Labor laws.

***United States v. Silver***, 864 F.3d 102 (2d Cir. 2017) Sheldon Silver's conviction for honest services fraud and Hobbs Act violations were reversed based on an error in the jury instructions, which failed the McDonnell requirements for an "official act." The trial court incorrectly explained that an "official act" was any action taken or to be taken under color of official authority.

***United States v. Blagojevich***, 794 F.3d 729 (7th Cir. 2015) Though affirming various counts of Governor Blagojevich's conviction, the Seventh Circuit held that the Hobbs Act was not violated when the defendant engaged in "logrolling" which essentially means that the defendant agreed to appoint a particular person to fill Obama's vacant Senate seat in exchange for the President appointing him to a Cabinet post. Swapping one public act for another public act does not amount to extortion under the Hobbs Act. To be illegal the swap must involve the agreement to perform a public act in exchange for private gain. The

statute requires that the public official receive “property of another” under color of official right. A Cabinet post is not “property of another.”

***United States v. Manzo***, 636 F.3d 56 (3rd Cir. 2011) A non-incumbent candidate for office who extorts money, but then loses the election, may not be prosecuted under the Hobbs Act. Only a public official can be prosecuted for extortion “under color of official right.” This principle applies, regardless of whether the charge is attempted extortion, or some other inchoate offense.

***United States v. Dean***, 629 F.3d 257 (D.C. Cir. 2011) The defendant received license fees from people in D.C. She told some of the applicants that they had to pay certain license fees in cash, which she then pocketed. The citizens were not aware of her theft. This does not constitute bribery under § 201, because there was no quid pro quo. This did not amount to a Hobbs Act violation for the same reason. Clearly, she had committed a theft, but the citizen who paid the money was never told that the money had to be paid to her personally for some reason other than to have the license issued in exchange for the proper amount of the fee. In fact, the citizens had no idea that she was pocketing the money.

***United States v. Needham***, 604 F.3d 673 (2d Cir. 2010) A Hobbs Act prosecution requires proof that the offense affected interstate commerce. Even in a robbery involving drugs, the government is required to prove that the offense affected interstate commerce. Because this is an essential element of the offense, the jury must be instructed that they must find that the robbery affected interstate commerce and the failure to do so is reversible error. See United States v. Parkes, infra.

***United States v. Kincaid-Chauncey***, 556 F.3d 923 (9th Cir. 2009) The Ninth Circuit affirms the defendant’s Hobbs Act and Honest Services Mail Fraud convictions, concluding that the court properly explained to the jury that the government was required to prove that there was a quid pro quo arrangement between the unlawful payment and an official act, even though the words “quid pro quo” were not used. The court noted that the quid quo pro requirement must be proven in the Hobbs Act context whether the payment is made in the context of a campaign contribution, or not. In the context of an Honest Services Mail Fraud prosecution of a public official, a specific quid pro quoins not required if the theory is an undisclosed conflict of interest, but a quid quo pro, at least an implicit quid pro quo, is required in an honest service “bribe” case. Portions of this case did not survive Skilling and Weyhrauch.

***United States v. McFall***, 558 F.3d 951 (9th Cir. 2009) Two separate Hobbs Act convictions were reversed in this case. In one count, the defendant, a lobbyist for a company that was attempting to win a county contract, threatened a competing company if it did not withdraw its bid. He followed through on his threat, by encouraging a county supervisor to pass a resolution condemning the other company’s performance in another project. This conduct did not deprive the competing company of property under the Sheidler standard. The second Hobbs Act conviction was spoiled, because even though it involved the lobbyist’s effort to obtain money from a contractor in exchange for securing a favorable vote by a public official, the lobbyist himself was not a public official and the jury was not instructed that he must, in fact, have been acting on behalf of a public official in order to violate the Hobbs Act “under color of official right” offense.

***United States v. Gray***, 521 F.3d 514 (6th Cir. 2008) The defendant was charged in a RICO indictment with various offenses, including paying bribes to public officials to ensure that the defendant’s clients were offered lucrative municipal contracts. As in Brock, discussed below, the court held that the bribe-payor (i.e., the person paying the public official) may not be convicted of a Hobbs Act offense unless that payor induces someone else to part with money or property. With regard to certain counts, Brock required reversal of the convictions (and predicate RICO offenses). With other counts, however, the government did offer evidence that the defendant induced other people to part with their property to pay the public official.

***United States v. Brock***, 501 F.3d 762 (6th Cir. 2007) If a person pays a bribe to a public official for some quid pro quo, the bribe-payor may not be prosecuted under the Hobbs Act on an “official right” extortion theory, because the bribe Payor is the person who was extorted, not a co-conspirator. The crime requires proof that the defendant obtained property “from another” which cannot be the defendant, himself.

***United States v. Mann***, 493 F.3d 484 (5th Cir. 2007) The defendant was convicted of various offenses, including mail fraud, wire fraud, and Hobbs Act, based on stealing motorists’ speeding ticket money. Because the government failed to prove that some of the motorists were traveling interstate, those counts had to be dismissed because of the failure to prove a sufficient nexus to interstate commerce.

***United States v. Parkes***, 497 F.3d 220 (2d Cir. 2007) Proof that a defendant’s robbery was designed to obtain illegal drugs – marijuana – is not alone sufficient to establish that the crime involved an effect on interstate commerce. The government must introduce evidence that the marijuana was, or was at least likely, to have traveled in interstate commerce. (The government satisfied its burden in this case).

***United States v. Zhou***, 428 F.3d 361 (2d Cir. 2005) In order to be guilty of the crime of extortion under the Hobbs Act, the defendant must obtain the property of another with his consent, induced by wrongful use of actual or threatened force, violence of fear. 18 U.S.C. § 1951(b)(2). The victim must be shown to have parted with the property as a matter of choice, though the victim may act out of fear. This is what differentiates (albeit by a razor’s edge) extortion from robbery. In a case of robbery, the property is taken against the victim’s will. The evidence in this case demonstrated that the defendants robbed the victim, they did not commit extortion.

***United States v. Santos***, 449 F.3d 93 (2d Cir. 2006) The defendants tried to rob an undercover drug agent by flashing fake DEA badges. The use of the fake badge did not amount to “force” in support of a Hobbs Act robbery charge. With regard to one

alleged co-conspirator, moreover, the evidence was insufficient to prove that the defendant was a knowing participant in the conspiracy to rob the victim. Mere presence and association with the other conspirators were all that was established.

***United States v. Saadey***, 393 F.3d 669 (6th Cir. 2005) A private citizen may not be prosecuted for a Hobbs Act "color of official right" extortion offense unless he is conspiring with a public official or aiding and abetting a public official. The defendant in this case was an attorney who "masqueraded" as a person who could "fix" criminal cases. The people paying the money, however, knew that he was not a state official when they paid him money. The Hobbs Act is reserved for cases in which the defendant is, in fact, a public official, or otherwise extorts money under color of official right. The defendant in this case did not qualify.

***United States v. McCormack***, 371 F.3d 22 (1st Cir. 2004) The court affirmed the defendant's Hobbs Act conviction. The defendant attempted to extort the victim into paying him $100,000 from his mutual fund. This would have had the effect of depleting the assets of the mutual fund and this provided a sufficient impact on interstate commerce. The First Circuit rejected, however, the government's invitation to hold that any extortion of a substantial amount of money has an impact on interstate commerce.

***United States v. Pendergraft***, 297 F.3d 1198 (11th Cir. 2002) The defendants threatened a county with a lawsuit, but premised the lawsuit, in part, on false allegations which were contained in an affidavit prepared by one of the defendants. The Eleventh Circuit held that threatening a lawsuit is not 'wrongful" within the meaning of the Hobbs Act. Particularly in this case, where the threat involved a lawsuit against a governmental entity, First Amendment considerations also came into play (the right to petition the government for the redress of grievances). In short, the Hobbs Act does not criminalize the fabrication of evidence, or perjury if the "threat" to use the evidence or testimony relates to a civil lawsuit. The court also concluded that this conduct did not amount to mail fraud, because the false affidavits were known to the "victims" to be false, so the victims were not being deceived.

***United States v. Perrotta***, 313 F.3d 33 (2d Cir. 2002) An extortion offense committed against a person who is employed by a company engaged in interstate commerce does not affect interstate commerce, simply because the employee misses time at work.

***United States v. Smith***, 156 F.3d 1046 (10th Cir. 1998) The defendant went into a sporting goods store and asked to see some guns. Two unloaded guns were given to him, and he promptly ran out of the store. While fleeing, he ran his car in the direction of store employees who chased him. This does not amount to a Hobbs Act robbery. The store employee who gave the guns to the defendant knew that they were empty and there was no threat or use of force. Though one of the employees was hurt in the parking lot, this does not establish that the guns were taken by means of force or violence.

***United States v. Garcia***, 992 F.2d 409 (2d Cir. 1993) Defendant's Hobbs Act conviction was reversed in light of the jury instructions which indicated that a conviction could be based on conduct which did not require that the money given to the Congressman involved a quid pro quo. The holding in McCormick v. United States, 111 S. Ct. 1807 (1991), though on its face limited to cases in which money is given during a campaign, also applies in cases in which the elected official receives money after he is elected: that is, the money must be given with a specific quid pro quo in mind.

***United States v. Inigo***, 925 F.2d 641 (3rd Cir. 1991) Though some of the defendants clearly participated in the acts which amounted to extortion, the proof did not establish that they knew an extortionate threat had been made.

***United States v. Taylor,*** 966 F.2d 830 (4th Cir. 1992) The trial court's instruction to the jury did not adequately explain the need to find a specific quid pro quo in order to convict a public official under the Hobbs Act.

***United States v. Buffey***, 899 F.2d 1402 (4th Cir. 1990) The government failed to demonstrate that the victim's effort to pay the defendant's demands were reasonably likely to affect interstate commerce. Therefore, the defendant's Hobbs Act conviction was reversed. The court does not rely on the fact that there had been no actual effect on interstate commerce. Rather, the court focused on the fact that if the facts had been as the defendant believed, there still would not have been any effect on interstate commerce.

***United States v. Box***, 50 F.3d 345 (5th Cir. 1995) The defendants, a bail bondsman and local law enforcement agents, would arrest people at a roadside rest area and agree to drop the charges after bond had been posted. With respect to the people arrested who had not traveled in interstate commerce, the facts did not show any impact on interstate commerce and the Hobbs Act convictions on these counts would be set aside.

United States v. Tomblin***, 46 F.3d 1369 (5th Cir. 1995) A private person who extorts money from another*** private person in exchange for his promise to help the "victim" with the defendant's influence over a public official does not violate the extortion provision of the Hobbs Act. The defendant did not "threaten" the victim with fear of harm and because he was a private person, he was not acting under color of official right.

***United States v. Collins***, 78 F.3d 1021 (6th Cir. 1996) Even where payments are made to a public official in a context other than a campaign contribution, the government must prove that there was a quid pro quo.

***United States v. Di Carlantonio***, 870 F.2d 1058 (6th Cir. 1989) The defendant's Hobbs Act conviction was reversed because of the government's failure to establish any effect on interstate commerce. The money used to pay the bribe was FBI funds; the sought-after action of the government officials was to permit the use of propane tanks within the city limits. The defendants did nothing which either increased or decreased the flow of propane as the result of the bribe. As a result, there was no effect on interstate commerce by virtue of the money paid or the action undertaken by the officials.

***United States v. Carpenter***, 961 F.2d 824 (9th Cir. 1992) The trial court committed reversible error by instructing the jury that no quid pro quo was required for a Hobbs Act conviction. McCormick v. United States. The quid pro quo must be clear and unambiguous, leaving no uncertainty about the terms of the bargain.

***United States v. Montoya***, 945 F.2d 1068 (9th Cir. 1991) This conviction was spoiled by an instruction inconsistent with McCormick v. United States. The jury was incorrectly instructed that the government was not required to prove that the defendant demanded or directly solicited the payment in question or that he offered anything specific in return.

***United States v. Frost***, 61 F.3d 1518, modified, 77 F.3d 1319 (11th Cir. 1996), judgment vacated on other grounds, 117 S. Ct. 1816 (1997) The defendants were political rivals of a city council member. They sent an extortion letter to their rival (threatening to expose his extramarital activity if he did not resign). The defendants were charged with a Hobbs Act violation. The evidence, however, failed to establish a sufficient nexus to interstate commerce. Although the indictment sufficiently alleged an interstate commerce nexus, the government's proof fell short of its intended purpose. The affairs of the city council were linked to interstate commerce; but there was no showing that the resignation of one member of the six-member city council would have impacted the continuing business of that governing body in such a manner as to constitute a violation of the federal statute. Therefore, the extortion threat, if it had succeeded, was not shown to be likely to have the natural effect of obstructing commerce.

***United States v. Davis***, 30 F.3d 108 (11th Cir. 1994) In order to establish Hobbs Act extortion, it is necessary to establish a specific quid pro quo. Because of the failure to properly charge the jury in this case, the conviction was set aside.

***United States v. O'Keefe***, 825 F.2d 314 (11th Cir. 1987) The evidence was insufficient to support the defendants' Hobbs Act conviction where they accepted the money to perform a service, despite the fact that they were members of local governing authorities.

## *IDENTIFICATION*

***Perry v. New Hampshire***, 132 S. Ct. 716 (2012) The Supreme Court held that an eyewitness identification procedure is not subject to Due Process review (or judicial gatekeeping), if there was no state action involved in the problems with the identification procedure. Where the police are merely present, for example, and the victim or witness points out the alleged perpetrator – without the police being involved in a show-up, or otherwise involved in the identification procedure – the trial court is not obligated to gauge the reliability of the identification procedure or preview the evidence to determine its admissibility. The lone dissenter, Justice Sotomayor, provided a primer on the unreliability of eyewitness identification and argued that whether the state was involved, or not, the evidence is sufficiently unreliable (yet persuasive to a jury), that the court should undertake a gatekeeping role.

***United States v. Gonzalez***, 863 F.3d 576 (7th Cir. 2017) Shortly after the commission of a bank robbery, the police based only on a hunch, showed the teller a picture of the defendant. There was no need to do this one-person photo ID (there was plenty of time to compose a photo array) and the process was unnecessarily suggestive. A six-person photo spread that was subsequently showed to the teller was also flawed, because some of the pictures did not have facial hair or a shaved head (which the teller reported to the police was the perpetrator's appearance). Nevertheless, these suggestive procedures did not taint the in-court identification testimony of the teller.

***United States v. Greene***, 704 F.3d 298 (4th Cir. 2013) The bank teller was not able to identify the defendant as the person who committed the robbery because of the disguise the robber was wearing. While on the witness stand, however, the witness was asked by the prosecutor to identify characteristics of the defendant that were similar to the characteristics of the robber. Focusing on the defendant made the identification too suggestive. This was error, but not reversible.

***Young v. Conway,*** 698 F.3d 69 (2d Cir. 2012) The defendant's arrest was not proper, because there was no probable cause. Shortly after the arrest, however, the victim saw the defendant in a line-up and picked him as the perpetrator. Pursuant to United States v. Crews, 445 U.S. 463 (1980), the line-up identification must be suppressed, because it was fruit of the illegal arrest. But an in-court identification would be permissible if untainted by the prior line-up. In this habeas case, the Second Circuit held that there was an insufficient showing of the lack of taint, so the in-court identification should have been suppressed.

***United States v. Jadlowe,*** 628 F.3d 1 (1st Cir. 2010) A police officer was improperly permitted to testify that in her opinion, the video of the perpetrator of the crime was the defendant (she compared the video with a recent driver's license photo). There was no reason to introduce this opinion testimony because the jury could have performed the same comparison. Harmless error.

***United States v. Garcia-Alvarez***, 541 F.3d 8 (1st Cir. 2008) The line-up in this case involved requiring the participants to repeat a statement made by the robbery participant. Only the defendant had the particular accent that matched the participant. This was unduly suggestive. Nevertheless, under the Neil v. Biggers 409 U.S. 188 (1972) totality of the circumstances test, the court allowed identification testimony to be introduced.

***United States v. Garcia-Ortiz***, 528 F.3d 74 (1st Cir. 2008) The victim of an armed robbery was shown a picture of the defendant and another person. The victim identified the other person as the perpetrator. At trial, an FBI agent was permitted to offer his opinion that the person who was incorrectly identified actually resembled the defendant. This was improper opinion testimony, because the subject matter of the testimony was not beyond the jury's purview. Harmless error.

***Bell v. Miller***, 500 F.3d 149 (2d Cir. 2007) The victim was robbed in the street and shot. When the police asked him who shot him, he said "a black male wearing a lemon-colored shirt." He lost copious amounts of blood and then slipped into a coma. Eleven days later he began to recover and was asked to identify the assailant again. This time he identified an acquaintance.

Trial counsel did not hire an expert to explain the effects of the coma and the drugs the victim had taken and how this could have altered his identification. This was ineffective assistance of counsel.

***United States v. Brownlee***, 454 F.3d 131 (3rd Cir. 2006) The trial court erred in preventing the defendant from introducing expert testimony on the fallibility of eyewitness testimony. Though the defendant was permitted to introduce the expert testimony relating to this subject, the trial court prohibited the expert from testifying about the lack of "confidence-accuracy correlation." In other words, a witness's assertion that she is confident of her identification of the defendant does not correlate to the accuracy of the identification. In a separate holding, the court held that a show-up identification was impermissibly suggestive but did not taint the in-court identification.

***Thomas v. Varner***, 428 F.3d 491 (3rd Cir. 2005) Trial counsel was ineffective in failing to challenge the admissibility of the out-of-court and the in-court identification of his client by one of the victims. The victim was initially unable to identify the perpetrator. He was shown numerous photos and still could not identify the perpetrator. Finally, the officer took out two photos and showed them to the victim, who agreed that one of the photos showed the perpetrator. This was an impermissibly suggestive identification procedure. Counsel initially objected pretrial to any identification evidence, but the victim failed to identify the defendant in court during that hearing, so the motion was withdrawn. At trial, however, the victim spontaneously identified the defendant. Trial counsel failed to object or seek any remedial measure. This was ineffective assistance of counsel.

***United States v. Dixon***, 413 F.3d 540 (6th Cir. 2005) A man attempted to extort money from a bank and surveillance photos recorded his actions. The government offered the testimony of three witnesses who identified the defendant as the person in the surveillance photos, his son and two ex-wives. The evidence was not admissible pursuant to Rule 701, because the witnesses' testimony was not likely to aid the jury. The witnesses acknowledged that they had not seen the defendant at the time of the crime and the video was of sufficiently good quality that the jury could make its own determination without the aid of the witnesses' opinions.

***United States v. Rogers***, 387 F.3d 925 (7th Cir. 2004) A criminal defendant has a due process right not to be identified before trial in a manner that is unnecessarily suggestive and conducive to irreparable mistaken identification. In this case, the police placed a witness in the same cell with the defendant (after he was unable to identify the defendant). The court noted that the police did not intentionally place the two in the same cell; but that is not critical. The fact is that they were placed in the same cell, and this tainted the subsequent identification testimony. Neil v. Biggers, 409 U.S. 188 (1972).

***United States v. Montgomery***, 150 F.3d 983 (9th Cir. 1998) The government employed suggestive identification techniques, though these pretrial techniques did not taint the subsequent in-court identification. First, the DEA showed three photographs of the three alleged conspirators to the witness, who identified the principal defendant as the person who bought precursor chemicals from him. Later the witness asked the DEA to send him the photograph of the person he identified (and he hung that photograph on the wall in his office). Just before testifying, the DEA brought the witness into the courtroom so he could see where the defendant was sitting. These unnecessarily suggestive techniques, however, did not create substantial likelihood of irreparable misidentification of the defendant in the courtroom.

***United States v. De Jesus-Rios***, 990 F.2d 672 (1st Cir. 1993) Two women dropped off boxes filled with cocaine at a ship and asked that the boxes be transported to Puerto Rico. After cocaine was discovered when the ship docked in Puerto Rico, the person on the boat who received the packages was asked to identify the women who delivered the boxes. The description did not fit the defendant. Later, through a confidential source, the police came to suspect the defendant. They arranged to have the defendant meet the police on the steps of the customs Building. The person on the boat was told that a suspect was going to meet the agents on the steps and that if he could identify the woman, he should waive his handkerchief. The person from the boat saw the woman approach and walk up the steps. Not until the woman met the police on the steps, however, did the person from the boat waive his handkerchief. This was an impermissibly suggestive show-up procedure which tainted that, and future, identifications. Though another witness also identified the defendant, the erroneous admission of the tainted identification necessitated reversal of the conviction.

***United States v. Bouthot***, 878 F.2d 1506 (1st Cir. 1989) The witness was subpoenaed to appear in the state trial court and watched the defendant being brought into court. Thereafter, she was shown a photographic array. This procedure is impermissibly suggestive, and the photographic identification should not have been admitted into evidence. This case needs to be re-examined in light of Perry v. New Hampshire, 132 S. Ct. 716 (2012).

***United States v. Eltayib***, 88 F.3d 157 (2d Cir. 1996) Though the error was harmless, the photo array that was shown to the witness was unduly suggestive and there was no independent basis of reliability for the identification.

***United States v. Emanuele,*** 51 F.3d 1123 (3rd Cir. 1995) The defendant was charged with two bank robberies. One of the bank tellers had previously either failed to identify the defendant and the other provided a contradictory identification. During the trial, the witnesses were instructed to wait in the hallway of the courthouse. The defendant, in shackles, was marched past the two witnesses, who, among themselves, concluded that he "must be the robber." They later provided in-court identifications of the defendant. This was error. Their in-court identifications were surely prompted by having seen the defendant in shackles in the hallway, and thus there was a substantial risk of misidentification. Whether the government acted intentionally or not is a factor which may be considered by the court in assessing whether the identification procedure was unduly suggestive, but it is not determinative. Also, other evidence of guilt or innocence is not relevant in gauging whether the identification procedure is unduly suggestive, or not.

***Dispensa v. Lynaugh***, 847 F.2d 211 (5th Cir. 1988) The defendant identified an assailant who did not meet the description of the defendant. Nevertheless, the victim was brought to a restaurant where she was told a suspect was located and a detective stood behind the defendant and asked the victim if the assailant could be identified. This was improper identification proof.

***Thigpen v. Cory***, 804 F.2d 893 (6th Cir. 1986) A robbery victim was confronted with the defendant at a co-defendant's line-up, preliminary hearing, and trial. The presence of the defendant at the other suspect's line-up planted suspicion in the victim's mind that was reinforced by the defendant's presence at the first suspect's trial. Admitting the identification testimony violated the defendant's right to due process and required setting aside the conviction.

***United States v. Kord***, 836 F.2d 368 (7th Cir. 1988) It was improper for the prosecutor to coach his witnesses prior to putting them on the standby having them look through the courtroom windows and see if they could identify the defendants. While improper, this did not require reversal of the conviction.

***Williams v. Armontrout***, 877 F.2d 1376 (8th Cir. 1989) A witness' in-court identification was impermissibly tainted by a suggestive photo array and a hypnotic session which was uncontrolled, and which could have led to the eyewitness' being influenced to identify a particular suspect.

***Tomlin v. Myers,*** 30 F.3d 1235 (9th Cir. 1994) The petitioner's trial counsel failed to challenge an out-of-court identification (because it was conducted without the benefit of counsel), as well as the in-court identification which may have been the product of the unlawful out-of-court identification. This was ineffective assistance of counsel, necessitating the granting of habeas relief. The court of appeals concluded, moreover, that the unconstitutional out-of-court identification did taint the in-court identification and the latter should have been excluded.

***United States v. Olvera***, 30 F.3d 1195 (9th Cir. 1994) A bank robber entered a bank and ordered the teller to give him money. The defendant, who did not testify at trial, was directed by the prosecutor to stand up and utter the same words uttered by the defendant. The teller, who was on the stand, was not asked if the voice was similar. This violated the defendant's right to due process. This procedure was not needed to enable the witness to identify the defendant – indeed, she identified the defendant by his appearance, not by the sound of his voice.

***United States v. Amador-Galvan***, 9 F.3d 1414 (9th Cir. 1993) Whether an expert should be permitted to testify on the issue of the reliability of eyewitness testimony should be evaluated under the standard set forth in Daubert v. Merrell Dow Pharmaceuticals, 113 S.Ct. 2786 (1993). A remand was required in this case to apply the proper standard.

***United States v. LaPierre***, 998 F.2d 1460 (9th Cir. 1993) Two holdings relating to identifications: (1) Defendant's attorney expressed an interest in being present at a post-charge line-up. When the line-up began, however, the attorney was left outside waiting in the hall. The police remembered the attorney was there after the first two lineup members had been asked to step forward and the attorney was then invited in the room. This violated the defendant's right to counsel.

***United States v. Wade***, 388 U.S. 218 (1967). (2) At trial, an officer was permitted to testify that the person portrayed in the bank videotape of the robbery was, in fact, the defendant. This "identification" invaded the province of the jury. There was no evidence that the officer knew the defendant and there was no evidence that the defendant had changed his appearance prior to trial. Only in these two circumstances may someone give an opinion that a surveillance photo is the defendant.

## *IDENTITY THEFT*

***Flores-Figueroa v. United States***, 129 S. Ct. 1886 (2009) The Supreme Court resolves a Circuit split and, agreeing with the majority (as set forth in the cases below), held that in order to be guilty of a § 1028A offense, the defendant must be shown to have known that the identifying information that was "used" was of a real person. That is, the language of the statute, the offender "knowingly . . . uses, without lawful authority, a "means of identification of another person" requires that the defendant "know" that he is using a means of identification and that he knows the "means" are "of another person."

***United States v. Berroa,*** 856 F.3d 141 (1st Cir. 2017) The defendants fraudulently obtained medical licenses in Puerto Rico, by conspiring with an employee of the medical board to improperly score their test. They were charged with mail fraud and identity theft (using the license improperly to write prescriptions to patients). The mail fraud conviction was reversed (see discussion in Mail Fraud). The Identity Theft conviction was reversed because the statute was not designed to reach this type of fraud in which nobody's identity was stolen or used improperly.

***United States v. Camick,*** 796 F.3d 1206 (10th Cir. 2015) The defendant's real name is Leslie Lyle Camick. But over ten years ago, he took the name of his deceased brother, Wayne Camick and had used that name ever since. He was charged with mail fraud, wire fraud and identity theft when he wrote a letter to a court and claimed an interest in certain property that was the subject of a Quiet Title action by another person. He used the name Wayne Camick in this correspondence. He also claimed that he had been wrongfully detained in jail and that was the reason his response to the court was late. He had been arrested and released recently, but, according to the government, his detention was not "wrongful." The Tenth Circuit held that claiming that he was "wrongfully detained" was not a material misstatement, nor was using the name Wayne Camick a material misstatement. In an entirely separate holding, the court held that using the name Wayne Camick on a provisional patent application was also not a materially false statement. Because his mail and wire fraud convictions were reversed on sufficiency grounds, the court also reversed the aggravated identity theft convictions which were predicated on those fraud convictions.

***United States v. Medlock***, 792 F.3d 700 (6th Cir. 2015) The defendants, who ran an ambulance service, falsely claimed Medicare reimbursements for some of the patients by stating that a particular service was provided that was not, in fact, provided

to those patients. There were, however, real patients to whom services were provided – just not the service for which reimbursement was sought. This does not qualify as identity theft. Though the defendants "used" the name and identifying information of the patient to receive Medicare reimbursement, this is not the type of "use" which is made unlawful by the identify theft statute.

***United States v. Miller***, 734 F.3d 530 (6th Cir. 2013) The defendant, a partner in a real estate investment partnership applied for a loan and falsely stated that the other partners had authorized the loan. This was false. Nevertheless, this did not constitute the crime of identity theft. The identity theft statute requires that the defendant "use" the identifying information to commit a crime (including making a false statement to a bank). The Sixth Circuit, however, relying on the Rule of Lenity, concluded that "use" requires that the defendant falsely claim to be the other person, not simply to lie about the other person's agreement.

***United States v. Spears***, 729 F.3d 753 (7th Cir. 2013) The defendant prepared a counterfeit identification card and sold it to a woman who wanted it in order to buy a gun illegally. The woman's name and birthdate were on the card, but it was otherwise counterfeit. This does not constitute the crime of identity theft, because nobody's identity was stolen. While the card was fraudulent, transferring the card to the woman did not amount to transferring the identity of "another."

***United States v. Hilton***, 701 F.3d 959 (4th Cir. 2012) The identity theft statutes are vague as to whether they apply to the unauthorized use of a corporation's means of identification. Pursuant to the rule of lenity, the Fourth Circuit held that a conviction for stealing the identity of a corporation would be reversed. The defendants opened a bank account in the corporate name and cashed checks stolen from the corporation.

***United States v. Onyesoh,*** 674 F.3d 1157 (9th Cir. 2012) The government must establish that an expired credit card can be used in order to enhance a sentence pursuant to 18 U.S.C. § 1029. Absent proof of "usability," the card is not capable of obtaining something of value, which is an element of the offense.

***United States v. Ochoa-Gonzalez***, 598 F.3d 1033 (8th Cir. 2010) During the plea colloquy in this identity fraud case, the AUSA told the judge that the government was not required to show that the defendant knew that the identity number she was using belonged to a real person. Because this was erroneous, the plea was defective and required that the plea be set aside.

***United States v. Gomez***, 580 F.3d 1229 (11th Cir. 2009) The trial court's failure to instruct the jury in accordance with Flores-Figueroa was not harmless error in this case and required reversal of the conviction. The element of the offense that was omitted in the jury instruction (the fact that the stolen identity applied to a real person), was a contested issue at trial and the error, therefore, was not harmless.

***United States v. Bonilla***, 579 F.3d 1233 (11th Cir. 2009) Convictions for identity theft (§ 1028(a)(7)) and aggravated identity theft (§ 1028A(a)(1)) may not be sustained. Punishment for both offenses would violate the Double Jeopardy Clause. Neither of the statutes requires proof of an additional fact that the other does not.

***United States v. Miranda-Lopez***, 532 F.3d 1034 (9th Cir. 2008) In order to be guilty of a § 1028A offense, the defendant must be shown to know that fake identifying information belonged to an actual individual.

***United States v. Godin***, 534 F.3d 51 (1st Cir. 2008) In order to be guilty of a § 1028A offense, the defendant must be shown to know that fake identifying information belonged to an actual individual.

***United States v. Mitchell***, 518 F.3d 230 (4th Cir. 2008) If a defendant commits identity theft by simply picking a name out of a phone book, this does not qualify as statutory aggravated identity theft (18 U.S.C. § 1028A), unless there is some effort to use sufficiently particular information, such as a social security number or some other uniquely identifying information relating to that person so that he is, in fact, victimized. The use of a name, alone, is not sufficiently unique to the individual to qualify. The government unsuccessfully argued that there was, in fact, a person named Marcus Jackson, and therefore the defendant did use the identity of "another person."

***United States v. Villanueva-Sotelo,*** 515 F.3d 1234 (D.C. Cir. 2008) The Federal Identity Theft Statute, 18 U.S.C. § 1028A, defines aggravated identity theft as the unauthorized use of "a means of identification of another person." The D.C. Circuit holds that this statute only applies if the "other person" is, in fact, a real person whose identity has been used. The offense does not include using forged or fraudulent documents that do not actually belong to another real person. Moreover, the government must prove that the defendant knew that the identification documents belonged to a real person.

## *IMMIGRATION OFFENSES*

***United States v. Tydingco***, 909 F.3d 297 (9th Cir. 2018) The crime of harboring a fugitive requires proof that the defendant intended to violate the law.

***United States v. Castillo-Mendez***, 868 F.3d 830 (9th Cir. 2017) If a defendant illegally crosses the border, intending to be taken into border patrol custody in order to avoid smugglers who threatened the defendant, this is not illegal reentry "free from official restraint." The failure to properly instruct the jury in this regard required reversing the conviction in this case.

***United States v. Ochoa***, 861 F.3d 1010 (9th Cir. 2017) The defendant was charged with illegal reentry, following his removal for the commission of an aggravated felony, to wit: conspiracy to export defense articles without a license. The Ninth Circuit held that the predicate offense was not an aggravated felony and therefore, the removal was not appropriate as charged and the illegal reentry conviction was reversed.

***United States v. Khalil***, 857 F.3d 137 (2d Cir. 2017) The defendant helped a Pakistani man illegally enter the country and prepared a false American passport for him. Count 4 of the indictment alleged that the defendant then picked up the Pakistani man and drove him to the train station for the purpose of helping him move to Canada. 8 U.S.C. § 1324(a)(1)(A)(ii). He was charged with transporting an alien to further his illegal presence in the United States. The jury convicted and the Second Circuit reversed. The transportation activity was intended to remove the alien from the United States, not to further his presence in the United States.

***United States v. Vazquez-Hernandez***, 849 F.3d 1219 (9th Cir. 2017) At the border in Nogales, Arizona, people coming into the United States actually enter the border for a short distance prior to entering the inspection station. The defendant was in this area, offering to wash car's windows. The defendant was charged with attempted reentry. The court failed to instruct the jury that attempted illegal reentry requires as an element the intent to reenter free from official restraint. The Ninth Circuit held that the area approaching the inspection station comes within the definition of "official restraint" and the failure to instruct the jury on this element was reversible error.

***United States v. Orona-Ibarra***, 831 F.3d 867 (7th Cir. 2016) The defendant was "found" in Texas by immigration officials. That is where the crime of illegal reentry occurred. Venue was not proper, therefore, in Illinois, where the case was tried. The case had been transferred to Illinois, because that was where he had originally been placed on probation.

***United States v. Cisneros-Rodriguez***, 813 F.3d 748 (9th Cir. 2015) A customs officer told the defendant, prior to her removal hearing, that a lawyer would be no use to her. She then waived her right to counsel at the hearing. She was now being prosecuted for re-entry. The customs agent's improper comment about the right to counsel at the removal hearing tainted that proceeding and thus, the defendant could not be prosecuted for illegal re-entry based on that removal.

***United States v. Guzman-Ibarez***, 792 F.3d 1094 (9th Cir. 2015) Based on his claim that the 1999 deportation hearing was conducted in violation of his due process rights, the defendant claimed that the indictment for illegal reentry was required to be dismissed. The Ninth Circuit remanded to determine whether the defendant was prejudiced by the IJ's failure to advise him of a then-existing avenue of relief.

***United States v. Guerrero-Jasso***, 752 F.3d 1186 (9th Cir. 2014) In order to invoke the twenty-year maximum sentence for being found in the United States after having been removed following a conviction for an aggravated felony, the indictment must allege, or the defendant must admit, that he had a prior aggravated felony that preceded his removal. Triggering the twenty-year maximum absent an allegation in the indictment or an admission by the defendant to these additional facts violates Apprendi.

***United States v. Borrero***, 771 F.3d 973 (7th Cir. 2014) The evidence in this harboring case failed to establish that the defendants knew that their clients were illegal aliens or that the defendants were recklessly indifferent to this fact.

***United States v. Raya-Vaca***, 771 F.3d 1195 (9th Cir. 2014) A defect in the procedure that led to the defendant's removal (the failure of the immigration officer to advise the alien of the charge against him and to permit his to read the sworn statement against him), invalidated his illegal re-entry conviction.

***United States v. Aguilera-Rios***, 769 F.3d 626 (9th Cir. 2014) Defendant was charged with illegal re-entry. He was originally removed based on having possessed a firearm after being convicted of a felony. The removal, however, was improper because it was based on a charge that did not qualify as a removable offense. (The offense was for possession of a firearm after being convicted of a felony, but the state offense did not have an exception for antique weapons, which meant it was not categorically a removable offense, according to Moncrieffe v. Holder, 133 S. Ct. 1678 (2013)).

***United States v. Vargas-Cordon***, 733 F.3d 366 (2d Cir. 2013) The offense of harboring requires some evidence more than simply providing shelter. In addition, there must be some indication of an intent to hide or conceal.

***United States v. Wei Lin***, 738 F.3d 1082 (9th Cir. 2013) 18 U.S.C. § 1546 makes it a crime to possession of forged or false documents used to gain entrance into the United States. The defendant possessed a forged driver's license from the Northern Mariana Islands. The Ninth Circuit held that this type of document is not covered by the statute.

***United States v. Macias***, 740 F.3d 96 (2d Cir. 2014) After the defendant unsuccessfully tried to cross into Canada at Niagra Falls, the Canadian authorities returned the defendant to CBP agents. When it was determined that the defendant had previously been deported, he was charged with being found in the United States in violation of 8 U.S.C. § 1326. The Second Circuit reversed the conviction. Macias was not "in" the United States when the Canadian officials returned him to the CBP agents.

***United States v. Thum***, 749 F.3d 1143 (9th Cir. 2014) The defendant's supervised release was revoked based on evidence that he escorted an illegal alien from a restaurant to a waiting van, knowing that the person was illegally in the country and needed transportation away from the post of entry. While this evidence may have supported a charge that he aided in the transportation of an illegal alien, it did not amount to encouraging or inducing the alien to reside in the country illegally. Because the revocation petition alleged that he encouraged or induced the alien to remain in the country, the trial court erred in granting the petition.

***United States v. Melendez-Castro***, 671 F.3d 950 (9th Cir. 2012) The defect in the defendant's 1997 immigration proceedings – that he was not meaningfully informed of his eligibility for voluntary departure – violated his due process rights. A remand to determine whether he was prejudiced was necessary to determine the impact on this criminal illegal reentry case.

***United States v. Barajas-Alvarado***, 655 F.3d 1077 (9th Cir. 2011) If a defendant's immigration illegal re-entry case is based on a prior removal that was expedited, he may challenge – in the criminal case – the procedure used in that prior proceeding.

***United States v. Costello***, 666 F.3d 1040 (7th Cir. 2012) The girlfriend of an illegal alien was not guilty of harboring under § 1324(a)(1)(A)(iii) simply by virtue of the fact the alien/boyfriend lived in her apartment. There was no evidence that she concealed the boyfriend or shielded him from detection. The court spends considerable time discussing the definition of the word "harboring" and concludes that it means more than simply providing a place to live. Various dictionaries were consulted, as well as Google in this endeavor to figure out the meaning of the word.

***United States v. Dominguez***, 661 F.3d 1051 (11th Cir. 2011) An essential element of a § 1324(a)(1)(A)(ii) offense of transporting an alien "in furtherance of such violation of law" requires proof that the transportation was designed to further the illegal presence of the alien. In this case, the defendant was a sports agent. He smuggled Cubans into the United States and after they arrived, he participated in transporting them to Los Angeles. This transportation, however, was not designed or intended to further their illegal status, but rather to get them in contact with a lawyer who endeavored to have them processed through Immigration so that they could remain. The Eleventh Circuit reversed the convictions on the § 1324(a)(1)(A)(ii) counts as well as harboring counts of the indictment.

***United States v. Garcia-Paulin***, 627 F.3d 127 (5th Cir. 2010) A prosecution under 8 U.S.C. § 1324(a)(1)(A)(i) for bringing an illegal alien into the country requires some proof that the defendant participated in bringing the alien into the country. Simply providing a phony stamp for his passport that would have assisted him in getting a job was not sufficient evidence to prosecute the defendant under this statute. In this case, the defendant entered a guilty plea and the Fifth Circuit concluded that that factual basis for the plea was insufficient, because the only facts offered to support the defendant's guilt related to his providing the fraudulent documents that were needed to assist the alien to enter the county.

***United States v. Cerna***, 603 F.3d 32 (2d Cir. 2010) Because of counsel's deficient performance during the administrative proceedings that led to defendant's initial deportation, the criminal conviction for illegal re-entry could not be upheld in this case.

***United States v. Arias-Ordonez***, 597 F.3d 972 (9th Cir. 2010) Because of defects in the removal proceedings, the defendant's prosecution for reentry after removal was properly dismissed by the district court. The defendant was advised during the removal proceedings that there was "no administrative relief which may be extended" which was not true.

***United States v. Pereyra-Gabino***, 563 F.3d 322 (8th Cir. 2009) The defendant was charged with harboring illegal aliens. The instruction explained that the jury must find (1) that a person was in the country illegally; (2) that the defendant knew that a person was in the country illegally; and (3) that the defendant harbored or attempted to harbor one of the people identified in #1. The problem with this instruction is that there were several aliens identified in the case and the instruction permitted a jury to find that the defendant harbored one of the illegal aliens, but not that he knew that particular alien was in the country illegally. That is, the court failed to explain that all three elements must apply to at least one of the aliens.

***United States v. Barraza-Ramos***, 550 F.3d 1246 (10th Cir. 2008) The defendant's prior conviction for aggravated battery under Florida law was not categorically a crime of violence and enhancing the sentence on the basis of this prior conviction was error.

***United States v. Silveus,*** 542 F.3d 993 (3rd Cir. 2008) The evidence was sufficient on counts alleging transportation of illegal aliens, but the evidence was insufficient to prove that the defendant was guilty of harboring the aliens. One illegal alien lived in the same apartment with the defendant. But cohabitation is not alone sufficient to prove harboring. When an agent went to the apartment looking for the alien, the defendant said that the alien was not in the apartment, and she did not know if someone had just left out the back door. This evidence, too, was insufficient to prove harboring.

***United States v. Ozcelik***, 527 F.3d 88 (3rd Cir. 2008) The defendant, a Customs Officer, accepted bribes from an alien and was convicted of those offenses. The defendant was also charged with harboring the alien, in violation of 8 U.S.C. § 1324. The basis for this charge was that the defendant told the alien, "Stay low key for 5 - 6 months." He also advised him to keep a low profile and that it was good that he lived at a different address than the one at file at INS. The Third Circuit held that this conduct – this advice – did not establish that he attempted to conceal or harbor the alien. The conviction on this count was reversed. ***United States v. Lopez***, 484 F.3d 1186 (9th Cir. 2007) The crime of bringing an alien into the United States is completed when the alien disembarks inside the United States. A person who transports the alien inside the country after the alien has arrived may only be prosecuted for transporting an alien in the country. He may not be prosecuted for aiding and abetting bringing the alien into the country.

***United States v. Gunera***, 479 F.3d 373 (5th Cir. 2007) The agents were aware of the defendant's presence in the country more than five years prior to the filing of the charges and the illegal reentry charge, therefore, was barred by the statute of limitations. The defendant reentered illegally and then applied for temporary protected status. More than five years later, the charges were filed.

***United States v. Charleswell***, 456 F.3d 347 (3rd Cir. 2006) Because the defendant was denied the opportunity for direct review of a reinstatement order, the district court should have further inquired into whether this caused prejudice thus barring a re-entry prosecution.

***United States v. Camacho-Lopez,*** 450 F.3d 928 (9th Cir. 2006) Defects in defendant's deportation proceeding rendered his illegal re-entry prosecution impermissible. The Immigration Judge erroneously told the defendant that he was not eligible for discretionary relief.

***United States v. Lopez***, 445 F.3d 90 (2d Cir. 2006) Because of an apparent defect in the deportation hearing (the absence of meaningful judicial review), the defendant's charge of illegal re-entry could not be sustained without further inquiry into the administrative process that resulted in his deportation.

***United States v. Lombera-Valdovinos,*** 429 F.3d 927 (9th Cir. 2005) An illegal alien who presents himself at the border for the express purpose of turning himself in to serve a previously imposed sentence, has not “unlawfully attempted to re-enter.” This case gets my vote for least likely ever to happen again.

***United States v. El Shami***, 434 F.3d 659 (4th Cir. 2006) The failure to give proper notice of deportation proceedings to the defendant deprived him of the right to administratively challenge the deportation. Consequently, his prosecution for unlawful entry could not be sustained.

***United States v. Smith-Balthier***, 424 F.3d 913 (9th Cir. 2005) The defendant sought to introduce evidence in this illegal re-entry case that he was actually a United States citizen. Barring this testimony was error. In addition, the trial court erred in barring the defendant from introducing evidence that he thought he was a United States citizen, thus negating the mens rea element of the offense.

***United States v. Munoz***, 412 F.3d 1043 (9th Cir. 2005) The defendant was found guilty of bringing illegal aliens into the United States for financial gain. The government argued that the defendant did not personally have to receive financial gain; it was only necessary that the defendant knew that somebody would receive financial gain as a result of the defendant’s actions of bringing the illegal aliens into the country. The Ninth Circuit disagreed: the defendant must be shown to have intended to reap financial gain as a result of the smuggling conduct.

***United States v. Bello-Bahena,*** 411 F.3d 1083 (9th Cir. 2005) In order to be found guilty of an offense under § 1326, it is not enough simply to be “found in” the United States after having been deported. The government must also prove that the defendant entered the United States free from official restraint at the time officials discovered or apprehended him. Official restraint includes constant governmental observation or surveillance from the moment of entry. In other words, a person under constant surveillance from the time that he enters the county is not “found in” the United States, for purposes of § 1326. This is true, even if the defendant is not aware that he is under surveillance and even if the actual arrest occurs at a point well past the point of entry. The trial court’s failure to properly instruct the jury on this concept was reversible error.

***United States v. Zavala-Mendez***, 411 F.3d 1116 (9th Cir. 2005) A defendant is not “found in” the United States for purposes of 8 U.S.C. § 1326 (a), if he has simply presented himself for entry at the border and been directed to the border station.

***United States v. Orellana***, 405 F.3d 360 (5th Cir. 2005) The defendant was charged with possessing a firearm while being an alien “illegally or unlawfully in the United States.” The defendant had a lawful temporary protected status pursuant to 8 U.S.C. § 1254a. The Fifth Circuit, applying the Rule of Lenity, concluded that the defendant was not “unlawfully in the United States” and reversed the conviction.

***United States v. Scott***, 394 F.3d 111 (2d Cir. 2005) The defendant successfully demonstrated a fundamental procedural error in his underlying deportation order – ineffective assistance of counsel – thus negating the validity of his deportation, which negated an essential element of his illegal reentry case.

***United States v. Calderon***, 391 F.3d 370 (2d Cir. 2004) The defendant successfully collaterally attacked his deportation in the district court and the Second Circuit affirmed. Despite the fact that the defendant failed to exhaust his administrative remedies with INS, his failure to do so was not knowing and intelligent. He was expressly misinformed by the Immigration Judge that no administrative relief was available.

***United States v. Sosa***, 387 F.3d 131 (2d Cir. 2004) In this illegal re-entry case, the lower court erred in barring the defendant from collaterally attacking his administrative deportation. Though the defendant had not exhausted his administrative remedies, the waiver of the appeal was invalid, because the waiver was not knowingly and intelligently made.

***United States v. Ortiz-Lopez***, 385 F.3d 1202 (9th Cir. 2004) The defendant demonstrated that he was prejudiced by the due process defects in his deportation proceeding.

***United States v. Karaouni***, 379 F.3d 1139 (9th Cir. 2004) 18 U.S.C. § 911 makes it a crime to falsely claim to be a U.S. citizen. On an I-9 employment form, the defendant checked a box indicating that he was a U.S. “national.” Checking the box did not violate § 911. Though all citizens are nationals, not all nationals are citizens.

***United States v. Copeland,*** 376 F.3d 61 (2d Cir. 2004) A deportation order may be collaterally challenged in an illegal reentry criminal case if the alien (1) exhausted administrative remedies; (2) was deprived of the opportunity for judicial review; and (3) showed that the proceeding was fundamentally unfair. 8 U.S.C. § 1326(d). In this case, the district court concluded that all three requirements were met and dismissed the indictment. The Second Circuit approved each of the findings but remanded to determine if the fundamental unfairness of the proceeding prejudiced the defendant.

***United States v. Ubaldo-Figueroa,*** 364 F.3d 1042 (9th Cir. 2004) An underlying removal hearing is “fundamentally flawed” if the alien’s due process rights were violated, and he suffered prejudice as a result. If the removal hearing is fundamentally flawed, a criminal prosecution under 8 U.S.C. § 1326 is defensible on this basis. In this case, the removal hearing was flawed because the immigration judge did not inform the defendant that he had the right to appeal the decision.

***United States v. Barajas-Chavez***, 134 F.3d 1444 (10th Cir. 1998) The defendant was charged with knowingly transporting undocumented aliens in furtherance of the aliens' illegal presence within the United States. The trial court granted a posttrial judgment of acquittal and the court of appeals affirmed. The evidence did show that the defendant was aware of the illegal alien status of the passengers in his vehicle. But there was insufficient evidence that the reason he was driving them from Arizona to

New Mexico was to further their illegal presence in the United States. Even if the transportation was for the purpose of helping the passengers seek employment, this does not satisfy the "in furtherance" element of the offense.

***United States v. Alviso***, 152 F.3d 1195 (9th Cir. 1998) The defendant was charged with a violation of 8 U.S.C. § 1326(a) – being a deported alien found in the United States without permission and 8 U.S.C. § 1326(b)(1) – being such an alien after having been deported following a felony conviction. This latter provision is a sentencing enhancement provision, not a separate crime. Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219 (1998). Therefore, there was no necessity (or relevance) in introducing the defendant's prior felony convictions at trial. Harmless error.

***United States v. Chukwura***, 101 F.3d 230 (2d Cir. 1996) The defendant was prosecuted in the Northern District of Georgia, and as part of his sentence, the judge ordered that he be escorted out of the country as part of his term of supervised release. After being escorted out of the country, he attempted to re-enter and was prosecuted under 8 U.S.C. §1326 for attempting to re-enter after being deported. Because he was never "deported" as that term is defined in §1326, he could not be prosecuted under this provision.

***United States v. Mendoza***, 873 F.2d 947 (6th Cir. 1989) A prerequisite to a prosecution under 8 U.S.C. §1324(a)(1)(B), is that defendant have the specific intent to transport the illegal alien to support the alien's illegal presence in the country. Merely transporting the alien within the country, without that specific intent is not sufficient to sustain a conviction. In this case the evidence was insufficient to support the defendants' conviction in light of the fact that they took no money from their passengers and did not attempt to conceal their immigration status.

***United States v. Jimenez-Marmolejo***, 104 F.3d 1083 (9th Cir. 1996) The defendant challenged his §1326 conviction on the basis that his original deportation was procedurally flawed. This Ninth Circuit agreed. Because the immigration judge failed to obtain a knowing and intelligent waiver of defendant's right to appeal the deportation decision, the procedure violated his right to due process and could not serve as the predicate for a prosecution for illegal reentry.

***United States v. Gomez-Rodriguez***, 77 F.3d 1150 (9th Cir. 1996) 8 U.S.C. §1326(b)(2) makes it a crime to re-enter the United States after having been deported and convicted of an aggravated felony. The definition of "aggravated felony" was amended in 1990 to include various crimes of violence. The defendant committed a crime of violence prior to the enactment of the 1990 amendment, at a time when that crime was not included within §1326's definition of an aggravated felony. Upon re-entering in 1995, the defendant could not be convicted of this offense. This decision was affirmed on rehearing en banc at 96 F.3d 1262 (9th Cir. 1996).

***United States v. Nguyen***, 73 F.3d 887 (9th Cir. 1995) 8 U.S.C. §1324(a) makes it an offense to bring any alien into the United States other than through a port of entry. The statute contains no explicit mens rea requirement. Nevertheless, the court concluded that Congress intended such a requirement. See Staples v. United States, 114 S.Ct. 1793 (1994); United States v. United States Gypsum Co., 438 U.S. 422 (1978); Morissette v. United States, 342 U.S. 246 (1952). The government must prove that the defendant knew that the individuals he was transporting were aliens and that he off-loaded them at other than a port of entry, intending to violate the law.

***United States v. Bahena-Cardenas***, 70 F.3d 1071 (9th Cir. 1995) 8 U.S.C. §1326 makes it a crime to attempt to re-enter the country after being previously arrested and deported. The defendant had been the subject of deportation proceedings previously but was never served with the warrant of arrest and simply left the country voluntarily. When he attempted to re-enter the country, he could not be charged with a §1326 offense. Because he was never served with the arrest warrant the first time, he was not under arrest, and this is an essential element of the offense.

***United States v. Canals-Jimenez***, 943 F.2d 1284 (11th Cir. 1991) While the evidence would have supported a conviction for entering or attempting to enter the country, the evidence did not support a conviction for "being found in" the country, where the defendant was stopped at the recognized immigration port of entry.

## *IMPOSSIBILITY*

***United States v. Fernandez,*** 722 F.3d 1 (1st Cir. 2013) The First Circuit discusses the defense of impossibility – distinguishing factual impossibility from pure legal impossibility. In this case, the "goal" of the conspiracy was not illegal, and therefore, impossibility was a defense to the conspiracy charge.

***United States v. Karaouni,*** 379 F.3d 1139 (9th Cir. 2004) 18 U.S.C. § 911 makes it a crime to falsely claim to be a U.S. citizen. On an I-9 employment form, the defendant checked a box indicating that he was a U.S. "national." Checking the box did not violate § 911. Though all citizens are nationals, not all nationals are citizens. The fact that the defendant told an agent that he intended to misrepresent himself as a citizen does not render his conduct criminal under § 911, because confessing to a crime that was not, in fact, committed, does not make it so.

## *INDICTMENTS*

***United States v. Resendiz-Ponce***, 127 S. Ct. 782 (2007) The Court initially agreed to answer the question whether the omission of an essential element of the offense in an indictment can ever be considered harmless error. However, after oral argument, the Court determined that the indictment under consideration did not, in fact, fail to allege a required element. The defendant was charged with attempted re-entry pursuant to 8 U.S.C. § 1326(a). The indictment did not specifically allege what the "substantial step" was that was a required element of the offense. The Court decided that it was sufficient that the indictment alleged that the defendant attempted to re-enter at a particular time and place. It was not also necessary to identify specifically what he did (such as presenting a misleading identification card, or walking into the inspection area, or lying to the inspector). If the defendant is charged under § 1326(a) with attempting to illegally re-enter, the indictment is not required to allege a particular overt act or any other "component part" of the offense.

***Jones v. United States,*** 119 S. Ct. 1215 (1999) The federal carjacking statute provides for three different punishments, depending on whether death results, serious bodily injury results, or if there is no serious injury. The Court, distinguishing Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219 (1998), held that these amounted to three separate crimes and the indictment had to spell out which crime was alleged, and the jury was required to unanimously agree on which crime was proved.

***Almendarez-Torres v. United States,*** 523 U.S. 224 (1998) An indictment must set forth each element of the crime that it charges, but it need not set forth factors relevant only to sentencing. 8 U.S.C. §1326(b)(2), which makes it a crime to reenter the United States after having been deported and convicted of an aggravated felony, is a penalty enhancement provision, not a separate offense. Therefore, the indictment is not required to allege the commission of a prior aggravated felony.

***United States v. Lang***, 732 F.3d 1246 (11th Cir. 2013) The crime of structuring a financial transaction (31 U.S.C. § 5324), is not committed simply by the depositing of an amount of money in increments less than $10,000.00. Rather the offense is committed by the act of "structuring" not the act of "depositing" and the critical element is that there is a larger sum of money that is being broken into incremental deposits. Therefore, an indictment that simply alleges that the defendant made deposits of less than $10,000 (even if there are dozens of such deposits and some occurred on the same day), it is not a crime, unless the indictment expressly alleges that there was an amount of money in excess of $10,000 that was divided into separate deposits for the purpose of evading the reporting requirement. The indictment in this case was defective and the conviction was reversed.

***United States v. Gonzalez***, 686 F.3d 122 (2d Cir. 2012) The indictment did not state the quantity of drugs involved in the conspiracy, but merely recited the statutory penalty that would be applicable if there were an allegation that 500 or more grams of cocaine were involved. Failure to allege a quantity of drugs involved was a violation of the defendant's right to be charged by the grand jury with the offense. "Stating that an act is in violation of a cited statutory section adds no factual information as to the act itself. It declares the legal basis for claiming that the act is deserving of punishment but does nothing to describe the act."

***United States v. McGarity,*** 669 F.3d 1218 (11th Cir. 2012) An indictment charging a defendant with a violation of 18 U.S.C. § 1512(c), obstruction of justice, must identify the official proceeding that was the object of the obstruction. Even if the indictment mirrors the elements of the offense in the statute, the indictment must specifically identify the particular proceeding that the government will prove was the object of the obstruction.

***United States v. Schmitz***, 634 F.3d 1247 (11th Cir. 2011) The defendant was charged with mail fraud and violating 18 U.S.C. § 666 (federal funds fraud). The latter counts failed to allege sufficient facts to support the charges and those counts of the indictment should have been dismissed. Though the factual background for the allegations appeared in other counts of the indictment, the court is not required to automatically incorporate facts from one count into another count.

***United States v. Kingrea***, 573 F.3d 186 (4th Cir. 2009) The indictment in this "cock-fighting" case failed to include all the essential elements of the offense. The indictment should have been dismissed. The fact that this was a conspiracy offense; and the fact that the judge properly instructed the jury on the elements of the offense, did not alter the result.

***United States v. Abu-Shawish***, 507 F.3d 550 (7th Cir. 2007) In order to violate § 666, the defendant's fraud must affect the program that employs the defendant. Thus, it is not enough that the defendant commits a fraud while employed by a covered organization (i.e., recipient of federal funds). The fraud must impact the organization. The indictment in this case failed to allege that the defendant defrauded the organization for which he worked. Though he was alleged to have defrauded the City of Milwaukee, he was not employed by Milwaukee. Thus, the indictment failed to allege that he defrauded the entity for which he worked and was fatally defective.

***Gautt v. Lewis***, 489 F.3d 993 (9th Cir. 2007) The indictment in this cited a criminal provision involving the "use of a firearm" rather than the provision outlawing "discharging" a firearm. The conviction and sentence for discharging a firearm, therefore, could not be sustained.

***Valentine v. Konteh***, 395 F.3d 626 (6th Cir. 2005) The state court indictment charged the defendant with twenty identically worded counts of sexual penetration and twenty identically worded counts of child rape. There was no distinction between these charges in the indictment, the bill of particulars, or even at trial. A conviction on all forty counts could not be sustained because the failure to provide adequate notice of the specific charges denied the defendant his right to due process. The conviction on these counts also violated the defendant's guarantee against double jeopardy. One of each count was allowed to stand.

***United States v. Omer***, 395 F.3d 1087 (9th Cir. 2005) The defendant's bank fraud indictment failed to allege that the falsehood was material. He moved to dismiss the indictment prior to trial, but this motion was denied. The conviction could not be sustained in light of his timely challenge to the sufficiency of the indictment.

***United States v. Pickett***, 353 F.3d 62 (D. C. Cir. 2004) In order to qualify as a criminal false statement under 18 U.S.C. § 1001(c), a false statement to the legislative branch must be in connection with an investigation or review of a committee, subcommittee, commission, or office of Congress. Alleging this element of the offense is essential in an indictment.

***United States v. Combs***, 369 F.3d 925 (6th Cir. 2004) In the 1998 amendment to § 924(c), Congress intended to create two separate violations: (1) using or carrying a firearm during and in relation to a drug trafficking crime; and (2) possessing a firearm in furtherance of a drug trafficking crime. "Use" requires active employment of the firearm by the person committing the drug offense. "In furtherance" requires proof that the firearm was possessed to advance or promote the commission of the underlying drug trafficking crime. An example of "use" without "in furtherance" would be if a buyer of drugs stole a gun from his dealer's house during a drug deal. Thus, the two crimes are, in fact, conceptually different. The indictment in this case mismatched the elements of these two offenses. The indictment charged the defendant with "possessing a weapon during and in relation to a drug offense." The indictment was fatally defective because it failed to allege the elements of an offense. In addition, with regard to a separate count, though the indictment properly alleged the elements of the possession offense, the jury instructions improperly "amended" the indictment by setting forth elements from the "use" prong of the statute (during and in relation to a drug offense) rather than the "possession" prong (in furtherance). The conviction on this count, therefore, had to be reversed.

***United States v. Bobo***, 344 F.3d 1076 (11th Cir. 2003) The indictment in this case failed to adequately allege either a conspiracy to commit health care fraud, or a substantive scheme to defraud.

***United States v. Adkinson***, 135 F.3d 1363 (11th Cir. 1998) The indictment in this case alleged that the defendants had a scheme to defraud a bank. The indictment did not allege, however, an execution of the scheme. Both elements are essential to a bank fraud prosecution. The indictment was defective, and the conviction was reversed.

***United States v. Yefsky***, 994 F.2d 885 (1st Cir. 1993) Though the error was harmless, the indictment in this case inadequately charged a mail fraud conspiracy. The indictment simply alleged that the defendant made false pretenses, without identifying them. In a mail fraud case – even if it is a conspiracy to commit mail fraud – the fraud must be specified in the applicable count of the indictment.

***United States v. Scanzello***, 832 F.2d 18 (3rd Cir. 1987) Because the indictment for conspiracy to steal goods from an interstate shipment failed to specify the value of the stolen goods, only a misdemeanor conviction could be upheld.

***United States v. Pupo,*** 841 F.2d 1235 (4th Cir. 1988) The indictment in this case failed to allege that the defendant acted "knowingly and intentionally." The fact that the indictment specifically charged the defendant with a violation of 21 U.S.C. §841 is not a sufficient substitute for alleging, in the indictment, the knowing and intentional elements of the offense.

***United States v. Hooker***, 841 F.2d 1225 (4th Cir. 1988) The defendant was indicted for conspiracy to violate RICO which requires that the business enterprise have an effect on interstate commerce. The indictment failed to allege the interstate commerce element of the offense. The Fourth Circuit holds that this is a fatal defect in the indictment requiring dismissal.

***United States v. Fitzgerald***, 89 F.3d 218 (5th Cir. 1996) The quantity of cocaine base – more than five grams – must be alleged in the indictment (it was sufficient in this case to make the allegation in the caption) in order to invoke the felony possession statute, 21 U.S.C. §844(a). Possession of less than five grams is a misdemeanor.

***United States v. Morales-Rosales***, 838 F.2d 1359 (5th Cir. 1988) An indictment's failure to allege an element of this immigration offense rendered it defective. The crime, 8 U.S.C. §1324, outlaws transporting an illegal alien to willfully further the alien's violation of the law. The indictment failed to allege that the defendant acted willfully or in furtherance of the alien's violation of the law. The indictment should have been dismissed.

***United States v. Holcomb***, 797 F.2d 1320 (5th Cir. 1986) In this Mann Act prosecution, the government failed to specify in the indictment that the prostitute was carried over a route used by a common carrier. Failure to specify this element of the offense renders the indictment insufficient.

***United States v. McGhee***, 854 F.2d 905 (6th Cir. 1988) An indictment which charged the defendant with an "attempt to facilitate" the possession and distribution of cocaine failed to state a legally cognizable crime under §§843(b) or 846 of Title 21.

***United States v. Locklear***, 97 F.3d 196 (7th Cir. 1996) Defendant was prosecuted for uttering counterfeit cashier's checks in violation of 18 U.S.C. §493. That statute requires proof that the instrument was purported to have been issued by a bank authorized or acting under the laws of the United States. The indictment did not charge this element of the offense, the government offered no evidence on this element of the offense and the jury was not instructed on this element of the offense. The conviction was reversed.

***United States v. ORS, Inc***., 997 F.2d 628 (9th Cir. 1993) The defendant corporation was charged with a Sherman Act violation, which requires a showing of an impact on interstate commerce. The indictment alleged in conclusory terms that there was an impact but failed to allege any facts in support of this charge. The indictment was defective and was properly dismissed by the district court.

***United States v. Bell***, 22 F.3d 274 (11th Cir. 1994) The defendant was charged with violating 18 U.S.C. §664, which outlaws embezzling money from a fund covered by ERISA. Many of the counts, including portions of the conspiracy count, alleged that

the defendant embezzled money from a fund which was not, in fact, covered by ERISA. After the defendant entered a guilty plea, he sought to withdraw the plea based on this defect in the indictment. The trial court erred in denying the defendant's motion to withdraw the plea.

***United States v. Scott***, 993 F.2d 1520 (11th Cir. 1993) The defendant was a postmaster. The government believed that he improperly brought some packages home with him. He was indicted and charged with "detaining" the mail in violation of 18 U.S.C. §1703. This indictment was inadequate. The indictment did not allege that he "unlawfully" detained the mail. Because the mail can be detained lawfully by a postmaster, this count did not allege the essential elements of the offense. The government argued that the specific reference to the statute cured the deficiency in the charging language. The appellate court disagreed: §1703 has two subsections, "a" and "b" and the indictment did not specify which one was the focus of the charge, so the indictment did not make "specific reference" to the code.

***United States v. Fitapelli***, 786 F.2d 1461 (11th Cir. 1986) The defendant was charged with an antitrust violation, but the indictment failed to adequately allege the effect on interstate commerce which is an essential and jurisdictional element of the offense.

***INDICTMENTS (Dismissal – Rules 12(h)(2) and 48(a))***

***United States v. Romero***, 360 F.3d 1248 (10th Cir. 2004) Generally, dismissal upon a government's motion pursuant to Rule 48(a) is required unless dismissal is clearly contrary to manifest public interest. The principal object of the "leave of court" requirement in Rule 48 is to protect a defendant against prosecutorial harassment, e.g., charging, dismissing, and recharging when the government moves to dismiss an indictment over the defendant's objection.

***In re United States***, 345 F.3d 450 (7th Cir. 2003) The district court may not decline to dismiss an indictment pursuant to Rule 48(a) simply on the ground that the court disagrees with the Justice Department's exercise of prosecutorial discretion. The government agreed to dismiss certain counts of the indictment in a plea agreement with the defendant. The district court refused to dismiss one of the counts because the government was attempting to circumvent the district court's sentencing authority. The Seventh Circuit granted a writ of mandamus for the purpose of dismissing the count. The purpose of Rule 48(a) is to protect the defendant from abuses of the government indicting and dismissing counts repeatedly, not to invest the court with discretion to decide that additional charges should be pursued. "The plenary prosecutorial power of the executive branch safeguards liberty, for, in conjunction with the plenary legislative power of Congress, it assures that no one can be convicted of a crime without the concurrence of all three branches. When a judge assumes the power to prosecute, the number shrinks to two."

***United States v. Flores***, 404 F.3d 320 (5th Cir. 2005) Disagreeing with the Eleventh Circuit. see United States v. Salman, 378 F.3d 1266 (11th Cir. 2004), the Fifth Circuit holds that if there is no dispute as to the facts, a court, pursuant to Rule 12(h)(2) may dismiss an indictment on legal grounds.

***United States v. Smith***, 55 F.3d 157 (4th Cir. 1995) Pursuant to Rule 48(a), the government, "with leave of court," may dismiss an indictment. In this case, one defendant entered a guilty plea, following which all four codefendants (against whom the defendant testified) were acquitted. The government moved to dismiss the indictment, but the district court refused to grant "leave of court." The Fourth Circuit reverses: Only if the government acts in bad faith may the court deny the government's motion to dismiss.

***United States v. Gonzalez***, 58 F.3d 459 (9th Cir. 1995) After the defendant entered a guilty plea to two counts, he provided substantial assistance to the government. The parties later realized that after sentencing, the defendant would be deported because of the nature of the charges in the second count. The government moved to dismiss the second count, pursuant to Rule 48(a). The trial court's denial of this motion was erroneous. The "leave of court" requirement of the rule is designed to protect the defendant from a prosecutor who dismisses, recharges, and harasses the defendant. When the government moves to dismiss and it is for the benefit of the defendant, the trial court may not deny the government's request to dismiss except in exceptional circumstances where the prosecutor has clearly "betrayed the public interest."

## *INDICTMENTS (DISMISSAL BASED ON UNDISPUTED FACTS)*

***United States v. Stock***, 728 F.3d 287 (3rd Cir. 2013) The defendant was charged with violating 18 U.S.C. §875. The Third Circuit held that "the word 'threat' in § 875(c) encompasses only communications expressing an intent to inflict injury in the present or future." Thus, a general threat that a person deserves to be killed is not sufficient to prove a threat under §875. In this case, the defendant wrote a post on Craigslist stating that he had been searching for some particular police officer so that he could beat him up but couldn't find him. He did not say that the search would continue, or that he had any intent to harm him in the future. However, he did state that he wished that the officer would die. The Third Circuit held that this "wish" was sufficient to satisfy the "future intent" element of the offense. The Third Circuit held that the district court had the authority to determine whether the indictment was sufficient to allege an offense, because the precise "threat" made by the defendant was set forth in the indictment.

***United States v. Ali, 557 F.3d 715*** (6th Cir. 2009) The defendant was charged with making a false statement on a naturalization document. Specifically, he stated that he had never been married to two different people at the same time. The government alleged that while he was still married to a Canadian woman, he married a woman in Georgia. He claimed, in a motion to dismiss, that under Georgia law, he could not marry the second woman, because of the pre-existing marriage. The government claimed that this defense had to be raised at trial. The Sixth Circuit disagreed and held that a motion that can be decided as a

matter of law without any contested facts can be raised pretrial pursuant to Rule 12. On the merits, the court held that the indictment should not be dismissed.

***INDICTMENTS (Duplicity)***

***In re Gomez***, 830 F.3d 1225 (11th Cir. 2016) The defendant was earlier convicted of a § 924(c) offense which alleged that he possessed a firearm in connection with certain drug offenses and a Hobbs Act conspiracy. A Hobbs Act conspiracy is not a crime of violence. Because the jury's verdict did not reveal what the underlying offense was, it was not possible to determine if the offense constituted a crime of violence which was an essential element of the § 924(c) charge. The indictment was duplicitous, and the defendant was entitled to raise a second § 2255 to challenge his conviction.

***United States v. Mancuso***, 718 F.3d 780 (9th Cir. 2013) Charging the defendant with multiple sales of cocaine over a several year periods in one count of an indictment violates the rule against duplicitous charges. Some of the substantive sales alleged in the count occurred outside the statute of limitations. Separate acts of distribution are separate crimes and must be charged in separate counts.

***United States v. Newell***, 658 F.3d 1 (1st Cir. 2011) This case contains a thorough discussion of the requirement that a jury be instructed that a verdict must be unanimous when an indictment contains duplicitous allegations, such as numerous fraudulent acts in one count of the indictment, or numerous false statements. The jury must unanimously agree that at least one of the false statements or fraudulent acts occurred and they must agree which one. The failure to object, however, resulted in affirmance of the conviction, because it did not amount to plain error.

***United States v. Pietrantonio***, 637 F.3d 865 (8th Cir. 2011) In this SORNA prosecution, the defendant was proved to have moved from Minnesota to Las Vegas and later traveled to Boston. Though the indictment was not duplicitous on its face, because of the manner in which the judge charged the jury, there was a likelihood that the jury may not have unanimously agreed on what conduct of the defendant constituted the offense.

**United States v. Lloyd,** 462 F.3d 510 (6th Cir. 2006) Charging a violation of § 924(c) "in furtherance" and "during and in relation" to a crime of violence in one count violates the rule against duplicitous indictments. These are two separate crimes and should not be charged in the same count.

***United States v. Savoires,*** 430 F.3d 376 (6th Cir. 2005) 18 U.S.C. § 924(c) sets forth two different crimes: (1) using or carrying a firearm during an in relation to a drug trafficking crime; and (2) possessing a firearm in furtherance of a drug trafficking crime. These two separate offenses may not be set forth in one count of the indictment.

***United States v. Nattier,*** 127 F.3d 655 (8th Cir. 1997) The defendant was charged in one count with conspiring to embezzle money and then to launder the proceeds of this embezzlement. The trial court cured any potential duplicity problem by instructing the jury that in order to convict the defendant on this count, the jury was required to unanimously agree on the particular object of the conspiracy the defendant agreed to commit (i.e., embezzlement, or money laundering, or both).

***United States v. Prescott***, 42 F.3d 1165 (8th Cir. 1994) The indictment in this money laundering case charged that the defendant engaged in numerous transactions over a three-year period. The statute outlaws' individual transactions which constitute money laundering, not a course of conduct. This indictment, therefore, was duplicitous. However, the failure to object pretrial waived the error.

***United States v. Gordon***, 844 F.2d 1397 (9th Cir. 1988) The indictment charged the defendants in one count with conspiracy to defraud the government in the administration of a weapons program and conspiracy to obstruct the grand jury in its investigation of fraud. This constitutes the potential for jury confusion and created the possibility of a verdict based on less than unanimity. Some jurors may have believed the defendants engaged in one conspiracy, while other defendants believed the defendants engaged in another.

***United States v. Schlei***, 122 F.3d 944 (11th Cir. 1997) Charging two sales of a security in one count of an indictment was duplicitous. Because of possible venue problems with regard to one of the sales, moreover, the error was not harmless. The dangers posed by a duplicitous count in an indictment are three-fold: (1) a jury may convict a defendant without unanimously agreeing on the same offense; (2) a defendant may be prejudiced in a subsequent double jeopardy defense; and (3) a court may have difficulty determining the admissibility of evidence.

***INDICTMENTS (Multiplicity)***

***United States v. Chilaca***, 909 F.3d 289 (9th Cir. 2018) The defendant had a hard drive, a laptop and desktop computer, each of which had access to a drop box account that had child pornography. This evidence only supports one count of possession of child pornography. The possession was simultaneous and in the same location his house.

***United States v. Vichitvongsa,*** 819 F.3d 260 (6th Cir. 2016) The defendant used a firearm in the commission of a home invasion which was alleged to have furthered two conspiracies: Hobbs Act and drugs. This only supports one § 924(c) conviction.

***United States v. Ajayi,*** 808 F.3d 1113 (7th Cir. 2015) The defendant deposited an altered check into his bank account. Thereafter, he withdrew funds from the account that were only in the account as a result of the altered check. Each withdrawal was indicted as a separate count. The Seventh Circuit held that the bank fraud offense was the deposit of the altered check, and the withdrawals were not separate indictable executions of the scheme, therefore the counts were multiplicitous.

***United States v. Bloch***, 718 F.3d 638 (7th Cir. 2013) The simultaneous possession of more than one firearm only supports one count of possession of a firearm by a convicted felon, even if more than one firearm is possessed and even if there is more than

one prior conviction, or reason that the defendant is prohibited from possessing the firearm. Charging the defendant with two counts under 18 U.S.C. § 922(g) was multiplicitous.

***United States v. Benjamin***, 711 F.3d 371 (3rd Cir. 2013) The defendant was twice found in possession of a firearm. He was a convicted felon. He was charged and convicted of two counts of possession of a firearm by a convicted felon The Third Circuit, joining the decisions of various other Circuits, held that possession of a firearm is a continuing offense and cannot be prosecuted in several counts, unless there is proof that the possession was not continuous, including constructively.

***Robertson v. Klem***, 580 F.3d 159 (3rd Cir. 2009) The opposite of a multiple conspiracy problem is where a defendant is convicted of two conspiracy charges where there was but one agreement. In this case, the defendant was convicted of two counts of conspiracy to commit murder, there were two victims. Both victims were killed at the same time as the result of one conspiratorial agreement. Only one conspiracy existed and only one count of conviction could be sustained.

***United States v. Polouizzi,*** 564 F.3d 142 (2d Cir. 2009) The unit of prosecution for possession of child pornography is the defendant's entire collection, not one count per image. For receipt prosecutions, however, the proper unit of prosecution is for each episode that images were received.

***United States v. Zalapa***, 509 F.3d 1060 (9th Cir. 2007) The possession of a short-barreled machine gun violates two separate provisions of the registration act, 26 U.S.C. §5861. However, only one conviction and one sentence can be imposed for the possession of one weapon, regardless of the number of ways in which its possession is a violation of the registration law.

***United States v. Parker***, 508 F.3d 434 (7th Cir. 2007) A defendant who possesses one firearm may not be convicted of both being a felon in possession of a firearm and being a drug user in possession of a firearm. Two convictions for this one offense are multiplicitous.

***United States v. Hollis***, 506 F.3d 415 (5th Cir. 2007) A defendant may not be convicted of both being a felon in possession of a firearm and for being a fugitive in possession of a firearm. This would be multiplicitous.

***United States v. Ankeny***, 490 F.3d 744 (9th Cir. 2007) The possession of several weapons by a convicted felon only amounts to one offense of possession of a weapon by a convicted felon unless the government proves that the weapons were acquired or stored at different times and places. The failure to prove this during the entry of the guilty plea required that the counts merged and all, but one count should have been dismissed.

***United States v. Buchanan***, 485 F.3d 274 (5th Cir. 2007) The defendant was convicted of several counts of receiving child pornography, but the evidence did not prove that there was more than one download with regard to the charged counts and even though there were several pictures, they were received as part of one transfer and, therefore, the defendant could only be convicted of one count of receiving child pornography.

***United States v. Wallace***, 447 F.3d 184 (2d Cir. 2006) The defendant used a firearm to commit a drive-by shooting that was prompted by a dispute involving his drug empire. The government charged the defendant with two § 924(c) violations: using the gun in connection with the drive-by shooting and using the gun in connection with the drug conspiracy. The Second Circuit held that only one § 924(c) conviction could be sustained based on one use of the gun.

***United States v. Stewart***, 420 F.3d 1007 (9th Cir. 2005) Repeating the same false statement to a law enforcement officer on two separate occasions does not constitute two separate crimes of violating § 1001, if the second false statement did not independently impair a government investigation.

***United States v. Jones,*** 403 F.3d 604 (8th Cir. 2005) Trial counsel was ineffective in failing to challenge the indictment as multiplicitous. The defendant was charged in one count of the indictment with being a felon in possession of a firearm in August and another count of being a felon in possession of the same firearm in October. The crime, however, outlaws the continued possession of the weapon and this cannot be multiplied by however many days, or hours, the gun is possessed as a separate crime.

***Valentine v. Konteh,*** 395 F.3d 626 (6th Cir. 2005) The state indictment included twenty identically worded rape allegations, over a period of several months, and twenty more identically worded sexual assaults over the same period of months. There was no differentiation between the charges. The child victim testified that she was sexually abused by the defendant many times (i.e., twenty), but could not identify any particular date. Each count of the indictment supposedly referenced another non-specific, but separate incident. The Sixth Circuit granted habeas relief: this violated due process. There was insufficient notice of the charges and a failure to prevent the possibility of double jeopardy. The jury was not able to consider each count individually and was left with an "all or nothing" type of decision.

***United States v. Walters***, 351 F.3d 159 (5th Cir. 2003) The defendant delivered a home-made bomb to a military base. Two counts of the indictment charged that he (1) used the bomb to assault a federal officer and (2) used a bomb to damage a federal building. At sentencing, the court relied on the second conviction to impose a mandatory life sentence. This was error. There was only one bomb, which detonated only once. Relying on United States v. Phipps, 319 F.3d 177 (5th Cir. 2003), the Fifth Circuit held that only one conviction could be sustained for this offense.

***United States v. Leftenant,*** 341 F.3d 338 (4th Cir. 2003) The defendant was arrested in possession of several counterfeit notes. This constitutes one offense, not separate offenses for each note. See also United States v. Bennafield, 287 F.3d 320 (4th Cir. 2002) (only one offense can be charged when defendant possesses several packages of cocaine); United States v. Dunford, 148 F.3d 385 (4th Cir. 1998) (one offense for possession of several guns).

***United States v. Johnson***, 130 F.3d 1420 (10th Cir. 1997) An indictment that charges the defendant with possession of a weapon in violation of 18 U.S.C. § 922(g)(1), possession by a convicted felon; and possession of the same weapon in violation of 18 U.S.C. § 922(g)(3), possession by a user of controlled substance, was multiplicitous. However, though the defendant could only be convicted and sentenced for one § 922(g) offense, the government was not necessarily required to "elect" which count to proceed on at trial. Whether to dismiss one of the counts pre-trial is left to the discretion of the trial court.

***United States v. McIntosh***, 124 F.3d 1330 (10th Cir. 1997) One count in this indictment charged the defendant with concealing an asset. Another count charged him with filing a false report in the bankruptcy court. These counts were multiplicitous.

***United States v. Stephens***, 118 F.3d 479 (6th Cir. 1997) The defendant possessed two separate quantities of cocaine on the same date, but at different locations. Even though the drugs were acquired at different times, this amounted to only one offense of possession with intent to distribute. Thus, the defendant could not receive a sentencing guideline gun enhancement pursuant to his possession of one cache of drugs (and a gun), and a § 942(c) sentence in connection with his possession of the other cache of drugs.

***United States v. Lilly***, 983 F.2d 300 (1st Cir. 1992) In an effort to obtain one bank loan, the defendants submitted a number of fraudulent documents. This amounted to one scheme to defraud a bank under 18 U.S.C. §1344, not several schemes associated with each set of documents.

***United States v. Seda***, 978 F.2d 779 (2d Cir. 1992) An indictment charging the defendant in two separate counts with bank fraud (18 U.S.C. §1344) and making a false statement to a bank in connection with a loan application (18 U.S.C. §1014) was multiplicitous. §1344 is a multi-faceted statute that is sufficiently broad to cover various types of misrepresentations and frauds. Here, the §1014 offense was simply a “species” of bank fraud. It is doubtful that this case survived the decision in United States v. Dixon, 509 U.S. 688 (1993), which held that the “modified Blockburger test” is not valid.

***United States v. Coiro***, 922 F.2d 1008 (2d Cir. 1991) The defendant coached several witnesses, during one meeting, to falsify testimony. This only constitutes one offense of obstruction of justice.

***United States v. Dunford***, 148 F.3d 385 (4th Cir. 1998) The defendant’s simultaneous possession of six guns and ammunition supported only one conviction under 18 U.S.C. §922(g) which prohibits possession of a firearm or ammunition by a person who is either a convicted felon or an illegal drug user.

***United States v. Kimbrough***, 69 F.3d 723 (5th Cir. 1995) The rule against multiplicity stems from the 5th Amendment to the Constitution which forbids placing a defendant twice in jeopardy for one offense. Here, the defendant was charged with possession of various items of pornography. In one count he was charged with possessing several items which had been shipped in interstate commerce. In the other count, he was charged with possessing several items which were produced with materials which had been transported in interstate commerce. These counts were multiplicitous. Each count charged that the defendant possessed “three or more” such items (and this is what the statute outlawed). Though one count charged that the items traveled in interstate commerce, and the other count charged that the items were produced with materials which had traveled in interstate commerce, this distinction was artificial. Because Congress outlawed possessing three or more items, the possession of many such items could not be broken down into several counts each of which included at least three items.

***United States v. Heath***, 970 F.2d 1397 (5th Cir. 1992) Even if the defendant endeavors to secure two different loans, if there is only one victim bank, there is only one scheme to defraud and there can only be one count charging this offense.

***United States v. Lemons,*** 941 F.2d 309 (5th Cir. 1991) One scheme to defraud a bank which involves several separate acts only constitutes one offense of bank fraud under 18 U.S.C. §1344. The statute only imposes punishment for each execution of the scheme, not each act in furtherance of the scheme.

***United States v. Evans***, 854 F.2d 56 (5th Cir. 1988) The defendant furnished false identification in order to obtain both a firearm and ammunition. Though the false identification was used for two purposes, this constitutes only one offense.

***United States v. Forester***, 836 F.2d 856 (5th Cir. 1988) A defendant may not be prosecuted for both attempting to manufacture methamphetamine and possessing a precursor, P2P. Possession of P2P is an interim and indispensable step in the process of manufacturing methamphetamine.

***United States v. Powell***, 894 F.2d 895 (7th Cir. 1990) The indictment charged the defendant with being a member of a conspiracy to distribute cocaine, and in a separate count, charged him with a conspiracy to distribute methamphetamine. This is a multiplicitous indictment because what was in fact one conspiracy was charged in two separate counts.

***United States v. Podell***, 869 F.2d 328 (7th Cir. 1989) The defendant was charged with tampering with or altering VINs. The charges related to two stolen automobiles. The indictment was multiplicitous. The statute does not create distinct offenses, one for removing and tampering a VIN and a separate offense for altering the same VIN.

***United States v. Graham***, 60 F.3d 463 (8th Cir. 1995) Repeating the same false statement several times during a bankruptcy proceeding only gives rise to one false statement conviction pursuant to 18 U.S.C. §152.

***United States v. Dixon***, 921 F.2d 194 (8th Cir. 1991) Defendant’s possession of numerous packets of cocaine under the bed of his hotel room and in his pocket was only one offense. The packet in his pocket was a “specimen” of the larger quantity of drugs found in the room.

***United States v. Molinaro***, 11 F.3d 853 (9th Cir. 1993) Each act in furtherance of a scheme to defraud cannot be prosecuted separately; rather, the proper unit of prosecution is each execution of the scheme. Thus, the preparation of several false documents in a scheme to defraud does not constitute different offenses under the bank fraud statute.

***United States v. Ravel,*** 930 F.2d 721 (9th Cir. 1991) Defendant's simultaneous possession of several stolen items was only one offense, even though he attempted to sell the goods at different times. His possession of the items could not be fragmented into separate units of prosecution coinciding with his selling the items.

***United States v. Sanchez-Vargas***, 878 F.2d 1163 (9th Cir. 1989) The defendant was charged in two counts with bringing an undocumented alien into the country and transporting the alien within the country. The convictions arose from the same act. This constitutes a multiplicitous indictment and only one conviction may be authorized for the illegal conduct.

***United States v. Olsowy,*** 836 F.2d 439 (9th Cir. 1987) The defendant repeated a false statement to the identical question posed by a Secret Service agent on a number of occasions. He may not be prosecuted more than once for making this same false statement repeatedly.

***United States v. Jewell***, 827 F.2d 586 (9th Cir. 1987) The defendant was charged with thirteen counts of having a personal interest in a government contract. The Ninth Circuit holds that he can only be indicted once for having a conflict of interest in connection with multiple signings of authorizations of payment.

***United States v. Arbelaez***, 812 F.2d 530 (9th Cir. 1987) Based on a single act, a defendant may not be convicted of aiding and abetting in the distribution of cocaine and aiding and abetting the possession of cocaine with intent to distribute.

***United States v. Hurt***, 795 F.2d 765 (9th Cir. 1986) The defendant's use of the mails to place an order for three pornographic films was only one offense of using the mails for delivery of obscene materials, not three separate offenses. It is irrelevant that the films were delivered to the defendant in separate packages.

***Mansfield v. Champion***, 992 F.2d 1098 (10th Cir. 1993) The defendant robbed a liquor store, taking cash from the cash register, liquor from the shelf and money from the clerk. He was prosecuted for two counts of robbery, one count dealing with the clerk's money and the other count relating to the store's property. This violated the double jeopardy clause. The defendant was being punished twice for the same act of robbery.

***United States v. Dashney,*** 937 F.2d 532 (10th Cir. 1991) The defendant split up one cash "hoard" in order to structure deposits in such a way that the bank would not file a CTR report. The government improperly charged the defendant with separate structuring offenses for each deposit. Only one offense is committed by the act of structuring transactions.

***United States v. Jones***, 841 F.2d 1022 (10th Cir. 1988) A defendant may not be convicted separately for the unlawful receipt of firearms by a convicted felon as well as unlawful possession of firearms by a convicted felon.

***United States v. Langford***, 946 F.2d 798 (11th Cir. 1991) In connection with the fraudulent sale of stock, the defendant made numerous mailings. Each such mailing should not have been listed as separate counts of securities fraud. A separate count should only be set forth for each separate sale or purchase of securities.

***United States v. Bonavia***, 927 F.2d 565 (11th Cir. 1991) The simultaneous undifferentiated possession of multiple firearms constitutes only one offense under 18 U.S.C. App. §1202(a). Only one offense is charged under the terms of §1202(a) regardless of the number of firearms involved absent a showing that the firearms were stored or acquired at different times or places. However, if the government presents evidence at trial that the defendant, at some point in the period covered by the indictment, separated one of the weapons charged in the indictment and possessed that weapon separately – that is, at a different location – the government may treat that weapon as a separate unit of prosecution, even though that gun was seized at the same time and in the same location as other weapons charged in the indictment and had been received by defendant at the same time as the other weapons.

***United States v. Winchester***, 916 F.2d 601 (11th Cir. 1990) The defendant was a fugitive from justice and a convicted felon. He was arrested in possession of a firearm. He could not be sentenced for two offenses – possession of a weapon by a fugitive and possession of a weapon by a convicted felon – on the basis of the possession of the one gun.

***United States v. Eaves***, 877 F.2d 943 (11th Cir. 1989) The defendant was charged with violating the Hobbs Act by accepting payments for certain votes as a county commissioner. He was convicted on three counts, two of which related to two separate payments which were part of one bribe. The Eleventh Circuit holds that this constitutes but one offense and cannot be the subject of separate convictions and sentences.

***United States v. Anderson***, 872 F.2d 1508 (11th Cir. 1989) The defendant was charged with multiple conspiracy counts alleging that he conspired to possess an unregistered firearm, conspired to transfer an unregistered firearm, and conspired to sell, convert, or dispose of property of the United States. The indictment was multiplicitous in this regard. Actually, there was only one conspiracy with several objects. Since there was only one agreement, there could be only one conviction.

***United States v. Anderson***, 59 F.3d 1323 (D.C. Cir. 1995) The government established that on four occasions, the defendant possessed a gun in connection with his drug conspiracy activities. Each of the alleged §924(c) violations was tied to the same drug conspiracy. This could only give rise to one §924(c) conviction.

***United States v. Johnson***, 909 F.2d 1517 (D.C. Cir. 1990) The defendant was prosecuted for his possession of liquid PCP as well as PCP mixed with marijuana and packaged in small foil packets for sale. This constitutes only one act of possession of PCP.

***INDICTMENTS (Variances and Amendments)***

***United States v. Davis***, 854 F.3d 601 (9th Cir. 2017) The defendant was charged with sexual exploitation of a minor. The indictment alleged that he recruited the child to participate in a sex video, "knowing or in reckless disregard of the fact that the person had not attained the age of 18." The jury instruction, however, the trial court instructed the jury that the knowledge requirement of the offense could be satisfied with roof that "the defendant had a reasonable opportunity to observe "the person]." This amounted to a constructive amendment of the indictment, because it provided the jury a path to conviction that was not alleged in the indictment. See also United States v. Dipentino, 242 F.3d 1090 (9th Cir. 2001).

***United States v. Mize***, 814 F.3d 401 (6th Cir. 2016) The proof at trial suffered from a prejudicial variance from the indictment. There were two separate conspiracies proven at trial, not one overarching conspiracy. Most of the evidence presented at trial focused on the other conspiracy, which was not the indicted conspiracy. The defendants were prejudiced by this variance and a new trial was necessary.

***United States v. Centeno***, 793 F.3d 378 (3rd Cir. 2015) A constructive amendment of an indictment may occur as a result of a prosecutor's closing argument. In this case, the defendant was charged with aiding and abetting an assault (in a federal park). In closing argument, the prosecutor argued that the defendant could be found guilty of aiding an abetting the assault if he drove the person who actually committed the assault away from the scene. But this would not be aiding and abetting an assault, because the crime was already completed; instead, this would be accessory after the fact. This argument had the effect of amending the indictment and required setting aside the verdict.

***United States v. Ward***, 747 F.3d 1184 (9th Cir. 2014) The indictment alleged that the defendant used the credit card information of a specific information to commit fraud, in violation of 18 U.S.C. § 1028A(a)(1). The court declined to instruct the jury that a specific person's identity was stolen. The Ninth Circuit explained the difference between a variance and an amendment and concluded that in this case the indictment was constructively amended by allowing the jury to convict the defendant of an offense for which the grand jury did not specifically return an indictment (i.e., any person's identity). Because the offense requires proof that the identity of an actual person was stolen, the court was obligated to instruct the jury that it was that person's identity that was stolen in order to convict on that count.

***United States v. Madden***, 733 F.3d 1314 (11th Cir. 2013) The indictment charged the defendant with a § 924(c) offense by knowingly using and carrying a firearm during an in relation to a crime of violence and knowingly possessing a firearm in furtherance of a drug trafficking crime. The judge instructed the jury that the defendant could be found guilty if he knowingly carried a in relation to a drug trafficking offense (which was not what was charged) or if he possessed a gun in furtherance of a drug trafficking offense (which was also incorrect, because he was charged with possessing a gun "in furtherance" of a drug offense, not "in relation to" a drug offense). This was an improper constructive amendment of the indictment that amounted to plain error.

***United States v. Lander***, 668 F.3d 1289 (11th Cir. 2012) A prejudicial variance occurred in this mail fraud prosecution of the defendant, a county attorney. The indictment alleged that he defrauded the citizens of the county by accepting (in essence) a bribe from certain developers and that the developers were falsely told that they had to pay him money as part of a "performance bond." At trial, however, the government proceeded on the theory that the defendant defrauded the developers by telling them that their "payments" to him were for certain development costs that he would escrow or to "ensure" that the project obtained approval from the county officials. No developer testified that the defendant said the money was needed to pay for a performance bond. The Eleventh Circuit held that this amounted to a material and prejudicial variance.

***United States v. Dellosantos***, 649 F.3d 109 (1st Cir. 2011) The First Circuit concluded that the variance between the charged overarching conspiracy to distribute cocaine and marijuana, and the proof at trial, which showed separate conspiracies that involved a different combination of drugs, was prejudicial and required reversal of the conspiracy conviction. The separate conspiracies were not interdependent and involved different people.

***United States v. Farr***, 536 F.3d 1174 (10th Cir. 2008) The indictment alleged that the defendant failed to pay quarterly employment taxes. At trial, however, the government argued (and the trial court instructed the jury) that she could be convicted based on her failure to pay a trust fund recovery penalty that was assessed against her personally. This was an improper constructive amendment of the indictment that tainted the conviction; this is an error not subject to harmless error analysis.

***United States v. McKee***, 506 F.3d 225 (3rd Cir. 2007) The indictment alleged that the defendants committed tax evasion by filing false quarterly tax returns (Form 941). The judge instructed the jury that tax evasion may be committed in several ways, including filing false quarterly returns and by falsifying books to hide income. There was evidence at trial that the defendants did falsify their books, but this was not the conduct that was the subject of the indictment. The jury instruction amounted to a constructive amendment of the indictment that necessitated reversing the conviction.

***United States v. Hoover***, 467 F.3d 496 (5th Cir. 2006) The trial court's jury charge improperly expanded the indictment by offering a theory by which the jury could find that the statement made by the defendant was false, in a manner different than the manner set forth in the indictment. The indictment alleged that he made a false statement about how many people complained to him about a financing arrangement of his car dealership. Specifically, the indictment said that "he knew the statement was false because "more than one person told him about the 'double floor planning." The jury was instructed, however, that he could be found guilty if he knew the statement, he made to the police was false, but did not limit the basis upon which he knew it was false. The Sixth Circuit held that, pursuant to Stirone v. United States, 361 U.S. 212 (1960), if the government chooses to

specifically charge the manner in which the defendant's statement is false, the government should be required to prove that it is untruthful for that reason.

***United States v. Pacheco*** 434 F.3d 106 (1st Cir. 2006) The trial court announced at the end of trial that he did not believe that the defendant was part of the large, indicted conspiracy, but only a part of one spoke. Later, however, the court allowed the jury to consider the evidence of the defendant's guilt of the charged conspiracy. The defendant's right to a fair trial was violated, in part because this altered his closing argument strategy.

***United States v. Stigler***, 413 F.3d 588 (7th Cir. 2005) The government alleged that the defendant was part of a larger conspiracy that involved the negotiation of several counterfeit checks. The evidence at trial, however, only demonstrated his knowledge of one check and that he had no role in, or knowledge of, the other checks being handled by other people. This amounted to an improper variance.

***United States v. Ross***, 412 F.3d 771 (7th Cir. 2005) The indictment charged the defendant with possessing a firearm on September 8, 2002. The judge instructed the jury, however, that the crime could be shown to have been committed anytime between May 1998 and the date the indictment was returned (thus ensuring that the offense occurred within the statute of limitations). This was an improper variance.

***United States v. Chambers***, 408 F.3d 237 (5th Cir. 2005) The indictment alleged that the defendant possessed "rounds" (i.e., bullets) that had traveled in interstate commerce. The rounds were actually manufactured in the same state where they were found in possession of the defendant. The government argued that components of the rounds had traveled in interstate commerce prior to the manufacture of the completed rounds. This amounted to an amendment of the indictment. The evidence was insufficient to support a conviction on these counts of the indictment and the conviction was reversed.

***United States v. Milstein***, 401 F.3d 53 (2d Cir. 2005) The defendant was charged with violating 21 U.S.C. § 352 (misbranding drugs). The indictment alleged that the offense was committed by repackaging the drugs. At trial, however, the proof involved selling drugs that were contaminated. This is a different offense under § 352. Changing the theory of the prosecution violated the Fifth Amendment. The defendant was not on notice that he would have to defend the contamination allegation.

***United States v. Hugs***, 384 F.3d 762 (9th Cir. 2004) The defendant was charged with involuntary manslaughter by committing an unlawful act not amounting to a felony. The jury was charged on two other methods of committing the offense, however. This was improper, but harmless, given another instruction that specifically told the jury that the defendant was only charged with the crime set forth in the indictment.

***United States v. Bradley***, 381 F.3d 641 (7th Cir. 2004) The defendant entered a guilty plea to carrying a firearm in connection with a drug offense. The factual basis offered by the government recited that the defendant carried the gun in a car that was transporting marijuana. The indictment, however, alleged that he carried the gun in connection with a cocaine offense. The defendant then moved to withdraw the plea on the basis of this variance. The trial court erred in denying the defendant the right to withdraw the plea.

***United States v. Narog***, 372 F.3d 1243 (11th Cir. 2004) The indictment charged the defendant with "possession and distribution of pseudoephedrine, knowing and having reasonable cause to believe that the listed chemical would be used to manufacture a controlled substance, that is, methamphetamine." During deliberations, the jury asked if the defendant had to have knowledge or believe the drug would be used to make specifically methamphetamine. The court responded that the government was only required to prove that the defendant possessed the precursor with the knowledge that it would be used to manufacture any controlled substance. This amounted to an amendment of the indictment which required reversal per se. See United States v. Weissman, 899 F.2d 1111 (11th Cir. 1990).

***United States v. Combs***, 369 F.3d 925 (6th Cir. 2004) In the 1998 amendment to § 924(c), Congress intended to create two separate violations: (1) using or carrying a firearm during and in relation to a drug trafficking crime; and (2) possessing a firearm in furtherance of a drug trafficking crime. "Use" requires active employment of the firearm by the person committing the drug offense. "In furtherance" requires proof that the firearm was possessed to advance or promote the commission of the underlying drug trafficking crime. An example of "use" without "in furtherance" would be if a buyer of drugs stole a gun from his dealer's house during a drug deal. Thus, the two crimes are, in fact, conceptually different. The indictment in this case mismatched the elements of these two offenses. The indictment charged the defendant with "possessing a weapon during and in relation to a drug offense." The indictment was fatally defective because it failed to allege the elements of an offense. In addition, with regard to a separate count, though the indictment properly alleged the elements of the possession offense, the jury instructions improperly "amended" the indictment by setting forth elements from the "use" prong of the statute (during and in relation to a drug offense rather than the "possession" prong in furtherance. The conviction on this count, therefore, had to be reversed.

***United States v. Iacaboni,*** 363 F.3d 1 (1st Cir. 2004) Payments of gambling winnings to the bettors constituted a money laundering financial transaction and the amount of these payments could be forfeited. However, the court erred in forfeiting additional money that may have been a financial transaction that concealed the money, because the money laundering charge only alleged "promotion prong" money laundering and therefore, a financial transaction that concealed the nature, source, or ownership of the money could not be forfeited. This would improperly amend the indictment.

***United States v. Collins***, 350 F.3d 773 (8th Cir. 2003) The defendant was charged under 18 U.S.C. § 922(d)(3) with disposing a firearm to a person that was known to be an unlawful user of controlled substances. The trial court instructed the jury that the offense could be proven if the defendant knew or had reasonable cause to believe there was a risk that the recipient would

unlawfully use a controlled substance while in possession of the firearms. This amounted to an improper amendment of the indictment. The government is required to prove that the defendant knew or had reasonable cause to believe that the recipient was an unlawful user of a controlled substance.

***United States v. Santa-Manzano***, 842 F.2d 1 (1st Cir. 1988) The indictment charged the defendant with issuing fake certificates of deposit in return for money. The evidence at trial indicated that the defendants gave the victim a $2,000,000 letter of credit in return for $18,000,000 worth of Venezuelan Bolivars. This constitutes a fatal variance and requires reversal of the conviction.

***United States v. Glenn***, 828 F.2d 855 (1st Cir. 1987) The indictment alleged a broad drug importation conspiracy involving the importation of marijuana from Thailand and hashish from Pakistan. The evidence only connected the defendant to the conspiracy involving Pakistan hashish. The court holds that this is a fatal variance.

***United States v. Wozniak***, 126 F.3d 105 (2d Cir. 1997) The indictment alleged that the defendant conspired to possess with intent to distribute cocaine and methamphetamine. The jury was charged that the defendant could be convicted of conspiring to distribute marijuana. This amounted to an improper constructive amendment of the indictment.

***United States v. Zingaro***, 858 F.2d 94 (2d Cir. 1988) This RICO indictment was drawn specifically to cover only loans made in connection with a social club's gambling activities. Proof at trial involved a loan that did not involve gambling activity. This constitutes an improper constructive amendment of the indictment.

***United States v. Mollica***, 849 F.2d 723 (2d Cir. 1988) An indictment which charged the defendant with fraud with respect to income taxes was constructively amended to allege a general conspiracy to defraud the government. The proof at trial demonstrated a money-laundering scheme which had no connection whatsoever to the payment of any income taxes. Reversible error.

***United States v. Floresca***, 38 F.3d 706 (4th Cir. 1994) The defendant was charged with violating 18 U.S.C. §1512(b)(1), witness tampering. In instructing the jury, however, the trial court included within its definition of §1512(b)(1), the offense described in §1512(b)(3), which describes an entirely separate offense of hindering or preventing another from reporting a federal offense. This represented an improper amendment to the indictment, permitting a conviction for an offense other than the indicted offense. A constructive amendment amounts to an error per se. See Stirone v. United States, 361 U.S. 212 (1960).

***United States v. Doucet***, 994 F.2d 169 (5th Cir. 1993) Defendant was charged with possession of an unlawful assembled machine gun. He prepared an entrapment defense, claiming that he modified the weapon because the informant asked him to do so. By the end of trial, the government had changed its theory and argued that the defendant illegally possessed the unassembled parts of a machine gun. This was an improper constructive amendment of the indictment. An indictment may be amended constructively by the actions of either the court or the prosecutor. In either event, the amendment violates the Fifth Amendment guarantee that a prosecution can only proceed on the basis of a grand jury indictment. "An indictment is not putty in the government's hands."

***United States v. Harrill***, 877 F.2d 341 (5th Cir. 1989) The trial judge improperly broadened the indictment by permitting the jury to convict the defendants of filing false bank documents in connection with a "change or extension" of a loan rather than in connection with a request for a loan or advances as charged in the indictment.

***United States v. Chandler***, 858 F.2d 254 (5th Cir. 1988) The indictment charged the defendant with embezzling $20,000 in her capacity as a bank teller. At trial, the jury was permitted to convict the teller if they found that over a long period of time, she took small sums of more than $500. The large sum related to an embezzlement charge whereas the smaller sums related to making false entries. The jury acquitted her of embezzlement but convicted her of making false entries. This represented an impermissible constructive amendment of the indictment.

***United States v. Trice***, 823 F.2d 80 (5th Cir. 1987) The indictment charged the defendant with making a false statement to a federal savings and loan in order to influence the bank's action in making an advance on a loan to the defendant's business. The court instructed the jury, however, that a conviction can be based on any false statement which was made with the intent to influence any change or extension of a loan. This constituted an improper expansion of the indictment and voids the conviction.

***United States v. Haga***, 821 F.2d 1036 (5th Cir. 1987) The indictment charged the defendant with a conspiracy to commit various offenses against the United States. The evidence however, demonstrated that the conspiracy was solely to defraud an agency of the United States. Both offenses arise under 18 U.S.C. §371, but the failure of the indictment to specify that the charge involved defrauding an agency constituted an improper variance.

***United States v. Willoughby***, 27 F.3d 263 (7th Cir. 1994) The defendant was charged with possessing a gun in connection with the offense of distributing cocaine, in violation of 18 U.S.C. §924(c). The evidence revealed that the defendant distributed cocaine several times at certain locations, but that the gun was possessed in a warehouse where the cocaine was being stored for future distribution. The gun, therefore, was possessed in connection with the offense of possession with intent to distribute cocaine, but not in connection with the actual distribution of cocaine. This is a fatal variance and required acquittal of the charged conduct.

***United States v. Leichtnam***, 948 F.2d 370 (7th Cir. 1991) In a lengthy discourse on the law of material variances, the court holds that the "amendment" of the indictment in this case was prejudicial. The defendant was charged with possessing a particular weapon. At trial, the jury was allowed to convict if they found that any of a number of weapons were possessed in connection with the drug offense. This improperly enlarged the indictment. Here, the indictment did not offer several means of

committing the offense, with the jury being offered one of these different means. Rather, the jury was offered a means of committing the offense (i.e., a particular weapon was possessed) other than the means set forth in the indictment. In short, any broadening of the possible bases for conviction from that which appeared in the indictment, is fatal. It is reversible per se.

***United States v. Tsinhnahijinnie***, 112 F.3d 988 (9th Cir. 1997) The defendant was charged with molesting a young girl. The indictment alleged that the acts occurred between June and July of 1992. The trial, which was in 1995, was based on an accusation made by the child in 1994. The child never testified, however, that the molestation occurred in 1992. While the date of the offense is not an element of the charge, where the indictment alleges that a crime occurred on a particular date, a slight variance may be tolerable, but a complete failure of proof that the offense occurred anytime near the indicted time, amounts to a fatal variance. Moreover, in this case, the defense was prejudiced, because it established at trial that he was not on the reservation between June and July of 1992.

***United States v. Solis***, 841 F.2d 307 (9th Cir. 1988) It was improper for the jury to have been instructed as to the elements of possession with intent to distribute when the defendants were charged only with conspiracy and distribution of heroin. This constitutes plain error and requires reversal of the conviction.

***United States v. Pina***, 974 F.2d 1241 (10th Cir. 1992) The trial court dismissed one count of the false tax return indictment on the basis that the wrong year was set out in the indictment. The government's request to amend the indictment was properly rejected: this was a material change, not a mere change of form, which the government was requesting. Even though the error was characterized as a typographical error, amending the indictment was not permitted.

***United States v. Hill***, 835 F.2d 759 (10th Cir. 1987) An indictment which charges the defendant with stealing government property does not permit a conviction based on evidence indicating that the property was taken by embezzlement or conversion.

***United States v. Cancelliere***, 69 F.3d 1116 (11th Cir. 1995) The indictment charged the defendant with knowingly and willfully committing the offense of money laundering. Under §1956, "willfulness" is not an element of the offense. Nevertheless, because this is what the indictment charged, the indictment could not be redacted or amended to delete this term. This was not simply the elimination of an unnecessary averment. The defendant's defense was based on his good faith (i.e., the lack of willfulness) and the jury had already been read the indictment, which included the willfulness element.

***United States v. Artrip,*** 942 F.2d 1568 (11th Cir. 1991) The defendant was charged with defrauding a bank by submitting a financial statement of his wife with overstated assets. At trial, proof was introduced of additional unreported liabilities which was not listed in the indictment as part of the fraud. The trial court's failure to instruct the jury that the only basis for the charge was overstated assets was reversible error. There was a substantial possibility that the jury convicted the defendant of understating liabilities, but that was not the charge as set forth in the indictment.

***United States v. Keller***, 916 F.2d 628 (11th Cir. 1990) The trial court instructed the jury that in order to convict the defendant of the conspiracy count, the jury must find that the defendant conspired with "anyone" and not just the party named in the indictment. The indictment named only one other individual and did not indicate the existence of any unindicted co-conspirators. The Eleventh Circuit concludes that this constitutes an amendment, not a mere variance of the indictment. "The proper distinction between an amendment and a variance is that an amendment occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible basis for conviction beyond what is contained in the indictment. A variance occurs when the facts proved at trial deviate from the facts contained in the indictment, but the essential elements of the offense are the same." The court concludes that the trial court's instructions in this case had the effect of adding the phrase "with other named and unnamed conspirators." The conviction on this count had to be reversed.

***United States v. Weissman***, 899 F.2d 1111 (11th Cir. 1990) The defendants were charged with being members of a RICO conspiracy. The indictment alleged in various sections that the defendants were members of a particular family of La Cosa Nostra. In response to a question from the jury, however, the trial judge told the jury that it was not necessary for the government to prove that the RICO enterprise was that particular family, if, in fact, the government proved that there was an enterprise that met the definition of the term. This constituted a material variance from the indictment. The court concluded that it is a fundamental right in our system of criminal justice that a defendant has a substantial right to be tried solely on the charges presented in an indictment returned by a grand jury. This right was violated in this case.

***United States v. Peel***, 837 F.2d 975 (11th Cir. 1988) The jury was instructed that the defendant could be convicted for being on board a vessel of the United States or being a citizen of the United States on board a vessel in connection with a drug conspiracy. The indictment only charged the defendant with being on board a vessel of the United States; it did not charge him with being a citizen of the United States on board any vessel. Because the jury may have convicted him of the latter offense, this constitutes a constructive amendment and violates the defendant's Fifth Amendment right to be tried on charges presented to a grand jury and requires a reversal of the conviction.

***United States v. Lawton***, 995 F.2d 290 (D.C. Cir. 1993) Defendant was charged with taking a union local's money. The jury instructions, however, permitted the jury to convict the defendant if he took the money of the local, the district council, or the international union. This was an improper constructive amendment of the indictment. Moreover, the defendant was not an officer of the district council or the international, which was an essential element of the offense. This was plain error, requiring reversal of the conviction, even in the absence of an objection at trial. the existence of any unindicted co-conspirators. The Eleventh Circuit concludes that this constitutes an amendment, not a mere variance of the indictment. "The proper distinction between an amendment and a variance is that an amendment occurs when the essential elements of the offense contained in the indictment

are altered to broaden the possible basis for conviction beyond what is contained in the indictment. A variance occurs when the facts proved at trial deviate from the facts contained in the indictment, but the essential elements of the offense are the same." The court concludes that the trial court's instructions in this case had the effect of adding the phrase "with other named and unnamed conspirators." The conviction on this count had to be reversed.

***INDICTMENTS*** (Sealing)

***United States v. Thompson***, 287 F.3d 1244 (10th Cir. 2002) Rule 6 (e)(4) governs the sealing of indictments. The government violated the rule in this case. The defendant established that the violation was not harmless, because between the date that the indictment was returned and the date it was unsealed, the defendant destroyed records that were material to his defense. The Tenth Circuit agreed that this was a sufficient showing of harm to support dismissing the indictment.

***INDICTMENTS (Apprendi errors)***

***United States v. Gonzalez***, 686 F.3d 122 (2d Cir. 2012) The indictment did not state the quantity of drugs involved in the conspiracy, but merely recited the statutory penalty that would be applicable if there were an allegation that 500 or more grams of cocaine were involved. Failure to allege a quantity of drugs involved was a violation of the defendant's right to be charged by the grand jury with the offense. "Stating that an act is in violation of a cited statutory section adds no factual information as to the act itself. It declares the legal basis for claiming that the act is deserving of punishment but does nothing to describe the act."

***United States v. Rodriguez-Gonzales,*** 358 F.3d 1156 (9th Cir. 2004) When proof of a prior conviction converts the charged offense from a misdemeanor into a felony, Apprendi applies, and the prior offense must be identified in the indictment. The "prior conviction" exception embodied in Almendarez-Torres does not apply in this limited situation. That exception applies when the prior conviction alters the penalty; in this case, the prior conviction altered the nature of the crime.

## *INSANITY*

***Shannon v. United States***, 512 U.S. 573 (1994) It is not necessary to inform the jury about the consequences of their verdict if the verdict is not guilty by reason of insanity. The rule might be otherwise if some type of misstatement of the consequences of a not guilty by reason of insanity verdict is made in the presence of the jury – for example, by a witness, or the prosecutor.

Foucha v. Louisiana, 504 U.S. 71 (1992) A statute which permits an insanity acquiree to be committed to an institution, though he no longer suffers from any mental illness, until he can prove that he is not dangerous to himself, or others violates the Fourteenth Amendment. Once the defendant has recovered his sanity, he cannot be committed to a psychiatric facility. Prior precedent, including Jones v. United States, 463 U.S. 354 (1983), permitted the continued commitment of the defendant, but only as long as he remained mentally ill.

***United States v. Christian***, 749 F.3d 806 (9th Cir. 2014) Prior to a related state court trial, the defendant was examined by a doctor who was asked to assess the defendant's competence to stand trial and the doctor concluded that the defendant was not competent. In the defendant's federal criminal trial, he sought to call the same doctor to testify about the defendant's defense of diminished capacity. The doctor testified that his competence examination was sufficient to support his conclusion about the defendant's diminished capacity, but the trial judge held that the two standards are different and therefore, having only evaluated the defendant for purposes of determining his competence, the expert could not offer any opinion about diminished capacity. The Ninth Circuit reversed. The doctor should have been permitted to testify and explain why his examination was sufficient to enable him to formulate an opinion on the subject of the defendant's diminished capacity.

***United States v. Goodman***, 633 F.3d 963 (10th Cir. 2011) The defendant relied on the insanity defense in this armed robbery case. The trial court barred the defense from introducing evidence of his combat experiences and his mental health around the time of his army experience. He had received extensive treatment for mental illness after returning from Iraq and clearly suffered from mental illness as a result of his combat experience. Limiting the "lay" witness testimony to his behavior at the time immediately surrounding the time of the robberies was reversible error. The defendant's mental health a few years prior to the armed robberies was not irrelevant to his insanity defense. In addition, the trial court erred in barring the defense to offer lay "opinion" testimony about the defendant's mental condition. Rule 704(a) specifically allows testimony in the form of an opinion that embraces an ultimate issue to be decided by the trier of fact. Rule 704(b), however, provides an exception for experts, who are not permitted to offer opinions as to the state of mind of a criminal defendant if that mental state is an element of the crime of which the defendant is accused.

***Wilson v. Gaetz***, 608 F.3d 347 (7th Cir. 2010) Trial counsel ineffectively developed the insanity defense evidence that was available in defense of the defendant who was charged with murder. The defendant was apparently operating under a delusional compulsion that required him to commit the crime. His delusion led him to believe that what he was doing was morally proper, even if it might have been a crime.

***United States v. Long***, 562 F.3d 325 (5th Cir. 2009) The trial court erred in failing to instruct the jury on the insanity defense. Expert testimony established that he suffered from schizotypal personality disorder that at times resulted in the defendant losing contact with reality.

***Perez v. Cain***, 529 F.3d 588 (5th Cir. 2008) The evidence at the state trial demonstrated that the defendant was insane, and the state courts unreasonably applied Constitutional standards regarding the sufficiency of the evidence to support a conviction.

***United States v. Allen***, 449 F.3d 1121 (10th Cir. 2006) Insanity is a viable defense to a charge of being a felon in possession of a firearm, even though the offense is a general intent crime.

***United States v. Southwell,*** 432 F.3d 1050 (9th Cir. 2005) When the defendant raises the defense of insanity, in order for the jury to return a guilty verdict, not only must the jury unanimously find the defendant guilty; the jury must also unanimously reject the insanity defense. This applies to all affirmative defenses.

***United States v. Rinaldi***, 351 F.3d 285 (7th Cir. 2003) Between the time the defendant entered his plea and the scheduled sentencing date, the defendant moved to withdraw his plea, claiming that he suffered from A.D.D. The trial court ordered that the defendant be committed for a 45-day evaluation. The Seventh Circuit held that the provisions of Fed. R. Crim. P. Rule 12.2 do not apply, because the defendant was relying on a defense of insanity: his claim related only to his intent to present a diminished capacity defense (lack of capacity to form specific intent).

***United States v. Baker***, 155 F.3d 392 (4th Cir. 1998) The defendant was found not guilty only by reason of insanity. Before he was committed, another evaluation was performed and the district court determined that he was not in need of commitment, but imposed conditions on his release. This is not permitted by 18 U.S.C. § 4242. Conditions for release may only be imposed after someone has already been committed, not in lieu of commitment. Remand was appropriate to allow the district court to decide whether release was appropriate, given the fact that conditions could not be imposed.

***Huminak v. Beyer***, 871 F.2d 432 (3rd Cir. 1989) The defendant based his defense in this murder prosecution on diminished capacity. It violated due process for the trial court to instruct the jury that the burden of proving diminished capacity is on the defendant. Because the diminished capacity defense seeks to negate the existence of the requisite intent to commit the crime, the burden cannot be placed on the defendant to establish this defense. Rather, the State must prove beyond a reasonable doubt that the defendant had the requisite intent.

***In re Newchurch***, 807 F.2d 404 (5th Cir. 1986) It is improper to commit a defendant to a penal institution for mental examination without a finding that such commitment is necessary to enable the government to prepare for trial. In this case, the defendant notified the government that he planned to plead that he was insane at the time of the charged offense but was presently mentally competent.

***United States v. Freeman***, 804 F.2d 1574 (5th Cir. 1986) The Fifth Circuit approves the various provisions of 18 U.S.C. §20 which places the burden on establishing insanity on the defendant, precludes expert testimony on the ultimate issue of insanity, and permits a conviction despite a defendant's inability to conform his actions to the requirements of the law.

***Sulie v. Duckworth***, 864 F.2d 1348 (7th Cir. 1988) The defendant's post-Miranda silence should not have been used against him to establish his sanity in a state criminal case. Though it was error, it was harmless in light of the overwhelming evidence of the defendant's sanity and guilt.

***United States v. Bartlett***, 856 F.2d 1071 (8th Cir. 1988) The Insanity Defense Reform Act provides that it is an affirmative defense that an accused was incapable of appreciating the nature and quality or wrongfulness of his acts as a result of a severe mental disease or defect and that "mental disease or defect does not otherwise constitute a defense." This provision does not apply to a defense based on the inability to form the specific intent to commit the crime. Psychiatric evidence of a defendant's inability to form the specific intent is admissible and not barred by 18 U.S.C. §17(a), or Fed. R. Evid. 704(b) which prohibit a psychiatric expert testifying about the mental condition of a defendant with regard to the "ultimate issue" of the accused's capacity to form the requisite intent.

***United States v. Samuels***, 801 F.2d 1052 (8th Cir. 1986) The evidence in this case was insufficient to establish that the defendant was sane at the time that he wrote a letter to the President threatening to kill him. The defendant introduced evidence that at the time he mailed the letter, he was in a mental health clinic experiencing acute exacerbation of chronic, psychotic process. The government's evidence was based on evidence not relating to the defendant's condition at the time of the offense.

***United States v. Twine,*** 853 F.2d 676 (9th Cir. 1988) The Insanity Defense Reform Act did not eliminate the defense based on diminished capacity. The court concludes that Congress was concerned with a defendant's ability to excuse guilt, as opposed to disproving guilt. The insanity defense excused guilt while the inability to form the specific intent constitutes a denial of guilt.

***United States v. Denny-Shaffer***, 2 F.3d 999 (10th Cir. 1993) An insanity instruction should be given when a defendant offers proof of multiple personality disorder. The inquiry focuses on the host personality, not just the acting personality. If the host personality was not aware of the offense when it was being committed, an insanity instruction would be appropriate. The trial court focused exclusively on the acting personality – the personality in control at the time of the offense.

***United States v. Westcott***, 83 F.3d 1354 (11th Cir. 1996) The Insanity Defense Reform Act, 18 U.S.C. §17 does not bar the defense from introducing evidence of a defendant's mental disease or defect in contexts other than reliance on the insanity defense. If the defendant claims that he lacked the mens rea element of the offense as opposed to lacking the capacity to form the mens rea element, he may offer expert psychiatric evidence.

***United States v. Cameron***, 907 F.2d 1051 (11th Cir. 1990) The Court of Appeals holds that the District Court abused its discretion in prohibiting the defendant from raising an insanity defense on the grounds of the defendant's failure to comply with Rule 12.2(a). That Rule requires a defendant to give notice of an intent to raise an insanity defense. The defendant filed a notice entitled "Notice of Intent to Rely Upon Expert Testimony of Defendant's Mental Condition." In response, the government filed various motions relating to the insanity defense including a request that the defendant be examined at the federal prisoner's medical center. The defendant also filed a Motion in Limine requesting a ruling on whether she would be permitted to introduce evidence not only of insanity, but also her diminished capacity. The government sought to bar evidence of the insanity defense because of the defendant's failure to comply with the requirements of Rule 12.2(a). The trial court granted the motion. The

Eleventh Circuit reverses: This amounted to an abuse of the trial court's discretion; the government was clearly aware of the intention of the defendant to raise the defense and the government was not prejudiced. The court also reviewed the admissibility of evidence relating to the diminished capacity defense. The court concludes that Congress meant to eliminate any form of legal excuse based upon one's lack of volitional control. This includes a diminished ability or failure to reflect adequately upon the consequences or nature of one's actions. Thus, "diminished capacity" is not a defense. However, there is a distinction between evidence of psychological impairment that supports an "affirmative defense" and psychological evidence that negates an element of the offense charged. Psychological evidence that aids the trier in determining the defendant's specific state of mind with regard to the actions she took at the time the charged offense was committed is not an affirmative defense but is evidence that goes specifically to whether the prosecution has carried its burden of proving each essential element of the crime, at least when specific intent is at issue. Psychiatric evidence is admissible to negate specific intent to commit the crime. This is not to say that evidence which demonstrates an incapacity to reflect or control the behavior that produces the criminal conduct is admissible. Rather, such evidence must focus on the defendant's specific state of mind at the time of the charged offense. The trial court did not err in excluding the evidence in this case because the defendant failed to establish that the evidence would be admissible under these standards.

***United States v. Owens***, 854 F.2d 432 (11th Cir. 1988) Insanity as an affirmative defense applies to charges of possession of a firearm in violation of federal law. Bailey v. Spears, 847 F.2d 695 (11th Cir. 1988) A habeas petitioner alleged sufficient facts to raise questions about his sanity at the time of the offense, and his competence to stand trial, requiring a remand for the taking of additional evidence.

***United States v. Marble***, 940 F.2d 1543 (D.C. Cir. 1991) The defendant was found competent to stand trial but had a viable insanity defense. However, he refused to enter a not guilty by reason of insanity plea. Reversing prior precedent, the D.C. Circuit concludes that if a defendant is competent to stand trial, he has the right to waive the insanity defense and the trial court is not obligated to instruct the jury on that defense.

## *INTERNAL REVENUE SERVICE SUMMONS*

***United States v. Norwood***, 420 F.3d 888 (8th Cir. 2005) The Eighth Circuit considers, and rejects, various challenges to an IRS summons. Though the IRS was engaged in a criminal investigation, as well as an investigation of unpaid taxes, this did not invalidate the summons. See generally United States v. Powell, 379 U.S. 48 (1964); United States v. LaSalle National Bank, 437 U.S. 298 (1978). The LaSalle National Bank case has limited precedential value in light of the amendment to 26 U.S.C. § 7602(b) which expressly permits the issuance of a summons as part of an investigation into the possibility of a tax offense. The court also considered and rejected a Fifth Amendment challenge to the enforceability of the summons.

***United States v. Peters***, 153 F.3d 445 (7th Cir. 1998) This case contains a comprehensive discussion of the rules that regulate when the IRS civil division is required to cease an audit when the Service determines that a criminal prosecution is indicated. In short, "If, during an examination, an examiner discovers a firm indication of fraud on the part of the taxpayer, the tax return preparer, or both, the examiner shall suspend his activities at the earliest opportunity without disclosing to the taxpayer, the taxpayer's representative, or employees the reason for such suspension."

***United States v. Gertner***, 65 F.3d 963 (1st Cir. 1995) When the IRS issues a subpoena to an attorney to obtain information about a fee-payor who was not identified on an 8300 form, the IRS must comply with the rules governing the issuance of John Doe summonses, including seeking judicial approval, 26 U.S.C. §7609(f). Though the IRS claimed that the summons was designed to obtain information about the law firm (and thus the John Doe procedure was not applicable), the First Circuit agreed with the lawyer that the intent of the IRS was to obtain information about the client, or fee-payor.

***United States v. Michaud***, 907 F.2d 750 (7th Cir. 1990) After the IRS has referred a case to the Justice Department for criminal prosecution, it may not obtain enforcement of a summons issued pursuant to its civil jurisdiction.

***United States v. Argomaniz***, 925 F.2d 1349 (11th Cir. 1991) The Fifth Amendment may be invoked by a taxpayer if he can establish that he is faced with substantial and real hazards of self-incrimination. The Supreme Court has held that the civil and criminal aspects of IRS enforcement are "inherently intertwined." United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978). Therefore, the mere fact that the taxpayer in this case was facing a civil request for documents is not determinative.

## *INTERPRETERS*

***United States v. Murguia-Rodriguez,*** 815 F.3d 566 (9th Cir. 2016) The trial court's failure at sentencing to use an interpreter for the defendant who had used an interpreter throughout the trial, was error and a new sentencing proceeding was required.

***United States v. Hasan***, 526 F.3d 653 (10th Cir. 2008) When the trial court determined during trial that the defendant needed an interpreter, the court should also have determined whether the defendant had been entitled to an interpreter at the grand jury. The defendant was on trial for committing perjury at the grand jury. The Court Interpreters Act, 18 U.S.C. § 1827, requires the appointment of an interpreter during trial and at the grand jury if the defendant needs an interpreter.

***United States v. Huang***, 960 F.2d 1128 (2d Cir. 1992) At the first trial, it was discovered that the interpreter was not properly certified and had at one point been summarizing answers, as opposed to fully interpreting. Two of the four defendants moved for a mistrial, the other two objected to the request for a mistrial. A mistrial was granted. The double jeopardy clause barred a retrial for the two who contested the mistrial. There was no manifest necessity for a mistrial; there was no certainty that the error would

have resulted in a reversal (one of the tests of manifest necessity) and the “summary interpreting” was not shown to have been inaccurate.

***United States v. Mayans***, 17 F.3d 1174 (9th Cir. 1994) Though the trial court allowed the defendant to use an interpreter throughout the course of the trial, when the defendant took the stand and stated that he had been in the country since 1971 (having lived in the U.S. longer than his homeland, Cuba), the trial court removed the interpreter, over objection. The defense attorney complained and then withdrew the defendant as a witness when the judge would not bring the interpreter back. This was reversible error. 28 U.S.C. §1827(d)(1) requires that an interpreter be made available if English is not the defendant’s primary language. The judge in this case made no determination of the defendant’s ability to speak or understand English, insisting, instead, that the defendant “try” English. “Trying” to speak English under oath in front of the jury was not the proper way to make this determination. The attorney explained that the defendant could not express himself in English and this statement was nowhere contradicted by the government or any other evidence.

***United States v. Gomez,*** 908 F.2d 809 (11th Cir. 1990) An interpreter “embellished” on the testimony of a particular witness. This violates the requirement of a continuous word-for-word translation of everything relating to the trial. The translation in this case was plainly improper and resulted in prejudice to the defendant. Nevertheless, it was harmless error.

***Giraldo-Rincon v. Dugger***, 707 F .Supp. 504 (M.D. Fla. 1989) The defendant’s Sixth Amendment rights were violated by the trial judge’s refusal to inquire into his need for an interpreter and his ability to pay for one. The confrontation clause of the Sixth Amendment requires that a defendant be capable of understanding the testimony of the witnesses. Simultaneous translation is required.

## *INTERSTATE OFFENSES*

***Gonzales v. Raich***, 545 U.S. 1 (2005) The United States Supreme Court holds that Congress may outlaw the possession or manufacturing of marijuana even if it is possessed for personal consumption and prescribed by a physician. The potential effect that intrastate, noncommercial cultivation and use of marijuana has on the interstate market for the drug is sufficient to allow Congress to exercise its power under the Commerce Clause to proscribe all production and use. The fact that the state authorized the medical use of marijuana had no bearing on Congress’s power to outlaw its possession or cultivation.

***Taylor v. United States***, --- S. Ct. --- (2016) Proof that a defendant engaged in a robbery of marijuana and money from the victim is sufficient to establish an interstate nexus for Hobbs Act purposes.

***United States v. Morrison***, 529 U.S. 598 (2000) Congress may not regulate noneconomic violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. Therefore, the Violence Against Women Act is unconstitutional.

***Jones v. United States***, 529 U.S. 848 (2000) Arson of a private residence does not affect interstate commerce for purposes of the federal arson statute’s jurisdictional element, even though the residence was insured and mortgaged through out-of-state entities and heated with out-of-state natural gas.

***United States v. Robertson***, 514 U.S. 669 (1995) The defendant was convicted of violating RICO by investing the proceeds of narcotics transactions in a gold mine in Alaska. Employees of the mine were recruited from outside the state; some of the gold was sold outside the state; and some of the equipment was purchased out of state. This satisfactorily established that the mine was “engaged in interstate commerce.” The court of appeals improperly focused solely on whether the operations of the mine “affected” interstate commerce. RICO, however, establishes jurisdiction if the enterprise’s activities affect interstate commerce, or if the enterprise is engaged in interstate commerce. The latter was sufficiently shown in this case.

***United States v. Lopez***, 514 U.S. 549 (1995) The Gun Free School Zones Act outlaw’s possession of a gun in a school zone. This law exceeded Congress’ authority under the Commerce Clause. There is no jurisdictional element of the offense (requiring a demonstrated effect on interstate commerce); nor any congressional finding that such activity affected interstate commerce.

***United States v. Needham,*** 604 F.3d 673 (2d Cir. 2010) A Hobbs Act prosecution requires proof that the offense affected interstate commerce. Even in a robbery involving drugs, the government is required to prove that the offense affected interstate commerce. Because this is an essential element of the offense, the jury must be instructed that they must find that the robbery affected interstate commerce and the failure to do so is reversible error. See United States v. Parkes, infra.

***United States v. Schaefer***, 501 F.3d 1197 (10th Cir. 2007) A child pornography prosecution requires proof that the image traveled in interstate commerce (including via a computer). In this case, the only evidence was that the image arrived via the Internet, but no proof of any interstate nexus. The mere fact that the image arrived over the Internet does not ipso facto establish that the image traveled in interstate commerce. OVERRULED in part by United States v. Sturm, 672 F.3d 891 (10th Cir. 2012).

***United States v. Parkes***, 497 F.3d 220 (2d Cir. 2007) Proof that a defendant’s robbery was designed to obtain illegal drugs – marijuana – is not alone sufficient to establish that the crime involved an effect on interstate commerce. The government must introduce evidence that the marijuana was, or was at least likely, to have traveled in interstate commerce. (The government satisfied its burden in this case).

***United States v. Mann,*** 493 F.3d 484 (5th Cir. 2007) The defendant was convicted of various offenses, including mail fraud, wire fraud, and Hobbs Act, based on stealing motorists’ speeding ticket money. Because the government failed to prove that some of the motorists were traveling interstate, those counts had to be dismissed because of failure to prove a sufficient nexus to interstate commerce.

***United States v. Craft***, 484 F.3d 922 (7th Cir. 2007) While affirming several counts of conviction, the Seventh Circuit held that the arson of the Hells Angels "clubhouse" was not a federal offense, because the clubhouse was not sufficiently connected to interstate commerce. While some of the members' dues were used to pay for members' interstate trips, this was not a sufficient nexus to interstate commerce.

***United States v. Groves***, 470 F.3d 311 (7th Cir. 2006) The defendant was convicted of being a felon in possession of a firearm (a shotgun). The police never recovered the shotgun, but a neighbor testified that he saw the defendant with the weapon. At trial, in order to prove that the gun had traveled in interstate commerce, the prosecutor asked the expert whether any major shotgun manufacturers were located in Indiana. There are not, and, consequently, the expert opined that if the defendant possessed a shotgun in Indiana, it had to have traveled in interstate commerce. The Seventh Circuit reversed. There was no definition of what a "major manufacturer" of shotguns was, and consequently, there was insufficient proof that the defendant's shotgun did, in fact, travel in interstate commerce.

***United States v. Patton***, 451 F.3d 615 (10th Cir. 2006) The Tenth Circuit concluded that the statute that criminalizes the possession of bulletproof vests by felons is unconstitutional insofar as it applies to all bullet-proof vests without proof that the particular vest traveled in interstate commerce. In this case, however, the vest was shown to have traveled in interstate commerce.

***United States v. MacEwan***, 445 F.3d 237 (3rd Cir. 2006) Any use of the Internet in connection with pornography satisfies the interstate commerce requirement, regardless of whether the government introduces evidence that the actual images traveled across a state line. United States v. Reasor, 418 F.3d 466 (5th Cir. 2005) Forged checks that were written on the bank account of a church were not sufficiently connected to interstate commerce to support a federal prosecution for forgery. There were insufficient facts stated during the guilty plea proceeding those the church's activities were "in" or that they "affected" interstate commerce. The factual statement at the guilty plea proceeding was therefore insufficient to support the plea.

***United States v. Chambers***, 408 F.3d 237 (5th Cir. 2005) The indictment alleged that the defendant possessed "rounds" (i.e., bullets) that had traveled in interstate commerce. The rounds were actually manufactured in the same state where they were found in possession of the defendant. The government argued that components of the rounds had traveled in interstate commerce prior to the manufacture of the completed rounds. This amounted to an amendment of the indictment. The evidence was insufficient to support a conviction on these counts of the indictment and the conviction was reversed.

***United States v. Davies***, 394 F.3d 182 (3rd Cir. 2005) The defendant burned a church which bought supplies from out-of-state and graduated students who moved out-of-state. This was insufficient evidence to establish an impact on interstate commerce. Note that this was an arson prosecution, not a prosecution under the church burning statute, as in Ballinger, infra.

***United States v. Maxwell***, 446 F.3d 1210 (11th Cir. 2006) The initial panel decision (386 F.3d 1042) held that a blank computer disk that was transported in interstate commerce (while still blank), and later used to copy child pornography, but that was not transported in interstate commerce afterwards, did not provide federal jurisdiction. The panel held that the pornography must travel in interstate commerce, not just the disk (blank) onto which the pornography is later copied. This case contains a very lengthy analysis of the various theories of interstate commerce. – THIS CASE WAS SENT BACK TO THE ELEVENTH CIRCUIT FROM THE SUPREME COURT FOR RECONSIDERATION IN LIGHT OF GONZALEZ V. RAICH. ---- AND REVERSED on April 20, 2006 – 446 F.3d 1210 (11th Cir. 2006). The new decision held that copying pornography onto a disk that has previously traveled in interstate commerce is a federal offense.

***Waucaush v. United States***, 380 F.3d 251 (6th Cir. 2004) The Sixth Circuit concluded in the RICO case that a gang member who kills a member of a rival gang has not engaged in conduct that satisfies the interstate commerce element of the offense, unless the rival gang was involved in economic activity that affected interstate commerce. In this case, the rival gang was affiliated with another gang that was involved in drug dealing, but the Sixth Circuit held that this was an insufficient connection to interstate commerce. Violence, alone, even when considered in the aggregate, does not affect interstate commerce. See United States v. Morrison, 529 U.S. 598 (2000).

***United States v. Lamont***, 330 F.3d 1249 (9th Cir. 2003) Arson of a church will not necessarily amount to a federal offense, because of the absence of a sufficient nexus to interstate commerce, even if members of the church come from other states, the church has membership in an interstate organization, and there are interstate transfers of church funds.

***United States v. Drury***, 396 F.3d 1303 (11th Cir. 2003) The initial panel decision in this case held that use of a telephone to make an intrastate phone call was not sufficient to create federal jurisdiction under the 2002 version of 18 U.S.C. § 1958, the murder for hire statute. Though the telephone system is an instrumentality in interstate commerce, the statute, as construed by the Eleventh Circuit, requires a call that actually travels in interstate commerce. The element was actually satisfied in this case, because the cell phone call relayed the signal from a place in South Georgia, to a tower in north Florida and then back to the recipient of the call in south Georgia. Though the caller and recipient of the call were in Georgia, the signal actually traveled in interstate commerce. The statute was subsequently amended to specifically provide for a conviction if a facility of interstate commerce was used – i.e., a telephone – even if the call was purely intrastate.

***United States v. Ballinger***, 312 F.3d 1264 (11th Cir. 2002) The Eleventh Circuit panel initially held that there was insufficient interstate commerce evidence to convict the defendant of burning down several churches in rural Georgia in violation of 18 U.S.C. § 247(a)(1). The statute expressly requires proof that the arson be "in or affect interstate commerce." When purely intrastate activity is involved and the government argues that this activity affected interstate commerce, the proof must

demonstrate a “substantial effect” on interstate commerce. REVERSED by the en banc court January 10, 2005. 395 F.3d 1218 (11th Cir. 2005) (en banc). The en banc court upheld the conviction on the theory that the defendant was traveling from state-to-state and burning churches wherever he went, thus satisfying the interstate commerce requirement.

***United States v. Perrotta***, 313 F.3d 33 (2d Cir. 2002) An extortion offense committed against a person who is employed by a company engaged in interstate commerce does not affect interstate commerce simply because the employee misses time at work. United States v. Corp, 236 F.3d 325 (6th Cir. 2001) The defendant’s possession of pornographic pictures of his wife and girlfriend having sexual relations could not be prosecuted under 18 U.S.C. § 2252(a)(4)(B), because of a lack of a sufficient interstate nexus. The fact that the photographic paper was manufactured out of state was not a sufficient nexus. This case was later distinguished in United States v. Andrews, 383 F.3d 374 (6th Cir. 2004). Still later, the Sixth Circuit held that in light of Raich, the decision in Corp was no longer good law. United States v. Bowers, 594 F.3d 522 (6th Cir. 2010).

***United States v. Wilson***, 133 F.3d 251 (4th Cir. 1997) The Clean Water Act does not authorize prosecutions where the water being polluted has not been shown to either be navigable or affect interstate commerce. Regulations promulgated pursuant to the Act which outlaw polluting intrastate non-navigable waters that could affect interstate commerce, were not authorized by the Act and are not constitutional.

***United States v. Leslie***, 103 F.3d 1093 (2d Cir. 1997) The government failed to prove that one of the money laundering transactions in this case affected interstate commerce. Just because the transaction involved a bank does not necessarily mean that interstate commerce was affected.

***United States v. Pinckney***, 85 F.3d 4 (2d Cir. 1996) The government failed to prove that the defendant’s operation of a “chop shop” affected interstate commerce. There was no evidence that the stolen cars were transported to the shop from outside the state, or that the disassembled car parts were sold out-of-state. The failure of proof doomed both the substantive and the conspiracy conviction.

***United States v. Coates***, 949 F.2d 104 (4th Cir. 1991) The murder-for-hire statute, 18 U.S.C. §1958, requires the use of a facility in interstate commerce in connection with the murder for hire scheme. In this case, the only interstate facility was a telephone call placed by the undercover agent to the defendant, across a state line, which was done for the purpose of “manufacturing” jurisdiction. The conviction was reversed. Though the jurisdictional link may be incidental in nature, it may not be contrived.

***United States v. Buffey***, 899 F.2d 1402 (4th Cir. 1990) The government failed to demonstrate that the victim’s effort to pay the defendant’s demands were reasonably likely to affect interstate commerce. Therefore, the defendant’s Hobbs Act conviction was reversed. The court does not rely on the fact that there had been no actual effect on interstate commerce. Rather, the court focused on the fact that if the facts had been as the defendant believed, there would not have been any effect on interstate commerce.

***United States v. Box***, 50 F.3d 345 (5th Cir. 1995) The defendants, a bail bondsman and local law enforcement agents, would arrest people at a roadside rest area and agree to drop the charges after bond had been posted. With respect to the people arrested who had not traveled in interstate commerce, the facts did not show any impact on interstate commerce and the Hobbs Act convictions on these counts would be set aside.

***United States v. Collins***, 40 F.3d 95 (5th Cir. 1994) The defendant stole the victim’s car and cellular phone while he was fleeing from the police after he robbed a restaurant. This latter robbery was not shown to have had a sufficient effect on interstate commerce under 18 U.S.C. §1951(a). The only effect on interstate commerce was the individual’s employment with a company whose business affected interstate commerce.

***United States v. DiCarlantonio***, 870 F.2d 1058 (6th Cir. 1989) The defendant’s Hobbs Act conviction was reversed because of the government’s failure to establish any effect on interstate commerce. The money used to pay the bribe was FBI funds; the sought-after action of the government officials was to permit the use of propane tanks within the city limits. The defendants did nothing which either increased or decreased the flow of propane as the result of the bribe. As a result, there was no effect on interstate commerce by virtue of the money paid or the action undertaken by the officials.

***United States v. Bruun***, 809 F.2d 397 (7th Cir. 1987) A broker who was proved to have received stolen securities did not cause their “transportation” merely by providing a ready market for them. Conviction for interstate transportation of stolen securities was reversed.

***United States v. Johnson***, 56 F.3d 947 (8th Cir. 1995) The car-jacking statute, 18 U.S.C. §2119, requires proof that the vehicle traveled in interstate commerce after it was assembled. It is not enough to prove that the parts of the vehicle were shipped to the car manufacturer from out of state. Therefore, in one count of this case, where the car was assembled in Missouri, the government failed to satisfy this jurisdictional element where the offense was shown to have occurred in Missouri. (Nevertheless, the court did affirm several other counts of conviction, for which the defendant was sentenced to 1,235 months of imprisonment – after which there would be three years of supervised released).

***United States v. Quigley***, 53 F.3d 909 (8th Cir. 1995) Pursuant to 18 U.S.C. §1951(a), it is unlawful to commit a robbery which in any way obstructs, hinders, delays, or affects commerce between the states. In this case, the defendants robbed two hitchhikers who were traveling to purchase beer in another town in the same state. This evidence did not satisfy the interstate commerce element of the offense. Usually, the statute is used in cases where the victim is a business which is involved in

interstate commerce. The fact that the beer which the victims were intending to purchase had traveled in interstate commerce was not sufficient to establish the jurisdictional element of §1951.

***United States v. Flynn***, 852 F.2d 1045 (8th Cir. 1988) Evidence that dynamite traveled in interstate commerce was not sufficient to convict the defendant of transportation and receipt of dynamite in interstate commerce. The only evidence was that the dynamite came from “across the river” which does not sufficiently establish that the dynamite came from another state.

***United States v. Ripinsky***, 109 F.3d 1436 (9th Cir. 1997) An essential element of §1957 money laundering is a financial transaction involving the use of a financial institution that is engaged in, or the activities of which affect, interstate or foreign commerce. The foreign commerce component of this element is an essential element of the offense that must be proven beyond a reasonable doubt and submitted to the jury.

***United States v. Barone***, 71 F.3d 1442 (9th Cir. 1995) The defendants cashed over 130 checks on the accounts of fake, or defunct companies at local casinos or businesses. The defendants were charged with the federal offense of uttering forged securities in violation of 18 U.S.C. §513(a). The victim casinos and businesses had operations which affected interstate commerce. Nevertheless, the companies on whose accounts these checks were drawn were defunct and the statute requires that the securities be of an organization which operates in or the activities of which affect interstate commerce. Because those companies’ activities did not affect interstate commerce, the conviction could not be sustained. It is not enough to prove under §513(a) that the victim organizations affected interstate commerce.

***United States v. Pappadopoulos,*** 64 F.3d 522 (9th Cir. 1995) An essential element of a federal arson prosecution under 18 U.S.C. §844(i) is that the property was used in, or used in any activity affecting, interstate or foreign commerce. In this case, the defendant committed arson on a home which used natural gas which was shipped in interstate commerce. There was no additional showing of an effect on interstate commerce. This evidence did not satisfy the interstate commerce element of the offense. The relationship between the property and interstate commerce must be “substantial,” the court holds, relying on United States v. Lopez. Need to re-examine this case in light of Jones v. United States, 529 U.S. 848 (2000).

***United States v. Cruz***, 50 F.3d 714 (9th Cir. 1995) 18 U.S.C. §922(j) outlaws the possession of a firearm which has been stolen and which has traveled in interstate commerce. The court holds that the government must prove that the defendant knew the firearm was stolen and must also prove that after the gun was stolen it traveled in interstate commerce. It is not enough to prove that at some point in time the gun traveled and thereafter was stolen. In this case the defendant possessed grenades which had traveled in interstate commerce and were stolen in Guam. The defendant possessed the grenades in Guam.

***United States v. Grey***, 56 F.3d 1219 (10th Cir. 1995) The defendant paid $200.00 to a club manager to add to the pool of an illegal video poker game. This was the basis for the defendant’s money laundering prosecution. The government’s argument that the $200.00 in federal reserve notes had traveled in interstate commerce was not sufficient to carry the day on the jurisdictional element that the transaction affect interstate commerce. The government’s theory would mean that all offenses involving currency automatically satisfy the interstate commerce element.

***United States v. Denalli***, 73 F.3d 328 (11th Cir. 1996), modified at 90 F.3d 444 The defendant burned down the house of his next-door neighbor. Because the neighbors’ house was not used, and did not affect interstate commerce, a conviction under 18 U.S.C. §844(i) could not be sustained. The court concluded that to sustain a conviction under the “affecting interstate commerce” theory, the government would have to prove that the residence had a substantial effect on interstate commerce.

***United States v. Frost***, 61 F.3d 1518, modified, 77 F.3d 1319 (11th Cir. 1996), judgment vacated on other grounds, 117 S. Ct. 1816 (1997) The defendants were political rivals of a city council member. They sent an extortion letter to their rival (threatening to expose his extramarital activity if he did not resign). The defendants were charged with a Hobbs Act violation. The evidence, however, failed to establish a sufficient nexus to interstate commerce. Although the indictment sufficiently alleged an interstate commerce nexus, the government’s proof fell short of its intended purpose. The affairs of the city council were linked to interstate commerce; but there was no showing that the resignation of one member of the six-member city council would have impacted the continuing business of that governing body in such a manner as to constitute a violation of the federal statute. Therefore, the extortion threat, if it had succeeded, was not shown to be likely to have the natural effect of obstructing commerce.

## *INTOXICATION DEFENSE*

***United States v. Kenyon***, 481 F.3d 1054 (8th Cir. 2007) Attempt crimes require proof of specific intent to commit the crime. Consequently, a defendant may defend on the basis that he did not intend to commit the crime, even if the crime itself is not a specific intent crime. In this case, the defendant was charged with attempt to commit child sex abuse. He claimed that he was too intoxicated to have that intent. Even though intoxication is not a defense to the crime of sex abuse, it is a defense to the crime of attempt to commit sex abuse. There was sufficient evidence of the defendant’s intoxication in this case to warrant the giving of an intoxication instruction and the failure to do so was reversible error as to those counts.

## *JENCKS ACT*

***United States v. Gonzalez-Melendez***, 570 F.3d 1 (1st Cir. 2009) The First Circuit remands this case to the trial court to make findings regarding whether a “302” amounted to a statement of the witness who was interviewed by the FBI agent. The prosecutor’s statement in court that the 302 was not a “statement” was not sufficient. The judge must make an independent finding whether the interview constituted a substantially verbatim recital of what the witness said, or whether the witness adopted the statement after reviewing it. It is not necessary that a witness physically write or record the statement in order to qualify as a statement. 18 U.S.C. § 3500(e)(1).

***United States v. Hodgkiss***, 116 F.3d 116 (5th Cir. 1997) Law enforcement agents interviewed various co-defendants during the course of the investigation and kept debriefing notes. The agents then testified at trial. The debriefing notes were Jencks material that should have been furnished to the defense, because the testimony of the agents related to the subject of the interviews, the interviews and the testimony related to the defendant's relationship to other members of the conspiracy. The fact that the agents did not expressly rely on the interviews of the co-defendants did not mean that the notes did not qualify as Jencks material. Harmless error.

***United States v. Neal,*** 36 F.3d 1190 (1st Cir. 1994) 18 U.S.C. §3500(e)(2), which requires the disclosure of written or recorded statements of a witness, includes statements which are written by a police officer during an interview of a witness if the written report represents a substantially verbatim account of what the witness said. It is not necessary that the witness’s statement be recorded stenographically or tape recorded.

***United States v. Welch***, 810 F.2d 485 (5th Cir. 1987) A DEA agent made a number of reports in connection with his undercover investigation of a methamphetamine lab. An in-camera hearing was required to determine whether these reports related to the subject matter of the agent’s testimony and thus were “statements” subject to disclosure under the Jencks Act. Since he had drafted the reports, they were clearly adopted by him or were verbatim recitations of his statements.

***United States v. DeFranco,*** 30 F.3d 664 (6th Cir. 1994) During the course of deliberations, the defense learned that it had been deprived of some Jencks material. The trial court erred in simply concluding that the inadvertent failure to produce the material was harmless. Alternative remedies, such as striking the witnesses’ testimony were more appropriate.

***United States v. Tincher***, 907 F.2d 600 (6th Cir. 1990) Despite the defendant’s request for Jencks or Brady material, the government failed to disclose material which clearly fell within the scope of both requests. The prosecutor failed to give to the defendant grand jury testimony of the agent who was testifying. In light of the deliberate misrepresentation of the prosecutor, the conviction was reversed.

***United States v. Allen***, 798 F.2d 985 (7th Cir. 1986) The conviction in this case was reversed because of the trial court’s refusal to conduct an in-camera examination of the FBI reports pursuant to the Jencks Act. The court holds that when it is acknowledged that documents exist but disputed whether these documents contain “statements,” the district court must make an in-camera examination of the documents. The trial court’s accepting the government’s word in this case, that no statements were contained in the documents, is not adequate compliance with the requirements of the Jencks Act. The court also notes that FBI reports, commonly known as 302’s, normally contain “statements” of witnesses.

***United States v. Ogbuehi***, 18 F.3d 807 (9th Cir. 1994) The AUSA interviewed a witness and occasionally read the notes back to the witness. The witness testified that the AUSA would “from time to time” read something back to her and ask if he had it right. She would say, “Yes, that’s what I said” or if it were “no,” he would correct it. Pursuant to Goldberg v. United States, 425 U.S. 94 (1976), this type of statement may have been “adopted” by the witness, even if the witness never actually read the AUSA’s notes, had them read to her in full, or signed them. See also United States v. Boshell, 952 F.2d 1101, 1104 (9th Cir. 1991).

***United States v. Brumel-Alvarez***, 991 F.2d 1452 (9th Cir. 1992) One informant for the government testified that he went to Bolivia and witnessed the source of the cocaine involved in the conspiracy alleged in this indictment. No other cocaine was introduced, seized, or known to have been in possession of any of the defendants. The prosecutor acknowledged in both his opening and his closing that the informant’s testimony was the key to the case. The prosecutor, however, failed to reveal to the defense a memorandum written by a DEA agent who severely criticized the operation and the credibility of the informant. Only a redacted version was provided to the defense. Among other things, the memorandum documented various false claims of the informant and his predilection to “run” the operation. The memorandum also revealed that the informant declined to make undercover calls to the supposed “higher-ups” who were involved in the smuggling venture. The memorandum also qualified as Jencks Act material of the author of the memorandum – the disgruntled DEA agent who testified on behalf of the government.

***United States v. Smith***, 984 F.2d 1084 (10th Cir. 1993) When an attorney alerts the court to the existence of notes reflecting a witness interview, some inquiry is necessary to determine if the notes are producible under the Jencks Act.

***United States v. Rivera Pedin,*** 861 F.2d 1522 (11th Cir. 1988) The Eleventh Circuit reversed this conviction because of a Jencks Act violation. The government was in the possession of a diary of one of its witnesses which contained material statements about the witness having erased a tape which had been produced in connection with the taping of the defendant’s telephone calls.

***United States v. Lloyd,*** 992 F.2d 348 (D.C. Cir. 1993) As an aside in this opinion dealing with Rule 16, the court suggests that a tax return of a witness may be covered by the Jencks Act. This is clearly dictum in the opinion, however.

***United States v. Snell***, 899 F. Supp. 17 (D. Mass. 1995) Witness statements which contain exculpatory information must be produced when Brady information is produced. Just because the information also falls under the Jencks Act does not mean that disclosure may be delayed.

***JUDGES (Motion to Recuse; Removal on Remand) SEE ALSO: PLEA AGREEMENTS (several cases in that section note that after a breached plea agreement, a new sentencing should be conducted before a different judge).***

***Liteky v. United States***, 510 U.S. 540 (1994) 28 U.S.C. §455(a) requires recusal of a judge in any proceeding in which his impartiality may be questioned. The Supreme Court holds: that matters arising out of the course of judicial proceedings – either in this case, or in a prior case – are not a proper basis for recusal.

***Williams v. Pennsylvania***, --- S. Ct. --- (2016) If a judge on the court that is reviewing a conviction was previously the prosecutor who had any decision-making role in the case, the judge must recuse himself. The Court "constitutionalized" via the Due Process Clause the ethical maxim that a person may not serve as both prosecutor and judge.

***Fowler v. Butts***, 829 F.3d 788 (7th Cir. 2016) The defendant filed a § 2254 which challenged, in part, a prior state conviction's eligibility to trigger recidivist punishment, and his state trial counsel's failure to argue against the validity of the state conviction. The federal district court judge presiding over the habeas action was the state could judge who imposed the sentence in the prior case. The judge should have recused.

***United States v. Herrera-Valdez***, 826 F.3d 912 (7th Cir. 2016) The defendant was charged with illegal re-entry. At his initial deportation proceeding, the judge presiding over the current criminal case was the INS District Counsel (though a different lawyer signed the pleadings). This created an appearance of impropriety, and the district judge should have recused himself. The Seventh Circuit also discussed the requirement – unique to the Seventh Circuit – that the denial of a motion to recuse must be immediately challenged by a mandamus petition to the appellate court or the issue is waived. In this case, however, this waiver rule was relaxed, because the defendant promptly entered a conditional guilty plea reserving the right to appeal the denial of the recusal motion.

***United States v. Smith***, 775 F.3d 879 (7th Cir. 2015) In this appeal of a supervised revocation proceeding, a remand to a new judge was necessary because the judge who presided over the revocation hearing had been the AUSA who initially participated in the prosecution of the defendant. This violation of the Judicial Code was not waivable.

***United States v. Hernandez-Meza***, 720 F.3d 760 (9th Cir. 2013) The trial court erred in this case in permitting the government to re-open the evidence and introduce evidence that was not previously produced to the defense as required by Rule 16. The government protested that the defendant's defense was unexpected (it was revealed when the defendant submitted his proposed requests to charge) and that the additional evidence was needed to refute the newly revealed theory of defense. The Ninth Circuit held that allowing the government to re-open the evidence was reversible error. The fact that the new defense was factually not realistic is not relevant, the defense had the right to raise this defense and to point out the gaps in the government's proof. Judge Kozinski wrote, "[A] criminal defendant, unlike the government, needn't have a good faith belief in the factual validity of a defense. So long as the defendant doesn't perjure himself or present evidence, he knows to be false—and Hernandez–Meza presented no evidence at all—he's entitled to exploit weaknesses in the prosecution's case, even though he may believe himself to be guilty. What matters in satisfying the government's burden of proof in a criminal case is not objective reality nor defendant's personal belief, but the evidence the government presents in court. No competent prosecutor would be surprised, based on what he thinks defendant should know, to find defense counsel poking holes in the government's case. The argument is without merit, yet the government made it before the district court, and again on appeal. The government's failure to produce the evidence in its Rule 16 production was not justified. The Rule requires the production of all documents "material to the preparation of the defense." Information is material even if it simply causes a defendant to completely abandon a planned defense and take an entirely different path. If the defendant in this case knew that government had this evidence, the defendant may not have relied on this defense. Moreover, a defendant need not spell out his theory of the case in order to obtain discovery. Nor is the government entitled to know in advance specifically what the defense is going to be. Discovery must still be provided pursuant to Rule 16(a)(1)(E)(i). The Ninth Circuit held that the trial judge's summary rejection of the defendant's Rule 16 argument, as well as his unsupported decision to allow the government to re-open the evidence, required that the case be remanded and that a new judge preside over the case.

***In re Bulger,*** 710 F.3d 42 (1st Cir. 2013) The judge to whom Whitey Bulger's case was assigned following his capture in 2011 held various managerial posts in the U.S. Attorney's Office in Boston that was involved in the investigation of Bulger and his associates' decades earlier. The First Circuit (Justice Souter, sitting by designation), granted a writ of mandamus, requiring the trial judge to recuse himself from presiding over the case.

***United States v. Dreyer***, 693 F.3d 803 (9th Cir. 2012) The defendant, a psychiatrist, developed dementia at the age of 63 and entered into a drug conspiracy. He entered a guilty plea. The Ninth Circuit held that at the sentencing hearing, the judge should have sua sponte ordered a competency hearing. At the sentencing hearing, the defense attorney declined to have the defendant speak, because he didn't know what the defendant would say, and his dementia might lead him to deny responsibility and he might say something inappropriate. This should have prompted the trial judge to order a competency examination. The appellate court also ordered that the case be reassigned to a different judge on remand because of comments made by the trial judge that reflected her premature judgment about the defendant's possible incompetence and his manipulative behavior. See also 705 F.3d 951 (9th Cir. 2013) (opinion regarding denial of rehearing en banc).

***Hurles v. Ryan***, 752 F.3d 768 (9th Cir. 2011) As a matter of due process, a judge who fails the "appearance of impartiality" test may not sit as the judge in the case. In this case, when a pretrial ruling concerning the appointment of additional counsel was appealed, the judge appeared as a nominal party in the appellate court but actually filed a pleading, urging that the ruling was proper and that the simplicity of the case (implying that the evidence of guilt was overwhelming) justified the decision to deny the appointment of two lawyers in this death penalty case. That pleading also questioned the ability of the lawyer who was representing the defendant. The Ninth Circuit held that the state trial judge's participation in the appeal may have rendered her too biased to participate in the death penalty proceedings that ensued in the trial court. A remand for a full evidentiary hearing on the state judge's impartiality was required.

***United States v. Paul***, 561 F.3d 970 (9th Cir. 2009) The Ninth Circuit previously reversed the defendant's 16-month sentence, holding that it was unreasonably harsh. On remand, the district court judge imposed a 15-month sentence. The Ninth Circuit reversed again and ordered a change of judges on remand.

***United States v. Demott***, 513 F.3d 55 (11th Cir. 2008) When a defendant is re-sentenced pursuant to a remand from the appellate court, he has the right to be present. The trial court's summary imposition of the same sentence without announcing findings in open court and without the defendant present was error. On remand, the case would be assigned to a different judge because of the judge's apparent lack of receptivity to the arguments of counsel (because he had not even given them an opportunity to be heard at the last proceeding).

***United States v. Amico***, 486 F.3d 764 (2d Cir. 2007) In this mortgage fraud trial, one of the key government witnesses was a mortgage broker who had previously helped the district court judge obtain a mortgage (before he was a judge). There was considerable controversy surrounding this witness (and whether he had actually submitted false papers in connection with the judge's application). Though the judge clearly was not involved in any misconduct, the appearance of a conflict was such that he should have recused himself. The defendants' convictions were reversed.

***United States v. Quattrone***, 441 F.3d 153 (2d Cir. 2006) Without providing much elaboration, the Second Circuit held that following reversal of the conviction, the case would be assigned to a different judge.

***Franklin v. McCaughtry***, 398 F.3d 955 (7th Cir. 2005) The judge in this case had previously filed a memorandum in another case that referred to Mr. Franklin. A newspaper article was then written about the judge's memorandum. Because the memorandum by the judge (in the other case) complained that when indigent defendants are released on bond pending appeal, they commit more crimes, his impartiality was in question, and he should have recused himself from further participation in this case. The judge had already expressed an opinion that the defendant had in fact, committed the charged offenses.

***In re Nettles***, 394 F.3d 1001 (7th Cir. 2005) Where the defendant is charged with targeting a federal courthouse for bombing, every judge (district court and court of appeals) should recuse himself from any participation in the case.

***United States v. Andrews***, 390 F.3d 840 (5th Cir. 2004) The district court departed upward on the Guidelines, expressing dissatisfaction with the sentence that was dictated by the Guidelines. The Fifth Circuit reversed and held that a remand to a different judge was appropriate in this case.

***United States v. Lentz***, 383 F.3d 191 (4th Cir. 2004) The trial court granted a motion for new trial based on his finding that the AUSA intentionally placed documents (that were not introduced in evidence) into the evidence cart that was provided to the jury during deliberations. The Fourth Circuit held that a new trial was required because of the presence of the inadmissible evidence in the jury room; however, there was no evidence that the AUSA intentionally caused this. In fact, it could have been caused by the trial court's staff. The Fourth Circuit decided on remand that the case should be assigned to a different judge. The trial court could not reasonably be expected to erase the earlier impressions from his mind or might tend to lean over backwards or overreact in an effort to be fair and impartial on retrial. Moreover, the AUSA would be understandably distracted from his task during the retrial.

***Ellis v. U.S. District Court***, 356 F.3d 1198 (9th Cir. 2004) (en banc) When a trial court accepts a guilty plea, but subsequently rejects the plea agreement, the ball is then in the defendant's court as to whether he wishes to withdraw his plea or go forward with sentencing, without the plea agreement in place. The trial court may not simply vacate the guilty plea and proceed to trial. See Rule 11(c)(5), Fed. R. Crim. P. The court reached this conclusion after reviewing the analysis of the Supreme Court in United States v. Hyde, 520 U.S. 670 (1997), which also explained that a trial judge may accept a guilty plea and defer acceptance of the plea agreement; but if the agreement is rejected, then the defendant must be given an opportunity to withdraw the plea. The Ellis court also held that upon remand, the case would be assigned to a different judge.

***United States v. Doe***, 348 F.3d 64 (2d Cir. 2003) The district court judge indicated his displeasure with the government for failing to make a specific recommendation in connection with a § 5K1.1 motion. In a prior case, the judge had refused to reduce a sentence, because of the government's refusal to make a specific recommendation and the Second Circuit reversed that sentence. The Second Circuit in this case ordered that the case be remanded to a different judge because the district court judge's apparent inability to comply with the Sentencing Guidelines.

***In the Matter of Jeffrey C. Hatcher***, 150 F.3d 631 (7th Cir. 1998) The judge assigned to preside over this gang-related trial had a son who was an intern in the U.S. Attorney's office and who had participated in the trial of a closely related case. The judge had watched part of that trial in the audience. The Seventh Circuit concluded that the judge should have recused himself.

***United States v. Anderson***, 160 F.3d 231 (5th Cir. 1998) The trial judge should have recused himself from further participation in this case after the defense counsel testified before a special investigatory committee of the Fifth Circuit Judicial Council which was investigating misconduct of the judge.

***United States v. Avilez-Reyes***, 160 F.3d 258 (5th Cir. 1998) Same facts – and same judge – as United States v. Anderson, 160 F.3d 231 (5th Cir. 1998). Same result, as well.

***United States v. Chantal***, 902 F.2d 1018 (1st Cir. 1990) The fact that a defendant pleads guilty does not waive his challenge to a trial judge's qualifications if the impartiality of the judge is reasonably open to question. Furthermore, the alleged basis for asserting that the judge is biased or prejudiced can be his conduct in a prior judicial proceeding. In this case, the judge had described the defendant as an "unreconstructed drug trafficker." This was in a prior sentencing; now, facing the defendant following his arrest on separate charges, the defendant moved to recuse the judge on the basis of his expressed bias. Because the trial judge refused to even consider the issue because the bias was revealed during a prior judicial proceeding, the First Circuit reverses and holds that the judge must make an adequate record in determining whether he should remain on the case.

***United States v. Brinkworth***, 68 F.3d 633 (2d Cir. 1995) A defendant who pleads guilty unconditionally may still appeal the trial judge's denial of a recusal motion under 28 U.S.C. §455.

***United States v. Diaz***, 797 F.2d 99 (2d Cir. 1986) The trial judge wrote a letter to his Senator complaining about the Court of Appeals decision in this case. The letter urged the introduction of legislation regarding sentence enhancements. Such conduct calls into question the impartiality of the district judge who should have recused himself, permitting re-sentencing to be conducted before a different judge.

***United States v. Antar***, 53 F.3d 568 (3rd Cir. 1995) The defendant was the subject of both a civil SEC action and a criminal contempt action for failing to comply with the court's order in the civil case regarding the return of money. When imposing sentence, the judge stated that his object, "from day one . . . was to get back to the public that which was taken from it." This unambiguously demonstrates that the judge had prejudged the case and lacked the impartiality required. Had the judge announced at the opening of the trial that this was his object, clearly, he would be recused. The fact that he made this disclosure at the end of the trial makes no difference.

***United States v. Furst***, 886 F.2d 558 (3rd Cir. 1989) Following his conviction, the defendant sought to recuse the trial judge from sentencing. The trial court held that this motion was untimely. However, the motion was based on the judge's ex parte comments to the defense attorney about the defendant's failure to enter a plea agreement and his discussion of the sentences which might be imposed. The trial court erred in ruling this motion untimely.

***United States v. Anderson***, 70 F.3d 353 (5th Cir. 1995) The judge's refusal to accept a plea agreement, his refusal to dismiss an indictment at the request of the government and his insistence on using information which would have been used had he been sentenced under the original indictment led the appellate court to vacate the sentence and remand the case to the district court for re-assignment to a different judge.

***United States v. Jordan***, 49 F.3d 152 (5th Cir. 1995) The defendant and an attorney were embroiled in numerous contentious dealings, which resulted, among other things, in the defendant's daughter taking out an arrest warrant on the attorney for assault. The district court judge which tried and sentenced the defendant on charges which related to the transactions for which the attorney was dealing with the defendant, was a good friend and former classmate of the attorney (the trial judge's husband was once a law partner of the attorney and tried to intervene with the district attorney when the attorney was arrested as a result of the defendant's taking out a warrant). There was an appearance of impropriety, and the case would be remanded for resentencing before a district court judge from another district.

***United States v. Goldfaden***, 959 F.2d 1324 (5th Cir. 1992) The government agreed to make no recommendation as to the defendant's sentence. Despite this pledge, the government wrote several letters to the probation officer advocating the use of certain Guideline ranges. This was a violation of the agreement. The fact that the government recommended guideline ranges, rather than a specific number of months or years is inconsequential. On remand, if the court concludes that specific performance is the appropriate remedy, the defendant must be sentenced by a different judge.

***In re Faulkner***, 856 F.2d 716 (5th Cir. 1988) The district judge should have recused himself because a relative with a close relationship to the judge was an important participant in a significant financial transaction forming the basis of the indictment. Furthermore, the relative had communicated to the judge about material facts and related her opinions and attitudes regarding those instances. Though there was no showing of actual bias, under the facts presented, the judge's partiality could reasonably be questioned; thus, recusal was required.

***United States v. Arnpriester***, 37 F.3d 466 (9th Cir. 1994) A district court judge who was formerly a United States Attorney may not sit on any case which was commenced during his tenure in the U.S. Attorney's office.

***Nichols v. Alley***, 71 F.3d 347 (10th Cir. 1995) The Oklahoma Bombing judge, whose chambers were rocked by the explosion, was required to recuse himself.

***United States v. Greenspan***, 26 F.3d 1001 (10th Cir. 1994) After the FBI informed the judge that the defendant had conspired with others to kill him and members of his family, the judge should have recused himself prior to sentencing.

***United States v. Cooley***, 1 F.3d 985 (10th Cir. 1993) The district court judge became embroiled in the Operation Rescue controversy by appearing on "Nightline." Thereafter, he should have recused himself from further participation in the case. The

judge's appearance on television conveyed an uncommon interest and degree of personal involvement which required him to recuse himself from further proceedings in the case.

***Porter v. Singletary***, 49 F.3d 1483 (11th Cir. 1995) Prior to the sentencing hearing in this death penalty trial in Florida (where the trial judge is the ultimate finder of fact), the judge told the clerk, with whom he was drinking coffee, that he was going to listen to the evidence, then sentence the son-of-a-bitch to the chair. This evidence indicated a pre-disposition on the part of the judge to execute the defendant even before the evidence was heard. A remand to develop the record was appropriate.

***United States v. Kelly***, 888 F.2d 732 (11th Cir. 1989) The trial court conducted a bench trial in this drug prosecution. During the trial, the defendant called as a witness an individual who was a close friend of the judge. The judge conducted a private conversation with the witness' wife in chambers and announced to the parties that he was troubled by the use of his friend as a witness. The judge himself stated that he had profound doubts about the propriety of continuing to sit on the case. He explained that he felt confronted by a personal dilemma between his friend and his duty to sit impartially. The judge later accused the defendant of having placed him in this "awkward position." The purpose of 29 U.S.C. §455 is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. The trial judge should have recused himself in this case. Furthermore, the defendant is not capable of waiving this issue. The practice of advising counsel of a possible conflict and asking them to indicate their approval of the judge's remaining in a particular case is "fraught with potential coercive elements which make this practice undesirable."

***United States v. Torkington,*** 874 F.2d 1441 (11th Cir. 1989) Because of the trial judge's actions during the trial, upon remand from the Eleventh Circuit, it would be appropriate for the case to be assigned to a different judge.

## *JUDGES (COMMENTING ON THE EVIDENCE)*

***United States v. Miller***, 738 F.3d 361 (D.C. Cir. 2013) During deliberations, the jury asked several questions about the relationship of certain evidence to certain counts (e.g., "does the phone call on a certain date apply to a certain count of the indictment?"). The judge answered the questions. This amounted to improper commenting on the evidence and required that the conviction be reversed.

***Smith v. Curry,*** 580 F.3d 1071 (9th Cir. 2009) After receiving a note that the jury was deadlocked, the judge read a model Allen charge. That instruction didn't accomplish a unanimous verdict, so the judge provided his "comment" on the evidence that suggested that the jury should focus on the consistencies and inconsistencies in the evidence relating to a particular issue (which of the conspirators committed the sexual assault on the victim). That comment (which strongly favored the prosecution) was unmistakably directed at the hold-out juror. Using the Allen charge jurisprudence as guide, the Ninth Circuit held that this amounted to an impermissibly coercive instruction that tainted the verdict. Though the Constitution does not prohibit judges from commenting on the evidence, in this case, the comment amounted to a denial of the right to a fair and impartial jury deciding the case.

## *JUDGES (MISCELLANEOUS)*

***Jackson v. United States***, 859 F.3d 495 (7th Cir. 2017) If a magistrate makes a credibility determination after hearing live testimony, the district court judge may not reject that credibility determination without conducting a de novo hearing.

***Norris v. United States***, 820 F.3d 1261 (11th Cir. 2016) After the defendant was convicted and sentenced, it was discovered that the judge was engaged in an affair with a dancer at a strip club. She was taping the judge. During the course of this taping, the judge revealed that he was racially prejudiced. The judge was later prosecuted (he participated in a drug deal with the dancer). The defendant successfully persuaded the Eleventh Circuit that he was entitled to a full evidentiary hearing to test the validity of his conviction and sentence. An actually biased judge amounts to a structural error at trial.

***United States v. Harden,*** 758 F.3d 886 (7th Cir. 2014) A Magistrate may not accept a guilty plea. The Magistrate may conduct the plea colloquy and prepare a Report and Recommendation suggesting that the plea be accepted, but it cannot actually accept the plea.

***Brown v. United States***, 748 F.3d 1045 (11th Cir. 2014) A Magistrate may not issue a final ruling on a § 2255 petition. Though a § 2255 petition is often referred to as a civil matter, it is a criminal motion for purposes of the Magistrate's Act, 28 U.S.C. § 636.

## *JUDICIAL MISCONDUCT*

***United States v. Lefsih***, 867 F.3d 459 (4th Cir. 2017) The defendant entered the United States pursuant to a little-known immigration program known as the Diversity Immigrant Visa Program. He was accused of filing a false application because he omitted his traffic citations. During the examination of the government's agent, the judge engaged in lengthy questioning session during which he ridiculed the program (emphasizing that from many countries, the applicant must show that he or she is a doctor, or professional, or engineer, but from the "bottom" countries, you just get to come in on a lottery). This questioning was inappropriate and led the Fourth Circuit to reverse the conviction. When a judge interjects a negative impression of the defendant or conveys a "skepticism" of the defendant's defense, the line has been crossed and the appearance of partiality requires reversal of the conviction. The fact that the judge instructed the jury that he had no interest in the outcome of the case and had no opinion about guilt or innocence did not cure the problem caused by his questioning of the government agent.

***United States v. Rivera-Rodriguez***, 761 F.3d 105 (1st Cir. 2014) When cooperating witnesses testified, the judge questioned them and emphasized that if they testified untruthfully, they would not receive a sentence reduction and were subject to prosecution for perjury. The extensive questioning of the witness by the trial judge was improper. In addition, during closing argument, the prosecutor argued that the defendant, on cross-examination, made a particular statement. The defense attorney objected, and the judge denied the objection adding the comment, “That’s exactly what he said.” Even though this was accurate, it amounted to an improper comment on the evidence. The cumulative effect of these errors required that the conviction be reversed.

***United States v. Ottaviano,*** 738 F.3d 586 (3rd Cir. 2013) The judge’s persistent questioning of the pro se defendant was improper and required reversing the conviction.

***United States v. Barnhart***, 599 F.3d 737 (7th Cir. 2010) The judge’s questioning of witnesses in this case was too prosecution-oriented and would have conveyed to the jury the impression that the judge disbelieved the defendant’s defense. The questioning was more like cross-examination. However, because there was no objection, the appellate court reviewed the error under a plain error standard and concluded that the error was not plain.

***United States v. Melendez-Rivas,*** 566 F.3d 41 (1st Cir. 2009) The judge asked a defense witness questions that elicited the response that the FBI had told the witness that the defendant was involved in a series of felony offenses that could lead to the death penalty. The FBI agents’ statements to the witness were not admissible and the judge’s behavior in eliciting these statements, even though the witness testified that he did not believe the FBI agent’s accusations, required a reversal of the conviction.

***United States v. Blanchard***, 542 F.3d 1133 (7th Cir. 2008) During a suppression hearing, the judge made certain comments and questioned a witness in a manner which revealed the judge’s credibility determination about the witness – that is, that he was lying to protect the defendant (his father). At trial, the witness recanted his defense favorable testimony and provided testimony that directly implicated the defendant. The defense attorney sought to show that the witness changed his testimony because of threats from the prosecutor. The prosecutor responded by showing that it was the judge who initially challenged the credibility of the witness. The dialogue between the judge and the witness at the suppression hearing was introduced to rebut the defense attorney’s theory. This was error. Admitting the judge’s statements was not permissible.

***United States v. Christman***, 509 F.3d 299 (6th Cir. 2007) The district court judge acknowledged that she had had a conversation with the probation officer that affected her view of what an appropriate sentence should be. Prior to entering the written judgment (but after imposing sentence in court), the court revealed this to counsel and decided that a new sentencing hearing should be convened to allow the defendant to respond to the probation officer’s comments. The Sixth Circuit agreed.

***United States v. Barnwell***, 477 F.3d 844 (6th Cir. 2007) During deliberations in this trial, an FBI agent in an unrelated case who was monitoring a wiretap determined that one of the deliberating jurors was possibly contacting people about her deliberations. Two prosecutors (not the trial prosecutors in this case), asked to speak to the judge and explained the situation. The trial prosecutors were aware of this ex parte communication. Over the next day or two, five ex parte meetings were held. The defendant and his attorneys had no idea this was occurring. There were also some meetings with the foreman (these were in the presence of the defense attorney, but he did not know exactly what prompted the meetings). Eventually, a mistrial was declared when the jury was unable to reach a verdict. The ex parte communications remained a secret. A new trial was held, and the defendant was found guilty. After that trial, the events that occurred during the first trial were unsealed and furnished to defense counsel. The Sixth Circuit held that the ex parte communications violated the defendant’s right to counsel and his right to be present at all stages of the proceedings, as well as his right to be tried with an impartial judge. The court set aside the verdict in the second trial, even though it was not directly affected by the ex parte communication. The decision ends with a series of observations about the impropriety of conducting ex parte communications and the necessity of judicial impartiality.

***Lyell v. Renico,*** 470 F.3d 1177 (6th Cir. 2006) The judge’s clashes with defense counsel were so dramatic, and her questioning of witnesses was so one-sided that the defendant was denied due process. Among other instances of her bias was directing the prosecutor to ask questions that would elicit inadmissible evidence and sustaining objections that were never made by the prosecutor. The coup de grace was holding the defense attorney in contempt in front of the jury.

***United States v. Nickl***, 427 F.3d 1286 (10th Cir. 2005) During the defendant’s cross-examination of the supposed principal in the crime with which the defendant was charged, the defendant suggested that the witness pled guilty without a factual basis. The judge interrupted and instructed the jury that they could assume that the principal actually committed the crime, based on the plea agreement and the factual basis that he, the judge, had accepted. This violated Rule 605’s prohibition on judicial testimony.

***Cartalino v. Washington***, 122 F.3d 8 (7th Cir. 1997) The judge who presided at the defendant's jury trial had accepted a bribe from defendant's co-defendant, who proceeded with a bench trial. This may have tainted the defendant's trial, even absent proof that the judge conducted himself in any improper or biased manner and a full evidentiary was necessary.

***United States v. Mortimer***, 161 F.3d 240 (3rd Cir. 1998) During the defendant’s closing argument, the judge left the bench. The Third Circuit concluded that this amounts to a structural error that necessitates reversing the conviction without a showing of prejudice.

***United States v. Tilghman***, 134 F.3d 414 (D.C. Cir. 1998) The trial judge improperly cross-examined the defendant. The tone of the questions telegraphed to the jury the judge's attitude that he doubted the credibility of the defendant's testimony.

***United States v. Saenz***, 134 F.3d 697 (5th Cir. 1998) The trial court's questioning of the prosecution's key witness suggested that he believed the witness's testimony. The court elicited key details of the relationship between the witness and the defendant, and the particulars of the proposed transaction. The court expressed no skepticism of the witness's testimony or questioned the witness's veracity. Then, when the defense counsel was cross-examining the witness, the court interrupted and once again elicited testimony about the proposed drug transaction and after the witness completed answering these questions, the court called a recess for lunch. Once the defendant took the stand, the judge's questioning continued, but rather then asking questions that supported the testimony, the judge asked questions that included phrases such as, "Is that what you are telling this jury?" Considering the judge's participation in the questioning throughout the course of the trial, the defendant was denied a fair trial and the conviction was reversed.

***United States v. Stavroff***, 149 F.3d 478 (6th Cir. 1998) The trial court erred in refusing to allow the defendant to question a cooperating coconspirator about his hopes in entering a plea agreement. The court also criticized the trial judge for sua sponte excluding this line of cross-examination, despite the government's failure to raise an objection. If the trial judge believes that a question posed by the defense is inappropriate, but the government does not object, the trial court should ask the lawyers to approach the bench, rather than taking on an adversarial role with the defense counsel. Harmless error.

***United States v. Filani,*** 74 F.3d 378 (2d Cir. 1996) The judge continuously questioned witnesses in a manner which served only to discredit the defendant. The judge questioned both prosecution witnesses in this manner, as well as the defendant himself. Even the transcript conveyed to the appellate court the tone of incredulity that the judge used in questioning witnesses. The Second Circuit devoted several pages to the historical, as well as practical justification for limiting judicial questioning of witnesses. The court reversed the conviction under the plain error standard because trial counsel did not object to the court's repeated interrogation of his client and the government witnesses.

***United States v. Edwardo-Franco***, 885 F.2d 1002 (2d Cir. 1989) The defendant was convicted of various drug-related offenses. During the course of the trial, the trial judge referred to the Colombian nationality of the defendants. Coupled with various evidentiary rulings which were erroneous the conduct of the trial gave an appearance of bias which warranted a new trial.

***United States v. Victoria***, 837 F.2d 50 (2d Cir. 1988) The manner in which the trial court interrogated the defendants denied them a fair trial. The interrogation was clearly in the mode of cross-examination and compelled the defendants to characterize the law enforcement agents' testimony as either true or false.

***Brown v. Lynaugh***, 843 F.2d 849 (5th Cir. 1988) The defendant was denied a fair trial when the presiding judge testified as a witness for the prosecution. The judge testified about the defendant's escape from the courtroom during a burglary prosecution.

***United States v. Cowan***, 819 F.2d 89 (5th Cir. 1987) The trial judge conducted ex parte conversations with jurors at a time when it was clear that they were deadlocked. This is judicial misconduct and resulted in reversal of the conviction.

***United States v. Segines***, 17 F.3d 847 (6th Cir. 1994) During a pretrial conference, the defense attorney refused to stipulate to the defendant's prior record. The trial court criticized the attorney and stated that unnecessarily requiring a clerk to bring certified records to the trial would "be taken into account at sentencing." Later, during trial, the judge criticized the attorneys for taking too long with the cross-examination; and (out of the jury's presence) remarked that the attorneys were being "extremely obnoxious" and being repetitive with questioning witnesses and making objections. The Sixth Circuit holds that even in the absence of objection, or a motion for a mistrial, this type of judicial misconduct requires reversing the conviction and granting a new trial.

***United States v. Donato***, 99 F.3d 426 (D.C. Cir. 1996) The judge's repeated rebukes of defense counsel, both in front of the jury, and outside their presence, resulted in an unfair trial. In this case, the negative comments directed by the trial judge to the defense counsel (and on some occasions to the defendant herself, when she was testifying) warranted reversal because they revealed such a high degree of favoritism and antagonism as to make fair judgment impossible.

## *JUROR MISCONDUCT / EXTRINSIC EVIDENCE / ISSUES DURING DELIBERATIONS*

Generally, cases involving ex parte communications between the court and a deliberating jury are collected in the topic "Defendant's Right to Be Present" Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) The Supreme Court held that where a juror during deliberations makes a clear statement that indicates he or she relied on racial stereotypes to convict a defendant, the right to a jury trial under the Sixth Amendment requires that the trial court inquire into the circumstances of the statements, the effect it had on other jurors and whether the statements had an impact on the verdict. FRE 606, which generally bars any evidence about the contents of the deliberations must yield to the constitutional right to a fair trial in this situation.

***Tanner v. United States***, 483 U.S. 107 (1987) Evidence that jurors had consumed alcohol during their deliberations was not admissible to impeach their verdict. Not only was such evidence inadmissible to impeach the verdict but the defendant's Sixth Amendment right to a trial by an impartial jury was not violated.

***United States v. Pagan-Romero***, 894 F.3d 441 (1st Cir. 2018) It is not proper to send a dictionary into the jury room during deliberations at the request of the jury. In this case, the judge granted the jurors' request over the objection of trial counsel. The subsequent investigation into this error, however, revealed no prejudice.

***United States v. Lanier***, 870 F.3d 546 (6th Cir. 2017) During deliberations, a juror called an assistant district attorney (a state A.D.A. who was not involved in the case) and said that there was a problem with the jury. The prosecutor told the juror she could not discuss the case and advised the juror to contact a bailiff. This encounter was not discovered until after trial. The Sixth Circuit holds that a Remmer hearing should have been held, because the contact was intentional, not incidental.

***Godoy v. Spearman***, 861 F.3d 956 (9th Cir. 2017) An alternate juror provided a declaration that another juror, throughout the course of trial, repeatedly said that she was communicating with “a judge up north” and that the juror was passing on messages to other jurors about the information learned from the judge. The state trial court declined to conduct a hearing into this issue, because the declaration did not, on its face, establish prejudice. The Ninth Circuit remanded the case to the district court that was considering the habeas petition. The declaration established (if true) that there was inappropriate outside influence on the jury that was potentially prejudicial. The hearing itself, not the declaration, is the place to determine whether the state could rebut the presumption that the outside influence was actually prejudicial.

***United States v. Zimny***, 857 F.3d 97 (1st Cir. 2017) The defendant, post-trial, learned that one (or perhaps more than one) juror reviewed blog posts about the case (and about how evil the defendant was) during trial. The First Circuit remanded the case to the district court for further development of the record. (See 848 F.3d 458 for the initial appeal, which instructed, “A district court judge does not have discretion to refuse to conduct any inquiry at all regarding the magnitude of the taint-producing event and the extent of the resulting prejudice if confronted with a colorable claim of juror misconduct.”). The defendant moved for bond pending appeal. 18 USC § 3143(b)(1). The district court denied the request and the defendant immediately appealed and the First Circuit reversed, holding that the issues presented were sufficient to necessitate bond pending appeal. The defendant was neither a danger to society nor a flight risk which was evidenced by the district court’s willingness to allow him to self-surrender after sentencing. The First Circuit held that the facts relating to the jury misconduct were sufficient to satisfy the “substantial question of fact” prong and the “likelihood of reversal if facts were proven” prong of the bond pending appeal statute.

***Tarango v. McDaniel***, 837 F.3d 936 (9th Cir. 2016) After the jury convicted the defendant, a juror wrote to the judge and the defense attorney advising them that during the second day of deliberations, a police squad car followed him for several miles, and this unnerved him and caused him to change his vote to guilty. The trial court failed to conduct an adequate hearing to determine whether this conduct occurred and whether it tainted the verdict. The state trial court only inquired into whether this amounted to a “communication” but failed to inquire into whether it was an impermissible “contact” that was prejudicial. See Parker v. Gladden, 385 U.S. 363 (1966).

***United States v. Mix***, 791 F.3d 603 (5th Cir. 2015) The defendant was charged with obstruction of justice in connection with his role in the Deepwater Horizon investigation. In a separate case, other defendants were charged with similar offenses. One juror, on an elevator during the trial, overheard people talking about the other people who were charged with similar offenses. During deliberations, this juror reported to the other jurors that she heard something in the elevator that this “gave her comfort in voting guilty.” The other jurors told her not to reveal what she heard. When this was learned after trial, the defendant filed a motion for new trial. The district court, based on the juror’s acknowledgment that she heard this comment in the elevator (though she denied that this influenced her) granted a new trial. Even though the juror did not reveal the information to the other jurors, she “vouched” for the guilty verdict based on information that was extraneous to the evidence at trial. The Fifth Circuit affirmed.

***United States v. Parse***, 789 F.3d 83 (2d Cir. 2015) During voir dire, a juror hid the fact that she was a disbarred attorney, an alcoholic and that she had a criminal record. There was some evidence that the defense attorneys were aware of these facts at some point during the trial and did not alert the court to their discovery. Nevertheless, the Second Circuit reversed the defendant’s conviction.

***United States v. Miller***, 738 F.3d 361 (D.C. Cir. 2013) The trial court’s response to certain jury notes that questioned the evidence amounted to an improper interference in the jury’s deliberations. The judge confirmed for the jury, in response to one note from the jury that a certain wiretap call related to a specific count. Eliminating confusion is not the proper role of the judge during the deliberations. In response to other notes, the judge directed the jury to evidence supporting the charge about which the jury inquired. The responses to the jury questions also confirmed that the indictment had a specific scope, but once the case is submitted to the jury, it is up to the jury to decide whether the prosecution had met its burden of proof. The D. C. Circuit reversed all counts to which these jury notes related.

***Hurst v. Joyner***, 757 F.3d 389 (4th Cir. 2014) During this death penalty trial, one juror went home during deliberations and discussed the difficulty of reaching a sentencing decision. Her father gave her the passage in the Bible that refers to “an eye for an eye”. The state court concluded that relief was not required. The Fourth Circuit holds that the state court failed to properly apply the presumption of prejudice required by Remmer and remanded for a hearing on prejudice.

***Barnes v. Joyner***, 751 F.3d 229 (4th Cir. 2014) During the deliberations in the state death penalty case, one juror brought a Bible into the jury room and another juror announced that she had consulted with her pastor. The pastor apparently explained that returning a death sentence would not be a sin. The juror shared the passage from the Bible that the pastor recommended. The Fourth Circuit held that this outside influence required further evidentiary hearings to determine whether there was actual prejudice.

***United States v. Haynes***, 729 F.3d 178 (2d Cir. 2013) The trial judge erred in failing to inquire whether there were premature deliberations and the possibility that the jurors rejected the presumption of innocence when it was learned that a couple jurors had discussed prior to the commencement of deliberations the fact that the defendant was guilty because she was being tried.

***Hall v. Zenk***, 692 F.3d 793 (7th Cir. 2012) The Remmer presumption of prejudice when an outside source of information invades the jury is clearly established constitutional law and the state court’s failure to apply the presumption required that a remand was required to allow the state to show an absence of prejudice. Remmer v. United States, 347 U.S. 227 (1954).

***United States v. Lawson***, 677 F.3d 629 (4th Cir. 2012) During deliberations, a juror consulted Wikipedia and looked up the term "sponsorship" that was at the heart of the criminal prosecution in this case. She shared with the other jurors the definition. The Fourth Circuit held that the conviction had to be reversed, because the government could not overcome the presumption of prejudice. The court's opinion includes a lengthy discussion of the scope of permissible testimony of jurors under Rule 606(b) and the burden on the government to establish a lack of prejudice, as well as the presumption of prejudice.

***United States v. Blitch***, 622 F.3d 658 (7th Cir. 2010) During the course of jury selection, jurors became concerned for their safety. The judge declined the defense request to question the jurors individually, but simply advised the jurors as a group not be concerned for their safety. This was insufficient and the conviction was reversed. The trial court must do more than the judge did in this case to ensure a fair jury which does not start a trial with fear of the defendants.

***Ward v. Hall***, 592 F.3d 1144 (11th Cir. 2010) The Eleventh Circuit granted a writ of habeas corpus, setting aside a death sentence, where the petitioner established that during the penalty phase deliberations, two jurors asked a bailiff whether a sentence of life without parole an available sentence was. At that time, such a sentence was not available in Georgia. The bailiff responded that only life and death were available. Had the bailiff passed the message on to the judge and the judge responded, the proper response would have included the admonition that "life means life" and the jury should not consider the possibility of parole. Because the bailiff provided inaccurate or incomplete advice, the inappropriate contact was not harmless, and the death sentence was vacated.

***United States v. Villar***, 586 F.3d 76 (1st Cir. 2009) A judge who learns of possible juror prejudice in the jury room (racial prejudice, for example), is not powerless to conduct an inquiry. Though Rule 606(b) does not allow questioning of the jury to impeach the verdict, the judge may inquire – assuming there is a sufficient foundation for doing so – whether ethnically biased statements were made during deliberations and, if so, whether these comments affected the outcome of the trial. The authority to conduct such an inquiry is based on the Fifth Amendment Due Process Clause and the Sixth Amendment right to a trial by an impartial jury.

***United States v. Bristol-Martir***, 570 F.3d 29 (1st Cir. 2009) During jury deliberations, it was learned that a juror had gone home at night and done research on the Internet regarding the terms "possession with intent to distribute" and other terms in the case. The judge questioned the juror about this conduct and also talked to the foreman. However, the judge failed to interview all the other jurors (as a group, or individually) to determine whether they were influenced by what the errant juror had done or said during the deliberations. The trial court abused its discretion in the manner in which it investigated the misconduct. A new trial was required.

***United States v. Villar***, 586 F.3d 76 (1st Cir. 2009) If there is information that indicates that during jury deliberations the jury relied on racial bias, Rule 606(b) does not prevent the court from making inquiry to determine if racial bias placed a part in the deliberations and verdict.

***Oliver v. Quarterman***, 541 F.3d 329 (5th Cir. 2008) A Bible in the jury room during deliberations. The Fifth Circuit explores the various cases that have considered this issue, and concludes that it violates the Sixth Amendment, but then finds harmless error, because the state court concluded that it was not prejudicial and the habeas petitioner could not rebut this factual finding.

***United States v. Vasquez-Ruiz***, 502 F.3d 700 (7th Cir. 2007) Jurors took notes in notebooks during the course of trial. During trial, someone (other than the juror) wrote "GUILTY" in one of the jurors' notebooks. She complained that she found this intimidating. The government failed to establish that this was not prejudicial.

***United States v. Simtob***, 485 F.3d 1058 (9th Cir. 2007) On the second day of trial, a juror reported to the court that the defendant had been "eyeballing" the juror and the juror felt uncomfortable. The defendant asked that the juror be questioned about this feeling of intimidation, but the judge refused. This rendered the trial unfair, and the conviction was vacated, though the appellate court remanded the case to the trial court to determine whether an interview of the juror at this time would enable the court to determine whether there actually was any prejudice or sharing of information from this juror to the other jurors.

***United States v. Vitale***, 459 F.3d 190 (2d Cir. 2006) After trial, it was learned that the husband of one of the jurors worked with the prosecutor's husband. Though there was no reason to suspect any inappropriate contact, the proper course of action to take in this situation is to conduct a hearing to determine the circumstances. Among other questions is why the prosecutor did not say anything, when, during voir dire, the juror stated that both she and her husband worked at the same place where the prosecutor's husband worked.

***United States v. Rosenthal***, 454 F.3d 943 (9th Cir. 2006) During deliberations, a juror called a lawyer friend to ask advice. The lawyer responded that the juror should follow the court's instructions, explaining that she could get into trouble if she did not. The Ninth Circuit held that this outside influence tainted the verdict. Learning that she "faced trouble" for a particular conclusion was an improper influence on the jurors' deliberations. A juror who fears retribution might change his or her determination of the issue for fear of being punished.

***Conaway v. Polk***, 453 F.3d 567 (4th Cir. 2006) A juror who sat on this case was a cousin of a co-defendant who testified for the state. The habeas court should have conducted a further inquiry into this claim to determine whether an honest answer to the voir dire would have resulted in a challenge for cause.

***Brooks v. Dretke***, 444 F.3d 328 (5th Cir. 2006) on rehearing from 418 F.3d 430. The Fifth Circuit re-affirmed its earlier decision holding that the arrest of a juror, midtrial, on weapons charges (i.e., coming into the courthouse with a gun), required that the sentencing phase of this death penalty case be retried.

***Wisehart v. Davis***, 408 F.3d 321 (7th Cir. 2005) A juror provided an affidavit decades after trial that she learned that the trial was delayed one day because the defendant was taking a polygraph. She did not hear what the results were. This affidavit from the juror should have prompted a hearing to determine what else she heard. See Remmer v. United States, 347 U.S. 227 (1954).

***United States v. Lentz***, 383 F.3d 191 (4th Cir. 2004) During deliberations, two-day planners authored by the kidnapping/murder victim were inadvertently sent into the jury room (only two pages of the day planner had been admitted in evidence). This was prejudicial and required setting aside the conviction.

***Oswald v. Bertrand***, 374 F.3d 475 (7th Cir. 2004) The defendant was tried for a highly publicized murder. Jury selection lasted several days. Towards the end of the process, a juror revealed that all the prospective jurors were talking about the case while awaiting their turn to be voir dire. The trial court took inadequate steps to determine if these discussions had poisoned the jury and the Seventh Circuit granted a writ of habeas corpus: "The due process clause of the Fourteenth Amendment entitles a state criminal defendant to an impartial jury, Morgan v. Illinois, 504 U.S. 719 (1992), which is to say a jury that determines guilt on the basis of the judge's instructions and the evidence introduced at trial, as distinct from preconceptions or other extraneous sources of decision. . . In addition, due process requires the trial judge, if he becomes aware of a possible source of bias, to determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial." Remmer v. United States, 347 U.S. 227 (1954); Smith v. Phillips, 455 U.S. 209 (1982). The court noted, but held that it was not determinative, that the defendant did not move for a change of venue, though one would have been granted if requested.

***Caliendo v. Warden of California Men's Colony***, 365 F.3d 691 (9th Cir. 2004) During the trial, the lead detective talked to three jurors during a lunch break. The conversation lasted about twenty minutes and addressed his heavy workload, baseball, exercise and other matters unrelated to the evidence in the case. The detective's testimony at trial was central to the guilt or innocence of the defendant. The Ninth Circuit held that the state failed to overcome the presumption of prejudice. Mattox v. United States, 146 U.S. 140 (1892); Turner v. Louisiana, 379 U.S. 466 (1965). Where there is a de minimis contact between a juror and a witness, the defendant must demonstrate that the contact could have influenced the verdict. But where the communication is possibly prejudicial, not de minimis, the prosecution must overcome a presumption of prejudice with a showing that that there is no reasonable possibility that the communication will influence the verdict. Whether the communication related to the evidence is only one factor to consider. The length of time that the contact lasted is another factor; so is the identity and role at trial of the parties involved; the possibility of eliminating the prejudice through a limiting instruction; and evidence of actual impact.

***United States v. Rutherford***, 371 F.3d 634 (9th Cir. 2004) During the defendant's tax evasion trial, several IRS agents sat behind the prosecution table. Post-trial interviews with jurors indicated that some of them felt intimidated by the agents. The lower court held that the defendant had to prove that the government acted with the intent to intimidate the jurors. The Ninth Circuit, however, held that the defendant was only required to prove a prejudicial impact on the jury; the defendant was not required to prove that this was the government's intent. A remand for further development of the record was required. The defendant should be permitted to introduce evidence regarding the jurors' perceptions of the agents' conduct and any discussions among the jurors concerning the possibility of IRS retaliation if they voted to acquit.

***Sanders v. Lamarque***, 357 F.3d 943 (9th Cir. 2004) Though the state trial judge did not intend to elicit the numerical division from the deliberating jurors, the colloquy with individual jurors unmistakably conveyed the information that there was one hold-out: juror number 4. The judge also learned that Juror 4 was not entirely honest during voir dire – according to the state, she failed to answer correctly certain questions about her children's' gang affiliation and her prior residences. Actually, however, her answers were correct. Excusing this juror during deliberations was error and required granting a writ of habeas corpus.

***United States v. Peters***, 349 F.3d 842 (5th Cir. 2003) During deliberations, the foreman sent out a note indicating that he was "not going to take insults and I ask to be relieved." The parties agreed that the judge could talk to the juror in chambers alone. During the course of the meeting, however, the conversation between the court and the juror included a revelation about the current status of deliberations (11 – 1), the prospects of a mistrial including a discussion akin to an Allen charge, and even a short explanation of the law, i.e., a substantive charge on the law. Conviction reversed.

***Williams v. Price***, 343 F.3d 223 (3rd Cir. 2003) The state trial court's refusal to consider certain post-verdict evidence relating to the overt racial hostility of certain jurors was erroneous and violated the defendant's right to due process. The Constitutional basis for this holding is the defendant's right to have a juror which answers questions honestly during voir dire (which, in this case, included questions dealing with racial bias). See Tanner v. United States, 483 U.S. 107 (1987). The Third Circuit concludes that the "no impeachment of verdict by a juror" rule may be enforced. However, some of the information was recited by people to whom jurors had expressed racial hostility and other information related to extraneous information that was heard by the jurors during the deliberations.

***United States v. Tucker***, 137 F.3d 1016 (8th Cir. 1998) The defendant was the Governor of Arkansas. One of the jurors failed to reveal during voir dire that the father of one of her children had sought clemency from the Governor. An evidentiary hearing was necessary to develop the facts of this claim. See generally McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984). An evidentiary hearing was also necessary to inquire into the allegations that the juror's husband talked to her during the course of trial.

***United States v. Sylvester***, 143 F.3d 923 (5th Cir. 1998) The trial court improperly engaged in ex parte communications with jurors during its investigation of jury tampering. A couple jurors advised the judge that they had been called at home at night and one had actually been approached at his home. The judge questioned the jurors and determined that there was no prejudice and

allowed the jurors to continue them service. Thereafter, the judge advised the parties of the incidents and his inquiries. This procedure violated the defendants' rights to be present during all phases of the trial.

***United States v. Keating***, 147 F.3d 895 (9th Cir. 1998) The defendant was tried in federal court for bank fraud, securities fraud, and related charges. He was previously convicted in state court for the same conduct. Following his conviction in federal court, it was determined that at least one juror, and perhaps more, knew about his state conviction learning about it during the federal trial, and discussed it with other jurors during deliberations. The trial court properly set aside the verdict and granted a new trial. Moreover, this evidence supported vacating the co-defendant's conviction, as well. "When a finding of guilt is dependent upon a connection between defendants, collateral information clearly prejudicial to one defendant is not harmless to the other defendant."

***Dyer v. Calderon***, 151 F.3d 970 (9th Cir. 1998) In this death penalty prosecution, the jurors had been asked if they, or any family member or close relative had been the victim of any type of crime. One juror's brother had been shot in the back of the head after being pistol-whipped. She did not respond and when later confronted with this discrepancy, she said that she thought his death was an accident, not a crime. The prosecutor in this case had also prosecuted the perpetrator in that case. The juror also did not respond to a question about relatives accused of crimes, despite the fact that her husband was prosecuted for rape, her uncle was arrested for murder and her father was arrested for kidnapping. In a bizarre twist, after the conviction and death sentence was imposed, the juror became a guard with the Department of Corrections and served as a guard on death row in San Quentin, where Dyer was being held awaiting execution. The Ninth Circuit ordered that the writ of habeas corpus be granted.

***United States v. Herndon***, 156 F.3d 629 (6th Cir. 1998) During deliberations, the court learned that a juror realized that he may have had business dealings with the defendant previously. The trial court declined the defendant's request to interview the juror and told the jurors to continue deliberating. This was error. This was an "extraneous" influence and there was no Rule 606(b) bar to questioning the juror about any influence that might have on his deliberations.

***United States v. Gaston-Brito*,** 64 F.3d 11 (1st Cir. 1995) The defense attorney claimed that during a witness's testimony, the case agent who was sitting at the prosecutor's table pointed to the defendant when the witness had trouble identifying the defendant. The trial court's failure to investigate this charge required that the conviction be reversed. Any unauthorized communication between jurors and persons associated with the case is presumptively prejudicial and obligates the court to conduct a sufficient inquiry to determine whether the communication was harmless.

***United States v. Resko***, 3 F.3d 684 (3rd Cir. 1993) Jurors acknowledged during the course of trial that they had discussed the case among themselves. The trial court erred in merely asking each juror to state that he or she had not yet formed an opinion. Rather, an inquiry should have been conducted into the nature of the conversation and each juror should have been addressed individually, rather than allowing the group to submit written answers to the question regarding their ability to keep an open mind.

***Keller v. Petsock***, 853 F.2d 1122 (3rd Cir. 1988) A habeas petitioner contended that a juror asked to see the judge during deliberations, but a bailiff informed them that they could not see the judge. This presents grounds for an evidentiary hearing and possibly habeas relief.

***United States v. Cheek***, 94 F.3d 136 (4th Cir. 1996) The defendant was tried with a co-defendant. During the trial, the co-defendant attempted to bribe one of the jurors. This triggered a presumption of prejudice against the defendant which the government failed to rebut.

***Stockton v. Virginia***, 852 F.2d 740 (4th Cir. 1988) During a recess in the defendant's death penalty trial, a number of the jurors were approached by the owner of a restaurant who informed them that they should "fry the son-of-abitch." The Fourth Circuit holds that such unauthorized conduct during jury deliberations creates a presumption of an unfair trial and absent rebuttal by the government, habeas relief is warranted.

***United States v. Luffred***, 911 F.2d 1011 (5th Cir. 1990) The defendant's conviction was reversed because the jury was permitted to bring into its deliberating room a chart reflecting the government's theory of the case which blurred the evidence. The chart had never been admitted into evidence but had been used as a trial aid during the government's closing argument. Obviously, the jury considered it important because the jury specifically requested to see the chart during its deliberations.

***United States v. Williams***, 817 F.2d 1136 (5th Cir. 1987) During the course of this trial, there was substantial publicity about the evidence. The trial court refused to voir dire the jury regarding the effect of the mid-trial publicity. The Court of Appeals reverses the conviction holding that mid-trial voir dire is appropriate in these circumstances.

***United States v. Smith***, 31 F.3d 469 (7th Cir. 1994) During the course of trial, the jury asked to see the judge and, in private with the judge, expressed fear that their addresses were known to the defense based on a juror questionnaire which had been distributed to the lawyers. The judge ordered that these questionnaires be returned to the jurors and also instructed the jurors, in private, that there was no need to be fearful. This communication with the jury outside the presence of the defense counsel was erroneous and required reversing the conviction. The judge's communication with the jury was more than a simple house-cleaning manner but involved an issue which was fundamental: the dangerousness of the defendant and whether the defendant had already been adjudged by the jury to be guilty.

***United States v. Smith***, 26 F.3d 739 (7th Cir. 1994) A juror indicated that she had received a "visitor" and that this caused her some concern. There was some indication that this juror communicated this fact to other jurors before she was excused. The trial court should have inquired of other jurors whether this juror's statement in any way affected their deliberations.

***United States v. Brown***, 108 F.3d 863 (8th Cir. 1997) During the trial, new accounts of the guilty plea of a corporate co-defendant were read by certain jurors. After trial, questioning of the jurors revealed that some of the jurors considered this information in their deliberations. This extraneous influence on the jury's deliberations supported the trial judge's decision to grant a new trial.

***United States v. Swinton***, 75 F.3d 374 (8th Cir. 1996) After the defendant was convicted, a juror contacted the defense attorney and revealed that one of the other jurors had informed the jury that the defendant had a prior conviction. This was true, but there was no evidence of this prior conviction admitted at trial (in fact, any mention of it was prohibited). Further inquiry into this matter was not barred by Rule 606(b). The inquiry would not focus on the mental processes of the jurors, but on the possibility that they were tainted by information from a source outside the courtroom.

***Dyer v. Calderon***, 151 F.3d 970 (9th Cir. 1998) Bias must be presumed when a juror, during voir dire lies about significant and material matters. Here, the juror, in a death penalty case, failed to reveal that her brother had been the victim of a homicide and that other family members (including herself) had been victimized by crimes and had perpetrated crimes.

***United States v. Keating***, 147 F.3d 895 (9th Cir. 1998) The defendant's federal conviction for RICO, bank fraud and related charges was tainted by the knowledge of certain jurors – learned during the course of the trial – that the defendant had been convicted in state court for the same conduct. The jurors discussed this during deliberations.

***Lawson v. Borg,*** 60 F.3d 608 (9th Cir. 1995) A juror learned from sources around town that the defendant had a violent reputation. He relayed this information to the other jurors during their deliberations. Jury exposure to facts not in evidence deprives a defendant of the rights to confrontation, cross-examination and assistance of counsel embodied in the Sixth Amendment. Among the factors which the court considers in determining whether extrinsic evidence requires a new trial are the following: (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of whether the introduction of extrinsic material substantially and injuriously affected the verdict. Weighing each of these factors in this case resulted in a determination that a habeas writ would be granted.

***United States v. Harber***, 53 F.3d 236 (9th Cir. 1995) After the jury returned its verdict, the parties learned that the jury had the 56-page case agent's report in the jury room during deliberations. It was evident that the jurors had read the report. The government failed to establish that this did not prejudice the defendant. In such cases, the burden is on the defendant to prove that the extrinsic evidence was in the jury room and that the jurors were aware of the extrinsic evidence. Where the intrusion into the jury's deliberations is by a law enforcement agent, the prejudice to the defendant is presumed. To overcome this presumption, the government must show beyond a reasonable doubt that there was no prejudice to the defendant.

***United States v. Navarro-Garcia***, 926 F.2d 818 (9th Cir. 1991) The defendant voluntarily opened her trunk at the border, revealing several hundred pounds of marijuana. She claimed that she had no idea the marijuana was in there. During a recess, a juror conducted a test to determine whether that much weight in the trunk would be noticeable to the driver. Such out-of-court experiments constitute extrinsic evidence. If such evidence affected the verdict, then a new trial would be necessary. The trial court erred in not holding an evidentiary hearing to inquire into this incident.

***Marino v. Vasquez***, 812 F.2d 499 (9th Cir. 1987) Two instances of jury misconduct lead to a reversal of the defendant's murder conviction. First, one juror used a dictionary to ascertain the definition of "malice." Second, a juror and a non-juror conducted an experiment with a handgun to evaluate the defendant's theory of defense. The juror then reported back to the jury that the defense was not plausible. The jury had been out for 40 days in this case prior to the experiment leading to the juror changing his mind.

***United States v. Scisum***, 32 F.3d 1479 (10th Cir. 1994) Just before the jury returned to announce its verdict, one of the jurors told a marshal that she could not join the others in the courtroom to announce the verdict. The juror spoke privately with the judge and expressed a desire not to face the defendant with the verdict (apparently because of her dissatisfaction with the verdict, not because of fear). The judge gave the juror a Kleenex and suggested she step in the restroom. This was an improper ex parte communication with a juror which required that the conviction be reversed. Among other problems was the failure of the trial judge to alert the attorneys that this communication had occurred so a hearing could be conducted to determine if there was any prejudice. At a minimum, counsel should have been notified immediately that the juror was in distress and a hearing could have been held to question the juror about her problem.

***Burton v. Johnson***, 948 F.2d 1150 (10th Cir. 1991) Defendant was charged in state court with killing her husband. She defended on the basis of the battered wife syndrome. A juror was the victim of spouse abuse but failed honestly to answer specific questions about this during voir dire. The juror lied about her background even during the new trial motion. This was a basis for federal habeas relief. This juror was clearly dishonest about a material matter which affected the defendant's choice of peremptory strikes. The reason that the juror did not answer these questions was because the voir dire was conducted in open court, and was not sequestered, as requested by defense counsel.

***United States v. Martinez***, 14 F.3d 543 (11th Cir. 1994) During the deliberations, a juror read a newspaper article about the case and reported to the other jurors about the possible sentence of the defendant, as compared to the informants. What followed was a lengthy interrogation of all the jurors, inquiring into what the jurors heard and what they would consider and put

out of their minds. Certain jurors were removed, and alternates were added. Prejudice is presumed whenever there is extrinsic contact with the jury. In this case, the government failed to overcome this prejudice.

***United States v. Heller***, 785 F.2d 1524 (11th Cir. 1986) The defendant was convicted of tax evasion. During the course of deliberations, one juror advised the court that a number of religious slurs were being used during the deliberations. The jurors were questioned and assured the court that they would not let these prejudicial comments influence their deliberations. It was also learned that one of the jurors had contacted an accountant to ask questions about the defense offered by the defendant. The Eleventh Circuit reverses the conviction, Judge Tuttle noting that "the religious prejudice displayed by the jurors was shocking to the conscience and damaging to the public confidence in our system of justice."

***United States v. Boney***, 68 F.3d 497 (D.C. Cir. 1995) A juror lied during voir dire, failing to reveal that he had a felony conviction. A post-trial hearing was held to determine if "actual bias" justified granting a new trial. At the hearing, the lower court committed two errors: first, the court erred in refusing to permit the defense attorney to question the juror. Moreover, the judge only asked the juror two very general questions about his bias, and this was not a sufficient inquiry into the juror's potential bias. The juror's possible desire to help the government, to prove that he was rehabilitated was not questioned; his vote of guilty may have been prompted by his desire to continue to hide his ex-con status. Finally, it was error to refuse, at counsel's request, to question the juror about whether his felony status was revealed to other jurors during deliberations. Rule 606(b) did not bar this question from being asked.

***JURY (Alternates)***

***United States v. Olano***, 507 U.S. 725 (1993) The trial court erred in allowing alternates to sit in during the jury's deliberations without obtaining the defendant's consent to this procedure. The consent of the defendant's counsel is not sufficient. However, contrary to the Ninth Circuit's decision, the Court held that the error was not plain error requiring reversal of the conviction. The defendants were unable to show prejudice from the alternates' presence in the jury room.

***United States v. Mendoza***, 510 F.3d 749 (7th Cir. 2007) Rule 24 does not permit the trial judge to choose alternates from among a jury of fourteen people who heard the evidence. The alternates must be designated at the time of jury selection and must be chosen sequentially from the jury pool after the jurors are chosen.

***United States v. Delgado***, 350 F.3d 520 (6th Cir. 2003) The trial court's method of choosing a jury was not permitted by the federal rules. The judge required the attorneys to exercise all their strikes resulting in a jury of 14 jurors. Then, just prior to deliberations, the two alternates were chosen. This random designation of alternates violates Rule 24.

***United States v. Beard***, 161 F.3d 1190 (9th Cir. 1998) Just before deliberations began, the judge became aware of discord between two jurors. After deliberations began and the alternates were discharged, the two jurors' animosity increased, and the judge decided to excuse them both. This was an acceptable procedure. However, the trial court erred in substituting in two alternates. Even though the judge instructed the jury to begin deliberations again and select a foreman again, Rule 24(c) only allows the substitution of alternates if the defendant consents.

***United States v. Acevedo***, 141 F.3d 1421 (11th Cir. 1998) Through oversight, the alternates were permitted to retire to the jury room with the jury and actually deliberated with them. After one hour of deliberations, all 14 jurors reached a unanimous verdict of guilty – one of the alternates served as the foreman. When the verdict form was returned and the judge realized what had happened, he required the 12 actual jurors to begin their deliberations again, which they did, returning a verdict in five minutes. The Eleventh Circuit affirmed the conviction. Though there was manifest error, it did not prejudice the final verdict of the jury.

***United States v. Bendek***, 146 F.3d 1326 (11th Cir. 1998) The defendants, the prosecutor and the judge all agreed that the jury would begin deliberating with 13 jurors (the 12 jurors plus the alternate) because of the necessity of one of the jurors leaving the next day. The plan envisioned the jury deliberating with 13 jurors and if all 13 agreed on a verdict, that would conclude the case on the first day of deliberations. If, however, the deliberations lasted longer, the juror who was required to leave would be permitted to leave and that would leave 12 jurors. Because all parties agreed with this procedure, there was no basis for setting aside the conviction (which occurred on the first day, with all 13 jurors voting to convict).

***United States v. Ottersburg,*** 76 F.3d 137 (7th Cir. 1996) Two alternates were permitted to deliberate with the jury and were actually asked to sign the verdict form. Even under the standard of United States v. Olano, 507 U.S. 725 (1993), this constituted plain error, necessitating reversal of the conviction, even though the defendant never objected.

***United States v. Ullah***, 976 F.2d 509 (9th Cir. 1992) A trial judge may not permit a non-unanimous verdict, even in exceptional circumstances, and even if the defendant acquiesces. Moreover, it is reversible error to permit alternates to participate in the deliberations.

***United States v. Donato***, 99 F.3d 426 (D.C. Cir. 1996) Just prior to the commencement of deliberations, the judge asked the jury if there was any juror who was sick, or otherwise unable to continue. One juror indicated that she had to teach a course in Boise, Idaho and was leaving Monday night (this was Thursday afternoon). Without further inquiry, the district judge excused the juror and replaced her with an alternate. This was error. Pursuant to Rule 24(c), a juror may be excused only if there is a finding that a juror is unable or disqualified to perform her duties. The court made no findings that the juror was unable or disqualified.

***JURY (Anonymous Jury)***

***United States v. Wecht***, 537 F.3d 222 (3rd Cir. 2008) A lengthy decision that explores the extent to which a trial judge, in a highly publicized case, may restrict public (i.e., media) and defense counsel access, to jurors' names. The Third Circuit concludes that the trial judge's order restricting access was improper.

***United States v. Mansoori,*** 304 F.3d 635 (7th Cir. 2002) The Seventh Circuit concluded that empaneling an anonymous jury was not appropriate in this street gang prosecution. There was no showing that the defendants had intimidated witnesses in the past or otherwise obstructed justice. Harmless error.

***United States v. Edwards***, 303 F.3d 606 (5th Cir. 2002) Empaneling an anonymous jury was appropriate in this extortion case, even though there was no organized crime involved. The overriding concern in this case was extensive publicity.

***JURY (Eleven-Member Jury)***

***United States v. Ginyard,*** 444 F.3d 648 (D.C. Cir. 2006) During deliberations, a juror indicated that he was fearful that he would lose a job opportunity if he were not available for work the next week. Deliberations had been going on for several days at that point. The judge eventually excused the juror, even though it appeared that he would remain available for at least a few more days and a call from the court to the employer could also have alleviated the problem. Releasing the juror over the defendant's objection was reversible error.

***United States v. Curbelo***, 343 F.3d 273 (4th Cir. 2003) On the first day of trial, a juror became ill and the district court, over the objection of the defendant, proceeded with an eleven-member jury. The Fourth Circuit held that this violation of Rule 23(b) (as it then existed) constituted structural error that necessitated reversing the conviction.

***United States v. Spence***, 163 F.3d 1280 (11th Cir. 1998) The decision to remove a juror and proceed with eleven jurors should not be made until it is determined that the juror who is being excused is, in fact, not able to continue. In this case a juror became sick during deliberations, but no effort was made to determine if she would be available to continue the next day. The failure to make sufficient inquiry resulted in an inability to determine if there was "just cause" for the removal of the juror and the conviction was reversed.

***JURY (Evidence in Jury Room)***

***United States v. Lee***, 573 F.3d 155 (3rd Cir. 2009) The jury was given a document that was not admitted in evidence, and which virtually eviscerated his defense. An instruction that admonished the jury not to consider the document was not adequate to eliminate the prejudice. The jury could not ignore the elephant in the jury room.

***Eslaminia v. White***, 136 F.3d 1234 (9th Cir. 1998) The jury was given a tape of the defendant's statement to the police. Unbeknownst to the trial's participants – but learned by the jury – the other side of the tape contained a taped statement of the defendant's brother that supported the theory of the prosecution. This statement, needless to say, had not been introduced at trial. The Ninth Circuit ordered that a writ of habeas corpus be granted.

***United States v. Cunningham***, 145 F.3d 1385 (D.C. Cir. 1998) The government offered into evidence the portion of a 911 tape that recorded the contemporaneous statements of a witness to a shootout. When the tape was given to the jury, however, inadvertently, the statements of eight other people who called 911 to report the incident were also included. Including this in the evidence supplied to the jury during their deliberations violated the Confrontation Clause. With regard to the relevant counts of the indictment, this was not harmless error.

***United States v. Lampkin***, 159 F.3d 607 (D.C. Cir. 1998) A portion of a witness's videotaped statement was introduced to rehabilitate the witness. During deliberations, the jury asked for the videotape, which included portions that were not presented in court. Providing the videotape to the jury during deliberations was reversible error.

***United States v. Luffred***, 911 F.2d 1011 (5th Cir. 1990) The defendant's conviction was reversed because the jury was permitted to bring into its deliberating room a chart reflecting the government's theory of the case which blurred the evidence. The chart had never been admitted into evidence but had been used as a trial aid during the government's closing argument. Obviously, the jury considered it important because the jury specifically requested to see the chart during its deliberations.

***United States v. Greene***, 834 F.2d 86 (4th Cir. 1987) Documents which had not been admitted into evidence were inadvertently sent to the jury room during deliberations. These documents indicated in this false claim prosecution that the defendant had made claims over $900,000 and received checks totaling $700,000. This constitutes reversible error.

***United States v. Berry***, 92 F.3d 597 (7th Cir. 1996) Unbeknownst to the judge and the parties, a disputed transcript of a conversation was submitted to the jury during their deliberations. Because this transcript was disputed and was not introduced in evidence – even though it was given to the jury when the tape was played during the trial – providing this to the jury was prejudicial and necessitated reversing the conviction.

***United States v. Noushfar***, 78 F.3d 1442 (9th Cir. 1996) During deliberations, the jury was given a number of tapes that had been recorded during the undercover operation, but that were not played during the trial. This was reversible error.

***United States v. Harber***, 53 F.3d 236 (9th Cir. 1995) After the jury returned its verdict, the parties learned that the jury had the 56-page case agent's report in the jury room during deliberations. It was evident that the jurors had read the report. The government failed to establish that this did not prejudice the defendant. In such cases, the burden is on the defendant to prove that the extrinsic evidence was in the jury room and that the jurors were aware of the extrinsic evidence. Where the intrusion into the jury's deliberations is by a law enforcement agent, the prejudice to the defendant is presumed. To overcome this presumption, the government must show beyond a reasonable doubt that there was no prejudice to the defendant.

***United States v. Brown***, 832 F.2d 128 (9th Cir. 1987) During deliberations, the jury was given a tape recording of events which occurred in the courtroom during the time that the defendant allegedly committed the contempt for which he was on trial. It was error to permit this tape to be replayed during deliberations in the absence of the defendants, defense counsel and judge. The error was not shown to be harmless beyond a reasonable doubt.

***JURY (Fair Cross Section)***

***Berghuis v. Smith***, 130 S. Ct. 1382 (2010) The Supreme Court reversed the decision of the Sixth Circuit which had granted habeas relief based on the petitioner's fair cross section claim. The Sixth Circuit had held that various factors contributed to a systematic exclusion of minority jurors. The Supreme Court, however, using the AEDPA standard, held that the state court's decision regarding the fair cross section claim was not unreasonable, given the lack of clarity in the Supreme Court precedent about the methods by which fair cross section claims should be evaluated. The method and standards which governed the local jurisdiction's decision to excuse jurors for cause, for example, does not necessarily support a fair cross section claim, even if statistical evidence establishes an effect on the minority representation in the jury pool.

***Garcia-Dorantes v. Warren***, 801 F.3d 584 (6th Cir. 2015) As a result of a computer "glitch" minorities were systematically excluded from the jury lists for nearly a year. The Sixth Circuit concludes that the defendant established that he was prejudiced by this denial of the right to a fair cross section of the community on his jury pool.

***United States v. Hernandez-Estrada***, 749 F.3d 1154 (9th Cir. 2014)(en banc) The Ninth Circuit in this en banc decision holds that the "absolute disparity" method of proving a "fair cross section" claim is not the only method. Other methods of proving the lack of a fair cross-section must be considered by the court if offered by one of the parties, including statistical analyses. The absolute disparity method could lead to somewhat absurd results: for example, if a distinctive group comprised 90% of the population, but only 80% of the jury pool, this would be deemed unconstitutional under the absolute disparity analysis.

***United States v. Stanko***, 528 F.3d 581 (8th Cir. 2008) The defendant moved to have the jury lists – both the grand jury list and the petit jury list and information used to formulate these lists – provided to him prior to trial. The trial court denied the motion because the defendant showed no particularized need for these records. This was error. Pursuant to 28 U.S.C. § 1867(f), a litigant has an unqualified right to have this information in order to pursue a jury challenge.

***United States v. Rodriguez-Lara***, 421 F.3d 932 (9th Cir. 2005) In raising a fair cross section claim, the defendant is only required, initially, to demonstrate a disparity between a cognizable group's representation in the jury wheel and the group's population in the district. It is not necessary (though it is preferable) to compare the group's representation in the wheel, with the jury-eligible population in the district. See generally Castaneda v. Partida, 430 U.S. 482 (1977); Duren v. Missouri, 439 U.S. 357 (1979). As discussed above this case was OVERRULED in United States v. Hernandez-Esatrada, 749 F.3d 1154 (9th Cir 2014).

***United States v. Ovalle***, 136 F.3d 1092 (6th Cir. 1998) In order to eliminate disparities in the petit jury pool, the district court randomly eliminated one out of every five non-African Americans from the jury pool. The Sixth Circuit concluded that this violated the Jury Selection and Service Act, as well as the Fifth Amendment's Equal Protection Clause.

***JURY (Hung Jury)***

***Brewster v. Hetzel***, 913 F.3d 1042 (11th Cir. 2019) After receiving three notes that the jury was deadlocked (the last two notes stating that the deadlock was 11-1 for conviction), the judge repeatedly told the jury to continue its deliberations. When told that the holdout was doing crossword puzzles, the judge ordered all reading material removed from the jury room. The judge also issued an Allen charge. The defense lawyers voiced no objection and did not request a mistrial. The lawyers provided ineffective assistance of counsel and the trial judge improperly coerced a verdict. A writ of habeas corpus was granted.

***United States v. Wecht***, 541 F.3d 493 (3rd Cir. 2008) The trial court consulted with the attorneys shortly after the jury sent in a note that the deliberations were dead-locked. However, a couple days later, when the judge declared a mistrial based on the jury's inability to reach a verdict, he did not consult with the attorneys. Rule 26.3 provides that before granting a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of granting a mistrial. In this case, the Third Circuit held that the "before" language in the Rule does not mean "days before" but means shortly before.

## *JURY (PARTIAL VERDICT)*

***United States v. Moore***, 763 F.3d 900 (7th Cir. 2014) This case contains a discussion of the propriety of accepting a partial verdict when the jury announces that it has reached a verdict on some, but not all counts. In this case, accepting a partial verdict was error. Count One charged carjacking and Count Two charged that the defendant committed a § 924(c) violation during the commission of the Count One offense. The jury informed the court that it had not reached a verdict on Count One but did reach a verdict on Count Two. Though inconsistent verdicts may be reached, in this situation, it was not appropriate to accept a partial verdict where the jury did not announce that it was deadlocked.

***JURY (Removal of Juror During Deliberations)***

***Williams v. Cavazos***, 646 F.3d 626 (9th Cir. 2011) In deciding whether to discharge a juror mid-deliberation, the critical Sixth Amendment questions are whether, after an appropriately limited inquiry, it can be said that there is no reasonable possibility that the jury's discharge stems from his views of the merits, and whether the grounds on which the trial court relied are valid and constitutional. In this case, the state trial judge removed a deliberating juror without adherence to these principles, because the juror who was removed was not shown to have been unable or unwilling to deliberate – he just stated that he was uncomfortable with the sufficiency of the evidence. In addition to other precedents, the Ninth Circuit cited Twelve Angry Men. See also United

States v. Symington, 195 F.3d 1080 (9th Cir. 1999). CERT GRANTED 1/13/12 and the Supreme Court reversed on AEDPA deference grounds. 133 S. Ct. 1088 (2013).

***JURY (Replaying Testimony – Questions During Deliberations) See also: Jury Instructions (Re-Charge)***

***United States v. Martinez***, 850 F.3d 1097 (9th Cir. 2017) The defendant was charged with unlawful re-entry. One issue that had to be decided unanimously by the jury was the date of his prior removal. A special verdict form required the jury to answer whether the defendant's prior removal occurred after a specific date. The jury sent in a note during deliberations asking what the significance of his question was. The judge, without telling counsel, answered, "It is a matter for the court to consider, not the jury. The jury has to consider whether the defendant was deported or removed after that date." Shortly thereafter the jury returned a verdict. The Ninth Circuit reversed. Answering the question without advising the attorneys or the defendant was erroneous. Proceeding in the absence of the defendant violated Rule 43(a). Trial counsel would have insisted that the judge advise the jury that the response to the question required the jury to believe beyond a reasonable doubt that the removal occurred after a specific date.

***United States v. Miller***, 738 F.3d 361 (D.C. Cir. 2013) During deliberations, the jury asked several questions about the relationship of certain evidence to certain counts (e.g., "does the phone call on a certain date apply to a certain count of the indictment?"). The judge answered the questions. This amounted to improper commenting on the evidence and required that the conviction be reversed.

***United States v. Evanston***, 651 F.3d 1080 (9th Cir. 2011) Though the procedure is allowed in some state courts, the Ninth Circuit holds that in federal court, it is not appropriate to allow the prosecution and the defense to provide a supplement argument to a deliberating jury in response to a question from the jury that has announced that it is deadlocked.

***United States v. Newhofff***, 627 F.3d 1163 (9th Cir. 2010) Consistent with the decision in Richard annotated below, the Ninth Circuit held that when the jury expresses an interest in hearing the testimony of a witness again, this should be done in open court with the parties present; the entire testimony should be re-played; and the court should admonish the jury not to place undue emphasis on the testimony of one witness. The trial court erred in this case, but it was not plain error.

***United States v. Ofray-Campos***, 534 F.3d 1 (1st Cir. 2008) During the deliberations, the jury asked if the cooperating witnesses who testified were in jail for the same conspiracy, to which the judge responded "yes." This was improper, because no evidence of the witnesses' status was introduced in evidence and adding this evidence during the deliberations was impermissible. Harmless error as to some defendants, reversible error as to others.

***United States v. Richard***, 504 F.3d 1109 (9th Cir. 2007) The trial court abused its discretion when only a portion of a witness's testimony was replayed for the jury during deliberations without cautioning the jury not to emphasize that portion of the testimony. Generally, when the jury wants to hear the testimony of a witness, all the testimony should be replayed – direct and cross-examination.

***United States v. Ayeni***, 374 F.3d 1313 (D. C. Cir. 2004) During deliberations, the jury asked a factual question about the evidence. The trial judge decided to allow both the defense and the government to argue for ten additional minutes. This was reversible error.

***United States v. Sabetta***, 373 F.3d 75 (1st Cir. 2004) During deliberations, the jury indicated that it had a question. The jury was brought back to the courtroom and a note was handed to the judge. The note asked for the definition of certain terms in the instructions. Prior to consulting with counsel, the judge answered the questions. This was improper. Prior to answering a jury's question, counsel should be consulted. Harmless error.

***United States v. Barragan-Devis***, 133 F.3d 1287 (9th Cir. 1998) When the jury sends a note to the judge during deliberations, it should be answered in open court and the attorneys should be given an opportunity to be heard before the trial judge responds. In this case, the jury sent a lengthy note to the judge, but the judge did not show it to the attorneys and did not respond. This was improper, but harmless error.

***United States v. Duran***, 133 F.3d 1324 (10th Cir. 1998) The trial court failed to instruct the jury in connection with the entrapment instruction that the government had the burden of disproving entrapment. That is, in order to convict the defendant who raises an entrapment defense, the government must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. The failure to instruct the jury on this principle was plain error requiring reversal of the conviction. The trial court also erred in failing to adequately answer jury questions about the status of "agents" (such as non-government employees who were acting as informants) in connection with the entrapment defense. The jury repeatedly asked if certain informants who were acting on behalf of the government were "agents" within the definition of the entrapment defense. Failing to answer these questions was reversible error.

***United States v. Sylvester***, 143 F.3d 923 (5th Cir. 1998) Prior to answering a question from the jury during deliberations, the trial court should consult with counsel about the proper response.

***United States v. Rivera-Santiago***, 107 F.3d 960 (1st Cir. 1997) The jury asked a question about the facts which were established at trial. The judge directed the court reporter to read back a portion of the witness's testimony, though there was contradictory evidence from this witness, as well as other evidence inconsistent with this testimony. The jury did not ask to have certain testimony read back, as opposed to getting the answer to certain factual questions. Providing this "answer" was reversible error.

***United States v. Argentine***, 814 F.2d 783 (1st Cir. 1987) The jury asked for certain testimony to be replayed. The judge, rather than replaying the testimony itself, summarized the testimony. The Court of Appeals reverses, holding that the trial judge's response gave the appearance that the judge certified the testimony as true and impermissibly trespassed upon the jury's fact-finding prerogative.

***United States v. Arboleda***, 20 F.3d 58 (2d Cir. 1994) During deliberations, on the same day that closing arguments were given, the jury asked to have the prosecutor's final argument read back to them. Shortly thereafter, the jury convicted each of the defendants. This was reversible error. While the prosecutor gets the last word, he does not get the last word twice.

***United States v. Criollo***, 962 F.2d 241 (2d Cir. 1992) During the defendant's closing argument, the trial judge announced that there would be no "read-backs" of trial testimony. This blanket prohibition on read backs was erroneous and required reversal – even though the jury never requested a read-back. In the Second Circuit, read-backs are preferred.

***United States v. Rodgers***, 109 F.3d 1138 (6th Cir. 1997) When the jury requests a portion of the trial transcript during deliberations, if the court provides a transcript to the jury, it should caution the jury to rely principally on its memory and to weigh all the evidence in making its decision, and not focus just on one portion of the trial. The failure to admonish the jury in this case was not plain error.

***United States v. Hernandez***, 27 F.3d 1403 (9th Cir. 1994) Providing to the jury during their deliberations the transcribed portion of one witness's testimony was reversible error. The trial court failed to caution the jury to weigh all the evidence and failed to warn that the transcript was not authoritative. Even though both direct and cross-examination were provided, this was not a sufficient protection. Counsel must be given an opportunity to review the transcript to ensure its accuracy and to ensure that all bench conferences are deleted.

***JURY (Right To Jury Trial)***

***Lewis v. United States***, 518 U.S. 322 (1996) A defendant who is prosecuted in a single proceeding for multiple petty offenses does not have a Sixth Amendment right to a jury trial, even where the aggregate prison term authorized for the offenses exceeds six months.

***Blanton v. City of North Vegas,*** 489 U.S. 538 (1989) Under Nevada law, a DUI is punishable with a prison term of between two days and six months imprisonment. The Supreme Court holds that this offense does not require trial by jury. The fact that the defendant can also be sentenced to a license suspension, 48 hours of community service, a $1,000 fine and that the prison term carries a mandatory minimum even for First Offenders, does not change the analysis. This constitutes a petty offense, and the Sixth Amendment does not guarantee a jury for the resolution of such cases.

***United States v. Salazar***, 751 F.3d 326 (5th Cir. 2014) The defendant testified and confessed. The trial judge instructed the jury to retire and deliberate and return a guilty verdict. This violated the Sixth Amendment. The trial court may not direct a verdict of guilty. The government's suggestion that this was harmless error was rejected.

***United States v. Kimsey,*** 668 F.3d 691 (9th Cir. 2012) The trial court erred in denying the defendant the right to a jury trial in a prosecution for contempt of court under 18 USC § 402. See 18 U.S.C. § 3691. The defendant was accused of ghost-writing pleadings in a civil case, though he was not a lawyer. The government alleged that this violated the Rules of the court that adopted state criminal offenses.

***United States v. Mendez***, 102 F.3d 126 (5th Cir. 1996) Though defendant's counsel waived a jury trial (the central issue was whether the evidence would be suppressed), the defendant himself never waived his right to a jury trial pursuant to Rule 23(a). The only exception to the requirement that a waiver be in a written format is the attorney expressly waives the right to a jury trial and the defendant acquiesces to the waiver through silence as the bench trial is being conducted. Here, however, the defendant was an uneducated Colombian who was not aware of his right to a jury trial.

***United States v. Duarte-Higareda***, 113 F.3d 1000 (9th Cir. 1997) The non-English speaking defendant's trial was conducted as a bench trial. The Ninth Circuit holds that where the defendant is non-English speaking, an on-the-record colloquy is necessary to determine if the defendant is knowingly, and voluntarily waiving his right to a jury trial.

***United States v. Christensen,*** 18 F.3d 822 (9th Cir. 1994) Criminal defendants may waive their constitutional right to a jury trial if the waiver is made in writing and has the approval of the government and of the court. Fed. R. Crim. P. 23(a). Furthermore, the defendant must be competent to waive the jury right, and the waiver must in fact be voluntary, knowing, and intelligent. The better practice in assessing a defendant's waiver is for the defendant to be told that, (1) twelve members of the community compose a jury; (2) the defendant may take part in jury selection; (3) jury verdicts must be unanimous; (4) the court alone decides guilt or innocence if the defendant waives a jury trial. Though these warnings are not absolutely essential, here, the trial court was aware of the defendant's possible psychiatric problems but did not explain these matters to the defendant. Therefore, the conviction was reversed.

***United States v. Robertson***, 45 F.3d 1423 (10th Cir. 1995) Rule 23(a) requires that waivers of the right to a jury trial must be in writing. The failure to waive the right in writing is not necessarily fatal to the waiver. However, there must be a record that the defendant herself voluntarily and knowingly made the waiver. Counsel's oral waiver is not alone sufficient to satisfy the requirement of Rule 23.

***JURY (Unanimous Verdict)***

***United States v. Newell***, 658 F.3d 1 (1st Cir. 2011) This case contains a thorough discussion of the requirement that a jury be instructed that a verdict must be unanimous when an indictment contains duplicitous allegations, such as numerous fraudulent acts in one count of the indictment, or numerous false statements. The failure to object, however, resulted in affirmance of the conviction, because it did not amount to plain error.

***United States v. Russell***, 134 F.3d 171 (3rd Cir. 1998) The trial court erred in failing to instruct the jury that they must agree on the specific three predicate offenses committed by the defendant in order to convict him of a CCE charge. Merely instructing the jury that they had to unanimously agree that there were three predicate offenses is not sufficient.

***Jones v. United States***, 119 S. Ct. 1215 (1999) The federal carjacking statute provides for three different punishments, depending on whether death results, serious bodily injury results, or if there is no serious injury. The Court, distinguishing Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219 (1998), held that these amounted to three separate crimes and the indictment had to spell out which crime was alleged, and the jury was required to unanimously agree on which crime was proved.

***Richardson v. United States***, 119 S. Ct. 1707 (1999) In a CCE prosecution, the jury must unanimously agree on the three predicate offenses the defendant committed. Thus, if the government alleges that the defendant committed more than three predicate drug offenses, the jury must agree on the three (or more) predicate offenses the defendant committed. Merely agreeing that there were three predicates (while disagreeing on which three) is not sufficient.

***JURY (Special Verdict Forms)***

***United States v. Reed***, 147 F.3d 1178 (9th Cir. 1998) The Ninth Circuit concludes that in certain circumstances, the use of special verdict forms is permissible in criminal cases. Though there is a risk that a special verdict form will provide a “roadmap” for conviction, in this case, the form was appropriate.

***JURY (Waiver of Right to Jury)***

***United States v. Bailon-Santana***, 429 F.3d 1258 (9th Cir. 2005) A trial judge must personally address a defendant – particularly a non-English speaking defendant (through an interpreter) – and not simply rely on an attorney’s claim that he translated a pre-printed form for the defendant that contained standard jury trial waiver language. See also United States v. Duarte-Higareda, 113 F.3d 1000 (9th Cir. 1997).

***United States v. Shorty***, 741 F.3d 961 (9th Cir. 2013) After being advised that the defendant had a low I.Q. and had a learning disability, the trial court did not engage in a sufficient colloquy or obtain a written waiver to ensure that the defendant was knowingly and voluntarily waiving his right to a jury trial.

***United States v. Diaz***, 540 F.3d 1316 (11th Cir. 2008) The defendant made numerous inconsistent (and incoherent) statements about his willingness to proceed without a jury. He also insisted on representing himself. Though there was considerable information that he was borderline incompetent to go to trial, the court ultimately determined that he was ultimate to be tried. Ultimately, standby counsel signed the jury trial waiver form, claiming that he did so at the defendant’s request (with the understanding that it did not waive the defendant’s claim that the court had no jurisdiction to try him). Considering the confusing state of the record, the Eleventh Circuit concluded that the defendant did not voluntarily and knowingly waive his right to a jury trial.

***JURY INSTRUCTIONS (Allen Charge)***

***United States v. Manning***, 79 F.3d 212 (1st Cir. 1996) The jury sent a note to the judge explaining that they were deadlocked and that it was apparent that they would not change their minds on one count. The note asked whether it was necessary to continue deliberating until a verdict was reached. The judge responded simply, “Would reading any portion of the testimony assist you in reaching a decision?” This response contained none of the appropriate Allen charge ingredients: (1) members of both the majority and the minority should reexamine their positions; (2) a jury has the right to fail to agree; and (3) the burden of proving guilt beyond a reasonable doubt remains with the government. The conviction on this count was reversed.

***United States v. Paniagua-Ramos***, 135 F.3d 193 (1st Cir. 1998) The trial court's Allen charge was defective and required a new trial. The trial court failed to explain to the jury that they had the right to disagree.

***United States v. Haynes***, 729 F.3d 178 (2d Cir. 2013) The Allen charge in this case encouraged the jurors to exchange views with one another, consider each other's views, and work diligently to reach a verdict, but did not contain the admonition not to give up conscientiously held beliefs. The charge did more than simply advise jurors to continue their deliberations. The charge did not suggest that failing to reach a unanimous verdict was permissible. To the contrary, the Court stated that it “believe[d]” that the jury would “arrive at a just verdict” on Monday. The charge was improper and, along with other errors, required setting aside the verdict. A reasonable juror could view this instruction as lending the Court’s authority to the incorrect and coercive proposition that the only just result was a verdict. However, a verdict is just only it if represents the conscientiously held beliefs of all jurors.

***United States v. Burgos***, 55 F.3d 933 (4th Cir. 1995) When coaxing a jury with an Allen instruction, the court should encourage the minority to consider the views of the majority but should also encourage the majority to consider the minority’s position. This is mandatory and the failure to do so is reversible error.

***Tucker v. Catoe***, 221 F.3d 600 (4th Cir. 2000) In evaluating an Allen charge for coerciveness, the appellate court considers the charge in its entirety and in context; suggestions or threats that the jury would be kept until unanimity is reached; suggestions or commands that the jury must agree; indications that the trial court knew the numerical division of the jury; indications that the

charge was directed at the minority; the length of deliberations following the charge; the total length of deliberations; whether the jury requested additional instruction; and other indications of coerciveness. In this death penalty case, the trial court was informed that the jury was deadlocked 11 – 1 for death. The instruction, as a whole, moreover, applauded the collective reasoning of the jury and did not stress the importance of the individual determination. Though the judge did advise the jury that no juror is expected to give up an opinion, the charge was too coercive. The Fourth Circuit also pointed out that in the death penalty context, because a re-trial was not going to occur, there was no concern with the cost of not reaching a verdict (i.e., a life sentence would be imposed if the jury could not unanimously agree on the death penalty).

***United States v. Clinton***, 338 F.3d 483 (6th Cir. 2003) The suggestion in the Allen charge that if "many" people are in favor of acquittal, the others should re-examine their views (thus being overly coercive if there was only one person in favor of acquittal) was discouraged, but not cause for reversal of the conviction. The court also questioned the wisdom of referring to the cost of a retrial and recommended that it be deleted from future instructions.

***United States v. Williams***, 819 F.3d 1026 (7th Cir. 2016) When the jury was initially polled after announcing that they had a verdict, one of the jurors said that the verdict was not her verdict. The judge continued to poll the rest of the jury, thus revealing that only one juror was not with the majority. After some confusion, the judge sent the jury back to the room to deliberate and simply said that the verdict must be unanimous. Shortly thereafter, the jury announced that it had a verdict and returned to the courtroom and the initial juror said that she had misunderstood the polling question and said that her verdict was guilty. The Seventh Circuit held that continuing the polling was error, because it isolated the one juror and revealed her lone holdout status. The instruction to the jury to return and reach a unanimous verdict, without any cautionary instruction typical of an Allen instruction was also error.

***United States v. Blitch***, 622 F.3d 658 (7th Cir. 2010) The jury requested that they be excused at 3:30 which the judge agreed to do. At about 3:15, the jury announced that it had reached a verdict, but when the jury was polled, one juror said that the verdict was not her verdict. Without any inquiry about the need to be excused at 3:30, the judge instructed the jury to return and continue deliberating. In the context of these developments, this instruction was improperly coercive, because there was no indication from the judge that the jury would be able to adjourn at 3:30, which might have resulted in a verdict that was coerced by the concern that the jury would not be excused anytime in the near future.

***United States v. Webb***, 816 F.2d 1263 (8th Cir. 1987) The giving of an incomplete Allen charge after having determined the numerical division of the jury, was error. Furthermore, the Allen charge did not advise the jury once again that the government had the burden to prove guilt beyond a reasonable doubt and the charge also failed to instruct both the minority and majority to re-examine their position

***United States v. Robinson***, 953 F.2d 433 (8th Cir. 1992) The trial court's Allen charge suggested that it was unpatriotic to "hang" and repeatedly implied that the minority should re-evaluate its view. This was reversible error.

***Jimenez v. Myers***, 40 F.3d 976 (9th Cir. 1993) Over the course of several days of deliberations, the trial court repeatedly asked what the division was (without asking which side was winning) and probed whether there had been any "movement." The judge stated that "movement" was what was important to him. This amounted to a de facto Allen charge, urging the jury to work towards unanimity, without cautioning the holdout juror not to give up a strongly held belief. This was reversible error.

***Smith v. Curry,*** 580 F.3d 1071 (9th Cir. 2009) After receiving a note that the jury was deadlocked, the judge read a model Allen charge. That instruction didn't accomplish a unanimous verdict, so the judge provided his "comment" on the evidence that suggested that the jury should focus on the consistencies and inconsistencies in the evidence relating to a particular issue (which of the conspirators committed the sexual assault on the victim). That comment (which strongly favored the prosecution) was unmistakably directed at the hold-out juror. Using the Allen charge jurisprudence as guide, the Ninth Circuit held that this amounted to an impermissibly coercive instruction that tainted the verdict. Though the Constitution does not prohibit judges from commenting on the evidence, in this case, the comment amounted to a denial of the right to a fair and impartial jury deciding the case.

***United States v. Williams***, 547 F.3d 1187 (9th Cir. 2008) The trial court's Allen instruction was improper, because the judge was made aware that one juror, a holdout, was feeling pressured by the other jurors to convict the defendants. The coercive feature of the instruction is not so much the content of the instruction, but the fact that the judge knows there is one holdout for acquittal and the juror knows that the judge knows that she is the one holdout for acquittal. Thus, the juror would reasonably believe that the instruction encouraging a unanimous verdict would be directed primarily at her and would encourage her to relent.

***United States v. Mc Elhiney***, 275 F.3d 928 (10th Cir. 2001) In a lengthy decision that reviews the history of Allen charges and the various proper and improper components of Allen charges, the Tenth Circuit condemned the instruction that was given in this case. First, the court noted that one way to avoid the coercive impact of an Allen charge is to instruct the jury on the duty to deliberate during the initial instruction, rather than when a deadlock is envisioned. Second, the court criticized the lower court for omitting the required cautionary language (no juror should surrender an honestly held view; burden of proof remains with the government to prove guilt beyond a reasonable doubt). Third, the court erred in its extemporaneous embellishments on the instruction, including a reminder to the jury about the cost of the security – to deal with danger – that was used during the trial, and the cost in time and expense of the trial itself. The court devotes seventeen pages of its decision to this lengthy analysis of the Allen jurisprudence.

***Hooks v. Workman***, 606 F.3d 715 (10th Cir. 2010) When the jury informed the court that its penalty phase deliberations were deadlocked, the court declined the defendant's request to instruct the jury that if they could not reach a unanimous verdict, a sentence of life without parole would be imposed. Instead, the judge repeatedly told the jury to continue deliberating and then advised the jury that they would spend a night in the hotel and continue deliberations the next day. The court also gave the jury an Allen charge that was generally applicable to the guilt-innocence phase of a trial. In this context, the Allen charge was improperly coercive.

***United States v. Zabriskie***, 415 F.3d 1139 (10th Cir. 2005) An Allen charge should not be issued to a single juror. Though an individual juror may be questioned in certain circumstances about an irregularity, it is not proper to encourage an individual juror to reach a verdict. In this case, the jury sent out a note complaining about a single hold-out juror who was frustrating the attempt to reach a verdict. Questioning that juror alone was improper.

***Brewster v. Hetzel***, 913 F.3d 1042 (11th Cir. 2019) After receiving three notes that the jury was deadlocked (the last two notes stating that the deadlock was 11-1 for conviction), the judge repeatedly told the jury to continue its deliberations. When told that the holdout was doing crossword puzzles, the judge ordered all reading material removed from the jury room. The judge also issued an Allen charge. The defense lawyers voiced no objection and did not request a mistrial. The lawyers provided ineffective assistance of counsel and the trial judge improperly coerced a verdict. A writ of habeas corpus was granted.

***United States v. Jones***, 504 F.3d 1218 (11th Cir. 2007) Shortly after deliberations began, the jury sent in a note that they were deadlocked, and the judge sent them home for the evening and directed them to return in the morning. When they returned, one of the jurors was absent and an alternate was installed. The judge announced, "There is no need of sending the court any notes that the jury cannot agree, because you are going to stay here for a long time." Shortly thereafter the jury returned a guilty verdict. The trial court's instruction was improper, and a new trial was required. At no time did the court emphasize that in reaching a verdict, no juror should abandon an honestly held belief.

***United States v. Yarborough***, 400 F.3d 17 (D.C. Cir. 2005) The trial court's Allen charge that invited questions to the court to help understand the evidence or the jury instructions was improper.

***United States v. Strothers***, 77 F.3d 1389 (D.C. Cir. 1996) In the D.C. Circuit, when giving an Allen charge to the jury, it is reversible error to fail to instruct the jury that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

***United States v. Berroa***, 46 F.3d 1195 (D.C. Cir. 1995) The district court's Allen charge did not comply with the requirements set forth by the D.C. Circuit 25 years ago in United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971). Specifically, the charge informed the jury that there was no reason to believe that a better jury, or clearer evidence would be presented in a new trial. These comments have been disapproved by the D.C. Circuit.

***JURY INSTRUCTIONS (Burden of Proof)***

***Gilbert v. Moore***, 134 F.3d 642 (4th Cir. 1998) In this murder prosecution, it was improper to instruct the jury on the definition of malice, as follows: "Malice is implied or presumed from the willful, deliberate and intentional doing of an unlawful act without just cause or excuse" and from the use of a deadly weapon. Though improperly burden-shifting, it was harmless error.

***Sanders v. Cotton***, 398 F.3d 572 (7th Cir. 2005) The state trial court erred in failing to instruct the jury, in accordance with state law, that if the issue of heat of passion is raised, the state was obligated to prove the absence of heat of passion beyond a reasonable doubt before it could convict the defendant of murder. The trial counsel requested the instruction. Appellate counsel provided ineffective assistance of counsel in failing to raise this meritorious issue in the state appeal.

***United States v. Southwell***, 432 F.3d 1050 (9th Cir. 2005) When the defendant raises the defense of insanity, in order for the jury to return a guilty verdict, not only must the jury unanimously find the defendant guilty; the jury must also unanimously reject the insanity defense. This applies to all affirmative defenses.

***Dixon v. United States***, 548 U.S. 1 (2006) Assuming that duress is a defense to possession of a firearm by a convicted felon, or by a person under indictment, it is not unconstitutional to place the burden of proving duress on the defendant.

***JURY INSTRUCTIONS (Defendant's Failure to Testify)***

***United States v. Medina-Martinez***, 396 F.3d 1 (1st Cir. 2005) The trial court erred in failing to instruct the jury that no adverse inference could be drawn from the defendant's failure to testify. However, there was no objection, and the trial judge did give an instruction containing this information in the opening instruction prior to trial. The failure to give the instruction was not plain error, though it was plain, clear and did affect substantial rights of the defendant.

***Woodall v. Simpson***, 685 F.3d 574 (6th Cir. 2012) After pleading guilty at the guilt-innocence phase of this death penalty case, the defendant did not testify during the penalty phase. He requested an instruction that no adverse inference could be drawn by the penalty phase jury from his failure to testify. The trial court's failure to give this instruction was error of constitutional proportions requiring that the writ of habeas corpus be granted. The United States Supreme Court reversed: Though the Sixth Circuit decision might be correct on the merits, the state court decision was entitled to AEDPA deference, and the state court decision did not contradict established law on this subject, because no court has held that the "no adverse inference" instruction must be given during the penalty phase of a trial. White v. Woodall, 134 S. Ct. 1697 (2014).

***United States v. Soto***, 519 F.3d 927 (9th Cir. 2008) Though a trial court is obligated to instruct the jury that no adverse inference may be drawn from a defendant's failure to testify, Carter v. Kentucky, 450 U.S. 288 (1981), the failure to do so may be harmless error.

## *JURY INSTRUCTIONS (DEFENDANT'S CREDIBILITY)*

***United States v. Gaines***, 457 F.3d 238 (2d Cir. 2006) Trial courts should not instruct the jury that a defendant has an interest in the outcome of the case and therefore, his testimony should be considered with great care. This instruction adversely impacts on the defendant's presumption of innocence. Moreover, it is obvious that the defendant has an interest in the outcome of the case, so instructing the jury in this manner is entirely superfluous. The trial court should give a general instruction on the credibility of witnesses and then instruct the jury to consider the defendant's testimony just as any other witness. See also United States v. Brutus, 505 F.3d 80 (2d Cir. 2007).

***United States v. Waller***, 654 F.3d 430 (3rd Cir. 2011) The trial court instructed the jury that in ascertaining the defendant's intent, it could consider any statements made or omitted by the defendant. The defendant had invoked his right to remain silent when he was arrested. This instruction was an improper invitation to consider the defendant's post-Miranda silence. Doyle v. Ohio, 426 U.S. 610 (1976). Conviction reversed.

***JURY INSTRUCTIONS (Defendant's Theory or Defense) SEE ALSO: Various Defenses, such as Mistake of Law; Public Authority; Entrapment; for cases relating to the failure to instruct the jury on the defendant's theory***.

***Mathews v. United States***, 485 U.S. 58 (1988) The Court holds that the defendant is entitled to present inconsistent defenses, including "I didn't do it" and "If I did, I was entrapped."

***United States v. Baird***, 712 F.3d 623 (1st Cir. 2013) The defendant purchased a firearm from another person. Several days later, he determined that the gun was stolen and returned it to the seller shortly thereafter. He requested an instruction on the defense of "innocent possession." Because the evidence was sufficient to support this requested instruction and the content of the instruction was integral to his defense (and not covered by other instructions), the trial court's refusal to give the instruction was reversible error.

***Jackson v. Edwards***, 404 F.3d 612 (2d Cir. 2005) The state trial court deprived the defendant of due process of law by failing to instruct the jury on the law of justification. The evidence at trial, as well as the defendant's post-arrest statement, supported a self-defense claim.

***Harris v. Alexander***, 548 F.3d 200 (2d Cir. 2008) Under New York State law, a person who buys drugs for a particular person and then distributes the drugs to that person is not guilty of "distribution" pursuant to what is known as an agency defense. The state trial court's failure to instruct the jury on this "defense" was a due process violation that warranted habeas relief.

***United States v. Theagene***, 565 F.3d 911 (5th Cir. 2009) The defendant was entitled to an entrapment instruction in this case involving an allegation of bribing an IRS revenue agent. There was sufficient evidence in the trial to support a jury's determination that the defendant was not predisposed to commit the offense and that the agent encouraged the defendant to bribe him. Failing to instruct the jury on this defense was reversible error.

***United States v. Adams***, 583 F.3d 457 (6th Cir. 2009) The trial court erred in refusing to instruct the jury that it could not convict the defendant based solely on the defendant's own confession, without corroborating evidence. The fact that there was other corroborating evidence does not eliminate the need to properly instruct the jury if a request is made.

***United States v. Wisecarver***, 598 F.3d 982 (8th Cir. 2010) Because of the inadvertent use of a double-negative in explaining the defense of justification, the jury instruction in this case was erroneous. Though it was inadvertent (and defense counsel did not object), the error was plain and necessitated setting aside the verdict.

***United States v. Toledo***, 739 F.3d 562 (10th Cir. 2014) In this prosecution for murder on an Indian reservation, the evidence was sufficient to authorize an instruction on self-defense and for the lesser included offense of involuntary manslaughter. The trial court's failure to instruct the jury on self defense and the lesser included offense was error.

***United States v. Kayser,*** 488 F.3d 1070 (9th Cir. 2007) When a defendant is indicted for tax evasion based on failing to report income, he may introduce evidence that there were unreported deductions that offset the income. He may do so, even if the "deductions" were reported in some different manner in the false tax return. In other words, a defense at trial which disproves the existence of a deficiency need not be consistent with the tax return that was filed. The defendant is also entitled to have the jury properly instructed on this theory.

***United States v. Kenyon***, 481 F.3d 1054 (8th Cir. 2007) Attempt crimes require proof of specific intent to commit the crime. Consequently, a defendant may defend on the basis that he did not intend to commit the crime, even if the crime itself is not a specific intent crime. In this case, the defendant was charged with attempt to commit child sex abuse. He claimed that he was too intoxicated to have that intent. Even though intoxication is not a defense to the crime of sex abuse, it is a defense to the crime of attempt to commit sex abuse. There was sufficient evidence of the defendant's intoxication in this case to warrant the giving of an intoxication instruction and the failure to do so was reversible error as to those counts.

***United States v. Bear***, 439 F.3d 565 (9th Cir. 2006) The defendant had been working for law enforcement officers but was indicted for continuing her drug offenses "off the reservation." Her defense was that she believed that she was still working undercover. The trial court's failure to instruct the jury on the defendant's public authority defense was plain error.

***United States v. Bello-Bahena***, 411 F.3d 1083 (9th Cir. 2005) The trial court's failure to instruct the jury on the defendant's theory of defense was reversible error. The defendant was charged with an immigration offense but claimed that he was not "found in" the United States, because he was under constant surveillance since the time of his entry, which is a valid defense.

***United States v. Burt***, 410 F.3d 1100 (9th Cir. 2005) The defendant was initially stopped for transporting illegal aliens across the border. She attended a meeting with agents during which, she claimed, she was told to gather information for them, but don't do anything illegal; but that during the course of gathering information, she was protected from illegal acts. Shortly thereafter, she was stopped again transporting aliens across the border. She requested an instruction on a public authority defense. The trial court erred in refusing to instruct the jury on this defense.

***Bradley v. Duncan***, 315 F.3d 1091 (9th Cir. 2002) The state trial court's failure to instruct the jury on the law of entrapment amounted to a due process violation and the Ninth Circuit ordered that the petitioner's § 2254 petition should have been granted. The defendant helped a decoy who was addicted and going through withdrawal, purchase a small quantity of drugs. The Ninth Circuit held that the right to have the jury instructed on a defense provided by state law is protected by the Due Process Clause.

***United States v. Allen***, 127 F.3d 260 (2nd Cir. 1997) 18 U.S.C. § 892 outlaws, in part, an extortionate extension of credit which is defined as any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person. In this case, the defendant made a loan to an undercover agent. In explaining the elements of the offense, the trial court repeatedly pointed out the factors that could support a conviction (the usurious interest rate, for example) and failed to clearly explain the defendant's theory of defense. This was reversible error.

***United States v. McIntosh***, 124 F.3d 1330 (10th Cir. 1997) The defendant was charged with bankruptcy fraud and money laundering on the basis of his failure to disclose during his bankruptcy proceeding that he had received certain money and deposited some of those funds in a bank account he controlled through an unincorporated business he managed. The defendant's bankruptcy attorney testified that he was aware of the existence of the unincorporated business and was remiss in failing to inquire further and determine if its existence should have been disclosed to the bankruptcy court. This evidence was sufficient to prompt an "advice-of-counsel" instruction and the failure to instruct the jury on this defense was error. ***United States v. Benally***, 146 F.3d 1232 (10th Cir. 1998) The trial court erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter, as well as the defense of self-defense.

***United States v. Durham***, 825 F.2d 716 (2d Cir. 1987) In this arson conspiracy prosecution, the defendant's defense was that although they obtained money as part of an agreement to commit the arson, the defendants were simply extorting money from the contractor, and had no intent to commit the arson. They requested an instruction that in order to be found guilty of conspiracy to commit arson, the jury must find that they had the specific intent to actually commit the arson. The trial court's failure to give this instruction was reversible error.

***United States v. Lewis***, 53 F.3d 29 (4th Cir. 1995) The defendant participated in a deal to possess with intent to distribute cocaine. Arguably, however, the only other "conspirators" were government informants/agents. The defendant requested an instruction which advised the jury that a conspiracy can only occur if at least one of the other conspirators is not a government agent. The trial court committed reversible error by failing to instruct the jury in accordance with this request.

***United States v. Newcomb***, 6 F.3d 1129 (6th Cir. 1993) A defendant is entitled to an instruction on the defense of justification if he is charged with being a felon in possession of a firearm and contends that he grabbed the gun from someone who was assaulting a third person.

***United States v. Douglas***, 818 F.2d 1317 (7th Cir. 1987) In this drug conspiracy trial, the defendant claimed that he was a mere purchaser, and not a member of any conspiracy. In light of this defense, it was error for the trial court to refuse to give an instruction that a buyer-seller relationship is not enough to convict one of drug conspiracy charges. In this case, the defendant offered a buyer-seller instruction but failed to object when the trial court omitted that charge. Nevertheless, the Seventh Circuit holds it to be plain error to have failed to give this instruction where it is the sole defense.

***United States v. Brown***, 33 F.3d 1002 (8th Cir. 1994) The defendant was charged with armed bank robbery. He was apprehended trying to recover the money which the robber had hidden in the woods. The government argued that he was the robber and that he had hidden the money there and was apprehended on his way to recover the loot. The defendant testified that he had not placed the money in the woods and that he had gone there at the behest of a friend to recover the duffel bags. The defendant's testimony was sufficient to raise the issue of whether he was an accessory after the fact and therefore not guilty of the armed robbery. The trial court's failure to instruct the jury on this defense was reversible error.

***United States v. Hairston***, 64 F.3d 491 (9th Cir. 1995) The defendant offered an alibi shortly after being arrested but did not offer the alibi at trial. The government introduced evidence of the alibi in order to ridicule it. The trial court should have given an alibi instruction to the jury. Even when a defense is offered by government witnesses, the defendant is entitled to an instruction on the defense.

***United States v. Zuniga***, 6 F.3d 569 (9th Cir. 1993) The trial court's failure to give an alibi instruction to the jury was reversible error. Defendant's wife testified that at the time of the robbery, the defendant was at home with the baby. Even if alibi evidence is weak, insufficient, inconsistent, or of doubtful credibility, the instruction should be given.

***United States v. Migliaccio***, 34 F.3d 1517 (10th Cir. 1994) The defendant, a doctor, was charged with mail fraud and conspiracy to defraud the government by means of filing false CHAMPUS health insurance forms. He claimed that the language

in the CHAMPUS regulations is ambiguous, that his interpretations were reasonable and that he lacked criminal intent. He requested a jury instruction which explained his theory of the defense, instructing the jury that if it found ambiguity in the forms, then the government would have to prove beyond a reasonable doubt that there was no reasonable interpretation of the situation that would make the defendant's statements factually correct. The trial court declined to give this instruction. This was reversible error. Even the court's general good faith defense instruction failed to adequately address the defense theory.

***United States v. Ruiz***, 59 F.3d 1151 (11th Cir. 1995) The defendant acknowledged that she participated in a multi-kilo cocaine deal but claimed that she did so in order to enable her son-in-law to earn credit with law enforcement in an effort to reduce his sentence. In short, she claimed that she thought she was engaged in undercover work for the FBI, along with another of the co-conspirators who (she claimed) told her that she was engaged in undercover work with the FBI. The defendant requested an instruction on the law of mistake of fact. The trial court committed reversible error in refusing this request. The general "willfulness" instruction did not satisfactorily cover the points of law included in the defendant's mistake of fact request. The defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence. In deciding whether a defendant has met her burden, the court is obliged to view the evidence in the light most favorable to the accused.

***United States v. Vicaria***, 12 F.3d 195 (11th Cir. 1994) The defendant requested a theory of the defense instruction at trial, which the trial court refused to give. After the defendant was convicted, the trial court granted a new trial under Rule 33, holding that it would have been better to give the defendant's theory of the defense instruction. Though the trial court did not err in refusing to give the instruction, it was within the trial court's discretion to give the instruction and it was thus within the trial court's discretion to grant a new trial.

***United States v. Edwards***, 968 F.2d 1148 (11th Cir. 1992) Because there was conflicting evidence as to when a drug importation offense was completed, the trial court committed reversible error in refusing to give an instruction on the statute of limitations defense.

***United States v. Banks***, 942 F.2d 1576 (11th Cir. 1991) The defendant was convicted of violating §1503 because of his refusal to testify at the grand jury investigating one of his previous drug suppliers. First, the court concludes that the willful refusal to give testimony to the grand jury may amount to obstruction of justice. However, the conviction in this case had to be reversed because of the trial judge's refusal to instruct the jury on the law of "fear of reprisal." The defendant testified that he feared for his safety and the safety of his family if he testified against the supplier. This is a valid defense to obstruction of justice, insofar as it negates the motive element of the offense.

***United States v. Opdahl***, 930 F.2d 1530 (11th Cir. 1991) The defendant was charged with bribing an IRS official. As a defense, the defendant argued that his attempted payment of money to the IRS official represented an attempt to compromise the tax deficiency. The trial court committed reversible error by refusing to give an instruction to the jury on the legal authority of an IRS official to reach a compromise settlement of delinquent taxes. An instruction on the intent requirement of the offense was not an adequate substitute for fully explaining the law of compromise settlements. "The defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility."

***United States v. Hedges***, 912 F.2d 1397 (11th Cir. 1990) The defendant was charged with conflict of interest – that is, that he took government action while having a financial stake in the outcome. He defended on the basis that he had consulted with his Standards of Conduct Counselor about the transaction. The trial court committed reversible error in refusing to instruct the jury on the theory of entrapment by estoppel. This defense applies even in cases of strict liability. The defense applies when an official tells a defendant that certain conduct is legal, and the defendant believes that official.

***JURY INSTRUCTIONS (Deliberate Ignorance)***

***Global-Tech Appliances Inc. v. SEB S.A.,*** 131 S. Ct. 2060 (2011) In this patent case, the United States Supreme Court explained the concept of "willful blindness" in terms that should equally apply in criminal cases: Willful blindness is more than deliberate indifference to a known risk. Instead, willful blindness requires that the defendant (1) subjectively believed there was a high probability that a fact existed and (2) took deliberate actions or active efforts to avoid learning the fact. This is a higher standard than negligence and even recklessness.

***United States v. Oti***, 872 F.3d 678 (5th Cir. 2017) The trial court erred, but it was harmless, in giving a deliberate ignorance instruction in this pill mill prosecution. This case, like so many others, involved either actual knowledge or actual ignorance. There was no evidence of deliberate ignorance.

***United States v. Little***, 829 F.3d 1177 (10th Cir. 2016) Though the error was harmless, the trial court erred in delivering a deliberate ignorance instruction to the jury in this case involving constructive possession of a firearm and ammunition.

***United States v. Willner,*** 795 F.3d 1297 (11th Cir. 2015) A deliberate ignorance instruction is permissible to establish that a defendant knew of the unlawful purpose of a conspiracy, but not to establish that he willfully joined in the conspiracy.

***United States v. Macias***, 786 F.3d 1060 (7th Cir. 2015) Even if a defendant is aware of facts that "pique" his interest and he then restricted his "natural curiosity," this is not enough to justify an instruction on deliberate ignorance after Global-Tech. In this case, Judge Posner wrote, "An ostrich instruction should not be given unless there is evidence that the defendant engaged in behavior that could reasonably be interpreted as having been intended to shield him from confirmation of his suspicious that he was involved in criminal activity."

***United States v. Esquenazi***, 752 F.3d 912 (11th Cir. 2014) The trial court erred in providing a deliberate ignorance instruction to the jury in this case, though the error was harmless. There was no evidence of a purposeful contrivance to avoid learning the facts.

***United States v. Mathauda***, 740 F.3d 565 (11th Cir. 2014) The Eleventh Circuit considered whether the theory of "deliberate ignorance" applied in applying an enhancement under the Sentencing Guidelines for violation of an administrative order. The Court accepted the holdings in other Circuits that the deliberate ignorance principle applied when either: (1) the defendant purposely contrived to avoid learning all the facts; or (2) the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact. Neither option applied in this case. There was no evidence to support a finding that the defendant purposely contrived to avoid learning the fact and he had no reason to be aware of a high probability that an administrative order had been entered previously.

***United States v Roussel***, 705 F.3d 184 (5th Cir. 2013) The evidence did not support a deliberate ignorance instruction. There was no evidence that the defendant took steps to remain ignorant of the essential facts that would establish his knowledge of fraud. Though he disguised various transactions, these were designed to hide his involvement in the fraud, not to avoid knowledge of it altogether. Harmless error.

***United States v. Kaiser***, 609 F.3d 556 (2d Cir. 2010) A conscious avoidance instruction must include the concept that a jury may infer knowledge of the existence of a particular fact if the defendant is aware of a "high probability of its existence, unless the defendant actually believes that it does not exist." See United States v. Feroz, 848 F.2d 359 (2d Cir. 1988). The error in omitting these two components of the conscious avoidance instruction was plain error necessitating the reversal of the defendant's securities fraud conviction.

***United States v. Ciesiolka***, 614 F.3d 347 (7th Cir. 2010) A deliberate ignorance instruction in a child-enticement prosecution was reversible error. The defendant was chatting with an undercover police officer. The officer said that she was 13 years old. But when asked what her interests were, the officer responded, Perdue University and beer. Then, when asked to send a photo, the officer twice sent a photo of a twenty-year-old woman. The Seventh Circuit opinion questions why, in a sting operation, the police would send a photo of a twenty-year-old, and then claim that the defendant remained deliberately ignorant of the girl's age. The instruction suggested that the defendant's negligent misunderstanding of the girl's age was sufficient to support an enticement of a minor conviction. The instruction is only appropriate when the defendant claims a lack of knowledge and there is evidence suggesting that he deliberately avoided the truth. Here, the defendant did not take deliberate steps to avoid learning the truth.

***United States v. Alston-Graves,*** 435 F.3d 331 (D.C. Cir. 2006) In a lengthy opinion that traces the development of the deliberate ignorance jury instructions in various Circuits, the D.C. Circuit apparently held that a deliberate ignorance instruction should not be given where the proof at trial demonstrates actual knowledge. Though the opinion ultimately holds that it was harmless error to instruct the jury on the principle of deliberate ignorance, the D.C. Circuit also held that the instruction should generally be reserved for cases in which there is proof of an affirmative effort to remain ignorant in order to have a defense at trial.

***United States v. Carrillo***, 435 F.3d 767 (7th Cir. 2006) While approving the use of a deliberate ignorance instruction in this case (drugs in car that the defendant was driving), the court cautioned that the prosecutor should not have argued to the jury that deliberate ignorance is somehow equivalent to "what a reasonable person would have known." That formulation of the rule comes too close to a negligence standard. The proper focus is not on what a reasonable person would have known, but on what this defendant did know, and what this defendant deliberately avoided learning.

***United States v. Heredia***, 429 F.3d 820 (9th Cir. 2005) The trial court erred in instructing the jury on deliberate ignorance. The Ninth Circuit concluded that the government offered insufficient evidence that the defendant deliberately avoided investigating her suspicions in order to provide herself with a defense in the event of prosecution. The Ninth Circuit also held that an essential feature of deliberate ignorance cases is that the defendant had a reasonable opportunity to reverse or abandon their course of conduct once the suspicion had formed. In this case, once it became apparent to the defendant that her passengers were carrying drugs in the car, it was too late for her to do anything about it. DECISION REVERSED. 483 F.3d 913. THE EN BANC COURT CONCLUDED THAT A DELIBERATE IGNORANCE INSTRUCTION MAY BE GIVEN, EVEN IN THE ABSENCE OF PROOF THAT THE DEFENDANT REMAINED IGNORANT FOR THE EXPRESS PURPOSE OF PRESERVING HIS ABILITY TO CLAIM LACK OF KNOWLEDGE AT TRIAL.

***United States v. Mendoza-Medina***, 346 F.3d 121 (5th Cir. 2003) Though it was harmless error, the trial court should not have given a deliberate ignorance instruction in this case. Where the jury is asked to decide simply between two versions of the facts: one in which defendant had actual knowledge; the other in which the defendant was no more than negligent or stupid, the deliberate ignorance instruction is inappropriate. To justify the instruction, the evidence must establish (1) that defendant was actually aware of a high probability of the existence of the illegal conduct; and (2) that he purposely contrived to avoid learning of the illegal conduct. In short, there must be proof that the defendant consciously attempted to escape confirmation of the conditions or event that he strongly suspected to exist.

***United States v. Ferrarini***, 219 F.3d 145 (2d Cir. 2000) The trial court erred in giving a conscious avoidance jury instruction in this case, but the error was harmless. The predicates for such an instruction are (1) the defendant asserts the lack of some specific aspect of knowledge required for conviction; and (2) the appropriate factual predicate for the charge exists, i.e., the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a

high probability of the fact in dispute and consciously avoided confirming that fact. It is not enough only to show that the factual context should have apprised the defendant of the unlawful nature of his conduct. In this case, there was no suggestion that the defendant consciously avoided learning of the fraudulent loans that were at the center of his prosecution.

***United States v. Sicignano***, 78 F.3d 69 (2d Cir. 1996) The defendant was the go-between delivering money to a narcotics supplier and returning with drugs to an undercover agent. He claimed that he did not know what was in the bag he delivered in either direction. The trial court's deliberate ignorance instruction was flawed because it failed to explain that if the defendant actually believed the bag did not contain drugs, then he could not be charged with knowledge of its contents. That is, if the defendant affirmatively believes that he is not committing a crime, he cannot be found to have knowingly committed the crime. It is only when the defendant consciously remains ignorant of some fact (i.e., "Don't tell me what is in the bag") that he can be found to have deliberately remained ignorant.

***United States v. Adeniji,*** 31 F.3d 58 (2d Cir. 1994) The trial court erroneously instructed the jury that the element of knowledge may be found to be present if the evidence established that the defendant deliberately closed his eyes to what would otherwise have been obvious. The defendant testified, however, that the suits in which the heroin was discovered at the airport had never been in his bag before but were placed there by mistake at the customs counter. This did not raise the issue of conscious avoidance. Harmless error.

***United States v. Soto-Silva***, 129 F.3d 340 (5th Cir. 1997) It was reversible error in this case to give a deliberate ignorance instruction in connection with the offense of maintaining premises for the purpose of distributing marijuana. The court held that as a matter of law, this instruction should never be given in a prosecution under 21 U.S.C. §856(a)(1).

***United States v. Ojebode***, 957 F.2d 1218 (5th Cir. 1992) Defendant was detained at the Houston Airport after a plane in which he was traveling from Germany to Mexico made a brief stop there. He was found to be in possession of heroin. He defended a charge of importation on the basis that he never intended to import the heroin into the United States. Though the evidence was sufficient to support the conviction, the failure to charge the jury that the defendant had to specifically intend to bring the contraband into the United States was reversible error. Moreover, it was error to instruct the jury that knowledge of the plane's flight schedule could be found if the defendant remained deliberately ignorant. There was no basis in the record for this deliberate ignorance instruction.

***United States v. Giovannetti,*** 919 F.2d 1223 (7th Cir. 1990) The defendant owned a lot with two houses on it. An undercover informant asked him if he could rent one of the houses. The house was then used as a "wire house" – a gambling house. The trial court improperly gave an "ostrich" instruction. The problem with the instruction is that it has a tendency to allow juries to convict upon a finding of negligence for crimes that require intent. The instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealing, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings. A deliberate effort to avoid guilty knowledge is all the guilty knowledge the law requires. When the facts require the jury to make a "binary choice" between "actual knowledge" and "complete innocence," the ostrich instruction should not be given. The error was grounds to reverse the conviction.

***United States v. Barnhart***, 979 F.2d 647 (8th Cir. 1992) If the evidence demonstrates only that the defendant either possessed or lacked actual knowledge of the facts in question – and did not also demonstrate some deliberate efforts on his part to avoid obtaining actual knowledge – a willful blindness instruction should not be given. The instruction should not be given unless there is evidence to support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution. In this bank fraud prosecution, the error in giving the instruction was reversible error.

***United States v. White***, 794 F.2d 367 (8th Cir. 1986) Though considered to be harmless error in this case, the Eighth Circuit holds that it was error to give a "conscious avoidance" instruction in light of the absence of any evidence that the defendant made a conscious effort to avoid learning of the contents of a bag which contained stolen mail. Because the evidence was overwhelming that the defendant was a direct participant in the mail theft scheme, the error was harmless.

***United States v. Baron***, 94 F.3d 1312 (9th Cir. 1996) The trial court committed plain error in giving a deliberate ignorance instruction to the jury. There was no evidence that the defendant took steps to remain deliberately ignorant of the presence of drugs in his car. This decision may not have survived the later Ninth Circuit holding in United States v. Heredia, 483 F.3d 913 (9th Cir. 2007), noted above. United States v. Aguilar, 80 F.3d 329 (9th Cir. 1996) On remand from the Supreme Court, the issue is whether the trial court erred in instructing the jury on the element of knowledge in this prosecution of a federal judge for disclosing the existence of a wiretap in violation of 18 U.S.C. §2232(c). The trial court instructed the jury that "knowledge" could be found if the defendant had actual knowledge of the existence of the wiretap, or if he was aware of a high probability of the existence of a wiretap. This was erroneous. The latter alternative, "awareness of a high probability," does not equate with actual knowledge unless there is evidence of willful blindness, that is, deliberate ignorance. Even irrational, or negligent ignorance is not sufficient.

***United States v. Mapelli***, 971 F.2d 284 (9th Cir. 1992) Where the evidence points to actual knowledge, there is no reason to give a deliberate ignorance instruction. It was reversible error to instruct the jury on this principle in this case. Here, either the defendant had knowledge, or she did not. If she did not, then she was not guilty. There was no evidence of conduct designed to avoid acquiring confirmation of a fact which was "all but known."

***United States v. Sanchez-Robles***, 927 F.2d 1070 (9th Cir. 1991) The defendant was riding in a van that reeked of the odor of marijuana. The trial court should not have given a deliberate ignorance instruction. The evidence of the odor pointed either directly or circumstantially only to actual knowledge of illegality, not deliberate ignorance. If the defendant recognized the smell, then she knew of the illegal contraband. If she did not recognize the smell, then she would have no reason to be suspicious. In other words, either she had actual knowledge, or she had no knowledge. There was no evidence of conscious avoidance.

***United States v. Alvarado***, 817 F.2d 580 (9th Cir. 1987) The Ninth Circuit sets forth the rules for the giving of a deliberate ignorance instruction. The court cautions that it is a rare case where a deliberate ignorance instruction is appropriate. Here, the evidence established that the defendant had actual knowledge of the presence of cocaine in the suitcase. It was error to instruct the jury on the deliberate ignorance theory. Such an instruction is appropriate only where proof indicates that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all the facts in order to have a defense in the event of prosecution. This is a far cry from a standard of negligence. See also 838 F.2d 311. Note that the later decision in Heredia – the Ninth Circuit en banc decision – questioned the holding in this case and limited the Ninth Circuit's jurisprudence of deliberate ignorance.

***United States v. Hilliard***, 31 F.3d 1509 (10th Cir. 1994) A deliberate ignorance instruction is appropriate only when evidence has been presented showing the defendant purposely contrived to avoid learning the truth. Here, the defendant was shown to be aware of an agency's civil regulatory position with regard to certain transactions but disputed that interpretation. He was prosecuted for tax violations based on these same transactions. There was no evidence, however, that he intentionally remained ignorant of the tax laws, however. In order to justify a deliberate ignorance instruction, the government must prove that the defendant intentionally remained ignorant of a fact, not a law.

***United States v. Barbee***, 968 F.2d 1026 (10th Cir. 1992) A deliberate ignorance instruction does not authorize a conviction of one who in fact does not have guilty knowledge. The deliberate ignorance instruction, however, is rarely appropriate because it is a rare occasion when the prosecution can present evidence that the defendant deliberately avoided knowledge. The deliberate ignorance instruction should be given only when evidence has been presented showing the defendant purposely contrived to avoid learning the truth. The defendant must deny knowledge and must engage in conduct that includes deliberate acts to avoid actual knowledge of the operant fact.

**United States v. de Francisco-Lopez**, 939 F.2d 1405 (10th Cir. 1991) Deliberate ignorance and actual knowledge are mutually exclusive. In order to justify an instruction on the law of deliberate ignorance, therefore, there must be some evidence of deliberate ignorance other than the proof of actual knowledge – that is, there must be proof of a deliberate attempt to remain ignorant.

***United States v. Rivera***, 944 F.2d 1563 (11th Cir. 1991) A deliberate ignorance instruction should not be given in every case in which a defendant claims a lack of knowledge, but only in those comparatively rare cases where there are facts that point in the direction of deliberate ignorance. The instruction is only warranted when the facts support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution. The trial court erred in giving the instruction in this case. Either the defendant knew that she was carrying contraband across the border, or she did not. There was no evidence that she consciously avoided acquiring the knowledge. There was no evidence, for example, that the defendant came into possession of the suitcase under suspicious circumstances. Harmless error.

***JURY INSTRUCTIONS (Elements of the Offense or Defense)***

***Hedgpeth v. Pulido***, 129 S. Ct. 530 (2008) If the jury is instructed on alternative methods by which the offense can be convicted, and one of the alternative methods is legally incorrect, the verdict is subject to challenge, if it cannot be determined whether the jury relied on the improper method. In this case, the Supreme Court held that this type of error is not "structural error" that necessarily requires setting aside the verdict.

***Washington v. Recuenco***, 548 U.S. 212 (2006) The failure to submit a sentencing factor to the jury for their determination is a Blakely error but is not a structural error. Therefore, as in Neder, such error may be deemed harmless.

Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827 (1999) In this pre-United States v. Gaudin trial, the judge failed to submit the issue of materiality to the jury. The trial attorney objected. Thus, rather than analyzing whether it was plain error to fail to submit this issue to the jury (Johnson v. United States), the Court had to decide whether it was harmless error. The Court held that in this case it was harmless error. Justice Scalia dissented, concluding that it was reversible error per se to omit to instruct the jury on an element of the offense if there is a proper objection.

***Johnson v. United States***, 520 U.S. 461 (1997) The district court erred in its jury instruction by removing the issue of materiality from the jury's consideration. The Court reviewed this error under the plain error standard and concluded that the error, though plain, did not affect the fairness, integrity or public reputation of the judicial proceedings.

***United States v. Gaudin***, 515 U.S. 506 (1995) The question of the materiality of a false statement is a jury question. The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. This includes the "materiality" element of a §1001 offense.

***United States v. Latorre-Cacho***, 874 F.3d 299 (1st Cir. 2017) The defendant was charged with being a member of a RICO conspiracy. Firearm offenses are not "racketeering acts" under the RICO statute. Nevertheless, the trial court twice instructed the jury that "firearms" were racketeering acts. This was plain error requiring reversal of the defendant's conviction.

***United States v. Vazquez-Hernandez***, 849 F.3d 1219 (9th Cir. 2017) At the border in Nogales, Arizona, people coming into the United States actually enter the border for a short distance prior to entering the inspection station. The defendant was in this area, offering to wash car's windows. The defendant was charged with attempted reentry. The court failed to instruct the jury that attempted illegal reentry requires as an element the intent to reenter free from official restraint. The Ninth Circuit held that the area approaching the inspection station comes within the definition of "official restraint" and the failure to instruct the jury on this element was reversible error.

***United States v. Wolfname***, 835 F.3d 1214 (8th Cir. 2016) Assault is an element of the offense of resisting or interfering with an officer under 18 U.S.C. § 111(a)(1). Omitting this element of the offense from the jury instruction was plain error which required setting aside the verdict, even absent an objection from trial counsel.

***United States v. Murphy***, 824 F.3d 1197 (9th Cir. 2016) The defendant was charged with numerous tax offenses and also with a violation of 18 U.S.C. § 514, which makes it a crime to present false financial instruments. The instruction failed to explain that the crime required that the instrument purport to be issued under the authority of the United States. This was plain error, requiring reversal of the conviction on those counts.

***United States v. Makkar***, 810 F.3d 1139 (10th Cir. 2015) The district court erred when it instructed the jury that it could infer the defendant had the requisite mens rea in this Analogue Drug prosecution if the defendant knew that inhaling the "incense" had the same effect as marijuana. The government did not attempt to argue that the defendant knew the drug was illegal (one method of establishing intent under McFadden), and the instruction failed to include the second element of the mens rea requirement (knowledge of the chemical structure) which is part of the second McFadden method of proving intent. Instead, the instruction simply explained that if the chemical structure was the same and the defendant knew it had the same effect as a listed drug, the jury could infer that the defendant knew the chemical structure was the same. The effect of the lower court's instruction was to eliminate one of the elements of the offense as explained by McFadden: the defendant's knowledge that the drug had the same chemical composition as a listed drug. This was plain error.

***United States v. Montoya-Gaxiola***, 796 F.3d 1118 (9th Cir. 2015) The defendant was charged with possession of a sawed-off shotgun. Pursuant to Staples v. United States, the government was required to prove that the defendant knew the characteristics of the firearm that brought it within the scope of the registration act. The jury instruction did not explain the proper mens rea element.

***United States v. Hughes***, 795 F.3d 800 (8th Cir. 2015) If wildlife is hunted in violation of state law and transported across state lines, it is a misdemeanor unless the market price of the item is more than $350, in which case it is a felony. "Market price" is the price that a willing buyer would pay a willing seller on the open market. In this case, however, the trial court instructed the jury to determine if the offense was a misdemeanor or a felony there were other measures of market price, including the cost of guide services. This was erroneous and required that the conviction be set aside.

***United States v. Borrero***, 771 F.3d 973 (7th Cir. 2014) The defendants were prosecuted for various offenses, including mail fraud. The mail fraud count alleged that the defendants defrauded the State of Indiana by submitting applications for car titles with false information. This theory of fraud does not pass muster under Cleveland, because a car title is not "property" in the hands of the State. The fact that there was another legal theory that may have supported the conviction does not rescue the conviction, because if the jury is given two options for conviction, one of which is legally correct, and the other legally incorrect, the verdict cannot be upheld. Griffin v. United States, 502 U.S. 46 (1991).

***United States v. Catone***, 769 F.3d 866 (4th Cir. 2014) If a defendant receives federal benefits in an amount in excess of $1,000, it is a felony (18 U.S.C. § 1920). If the defendant receives less than $1,000, it is a misdemeanor. The jury must find the amount of the benefits beyond a reasonable doubt, pursuant to Apprendi, in order to sustain a felony conviction.

***Dixon v. Williams***, 750 F.3d 1027 (9th Cir. 2014) In the state murder trial, the judge erroneously instructed the jury that an honest, but reasonable belief that self-defense was necessary is not a defense to malice murder. The proper instruction is that an honest, but unreasonable belief that self-defense is necessary is not a defense. This erroneous instruction violated the defendant's right to due process and necessitated granting the writ of habeas corpus.

***United States v. McKye***, 734 F.3d 1104 (10th Cir. 2013) Whether a particular transaction involves a "security" is a mixed question of fact and law that, pursuant to Gaudin, must be submitted to the jury to be decided under the reasonable doubt standard. In this case the judge instructed the jury that a "note" constitutes a security. This was reversible error. Not all notes are securities, so the instruction erroneously explained the law and removed from the jury's consideration whether the notes in this case were securities.

***United States v. Zhen Zhou Wu***, 711 F.3d 1 (1st Cir. 2013) The defendant was charged with violating the Arms Export Control Act by selling a specific product (phase shifters) to China. The law provides that the President will designate certain items that may not be sold to certain countries. The President delegated the designation determination to the State Department. The State Department did not identify particular products that qualify, except by generic categories (thus, as one Court analogized, the Department identified "bicycles" without specifying every conceivable manufacturer, make and model of every bicycle). The question in this case is whether the jury was required to decide whether the phase shifters were covered by the law. The First Circuit held that this is a fact question that the jury must decide, despite the fact that the law specifically states that a defendant may not challenge the President's determination that a particular product may not be sold to China. Moreover, the fact that the State Department later specified that the defendant's phase shifters were covered could not be applied to the defendant, whose

sales occurred prior to the State Department determination. Finally, the First Circuit held that the fact that the defendant was obviously aware of that the product was covered by the prohibition (based on their conduct) did not eliminate the fact that they were outlawed from what the government was required to prove to the jury beyond a reasonable doubt. Even if the defendant's conduct exhibited a guilty mens rea, this does not alleviate the government's burden of proving the actus reus to the jury.

***United States v. Bader***, 678 F.3d 858 (10th Cir. 2012) The trial court instructed the jury on a theory of guilt that was not alleged in the indictment, and which was inconsistent with the government's theory of prosecution. The conviction on the pertinent counts was reversed.

***United States v. Johnson***, 652 F.3d 918 (8th Cir. 2011) The evidence was insufficient to support a conviction for receiving child pornography, though there was sufficient evidence to prove possession. The defendant's computer had child pornography images. The indictment alleged that he possessed child pornography that had been shipped and transported in interstate commerce, a violation of § 2252(a)(2). However, when the judge instructed the jury, the jurisdictional element was explained as follows: "The materials containing the illicit visual depictions were produced using materials that had been mailed, shipped, or transported by computer in interstate or foreign commerce." There was no evidence at trial that the components of the computer were shipped in interstate commerce. The Eighth Circuit held that where the jury instructions limit the manner in which the offense may be committed, this also limits the sufficiency-of-the-evidence review by the appellate court. The evidence was insufficient in this case.

***United States v. Ferguson***, 676 F.3d 260 (2d Cir. 2011) In this securities fraud trial, one theory of culpability was aiding and abetting, i.e., "willfully caused an act to be done which, if directly performed by him or another would be an offense against the United States." The trial court properly defined "willfully" but failed to explain that the defendant's willful conduct must cause the act to be done by the other person. This was plain error requiring a reversal of the conviction.

***United States v. Needham***, 604 F.3d 673 (2d Cir. 2010) A Hobbs Act prosecution requires proof that the offense affected interstate commerce. Even in a robbery involving drugs, the government is required to prove that the offense affected interstate commerce. Because this is an essential element of the offense, the jury must be instructed that they must find that the robbery affected interstate commerce and the failure to do so is reversible error.

***United States v. Wisecarver,*** 598 F.3d 982 (8th Cir. 2010) Because of the inadvertent use of a double-negative in explaining the defense of justification, the jury instruction in this case was erroneous. Though it was inadvertent (and defense counsel did not object), the error was plain and necessitated setting aside the verdict.

***United States v. Gomez***, 580 F.3d 1229 (11th Cir. 2009) The trial court's failure to instruct the jury in accordance with Flores-Figueroa was not harmless error in this case and required reversal of the conviction. The element of the offense that was omitted in the jury instruction (the fact that the stolen identity applied to a real person), was a contested issue at trial and the error, therefore, was not harmless.

***United States v. Rush-Richardson***, 574 F.3d 906 (8th Cir. 2009) The defendant was charged with possessing a firearm in furtherance of a drug trafficking offense, but the just instruction defined the crime in the language that applies to possession of a firearm during and in relation to a drug trafficking offense. The "in furtherance" offense requires a greater relationship between the possession of the weapon and the drug crime than the "during and in relation" offense. See also United States v. Brown, 560 F.3d 754 (8th Cir. 2009).

***United States v. Tureseo***, 566 F.3d 77 (2d Cir. 2009) The trial court's erroneous instruction about the elements of aggravated identity theft (this case was tried pre-United States v. Flores-Figueroa, 129 S.Ct. 1886 (2009)), required vacating the conviction for aggravated identity theft.

***United States v. Pereyra-Gabino***, 563 F.3d 322 (8th Cir. 2009) The defendant was charged with harboring illegal aliens. The instruction explained that the jury must find (1) that a person was in the country illegally; (2) that the defendant knew that a person was in the country illegally; and (3) that the defendant harbored or attempted to harbor one of the people identified in #1. The problem with this instruction is that there were several aliens identified in the case and the instruction permitted a jury to find that the defendant harbored one of the illegal aliens, but not that he knew that particular alien was in the country illegally. That is, the court failed to explain that all three elements must apply to at least one of the aliens.

***United States v. Tureseo***, 566 F.3d 77 (2d Cir. 2009) The trial court failed to instruct the jury in this identity theft case that the defendant must have known that the identity he stole was of a "real person." See Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009). Even though there was considerable evidence that the defendant was aware that it was a real person whose identity he stole, the failure to instruct the jury on this essential element of the offense was reversible error.

***United States v. Hassan***, 578 F.3d 108 (2d Cir. 2008) The defendant was prosecuted for conspiring to import "khat" a plant grown in the Africa that sometimes contains a controlled substance known as cathinone. The plant itself is not illegal, but cathinone is. The evidence was sufficient to prove that he conspired to import khat containing cathinone. However, the jury instruction explaining the offense to the jury was erroneous. The jury instruction suggested that if the defendant conspired to import any controlled substance, the jury could convict the defendant. In this case, however, because of the confusion about whether khat was a controlled substance (it is not, but many government witnesses erroneously testified that it is), the judge should have specifically instructed the jury that the government had to prove that the defendant conspired to import khat containing cathinone in order to convict him of the conspiracy offense.

***Medley v. Runnels***, 506 F.3d 857 (9th Cir. 2007) The trial court erred in instructing the jury that a flare gun qualified as a firearm. The Whether a flare gun qualified as a firearm involved the resolution of certain factual questions which must be decided by a jury, not the judge.

***Polk v. Sandoval***, 503 F.3d 903 (9th Cir. 2007) The trial court's instruction to the jury failed to accurately define the elements of the offense of murder, specifically it omitted the element of "deliberation." The conviction was tainted by this error and the writ was granted. A similarly defective instruction also led to habeas relief in Chambers v. McDaniel, 549 F.3d 1191 (9th Cir. 2008).

***United States v. Holly***, 488 F.3d 1298 (10th Cir. 2007) The judge instructed the jury on the offense of aggravated sexual assault explaining that this offense may be committed in one of two ways. One of the ways suggested by the judge was legally incorrect, the other theory was correct. With regard to certain counts of conviction, it could not be determined if the jury relied on the incorrect, or correct theory. In this situation, the conviction must be reversed. See Stromberg v. California, 283 U.S. 359 (1931); Zant v. Stephens, 462 U.S. 862 (1983); Griffin v. United States, 502 U.S. 46 (1991).

***United States v. Korey***, 472 F.3d 89 (3rd Cir. 2007) The defendant was charged with using a firearm during and in relation to a conspiracy to distribute cocaine. A correct instruction on the law of conspiracy to distribute cocaine was required. The evidence established that the defendant was asked by a cocaine dealer to kill someone, in exchange for which the dealer would pay the defendant with cocaine. The district court judge instructed the jury that if they found that the defendant agreed to accept cocaine in payment for killing the victim, that is a conspiracy to distribute cocaine. This was erroneous. This instruction failed to explain correctly that a conspiracy to distribute cocaine requires proof of a "unity of purpose" between the conspirators to distribute cocaine and this instruction did not include that concept. Merely accepting payment in the form of cocaine is not the same as sharing a purpose with the dealer to distribute cocaine. Reversible error.

***United States v. Hoover***, 467 F.3d 496 (5th Cir. 2006) The trial court's jury charge improperly expanded the indictment by offering a theory by which the jury could find that the statement made by the defendant was false, in a manner different than the manner set forth in the indictment.

***United States v. Alferahin,*** 433 F.3d 1148 (9th Cir. 2006) The defendant was charged with a violation of 8 U.S.C. § 1425(a), knowingly procuring naturalization contrary to law. The trial court did not instruct the jury on the concept of materiality in connection with the false statement that the defendant allegedly made on his naturalization application. The trial defense attorney acquiesced to the failure to instruct the jury on the concept of materiality. The Ninth Circuit held that materiality is an element of the offense, the failure to instruct the jury on this essential element was plain error and the attorney was ineffective in failing to object.

***United States v. Southwell***, 432 F.3d 1050 (9th Cir. 2005) When the defendant raises the defense of insanity, in order for the jury to return a guilty verdict, not only must the jury unanimously find the defendant guilty; the jury must also unanimously reject the insanity defense. This applies to all affirmative defenses.

***United States v. Nickl***, 427 F.3d 1286 (10th Cir. 2005) In connection with the allegation that the defendant was an aider and abettor, the judge instructed the jury that they could assume that the principal actually committed the crime, based on his plea agreement. This violated Rule 605's prohibition on judicial testimony.

***United States v. Zhou***, 428 F.3d 361 (2d Cir. 2005) In a §924(c) firearm prosecution, the evidence of the underlying felony must establish its commission beyond a reasonable doubt, because the commission of the underlying felon is an essential element of the firearm offense. Nevertheless, it is not necessary that the defendant actually be convicted of the predicate offense.

***United States v. Serawop***, 410 F.3d 656 (10th Cir. 2005) In defining voluntary manslaughter to the jury, the trial court explained the concept of "heat of passion" but failed to explain that the homicide must be intentional. Consequently, the jury may have convicted the defendant of voluntary manslaughter without finding that the killing was intentional – for example, it could have been in the heat of passion, but still negligent (in which case it might have been involuntary manslaughter). The conviction was reversed.

***United States v. Cassel***, 408 F.3d 622 (9th Cir. 2005) The defendant was charged with interfering with a sale of federal land by intimidation (18 U.S.C. § 1860). He defended on First Amendment grounds. The Ninth Circuit held that the government must prove that the defendant subjectively intended to intimidate the victim. Absent this requirement, the First Amendment would bar a prosecution. The trial court's failure to properly instruct the jury on this element – subjective intent to intimidate – was harmful error.

***Sanders v. Cotton***, 398 F.3d 572 (7th Cir. 2005) The state trial court erred in failing to instruct the jury, in accordance with state law, that if the issue of heat of passion is raised, the state was obligated to prove the absence of heat of passion beyond a reasonable doubt before it could convict the defendant of murder, because the absence of heat of passion was an essential element of the offense of murder. The trial counsel requested the instruction. Appellate counsel provided ineffective assistance of counsel in failing to raise this meritorious issue in the state appeal.

***United States v. McLaughlin***, 386 F.3d 547 (3rd Cir. 2004) Materiality is an essential element of an offense under 29 U.S.C. § 439(b) (False reports in Department of Labor filings). The trial court erred in failing to submit the question of materiality to the jury. Harmless error.

***United States v. Hugs***, 384 F.3d 762 (9th Cir. 2004) The defendant was charged with involuntary manslaughter by committing an unlawful act not amounting to a felony. The jury was charged on two other methods of committing the offense, however. This

was improper, but harmless, given another instruction that specifically told the jury that the defendant was only charged with the crime set forth in the indictment.

***Martinez v. Garcia***, 379 F.3d 1034 (9th Cir. 2004) With regard to ambiguous jury instructions, in some instances, when a case is submitted to the jury on alternative theories, the unconstitutionality of any of the theories requires that the conviction be set aside. In those cases, a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal theory, as well as on a proper theory or theories. Although it is possible that the guilty verdict may have had a proper basis, it is equally likely that the verdict rested on an unconstitutional ground and the court will decline to choose between two such likely possibilities. The jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court is uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See Boyde v. California, 494 U.S. 370 (1990); Mills v. Maryland, 486 U.S. 367 (1988). See also United States v. Holly, 488 F.3d 1298 (10th Cir. 2007), discussed above.

***Reagan v. Norris,*** 365 F.3d 616 (8th Cir. 2004) Defendant was charged with murdering his girlfriend's young child. The girlfriend was also charged with the homicide and ultimately entered a guilty plea to a lesser charge. The defendant claimed that if he was the cause of death, it was accidental. In the jury instruction, the trial court erroneously failed to tell the jury that in order to be found guilty, the defendant had to knowingly cause the death of the victim. Instead, the instruction simply stated that the defendant had to be shown to have caused the death. Trial counsel's failure to object to this omission in the instruction was ineffective assistance of counsel necessitating a new trial.

***Evanchyk v. Stewart***, 340 F.3d 933 (9th Cir. 2003) It is a violation of due process for a jury instruction to omit an element of the crime. United States v. Gaudin, 515 U.S. 506 (1995); Osborne v. Ohio, 495 U.S. 103 (1990); Sandstrom v. Montana, 442 U.S. 510 (1979); In re Winship, 397 U.S. 358 (1970). In this case, the jury instruction on the law of conspiracy to commit murder omitted the element of the offense of intent to murder (the trial court offered the jury the option of finding the defendant guilty of conspiracy to commit felony murder which is not an offense under the applicable state law). Only if the omission of the element is harmless will such an error not lead to reversal. Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827 (1999). The error was not harmless in this case.

***Powell v. Galaza***, 328 F.3d 558 (9th Cir. 2003) Instructing the jury that the defendant's testimony amounted to an acknowledgement of one of the elements of the offense was reversible error. The defendant tried to explain why he failed to appear in court for sentencing (he was charged with failure to appear). The judge told the jury that his explanation was not a valid defense and that his testimony was sufficient to satisfy the intent element of the offense.

***United States v. Syme***, 276 F.3d 131 (3rd Cir. 2002) The Third Circuit explains that where a conspiracy alleges that the defendants conspired to commit an offense in several ways, if the evidence is sufficient with regard to certain ways, but not others, a general verdict of guilty will be sustained on the theory that the jury properly evaluated the evidence and convicted on the sufficient basis. However, where the judge instructs the jury incorrectly about one of the ways, the verdict will not be upheld, because the jury may not have realized the legal elements of one of the alternative methods of committing the offense. In this case, the conviction was upheld. See generally Griffin v. United States, 502 U.S. 46 (1991); Yates v. United States, 354 U.S. 298 (1957); Stromberg v. California, 283 U.S. 359 (1931).

***Smith v. Horn***, 120 F.3d 400 (3rd Cir. 1997) The defendant was charged with capital murder in Pennsylvania. The trial court charged the jury (and the prosecutor argued), that as long as the defendant and his colleague were "accomplices" in the robbery, it did not matter who actually shot the victim. This was erroneous under state law. The defendant must have had the specific intent to kill in order to be guilty of first-degree murder under state law and the failure to properly instruct the jury amounted to a violation of due process.

***United States v. Baird***, 134 F.3d 1276 (6th Cir. 1998) The defendant was charged with making a false statement to the government in an effort to obtain a progress payment on a government construction project. The defendant submitted a claim for payment based on "incurred costs," though the defendant had not yet paid for the product for which he was requesting a progress payment. Because of the confusion over the definition of the term "incurred costs," the trial court should have instructed the jury on this aspect of the charge.

***United States v. Allen***, 129 F.3d 1159 (10th Cir. 1997) 18 U.S.C. § 1957 requires that the monetary transaction be "in or affecting interstate or foreign commerce." This requirement is both jurisdictional and an element of the offense that should be submitted to the jury for decision.

***United States v. Bordeaux,*** 121 F.3d 1187 (8th Cir. 1997) Omitting to include the element of force in the court's instruction to the jury in a case alleging abusive sexual contact by force (18 U.S.C. § 2244(a)(1)) was plain error. A new trial was required even though the defendant did not object at trial.

***United States v. Gallerani***, 68 F.3d 611 (2d Cir. 1995) In order to be guilty of a conspiracy offense, there must be an unlawful object of the conspiracy. Thus, proving that there was an unlawful object is an essential element of the offense. In this case, the trial court failed to instruct the jury about the need to prove an unlawful object of the conspiracy. Even absent an objection, this was reversible error. The fact that the court referred to the indictment and sent the indictment to the jury did not ameliorate the error. With respect to counts of the indictment which relied on a Pinkerton theory of liability, the error in the conspiracy charge tainted the convictions on those counts, as well.

***United States v. Smith***, 939 F.2d 9 (2d Cir. 1991) The trial judge, over the objection of both the government and the defense, refused to instruct the jury on all the elements of the offense, instructing them, instead, only on the disputed elements. This was reversible error, not subject to harmless error analysis.

***United States v. Stansfield,*** 101 F.3d 909 (3rd Cir. 1996) The defendant was charged with a violation of 18 U.S.C. §1512(a)(1)(C), attempting to kill a witness to prevent him from communicating with a federal law enforcement officer about a federal offense, but the jury was instructed pursuant to §1512(b)(3): intimidating, or using physical force, to prevent a person from communicating with a federal law enforcement officer about a federal offense. This was not what the defendant was charged with, or tried for, and thus, the conviction was reversed. Other aspects of this decision were abrogated by the United States Supreme Court decision in Fowler v. United States, 131 S. Ct. 2045 (2011).

***United States v. Edmonds***, 80 F.3d 810 (3rd Cir. 1996) The "series" element of a CCE prosecution requires proof that the defendant committed at least three related predicate offenses. In this case, the government alleged that there were eight predicate offenses. The trial court erred in failing to instruct the jury that there must be unanimity among the jurors as to which three (at least) predicates formed the series. Harmless error.

***United States v. Johnson***, 71 F.3d 139 (4th Cir. 1995) The defendant was charged with robbing a credit union. At trial, the government offered undisputed conclusive proof that the victim was, in fact, a credit union as defined in federal law. The judge instructed the jury that the victim met the statutory definition of a credit union. This instruction violated the defendant's right to have the jury make findings on every element of the offense. This type of error is not subject to harmless error analysis.

***United States v. Tomblin***, 46 F.3d 1369 (5th Cir. 1995) The defendant, who was not a public official, was charged with a Hobbs Act violation. The theory was that he threatened his victims into paying him money to ensure that he would get favorable treatment from a public official with whom he was affiliated. The government could proceed on a theory of extortion by use of fear of economic harm but could not proceed on a "color of official right" theory. The trial court, however, provided both options to the jury. This was erroneous and required reversal of the conviction on this count: "When disjunctive theories are submitted to the jury and the jury renders a general verdict of guilty, appeals based on evidentiary deficiencies must be treated differently than those based on legal deficiencies. If the challenge, as here, is legal and any of the theories was legally insufficient, then the verdict must be reversed."

***United States v. Palazzolo***, 71 F.3d 1233 (6th Cir. 1995) The defendant was charged with a conspiracy which had three illegal objects, one of which was structuring financial transactions. The trial court instructed the jury erroneously about the mens rea element of the structuring offense (see Ratzlaf v. United States, 114 S. Ct. 655 (1994)). The conspiracy conviction had to be set aside. Because the jury may have relied on the invalid object – that is, the object that was improperly defined – the general verdict could not be upheld.

***United States v. Nelson***, 27 F.3d 199 (6th Cir. 1994) The defendant was charged with possessing a weapon in connection with a drug offense in violation of 18 U.S.C. §924(c). It is not necessary in such a case for the government to also charge the defendant with the underlying drug offense. However, the government must prove that the defendant engaged in the underlying drug offense. In the judge's instructions to the jury, he mentioned the need to prove that a drug offense be found to be the predicate, but there was no definition of the elements of the underlying drug offense. Failing to instruct the jury about the elements of the underlying drug offense amounts to omitting an element of the §924(c) offense. Even absent an objection, this is plain error requiring reversal of the conviction.

***United States v. Mentz***, 840 F.2d 315 (6th Cir. 1988) In this bank robbery trial, the trial judge instructed the jury that the victim-bank was insured by the FDIC. This improperly removed from the jury's consideration one of the elements of the offense and violated the defendant's right to have a jury determine his guilt or innocence and to make such a finding with regard to each element of the offense. The error was not harmless.

***United States v. Locklear***, 97 F.3d 196 (7th Cir. 1996) Defendant was prosecuted for uttering counterfeit cashier's checks in violation of 18 U.S.C. §493. That statute requires proof that the instrument was purported to have been issued by a bank authorized or acting under the laws of the United States. The indictment did not charge this element of the offense, the government offered no evidence on this element of the offense and the jury was not instructed on this element of the offense. The conviction was reversed.

***United States v. Ripinsky***, 109 F.3d 1436 (9th Cir. 1997) An essential element of §1957 money laundering is a financial transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce. The foreign commerce component of this element is an essential element of the offense which must be proven beyond a reasonable doubt and submitted to the jury.

***United States v. Tagalicud,*** 84 F.3d 1180 (9th Cir. 1996) Several defendants were charged with conspiracy and several substantive counts involving marriage fraud, immigration fraud, and submitting false immigration documents. The trial judge singled out one defendant and explained the offenses to the jury using that defendant as an example. The Ninth Circuit concluded that omitting to define the offenses for the other defendants, or even referring to the instructions as applying to the other defendants, required reversing their convictions. Moreover, because the judge singled out the one defendant, this amounted to an improper judicial implication that the case against her was more important and her conviction was reversed, as well.

***United States v. Nguyen***, 73 F.3d 887 (9th Cir. 1995) 8 U.S.C. §1324(a) makes it an offense to bring any alien into the United States other than through a port of entry. The statute contains no explicit mens rea requirement. Nevertheless, the court concluded that Congress intended such a requirement. See Staples v. United States, 114 S.Ct. 1793 (1994); United States v. United States Gypsum Co., 438 U.S. 422 (1978); Morisette v. United States, 342 U.S. 246 (1952). The government must prove that the defendant knew that the individuals he was transporting were aliens and that he off-loaded them at other than a port of entry, intending to violate the law.

***Harmon v. Marshall***, 69 F.3d 963 (9th Cir. 1995) Failing to instruct the jury on all elements of an offense is constitutional error, because it precludes the jury from finding each fact necessary to convict a defendant. Such error is plain and cannot be harmless. In this case, with regard to two counts, the trial court did not give the jury any instructions regarding the elements of the offense. This required setting aside the verdicts on those counts.

***United States v. Smith***, 82 F.3d 1564 (10th Cir. 1996) Where two methods of committing a crime are charged disjunctively in the indictment and the appellate court concludes that there was insufficient evidence to support one of the methods, a conviction will still be upheld. However, where the trial court gives an erroneous instruction about one of the methods, even if the other method is explained properly, the conviction cannot be sustained, because there is no assurance that the jury did not convict the defendant on the basis of the method that was mis defined. Here, for example, the defendant was charged with "using" and "carrying" a firearm in connection with a drug offense. 18 U.S.C. §924(c). The court instructed the jury in the pre-Bailey language, which provided an overly broad definition of "using" a firearm. Because the jury may have convicted the defendant based on the defendant's "use" of the firearm – in the overly broad sense of "use" – the conviction was reversed.

***United States v. Rogers***, 94 F.3d 1519 (11th Cir. 1996) The trial court erred by failing to instruct the jury, in accordance with Staples, that the government must prove that the defendant knew the characteristics of the weapon which brought it within the definition of the Firearms Act (i.e., that it was a machine gun, or a silencer). The error, however, even though it amounted to omitting an element of the offense, was harmless error.

***United States v. DeFries,*** 129 F.3d 1293 (D.C. Cir. 1997) In the midst of instructing the jury on the elements of a RICO offense, the judge instructed the jury that they should presume that the union was an enterprise. Because the existence of an enterprise is an essential element of the offense, this instruction was erroneous.

***United States v. Rawlings***, 73 F.3d 1145 (D.C. Cir. 1996) The defendant was charged with knowingly possessing an unregistered firearm. He contended that he did not knowingly possess the weapon. During the jury instructions, the judge explained to the jury that the most important element of the offense was the "possession" element. The trial court also erred in instructing the jury that the critical issue in this case was one of credibility – that this was a classic swearing contest. Actually, the defendant admitted holding a box that contained the gun but did not know the gun was in the box; and the police simply testified that the defendant was in possession of the box. Thus, this was not simply a swearing contest between the police and the defendant, and the sole issue was not "possession." Even if the court were to put one element above another (and it should not), the most important issue in the case was whether the defendant had knowledge of what he was possessing. Also important was whether the police were accurate in their identification of the defendant as someone they saw in possession of the gun; this was not a matter of credibility, but of perception.

***United States v. Jones***, 909 F.2d 533 (D.C. Cir. 1990) Four women were prosecuted under the Travel Act for their participation in a "prostitution ring." In order to prosecute someone for using a facility in interstate commerce for the purpose of violating a state law, the prosecution must show the activity was, in fact, unlawful under a specific state law. Furthermore, the government must prove that the defendant had the intent, with respect to each element of the relevant state offense. In instructing the jury in this case, the district court read the prostitution-related statutes of the relevant states, but did not adequately charge the jury, as a state court would, on the elements of those offenses. Because of this failure, all travel act convictions in this case were reversed.

***JURY INSTRUCTIONS (Flight) SEE ALSO: EVIDENCE (Flight)***

***United States v. Blanco,*** 392 F.3d 382 (9th Cir. 2004) The trial court erred (though it was harmless) in instructing the jury on flight as consciousness of guilt. The evidence did not establish that the defendant fled from the agents after learning that they had a warrant for his arrest. Rather, his flight was not in response to an attempt to effectuate an arrest.

***JURY INSTRUCTIONS (Good Faith) SEE ALSO: ADVICE OF COUNSEL OR OTHER EXPERT; MAIL FRAUD***

***United States v. Wallen***, 874 F.3d 620 (9th Cir. 2017) The Endangered Species Act makes it a crime to kill a grizzly bear unless, in good faith, the defendant believed it was necessary in self-defense. The good faith element is judged under subjective standard, not an objective standard. In other words, did the defendant believe that he needed to kill the bear in self-defense, as opposed to, "would a reasonable person" have believed that it was necessary to kill the grizzly bear in self-defense.

***United States v. Certified Environmental Services, Inc.,*** 753 F.3d 72 (2d Cir. 2014) Federal and State laws regulate the removal of asbestos from buildings, including OSHA regulations and the Clean Air Act. A company that removes asbestos must comply with various laws regarding the method of removal and a separate "monitoring" company must monitor the air after the removal is accomplished. The defendants in this case (a company and several employees) were involved in monitoring asbestos removal and were charged with not properly monitoring the asbestos removal and submitting false monitoring reports. The defense sought to introduce evidence at trial about certain conversations with officials about their monitoring practices, specifically, whether particular monitoring practices were required if the location was not sufficiently "contained" (i.e., the area

where the asbestos was being removed was not fully contained which might result in the monitoring causing more contamination in nearby areas). The government objected that these conversations were hearsay. The trial court's exclusion of this evidence was reversible error. The evidence relating to the conversations with regulators was not offered to prove the truthfulness of the information provided by the regulators, but to prove that the defendants were acting in good faith when they engaged in certain monitoring practices. The fact that some of the conversations occurred after the criminal conduct did not make the evidence irrelevant, because it was consistent with what the defendants claimed was there long-standing understanding of the monitoring rules.

***United States v. Kottwitz***, 627 F.3d 1383 (11th Cir. 2010) The trial court erred in refusing to give an instruction on good faith reliance on advice of an accountant in this tax fraud prosecution. The defendant bears an extremely low threshold to justify the good faith reliance instruction and does not neet to prove good faith. Whether the defendant fully disclosed the relevant facts, failed to disclose all relevant facts, or concealed information from his advisor, and relied in good faith on his advisor are matters for the jury – and not the court – to determine, under proper instruction. See also United States v. Morris, 20 F.3d 1111 (11th Cir. 1994); United States v. Eisenstein, 731 F.2d 1540 (11th Cir. 1984). (Note, rehearing resulted in reversal of additional counts on 12/22/2010, 627 F.3d 1383).

***United States v. Hurwitz,*** 459 F.3d 463 (4th Cir. 2006) In a lengthy opinion explaining the law governing the prosecution of doctors for prescribing pain medication, the Fourth Circuit concludes that reversible error occurred when the trial court instructed the jury that good faith is not a defense to a § 841 prosecution of a doctor. The core holding is that an objective standard is appropriate, but this is not necessarily inconsistent with a good faith defense.

***United States v. Rossomando***, 144 F.3d 197 (2d Cir. 1998) It may be appropriate in some cases to instruct the jury that the defendant's expectation that no harm will ultimately befall the victim is not a defense. The point of this instruction, however, assumes that the defendant did, in fact, believe that there would be at least temporary harm. Thus, if a defendant makes a false statement in a loan application, knowing that this will facilitate a loan, but honestly believes that he will ultimately re-pay the loan, this is not a valid "good faith" defense. In this case, however, the defendant did not ever intend that the victim suffer any loss. In this situation, the caveat to the good faith instruction was inappropriate.

***United States v. Cavin***, 39 F.3d 1299 (5th Cir. 1994) Instructing the jury that it "may" acquit if they find that the defendant acted in good faith, was improper. If the defendant acted in good faith, the jury was obligated to find the defendant not guilty. Acquittal is not optional in such circumstances; it is mandatory, because a finding of good faith precludes a finding of fraudulent intent. United States v. Haddock, 956 F.2d 1534 (10th Cir. 1992) The trial court erred in not instructing the jury on defendant's good faith defense to §656 misapplication charges. Instructions on the law of willfulness and "intent to defraud" are not adequate substitutes for a charge on good faith. This decision was later abrogated in United States v. Wells, 519 U.S. 482 (1997), on the grounds that materiality is not an element of a false statement charge.

***United States v. Morris***, 20 F.3d 1111 (11th Cir. 1994) The trial court committed reversible error by failing to instruct the jury on the good faith defense, as requested by the defendant in this prosecution for filing a false income tax return. The court's instruction defining the terms "willfully" and "knowingly" was not an adequate substitute. Among other things, the charge did not explain that a good faith – yet objectively unreasonable – belief in the correctness of the return, would be a complete defense.

***JURY INSTRUCTIONS (Inconsistent Verdicts)***

***United States v. Randolph***, 794 F.3d 602 (6th Cir. 2015) The defendant was charged with being a member of a drug conspiracy with various members of his family. On the verdict form, the jury was asked to first mark whether the defendant was "guilty" or "not guilty" of the conspiracy charge and then, "If you unanimously find that a particular controlled substance was not involved in the offense [i.e., cocaine, crack cocaine, marijuana], mark 'none' on the appropriate special verdict form." The jury returned a verdict of guilty against Randolph but marked "none" beside each of the three drugs. The Sixth Circuit held that this amounted to an acquittal, because the jury had to find that the conspiracy had as its object at least one of the drugs. This is not a case in which there are inconsistent verdicts (which generally do not require a reversal). This was one count of the indictment for which the jury apparently found insufficient evidence with regard to one of the elements of the offense.

***United States v. Moran-Toala***, 726 F.3d 334 (2d Cir. 2013) The defendant was charged with being a member of a drug conspiracy and with accessing a computer unlawfully. The computer offense was a misdemeanor unless the access was related to a separate felony offense. The jury was initially properly instructed that the computer offense required a separate finding regarding whether it was committed in connection with a felony offense (i.e., the drug conspiracy). During deliberations, the jury asked if the verdicts had to be consistent. The judge, over objection from the defense, answered that the verdicts on the two counts were not required to be consistent. The jury acquitted the defendant of the drug conspiracy but convicted on the computer offense with the felony enhancement. The Second Circuit held that the supplemental instruction was reversible error. The jury, in essence, was instructed that jury nullification was permissible.

***JURY INSTRUCTIONS (Intent / Willfulness)***

***United States v. O'Hagan***, 521 U.S. 642 (1997) The "misappropriate theory" of securities fraud involves a corporate "outsider" who violates Rule 10b-5 by misappropriating confidential information for securities trading purposes, in breach of a fiduciary duty owed to the source of the information, rather than to the persons with whom he trades. In this case, the Court holds that this conduct amounts to a criminal violation of the securities laws. The Court also held that the willfulness requirement in the criminal

provision required the government to prove that the defendant knew about Rule 10b-5 before a sentence of imprisonment may be imposed.

***Ratzlaf v. United States***, 510 U.S. 135 (1994) The defendants were charged with willfully structuring currency transactions at banks – that is, exchanging $9,500 for cashier's checks. The defendants acknowledged knowing about the bank's reporting requirement and conceded that their conduct was intended to avoid the filing of a report. They insisted that they did not know that structuring a transaction was a criminal offense (18 U.S.C. § 5324). The Supreme Court held that this was a valid defense: the term "willfully" in the statute requires proof that the defendants knew that their conduct was unlawful. Note: In 1994 Congress "legislatively overruled" Ratzlaf.

***Cheek v. United States***, 498 U.S. 192 (1991) In this tax evasion prosecution, the district court erroneously instructed the jury that the defendant could be found guilty of tax evasion if he unreasonably believed that he had no obligation to pay taxes. That is, in order to establish the element of willfulness, the government must prove that the defendant in fact knew that he was evading taxes. A good faith misunderstanding of the law or a good faith belief that one is not violating the law negates willfulness, whether or not that claimed belief or misunderstanding is objectively reasonable.

***Bryan v. United States***, 118 S. Ct. 1939 (1998) It is a federal offense to engage in the sale of firearms without a license. The question in this case is what the government is required to prove about the defendant's knowledge of the law before he may be convicted of willfully violating the statute. The Court concludes that the defendant must be shown to know that he is violating the law, but the government is not required to show that the defendant was aware of the specific licensing requirement that he violated.

***Elonis v. United States***, 135 S. Ct. 2001 (2015) In order to be guilty of making an unlawful interstate threat, it is not enough that the defendant's rants (on Facebook) would be perceived by others as threatening. The government must prove that the defendant intended the statements as threats. There must be subjective intent to threaten the listener, which is not satisfied simply with proof that a reasonable listener would feel threatened.

***United States v. Tydingco***, 909 F.3d 297 (9th Cir. 2018) The crime of harboring a fugitive requires proof that the defendant intended to violate the law.

***United States v. Edwards***, 869 F.3d 490 (7th Cir. 2017) Omitting term "corruptly" when defining the elements of a § 1512(b)(3) offense was reversible error. The Seventh Circuit also noted the divergent opinions about what exactly the mens rea is for a § 1512(b)(3) offense: whether the defendant must specifically be intent to impair a criminal investigation or if it is sufficient to intend to violate the law. But in either event, the lack of any mens rea in the instruction in this case was reversible error.

***United States v. Hernandez***, 859 F.3d 817 (9th Cir. 2017) The defendant was charged with illegally bringing guns into California. Under the Bryan standard, a defendant can be found guilty of a crime requiring a "willful" mens rea if the defendant knew that he was committing an illegal act, even if he was not necessarily aware of the specific illegality of his conduct. In this case, the court instructed the jury on this principle in the standard Bryan jury language. However, during the course of trial, the government introduced evidence that the defendant may have been engaged in other illegal conduct after he engaged in the charged offense. The jury may have believed that this subsequent illegal conduct qualified to satisfy the willfulness requirement of the charged offense. The Ninth Circuit reversed the conviction. The defendant's bad purpose must involve the charged offense, not some other (and in particular subsequent) offense.

***United States v. Williams***, 836 F.3d 1 (D.C. Cir. 2016) The defendant was charged with second degree murder for his role in a "hazing" incident involving another soldier on a military base. The hazing involved several soldiers beating another soldier (with his consent) for a few minutes. The incident resulted in the death of the hazee. The defendant argued that the victim's consent was relevant to the defendant's state of mind. Second degree murder requires the government to prove malice and malice can be proven by showing that a defendant intended to kill or, as the government argued here, that he consciously disregarded an extreme risk of death or serious bodily injury. While it is true that the defendant cannot "blame the victim," the defense is still entitled to offer evidence that negates his culpable state of mind. The defense counsel argued that the victims' consent to being hazed was relevant to the determination whether the defendant acted with malice. In closing argument, the prosecutor told the jury that that was entirely erroneous, and that the victim's consent was not relevant to any issue in the case. After closing argument, the judge declined to issue an instruction that explained that the victim's consent could be relevant to the issue of malice. The D.C. Circuit reversed the conviction. The victim's consenting behavior—that is, his "continued, and enthusiastic, statements that he wanted the initiation to continue"—suggested that Williams was not conscious of an extreme risk that Johnson might die or be seriously injured.

***United States v. Dobek***, 789 F.3d 698 (7th Cir. 2015) The statute that outlaws exporting munitions illegally (The Arms Export Control Act) requires that the government prove that the offense was committed willfully. 22 U.S.C. § 2778(b)(2) and (c). The Seventh Circuit holds that the term "willfully" in this statute requires proof that the defendant had knowledge that he needed a license to export the munitions that he exported. The instruction should specifically reference the necessity of proving that the defendant knew that the specific item that he was exporting was not allowed to be exported.

***United States v. Gray***, 780 F.3d 458 (1st Cir. 2015) The defendant was prosecuted for falsely reporting a bomb threat on a flight. The required mens rea instruction is that the hoax must have been perpetrated with "malice" which is defined as acting with "evil purpose or evil motive." The trial judge instructed the jury that "malice" means "evil purpose or improper motive." This was reversible error. "Improper" is not the same as "with malice" or "evil."

***United States v. Montgomery***, 747 F.3d 303 (5th Cir. 2014) In a tax prosecution, when the trial court instructs the jury in accordance with Cheek, the instruction must include the concept that a defendant's belief in the legality of his conduct is a defense and the belief need not be reasonable. Even an unreasonable belief in the lawfulness of one's conduct is sufficient to require acquittal.

***United States v. Liu***, 731 F.3d 982 (9th Cir. 2013) In a criminal copyright prosecution, 17 U.S.C. § 506(a), the term "willfully" requires proof that the defendant intended to violate a criminal law, not just that he or she intended to make a copy of a copyrighted work. In a case involving counterfeit labels, the term "knowingly" requires proof that the defendant knew that the labels were counterfeit, not just that he knew that he was trafficking in labels that happen to turn out to be counterfeit.

***United States v. Sasso***, 695 F.3d 25 (1st Cir. 2012) 18 U.S.C. § 32(a)(5) makes it a crime to willfully interfere with anybody engaged in the authorized operation of an aircraft with intent to endanger the safety of any person or with reckless disregard for the safety of human life. The trial court instructed the jury, "If a person's actions interfere with an aircraft operator, you may infer that the person acted willfully if his actions were deliberate and intentional and had the natural and probable effect of interering with the aircraft operator." The First Circuit held that this instruction diluted the willfulness element by allowing the jury to infer willfulness from the fact that the defendant acted purposefully, without proof that he knew that interference was the natural and probable effect of his action (i.e., pointing a laser at a helicopter). See also United States v. Rodriguez, 790 F.3d 951 (9th Cir. 2015); United States v. Gardenhire, 784 F.3d 1277 (9th Cir. 2015).

***United States v. Phillips***, 688 F.3d 802 (7th Cir. 2012) Judge Easterbrook and Judge Posner face off on the question of whether a defendant is guilty of making a false statement to a bank if the defendant is not aware that the false statement would influence the bank (because the defendant is lured into believing that the bank does not care about this particular statement). Judge Easterbrook in the panel opinion, concluded (for the majority) that the defendant need only be shown to have known that the statement was false and it was submitted to the bank with the understanding that the bank would consider the loan application when deciding whether to authorize the loan. Judge Posner, in dissent, wrote that the trial court erred in prohibiting the defendant from introducing evidence that the defendant, though knowing that the statement was false, was led to believe that it was not something the bank cared about. This case involved the typical "stated income" mortgage fraud case in which the mortgage broker told the customer/defendant that it made no difference what was written on the loan application, because "no doc" loans were known as "liar's loans" and the bank was not interested in the customer's recitation of income, because all that mattered was the customer's credit score. NOTE: Rehearing en banc was granted on December 7, 2012. REHEARING EN BANC GRANTED, and the conviction was reversed: In the en banc decision, Judge Posner wrote the majority opinion, and held that the evidence about what the defendants were told was admissible and could have disproved that they had the required state of mind to commit the offense. 731 F.3d 649 (7th Cir. 2013). United States v. Berry, 683 F.3d 1015 (9th Cir. 2012) Though the error was harmless, the trial court erred in its definition of "willfulness" because the definition simply reiterated the concept of knowledge. Willfulness involves an act committed with the purpose of violating the law. Knowledge simply means that the act is committed not through accident or mistake.

***United States v. Tobin***, 676 F.3d 1264 (11th Cir. 2012) The court held that "willfulness" is not an element of a § 841 offense (distribution of a controlled substance) and therefore, it is no defense that the defendant did not realize that his conduct was illegal or that he had consulted with a lawyer and the lawyer said the conduct was not illegal (this was an Internet Pharmacy prosecution). However, to be convicted of conspiracy to distribute a controlled substance, the defendant is required to act with knowledge of the illegality of his conduct, because under § 846, willfulness is an element of the offense and therefore, advice of counsel is a defense to a § 846 offense.

***United States v. Waller***, 654 F.3d 430 (3rd Cir. 2011) The trial court instructed the jury that in ascertaining the defendant's intent, it could consider any statements made or omitted by the defendant. The defendant had invoked his right to remain silent when he was arrested. This instruction was an improper invitation to consider the defendant's post-Miranda silence. Doyle v. Ohio, 426 U.S. 610 (1976). Conviction reversed.

***United States v. Weeks***, 653 F.3d 1188 (10th Cir. 2011) In the context of reviewing an ineffective assistance of counsel claim for a defendant who entered a guilty plea to a conspiracy offense, the Tenth Circuit emphasized that a conspiracy conviction requires proof that the defendant knew that his agreement involved a violation of the law, not simply an agreement to engage in certain conduct: "An agreement with others that certain activities be done, without knowing at the time of the agreement that the activities violate the law, is therefore insufficient to establish conspiracy."

***United States v. Mousavi***, 604 F.3d 1084 (9th Cir. 2010) The Bryan standard of willfulness – the defendant must be shown to have known that he was acting illegally, but the government is not required to prove that the defendant knew the specific licensing requirement that he violated – applies in a prosecution for the International Economic Emergency Powers Act, which outlaws selling certain goods to Iran.

***United States v. Hassan***, 578 F.3d 108 (2d Cir. 2008) The defendant was prosecuted for conspiring to import "khat" a plant grown in the Africa that sometimes contains a controlled substance known as cathinone. The plant itself is not illegal, but cathinone is. The evidence was sufficient to prove that he conspired to import khat containing cathinone. However, the jury instruction explaining the offense to the jury was erroneous. The jury instruction suggested that if the defendant conspired to import any controlled substance, the jury could convict the defendant. In this case, however, because of the confusion about whether khat was a controlled substance (it is not, but many government witnesses erroneously testified that it is), the judge

should have specifically instructed the jury that the government had to prove that the defendant conspired to import khat containing cathinone in order to convict him of the conspiracy offense.

***United States v. Griffin,*** 524 F.3d 71 (1st Cir. 2008) At least in the context of a tax case, the trial court may not equate willfulness with recklessness. Thus, in a case involving filing a false tax return, the jury should not be told that recklessness is sufficient to prove the mens rea of the offense. Rather, "'Willfully' for purposes of the statute, means a voluntary, intentional violation of a known legal duty."

***United States v. Fields***, 500 F.3d 1327 (11th Cir. 2007) The Child Support Recovery Act (18 U.S.C. § 228) requires proof that the defendant willfully failed to pay a past due support obligation to his child who resided in another state. Is the state required to prove that the defendant knew that his child resided in another state? According to this decision, the answer is "yes." Though the "out of state" requirement is also a federal jurisdictional element of the offense, the court concludes that defendant's knowledge of the location of the child is also an element of the offense that the government must prove.

***United States v. Kenyon***, 481 F.3d 1054 (8th Cir. 2007) Attempt crimes require proof of specific intent to commit the crime. Consequently, a defendant may defend on the basis that he did not intend to commit the crime, even if the crime itself is not a specific intent crime. In this case, the defendant was charged with attempt to commit child sex abuse. He claimed that he was too intoxicated to have that intent. Even though intoxication is not a defense to the crime of sex abuse, it is a defense to the crime of attempt to commit sex abuse. There was sufficient evidence of the defendant's intoxication in this case to warrant the giving of an intoxication instruction and the failure to do so was reversible error as to those counts.

***Laird v. Horn***, 414 F.3d 419 (3rd Cir. 2005) Two defendants were tried for first degree murder in a Pennsylvania state court. The accomplice liability jury instruction did not clearly inform the jury that in order to be found guilty of aiding and abetting murder in the first degree (as opposed to being the actual killer), the defendant must have the intent to kill, not just the intent to engage in criminal activity that resulted in an accomplice killing the victim.

***United States v. Cassel***, 408 F.3d 622 (9th Cir. 2005) The defendant was charged with interfering with a sale of federal land by intimidation (18 U.S.C. § 1860). He defended on First Amendment grounds. The Ninth Circuit held that the government must prove that the defendant subjectively intended to intimidate the victim. Absent this requirement, the First Amendment would bar a prosecution. The trial court's failure to properly instruct the jury on this element – subjective intent to intimidate – was harmful error.

***Smith v. Horn***, 120 F.3d 400 (3rd Cir. 1997) The defendant was charged with capital murder in Pennsylvania. The trial court charged the jury (and the prosecutor argued), that as long as the defendant and his colleague were "accomplices" in the robbery, it did not matter who actually shot the victim. This was erroneous under state law. The defendant must have had the specific intent to kill in order to be guilty of first-degree murder under state law and the failure to properly instruct the jury amounted to a violation of due process.

***United States v. Ladish Malting Co***., 135 F.3d 484 (7th Cir. 1998) The defendant corporation was charged with violating OSHA laws, because a fire escape was in an unsafe condition, resulting in the death of an employee. The statute, 29 U.S.C. § 666, requires that the violation be willful before certain criminal penalties can be imposed. The judge instructed the jury that "willful" in this context means that the corporation either knew of the unsafe condition of the fire escape, or "should have known" of the hazardous condition. This was reversible error. "Should have known" is a civil negligence standard. In order to have knowledge, the corporation must have had actual knowledge, or remained deliberately ignorant of the unsafe condition.

***United States v. King***, 122 F.3d 808 (9th Cir. 1997) The crime of mailing threatening communications (18 U.S.C. § 876) requires proof that the defendant had the specific intent to threaten. The trial court's failure to instruct the jury on this element was reversible error.

***United States v. Starks***, 157 F.3d 833 (11th Cir. 1998) The defendant was charged with violation of the Medicare Antikickback Statute, 42 U.S.C. § 1320a-7b(b). The court concluded that the "willful" requirement was properly explained to the jury in these terms: "The word "willfully," as that term is used from time to time in these instructions, means the act was committed voluntarily and purposely, with the specific intent to do something the law forbids, that is with a bad purpose, either to disobey or disregard the law." The defendant sought a "Ratzlaf" instruction that would have required the jury to find that the defendant was aware of the actual law he was violating. Based on Bryan v. United States, 118 S. Ct. 1939 (1998), however, the court concluded that the government was only required to prove that the defendant was aware that he was violating the law – not that he was aware of the specific law that he was violating.

***United States v. Regan***, 937 F.2d 823 (2d Cir. 1991) The trial court erred in refusing to instruct the jury on the specific mistake of law defense offered by the defendants. A general mistake of law instruction was not sufficient. Rather, the court should have specifically instructed the jury clearly that the theory of the defendants, if believed, justified acquittal on the tax charges.

***United States v. Hayden***, 64 F.3d 126 (3rd Cir. 1995) The defendant was charged with a violation of 18 U.S.C. §922(n), possessing a firearm while under a felony charge. An essential element of this offense is that the defendant know that he is currently charged with a felony. This knowledge is part of the "willful" element of the offense. The defendant must act with the knowledge that he is violating the law. Here, the defendant offered evidence of his low I.Q. to support an inference that he was unaware of the pending felony charge. Excluding this evidence was reversible error.

***United States v. Curran***, 20 F.3d 560 (3rd Cir. 1994) The defendant was charged under §1001 with causing the filing of a false statement to the Federal Election Commission relating to campaign contributions. The defendant had his company's employees

make personal contributions to political candidates and then reimbursed them, a practice which violates the Federal Election Campaign Act. The court holds that the Ratzlaf definition of willfulness applies in this context – therefore, the jury must be instructed that the defendant was aware of the law and knew that his conduct was illegal. The election law, like the structuring laws, does not outlaw conduct which is "obviously evil" and represents a "regulatory statute." Thus, the jury should have been instructed that the defendant must have been shown to know of the campaign treasurers' reporting obligations, that he attempted to frustrate those obligations, and that he knew his conduct was unlawful.

***United States v. Rogers***, 18 F.3d 265 (4th Cir. 1994) The trial court's jury instruction was infected with a Ratzlaf error: the jury was not instructed that the defendant had to know that structuring was a criminal offense.

***United States v. Ojebode***, 957 F.2d 1218 (5th Cir. 1992) Defendant was detained at the Houston Airport after a plane in which he was traveling from Germany to Mexico made a brief stop there. He was found to be in possession of heroin. He defended a charge of importation on the basis that he never intended to import the heroin into the United States. Though the evidence was sufficient to support the conviction, the failure to charge the jury that the defendant had to specifically intend to bring the contraband into the United States was reversible error. Moreover, it was error to instruct the jury that knowledge of the plane's flight schedule could be found if the defendant remained deliberately ignorant. There was no basis in the record for this deliberate ignorance instruction.

***United States v. Buford***, 889 F.2d 1406 (5th Cir. 1989) The trial court instructed the jury as follows: "It is not necessary for the government to prove that either defendant knew that a particular act or failure to act is a violation of law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done." This is an improper burden-shifting instruction. Any crime which has willfulness as an element requires that the defendant's conduct represent a voluntary intentional violation of a known legal duty. Thus, the defendants must be shown to have known the legal duty which they violated.

***United States v. Burroughs***, 876 F.2d 366 (5th Cir. 1989) The trial judge committed reversible error in failing to define the term "willfully" in this conspiracy trial. Because the defendant claimed that he lacked the intent to form the agreement, the error could not be deemed harmless.

***United States v. Obiechie***, 38 F.3d 309 (7th Cir. 1994) Certain provisions of the Gun Control Act (18 U.S.C. §924) require that the defendant act knowingly; other provisions require that the defendant act willfully. The difference is this: to act knowingly is to act with knowledge of what one is doing, that is, to act with the intent to do the act that is proscribed by the law. To act willfully requires that the defendant act with knowledge of what the law proscribes and to act in violation of the law, knowing that he is doing so. In short, willfully requires knowledge of what the law is; to act knowingly does not require knowledge of the law.

***United States v. Shortman***, 91 F.3d 80 (9th Cir. 1996) The defendant was charged with involuntary manslaughter under 18 U.S.C. §1112, 1153. The court instructed the jury that if the defendant acted in a manner without due caution, this was sufficient to constituted gross negligence which could support an involuntary manslaughter conviction. This was erroneous. The absence of due care is not equivalent to gross negligence.

***United States v. Grigsby***, 111 F.3d 806 (11th Cir. 1997) The African Elephant Conservation Act, 16 U.S.C. §4223(l), makes it a crime to knowingly violate the provisions of the act. The court in this case held that even though there is no "willful" element of the act, the government must prove that the defendant knew the provisions of the law and knowingly violating the law.

***United States v. Rhone***, 864 F.2d 832 (D.C. Cir. 1989) The trial judge informed the jury that the defendant's ignorance of the law was no excuse. The defendant had attempted to obtain unemployment benefits while he was working full time. The trial judge's instruction could have been misinterpreted to mean that the defendant did not have to defraud the government, which would be erroneous. The defendant did have to realize his ineligibility for the benefits in order to have been guilty of committing mail fraud. Because of this possible confusion, a reversal was required.

***JURY INSTRUCTIONS (Knowledge)***

***United States v. X-Citement Video, Inc***., 513 U.S. 64 (1994) The United States Supreme Court held that the statute outlawing the interstate transportation of obscene material depicting minors, 18 U.S.C. §2252, has an implicit requirement that the offender know that the actor depicted is a minor.

***Staples v. United States***, 511 U.S. 600 (1994) The National Firearm Act outlaws the possession of a machine gun. There is no explicit scienter requirement in the Act. The Supreme Court holds that there is an implicit knowledge requirement. Thus, the government must prove beyond a reasonable doubt that the defendant knew that the weapon he possessed had automatic firing capability.

***McFadden v. United States***, 135 S. Ct. 2298 (2015) In a normal prosecution for possession, possessing with intent to distribute, or distributing a controlled substance, the government can satisfy the element of "knowledge" in one of two ways: (1) the defendant knew that he was possessing/distributing a controlled substance (though not necessarily which one – he or she did know however, that the object possessed was a controlled substance); or (2) the defendant knew that he or she was in possession of a particular substance (e.g., heroin, marijuana, cocaine, methamphetamine) which is, in fact, a controlled substance, even if the defendant did not know that the particular substance that he knew he was possessing was in fact a controlled substance. In other words, the defendant must either know that the substance possessed was some kind of controlled substance (though not necessarily which one) or that the substance was a particular substance, even if he did not know that that substance was a controlled substance. In a case involving an Analogue Drug, the same rule applies: the defendant must either

be shown to know that the substance possessed was a particular substance that he knew to be an analogue, or he must be shown to have known that he possessed a particular substance which is, in fact, a qualifying analogue.

***United States v. Davis***, 854 F.3d 601 (9th Cir. 2017) The defendant was charged with sexual exploitation of a minor. The indictment alleged that he recruited the child to participate in a sex video, "knowing or in reckless disregard of the fact that the person had not attained the age of 18." However, the trial court instructed the jury that the knowledge requirement of the offense could be satisfied with proof that "the defendant had a reasonable opportunity to observe "the person]." This amounted to a constructive amendment of the indictment, because it provided the jury a path to conviction that was not alleged in the indictment. See also United States v. Dipentino, 242 F.3d 1090 (9th Cir. 2001).

***United States v. White***, --- F.3d ----, 15-2027 (8th Cir. 2017) Finally coming into line with the Staples decision, the Eighth Circuit holds that in order to be convicted of possession of an unregistered firearm, the government must prove that the defendant had knowledge of the facts relating to the gun that it made it subject to the registration requirement (i.e., the diameter of the barrel).

***United States v. Stanford***, 823 F.3d 814 (5th Cir. 2016) This case was tried prior to the decision in McFadden v. United States, 135 S. Ct. 2298 (2015), but that Supreme Court decision was issued while this appeal was pending. The jury instruction at trial did not comply with McFadden's knowledge requirement. The error was not harmless, even though a special interrogatory correctly included the knowledge requirement for a prosecution under the Analgue Act, because the special interrogatory did not repeat that the element of knowledge had to be found beyond a reasonable doubt.

***United States v. Montoya-Gaxiola***, 796 F.3d 1118 (9th Cir. 2015) The defendant was charged with possession of a sawed-off shotgun. Pursuant to Staples v. United States, the government was required to prove that the defendant knew the characteristics of the firearm that brought it within the scope of the registration act. The jury instruction did not explain the proper mens rea element.

***United States v. Tang Nguyen***, 758 F.3d 1024 (8th Cir. 2014) The defendant was charged with conspiracy to fraudulently import contraband cigarettes. The Eighth Circuit held that although this is a general intent crime, the government is still required to prove "knowledge" that the defendant was transacting in contraband cigarettes. She undeniably knew that she was receiving cigarettes from overseas, but there was insufficient proof that she knew that they were contraband. A knowingly violation of the law requires proof that the defendant knew the essential facts, even if she did not know the law regarding contraband cigarettes.

***United States v. Horse***, 747 F.3d 1040 (8th Cir. 2014) The defendant was charged with criminal sexual conduct (rape), pursuant to 18 U.S.C. § 2242(2), by having sex with the victim who lacked the capacity to consent. The issue addressed by the Eighth Circuit was whether the government must prove that the defendant knew that the victim lacked capacity to consent. The Eighth Circuit concluded that the defendant must, indeed, have known that the victim lacked the capacity to consent and the failure to instruct the jury on this point was plain error.

***United States v. Liu***, 731 F.3d 982 (9th Cir. 2013) In a criminal copyright prosecution, 17 U.S.C. § 506(a), the term "willfully" requires proof that the defendant intended to violate a criminal law, not just that he or she intended to make a copy of a copyrighted work. In a case involving counterfeit labels, the term "knowingly" requires proof that the defendant knew that the labels were counterfeit, not just that he knew that he was trafficking in labels that happen to turn out to be counterfeit.

***United States v. Rouillard***, 701 F.3d 861 (8th Cir. 2012) It is a federal crime to have sex with a person who lacks the capacity to consent (e.g., because of intoxication) if the offense occurs on federal property. 18 U.S.C. § 2242. Does the defendant have to be shown to know the victim lacked consent? In this case, the Eighth Circuit held that knowledge of the victim's lack of capacity is an element of the offense. Because sexual conduct is not inherently illegal, knowledge of the fact that makes the conduct illegal must be an element of the offense that must be proven by the government. REHEARING EN BANC GRANTED ON MARCH 3, 2013. See 740 F.3d 1170 (8th Cir 2014) (affirming the panel decision) and United States v. Bruguier, 735 F.3d 754 (8th Cir. 2013).

***United States v. Munguia,*** 704 F.3d 596 (9th Cir. 2012) The defendant was charged with possessing pseudoephedrine knowing or having reasonable cause to believe it would be used to manufacture meth. 21 U.S.C. § 841(c)(2). The Ninth Circuit holds that "reasonable cause to believe" is to be applied in a subjective, not an objective, manner. Thus, the question is whether this defendant had reasonable cause to believe that the listed chemical was destined to be used to manufacture meth, not whether a reasonable person would have cause to believe this.

***United States v. Huping Zhou***, 678 F.3d 1110 (9th Cir. 2012) The defendant accessed personal patient records in violation of HIPAA. The question posed to the Ninth Circuit is whether the government was required to prove that the defendant knew that this was a crime. The statute provides that "A person who knowingly and in violation of this part – (2) obtains individually identifiable health information relating to an individual . . . shall be punished." The Ninth Circuit concluded that the defendant must be shown to know what he was doing, but not that what he was doing was a violation of the statute.

***United States v. Chappell***, 665 F.3d 1012 (8th Cir. 2012) When the defendant committed his prostitution offense, the law required proof that the defendant "knew" that the prostitute was younger than 18. Prior to trial, however, the law was amended to provide that the offense was committed if the defendant "knew or acted in reckless disregard of the fact that the person was younger than 18." The trial court instructed the jury under the new standard, even though that was not the law when the crime was committed. This was plain error.

***United States v. Shim***, 584 F.3d 394 (2d Cir. 2009) In a Mann Act prosecution, 18 U.S.C. § 2421, the government must prove that the defendant knew that the woman was transported in interstate commerce. It is not sufficient to only prove that the defendant knowingly transported the woman.

***United States v. Fields***, 500 F.3d 1327 (11th Cir. 2007) The Child Support Recovery Act (18 U.S.C. § 228) requires proof that the defendant willfully failed to pay a past due support obligation to his child who resided in another state. Is the state required to prove that the defendant knew that his child resided in another state? According to this decision, the answer is “yes.” Though the “out of state” requirement is also a federal jurisdictional element of the offense, the court concludes that defendant’s knowledge of the location of the child is also an element of the offense that the government must prove.

***United States v. Cacioppo***, 460 F.3d 1012 (8th Cir. 2006) The defendants were prosecuted for making a false statement in connection with ERISA reports, 18 U.S.C. §1027. The trial court erroneously instructed the jury that a conviction could be predicated on a finding that the defendant recklessly disregarded whether his statement was false, or not. The statute requires proof of “knowing” false statements and reckless disregard for the truthfulness of a statement is not the same as knowing that a statement is false.

***United States v. Murphy***, 406 F.3d 857 (7th Cir. 2005) Two defendants were charged with threatening and beating up a government witness. Both defendants participated in the beating. However, one of the defendants was not shown to have known that the victim was being beaten because she was a witness. While she was guilty of assaulting the victim, she was not guilty of obstructing justice because of the absence of proof that she knew the reason for the assault.

***United States v. Valencia***, 394 F.3d 352 (5th Cir. 2004) The Commodities Exchange Act makes it a crime to knowingly deliver or cause to be delivered false or misleading or knowingly inaccurate reports. Does this mean that a person can be found guilty if he (1) knowingly delivers; (2) a false report that he does not know is false? The Fifth Circuit held that pursuant to United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), the law would be interpreted to mean that the “knowledge” requirement applies not only to the delivery, but also to the falsity of the report.

***United States v. Hussein***, 351 F.3d 9 (1st Cir. 2003) Claiming that it is an issue of first impression, the First Circuit holds that it is no defense to a § 841 charge that the defendant did not know the type, or quantity of drugs that he possessed. In this case, the defendant acknowledged that he possessed a controlled substance knowingly but claimed he did not know what type of drug, or the quantity. The First Circuit held that even post-Apprendi, this is not a defense.

***United States v. Jackson***, 124 F.3d 607 (4th Cir. 1997) The trial court erred in failing to instruct the jury that the defendant, charged with possessing an unregistered firearm, had to be shown to have known the characteristics of his sawed-off shotgun that made it a firearm subject to the requirements of the Firearm Act. See Staples v. United States, 511 U.S. 600 (1994). The failure to instruct the jury consistent with Staples, however, was not plain error.

***United States v. Wilson***, 133 F.3d 251 (4th Cir. 1997) In order to prove a violation of the Clean Water Act, the government must prove that the defendant had knowledge of each of the facts -- the elements of the offense -- that constitute the crime, though the defendant need not be shown to have knowledge of the illegality of his conduct. Thus, the defendant must know that he was discharging a substance; must know the identity of the substance he was discharging; must know the instrumentality or method by which the pollutants were discharged; must know the physical characteristics of the property into which the pollutant was discharged that identify it as a wetland; must know the link between the wetlands and waters of the United States; and must know that he did not have a permit. The trial court erred in failing to instruct the jury that the government was required to prove the defendant's knowledge with regard to each element of the offense.

***United States v. Ladish Malting Co.,*** 135 F.3d 484 (7th Cir. 1998) The defendant corporation was charged with violating OSHA laws, because a fire escape was in an unsafe condition, resulting in the death of an employee. The statute, 29 U.S.C. § 666, requires that the violation be willful before certain criminal penalties can be imposed. The judge instructed the jury that "willful" in this context means that the corporation either knew of the unsafe condition of the fire escape, or "should have known" of the hazardous condition. This was reversible error. "Should have known" is a civil negligence standard. In order to have knowledge, the corporation must have had actual knowledge, or remained deliberately ignorant of the unsafe condition.

***United States v. MacDonald & Watson Waste Oil Co***., 933 F.2d 35 (1st Cir. 1991) The trial court improperly instructed the jury that a corporate officer could be guilty of violating the Resource Conservation and Recovery Act either by having actual knowledge of the violation or by proof that the defendant is the responsible corporate officer who had direct responsibility for the activities that are alleged to be illegal. The judge also cautioned the jury that the proof must show that the defendant must have known or believed that the illegal activity of the type alleged occurred. While knowledge may be inferred from various circumstances, including the defendant’s position and responsibility – and while willful blindness may suffice in certain circumstances – the instruction in this case allowed the government to establish knowledge simply by proving that the defendant occupied a certain position and knew of prior violations. This was reversible error.

***United States v. Hastings***, 918 F.2d 369 (2d Cir. 1990) After being asked by jurors to elaborate on the difference between “possession” and “knowing possession” in connection with a firearm offense, the trial judge’s incomplete charge could have left the jury with the belief that a finding of knowledge was not necessary in order to convict the defendant.

***United States v. Cedelle***, 89 F.3d 181 (4th Cir. 1996) As explained by the Supreme Court in United States v. X-Citement Video, Inc., 115 S.Ct. 464 (1994), in a prosecution for possession of child pornography under 18 U.S.C. §2252(a)(2), the government must prove not only that the defendant knew he was in possession of a videotape, but also that he knew the participants were

children and that they were engaged in explicit sexual activity. The trial court erred in its instruction to the jury in this case, but the error did not amount to plain error necessitating a reversal because the defendant expressly ordered child pornography from the undercover agents.

***United States v. Ahmad***, 101 F.3d 386 (5th Cir. 1996) The defendant was charged with a violation of 33 U.S.C. §1319(c)(2)(A), the Clean Water Act. The Act makes it a crime to knowingly discharge a pollutant into a navigable water. The question in this case was what the defendant had to "know?" The Fifth Circuit concluded that the government had to prove that the defendant knew (1) that he discharged; (2) a pollutant; (3) into a navigable water of the U.S. The trial court erroneously instructed the jury that the knowledge requirement only applied to the element that there was a discharge. Thus, in this case, the defendant should have been able to argue that he thought he was discharging water (as opposed to a pollutant) into the navigable waters.

***United States v. Burian***, 19 F.3d 188 (5th Cir. 1994) The federal statute criminalizing the knowing receipt of visual depictions of minors engaged in sexually explicit conduct has an implicit knowledge requirement that the defendant be aware (or be recklessly disregarding) the age of the performer.

***United States v. Hooker***, 997 F.2d 67 (5th Cir. 1993) 18 U.S.C. §922(k) outlaws the knowing transportation of firearms with altered serial numbers. The Fifth Circuit concluded that the knowledge element of the offense includes actual knowledge that the firearm had an altered serial number, not just knowledge of the interstate transportation.

***United States v. Garrett***, 984 F.2d 1402 (5th Cir. 1993) Though the statute is silent on the mens rea element of the offense, the crime of carrying a weapon on an aircraft requires that the defendant know that he is carrying a gun, or at least that he should have known. The government urged a strict liability theory. Absent a clear indication from Congress that this was to be a strict liability offense, however, the court concluded that the minimum level of scienter – "should have known" – applies.

***United States v. Obiechie***, 38 F.3d 309 (7th Cir. 1994) Certain provisions of the Gun Control Act (18 U.S.C. §924) require that the defendant act knowingly; other provisions require that the defendant act willfully. The difference is this: to act knowingly is to act with knowledge of what one is doing, that is, to act with the intent to do the act that is proscribed by the law. To act willfully requires that the defendant act with knowledge of what the law proscribes and to act in violation of the law, knowing that he is doing so. In short, willfully requires knowledge of what the law is; to act knowingly does not require knowledge of the law.

***United States v. Nguyen***, 73 F.3d 887 (9th Cir. 1995) 8 U.S.C. §1324(a) makes it an offense to bring any alien into the United States other than through a port of entry. The statute contains no explicit mens rea requirement. Nevertheless, the court concluded that Congress intended such a requirement. See Staples v. United States, 114 S.Ct. 1793 (1994); United States v. United States Gypsum Co., 438 U.S. 422 (1978); Morisette v. United States, 342 U.S. 246 (1952). The government must prove that the defendant knew that the individuals he was transporting were aliens and that he off-loaded them at other than a port of entry, intending to violate the law.

***United States v. Stein***, 37 F.3d 1407 (9th Cir. 1994) In its money laundering instruction, the trial court correctly informed the jury that the defendant must have knowledge that the money engaged in the transaction was derived from a specified felony. In a later general charge to the jury, the judge explained that "An act is done knowingly if the defendant is aware of the act and doesn't act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful." This latter instruction conflicted with the former instruction and therefore tainted the money laundering conviction. Where the jury is offered inconsistent instructions, one right.

***United States v. Rubio-Villareal***, 967 F.2d 294 (9th Cir. 1992) A trial court should not give an instruction to the jury to the effect that an inference can be drawn that the driver of a vehicle knows of the existence of any contraband in the vehicle. In effect, this instruction could lead the jury to ignore other relevant facts and decide based solely on the facts giving rise to the inference.

## *JURY INSTRUCTIONS (MISCELLANEOUS)*

***United States v. McKnight***, 671 F.3d 664 (7th Cir. 2012) Judge Posner authors an interesting dissent to the denial of rehearing en banc on the question of the propriety of instructing the jury on an irrelevant issue. In this case, the government requested an instruction that explained that the use of wiretaps was a legitimate tool for investigating criminal offenses and the trial judge instructed the jury on this topic. According to Judge Posner, the judge should not have done so.

### *JURY INSTRUCTIONS (Missing Witness)*

***United States v. Leal-Del Carmen***, 697 F.3d 964 (9th Cir. 2012) Deporting a potentially exculpatory witness prior to providing the defense an opportunity to interview the witness violates the defendant's right to compulsory process and to due process. The defendant, however, is required to show that the government acted in bad faith, a showing that was, in fact, made in this case, because the government had interviewed the witness prior to deporting him. The Ninth Circuit held that once the government is aware that a witness has exculpatory evidence, the government must alert the defense. If defense counsel has not yet been appointed or retained, the government may not deport the witness until after counsel is appointed or retained and given an opportunity to preserve the testimony. The Ninth Circuit also held that the trial court should have permitted the defendant to introduce the witness's statement to the border agent prior to being deported. The out-of-court declaration was admissible pursuant to Rule 804(b)(6) – the forfeiture by wrongdoing hearsay exception – because the government rendered the witness unavailable. Finally, the appellate court held that the defendant was entitled to a "missing witness" instruction that would have advised the jury that the failure of a party to produce a material witness who could elucidate matters under investigation gives rise to a presumption that the testimony of that witness would be unfavorable to that party if the witness is peculiarly within the

party's control. The deported witness could have been paroled back into the country, but only the government could produce the witness under that procedure. "For the government to say that it isn't responsible for her absence because it no longer knows where to find her comes close to the classic definition of chutzpah."

***JURY INSTRUCTIONS (Presumptions)***

***United States v. Cessa***, 785 F.3d 165 (5th Cir. 2015) A legitimate business that accepts money from a drug dealer, knowing that the money is tainted and knowing that the effect of taking the money would be to conceal the source of the money, is not necessarily guilty of conspiracy to launder the money. It is one thing to be in the business of laundering money and another to simply do business with a drug dealer: the former is a money launderer, the latter is not (at least not necessarily, simply by doing business with the drug dealer). The court also reversed the conviction of one defendant because of a mandatory presumption jury instruction: the trial court instructed the jury that, "The commingling of illegal proceeds with legitimate business funds is evidence of intent to conceal or disguise." This instruction created a mandatory presumption. The appropriate instruction should state that the jury "may infer," such intent, not that such conduct "is evidence" of such an intent.

***Owens v. McLaughlin***, 733 F.3d 320 (11th Cir. 2013) In Georgia, if the location where a murder occurred cannot be determined with certainty, a pattern jury instruction advises the jury, "If a dead body is discovered in this state and it cannot be readily determined in what county the cause of death was inflicted, it shall be considered that the cause of death was inflicted in the county in which the dead body was discovered." In Georgia, venue is an essential element of an offense and, therefore, the state must prove venue beyond a reasonable doubt. This instruction operates as a mandatory presumption by instructing the jury what it shall consider to be the proper venue in certain circumstances. As such, the instruction is unconstitutional, though it was harmless error in this case.

***United States v. Sasso***, 695 F.3d 25 (1st Cir. 2012) 18 U.S.C. § 32(a)(5) makes it a crime to willfully interfere with anybody engaged in the authorized operation of an aircraft with intent to endanger the safety of any person or with reckless disregard for the safety of human life. The trial court instructed the jury, "If a person's actions interfere with an aircraft operator, you may infer that the person acted willfully if his actions were deliberate and intentional and had the natural and probable effect of interfering with the aircraft operator." The First Circuit held that this instruction diluted the willfulness element, by allowing the jury to infer willfulness from the fact that the defendant acted purposefully, without proof that he knew that interference was the natural and probable effect of his action (i.e., pointing a laser at a helicopter).

***Stark v. Hickman***, 455 F.3d 1070 (9th Cir. 2006) The trial court's "presumption of sanity" instruction in this state court prosecution was constitutionally infirm.

***JURY INSTRUCTIONS (Lesser Included Offenses)***

***Schmuck v. United States***, 489 U.S. 705 (1989) The Supreme Court affirmed the Seventh Circuit en banc decision, holding that a defendant is entitled to a lesser-included offense instruction only if the "elements test" is satisfied. That is, a defendant may only be found guilty of a lesser-included offense if that offense is necessarily included in the offense which is charged in the indictment. It is not proper to examine the "inherent relationship" between the offenses in light of the specific facts of the case. Rather, the Court need only examine the elements of the offense to determine whether one offense is a lesser-included offense of another.

***Hopkins v. Reeves***, 118 S. Ct. 1895 (1998) In a death penalty case, the trial court is not required to instruct the jury on lesser included offenses that are not, as a matter of state law, lesser included offenses of the charged offense. In Nebraska, for example, manslaughter is not a lesser-included offense of felony murder. Therefore, in a felony murder prosecution in which the state is seeking the death penalty, it is not required that the jury be instructed on the law of manslaughter.

***Beck v. Alabama***, 447 U.S. 625 (1980) A death sentence cannot constitutionally be imposed unless the jury is permitted to consider a verdict of guilt as to a lesser-included non-capital offense, provided that the evidence would support such a verdict.

***United States v. LaPointe***, 690 F.3d 434 (6th Cir. 2012) Defendant was charged with conspiracy to possess with intent to distribute oxycodone. He requested an instruction on the lesser included offense of conspiracy to possess oxycodone (a conspiracy). The trial court erred in failing to instruct the jury as requested. First, the court held that the fact that the indictment alleged that the defendants conspired to distribute and to possess with intent to distribute did not mean that a conspiracy to possess was not a lesser included offense because it is not a lesser offense of the conspiracy to distribute. (An indictment frequently charges in the conjunctive, but a jury can convict of either of the methods). Second, the fact that all conspirators did not share the limited conspiracy to simply possess the drugs did no mean that the defendant did not have that limited agreement with others.

***United States v. Pillado***, 656 F.3d 754 (7th Cir. 2011) The defendant was enlisted by undercover agents to help unload a kilogram of marijuana from a truck. The defendant was at first reluctant, but later agreed to help. He was prosecuted for possession with intent to distribute the marijuana. He requested an instruction on simple possession. The Seventh Circuit held that the trial court erred in failing to instruct the jury on simple possession. Though he obviously did not possess the marijuana for personal use, that is not the only type of simple possession that exists. The government failed to prove that the defendant's only possession could have been for the purpose of distributing it. The defendant may have simply abandoned the marijuana, in which case he would not have possessed it with the intent to distribute it.

***United States v. Boidi***, 568 F.3d 24 (1st Cir. 2009) A conspiracy to possess drugs is a lesser included offense of a conspiracy to possess with intent to distribute. The government acknowledged that possession is a lesser included offense of possession with

intent to distribute; but argued that this logic does not apply to conspiracy offenses. The First Circuit rejected this argument but held that in order to insist on such an instruction, the defendant must show that that, on the evidence presented, it would be rational for the jury to convict only on the lesser included offense and not the greater one. Failure to instruct the jury on the lesser included offense in this case was error.

***United States v. Gentry***, 555 F.3d 659 (8th Cir. 2009) The defendant was entitled to a lesser included offense instruction in this case involving possession of methamphetamine with intent to distribute. The evidence would have supported the conclusion that she possessed the drugs without the intent to distribute and therefore a simple possession instruction was appropriate.

***Taylor v. Workman***, 554 F.3d 879 (10th Cir. 2009) The state trial court erred in failing to accurately define the elements of a lesser included offense in this murder case, thus depriving the defendant of the ability to avoid a death sentence.

***United States v. Hernandez***, 476 F.3d 791 (9th Cir. 2007) The trial court erred in refusing to instruct the jury in this possession with intent to distribute methamphetamine case on the lesser offense of simple possession. The quantity involved was not sufficient to preclude the possibility that it was possessed for personal consumption. The burden is not on the defendant to prove that it was for personal consumption; the burden is on the government to prove that the quantity could not have been for personal consumption. The amount in this case was somewhere between 50 and 100 doses (115 grams), valued in a range of $2,000 to $4,000.

***United States v. Trujillo***, 390 F.3d 1267 (10th Cir. 2004) A defendant is not prohibited from having the jury instructed on a lesser included offense just because he denies participation in the offense at all. Consistent with the Supreme Court decision in Mathews v. United States, 485 U.S. 58 (1988) (defendant may inconsistently argue “I didn’t do it; and if I did, I was entrapped”) a defendant can argue that he was not involved in a drug deal, but if he did, it was personal use, not trafficking.

***United States v. McCullough***, 348 F.3d 620 (7th Cir. 2003) Defendant was charged with willfully selling firearms without recording the name, age, and residence of the buyer. 18 U.S.C. § 922(b)(5). At trial, he requested a jury instruction on the lesser record keeping offense. 18 U.S.C. § 922(m). Because it is impossible to violate § 922(b)(5) without also violating § 922(m), the trial court should have given the lesser included instruction. The fact that it is possible to commit the record keeping violation without committing the greater offense (for example, by making some other false entry that does not relate to the buyer’s name, age or residence) does not mean that the record keeping offense is not a lesser included offense. Moreover, the lesser offense requires proof that the defendant acted knowingly, while the greater offense requires proof that the defendant acted willfully. This does not preclude the record keeping offense from being characterized as a lesser offense of the false recording offense. The failure to instruct the jury on the lesser offense was reversible error.

***United States v. Mendez***, 117 F.3d 480 (11th Cir. 1997) The offense of possessing stolen mail (18 U.S.C. § 1708) is a lesser included offense of forcibly taking mail from a mail carrier (18 U.S.C. § 2114), when the two crimes are committed contemporaneously. United States v. Gonzalez, 122 F.3d 1383 (11th Cir. 1997) The offense of obstruction of a federal officer (18 U.S.C. § 1501) is a lesser included offense of forcibly assaulting, resisting, impeding, or interfering with a federal official (18 U.S.C. § 111). The failure to instruct the jury on the lesser offense resulted in reversing the conviction.

***United States v. Benally***, 146 F.3d 1232 (10th Cir. 1998) The trial court erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter, as well as the defense of self-defense. United States v. Estrada-Fernandez, 150 F.3d 491 (5th Cir. 1998) The defendant was charged with assault with a dangerous weapon pursuant to 18 U.S.C. § 113(a)(3). He requested a charge on the lesser included offense of simple assault, pursuant to § 113(a)(5). The trial court erred in failing to charge the jury as requested. Though the defendant testified that he was not involved in the altercation, “at all,” the Fifth Circuit held that the jury was entitled to believe none, all, or any part of his testimony. “Even if the defendant presents a totally exculpatory defense, the lesser-included offense instruction should be given if the prosecution’s evidence provides a rational basis for the jury’s finding the defendant guilty of a lesser offense.”

***United States v. Barrett***, 870 F.2d 953 (3rd Cir. 1989) The trial judge instructed the jury that they could return a verdict of guilty, guilty of a lesser-included offense, or not guilty. The verdict form, however, only provided for a verdict of guilty or not guilty. Thus, when the jury returned a verdict of guilty, it was not possible to determine whether they were convicting him of the charged offense or the lesser-included offense. This requires reversal of the conviction.

***Vujosevic v. Rafferty***, 844 F.2d 1023 (3rd Cir. 1988) The defendant admitted to having engaged in aggravated assault of the victim but claimed that the co-defendant was responsible for the murder. He was entitled to a lesser included charge on aggravated assault. Failing to do so constituted reversible error.

***United States v. Baker***, 985 F.2d 1248 (4th Cir. 1993) Defendant was charged with conspiring to possess with intent to distribute cocaine. There was a plausible theory that he intended to purchase the cocaine in order to consume it. It was reversible error to fail to instruct the jury on the lesser offense of conspiring to possess cocaine.

***United States v. Ahmad***, 101 F.3d 386 (5th Cir. 1996) The trial court erred in declining to instruct the jury on the lesser-included offense of negligent violations of the Clean Water Act. The defendant was charged with a knowing violation of the Act.

***United States v. Lucien***, 61 F.3d 366 (5th Cir. 1995) The police searched the defendant’s house and discovered sixteen grams of cocaine base, foil wrappings, $1,200 in currency, and three guns. The defendant was charged with possession with intent to distribute. He was denied a request for a lesser-included instruction on possession of a controlled substance under 21 U.S.C. §844(a). The trial court erred in this regard. The packaging was consistent with the defendant’s purchasing several packages of the cocaine base; the money was not necessarily indicative of an intent to distribute cocaine and the guns are not inconsistent

with simple possession. The error also required reversal of the conviction for possessing a firearm in connection with the offense set forth in the indictment – because the conviction for the offense set forth in the indictment was reversed.

***United States v. Deisch***, 20 F.3d 139 (5th Cir. 1994) The defendant was charged with violating 21 U.S.C. §841, possessing with intent to distribute cocaine base. The trial court instructed the jury on what the government urged was a lesser-included offense, possession of cocaine base under the third sentence of 21 U.S.C. §844. The Fifth Circuit holds that the §844 offense is not a lesser-included offense of the §841 offense. This is because §841 outlaws the possession of any controlled substance, and then sets forth a scheme of punishments, depending on the nature of the contraband that is possessed. §844, on the other hand, expressly outlaws the possession of cocaine base in the third sentence. Thus, §844 contains an element lacking in §841: the controlled substance must be cocaine base.

***United States v. Browner***, 937 F.2d 165 (5th Cir. 1991) Assault with a deadly weapon is not a lesser-included offense of voluntary manslaughter under the Schmuck standard. There must be a deadly weapon for the assault offense, but not for the voluntary manslaughter offense. Therefore, over the defendant's objection, it was improper to charge the jury on the law of assault with a deadly weapon.

***Cordova v. Lynaugh***, 838 F.2d 764 (5th Cir. 1988) The evidence in the defendant's death penalty trial suggested that four men attacked a couple in a parked car, killed and robbed the man and raped his female companion. The evidence would have supported a finding that the petitioner did not have the intent to rob the man thus rendering him not guilty of the capital offense but only of the rape. This would not have made him eligible for the death penalty. The trial court erred in failing to instruct the jury on the lesser included offense.

***United States v. Sitton***, 968 F.2d 947 (9th Cir. 1992) The police seized a large quantity of a mixture containing methamphetamine from a storage facility. The defendants were charged with possession with intent to distribute. The defendant claimed that this was the waste from a prior manufacture of meth and that this was going to be discarded, not distributed. The government's chemist could not state how much methamphetamine was in the mixture and acknowledged that it could have been waste, based on the acetone content. The trial court erred in not instructing the jury on the law of simple possession.

***United States v. Spencer***, 905 F.2d 1260 (9th Cir. 1990) The defendant was charged with taking property under 18 U.S.C. §661. The evidence did not support this charge, and the government requested an instruction on the "lesser included offense" of receiving stolen property, 18 U.S.C. §662. The trial judge agreed that the evidence was insufficient for a conviction under §661 and gave an instruction on the lesser-included offense. The jury returned a verdict of guilty on the lesser-included offense. However, a §662 offense is not a lesser-included offense of a §661 offense. Having found insufficient evidence under §661, the court should have entered a judgment of acquittal and dismissed the indictment.

***Vickers v. Ricketts***, 798 F.2d 369 (9th Cir. 1986) The defendant offered evidence of a brain disorder which may well have reduced his culpability in this murder trial with respect to the element of premeditation. It was error for the state trial court to refuse to give the lesser-included offense instruction.

***Wiggerfall v. Jones***, 918 F.2d 1544 (11th Cir. 1990) The state trial court violated the defendant's due process rights by failing to instruct the jury on a lesser non-capital offense. The defendant was tried under Alabama's then-existing death penalty statute, which, in essence, required that if a defendant was indicted under this section, the jury had only two options: guilty with the sentence being death and innocence. The jury could not recommend life and could not find the defendant guilty of a lesser-included offense.

***United States v. Gibbs***, 904 F.2d 52 (D.C. Cir. 1990) Though the evidence was sufficient to convict the defendants of possession with intent to distribute crack cocaine, a jury could also have found the defendants guilty only of simple possession. Therefore, it was error to fail to give the lesser-included offense instruction to the jury.

***JURY INSTRUCTIONS (Reasonable Doubt)***

***Sullivan v. Louisiana***, 508 U.S. 275 (1993) A charge which mischaracterizes the concept of reasonable doubt can never be harmless error. The state trial court equated reasonable doubt with "a doubt which would give rise to a grave uncertainty" and "a substantial doubt" and "a serious doubt, for which you could give good reason." This violates the ruling in Cage v. Louisiana, 498 U.S. 39 (1990), and is not harmless error. No harmless error analysis would be undertaken in such cases.

***United States v. Stanford***, 823 F.3d 814 (5th Cir. 2016) This case was tried prior to the decision in McFadden v. United States, 135 S. ct. 2298 (2015), but that Supreme Court decision was issued while this appeal was pending. The jury instruction at trial did not comply with McFadden's knowledge requirement. The error was not harmless, even though a special interrogatory correctly included the knowledge requirement for a prosecution under the Analogue Act, because the special interrogatory did not repeat that the element of knowledge had to be found beyond a reasonable doubt.

***United States v. Nur***, 799 F.3d 155 (1st Cir. 2015) The trial court erred in failing to instruct the jury on the lesser-included offense of simply possession of crack cocaine (the defendant was charged with possession with intent to distribute). Though the defendant denied committing any crime (he represented himself at trial), this did not foreclose the availability of a lesser-included offense instruction. A lesser offense instruction is not unavailable simply because the defendant denies committing any offense at all if a rational jury could convict of the lesser offense given the evidence presented at trial.

***Payne v. Stansberry***, 760 F.3d 10 (D. C. Cir. 2014) The trial judge instructed the jury (according to the transcript), "If you find that the government has failed to prove any element of the offense, beyond a reasonable doubt, you must find that defendant

guilty." Though this may have been a transcription error, the government failed to prove that it was. And if it were simply a slip of the tongue, that does not alter the fact that it was obvious and plain error affecting the defendant's substantial rights. Appellate counsel's failure to raise this issue on appeal amounted to ineffective assistance of counsel.

***Gibson v. Ortiz***, 387 F.3d 812 (9th Cir. 2004) The California state jury instruction in this case provided that a prior sexual offense need only be proven by a preponderance of the evidence; and that a prior sexual offense, if proven, could lead to the inference that the defendant committed the charged offense. This violated the due process clause, because it suggested a burden of less than proof beyond a reasonable doubt. The court also held that inconsistent instructions that emphasized the proper burden of proof did not cure the infirmity. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." Francis v. Franklin, 471 U.S. 307, 322 (1985). See also Doe v. Busby, 661 F.3d 1001 (9th Cir. 2011). The Ninth Circuit later overruled Gibson v. Ortiz, on the basis that it applied the incorrect AEDPA standard of review. Byrd v. Lewis, 566 F.3d 855 (9th Cir. 2009).

***Wansing v. Hargett***, 341 F.3d 1207 (10th Cir. 2003) When the jury asked the judge to provide guidance on the definition of proof beyond a reasonable doubt, the state judge explained at some length (and somewhat unintelligibly) that proof beyond a reasonable doubt could be compared to the doubt that a groom or bride might rely on to call off a wedding at the last minute while standing at the altar. Yet, he also cautioned that each juror had to decide for himself what the real definition of proof beyond a reasonable doubt was. Citing Victor v. Nebraska, 511 U.S. 1 (1994) and Cage v. Louisiana, 498 U.S. 39 (1990), the Tenth Circuit grants the writ of habeas corpus.

***Humphrey v. Cain***, 138 F.3d 552 (5th Cir. 1998) (en banc) The state trial court's jury instruction on reasonable doubt was defective pursuant to Cage and Sullivan. The trial court instructed the jury that reasonable doubt meant "grave uncertainty," "moral certainty," "actual or substantial doubt," and "a serious doubt, for which you could give good reason." The full court hearing the case en banc also concluded that this claim was not Teague-barred and amounted to "structural error" that could be remedied in a habeas petition.

***Bloomer v. United States***, 162 F.3d 187 (2d Cir. 1998) The district court's numerous "embellishments" on the definition of proof beyond a reasonable doubt were erroneous. The trial court instructed the jury that if they did not find the elements proven beyond a reasonable doubt, the jury "could" return a not guilty verdict. Actually, absent such proof, the jury would be required to return a not guilty verdict. In addition, the trial court misleadingly explained, "To support a verdict of guilty, you need not find every fact beyond a reasonable doubt." The court also incorrectly stated, "So a reasonable doubt means only a substantial doubt." The Second Circuit also concluded that the failure to object to these improper instructions was probably ineffective assistance of counsel, but additional testimony was required in the lower court before this decision could be made with finality.

***Lanigan v. Maloney***, 853 F.2d 40 (1st Cir. 1988) The First Circuit concludes that the harmless error rule will almost never apply in a case where the trial jury was incorrectly instructed with regard to guilt beyond a reasonable doubt.

***United States v. Birbal***, 62 F.3d 456 (2d Cir. 1995) In the court's instructions on reasonable doubt, the judge stated, "You need not find every fact beyond a reasonable doubt" and "So a reasonable doubt means only a substantial doubt." Both of these statements were erroneous and even without objection, amounted to plain error requiring reversal of the conviction. Moreover, the court's statement that "Should the prosecution fail to prove the guilt of a defendant beyond a reasonable doubt, you may acquit the defendant" was also erroneous.

***Perez v. Irwin,*** 963 F.2d 499 (2d Cir. 1992) The state trial court instructed the jury that a reasonable doubt meant "a doubt to a moral certainty of guilty." This instruction inappropriately cast the burden on the defense to establish a doubt. Moreover, the "moral certainty" language suggests that the doubt should be based on feelings rather than fact.

***United States v. Woods***, 812 F.2d 1483 (4th Cir. 1987) Elaborating on the meaning of "reasonable doubt" in jury instructions is not permitted.

***United States v. Glass***, 846 F.2d 386 (7th Cir. 1988) It is inappropriate for a judge to give an instruction which defines reasonable doubt.

***United States v. Nolasco***, 926 F.2d 869 (9th Cir. 1991) The trial court has discretion in all cases to define the meaning of "reasonable doubt."

***United States v. May***, 68 F.3d 515 (D.C. Cir. 1995) The trial court instructed the jury that "Proof beyond a reasonable doubt is proof that leaves you with a strong belief in a defendant's guilt" and that "if based on your consideration of the evidence you have a strong belief that the defendant is guilty of one or more of the crimes charged, it is your duty to find him guilty." This is incorrect and cannot be harmless error. However, the error does not amount to plain error and a remand was necessary to determine if an objection was made during an unrecorded jury charge conference.

***United States v. Merlos***, 8 F.3d 48 (D.C. Cir. 1993) Instructing the jury that they could find the defendant guilty beyond a reasonable doubt if the evidence caused them to have a "strong belief" in the defendant's guilt is constitutionally deficient. While this error is not harmless, it was not plain error and the failure to object waived the error. See also United States v. Loriano, 996 F.2d 424 (D.C. Cir. 1993).

***JURY INSTRUCTIONS (Recharge) See also: Jury (Replaying Testimony – Questions during deliberations)***

***United States v. Duran***, 133 F.3d 1324 (10th Cir. 1998) The trial court failed to instruct the jury in connection with the entrapment instruction that the government had the burden of disproving entrapment. That is, in order to convict the defendant who has raised an entrapment defense, the government must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. The failure to instruct the jury on this principle was plain error requiring reversal of the conviction. The trial court also erred in failing to adequately answer jury questions about the status of "agents" (such as nongovernment employees who were acting as informants) in connection with the entrapment defense. The jury repeatedly asked if certain informants who were acting on behalf of the government were "agents" within the definition of the entrapment defense. Failing to answer these questions was reversible error.

***McDowell v. Calderon***, 130 F.3d 833 (9th Cir. 1997) The jury indicated through a note they provided to the court that they were confused about the proper role of mitigating evidence in this death penalty trial. The judge simply instructed the jury to reconsider the jury instructions which were provided before they began deliberations. This was insufficient. Though the initial jury instructions were accurate, there is no point in reiterating language that has failed to enlighten the jury. Where the jury expresses uncertainty or indicates that it did not understand the original instructions -- especially in cases involving the death penalty -- the judge should answer the jury's question clearly.

***United States v. Stevens***, 38 F.3d 167 (5th Cir. 1994) A picture of a handgun was introduced in evidence. The handgun itself had been destroyed in a fire. During deliberations, the jury asked if they could consider the picture of the weapon to be evidence of the defendant's possession of the gun. The trial court's answer, "Consider all the evidence," was not a proper response. The gun with which the defendant was charged possessing was another gun. Therefore, the picture of the gun was not evidence of his possession offense. The improper response was reversible error.

***United States v. Flitcraft***, 863 F.2d 342 (5th Cir. 1988) During its deliberations, the jury expressed confusion as to what evidence applied to the withholding tax counts as opposed to the failure to file tax return counts. The trial judge erred in assisting the jury by designating certain counts as "W-4" counts and the other counts as "1040" counts.

***United States v. Bustamante***, 805 F.2d 201 (6th Cir. 1986) The jury requested a re-charge on a certain point of law. In the absence of counsel, the trial court issued a further written instruction providing an answer to the question. Though error, it was not reversible in this case.

***United States v. Warren***, 984 F.2d 325 (9th Cir. 1993) Defendant was charged with murder. During deliberations, the jury inquired if the premeditation requirement related to the intent to kill, or if it could be satisfied by a showing of premeditated intent to hurt. The judge simply referred to his initial instruction which did not specifically answer this question. The failure to clear up any uncertainty was error. Also, the jury later asked if they could consider second degree murder if they could not agree on first degree murder. The judge's response did not clearly instruct the jury that they could consider second degree even before they unanimously agreed to find the defendant not guilty of first-degree murder. That is, the lesser offense could be considered if even just one juror was not satisfied that the greater offense was proven. This, too, was error, even though the initial instruction properly advised the jury about when they could consider the lesser offense.

***JURY INSTRUCTIONS (Sentence – Mandatory Minimums)***

***United States v. Polouizzi,*** 564 F.3d 142 (2d Cir. 2009) In certain limited circumstances, the trial court may instruct the jury on an applicable mandatory minimum sentence that the defendant faces. In this case, the judge did not instruct the jury on the mandatory minimum sentence in a child pornography possession case and it was not error to fail to do so. The district judge's decision to grant a new trial on the basis that he should have instructed the jury on the mandatory minimum sentence was not appropriate. However, the Second Circuit noted one circumstance where it would be appropriate to instruct the jury on a mandatory minimum and that is where a prosecutor or witness suggests that a conviction on a lesser offense (that carries a mandatory minimum sentence), or a verdict of not guilty by reason of insanity, would allow the defendant to "go free." See Shannon v. United States, 512 U.S. 573 (1994).

***JURY INSTRUCTIONS (Special Interrogatories)***

***United States v. Stanford***, 823 F.3d 814 (5th Cir. 2016) This case was tried prior to the decision in McFadden v. United States, 135 S. ct. 2298 (2015), but that Supreme Court decision was issued while this appeal was pending. The jury instruction at trial did not comply with McFadden's knowledge requirement. The error was not harmless, even though a special interrogatory correctly included the knowledge requirement for a prosecution under the Analogue Act, because the special interrogatory did not repeat that the element of knowledge had to be found beyond a reasonable doubt.

***United States v. Perez***, 129 F.3d 1340 (9th Cir. 1997) The indictment charged the defendant with using three guns in connection with a drug offense. The sentence would be dramatically different if the defendant used an assault weapon, versus a pistol. In this situation, the trial court must submit a special verdict form to the jury to determine which gun(s) they unanimously agreed the defendant used.

***JURY INSTRUCTIONS (Spoliation)***

***United States v. Sivilla***, 714 F.3d 1168 (9th Cir. 2013) A remedial jury (adverse inference) instruction is appropriate in a case in which the government destroys physical evidence prior to trial that may have been useful in establishing a defense, even if the government's conduct was not in bad faith. Bad faith is required to grant a motion to dismiss but is not required to warrant a jury instruction.

***JURY INSTRUCTIONS (Standard of Review)***

***Gibson v. Ortiz***, 387 F.3d 812 (9th Cir. 2004) The California state jury instruction in this case provided that a prior sexual offense need only be proven by a preponderance of the evidence; and that a prior sexual offense, if proven, could lead to the inference that the defendant committed the charged offense. This violated the due process clause, because it suggested a burden of less than proof beyond a reasonable doubt. The court also held that inconsistent instructions that emphasized the proper burden of proof did not cure the infirmity. “Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.” Francis v. Franklin, 471 U.S. 307, 322 (1985). The Ninth Circuit later overruled Gibson v. Ortiz, on the basis that it applied the incorrect AEDPA standard of review. Byrd v. Lewis, 566 F.3d 855 (9th Cir. 2009).

***Martinez v. Garcia***, 379 F.3d 1034 (9th Cir. 2004) With regard to ambiguous jury instructions, in some instances, when a case is submitted to the jury on alternative theories, the unconstitutionality of any of the theories requires that the conviction be set aside. In those cases, a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal theory, as well as on a proper theory or theories. Although it is possible that the guilty verdict may have had a proper basis, it is equally likely that the verdict rested on an unconstitutional ground and the court will decline to choose between two such likely possibilities. The jury’s verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court is uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See Boyde v. California, 494 U.S. 370 (1990); Mills v. Maryland, 486 U.S. 367 (1988).

***United States v. Perez***, 116 F.3d 840 (9th Cir. 1997) Even if the defendant proposed the erroneous jury instruction, the appellate court may review the erroneous instruction under a plain error standard. If the error is affirmatively invited (that is, there was a knowing relinquishment of a right), the error may not be reviewed. But where the defendant was not aware of the error in the proposed instruction (here, the prosecution and the trial court were also unaware of the fault in the proposed instruction), the appellate court may review the error for plain error. United States v. High, 117 F.3d 464 (11th Cir. 1997) The defendants were charged in one count with conspiring to violate several criminal laws, one of which was structuring currency transactions in violation of the CTR laws (31 U.S.C. § 5324). The trial was held prior to the decision in Ratzlaf v. United States, 510 U.S. 135 (1994), which held that a defendant had to be shown to have known the illegality of his conduct before he could be convicted of a CTR structuring violation. The trial court erroneously instructed the jury on this object of the conspiracy (incorrectly stating that ignorance of the criminal law was no defense). The Eleventh Circuit held that where the trial court erroneously sets forth the elements of one of the objects of a multi-object conspiracy, the conviction on the conspiracy count may not be sustained, even if there is sufficient evidence on the other objects and the other objects were property defined.

***United States v. Edmonds***, 80 F.3d 810 (3rd Cir. 1996) In a CCE prosecution, the jury must be instructed that they must reach unanimous decision on the three predicate offenses that constitute the series. Failing to do so in this case was harmless error.

***United States v. Echeverri***, 854 F.2d 638 (3rd Cir. 1988) The trial court committed reversible error when it failed to give an instruction requested by the defense that the jury must unanimously agree on the “continuing series” of narcotics violations which served as the predicate for the defendant’s CCE conviction.

***United States v. Beros***, 833 F.2d 455 (3rd Cir. 1987) Generally, a basic unanimity instruction is sufficient in a criminal prosecution. However, a more specific instruction is necessary in complex cases in which a statute provides alternative means by which a crime can be committed, and numerous acts are alleged in the indictment which would satisfy the statute. In this case, the defendant was charged with violating 18 U.S.C. §664 which outlaws embezzling, stealing, abstracting, or converting union pension funds. The defendant asked that the judge instruct the jury that they must reach a unanimous decision with regard both to the theory of criminality and the specific transaction which it believed the defendant was guilty of. The trial court agreed with the former suggestion but not the latter. The Third Circuit reverses because of the trial judge’s refusal to require a unanimous decision with regard to the “specific transaction” request.

***United States v. Holley***, 942 F.2d 916 (5th Cir. 1991) The jury in this perjury prosecution was not instructed that they must unanimously agree that at least one statement in each count of the indictment was false. This was reversible error, as it could not be determined whether the jury unanimously agreed that the defendant lied with respect to any one statement. United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988) The defendant was charged with making false statements on his tax return. In light of pretrial motions raising the issue as well as a question from the jury during the course of deliberations, it was error for the trial court to fail to instruct the jury that they must unanimously agree on a particular false statement in the tax return prior to returning a verdict of guilty.

***United States v. Gordon***, 844 F.2d 1397 (9th Cir. 1988) The indictment charged the defendants in one count with conspiracy to defraud the government in the administration of a weapons program and conspiracy to obstruct the grand jury in its investigation of fraud. This constitutes the potential for jury confusion and created the possibility of a verdict based on less than unanimity. Some jurors may have believed the defendants engaged in one conspiracy, while other defendants believed the defendants engaged in others.

***United States v. Gilley***, 836 F.2d 1206 (9th Cir. 1988) The trial court failed to instruct the jury in this gambling prosecution that they had to unanimously agree on the thirty-day period during which the gambling enterprise was in existence. This thirty-day period was an element of the offense and the jury had to agree on a specific period before a guilty verdict would be justified.

***JURY INSTRUCTIONS (Unanimity)***

***Richardson v. United States***, 119 S. Ct. 1707 (1999) The jury must be unanimous as to the "series" of underlying offenses in a CCE prosecution. That is, the jury must unanimously agree not only that the defendant committed some "continuing series of violations," but also about which specific "violations" make up that continuing series.

***United States v. Lapler***, 796 F.3d 1090 (9th Cir. 2015) The defendant was charged with conspiracy to sell drugs over a fifteen-month period. The proof at trial, however, showed two separate conspiracies, one with one supplier, another with a second supplier. In this situation, the jury should have been instructed that the jurors must unanimously agree on what conspiracy the defendant was involved in (or both). There was a genuine possibility of jury confusion in this case.

***United States v. Newell***, 658 F.3d 1 (1st Cir. 2011) This case contains a thorough discussion of the requirement that a jury be instructed that a verdict must be unanimous when an indictment contains duplicitous allegations, such as numerous fraudulent acts in one count of the indictment, or numerous false statements. The jury must unanimously agree that at least one of the false statements or fraudulent acts occurred and they must agree which one. The failure to object, however, resulted in affirmance of the conviction, because it did not amount to plain error.

***United States v. Mannava***, 565 F.3d 412 (7th Cir. 2009) The defendant was charged under 18 U.S.C. § 2422(b) with attempting to persuade a child to engage in sexual activity that constitutes a violation of state law. The indictment alleged two state laws that would qualify. In this situation, the jury should be instructed that they must be unanimous as to which (or both) of the state laws were violated. A conviction cannot be sustained if half the jurors believe the defendant committed one underlying offense and half believe he committed another offense.

***United States v. Southwell,*** 432 F.3d 1050 (9th Cir. 2005) When the defendant raises the defense of insanity, in order for the jury to return a guilty verdict, not only must the jury unanimously find the defendant guilty; the jury must also unanimously reject the insanity defense. This applies to all affirmative defenses. The trial court's failure to explain this to the jury when the jurors asked a question during deliberations was reversible error.

***United States v. Garcia-Rivera***, 353 F.3d 788 (9th Cir. 2003) The defendant was alleged to have been a felon in possession of a firearm on three different dates. The judge instructed the jury that it had to agree unanimously that the possession occurred either on date A, date B, or date C. This could have led the jury to believe that unanimity was only required to establish that the possession was on any of the days, but not possession was on Date A, four different jurors on Date B, and the remaining jurors on Date C. This was plain error, and the conviction was reversed.

***United States v. Bobo***, 344 F.3d 1076 (11th Cir. 2003) Generally, the overt acts in a conspiracy indictment may not be utilized to describe the "scheme" in related fraud counts. But if they are used in this manner, then the jury must unanimously agree on which overt acts occurred in order to sustain a verdict.

***United States v. Fawley,*** 137 F.3d 458 (7th Cir. 1998) The perjury indictment alleged in one count that the defendant made two false statements when testifying before the grand jury. The defendant requested an instruction that explained that the jury must reach a unanimous verdict on whether a particular statement was proven to be false. It was not sufficient that the jury reach a unanimous verdict that a false statement was made. Failing to give the defendant's instruction was reversible error.

***JURY INSTRUCTIONS (Witness Credibility)***

***United States v. Luck,*** 611 F.3d 183 (4th Cir. 2010) Trial counsel was ineffective, and the conviction was required to be set aside, because he failed to request a jury instruction that cautioned the jury that an informant's testimony needed to be examined and weighed with greater care than the testimony of an ordinary witness. Even a general credibility instruction does not substitute for an instruction that specifically points out the potential for perjury born out of self-interest.

***United States v. Gaines***, 457 F.3d 238 (2d Cir. 2006) Trial courts should not instruct the jury that a defendant has an interest in the outcome of the case and therefore, his testimony should be considered with great care. This instruction adversely impacts on the defendant's presumption of innocence. Moreover, it is obvious that the defendant has an interest in the outcome of the case, so instructing the jury in this manner is entirely superfluous. The trial court should give a general instruction on the credibility of witnesses and then instruct the jury to consider the defendant's testimony just as any other witness. See also United States v. Brutus, 505 F.3d 80 (2d Cir. 2007).

***United States v. Bruno***, 383 F.3d 65 (2d Cir. 2004) The trial court erred in suggesting in the jury instruction that the trial court had the authority to sentence the government witnesses below the mandatory minimum sentence, even without a § 5K1.1 motion by the government. In fact, absent such a motion, the court lacked the authority to sentence the "snitches" to a sentence under the mandatory minimum statutory sentence. United States v. Lampkin, 159 F.3d 607 (D.C. Cir. 1998) The trial court repeatedly – and erroneously – instructed the jury that two juvenile witnesses for the government could not be prosecuted by the AUSA, thus negating the defendant's theory that the witnesses were testifying for the government in exchange for not being prosecuted. This erroneous instruction deprived the defense of its ability to mount a defense and was reversible error.

***JURY SELECTION (Batson v. Kentucky)***

***Foster v. Chatman***, 136 S. Ct. 1737 (2016) In this 7-1 decision, the Supreme Court holds that the state prosecutor's intent in exercising his peremptory strikes was racially motivated. Based on a review of the prosecutor's notes on the jury selection forms, as well as the explanations offered by the prosecutor at the habeas hearing, the Supreme Court holds that the evidence established that the reasons offered by the prosecutor were pretextual and the death penalty defendant was entitled to a new trial.

***Rice v. Collins***, 546 U.S. 333 (2006) The state prosecutor's exercise of a peremptory strike was upheld by the state trial court, the state appellate court and the federal habeas trial court. The Ninth Circuit disagreed, but simply found different facts. The Supreme Court reversed the Ninth Circuit decision, holding that it violated the AEDPA in its methodology. Justices Breyer and Souter concurred, but again decried the entire Batson enterprise.

***Johnson v. California***, 545 U.S. 162 (2005) The United States Supreme Court considers the standard to be applied in deciding whether a prima facie Batson showing had been made. The appropriate standard requires the movant to: "Produc[e] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." It is not proper to hold that the movant must make a showing by a preponderance of the evidence.

***Miller-El v. Cockrell***, 537 U.S. 322 (2003) The Court identified factors that should inform the trial court's assessment of whether the proffered explanations rebutted the prima facie case. In this death penalty case, the manner in which the prosecutor questioned prospective jurors showed a discriminatory motive. When "death-qualifying" the jurors, for example, different questions were asked of white jurors than black jurors. In addition to disparate questioning, the Court focused on the percentage of strikes used against blacks versus whites, noting that "happenstance is unlikely to produce this disparity." Other factors included a policy of the prosecutor's office to strike minority potential jurors and proof that the reasons proffered for striking black jurors in this case applied to white jurors who were not struck. The Supreme Court reviewed the conviction again, after the Fifth Circuit re-considered the case, and this time the Supreme Court held that the defendant made a sufficient Batson showing and the conviction was set aside. Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317 (2005).

***Snyder v. Louisiana***, 552 U.S. 472 (2008) The Court held that a prosecutor failed to provide adequate race-neutral reasons for exercising a disproportionate number of peremptory strikes against black jurors. The Court wrote, in other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative . . . We have not previously applied this rule in a Batson case, and we need not decide here whether that standard governs in this context. For present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution.

***Purkett v. Elem***, 514 U.S. 765 (1995) When a party has been challenged under Batson to provide a race-neutral explanation for a peremptory strike, the reason offered need not be persuasive, or even plausible. Whatever the reason offered, the burden then shifts to the challenger to establish that the party who exercised the strike was purposefully exercising the strike in a discriminatory manner. In this case, the prosecutor struck two jurors because they had facial hair. The trial court may not terminate the inquiry at that point, simply holding that the explanation was frivolous. The trial court must then proceed to the next step and determine whether, considering the prima facie case and the explanation offered by the party who exercised the strike, the opponent of the strike carried his burden of establishing purposeful discrimination.

***J.E.B. v. Alabama***, 511 U.S. 127 (1994) Batson applies to peremptory strikes exercised on the basis of gender.

***Georgia v. McCollum,*** 505 U.S. 42 (1992) Batson applies to defense strikes, as well. The defendant's exercise of peremptory strikes amounts to state action and the exercise of those strikes against jurors based on their race violates those jurors' constitutional rights.

***Hernandez v. New York***, 500 U.S. 352 (1991) The prosecutor excused two Hispanics and explained that he excused them because they were bilingual and was fearful that they would not listen to the interpreter who would be translating witnesses who spoke Spanish. This was not a violation of Batson. The three-step inquiry under Batson requires (1) the defendant make prima facie showing that the prosecutor exercised his strikes in a discriminatory manner; (2) the prosecutor must then articulate a race neutral reason for the exercise of his peremptory strikes; (3) the trial court must then decide whether the defendant has carried his burden of proving purposeful discrimination. Though excusing jurors in a case solely on the basis of their language may in some cases serve as only a surrogate for race discrimination, in this case, the explanation was acceptable.

***Powers v. Ohio***, 499 U.S. 400 (1991) In order to assert a Batson claim based on equal protection grounds, the defendant need not share the racial identity of the excluded minority. That is, a white defendant may complain that the prosecutor improperly exercised peremptory strikes against black prospective jurors. The rights being protected are the rights of the excluded jurors to be selected as jurors. Holland held that this rule did not apply when considered in the context of the defendant's Sixth Amendment rights, as opposed to the jurors' Fourteenth Amendment rights.

***Ford v. Georgia***, 498 U.S. 411 (1991) A state procedural bar to raising a Batson claim could not be constitutionally applied because Batson did not even exist at the time of the prosecution in this case and the defense took all reasonable steps to protect the issue.

***Holland v. Illinois***, 493 U.S. 474 (1990) The Sixth Amendment's guarantee of an impartial jury does not protect a defendant against a prosecutor's racially motivated exercise of peremptory jury challenges. Therefore, a white defendant from whose jury blacks were struck, has no Sixth Amendment objection. The Court indicated, however, that a white defendant may have an equal protection argument under such circumstances.

***Chamberlin v. Fisher***, 855 F.3d 657 (5th Cir. 2017) Writ granted based on Batson violation. The prosecution's "race neutral" explanations why black jurors were struck applied equally to white jurors who were not struck. Under the comparison juror analysis required by Supreme Court precedent, the defendant's Batson claim was meritorious.

***United States v. Atkins*** 843 F.3d 625 (6th Cir. 2016) The prosecutor struck a black venireman because he had a checkered work history and eight children. White jurors with the same work history, however, were not struck and the prosecutor asked no questions about the juror's eight children (i.e., whether they would "distract" the juror as the prosecutor hypothesized during the Batson inquiry). The conviction was reversed.

***Currie v. McDowell***, 825 F.3d 603 (9th Cir. 2016) The defendant's first trial resulted in a grant of habeas relief in the Ninth Circuit based on a Batson violation. At the retrial, the district court decided that the same prosecutor once again violated Batson, and the judge declared a mistrial. The case was retried again – with the same prosecutor – and the Ninth Circuit, once again on habeas review, held that the prosecutor violated Batson yet again, by using one peremptory strike against an African American juror. The Ninth Circuit held that the prosecutor's reasons were either run reasonable, demonstrably false, or applied just as well to the non-black jurors who were not struck.

***United States v. Mahbub***, 818 F.3d 213 (6th Cir. 2016) The defendant, who was Muslim, was charged with health care fraud. The government exercised a peremptory against the only Muslim in the venire. The judge found that there was no prima facie case because the defendant failed to prove that the defendant was in a cognizable group and because the prosecutor asked no questions of the juror that focused on his religion. Neither reason was a sufficient basis to find the absence of a prima facie case. Pursuant to Powers v. Ohio, the defendant's membership in a particular racial group is irrelevant. Regarding the questions that were asked during voir dire, it is true that questions that focus on race might raise an inference of discrimination, there is no requirement that the lawyer ask such questions in order for a Batson challenge to be successful. Sometimes, for example, the fact that a lawyer asks different questions of members of the venire based on their race, might raise an inference of discrimination. See, e.g., Miller-el v. Dretke, discussed above.

***Shirley v. Yates***, 807 F.3d 1090 (9th Cir. 2015) The Ninth Circuit orders that a writ be granted setting aside defendant's conviction because of the trial judge's erroneous findings regarding the reasons that certain prosecution strikes were exercised. The prosecution recited race neutral reasons for exercising its strikes, but the trial court's findings that these were, in fact, the reasons for the strikes were not supported by the record. Pursuant to Batson, once a prima facie case is made, the opposing party must recite the race-neutral reasons for exercising its strikes and thereafter, the trial court must make findings whether the strikes were, or were not race-based, after providing the moving party an opportunity to argue that the reasons were pretextual, or simply not the actual reasons. Comparing the prosecution's stated reasons for striking one black juror – and the failure to strike a white juror with similar characteristics – the Ninth Circuit held that the record failed to support a finding that the strikes were not racially motivated.

***Crittenden v. Chappell***, 804 F.3d 998 (9th Cir. 2015) The Ninth Circuit holds that the district court's decision that the state prosecutor's peremptory strikes were substantially motivated by race was supported by the record and habeas relief was appropriate. The court applied the standard announced in Cook v. LaMarque, 593 F.3d 810 (9th Cir. 2010), which clarified that a peremptory challenge violates the Equal Protection Clause if it is motivated in substantial part by race, regardless of whether the strike would have issued if raced had played no role.

***Castellanos v. Small***, 766 F.3d 1137 (9th Cir. 2014) The Batson hearing conducted in the state court revealed that the prosecutor explained the basis for certain strikes on demonstrably false grounds (i.e., the prosecutor struck one juror based on the juror having no children, when, in fact, the transcript revealed that the juror had two children). Thus, under AEDPA review, the state court findings were based on an unreasonable determination of the facts.

***United States v. Tomlinson***, 764 F.3d 535 (6th Cir. 2014) The defendant raised his Batson challenge prior to the time the jury was sworn, but after the prosecution had exercised several of its strikes and jurors had left the courtroom. The challenge was timely, nevertheless, because a Batson challenge cannot be effectively raised after each strike because the existence of a pattern (the prima facie) cannot be ascertained in the midst of the striking process.

***Sanchez v. Roden***, 753 F.3d 279 (1st Cir. 2014) The petitioner established that he had established a prima facie Batson violation in his state court prosecution and the prosecutor should have been required to articulate his race-neutral reason for striking a juror. A remand to further develop the record was necessary.

***SmithKline Beecham Corp. v. Abbott Labs***., 740 F.3d 471 (9th Cir. 2014) Striking a potential juror on the basis of his sexual orientation (a homosexual male) violated Batson.

***Adkins v. Warden, Holman CF***, 710 F.3d 1241 (11th Cir. 2013) The Eleventh Circuit granted a writ of habeas corpus, concluding that the state trial court failed to undertake the type of inquiry that is necessary to determine whether facially neutral explanations were mere pretexts. Among the circumstances that the trial court failed to consider were (1) the strength of the prima facie case; (2) the fact that the prosecution explicitly noted the race of every black venire member (and only black venire members) on the jury list the state prepared during jury selection; (3) the fact that specific proffered reasons provided by the prosecutor were incorrect and/or contradicted by the record; (4) the fact that the trial court relied upon facts not part of the record, such as the trial court's personal experience with the prosecutor in unrelated matters. After deciding that the state court's decision was not entitled to AEDPA deference, the court undertook a de novo review of the record and concluded that the state prosecutor did intentionally excuse jurors on the basis of their race.

***Ayala v. Wong***, 693 F.3d 945 (9th Cir. 2012) It is not proper to permit the prosecutor to present the race-neutral reasons for the exercise of strikes in an ex parte proceeding. The defense has the right to be present and to argue that the reasons are pretextual. See also 756 F.3d 656. The Supreme Court reversed: Davis v. Ayala, 135 S. Ct. 2187 (2015).

***United States v. McAllister***, 693 F.3d 572 (6th Cir. 2012) The district court merged the stage-two and stage-three determinations. In essence, the court simply listened to the government's explanations for the strikes and made no additional finding whether the strikes were pretextual. The district court must do more than simply perfunctorily listen to the government's explanations and then declare those explanations to be race neutral. Remand for further proceedings was necessary to enable the district court to make the proper findings.

***Harris v. Hardy***, 680 F.3d 942 (7th Cir. 2012) Habeas petitioner established that the prosecution exercised its strikes in its death penalty murder case in a discriminatory manner. Comparing the reasons that strikes were exercised with the failure to strike other jurors, and the statistical evidence was sufficient to prove intentional discrimination.

***Madison v. Commissioner, Ala. Dept. of Corrections,*** 677 F.3d 1333 (11th Cir. 2012) The defendant offered sufficient evidence to establish a prima facie Batson violation and the trial court erred in denying the defendant's motion for a Batson hearing. In addition to the statistics (the prosecutor used six of his eighteen peremptory strikes to remove black jurors; there were 13 black jurors on the venire), the prosecutor asked no questions at all of three of the black jurors, the case was "racially charged" (black defendant, white victim); and the prosecutor's office had a history of racially discriminatory practices.

***Johnson v. Finn***, 665 F.3d 1063 (9th Cir. 2011) The Federal Magistrate concluded that the state prosecutor had violated Batson. The district court judge rejected the Magistrate's finding without conducting a new hearing. This was error. The Magistrate conducted a comparative analysis of the struck juror with other jurors who were not struck and determined that the state prosecutor had struck the juror on the basis of race and not the reasons offered at the habeas hearing.

***Rice v. White***, 660 F.3d 242 (6th Cir. 2011) The state trial court found that the prosecutor's race-neutral reasons for striking two jurors were not supported by the record. One of the jurors, however, had already left the courthouse. The trial judge decided that if a racially balanced jury was selected, the error would be cured. This was erroneous and the federal court properly granted a writ.

***United States v. Rutledge***, 648 F.3d 555 (7th Cir. 2011) The trial judge afforded the AUSA the opportunity to offer race neutral reasons for exercising certain strikes but failed to make any finding of fact after listening to the reasons. A remand was required for the trial court to make findings. It is not sufficient for the judge to simply state that the AUSA "offered a race neutral reason;" the judge must also decide whether the prosecutor was credible in explaining the basis for the strike, given the facts offered by the opposing party, as well as the prima facie evidence. Also, the AUSA's statement that she is an African American was not a proper factor to consider, because minorities are equally capable of discriminating against other minorities.

***United States v. Taylor***, 636 F.3d 901 (7th Cir. 2011) The defendant raised a Batson challenge that was denied in the trial court. The appellate court remanded for an evidentiary hearing on the Batson claim, specifically, to analyze credibility of the prosecutor's reason for exercising the strikes. On remand, the trial court allowed the prosecutor to offer any additional reasons for exercising the strikes. The Seventh Circuit reversed: the remand only permitted the trial court to analyze the strikes for the reasons initially offered by the prosecutor, not to afford the prosecutor an opportunity to advance additional reasons.

***Coombs v. Diguglielmo***, 616 F.3d 255 (3rd Cir. 2010) In the habeas petitioner's state trial, he raised a Batson claim. The prosecutor provided race neutral reasons, but the defendant was not provided an opportunity to rebut those raconteurial reasons to show that those reasons were pretextual. Batson requires that the court engage in the three-step process (1. prima facie case; 2. race-neutral reasons; 3. opportunity to rebut the validity of the race-neutral reasons). The prosecutor's explanations included statements such as, "I just didn't like" that juror; and "that juror gave me back looks." These types of explanations are particularly susceptible to rebuttal.

***Ali v. Hickman***, 584 F.3d 1174 (9th Cir. 2009) The prosecutor exercised two of his peremptory strikes to eliminate the only two African American jurors on the panel. The reasons for striking one of the jurors applied equally to white jurors who were not struck, thus establishing that the prosecutor was offering pretextual reasons for exercising the strike. The Ninth Circuit engaged in an exhaustive review of each of the "pretextual" reasons offered by the prosecutor and demonstrated that the reasons were either non-sensical (not "case related"), applied equally to white jurors, or were not supported factually by the voir dire. Writ granted.

***Price v. Cain***, 560 F.3d 284 (5th Cir. 2009) The defense satisfactorily established a prima facie case by showing that the prosecutor struck six black veniremen and the resulting jury was all white. A prima facie case is "simple and without frills." The facts in this case gave rise to an inference of race-based peremptory strikes.

***McGahee v. Alabama Dept. of Corrections***, 560 F.3d 1252 (11th Cir. 2009) In this case that was tried several months after Batson was decided in 1986, the state moved to excuse eight jurors for cause, all of whom were African Americans. The state removed all African Americans from the jury with its exercise of 16 peremptory strikes against African Americans (there were 24 on the venire) and the jury was all white. In response to the Batson challenge, the prosecutor assured the court that his strikes were not race-based. The Eleventh Circuit granted the writ.

***Reed v. Quarterman***, 555 F.3d 364 (5th Cir. 2009) During a "reconstruction" Batson hearing – that is, a hearing that is conducted years after the initial trial, following a remand, or habeas hearing – the trial judge must review the entire transcript of the voir dire to determine whether the defendant's "comparative analysis" was meritorious. In this case, the trial judge simply looked at the struck jurors and the prosecutor's statement about why that juror would have been struck. The comparative analysis, however, would have shown that the same reasons applied equally to jurors who were not in the cognizable group. The

court noted that the strongest case on the importance of the comparative analysis is Miller-El v. Dretke, cited above. The Fifth Circuit, conducting the comparative analysis, concluded that a Batson violation was established.

***Jones v. West***, 555 F.3d 90 (2d Cir. 2009) The lower courts failed to properly evaluate the defendant's claim that a prima facie Batson claim had been satisfied. The Second Circuit considers different ways in which a prima facie case is made, including the "challenge rate" method (comparing the number of strikes against a cognizable racial group, versus strikes of others) and the "exclusion rate" (which focuses on the number of minority jurors who end up left on the jury, regardless of the ratio of strikes that are used. Thus, in the exclusion method, one strike of the only black juror, may establish a prima facie case. In this case, the defendant established a prima facie case. His argument was added by the trial judge's conclusion, at one point during voir dire, that the prosecutor was, in fact, offering pretextual reasons.

***Dolphy v. Mantello,*** 552 F.3d 236 (2d Cir. 2009) The state trial court's Batson findings were insufficient. The court simply accepted at face value all the prosecutor's "race neutral" explanations for his strikes, without making any findings that the prosecutor actually relied on those reasons, as opposed to simply offering pretexts. Among the explanations offered by the prosecutor was that he struck all "overweight" people, because in his experience, overweight people are more sympathetic to defendants. When the defense attorney pointed out that the prosecutor had allowed overweight jurors to sit in other cases, the judge responded, "that's neither here nor there; I'm satisfied that is a race neutral explanation."

***United States v. Collins***, 551 F.3d 914 (9th Cir. 2009) Only one African American juror remained in the venire and the prosecutor exercised a strike against her. From one point of view, the prosecutor excused "100% of the African Americans in the venire" but only exercised 25% of their strikes against African Americans (the government only used four strikes). The Ninth Circuit concluded that considering various factors (including a comparison of that juror's answers to voir dire questions with other jurors' answers, the evidence was sufficient to establish a prima facie case and the trial court erred in not requiring the government to set forth a race neutral reason for exercising the strike. The appellate court explains in some detail the law governing the existence of a prima facie case.

***Paulino v. Harrison***, 542 F.3d 692 (9th Cir. 2008) The state court prosecutor used five out of six peremptory strikes to remove African American venire members. The defense attorney objected. The trial judge looked at his notes and said that statistically "it looks bad" but based on his review of the voir dire, he could understand each of the strikes. The prosecutor was never asked to explain her strikes. The first time the case reached the federal appellate court, the case was sent back to the district court so that the prosecutor could explain her strikes. She said she had no memory of any aspect of jury selection. However, she gave "hypothetical" explanations, based on her review of the voir dire transcript, though she said she did not remember her actual reasons. The Ninth Circuit set aside the conviction. "It does not matter that the prosecutor might have had good reasons . . . what matters is the real reason the jurors were stricken." Johnson v. California, 545 U.S. 162, 172 (2005).

***United States v. Williamson***, 533 F.3d 269 (5th Cir. 2008) The trial court clearly erred in rejecting defense counsel's Batson challenge to the government exercise of peremptory strikes. The government struck both black venire members. The government's explanation (the jurors had friends and relatives with drug convictions), applied equally to numerous white jurors who were not struck.

***Green v. Lamarque***, 532 F.3d 1028 (9th Cir. 2008) The state defendant established that the prosecutor's exercise of peremptory strikes was motivated by race and the state courts' determination otherwise was an unreasonable determination of the facts. The prosecutor's race-neutral explanations applied equally to white jurors who were not struck. Habeas relief granted.

***United States v. Kimbrell***, 532 F.3d 461 (6th Cir. 2008) The trial court granted the government's Batson challenge to the defendant's use of a peremptory strike against a white juror. However, the trial court placed the burden of proof on the defendant to prove a non-discriminatory basis for the strike. In "step three" of the Batson procedure, the burden is on the party challenging the strike to prove a discriminatory motive (after the party exercising the strike has offered a race-neutral reason during step two). The Sixth Circuit reversed defendant's conviction. See also United States v. McFerron, 163 F.3d 952 (6th Cir. 1995).
***United States v. Odeneal***, 517 F.3d 406 (6th Cir. 2008) The prosecutor failed to offer a sufficiently convincing race neutral reason for excusing the African American jurors that he struck. The juror indicated that she was going through a divorce, but this was information contained on a questionnaire that was over a year old. Also, the juror indicated that she had previously served on a jury that acquitted a defendant. But a white prospective juror served on that same jury and was not struck by the prosecutor.

***Kesser v. Cambra***, 465 F.3d 351 (9th Cir. 2006) The Ninth Circuit concluded that none of the facially neutral explanations offered by the prosecutor for striking Native American jurors was sincere and held that the defendant's Batson challenge should have been granted.

***Willliams v. Runnels***, 432 F.3d 1102 (9th Cir. 2006) The Ninth Circuit concluded that the habeas petitioner was entitled to a full Batson hearing. The petitioner established the existence of a prima facie Batson violation, and the state did not sufficiently rebut that inference – in large measure because the state trial judge wasn't interested in hearing the explanation and summarily rejected the petitioner's Batson claim during the course of jury selection.

***Wilson v. Beard***, 426 F.3d 653 (3rd Cir. 2005) Based on the prosecutor's training tape that the defendant unearthed years later, the defendant was able to show that the prosecutor regularly and intentionally removed African Americans from his juries.

***United States v. Esparza-Gonzalez***, 422 F.3d 897 (9th Cir. 2005) Even the failure to exercise a strike may constitute a Batson violation. In this case, the government did not exercise all of its strikes, thus eliminating the possibility that the jurors on the bottom of the list could be chosen. This effectively eliminated the only Hispanic in the jury venire. Coupled with other evidence,

this failure to strike could be considered as part of the prima facie case. The trial court also erred in failing to make a determination whether the government's stated reason for not exercising a strike established that there was no discriminatory motive.

United States v. Stephens, 421 F.3d 503 (7th Cir. 2005) If a statistical prima facie showing of discriminatory use of preemption is made, the trial court may not reject the showing on the basis of apparent non-discriminatory reasons for exercising the strikes. That is, during phase one of the Batson challenge, the trial court may not abort the process by summarily finding that there were race-neutral reasons for exercising the strikes. This type of analysis is appropriate during phase three of the Batson challenge. The court also noted that the prosecution struck African Americans, Hispanics and an Asian juror, and the trial court properly "combined" these strikes to find a pattern of removing non-white jurors. The Seventh Circuit later affirmed the conviction, holding that the evidence developed on remand was sufficient to establish that there was no Batson violation. 514 F.3d 703 (7th Cir. 2008).

***Walker v. Girdich***, 410 F.3d 120 (2d Cir. 2005) In explaining why she exercised one of her peremptory strikes against a potential black juror, the prosecutor stated, "because he was a black man with no family . . ." The state argued that the prosecutor was simply describing the juror, as opposed to explaining the basis for the strike. The Second Circuit disagreed, holding that the "reason" offered by the prosecutor was that he was a black man with no family, and this is not a racial neutral explanation.

***Brinson v. Vaughn***, 398 F.3d 225 (3rd Cir. 2005) A prima facie case of a Batson violation may be made out even if the party being challenged does not use all of its strikes and some members of the targeted class are seated on the jury. In other words (as in this case), if the prosecutor strikes a disproportionate number of black jurors but does not exhaust all of the strikes available and some blacks are seated, the prima facie case may still exist. The state trial court in this case erred in failing to require the state to offer explanations for its disproportionate use of strikes against black jurors. The trial court also erred in holding that "where the victim, the defendant, and the witnesses are all black, there is no Batson violation."

***Paulino v. Castro,*** 371 F.3d 1083 (9th Cir. 2004) The defendant voiced a Batson challenge, and the trial judge then reviewed his notes and stated that he could see reasons for each of the strikes – but never made the prosecutor announce her reasons for exercising the strikes that she did. The trial court's procedure was not in compliance with the procedures required by Batson.

***Hardcastle v. Horn***, 368 F.3d 246 (3rd Cir. 2004) The initial state trial was conducted pre-Batson. Nevertheless, the trial lawyer preserved a Batson objection (relying on Swain). The state habeas court failed to properly evaluate whether the state's proffered explanations supported its claim that its strikes were not motivated by race. A remand for an additional hearing in the district court is the appropriate remedy.

***Holloway v. Horn***, 355 F.3d 707 (3rd Cir. 2004) The prosecutor violated Batson. Though many of his race neutral reasons were suspect, one particular explanation, "black male, same age as defendant" was clearly a pretext, given that three white jurors were also the same age as the defendant. The court noted that other reasons that a review of the record might reveal are irrelevant when the prosecutor, in court, specifically states what the reasons were that prompted the strike.

***United States v. Brown***, 352 F.3d 654 (2d Cir. 2003) Excluding jurors based on their religion would violate Batson. In this case, it was the juror's participation in religious activities, not his religion that was the basis for the prosecutor's strike and this was permissible.

***Harris v. Kuhlmann***, 346 F.3d 330 (2d Cir. 2003) The prosecutor used five peremptory strikes to excuse every potential black juror. The prosecutor initially accepted a black juror, but that juror was later struck, still during the jury selection process, when he revealed that he actually had a misdemeanor conviction. "The fact that the prosecutor was initially willing to accept one black juror is not sufficient to exempt from scrutiny the prosecutor's later decisions to strike all four of the remaining black potential jurors." These facts establish a prima facie case and remand was necessary to assess whether there were race-neutral reasons supporting the state's exercise of peremptory strikes. (The state murder trial was held in 1985).

***Aki-Khuam v. Davis***, 339 F.3d 521 (7th Cir. 2003) The trial court deviated from the standard Batson procedure by requiring the parties to explain the purpose of each peremptory strike as the jury selection process went along. Five of the defendant's peremptory challenges were rejected by the trial judge, despite the fact that there were no objections by the state. This procedure violated the defendant's right to due process and equal protection and required that his conviction and death sentence be set aside. The fact that the trial judge found the explanations offered by the defendant to be "terrible" is not the same as finding that the strikes were racially motivated. Moreover, requiring the lawyers to explain the basis for each strike, without an objection from the opponent is not consistent with the requirements of Batson.

***United States v. Alanis***, 335 F.3d 965 (9th Cir. 2003) The trial court denied the defendant's Batson challenge, but failed to complete the "step three" analysis by reviewing the persuasiveness of the prosecutor's gender-neutral explanations. Instead, the court simply stated that gender-neutral explanations were offered and that was the end of the inquiry. Conducting its own inquiry, the Ninth Circuit concluded that the explanations offered by the prosecutor were pretextual and that the strikes were actually used in a gender-based manner.

***Eagle v. Linahan***, 279 F.3d 926 (11th Cir. 2001) At trial, defense counsel raised a Batson claim. The prosecutor responded that the ratio of blacks on the jury mirrored the ratio in the venire, thus there could be no Batson claim. The judge agreed with this argument, but commented at the conclusion of the Batson hearing, ``I think both of you were doing what you could to get the different races off.'' Appellate counsel was ineffective in failing to raise what was a blatant error of law committed by the trial court

in denying the Batson claim on an improper basis (comparing the venire with the jury), especially in light of the judge's comment that demonstrated that the Batson claim was meritorious.

***United States v. Nelson***, 277 F.3d 164 (2d Cir. 2002) This case involved the notorious prosecution of two African Americans for the killing of an orthodox Jew in Brooklyn during a riot. The District Court judge stressed the need to have a jury that was diverse. To achieve this result, the judge denied a Batson challenge, made decisions regarding excusals for cause, and shifted the order of jurors. The Second Circuit holds that a jury that is selected intentionally to achieve racial and religious objectives is not a valid jury, particularly where an unqualified juror (i.e., a biased juror) is allowed to sit in order to achieve this goal.

***Riley v. Taylor***, 277 F.3d 261 (3rd Cir. 2001) The prosecutor struck all three black potential jurors. The habeas petitioner offered evidence demonstrating a pattern of discriminatory use of peremptory strikes by the prosecutor's office in death penalty trials. The state's explanation of its use of peremptory strikes (at the habeas hearing years later) was not supported by the record of the voir dire. The death penalty was set aside.

***United States v. McFerron***, 163 F.3d 952 (6th Cir. 1998) The trial court improperly placed the burden on the defendant to articulate a race-neutral basis for exercising peremptory strikes against certain jurors. When one party challenges the exercise of strikes by the adversary, the party voicing the objection has the burden of proving that the strikes were racially motivated. This amounted to structural error that is not subject to harmless error analysis.

***Tankleff v. Senkowski***, 135 F.3d 235 (2d Cir. 1998) A defendant may raise a Batson challenge, regardless of whether he is the same race as the jurors who, he claims, were improperly excused. Moreover, there is no harmless error analysis when evaluating a Batson challenge. In this case, the prosecutor attempted to strike the three blacks on the panel; this establishes a prima facie case and the trial court should have conducted a full Batson inquiry.

***Mahaffey v. Page***, 162 F.3d 481 (7th Cir. 1998) The state exercised strikes against all seven African American members of the jury venire. This evidence was sufficient to establish a prima facie Batson claim.

***United States v. Serino,*** 163 F.3d 91 (1st Cir. 1998) The trial court initiated a Batson challenge and re-seated a juror struck by the defense. The First Circuit reversed: the defendant offered a race-neutral reason for striking the only Asian-American juror – she was a social worker, and her husband was a financial analyst. The defendant's proffered explanation was not inherently unbelievable and there was no basis for the judge's factual finding that the explanation was not believable.

***United States v. Blotcher***, 142 F.3d 728 (4th Cir. 1998) The defendant provided a race-neutral reason for striking a white juror (he appeared to be very conservative based on the way he was dressed) and the trial court's decision to re-seat that juror required that the conviction be reversed.

***United States v. Hill***, 146 F.3d 337 (6th Cir. 1998) There was one black potential juror. She was struck by the prosecutor. When asked why he struck that juror, the prosecutor was unable to provide a reason, but reassured the court that it was not based on the juror's race. The Sixth Circuit remanded. The trial court made insufficient findings to deny the Batson challenge.

**Coulter v. Gilmore**, 155 F.3d 912 (7th Cir. 1998) Nine of the ten strikes exercised by the prosecutor were against black potential jurors. Though the prosecutor did not use all of his peremptory strikes and there were three black jurors and two black alternates ultimately on the jury, the state failed to rebut the prima facie case. The state trial court failed to consider the totality of the circumstances and never evaluated the differential manner in which the state handled – or rather failed to handle – nonminority jurors who were similarly situated to the African Americans the prosecution struck.

***United States v. Alvarado***, 923 F.2d 253 (2d Cir. 1991) The government exercised 57% of its peremptory strikes against minorities. Although the record did not establish what the percentage of minorities was on the venire, the court would accept as a surrogate, the percentage of minorities in the entire district. Because the minority population in the district was 29% and the government exercised strikes against 57%, a prima facie case was established.

***Harrison v. Ryan***, 909 F.2d 84 (3rd Cir. 1990) A prosecutor's race-conscious exclusion of even one juror is sufficient grounds to require a new trial under Batson. During the trial, six blacks were excluded by the State. The prosecutor was later able to identify reasons for only five of these strikes. Because of the failure to identify a reason for the sixth juror, a new trial was required. Virgin Islands v. Forte, 865 F.2d 59 (3rd Cir. 1989) The Third Circuit holds that Batson applies to the intentional removal of white jurors as well as black jurors. Thus, a white defendant has the right to complain about a prosecutor's discrimination-based exercise of strikes against white veniremen.

***United States v. Clemons***, 843 F.2d 741 (3rd Cir. 1988) The Third Circuit holds that it is inappropriate to search for a particular percentage in evaluating a Batson claim. Rather, a fact-specific determination must be made by the trial judge in determining whether the prosecutor has exercised his peremptory strikes in a discriminatory manner.

***United States v. Garrison***, 849 F.2d 103 (4th Cir. 1988) The Fourth Circuit holds that an adversary hearing is the proper means of conducting a Batson inquiry. Unless the government makes an extraordinary showing why an ex parte proceeding is required (as, for example, if a current investigation involves a prospective juror) the proceedings should be fully adversarial.

***United States v. Huey***, 76 F.3d 638 (5th Cir. 1996) One defendant can raise a Batson challenge to a co-defendant's racially motivated peremptory strikes. Here, the court found that the co-defendant did exercise his strikes in a racially discriminatory manner and then reversed the conviction not only of the complaining defendant, but also of the co-defendant (i.e., the party whose attorney violated the constitutional rights of the prospective jurors).

***United States v. Romero-Reyna***, 867 F.2d 834 (5th Cir. 1989) The prosecutor exercised six peremptory challenges to strike Mexican Americans from the jury. A remand was required to make findings on the Batson issue since the record contained no findings by the district court on the issue. Following remand and finding by the trial judge that there was no discriminatory intent, the Fifth Circuit affirmed the conviction. 889 F.2d 559. During the hearing on remand, the prosecutor stated that he always struck jurors whose occupations began with the letter "p." He explained that he at first thought such a rule was irrational, until he suffered two mistrials, one of which he attributed to a holdout who was a pharmacist and the other to a juror who was a postal worker. The trial court, however, rejected this particular explanation for the prosecutor's exercise of his strikes because he did not strike Anglos who were employed as a payroll clerk, a part-time secretary, and an area production supervisor. Nevertheless, non-discriminatory reasons were given for the exercise of each of the prosecutor's strikes against Mexican Americans.

***Splunge v. Clark***, 960 F.2d 705 (7th Cir. 1992) The prosecutor struck both black veniremen. One knew the defendant, but the prosecutor's only explanation for the other strike was that "he had a feeling" about that juror; and he felt she did not understand the concept of reasonable doubt. The prosecutor's attitude was exemplified by his asking the black jurors if they knew anybody who had been charged with murder, or robbery; and asking the white jurors if they knew anybody who was a victim of either robbery or murder. The writ was properly granted by the district court. Ford v. Norris, 67 F.3d 162 (8th Cir. 1995) The defendant established that the prosecutor violated the defendant's rights under the Swain v. Alabama standard. This violation of the defendant's rights in the jury selection process amounts to structural error in the trial and is not subject to harmless error analysis in habeas proceeding.

***Miller v. Lockhart***, 65 F.3d 676 (8th Cir. 1995) The petitioner established that the prosecutor used all of his peremptory strikes against blacks and had systematically excluded blacks over a period of time. This evidence was sufficient to make out a Swain violation.

***Devose v. Norris***, 53 F.3d 201 (8th Cir. 1995) A state prosecutor claimed to have exercised peremptories on certain black jurors because they had previously served on juries and might have been suffering from juror burnout. White jurors who had previous jury service, however, were not struck (the prosecutor claimed that this experience would give them a clearer understanding of the issues). This led the court to conclude that the state's explanations were pretextual and because of this Batson violation, the conviction was set aside.

***Walton v. Caspari***, 916 F.2d 1352 (8th Cir. 1990) The Eighth Circuit holds that there is no presumption that prosecutors act lawfully in connection with their exercise of peremptory strikes. The prosecutor in this case excluded fourteen out of fifteen black venire persons in the defendant's state trial. The district court did not abuse its discretion in finding that this constituted the discriminatory use of peremptory strikes and required vacating the conviction.

***United States v. Johnson***, 873 F.2d 1137 (8th Cir. 1989) Although two blacks did serve on the jury which convicted the defendant of escaping from lawful custody, this did not excuse the prosecutor from exercising his other peremptory challenges against blacks. The prosecutor exercised his peremptory strikes against blacks who did not respond during voir dire but did not strike any whites who also did not respond.

***United States v. Wilson***, 884 F.2d 1121 (8th Cir. 1989) The prosecutor's use of all six of its strikes against six black people from the jury violated Batson. On rehearing en banc, the court finds that the prosecutor failed to assert race neutral grounds for the exercise of peremptory strikes against the black veniremen. Though the prosecutor gave acceptable race neutral explanations for five of his six strikes against blacks, the failure to offer a race neutral explanation for the sixth strike against a black requires that the conviction be reversed.

***United States v. Hughes***, 864 F.2d 78 (8th Cir. 1988) The prosecutor struck three of the five jurors who were on the jury venire. This constitutes a prima facie Batson violation requiring the prosecutor to offer reasons other than race, for striking those jurors. The Court of Appeals took judicial notice of the number of times that prosecutors in the Eastern District of Missouri were charged with exercising peremptory strikes in a discriminatory manner.

***United States v. Townsley***, 843 F.2d 1070 (8th Cir. 1988) The prosecutor exercised ten of twelve peremptory challenges to remove black jurors. White defendants had standing to join the black defendants' challenge because if the peremptory challenges were improperly used, the white defendants were treated differently because they were tried together with black defendants.

***United States v. Battle,*** 836 F.2d 1084 (8th Cir. 1987) The prosecutor's use of five out of six peremptory challenges to strike five of seven blacks from the jury panel established the prima facie evidence of purposeful discrimination. Remand was required to afford the government the opportunity to set forth racially neutral reasons for its use of peremptory challenges.

***Garrett v. Morris,*** 815 F.2d 509 (8th Cir. 1987) The State violated Batson by the exercise of its preemptory challenges in a way that excluded all black jurors from the petit jury panel. The prosecutor's stated reasons for excluding all black prospective jurors, that they lacked background, education, and knowledge to understand the scientific evidence, was clearly a pretext for rank racial discrimination.

***Turner v. Marshall***, 121 F.3d 1248 (9th Cir. 1997) Although the prosecutor did not utilize all of the state's peremptory challenges and there were African Americans left on the jury, the prosecutor failed to articulate race-neutral reasons for striking one of the African American prospective jurors. The reason articulated for striking the juror (a hesitancy about looking at gruesome crime scene photographs) would have supported striking white jurors who were not struck. Though other African American jurors were

not struck, this did not defeat the Batson claim: “Where the prosecutor’s explanation for striking a minority juror is unsupported by the record, empaneling other minority jurors will not salvage her discredited justification.”

***United States v. Annigoni***, 96 F.3d 1132 (9th Cir. 1996) In this en banc decision, the court concludes that automatic reversal of a conviction is the proper remedy where a trial court erroneously deprives a criminal defendant of the right of exercising a peremptory challenge. In this case, the trial court concluded, incorrectly, that one of the defendant’s peremptory strikes was racially motivated. The defendant, therefore, was denied the right to exercise that strike. This error, the Ninth Circuit holds, is automatically grounds for reversal. This holding did not survive the decision in Rivera v. Illinois, 556 U.S. 148 (2009), which held that denying a defendant a peremptory strike is not grounds for automatic reversal.

***United States v. Sammaripa***, 55 F.3d 433 (9th Cir. 1995) In a jury trial, jeopardy attaches when the jury is impaneled and sworn. In this case, after the jury was impaneled and sworn, the prosecutor voiced a Batson challenge, and the trial court thereafter granted a mistrial. There was no manifest necessity for doing so because the prosecutor should have made the Batson challenge before the jury was impaneled and sworn. Therefore, the double jeopardy clause barred trying the defendant after this first aborted attempt.

***United States v. Omoruyi***, 7 F.3d 880 (9th Cir. 1993) The prosecutor explained that he struck two women jurors because they were single females who may have been attracted to the defendant. The exercise of peremptory strikes on the basis of gender is impermissible. Even though half of the seated jurors were women, the prosecutor’s concession that he struck the two jurors because they were women necessitated a reversal of the conviction.

***United States v. Bishop***, 959 F.2d 820 (9th Cir. 1992) The prosecutor excused one black juror because she lived in a predominantly black neighborhood and probably thought the police picked on people. This was not a “race-neutral” explanation, and the conviction was reversed. This explanation was a surrogate for impermissible racial biases. Also, the fact that the jury ended up being “representative” is not determinative. Though this may be probative of the prosecutor’s intent, the exclusion of even one juror on the basis of race violates Batson no matter how many black jurors ultimately serve.

***United States v. Chinchilla***, 874 F.2d 695 (9th Cir. 1989) The Hispanic defendants were denied due process when the prosecutor exercised his peremptory challenges to remove the only Hispanic juror and the only Hispanic alternate juror.

***United States v. Thompson***, 827 F.2d 1254 (9th Cir. 1987) In order to fulfill its Batson duty, the trial court conducted an in camera ex parte conference with the prosecutor. This is error and is not harmless. The defense has a right to be present during the prosecutor’s explanation of the use of his peremptory instructions and may make comments during this conference.

***Hollingsworth v. Burton***, 30 F.3d 109 (11th Cir. 1994) Though the prosecutor satisfactorily explained his basis for striking potential black jurors, the court holds that the proper way to analyze a Batson claim is to compare the characteristics of the excluded jurors with jurors who were not struck by the government. Thus, if a seated juror had the same characteristic as a juror who was struck, and that characteristic was the asserted basis for striking the juror, then the explanation offered by the prosecutor will not be sufficient to overcome the prima facie Batson claim.

***Hollis v. Davis***, 941 F.2d 1471 (11th Cir. 1991) The state defendant was able to establish in this habeas action that all blacks had been excluded from grand and petit juries in this jurisdiction in Alabama in 1959. That was all that was required to vacate this thirty-one-year-old conviction. Furthermore, his attorney’s failure to challenge the composition of the grand and petit juries excused any procedural default in this habeas action.

***Horton v. Zant***, 941 F.2d 1449 (11th Cir. 1991) Under the Swain standard, the prosecutor failed to rebut the prima facie case that he had exercised his peremptory strikes in a discriminatory manner. Among the evidence relied upon by the defendant was evidence that the DA had engaged in other types of discriminatory actions in the past in addition to his practice of excusing prospective black jurors.

***United States v. Rodriguez***, 935 F.2d 194 (11th Cir. 1991) Following the Supreme Court’s decision in Powers v. Ohio, the court holds that a Hispanic defendant may raise a Batson challenge if the prosecutor exercises strike against black jurors on the basis of their race.

***Love v. Jones***, 923 F.2d 816 (11th Cir. 1991) The defendant’s conviction was tainted as a result of the prosecutor’s discriminatory exercise of peremptory strikes to eliminate all the blacks from the jury. This case was tried prior to the decision in Batson, but the prosecutor’s conduct was outlawed by Swain v. Alabama. That is, the prosecutor’s actions were shown to be part of a systematic exclusion of blacks from petit juries in that county.

***United States v. Horsley***, 864 F.2d 1543 (11th Cir. 1989) The prosecutor exercised one of his peremptory strikes against the only black venireman. When asked why he exercised his strike against the black juror, the prosecutor responded, “I just got a feeling about him.” Despite the fact that only one peremptory strike was used against a potential black juror, the Court of Appeals holds that the prosecutor must offer an explanation better than “I got a feeling about him.” The defendant is not required to show a pattern of peremptory strikes against a certain number of veniremen in order to establish a prima facie case of purposeful discrimination.

***Jones v. Davis***, 835 F.2d 835 (11th Cir. 1988) The defendant in this case attempted to apply Batson to a conviction which was final long before the Batson decision was issued by the U.S. Supreme Court. The Eleventh Circuit holds that the exercise of peremptory strikes by the prosecutor was so blatantly discriminatory in this case, and part of a pattern and practice of discriminatory use of peremptory strikes, that the defendant could rely on Swain v. Alabama in vacating his conviction.

***JURY SELECTION (False Voir Dire Answers)***

***English v. Berghuis***, 900 F.3d 804 (6th Cir. 2018) The defendant was tried in a state court on a charge of sexual assault involving a teenager visiting at his house. During voir dire one juror did not reveal that she had been the victim of a sexual assault by a family member. Based on the post-trial record, this false statement – which was intentional – would have provided a basis to excuse the juror for cause and therefore, the defendant was deprived of a fair trial. Habeas granted.

***United States v. Parse***, 789 F.3d 83 (2d Cir. 2015) During voir dire, a juror hid the fact that she was a disbarred attorney, an alcoholic and that she had a criminal record. There was some evidence that the defense attorneys were aware of these facts at some point during the trial and did not alert the court to their discovery. Nevertheless, the Second Circuit reversed the defendant's conviction.

***Sampson v. United States***, 724 F.3d 150 (1st Cir. 2013) This case provides an excellent primer on the various issues relating to the discovery, after trial, that a juror had not been honest in answering voir dire questions. The defendant challenging the conviction must show that the materially false statements were made. A statement is material if it had a natural tendency to influence, or is capable of influencing, the judge's impartiality determination. A finding that an accurate answer would demonstrate actual bias is not necessary. The determination of materiality must be gauged on a case-by-case basis. The evidence was sufficient in this case to establish that the false voir dire answers were material and would have led to the excusal of the juror for cause.

***United States v. Colombo***, 869 F.2d 149 (2d Cir. 1989) The defendant offered evidence that a juror intentionally concealed the fact that her brother-in-law was a government attorney. The juror apparently did so in the hope that this would help her get a seat on the jury. If this could be proved at an evidentiary hearing, it would be grounds for a new trial. The misrepresentation not only deprived the defendant of his right to exercise his peremptory strikes intelligently, it also revealed that the juror withheld information which indicated a partiality on her part.

***United States v. Tucker***, 137 F.3d 1016 (8th Cir. 1998) The defendant was the Governor of Arkansas. One of the jurors failed to reveal during voir dire that the father of one of her children had sought clemency from the Governor. An evidentiary hearing was necessary to develop the facts of this claim. See generally McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984). An evidentiary hearing was also necessary to inquire into the allegations that the juror's husband talked to her during the course of trial.

***JURY SELECTION (Voir Dire – Excusals for Cause)***

***United States v. Martinez-Salazar***, 120 S. Ct. 774 (2000) If the trial court fails to remove a juror for cause and the defendant then exercises a peremptory strike against the juror, there is no appellate review of the trial court's error because any challenge to the impartiality of the jury must focus on the actual jurors who considered the case. The fact that the defendant was required to use a peremptory strike against a juror who should have been excused for cause does not diminish his rights under Rule 24.

***United States v. Shepard***, 739 F.3d 286 (6th Cir. 2014) After being selected to serve on the jury in this child pornography case, one juror sent a note to the clerk saying that he couldn't do it because she could not look at the pictures or videos. Further voir dire of the juror did not alter his views; he said that he could not look at the videos. The trial court erred in not excusing the juror and replacing him with an alternate.

***United States v. Littlejohn***, 489 F.3d 1335 (D.C. Cir. 2007) The trial court posed compound questions to jurors such as this: are you, or any member of your family member employed (or ever been employed) by law enforcement, and, if so, would that make it hard for you to be impartial? If the answer to the second question was "no", the juror was not expected to respond whether he or she was ever employed by law enforcement. This method of questioning jurors violated the defendant's right to an impartial jury.

***Virgil v. Dretke***, 446 F.3d 598 (5th Cir. 2006) Trial counsel's failure to conduct further voir dire, or to move to remove certain prospective jurors for cause or peremptorily was ineffective assistance of counsel. The jurors expressed an inability to be fair. One juror said that because his mother had been mugged, he could not be fair. Another juror said that his relationship to law enforcement officers would preclude him from being an impartial juror. Failing to move to strike the jurors for cause – and failing to exercise a peremptory strike against these jurors – was not a matter of strategy. In addition to the decision's analysis of the ineffective claim, the court extensively reviews the case law relating to the requirement of ensuring that jurors are impartial.

***Franklin v. Anderson***, 434 F.3d 412 (6th Cir. 2006) Appellate counsel was ineffective in failing to raise the trial court's error in failing to excuse a prospective juror for cause. The juror demonstrated during voir dire that the juror could not comprehend the legal standard she was supposed to apply. White v. Mitchell, 431 F.3d 517 (6th Cir. 2005) Reviewing the voir dire at length, the Sixth Circuit concluded that the state courts were incorrect in upholding a conviction where a juror clearly indicated that she had a fixed opinion about the defendant's guilt and could not be fair.

***Miller v. Webb***, 385 F.3d 666 (6th Cir. 2004) Trial counsel was ineffective in failing to request that a juror be excused for cause – and then failing to utilize a peremptory strike on the juror. During voir dire, the juror expressed her bias in favor of the government's key witness in this murder case. She knew the witness from Bible study courses. The juror should have been removed for cause. See also Wolfe v. Brigano, 232 F.3d 499 (6th Cir. 2000) (failure to excuse juror for cause was reversible error).

***Oswald v. Bertrand,*** 374 F.3d 475 (7th Cir. 2004) The state trial involved one of the most highly publicized cases in the history of the County, the killing of a police officer and a hostage-taking. Towards the end of several days of voir dire a prospective juror

stated that he had learned more about the case sitting in the jury room over the past three days than he had learned from the newspapers previously. Nevertheless, the trial court refused to re-question any jurors about their discussions in the jury room and the remaining jurors who had not yet been questioned confirmed that there were discussions occurring in the jury room. The Seventh Circuit granted a writ of habeas corpus. Inadequate measures were taken by the state judge to ensure that the jury was not biased, or that the jury pool was not poisoned. “Even a clearly guilty criminal is entitled to be tried before an impartial tribunal, something the jurors in this case may well have failed to understand.”

***United States v. Nelson***, 277 F.3d 164 (2d Cir. 2002) This case involved the notorious prosecution of two African Americans for the killing of an orthodox Jew in Brooklyn during a riot. The District Court judge stressed the need to have a jury that was diverse. To achieve this result, the judge denied a Batson challenge, made decisions regarding excusals for cause, and shifted the order of jurors. The Second Circuit holds that a jury that is selected intentionally to achieve racial and religious objectives is not a valid jury, particularly where an unqualified juror (i.e., a biased juror) is allowed to sit in order to achieve this goal.

***United States v. Tucker***, 137 F.3d 1016 (8th Cir. 1998) The defendant was the Governor of Arkansas. One of the jurors failed to reveal during voir dire that the father of one of her children had sought clemency from the Governor. An evidentiary hearing was necessary to develop the facts of this claim. See generally McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984). An evidentiary hearing was also necessary to inquire into the allegations that the juror's husband talked to her during the course of trial.

***Mach v. Stewart***, 137 F.3d 630 (9th Cir. 1997) The defendant was charged with child molestation. During voir dire, one member of the panel stated that she worked for the welfare department, and she was aware of no false reports of abuse. Later, she revealed that she had considerable psychological training and she reiterated that in her experience, she was not aware that children ever fabricated allegations of abuse. The entire venire was tainted by these answers – surely at least one juror remembered these comments and believed them when deliberations began – and the Ninth Circuit granted a writ of habeas corpus.

***United States v. Polichemi,*** 219 F.3d 698 (7th Cir. 1998) The trial court erred in failing to strike for cause a fifteen-year employee of the U.S. Attorney’s office. However, because the defendants exercised a peremptory strike against this juror, there was no cause to set aside the conviction.

***United States v. Mendoza***, 157 F.3d 730 (9th Cir. 1998) Two jurors raised their hands in response to the question, “Is there any of you that feel that our approach to the problem of marijuana is all wrong, that we should permit it like smoking nicotine, something like that?” The court summarily excused those jurors without any further inquiry. This was improper. The court should have made some effort to determine whether the jurors could, despite their beliefs, perform their duties as jurors. Harmless error.

***United States v. Torres***, 128 F.3d 38 (2d Cir. 1997) A juror who admitted during voir dire that she structured financial transactions. This provided sufficient basis for the judge to excuse the juror for cause. The court distinguished cases in which bias is presumed – for example, cases in which a juror is related to a party or admits to being partial for some other reason – from cases, such as this one, where a juror may be inferred to be biased. In the inferred bias cases, a judge has discretion whether to excuse a juror for cause.

***United States v. Colombo***, 869 F.2d 149 (2d Cir. 1989) The defendant offered evidence that a juror intentionally concealed the fact that her brother-in-law was a government attorney. The juror apparently did so in the hope that this would help her get a seat on the jury. If this could be proved at an evidentiary hearing, it would be grounds for a new trial. The misrepresentation not only deprived the defendant of his right to exercise his peremptory strikes intelligently, but it also revealed that the juror withheld information which indicated a partiality on her part.

***United States v. Severino***, 800 F.2d 42 (2d Cir. 1986) The defendant was denied a fair trial by the Court’s denial of his request to exercise preemptory challenges outside of the presence of prospective jurors.

***United States v. Calabrese***, 942 F.2d 218 (3rd Cir. 1991) Any jurors who indicated on a juror questionnaire that they “knew” the defendant were automatically excused. This was reversible error. 28 U.S.C. §1866(c)(2) and (4) directs that juror may be excused for cause if they are unable to render impartial jury service or for other good cause. Simply knowing the defendant is not enough to excuse the juror. Some further inquiry is necessary to determine if the juror is capable of rendering impartial service.

***United States v. Salamone***, 800 F.2d 1216 (3rd Cir. 1986) The District Court decided that no one who was affiliated with the National Rifle Association would be permitted to serve on the jury in this firearms case. The Court of Appeals reverses holding that this violates the defendant’s Sixth Amendment right to an impartial jury. The decision to exclude seven prospective jurors solely on the basis of their affiliation is not subject to harmless error analysis.

***United States v. Ricks,*** 802 F.2d 731 (4th Cir. 1986) It is improper in the jury selection procedure if a “struck jury” system is employed to use an overly large list of venire persons. If the list of venire persons contains more names than are needed, it is the duty of the District Court to state in unequivocal language the portion of the list which contains not in excess of the number of venire persons necessary to achieve the jury from which the actual jury selection will be made.

***United States v. Rowe***, 106 F.3d 1226 (5th Cir. 1997) When a juror responded during voir dire that she was not sure she could be impartial, because her brother was an undercover officer, the trial judge chastised her and eventually directed the clerk to require the juror to return to court repeatedly in subsequent terms. This conduct on the part of the judge tainted the entire panel. The judge’s abuse of the juror would have led other jurors not to be honest in answering voir dire questions. Conviction reversed.

***United States v. Beckner***, 69 F.3d 1290 (5th Cir. 1995) The defendant, a former U.S. Attorney, and a prominent lawyer in Baton Rouge, was indicted for fraud, obstruction of justice and perjury. A first trial ended in a mistrial. The judge denied the motion of the government and the defendant for individual voir dire at the second trial. Instead, he questioned the jurors as a group about their knowledge of the case and the pretrial publicity. A defendant's right to an impartial jury includes the right to an adequate voir dire to identify unqualified jurors. Morgan v. Illinois, 504 U.S. 719 (1992). But see Mu'Min v. Virginia, 500 U.S. 415 (1991). The standard for gauging the effectiveness of the voir dire procedure is as follows: first, the defendant must establish that pretrial publicity raised a significant possibility of prejudice; second, the issue is whether the court's voir dire procedure failed to provide a reasonable assurance that prejudice would be discovered if present. The publicity in this case consisted of several dozen newspaper articles, as well as television reports of the first trial (including the prosecutor's statement that the vote was 11 - 1 for conviction). The voir dire procedure was inadequate. In sum, the judge simply asked the jurors whether they felt that they could be impartial and relied on their opinion, rather than making an independent assessment of the jurors' impartiality.

***United States v. Scott***, 854 F.2d 697 (5th Cir. 1988) The foreman of the jury had a brother who was a deputy sheriff in the police office which performed some of the investigation in this case. The foreman failed to reveal that fact in voir dire despite being specifically asked by the judge whether any of the jurors had close relatives who were in law enforcement. The failure of the juror to respond affirmatively to this question required that the defendant be granted a new trial.

***United States v. Amerson***, 938 F.2d 116 (8th Cir. 1991) The prosecution turned on the credibility of law enforcement officers. The judge committed reversible error by failing to excuse jurors who stated that they would believe the testimony of officers over other witnesses.

***Dyer v. Calderon,*** 151 F.3d 970 (9th Cir. 1998) Bias must be presumed when a juror, during voir dire lies about significant and material matters. Here, the juror, in a death penalty case, failed to reveal that her brother had been the victim of a homicide and that other family members (including herself) had been victimized by crimes and had perpetrated crimes.

***Mach v. Stewart***, 137 F.3d 630 (9th Cir. 1997) During a voir dire in this sexual assault of a minor case, one of the prospective jurors, in the presence of the other jurors explained that she was a social worker and every case of alleged sexual abuse of a minor in which she was involved turned out to be true. Moreover, she was aware of no instance in which a child lied about being abused. This tainted the entire panel, and the conviction was set aside.

***United States v. Sinigaglio***, 942 F.2d 581 (9th Cir. 1991) 26 U.S.C. §6103(h)(5) provided that the Treasury Department must (upon request) provide information to the defendant about any prospective juror who has been investigated or audited by the IRS if the defendant is charged with a tax offense. The audit history may not be arbitrarily limited by the government (as in this case to the past six years). Though the court does not hold that this is reversible error per se, it was reversible in this case where the voir dire did not eliminate the significant risk of prejudice.

***United States v. Contreras-Castro***, 825 F.2d 185 (9th Cir. 1987) It was reversible error for the trial court to fail to ask venire persons if the testimony of law enforcement officers would unduly influence them in this narcotics prosecution. The government's entire case was based on the uncorroborated testimony of two DEA agents.

***United States v. Washington***, 819 F.2d 221 (9th Cir. 1987) It is an abuse of discretion for a trial court to fail to ask the jurors if they know any of the government witnesses. The proper remedy is reversal, not a remand to then question the witnesses. To remand the case after two years would not have satisfied the guaranty of an impartial jury.

***United States v. Iribe-Perez***, 129 F.3d 1167 (10th Cir. 1997) When the jury first entered the courtroom, they were told by the trial judge that the defendant had decided to enter a guilty plea. Plea negotiations broke down, however, and the same jury pool was then used to strike a jury. The district court erred in selecting the jury from a panel comprised of individuals who were informed by the trial judge that the defendant was going to plead guilty to the very crime of which they ultimately convicted him.

***JURY SELECTION (Voir Dire– Excusals For Cause – Death Penalty Cases)***

***Morgan v. Illinois***, 504 U.S. 719 (1992) A defendant has a right to voir dire a juror about whether the juror would automatically impose the death penalty in certain circumstances, regardless of the presence of any mitigating circumstances. This type of reverse-Witherspoon inquiry must be permitted and a juror who says that he would automatically vote for death, regardless of any mitigating circumstance, should be excused.

***Gray v. Mississippi***, 481 U.S. 648 (1987) The United States Supreme Court holds that the improper exclusion of a juror on the basis that she equivocated about her ability to impose a death sentence is per se reversible error. No harm need be shown. Wheeler v. Simpson, 779 F.3d 366 (6th Cir. 2015) Improperly excusing a juror for cause in a death penalty case is structural error and requires setting aside the death penalty.

***White v. Mitchell***, 431 F.3d 517 (6th Cir. 2005) Reviewing the voir dire at length, the Sixth Circuit concluded that one juror should have been excused because she held a fixed opinion that the death penalty was the appropriate sentence.

## *JUVENILE CASES*

***United States v. Juvenile Male***, 492 F.3d 1046 (9th Cir. 2007) The lower court abused its discretion in its findings pursuant to 18 U.S.C. § 5032. Among the factors that were required to be considered was the juvenile's social background. The district court incorrectly found that the juvenile experienced no domestic violence growing up with his grandparents. United States v. C.M., 485 F.3d 492 (9th Cir. 2007) The police failed to comply with the Juvenile Delinquency Act requirements of prompt notification of parents, notification of the consulate, and prompt arraignment. 18 U.S.C. § 5033. The appropriate remedy was not just the suppression of the juvenile's statements but the dismissal of the charges.

***United States v. Female Juvenile***, A.F.S., 377 F.3d 27 (1st Cir. 2004) The prosecution of the juvenile was barred because of the government's failure to comply with the speedy trial provision of the Federal Juvenile Delinquency Act 18 U.S.C. § 5036. This provision requires trial within thirty days of detention.

***United States v. Juvenile***, 347 F.3d 778 (9th Cir. 2003) A lengthy opinion detailing the sentencing rules for juveniles. Ultimately, the Ninth Circuit concludes that the sentence imposed on the juvenile in this case was too harsh.

***United States v. Ramirez***, 297 F.3d 185 (2d Cir. 2002) The Juvenile Delinquency Act continues to apply even if the defendant who is being treated as an adult (his case having been transferred) reaches age 21 during the courses of the proceedings. 18 U.S.C. § 5031.

***United States v. Male Juvenile***, 148 F.3d 468 (5th Cir. 1998) In order to prosecute a juvenile, the United States Attorney must certify that the case should be prosecuted in federal court. 18 U.S.C. § 5032. In this case, an Assistant United States Attorney filed the certificate. Because there was no evidence that the U.S. Attorney delegated his authority to the AUSA, there was no jurisdiction to try the juvenile in district court.

***United States v. Doe***, 219 F.3d 1009 (9th Cir. 2000) The government violated 18 U.S.C. § 5033 by failing to advise the juvenile's parents promptly after his arrest; failing to promptly advise him of his rights; and by failing to promptly bring him before a magistrate. There was a three and a half hour delay in advising him of his rights. There was a day and a half delay in bringing the defendant to a magistrate and the parents were not promptly notified of the juvenile's rights. The juvenile's confession should have been suppressed.

## *KIDNAPPING*

***United States v. Valle***, 807 F.3d 508 (2d Cir. 2015) The defendant was a participant in an online chat room whose participants fantasized about various brutal and graphic schemes of kidnapping, torturing, cooking, raping, murdering, and cannibalizing various women. The defendant also participated outside the chatroom with other people (whom he never met, talked to, or even knew the true identifies of) about the same topics. The government offered no evidence that the defendant ever engaged in any criminal activity, to say nothing of any of the activity described in the chats, though he did post pictures of some of the women whom he fantasized killing or torturing. He was charged with conspiracy to kidnap the women. The district court granted a Rule 29 motion after trial and the Second Circuit affirmed. The fantasy chats and the "real chats" were, for purposes of determining the existence of a conspiracy, indistinguishable and there was, therefore no proof of an agreement to actually commit any crime. The fact that the some of the "victims" were real women; and the fact that the defendant engaged in internet searches to learn how to "cannibalize" a person, did not convert the fantasy into a conspiracy. Not only did the government fail to prove that the defendant had a real conspiratorial intent, but it also failed to prove that the people with whom he was chatting had conspiratorial intent and, of course, it takes two to tango.

***United States v. Rodriguez***, 587 F.3d 573 (2d Cir. 2009) The Hostage Taking Act requires an enhanced sentence for any defendant found guilty of its provisions. The Second Circuit concluded in this case that the defendants' conduct of briefly detaining a taxicab passenger to extort money from her did not constitute hostage taking under the terms of the statute. This statute requires some element of international terrorism, or some other international element (either the victim, or the defendant is an alien) plus confinement of the victim for an appreciable period of time.

***United States v. Clenney***, 434 F.3d 780 (5th Cir. 2005) Venue in this kidnapping case was not proper in the district of the child's primary residence, or the residence of his mother. The court rejected the government's argument that in a case of international parental kidnapping, venue is proper in the district where the parent (whose parental rights were violated) resides.

***United States v. Lentz***, 383 F.3d 191 (4th Cir. 2004) At some length, the court reviews the elements of a kidnapping resulting in death prosecution. 18 U.S.C. § 1201(a). The district court granted a judgment of acquittal, finding insufficient evidence to support the element of "held for ransom, reward, or otherwise." See Chatwin v. United States, 326 U.S. 455 (1946). The Fourth Circuit ultimately reversed (over one dissent), finding sufficient evidence that the defendant/husband, killed his wife after holding her "otherwise."

***United States v. Boone***, 959 F.2d 1550 (11th Cir. 1992) Kidnapping can be committed without the use of force. That is, the victim can be inveigled across state lines and the use of force reserved. Nevertheless, the entirely voluntary act of the "victim" to cross the state line – even if occasioned by the deceit of the defendant – does not amount to kidnapping. In order to be kidnapping, the inveiglement requires the alleged kidnapper to have formed the intent to use forcible action, in the event his deception failed, to complete the kidnapping. The trial court's instructions in this case failed to make this clear.

***United States v. Howard***, 918 F.2d 1529 (11th Cir. 1990) The evidence was not sufficient to support the defendant's conviction for conspiring or attempting to kidnap a DEA agent. The defendants were attempting to "rip-off" the undercover DEA agent.

When he was inspecting the cocaine which he was about to purchase, the agent was pushed into a car and guns were drawn. He immediately drew his gun and escaped. This was not sufficient evidence to prove that the defendants were attempting to kid of the “victim” to cross the state line – even if occasioned by the deceit of the defendant – does not amount to kidnapping. In order to be kidnapping, the inveiglement requires the alleged kidnapper to have formed the intent to use forcible action, in the event his deception failed, to complete the kidnapping. The trial court’s instructions in this case failed to make this clear.

***United States v. Howard***, 918 F.2d 1529 (11th Cir. 1990) The evidence was not sufficient to support the defendant’s conviction for conspiring or attempting to kidnap a DEA agent. The defendants were attempting to “rip-off” the undercover DEA agent. When he was inspecting the cocaine which he was about to purchase, the agent was pushed into a car and guns were drawn. He immediately drew his gun and escaped. This was not sufficient evidence to prove that the defendants were attempting to kidnap or conspiring to kidnap him.

## *LESSER INCLUDED OFFENSES*

***United States v. Jackson***, 443 F.3d 293 (3rd Cir. 2006) Possession with intent to distribute drugs is a lesser included offense of possession with intent to distribute drugs within 1,000 feet of a school and a defendant cannot be convicted and sentenced for both offenses.

***United States v. Downer***, 143 F.3d 819 (4th Cir. 1998) After the defendant was convicted by a jury of aggravated sexual abuse, the court realized that the definition of the offense given to the jury violated the Ex Post Facto Clause, because the offense, as defined, did not exist at the time of the alleged conduct. The trial court then entered judgment on a lesser included offense. The Fourth Circuit reversed: entering judgment on the lesser offense, which was not the subject of the indictment, violated the Grand Jury Clause.

***MAIL FRAUD (Proof of Fraud) See also: Jury Instructions (Good Faith) MATERIALITY***

***Neder v. United States***, 527 U.S. 1, 119 S. Ct. 1827 (1999) Though there is no explicit materiality element set forth in the mail fraud, wire fraud and bank fraud statutes, this element is implicit in the concept of fraud. Thus, the government must prove that any misrepresentation involved in a mail, wire or bank fraud prosecution must relate to a material fact. This issue, pursuant to United States v. Gaudin, must be submitted to the jury.

***Cleveland v. United States***, 121 S. Ct. 365 (2000) The defendants were charged with engaging in fraudulent activity in connection with their efforts to obtain video poker licenses from the state of Louisiana. The court held these licenses are not property; therefore, a mail fraud conviction was invalid. Though the state receives substantial money in exchange for issuance of the license, the money is primarily received after the license is issued. In short, the license may be property in the hands of the defendant (it has economic value), but it was not property in the hands of the victim (the state) before it was issued.

***United States v. Berroa***, 856 F.3d 141 (1st Cir. 2017) The defendants fraudulently obtained medical licenses in Puerto Rico, by conspiring with an employee of the medical board to improperly score their test. They were charged with mail fraud. The indictment alleged that the doctors, through this deceit, obtained money from patients. The First Circuit reversed: the fraud did not cause the “victims” to lose money or property. The Court noted that the government could not prosecute on theory that the doctors obtained their licenses by fraud, because of the Cleveland precedent (above). The Court relied on Loughrin v. United States, 134 S. Ct. 2384 (2014), that there must be a closer connection between the fraud and the obtaining of property from the victim. A simple “but for” test is not sufficient. In both the bank fraud statute (interpreted in Loughrin) and the mail fraud statute (interpreted in this case), the link between the fraud and the victim’s loss is the phrase “by means of” (the victim loses money by means of the fraud).

***United States v. Takhalov***, 827 F.3d 1307, amended 838 F.3d 1168 (11th Cir. 2016) To deceive is not the same as to defraud. Deception that is used to induce a person to buy a product is not necessarily fraudulent. In this case, the defendant owned nightclubs in Miami. They employed women who posed as tourists to encourage businessmen and tourists to take them to the nightclub. Unbeknownst to the men, the women were paid by the nightclubs to induce the men to take them to the clubs. This was deceptive. But it was not fraudulent, because the men, once they arrived at the nightclub got what they paid for: drinks. And they were accompanied by the pretty women. Though they were deceived, this was not fraudulent. It is not enough for the government to prove that the “victims” would not have entered into the transaction but for the deception. The government must prove that the victims did not get what they paid for. A leading Second Circuit case on which the Eleventh Circuit relied is United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970).

***United States v. Weimert***, 819 F.3d 351 (7th Cir. 2016) The mail and wire fraud statutes may not be stretched to criminalize deception about a party’s negotiating positions, such as a party’s bottom-line reserve price or how important a particular non-price term is. Buyers and sellers negotiate prices and other terms. They will often try to mislead the other party about the prices and terms they are willing to accept. Such deceptions are not criminal and neither party to the negotiation expects complete candor about the counterparty’s “bottom line:” “In the Restatement (Second) of Torts treatment of fraud … statements about a party's opinions, preferences, priorities, and bottom lines are generally not considered statements of fact material to the transaction. See Restatement (Second) of Torts § 538A cmts. b, (distinguishing between representations of facts—where the maker has definite knowledge—and opinions—including a “maker's judgment as to quality, value, authenticity or similar matters as to which opinions may be expected to differ”).” In this case, Weimert, an employee of the bank, told the buyer of the bank’s asset, that the bank insisted that he be a partner of the buying entity; he told the bank that the buying entity insisted that he be its partner. Neither statement was true, but neither of these statements was a material misrepresentation about the actual terms of

the deal. The Seventh Circuit reversed the conviction in this case because the alleged deceptive statements were not criminally fraudulent.

***United States v. Litvak***, 808 F.3d 160 (2d Cir. 2015) Litvak was a securities broker who worked for Jefferies & Company and was involved in selling residential mortgage-backed securities ("RMBS"). He was charged with fraud in connection with his sales of RMBS's. There were three categories of misrepresentations: (1) He lied about the cost at which Jefferies acquired certain RMBS in his effort to convince a purchaser to pay more for the same RMBS's; (2) He lied when he said that he was negotiating for the purchase of certain RMBS's at a certain price in his efforts to re-sell the RMBS's, when, in fact, Jefferies already owned the RMBS's at a lower price than the price he was about to pay to purchase the RMBS's; (3) In the process of purchasing RMBS's, he lied about the price at which he had negotiated to re-sell the RMBS's (falsely saying that the price was less than it actually was) and thereby induced the seller to sell the RMBS's to him at a cheaper price to enable Jefferies to make a profit. On the basis of these representations, Litvak was convicted of securities fraud and also making a false statement to the U.S. Treasury which was overseeing certain RMBS sales in connection with TARP. The Second Circuit reversed the false statement count, based on the failure to prove that Litvak's false statements were material. Though the U.S. Treasury was aware and monitored these types of sales, the Treasury made no "decision" that was affected by the price of the sales. The Second Circuit held, however, that the materiality of the false statements to counterparties was a jury question that could not be decided as a matter of law for purposes of the securities fraud convictions under Rule 10b-5. Litvak argued that the "price" of the RBMS's to Jefferies was not what was important to the counterparties; what mattered was the value. The Second Circuit disagreed, holding that the jury was the proper factfinder on the question of materiality. However, the securities fraud convictions were reversed, because the district court improperly excluded expert testimony offered by Litvak on the topic of materiality. The expert was prepared to testify that a reasonable counterparty would not rely on representations made by Litvak and that they would normally make their own determination of value, rather than relying on Litvak's representation about Jefferies' price in purchasing (or the intended sales price of) the RMBS's. This was the proper subject of expert testimony. Finally, the Second Circuit held that the trial court erred in excluding evidence offered by Litvak that his supervisors permitted these types of sales practices by other brokers, which, according to Litvak, demonstrated his good faith and his lack of intent to defraud. The evidence was relevant to show that Litvak held an honest belief that he was not engaged in improper or illegal conduct.

***United States v. Camick,*** 796 F.3d 1206 (10th Cir. 2015) The defendant's real name is Leslie Lyle Camick. But over ten years ago, he took the name of his deceased brother, Wayne Camick and had used that name ever since. He was charged with mail fraud, wire fraud and identity theft when he wrote a letter to a court and claimed an interest in certain property that was the subject of a Quiet Title action by another person. He used the name Wayne Camick in this correspondence. He also claimed that he had been wrongfully detained in jail and that was the reason his response to the court was late. He had been arrested and released recently, but, according to the government, his detention was not "wrongful." The Tenth Circuit held that claiming that he was "wrongfully detained" was not a material misstatement, nor was using the name Wayne Camick a material misstatement. In an entirely separate holding, the court held that using the name Wayne Camick on a provisional patent application was also not a materially false statement. Because his mail and wire fraud convictions were reversed on sufficiency grounds, the court also reversed the aggravated identity theft convictions which were predicated on those fraud convictions.

***United States v. Borrero***, 771 F.3d 973 (7th Cir. 2014) The defendants were prosecuted for various offenses, including mail fraud. The mail fraud counts alleged that the defendants defrauded the State of Indiana by submitting applications for car titles with false information. This theory of fraud does not pass muster under Cleveland, because a car title is not "property" in the hands of the State.

***United States v. Sadler***, 750 F.3d 585 (6th Cir. 2014) The operator of a pill mill lied to a pharmaceutical supplier about who was to receive the drugs. Nevertheless, the operator paid full price. This does not constitute wire fraud and will not support a conviction under 18 U.S.C. § 1343 or § 1346. The seller's right to "accurate information" is not an intangible right that is cognizable under the honest services fraud provision.

***United States v. Farinella***, 558 F.3d 695 (7th Cir. 2009) The defendant was charged with wire fraud and introducing misbranded food in interstate commerce in violation of 21 U.S.C. § 331(a). The defendant purchased a million bottles of salad dressing that had a label that stated, "best when purchased by" a certain date and then pasted another label over that label that extended the date by approximately one year. The government contended at trial that the salad dressing "expired" on the original date, but this was not true. The "best when purchased by" date was not an expiration date. The salad dressing did not expire and was not rancid or unhealthy if purchased after the "best when purchased by" date. There was no evidence introduced at trial what was meant by "best when purchased by" or whether this was a decision made by the manufacturer to generate sales quicker (as opposed to having anything to do with the quality of the food).

***United States v. Svete,*** 556 F.3d 1157 (11th Cir. 2009) The original panel opinion held that the pattern jury instruction in the Eleventh Circuit failed to adequately explain the definition of fraud. According to United States v. Brown, 79 F.3d 1550 (11th Cir. 1996), the scheme to defraud must be "reasonably calculated to deceive persons of ordinary prudence and comprehension." The pattern instruction simply requires that the scheme represent a "plan or course of action intended to deceive or cheat someone out of money or property by means of false or fraudulent pretenses, representation, or promises." The en banc court vacated the panel decision and concluded that Brown should be overruled, and the "reasonable prudent victim" rule has thus been abolished in the Eleventh Circuit.

***United States v. Ratcliff***, 488 F.3d 639 (5th Cir. 2007) The Fifth Circuit holds that a mail fraud conviction cannot be sustained where the offense involves the violation of state election laws (i.e., campaign finance disclosure requirements and ethics rules), because of the absence of any property or money that the "victim" loses. The government's argument that the scheme involved an effort to obtain a public salary and other employment benefits (if the defendant had been elected), was rejected by the Fifth Circuit.

***United States v. Lake***, 472 F.3d 1247 (10th Cir. 2007) In this highly publicized corporate fraud prosecution, the underlying basis was the defendants' failure to reveal their use of a corporate jet in SEC filings which were designed to reveal the benefit to the defendants of their use of the jet for personal use. However, the SEC form only required the disclosure of this personal benefit under specific circumstances (threshold amount and proof of actual cost to the corporation), none of which the government proved at trial. Absent this proof, the evidence was insufficient that the forms filed by the defendants were actually false.

***United States v. Brown***, 459 F.3d 509 (5th Cir. 2006) The court reversed these Enron-related convictions on various grounds, including a rejection of the government's honest-services fraud theory (discussed below in the honest services section). In addition, one defendant was not shown to have been knowledgeable of the fraud perpetrated by the others.

***United States v. Novak***, 443 F.3d 150 (2d Cir. 2006) The defendant engaged in an unlawful scheme, but the victim was not the party that issued checks to him. The defendant organized the payment to certain construction workers from the contractor. He victimized some of the workers by requiring them to give to him a certain kickback of their pay. The indictment alleged, however, that the defendant defrauded the contractor who mailed the payments. The contractor, however, was not defrauded: he paid what he intended to pay for the service he intended to receive. The mail fraud counts of the indictment could not be sustained. See also United States v. Starr, 816 F.2d 94 (2d Cir. 1987).

***United States v. Dobson***, 419 F.3d 231 (3rd Cir. 2005) The defendant claimed that she was an unwitting participant in her employer's fraud scheme. The trial court's jury instructions failed to adequately explain that the defendant had to be a knowing participant in the charged scheme to defraud in order to be found guilty. Though the instruction that the defendant had to knowingly participate in "a" scheme to defraud, this may have misled the jury into believing that she could be found guilty based on her own misrepresentations in the sales presentations, as opposed to the overall fraudulent nature of the entire company. See also United States v. Pearlstein, 576 F.2d 531 (3rd Cir. 1978).

***United States v. Chandler***, 388 F.3d 796 (11th Cir. 2004) Forty-three defendants were charged with conspiring to commit mail fraud. The conspiracy involved cheating in a McDonald's game. The leader of the alleged conspiracy worked for McDonald's. He stole winning "stamps" from McDonald's products and then, through a series of transfers, would "sell" the winning stamps to other members of the conspiracy. In fact, down the "food chain" some of the purchasers did not know the source of the winning pieces. The four defendants who were tried in this part of the case were not even alleged to have known that the winning pieces were embezzled. Instead, the government alleged that these people claimed to be legitimate "winners" when, in fact, they knew that they had purchased the winning pieces from someone else. The definition of "legitimate" was quite problematic, because the McDonald's game rules did not clearly set forth who was a "legitimate" winner (the transfer of a winning piece from one person to another was not specifically prohibited). The Eleventh Circuit reversed the convictions. First, the appellate court addressed the allegation that the defendant conspired to commit mail fraud by defrauding McDonalds. The fraudulent representation was alleged to be the representation that the game piece was acquired through legitimate means. Yet, it was never clear what this meant. McDonald's representatives acknowledged that winning pieces were traded on E-bay and that pieces could even be traded on McDonald's own web site. Thus, there was no unequivocal prohibition on trading or selling winning pieces and the act of redeeming the piece did not amount to a representation that the piece was acquired in any one particular manner. Again, there was no proof that these defendants ever knew that the pieces were initially stolen. Second, the court focused on the absence of an agreement that united the alleged conspirators. Given the fact that the ultimate purchasers of the game pieces were unaware that they were stolen, or even obtained illegally, the government failed to prove the existence of one conspiracy with members all having agreed to commit a crime. Moreover, the initial thief – the person who embezzled the pieces – kept it a secret from each of the people he recruited to sell the pieces that there were other sellers and buyers. This was a classic hub-and-spoke conspiracy without a rim. Each spoke in this scenario amounts to a separate conspiracy.

***United States v. Wood***, 364 F.3d 704 (6th Cir. 2004) The government failed to prove venue with regard to several of the mail fraud counts in this case. Though the scheme to defraud was centered in the district where the charges were brought, the actual mailings involved in the challenged counts did not start, end, or move through that district.

***United States v. Pendergraft***, 297 F.3d 1198 (11th Cir. 2002) The defendants threatened a County with a lawsuit, but premised the lawsuit, in part, on false allegations which were contained in an affidavit prepared by one of the defendants. The Eleventh Circuit held that threatening a lawsuit is not "wrongful" within the meaning of the Hobbs Act. Particularly in this case, where the threat involved a lawsuit against a governmental entity, First Amendment considerations also came into play (the right to petition the government for the redress of grievances). In short, the Hobbs Act does not criminalize the fabrication of evidence, or perjury if the "threat" to use the evidence or testimony relates to a civil lawsuit. The court also concluded that this conduct did not amount to mail fraud, because the false affidavits were known to the "victims" to be false, so the victims were not being deceived.

***United States v. Pasquantino,*** 336 F.3d 321 (4th Cir. 2003) Schemes to defraud that target the revenue laws of foreign governments are covered by the federal mail and wire fraud statutes. Here, the defendants participated in a scheme to smuggle alcohol into Canada in order to deprive Canada of excise taxes. See also Fountain v. United States, 357 F.3d 250 (2d Cir. 2004)

(wire fraud statute covers schemes to defraud foreign governments out of tax revenues). The United States Supreme Court affirmed: Pasquantino v. United States, 544 U.S. 349 (2005).

***United States v. Gabriel***, 125 F.3d 89 (2d Cir. 1997) In order to prove fraudulent intent, the government must prove that the defendant intended to harm the victim. Here, the trial court charged the jury that the defendant need only "contemplate" harm to the victim. This is not sufficient. One can contemplate harm, without intending that it occur. The error in this case was harmless.

***United States v. Beckner***, 134 F.3d 714 (5th Cir. 1998) The defendant, an attorney, was charged with aiding and abetting his client's fraudulent efforts to raise money for a real estate venture. The Fifth Circuit held that the evidence was insufficient to show the attorney's knowledge that his client was engaged in fraudulent activity. "For an attorney to be convicted for aiding and abetting a client's fraud, that attorney must have had actual knowledge of the fraud and must have taken an active role in advancing the wrongdoing."

***United States v. Frost***, 125 F.3d 346 (6th Cir. 1997) Defendants were students and professors at a graduate science program. The students were also government employees. The defendants agreed that the students would be awarded their Masters and Phd's without properly earning these degrees, in exchange for which the students would use their influence in their government jobs to award contracts to the professors in their private venture. To the extent that the indictment charged in certain counts that this amounted to a fraud of a property right as opposed to an "honest services" fraud, the evidence was insufficient. With regard to other counts, the government failed to prove that the defendant's deception caused the "victim" to part with any property in those counts, the defendant simply failed to reveal to his employer, the government, that he had a relationship with the beneficiary of the contracts.

***United States v. Rossomando***, 144 F.3d 197 (2d Cir. 1998) It may be appropriate in some cases to instruct the jury that the defendant's expectation that no harm will ultimately befall the victim is not a defense. The point of this instruction, however, assumes that the defendant did, in fact, believe that there would be at least temporary harm. Thus, if a defendant makes a false statement in a loan application, knowing that this will facilitate a loan, but honestly believes that he will ultimately re-pay the loan, this is not a valid "good faith" defense. In this case, however, the defendant did not ever intend that the victim suffer any loss. In this situation, the caveat to the good faith instruction was inappropriate.

***United States v. Shotts***, 145 F.3d 1289 (11th Cir. 1998) While 18 U.S.C. § 1346 added "honest services" to the concept of fraud, this did not mean that all intangible property rights could be the subject of a mail fraud prosecution. In this case, the defendant was charged with mail fraud in connection with his scheme to obtain a bail bond license in the state of Alabama. The court held that the license was not "property" under Alabama law and therefore could not be the basis of a mail fraud prosecution.

***United States v. Bloom***, 149 F.3d 649 (7th Cir. 1998) The defendant, a lawyer, was also a City Alderman for Chicago. Advice that he gave to a client operated to the financial detriment of the City. The Seventh Circuit upheld the lower court's dismissal of this aspect of the mail fraud indictment. Not every breach of a fiduciary duty works a criminal fraud. In the intangible rights context, there must be a showing that the defendant's conduct of depriving his employer of his honest services was part of a scheme to secure some type of private gain. This decision, like so many others, needs to be re-examined in light of Skilling.

***United States v. Czubinski***, 106 F.3d 1069 (1st Cir. 1997) The defendant was an IRS employee who had access to confidential information on the IRS computer. He abused this access by browsing through taxpayer's files. This did not amount to "fraud" under the wire fraud statute and did not deprive taxpayers of their right to honest services.

***United States v. Loder***, 23 F.3d 586 (1st Cir. 1994) The evidence failed to support defendant's conviction for aiding and abetting his employer's mail fraud conviction. The defendant helped his employer "cut up" a vehicle which was fraudulently reported to an insurance company as being stolen. There was no evidence, however, that the defendant had any knowledge of the scheme to defraud the insurance company. Even circumstantial evidence failed to establish that the defendant was aware of the purpose of cutting up the car. Cars can be cut up for numerous purposes, other than to accomplish a mail fraud scheme, such as recovering parts from a stolen car, or destroying evidence used in an armed robbery or kidnapping.

***United States v. D'Amato***, 39 F.3d 1249 (2d Cir. 1994) The defendant, a lobbyist, was the brother of the Senator from New York. He agreed with a client of his to lobby the Senator. In invoices that he submitted to his client, he disguised his name and the purpose of his services. This did not amount to defrauding the client, because the client knew what services he was performing. Though the corporate board of directors may not have known the true state of affairs, the defendant was nevertheless acting on behalf of the corporation and was not victimizing the corporation in any way – although his conduct was deceptive.

***United States v. Starr***, 816 F.2d 94 (2d Cir. 1987) The owners of a bulk mailing service hid higher rate mailings in large lower rate bulk mailings. The postal service was not paid the correct amount for these higher rate mailings. However, the customers received their mailings at the correct destination and paid the appropriate amounts to the bulk mailing company. Thus, the customers were not defrauded.

***United States v. Sokolow***, 91 F.3d 396 (3rd Cir. 1996) The error was harmless, but the government should not have elicited from the mail fraud victims' stories about the consequences of the fraud. Such evidence has little probative value and is outweighed by its prejudicial effect.

***United States v. Ham***, 998 F.2d 1247 (4th Cir. 1993) The evidence failed to support defendant's mail fraud conviction. The defendant was the print shop foreman in a Hare Krishna community. The community prepared counterfeit copyrighted materials. There was no evidence that he had the intent to defraud. He simply carried out the orders to prepare certain materials.

***United States v. Grossman***, 117 F.3d 255 (5th Cir. 1997) The government failed to prove that defendant's dealings in connection with the real estate transactions set forth in the indictment were fraudulent. "No criminality can be attached to real estate purchasers or lending institutions because the bottom dropped out of the real estate markets."

***United States v. Tencer***, 107 F.3d 1120 (5th Cir. 1997) Though there was sufficient evidence to prove that the defendant was engaged in a scheme to defraud medical insurers, the government failed to link certain insurance checks with the fraudulent scheme, so certain counts of the conviction were set aside.

***United States v. Ragan***, 24 F.3d 657 (5th Cir. 1994) The evidence failed to link the defendant to the mail, or wire fraud scheme which were the indicted offenses in this case. Though the defendant was the manager of the brokerage house which engaged in government securities trading, the particular trading irregularities which were the subject of the indictment were never shown to have been initiated or perpetrated by the defendant.

***United States v. Walters***, 997 F.2d 1219 (7th Cir. 1993) The defendant, a sports agent, induced college athletes to sign agency contracts prior to their graduation, a practice that is not permitted by the NCAA. The agent was prosecuted for mail fraud. The conviction was reversed for several reasons: (1) the only alleged mailing was a form which the colleges mailed to the Big Ten conference, certifying that the players were eligible. This mailing was not instrumental to the fraud and was probably not even known to the defendant; (2) the supposed victims of the fraud were the colleges, which awarded scholarships to the players, despite their ineligibility. Yet, the defendant did not receive any of this money, thus the defendant did not defraud the schools out of any money; (3) in essence, this fraud amounted to no more than cheating the NCAA and was not fraud.

***United States v. Spudic***, 795 F.2d 1334 (7th Cir. 1986) In this mail fraud prosecution, the jury was not instructed on a Pinkerton theory of culpability. That is, the jury was not instructed that the acts of one co-conspirator can be attributed to the defendant if he had agreed to be a member of the conspiracy. If the jury so found, the defendant could be found guilty of the substantive offenses committed by other coconspirators. Because the jury was not instructed on a Pinkerton theory, the substantive conviction could not stand.

***United States v. Goodman***, 984 F.2d 235 (8th Cir. 1993) Defendant sent mailgrams to over a million people, advising them that they had won a valuable prize and all that was required by the recipient was to call a "900" number. The "prizes" were merchandise that was sold to the purchaser at a discount, but above the cost of the items to the defendant. This did not amount to a scheme to defraud. The essence of a scheme is a plan to deceive persons as to the substantial identity of the things they are to receive in exchange. Here, the mailgrams were literally true; the cost of the "900" call is accurately stated; the coupons were worth some value. Many shrewd advertising schemes are concocted to persuade the consumer into purchasing products of questionable worth, without amounting to mail fraud. "Perhaps the naive and gullible consumer needs more protection from the wily promoter than the sophisticated customer. . . But in today's society, criminal prosecution cannot be used to punish those who run promotional schemes to make money simply because some persons are more susceptible to try their luck than a more prudent recipient of the mail."

***United States v. Thomas***, 32 F.3d 418 (9th Cir. 1994) The defendant bought fruit from growers and sold it to wholesalers. He kept a percentage and remitted the balance back to the growers. At some point, he decided to start averaging the prices. He would then send a fixed amount to the growers, sometimes paying them more than he actually received, sometimes keeping more than the agreed upon commission. By an agreed upon final accounting, this averaging scheme resulted in losses to him of over $700,000. Nevertheless, the government indicted him for mail fraud. At trial, the government called as witnesses certain growers who were underpaid. The defendant was denied the right to call growers who were overpaid, in order to prove that there was no "scheme to defraud." This was reversible error. Such testimony would have been relevant in establishing the defendant's intent in devising the averaging system. Individuals accused of criminal behavior should be permitted to present, within reason, the strongest case they are able to marshal in their defense. See also United States v. Garvin, 565 F.2d 519 (8th Cir. 1977); United States v. Foshee, 569 F.2d 401 (5th Cir. 1978); United States v. Etheridge, 948 F.2d 1215 (11th Cir. 1991).

***United States v. Cochran***, 109 F.3d 660 (10th Cir. 1997) Greed and criminal liability are not necessarily synonymous. The defendant in this case worked for an investment firm which was underwriting municipal bonds. He received a fee from a bank that he did not disclose to the municipality. Because there was no duty to disclose this fee, there was no fraud. The courts cannot create duties, and thus common law crimes if there was no deceit inherent in the defendant's conduct.

***United States v. Hanson***, 41 F.3d 580 (10th Cir. 1994) The defendant hired another person to raise money for her investment firm. The solicitations made by this other person were untrue. There was insufficient evidence, however, that the defendant participated in this fraud. Moreover, with regard to certain wire fraud counts, the supposed victim could recount nothing about the phone call that was the core of that wire fraud count. No rational finder of fact could have found that the phone call facilitated a scheme to defraud.

***United States v. Jackson***, 26 F.3d 999 (10th Cir. 1994) Defendant had a power of attorney that authorized him to receive and cash his father's pension checks. He did so for many years, including eight years after his father's death. The evidence in the record failed to establish that he was aware of his father's death during this eight-year period; therefore, the government failed to prove that the defendant was engaged in a scheme to defraud. Also, though the defendant did tell the pension fund at one point

that his father was living with him – and this was obviously false, since his father had already died – this misrepresentation did not necessarily mean that he was aware that his father had died. Therefore, even this misrepresentation did not suffice to establish that the defendant was engaged in a scheme to defraud the pension fund.

***United States v. Cronic***, 900 F.2d 1511 (10th Cir. 1990) The defendant was engaged in a simple check-kiting scheme. This does not constitute a violation of 18 U.S.C. §1341.

***United States v. Mann***, 884 F.2d 532 (10th Cir. 1989) The defendant was convicted of wire fraud based on a radio spot involving the IRS. The government failed to prove any scheme to defraud in connection with the conduct of the defendant. The conviction could not be sustained.

***United States v. Brown***, 79 F.3d 1550 (11th Cir. 1996) The defendants were owners and managers of a large real estate development company which sold lots and homes in Florida primarily to northern customers. There was no fiduciary relationship between the sellers and purchasers. The court assumed that various sales practices involved telling lies to customers, such as the investment value of, or the potential rental income which could be derived from, the homes. However, a person of ordinary prudence would not rely on such representations of a seller. This did not amount to fraud under the mail fraud statute. THIS DECISION WAS OVERRULED IN 2009, See above, United States v. Svete, 556 F.3d 1157 (11th Cir. 2009).

***United States v. Copple***, 24 F.3d 535 (3rd Cir. 1994) Though there is no prohibition in a fraud case on calling the victims to testify about their losses, there is no reason to allow the government to overdo it. Testimony that the victims lost their children's college education funds or that the losses affected their health, was unnecessary and not relevant to any issue relating to the defendant's fraudulent intent. The evidence, even if marginally relevant, should have been excluded pursuant to Rule 403. See also United States v. Holloway, 826 F.3d 1237 (10th Cir. 2016).

***United States v. Ethridge***, 948 F.2d 1215 (11th Cir. 1991) The defendants were charged with mail fraud. They filed false claims to an insurance company in connection with a fire loss. At trial, they sought to introduce evidence that the claimed losses exceeded the policy limits, therefore, even excluding the falsely claimed items, they could not have received more than that to which they were entitled. While this is not a defense to the mail fraud charge, the trial court committed reversible error by excluding the evidence. The evidence tended to show that the defendants did not intentionally try to defraud the insurance company, because the inclusion in the proof of loss of items not in fact lost, would not have netted them any additional money.

***United States v. Parker***, 839 F.2d 1473 (11th Cir. 1988) Defendants sold short-term investments and had been told by their employer that the investments were collateralized by zero coupon bonds. They had no reason to suspect that the investments were in fact fraudulent. The sellers' convictions for mail fraud were reversed on sufficiency grounds.

***MAIL FRAUD (Proof of Mailing or Wiring)***

**Schmuck v. United States**, 489 U.S. 705 (1989) It is not necessary that a mailing constitute an essential element of the scheme to defraud; it is enough if the mailings are an incident to an essential part of the scheme and that the defendant could foresee that the mails would be used. In this case, the mailings did not contribute directly to the fraud but did constitute a necessary element of the successful passage of title of the cars which were fraudulently sold by the defendant. Without the mailing of the car titles to the Motor Vehicles Bureau, title to the car could not be passed from the defendant to his victims.

***United States v. Tavares***, 844 F.3d 46 (1st Cir. 2016) The defendants were officials in the Massachusetts State Probation Department. They were charged with a RICO, bribery/gratuities and mail fraud offenses based on their practice of hiring people for various Probation Department positions based on requests by State Legislators, who, in turn, would vote favorably on Probation legislation (including increased budgets). The First Circuit reversed the conviction on all counts: there was insufficient proof of a nexus between any act of the Probation Department officials (rigging the hiring process) and any official act of the legislature. Regarding the mail fraud counts, there was insufficient proof that any mailing was linked to any fraudulent conduct. Each mailing was a rejection letter to an applicant who was allegedly more qualified for a position than the person who was hired at the request of a legislator.

***United States v. Biyiklioglu***, 652 Fed.Appx. 274 (5th Cir. 2016) Use of the Internet, alone, is not sufficient to prove an interstate wire transmission. There must be some proof that the communication crossed a state line.

***United States v. Eglash,*** 813 F.3d 882 (9th Cir. 2016) The defendant applied for social security disability and made fraudulent statements about his physical and mental condition. As part of the application process, the Social Security Administration wrote a letter to the defendant confirming receipt of his statements and noting that the statements were recorded in the SSA computers. This mailing did not satisfy the Schmuck standard and could not be the basis for one of the mail fraud counts. (Other communications were sufficient to support other counts of conviction).

***United States v. Tanke***, 743 F.3d 1296 (9th Cir. 2014) A post-fraud "lulling" letter or "cover-up" letter can be considered a mailing in connection with the mail fraud scheme only if the lulling or cover-up letter was conceived before the fraud was completed. Otherwise, the mailing is not part of the scheme to defraud. The evidence was sufficient to support the conviction in this case.

***United States v. Phillips***, 704 F.3d 754 (9th Cir. 2012) The defendant defrauded a company and then used the proceeds to purchase a watch. The watch was mailed to the defendant. This mailing was not connected to the fraud; it simply represented his expenditure of the fraud proceeds. Pursuant to United States v. Maze, 414 U.S. 395 (1974), this did not support a mail fraud conviction.

***United States v. Dooley***, 578 F.3d 582 (7th Cir. 2009) The defendant, a police officer, stole money from the evidence room that was evidence in an armed robbery case. A supervisor sent him an email, instructing him to retrieve the evidence in preparation for the FBI which was going to assume responsibility for the case. Though this "wire" alerted the defendant to the need to cover-up his crime, it was not a sufficient wire to support a wire fraud prosecution. The defendant did not "cause" the wire to be sent.

***United States v. Lazarenko***, 564 F.3d 1026 (9th Cir. 2009) Wires that occurred four years after the money was obtained by fraud were not in furtherance of the fraud. The fact that the wires were intended to hide the existence of the fraud is not sufficient.

***United States v. Redcorn***, 528 F.3d 727 (10th Cir. 2008) In a wire fraud case, wiring money that has been embezzled is a sufficient wiring to support a conviction. In this case, however, after the defendant wired money into their accounts, they later wired the money out of the accounts into different accounts, such as investment accounts. These wirings were not designed to further conceal the money or the embezzlement. Therefore, these subsequent wirings were not in furtherance of the scheme to embezzle the money, or part of the scheme to defraud, as opposed to post-fraud/embezzlement transfers of the money. Those transfers could not form the basis for separate wire fraud convictions. See Parr v. United States, 363 U.S. 370 (1960); Kann v. United States, 323 U.S. 88 (1944); United States v. Maze, 414 U.S. 395 (1974).

***United States v. Ingles***, 445 F.3d 830 (5th Cir. 2006) The defendant was charged with burning a "camp" that belonged to another member of his family. The mailings on which the government relied to make out its mail fraud prosecution were sent to the other member of his family from the insurer and the other member of the family was not involved in the arson. Moreover, regardless of whether the fire was caused by arson, the insurer was required to pay the family member. Therefore, those mailings were not "part of the scheme" and could not form the basis for a mail fraud prosecution. The government argued that the family member was planning on turning the insurance proceeds over to the arsonist, thus the mailings were part of the arsonist's scheme, but this fact did not alter the Fifth Circuit's reasoning.

***United States v. Strong***, 371 F.3d 225 (5th Cir. 2004) The mailings in this case were insufficiently linked to the scheme to defraud. The defendant was involved in a fraudulent scheme by which he obtained cars at an auction and promptly applied for a new title using various forged documents. A certified copy of an original title was given to the defendant at the office where he filed the application. The applications were then sent to a state agency for processing. The fraud was complete, however, when he obtained his certified copy. The mailings to the state office, therefore, were tangential mailings that occurred after the fraud scheme was completed.

***United States v. Frost***, 125 F.3d 346 (6th Cir. 1997) In this complex mail fraud case, with respect to one series of counts, the government failed to prove that the mailings were related to the fraud. 125 F.3d at 358-359.

***United States v. Lefkowitz***, 125 F.3d 608 (8th Cir. 1997) The government failed to prove that the phone call that was the subject of one of the wire fraud counts involved an interstate call. Though circumstantial evidence can supply the proof that a call was interstate, there was no evidence in this case that the call was not intrastate.

***United States v. Evans***, 148 F.3d 477 (5th Cir. 1998) The defendant was a parole officer. She received bribes from one of her parolees in exchange for which she protected him from dirty urine results. She also accepted drugs and started having sexual relations with him. The defendant visited the parolee in his home periodically (as part of her job) and submitted travel vouchers for reimbursement from the state. She submitted false travel vouchers, as well, and these, too, were mailed by her office to the state capital for reimbursement. The Fifth Circuit reversed the mail fraud convictions: the government's evidence did not establish that Evans's travel vouchers were mailed in furtherance of her scheme to defraud the state. See Kann v. United States, 323 U.S. 88 (1944); Parr v. United States, 363 U.S. 370 (1960); United States v. Maze, 414 U.S. 395 (1974); United States v. Vontsteen, 872 F.2d 626 (5th Cir. 1989). The vouchers and the defendant's reimbursement were not part of the scheme to defraud the state. The scheme focused on the defendant's receipt of bribes in exchange for depriving the state of her honest services. Though the defendant was required to travel to the parolee's house (and the vouchers verified that this occurred – falsely), the voucher was submitted to her supervisor, who later mailed it to the state capital. Once the supervisor reviewed the voucher, the scheme to defraud was complete and the subsequent mailing to the state was irrelevant to the scheme.

***United States v. Pietri-Giraldi,*** 864 F.2d 222 (1st Cir. 1988) The evidence did not support the defendant's wire fraud conviction because the telexes which formed the basis of the indictment were not in furtherance of the financial institution fraud. The wires were used in communications between financial institutions. These telexes led to the discovery that the defendant was engaged in a fraudulent scheme and were not a part of the scheme envisioned by the defendant.

***United States v. LaBarbara***, 129 F.3d 81 (2d Cir. 1997) The government failed to prove that checks were mailed in this mail fraud prosecution. There was evidence that other checks were hand-delivered. There was no direct evidence that the checks involved in this case were mailed.

***United States v. Altman***, 48 F.3d 96 (2d Cir. 1995) The government failed to prove that the mail fraud counts in this indictment involved mailings which were sufficiently related to the fraud to sustain the conviction. In this scheme to defraud, the mailings were not necessary to avoid jeopardizing a relationship of trust and good will; were not part of the business of processing a claim or transaction; and in general, were not sufficiently related to the defendant's scheme to be said to be in furtherance of it. See also Kann v. United States, 323 U.S. 88 (1945); United States v. Maze, 414 U.S. 395 (1974); Parr v. United States, 363 U.S. 370 (1960).

***United States v. Cross***, 128 F.3d 145 (3rd Cir. 1997) Employees of the court system in Allegheny County, Pennsylvania participated in a scheme to deprive litigants of impartial justice. The only mailing involved in the mail fraud counts was the court notice that was sent to the litigant after the case was resolved. Because the deprivation of the honest services of government employees occurred prior to the time these notices were mailed out, these mailings could not serve as the foundation for the mail fraud convictions.

***United States v. Hannigan***, 27 F.3d 890 (3rd Cir. 1994) The government failed to offer sufficient evidence of a mailing to support this mail fraud conviction. Though there was testimony from an insurance company employee about the normal procedures of the company (checks were stuffed in envelopes and then sent to the mail room), and a computer printout was in evidence which suggested that the check was handled in this manner, there was no evidence about what happened in the usual circumstance with regard to envelopes once they ended up in the mail room. Only by speculation could the jury assume that the US mail was used by the “mail room” as opposed to messenger, or private carrier.

***United States v. Burks***, 867 F.2d 795 (3rd Cir. 1989) The Court of Appeals reverses this mail fraud conviction on the basis that the government failed to establish that the mails were actually used to further the scheme. Simply relying on evidence that it was standard business practice to use the mail was not sufficient to establish that the mail was in fact used to further the scheme in this case. It is questionable whether this case is still good law. See United States v. Hannigan, 27 F.3d 890 (3rd Cir. 1994).

***United States v. Evans***, 148 F.3d 477 (5th Cir. 1998) The defendant, a parole officer, accepted bribes from one of her charges in exchange for not supervising him. The defendant submitted travel vouchers to her officer, falsely claiming that she had made trips in the field to supervise the parolee. The office later mailed these vouchers to the state office. These mailings were not sufficiently connected to the crime to satisfy the mailing element of a mail fraud offense. The crime was completed once the defendant submitted the vouchers to her office. No part of the crime depended on the subsequent mailing of the vouchers to the state office.

***United States v. Vontsteen***, 872 F.2d 626 (5th Cir. 1989) A mail fraud conviction cannot be based on the fact that a victim mails a related document after the fraud has been committed. Although mailing of invoices of a defrauded seller may in some cases provide a basis for a mail fraud conviction, the mailings must somehow advance, or be an integral part of, the fraud. Mere “post-fraud accounting” by the victims of the fraud is not a sufficient mailing to allow for a mail fraud conviction.

***United States v. Massey,*** 827 F.2d 995 (5th Cir. 1987) The defendant was convicted of mail fraud. The only evidence that there was a mailing was evidence of the usual office procedure regarding the transmittal of mail. The Fifth Circuit reverses holding that this was insufficient evidence of the existence of a mailing.

***United States v. Castile***, 795 F.2d 1273 (6th Cir. 1986) A fire insurer served various documents to an insured who in this mail fraud prosecution was accused of burning down his restaurant and using the mails in connection therewith. The mailings by the insurance company did not further the mail fraud scheme. On the contrary, these mailings were designed to frustrate the scheme. In the absence of any evidence that the mails were used to further the scheme to defraud, the conviction was reversed.

***United States v. Walters***, 997 F.2d 67 (7th Cir. 1993) The defendant, a sports agent, induced college athletes to sign agency contracts prior to their graduation, a practice which is not permitted by the NCAA. The agent was prosecuted for mail fraud. The conviction was reversed for several reasons: (1) the only alleged mailing was a form which the colleges mailed to the Big Ten conference, certifying that the players were eligible. This mailing was not instrumental to the fraud and was probably not even known to the defendant; (2) the supposed victims of the fraud were the colleges, which awarded scholarships to the players, despite their ineligibility. Yet, the defendant did not receive any of this money, thus the defendant did not defraud the schools out of any money; (3) in essence, this fraud amounted to no more than cheating the NCAA, and was not fraud.

***United States v. Swinson,*** 993 F.2d 1299 (7th Cir. 1993) The circumstantial evidence that a mailing had occurred in this case was not sufficient to support a mail fraud conviction. The government relied on “normal” business practice, but also established that this particular transaction was not handled in a normal fashion; thus, the fact that normal business practice would have involved a mailing was not sufficient proof that a mailing occurred in this case.

***United States v. Kwiat***, 817 F.2d 440 (7th Cir. 1987) The defendants were bank officers who made collateralized loans on real estate. The conduct of the officers clearly deprived the bank’s shareholders and depositors of the defendants’ honest services as directors. However, the only mailings involved in this scheme were the mailing of the mortgage instrument by the recorder of deeds. These mailings did not make the fraud possible or facilitate it in any way. Thus, there was an absence of proof that the mailings were made for the purpose of executing the fraudulent scheme. The convictions of the bank employees were reversed.

***United States v. Leyden***, 842 F.2d 1026 (8th Cir. 1988) The defendant was convicted of mail fraud with the predicate mailing being a responsive pleading filed by an insurance company in the plaintiff’s fraudulent lawsuit. The Court holds that the mailing by the insurance company cannot be the predicate mailing for the basis of a mail fraud conviction. The insurance company’s pleading denied coverage in this case and thus in no way could it have furthered the defendant’s fraudulent scheme to collect insurance.

***United States v. Hanson,*** 41 F.3d 580 (10th Cir. 1994) The defendant hired another person to raise money for her investment firm. The solicitations made by this other person were untrue. There was insufficient evidence, however, that the defendant participated in this fraud. Moreover, with regard to certain wire fraud counts, the supposed victim could recount nothing about the phone call which was the core of that wire fraud count. No rational finder of fact could have found that the phone call facilitated a scheme to defraud.

***United States v. Smith***, 934 F.2d 270 (11th Cir. 1991) The defendant participated in a scheme to defraud an insurance company by filing a false claim. There was insufficient evidence to show that he reasonably should have known that the mails would be used in connection with his scheme. The only actual mailing involved occurred after he received a draft settlement from his local agent, a copy of the draft was mailed by the agent to the regional headquarters for approval to pay the draft. This is not a sufficient mailing to bring this offense within the scope of 18 U.S.C. §1341. Because the indictment alleged that the mailing consisted solely of the mailing of the accounting copy of the draft from the agent to the headquarters of the insurer, and because the mailing was not reasonably foreseeable to the defendant, his convictions on the substantive mail fraud counts were reversed.

***MAIL FRAUD (Intangible Rights -- Honest Services) SEE ALSO: BRIBERY AND GRATUITIES***

***Skilling v. United States***, 130 S. Ct. 2896 (2010) Reviewing the conviction of the CEO of Enron, the Supreme Court concludes that the honest services fraud component of the mail fraud statue, 18 U.S.C. § 1346, is constitutional, but only if it is limited to situations in which the defendant accepts a bribe or a kickback in connection with his work either in the private context (i.e., without the consent of his employer) or as a public official. Under this construction of the statute, Skilling's conviction for honest services fraud was reversed. See also Black v. United States, 130 S. Ct. 2963 (2010) and United States v. Weyhrauch, 130 S.Ct. 2971 (2010).

***United States v. Silver,*** 864 F.3d 102 (2d Cir. 2017) Sheldon Silver's conviction for honest services fraud and Hobbs Act violations were reversed based on an error in the jury instructions, which failed the McDonnell requirements for an "official act." The trial court incorrectly explained that an "official act" was any action taken or to be taken under color of official authority.

***United States v. Boyland,*** 862 F.3d 279 (2d Cir. 2017) The district court's instruction to the jury on the law of honest services fraud for a public official did not satisfy the standard of McDonnell, because it included within the definition of "official act," "contacting or lobbying other government agencies." But the error in the instruction in this case did not satisfy the plain error standard.

***United States v. Aunspaugh***, 792 F.3d 1302 (11th Cir. 2015) The Eleventh Circuit held that post-Skilling, the government must prove more than simple self-dealing. There must be a kickback or bribe and not simply a conflict of interest, in order to sustain an honest services fraud conviction. The Aunspaugh court noted that the Eleventh Circuit had yet to decide whether an actual quid pro quo is required; perhaps an unlawful reward is sufficient. What is required in order for the conduct to amount to an unlawful kickback is proof that the payment to the defendant was for the purpose of inducing the employee to steer business in the direction of the payor or rewarding the employee for doing so. Simply paying the employee for rendering a service even if the payment or the service is not disclosed to the employer is not an unlawful kickback under § 1346. The court's instructional error in this case required that the conviction be reversed, because it included "self-dealing" within the definition of a kickback.

***United States v. Hawkins***, 777 F.3d 880 (7th Cir. 2015) Though 18 U.S.C. § 666 covers both bribes and gratuities, in order to violate § 1346, the payment must amount to a bribe, not a gratuity. There must be a quid pro quo, not a mere "reward" in order to violate the honest services fraud provision.

***United States v. Sadler***, 750 F.3d 585 (6th Cir. 2014) The operator of a pill mill lied to a pharmaceutical supplier about who was to receive the drugs. Nevertheless, the operator paid full price. This does not constitute wire fraud and will not support a conviction under 18 U.S.C. § 1343 or § 1346. The seller's right to "accurate information" is not an intangible right that is cognizable under the honest services fraud provision.

***United States v. Avery***, 719 F.3d 1080 (9th Cir. 2013) The factual basis of defendant's plea demonstrated that the defendant's plea was based on a theory of honest services fraud that did not survive Skilling. The factual basis established that the defendant violated his fiduciary duty to a trust by spending money on speculative investments that benefitted him.

***United States v. Garrido***, 713 F.3d 985 (9th Cir. 2013) The defendants' honest services mail fraud convictions, predicated on a "failure to disclose a conflict of interest" theory, were reversed.

***United States v. Ring***, 706 F.3d 460 (D. C. Cir. 2013) The D.C. Circuit provides a thorough post-Skilling review of the honest services mail fraud theory and the law of gratuities in the context of a lobbyist providing gifts to federal officials.

***United States v. Jiminez***, 705 F.3d 1305 (11th Cir. 2013) 18 U.S.C. § 666 is often applied to employees of an entity that receives federal funds and who accepts money (either a bribe or a gratuity) to benefit the payor. The statute also applies, however, to agents of an entity that receives federal funds who misapplies money of the entity. In this case, the defendant encouraged his employer to purchase books that, unbeknownst to his employer, were actually written by the defendant's wife. The defendant failed to reveal his conflict of interest. The Eleventh Circuit held that this was neither an honest service fraud offense, nor a § 666 violation. Skilling foreclosed the theory that a conflict of interest could be the basis for an honest services fraud prosecution. The § 666 offense was invalid, because the defendant was not the person responsible for spending the funds of the agency.

***United States v. Milovanovic***, 678 F.3d 713 (9th Cir. 2012) (en banc) In this post-Skilling en banc decision, the Ninth Circuit reinstates an indictment against a company that contracted with the State to provide driving tests to commercial drivers, but which accepted bribes. The court held that a fiduciary duty is required, but not necessarily a formal fiduciary duty (a trust relationship is sufficient). The court also held that foreseeable economic harm is not a necessary ingredient of honest services mail fraud – at least not in a public honest services fraud case – though materiality is an essential element.

***United States v. Hornsby***, 666 F.3d 296 (4th Cir. 2012) Honest services fraud counts were invalid in light of Skilling.

***United States v. Wright***, 665 F.3d 560 (3rd Cir. 2012). The jury was instructed on different theories under which the defendant could be convicted of honest services mail fraud, including bribery and conflict of interest. The latter, post-Skilling was invalid. Not only were the honest services mail fraud counts reversed, but the traditional mail fraud counts were also reversed because of the prejudicial spillover effect caused by the admission of evidence relating to the honest services counts that would not have been admitted in a traditional mail fraud trial.

***United States v. Siegelman***, 640 F.3d 1159 (11th Cir. 2011) Certain counts of the Siegelman / Scrushy prosecution did not survive Skilling and were reversed on remand from the U.S. Supreme Court.

***United States v. Riley***, 621 F.3d 312 (3rd Cir. 2010) The defendants' honest services fraud convictions were not based on either a kickback, or bribe theory and for that reason, under plain error review, the convictions could not be sustained post-Skilling. One defendant was the mayor of Newark, and the other co-defendant was apparently his intimidate friend. City business was sent her way and the honest services fraud prosecution was based on this misconduct which did not amount to either a kickback or a bribe.

***United States v. Kincaid-Chauncey***, 556 F.3d 923 (9th Cir. 2009) The Ninth Circuit affirms the defendant's Hobbs Act and Honest Services Mail Fraud convictions, concluding that the court properly explained to the jury that the government was required to prove that there was a quid pro quo arrangement between the unlawful payment and an official act, even though the words "quid pro quo" were not used. The court noted that the quid quo pro requirement must be proven in the Hobbs Act context whether the payment is made in the context of a campaign contribution, or not. In the context of an Honest Services Mail Fraud prosecution of a public official, a specific quid pro quo is not required if the theory is an undisclosed conflict of interest, but a quid quo pro, at least an implicit quid pro quo, is required in an honest service "bribe" case. Though not necessarily requiring a definite and identifiable quid pro quo as required by McCormick and its progeny, the minimum proof that is required is similar to what is required in a gratuity case (18 U.S.C. § 201(c)), as explained in United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999) (mere payments to public official that are designed to build a reservoir of goodwill are not sufficient to prove a gratuity violation). Portions of this case did not survive the decision in Skilling and Weyhrauch.

***United States v. Sorich,*** 523 F.3d 702 (7th Cir. 2008) The Seventh Circuit re-affirms that "private gain" is a prerequisite for an honest services fraud prosecution. However, accommodating the various decisions from other Circuits that questioned the Seventh Circuit's position, the court notes that "private gain" does not necessarily have to inure to the benefit of the defendant. This case contains a useful Circuit-by-Circuit review of the caselaw in the area of honest services fraud.

***United States v. Howard***, 517 F.3d 731 (5th Cir. 2008) The trial court properly vacated one count of the defendant's conviction, because the jury may have relied on an improper theory of guilt; that is, a theory that the Fifth Circuit rejected in United States v. Brown, 459 F.3d 509 (5th Cir. 2006) relating to honest services fraud of an employee.

***United States v. Urciuoli,*** 513 F.3d 290 (1st Cir. 2008) In this honest services fraud prosecution, the defendants were two hospital administrators who hired a legislator to provide "consulting" services. The evidence relating to what the legislator did in connection with the hospitals was to urge local municipalities to comply with the law regarding where ambulances should take patients; and urging health insurance companies to settle disputed claims with the hospitals. Because urging the municipalities to comply with the law was not improper and did not involve work on pending legislation, this could not be the basis of an honest services fraud prosecution. Pressuring insurance companies was an activity that could be prosecuted as honest services fraud. However, because the jury's verdict could have relied on the improper theory, the conviction was reversed.

***United States v. Thompson***, 484 F.3d 877 (7th Cir. 2007) An honest services fraud prosecution may not be predicated on proof that the defendant made decisions about awarding contracts for state work based on the contractor's political affiliation or alliance with the political party in power. The court reversed not only the § 1346 honest services conviction, but also the § 666 bribery/gratuity/misapplication conviction. The defendant did not "misapply" the money by making a procurement decision based in part on political considerations, even if her decision was not completely in accordance with state procurement rules. With regard to the honest services conviction, even though the defendant received a raise, based in part on her work on this contract, this did not convert her state regulatory violation into a federal mail fraud offense.

***United States v. Turner***, 465 F.3d 667 (6th Cir. 2006) A candidate for public office does not violate § 1346 (honest services mail fraud) by buying votes and engaging in illicit campaign contribution schemes. The Sixth Circuit held that this conduct does not violate the honest services provision because a candidate (unlike an officeholder) does not have a fiduciary duty to the public. Additionally, a candidate does not provide a "service" to the public.

***United States v. Brown***, 459 F.3d 509 (5th Cir. 2006) The Fifth Circuit reversed the honest services fraud conviction of certain Enron employees. The employees engaged in a scheme to overstate corporate earnings and received a bonus for their efforts. The conduct benefited Enron and the employees. The Fifth Circuit held that although the conduct was illegal, it did not violate the defendants' honest services obligation to their employer in a manner that is covered by § 1346. Unlike most private honest services fraud cases, this case did not involve any self-dealing, or the receipt of kickbacks from a customer. The court wrote, "Where an employee intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefiting him and his employer, and where the employee's conduct is consistent with that perception of the mutual interest, such conduct is beyond the reach of the honest services theory of fraud as it has hitherto been applied." 459 F.3d at 522.

***United States v. Murphy***, 323 F.3d 102 (3rd Cir. 2003) The defendant was a political party official, but was not a public official. He took bribes and steered business in the direction of the bribe-payer. However, he owed no duty of honest service to the public and could not be prosecuted, therefore, under § 1346.

***United States v. Handakas***, 286 F.3d 92 (2d Cir. 2002) 18 U.S.C. § 1346 is unconstitutionally void for vagueness as applied in this case in which the defendant was charged with mail fraud in connection with his breach of a nonfiduciary obligation under a contract with a state governmental entity. The defendant submitted false reports regarding the wages he was paying workers on state construction sites. The state was not deprived of property or money, so the government pursued the defendant on an intangible rights / honest services theory under § 1346. The Second Circuit held that applying the statutes to this conduct violated due process, because the statute does not sufficiently identify the prohibited conduct. The court reasoned that under the state's theory, filing a false state tax return would amount to federal mail fraud. Even the breach of a contract "in the vicinity of a telephone" would suddenly amount to a federal felony. In a subsequent decision, the Handakas decision was overruled.

***United States v. Rybicki***, 354 F.3d 124 (2d Cir. 2003) (en banc). The Rybicki en banc decision held the conduct of the defendant in Handakas did not amount to a violation of § 1346, because he was not an employee of a private entity purporting to act for and in the interest of his employer and he was not rendering services in which the relationship between him and the person to whom the service was rendered gave rise to a duty of loyalty comparable to that owed by employees to employers. Thus, the defendant in Handakas, according to the Rybicki court was not guilty of a § 1346 offense and the court should never have reached the constitutional issue. This decision, of course, pre-dates Skilling.

***United States v. Rybicki***, 287 F.3d 257 (2d Cir. 2002) The defendants – personal injury lawyers – paid insurance adjustors to settle their claims quickly. However, the settlement amounts were reasonable. The Second Circuit considered whether this qualified as honest services fraud. Every breach of fiduciary duty does not rise to the level of § 1346 mail fraud. In addition, there must be proof that there is some kind of foreseeable economic harm that results from the conduct. Additionally, the harm must be more than de minimis. In this case, the original panel opinion concluded that the evidence was sufficient, because the quick settlement deprived the insurance company of the money that would have remained in the insurance company due to typical delays in settling a case. Also, the adjustors presumably offered more money to succeed in quickly settling the case. Finally, the jury could have concluded that the plaintiffs would have accepted a lower settlement that did not include the kickback to the adjustor. The en banc court affirmed. 354 F.3d 124 (2d Cir. 2003) (en banc). The en banc decision contains an extensive review of the history of the intangible rights / honest services theory of mail fraud and sets forth certain limitations of that section. Finally, the en banc opinion reversed the panel opinion's conclusion that there must be proof of a foreseeable economic harm. Instead, the en banc opinion held that there must be proof that the misrepresentation (or omission) has the natural tendency to influence or is capable of influencing the employer to change his behavior. This decision pre-dates Skilling.

***United States v. Bloom***, 149 F.3d 649 (7th Cir. 1998) The defendant, a lawyer, was also a City Alderman for Chicago. Advice that he gave to a client operated to the financial detriment of the City. The Seventh Circuit upheld the lower court's dismissal of this aspect of the mail fraud indictment. Not every breach of a fiduciary duty works a criminal fraud. In the intangible rights context, there must be a showing that the defendant's conduct of depriving his employer of his honest services was part of a scheme to secure some type of private gain. This decision, like so many others, needs to be re-examined in light of Skilling.

## *MAILING THREATENING COMMUNICATIONS SEE: THREATENING COMMUNICATIONS*

***Elonis v. United States***, 135 S. Ct. 2001 (2015) In order to be guilty of making an unlawful interstate threat, it is not enough that the defendant's rants (on Facebook) would be perceived by others as threatening. The government must prove that the defendant intended the statements as threats. There must be subjective intent to threaten the listener, which is not satisfied simply with proof that a reasonable listener would feel threatened.

***United States v. Martinez***, 800 F.3d 1293 (11th Cir. 2015) Conviction reversed based on a jury instruction that was erroneous in light of Elonis.

***United States v. Havelock***, 664 F.3d 1284 (9th Cir. 2012) The statute that makes it a federal crime to mail a threatening communication to another person – 18 U.S.C. § 876(c) – requires that the mailing be to a person, not to an institution, or a company.

## *MATERIALITY*

***United States v. Wells***, 519 U.S. 482 (1997) Materiality is not an element of a bank fraud offense under 18 U.S.C. §1014.

***United States v. Gaudin***, 515 U.S. 506 (1995) The question of the materiality of a false statement is a jury question. The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. This includes the "materiality" element of a §1001 offense.

***United States v. Weimert***, --- F.3d --- (7th Cir. 4/8/16) The mail and wire fraud statutes may not be stretched to criminalize deception about a party's negotiating positions, such as a party's bottom-line reserve price or how important a particular non-price term is. Buyers and sellers negotiate prices and other terms. They will often try to mislead the other party about the prices and terms they are willing to accept. Such deceptions are not criminal and neither party to the negotiation expects complete candor about the counterparty's "bottom line:" "In the Restatement (Second) of Torts treatment of fraud … statements about a party's opinions, preferences, priorities, and bottom lines are generally not considered statements of fact material to the

transaction. See Restatement (Second) of Torts § 538A cmts. b, g (distinguishing between representations of facts—where the maker has definite knowledge—and opinions—including a "maker's judgment as to quality, value, authenticity or similar matters as to which opinions may be expected to differ")." In this case, Weimert, an employee of the bank, told that buyer of the bank's asset, that the bank insisted that he be a partner of the buying entity; he told the bank that the buying entity insisted that he be its partner. Neither statement was true, but neither of these statements was a material misrepresentation about the actual terms of the deal. The Seventh Circuit reversed the conviction in this case because the alleged deceptive statements were not criminally fraudulent.

***United States v. Litvak***, 808 F.3d 160 (2d Cir. 2015) Litvak was a securities broker who worked for Jefferies & Company and was involved in selling residential mortgage-backed securities ("RMBS"). He was charged with fraud in connection with his sales of RMBS's. There were three categories of misrepresentations: (1) He lied about the cost at which Jefferies acquired certain RMBS in his effort to convince a purchaser to pay more for the same RMBS's; (2) He lied when he said that he was negotiating for the purchase of certain RMBS's at a certain price in his efforts to re-sell the RMBS's, when, in fact, Jefferies already owned the RMBS's at a lower price than the price he was about to pay to purchase the RMBS's; (3) In the process of purchasing RMBS's, he lied about the price at which he had negotiated to re-sell the RMBS's (falsely saying that the price was less than it actually was) and thereby induced the seller to sell the RMBS's to him at a cheaper price to enable Jefferies to make a profit. On the basis of these representations, Litvak was convicted of securities fraud and also making a false statement to the U.S. Treasury which was overseeing certain RMBS sales in connection with TARP. The Second Circuit reversed the false statement count, based on the failure to prove that Litvak's false statements were material. Though the U.S. Treasury was aware and monitored these types of sales, the Treasury made no "decision" that was affected by the price of the sales. The Second Circuit held, however, that the materiality of the false statements to counterparties was a jury question that could not be decided as a matter of law for purposes of the securities fraud convictions under Rule 10b-5. Litvak argued that the "price" of the RBMS's to Jefferies was not what was important to the counterparties; what mattered was the value. The Second Circuit disagreed, holding that the jury was the proper factfinder on the question of materiality. However, the securities fraud convictions were reversed, because the district court improperly excluded expert testimony offered by Litvak on the topic of materiality. The expert was prepared to testify that a reasonable counterparty would not rely on representations made by Litvak and that they would normally make their own determination of value, rather than relying on Litvak's representation about Jefferies' price in purchasing (or the intended sales price of) the RMBS's. This was the proper subject of expert testimony. Finally, the Second Circuit held that the trial court erred in excluding evidence offered by Litvak that his supervisors permitted these types of sales practices by other brokers, which, according to Litvak, demonstrated his good faith and his lack of intent to defraud. The evidence was relevant to show that Litvak held an honest belief that he was not engaged in improper or illegal conduct.

***United States v. Camick,*** 796 F.3d 1206 (10th Cir. 2015) The defendant's real name is Leslie Lyle Camick. But over ten years ago, he took the name of his deceased brother, Wayne Camick and had used that name ever since. He was charged with mail fraud, wire fraud and identity theft when he wrote a letter to a court and claimed an interest in certain property that was the subject of a Quiet Title action by another person. He used the name Wayne Camick in this correspondence. He also claimed that he had been wrongfully detained in jail and that was the reason his response to the court was late. He had been arrested and released recently, but, according to the government, his detention was not "wrongful." The Tenth Circuit held that claiming that he was "wrongfully detained" was not a material misstatement, nor was using the name Wayne Camick a material misstatement. In an entirely separate holding, the court held that using the name Wayne Camick on a provisional patent application was also not a materially false statement. Because his mail and wire fraud convictions were reversed on sufficiency grounds, the court also reversed the aggravated identity theft convictions which were predicated on those fraud convictions.

***United States v. Tuyet Thi-Bach Nguyen***, 565 F.3d 668 (9th Cir. 2009) Materiality is an element of the offense of misbranding of medical devices. 21 U.S.C. § 331. Failing to instruct the jury on this element of the offense, however, was not plain error.

***United States v. Alferahin***, 433 F.3d 1148 (9th Cir. 2006) The defendant was charged with a violation of 8 U.S.C. § 1425(a), knowingly procuring naturalization contrary to law. The trial court did not instruct the jury on the concept of materiality in connection with the false statement that the defendant allegedly made on his naturalization application. The trial defense attorney acquiesced to the failure to instruct the jury on the concept of materiality. The Ninth Circuit held that materiality is an element of the offense, the failure to instruct the jury on this essential element was plain error and the attorney was ineffective in failing to object.

***United States v. McLaughlin***, 387 F.3d 547 (3rd Cir. 2004) Materiality is an essential element of an offense under 29 U.S.C. § 439(b) (False reports in Department of Labor filings). The trial court erred in failing to submit the question of materiality to the jury. Harmless error.

***United States v. Finn***, 375 F.3d 1033 (10th Cir. 2004) The defendant was a law enforcement agent with HUD. His car was towed and despite his efforts to bully the towing company to release his car, the company refused to release the car without being paid. He eventually enlisted the aid of a colleague to drive the car off the lot, running through a fence. When he realized that there would be trouble, he had the friend take some petty cash from the HUD office and reimburse the towing company. On the government expenditure form and receipt, the defendant crossed out the phrase "damage to fence" and added the word "storage." The Tenth Circuit concludes that changing the term "damage to fence" to "storage" was not a materially false statement.

***United States v. Keys,*** 133 F.3d 1282 (9th Cir. 1998) The element of materiality in a perjury or false declaration prosecution must be submitted to the jury.

***United States v. Di Rico***, 78 F.3d 732 (1st Cir. 1996) The trial court erred in concluding that materiality was established as a matter of law in this false tax return prosecution. Though the false reporting of gross receipts on a tax return is presumably always material, it is still one of the essential elements of the offense and must be submitted to the jury.

***United States v. Ismail***, 97 F.3d 50 (4th Cir. 1996) The government failed to prove that the defendant's false statement on a form filed with a bank was material.

***United States v. Littleton***, 76 F.3d 614 (4th Cir. 1996) The defendant was the mother of a young man who was charged with murder. The defendant testified at a suppression hearing for her son and explained that she went to the police station when her son was arrested; and also testified about a conversation she had with investigators several days later at her house. The government claimed she lied about these matters and prosecuted her for perjury and obstruction of justice. The Fourth Circuit reversed both convictions on the grounds that her statements, even if false, were not material to the suppression hearing at which she testified. With regard to the obstruction count, there was no showing that the defendant intended to obstruct the proceedings involving her son.

***United States v. Friedhaber***, 826 F.2d 284 (4th Cir. 1987) A defendant's statements to a grand jury which was investigating a fire at a funeral home were not material to the investigation and thus could not support a prosecution for having made a false statement to the grand jury. At the grand jury, the defendant testified that he had smelled a strong odor at the funeral home on the morning of the fire. To investigators he denied having smelled any such odor.

***United States v. Pettigrew***, 77 F.3d 1500 (5th Cir. 1996) The defendants' conviction for making false entries in the records of a lending institution was reversed because of a Gaudin error. Because one of the objects of the conspiracy count was also a false entry offense, the conspiracy offense was also required to be set aside.

***United States v. Beuttenmuller***, 29 F.3d 973 (5th Cir. 1994) With regard to the false entry on the bank record count of this indictment, the government contended that the documentation of a transaction on the bank's books erroneously described a payment to one of the conspirators as a commission, as opposed to a payment for his equity in the purchased property. The government failed to prove that this mischaracterization of the payment was a material misrepresentation. No witness testified about why this would be material to any agency of the government reviewing the transaction.

***United States v. Lueben,*** 816 F.2d 1032 (5th Cir. 1987) In this mail fraud prosecution, the defendant offered expert testimony on the materiality of the statements, that is, whether the false statements would have had any bearing on the lender's decision to make the requested bank loans. The Court holds that expert testimony is admissible and does not constitute impermissible expert testimony about a legal conclusion.

***Waldemer v. United States***, 106 F.3d 729 (7th Cir. 1996) The Gaudin error was cognizable in a federal habeas attack on the defendant's perjury conviction, even absent an objection at the time of trial, or on direct appeal.

***United States v. Ross***, 77 F.3d 1525 (7th Cir. 1996) The court held that materiality is an issue in a §1001 prosecution and the trial court erred in removing the issue of materiality from the jury's consideration. However, though this amounted to plain error, the appellate court exercised its discretion not to reverse the conviction, because the district court's error did not seriously affect the fairness, integrity and public reputation of judicial proceedings.

***United States v. Kwiat,*** 817 F.2d 440 (7th Cir. 1987) An attorney misstated a broker's commission in applications made to HUD for agency funds. The Seventh Circuit holds that this is not a material misstatement because it was the FDIC, not HUD that was defrauded. The essential fact revealed by the forms for FDIC purposes was that a member of the bank's board of directors was engaged in self-dealing. The exact amount of the commission received by the broker was unimportant in this respect.

***United States v. Allen***, 892 F.2d 66 (10th Cir. 1989) The defendant was prosecuted for perjury in connection with his application for the appointment of an attorney in a pending criminal case. The defendant used an alias on the application. The use of the alias, however, was not a material misstatement and therefore a perjury prosecution could not be sustained.

***United States v. De Castro***, 113 F.3d 176 (11th Cir. 1997) Relying on the decision in United States v. Wells, 519 U.S. 482 (1997), the Eleventh Circuit concluded that materiality is not an element of a §1010 offense, making false statements to HUD.

***United States v. Barrett***, 111 F.3d 947 (D.C. Cir. 1997) The defendant's false statement at another's bench trial was not material and his conviction under 18 U.S.C. §1623 on this count was reversed.

## *MERGER OF OFFENSES SEE ALSO: DOUBLE JEOPARDY*

***United States v. Benjamin***, 711 F.3d 371 (3rd Cir. 2013) The defendant was twice found in possession of a firearm. He was a convicted felon. He was charged (and convicted) of two counts of possession of a firearm by a convicted felon The Third Circuit, joining the decisions of various other Circuits, held that possession of a firearm is a continuing offense and cannot be prosecuted in several counts, unless there is proof that the possession was not continuous, including constructively.

***United States v. Chiaradio***, 684 F.3d 265 (1st Cir. 2012) The possession of several items of child pornography on different computers in one location can only support one count of "possession one or more items of child pornography." 18 U.S.C. § 2252(a)(4)(B). A different result might apply to charges brought under 18 U.S.C. § 2252A, which makes it a crime to possess "any" items of child pornography.

***United States v. Hector***, 577 F.3d 1099 (9th Cir. 2009) When two counts of an indictment merge (or where one conviction must be vacated to ensure no violation of the double jeopardy clause), the court, not the prosecutor, must decide which count survives.

***United States v. Tann***, 577 F.3d 533 (3rd Cir. 2009) Convictions for both possession of a firearm and possession of ammunition for that firearm violate the double jeopardy clause. See Bell v. United States, 349 U.S. 81 (1955) (transporting two women across state lines in violation of Mann Act is only one offense).

***United States v. Davenport***, 519 F.3d 940 (9th Cir. 2008) A defendant may not be found guilty of both receiving and possessing child pornography. See also United States v. Miller, 527 F.3d 54 (3rd Cir. 2008) (same); United States v. Schales, 546 F.3d 965 (9th Cir. 2008); United States v. Johnston, 789 F.3d 934 (9th Cir. 2015).

***United States v. Fenton***, 367 F.3d 14 (1st Cir. 2004) The offense of distribution of a controlled substance is a lesser included offense of distribution of a controlled substance within 1,000 feet of a school.

***United States v. Stephens***, 118 F.3d 479 (6th Cir. 1997) The defendant possessed two separate quantities of cocaine on the same date, but at different locations. Even though the drugs were acquired at different times, this amounted to only one offense of possession with intent to distribute. Thus, the defendant could not receive a sentencing guideline gun enhancement pursuant to his possession of one cache of drugs (and a gun), and a § 924(c) sentence in connection with his possession of the other cache of drugs.

## *MISPRISION OF A FELONY*

***United States v. Solis***, 915 F.3d 1172 (8th Cir. 2019) Where the person who knows about a felony is the same person who committed the felony, there are obvious Fifth Amendment implications if the person is charged with failure to report the crime. In this case, the conviction was barred by the Fifth Amendment.

***United States v. Caraballo-Rodriguez,*** 480 F.3d 62 (1st Cir. 2007) At great length, the First Circuit reviews the elements of a misprision of a felony offense, pursuant to 18 U.S.C. § 4. This case arose in the context of a defendant who avoided considerably more serious charges by entering a guilty plea to a misprision offense, and then challenged the sufficiency of the factual basis for the plea. The First Circuit devoted considerable attention to the issue of when the failure to report a crime may be prosecuted under the statute. In this case, the evidence supported the guilty plea, because the defendant was a law enforcement officer who had a duty to report a crime and his failure to do so was misprision of a felony. The court noted that there is considerable tension between the crime of misprision and the Fifth Amendment when the person who failed to report the offense was also a participant in the criminal conduct. The court also observed that there is no clear rule regarding when a duty to report a crime arises in situation where the defendant is not a law enforcement officer.

## *MISTAKE OF FACT*

***Staples v. United States***, 511 U.S. 600 (1994) The National Firearm Act outlaws the possession of a machine gun. There is no explicit scienter requirement in the Act. The Supreme Court holds that there is an implicit knowledge requirement. Thus, the government must prove beyond a reasonable doubt that the defendant knew that the weapon he possessed had automatic firing capability.

***United States v. X-Citement Video, Inc.,*** 513 U.S. 64 (1994) The United States Supreme Court held that the statute outlawing the interstate transportation of obscene material depicting minors, 18 U.S.C. §2252, has an implicit requirement that the offender know that the actor depicted is a minor.

***United States v. Encarnacion-Ruiz***, 787 F.3d 581 (1st Cir. 2015) In a child pornography production case, if a defendant is charged with aiding and abetting the production of child porn, a mistake of fact (the child's age) is a defense. Unlike the principal perpetrator, who cannot raise this defense, pursuant to Rosemond v. United States, an aider and abettor must have the intent to commit the offense including all elements of the crime.

***United States v. Bowling***, 770 F.3d 1168 (7th Cir. 2014) The defendant was charged with making a false statement on a firearms form that he filled out in order to purchase a gun. He denied that he was a convicted felon. In fact, he was a convicted felon (a fact that he acknowledged at trial), but he claimed that he was laboring under a mistake of fact when he filled out the form, because when he pled guilty to the predicate offense, he thought it was a misdemeanor offense. He sought to introduce evidence at the false statement trial that the prosecutor in the prior case had communicated an offer to the defense attorney in that case offering a misdemeanor disposition which the lawyer then communicated to the defendant. This, he claimed, was the source of his confusion. Excluding this evidence was reversible error.

***United States v. Fields***, 500 F.3d 1327 (11th Cir. 2007) The Child Support Recovery Act (18 U.S.C. § 228) requires proof that the defendant willfully failed to pay a past due support obligation to his child who resided in another state. Is the state required to prove that the defendant knew that his child resided in another state? According to this decision, the answer is "yes." Though the "out of state" requirement is also a federal jurisdictional element of the offense, the court concludes that defendant's knowledge of the location of the child is also an element of the offense that the government must prove.

***United States v. Murphy,*** 406 F.3d 857 (7th Cir. 2005) Two defendants were charged with threatening and beating up a government witness. Both defendants participated in the beating. However, one of the defendants was not shown to have known

that the victim was being beaten because she was a witness. While she was guilty of assaulting the victim, she was not guilty of obstructing justice because of the absence of proof that she knew the reason for the assault.

***United States v. Valencia***, 394 F.3d 352 (5th Cir. 2004) The Commodities Exchange Act makes it a crime to knowingly deliver or cause to be delivered false or misleading or knowingly inaccurate reports. Does this mean that a person can be found guilty if he (1) knowingly delivers; (2) a false report that he does not know is false? The Fifth Circuit held that pursuant to United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), the law would be interpreted to mean that the "knowledge" requirement applies not only to the delivery, but also to the falsity of the report. United States v. Johnson, 381 F.3d 506 (5th Cir. 2004) The defendant was charged with possession of a firearm with an obliterated serial number. The Fifth Circuit held that the evidence was insufficient to prove that the defendant was aware that the gun had this characteristic.

***Bartlett v. Alameida***, 366 F.3d 1020 (9th Cir. 2004) The defendant was convicted in state court of rape. This triggered a life-long obligation under California state law to register as a sex offender. He was then charged in state court with failing to register. He defended on the basis that he thought he was only required to register while on parole. The state court held that this misunderstanding about the duty to register was not a defense. The Ninth Circuit reversed. Citing Lambert v. California, 355 U.S. 225 (1957) (state law that required convicted felons to register with the chief of police was unconstitutional as applied to a person who had no actual knowledge of his duty to register, if there is no showing of the probability of such knowledge), the Ninth Circuit held that knowledge of a duty to register is an essential element of such an offense and to deny a defense on this basis would violate the due process clause of the United States Constitution.

***United States v. Hussein***, 351 F.3d 9 (1st Cir. 2003) Claiming that it is an issue of first impression, the First Circuit holds that it is no defense to a § 841 charge that the defendant did not know the type, or quantity of drugs that he possessed. In this case, the defendant acknowledged that he possessed a controlled substance knowingly, but claimed he did not know what type of drug, or the quantity. The First Circuit held that even post-Apprendi, this is not a defense.

***United States v. King***, 345 F.3d 149 (2d Cir. 2003) Drug dealers convicted under §841(a) need not know the type and quantity of drugs in their possession in order to be subject to sentencing enhancements contained in § 841(b). The court notes that this holding is consistent in virtually every Circuit.

***United States v. Wilson***, 133 F.3d 251 (4th Cir. 1997) In order to prove a violation of the Clean Water Act, the government must prove that the defendant had knowledge of each of the facts -- the elements of the offense -- that constitute the crime, though the defendant need not be shown to have knowledge of the illegality of his conduct. Thus, the defendant must know that he was discharging a substance; must know the identity of the substance he was discharging; must know the instrumentality or method by which the pollutants were discharged; must know the physical characteristics of the property into which the pollutant was discharged that identify it as a wetland; must know the link between the wetlands and waters of the United States; and must know that he did not have a permit. The trial court erred in failing to instruct the jury that the government was required to prove the defendant's knowledge with regard to each element of the offense.

***United States v. Graves***, 143 F.3d 1185 (9th Cir. 1998) In order to be convicted of accessory after the fact (18 U.S.C. § 3) to the crime of possession of a weapon by a convicted felon, the defendant must be shown not only to have known about the principal's possession of the weapon, but also that the principal had a felony offense. This is true, even though the government is not required to prove that the principal (in order to be guilty of being a felon in possession of a weapon) was aware that he had a felony conviction. It is true, moreover, even though someone may be found guilty of aiding and abetting another person's possession of a weapon by a convicted felon, even though the aider is unaware of the principal's status.

***United States v. Abernathy***, 83 F.3d 17 (1st Cir. 1996) Defendant was charged with possession of a weapon with an obliterated serial number. At the guilty plea, the government and the court advised the defendant that the government was not required to prove that the defendant had actual knowledge that the weapon had this characteristic. This was erroneous and the defendant should have been allowed to withdraw his plea.

***United States v. Hayden***, 64 F.3d 126 (3rd Cir. 1995) The defendant was charged with a violation of 18 U.S.C. §922(n), possessing a firearm while under a felony charge. An essential element of this offense is that the defendant know that he is currently charged with a felony. This knowledge is part of the "willful" element of the offense. The defendant must act with the knowledge that he is violating the law. Here, the defendant offered evidence of his low I.Q. to support an inference that he was unaware of the pending felony charge. Excluding this evidence was reversible error.

***United States v. Langley***, 62 F.3d 602 (4th Cir. 1995) The government is not required to prove, in a case in which a defendant is charged with being a felon in possession of a firearm, that the defendant knew that he was a convicted felon.

***United States v. United States District Court for The Central District of California***, 858 F.2d 534 (9th Cir. 1988) A mistake of fact defense must be available in a prosecution under 18 U.S.C. §2251(a) in order to comply with the First Amendment. That statute prohibits producing materials which depict a minor engaged in sexually explicit conduct. A defendant may assert a mistake of fact defense contending that he reasonably in good faith believed that he was engaged in activities protected by the First Amendment.

***United States v. Migliaccio***, 34 F.3d 1517 (10th Cir. 1994) The defendant, a doctor, was charged with mail fraud and conspiracy to defraud the government by means of filing false CHAMPUS health insurance forms. He claimed that the language in the CHAMPUS regulations is ambiguous, that his interpretations were reasonable and that he lacked criminal intent. He requested a jury instruction which explained his theory of the defense, instructing the jury that if it found ambiguity in the forms,

then the government would have to prove beyond a reasonable doubt that there was no reasonable interpretation of the situation that would make the defendant's statements factually correct. The trial court declined to give this instruction. This was reversible error. Even the court's general good faith defense instruction failed to adequately address the defense theory.

***United States v. Ruiz***, 59 F.3d 1151 (11th Cir. 1995) The defendant acknowledged that she participated in a multi-kilo cocaine deal but claimed that she did so in order to enable her son-in-law to earn credit with law enforcement in an effort to reduce his sentence. In short, she claimed that she thought she was engaged in undercover work for the FBI, along with another of the co-conspirators who (she claimed) told her that she was engaged in undercover work with the FBI. The defendant requested an instruction on the law of mistake of fact. The trial court committed reversible error in refusing this request. The general "willfulness" instruction did not satisfactorily cover the points of law included in the defendant's mistake of fact request. The defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence. In deciding whether a defendant has met her burden, the court is obliged to view the evidence in the light most favorable to the accused.

## *MISTAKE OF LAW*

***United States v. O'Hagan***, 521 U.S. 642 (1997) The "misappropriate theory" of securities fraud involves a corporate "outsider" who violates Rule 10b-5 by misappropriating confidential information for securities trading purposes, in breach of a fiduciary duty owed to the source of the information, rather than to the persons with whom he trades. In this case, the Court holds that this conduct amounts to a criminal violation of the securities laws. The Court also held that the willfulness requirement in the criminal provision required the government to prove that the defendant knew about Rule 10b-5 before a sentence of imprisonment could be imposed.

***Ratzlaf v. United States,*** 510 U.S. 135 (1994) The defendants were charged with willfully structuring currency transactions at banks – that is, exchanging $9,500 for cashier's checks. The defendants acknowledged knowing about the bank's reporting requirements and conceded that this conduct was intended to avoid the filing of a report. They insisted that they did not know that structuring a transaction was a criminal offense (18 U.S.C. § 5324). The Supreme Court held that this was a valid defense: the term "willfully" in the statute requires proof that the defendants knew that their conduct was unlawful. Note: The 1994 Congress "legislatively overruled" Ratzlaf.

***Cheek v. United States***, 498 U.S. 192 (1991) In this tax evasion prosecution, the District Court erroneously instructed the jury that the defendant could be found guilty of tax evasion if he unreasonably believed that he had no obligation to pay taxes. That is, in order to establish the element of willfulness, the government must prove that the defendant in fact knew that he was evading taxes. A good faith misunderstanding of the law or a good faith belief that one is not violating the law negates willfulness, whether or not that claimed belief or misunderstanding is objectively reasonable.

***Bryan v. United States***, 118 S. Ct. 1939 (1998) It is a federal offense to engage in the sale of firearms without a license. The question in this case is what the government is required to prove about the defendant's knowledge of the law before he may be convicted of willfully violating the statute. The Court concludes that the defendant must be shown to know that he is violating the law, but the government is not required to show that the defendant was aware of the specific licensing requirement that he violated.

***United States v. Ibisevic***, 675 F.3d 342 (4th Cir. 2012) The defendant carried over $10,000 into an international flight from Dulles Airport heading to Bosnia. An ICE agent who had a Puerto Rican accent questioned the defendant and his mother (the mother spoke no English) about whether they were carrying cash. The defendant responded that they had $5,000.00. During this "questioning" the defendant turned to his mother and translated, "They are asking how much the luggage is worth if it is lost." The defendant and his mother actually had about $40,000 in the luggage, on their persons and in the mother's purse. At trial, the defendant claimed that he did not understand the question and that the mother's testimony (about what the defendant said to the mother) was admissible as a "present sense impression" to show a lack of understanding. The trial court held that this was hearsay and inadmissible. The Fourth Circuit reversed: The defendant's statement was not hearsay (it was not offered for the truth of the matter asserted; it nevertheless would qualify as a present sense impression; and it was important to his defense regarding his lack of understanding that he was making a false statement or knowingly failing to file a currency form in violation of the law.

***United States v. Pulungan***, 569 F.3d 326 (7th Cir. 2009) The defendant was charged with attempting to export defense articles without a license. This case contains an analysis of what the government must prove regarding the defendant's knowledge of the licensing requirement and suggests that even if the defendant is aware that what he is doing might be illegal (as evidenced by his suspicious conduct in connection with the sales), the government is required to prove that he knew the guns he was exporting were in fact covered by the licensing statute.

***United States v. Ali***, 557 F.3d 715 (6th Cir. 2009) The defendant was charged with making a false statement on a naturalization document. He had been married to a Canadian woman and then, prior to the divorce being finalized, he married a woman in Georgia. He answered a question on a naturalization form that he had never been married to two women at the same time. The defendant claimed that he could not be guilty of making a false statement because a bigamous marriage, under Georgia law, was void ab initio, therefore he was never actually married to the woman in Georgia. The government moved to bar this defense on the theory that it represented a "mistake of law" defense. The Sixth Circuit disagreed, holding that if the defendant in fact

believed that he was not married, based on the void ab initio principle, then he was not guilty of knowingly making a false statement.

***United States v. Moore***, 504 F.3d 1345 (11th Cir. 2007) The defendants, husband, and wife, were charged with theft of Veterans Benefits. After the death of the mother of one of the defendants, the VA continued to direct deposit his benefits into an account which the defendant then converted to his own use. The defendants contended that they did not realize that they were not entitled to continue to receive the benefits upon the death of the veteran. That is, they claimed that they lacked knowledge that the money was "government funds" that they were using and that they did not take the money "willfully." Based on the evidence presented during the government's case in chief, there was simply no evidence that the defendants were aware that they were not entitled to the money. All that the government proved is that the mother died, the benefits continued to be deposited into the account and the defendants continued to use the money. There was no evidence of any notice to the defendants that they were not entitled to use the money or continue to receive benefits based on the death of the veteran.

***United States v. Caseer***, 399 F.3d 828 (6th Cir. 2005) Khat is a substance that contains both cathinone and cathine, both of which are controlled substances. Khat is a vegetation that is frequently chewed (apparently like chewing tobacco) by people in Africa, the Middle East and elsewhere. The Sixth Circuit held that the scheduling of the substance was proper. However, the appellate court reversed the defendant's conviction in light of the failure of the government to prove that he had the requisite mens rea to commit the offense. The general rule that citizens are presumed to know the requirements of the law is not absolute and may be arrogated when a law is so technical or obscure that it threatens to ensnare individuals engaged in apparently innocent conduct, because to presume knowledge of such a law would violate a core due process principle, namely that citizens are entitled to fair warning that their conduct may be criminal. Outlawing "cathinone" and "cathine" did not provide clear warning that khat was illegal to possess. To overcome this flaw in the statute, the court held that the government would be required to prove actual knowledge that the possession and importation of khat was illegal. The evidence was insufficient to prove the defendant's actual knowledge in this case.

***United States v. Wilson***, 159 F.3d 280 (7th Cir. 1998) A good discussion of ignorance of the law as a defense. Not a favorable case, however.

***United States v. Curran***, 20 F.3d 560 (3rd Cir. 1994) The defendant was charged under §1001 with causing the filing of a false statement to the Federal Election Commission relating to campaign contributions. The defendant had his company's employees make personal contributions to political candidates and then reimbursed them, a practice which violates the Federal Election Campaign Act. The court holds that the Ratzlaf definition of willfulness applies in this context – therefore, the jury must be instructed that the government was required to prove that the defendant was aware of the law and knew that his conduct was illegal. The election law, like the structuring laws, does not outlaw conduct which is "obviously evil" and represents a "regulatory statute." Thus, the jury should have been instructed that the defendant must have been shown to know of the campaign treasurers' reporting obligations, that he attempted to frustrate those obligations, and that he knew his conduct was unlawful.

***United States v. Grigsby***, 111 F.3d 806 (11th Cir. 1997) The African Elephant Conservation Act, 16 U.S.C. §4223(I), makes it a crime to knowingly violate the provisions of the act. The court in this case held that even though there is no "willful" element of the act, the government must prove that the defendant knew the provisions of the law and knowingly violated the law. The evidence of the defendant's knowledge of the law in this case was lacking and the conviction, therefore, was reversed on sufficiency grounds.

***United States v. Morris***, 20 F.3d 1111 (11th Cir. 1994) The trial court committed reversible error by failing to instruct the jury on the good faith defense, as requested by the defendant in this prosecution for filing a false income tax return. The court's instruction defining the terms "willfully" and "knowingly" was not an adequate substitute. Among other things, the charge did not explain that a good faith – yet objectively unreasonable – belief in the correctness of the return, would be a complete defense.

***United States v. Lankford***, 955 F.2d 1545 (11th Cir. 1992) In defense of tax evasion charges, the defendant sought to introduce expert evidence that the money he received could be characterized as a gift rather than a loan. The trial court committed reversible error by excluding this evidence. Such expert testimony is highly relevant to the assessment of whether the defendant willfully violated the tax laws.

***United States v. Manapat***, 928 F.2d 1097 (11th Cir. 1991) The application form for an FAA medical certificate was so inherently ambiguous that a false answer could not form the basis of a prosecution under 18 U.S.C. §1001.

***United States v. Hedges***, 912 F.2d 1397 (11th Cir. 1990) 18 U.S.C. §208(a) is a strict liability offense. One who takes government action while having a conflicting financial interest is guilty of the offense even if he has no intent to violate the statute. However, in this case, the conviction had to be reversed because the trial court erred in failing to instruct the jury on the law of entrapment by estoppel. The defendant asked his Standards of Conduct Counselor to counsel him about the transactions in which he was engaged. Entrapment by estoppel applies when an official tells a defendant that certain conduct is legal, and the defendant believes that official. This defense applies even in cases of strict liability because entrapment does not negate the intent element of an offense, it relies on the principle of fairness.

***United States v. Markovic***, 911 F.2d 613 (11th Cir. 1990) The defendant was prosecuted for attempting to export firearms. The defendants, Yugoslavian seamen, were at port in Mobile, Alabama. They were given warnings in English, regarding the Arms Export Control Act. That Act outlaws exporting any firearms by a foreign person. Because the Yugoslavian defendant did not understand a word of English, his conviction for knowingly and voluntarily violating the law could not be upheld.

***United States v. Heller***, 830 F.2d 150 (11th Cir. 1987) An attorney relied on the "case-closed" method of reporting advance payments of cost and fees in filing his taxes. Though this is no longer a valid method of computing taxes and income, the defendant/attorney could rely on the uncertainty-of-law-defense in his prosecution for federal income tax evasion.

## *MONEY LAUNDERING*

***Whitfield v. United States***, 543 U.S. 209 (2005) There is no requirement that the government prove an overt act in a money laundering conspiracy case brought under 18 U.S.C. § 1956(h).

***United States v. Santos***, 128 S. Ct. 2020 (2008) In a 4-1-4 decision, the Supreme Court held that the term "proceeds" in § 1956 refers to "profits" and not gross receipts. Thus, in a gambling case, such as this case, the money that is paid to runners and other participants/employees of the gambling activity does not amount to a transaction in proceeds, because this money does not represent the profit of the gambling venture. Justice Stevens, who provided the fifth vote, limited the holding (perhaps) to cases in which the money is not derived from the sale of contraband. NOTE: Congress amended the money laundering law in 2009 and legislatively overruled this decision by including the following definition: "the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C.A. § 1956(c)(9).

***Cuellar v. United States***, 128 S. Ct. 1994 (2008) The defendant was stopped near the Mexico border and was found to be in possession of approximately $80,000 in currency hidden in the car. The statute, 18 U.S.C. § 1956(a)(2)(B)(i), requires proof that: (1) the money was destined to cross a border; (2) the money was the proceeds of specified unlawful activity; (3) the defendant must know that funds were proceeds of specified unlawful activity; (4) the transportation of the funds must have been designed to conceal or disguise the nature, location, source, or control of the proceeds; (5) the defendant must have known that the transportation was for the purpose of concealing the proceeds. The Supreme Court holds that merely hiding money in a car that is traveling from the United States to Mexico does not amount to "concealment" in the money laundering statute.

***United States v. Cessa***, 785 F.3d 165 (5th Cir. 2015) A legitimate business that accepts money from a drug dealer, knowing that the money is tainted and knowing that the effect of taking the money would be to conceal the source of the money, is not necessarily guilty of conspiracy to launder the money. It is one thing to be in the business of laundering money and another to simply do business with a drug dealer: the former is a money launderer, the latter is not (at least not necessarily, simply by doing business with the drug dealer). The court also reversed the conviction of one defendant because of a mandatory presumption jury instruction: the trial court instructed the jury that "The commingling of illegal proceeds with legitimate business funds is evidence of intent to conceal or disguise." This instruction created a mandatory presumption. The appropriate instruction should state that the jury "may infer," such intent, not that such conduct "is evidence" of such an intent.

***United States v. Simmons***, 737 F.3d 319 (4th Cir. 2013) This case, controlled by Santos (pre-§1956(c)(9)), holds that Ponzi payments are not money laundering transactions, because the payments merge with the charged fraud offense.

***United States v. Abdulwahab,*** 715 F.3d 521 (4th Cir. 2013) This pre-§1956(c)(9) case held that the fraud and the money laundering transactions merged under the Santos rationale and the court vacated the money laundering convictions, noting, however, that post-§1956(c)(9) cases would not be treated similarly.

***United States v. Demmitt***, 706 F.3d 665 (5th Cir. 2013) The defendant defrauded her customers and deposited the money into her credit union account. A couple weeks later, she transferred the money to her son. This did not amount to concealment money laundering. There was no evidence that the purpose of these transactions (as opposed to their effect) was to hide or conceal the money. This illicit purpose is an essential element of a concealment money laundering offense.

***United States v. Cloud***, 680 F.3d 396 (4th Cir. 2012) Pursuant to Santos (pre-§ 1956(c)(9)), the money laundering conviction in this mortgage fraud case was invalid. The transactions involved "essential expenses of the underlying fraud" and thus these payments "merged" with the fraud offense. The payments in this case involved money transferred to recruiters, buyers, and other coconspirators for the role each person played in the mortgage fraud scheme. The court noted in footnote 6 that the holding in this case would likely not be relevant post-§1956(c)(9).

***United States v. Chi Tong Kuok***, 671 F.3d 931 (9th Cir. 2012) The extra-territorial provision of § 1956 only applies if the transaction involves more than $10,000.00. That threshold amount was not reached in this case and the money laundering conviction, therefore, could not be sustained.

***United States v. Harris***, 666 F.3d 905 (5th Cir. 2012) Harris, in California, sold drugs to Miller, who was in Texas. Miller sent money to Harris. There was no evidence, however, that the money sent by Miller to Harris represented the proceeds of prior sales, or any other illegal activity. The fact that the money was used to buy drugs did not mean, necessarily, that the money represented the proceeds of some prior illegal activity. Unless the money in a particular transaction is dirty, it cannot be laundered. Buying drugs with clean money is not money laundering. Conviction reversed on sufficiency grounds.

***United States v. Blair***, 661 F.3d 755 (4th Cir. 2011) Rejecting the reasoning of the Eleventh Circuit in United States v. Velez, 586 F.3d 875 (11th Cir. 2009), the Fourth Circuit holds that a lawyer who knowingly receives tainted money from a client (in this case, drug money) and uses it for his fee, as well as the fee for criminal lawyers representing co-conspirators, may be prosecuted for money laundering, notwithstanding the safe harbor provision of 18 U.S.C. § 1957(f)(1). The facts in this case are not the typical case in which a legitimate criminal defense attorney accepted a fee. The lawyer was involved in various crimes

with the client and others. Nevertheless, the Fourth Circuit rejected the notion that § 1957(f)(1) protects a lawyer when he knowingly accepts drug money to represent a criminal defendant.

***United States v. Richardson***, 658 F.3d 333 (3rd Cir. 2011) The defendant was the girlfriend of a drug dealer. She participated in certain financial transactions with the proceeds of her boyfriend's drug dealing. The evidence was insufficient to prove, however, that the defendant knew that the purpose of these transactions was to conceal the source or location of the money, or, more importantly, that the earlier transactions that demonstrated an attempt to conceal the money were either conducted by the defendant or known to her. The fact that the defendant engaged in a final financial transaction with proceeds that had previously been moved in a suspicious manner does not establish that the defendant knew that the final transaction was designed to conceal the money.

***United States v. Wright***, 651 F.3d 764 (7th Cir. 2011) The defendant was charged with § 1957 money laundering. The defendant obtained $8,000 in drug proceeds and purchased real estate. Several years later, the defendant sold the real estate for $49,623.00. The government claimed that it could satisfy the $10,000 minimal threshold with the sale of the real estate. The Seventh Circuit disagreed, holding that there must be tainted money in the amount of $10,000 in order to trigger a § 1957 violation.

***United States v. Heid***, 651 F.3d 850 (8th Cir. 2011) The defendant was the mother of a drug dealer. When her son was in jail, she agreed to help him post bond. She retrieved several thousand dollars that she acknowledged was derived from drug dealing and gave the money to bondsmen to post the bond. She was indicted for conspiracy to launder money, with the object of the conspiracy being a § 1956(a)(1)(B)(i) violation (i.e., concealment money laundering). She entered a guilty plea with the factual basis essentially including no more facts than recited above. She later moved to withdraw her plea on the basis that the factual basis was insufficient to set forth a crime (i.e., there was no evidence of an intent, or an agreement, to conceal the proceeds). The Eighth Circuit held that the trial court erred in failing to grant the motion to withdraw the plea.

***United States v. Warshak***, 631 F.3d 266 (6th Cir. 2010) One defendant's concealment prong money laundering conviction was reversed. Though the principal perpetrator of the predicate offenses may have intended to conceal the money by giving the money to his mother, this did not suffice to prove that the mother was guilty of concealment prong money laundering, because there was no evidence that she knew her son's purpose or that she engaged in any concealment activity.

***United States v. Adams***, 625 F.3d 371 (7th Cir. 2010) One of the defendants in this case was a drug courier and was asked by another conspirator to take cash and purchase money orders in relatively small denominations. The courier knew the money represented drug proceeds and she probably could have been convicted of concealment money laundering. However, this evidence was not sufficient to convict her of promotion money laundering, because there was insufficient evidence to show that she knew how the money orders were later used.

***Garland v. Roy***, 615 F.3d 391 (5th Cir. 2010) A § 2255 petition can be used to challenge a money laundering conviction on the basis that the proof failed to satisfy the Santos definition of profits. The Fifth Circuit also weighs in on the parameters of Santos, disagreeing with the decisions of virtually every other Circuit, some of which severely limited Santos, others of which read the decision expansively.

***United States v. Hall***, 613 F.3d 249 (D.C. Cir. 2010) A money laundering transaction must not be the same as the transaction that is fraudulent. In other words, funds that are laundered must already be tainted. In this case, the money laundering indictment listed the transaction that was the fraudulent transaction itself. The money laundering conviction was reversed by the D.C. Circuit.

***United States v. Moreland***, 622 F.3d 1147 (9th Cir. 2010) The trial court's instruction to the jury violated the principle of Santos and required reversing the money laundering convictions in this case.

***United States v. Faulkenberry***, 614 F.3d 573 (6th Cir. 2010) Just as Cuellar held that the purpose of the transportation of money must be to conceal the money (as opposed to showing that the money was concealed while being transported) under § 1956(a)(2)(B)(i), in a case involving transaction money laundering for the purpose of concealing the money, the government must show that the transaction was designed to conceal the money. 18 U.S.C. § 1956(a)(1)(B)(i). In this case, the defendant was defrauding investors. Though the transaction at issue (making an unsecured loan with the investor's money) concealed the source of the money – it had that effect – that was not the purpose of the transaction. Even if there is deliberate concealment, this does not mean that the purpose of the transaction was to conceal the money.

***United States v. Trejo,*** 610 F.3d 308 (5th Cir. 2010) Evidence that a defendant knowingly transported a large of quantity of tainted cash is not, alone, sufficient to prove that he is guilty of promotion money laundering. Promotion money laundering requires proof that the defendant intended to promote additional criminal acts. Accepting a guilty plea with an inadequate factual basis, however, was not plain error.

***United States v. Kratt,*** 579 F.3d 558 (6th Cir. 2009) The Sixth Circuit decided that Santos was not limited to gambling cases. Any money laundering case in which there is a merger problem as envisioned by the Court would be covered by the Santos holding. Of course, this only applies to pre-2009 convictions (after which § 1956(c)(9) reversed the Santos decision).

***United States v. Velez,*** 586 F.3d 875 (11th Cir. 2009) Applying 18 U.S.C. § 1957(f)(1) ("any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution" is not a monetary transaction), the Eleventh Circuit held that paying money – even "dirty" money – to an attorney for purposes of retaining the attorney for a criminal case, is not money laundering under 18 U.S.C. § 1957. This is the case involving the prosecution of Ben Kuehne in Miami. The

government argued that § 1957(f)(1) was meaningless, because it assumes that a defendant has the constitutional right to pay an attorney with dirty money, which according to the forfeiture decisions in United States v. Monsanto and Caplin & Drysdale v. United States a person does not have the right to do. The Eleventh Circuit rejected this argument, noting that Congress did not write § 1957(f)(1) for no reason, and therefore, attorneys may not be prosecuted for knowingly engaging in a monetary transaction with dirty money.

***United States v. Bah***, 574 F.3d 106 (2d Cir. 2009) The defendant was charged pursuant to 18 U.S.C. § 1969 with operating a money transmitting business without a license as required by state law. The defendant claimed that he received the money in New York but transmitted it from an office in New Jersey. He requested a jury instruction that it was not a crime to receive the money for the purpose of transmitting it in New York. The failure to instruct the jury consistent with this defense was error.

***United States v. Van Alstyne***, 584 F.3d 803 (9th Cir. 2009) The Ninth Circuit concludes that Santos applies in the context of a Ponzi scheme: payments made to earlier investors to maintain the appearance of legitimacy, are not payments of "proceeds" of the criminal fraud scheme. Of course, this only applies to pre-2009 convictions (after which § 1956(c)(9) reversed the Santos decision).

***United States v. Garcia***, 587 F.3d 509 (2d Cir. 2009) The fact that the defendant, a truck driver, accepted dirty money and then transported it in a hidden manner, and that he knew the recipients of the money would not report the money on their income taxes, was not sufficient, under the Cuellar decision, to establish a factual basis for a guilty plea to a money laundering charge. The key to concealment money laundering under § 1956(a)(1)(B)(i) is proof that the purpose of the transaction was to conceal the funds, not just that the effect of the transaction was concealment. Not reporting the money as income is not the same as "concealing" the source, location, or ownership of the money. Accepting a guilty plea based on the factual basis in this case was plain error.

***United States v. Ness***, 565 F.3d 73 (2d Cir. 2009) The defendant's international money laundering conviction (§ 1956(a)(1)(B)(i)) conviction was reversed based on Cuellar v. United States. The defendants helped drug dealers transfer currency out of the country. Though the money was concealed when it was transported, it was not transported to conceal it. The latter is required to satisfy the "conceal" element of the money laundering statute. The government must prove "why" the money was being transported, not "how" it is being transported, to prove money laundering. This case also contains a discussion of the term "financial institution" for purposes of a § 1957 offense, including the various definitions that incorporate 31 U.S.C. § 5312 and 31 C.F.R. § 103.11. The court ultimately concludes that an armored car business does not qualify as a financial institution.

***United States v. Caldwell***, 560 F.3d 1214 (10th Cir. 2009) The evidence was sufficient to convict the defendant of wire fraud, but the expenditure of the money did not amount to money laundering, because there was no effort to conceal the transaction. The fact that the money was transferred quickly does not mean that it was concealed.

***United States v. Hodge***, 558 F.3d 630 (7th Cir. 2009) Applying the Santos rationale (prior to the Congressional re-definition of "proceeds" in 18 U.S.C. § 1956(c)(9)), the Seventh Circuit held that a defendant who runs a house of prostitution cannot be prosecuted for money laundering for all expenditures of the money received, because the cost of doing business must be deducted from the term "proceeds." The court spent some time deciding whether "advertising" costs should be included in the term "proceeds" under the pre-§1956(c)(9) definition. See also United States v. Lee, 558 F.3d 638 (7th Cir. 2009).

***United States v. Hassan***, 578 F.3d 108 (2d Cir. 2008) The defendant was prosecuted for conspiring to import "khat" a plant grown in the Africa that sometimes contains a controlled substance known as cathinone. The plant itself is not illegal, but cathinone is. The evidence was sufficient to prove that he conspired to import khat containing cathinone. The defendant was also prosecuted for several substantive money laundering offenses. However, the government never proved that any of the shipments of khat that the defendant received actually contained cathinone. Therefore, substantive money laundering counts, based on transactions involving the proceeds of khat sales could not be sustained, because there was insufficient proof that the money represented proceeds of cathinone sales.

***United States v. Law***, 528 F.3d 888 (D.C. Cir. 2008) The defendant used drug profits to make mortgage payments on rental property where he collected the rent. This amounted to spending money, not money laundering. Even though he made the mortgage payments in another person's name, this was because the other person held the mortgage, and there was insufficient evidence that this reflected an intention to conceal the money.

***United States v. Adefehinti***, 510 F.3d 319 (D.C. Cir. 2007) The defendant's mortgage fraud scheme involved inflating property values and then having settlement checks issued in the name of fictitious buyers. He deposited some of the fictitious buyer checks into an account with his name. This did not amount to concealment money laundering. Depositing the checks into an account in his name did not conceal the money. The act of laundering the money must have some element of "concealment" above and beyond the actual fraudulent crime itself that involved concealing the defendant's identity as the recipient of the proceeds.

***United States v. Khanani,*** 502 F.3d 1281 (11th Cir. 2007) A defendant who employs illegal aliens and thereby saves money does not commit money laundering when he engages in a financial transaction with the "saved money" because this money does not represent proceeds. The Third Circuit reached a contrary conclusion in United States v. Yusuf, 536 F.3d 178 (3rd Cir. 2008), where the court concluded that if the defendants fail to pay taxes on gross revenue at their grocery store and then mail fraudulent tax returns to the government (mail fraud), the retained money, when deposited into a bank, constitutes the proceeds of the mail fraud and the deposit can be prosecuted as a money laundering offense.

***United States v. Malone***, 484 F.3d 916 (7th Cir. 2007) Another Seventh Circuit money laundering conviction falls victim to the analysis of United States v. Scialabba, 282 F.3d 475 (7th Cir. 2002). The defendant participated in transferring money from drug purchasers to the sellers, but because of the absence of any showing that the "proceeds" were net, rather than gross sales, the conviction could not be sustained.

***United States v. Johnson***, 440 F.3d 1286 (11th Cir. 2006) The defendant was charged with money laundering and conspiracy to launder money. The court reversed several counts of the conviction. First, the court held that the mere transfer of money from one account to another (even overseas) did not satisfy the "concealment prong" of a money laundering prosecution, without further proof of the defendant's efforts to conceal the location or source of the money. Second, the court held that the conspiracy conviction could not be sustained, because the only alleged co-conspirator was not shown to have had knowledge of the tainted source of the money. If the other member of the conspiracy, as a matter of law, was not proven to be guilty, then a conspiracy conviction could not be sustained.

***United States v. Elso***, 422 F.3d 1305 (11th Cir. 2005) The attorney's fee exception to a money laundering prosecution embodied in 18 U.S.C. § 1957(f) does not apply in a prosecution of the lawyer under § 1956. The exception applies in § 1957 prosecutions, because the exception endeavors to shield an attorney who receives a fee (in excess of $10,000) that comes from specified unlawful activity. A § 1956 prosecution, however, also requires proof of an unlawful purpose in engaging in the transaction (e.g., concealing the money, or promoting the unlawful activity). Thus, if an attorney is prosecuted under § 1956, the government is required to prove that the transaction was designed by the attorney to either conceal the money, or promote the unlawful activity, in which case the fact that the money was paid as an attorney fee would not excuse the conduct.

***United States v. Blankenship***, 382 F.3d 1110 (11th Cir. 2004) The Eleventh Circuit reversed the defendant's money laundering conviction because the government failed to prove that his conduct with the tainted funds amounted to "concealing" the proceeds. The defendant deposited the money into a bank account with his name on it. Though it was a different bank account than the one into which he normally made business deposits, this did not satisfy the "concealment" requirement of §1956(a)(1)(B)(i). Among the factors the courts consider in deciding whether there is concealment is whether the defendant engages in unnecessary transactions to add extra degrees of separation between himself and the source of the funds. This is not a requirement however, because any conduct that makes the proceeds more concealed after the transaction, than before the transaction, will satisfy the concealment element. The transactions in this case did not meet this threshold.

***United States v. Anderson***, 391 F.3d 970 (9th Cir. 2004) When the government initiates a money laundering sting involving money supposedly derived from bank fraud, the agent must convey information to the target that the bank was insured by the FDIC – otherwise, the proceeds would not be from specified unlawful activity (i.e., federal bank fraud). Because no such representation was made to the target in this case, the conviction was not supported by sufficient evidence.

***United States v. Miles***, 360 F.3d 472 (5th Cir. 2004) The defendant was indicted for money laundering, the government alleging that his company was engaged in Medicare fraud. The company began as a legitimate enterprise, however, and continued to conduct legitimate business, even after the time that it began its fraudulent activity. The indictment charged the defendant with money laundering under 18 U.S.C. § 1956(a)(1)(A)(i) – engaging in financial transactions with proceeds of illegal activity with the intent to promote illegal activity. Many of the financial transactions, however, involved paying rent, payroll, and payroll taxes. The Fifth Circuit held that these transactions did not satisfy the "promotion" element of the offense. The court held that, "When a business as a whole is illegitimate, even individual expenditures that are not intrinsically unlawful can support a promotion money laundering charge." See United States v. Peterson, 244 F.3d 385 (5th Cir. 2001). However, when the business is legitimate, the payment of operating expenses for the company – even with unlawful proceeds – does not constitute "promotion" money laundering. See also United States v. Brown, 186 F.3d 661 (5th Cir. 1999). The court concluded that promotion money laundering is a crime that focuses on transactions that funnel dirty money directly back into the criminal activity.

***United States v. Carucci***, 364 F.3d 339 (1st Cir. 2004) The defendant was a known associate of a mobster. He purchased real estate for the mobster and part of the transaction was structured. The mobster had no apparent legitimate income. This evidence, alone, was not sufficient to prove that the real estate purchase was with "dirty" money and therefore a § 1957 money laundering conviction could not be sustained. A § 1957 conviction cannot be based solely on the finding that a known criminal had no other legitimate income.

***United States v. Iacaboni***, 363 F.3d 1 (1st Cir. 2004) Payments of gambling winnings to the bettors constituted a money laundering financial transaction and the amount of these payments could be forfeited. However, the court erred in forfeiting additional money that may have been a financial transaction that concealed the money, because the money laundering charge only alleged "promotion prong" money laundering and therefore, a financial transaction that concealed the nature, source, or ownership of the money could not be forfeited. This would improperly amend the indictment.

***United States v. Scialabba***, 282 F.3d 475 (7th Cir. 2002) The Seventh Circuit rejected the government's argument that the use of gross receipts to fund ongoing criminal activity constitutes money laundering. The defendants were convicted of unlawful gambling, and money laundering (as well as certain tax offenses). The money laundering charge was based on the defendants' use of revenue from their gambling operations to meet the ongoing expenses of the business. The court explained that the government's theory amounted to saying that every drug dealer who uses money to purchase more drugs is thereby engaged in money laundering. The court held that the money laundering statute only applies when the defendant invests the profits of the criminal venture, as opposed to any receipts, into further criminal activity. The Seventh Circuit's decision was later rejected in United States v. Grasso, 381 F.3d 160 (3rd Cir. 2004), which held that reinvesting money earned from criminal activity in the

criminal venture does amount to money laundering. The Seventh Circuit reaffirmed Scialabba in the 2006 decision Santos v. United States, 461 F.3d 886 (7th Cir. 2006), annotated above). The Supreme Court affirmd the Santos decision, thus agreeing with this decision. See above. However, as noted in the annotation to Santos, Congress has legislatively overruled these decisions by re-defining “proceeds” as including “gross receipts” from any specified unlawful activity. 18 U.S.C. § 1956(c)(9).

***United States v. Garza***, 118 F.3d 278 (5th Cir. 1997) During a search, police discovered $5 million in cash, as well as ledgers and notebooks detailing the sale of nearly $8 million worth of cocaine and receipts of over $6 million. Nevertheless, the government failed to prove the elements of a § 1956 offense, because there was no proof of a financial transaction. A "transaction" is defined as "a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition or some action involving a financial institution or its facilities." Thus, if a financial institution is not involved, there must be some kind of "disposition." The mere presence of a large sum of currency, and evidence of sales, is not, alone, sufficient to support a money laundering conviction.

***United States v. McIntosh***, 124 F.3d 1330 (10th Cir. 1997) The defendant was charged with bankruptcy fraud and money laundering on the basis of his failure to disclose during his bankruptcy proceeding that he had received certain money and deposited some of those funds in a bank account he controlled through an unincorporated business he managed. The money laundering counts were based on his concealment of income that should have been reported. The evidence was insufficient to sustain a conviction. Money that is lawfully received, but not reported to the bankruptcy court, is not tainted money. It is not derived from, nor the proceeds of, a criminal offense. Moreover, when he engaged in a financial transaction, he was not at that time under an immediate duty to report the receipt of the money. United States v. Allen, 129 F.3d 1159 (10th Cir. 1997) 18 U.S.C. § 1957 requires that the monetary transaction be "in or affecting interstate or foreign commerce." This requirement is both jurisdictional and an element of the offense that should be submitted to the jury for decision.

***United States v. Shoff,*** 151 F.3d 889 (8th Cir. 1998) The defendant induced numerous people to invest money with him so that he could invest the money in stock options. Actually, he defrauded these people and used the money for his own purposes. Two transactions formed the basis for money laundering charges. In both instances, he deposited money invested by his victims in a “Shoff Trading” account and then had a cashier’s check drawn on the account (listing him as the remitter). Both cashier’s checks were used to purchase cars, both of which were titled in his name. Though the money was clearly the proceeds of fraud, and the purchase of the cars was a financial transaction, these transactions were not designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of those proceeds.

***United States v. Holmes,*** 44 F.3d 1150 (2d Cir. 1995) Charges of money laundering and violating the CTR laws with respect to the laundered funds merge when the money laundering violation is based on the transaction which also constitutes the structuring transaction.

***United States v. Voigt***, 89 F.3d 1050 (3rd Cir. 1996) The defendant claimed that in order to sustain a money laundering conviction, the government must prove that at least some of the money engaged in transaction is, in fact, tainted money. This is conceivably difficult where the defendant deposits tainted money into an account that contains untainted money, and the prosecution focuses on a transaction withdrawing money from that account (in an amount that could have included only the untainted money). The court noted the problem but decided that the issue did not have to be decided here, where the money withdrawn was conceded by a co-defendant to include tainted money.

***United States v. Heaps***, 39 F.3d 479 (4th Cir. 1994) The defendant, a drug dealer, instructed his colleague to wire him money that was the proceeds of drug sales. This, alone, does not amount to money laundering. The government argued that §1956(a)(1)(A)(i) proscribes transactions that promote the criminal venture. However, every transaction relating to the payment for the purchase of drugs is not a money laundering offense. There was no showing that when the defendant received the money that the money was reinvested in drugs.

***United States v. Baker***, 985 F.2d 1248 (4th Cir. 1993) The government prosecuted the defendant for money laundering; he allegedly purchased a boat with drug proceeds. However, the government failed to establish with sufficient evidence that a boat was ever purchased by the defendant, or that its ownership was concealed through the use of nominee owners. The conviction was reversed.

***United States v. Tencer***, 107 F.3d 1120 (5th Cir. 1997) The appellate court affirmed the lower court’s decision to grant a judgment of acquittal on one money laundering count where the government failed to prove that the defendant’s deposit of fraud proceeds in a brokerage account was accompanied by an intent to conceal the nature, or source of the money, an element of a §1956 prosecution.

***United States v. Gaytan***, 74 F.3d 545 (5th Cir. 1996) Funds do not become the proceeds of drug trafficking until a sale of drugs is completed. Hence, a transaction to pay for illegal drugs is not money laundering, because the funds involved are not proceeds of an unlawful activity when the transaction occurs but become so only after the transaction is completed.

***United States v. Dobbs***, 63 F.3d 391 (5th Cir. 1995) Merely spending money which is obtained by fraud does not amount to money laundering under §1956 absent some effort to disguise the money, or its source. The government must show that the defendant had a desire to create the appearance of legitimate wealth or otherwise to conceal the nature of funds so that it might enter the economy as legitimate funds. Here, the defendant obtained money by fraud, but spent the money in an open and notorious manner. Some of the funds were deposited into the wife’s account and the other money was converted to cashier’s checks but spent on the ordinary costs of the defendant’s farm. This did not amount to money laundering.

***United States v. Puig-Infante***, 19 F.3d 929 (5th Cir. 1994) The defendants were charged with money laundering. Two "transactions" were the focus of this count of the indictment. First was the purchase of marijuana with cash; second was the transportation of this cash, by car, to another location. Neither event represented the substantive offense of money laundering. The purchase of marijuana does not qualify, because the money, at that point, does not represent "proceeds." The transportation of the money does not qualify, because that does not amount to a "transaction." Merely being in possession of drug proceeds is not sufficient to support a money laundering conviction. United States v. Ramirez, 954 F.2d 1035 (5th Cir. 1992).

***United States v. Gonzalez-Rodriguez***, 966 F.2d 918 (5th Cir. 1992) Evidence that the defendant was travelling with drug proceeds is not sufficient to support a money laundering prosecution. The government offered no evidence that the defendant was attempting, in any manner, to conceal the source, location, nature, ownership, or control of the proceeds.

***United States v. Reed***, 77 F.3d 139 (6th Cir. 1996) Giving drug trafficking proceeds to a courier is a financial transaction for purposes of §1956. The Reed court, en banc, overruled several prior cases that had held that the transfer of money from one person to another did not qualify as a financial transaction, including United States v. Samour, 9 F.3d 531 (6th Cir. 1993) and United States v. Oleson, 44 F.3d 381 (6th Cir. 1995). The court noted that the mere transportation of money does not suffice; there must be a "transaction," but this includes a transfer from one person to another.

***United States v. McDougald,*** 990 F.2d 259 (6th Cir. 1993) Even viewing the evidence in a light most favorable to the government, there was insufficient evidence that the funds used by the defendant to purchase a car represented the proceeds of any drug transaction. Proof that the purchaser had insufficient legitimate funds to afford the purchase is not alone sufficient to establish that the funds came from a tainted source. Also, the fact that the car purchase was made in a way designed to conceal the ownership is not sufficient, because the purchaser may have been attempting to hide the purchase from tax agents or other creditors. Finally, there was insufficient evidence that the defendant had the requisite knowledge of the source of the funds, even if the funds were tainted. The defendant was indisputably not a drug dealer.

***United States v. Bell***, 936 F.2d 337 (7th Cir. 1991) Depositing cash into a safety deposit box is not a "transaction" under 18 U.S.C. §1956(c)(3). NOTE: The statute was amended after this decision and the law now expressly provides that a transaction involving a safe deposit box does qualify as a financial transaction.

***United States v. Herron***, 97 F.3d 234 (8th Cir. 1996) A prosecution under 18 U.S.C. §1956(a)(1)(B)(ii) requires proof that the financial transaction was designed to disguise or conceal the nature or source of the proceeds. This element was not proved in this money laundering prosecution. Though the money was undeniably drug money, and the wire transfers were undeniably financial transactions, the defendants used their own names, and the recipients used their own names, as well. The court cautioned that the money laundering statutes are not intended to outlaw money spending, even if the money being spent represents proceeds.

***United States v. Termini,*** 992 F.2d 879 (8th Cir. 1993) The defendant worked for a video company which illegally allowed customers to gamble on the machines. The defendant was a "route man" who went to the various stores where the videos were located and collected the money from the machines – both the machines which illegally permitted gambling and various other vending machines, including cigarette machines. The money which was collected was commingled with other legitimate receipts from the vending machines. This could satisfy the "concealment" element of a money laundering offense. However, the evidence did not support the allegation that the defendant, who was little more than a deliveryman, had willingly joined a money laundering venture. There was no evidence, for example, that he had any interest in hiding the money, concealing it, or disguising its source. His money laundering conviction, therefore, was reversed.

***United States v. Rutgard,*** 116 F.3d 1270 (9th Cir. 1997) A significant amount of fraudulently obtained money was deposited into the defendant's account. The account also had considerable legitimate money. The government charged the defendant with §1957 money laundering in connection with a large withdrawal. Obviously, the government did not prove that the specific money withdrawn was tainted. The Ninth Circuit concludes that §1957 money laundering cannot be sustained on this basis. There must be proof of a transaction in excess of $10,000 of tainted funds. The court refused to adopt the presumption that once an account has tainted funds, any transfer out of that account is deemed to be the tainted money. The government should have alleged money laundering with regard to the deposit of one of the fraudulent checks (in excess of $10,000), rather than focusing on the withdrawal from the commingled funds. Of course, if the intent of the defendant is to hide the tainted funds in the commingled account, then §1956 money laundering could be charged.

***United States v. Ripinsky***, 109 F.3d 1436 (9th Cir. 1997) An essential element of §1957 money laundering is a financial transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce. The foreign commerce component of this element is an essential element of the offense which must be proven beyond a reasonable doubt and submitted to the jury.

***United States v. Stein***, 37 F.3d 1407 (9th Cir. 1994) In its money laundering instruction, the trial court correctly informed the jury that the defendant must have knowledge that the money engaged in the transaction was derived from a specified felony. In a later general charge to the jury, the judge explained that "An act is done knowingly if the defendant is aware of the act and doesn't act through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful." This latter instruction conflicted with the former instruction and therefore tainted the money laundering conviction. Where the jury is offered inconsistent instructions, one right and the other wrong, the jury cannot be presumed to have followed the correct instruction. See also United States v. Turman, 122 F.3d 1167 (9th Cir. 1997).

***United States v. Monroe***, 943 F.2d 1007 (9th Cir. 1991) An international wire transfer constitutes the transportation of funds (for purposes of §1956) from a place in the United States to a place outside the United States.

***United States v. Dimeck,*** 24 F.3d 1239 (10th Cir. 1994) The delivery of alleged drug-money by one courier to a second courier, who was to deliver the money to the seller of the drugs, does not constitute money laundering under §1956(a)(1)(B)(i). The court disagrees with other circuits which hold that the delivery of money does not amount to a "transaction." Rather, the court finds that though the delivery amounts to a transaction, it was not shown to have been designed to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds. This is a required element of money laundering. The purpose of the money laundering laws is to prohibit efforts to legitimize the proceeds – something which Dimeck did not do in this case.

***United States v. Garcia-Emanuel,*** 14 F.3d 1469 (10th Cir. 1994) The defendant converted substantial proceeds which he acquired in the drug trade into cashier's checks (in his own name) and then bought horses, land and companies. The property was either listed in his name or was conspicuously owned by him. This does not constitute §1956 money laundering. The defendant clearly was not endeavoring to conceal his assets. Spending money does not constitute money laundering.

***United States v. Johnson***, 971 F.2d 562 (10th Cir. 1992) The defendant received wire transfers from his fraud victims. This is not §1957 money laundering. The receipt of the fraudulently obtained money does not constitute engaging in a transaction with the proceeds of specified criminal activity. The funds could not be characterized as criminally derived until the fraud was completed, which had not occurred when the victims sent the defendant the money. When the money was taken out of the defendant's account, however, that was a transaction with criminally derived property. Also, had the money been given to the defendant and then he deposited the funds into his account, this would be an outlawed transaction. The fact that the funds were wired from the victim straight into the defendant's account, however, spoiled the conviction in this case.

***United States v. Lovett***, 964 F.2d 1029 (10th Cir. 1992) The defendant withdrew several hundred thousand dollars from his grandmother's various accounts, while purporting to take care of her. His purchase of a car and a ring with that money, however, could not support a money laundering charge. There was no effort to conceal the source or identity of this money in these transactions.

***United States v. Sanders***, 928 F.2d 940 (10th Cir. 1991) Under §1956(a)(1)(B)(i), a person who merely spends money which is derived from an illicit source is not guilty of money laundering unless the defendant intended to conceal the nature or source of the funds. The transactions in this case involved the purchase of two expensive cars by the defendant, knowing the funds used to make the purchases was derived from a drug transaction. However, no steps were taken to conceal the identity of the purchaser, no steps were taken to hide the purchase price and the defendant drove the car conspicuously. The proof failed to establish that the defendant engaged in a financial transaction with the prohibited intent and the conviction was reversed.

***United States v. Christo***, 129 F.3d 578 (11th Cir. 1997) The defendant participated in a check-kiting scheme. The act of withdrawing the funds from the bank was the conduct that satisfied the elements of the bank fraud and misapplication of bank fund offenses. Those same transactions could not qualify as money laundering because the money was not tainted until the transaction was completed.

***United States v. Kramer***, 73 F.3d 1067 (11th Cir. 1996) In order to be guilty of money laundering under 18 U.S.C. §1956(a)(2), the funds must be transported from a place in the United States to or through a place outside the United States. The transfer of funds between two foreign countries does not suffice.

***United States v. Jenkins***, 58 F.3d 611 (11th Cir. 1995) 18 U.S.C. §1957 outlaws engaging in a transaction with more than $10,000 derived from specified unlawful activity. It is not clear whether the law applies only to single transactions involving more than $10,000, or if a series of transactions which total more than $10,000 would also be illegal. Applying the rule of lenity, the court concludes that only single transactions involving more than $10,000 are covered by the law.

***United States v. Newton***, 44 F.3d 913 (11th Cir. 1994) The defendant rented an apartment for the leader of a drug conspiracy so that the leader could have a place for his girlfriend to live. There was no evidence that the defendant used (or knowingly used) tainted funds to make any of the rent payments, or that the apartment was used to facilitate the drug conspiracy in any way. This evidence did not support a money laundering conviction or a conviction for aiding and abetting the drug conspiracy.

***United States v. Awan***, 966 F.2d 1415 (11th Cir. 1992) Defendant, a banker, was charged with conspiring to launder money. The evidence upon which the government relied in establishing his knowledge that the funds were derived from unlawful activity included: (1) the lead defendant suggested that the undercover agent utilize the bank where the defendant worked – but this established nothing, since the defendant himself was not mentioned; (2) another agent talked to the defendant about other people involved in cocaine sales – but again, there was no specific statement that the agent's funds were actually derived from cocaine; (3) the defendant participated in the transfer of drug proceeds – the problem with this argument is that this does not establish that the defendant knew that the funds represented drug proceeds. On this evidence, the defendant could not be found guilty of conspiring to launder money in violation of 18 U.S.C. §1956. The court also rejects several challenges to the constitutionality of the Money Laundering Control Act of 1986.

## *MURDER / MANSLAUGHTER*

***United States v. Williams,*** 836 F.3d 1 (D.C. Cir. 2016) The defendant was charged with second degree murder for his role in a "hazing" incident involving another soldier on a military base. The hazing involved several soldiers beating another soldier (with his consent) for a few minutes. The incident resulted in the death of the hazee. The defendant argued that the victim's consent was relevant to the defendant's state of mind. Second degree murder requires the government to prove malice and malice can be proven by showing that a defendant intended to kill or, as the government argued here, that he consciously disregarded an extreme risk of death or serious bodily injury. While it is true that the defendant cannot "blame the victim," the defense is still entitled to offer evidence that negates his culpable state of mind. The defense counsel argued that the victims' consent to being hazed was relevant to the determination whether the defendant acted with malice. In closing argument, the prosecutor told the jury that that was entirely erroneous, and that the victim's consent was not relevant to any issue in the case. After closing argument, the judge declined to issue an instruction that explained that the victim's consent could be relevant to the issue of malice. The D.C. Circuit reversed the conviction. The victim's consenting behavior—that is, his "continued, and enthusiastic, statements that he wanted the initiation to continue"—suggested that Williams was not conscious of an extreme risk that Johnson might die or be seriously injured.

***United States v. Garcia,*** 729 F.3d 1171 (9th Cir. 2013) The defendant was charged with murder and involuntary manslaughter as a result of his killing a person with whom he was fighting. He claimed the shooting was an accident. He was convicted of involuntary manslaughter and acquitted of murder. The instruction on the law of involuntary manslaughter failed to explain that the defendant must have acted with gross negligence and allowed the jury to convict the defendant based only on a finding that the defendant committed "an unlawful act" that resulted in the death of the victim.

***United States v. Pineda-Doval***, 614 F.3d 1019 (9th Cir. 2010) This case involves a charge of smuggling illegal aliens resulting in death. The question presented to the Ninth Circuit is whether the defendant's offense "caused" the death of the aliens. The aliens were in the van which the police were chasing. The police placed "spike strips" on the road as part of the pursuit and this resulted in the van crashing, killing numerous illegal aliens in the vehicle. The Ninth Circuit held that excluding evidence of the policies that governed the use of spike strips was error, because the question of proximate cause was hotly disputed. Harmless error.

## *MURDER FOR HIRE*

***United States v. Chong***, 419 F.3d 1076 (9th Cir. 2005) There was insufficient evidence that the "hitmen" were offered anything of value in exchange for attempting to kill the victim. The hitmen were members of a gang, and the defendant was the leader. There was no evidence that the hitmen were offered any quid pro quo for killing the victim.

***United States v. Frampton***, 382 F.3d 213 (2d Cir. 2004) The hit man shot the victim in exchange for "a favor in the future" from the person who hired him to kill the victim. This "favor in the future" was never identified. The Second Circuit affirmed the district court which granted a judgment of acquittal on the murder for hire prosecution. In order to be prosecuted under § 1958, the murder must be in exchange for "anything of pecuniary value." A favor in the future does not qualify.

***United States v. Hernandez***, 141 F.3d 1042 (11th Cir. 1998) To be guilty of conspiring to commit murder-for-hire the government must show an agreement by two or more persons to achieve the unlawful purpose of murder-for-hire, the defendant's knowing and voluntary participation in the agreement, and an overt act committed by any one of the conspirators in furtherance of the conspiratorial objective. In this case, the court found insufficient evidence, where the defendant was present when other family members discussed a murder-for-hire, but he did not participate in the discussion or participate in the actual homicide.

***United States v. Delpit***, 94 F.3d 1134 (8th Cir. 1996) The elements of the murder for hire statute, 18 U.S.C. §1958, as applied in this case, are that the defendant caused another to travel in interstate commerce, intending that a murder be committed in violation of state law, and that the murder was to be committed for hire. Here, one of the defendants joined the murder plot after the "hit man" had already traveled in interstate commerce. Thus, the crime of murder for hire had already been accomplished. While the defendant was guilty of participating in a state law murder, she was not guilty of participating in the federal offense. She could not be convicted of aiding and abetting the crime, because the crime was completed – the hit man had already traveled in interstate commerce – before she became involved. The same rule applied to bar a conspiracy conviction.

***United States v. Wicklund,*** 114 F.3d 151 (10th Cir. 1997) The defendant asked a friend to kill the ex-spouse of his wife, but never had any agreement that he would pay his friend for doing so. The defendant, himself, also was not being paid to do so (for example, by his new wife). This evidence was insufficient to support a murder for-hire conviction under 18 U.S.C. §1958. There must be some "contracted-for" pecuniary gain associated with the plan to murder the victim. It is not enough that there may be some pecuniary gain associated with the death of the victim (such as a termination of the surviving spouse's obligation to pay child support).

***United States v. Sullivan***, 809 F. Supp. 934 (N.D. Ga. 1992) Defendant's motion for judgment of acquittal on all counts of this murder for hire prosecution was granted. Though there was evidence of defendant's participation in the murder of his wife, there was insufficient evidence that the particular phone calls set forth in the separate counts of the indictment were related to the murder for hire scheme. The district court declined to decide whether the phone call must "facilitate" the murder or just "relate to" the murder. On either standard, the government's proof was insufficient.

## *NEW TRIAL / NEWLY DISCOVERED EVIDENCE*

***Eberhart v. United States***, 126 S. Ct. 403 (2005) The seven-day deadline for filing a motion for new trial pursuant to Rule 33 is not jurisdictional. If the defendant is tardy (or files a timely initial motion with some claims but adds more claims after the seven-day period) and the government does not object, focusing instead on the merits, the motion may be considered by the court.

***United States v. Knight***, 800 F.3d 491 (8th Cir. 2015) The trial court did not abuse its discretion in granting a new trial in this case. The defendant, an attorney, was convicted of bankruptcy fraud and related offenses in connection with his representation of a real estate client. The government's theory of the fraudulent conduct of the attorney was vague and authorized the trial court to grant a new trial based on the weakness of the case, even though there was sufficient evidence to support a conviction.

***United States v. Moore***, 709 F.3d 287 (4th Cir. 2013) After trial, the defense learned that a photograph of the person that the defendant claimed was the actual perpetrator was taken at a different time than what was described by the government. The actual date that the photograph of the other person was taken showed that he did, in fact, look like the person who the victim described as his assailant. A new trial, based on newly discovered evidence, should have been granted by the trial court.

***United States v. Piazza***¸ 647 F.3d 559 (5th Cir. 2011) The trial court acted within its discretion in granting the defendant's motion for new trial based on the discovery of newly discovered evidence. The evidence was unknown to the defense; the failure to discover the evidence earlier was not due to a lack of diligence; the evidence was not merely cumulative or impeaching; and the evidence was material and would probably produce an acquittal.

***United States v. Banks***, 546 F.3d 507 (7th Cir. 2008) A crime lab expert testified at trial about the nature of the substance tested, as well as its weight. Unbeknownst to the prosecutor and the defendant (but known to the DEA), the expert was under investigation by the DEA for misuse of a government credit card. At the point she testified, she did not know the outcome of this investigation. Shortly thereafter, she received an informal reprimand. When the defendant learned about this after trial, he moved for a new trial and the trial court granted the motion. The Seventh Circuit affirmed, holding that the district judge was within the bounds of his discretion in granting the new trial based on this Brady violation.

***United States v. Velarde***, 485 F.3d 553 (10th Cir. 2007) Post-trial, in preparation for a new trial motion, the trial court should have empowered the defendant to subpoena records relating to the government's chief witness, whose prior inconsistent statements (or prior false accusations directed at others) were not disclosed to the defense prior to trial.

***United States v. Hernandez-Rodriguez***, 443 F.3d 138 (1st Cir. 2006) The trial court abused its discretion in denying the defendant a new trial. The defendant's co-defendant provided an affidavit that exculpated the defendant with evidence that was not available to the defendant at trial. The affidavit was more than a simple denial of the defendant's participation. Even viewed, as the court requires, with "great skepticism" this affidavit meaningfully demonstrated that the defendant was wrongfully convicted.

***United States v. Robinson***, 430 F.3d 537 (2d Cir. 2005) The trial court granted a new trial motion, concerned about the reliability of the evidence that linked the defendant to the murder. The court concluded that judicial intervention was necessary to prevent a manifest injustice.

***United States v. Hernandez***, 433 F.3d 1328 (11th Cir. 2005) The difference between granting a post-trial judgment of acquittal (Rule 29) and a posttrial new trial (Rule 33) is this: On a motion for new trial based on the weight of the evidence, the court need not view the evidence in a light most favorable to the verdict and may weigh the evidence and consider the credibility of the witnesses. If the court determines (despite the abstract sufficiency of the evidence to sustain the verdict) that the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by a new jury.

***United States v. Tarango***, 396 F.3d 666 (5th Cir. 2005) The defendant's co-defendant was a fugitive and was tried in absentia, but the defendant had to endure a joint trial with the fugitive. The vast majority of the evidence focused on the absent co-defendant. The defendant was prejudiced by this joinder and the trial court correctly granted a Rule 33 Motion for New Trial.

***United States v. Scroggins***, 379 F.3d 233 (5th Cir. 2004) A trial court may order a new trial pursuant to Rule 33, even if there had been no specific trial error. In order to avoid a miscarriage of justice a new trial may be ordered if, for example, critical defense witnesses did not appear in response to a subpoena.

***United States v. Wilkins***, 139 F.3d 603 (8th Cir. 1998) After the government rested its case-in-chief, the trial court granted a judgment of acquittal on several counts. Thereafter, the jury acquitted the defendant on some counts and convicted him on one count. The trial court granted defendant's Motion for New Trial, on the grounds that the spillover effect of the evidence heard on the counts that the judge threw out prejudiced the defendant on the remaining count. The Court of Appeals concluded that this was not an abuse of discretion.

***United States v. Montilla-Rivera***, 115 F.3d 1060 (1st Cir. 1997) The defendant was charged with two others in connection with a drug transaction. The other two pled guilty and were awaiting sentencing. At defendant's trial, he contended that he was just an innocent bystander, but when he called the other two defendants to testify on his behalf, they indicated their intention of pleading the Fifth. After the defendant was convicted, he obtained an affidavit from both of the co-defendants who averred that the defendant had nothing to do with the drug transaction. This evidence justified conducting a full hearing on the new trial motion.

This evidence was unavailable at the first trial, so it satisfied the requirements of Rule 33 that was newly discovered. The court notes, however, that this is a minority view not accepted by most other Circuits.

***United States v. Graciani,*** 61 F.3d 70 (1st Cir. 1995) Even if a case is on direct appeal, the defendant should file his motion for new trial based on newly discovered evidence in the district court. The district court may deny the motion or may indicate to the appellate court its intention to grant the motion, in which case the appellate court should remand the case to the district court.

***United States v. Reyes***, 49 F.3d 63 (2d Cir. 1995) The two-year time limit for filing a motion for new trial on the basis of newly discovered evidence commences the date the appellate court issues its mandate affirming the conviction Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988) The Second Circuit concludes that if a material witness recants his testimony, the due process clause requires a new trial if the recantation is credible and the perjured testimony is highly material. It is not necessary to show that the prosecutor was aware of the witness's perjury. The Second Circuit revisited this decision at 900 F.2d 601 (2d Cir. 1990) and again offered relief to the defendant.

***United States v. Ouimette,*** 798 F.2d 47 (2d Cir. 1986) A favorable witness in this prosecution was dissuaded from testifying by the police. Although the defendant had interviewed this witness prior to trial, the police conduct in dissuading the witness occurred after that interview. Consequently, the newly discovered evidence could not have been discovered prior to trial and the defendant was entitled to a hearing on his motion for new trial based on newly discovered evidence.

***United States v. Biberfeld***, 957 F.2d 98 (3rd Cir. 1992) If the prosecutor has access to information which would reveal that a prosecution witness has committed perjury, a §2255 hearing is necessary to determine what relief is appropriate. The fact that the defendant knew that the witness was lying at trial does not amount to a waiver of this collateral attack. The key to the waiver issue is whether the defendant is aware that the prosecutor has the information in his possession which establishes that the witness is committing perjury.

***United States v. Robertson***, 110 F.3d 1113 (5th Cir. 1997) In deciding whether to grant a new trial pursuant to Rule 33, the trial judge may weigh the evidence and may assess the credibility of the witnesses. In this case, the trial judge acted within his discretion in deciding to grant a new trial in light of the ambiguous evidence establishing his guilt of being a member of a drug conspiracy.

***United States v. Garland***, 991 F.2d 328 (6th Cir. 1993) The defendant borrowed $75,000 for the claimed purpose of investing in a 5,000-ton cocoa bean purchase from Ghana. When the beans did not materialize, the defendant was prosecuted for transporting the $75,000 that was fraudulently obtained. The defendant testified at trial that he had been defrauded by the Ghana cocoa bean dealers and that he, too, was a victim and he did not knowingly obtain the money by fraud. After the defendant was convicted, the two cocoa bean dealers in Ghana were found by the Ghana court to have defrauded the defendant. This was grounds for a new trial based on newly discovered evidence. The Ghana judgment would have been admissible in court and surely may have altered the outcome of the defendant's case. Also, a witness who had been out of the country at the time of the trial and who had had no contact with the defendant or his attorney at trial, had been found and he would testify that he played an instrumental role in setting up the coca purchase in Ghana. His testimony, too, was newly discovered evidence warranting a new trial.

***United States v. Young,*** 17 F.3d 1201 (9th Cir. 1994) The defendant was arrested at a house where a methamphetamine lab was located. Other than his presence at the scene, the strongest evidence linking him to the crime was the discovery of notebooks in his truck with directions how to set up a lab. At trial, he explained that a resident of the house had thrown the books into the back of the truck. A law enforcement officer, however, testified that the notebooks were found by another officer taped underneath the dashboard. After the defendant was convicted, the officer who discovered the notebooks heard about this testimony and revealed that the notebooks were actually found in the back of the pickup and claimed that she told the AUSA this during the trial before the other officer testified. Regardless of whether the AUSA purposefully introduced perjured testimony, or did so in good faith, a new trial was required. If the use of the perjured testimony was knowing, then the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. If the government unwittingly presents false evidence, a defendant is entitled to a new trial if there is a reasonable probability that without the evidence the result of the proceeding would have been different.

***United States v. Culliver***, 17 F.3d 349 (11th Cir. 1994) After the defendant was convicted of possessing a firearm as a convicted felon, a key government witness recanted his trial testimony, indicating that the gun belonged to him. The trial court properly set the matter down for an evidentiary hearing to inquire into the basis of the recanting witness's testimony.

***United States v. Vicaria***, 12 F.3d 195 (11th Cir. 1994) The defendant requested a theory of the defense instruction at trial, which the trial court refused to give. After the defendant was convicted, the trial court granted a new trial under Rule 33, holding that it would have been better to give the defendant's theory of the defense instruction. Though the trial court did not err in refusing to give the instruction, it was within the trial court's discretion to give the instruction and it was thus within the trial court's discretion to grant a new trial.

***United States v. Gates***, 10 F.3d 765 (11th Cir. 1993) Six months after the defendant was convicted of armed bank robbery, a co-defendant offered an affidavit that the defendant was not guilty. This affidavit was sufficient to require a hearing to determine whether there was any merit to the motion.

***United States v. Dayton***, 981 F.2d 1200 (11th Cir. 1993) In order to move for a new trial on the basis of newly discovered evidence, the motion must be filed within two years of the final judgment. The two year period is measured from the date the court of appeals issues the mandate, not the date the trial court enters judgment.

***Alvarez v. United States***, 808 F. Supp. 1066 (S.D.N.Y. 1992) The defendant was entitled to a new trial based on the newly discovered evidence of prior instances of perjury committed by the informant, as well as conflicting evidence offered by the government agent. Pursuant to Rule 33, this evidence of the witness' perjury was more than "merely impeaching" and called into question the integrity of the verdict. The court cited United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975) and United States v. Taglia, 922 F.2d 413 (7th Cir. 1991).

## *OBSTRUCTION OF JUSTICE*

***Arthur Andersen v. United States***, 544 U.S. 696 (2005) The Supreme Court reversed the accounting firm's obstruction of justice conviction for two reasons: First, the instructions to the jury failed to adequately explain the knowledge requirement. Second, there was an erroneous instruction regarding the relationship between the destruction of evidence and the defendant's knowledge of a pending, or any particular, proceeding. The mens rea element of § 1512(b)(2)(A) requires that the defendant knowingly corruptly destroy evidence (or persuade another to destroy evidence) to be used in an official proceeding. The Supreme Court held that the "knowingly corruptly" element requires proof that the defendant have consciousness of wrongdoing. It is not enough that he destroys, or persuades another to destroy, evidence. The Court noted that destroying or withholding evidence may be done lawfully (for example, a parent may tell a child not to answer questions; or a lawyer may encourage a client to plead the Fifth Amendment; or a wife may insist that a husband respect the marital privilege). The instructions in the trial court suggested that a person could be guilty of § 1512 even if he (or the corporation) honestly believed impeding the investigation would occur, but that the conduct was lawful (i.e., the corporation believed that compliance with the document retention/destruction policy was lawful, even if it had the effect of impeding the government's investigation). This instruction was erroneous. In order to act "knowingly corruptly" the defendant must be aware that what he is doing is illegal. Second, with regard to the nexus requirement, though the statute does not require proof of a specific pending proceeding, the government is required to prove that the defendant engaged in the prohibited conduct with the intention of impeding a proceeding in which the documents would be material. See also United States v. Aguilar, 515 U.S. 593 (1995).

***United States v. Aguilar***, 515 U.S. 593 (1995) Uttering false statements to an investigating agent who might or might not testify before a grand jury is not sufficient to make out a violation of §1503. Making a false statement to an investigating officer is not a §1503 violation merely because the agent may relate this information to the grand jury. Such statements cannot be said to have the natural and probable effect of interfering with the due administration of justice.

***Fowler v. United States***, 131 S. Ct. 2045 (2011) 18 U.S.C. § 1512(a)(1)(C) makes it a federal crime to kill someone to prevent that person from communicating information about a crime to federal law enforcement. In this Supreme Court case, the Court held that the government must prove a "reasonable likelihood" that the person killed would have communicated something about the crime to federal law enforcement. It is not necessary that the defendant be aware of the likelihood of a report being made to a federal official, but the government must prove that it is reasonable likely.

***Yates v. United States***, 135 S. Ct. 1074 (2015) Employing numerous rules of statutory construction, the Court concluded that the term "tangible object" in 18 U.S.C. § 1519 refers only to tangible objects that record or preserve information (such as hard drives and flash drives). It does not apply to tangible objects that do not record or preserve information (such as under-size fish, as in this case), that are concealed or destroyed, in order to prevent law enforcement from investigating a crime.

***Lobbins v. United States***, 900 F.3d 799 (6th Cir. 2018) Two sections of § 1512 apply to witness tampering: § 1512(a)(1)(C) applies to killing or attempting to kill a witness and § 1512 (a)(2)(C) applies to the use of physical force to prevent a witness from communicating with federal law enforcement. In Fowler, discussed above, the Court held that the government must prove in a § 1512(a)(1)(C) case a "reasonable likelihood" that the witness was communicated with federal law enforcement. In this case, the Sixth Circuit holds that the same proof is required in a § 1512 (a)(2)(C) case: the government must prove a reasonable likelihood that the witness against whom the defendant used physical force would have communicated with federal law enforcement about a federal offense. Trial counsel's failure to object to a jury instruction that incorrectly explained this element of the offense was ineffective assistance of counsel requiring that this conviction be set aside.

***United States v. Acevedo***, 882 F.3d 251 (1st Cir. 2018) The defendant, a lawyer, visited a co-defendant who was represented by counsel in a jail and encouraged him to lie (and exculpate the defendat's/lawyer's client). At trial, the court instructed the jury on Rule 4.2 of the Cannons of Professional Conduct, which dictates that a lawyer may not communicate with a represented party about a subject matter of the other client's representation. The trial court instructed the jury on this Rule. The First Circuit held that this was not error. The Rules of Professional Conduct may be considered as some evidence of the defendant's mens rea, or corrupt intent, though a violation of such a rule is not sufficient to convict a defendant of obstruction of justice.

***United States v. Johnson***, 874 F.3d 1078 (9th Cir. 2017) The defendant a guard at a county jail, struck an inmate and later falsified a report. He was prosecuted for obstruction of justice based on § 1512(b)(3). The government was required to prove that it was "reasonably likely" that the false report would reach a federal officer. (See Fowler, above). The government failed to prove that in this case. United States v. Edwards, 869 F.3d 490 (7th Cir. 2017) Omitting term "corruptly" when defining the elements of a § 1512(b)(3) offense was reversible error. The Seventh Circuit also noted the divergent opinions about what exactly the mens rea is for a § 1512(b)(3) offense: whether the defendant must specifically intend to impair a criminal investigation or if it is

sufficient to intend to violate the law. But in either event, the lack of any mens rea in the instruction in this case was reversible error.

***United States v. Snyder***, 865 F.3d 490 (7th Cir. 2017) As noted above in Fowler, in a federal witness murder case, the government must prove a "reasonable likelihood" that the person killed would have communicated something about a crime to federal law enforcement had she not been killed. In this case, the defendant fled from a convenience store robbery and later killed his getaway driver because he suspected she would snitch. The Seventh Circuit held that the defendant could not be prosecuted under 18 U.S.C. §1512(a)(1), because it was unlikely that this convenience store robbery would have been investigated or prosecuted by the feds, so it was not likely that the victim would have ever been a witness in a federal case. This case became a federal case because she was killed and otherwise would have been a state prosecution.

***United States v. Liew***, 856 F.3d 585 (9th Cir. 2017) The defendant was charged with various offenses, including obstruction of justice, based on his "general denial" of certain allegations in a related civil lawsuit. While an express false statement in a civil case may constitute obstruction of justice pursuant to 18 U.S.C. § 1512(c), a general denial of liability does not amount to obstruction of justice. A separate count of the indictment alleged a violation of §1512(b)(1) based on the defendant's statement to a colleague "not to mention" anything about a former employee at the victim's business, because doing so would not be good for the colleague or the colleague's family. The Ninth Circuit held that this statement "keep your mouth shut" does not, alone, amount to improper coercion and the "would not be good for you or your family" was not an express threat of harm. Rather, it was not unlike what an attorney tells a client: "Keep your mouth shut or it won't be good for you or your family."

***United States v. Natal***, 849 F.3d 530 (2d Cir. 2017) Based on the decision in Yates, the Second Circuit reversed the conviction of the defendant who was convicted under § 1519 of obstructing justice by altering his vehicle (painting it) to obstruct the government's investigation. A blue car was seen leaving the scene of a crime. The defendant painted his car black after the crime was committed.

***United States v. McRae***, 795 F.3d 471 (5th Cir. 2015) The defendant, a police officer during the Hurrican Katrina disaster, was aware that his colleague had fatally shot a citizen and left the citizen in a car. The defendant burned the car to hide the evidence. He was prosecuted for a § 1519 violation. Based on Yates, the Fifth Circuit reversed: neither the car, nor the body, constituted a "record" under the Yates standard. United States v. Bonds, 784 F.3d 582 (9th Cir. 2015) In this en banc review of the conviction of Barry Bonds for obstruction of justice, in a brief per curium opinion, the court holds that the defendant's unresponsive, rambling answer to the question posed by the prosecutor in the grand jury proceeding was not "material" and did not support a § 1503 conviction for obstructing justice. The question and answer that formed the basis for the § 1503 conviction was as follows: Q: Did Greg[, your trainer,] ever give you anything that required a syringe to inject yourself with? A: I've only had one doctor touch me. And that's my only personal doctor. Greg, like I said, we don't get into each other's personal lives. We're friends, but I don't—we don't sit around and talk baseball, because he knows I don't want—don't come to my house talking baseball. If you want to come to my house and talk about fishing, some other stuff, we'll be good friends. You come around talking about baseball, you go on. I don't talk about his business. You know what I mean? Q: Right. A: That's what keeps our friendship. You know, I am sorry, but that—you know, that—I was a celebrity child, not just in baseball by my own instincts. I became a celebrity child with a famous father. I just don't get into other people's business because of my father's situation, you see. In concurring opinions, the judges relied on a number of reasons to reverse the conviction, including lack of materiality, failure to "pin the witness down" as required for a perjury prosecution (Bronston v. United States, 409 U.S. 352 (1973)), and the fact that the answer, though unresponsive, was true. In one of the concurring opinions, the judges observed that evasive, but truthful answers cannot constitute obstruction: The government also contended that the statute criminalizes a truthful but intentionally evasive or misleading answer during appellate oral argument: Q: I think it's a common experience among all of us on the appellate court to ask of the lawyer in front of us in a criminal case that's come up on appeal: "Counsel, could you please explain to me what happened at trial?" and for the lawyer arguing from the U.S. Attorney's Office to say, "Your Honor, I was not the trial attorney." Now, sometimes that's an evasive answer. They may well know the answer, but it's true that they weren't the trial attorney.... Has the lawyer just committed a crime? ... [T]he answer that I just hypothesized was designed to put me off the track.... A truthful but evasive answer… A: I think that would be obstructive, Your Honor. When asked how many San Francisco lawyers it planned to throw in jail, the government declined to specify.

***United States v. Petruk***, 781 F.3d 438 (8th Cir. 2015) In order violate 18 U.S.C. § 1512(c)(2), the defendant must obstruct justice and know of, or foresee, a particular proceeding that qualifies as an "official proceeding" as defined in section 1515. It is not necessary that the defendant know that the proceeding that he foresaw is a federal proceeding, but the proceeding that he foresaw must, in fact, be a federal proceeding. In this case, the defendant was only contemplating a pending state prosecution, so his conviction was reversed. The court relied on similar rulings in Aguilar and Arthur Andersen, both of which applied the same mens rea requirement for other obstruction statutes.

***United States v. Katakis***, 800 F.3d 1017 (9th Cir. 2015) The defendant was charged with bid-rigging and obstruction of justice. The defendant received a notice from his bank that a subpoena had been received from federal investigators. The defendant then purchased a "scrubber" that was designed to erase deleted items from his computer (erasing previously deleted items that were then located in free space). The FBI later seized three computers from the office. On the computer seized from his partner were ten emails written by, or to, the defendant that implicated him in the bid-rigging conspiracy. On the office computer and on the defendant's computer, however, there was no evidence of any of these ten emails. On the basis of this evidence, the defendant was charged and convicted of obstruction of justice (§ 1519) for destroying the emails. The district court granted a

judgment of acquittal and the Ninth Circuit affirmed. The evidence may have been sufficient to convict the defendant of attempted obstruction (a crime with which he was not charged), but the evidence presented at trial was insufficient to prove that his actions actually resulted in the elimination of the emails A: That's what keeps our friendship. You know, I am sorry, but that—you know, that—I was a celebrity child, not just in baseball by my own instincts. I became a celebrity child with a famous father. I just don't get into other people's business because of my father's situation, you see. In concurring opinions, the judges relied on a number of reasons to reverse the conviction, including lack of materiality, failure to “pin the witness down” as required for a perjury prosecution (Bronston v. United States, 409 U.S. 352 (1973)), and the fact that the answer, though unresponsive, was true. In one of the concurring opinions, the judges observed that evasive, but truthful answers cannot constitute obstruction: The government also contended that the statute criminalizes a truthful but intentionally evasive or misleading answer during appellate oral argument: Q: I think it's a common experience among all of us on the appellate court to ask of the lawyer in front of us in a criminal case that's come up on appeal: “Counsel, could you please explain to me what happened at trial?” and for the lawyer arguing from the U.S. Attorney's Office to say, “Your Honor, I was not the trial attorney.” Now, sometimes that's an evasive answer. They may well know the answer, but it's true that they weren't the trial attorney.... Has the lawyer just committed a crime? ... [T]he answer that I just hypothesized was designed to put me off the track.... A truthful but evasive answer… A: I think that would be obstructive, Your Honor. When asked how many San Francisco lawyers it planned to throw in jail, the government declined to specify.

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***United States v. McGarity***, 669 F.3d 1218 (11th Cir. 2012) An indictment charging a defendant with a violation of 18 U.S.C. § 1512(c), obstruction of justice, must identify the official proceeding that was the object of the obstruction. Even if the indictment mirrors the elements of the offense in the statute, the indictment must specifically identify the particular proceeding that the government will prove was the object of the obstruction.

***United States v. Friske***, 640 F.3d 1288 (11th Cir. 2011) The government failed to prove that the defendant was aware of, or foresaw, an official proceeding that he was obstructing. The defendant had a friend in jail. The friend in jail asked him to go to his house and dig up some money that was buried in the backyard. The defendant was not shown to have had any knowledge that this had any relationship to a forfeiture case. Absent any evidence that the defendant was aware of a forfeiture proceeding, a prosecution under 18 U.S.C. § 1512(c)(2) could not be sustained. Though there is no requirement under § 1512(c)(2) that an official proceeding be pending at the time the obstructive conduct occurs, the defendant must be shown to have intended to obstruct a proceeding at some point, even if his conduct was designed to obstruct a future proceeding.

***United States v. Doss***, 630 F.3d 1181 (9th Cir. 2011) The defendant was charged with sex trafficking of minors. He urged his wife to assert the marital privilege and, on that basis, was charged with obstruction of justice under 18 U.S.C. § 1512. The Ninth Circuit, relying on Arthur Andersen, held that in order to violate § 1512, the defendant must know that what he is doing (in an effort to impede justice) is illegal. Simply encouraging a wife to assert a legitimate privilege does impede the administration of justice, but it is not wrongful and therefore does not violate § 1512.

***United States v. Sanchez***, 615 F.3d 836 (7th Cir. 2010) The defendants was convicted (among other offenses) of retaliating against a witness, 18 U.S.C. § 1513(c). The evidence, however, failed to show that the defendant was aware that the victims had testified; the motive for the kidnapping appeared to be to recover money that the victims owed to the defendant’s colleague.

***United States v. Phillips,*** 583 F.3d 1261 (10th Cir. 2009) Following the logic of United States v. Aguilar, the Tenth Circuit held that 18 U.S.C. § 1512(c)(2), which makes it a crime to obstruct an official proceeding, requires proof of a nexus between a defendant's conduct and its effect on the proceeding purportedly obstructed. Aguilar held that the same hurdle must be overcome in a § 1503 prosecution.

***United States v. Draper***, 553 F.3d 174 (2d Cir. 2009) The federal "witness retaliation" statute, 18 U.S.C. § 1513(b)(2) makes it federal offense to injure, or damage to the property of, a person with intent to retaliate against any person for information given by that person relating to a federal offense to a federal law enforcement officer. (§ 1515(a)(4) defines "a law enforcement officer" as that term is used in § 1513(b)(2) to mean a "federal law enforcement officer"). In this case, the evidence did not prove that the victim was providing information to federal law enforcement officers, as opposed to local police. The trial court's jury instruction failed to properly define the term "law enforcement officer," but because the evidence was insufficient to prove this element of the offense, the conviction was reversed and retrial was barred.

***United States v. Ramos***, 537 F.3d 439 (5th Cir. 2008) In order to be convicted under § 1512, there must be an "official proceeding." In this case, the defendants (Border Patrol agents) where charged with obstruction based on their conduct in connection with the Border Patrol internal investigation of the use of a firearm. The Ninth Circuit concludes that the internal investigation relating to the use of a firearm is not an official proceeding under § 1512. "The term 'official proceeding' does not apply to routine agency investigations of employee misconduct."

***United States v. Quattrone***, 441 F.3d 153 (2d Cir. 2006) Based on the decisions in Arthur Andersen and Aguilar the defendant's § 1503, § 1505 and §1512 convictions in this highly publicized case were reversed. The defendant was aware that grand jury subpoenas had been issued to his company (Credit Suisse First Boston) and shortly thereafter sent an email to employees reminding them of the document retention policy (i.e., instructed them to shred old documents). The Second Circuit reviewed both Aguilar and Arthur Andersen: A conviction requires proof that the defendant's conduct was sufficiently connected to the pending investigation that it had the potential to obstruct the investigation. And the defendant must be shown to have known that the documents he intended to be destroyed were those that were sought by the grand jury. The trial court's instruction in this case mistakenly failed to explain that the defendant must be aware of the relationship between the documents destroyed and the scope of the subpoena.

***United States v. Plavcak***, 411 F.3d 655 (6th Cir. 2005) It is a federal crime to destroy evidence that is subject to seizure. 18 U.S.C. § 2232. In order to prosecute a person for committing the offense, the government must prove that there was either a valid warrant authorizing the seizure of the evidence, or an applicable warrant exception that would have resulted in the seizure of the evidence.

***United States v. Murphy***, 406 F.3d 857 (7th Cir. 2005) Two defendants were charged with threatening and beating up a government witness. Both defendants participated in the beating. However, one of the defendants was not shown to have known that the victim was being beaten because she was a witness. While she was guilty of assaulting the victim, she was not guilty of obstructing justice because of the absence of proof that she knew the reason for the assault.

***United States v. Bruno***, 383 F.3d 65 (2d Cir. 2004) The defendants were charged with a conspiracy to obstruct justice (§ 1503) by agreeing, after committing a murder, that they "wouldn't tell nobody who did nothing" – i.e., to lie to investigators. The federal grand jury that actually investigated the murder was not convened until six years after the murder. In fact, it could hardly have been envisioned at the time of the murder that this would become a federal investigation, as opposed to a state murder investigation. Moreover, statements that they later made to their relatives (which were not true) could not reasonably have been envisioned to be passed on to the grand jury.

***United States v. Lopez***, 372 F.3d 86 (2d Cir. 2004) 18 U.S.C. § 1512(a)(1)(C) makes it a federal crime to commit a murder to prevent communications to a federal official about a federal crime. In this case, the Second Circuit held that the government must show more than the "possibility" that the decedent would report a crime to federal authorities. The court held that the government must prove that the decedent was aware of a federal crime that had been committed and that some other evidence established that the decedent was going to be a witness. In this case, the only evidence offered by the government was the fact that a crime had been committed that violated both federal and state law and the decedent had previously reported his knowledge of crimes to state authorities. This was insufficient to prove a federal offense under § 1512 (a)(1)(C). Need to re-examine this holding in light of Fowler, noted above.

***United States v. Cooper***, 121 F.3d 130 (3rd Cir. 1997) The defendant sold a bag of what was claimed to be cocaine to an informant on one occasion. The substance turned out to be procaine, which is not a controlled substance. The defendant and the informant then planned another transaction, but the defendant detected the surveillance and aborted the transaction. He then threatened the informant and was charged with tampering with a witness. To be guilty of that offense, the underlying crime must be a federal offense. No such federal offense existed in this case. The defendant was not guilty of attempted sale of cocaine, because he knew the substance, he was selling was not a controlled substance and therefore he did not "attempt" to commit that crime.

***United States v. Lowery***, 135 F.3d 957 (5th Cir. 1998) The defendant was charged with obstruction of justice in connection with his actions relating to the tax evasion trial of one of his employees (who was also his girlfriend). He claimed that his conduct was directly related to his efforts to prevent the IRS from pressuring witnesses to testify falsely in that trial. During the course of his obstruction trial, the trial court barred him from introducing evidence about the outcome of the girlfriend's trial (the trial court set

aside the conviction) and other evidence relating to that prosecution. This was reversible error. A criminal defendant is entitled to present his theory of defense and barring him from doing so denied him a fair trial.

***United States v. Cintolo***, 818 F.2d 980 (1st Cir. 1987) A lawyer was convicted of obstruction of justice in connection with his representation of a witness before the grand jury. The lawyer also represented the target of the grand jury and unbeknownst to the witness was taking directions from the target and giving advice to the witness which was solely for the benefit of the target and not in the best interests of the witness. Among other things, the lawyer advised the witness to not testify despite a grant of immunity and to take the 18-month contempt time rather than provide the testimony against the target. The lawyer was also aware that the target had hired a hit man to kill the witness.

***United States v. Masterpol***, 940 F.2d 760 (2d Cir. 1991) The defendant induced witnesses to lie to the district court at his sentencing. This is not a §1503 violation. Such conduct may only be prosecuted under §1512. The defendant was also prosecuted for a §1001 violation for submitting a false letter of recommendation to the sentencing judge. This, too, was not the proper charge: the false statement statute does not cover false statements made to a court in its adjudicative capacity.

***United States v. Coiro***, 922 F.2d 1008 (2d Cir. 1991) The defendant coached several witnesses, during one meeting, to falsify testimony. This only constitutes one offense of obstruction of justice.

***United States v. Farrell***, 126 F.3d 484 (3rd Cir. 1997) The defendant urged a co-conspirator not to reveal to the FBI his knowledge of the crime. This evidence, alone, does not amount to a violation of 18 U.S.C. §1512(b) which requires proof that the defendant "corruptly" persuade another person to hinder or prevent the communication to a law enforcement officer information relating to the commission of a federal offense.

***United States v. Nelson,*** 852 F.2d 706 (3rd Cir. 1988) A prosecutor issued subpoenas in connection with a grand jury investigation. The defendant allegedly mounted a "cover-up" effort after the issuance of the grand jury subpoenas. During trial, the defense sought to cross-examine the United States Attorney regarding his intentions in securing the subpoenas, especially with regard to whether there was, in fact, a "pending grand jury investigation." The restrictions on the defendant's cross-examination of the United States Attorney required reversal of the conviction. The mere existence of a sitting grand jury does not necessarily determine when an investigation begins; the critical issue is whether the government had the requisite intention to present the evidence to the grand jury at the time the subpoena was requested.

***United States v. Littleton***, 76 F.3d 614 (4th Cir. 1996) The defendant was the mother of a young man who was charged with murder. The defendant testified at a suppression hearing for her son and explained that she went to the police station when her son was arrested; and also testified about a conversation she had with investigators several days later at her house. The government claimed she lied about these matters and prosecuted her for perjury and obstruction of justice. The Fourth Circuit reversed both convictions on the grounds that her statements, even if false, were not material to the suppression hearing at which she testified. With regard to the obstruction count, there was no showing that the defendant intended to obstruct the proceedings involving her son.

***United States v. Bashaw***, 982 F.2d 168 (6th Cir. 1992) Following the conviction of a colleague, the defendant allegedly made intimidating remarks to some of the jurors. This does not amount to obstruction of justice, because the remarks could not have had the effect of obstructing justice, because the jurors' work was done. There was no evidence that the jurors were continuing in their jury service. Had the defendant injured a juror, this would be outlawed by the second clause of §1503; but the "interference with duties" clause, does not cover interference after the jurors' duties are over.

***United States v. Frederick***, 835 F.2d 1211 (7th Cir. 1987) The appropriate venue for prosecuting a defendant for witness tampering is in the district in which the judicial proceeding was affected, not in the place where the witness was assaulted.

***United States v. Machi,*** 811 F.2d 991 (7th Cir. 1987) Two individuals, one an attorney, the other not, told a convicted drug dealer that if he gave them $50,000, they could get his prison term reduced. Among other things, the drug dealer then dropped his appeal and was lulled into a false sense of security and failed to take any proper steps to appeal his conviction or reduce his term. This constitutes obstruction of justice under §1503. It matters not that the defendants had no intention of actually interfering with the administration of justice; it is enough that they intended to swindle their victim and induce him not to use proper legal channels in his own behalf.

***United States v. Kulczyk***, 931 F.2d 542 (9th Cir. 1991) Under the pre-1988 version of 18 U.S.C. §1512, it was a crime to influence or threaten witnesses. Merely urging a witness to lie to investigators and to a jury was not covered by this offense. That is, under that version of the code, suborning perjury was not obstruction of justice. However, §1512 was amended subsequent to the criminal act in this case to include instances in which one "corruptly persuades" a witness to commit perjury.

***United States v. Banks***, 988 F.2d 1106 (11th Cir. 1993) On retrial following the prior reversal (See, infra), the trial court instructed the jury that in order to find that the defendant did not obstruct justice by refusing to testify at the grand jury based on his defense of fear of the target, the defendant was required to establish that his fear was genuine and substantiated. This improperly set up a mandatory rebuttable presumption. The government must prove a corrupt motive; the defendant is not required to prove an innocent or non-corrupt motive. Also, the trial court erred in failing to instruct the jury that the defendant must have known or should have known, that the failure to testify would be likely as a natural and probable consequence, to obstruct the grand jury's investigation.

***United States v. Banks***, 942 F.2d 1576 (11th Cir. 1991) The defendant was convicted of violating §1503 because of his refusal to testify at the grand jury investigating one of his previous drug suppliers. First, the court concludes that the willful refusal to give

testimony to the grand jury may amount to obstruction of justice. However, the conviction in this case had to be reversed because of the trial judge's refusal to instruct the jury on the law of "fear of reprisal." The defendant testified that he feared for his safety and the safety of his family if he testified against the supplier. This is a valid defense to obstruction of justice, insofar as it negates the motive element of the offense.

***United States v. Thomas***, 916 F.2d 647 (11th Cir. 1990) The evidence was insufficient to sustain the defendant's conviction for obstruction of justice. The defendant was an attorney and testified at one of his client's forfeiture hearings. He was asked at that trial whether he was aware that his client had used aliases. He responded that he did not. "Because proof that the false testimony was of the kind having a probable effect of obstructing justice is critical in distinguishing a Section 1503 offense from mere perjury, the trial court must clearly and explicitly instruct the jury of the necessity of finding this relationship between the statements and obstruction." The trial court's instructions were inadequate in this case. There was no instruction that the alleged false testimony must have had a natural and probable effect of obstructing justice. The evidence was insufficient to sustain a conviction anyway and thus a new trial was not allowed.

## OPENING STATEMENT

***United States v. Sloan***, 36 F.3d 386 (4th Cir. 1994) During his opening statement, the attorney for the defendant described the defendant's Horatio Alger life. Throughout the course of the trial, moreover, the trial court stated that it based evidentiary rulings on the defendant's asserted intention to take the stand. At the close of the government's case, however, the defendant opted not to testify. The trial court declared a mistrial. There was no manifest necessity to do so and a retrial was barred by the double jeopardy clause. With regard to the evidentiary rulings, the record demonstrated that the few times the issue of the defendant's expected testimony was raised, it was when the district court ruled out certain defense-offered testimony, on the basis that such evidence would have to wait until the defendant testified. With regard to the opening statement, the trial court did not entertain options short of declaring a mistrial. Here, unlike in Arizona v. Washington, 434 U.S. 497 (1978), the attorney did not refer to clearly inadmissible evidence. Rather, as in Frazier v. Culp, 394 U.S. 731 (1969), the attorney had a good faith belief in the availability of the evidence which he referred to in the opening statement.

***United States v. Murrah***, 888 F.2d 24 (5th Cir. 1989) During the prosecutor's opening statement, he alluded to a witness who would testify that the defendant had earlier approached him to torch his business. There was no such witness, or at least the prosecutor never called him to testify, and the comment in opening statement necessitated reversal of the conviction.

***United States v. Cardenas Alvarado***, 806 F.2d 566 (5th Cir. 1986) During the government's opening statement, the prosecutor referred to the defendant's post-arrest silence. This is error. However, in this case, the error was harmless in light of the strong evidence of guilt and lack of any trial testimony concerning the post-arrest silence.

***United States v. Shaw***, 829 F.2d 714 (9th Cir. 1987) During opening statements, the prosecutor stated that as long as the witness was truthful, the prosecutor would present his truthful cooperation to a local prosecutor at the time of sentencing. This constitutes improper vouching for a witness. Implicit in such a comment is the suggestion that a prosecutor has a method of determining whether the testimony of the witness is truthful.

***United States v. Novak***, 918 F.2d 107 (10th Cir. 1990) A mistrial should have been granted after the prosecutor utterly failed to back up his factual statements made during the opening statement about a tip received from an informant and also about the purity of cocaine which had been found at the defendant's house. The prosecutor should have known that the evidence would not have been admitted because of its hearsay nature and thus the failure to back up this opening statement was grounds for a mistrial.

***United States v. Adams***, 74 F.3d 1093 (11th Cir. 1996) During opening statements prosecutors should avoid referring to evidence that is even of questionable admissibility. Here, the prosecutor recited to the jury the statements of a person that implicated the defendants – statements that were not admissible, because they were hearsay. Harmless error.

***United States v. Sawyer***, 799 F.2d 1494 (11th Cir. 1986) During opening statements, the prosecutor stated that the defendant had confessed to the crimes charged and that there would be testimony to that effect. In fact, there was no such testimony, and none intended. However, there was no objection, and the remark did not amount to plain error requiring a reversal.

## *PARALLEL PROCEEDINGS*

***United States v. Stringer***, 535 F.3d 929 (9th Cir. 2008) Reversing the decision of the district court, the Ninth Circuit held that parallel proceedings by both the SEC and the local United States Attorney's office did not violate the defendant's due process rights. The district court stressed the arguably dishonest representations (or omissions) made by SEC lawyers about the status of a criminal case. The Ninth Circuit rejected the lower court's analysis. This case contains a lengthy discussion of the various rules governing parallel civil and criminal proceedings.

***United States v. Scrushy***, 366 F.Supp.2d 1134 (N.D. Ala. 2005) In this district court decision, the judge held that the government could not offer the deposition testimony of the defendant that was taken before the SEC. The SEC lawyer taking the deposition failed to reveal to the defendant that the Department of Justice was coordinating the deposition between the criminal prosecutors and the SEC investigators.

## *PERJURY*

***Wilkinson v. Gingrich***, 806 F.3d 511 (9th Cir. 2015) At his speeding trial, the defendant claimed that he was not the driver of the car. That was the only defense, and he was found not guilty. Later he was prosecuted for perjury on the basis that he was, in fact, the driver of the car. The collateral estoppel prong of double jeopardy barred this prosecution.

***United States v. Hale***, 762 F.3d 1214 (10th Cir. 2014) At the meeting of creditors in a bankruptcy case, the defendant was asked, “To your best knowledge and belief, is the information contained in your petition, statements, schedules, and related bankruptcy documents true, complete and accurate?” There is an ambiguity in this question because it is not clear if the truthfulness of the answer is measured at the time the statement was made (i.e., the bankruptcy schedules were filed) or at the time of the creditors’ meeting. In this case, the ambiguity was important, because the defendant learned after filing the schedules that one of the assets was worth substantially more than what he had listed on the schedule. Because of this ambiguity, the defendant could not be convicted of making a false statement in a bankruptcy proceeding.

***United States v. Wiggan,*** 700 F.3d 1204 (9th Cir. 2012) The defendant was charged with committing perjury at the grand jury. At trial, the foreman was called to the stand by the government and asked not only what the defendant said, but also whether the foreman found her to be credible. The foreman testified that he did not find the defendant credible. This was reversible error. While the foreman can be asked about the circumstances of the testimony and the defendant’s appearance (and, for example, the defendant’s nervousness, etc), it is not proper for the foreman to testify whether he believed that defendant’s testimony was false.

***United States v. Awadallah,*** 436 F.3d 125 (2d Cir. 2006) The defendant was charged with committing perjury in the grand jury. He defended on the basis that he was exhausted, confused, and intimidated. The government wanted to call grand jurors as witnesses and have them testify about the circumstances of the defendant’s testimony, as well as their opinion of the witness’s state of mind (i.e., exhaustion, confused, etc). The trial court entered an order providing that a grand juror witness would be permitted to describe the objectively observable circumstances of the grand jury testimony but would not be permitted to express any opinion about the defendant’s state of mind or express any opinion about the defendant’s demeanor. The Second Circuit held that this was a proper Rule 403 limitation on the grand jurors’ testimony.

***Chein v. Shumsky,*** 373 F.3d 978 (9th Cir. 2004) The defendant was a doctor who testified as an expert witness in a personal injury case. He was charged with perjury because of his inflated testimony about his credentials. The Ninth Circuit held that the evidence was insufficient as a matter of law to establish that this testimony was “material” as defined by California law (the substantive law of the state in which the defendant was convicted). The Jackson v. Virginia standard of sufficiency must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.

***United States v. Kennedy,*** 372 F.3d 686 (4th Cir. 2004) The AUSA improperly advised the defendant that when he appeared at the grand jury, he had no right to plead the Fifth, because he had already been convicted of drug charges about which he was being questioned (his case was still on appeal). The defendant’s answers led to a perjury prosecution. While condemning the misconduct of the AUSA, the Fourth Circuit holds that the erroneous advice did not provide a defense to the perjury charges.

***United States v. Keys***, 133 F.3d 1282 (9th Cir. 1998) The element of materiality in a perjury or false declaration prosecution must be submitted to the jury.

***United States v. Farmer***, 137 F.3d 1265 (10th Cir. 1998) The defendant was asked the following questions during her testimony at a pretrial hearing: "Prior to your coming to testify here today, did you speak to anyone about your testimony here today?" "Have you talked to Mr. McMahon, the defendant about your testimony here today?" The witness had talked to Mr. McMahon about her testimony but had not talked to him that day. The appellate court held that the questions were fundamentally ambiguous because they may have been interpreted as asking whether she had spoken to the defendant that day. This was not a matter which would be left up to the jury to decide. Given the ambiguity in the question, a jury could not find the defendant guilty of perjury beyond a reasonable doubt.

***United States v. Shotts***, 145 F.3d 1289 (11th Cir. 1998) The evidence was insufficient to prove that the defendant’s grand jury testimony was perjurious. The defendant was asked if he “owned” a bail bond business and he answered “no,” because, technically, as a matter of state law, the shareholders own the corporation and the defendant was not a shareholder, even though they were just nominees for the defendant. An answer to a question may be non-responsive, or may be subject to conflicting interpretations, or may even be false by implication. Nevertheless, if the answer is literally true, it is not perjury. Bronston v. United States, 409 U.S. 352 (1973).

***United States v. Reveron Martinez***, 836 F.2d 684 (1st Cir. 1988) A misleading statement that is literally true may not be the basis for a perjury conviction.

***United States v. Regan***, 103 F.3d 1072 (2d Cir. 1997) The court explained the concept of the “perjury trap” doctrine. The “defense” applies when the government is not legitimately seeking to obtain the answers to any questions when the defendant is questioned in the grand jury but is only asking the questions in order to elicit false answers to trigger a perjury prosecution. The defense did not apply in this case.

***United States v. Littleton***, 76 F.3d 614 (4th Cir. 1996) The defendant was the mother of a young man who was charged with murder. The defendant testified at a suppression hearing for her son and explained that she went to the police station when her son was arrested; and also testified about a conversation she had with investigators several days later at her house. The government claimed she lied about these matters and prosecuted her for perjury and obstruction of justice. The Fourth Circuit

reversed both convictions on the grounds that her statements, even if false, were not material to the suppression hearing at which she testified. With regard to the obstruction count, there was no showing that the defendant intended to obstruct the proceedings involving her son.

***United States v. Flowers***, 813 F.2d 1320 (4th Cir. 1987) A witness testified inconsistently at a grand jury and at a post-conviction hearing on a third party's motion for new trial. The Fourth Circuit holds that the inconsistency in the testimony – the amount of money the defendant had received from the third party for cocaine – was not material. The defendant had acknowledged while giving testimony that the differences in the amount of money specified was due to his faulty memory.

***United States v. Earp***, 812 F.2d 917 (4th Cir. 1987) The defendant, a Klansman, was asked before the grand jury whether he had burned crosses at residences of interracial couples. The witness answered in the negative. Although the witness had participated in attempted cross burnings, the government failed to specifically ask about any attempted burnings or whether the witness was at or near a particular residence on the night of an alleged cross-burning attempt.

***United States v. Holley,*** 942 F.2d 916 (5th Cir. 1991) The jury in this perjury prosecution was not instructed that they must unanimously agree that at least one statement in each count of the indictment was false. This was reversible error, as it could not be determined whether the jury unanimously agreed that the defendant lied with respect to any one statement.

***United States v. Chaplin,*** 25 F.3d 1373 (7th Cir. 1994) Under the rule established in Bronston v. United States, 409 U.S. 352 (1973), an answer under oath that is literally true but not responsive to the question, and arguably misleading, is not a violation of 18 U.S.C. §1621. In order to establish falsity, the "two-witness" rule provides that the uncorroborated testimony of one witness is not sufficient to establish falsity. There must be at least some corroboration of the witness's testimony. Another rule provides that a conviction may not be obtained based solely on circumstantial evidence. However, this second rule does not apply in cases in which the perjury relates to the defendant's state of mind, since that is a matter which can only be proved by circumstantial evidence. In this case, the evidence was sufficient on some counts, but insufficient on other counts.

***United States v. Smith***, 35 F.3d 344 (8th Cir. 1994) Under 18 U.S.C. §1623(d), a defendant can avoid a perjury prosecution if he recants either (1) before it becomes manifest to her that the false testimony would be exposed; or (2) if she can show that the proceeding was not substantially affected by her false testimony. Though this may not be good logic, the words of the statute are not ambiguous. Thus, if a witness lies to a judicial tribunal and then, upon learning that she had been discovered, grudgingly recants before the proceeding was substantially affected, this would be a defense to the charge.

***United States v. Swink***, 21 F.3d 852 (8th Cir. 1994) The defendant was prosecuted for committing perjury during an SEC investigation. His allegedly perjurious testimony related to his knowledge about the securities in which he was dealing. The evidence at trial did not establish that he lied about his lack of knowledge about the securities.

***United States v. Porter***, 994 F.2d 470 (8th Cir. 1993) 18 U.S.C. §1623(c) provides that if a person makes two irreconcilably inconsistent statements under oath and both are material to the inquiry in question and are within the statute of limitations, the defendant can be prosecuted for perjury without the government having to prove which statement is false. The defendant entered a guilty plea to mail fraud and later filed a habeas petition and denied his guilt. He was prosecuted under §1623. The Eighth Circuit reversed: the two statements of the defendant were not such that one had to be false. The statute requires "a variance in testimony that extends beyond mere vagueness, uncertainty, or equivocality. . . Even though two declarations may differ from one another, the §1623(c) standard is not met unless, taking them in context, they are so different that if one is true there is no way that the other can also be true." Among other things, because the questions were slightly different at the two proceedings, the defendant's answers were not necessarily irreconcilable: "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry . . . Precise questioning is imperative as a predicate for the offense of perjury."

***United States v. Jaramillo,*** 69 F.3d 388 (9th Cir. 1995) 18 U.S.C. §1623(c) provides that, if two statements are made by a defendant which are inconsistent, the government may convict the defendant of making a false statement without showing which statement was false. The Ninth Circuit holds that, in order for this section to apply, both statements must be made under oath.

***United States v. Boone,*** 951 F.2d 1526 (9th Cir. 1991) Though literally true, the defendant's answer in the grand jury was misleading. This could not support a perjury conviction. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry.

***United States v. Schulman***, 817 F.2d 1355 (9th Cir. 1987) The allegations in the indictment in this perjury prosecution did not sufficiently set out the allegedly perjurious statements and objective truths in stark contrast so that the claim of the falsity was clear to all who read the charge.

***United States v. Allen***, 892 F.2d 66 (10th Cir. 1989) The defendant was prosecuted for perjury in connection with his application for the appointment of an attorney in a pending criminal case. The defendant used an alias on the application. The use of the alias, however, was not a material misstatement and therefore a perjury prosecution could not be sustained.

## *PHOTOGRAPHS*

***Spears v. Mullin***, 343 F.3d 1215 (10th Cir. 2003) The victim was severely beaten and stabbed, but the medical experts agreed that he was either dead, or certainly unconscious long before the stabbings began and shortly after the beating began. During the penalty phase, the state introduced several gruesome photographs that showed the results of the stabbings and the beating. This violated the defendant's right to due process and required that the death sentence be set aside.

***PLEA AGREEMENTS (Breach of Plea Agreement) SEE ALSO: GUILTY PLEA (RIGHT TO WITHDRAW)***

***Puckett v. United States***, 129 S. Ct. 1423 (2009) If the defendant claims that the government breached a plea agreement at sentencing but does not object until he is in the appellate court, the plain error standard applies.

***United States v. King-Gore***, --- F.3d --- (D.C. Cir. 2017) After he was arrested, the defendant met with the prosecutors and agents and after being assured that nothing he said would be used against him at sentencing, he acknowledged being a drug wholesaler. The government used this information against him at sentencing. Even though the district court judge did not know that there was a breach of the plea agreement, and the defendant did not object in the lower court, this was plain error.

***United States v. Doe***, 865 F.3d 1295 (10th Cir. 2017) When the government agrees "in its discretion" to move for a § 5K1.1, the government must act in good faith and this determination is subject to judicial review.

***United States v. Kirkland***, 851 F.3d 499 (5th Cir. 2017) The plea agreement required the government to request a low-end sentence. At sentencing, the government requested a high-end sentence. The defendant did not object. The trial court imposed a mid-range sentence. The Fifth Circuit held that the government's failure to honor the plea agreement satisfied the plain error test for reversal.

***United States v. Hunter***, 835 F.3d 1320 (11th Cir. 2016) The government agreed in the plea agreement to recommend a three-level reduction for acceptance of responsibility. At sentencing, however, the government reneged and argued that it was not obligated to make the recommendation because the defendant had committed perjury at the suppression hearing. The appellate court rejected this argument because the suppression hearing occurred prior to the time the plea agreement was executed, so the government had no basis to abjure its obligation. Noteworthy is the fact that the district court granted the three-level reduction based on the terms of the plea agreement notwithstanding the government's refusal to make the recommendation. However, the court then granted the government's upward departure motion. The Eleventh Circuit held that reversal of the judgment was required. It was the government's obligation to make the recommendation and the government breached, not the district court. The government was required on remand to make the recommendation it agreed to make, and the case would be assigned to a different judge.

***Cuero v. Cate***, 827 F.3d 879 (9th Cir. 2016) After the defendant entered a guilty plea subject to a plea agreement that was accepted by the trial court, the prosecution "amended" the plea agreement that added an additional prior offense and substantially increased the punishment due to California's three-strikes law. The Ninth Circuit granted habeas relief: the California court's remedy (allowing the defendant to withdraw the plea), was not a sufficient remedy. The defendant was entitled to specific performance. "In other words, a guilty plea seals the deal between the state and the defendant and vests the defendant with a due process right to enforce the terms of his plea agreement."

***United States v. Williams***, 821 F.3d 656 (5th Cir. 2016) The plea agreement required the government to recommend a sentence at the low end of the guidelines. It failed to do so. The defendant had the option of requesting a re-sentencing by a different judge at which the government would be required to comply with its obligation, or to withdraw his plea. On rehearing, the appellate court re-affirmed that the defendant was entitled to make that choice. 833 F.3d 449.

***United States v. Warner***, 820 F.3d 678 (4th Cir. 2016) The government agreed to "take the position" that a particular guideline enhancement did not apply. After receiving the PSR, however, it apparently recognized that its position was legally wrong. The government advised the court that it had changed its "position" but honored the plea agreement by requesting that the enhancement not be applied. The court applied the enhancement. The Fourth Circuit held that the government violated the plea agreement. The agreement required the government to maintain the same position, not just to make a recommendation – especially because the recommendation was inconsistent with its new position.

***United States v. Reyes-Santiago***, 804 F.3d 453 (1st Cir. 2015) The defendant was one of numerous individuals sentenced in a Puerto Rico federal drug conspiracy case. The plea agreements in these cases set various drug quantities that would set the base offense level. The district court abided by most of the recommended quantities, but with the defendant, the court found a considerably higher drug quantity. The First Circuit reversed, holding that the sentence was substantively unreasonable. The court also held that the government arguably breached the plea agreement by failing to properly argue the disparity between the defendants' sentences that resulted in a disproportionately higher sentence for the defendant. The court also criticized the government failure to argue for the drug quantity that was in the plea agreement, and its objections to the defense attorney's efforts to convince the court to accept the agreed-upon amount. "The government's duty to bring all facts relevant to sentencing to the judge's attention . . . does not come with license to impede defense counsel's effort to persuade the court to adopt the parties' agreed-upon sentencing recommendation."

***United States v. Navarro***, 817 F.3d 494 (7th Cir. 2015) The plea agreement provided that the government would not seek an upward departure. At the sentencing hearing, the government suggested that a three-level role adjustment was appropriate (which the government was permitted to argue, according to the agreement), but then added to the argument that even if the role adjustment technically did not apply (because the defendant managed and organized assets, not people), the application notes suggest that an upward departure may be appropriate. The court accepted the invitation to upwardly depart. The Seventh Circuit held that the government breached the plea agreement.

***United States v. Chavful***, 781 F.3d 758 (5th Cir. 2015) The plea agreement provided section § 1B1.8 protection to the defendant for the defendant's statements made during a debriefing. At sentencing, however, the government relied on evidence

of the transactions revealed during the debriefing to increase the defendant's sentence. This violated the plea agreement and required that the sentence be set aside.

***United States v. Morales Heredia***, 768 F.3d 1220 (9th Cir. 2014) Despite paying lip service to the low-end recommendation in the plea agreement, the government's "incendiary" presentation of information about the defendant's criminal history undermined its agreement to recommend the low-end sentence. Based on the government's sentencing memorandum, the trial court rejected the binding plea, but claimed that the rejection was not based on what the government had written. The Ninth Circuit reversed and ordered that the case be sent back to the district court and assigned to a different judge. The court noted that though the government is not obligated to "enthusiastically" recommend a sentence that is in the agreement, it may not do the opposite, especially in the context of a fast-track binding plea offer as was the situation in this case. The Ninth Circuit also held that where the defense objects to the government's breach of an agreement, the error is not reviewed for harmlessness. Automatic reversal is required.

***United States v. Lara***, 690 F.3d 1079 (8th Cir. 2012) The prosecution breached the plea agreement when it introduced evidence of a larger quantity of drugs than the amount stipulated to in the agreement. The fact that the plea agreement also stated that the government could introduce evidence of relevant conduct did not supersede the specific agreement about drug quantity.

***United States v. Hanshaw,*** 686 F.3d 613 (8th Cir. 2012) The plea agreement provided that the defendant would be present at any hearing on a Rule 35 reduction of sentence motion. When the motion was heard, the defendant was not present, and the defense attorney was only present on the phone. This violated the plea agreement.

***United States v. Hebron***, 684 F.3d 554 (5th Cir. 2012) The government breached the plea agreement by advocating for a loss figure under the fraud guidelines higher than the loss figure agreed to in the plea agreement. Not plain error, however.

***United States v. Lara-Ruiz***, 681 F.3d 914 (8th Cir. 2012) A plea agreement provided that the government would not prosecute the defendant for any crime, other than a crime of violence if he entered a plea in the first indictment. He entered the plea and then was later prosecuted in the same district for additional offenses. One count of the second prosecution involved trading guns for drugs. Prosecuting the defendant for that offense breached the plea agreement, because that offense did not qualify as a crime of violence as envisioned by the initial plea agreement.

***United States v. Manzo***, 675 F.3d 1204 (9th Cir. 2012) The government agreed that the defendant's guideline range, after acceptance of responsibility would be at a level 31 and agreed to recommend the low end of that range. The trial court concluded that the sentencing range was actually 38 because of the grouping rules. The government recommended the low end of guideline range 34. This was a breach of the plea agreement. The trial court should have vacated the plea instead of holding the defendant to his bargain and excusing the government from having to honor its obligation.

***United States v. Lewis***, 673 F.3d 758 (8th Cir. 2012) The government breached the plea agreement by proceeding with a Rule 35 without affording the defendant the right to be present during that hearing. Because of this breach, an appeal waiver did not bar appellate review.

***United States v. Whitney***, 673 F.3d 965 (9th Cir. 2012) The government breached the plea agreement when it revealed to the court (and argued the significance of) the defendant's debriefing statements. The government's entire presentation was inconsistent with its obligation to request a "low-end" sentence.

***United States v. Alcala-Sanchez***, 666 F.3d 571 (9th Cir. 2012) The government and the defense reached a plea agreement about a particular guideline enhancement. The government then wrote a sentencing memo that recommended a higher guideline enhancement. When the defense objected, the AUSA realized her mistake and promptly withdrew the memo and told the judge that the lower enhancement was appropriate. The judge rejected the recommendation and sentenced the defendant using the higher enhancement as the Guideline calculation. The Ninth Circuit held that the government's breach was not cured by the withdrawal of the recommendation, because the trial judge was likely led to believe that the higher enhancement was probably the accurate enhancement even though it was not ultimately recommended by the government simply because of the agreement.

***United States v. Harper***, 643 F.3d 135 (5th Cir. 2011) The defendant entered into a plea agreement that included a U.S.S.G. § 1B1.8 use immunity provision that barred the government from using his debriefing statements at sentencing. The PSR calculated the drug quantity at 18 kilograms of crack cocaine. The defendant objected, claiming that the information was unreliable. The government responded, stating the information was accurate and was consistent with the defendant's debriefing. The defendant objected to the government's argument, claiming a violation of the plea agreement. At sentencing, the court heard testimony from different witnesses that the quantity involved was 18 kilograms of crack and there was no evidence of the defendant's debriefing that was introduced. The defendant maintained that the government's written response to the defendant's objections constituted a violation of the immunity agreement, notwithstanding the fact that no evidence of the debriefing was introduced at the sentencing hearing. The Fifth Circuit agreed, reversed the judgment of the trial court, and remanded for sentencing before a new judge. The Fifth Circuit held that the defendant's insistence that the information in the PSR was unreliable was not a "false statement" that justified breaching the immunity agreement.

***United States v. Roberts***, 624 F.3d 241 (5th Cir. 2010) Where the plea agreement stipulates that a particular base offense level is appropriate, the government breaches that agreement when it then advocates for the use of the career offender "enhancement" that increases the base offense level. Even though the government reserved the right to advocate for different

enhancements in this case, the use of the career offender guideline is not simply an enhancement, but a different base offense level than the level that was embodied in the plea agreement.

***United States v. Diaz-Jiminez***, 622 F.3d 692 (7th Cir. 2010) Where the government agrees to recommend a low-end sentence, it must do so and not in a "mixed" message sort of way. In this case, the government mistakenly recommended a high-end sentence and when the plea agreement was brought to the attention of the prosecutor, he apologized said that a longer sentence might be appropriate, but he would recommend low-end. The Seventh Circuit held that this conduct amounted to a breach of the agreement. Recommending leniency is an important part of the plea agreement and that cannot be done as the prosecutor did it in this case. Remand to a different judge was required.

***United States v. Dawson***, 587 F.3d 640 (4th Cir. 2009) The government's failure to abide by the plea agreement and advocate for a minor role adjustment amounted to plain error. There was nothing in the record to justify the government in reneging on its agreement to recommend the two-point reduction.

***United States v. Lovelace***, 565 F.3d 1080 (8th Cir. 2009) If a defendant appeals the government's breach of a plea agreement after failing to challenge the breach in the lower court and after signing an appeal waiver, the appellate court will consider the allegation of breach under the plain error standard of review.

***United States v. Cudjoe***, 534 F.3d 1349 (10th Cir. 2008) The government agreed to stand mute at sentencing after the defendant made his recommendation. At sentencing, the government urged the court to impose a sentence that would protect the community "in any and all future events." This argument amounted to a violation of the plea agreement. The Tenth Circuit remanded the case for re-sentencing before a different judge.

***United States v. Villa-Vazquez***, 536 F.3d 1189 (10th Cir. 2008) The government is bound by the terms of a plea agreement, even if the court has not yet accepted the plea agreement if the defendant has entered his guilty plea. In this case, the government agreed to recommend a reduction for acceptance of responsibility and no upward departure. It violated both facets of the agreement. The fact that the district court deferred accepting the plea agreement did not alter the government's obligation to comply with its obligations under the agreement that it reached with the defendant.

***United States v. Mosley***, 505 F.3d 804 (8th Cir. 2007) The government breached the plea agreement by arguing that the defendant should not receive acceptance of responsibility based on her pre-plea statements. The agreement stated that "as of now" the defendant was entitled to the reduction for acceptance of responsibility. Because the government was then aware of her statements minimizing her role in the offense, the government could not advocate for a denial of the reduction at sentencing based on those statements. Harmless error analysis may not be invoked in this situation; thus, it does not matter if the trial judge states that his decision was not based on the prosecutor's recommendation. A remand to a different judge was required.

***United States v. Griffin***, 510 F.3d 354 (2d Cir. 2007) The plea agreement provided that the government would recommend a three-point acceptance of responsibility reduction. In response to the defendant's statements to the probation officer minimizing his guilt, the government filed a brief that reiterated its recommendation, but stated that it was troubled by the defendant's objections to the presentence report. The Second Circuit held that this amounted to a breach of the plea agreement. The government's "skepticism" was inconsistent with its obligation to advocate for the acceptance of responsibility reduction. A remand to a different judge was required so that the government could comply with its obligation.

***United States v. Jordan***, 509 F.3d 191 (4th Cir. 2007) In the plea agreement in a drug conspiracy prosecution, the government agreed not to prosecute the defendant in the future for any "conduct" set forth in the indictment to which he was entering a guilty plea. Inconsistently, the agreement also stated that the defendant could be prosecuted for different "crimes" that were not the subject of the indictment to which he was entering his plea. The Fourth Circuit concluded that the government could not prosecute the defendant for a murder that was "conduct" that was recited in the original drug conspiracy indictment.

***United States v. Yah***, 500 F.3d 698 (8th Cir. 2007) In the plea agreement, the government agreed to recommend the low end of the Guidelines. Because of the wording of the plea agreement, this was not conditioned on defendant's acceptance of responsibility, or any other condition precedent. The defendant committed additional crimes after the plea (but before sentencing) and the government argued for a high-end sentence. The Eighth Circuit reversed, holding that the language of the plea agreement obligated the government to recommend a low-end sentence.

***United States v. Vandam***, 493 F.3d 1194 (10th Cir. 2007) The government breached its plea agreement by failing to recommend a sentence at the low end of the guideline range. Though the sentencing court calculated a guideline range lower than the range envisioned by the government, it was still obligated to recommend a low-end sentence of the applicable guideline range. Interestingly, the court held that the government's failure to comply with his obligation may (almost) be deemed harmless error, because of the institutional harm caused by the government's breach. Thus, even if the court sentenced the defendant at the low end of the range (as the court did in this case), the appellate court will remand so that the government can fulfill its obligation.

***United States v. Cachucha***, 484 F.3d 1266 (10th Cir. 2007) The prosecutor's protestation that the "agreed-upon" sentence was way too low amounted to a breach of the plea agreement, even though he begrudgingly argued for that sentence, in the end. The prosecutor owes the defendant a duty to pay more than lip service to a plea agreement.

***United States v. Harris***, 473 F.3d 222 (6th Cir. 2006) The defendant was charged with counterfeiting and entered into a plea agreement that provided that he would be debriefed and fully reveal his knowledge of counterfeiting operations, in exchange for which the government would not bring any additional charges. Another investigation was ongoing unbeknownst to the AUSA and

the defendant (apparently). An investigator approached the defendant and asked him some questions. He declined to respond. The government then indicted the defendant on additional charges. The government claimed that the attempted interview amounted to a “debriefing” and because the defendant did not cooperate, the government could bring additional charges. The Sixth Circuit remanded for additional hearings on the nature of the attempted interview and whether the defendant was made aware that this was his debriefing opportunity. If he did not know, then the government was obligated to afford him an opportunity to debrief and thereby avoid new charges.

***United States v. Scott***, 469 F.3d 1335 (10th Cir. 2006) After agreeing to a guideline calculation that provided for two enhancements, but not others, the government, in response to questioning by the trial judge noted that other enhancements might also apply. This violated the plea agreement and required that the case be remanded for re-sentencing.

***Davis v. Woodford***, 446 F.3d 957 (9th Cir. 2006) The defendant had previously entered a guilty plea to eight robbery counts. When that plea was entered, the state prosecutor expressly stated that the eight robbery convictions would be treated as one conviction for subsequent recidivist purposes. Later, the defendant was sentenced in a new case and the prior convictions were treated as eight prior convictions. The Ninth Circuit held that the earlier plea bargain governed the way in which the prior counts could be considered in the new case.

***United States v. Fowler***, 445 F.3d 1035 (8th Cir. 2006) The government agreed to advocate for a sentence under a particular guideline range, but, at sentencing, advocated the application of the career-offender enhancement. This violated the plea agreement. The Eighth Circuit decided to remand to the district court to fashion an appropriate remedy.

***United States v. Roe***, 445 F.3d 202 (2d Cir. 2006) If there is no reference in the plea agreement to the government’s obligation to file a substantial assistance downward departure, the court will rarely inquire into the government’s failure to do so. But where the plea agreement does state that the government will file such a motion if it determines that the defendant has provided substantial assistance, a court’s review is more searching and focuses on whether the government has acted in good faith. If the government is dissatisfied with the defendant’s proffers, this may justify the refusal to move for a downward departure. However, if the information that prompts the government not to file the motion was known prior to the execution of the plea agreement, this would not be acting in good faith, because when it entered into the agreement, the government already knew it would not file the motion. That was the situation in this case. Prior to entering the plea agreement, the government was skeptical about the defendant’s cooperation. No further efforts at cooperating occurred after the date of the agreement. Based on this limited information, a hearing was required to determine whether the government breached the agreement, or acted in bad faith.

***United States v. Transfiguracion***, 442 F.3d 1222 (9th Cir. 2006) The plea agreement provided that the defendant would enter a guilty plea to one count of importation of drugs (from California to Guam) and in exchange, the defendant would not be prosecuted for any other offenses. Later, the Ninth Circuit held that the transfer of drugs from California to Guam does not qualify as “importation” under 21 U.S.C. § 952. The government then sought to cure the “mutual mistake of fact” in the plea agreement by bringing other charges against the defendant. The Ninth Circuit held that the non-prosecution clause of the agreement was still enforceable, and no additional charges could be brought against the defendant. The government’s failure to provide for the contingency that the importation prosecution might fail barred it from claiming that it could be excused from performing its obligation under the contract. See also United States v. Barron, 172 F.3d 1153 (9th Cir. 1999).

***United States v. O’Neill***, 437 F.3d 654 (7th Cir. 2006) What should a judge do when she decides that she is not going to accept a “binding” plea pursuant to Rule 11(c)(1)(c) (formerly known as 11(e)(1)(C))? In this case, the Seventh Circuit offered a number of different opinions on the subject, concluding, that “the less said, the better.” When initially provided with the binding plea, the court rejected it as a binding plea, explaining that maybe it was appropriate, maybe not, but that she was not going to be bound by the specific sentence envisioned by the agreement. The parties then reached a new agreement which appeared to reflect the judge’s “range” for the appropriate sentence. The court acknowledged that in evaluating a binding plea agreement, the court should take an active role in evaluating the plea agreement, but if the plea is ultimately rejected, the court may take no role in further plea negotiations, even though the comments made by the judge in rejecting the binding plea may lead the parties to refine the agreement in accordance with the comments of the court. There is no easy solution to this quandary, Judge Posner, concurring, acknowledged.

***United States v. Floyd***, 428 F.3d 513 (3d Cir. 2005) The government agreed to move for a downward departure if the defendant provided substantial assistance. The plea agreement reserved the decision whether to file such a motion to the government’s discretion. At sentencing, the government acknowledged that the defendant provided substantial assistance, but refused to move for a downward departure because the “charge bargain” ended up being such a good deal for the defendant. The Third Circuit held that this amounted to a breach of the plea agreement. Refusing to move for a downward departure on the basis of something other than the nature and quality of the assistance was not part of the bargain reached between the defendant and the government.

***United States v. Hodge***, 412 F.3d 479 (3rd Cir. 2005) The government breached its plea agreement when it advocated a sentence that suggested to the trial court that a life sentence was appropriate. The prosecutor queried, “whether the community at large had to wonder, once the defendant’s sentence is completed and he’s released back into the community, whether he made a genuine change or not.” He also argued that the defendant “had his chance to be a positive influence in the community.” Given the government’s agreement to recommend a Guideline sentence (which was less than life), the argument breached this agreement.

***United States v. Munoz***, 408 F.3d 222 (5th Cir. 2005) The government entered into a plea agreement that provided for a specific application of the sentencing guidelines. The agreement did not anticipate an "abuse of position of trust" enhancement. The PSR recommended that the enhancement be applied. At sentencing, the government argued for the enhancement. This violated the plea agreement. Though this enhancement was not mentioned in the plea agreement, the parties agreed to a specific application of the guidelines that did not envision this enhancement and, therefore, arguing for the enhancement violated the agreement.

***United States v. Vaval,*** 404 F.3d 144 (2d Cir. 2005) The plea agreement envisioned a Criminal History Category II and a Role in the Offense enhancement of two points. The government agreed not to take a position about where in the guideline range the sentence should be. At sentencing, the government pointed out that the role should actually have been a three-point enhancement and that the Criminal History should be III. In addition, after the defendant asked for mercy, the AUSA described the defendant's conduct as appalling and that he was a persistent recidivist and "I ask the court to consider all of that when making the court's decision about where to sentence this defendant." This amounted to a breach of the plea agreement. Though the plea agreement permitted the government to advise the court about the facts of the case and the defendant's background, there is a difference between providing information and advocating a stiff sentence. Re-sentencing before a different judge was required.

***United States v. Thompson***, 403 F.3d 1037 (8th Cir. 2005) The defendant and the government agreed that the appropriate Guideline range was § 2K2.1(a), but the PSR recommended the application of §2K2.1(c). The prosecutor, at sentencing, simply stated, in essence that he was bound by the agreement, but the facts supported the probation officer's assessment. The Eighth Circuit held that the prosecutor did not act in bad faith, but the plea agreement did not permit him to advocate for the higher sentence.

***United States v. Copeland***, 381 F.3d 1101 (11th Cir. 2004) The defendant signed a plea agreement that obligated the government not to bring any additional charges based on information that he provided to the government. Thereafter, the defendant was charged with firearms offenses that significantly increased his sentence. He challenged the firearms charges on the basis that the parties intended that conduct to be covered by the plea agreement. The government disputed this contention. The Eleventh Circuit held that plea agreements must be viewed against the background of the negotiations and should not be interpreted to directly contradict an oral understanding. The court must also consider whether the government's actions are inconsistent with what the defendant reasonably understood when he entered his guilty plea. In this case, there was ambiguity in the plea agreement, because it was not clear whether the defendant had to have already provided the information (that was considered immunized) or whether he could provide the information after the plea agreement was signed. The opinion also discusses the concept that a plea agreement that envisions being debriefed creates an obligation on the part of the government to actually conduct a debriefing. See United States v. Ringling, 988 F.2d 504 (4th Cir. 1993) and United States v. Laday, 56 F.3d 24 (5th Cir. 1995). Ultimately, the court remanded the case to the lower court for further inquiry into the defendant's reasonable belief at the time he signed the plea agreement.

***United States v. Graves***, 374 F.3d 80 (2d Cir. 2004) The plea agreement provided that the defendant would be sentenced to fifteen years. However, there was an oral understanding between the parties that if he cooperated enough, he could receive a shorter sentence. The Second Circuit invalidated the guilty plea (which the defendant attempted to withdraw after he was not allowed to engage in proactive cooperation): "If Graves was induced to enter into the plea agreement by representations that were made and not intended to be carried out, that sort of improper inducement might well provide a basis for invalidating the agreement, or at least for permitting withdrawal of the plea."

***United States v. White***, 366 F.3d 291 (4th Cir. 2004) The defendant entered into a guilty plea but claimed in a § 2255 petition that he was orally assured by his attorney and the AUSA that he could appeal the denial of the suppression motion. Both parties in the § 2255 proceeding agreed that defense counsel made this assurance. Both parties also agreed that this rendered the plea involuntary, because the defendant did not understand the consequences of his plea. The Fourth Circuit held that the trial court should have conducted a full evidentiary hearing to determine if the government did, in fact, orally assure the defendant that he could enter a conditional plea.

***United States v. Dewitt***, 366 F.3d 667 (8th Cir. 2004) The government agreed to a specific drug quantity in the plea agreement but offered evidence in support of the probation officer's higher calculation. This amounted to a violation of the plea agreement. Though the trial court was not bound by the plea agreement and could have found a greater quantity of drugs, this did not excuse the government's failure to abide by its agreement.

***United States v. Gonczy,*** 357 F.3d 50 (1st Cir. 2004) Though the government was required to recommend a sentence at the low end of the sentencing guidelines, at sentencing, the AUSA stressed the serious nature of the crime, the defendant's unrepentant behavior and the fact that many lives had been ruined by the defendant's conduct. Though paying lip service to the "low end" recommendation, this argument violated the spirit of the plea agreement. Because the defendant waives numerous rights when he enters a guilty plea, "the government is required to meet the most meticulous standards of both promise and performance."

***United States v. Rivera***, 357 F.3d 290 (3rd Cir. 2004) The plea agreement provided for a stipulation of the drug quantity and a three-level reduction for acceptance of responsibility. There was no reference to a Role enhancement, but the plea agreement did provide that the applicable guideline total offense level would be 35. The PSR recommended a four-point leadership role enhancement and the government argued that this was not precluded by the plea agreement. The government was incorrect.

The total offense level was the final guideline range that the parties agreed to in the plea bargain. To the extent that the plea agreement suffered from “poor draftsmanship,” the agreement would be construed against the government.

***United States v. Bennett***, 332 F.3d 1094 (7th Cir. 2003) Where a plea agreement is part of a package deal involving other defendants, or third parties, the trial court should be apprised of the existence of this “package” and should ensure that the plea has been entered into voluntarily by the defendant.

***United States v. Palladino***, 347 F.3d 29 (2d Cir. 2003) The plea agreement included an estimate by the government about the expected sentencing guideline calculation. The probation officer noted that an unanticipated enhancement might apply. The government then furnished additional evidence to the probation officer – evidence that it had when it entered the plea agreement – and the district court concluded that based on that evidence, the enhancement should be applied. The Second Circuit holds that this amounted to a breach of the plea agreement. The estimated offense level in the plea agreement was expressly based on information known to the government at the time of bargaining. Absent new information, the government should not be allowed to advocate for a higher offense level.

***Brown v. Poole***, 337 F.3d 1155 (9th Cir. 2003) The prosecutor stated at the time of the plea that the defendant would only be required to serve half her sentence if she had no disciplinary infractions in prison. Seventeen years later, she filed for a writ to enforce this provision. The Ninth Circuit agreed that the writ had to be granted. The only appropriate remedy was specific performance, and release from prison.

***United States v. Gebbie,*** 294 F.3d 540 (3rd Cir. 2002) When a plea agreement refers to “the government” or “The United States,” it will be construed as binding on U.S. Attorneys in every federal district in the nation (though not necessarily on other agencies, such INS). Only when the plea agreement unambiguously refers to the local U.S. Attorney will the breadth of the plea agreement be narrowed to that district. In this case, the plea agreement expressly stated that it was binding on two U.S. Attorneys’ offices, but then added that the defendant could still be prosecuted for other crimes that the United States discovers by independent investigation. This ambiguity in the plea agreement would be construed against the government.

***United States v. Quach***, 302 F.3d 1096 (9th Cir. 2002) If the government agrees in a plea agreement to recommend a § 5K1.1 substantial assistance departure if the defendant cooperates, then the government must fully assess the defendant’s cooperation at the time of sentencing, even if the defendant’s cooperation has not finished, as of that time.

***United States v. Barnes***, 278 F.3d 644 (6th Cir. 2002) The plea agreement provided that the government would request a sentence at the low end of the guidelines. The government failed to do so, but the defendant failed to object. Nevertheless, the government’s failure to comply with its obligation amounted to plain error. In Santobello v. New York, 404 U.S. 257 (1971), the Supreme Court held that a defendant was entitled to relief, even if the government’s obligation involved nothing more than a “recommendation” which the trial court said he would disregard in any event.

***United States v. Franco-Lopez***, 312 F.3d 984 (9th Cir. 2002) The government agreed to recommend application of the safety valve, if the defendant qualified, according to the probation department and the government was satisfied that the defendant truthfully cooperated. The plea agreement also provided that the government would limit its argument about drug relevant conduct. The government then represented to the probation officer that the defendant was an organizer – including an organizer of a smuggling venture that was part of the “excluded” relevant conduct. The Ninth Circuit held that the government was bound to maintain neutrality with respect to matters that would impact on the safety valve determination. Recommending a role enhancement precluded application of the safety valve.

***United States v. Gilchrist***, 130 F.3d 1131 (3rd Cir. 1997) The government and the defense entered into a Fed. R. Crim P. Rule 11(e)(1)(C) plea agreement that provided that the sentence would be nine months incarceration, one month of home detention and a $10,000 fine. The court sentenced the defendant in accordance with the agreement but added a one-year period of supervised release. This amounted to a breach of the plea agreement and the case had to be remanded to provide for specific performance of the plea agreement, or to allow the defendant to withdraw his plea.

***United States v. Mitchell***, 136 F.3d 1192 (8th Cir. 1998) The government breached its plea agreement to move for a § 5K1.1 downward departure of up to 50%. At sentencing, after filing the motion, the government stated that the reduction in charges was a substantial benefit to the defendant. The government also introduced victim impact evidence that clearly counseled against a reduction in the defendant's sentence. These tactics of the government violated the "spirit" of the plea agreement.

***United States v. Sandoval-Lopez***, 122 F.3d 797 (9th Cir. 1997) The defendants were charged with drug offenses and § 924(c) charges. The parties entered into a plea agreement that provided that the defendants would plead guilty to the gun counts, agree to certain forfeitures, and the government would dismiss the drug counts. The pleas were then entered. After the Supreme Court decided Bailey v. United States, 116 S. Ct. 501 (1995), it was clear that the defendants had actually not committed the § 924(c) offenses. They successfully collaterally attacked those convictions. The government moved to reinstate the drug counts on the basis that the defendants breached their plea agreements. The Ninth Circuit rejected the government's argument: the defendants did what they agreed to do (they entered guilty pleas). They did not agree to not challenge the convictions at a later time. Having lived up to their side of the bargain, the defendants had the right to insist that the government honor its obligation, the dismissal of the drug charges.

***United States v. Johnson***, 132 F.3d 628 (11th Cir. 1998) The plea agreement provided that the government agreed that 100 pounds of marijuana should be attributed to the defendant. The day after the plea was entered, the government learned from debriefing an informant that 1,400 pounds of marijuana was attributable to the defendant. The presentence report relied on the

greater amount. At sentencing, the government stated that the presentence report contained correct information but did not expressly advocate for the greater amount. This conduct amounted to a violation of the plea agreement. The appropriate remedy was re-sentencing before a different judge.

***United States v. Wolff***, 127 F.3d 84 (D.C. Cir. 1997) The plea agreement provided that the government would recommend a three-level reduction for acceptance of responsibility. The government recommended no reduction, however, because it discovered various efforts the defendant made to obstruct justice. However, the government should have moved to set aside the agreement, not simply breached the agreement at sentencing. The appropriate remedy was to remand for re-sentencing -- on all issues -- and not reassignment to a new judge.

***United States v. Brye***, 146 F.3d 1207 (10th Cir. 1998) The government agreed that the defendant could request a downward departure under § 5K2.0 and "the government would defer to the Court's determination of this point." At sentencing, however, the government argued against the departure. On appeal, the government claimed that "to defer" meant that the government would agree to submit the question of a departure to the court. Of course, the sentencing court already had the authority to consider this motion. The government's argument against the motion violated the plea agreement. Remand to a different sentencing judge was required.

***United States v. Carrero***, 77 F.3d 11 (1st Cir. 1996) In the plea agreement, the government agreed to recommend no adjustment in the Guidelines for the defendant's role. At sentencing, the government said that it would take no position. This breached the plea agreement. The government did not agree to remain neutral; it agreed to recommend no role adjustment. The court held that the defendant should be resentenced by a different judge.

***United States v. Clark***, 55 F.3d 9 (1st Cir. 1995) The government entered into a plea agreement which required it to recommend a three-level reduction for acceptance of responsibility. After the plea was entered, the government learned that the defendant, before the plea, had induced his co-defendants to commit perjury, thus authorizing an obstruction of justice enhancement. In its sentencing memorandum, the government noted this fact and suggested that the reduction may not be appropriate in light of the obstruction of justice enhancement. This violated the plea agreement. It is improper for the prosecutor to inject material reservations about the agreement to which the government has committed itself. The fact that the government was not aware of the obstruction of justice conduct previously does not entitle it to withdraw from its agreement. On remand, the defendant was entitled to specific performance of the plea agreement before a different sentencing judge.

***Bemis v. United States***, 30 F.3d 220 (1st Cir. 1994) The petitioner claimed that he had an oral agreement with the government to enter the witness protection program. Though he testified at the Rule 11 guilty plea that there were no additional promises which induced him to enter the plea, he was entitled to a hearing to establish that this promise was made. Moreover, if it was made, it could be enforced, even though the prosecutor may have lacked the authority to make such a promise.

***United States v. Mercedes-Amparo***, 980 F.2d 17 (1st Cir. 1992) The government was obligated, pursuant to the plea agreement, to recommend a sentence within the applicable guideline range. At sentencing, the government made no recommendation and the court departed upward. Though the defendant did not complain at trial about the government's failure to honor its agreement, the error would be considered by the appellate court and required that the sentence be vacated.

***United States v. Canada***, 960 F.2d 263 (1st Cir. 1992) The plea agreement provided that the government would recommend a sentence of thirty-six months. At sentencing, however, the government urged the court to adjust the guideline range upward two levels to reflect defendant's role in the offense and the prosecutor repeatedly urged the court to "send a strong message" and otherwise impose a harsh sentence. The prosecutor also failed to fully reveal the extent of defendant's cooperation, as required by the plea agreement. This conduct on the part of the prosecutor violated the plea agreement. Paying mere lip service to the plea agreement is not sufficient; the prosecutor's reference to the plea agreement was grudging and apologetic. The most meticulous standards of both promise and performance must be met by prosecutors in plea bargaining.

***United States v. Kurkculer***, 918 F.2d 295 (1st Cir. 1990) The First Circuit holds that the remedy for a prosecutor's breach of a plea agreement cannot be requiring the defendant to replead. At the defendant's sentencing, the prosecutor recommended the maximum sentence, instead of the lower one he had agreed to recommend. The defendant requested sentencing before a different judge; the judge gave the defendant the opportunity to withdraw his guilty plea. The defendant should have been given the right to be sentenced by a different judge. Where specific performance is "feasible" the plea should not be disturbed, rather, it should be enforced.

***United States v. Fagge***, 101 F.3d 232 (2d Cir. 1996) As part of his initial debriefing, the defendant entered into a "proffer" agreement with the government which provided that nothing he said would be used at sentencing to enhance his sentence. Later, he entered a plea agreement which contained no such limitation and expressly provided that there were no other agreements between the defendant and the government. The plea agreement superseded the proffer agreement and the defendant's statements during the proffer session could be used to enhance his sentence.

***United States v. Pollack***, 91 F.3d 331 (2d Cir. 1996) During his debriefing, the defendant neglected to mention that he was the subject of an unrelated arson investigation. This did not violate the plea agreement, as argued by the government because there was nothing in the agreement that expressly required the defendant to disclose all other cases in which he was being investigated.

***United States v. Russo***, 801 F.2d 624 (2d Cir. 1986) A plea agreement between the United States Attorney's office and the defendant may be binding upon the United States Attorney's office in another district even in the absence of an express

statement in the agreement to that effect. The plea agreement is binding on another office if it affirmatively appears that the agreement contemplates broader restrictions.

***United States v. Nolan-Cooper***, 155 F.3d 221 (3rd Cir. 1998) The government agreed not to oppose either the defendant's request that the "special skill" enhancement not apply, or that she receive the maximum acceptance of responsibility reduction. The government lived up to neither promise: the government presented evidence that was inconsistent with both positions. That is, it presented evidence that supported the special skill enhancement and that negated the applicability of the acceptance of responsibility reduction.

***United States v. Moscahlaidis***, 868 F.2d 1357 (3rd Cir. 1989) The plea agreement provided that the government would "take no position" regarding a custodial sentence for the defendant. In its sentencing memorandum, the government described the conduct of the defendant and stated that this evidence reflected "the depth of [the defendant's] greed and moral bankruptcy . . . it is well within the reach of most white-collar criminals to assume an air of irreproachable virtue especially when they are about to be sentenced. [The defendant] cannot maintain even the air of irreproachable virtue with any degree of legitimacy . . . this demonic pursuit demonstrates his utter contempt for the welfare of his fellow man . . . to preserve his fetid empire, he relentlessly pursued a course of corruption and obstruction of justice . . . the United States will make no recommendation as to an appropriate sentence." This sentencing memorandum violated the government's agreement to take no position as to a custodial sentence for the defendant.

***United States v. McQueen***, 108 F.3d 64 (4th Cir. 1997) The government breached its oral plea agreement to recommend acceptance of responsibility, as well as a 63-month sentence. Even though the defendant did not object at sentencing, the government's failure to live up to its obligation was plain error.

***United States v. Beltran-Ortiz***, 91 F.3d 665 (4th Cir. 1996) If the plea agreement anticipates that the government will debrief the defendant so that he could qualify for the safety valve (U.S.S.G. §5C1.2), then the government must, in fact, give the defendant the opportunity to provide to the government information about the offense and the related course of conduct.

***United States v. Peglera***, 33 F.3d 412 (4th Cir. 1994) Though the plea agreement provided that the government would recommend the low end of the guideline range (and the trial judge was aware of this provision), the government failed to do so at sentencing. The government contended that the defendant's statements at sentencing (where he claimed that he only distributed powder cocaine, not crack) were not true and therefore, the government was not bound by its pledge to recommend low end. Yet, the plea agreement specifically provided that the defendant could argue for the applicability of the powder guideline, rather than the crack guideline. Thus, this did not amount to a changed circumstance which would absolve the government from its duty under the plea agreement.

***United States v. Dixon***, 998 F.2d 228 (4th Cir. 1993) The defendant's plea agreement provided that if the defendant cooperated in the investigation or prosecution of any cases, the government would move for a downward departure. The defendant aided in the investigation of another case, but the government wanted to wait until he testified at the other trial. This was a breach of the plea agreement. The government's discretion in the plea agreement was limited to deciding whether the defendant provided substantial assistance (which the government agreed he had done), and not whether to file the §5K1.1 motion. Because the defendant provided substantial assistance – a fact which the government did not dispute – the government was obligated to file the motion for a downward departure.

***United States v. Ringling***, 988 F.2d 504 (4th Cir. 1993) The plea agreement provided that the government would inform the court of the defendant's cooperation. No explicit promise was made to move for a downward departure, however. Nevertheless, this agreement implicitly required the government to at least interview the defendant so that he would be able to provide information. Failing to interview the defendant deprived him of the benefit of the bargain to which he was entitled.

***United States v. Garcia***, 956 F.2d 41 (4th Cir. 1992) As part of the plea agreement, the government told the defendant that he would not have to cooperate. This was not made an explicit part of the plea agreement, but was a provision contained in a cover letter sent to the defendant's counsel. After the plea was taken, the government brought the defendant to the grand jury and immunized him. He refused to testify. He was held in contempt for eighteen months. The Fourth Circuit granted his §2255 petition. The failure of the government to include the no-cooperation provision in the plea agreement was its oversight, or overreaching. All parties agreed that it was a part of the agreement which was actually reached. The proper remedy is specific performance. The defendant would re-plead, again get the fifteen-year sentence, but be given credit for the eighteen months he served in dead time on the contempt case. ***United States v. Harvey***, 791 F.2d 294 (4th Cir. 1986) In this plea agreement, it was agreed that "the Eastern District of Virginia further agrees not to prosecute the defendant for any other possible violation of criminal law arising from the offenses set out in the indictment or the investigation giving rise to those charges." The Fourth Circuit holds that this language is sufficiently ambiguous that it will prevent any further prosecution from any agency of the government in any district in the United States.

***United States v. Crowell***, 60 F.3d 199 (5th Cir. 1995) The government and the defense entered into a binding plea agreement. The district court conditionally accepted the defendant's guilty plea, but later allowed him to withdraw it when the judge concluded that the possible sentence (there was a five-year cap) was not sufficient. The parties then began to re-negotiate and approached the court before the agreement was reached, with their tentative proposal. The district court indicated that a longer sentence would be necessary than was envisioned by the first plea. The government and the defendant then drafted an agreement. Once again, the court conditionally accepted the guilty plea, and again allowed the defendant to withdraw the plea when he rejected the binding sentence which he calculated under the Guidelines for the mail fraud offenses. The defendant was

then tried and convicted (on mail fraud and money laundering counts) and the court sentenced the defendant to a total of ten years imprisonment. The court of appeals concluded that the trial court improperly participated in the plea negotiations when he indicated what he thought was necessary in terms of the sentence prior to the time the second agreement was reached. This violation does not require that the verdict be set aside, or that a specific sentence should be entered. Rather, the remedy is to remand the matter for resentencing by a different judge.

***United States v. Laday***, 56 F.3d 24 (5th Cir. 1995) When the government agrees to move for a downward departure pursuant to §5K1.1 if the defendant provides substantial assistance, the government breaches the agreement if it fails to interview the defendant. That is, the government must give the defendant the opportunity to provide substantial assistance.

***United States v. Goldfaden***, 959 F.2d 1324 (5th Cir. 1992) The government agreed to make no recommendation as to the defendant's sentence. Despite this pledge, the government wrote several letters to the probation officer advocating the use of certain Guideline ranges. This was a violation of the agreement. The fact that the government recommended guideline ranges, rather than a specific number of months or years is inconsequential. On remand, if the court concludes that specific performance is the appropriate remedy, the defendant must be sentenced by a different judge.

***United States v. Birdwell***, 887 F.2d 643 (5th Cir. 1989) The defendant pled guilty in federal court in partial consideration of a plea offer made by state authorities in a connected case. The State subsequently reneged on its agreement. Though the federal court cannot require the State to honor its agreement, since the state offer was a significant factor in inducing the defendant to plead guilty in federal court, that plea was tainted, and the defendant would be given an opportunity to replead.

***United States v. Crowell***, 997 F.2d 146 (6th Cir. 1993) The trial court permitted the government to withdraw from a plea agreement without showing by a preponderance of the evidence that there was a substantial breach on the part of the defendant. This was error.

***United States v. Barrett***, 982 F.2d 193 (6th Cir. 1992) Before the defendant decided whether to plead or not, the trial court held a conference call with the prosecution and defense counsel to resolve a dispute concerning the sentencing guidelines. The defense counsel advised the court that the minimum was probably seven years. The judge responded that there was no way he would impose such a light sentence. The judge also told the attorney that he thought there was no defense and that he had heard that the investigator had found none of the defendant's witnesses (which didn't surprise him). The defendant entered a guilty plea shortly thereafter. The Sixth Circuit reversed: the judge's comments amounted to improper participation in the plea negotiation process. Note that pursuant to Davila, automatic reversal is no longer appropriate for a Rule 11 violation.

***United States v. Fitch***, 964 F.2d 571 (6th Cir. 1992) Though defendant lied during his de-briefing, attempting to shift blame to another person, this did not amount to a material breach of his plea agreement. Even if this was a material breach, the government's remedy was to prosecute the defendant for perjury.

***United States v. Moore***, 916 F.2d 1131 (6th Cir. 1990) Merely complaining that a plea agreement was not filed until the date set for trial is not an adequate reason for rejecting a plea agreement.

***United States v. Ritsema***, 89 F.3d 392 (7th Cir. 1996) The district court initially accepted the defendant's guilty plea and imposed sentence and granted the government's motion to dismiss the remaining counts. On appeal, the Seventh Circuit reversed and remanded for re-sentencing, a decision which necessitated a considerably shorter sentence. On remand, the district court announced that the plea agreement would not be accepted, and the dismissed counts would proceed. The Seventh Circuit reversed. Once the plea agreement was accepted, the court could not later change its mind, even if the appellate court reversed the initial sentence that was imposed.

***United States v. Verrusio***, 803 F.2d 885 (7th Cir. 1986) The prosecution sought to try the defendant after a plea agreement had purportedly disposed of the charges. The defendant sought to prevent his indictment, but the Seventh Circuit holds that a defendant has no due process right to be free from indictment; the defendant's due process rights are triggered by the trial. Thus, the government must establish that the defendant has breached his part of the agreement prior to trial, but not prior to going to the grand jury. In this case, the hearing which ultimately was conducted to determine whether the defendant had breached his plea agreement was defective in two respects: First, the court improperly thrust the burden on the defendant to prove that he had not breached the plea agreement when in fact the burden is on the government to prove that a breach has occurred. Second, the hearing consisted primarily of inadmissible hearsay. The Seventh Circuit rejects the defendant's contention that prior to indictment on the charges for which he had already entered a plea, if the government's contention is that the breach consisted of perjury before the grand jury, the government must first obtain a conviction for perjury. The court disagrees. The proof that the defendant had breached his plea agreement does not have to rise to proof beyond a reasonable doubt that he committed perjury. The government need only prove a breach by a preponderance of the evidence.

***United States v. Anzalone***, 148 F.3d 940 (8th Cir. 1998) The government agreed to file a §5K1.1 motion in light of the defendant's substantial assistance. After entering the plea, the defendant engaged in additional criminal conduct. This did not justify the government's decision not to file the §5K1.1 motion. Even though the agreement provided that any breach of the agreement by the defendant would support the government's refusal to make any motion it was otherwise bound to make, this did not apply to the §5K1.1 motion.

***United States v. Barresse***, 115 F.3d 610 (8th Cir. 1997) In a plea agreement, the government usually reserves for itself the discretion to move for a U.S.S.G. §5K1.1 downward departure if the defendant provides substantial assistance. In this case,

however, the plea agreement stated that the government would move for a downward departure if the defendant provided substantial assistance. The defendant did, but the government didn't. This amounted to a violation of the plea agreement.

***United States v. Van Thournout***, 100 F.3d 590 (8th Cir. 1996) Absent an express limitation, any promises made by an Assistant United States Attorney in one district will bind an Assistant United States Attorney in another district. Here, the assistant in the District of Wyoming entered into an agreement with the defendant that any sentence imposed in that district would be concurrent with any sentence imposed in the Iowa district court, where the defendant was awaiting sentencing. The Iowa AUSA recommended a consecutive sentence. This was a breach of the agreement and required that the case be remanded for resentencing with the proper recommendation by the government.

***United States v. Mendoza-Alvarez***, 79 F.3d 96 (8th Cir. 1996) When the government agrees in the plea agreement to remain silent at sentencing, this includes remaining silent when asked a legal question, or asked for the government's "position" by the court.

***United States v. Feldewerth***, 982 F.2d 322 (8th Cir. 1993) The defendant was given transactional immunity (a non-prosecution agreement) if he would tell the police who was leaking information to him from the law enforcement community. He agreed, and then revealed that no one was supplying him information. The government prosecuted the defendant, claiming that he was not truthful and relied on the information supplied by a confidential informant who alleged that the defendant did have an inside source. The trial court erred in not requiring the government to produce this confidential informant.

***United States v. Van Horn***, 976 F.2d 1180 (8th Cir. 1992) The government agreed not to move for an upward departure from the range calculated by the probation office. The probation department recommended a certain range, but the court determined that the appropriate range was ten levels lower. The government then urged an upward departure. This violated the plea agreement. Just because one aspect of the pre-sentence report was rejected, the government was not permitted to move for an upward departure.

***United States v. Olesen***, 920 F.2d 538 (8th Cir. 1990) After unconditionally accepting a plea agreement which defined a specific sentence, the trial court later modified the plea agreement. Once the court accepts a plea agreement under Rule 11(e)(2), however, it may not reject or modify it. If the government or the court later rejects the plea, the defendant may seek specific performance or the right to withdraw the plea.

***United States v. Vogt***, 901 F.2d 100 (8th Cir. 1990) The government delayed ten weeks in complaining about the defendant's alleged breach of his plea agreement and thereby waived its right to breach its obligation.

***Brunelle v. United States***, 864 F.2d 64 (8th Cir. 1988) Resentencing before a different judge was the only appropriate remedy in light of the government's breach of its agreement to recommend only "an unspecified period" of incarceration.

***United States v. Johnson***, 861 F.2d 510 (8th Cir. 1988) The government breached an agreement not to prosecute the defendant. The trial court ordered suppression of certain evidence; the Eighth Circuit holds that an evidentiary hearing must be conducted to decide whether specific performance – that is dismissal of the indictment – is the appropriate remedy.

***United States v. McCray***, 849 F.2d 304 (8th Cir. 1988) The prosecutor agreed to "stand mute" at sentencing but then, after sentence, told the Court that it would resist any request for early parole. The Eighth Circuit holds that the defendant is entitled to resentencing as a result of the government's comment.

***Thomas v. I.N.S.***, 35 F.3d 1332 (9th Cir. 1994) An assistant United States Attorney entered into an agreement with an informant that the "government" would not oppose his application for discretionary relief from deportation. The INS did oppose the application. This violated the agreement: An AUSA can bind the INS. Using ordinary principles of agency, such authority is implicit in the prosecutor's authority to prosecute for all offenses against the United States. A U.S. Attorney's authority to commit the government not to oppose deportation as part of a plea bargain is incidental to his or her statutory authority to prosecute crimes.

***United States v. Myers***, 32 F.3d 411 (9th Cir. 1994) The government agreed to recommend low end of the applicable guideline range. The court was aware of this provision of the plea agreement, but the government failed to make the recommendation. This was a violation of the plea agreement, and the case would be remanded for resentencing.

***United States v. De la Fuente***, 8 F.3d 1333 (9th Cir. 1993) The defendant entered into a plea agreement which required the government to urge the court to recommend the minimum term under the guidelines. The guidelines provided for a sentence of 41 - 51 months. The statutory mandatory minimum, however, required a sentence of five years. Given the wording of the plea agreement, the government was obligated to move, pursuant to §3553(e), for a sentence below the statutory minimum. The agreement could not have envisioned a sentence (given the wording of the agreement) which was actually at least nine months more than the guidelines.

***United States v. Caro***, 997 F.2d 657 (9th Cir. 1993) Whenever a plea agreement with multiple defendants is offered as a "package deal" – all plead, or the deal is off – the district court must make additional inquiries as part of the Rule 11 colloquy to ensure that there has not been any coercion between the defendants. Though such agreements are not impermissible, there is the inherent risk that a defendant who perceives that he is getting a good deal will influence other defendants to get on board. The district court in this case did not adequately address this potential problem.

***United States v. Fagan***, 996 F.2d 1009 (9th Cir. 1993) The plea agreement entered into by the government and the defendant required two guilty pleas before two different judges. The defendant entered one plea, but prior to entering the second plea, the

government moved to vacate the agreement. The second judge, concluding that there had been no agreement in his court, permitted the government to prosecute the defendant. The Ninth Circuit reversed: though the second trial judge was not required to accept the plea agreement, the government was bound to follow through with the recommendation.

***United States v. Bruce***, 976 F.2d 552 (9th Cir. 1992) The guilty plea in this case was void for two reasons: (1) the trial judge participated in the plea bargaining; (2) the trial judge failed to correctly explain the nature of the charges during the plea colloquy. The judge discussed the proposed plea with the defendants at length – on the record – and suggested that in light of the fact that they were parents, he thought it was a good idea to accept the plea. He suggested that this was far better than the life sentence the defendants were facing if convicted. Such discussions and participation in the plea negotiation is barred by Rule 11(e)(1). Though the judge's advice was sound and compassionate, Rule 11(e)(1) has no exceptions.

***United States v. Escamilla,*** 975 F.2d 568 (9th Cir. 1992) Defendant entered into a plea agreement which required him to be debriefed and polygraphed. The agreement provided that if he were to fail the polygraph, the deal would be void and the government would not be bound by its obligation under the plea agreement. Defendant was fully debriefed, and then failed the polygraph. The plea was withdrawn and the defendant went to trial. At trial, the defendant's debriefing statements were introduced against him. This was reversible error. The government obtained the benefit of the bargain and could not use the defendant's statements against him at trial. Moreover, there was no provision in the agreement which would permit the government to use the defendant's statements in the event the plea agreement was voided.

***United States v. Fisch***, 863 F.2d 690 (9th Cir. 1988) Pursuant to the plea agreement, the prosecutor was obligated to inform the sentencing court about the defendant's cooperation. The prosecutor attempted to fulfill this obligation by merely stating that "the defendant had cooperated." This was a violation of the plea agreement.

***United States v. Partida-Parra***, 859 F.2d 629 (9th Cir. 1988) The defendant and the government entered into a plea agreement which obligated the defendant to plead guilty to a felony. However, because of a clerical mistake, the plea agreement which was accepted by the trial court indicated that the defendant was to plead to a misdemeanor. The government sought to obtain release from this "mistake of fact" utilizing contract law theories as the basis for its argument. The Ninth Circuit disagreed: While contract law doctrine may apply to cases of breach, such theories cannot be used to amend a plea agreement where there has been no breach. The government must live by the terms of the agreement as accepted by the trial court.

***United States v. Brye,*** 146 F.3d 1207 (10th Cir. 1998) The government agreed in the plea agreement to "defer to the court" regarding the defendant's request for a downward departure. At sentencing, however, the government presented facts inconsistent with granting a downward departure and suggested that the court focus on certain facts (unfavorable to the defendant) in making the decision. This advocacy on the part of the government amounted to a breach of the plea agreement.

***United States v. Belt,*** 89 F.3d 710 (10th Cir. 1996) The prosecutor agreed in the plea agreement not to make a recommendation regarding a particular sentence. At sentencing, the defendant asked that he be sentenced to probation based on his substantial assistance, as well as his vulnerability in prison to abuse, because of his homosexuality. The prosecutor initially said that he would make no recommendation, but then challenged the logic of the defendant's argument for probation and reminded the court of the seriousness of the offense. This argument violated the plea agreement.

***United States v. Cooper***, 70 F.3d 563 (10th Cir. 1995) The government agreed in the plea agreement that the relevant conduct began on a certain date and further agreed to recommend a sentence of probation. The parties believed that the sentencing range would be 0 - 6 months. At sentencing, however, the government argued that the loss to the government was over $300,000 in this fraud case and therefore, the sentencing range was actually Level 13 (which does not allow for a sentence of probation). This violated the plea agreement: The government may not accomplish through indirect means what it promised not to do directly. Though the government has an ethical duty not to lie to the court, all the information which it had at sentencing was known to it at the time the plea was entered, so the "ethical" duty was apparently ignored in order to induce the defendant to enter the plea. "It is disappointing that the government seeks to create an ethical conflict between its duty to inform the court and its duty to keep its promises."

***United States v. Greenwood***, 812 F.2d 632 (10th Cir. 1987) The government had an agreement with the defendant that the prosecutor would make no comment regarding the sentence at sentencing. Nevertheless, the government advised the trial judge that the defendant showed no remorse and that a period of incarceration would be needed to deter others from committing similar crimes. This constituted a violation of the plea agreement and required that the guilty plea and sentencing be set aside.

***United States v. Johnson***, 132 F.3d 628 (11th Cir. 1998) The prosecutor executed a plea agreement that stipulated the defendant was accountable for 100 pounds of marijuana. The next day, an informant revealed credible evidence that the defendant was responsible for 1,400 pounds of marijuana. This amount was reflected in the presentence report. The prosecutor's advocacy of the greater amount breached the plea agreement and required re-sentencing. While the court did not suggest that the prosecutors should misrepresent the facts to the sentencing judge, they should not advocate a finding other than that which they agree to in the plea agreement.

***United States v. Dean***, 80 F.3d 1535 (11th Cir. 1996), modified 87 F.3d 1212 (11th Cir. 1996) Where a plea agreement provides that the defendant will forfeit certain property, or withdraw his claim to the property, the court may accept the plea agreement, and later order that some of the property be returned on the basis that the forfeiture would amount to an excessive fine. The forfeiture provision in the plea agreement amounts to simply a "recommendation" under Rule 11(e)(1)(B).

***United States v. Taylor***, 77 F.3d 368 (11th Cir. 1996) The government agreed to recommend a sentence of ten years. The pre-sentence report, however, indicated that the relevant conduct would result in a sentence of fifteen years. The defendant challenged the applicability of the relevant conduct. The government responded that the evidence supported the pre-sentence report's conclusion, and the government was prepared to prove that the relevant conduct occurred. Nevertheless, at sentencing, the government recommended a sentence of ten years. This amounted to a breach of the plea agreement. When the government's statements regarding the pre-sentence investigation are inconsistent with the plea agreement the government has breached that agreement. The fact that the government recommended ten years at the sentencing did not cure the breach. That recommendation, which merely paid lip service to the agreement, was insufficient to rectify the breach committed when the government advocated a position requiring a longer sentence than it had agreed to recommend.

***United States v. Casallas***, 59 F.3d 1173 (11th Cir. 1995) Any participation by the judge in the plea negotiation process taints a guilty plea and entitles the defendant to withdraw his plea. Here, the defendant changed his mind about entering a guilty plea. The judge cautioned the defendant that if he were to go to trial and be found guilty, there was a mandatory minimum sentence. The defendant then changed his mind again and entered a guilty plea. Though the judge's motive was simply to ensure that the defendant was aware of the dangers of going to trial, this crossed over the Rule 11(e) line and entitled the defendant to withdraw his plea. NOTE: The automatic reversal rule was abolished in United States v. Davila, 133 S. Ct. 2139 (2013).

***United States v. Corbitt***, 996 F.2d 1132 (11th Cir. 1993) At the scheduled change of plea hearing, one defendant's attorney asked for more time. The judge responded that all pleas must be submitted by noon that day. He also advised the attorneys and the defendants that if the defendants were convicted, he generally gave "high sentences." The plea agreements were tendered that day. The Eleventh Circuit reversed: the judge's comments violated Rule 11(e)(1) which strictly outlaws any judicial participation in plea negotiations, which would include the judge's threat that convicted defendants received higher sentences. The case would be remanded to the district court for assignment to a different judge and to permit the defendant to withdraw his plea. . NOTE: The automatic reversal rule was abolished in United States v. Davila, 133 S. Ct. 2139 (2013).

***United States v. Yesil***, 991 F.2d 1527 (11th Cir. 1992) Pursuant to a plea agreement, the government was obligated to inform the court of the full extent of three defendants' cooperation with the government. Because the court accepted the plea agreement, the court was obligated to conduct an evidentiary hearing on the motion to reduce the sentence. The court, of course, retains the authority to refuse to reduce the sentence, but having accepted the plea agreement, the court could not refuse to hear evidence at a Rule 35 proceeding about the defendants' cooperation.

***United States v. Rewis***, 969 F.2d 985 (11th Cir. 1992) The plea agreement provided that the government would make no recommendation concerning the actual sentence but reserved the right to make known the facts of the offense to the sentencing judge. In a sentencing memorandum the government criticized the defendant for failing to cooperate or sever ties with his co-conspirators. The memorandum discussed at length the defendant's failure to cooperate despite being urged to do so and the fact that this showed that the defendant was not rehabilitated. The government also urged the court to consider the defendant's failure to cooperate in setting a sentence, so as to encourage others to cooperate. This violated the plea agreement in two respects: first, the memorandum amounted to a recommendation of a harsh sentence and the plea agreement prevented the government from doing this; second, the discussion of the defendant's failure to cooperate was not a statement of the "facts of the offense" which was the limit of the government's right under the plea agreement.

***United States v. Boatner***, 966 F.2d 1575 (11th Cir. 1992) In this pre-Guideline plea agreement, the government agreed that the amount of cocaine involved in the offense was two ounces. In the pre-sentence report, however, the probation officer indicated that the conduct involved three kilograms of cocaine. This amount was based on the statements of a cooperating witness. The government agent furnished this information to the probation officer. This was a violation of the plea agreement. Though the court is not bound by the stipulation, the government, nevertheless, must honor its commitment.

***United States v. One Parcel of Real Estate at 136 Plantation Drive, Tavernier, Fla.,*** 911 F.2d 1525 (11th Cir. 1990) As part of the defendant's plea agreement relating to a drug conspiracy charge, the government agreed "not to use" any statements he made during his cooperation. During a confederate's trial, the defendant testified that he purchased certain property with drug proceeds. A forfeiture proceeding had already been instituted against that property, and the defendant had filed a claim. The Eleventh Circuit holds that the plea agreement was ambiguous about the extent of the immunity and the trial court was required to make explicit findings about the intent of the parties.

***United States v. Jefferies***, 908 F.2d 1520 (11th Cir. 1990) The defendant entered into a plea agreement which stipulated that the quantity of cocaine involved in the drug offense was thirteen grams. The plea agreement also indicated that the parties had agreed that the sentence would be at most ten years on the drug count and left the sentence on the tax count to the court's discretion. In an earlier draft of the plea agreement, there was a reference to allowing the court discretion to fine the defendants; but this was later deleted. At the time of sentencing, the government provided to the probation officer information indicating that the defendant had been involved in large scale drug trafficking. This evidence was also presented to the judge at the time of sentencing. The trial court concluded that the offense involved fifteen kilograms of cocaine and sentenced the defendant accordingly. The trial court also imposed a $100,000 fine in connection with the tax offense. The Eleventh Circuit concludes that the fine violated the plea agreement between the parties: There was substantial negotiation over the financial implications of the plea, and the record indicated that the government agreed that no fine would be imposed. The Eleventh Circuit also concludes that finding that fifteen kilos was involved in the offense was prohibited by the plea agreement. While the government and the defendant cannot stipulate the parole consequences of a particular sentence, they can agree that the defendant will admit to

particular conduct and the government will not attempt to show that other conduct was involved. That is precisely the agreement the parties made in this case. The proper remedy was the elimination of the $100,000 fine and a finding that the quantity of cocaine involved was thirteen grams. This finding would govern the actions of the parole commission.

***United States v. Foster***, 889 F.2d 1049 (11th Cir. 1989) Following the defendant's conviction, but prior to sentencing, the defendant agreed to meet with the DEA agent and discuss his involvement in drug trafficking activities. The government agreed not to disclose to the sentencing judge any information provided by the defendant. Nevertheless, the government breached this agreement by disclosing to the trial judge some of the drug trafficking activities which had not been disclosed during the trial, but which had been revealed by the defendant after the trial. It was not a sufficient remedy that the trial judge agreed not to consider that evidence in imposing sentence. Rather, the case would be remanded and a different judge would impose sentence.

***United States v. Tobon-Hernandez***, 845 F.2d 277 (11th Cir. 1988) As part of his plea agreement, the defendant persuaded the government to limit its contentions as to the defendant's participation in the conspiracy to certain sub-events. The government breached this agreement by indicating that the defendant participated in the conspiracy involving 432 kilograms of cocaine. The Court opted to compel the government to comply with its agreement under the plea agreement – a specific performance remedy as opposed to permitting the defendant to withdraw his guilty plea.

***United States v. Nelson***, 837 F.2d 1519 (11th Cir. 1988) The government and the defendant had a plea agreement which provided that the government would reveal no further drug conspiracy involvement than that stipulated in the counts of the indictment to which the defendant was pleading guilty. The government violated its obligation by implying further involvement by the defendant. The District Court stated that it would consider no facts other than those listed in the pre-sentence investigation. However, the Court of Appeals holds that the defendant would be entitled to withdraw his plea or to have the plea agreement specifically enforced. Even if the trial court would not consider the additional information, it would be available to the Parole Commission.

***In re Arnett,*** 804 F.2d 1200 (11th Cir. 1986) As part of his plea agreement, the defendant agreed to forfeit all money which was found in his possession at the time of his arrest. Subsequently, the government sought to forfeit additional assets of the defendant. The court holds that the plea agreement impliedly prevented the government from moving to forfeit any additional assets of the defendant. However, the court will permit the government to forfeit additional assets but the defendant then has the right to vacate his plea agreement.

***United States v. Lugg***, 892 F.2d 101 (D.C.Cir. 1989) A convicted but unsentenced defendant retains a Fifth Amendment right not to testify as to incriminating matters that could have an impact on his sentence. This is true even if the plea agreement calls for the defendant to cooperate and results in the dismissal of other counts. In this case, co-defendants sought to call individuals to the stand who had pled guilty but who had not yet been sentenced. Those witnesses' refusal to testify was upheld by the Court over the objection of the defendants who went to trial and sought their testimony.

***United States v. Hawes***, 774 F.Supp. 965 (E.D.N.C. 1991) The defendant's transactional immunity plea agreement prohibited any further prosecution for the transaction in question, even if the government did not have "substantial knowledge" of the offense when the plea agreement was entered.

***PLEA AGREEMENTS (Improper Judicial Participation)***

***In re Benvin***, 791 F.3d 1096 (9th Cir. 2015) The district court's participation in the plea bargain process violated Rule 11. During in chambers proceedings, the court stated that portions of the proposed plea agreement were not acceptable because of certain limitations on restitution. The Ninth Circuit held these discussions violated Rule 11. Mandamus was an appropriate remedy and reassignment to a different judge was required.

***United States v. Braxton***, 784 F.3d 240 (4th Cir. 2015) The defendant was facing ten years in prison for heroin distribution and the government filed a § 851 enhancement setting the mandatory minimum at 20 years. The government agreed to withdraw the § 851 notice if the defendant would plead guilty. The defendant insisted on a trial and sought to replace his attorney who strenuously urged the defendant to accept the plea. The judge, on the first day of trial, also urged the defendant to accept the plea, warning him that he was walking "into a buzz saw" "putting his head in a vice [sic]" and "I am not favorably inclined towards having you go to trial." The defendant eventually agreed to plead guilty and was sentenced to eleven and one-half years. These comments by the court tainted the guilty plea.

***United States v. Sanya***, 774 F.3d 812 (4th Cir. 2014) The proper standard in deciding whether a judge's participation in plea negotiations warrants setting aside a plea is whether the defendant can demonstrate "a reasonable probability" that the defendant would not have pleaded guilty without the judge's interference. In this case, the judge repeatedly intimated that a plea was in the defendant's best interest. The defendant's proof was sufficient to satisfy the Fourth Circuit standard and the plea was vacated. The court expressly rejected the "but for" standard required by the Eleventh Circuit in its post-Davila decision, United States v. Davila, 749 F.3d 982 (11th Cir. 2014).

***United States v. Hemphill***, 748 F.3d 666 (5th Cir. 2014) After the government offered a defendant a 5-year deal, the court engaged in lengthy discussions with the defendant about what had happened in other cases, e.g., two defendants rejected good offers and were sentenced to lengthy prison sentences and were not released early, and other defendants were successful in getting substantially reduced sentences who accepted deals. These comments crossed the boundary of what was permissible participation in plea negotiations and were coercive. The judge did not simply provide generic commentary about the pros and

cons of plea offers. He provided only examples of the negative results for those who went to trial and positive results for those who accepted plea deals. Even post-Davila, setting aside the conviction was required based on this record.

***United States v. Harrell***, 751 F.3d 1235 (11th Cir. 2014) The trial court addressed the defendant prior to trial and explained that the charges were very serious and that after trial, the options for fashioning a lower sentence was less likely than if a guilty plea were entered. The judge explained to another defendant that he was facing 22 years if convicted after trial, but only 7 years if he accepted the plea offer. The judge then remarked that the defendant's desire to go to trial "is so far removed from logical, intelligent consideration that I have a doubt about his mental ability and mental capabilities." The dialogue continued and eventually, the defendant entered a guilty plea. The Eleventh Circuit held that the judge violated Rule 11(c)(1) and set aside the judgment.

***United States v. Kyle***, 734 F.3d 956 (9th Cir. 2013) The parties advised the court that a plea agreement in this case had been reached that provided for a 360-month sentence, which was within the guideline range for this child sex abuse case. The judge said that he would not accept that plea and wanted an above-guideline sentence, albeit not a life sentence. In a second hearing, the court indicated that a life sentence was appropriate. Eventually, the defendant entered a plea and was sentenced to 450 months. The Ninth Circuit held that the participation of the judge in the plea negotiations violated Rule 11, was plain error, and was prejudicial under the Davila standard. Remand to a new judge was the appropriate remedy. The court wrote, "We take this opportunity to emphasize that Rule 11(c)(1) is intended to eliminate all judicial pressure from plea discussions . . . We join other circuits in holding that "[w]hen a court goes beyond providing reasons for rejecting the agreement presented and comments on the hypothetical agreements it would or would not accept, it crosses over the line established by Rule 11 and becomes involved in the negotiations."

***United States v. Davila,*** 664 F.3d 1355 (11th Cir. 2011) A magistrate judge who encouraged a defendant to think seriously about rejecting a plea and risking a long prison sentence violated Rule 11 and tainted a subsequent plea. The conversation with the magistrate occurred when the defendant sought to replace his court appointed attorney (or proceed pro se), based on the attorney's encouragement to plead guilty. The Magistrate essentially encouraged the defendant to seriously consider the wisdom of the attorney's advice and also informed him about the two versus three-point acceptance of responsibility reduction. The Eleventh Circuit held that prejudice is presumed whenever the judge contrasts the sentence that would be imposed if the defendant enters a guilty plea and the sentence that would be imposed following a conviction. THE SUPREME COURT REVERSED: Absent a showing of prejudice, vacating the plea is not necessary. United States v. Davila, 133 S. Ct. 2139 (2013).

***United States v. Pena***, 720 F.3d 561 (5th Cir. 2013) During an in-chambers status conference that was not reported, the district court was informed that plea negotiations were occurring. The judge stated something to the effect that he expected that a related civil case would be resolved. The parties had somewhat different memories of what precisely the judge stated. The relationship between the civil case and the criminal case created a conflict for defense counsel. He later alerted the court about the conflict. The court responded by stating that the parties should disregard any comments the court made about the civil case during the in-chambers conference. The Fifth Circuit held that the court violated Rule 11's prohibition on the court participating in plea negotiations and the plea should have been withdrawn when the defendant made the request to withdraw the plea. Note that this case is post-Davila.

***United States v. Gonzalez-Melchor*** 648 F.3d 959 (9th Cir. 2011) A judge who actively negotiated an appeal waiver in exchange for a shorter sentence violated Rule 11 and rendered the appeal waiver unenforceable.

***United States v. Cano-Varela***, 497 F.3d 1122 (10th Cir. 2007) When the defendant attended a pretrial conference intending to request a new lawyer to prepare for trial, the judge cautioned the defendant that the proposed plea agreement would result in a much shorter sentence than he would face if he were to go to trial and be convicted. This violated Rule 11(c)(1) and necessitated setting aside the guilty plea. Though the judge was genuinely trying to be helpful and provide accurate advice to the defendant, "there is no avuncular-judge exception" to the Rule.

***United States v. Baker***, 489 F.3d 366 (D.C. Cir. 2007) During the course of plea negotiations between the defendant and the government, the judge noted that in a similar case, he had given a sentence below what the government had offered in this case (implying that if the defendant accepted the offered plea, the court would impose a sentence at the same level, which was below what the government was offering). This amounted to improper participation in the plea negotiations. At sentencing, the court imposed a sentence well-above the sentence he imposed in the previous case.

***In re Morgan***, 506 F.3d 705 (9th Cir. 2007) A district court judge may not summarily reject all plea agreements that contain a recommendation by the prosecution as a matter of policy. The district court must make an individualized decision regarding any plea agreement and whether to accept or reject the agreement and cannot establish his own policy of rejecting all government recommendations that are contained in a plea agreement.

***United States v. Bradley***, 455 F.3d 453 (4th Cir. 2006) In the midst of trial, the judge excused the prosecutors and talked directly to the defendants about the enormous risks they faced if they proceeded until the end of trial. The court inquired of the defense attorneys about the status of failed plea negotiation efforts. The defendant then started the process of tendering a plea but refused to acknowledge his guilt of participation in the conspiracy. The trial proceeded for another two weeks, and the court again addressed the defendants about whether they really wanted to proceed through the conclusion of trial, which would include evidence of various murders and autopsies. The court expressed shock that the defendants would not accept a ten-year deal that had been offered by the government. Later, the federal judge contacted a state court judge to negotiate a concurrent sentence if the defendant were to plead in both courts. After they entered guilty pleas, the court sentenced the three defendants

to, 24 years, 60 years, and life. Not surprisingly (and with the government's agreement), the Fourth Circuit held that this process represented a blatant violation of Rule 11(c)(1)'s prohibition on court participation in the plea negotiation process.

***United States v. O'Neill***, 437 F.3d 654 (7th Cir. 2006) What should a judge do when she decides that she is not going to accept a "binding" plea pursuant to Rule 11(c)(1)(c) (formerly known as 11(e)(1)(C))? In this case, the Seventh Circuit offered a number of different opinions on the subject, concluding, that "the less said, the better." When initially provided with the binding plea, the court rejected it as a binding plea, explaining that maybe it was appropriate, maybe not, but that she was not going to be bound by the specific sentence envisioned by the agreement. The parties then reached a new agreement which appeared to reflect the judge's "range" for the appropriate sentence. The court acknowledged that in evaluating a binding plea agreement, the court should take an active role in evaluating the plea agreement, but if the plea is ultimately rejected, the court may take no role in further plea negotiations, even though the comments made by the judge in rejecting the binding plea may lead the parties to refine the agreement in accordance with the comments of the court. There is no easy solution to this quandary, Judge Posner, concurring, acknowledged.

***United States v. Diaz***, 138 F.3d 1359 (11th Cir. 1998) The prosecutor and the defense counsel were engaged in plea negotiations and advised the court that they were awaiting word from the U.S. Attorney's office whether the government would agree that the drug offense involved powder cocaine, not crack. The judge responded that such an agreement would not be made by the government, in his experience. The court also remarked about the strength of the government's case against the defendant and briefly discussed the applicable guideline range. This conversation occurred in the midst of a co-defendant's guilty plea on the morning of trial. The defendant ended up going to trial and was convicted. The Eleventh Circuit concluded that the trial judge's comments violated Rule 11(c)(1), but it was harmless error. The defendant did not claim that he would not have gone to trial, but for the judge's comments and there was no showing that the judge was biased, or incapable of conducting a fair trial and sentencing.

***United States v. Kraus***, 137 F.3d 447 (7th Cir. 1998) The guilty plea was tainted by the fact that a court clerk communicated with the prosecutor about whether in the clerk's mind the judge would accept a particular 11(e)(1)(C) plea. The prosecutor repeated these observations to the defense attorney, who repeated them to the defendant. Though the clerk did not expressly state what the judge would do, the clerk's expression of her opinion created an appearance of impropriety.

***United States v. Barrett***, 982 F.2d 193 (6th Cir. 1992) Before the defendant decided whether to plead or not, the trial court held a conference call with the prosecution and defense counsel to resolve a dispute concerning the sentencing guidelines. The defense counsel advised the court that the minimum was probably seven years. The judge responded that there was no way he would impose such a light sentence. The judge also told the attorney that he thought there was no defense and that he had heard that the investigator had found none of the defendant's witnesses (which didn't surprise him). The defendant entered a guilty plea shortly thereafter. The Sixth Circuit reversed: the judge's comments amounted to improper participation in the plea negotiation process. Note that pursuant to Davila, automatic reversal is no longer appropriate for a Rule 11 violation.

## *POLYGRAPHS*

***United States v. Scheffer***, 523 U.S. 303 (1998) Though a defendant has a constitutional right to introduce evidence in his defense, this is subject to appropriate rules of evidence. In military prosecutions, polygraph evidence is per se inadmissible. The Supreme Court held that this per se ban does not violate the defendants' constitutional rights, because it is neither arbitrary, nor disproportionate.

***United States v. Harvey,*** 829 F.3d 586 (8th Cir. 2016) The defendant was improperly sentenced for both possession and receipt of child pornography. This violated the double jeopardy clause.

***United States v. Posado***, 57 F.3d 428 (5th Cir. 1995) Under the Daubert standard, polygraph evidence may be admitted, but a remand to further develop the record was necessary. The lower court must also consider whether Rule 403 would constrain the use of polygraph evidence.

***United States v. Cordoba***, 104 F.3d 225 (9th Cir. 1997) A per se bar on polygraph evidence is inconsistent with the requirements of Daubert that the lower courts decide whether an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.

***United States v. Miller***, 874 F.2d 1255 (9th Cir. 1989) The defendant was charged with espionage. The government sought to introduce the fact that he failed a polygraph not to rely on the results, but to explain why he subsequently made certain admissions. The Ninth Circuit agrees that the fact that a defendant failed a polygraph test may be admissible, as in the Hall case discussed above, not to prove the results of the polygraph test but to explain subsequent events. In this case, however the government went too far: The government went through a question by question and test result by test result review of the polygraph. This was unnecessary to explain the defendant's subsequent confession. The impact of the polygraph examination evidence prejudiced the defendant and required a new trial.

***United States v. Bowen***, 857 F.2d 1337 (9th Cir. 1988) Despite the government's assurances to the defense and the court that it would not seek admission of the polygraph evidence, evidence of a polygraph examination and the surrounding circumstances of the examination were introduced requiring reversal of the conviction.

***United States v. Hall***, 805 F.2d 1410 (10th Cir. 1986) Though polygraphs are generally inadmissible in a criminal trial, the Tenth Circuit affirms a conviction where the government introduced polygraph evidence for the sole purpose of refuting the defendant's

repeated arguments and suggestions during cross-examination that the government had failed to adequately investigate this case. A government agent was permitted to testify that no further investigation was performed because the polygraph results revealed that the defendant had blatantly mischaracterized the events.

***United States v. Piccinonna***, 885 F.2d 1529 (11th Cir. 1989) In a lengthy decision reviewing the law and science of polygraphs, the Eleventh Circuit decides that such evidence will henceforth be admissible in the following circumstances: First, if both parties stipulate to the admissibility of a polygraph, including the manner in which the test is conducted, the nature of the questions asked and the identity of the examiner who administers the test; second, a polygraph may be admitted when used to impeach or corroborate the testimony of a witness. If the test results are admitted under this theory, three preliminary conditions must be met: (a) the party planning to use the evidence must provide adequate notice to the opposing party; (b) the opposing party must be given an opportunity to have his own expert administer a test covering substantially the same questions to the witness; (c) the Federal Rules of Evidence governing corroboration or impeachment must otherwise be met. Thus, evidence that a witness passed a polygraph test may only be used if that witness's credibility has been attacked. In any case, if the polygraph is being used for purposes of impeachment or corroboration, the trial judge is left with the discretion to determine admissibility.

***United States v. Crumby***, 895 F. Supp. 1354 (D.C. Ariz. 1995) The defendant is entitled to introduce polygraph evidence for corroboration, or impeachment of the defendant. Polygraph evidence satisfies the standard of Daubert v. Merrell Dow Pharmaceuticals.

***United States v. Piccinonna***, 729 F. Supp. 1336 (S.D. Fla. 1990) Following remand from the Eleventh Circuit, the trial court held the questions and answers given by the defendant during a polygraph session were not relevant to the issues in his perjury trial and thus the evidence would be excluded. The court went on to question whether a polygraph could ever be used to corroborate or impeach a witness's testimony, because under Rule 608(a) only "character" evidence is admissible for this purpose. One polygraph session would not be adequate to enable a polygrapher to give character testimony. Affirmed: 925 F.2d 1474.

***United States v. Henderson***, 409 F.3d 1293 (11th Cir. 2005) A district court may reject the admissibility of polygraph evidence under the Daubert standard, despite the earlier ruling by the same court that such evidence may be admitted. United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989).

## *PORNOGRAPHY*

***United States v. Williams***, 128 S. Ct. 1830 (2008) The Supreme Court upheld the child pornography pandering provision that had earlier been held unconstitutional by the Eleventh Circuit. The statute, 18 U.S.C. § 2252A(a)(3)(B) makes it a crime to solicit, or to offer to sell or distribute material that is purported to be child pornography. The Court rejected the defendant's claim that it violates the First Amendment to make it a crime to offer to sell or distribute material as child pornography, if, in fact, the material being offered for sale is not, in fact, child pornography. The Court also rejected a Fifth Amendment vagueness challenge.

***Ashcroft v. Free Speech Coalition***, 535 U.S. 234 (2002) The Supreme Court holds that the "virtual" pornography provision contained in the 1996 Child Pornography Prevention Act is unconstitutional. This provision is not intrinsically related to the protection of children or to the sexual abuse of children, because, by definition, no children are involved in the production of the images. In addition, the statute is defective because it does not incorporate the community standards test of obscenity requiring that the artistic merit of a work be judged considering the work as a whole.

***Ashcroft v. American Civil Liberties Union***, 535 U.S. 564 (2002) The Child Online Protection Act is not unconstitutionally overbroad just because it uses community standards test to regulate speech on the World Wide Web.

***United States v. X-Citement Video, Inc.,*** 513 U.S. 64 (1994) The United States Supreme Court held that the statute outlawing the interstate transportation of obscene material depicting minors, 18 U.S.C. §2252, has an implicit requirement that the offender know that the actor depicted is a minor. United States v. Chilaca, 909 F.3d 289 (9th Cir. 2018) The defendant had a hard drive, a laptop and desktop computer, each of which had access to a drop box account that had child pornography. This evidence only supports one count of possession of child pornography. The possession was simultaneous and in the same location (his house).

***United States v. Brown***, 859 F.3d 730 (9th Cir. 2017) 18 U.S.C. § 2251(d)(1) makes it a crime to advertise the availability of child pornography. The defendant had a bulletin board on his website that advertised the availability of child pornography, but it was a "closed" bulletin board. The government moved in limine to bar the defendant from arguing to the jury that the fact that the bulletin board was "closed" meant that it did not qualify as an advertisement. The trial court granted the motion. The Ninth Circuit reversed. While the defense counsel's proposed argument did not suggest that a "closed" bulletin board was legally incapable of qualifying as an advertisement, it was fair game to argue that the jury could decide that the closed nature of the bulletin board meant that it did not qualify as an advertisement. It was a fact question, not a legal question and the defendant was entitled to make his argument to the jury.

***United States v. Palomino-Coronado***, 805 F.3d 127 (4th Cir. 2015) In order to be convicted of violating § 2251, the defendant must engage in sexual conduct with the minor for the purpose of producing a visual depiction of such conduct. It is not enough to engage in sexual conduct and to produce a visual depiction: the defendant must engage in the sexual conduct for the proscribed purpose. In most cases – many of which are cited by the court – the purpose is proven through circumstantial evidence (the number of images taken; the defendant's statements during the sexual conduct that indicate that he is "directing" the filming; the number of images; the defendant's subsequent distribution of the images). But in this case, there were numerous sexual acts

and only one sexually explicit photo was found, and that photo had been deleted. The evidence was insufficient to prove that the sexual conduct occurred with the specific intent and purpose to produce a visual depiction of the conduct.

***United States v. Lowe***, 795 F.3d 519 (6th Cir. 2015) The defendant lived in the house with his wife and until recently with a young relative. Child pornography was on a file sharing program in one of the computers found in the house that was not password protected, but which had the defendant's first name as the username. This evidence, standing alone, was not sufficient to convict the defendant of possessing, receiving, and distributing child pornography. There must be some evidence linking him to the contraband when it is shown that the computer was accessible to others.

***United States v. Encarnacion-Ruiz***, 787 F.3d 581 (1st Cir. 2015) In a child pornography production case, if a defendant is charged with aiding and abetting the production of child porn, a mistake of fact (the child's age) is a defense. Unlike the principal perpetrator, who cannot raise this defense, pursuant to Rosemond v. United States, an aider and abettor must have the intent to commit the offense including all elements of the crime.

***United States v. Husmann***, 765 F.3d 169 (3rd Cir. 2014) Possessing child pornography and a file-sharing program is not alone sufficient to convict the defendant of distributing child pornography. There must be evidence that someone else downloaded the pornography from the defendant's computer. This holding applies to the code section that makes it a crime to distribute child pornography, but does not apply to the sentencing guideline, which defines "distribute" to include possession with intent to distribute.

***United States v. Emly***, 747 F.3d 974 (8th Cir. 2014) The possession of several images of child pornography only amounts to one offense under 18 U.S.C. § 2252(a)(4)(A) and (B). Unlike § 2252A, the former sections make it a crime to possess "one or more" items of child pornography.

***United States v. Grzybowicz***, 747 F.3d 1296 (11th Cir. 2014) A defendant who transfers images of child pornography from his phone to his computer has not committed the offense of distribution of child pornography under 18 U.S.C. §2252A(a)(2).

***Boland v. Holder***, 682 F.3d 531 (6th Cir. 2012) Neither a defense attorney, nor his forensic expert, are exempt from the laws proscribing the possession or creation of child pornography and therefore, the creation of child pornography (even for purposes of a demonstration at trial), by photo-shopping a child's head on a nude adult body is a criminal offense.

***United States v. Chiaradio***, 684 F.3d 265 (1st Cir. 2012) The possession of several items of child pornography on different computers in one location can only support one count of "possession one or more items of child pornography." 18 U.S.C. § 2252(a)(4)(B). A different result might apply to charges brought under 18 U.S.C. § 2252A, which makes it a crime to possess "any" items of child pornography.

***United States v. Huether,*** 673 F.3d 789 (8th Cir. 2012) Possession of child pornography is a lesser included offense of receipt of child pornography if both charges involve the same images. In this case, the trial court did not identify for the jury which images applied to which count and therefore, there was no way to determine that the jury did, in fact, convict the defendant of the two offenses based on separate images.

***United States v. Moreland***, 665 F.3d 137 (5th Cir. 2011) The evidence was insufficient to support the defendant's conviction of possessing child pornography that was found in the "slack space" of a computer the defendant shared with others in the house. The defendant's father was known to be a pornography "enthusiast" and the evidence equally pointed to him as the possessor.

***United States v. Johnson***, 652 F.3d 918 (8th Cir. 2011) The evidence was insufficient to support a conviction for receiving child pornography, though there was sufficient evidence to prove possession. The defendant's computer had child pornography images. The indictment alleged that he possessed child pornography that had been shipped and transported in interstate commerce, a violation of § 2252(a)(2). However, when the judge instructed the jury, the jurisdictional element was explained as follows: "The materials containing the illicit visual depictions were produced using materials that had been mailed, shipped, or transported by computer in interstate or foreign commerce." There was no evidence at trial that the components of the computer were shipped in interstate commerce. The Eighth Circuit held that where the jury instructions limit the manner in which the offense may be committed, this also limits the sufficiency-of-the-evidence review by the appellate court. The evidence was insufficient in this case.

***United States v. Ehle***, 640 F.3d 689 (6th Cir. 2011) Convictions for both possessing and receiving child pornography violated the double jeopardy clause. The convictions could not stand, even though the defendant entered a guilty plea.

***United States v. Lynn***, 636 F.3d 1127 (9th Cir. 2011) It violates double jeopardy to convict a person of both receiving and possessing child pornography. Even if the offenses were alleged to have occurred on different dates, this does not necessarily alleviate the constitutional problem.

***United States v. Muhlenbruch***, 634 F.3d 987 (8th Cir. 2011) The double jeopardy clause prohibits a conviction for both receiving and possession child pornography. The Eighth Circuit remanded to the district court to determine which conviction should be vacated.

***United States v. Steen***, 634 F.3d 822 (5th Cir. 2011) The surreptitious video recording of a naked minor girl on a tanning salon bed was not lacivicious, because the video did not draw attention the girl's genital area for the purpose of sexual stimulation of the viewer. The court cited the five factors originally detailed in United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), in reaching its decision.

***United States v. Szymanski***, 631 F.3d 794 (6th Cir. 2011) The defendant entered a guilty plea to receiving child pornography under 18 U.S.C. § 2252(a)(2). However, during the plea colloquy, it was not made clear to the defendant that the scienter requirement of the statute required that he know when he received the pornography that it included images of children engaged in sexual activity. See United States v. X-Citement Video, Inc., 513 U.S. 64 (1994). This defect in the plea necessitated setting aside the guilty plea.

***United States v. Dobbs***, 629 F.3d 1199 (10th Cir. 2011) Child pornography that was only located in a temporary internet folder, or cache, on the defendant's computer and not shown to have ever been viewed by the defendant cannot support a "receiving child pornography" conviction under § 2252 (as it existed at the time of the events in this case). The statute was amended in 2007 and now also outlaws "knowingly accessing sexually explicit images with the intent to view them," which might have changed the result in this case.

***United States v. Wright***, 625 F.3d 583 (9th Cir. 2010) Prior to the 2008 amendments to 18 U.S.C. § 2252A, the child pornography had to be mailed or transported in interstate or foreign commerce. (Now the statute outlaws receiving or sending child pornography "using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer"). Under the former version (which was the statute in force when the defendant's conduct occurred), the government had to prove – and did not succeed in this case – that the pornography crossed a state line, not simply that the Internet was used. In this case, the undercover agent received the pornography from the defendant's computer directly, computer-to-computer, without a server in another state being involved. The evidence was insufficient to support the conviction on that count. Based on Wright, the Ninth Circuit also reversed the conviction in United States v. Flyer, 633 F.3d 911 (9th Cir. 2011).

***United States v. Broxmeyer,*** 616 F.3d 120 (2d Cir. 2010) The defendant was charged with production of child pornography. 18 U.S.C. § 2251(a). The theory of the prosecution is that he induced his young girl friend to take sexually explicit photographs of herself and send the pictures to him. Though the evidence established that over the course of the relationship, he did encourage her to provide him sexually explicit photographs, there was insufficient evidence that he encouraged her to produce the particular photographs that were the subject of the indictment. In fact, the evidence indicated that the girl sent him the photographs prior to the time that they began their sexual relationship. Because of the absence of evidence proving that he induced or encouraged her to take the two pictures that were the subject of those two counts of the indictment, he could not be convicted of producing those pictures.

***United States v. Kilbride***, 584 F.3d 1240 (9th Cir. 2009) In determining whether speech which is communicated online is obscene, the Ninth Circuit held that a "national standard" rather than a local community standard must be applied.

***United States v. Polouizzi,*** 564 F.3d 142 (2d Cir. 2009) The unit of prosecution for possession of child pornography is the defendant's entire collection, not one count per image. For receipt prosecutions, however, the proper unit of prosecution is for each episode that images were received.

***United States v. Lewis***, 554 F.3d 208 (1st Cir. 2009) 18 U.S.C. § 2252(a)(2) makes it a crime to receive child pornography that has traveled in interstate commerce. The First Circuit holds that the images must, in fact, travel in interstate commerce in order for this statute to be violated. However, if the images are received over the Internet, this jurisdictional fact is established. NOTE: the statute has now been amended and the crime can be proven if the images traveled in or affected interstate commerce (2008 amendment to § 2252(a)(2)).

***United States v. Rivera***, 546 F.3d 245 (2d Cir. 2008) Though ultimately upholding the conviction in this child pornography case, the Second Circuit thoroughly analyzes the requirement that an image be "lewd and lascivious" before it can qualify as pornography under 18 U.S.C. § 2256(2)(A)(v). The court concludes that a nude photo of a 16-year-old male on a bed satisfied the requirement of the statute. The leading case on the definition of "lascivious" is United States v. Dorst, 636 F. Supp. 828 (S.D. Cal. 1986).

***United States v. Schales***, 546 F.3d 965 (9th Cir. 2008) The double jeopardy clause prohibits a conviction on charges of both possessing and receiving material involving the sexual exploitation of minors.

***United States v. Schene***, 543 F.3d 627 (10th Cir. 2008) The fact that a hard drive was manufactured in a foreign country, and that child pornography was found on the hard drive does not suffice to establish the jurisdictional prong in § 2252A(a)(5)(B) that the pornography was "produced using materials that have been mailed or shipped or transported in interstate or foreign commerce." The hard drive did not "produce" the images, nor did the hard drive "produce" the images by portraying the images on the computer monitor. However, under the plain error standard of review, the evidence was sufficient to establish that the images were created elsewhere, and the hard drive was used to copy the images onto the defendant's computer.

***United States v. Davenport,*** 519 F.3d 940 (9th Cir. 2008) A defendant may not be found guilty of both receiving and possessing child pornography. See also United States v. Miller, 527 F.3d 54 (3rd Cir. 2008) (same); United States v. Johnston, 789 F.3d 934 (9th Cir. 2015).

***United States v. Schaefer***, 501 F.3d 1197 (10th Cir. 2007) A child pornography prosecution requires proof that the image traveled in interstate commerce (including via a computer). In this case, the only evidence was that the image arrived via the Internet, but no proof of any interstate nexus. The mere fact that the image arrived over the Internet does not ipso facto establish that the image traveled in interstate commerce. OVERRULED in part by United States v. Sturm, 672 F.3d 891 (10th Cir. 2012).

***United States v. McDowell***, 498 F.3d 308 (5th Cir. 2007) The defendant was charged with aiding and abetting a violation of 18 U.S.C. § 1461, mailing obscene material using the U.S. Postal Service. Though the obscene material was, in fact, mailed, there was in sufficient evidence that the defendant was aware that the mails were being used or that he aided and abetted the offense with the knowledge that the mails were being used to distribute the obscene videos.

***United States v. Buchanan***, 485 F.3d 274 (5th Cir. 2007) The defendant was convicted of several counts of receiving child pornography, but the evidence did not prove that there was more than one download with regard to the charged counts and even though there were several pictures, they were received as part of one transfer and, therefore, the defendant could only be convicted of one count of receiving child pornography.

***United States v. Kuchinski,*** 469 F.3d 853 (9th Cir. 2006) A defendant may not be held responsible for images of child pornography that are contained in a computer's internet cache file, unless there is proof that the defendant endeavored to access the images in the cache file or was knowingly in possession of the images in that compartment of the computer.

***United States v. Macewan***, 445 F.3d 237 (3rd Cir. 2006) Any use of the Internet in connection with pornography satisfies the interstate commerce requirement, regardless of whether the government introduces evidence that the actual images traveled across a state line.

***American Civil Liberties Union v. Ashcroft***, 322 F.3d 240 (3rd Cir. 2003) On remand from the Supreme Court (535 U.S. 564) which upheld certain portions of the "Child Online Protection Act" 47 U.S.C. § 231, the Third Circuit found other provisions unconstitutional. First, because the Internet has no geographical limits, the Act is too broad in invoking "community standards" for determining what constitutes pornography. Second, the Act's definition of "material harmful to minors" fails to allow for an evaluation of the material in context, thus the "taken as a whole" definition fails to meet First Amendment strictures. AFFIRMED: 542 U.S. 656 (2004).

***United States v. Maxwell***, 446 F.3d 1210 (11th Cir. 2006) The initial panel decision (386 F.3d 1042) held that a blank computer disk that was transported in interstate commerce (while still blank), and later used to copy child pornography, but that was not transported in interstate commerce afterwards, did not provide federal jurisdiction. The panel held that the pornography must travel in interstate commerce, not just the disk (blank) onto which the pornography is later copied. This case contains a very lengthy analysis of the various theories of interstate commerce. – THIS CASE WAS SENT BACK TO THE ELEVENTH CIRCUIT FROM THE SUPREME COURT FOR RECONSIDERATION IN LIGHT OF GONZALEZ V. RAICH. ---- AND REVERSED on April 20, 2006 – 446 F.3d 1210 (11th Cir. 2006). The new decision held that copying pornography onto a disk that has previously traveled in interstate commerce is a federal offense.

***United States v. Hilton***, 363 F.3d 58 (1st Cir. 2004) In a prosecution under 18 U.S.C. § 2252, if the defendant is alleged to have possessed photos of children in sexually explicit poses, the government must prove with relevant evidence – in addition to the pictures themselves – that the images appearing in the photo are, in fact, real children. The defendant is entitled to have this element proved affirmatively without entering any evidence to the contrary. NOTE: This decision was subsequently withdrawn, and a new decision was issued on Sept. 27, 2004 – United States v. Hilton, 386 F.3d 13 (1st Cir. 2004). In the new decision, the court again granted post-conviction relief, but this time only on the basis that the trial judge (this was a bench trial) failed to make any finding of fact regarding whether the materials the defendant possessed depicted real children. This is an element of the offense. The First Circuit did not allude to the necessity of presenting any evidence to affirmatively disprove the possibility that the images were not real.

***United States v. Burian***, 19 F.3d 188 (5th Cir. 1994) The federal statute criminalizing the knowing receipt of visual depictions of minors engaged in sexually explicit conduct has an implicit knowledge requirement that the defendant be aware (or be recklessly disregarding) the age of the performer.

***United States v. Corp***, 236 F.3d 325 (6th Cir. 2001) The defendant's possession of pornographic pictures of his wife and girlfriend having sexual relations could not be prosecuted under 18 U.S.C. § 2252(a)(4)(B), because of a lack of a sufficient interstate nexus. The fact that the photographic paper was manufactured out of state was not a sufficient nexus. This case was later distinguished in United States v. Andrews, 383 F.3d 374 (6th Cir. 2004). Still later, the Sixth Circuit held that in light of Raich, the decision in Corp was no longer good law. United States v. Bowers, 594 F.3d 522 (6th Cir. 2010).

***United States v. Easley,*** 942 F.2d 405 (6th Cir. 1991) In instructing the jury on the definition of obscenity, the judge explained that whether the material "lacked serious literary, artistic, political or scientific merit" was judged by an average person applying contemporary community standards. This was erroneous. The material is not to be judged on a local community standard in deciding the third prong of the Miller test. That test focuses only on the reasonable person, not a reasonable person in that community.

***United States v. Shumway***, 911 F.2d 1528 (11th Cir. 1990) The defendant was prosecuted for violating 18 U.S.C. §1461, mailing obscene matter. The defendant, a woman, had posed for various sexual videotapes which were made by her boyfriend. Unbeknownst to her, after she and her boyfriend broke up, the boyfriend sold the videotapes through magazine advertisements. The evidence was not sufficient to convict the woman since there was no proof that she was aware that the tapes would be used for that purpose. The act of posing for tapes does not provide proof of the defendant's knowledge that her boyfriend would later mail the tapes in interstate commerce.

## *POSSE COMITATUS ACT*

***United States v. Dreyer***, 804 F.3d 1266 (9th Cir. 2015) The Posse Comitatus Act, 18 U.S.C. § 1385 forbids Army and Air Force military personnel from participating in civilian law enforcement activities. Regulations extend this to all branches of the military. In this case, a civilian Navy Criminal Investigative Service investigator launched a child pornography investigation. The panel held that the evidence he obtained should have been suppressed. Reviewing the case en banc, the Ninth Circuit held that the Navy's conduct did violate the Posse Comitatus Act, but that the evidence would not be suppressed.

## *POST-ARREST SILENCE AND INVOCATION OF RIGHT TO COUNSEL*

***Greer v. Miller***, 483 U.S. 756 (1987) In this murder prosecution, the state prosecutor asked the defendant why he did not give his version of the story to the police at the time of arrest. An objection by the defendant was sustained and the judge told the jury to disregard the question. The United States Supreme Court holds that this does not constitute a violation of Doyle v. Ohio, 426 U.S. 610 (1976), because the defendant's silence was not used against him. The state trial court specifically ruled that evidence inadmissible and told the jury to disregard the statement. Thus, the question, though improper, constitutes harmless error.

***United States v. Wilchcombe***, 838 F.3d 1179 (11th Cir. 2016) Several cases in the Eleventh Circuit have held that the government may comment on a defendant's silence if it occurred prior to the time that he was arrested and given his Miranda warning. That is, the defendant's silence after he is placed in custody, if he has not yet been advised of his Miranda rights, is admissible to prove the defendant's guilt. In this case, Judge Jordan authored a concurring opinion advocating that these decisions were decided erroneously and advocated en banc reconsideration of this issue. En Banc consideration was denied and the Supreme Court subsequently denied a petition for certiorari. The Supreme Court has held that post-arrest pre-Miranda silence may be used to impeach the defendant. Brecht v. Abrahamson, 507 U.S. 619, 628 (1993).

***United States v. Edwards***, 792 F.3d 355 (3rd Cir. 2015) The government repeatedly referred during trial and during closing argument to the defendant's failure to speak, after having received his Miranda warning and having invoked his right to remain silent. This was reversible error.

***United States v. Shannon***, 766 F.3d 346 (3rd Cir. 2014) The prosecutor was permitted to ask the defendant, on cross-examination, whether he had ever told anybody about his exculpatory version of the facts. This violated Doyle, because it amounted to a comment on his post-arrest, post-Miranda silence. It matters not that some of the questions were directed to his pre-arrest silence. Even a couple questions about post-Miranda silence may violate Doyle's prohibition.

***Ford v. Wilson***, 747 F.3d 944 (7th Cir. 2014) Doyle v. Ohio, 426 U.S. 610 (1976) prohibits impeaching a defendant with the defendant's post-Miranda silence (i.e., "You didn't' tell this story after you were arrested, did you?"). In Griffin v. California, 380 U.S. 609 (1965), the Supreme Court held that a prosecutor may not comment during closing argument about the defendant's failure to testify at trial. Both of these decisions address the improper suggestion that invoking the Fifth Amendment can be costly to the defendant. Griffin, however, is subject to exceptions if the defense attorney's closing argument raises the issue and the prosecutor is simply responding.

***United States v. Robinson***, 485 U.S. 25 (1988). In this case, the defendant was charged with murder. The defense attorney argued in his closing that the prosecutor failed to prove any motive why the defendant would kill the victim. In response, in his closing, the prosecutor argued that there were only two people were there who could explain what happened and one of them was dead. "The next possible source is the person who committed the offense. If that person who committed the offense don't talk, how would we ever know?" In this habeas, case, the Seventh Circuit ultimately held that habeas relief was not required for procedural reasons.

***United States v. Andaverde-Tinoco***, 741 F.3d 509 (5th Cir. 2013) The prosecutor improperly referenced the defendant's post-arrest silence during closing argument in an effort to imply that this disproved the defendant's defense that he was justified in illegally crossing the border after being beaten and robbed before crossing the Rio Grande. Not plain error, however.

***Jaradat v. Williams,*** 591 F.3d 863 (6th Cir. 2010) The state court prosecutor elicited testimony from the arresting officer that the defendant invoked his right to counsel rather than answering any questions and that he always wants to hear both sides of the story, but the defendant did not tell his side of the story and never admitted that he had sexual contact with the victim (at trial, the defendant contended that the sexual contact was consensual). The Sixth Circuit held that this testimony represented a direct comment on the defendant's post-arrest silence and were impermissible under Doyle. Harmless error.

***United States v. Waller***, 654 F.3d 430 (3rd Cir. 2011) The trial court instructed the jury that in ascertaining the defendant's intent, it could consider any statements made or omitted by the defendant. The defendant had invoked his right to remain silent when he was arrested. This instruction was an improper invitation to consider the defendant's post-Miranda silence. Doyle v. Ohio, 426 U.S. 610 (1976). Conviction reversed.

***Gov't. of Virgin Islands v. Davis,*** 561 F.3d 159 (3rd Cir. 2009) The prosecutor cross-examined the defendant about his failure to make a statement to the police post-arrest/post-Miranda. Reversible error.

***United States v. Gentry,*** 555 F.3d 659 (8th Cir. 2009) The defendant claimed at trial that the drugs in the car belonged to someone else. She made no such statement to the police when she was arrested. Cross-examining her about this failure to alert the police about the real culprit was reversible error. A defendant may not be impeached with her post-arrest silence, or failure to provide exculpatory information.

***United States v. Caruto***, 532 F.3d 822 (9th Cir. 2008) Generally, a defendant who invokes his Miranda rights may not be impeached by evidence that he invoked his rights or that he remained silent. Doyle v. Ohio, 426 U.S. 610 (1976); Wainwright v. Greenfield, 474 U.S. 284 (1986). In this case, the defendant started making a statement – waiving her right to remain silent – but then stopped and invoked her right to remain silent. At trial, when she was cross-examined, she expanded on her statement. The prosecutor then cross-examined her, pointing out that various facts included in her testimony at trial were not included in her statement to the police. The "omission" was the result of her invocation of the right to remain silent. In other words, the only way the defendant could explain that certain portions of her trial testimony were omitted from her statement to the police, was to explain that she invoked her right to remain silent. The Ninth Circuit held that in this limited circumstance, the prosecutor should not be permitted to cross-examine the defendant about the omitted portion of the statement.

***United States v. Andujar-Basco***, 488 F.3d 549 (1st Cir. 2007) If a defendant initially waives his right to remain silent and begins answering questions, he still retains the right to terminate questioning and invoke his right to remain silent. If he does so, the government may not introduce the subsequent invocation of his right to remain silent at trial.

***United States v. Hernandez,*** 476 F.3d 791 (9th Cir. 2007) Introducing the defendant's post-arrest, pre-Miranda silence, when asked, "What is this?" by an officer who was holding up a brick of cocaine, was error. Harmless error.

***United States v. Lopez***, 500 F.3d 840 (9th Cir. 2006) The defendant claimed that he fled across the border into the United States to avoid being killed by a Mexican drug dealer. The AUSA cross-examined him about his failure to make this claim when he was apprehended by border patrol agents. The question arguably included post arrest/post-Miranda silence. This was an improper comment on his right to remain silent. Harmless error.

***People of Territory of Guam v. Veloria***, 136 F.3d 648 (9th Cir. 1998) The government called to the stand a police officer who arrested the defendant. The only testimony elicited from the officer was that the defendant invoked his right to remain silent and his right to counsel. This was plain error.

***Hill v. Turpin***, 135 F.3d 1411 (11th Cir. 1998) Repeatedly during the course of trial, the prosecutor referred to the defendant's invocation of his right to counsel, and to remain silent, after receiving Miranda warnings. This violated the rule of Doyle v. Ohio, 426 U.S. 610 (1976) and required setting aside the death penalty conviction.

***Brown v. Dugger,*** 831 F.2d 1547 (11th Cir. 1987) It was improper for the prosecutor to refer during his closing argument to the defendant's silence in the face of accusatory statements made by his co-defendant when the police put the two together in a room. The Court further holds that this argument was not "invited" by any statements of defense counsel.

***Matire v. Wainwright***, 811 F.2d 1430 (11th Cir. 1987) During closing argument, the prosecutor referred to the defendant's silence after having been warned of his Miranda rights. The government argued that evidence of post-arrest silence was probative on the defendant's insanity defense. The Eleventh Circuit reverses on the basis of this Fifth Amendment violation.

***Coppola v. Powell***, 878 F.2d 1562 (1st Cir. 1989) Prior to his arrest and prior to being placed in custody, the defendant invoked his privilege against self-incrimination in a "bragging tone of voice." The trial court committed reversible error in allowing a trooper to describe the defendant's invocation of his privilege.

***United States v. Szymaniak***, 934 F.2d 434 (2d Cir. 1991) After being arrested, the defendant stated, "I'm in a lot of trouble and I want to speak to my lawyer." The government introduced this statement into evidence. This was reversible error as it amounts to evidence of the defendant's post-Miranda post-arrest silence.

***Gravley v. Mills***, 87 F.3d 779 (6th Cir. 1996) The prosecutor improperly introduced evidence and argued to the jury the significance of this evidence, relating to the defendant's post-Miranda silence. This "egregious" conduct required that the conviction be set aside.

***Thomas v. Indiana***, 910 F.2d 1413 (7th Cir. 1990) The state trial court committed reversible error in permitting the state to introduce evidence in support of the state's theory that the defendant was sane, and that the defendant remained silent after being read his Miranda rights. This evidence is clearly inadmissible under Doyle v. Ohio, 426 U.S. 610 (1976) and Wainwright v. Greenfield, 474 U.S. 284 (1986). ***Freeman v. Class,*** 95 F.3d 639 (8th Cir. 1996) Counsel was ineffective in failing to object when the state offered evidence of the defendant's silence after being advised of his Miranda rights.

***Fields v. Leapley***, 30 F.3d 986 (8th Cir. 1994) The prosecutor violated the defendant's rights under Doyle v. Ohio, 426 U.S. 610 (1976), by asking an officer about the defendant's post-arrest post-Miranda silence. With respect to post Miranda warnings "silence," silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted.

***Wainwright v. Greenfield***, 474 U.S. 284 (1983). The error was not harmless, and the writ would be granted.

***United States v. Turner***, 966 F.2d 440 (8th Cir. 1992) The trial court erred in permitting the government to introduce evidence of the defendant's post-arrest / post-Miranda silence. Though the defendant later waived his Miranda rights and made a statement, this does not amount to a waiver of the right not to have post-arrest silence admitted. Harmless error.

***Bass v. Nix***, 909 F.2d 297 (8th Cir. 1990) The prosecutor's references to the petitioner's post-arrest silence violated the defendant's rights under the Fifth Amendment. The district court correctly granted the writ vacating the conviction.

***United States v. Kallin***, 50 F.3d 689 (9th Cir. 1995) The defendant was charged with tax evasion. When he was cross-examined by the prosecutor, he was asked whether he had ever told the IRS agent that he was innocent; and asked whether he had hired a criminal defense attorney when he was first approached by the IRS. Both of these lines of questioning

were improper and merited a reversal of the conviction, even though the trial court later directed the jury to disregard these questions and answers. The questions amounted to improper Doyle v. Ohio questions. Even with regard to non-custodial questioning by the IRS agent, because the agent advised the defendant of his right to an attorney, and his right to remain silent, the invocation of that right could not be used to impeach the defendant or suggest that he was demonstrating a consciousness of guilt. With regard to the curative instruction, the instruction merely repeated the offensive questions and answers and then urged the jury to ignore the testimony. This was not an adequate curative instruction.

***United States v. Newman***, 943 F.2d 1155 (9th Cir. 1991) The prosecutor's repeated efforts to elicit testimony about the defendant's post-arrest silence necessitated a reversal of the conviction.

***United States v. Canterbury***, 985 F.2d 483 (10th Cir. 1993) Defendant claimed that he purchased a silencer after being set up (entrapped). At trial, he was cross-examined about this failure to make this claim at the time of his arrest. Because this cross was designed to impeach the defendant's claim of entrapment, this amounted to reversible error.

***United States v. Harrold***, 796 F.2d 1275 (10th Cir. 1986) It was error to admit evidence of the defendant's post-Miranda silence. The error was harmless in this case. United States v. Tenorio, 69 F.3d 1103 (11th Cir. 1995) When entering customs at Miami Airport, the defendant was searched by a customs agent who discovered heroin in his suitcase. Shortly thereafter, the defendant was Mirandized, and he declined to waive his rights. The next day, the defendant told an agent that the suitcase had been given to him by a cab driver. At trial, the prosecutor argued that this excuse, coming as it did a day after the discovery of the heroin, was indicative of guilt. If the defendant had been given the suitcase by a cab driver, the prosecutor argued, he would have revealed this immediately after the heroin was discovered. This was not harmless error since the defendant's silence was the touchstone of the government's case.

***United States v. Rivera,*** 944 F.2d 1563 (11th Cir. 1991) After the defendant was arrested and while his bags were being searched, he said nothing. In fact, the defendant, along with her companions, remained "deadpan" during the entire encounter with Customs officials, including after being Mirandized and as their bags were being searched. During closing argument, the prosecutor argued that this reaction was pre-planned by the defendants. The court thoroughly reviews the law governing the use of a defendant's post Miranda silence – including a discussion of whether one's facial expressions or demeanor can amount to "silence" – and concludes that even if there was error, it was harmless.

***United States v. Pena***, 897 F.2d 1075 (11th Cir. 1990) Following his arrest, the defendant was asked if he wanted to make a statement. He responded, "I really want to but I can't. They will kill my parents." This amounted to at least an ambiguous invocation of his right to remain silent. The government should have clarified the defendant's desire before continuing the interrogation. His subsequent incriminating statements should not have been used, though it was harmless error. Also, the Court notes that a defendant's post-Miranda ambiguous expression of a desire to remain silent is not admissible in evidence. The same is true, of course, for an unambiguous expression of intent to remain silent. This case probably did not survive the decision in Davis v. United States, 512 U.S. 452 (1994). See Coleman v. Singletary, 30 F.3d 1420 (11th Cir. 1994).

***Brown v. Dugger***, 831 F.2d 1547 (11th Cir. 1987) Following the arrest of the defendant and his confederate, the two were placed in a room together in the presence of the investigating officer. The co-defendant implicated the defendant in the murder; the defendant remained silent. At trial, the investigating officer was permitted to testify that the defendant remained silent, and the prosecutor relied on this incriminating silence in his closing argument. The Eleventh Circuit holds this is reversible error.

***Matire v. Wainwright***, 811 F.2d 1430 (11th Cir. 1987) The testimony of two police officers as well as the prosecutor's closing argument regarding the defendant's silence after being informed of his Miranda rights was impermissible. The evidence was argued by the prosecutor to demonstrate the defendant was not, in fact, insane as he contended in his defense. Because the issue of sanity was not overwhelming, the conviction was reversed.

***United States v. Moore***, 104 F.3d 377 (D.C. Cir. 1997) The defendant was charged with possession of cocaine that was found under the hood of his car. After the police discovered the cocaine under the hood, the defendant made no comment and expressed no surprise. He was in custody when this occurred. In closing argument, the prosecutor queried why, if the defendant were unaware that there were drugs under the hood, he said nothing, and failed to register surprise when the drugs were found there. This was an impermissible comment on the defendant's post-arrest silence. The court further held that the fact that the defendant had not received Miranda warnings did not alter the result. After a defendant is in custody, whether Mirandized or not, his silence cannot be used by the prosecution as evidence of his guilty knowledge, or state of mind. The use of un-Mirandized silence may, however, be used for impeachment purposes, the court notes. Harmless error. The court denied re-hearing en banc, with a lengthy dissent by Judge Silberman, explaining the significance of the court's holding.

***United States v. Johnson***, 802 F.2d 1459 (D.C. Cir. 1986) It was error for the prosecutor to call a witness for the sole purpose of bringing out the post-arrest statement which was not otherwise admissible. However, the defendant's failure to object to the statement renders the error harmless.

## *PRIVILEGES*

***United States v. BDO Seidman,*** 337 F.3d 802 (7th Cir. 2003) The IRS issued a summons to the large accounting firm, asking for documents that would reveal the identity of every client who sought advice regarding, and ultimately invested in, certain tax shelters. The clients invoked the privilege of confidential communications between an accountant and his client. See 26 U.S.C. § 7525. Because the information being sought did not include actual communications, the summons was permissible. This decision reviews in depth the law surrounding the issuance of IRS summonses and the law of privilege in the context of IRS inquiries.

***PRIVILEGES (Journalist)***

***United States v. Sterling***, 724 F.3d 482 (4th Cir. 2013) The court reaffirmed that there is no reporter's privilege protecting a reporter from revealing his source. In re: Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006) The First Amendment does not allow reporters to shield their sources from the grand jury.

***Branzburg v. Hayes,*** 408 U.S. 665 (1972). Even if there were a common law recognizing a reporter's privilege, it would not be absolute and would have been overcome in this case, where the special counsel was investigating unlawful disclosures of a CIA agent's identity.

***In re Grand Jury Subpoena, Judith Miller***, 438 F.3d 1131 (D. C. Cir. 2005) The New York Times reporter was properly held in contempt for failing to comply with a grand jury subpoena relating to her coverage of a story involving the improper leaking of the identity of a CIA agent. See Branzburg v. Hayes, 408 U.S. 665 (1972).

***PRIVILEGES (Marital)***

***United States v. Jarvison***, 409 F.3d 1221 (10th Cir. 2005) The evidence supported the district court's decision that the defendant and the witness were married pursuant to Navajo law. The court also held that a witness's right to invoke the spousal privilege applies even in cases of familial child abuse.

***United States v. Gilbert***, 391 F.3d 882 (7th Cir. 2004) When the defendant's spouse refused to testify at trial, relying on the marital privilege, the trial court allowed the government to play her previous statement, because the court found that it had circumstantial guarantees of trustworthiness. Post-Crawford, this was erroneous.

***United States v. Montgomery***, 384 F.3d 1050 (9th Cir. 2004) The Ninth Circuit explains the difference between the marital communication privilege (which the defendant and/or the witness may invoke, to bar the disclosure of a communication with his/her spouse) and the spousal privilege (which allows a witness to refuse to testify against his/her spouse). In this case, the trial court erroneously permitted the government to introduce a letter written from the spouse to the defendant accusing him (and his sister) of perpetrating a fraud in their business. The court also held that the communication in this case was not in furtherance of the criminal activity (in fact, it was made in an effort to stop the crime), so that exception to the privilege did not apply.

***United States v. Rakes***, 136 F.3d 1 (1st Cir. 1998) The defendant was charged with perjury. He was the victim of extortion and had been called to the grand jury to testify about the crime but denied that he had been victimized. He confided in his wife, and his attorney about the extortion. The government then sought to compel the testimony of his wife and attorney. The district court upheld the marital communication and attorney-client privilege claims. The First Circuit affirmed. There is no exception to the privileges in cases in which the client is the victim of a crime. The court also held, with respect to the marital privilege, that it applies to conversations that relate to events that occurred prior to the marriage; and also applies after divorce. Finally, there is no exception for conversations that relate to financial matters, assuming the discussion is intended to be confidential.

***United States v. Montgomery***, 384 F.3d 1050 (9th Cir. 2004) A wife wrote a letter to her husband, encouraging him to talk to a third party about the third party's criminal conduct. This communication was covered by the spousal privilege. The court also noted that the privilege belongs not only to the communicating spouse, but to the spouse who receives the communication.

***In re Grand Jury,*** 111 F.3d 1083 (3rd Cir. 1997) The government subpoenaed the wife of a subject of the grand jury (a subject, not a target) to testify before the grand jury. She asserted the marital privilege. The government offered her immunity – a promise not to use her testimony either directly, or indirectly against her husband, or to seek an indictment against her husband by this grand jury. This was permissible.

***United States v. Hall***, 989 F.2d 711 (4th Cir. 1993) The defendant's wife made statements to an investigator, prior to trial, revealing conversations she had had with her husband about his drug use. Prior to trial, however, she indicated that she would not testify, relying on the marital privilege. When the defendant testified, however, the prosecutor questioned him about the statements made by the wife. When the defense counsel objected because of the lack of foundation, the prosecutor responded (in front of the jury) that the wife had made these statements. Even with a curative instruction, this was reversible error.

, 988 F.2d 1335 (4th Cir. 1993) At the grand jury, the defendant's wife refused to testify, ***United States v. Morris*** relying on the marital privilege. At trial, however, she testified on behalf of her husband. When cross-examined, she was asked by the prosecutor about her prior invocation of the marital privilege. This was reversible error. Just as a witness may not be asked about the prior invocation of the Fifth Amendment privilege, a witness may not be asked about a prior invocation of the marital privilege. The privilege should not be undermined by permitting the prosecutor to capitalize on a witness's reliance on the privilege.

***United States v. Ramos-Oseguera***, 120 F.3d 1028 (9th Cir. 1997) A spouse's exercise of the marital privilege not to testify against her husband is not waived by evidence that she was jointly involved in the criminal activity with her husband. That is, there is no "joint participation in crime exception" to the spousal testimonial privilege.

***United States v. Marchini***, 797 F.2d 759 (9th Cir. 1986) During the course of the grand jury investigation, the defendant's wife, who was not married to the defendant at that time, gave testimony which inculpated the defendant. Prior to trial the witness married the defendant. The district court held that the wife's grand jury testimony could be admitted at the trial since she was now an unavailable witness. The Ninth Circuit affirms.

***PRIVILEGES (Pre-trial Services Worker***)

***United States v. Perez***, 473 F.3d 1147 (11th Cir. 2006) Information gathered by a pretrial services worker is considered to be confidential and may only be used to assess the defendant's eligibility for bond. 18 U.S.C. § 3153(c)(1). Allowing a pretrial services worker to identify the defendant's voice and cell phone number was inappropriate, but not plain error.

***PRIVILEGES (Psychiatrist-patient)***

***Jaffee v. Redmond***, 518 U.S. 1 (1996) The Supreme Court recognized a psychotherapist-patient privilege.

***United States v. Ghane***, 673 F.3d 771 (8th Cir. 2012) In Jaffee v. Redmond, 518 U.S. 1 (1996), the Supreme Court recognized the psychotherapist-patient privilege. In this case, the court held that the defendant's statements to an intake physician's assistant were not covered by the privilege. However, later statements to a treating psychiatrist were privileged. The court rejected a "dangerous patient" exception to the privilege in the context of a criminal trial.

***United States v. Chase***, 340 F.3d 978 (9th Cir. 2003) The defendant's psychiatrist was permitted to testify about specific threats made by the defendant directed to specific people. However, it was error to permit the psychiatrist to testify about other matters revealed to her during therapeutic sessions. Harmless error.

***United States v. Glass***, 133 F.3d 1356 (10th Cir. 1998) The defendant told his psychotherapist that he wanted to kill Bill Clinton and Hillary. Based on this statement, the government prosecuted him for threatening the life of the President. The Tenth Circuit held that using this statement violated the psychotherapist-patient privilege, because there was no finding by the trial court that the threat amounted to a serious threat of danger to the President, or that the psychotherapist's disclosure of the statement was the only way of averting the danger. Absent these findings, the privilege applied.

***PRIVILEGES (Reporter's Privilege)***

***McKevitt v. Pallasch,*** 339 F.3d 530 (7th Cir. 2003) Judge Posner explains the history and scope of the journalist privilege (to the extent that such a privilege exists) and concludes that it does not apply in this case where the reporter was not interviewing a non-confidential source and the person being interviewed did not object to disclosure of the full interview.

## *PROBATION REVOCATION / SUPERVISED RELEASE*

***United States v. Moslavac***, 779 F.3d 661 (7th Cir. 2015) The trial court's failure to conduct a balancing test under Fed. R. Crim. P. 32.1(b)(2)(C) to gauge the reliability of the hearsay evidence presented against the defendant was reversible error. In fact, the trial court must consider other factors – not just reliability – in deciding whether the government should be permitted to introduce hearsay evidence.

***United States v. Lloyd***, 566 F.3d 341 (3rd Cir. 2009) Though the Rules of Evidence do not apply at a supervised release revocation hearing, Due Process requires that evidence used to revoke a person's release status must meet some level of reliability and the defendant must be given some opportunity to confront the evidence against him. The Third Circuit concludes that the government must provide good cause for a declarant's absence.

***United States v. Taveras***, 380 F.3d 532 (1st Cir. 2004) Rule 32.1(b)(2)(C) provides that the defendant should be allowed to confront the witnesses against him unless the judge concludes that countervailing interests weigh against this right. The Rules were designed to assure the defendant the rights envisioned by Morrissey v. Brewer, 408 U.S. 471 (1972). In this case, the probation officer simply recited the evidence that supported the petition for revocation. This was improper. The declarant's statements did not qualify as an excited utterance and did not otherwise have indicia of reliability.

***United States v. Poellnitz***, 372 F.3d 562 (3rd Cir. 2004) If a supervised release revocation is predicated on a violation of conditions, and the alleged violation is the commission of another criminal offense, the government is not required to establish that the defendant was actually convicted of another criminal offense. Rather, the government must simply prove that the defendant did, in fact, commit the crime. In this case, the government relied exclusively on the defendant's entry of a nolo contendere plea in state court to another criminal offense. The Third Circuit holds that the entry of a nolo plea in Pennsylvania does not, by itself, establish that the defendant committed another criminal offense. In Pennsylvania, a nolo plea does not constitute an admission of factual guilt.

***United States v. Guagliardo***, 278 F.3d 868 (9th Cir. 2002) A condition of the defendant's supervised release prohibited him from possessing any "pornography." Because of the lack of any definition of this term, it could not be enforced. Delegating to the probation officer the determination of what qualifies as pornography, moreover, could result in an interpretation that was stricter than that envisioned by the trial judge who imposed the sentence. Also, a term of supervised release that prohibited the defendant from residing "in close proximity" to places frequented by children, was too vague to be enforced.

***United States v. Bass***, 121 F.3d 1218 (8th Cir. 1997) The defendant was convicted of crack cocaine offenses. The trial court abused its discretion in ordering, as part of the conditions of supervised release, that the defendant refrain from using any alcohol. See also United States v. Prendergast, 979 F.2d 1289 (8th Cir. 1992).

***United States v. Strager,*** 162 F.3d 921 (6th Cir. 1998) The defendant's threat to sue his probation officer, and his threat to "research the law" did not provide a sufficient basis to revoke his probation.

## *PUBLIC AUTHORITY DEFENSE*

***United States v. Canty,*** 499 F.3d 729 (7 th Cir. 2007) The police found counterfeit money on the defendant's printer. There was no question that the money was counterfeit and the defendant was manufacturing the bills. The defendant claimed, however, that he was manufacturing the bills as a favor to the government, because he was going to give the bills to the police who could then use them as "flash money." The defendant was facing a pending drug charge and thought that this "assistance" could inure to his benefit. At trial, the court precluded the defendant from offering this defense, because the defense did not give pretrial notice of public authority defense pursuant to Rule 12.3(a)(1). The Seventh Circuit reversed: the defendant's defense was not that he actually had the public authority to counterfeit the money, but that he lacked the intent to defraud, which is an essential element of a counterfeiting charge under 18 U.S.C. § 471.

***United States v. Giffen***, 473 F.3d 30 (2d Cir. 2006) The Second Circuit discusses at some length – all of which is dicta – the concept of entrapment by estoppel and the defense of "public authority."

***United States v. Bear***, 439 F.3d 565 (9th Cir. 2006) The defendant had been working for law enforcement officers but was indicted for continuing her drug offenses "off the reservation." Her defense was that she believed that she was still working undercover. The trial court's failure to instruct the jury on the defendant's public authority defense was plain error.

***United States v. Burt***, 410 F.3d 1100 (9th Cir. 2005) The defendant was initially stopped for transporting illegal aliens across the border. She attended a meeting with agents during which, she claimed, she was told to gather information for them, but don't do anything illegal; but that during the course of gathering information, she was protected from illegal acts. Shortly thereafter, she was stopped again transporting aliens across the border. She requested an instruction on a public authority defense. The trial court erred in refusing to instruct the jury on this defense.

## *PUBLIC TRIAL*

***Presley v. Georgia***, 130 S. Ct. 721 (2010) The Supreme Court reversed a Georgia state court conviction because the trial court excluded the public from jury selection because the courtroom was too small to accommodate the public and the prospective jurors. The Supreme Court held that the right to a public trial is rooted in both the Sixth Amendment right to a public trial, as well as the First Amendment, which guarantees press access to the courts. The Court concluded that the command in prior cases under both the First Amendment and the Sixth Amendment that a decision to close the courtroom must only occur after considering all reasonable alternatives to closure, applies to voir dire. "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." Id. at 725.

***Carey v. Musladin***, 127 S. Ct. 649 (2006) Reversing the Ninth Circuit, the Supreme Court held that the defendant's right to due process was not clearly violated when spectators in the courtroom wore buttons that depicted the face of the murder victim, and habeas relief under the standards of AEDPA was not warranted. This case is distinguishable from prior decisions such as Estelle v. Williams, 425 U.S. 501 (1976) (defendant compelled to wear prison clothing during trial); and Holbrook v. Flynn, 475 U.S. 560 (1986) (troopers sitting in courtroom), because the conduct in this case was purely private – there was no state sponsorship of the courtroom conduct of the spectators.

***United States v. Candelario-Santana***, 834 F.3d 8 (1st Cir. 2016) A witness expressed fear about testifying because of a perceived threat to himself and his family. The district court judge decided to tell the public that the proceedings were done for the day and once everybody left, court reconvened, and the witness testified. This was a violation of the defendant's right to a public trial and amounted to structural error, requiring reversal of the conviction.

***United States v. Simmons***, 797 F.3d 409 (6th Cir. 2015) Three of the defendant's alleged co-conspirators were sitting in the back of the courtroom when a government witness was about to testify. The prosecutor asked that the three leave the courtroom because it was feared that they would intimidate the witness. The defense attorney objected, but the "spectators" were removed. This violated the defendant's right to a public trial and the conviction was set aside. The trial court made no findings of fact and failed to adequately develop the record to support the partial closure of the courtroom.

***United States v. Negron-Sostre,*** 790 F.3d 295 (1st Cir. 2015) The Sixth Amendment was violated when the court ordered the defendant's family and friends removed from the courtroom during jury selection. This was apparently standard practice in Puerto Rico. The result was that a three-month trial was doomed from the beginning and all convictions were reversed.

***United States v. Pickard***, 733 F.3d 1297 (10th Cir. 2013) This case contains a useful discussion of the right of litigants to seek to unseal records that are filed in an earlier criminal case. Here, the litigants were defendants who had previously been convicted of criminal offenses based on the testimony of an informant, whose DEA file was submitted to the court by the AUSA but placed under seal. Years later, the defendants sought to unseal the records.

***United States v. Gupta***, 699 F.3d 682 (2d Cir. 2012) Excluding the public entirely from the voir dire portion of defendant's trial was a Sixth Amendment violation that required vacating the conviction.

***United States v. Rivera***, 682 F.3d 1223 (9th Cir. 2012) The trial court excluded the defendant's family from the sentencing proceeding. The judge thought it was "shameful" and manipulative that the defendant (a motorcycle gang defendant) had his

young child, among others, in the courtroom. The Ninth Circuit held that this violated the Sixth Amendment and remanded for sentencing before a different judge.

***United States v. Waters***, 627 F.3d 345 (9th Cir. 2010) The trial court erred in barring the public from attending a pre-trial omnibus hearing on various substantive motions and administrative matters.

***United States v. Withers***, 638 F.3d 1055 (9th Cir. 2010) The defendant made a colorable claim that the trial court had violated his right to a public trial by ordering all spectators to leave in anticipation of the beginning of jury selection. The transcript simply indicated that the trial judge directed all spectators to leave as the jurors were brought to the courtroom, though it was not clear if this was just a momentary clearing of the courtroom, or if the courtroom remained inaccessible to spectators throughout the jury selection proceedings.

***United States v. Agosto-Vega,*** 617 F.3d 541 (1st Cir. 2010) Prior to jury selection, the defendant's family members were instructed to leave the courtroom. The defense objected. The court explained that there was not enough room for the family members and the jurors. This was structural error requiring reversal of the conviction.

***Johnson v. Sherry***, 586 F.3d 439 (6th Cir. 2009) Trial counsel was arguably ineffective in failing to object to the closure of the courtroom during the testimony of two prosecution witnesses. A remand was necessary to determine whether there was any strategy involved and if not, whether the deficient performance was prejudicial to the defendant.

***Gibbons v. Savage,*** 555 F.3d 112 (2d Cir. 2009) Excluding one spectator from the courtroom during voir dire was error and amounts to structural error. However, the structural error was so trivial that it does not require granting a writ.

***Owens v. United States***, 483 F.3d 48 (1st Cir. 2007) The trial court may not bar the public from the courtroom because of the need to accommodate the jury pool during jury selection. If the defendant is denied his right to a public trial, a new trial is required without a showing of prejudice. Counsel's failure to object to the closure would constitute ineffective assistance of counsel.

***Hoi Man Yung v. Walker***, 468 F.3d 169 (2d Cir. 2006) The court discusses the requirements of a hearing to close the courtroom when an undercover testifies and claims that his safety and ongoing investigations require that he testify in a closed courtroom, and the prosecutor requests that members of the defendant's family be excluded as well. The Waller requirement that closures be no broader than necessary (Waller v Georgia, 467 U.S. 39 (1984)) remains the same, but as applied to family members may result in a different finding of necessity. The findings by the state trial court in this case were insufficient. Remand.

***Smith v. Hollins***, 448 F.3d 533 (2d Cir. 2006) The state trial court made insufficient findings to support requiring that the defendant's siblings sit behind a screen during the testimony of an undercover agent.

***Carson v. Fischer***, 421 F.3d 83 (2d Cir. 2005) Excluding members of the defendant's family during the testimony of a witness was error. Violations of the right to a public trial, moreover, are not subject to harmless error review. However, some violations are sufficiently insubstantial that they do not necessitate granting habeas relief. In this case, only one member of the defendant's family was excused during the testimony of a confidential informant.

***United States v. Thunder,*** 438 F.3d 866 (8th Cir. 2006) The trial court erred in closing the courtroom during the testimony of the children who were alleged to be victims of the defendant's sexual assault. Though 18 U.S.C. § 3509(e) permits closure during the testimony of children in certain limited circumstances, the court must make particularized findings before closure is permitted. No showing of actual prejudice is required; closure of the courtroom necessitates reversal of the conviction.

***United States v. Ochoa-Vasquez,*** 428 F.3d 1015 (11th Cir. 2005) The lower court's decision to seal various parts of the record (i.e., documents and transcripts) in a related case violated the First Amendment.

***United States v. Quattrone***, 402 F.3d 304 (2d Cir. 2005) In an effort to protect the integrity of the trial process, the district court entered an order that prohibited the press from publishing the names of jurors whose names were used in open court. This prior restraint violated the First Amendment and was not justified by any compelling Sixth Amendment concern.

***United States v. Alcantara***, 396 F.3d 189 (2d Cir. 2005) Conducting the plea colloquy and sentencing in chambers was error. The closure of the proceedings, without notice or an on-the-record finding of necessity warranted setting aside the judgment. See also 18 U.S.C. § 3553(c) (the reason for imposing a particular sentence shall be announced in open court).

***United States v. Abuhamra***, 389 F.3d 309 (2d Cir. 2004) A district court's order of detention pending sentencing is a final order that may be appealed to the court of appeals. 18 U.S.C. § 3145(c). In this case, the Second Circuit held that an appeal bond may not be denied based on an ex parte showing to the district court relating to the defendant's alleged risk of flight and dangerousness. An ex parte proceeding violates the Sixth Amendment public trial right.

**United States v. Rutherford**, 371 F.3d 634 (9th Cir. 2004) During the defendant's tax evasion trial, several IRS agents sat behind the prosecution table. Post-trial interviews with jurors indicated that some of them felt intimidated by the agents. The lower court held that the defendant had to prove that the government acted with the intent to intimidate the jurors. The Ninth Circuit, however, held that the defendant was only required to prove a prejudicial impact on the jury; the defendant was not required to prove that this was the government's intent. A remand for further development of the record was required. The defendant should be permitted to introduce evidence regarding the jurors' perceptions of the agents' conduct and any discussions among the jurors concerning the possibility of IRS retaliation if they voted to acquit.

***Walton v. Briley***, 361 F.3d 431 (7th Cir. 2004) Conducting a trial in the evening, after the courthouse has been closed and locked is impermissible under the Sixth Amendment. The failure to object is not a waiver of the right. There was no showing of a knowing and voluntary waiver of his right to a public trial.

***ABC, Inc. v. Stewart***, 360 F.3d 90 (2d Cir. 2004) The trial court erred in closing the voir dire proceedings in Martha Stewart's case. There was no showing made that juror would not be candid if the press was allowed in the courtroom during voir dire.

***Judd v. Haley***, 250 F.3d 1308 (11th Cir. 2001) The Eleventh recognized that there is a difference between total closure, where all spectators are excused from a portion of the trial, and partial closure, where members of the defendant's family or the press are permitted to remain. Partial closures may be justified by a "substantial reason" for the partial closure, which is a less demanding standard than the Waller standard. The total closure of a courtroom, even for a limited period of time (during one witness's testimony, for example), must satisfy the Waller standard. In Judd, the court concluded that an Alabama trial judge who closed the courtroom entirely during the testimony of a minor sexual assault victim — without any of the Waller steps having been taken — violated the defendant's Sixth Amendment public trial guarantee.

***English v. Artuz,*** 164 F.3d 105 (2d Cir. 1998) The exclusion of courtroom observers, especially a defendant's family members and friends, even from part of a criminal trial, is not a step to be taken lightly. The unwarranted exclusion of a defendant's family member justifies granting habeas corpus relief, and petitioner need not show prejudice. Nor does the doctrine of harmless error apply in such circumstances. In this case, excluding family members because a witness feared for his life if his identity was revealed was insufficient to justify excluding the defendant's family from the courtroom.

***Ayala v. Speckard,*** 131 F.3d 62 (2d Cir. 1997) In this en banc decision, the Second Circuit reviews the jurisprudence dealing with closing courtrooms and concludes that the lower courts in these consolidated cases acted properly in closing the courtroom during the testimony of undercover police officers in order to preserve their identity.

## *RAPE*

***United States v. Horse,*** 747 F.3d 1040 (8th Cir. 2014) The defendant was charged with criminal sexual conduct (rape), pursuant to 18 U.S.C. § 2242(2), by having sex with the victim who lacked the capacity to consent. The issue addressed by the Eighth Circuit was whether the government must prove that the defendant knew that the victim lacked capacity to consent. The Eighth Circuit concluded that the defendant must, indeed, have known that the victim lacked the capacity to consent and the failure to instruct the jury on this point was plain error.

***United States v. Peters***, 277 F.3d 963 (7th Cir. 2002) The defendant was charged with having sexual intercourse with a woman who was incapacitated. 18 U.S.C. § 2242(2)(B). The woman was drunk. The Seventh Circuit held that there was insufficient evidence to prove that she was incapable of declining participation in the sexual act at the time that the two had sex, though she could not remember the evening and claimed that she would not have voluntarily had sex with the defendant.

## *RE-OPENING EVIDENCE*

***United States v. Hernandez-Meza***, 720 F.3d 760 (9th Cir. 2013) The trial court erred in this case in permitting the government to re-open the evidence and introduce evidence that was no previously produced to the defense as required by Rule 16. The government protested that the defendant's defense was unexpected (it was revealed when the defendant submitted his proposed requests to charge) and that the additional evidence was needed to refute the newly revealed theory of defense. The Ninth Circuit held that allowing the government to re-open the evidence was reversible error. The fact that the new defense was factually not realistic is not relevant, the defense had the right to raise this defense and to point out the gaps in the government's proof. Judge Kozinski wrote, "[A] criminal defendant, unlike the government, needn't have a good faith belief in the factual validity of a defense. So long as the defendant doesn't perjure himself or present evidence, he knows to be false—and Hernandez–Meza presented no evidence at all—he's entitled to exploit weaknesses in the prosecution's case, even though he may believe himself to be guilty. What matters in satisfying the government's burden of proof in a criminal case is not objective reality nor defendant's personal belief, but the evidence the government presents in court. No competent prosecutor would be surprised, based on what he thinks defendant should know, to find defense counsel poking holes in the government's case. The argument is without merit, yet the government made it before the district court, and again on appeal. The government's failure to produce the evidence in its Rule 16 production was not justified. The Rule requires the production of all documents "material to the preparation of the defense." Information is material even if it simply causes a defendant to completely abandon a planned defense and take an entirely different path. If the defendant in this case knew that government had this evidence, the defendant may not have relied on this defense. Moreover, a defendant need not spell out his theory of the case in order to obtain discovery. Nor is the government entitled to know in advance specifically what the defense is going to be. Discovery must still be provided pursuant to Rule 16(a)(1)(E)(i). The Ninth Circuit held that the trial judge's summary rejection of the defendant's Rule 16 argument, as well as his unsupported decision to allow the government to re-open the evidence, required that the case be remanded and that a new judge preside over the case.

***United States v. Crawford***, 533 F.3d 133 (2d Cir. 2008) During closing argument, defense counsel noted that the government failed to trace the provenance of the firearm. During deliberations, the jury asked about the "trace report" on the weapon; evidence of the tracing of the weapon had been supplied to the defense in discovery, but evidence was not introduced at trial about tracing the evidence. After receiving the jury's note, the judge decided to let the government offer additional evidence about tracing the weapon. The government also asked the agent whether the defense counsel had actually been given the report

in discovery, and the agent confirmed that it was. This was reversible error. The error was compounded by the testimony relating to the defense counsel's knowledge of the evidence, because it insinuated that the attorney was dishonest with the jury during his closing argument. The government's suggestion that the defense was engaged in improper "gamesmanship" by referring to the absence of evidence relating to the tracing of the weapon, and the government was merely accurately revealing this to the jury, was meritless: the government failed to introduce the tracing evidence at trial and the defense attorney properly pointed this out to the jury during his argument.

***United States v. Nunez***, 432 F.3d 573 (4th Cir. 2005) During the jury's deliberations, a note was sent indicating that the jury could not find a particular agent's report. The report had actually not been entered into evidence. The trial court improperly permitted the government to introduce the report into evidence during deliberations.

***United States v. Peay***, 972 F.2d 71 (4th Cir. 1992) After the evidence was closed, the government was permitted to re-open the evidence and a witness offered additional testimony against the defendant. The defendant was denied the right to offer rebuttal evidence. This was reversible error. While the judge has discretion to re-open the evidence, this discretion can be abused if the defendant is denied the opportunity to confront this evidence or to offer rebuttal. Such rebuttal might include traditional impeachment of the evidence offered in rebuttal.

***United States v. Parker***, 73 F.3d 48 (5th Cir. 1996) The defendant was charged with armed robbery. He claimed that he used a toy gun. His attorney's investigator interviewed the victim, who conceded that the gun may have been a toy gun. At trial, the victim testified that the gun was real. The parties rested just before lunch. After lunch, the defendant requested an opportunity to re-open his case to introduce the testimony of the investigator which would impeach the witness. The trial court abused his discretion in denying this request. The motion was not untimely – it was made immediately after the conclusion of the lunch recess; the testimony was important, because it impeached the only testimony offered by the government that the gun was real; finally, allowing the defendant to reopen the evidence would not have unfairly prejudiced the government, or confused the jury. Another portion of this opinion was overruled in en banc reconsideration, but not this portion. 104 F.3d 72 (5th Cir. 1997).

## *RICO*

***Boyle v. United States,*** 129 S. Ct. 2237 (2009) The enterprise element of a RICO allegation may be proven with evidence of an "association-in-fact" enterprise. Though the enterprise must have certain characteristics, such as an ongoing organization" it is not necessary to instruct the jury that the "structure" must be distinct from the pattern of racketeering activity.

***Salinas v. United States***, 522 U.S. 52 (1997) In a RICO conspiracy case, if the government proves an agreement on an overall objective, it is not necessary to prove that the defendant agreed personally to commit two predicate acts.

***United States v. Robertson***, 514 U.S. 669 (1995) The defendant was convicted of violating RICO by investing the proceeds of narcotics transactions in a gold mine in Alaska. Employees of the mine were recruited from outside the state; some of the gold was sold outside the state; and some of the equipment was purchased out of state. This satisfactorily established that the mine was "engaged in interstate commerce." The court of appeals improperly focused solely on whether the operations of the mine "affected" interstate commerce. RICO, however, establishes jurisdiction if the enterprise's activities affect interstate commerce, or if the enterprise is engaged in interstate commerce. The latter was sufficiently shown in this case.

***H.J. Inc. v. Northwestern Bell Telephone***, 492 U.S. 229 (1989) It is not necessary to prove that a RICO defendant engaged in multiple criminal schemes in order to establish the requisite pattern of racketeering activity. It is enough to show at least two predicate acts of racketeering activity that are related and that amount to or threaten the likelihood of continued criminal activity.

***United States v. Tavares***, 844 F.3d 46 (1st Cir. 2016) The defendants were officials in the Massachusetts State Probation Department. They were charged with a RICO, bribery/gratuities and mail fraud offenses based on their practice of hiring people for various Probation Department positions based on requests by State Legislators, who, in turn, would vote favorably on Probation legislation (including increased budgets). The First Circuit reversed the conviction on all counts: there was insufficient proof of a nexus between any act of the Probation Department officials (rigging the hiring process) and any official act of the legislature. Regarding the mail fraud counts, there was insufficient proof that any mailing was linked to any fraudulent conduct. Each mailing was a rejection letter to an applicant who was allegedly more qualified for a position than the person who was hired at the request of a legislator.

***United States v. Pinson***, 860 F.3d 152 (4th Cir. 2017) The defendant was charged with a RICO conspiracy with some of the predicate acts being § 666 violations. The various crimes, however, were not related to each other, though a couple grew out of his receipt of money from individuals or companies that benefitted from his role on the Board of Trustees of South Carolina State University. The Fourth Circuit held that the crimes did not demonstrate the type of continuity, relationship between the members of the supposed enterprise and longevity to qualify as an association in fact enterprise. The evidence also failed to support the § 666 violations, because the person receiving the illicit payments was not proven to be an agent of the covered entity. Finally, with regard to a third § 666 count, the evidence failed to show that the recipient of federal funds qualified under the $10,000 threshold, because the money received was earmarked for the construction of housing and this does not qualify as a grant, loan, or contract.

***United States v. Cain***, 671 F.3d 271 (2d Cir. 2012) The district court erred in failing to instruct the jury that, in order to establish a "pattern of racketeering" for the purposes of securing a RICO conviction, the government is required to show that the predicate

acts were related to one another and threatened continued criminal activity. This “horizontal relatedness” requirement is essential to proving a “pattern.” See United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989).

***United States v. Warner***, 498 F.3d 666 (7th Cir. 2007) A state may be an enterprise. Former Governor George Ryan’s conviction was affirmed.

***United States v. Cummings***, 395 F.3d 392 (7th Cir. 2005) The government alleged that the enterprise in this case was a state agency. Low level employees of the agency were bribed to provide to outsider’s confidential personal information from the agency’s databases. The Seventh Circuit held that the low level employees did not satisfy the “operation or management” test of Reves v. Ernst & Young, 507 U.S. 170 (1993). That test requires a showing (with respect to insiders) of some degree of direction, so that a person charged with conducting or participating in the enterprise’s affairs within the meaning of § 1962(c) must have some part in directing those affairs. The same standard applies in a § 1962(d) conspiracy case.

***United States v. Bruno***, 383 F.3d 65 (2d Cir. 2004) The evidence was insufficient to support the defendants’ RICO and Murder in Aid of Racketeering convictions. The Murder charge (18 U.S.C. § 1959) requires proof that the murder was committed for the purpose of maintaining or increasing a defendant’s position in an enterprise. See also United States v. Ferguson, 246 F.3d 129 (2d Cir. 2001); United States v. Palanco, 145 F.3d 536 (2d Cir. 1998); United States v. Thai, 29 F.3d 785 (2d Cir. 1994). The government failed to prove that the defendants murdered the victim for the required purpose. One theory, that the defendants wanted to “switch crews” within the organized crime family (and for that reason, murdered the victim) does not qualify as “maintaining or increasing” the defendant’s position in the enterprise. Moreover, there were considerably more motivations (such as avoiding paying a debt). In addition, the shooting violated organized crime protocol. Regarding the RICO conviction, the evidence failed to establish that the murder was “related” to the affairs of the enterprise.

***Waucaush v. United States***, 380 F.3d 251 (6th Cir. 2004) The Sixth Circuit concluded in the RICO case that a gang member who kills a member of a rival gang has not engaged in conduct that satisfies the interstate commerce element of the offense, unless the rival gang was involved in economic activity that affected interstate commerce. In this case, the rival gang was affiliated with another gang that was involved in drug dealing, but the Sixth Circuit held that this was an insufficient connection to interstate commerce. Violence, alone, even when considered in the aggregate, does not affect interstate commerce.

***United States v. Miller***, 116 F.3d 641 (2d Cir. 1997) Under the "operation and management" test of Reves v. Ernst & Young, 507 U.S. 170 (1993), to be prosecuted for a RICO violation, the defendant must participate in the operation or management of the enterprise itself to be subject to liability. It is not sufficient, therefore, to charge the jury that "to participate in the conduct of an enterprise includes the performance of the acts, functions or duties that are necessary or helpful to the operation of the enterprise." The error in this case was harmless because the defendants were shown to be managers of the enterprise.

***United States v. To***, 144 F.3d 737 (2d Cir. 1998) With regard to one defendant in this RICO conspiracy case, the evidence was insufficient. Even assuming that the defendant participated in at least one robbery, this was insufficient evidence that he agreed to an overall objective of supporting the enterprise through a series of robberies. His association with other members of the enterprise was also insufficient evidence of his guilt of being a member of the RICO conspiracy.

***United States v. Polanco,*** 145 F.3d 536 (2d Cir. 1998) The defendant was a leader of a substantial criminal enterprise engaged in drug dealing and gun sales. One of the defendant’s other interests was selling guns to another enterprise with which he did not compete. On one occasion, he sold a machine gun to the leader of the other organization, and the other leader, in defendant’s presence, tested the machine gun by killing an innocent bystander. The government charged the defendant with violating 18 U.S.C. § 1959 which makes it a separate crime to commit murder for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity. The indictment alleged that the defendant committed the murder to enhance his position in the other criminal enterprise. The Second Circuit reversed. The defendant was a mere “vendor” with respect to his relationship to the other enterprise and the murder was not committed to enhance his position in that enterprise.

***United States v. Goldin Industries, Inc***., 219 F.3d 1268 (11th Cir. 2000) The RICO defendant must be distinct from the enterprise in the indictment. Thus, a corporation named as a defendant in the indictment cannot also be the enterprise. In this case, the panel then decided that the defendants were individual corporations, but the enterprise was the association of these corporations. 219 F.3d 1271.

***United States v. Posado-Rios***, 158 F.3d 832 (5th Cir. 1998) The Fifth Circuit reversed one defendant’s RICO conspiracy conviction, 158 F.3d at 858, though his convictions for various drug offenses were affirmed.

***United States v. Lopez***, 851 F.2d 520 (1st Cir. 1988) The predicate acts which the defendant allegedly committed in connection with this RICO violation were not committed within the last five years and thus the substantive RICO conviction was time-barred; however, the RICO conspiracy conviction was not barred because the statute of limitations did not begin to run until the accomplishment of, or the abandonment of the objectives of, the conspiracy.

***United States v. Viola***, 35 F.3d 37 (2d Cir. 1994) The district court’s charge to the jury did not properly address the issue decided by Reves v. Ernst & Young, 113 S.Ct. 1163 (1993). The court did not explain to the jury that a defendant could only be convicted of violating RICO if he had some part in directing the RICO enterprise’s affairs. Thus, an errand boy, who aided the enterprise, could not be convicted of violating RICO.

***United States v. Long***, 917 F.2d 691 (2d Cir. 1990) The Second Circuit requires proof of both horizontal and vertical relatedness between the predicate offenses and the enterprise in order to sustain a RICO conviction. The judge instructed the

jury that they had to find relatedness between the offenses and the activities of the enterprise but failed to instruct them that there had to be relatedness between the predicate offenses themselves.

***United States v. Biaggi,*** 909 F.2d 662 (2d Cir. 1990) The defendant accepted a bribe and later lied to investigators about taking the money. This does not constitute a "pattern of racketeering activity" under the RICO Act. The act of lying to investigators was pled by the government as a violation of 18 U.S.C. §1503. Though the acceptance of the bribe and the obstruction count were "related," they lacked the requisite "continuity" which is necessary to establish the pattern requirement.

***United States v. Indelicato***, 865 F.2d 1370 (2d Cir. 1989) The Second Circuit substantially revamps its analysis of the "pattern" requirement of a RICO prosecution in a case involving the killing of three Mafia men in a restaurant. The Court concludes that this triple slaying sufficed to establish a pattern of racketeering activity.

***United States v. Persico***, 832 F.2d 705 (2d Cir. 1987) The Second Circuit holds that the statute of limitations with regard to RICO conspiracy charges does not begin to run until the objectives of the conspiracy have been accomplished or abandoned, regardless of when the last predicate act occurred. With regard to a substantive RICO violation, the government must prove the defendant committed at least one predicate racketeering act within the period of limitations; it is not enough to show that any member of the illegal enterprise committed an overt act during the period.

***United States v. Pelullo***, 14 F.3d 881 (3rd Cir. 1994) Defendant was convicted of wire fraud in his first trial. At his second trial, which included a RICO count, the judge instructed the jury that the wire fraud conviction – one of the predicate offenses – was committed "as a matter of law." The judge further instructed the jury that they did not have to further consider whether that offense had been committed, because, as a matter of law, it had been committed. This was reversible error. In a criminal trial, the prosecution must prove every element beyond a reasonable doubt, including the predicate offenses. The Third Circuit noted that the goal of collateral estoppel efficiency and public policy concerns is not necessarily consistent with the Sixth Amendment's guarantee of a jury trial in all cases.

***United States v. Marcello***, 876 F.2d 1147 (5th Cir. 1989) Among the predicate acts offered to the jury in this RICO prosecution were certain mail and wire fraud counts which were invalid since they were based on an intangible right theory. Because there was no way to determine upon which predicate acts the jury based its decision, the RICO conviction had to be reversed.

***United States v. Jennings***, 842 F.2d 159 (6th Cir. 1988) The government failed to prove that the defendant engaged in two predicate offenses thus spoiling his RICO conviction. One of the acts relied on by the government was a telephone call in which the defendant's name was mentioned, but the defendant was not a party to that telephone conversation.

***United States v. Neapolitan***, 791 F.2d 489 (7th Cir. 1986) Defendant was convicted of a RICO offense with predicate acts that were not alleged in the indictment. While these acts would be admissible as circumstantial evidence that the defendant was a member of the conspiracy, they were actions outside the scope of the specific RICO conspiracy charged and could not be used to establish the pattern of racketeering activity defined in the indictment.

***United States v. Kragness,*** 830 F.2d 842 (8th Cir. 1987) The Eighth Circuit holds that one action that violates two statutes may not be charged as two separate predicate acts under RICO. The pattern of racketeering requirement of the act requires the commission of at least two continuous, related acts of racketeering. Thus, the importation, and subsequent possession of marijuana with the intent to distribute does not represent two predicate acts for a RICO prosecution.

***United States v. Weissman***, 899 F.2d 1111 (11th Cir. 1990) The trial court improperly allowed the government to change the "enterprise" from that which was alleged in the indictment. The indictment charged the defendant with participating in a pattern of racketeering activity with the "DeCavalcante Family." At trial, however, the Court instructed the jury that they could find him guilty if there was proof of any enterprise.

***United States v. DeFries***, 129 F.3d 1293 (D.C. Cir. 1997) In the midst of instructing the jury on the elements of a RICO offense, the judge instructed the jury that they should presume that the union was an enterprise. Because the existence of an enterprise is an essential element of the offense, this instruction was erroneous.

***RICO (Forfeiture)***

***United States v. Saccoccia,*** 354 F.3d 9 (1st Cir. 2003) The government could not seize attorney's fees that had been paid and spent by the attorneys as substitute assets in this RICO case. The district court concluded that the attorneys did not know the money represented proceeds of money laundering until after the client was convicted. The government argued that the attorneys' knowing violation of a pre-trial restraint of the defendant's assets justified entering a judgment against the lawyers. With regard to substitute assets, the First Circuit wrote that the forfeiture statute does not provide an avenue through which the government may reach a third party's untainted assets as a substitute for tainted assets which the third party had already transferred prior to the date of forfeiture. Back in the District Court, the lower court held the lawyers in contempt (civilly) until they returned the money. 91-115-T (10/25/04). The First Circuit reversed the contempt judgment, however, at 433 F.3d 19 (1st Cir. 2005).

***United States v. Gotti***, 155 F.3d 144 (2d Cir. 1998) The RICO statute, 18 U.S.C. §1963(d)(1), does not authorize the pretrial, post-indictment seizure of substitute assets.

***United States v. Carson***, 52 F.3d 1173 (2d Cir. 1995) The provision in 18 U.S.C. §1964 (civil RICO) which permits the court to disgorge an enterprise's assets may not be used to remedy a past act of racketeering. Rather, the provision may only be invoked to prevent future illegal activity.

***United States v. Pelullo***, 14 F.3d 881 (3rd Cir. 1994) The standard of proof in a RICO criminal forfeiture proceeding is proof beyond a reasonable doubt. The court distinguished the standard which most courts have applied in the CCE forfeiture context, based on the different Congressional intent in enacting the statutes.

***United States v. Ofchinick***, 877 F.2d 251 (3rd Cir. 1989) The evidence did not support the jury's verdict that the defendant should forfeit $6,000,000 which represented his stock in the corporate defendant.

***United States v. Horak,*** 833 F.2d 1235 (7th Cir. 1987) The defendant was convicted of RICO, and the issue was what would be forfeited. The defendant, the head of a garbage collection company, was convicted of bribery offenses. The government sought to forfeit his salary, profit sharing and other benefits from his company. The Seventh Circuit rejected the government contention that a defendant acquires or maintains an interest in violation of the racketeering law simply by virtue of the fact that his racketeering activities "enhance" his performance within an enterprise. Instead, a "but for" test is required. The Seventh Circuit also held that it would not review the trial court's refusal to order forfeiture of the defendant's stockholding in a parent corporation. The Court held that such an order is not appealable under 18 U.S.C. §3731.

***United States v. Riley***, 78 F.3d 367 (8th Cir. 1996) Pursuant to 18 U.S.C. §1963(a), the government may seek forfeiture of a defendant's interest in an enterprise, or the proceeds of racketeering activity. In this case, the government sought to seize pretrial an insurance company that was described as the enterprise. This was not permissible. The enterprise is not forfeitable, only the defendant's interest in the enterprise and the proceeds of racketeering activity. Moreover, the statute does not permit seizure of substitute assets.

***United States v. Reed,*** 924 F.2d 1014 (11th Cir. 1991) Property which was transferred prior to the enactment of the substitute asset provision of RICO (18 U.S.C. §1963(m)) may still be subject to the substitute asset provision. That is, the government may seize substitute assets if the forfeitable property was transferred before the enactment of the substitute asset provision. This does not violate the ex post facto clause.

***United States v. Kramer***, 912 F.2d 1257 (11th Cir. 1990) Claimants are entitled to an immediate hearing on their claim to property which has been ordered forfeited by a jury in a criminal trial. Pursuant to 18 U.S.C. §1963(l), the trial judge cannot delay the hearing for an indefinite period of time.

## *ROBBERY*

***United States v Ornelas***, 906 F.3d 1138 (9th Cir. 2018) In a case involving a charge of attempted robbery, the government must prove that the defendant had the specific intent to rob and that the force he used was designed to accomplish the robbery. The trial court's failure to charge on the specific intent element of the offense was plain error.

***United States v. Salgado,*** 519 F.3d 411 (7th Cir. 2008) The defendants attempted to rob a person who they thought was bringing money to purchase drugs. Actually, the person was an informant, working with the DEA. The informant had no money in his possession. The government prosecuted the defendant for attempting to rob a person who was in possession of money belonging to the United States (18 U.S.C. § 2114) and conspiracy to commit that offense. The Seventh Circuit held that neither theory could be used. The defendants could not be convicted of conspiracy, because the defendants did not know they were attempting to rob a government employee, thus, their agreement could not be to steal government money. They could not be convicted of attempting to steal government money, because the informant had no money in his possession.

## *SABOTAGE*

***United State v. Walli***, 785 F.3d 1080 (6th Cir. 2015) Two veterans and a nun defaced property at a site that was used to enrich uranium. This evidence did not support a sabotage conviction (18 U.S.C. § 2155(a)), because they lacked the mens rea to injure, obstruct or interfere with the national defense.

***SEARCH AND SEIZURE (Abandonment)***

***United States v. Griffith***, 867 F.3d 1265 (D.C. Cir. 2017) The police had reason to believe that the defendant had participated (perhaps as the getaway driver) in a homicide that occurred a year earlier. The search warrant affidavit reviewed all the facts amounting to probable cause and then sought permission to search the defendant's current apartment where he had moved after the homicide and a brief stint in jail. The warrant only sought authority to seize cell phones because criminals communicate by phone. During the execution of the search warrant, the defendant threw a gun out the window. The D.C. Circuit held that (1) the warrant was deficient, because there was no probable cause that the defendant even had a cell phone or that it had any incriminating information contained in it; (2) there was no probable cause that a phone would be found in the apartment (as opposed to on his person if he were not present at the apartment when the warrant was executed); (3) the good faith exception to the exclusionary rule did not apply because the warrant was so lacking in probable cause to search or seize a cell phone; (4) the "abandonment" of the gun was the fruit of the execution of the defective search warrant and therefore the gun that was thrown out of the window was subject to the exclusionary rule. Abandonment that is occasioned by an illegal arrest or search is not voluntary abandonment.

***United States v. Harrison***, 689 F.3d 301 (3rd Cir. 2012) The Third Circuit noted that if the police make a reasonable mistake of fact such as whether an apartment is abandoned, as in this case, that does not negate probable cause. A mistake of law, on the other hand, is per se unreasonable.

***United States v. Nicholson***, 144 F.3d 632 (10th Cir. 1998) A police officer "felt" the outside of the defendant's carry-on and checked luggage on a bus in such a way that he was able to determine that the bags contained some tightly wrapped bundles. While the touching of a bag's exterior is not a search, in this case, the officer acknowledged that he "manipulated" the bags; this constituted a search. After having his suspicions aroused, the officer asked the bus passengers to whom the bag belonged. Nobody answered. Because of the initial illegal search, this did not amount to an abandonment of the property.

***United States v. Infante-Ruiz***, 13 F.3d 498 (1st Cir. 1994) The defendant placed his briefcase in the trunk of a car being driven by a colleague. This did not deprive the defendant of a legitimate expectation of privacy in the briefcase, even though he allowed his colleague to drive with the briefcase when the defendant was not present, and even though he permitted his colleague to place objects in the briefcase.

***United States v. Mulder***, 808 F.2d 1346 (9th Cir. 1987) The defendant left his suitcase in a hotel after intending to check out. The Court holds that this does not constitute abandonment. Consequently, when the DEA subsequently used a sophisticated piece of machinery to test the pills and tablets found inside the suitcase, a search warrant was required. The type of test conducted by the DEA did not fall within the "field test" exception to the warrant requirement.

***United States v. Garzon***, 119 F.3d 1446 (10th Cir. 1997) Police boarded a bus in Denver and asked all the passengers to disembark, holding their carry-on luggage in their right hand so a drug dog could sniff the luggage. The defendant exited the bus but left two bags on the bus. The police took the bags off the bus, put them on a cart and a drug dog alerted to the bags. The bags were opened and found to contain cocaine. The Tenth Circuit held that the bags were not abandoned by the defendant. The government conceded that the officer had no lawful authority to order all the passengers off the bus. The lower court's only basis for finding abandonment was the court's holding that the defendant failed to heed the officer's unlawful order that all luggage be removed from the bus. This did not support a conclusion that the defendant abandoned his luggage.

***United States v. Ramos***, 12 F.3d 1019 (11th Cir. 1994) The defendant rented a condo for two months. The day he was supposed to leave, the cleaning personnel arrived and discovered that his belongings were still present, including a partially opened suitcase. The suitcase was examined by the cleaning people, who then summoned the police who made a warrantless search, discovering cocaine in the suitcase. The government argued that the suitcase was abandoned. In determining whether there was abandonment, the critical inquiry is whether the person prejudiced by the search . . . voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search. The defendant has the burden of establishing an expectation of privacy; the government has the burden of proving abandonment. This case is distinguishable from the cases in which an overnight guest at a hotel overstays his "welcome." Here, the defendant had initially signed up for the condominium for a five-month period. Also, though both cleaning personnel and the police had a right to enter the room, this did not confer upon them the right to break into the locked suitcase.

***United States v. Most***, 876 F.2d 191 (D.C. Cir. 1989) The defendant was followed to a grocery store by police officers who believed he was acting suspiciously. The defendant carried a bag into the store and checked it with the clerk behind the counter. When the defendant left the store, he asked the clerk to continue watching it. After the defendant left, the police went into the store, retrieved the bag from the clerk, and based on touching the contents, opened the bag and discovered cocaine. The government argued that the bag was abandoned when the defendant left the store. The Court of Appeals disagrees. The defendant did not leave the object unattended in a public place; the law does not insist that a person assertively clutch an object in order to retain the protection of the Fourth Amendment. In light of the defendant's insistence that the clerk continue to watch the bag after he left, it is clear the defendant did not abandon his expectation of privacy in the bag.

***SEARCH AND SEIZURE (Access to Warrant)***

***In re Search Warrants Issued on April 26, 2004,*** 353 F.Supp.2d 584 (D. Md. 2004) Even pre-indictment, the target of a search has a right to see the affidavit that was used to obtain a search warrant. Only if the government can present evidence of a compelling need to keep the affidavit under seal is it entitled to do so. The District Court relied on the Fourth Amendment's reasonableness requirement. See also United States v. Sealed Search Warrants, 868 F.3d 385 (5th Cir. 2017).

***SEARCH AND SEIZURE (Administrative and Regulatory Searches)***

***City of Los Angeles v. Patel***, --- S. Ct. --- (2015) The City of Los Angeles adopted a regulation that requires hotel operators to provide police a list of registrants upon request. The Supreme Court held that the regulation was facially unconstitutional because it provided no procedure by which a hotel could challenge a police officer's demand for its records. The Court rejected the City's argument that hotels are closely regulated businesses.

***New York v. Burger***, 482 U.S. 691 (1987) A New York statute permits warrantless searches of certain businesses. In this case, the statute was employed to authorize the search of a junkyard which is a "closely regulated" business. The U.S. Supreme Court upholds this search holding that when the business is closely regulated, the owner has a reduced expectation of privacy, and a warrantless search is permissible.

***United States v. Orozco***, 858 F.3d 1204 (9th Cir. 2017) The defendant's truck was pulled over because the police received a tip that he was hauling drugs. There was insufficient basis under Terry to stop the truck, so the government relied on the administrative warrant exception to support the legality of the stop (which led to a consent search). The Ninth Circuit held that the evidence was clear that the police did not pull the truck over on the basis of the administrative search provisions, but solely based on the tip. This was a classic "pretextual" stop and therefore the stop was not legitimate and the resulting consent to

search was invalid. The Court emphasized that in the context of administrative searches (and roadblocks), the actual motive of the police does matter.

***United States v. Rahman***, 805 F.3d 822 (7th Cir. 2015) A restaurant owner has a reasonable expectation of privacy in the business area of the restaurant and has standing to contest a warrantless search of the area. In this case, the defendant, the owner of a restaurant that burned down, consented to a search of the basement of the building "for the cause and origin" of the fire that consumed the restaurant and apartments above the restaurant. At the time the search was conducted, however, the investigators already knew that the fire's origin was upstairs, thus the "cause and origin" was not the object of the search in the basement. Rather, the investigators were looking for circumstantial evidence of the defendant's guilt, such as records, business receipts and a laptop. This search exceeded the scope of the consent that the defendant provided, and the evidence should have been suppressed.

***Bruce v. Beary***, 498 F.3d 1232 (11th Cir. 2007) Though the Supreme Court has approved warrantless administrative searches in certain cases for regulated businesses, such as auto-salvage yards, in this case, the warrantless search was conducted by 20 SWAT officers who searched all the people on the premises personally, as well as every file in the office. This went beyond the scope of a reasonable administrative or regulatory search and subjected the defendants to a civil damage award.

***United States v. Herrera,*** 444 F.3d 1238 (10th Cir. 2006) A state administrative law permitted the inspection of any vehicle weighing over 10,000 pounds. The police officer in this case believed that the defendant's pickup truck weighed over 10,000 pounds and stopped the vehicle to perform an inspection. Actually, the truck did not weigh over 10,000 pounds. The officer's mistake of fact rendered the search unlawful. In contexts of searches other than administrative searches, a reasonable mistake of fact does not render a search unlawful. But with regard to administrative searches, because the exception to the warrant requirement is based on the "target's" acquiescence to being searched by engaging in the administratively regulated activity, the officer's mistake of fact cannot be used as a basis for obviating the requirement of probable cause. In short, the defendant, by driving a vehicle that did not weigh over 10,000 pounds, did not knowingly engage in activity that was pervasively regulated.

***United States v. Knight***, 306 F.3d 534 (8th Cir. 2002) A DOT regulation permits inspections of truck cabs. This regulation does not permit the police to conduct a warrantless search of the driver's briefcase.

***United States v. Bulacan***, 156 F.3d 963 (9th Cir. 1998) The defendant went to a Social Security Office to obtain a replacement card. Security personnel were searching all people coming to the Federal Building manually. The security guard acknowledged that he was looking for weapons, but also for drugs and alcohol. The Ninth Circuit held that the search was unlawful. Though a search for weapons is permissible, the regulations that permitted the search in this case, 41 C.F.R. 101-20.301, were implemented at this Federal Building with the directive to personnel that they should be looking both for weapons and for drugs. Because the officer had a dual motive in undertaking the search – one of which was not reasonable – reliance on the regulations, to the extent that they were reasonable, did not support the search.

***Alexander v. City and County of San Francisco***, 29 F.3d 1355 (9th Cir. 1994) City officials obtained an inspection warrant, based on the fact that sewage was leaking from the defendant's house and other evidence which supported a finding that he was creating a nuisance. When the city officials went to execute the warrant, however, the door was nailed shut and the defendant yelled out that he would use a gun to prevent entry. The police then used a battering ram to enter the premises in order to arrest the defendant. During the ensuing encounter, the defendant was shot and killed. The administrative warrant did not justify the police in breaking into the house for the purpose of arresting the defendant.

***United States v. $124,570***, 873 F.2d 1240 (9th Cir. 1989) Airport security searches are designed to interdict weapons. This case involves the use of private airport security officers to detect large amounts of currency and drugs. The Ninth Circuit holds that such searches by private personnel, who act with the encouragement of law enforcement officials, cannot be justified under the administrative search exception to the Fourth Amendment warrant requirement.

***United States v. Limatoc,*** 807 F.2d 792 (9th Cir. 1987) The ATF could not conduct an administrative inspection of the defendant's firearm inventory and business records following the execution of a valid search warrant at his business. Despite the fact that the firearms business is heavily regulated, this authorizes a search of the premises under certain conditions, it does not authorize the warrantless inspection of the inventory and business records.

***Winters v. Board of County Commissioners of Osage***, 4 F.3d 848 (10th Cir. 1993) The police had reason to believe that a stolen ring was at a particular pawn shop. A state regulation permitted warrantless "examinations" of the place of business of pawn shops, but not the seizure of items. The police went to the pawn shop and asked a clerk to give the ring to the officer to be examined. The officer then seized it because it fit the description. This was not a valid seizure under the regulation, because seizures are not permitted by the regulation. It was not a valid plain view seizure, because the officer did not have the right to be in possession of the ring, or even to have warrantless access to it, so the officer could not claim that the discovery of the item occurred at a time when he was lawfully where he was supposed to be. The pawn shop had a viable §1983 action because of this seizure.

***United States v. Johnson***, 994 F.2d 740 (10th Cir. 1993) Based on a tip, federal and state agents went to a taxidermy shop to determine if violations of federal law were occurring. The agents gained entry by showing an employee a state statute which permitted state inspection of taxidermy shops. This regulatory search was conducted as a pretext to investigate federal offenses. The fact that federal agents participated clearly shows that the state regulatory purposes were not the motivation for the inspection. The evidence should have been suppressed.

***SEARCH AND SEIZURE (Airport, Bus Station and Train Station Searches)***

***United States v. Drayton***, 536 U.S. 194, 122 S. Ct. 2105 (2002) Police offices boarded an outgoing bus before departure and asked the passengers for consent to search their luggage. The officer did not inform the passengers that they could decline to give consent. The defendants consented to a search of their luggage and persons. The Eleventh Circuit had held that the consents were not voluntary because of the coercive nature of the interdiction activity, as well as the officers' failure to advise the passengers that they could refuse to consent to a search. The Supreme Court reversed. According to Florida v. Bostick, 501 U.S. 429 (1991), every encounter between the police and a defendant on a bus is not necessarily a "seizure." In this case, the Court held that the failure to advise the passengers of their right to refuse consent did not taint consent that was otherwise voluntarily given.

***United States v. Sokolow***, 490 U.S. 1 (1989) The Court upholds the detention of a passenger and the subsequent search of his suitcase. The defendant made a quick roundtrip from Hawaii to Miami, used small bills, and an apparently false call-back number. This was sufficient to authorize a Terry stop.

***United States v. Aquino***, 674 F.3d 918 (8th Cir. 2012) The police approached a bus passenger and interviewed him, ultimately asking him to leave the bus, retrieve his baggage and then hold his clothes close to his body so they could determine if there were any "bulges" that would indicate the presence of contraband. The defendant complied. The district court held that there was no articulable suspicion justifying the officer's encounter with the defendant and further found that the encounter was not consensual, especially when the police lifted the defendant's pants above his ankle to examine a "bulge." Even after a "bulge" is observed, moreover, this information, alone, does not provide probable cause to arrest someone.

***United States v. McCarty***, 648 F.3d 820 (9th Cir. 2011) TSA screening agents saw a dark object around a computer when the defendant passed through the security line. When the bags were opened, an envelope with newspaper and pictures emptied out and the agent saw child pornography in the pictures and then read the newspaper articles and found further evidence of child pornography related activity. A TSA agent's search must be limited to its intended scope: aircraft security and ensuring that nobody is carrying weapons or other dangerous items on a plane. The Ninth Circuit decision thoroughly reviews the law governing the permissible scope of TSA searches and ultimately concludes that reading the newspaper articles went too far, but that the photographs seen by the TSA Agent may have provided a sufficient basis to support an arrest of the defendant. A remand for further factfinding was necessary.

***United States v. Alvarez-Manzo***, 570 F.3d 1070 (8th Cir. 2009) The police seized a suitcase from underneath an interstate bus during a layover at a bus depot. They brought the suitcase into the bus and asked the passengers to whom it belonged. The defendant eventually said that it was his. He agreed to exit the bus and went with an officer into the bus station. Ultimately, he was arrested based on what was seen in his wallet and a search warrant was obtained to search the bag. The police did not act with the consent or at the direction of any employee of the bus company when they initially took the bag out cabbage compartment and brought it into the bus. This amounted to a seizure and because there was no warrant or probable cause, evidence discovered as a result of the seizure – which was both the contents of the wallet and the suitcase – was properly suppressed.

***United States v. Goodwin***, 449 F.3d 766 (7th Cir. 2006) Judge Posner explains at some length the rules governing when the police may detain a passenger on a train and the length of time that this detention may last. He concludes that there is a sliding scale that reflects when the police learn the information that justifies the stop, the seriousness of the offense and the reasonable length of time it takes to investigate the suspicious circumstances. In this case, the court upholds the detention and use of a dog sniff, based on the defendant's statements that he had lost the key to his luggage and thus, could not open it for the police. The defendant also met certain characteristics of the drug courier profile.

***United States v. Escobar***, 389 F.3d 781 (8th Cir. 2004) The police were suspicious of the defendants' bags that were in the baggage compartment of a bus. The bags were removed from the compartment and brought to a room where the defendants were being questioned. The officers told the defendants that a drug dog had alerted to the bags and that there was probable cause to search them (there had been no drug dog and there was not probable cause). The defendants then consented to a search. This was not a valid consent search. The environment was overly coercive and the misrepresentation that there was already probable cause to search tainted the voluntariness of the consent.

***United States v. Hernandez***, 279 F.3d 302 (5th Cir. 2002) Suspicious of a bus traveler, a police officer took her luggage out of the baggage compartment of the bus and handled it, feeling (from the outside) the contents. This violated Bond v. United States, 529 U.S. 334 (2000), which held that such manipulation of luggage amounts to a search. The agent at that point entered the bus and secured the defendant's consent to open the suitcase. This was valid consent. But the consent was not sufficiently attenuated from the initial illegality to remove the taint. Thus, even though the search was conducted pursuant to the defendant's consent, it was still the fruit of the illegal search that preceded it. "The officer decided to approach the defendant only after he had felt something suspicious in her suitcase." This invalidates the consent search.

***United States v. Pena-Saiz***, 161 F.3d 1175 (8th Cir. 1998) The police approached the defendant at the baggage claim area and brought her to the drug interdiction office where her luggage and a wrapped gift were searched. She was never told that she could refuse consent. Nothing was found in her belongings and the agents then said they wanted to frisk her. She initially refused but relented when the agents said that she would be arrested. The ensuing search was unlawful. She was being detained at the time she was brought to the interdiction office; moreover, her refusal to consent was not honored.

***United States v. Ward***, 144 F.3d 1024 (7th Cir. 1998). The defendant checked his suitcase, which contained a kilogram of cocaine, on a bus from L.A. to Indianapolis, but did not board the bus. He flew to Indianapolis and awaited the arrival of the bus. When the bus stopped in St. Louis, the police became suspicious of the bag and took it out of the luggage compartment and asked the passengers if anybody claimed it. Nobody did, and the police confirmed that none of the passengers were heading for Indianapolis. The bus was taken out of the bus and the bus departed. Later, a drug dog alerted to the bag and a warrant was obtained. The Seventh Circuit concludes in this case that the luggage was "seized" when it was taken off the bus; however, there was a reasonable suspicion justifying the seizure. Relying on United States v. Place, 462 U.S. 696 (1983), the court held that detaining luggage is the same as detaining a traveler and must be supported by an articulable suspicion. See also United States v. Puglisi, 723 F.2d 779 (11th Cir. 1984). This rule applies even if, as in this case, the traveler was not accompanying his luggage, because the detention would have deprived the traveler of his luggage at the ultimate destination. See United States v. Van Leeuwen, 397 U.S. 249 (1970) (detaining mail is not unlawful if it is delivered the next day). Because there was an articulable suspicion, however, the dog alert and the execution of a search warrant was permissible.

***United States v. Guapi***, 144 F.3d 1393 (11th Cir. 1998) The Eleventh Circuit holds that an encounter between drug interdiction agents and the defendant, a passenger on a bus, was not consensual. The bus arrived at the Mobile, Alabama bus terminal, and before the passengers could exit, two agents entered the bus and asked each passenger for consent to search the on-board luggage; they did not tell the passengers that they could refuse consent to search the bags. The court held that this encounter was not consensual. Note that this decision pre-dates the United States Supreme Court decision in United States v. Drayton, supra which arguably overruled Guapi, though the Supreme Court did not expressly do so.

***United States v. Washington,*** 151 F.3d 1354 (11th Cir. 1998) Following the reasoning of United States v. Guapi, 144 F.3d 1393 (11th Cir. 1998), the Eleventh Circuit concludes that officers who conducted a search of bus passengers did not have their voluntary and knowing consent, given the fact that the passengers were never told that they were free to decline to be searched and the manner in which the agents conducted the search. The search was conducted in the cramped quarters of an interstate bus and was consciously designed to take full advantage of a coercive environment. Under these circumstances, the typical bus passenger would not feel free to refuse the requests but would consider these "requests" to be orders backed by the full force of the United States government. Note that this decision, as well as Guapi, were decided prior to the decision in United States v. Drayton, 536 U.S. 194, 122 S. Ct. 2105 (2002), which denounced the per se rule that all bus searches were non-consensual unless preceded with advice that the passengers were free to decline consent.

***United States v. Acosta-Colon***, 157 F.3d 9 (1st Cir. 1998) A drug dog alerted to suitcases that were destined from Puerto Rico to New York. Agents determined that the bags were checked by people related to the defendant's reservation. When the defendant attempted to board the plane, he and three other passengers were handcuffed and brought to a customs area. Once in an interview room, the defendant was seen attempting to eat some paper (the claim tickets for the suitcases). This occurred about fifteen minutes after he was placed in the room. The bags had 15 kilograms of cocaine. The First Circuit concluded: (1) There was no probable cause for the arrest; (2) There was an articulable suspicion supporting a brief detention; (3) the detention in this case rose to the level of an arrest. The following factors are indicative of an arrest: the defendant was in handcuffs; transported to a different location; detained for more than a momentary period; was never informed of how long he would be detained. Though no factor is outcome determinative, in combination the circumstances in this case amounted to a de facto arrest. Because there was no probable cause, the evidence should have been suppressed.

***United States v. Allen***, 159 F.3d 832 (4th Cir. 1998) The police entered a bus and questioned the occupants about their luggage. The defendant was asked if he had any bags and he pointed to a knapsack. The police pulled down the knapsack and asked for permission to search it. The defendant consented and the police found marijuana in the bag. The defendant was arrested. After he was removed from the bus, the police found another duffel bag which none of the other passengers claimed. The police searched that bag and found cocaine. The lower court upheld the search of the duffel bag on the theory that it inevitably would have been discovered. The trial court reasoned that if nobody claimed the bag, the police would have brought a drug-detecting dog to sniff the bag and if he alerted, the police would then obtain a search warrant and locate the cocaine. The Fourth Circuit reversed. There was insufficient evidence that a drug dog would have been summoned. In fact, testimony at the hearing demonstrated that there was a dog present, but that the dog had never been used inside the bus before (it had previously been used to sniff the undercarriage of the bus). Moreover, the inevitable discovery doctrine does not apply where the police were not already in the process of obtaining a search warrant when the illegal search occurred. Under the government's theory, whenever there is probable cause, the inevitable discovery doctrine would apply. That is not the purpose of the inevitable discovery doctrine.

***United States v. Acosta-Colon,*** 157 F.3d 9 (1st Cir. 1998) Though the agents had an articulable suspicion justifying the detention of the defendants at the airport after a drug dog alerted to what the agents believed was the luggage of the suspects' companions, the thirty-minute detention, during which time the defendants were handcuffed and missed their flight went too far and amounted to an arrest which required probable cause.

***United States v. Doe***, 61 F.3d 107 (1st Cir. 1995) An airport security officer noticed a dense object in the defendant's carry-on luggage. He pulled it out of the bag (which was a proper airport security search) and handed it to a DEA agent. The agent then punctured the bag to field test the contents. This was an illegal search which required a warrant. Exigent circumstances and probable cause justify the seizure of a bag such as this, but do not justify opening the bag or removing the contents.

***United States v. Wilson***, 953 F.2d 116 (4th Cir. 1991) The defendant was encountered by task force agents at the airport. They asked if they could search him. He allowed them to search his carry-on bag and his person, but when they asked to search his coat which he had over his arm, he refused. They persisted. He refused. He walked away and the officers walked with him. At this point, the defendant was "detained" in so far as he would have been aware that he was not free to leave in the sense of being free to "break off the encounter." The information known to the police did not give them an articulable suspicion. Apart from looking suspicious, coming from a source city, providing only a check cashing card for identification, and misrepresenting his itinerary, the only information known to the police was that there was a visible bulge in the coat pocket. A bulge in a coat pocket – not hidden from view – is not suspicious at all. The only suspicious factor was the lie about where the defendant was coming from. However, it is not clear why this would provide suspicion that the defendant was a courier. That is, why would someone coming from New York carrying drugs lie and state that he was actually coming form Boston? This does not support the inference that he was carrying drugs. The motion to suppress should have been granted.

***United States v. Gonzales***, 842 F.2d 748 (5th Cir. 1988) A federal agent approached an air traveler and advised her that he was working narcotics and requested to look in her carry-on luggage. The Fifth Circuit concludes that this constitutes a "seizure" requiring reasonable suspicion. The Fifth Circuit later held that the Gonzales decision set forth the incorrect burden of proof to establish consent but did not alter the holding regarding what constitutes a seizure. United States v. Hurtado, 905 F.2d 74 (5th Cir. 1990).

***United States v. Caicedo,*** 85 F.3d 1184 (6th Cir. 1996) The defendant arrived at the bus station in Cincinnati and a narcotics officer testified that he looked nervous. The officer followed the defendant until he got into the car of another person. The officer approached the car and asked the two if he could talk to them. The defendant (the passenger) got out of the car and – though the evidence was unclear, the appellate court concluded – the officer then frisked him and then asked for consent to search his backpack. The appellate court held that the evidence should have been suppressed. If the frisk occurred before the request for consent, then the defendant was at that time "seized" and there was no basis for this seizure. The ensuing consent, therefore, was invalid and the search of the backpack violated his Fourth Amendment rights.

***United States v. Stewart***, 831 F.2d 298 (6th Cir. 1987)(unpublished)(1987 WL 44968) The Sixth Circuit holds that the indicia of the drug courier profile manifested by the defendant in this case did not authorize a Terry stop or a subsequent search. The defendant arrived in Atlanta on a flight from Florida and appeared nervous. She went to the luggage carousel and cursorily examined pieces of baggage and then went and claimed unclaimed luggage which had arrived on an earlier flight. When she went out to a taxicab stand, DEA agents approached her and began to question her. The agents also signaled the man who called the cabs to the door and instructed him not to call a cab for the defendant. Following a lengthy interrogation, the defendant consented to a search of her baggage. Cocaine was found. The Court initially concludes that the totality of the circumstances existing at the time the defendant was approached at the taxicab stand indicates that she in fact had been seized. The Court further concludes that there were not sufficient facts to give rise to an articulable suspicion that the defendant was transporting drugs. Consequently, the resulting consent was invalid, and the evidence was suppressed.

***United States v. Clardy***, 819 F.2d 670 (6th Cir. 1987) The defendant was on a flight from Miami to Atlanta. As he entered a taxicab in Atlanta, police officers conducted an investigatory stop. The police stated that he met one characteristic of the drug courier profile, travelling from Miami. However, he was accompanied by a person who met several additional characteristics of the profile. The Court holds that this was not sufficient grounds to conduct the investigatory stop of the defendant.

***United States v. Novak***, 870 F.2d 1345 (7th Cir. 1989) The defendants were approached in an airport walkway by six to nine law enforcement officers, one of whom was brandishing a gun. The defendant's colleague was handcuffed. The defendant was then escorted to the sheriff's office. This constitutes an arrest which was not predicated on probable cause.

***United States v. Fletcher***, 91 F.3d 48 (8th Cir. 1996) The factors upon which the government relied in support of the detention of the defendant's luggage were not sufficient. The defendant arrived in Des Moines from a source city; he was the first off the plane and went directly to a bathroom; he was "connected" with a white pickup that had supplemental gas tanks and out of state tags; he told the officers that he had a round trip ticket, when they knew, in fact, he had purchased the return ticket in cash; he was associated with a woman who lived at an address where a narcotics complaint had been made. These factors did not justify detaining his bags. However, having detained the bags, the officers then obtained a search warrant and the good faith exception to the exclusionary rule applied. Note, in this regard, that the court held that if facts are learned during an illegal detention that are then used to acquire a search warrant, the Leon good faith rule may still apply.

***United States v. Green***, 52 F.3d 194 (8th Cir. 1995) The police approached the defendant because she was single, travelling alone, carrying a duffel bag, but no purse, and was taking "counter-surveillance" measures. She agreed to talk with the police but appeared nervous. She had difficulty producing identification or her plane ticket. The police then asked for permission to search the duffel bag which she declined to give. The police would not let her leave, stating that a drug dog was being summoned. At this point, the defendant was in custody. Moreover, the information known to the police was not sufficient at that point to justify the stop. The inability to locate a plane ticket, after the trip has ended, is not suspicious; "counter-surveillance" may simply be a traveler's efforts to get their bearings in a new surrounding; and the fact that the defendant arrived from a source city, without more, simply does not establish an articulable suspicion, or probable cause to justify the detention, awaiting the arrival of a drug dog.

***United States v. O'Neil***, 17 F.3d 239 (8th Cir. 1994) The defendant and his brother arrived at a bus station in Minnesota from a source city, Chicago. The defendant and his brother walked immediately and briskly to the exit and were carrying athletic type

bags. The brother had both of the bus tickets; the defendant, when confronted by drug agents, began sweating profusely. This information did not justify the officer's seizure of the athletic bag. Becoming nervous when confronted by the police is not an unusual reaction. Though there was insufficient information to seize the bag, the defendant immediately revealed that there was cocaine in the bag, therefore, there was probable cause to obtain a search warrant.

***United States v. $7,850***, 7 F.3d 1355 (8th Cir. 1993) The defendant purchased a ticket with cash to fly from Minneapolis to Nebraska; he carried no identification or baggage; he was seen by the ticket agent to have a large wad of cash; he lied to an officer about whether he had been at the airport the day before (he had been seen there by another officer); a NADDIS report indicated that he had a heroin supplier in Nebraska. These facts did not amount to probable cause to seize the currency. (Because the district court did not consider whether there was an articulable suspicion justifying the seizure, that was not addressed by the appellate court).

***United States v. Millan,*** 912 F.2d 1014 (8th Cir. 1990) The police stopped a traveler based on the fact that he arrived from San Francisco, was among the first to leave the airplane, he had only carry-on luggage, dressed casually, wore a gold necklace, and had long hair. He had purchased his ticket with cash the day before but was traveling under his own name. The Eighth Circuit holds that this information was not sufficient to justify a seizure. Furthermore, the fact that agents noticed "bulges" in his jacket pockets did not justify the seizure.

***United States v. White***, 890 F.2d 1413 (8th Cir. 1989) The defendant arrived at the St. Louis airport and attracted the attention of DEA agents who were suspicious of his carry-on bag, the flight from Los Angeles, his nervousness, and his use of a one-way cash ticket. On the basis of these factors, the agents seized the defendant's luggage but permitted him to depart. The agents subjected the luggage to a drug-detection dog which alerted. The Court holds that probable cause did not exist to seize the bag; however, after the dog alerted, the police obtained a search warrant and the good faith exception to the exclusionary rule operated to permit introduction of the evidence.

***United States v. Ross***, 32 F.3d 1411 (9th Cir. 1994) The government's involvement in promulgating the FAA guidelines to combat hijacking is so pervasive "as to bring any search conducted pursuant to that program within the reach of the Fourth Amendment." Thus, when an airline employee searches a passenger's baggage at the ticket counter because of certain characteristics of the traveler (paid in cash, produced no identification) this is a search which must be scrutinized under Fourth Amendment standards. In this case, the search of the luggage by the employee violated the standards of Terry and

***United States v. Place***, 462 U.S. 696 (1983). The information was not sufficient to justify opening up the luggage, or the containers found inside. The X-ray found no evidence of an incendiary device, or any other dangerous device.

***United States v. Garzon***, 119 F.3d 1446 (10th Cir. 1997) Police boarded a bus in Denver and asked all the passengers to disembark, holding their carry-on luggage in their right hand so a drug dog could sniff the luggage. The defendant exited the bus but left two bags on the bus. The police took the bags off the bus, put them on a cart and a drug dog alerted to the bags. The bags were opened and found to contain cocaine. The Tenth Circuit held that the bags were not abandoned by the defendant. The government conceded that the officer had no lawful authority to order all the passengers off the bus. The lower court's only basis for finding abandonment was the court's holding that the defendant failed to heed the officer's unlawful order that all luggage be removed from the bus. This did not support a conclusion that the defendant abandoned his luggage.

***United States v. Little***, 60 F.3d 708 (10th Cir. 1995) A train passenger was seized for Terry purposes when an agent questioned her in her roomette and asked incriminating questions in a manner which indicated that she was not free to leave. The agent also failed to advise the defendant that she was free to decline answering the questions.

***United States v. Lambert***, 46 F.3d 1064 (10th Cir. 1995) The defendant purchased a plane ticket from Los Angeles to Wichita, Kansas with cash. When he arrived in Kansas, DEA agents approached him and asked if they could speak with him. He provided his driver's license which they retained during further questioning. His license, plane ticket and other identifying information were all in order and consistent. Finally, the agents asked him if they could search his suitcase, which he declined. They then seized his suitcase and allowed him to leave. This was an unlawful detention without adequate foundation and the evidence obtained from a subsequent search of the suitcase (done under the authority of a search warrant) should have been suppressed. The defendant was detained at the point in time that the officer retained his driver's license.

***United States v. Washington***, 151 F.3d 1354 (11th Cir. 1998) Two federal agents boarded a bus in Jacksonville and, holding their badges above their heads, announced that they would like to see the identification of the passengers. The agents did not tell anyone that they were free to refuse to cooperate, or to refuse to consent to a search. When they approached the defendant, they asked if they could look inside his luggage and then, when the agents saw an unusual bulge in the defendant's pants, asked if they could search him. Again, he consented. The Eleventh Circuit held that this was not a lawful search, because the consent was not freely and voluntarily given. There is no doubt in this case that the encounter began with a "show of authority," because the agent held his badge above his head and identified himself as a federal agent. He announced what he wanted the passengers to do, and what he was going to do. Absent some positive indication that they were free not to cooperate, it is doubtful a passenger would think he or she had the choice to ignore the police presence. Most citizens, the court observed, believe that it is their duty to cooperate with the police. Though the court declined to hold that police must advise suspects of their right to refuse to consent to a search, in this context, this is exactly what was needed. As the court held, "It seems obvious to us that if police officer genuinely wants to ensure that their encounters with bus passengers remain absolutely voluntary, they can simply say so. Without such notice in this case, we do not feel a reasonable person would have felt able to decline the agents' requests."

***United States v. Guapi***, 144 F.3d 1393 (11th Cir. 1998) At the bus station in Mobile, Alabama, two officers boarded the bus and announced that "with the passengers' consent" they were going to quickly search all of the luggage on the bus for contraband. Nobody was told that they could exit the bus with their luggage, or that they were permitted to refuse the request. Though the court stopped short of holding that voluntary consent requires proof that the target was aware of his or her right to refuse consent, in this situation, there was no voluntary consent. The actions of the police, in the language of Florida v. Bostick "would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." Note that this decision predates the United States Supreme Court decision in United States v. Drayton, supra which arguably overruled Guapi, though the Supreme Court did not expressly do so.

***United States v. Gibson,*** 19 F.3d 1449 (D.C. Cir. 1994) Defendant purchased a one-way ticket on an Amtrak train, with cash, several minutes prior to departure time. When he arrived at Union Station, he was approached by the police. He claimed to have been at a funeral, but his clothing did not seem appropriate. He had no identification. When the police called the telephone number listed on the reservation, there was no answer. The Court of Appeals holds that this does not amount to probable cause to arrest, and the arrest and ensuing search were illegal. Even after having his suspicions aroused, the fact that the police officer frisked the defendant and felt a hard flat object in his pants did not increase the knowledge of the officer to the level of probable cause. "The Fourth Amendment stands in the way of the police arresting people simply because they appear suspicious and may be hiding something."

***SEARCH AND SEIZURE (Anticipatory Warrant)***

***United States v. Grubbs***, 547 U.S. 90 (2006) Reversing the decision of the Ninth Circuit, the Supreme Court holds that an anticipatory search warrant is permissible under the Fourth Amendment. Moreover, the triggering event is not required to be explicitly set forth in the warrant itself, or expressly incorporated by reference to the attached search warrant affidavit. The Ninth Circuit had previously held that under Groh v. Ramirez, the triggering event had to be in the warrant itself or incorporated by reference to an attached search warrant application.

***United States v. Perkins***, --- F.3d --- (6th Cir. 2018) The anticipatory search warrant stated that when the drugs were delivered to the defendant at his house, the warrant would be executed (the drugs were seized at the post office, a warrant was then obtained, and the drugs were then destined to be delivered). But when the drugs were delivered, the package was given to the defendant's wife. Though there was still probable cause to search, the delivery of the drugs to the wife was not the triggering event described in the anticipatory warrant and executing the warrant was improper.

***United States v. Hotal,*** 143 F.3d 1223 (9th Cir. 1998) An anticipatory search warrant must either on its face or on the face of the accompanying affidavit clearly, expressly, and narrowly specify the triggering event. In this case, the warrant signed by the magistrate made no reference to the fact that it was an anticipatory warrant and no "triggering" event was described. Even though the search warrant application explained that videotapes would be delivered to the defendant's house, and thereafter, the warrant would be executed, the affidavit was not incorporated in the warrant.

***United States v. Rowland***, 145 F.3d 1194 (10th Cir. 1998) The government obtained an anticipatory warrant that authorized the police to enter the defendant's home after he received two child pornographic video tapes that he ordered as part of a sting operation. The agents surveilled the defendant as he retrieved the package from a post office box, but he went back to his place of employment, not home, with the package. The agents then determined that an alarm which they placed in the package was activated (indicating that the package was opened at the defendant's site of employment). They later observed him leave his job with a briefcase, but they did not see the package. The Tenth Circuit held that the anticipatory warrant was invalid because it failed to establish probable cause that the contraband would be located at the defendant's home after a specified triggering event (i.e., the delivery of the tape to the post office box). There was no evidence in the search warrant application that the agents had any basis to believe that the defendant would pick up the tapes from the post office box and then go home – in fact, he had previously been observed picking up items from the post office box and then going back to work. The court held, however, that the good faith exception to the exclusionary rule applied and the evidence was admissible.

***SEARCH AND SEIZURE (Appeal by Government)***

***United States v. Ibarra***, 502 U.S. 1 (1991) The Court holds that the 30-day period in which the government is required to file its appeal from an order granting a suppression motion begins to run on the date the district court denied the government's motion for reconsideration rather than on the date of the district court's original suppression order.

***United States v. Hanks***, 24 F.3d 1235 (10th Cir. 1994) In order for the government to take an interlocutory appeal of a suppression motion granted to the defendant under 18 U.S.C. §3731, the government must certify to the district court that the appeal is not taken for purposes of delay and that the evidence is a substantial proof of a fact material in the proceeding. Though this is not jurisdictional, and virtually any certification will suffice, in this case, the government failed to file any certificate. Even when the defendant moved to dismiss the appeal, the government only filed the certificate in the district court but failed to include it in the record on appeal. The appeal was dismissed.

***United States v. Salisbury***, 158 F.3d 1204 (11th Cir. 1998) When the government appeals pursuant to 18 U.S.C. § 3731, the government must file a certificate that the appeal is not taken for purposes of delay and concerns evidence of a material fact in the proceeding. If the government fails to file this certificate in a timely manner, the Court of Appeals may dismiss, as it did in this case. Here the certificate was filed one month after the appeal was filed and the Court held that this was too late.

***SEARCH AND SEIZURE (Appellate Issues)***

***United States v. McIntire***, 516 F.3d 576 (7th Cir. 2008) When considering whether there was probable cause to issue a search warrant, the appellate court reviews the district court's decision on the Motion to Suppress de novo – that is, the appellate court reviews the search warrant application without affording any deference to the district court's decision. However, the appellate court reviews the Magistrate's decision to issue the search warrant with great deference to the determination of probable cause. See also Ornelas v. United States, 517 U.S. 690 (1996).

***United States v. Gray***, 491 F.3d 138 (4th Cir. 2007) Evidence developed at a sentencing hearing may be considered by the appellate court in resolving an issue relating to a Motion to Suppress. In this case, the evidence at the sentencing hearing confirmed the lower court's previous ruling that the defendant did not have standing to contest a search at the location where drugs were found.

***SEARCH AND SEIZURE (Arrest Warrants – Arrests in Homes)***

***Kirk v. Louisiana,*** 536 U.S. 635 (2002) The Supreme Court summarily reversed a Louisiana Supreme Court decision that held that a warrantless entry into a house in order to arrest the occupant was permissible. Pursuant to Payton v. New York, 445 U.S. 573 (1980), either a search warrant, or an arrest warrant is required to enter a home to make an arrest, assuming there are no exigent circumstances.

***New York v. Harris***, 495 U.S. 14 (1990) The police violated Payton v. New York, by entering the defendant's apartment and arresting him without a search warrant, or an arrest warrant. While in the apartment, the defendant made an incriminating statement. He was then removed from the apartment and made additional incriminating statements. The Supreme Court holds that the statements made outside the apartment need not be suppressed.

***United States v. Young***, 835 F.3d 13 (1st Cir. 2016) The police had an arrest warrant for Young based on an indictment that had been returned against him. But the police did not know for sure where he was and went from one house that they suspected he might be visiting to another, finally going to an "on-again-off-again" girlfriend's house. The officers went to the door, knocked, and then entered and walked through the house, eventually finding the defendant, as well as drugs that were introduced at trial. The First Circuit held that the police did not have sufficient information to support the entry into the girlfriend's house and because the defendant had a reasonable expectation of privacy in that location, the evidence found during the unlawful entry should have been suppressed.

***United States v. Vasquez-Argarin***, 821 F.3d 467 (3rd Cir. 2016) If the police have an arrest warrant for a person who resides at a certain location, all that is required to enter the premises is the arrest warrant. If the person for whom the arrest warrant was issued is simply present at a location, the police must obtain a search warrant in addition to the arrest warrant to enter the premises. The level of information known to the police that the person resides at the location must rise to the level of probable cause in order to obviate the need for a search warrant. The information known to the police in this case was insufficient to meet this threshold. The court noted that there is a wide divergence in the circuits regarding the level of knowledge that the police must have. Some courts require less than probable cause (reason to believe), others require probable cause. The Third Circuit also held that the good faith exception to the exclusionary rule did not apply in this case, because the police were not relying on binding precedent, or a search warrant when they entered the house.

***United States v. Allen***, 813 F.3d 76 (2d Cir. 2016) If the police are outside the door and the defendant is inside the door, this counts as an arrest "inside" the home and requires a warrant. What matters is where the defendant is, not the police. If the police do not have a warrant and arrest the defendant across the threshold, any evidence derived from the warrantless arrest must be suppressed.

***United States v. Nora,*** 765 F.3d 1049 (9th Cir. 2014) The police observed the defendant with a gun in his hand on the street and later on his porch. He retreated into his house. The police ordered him to come out of the house. This was improper: the police need a search warrant or an arrest warrant to enter a house or to order someone to exit the house. Possession of a loaded gun is, at most, a misdemeanor in California. The police officer had no basis for believing that the defendant posed a danger, or was committing a felony by possessing the gun.

***United States v. Stokes***, 733 F.3d 438 (2d Cir. 2013) The police had reason to believe that the defendant was responsible for a homicide but did not seek an arrest warrant for strategic reasons (having to do with state law that would prohibit any questioning after the issuance of an arrest warrant). The police went to the defendant's hotel room and entered the open door. While handing him his pants to get dressed, the police saw a gun in a duffle bag. The Second Circuit held the entry was unlawful. If the police had an arrest warrant, entry into the hotel room may have been permissible, but absent an arrest warrant, entering the room was not permissible and only an arrest in a public place would have been permissible (absent consent to enter). The government also failed in its effort to invoke the inevitable discovery doctrine, because the guns in the duffle bag would not inevitably have been discovered: if the police had waited for the defendant to exit the room, it is certainly possible that he would have left without the guns, been arrested, and taken away, in which case the guns would not have been discovered. It is also possible the defendant's companion might have left the hotel room first, with the guns, and there was no basis to arrest or search her. These contingencies were possible and rendered the inevitable discovery doctrine inapplicable.

***United States v. Shaw,*** 707 F.3d 666 (6th Cir. 2013) The police had an arrest warrant for Ms. Brown, located at 3171 Hendricks Ave. They went to the general area and found two houses across the street from each other, both of which had the number 3170. Rather than further investigating the situation, the police chose the house that appeared to be occupied, knocked on the door and announced that they had a warrant, went in, conducted a sweep search, and found cocaine. The occupant, Mr. Shaw, was

arrested and prosecuted for the cocaine. The house was not 3171 Hendricks and Ms. Brown did not live in Shaw's house. The Sixth Circuit held that the evidence should be suppressed. There was no basis to enter that house; there was no basis to search that house; the officers were not acting in good faith when they said that they had a warrant for that house, or when they remained in the house after determining that it was the wrong house.

***United States v. Hill***, 649 F.3d 258 (4th Cir. 2011) The information known to the police was not sufficient to support a reasonable belief that the target of an arrest warrant was present in the residence that they entered. There were also no exigent circumstances to justify the entry into the residence, despite apparent damage to the door frame that the police observed when they arrived.

***United States v. Werra***, 638 F.3d 326 (1st Cir. 2011) The police had a warrant to arrest an individual and had information that the person was seen at a particular residence. The police went there, asked permission to enter, which was denied, and then entered without permission. The target of the warrant was not there, but the defendant was. He was frisked and a gun was found. The First Circuit held that the entry was unlawful, because the information known to the police did not amount to a reasonable belief that the target of the warrant was within. Because the officers entered unlawfully, there was no lawful basis to frisk the defendant and the gun found in his possession should have been suppressed.

***United States v. Hardin***, 539 F.3d 404 (6th Cir. 2008) The Sixth Circuit considers – but decides not to decide – what the proper standard is for assessing whether the police had sufficient information that the defendant was in the home which they entered with an arrest warrant. Pursuant to Payton v. New York, 445 U.S. 573 (1980), the police may enter a home with an arrest warrant if they have reason to believe that the suspect is in the home. What does "reason to believe" mean? The Sixth Circuit suggested that the standard probably is "probable cause" as opposed to "reasonable belief," but ultimately decided in this case that there was insufficient information to support the entry under either standard. There was simply no reliable recent information that suggested that the defendant was then in the apartment that was entered.

***United States v. Reeves***, 524 F.3d 1161 (10th Cir. 2008) The police repeatedly knocked on the defendant's motel room door, after calling him on the phone numerous times. They pounded on the door at least twenty minutes. This amounted to a de facto arrest and because it occurred at the defendant's motel room, was unconstitutional in the absence of a search warrant. The fact that the officers remained outside is not critical. The defendant had been inside and was clearly under the belief that he was required to come out of the house.

***McClish v. Nugent***, 483 F.3d 1231 (11th Cir. 2007) Payton requires a search warrant, or an arrest warrant before the police may enter a house to arrest an occupant.

***United States v. Santana***, 427 U.S. 38 (1976), however, holds that if a defendant is standing in the open doorway, he may be arrested. What if the defendant opens the door in response to police knocking? May he be arrested without a warrant? The Eleventh Circuit holds that an arrest in this situation violates Payton.

***United States v. Quaempts,*** 411 F.3d 1046 (9th Cir. 2005) If the police want to arrest a person in his home, an arrest warrant or search warrant is needed to enter the home. However, if the defendant opens the door and is standing in the threshold, the police may arrest him. In this case, the defendant lived in a small trailer and opened the door while still on his bed. He was immediately told that he was under arrest. The defendant's act of opening the door, while still on his bed did not qualify as standing in the threshold and an arrest sans warrant was not valid and any fruit must be suppressed. The fruit of the warrantless arrest in this case was a statement by the defendant.

***United States v. Flowers***, 336 F.3d 1222 (10th Cir. 2003) Generally, in order to arrest someone in his home, the police need a warrant to gain entry. However, in United States v. Santana, 427 U.S. 38 (1976), the Supreme Court held that if the suspect is in the doorway of an open door, the police may arrest him. In this case, the police knocked on the door and the suspect handed a bottle of wine through a whole next to the door. This conduct was not sufficient to invoke Santana and the police could not order him to exit the house without a warrant, or to enter the house without a warrant. The evidence they observed in the house (guns and more liquor) should have been suppressed.

***United States v. Albrektsen***, 151 F.3d 951 (9th Cir. 1998) Armed with an arrest warrant, the police knocked on the defendant's motel door and when the defendant answered the door, the police barged in. This was an unlawful entry, because the arrest warrant could have been executed in the doorway without the necessity of entering the premises. Note that the government waived the argument that the entry might have been justified as a permissible protective sweep.

***United States v. Berkowitz***, 927 F.2d 1376 (7th Cir. 1991) Under Payton v. New York, 445 U.S. 573 (1980), the police may not enter a home to make a warrantless arrest; a warrant to arrest is necessary. If, however, the defendant is in the doorway when the police approach and he flees into the house, then the police may follow.

***United States v. Santana***, 427 U.S. 38 (1976). In this case, the defendant claimed that the police entered the house without consent and once inside announced that he was under arrest. He acknowledged that he was in the doorway when the police first arrived, though. The lower court refused to conduct a hearing, holding that this did not violate the Fourth Amendment. If, however, the defendant's version was correct, this would violate the Fourth Amendment and a remand to develop the record was required.

***United States v. Alvarez***, 810 F.2d 879 (9th Cir. 1987) The agents learned approximately two hours in advance that the defendant was waiting to receive a shipment of cocaine in the hotel room. They made no effort to obtain a telephone arrest warrant. Consequently, their warrantless arrest of the defendant was improper, and evidence seized in the hotel room should

have been suppressed. An arrest in a non-public place requires a warrant unless exigent circumstances require immediate action, and the situation in this case was not sufficiently exigent to excuse the need for a warrant.

***United States v. McIntosh***, 857 F.2d 466 (8th Cir. 1988) Relying on the decision in Steagald v. United States, 451 U.S. 204 (1981), the Eighth Circuit holds that utilizing an arrest warrant to arrest a third party in a defendant's home was not proper; a search warrant should have been required. Any evidence found during a warrantless search in the defendant's home while searching for the arrestee must be suppressed. In this case, the defendant was an overnight guest in the house which was being searched for a suspect.

***United States v. Maez***, 872 F.2d 1444 (10th Cir. 1989) The defendant's trailer was surrounded by law enforcement agents, and he was ordered to exit. After his exit, he was arrested without a warrant. Though his arrest was technically executed in a "public place" (that is, outside his home) a warrant was nevertheless required since he was, in effect, arrested in his home in light of the show of force exhibited by the police officers.

***SEARCH AND SEIZURE (Arrests – Good Faith)***

***Arizona v. Evans***, 514 U.S. 1 (1995) Because of a clerical error, a computer showed that there was an outstanding arrest warrant for the defendant. He was arrested and a bag of marijuana was found. The Court holds that the good faith exception to the exclusionary rule applies in this context. Thus, if the police are acting in objectively reasonably good faith in arresting the defendant, a search incident to that arrest will be upheld, even if the arrest was later determined to be invalid because of a clerical error.

***Herring v. United States,*** 129 S. Ct. 695 (2009) Sheriff's Deputies in one county were told by a clerk in a neighboring county that there was a warrant for the defendant's arrest. This was inaccurate. The neighboring county Sheriff personnel had negligently failed to erase the warrant from the computer system when it had been withdrawn. The question in this case is whether Arizona v. Evans, which applies to negligent errors by court personnel also applies in this situation, where the negligence is committed by law enforcement personnel. The Supreme Court held that the exclusionary rule would not be applied in this situation. Excluding the evidence derived from the improper arrest would not deter police misconduct since negligence is not deterred by "punishing" the police. There was no evidence of systematic errors by the neighboring county's sheriff's department.

***United States v. Nicholson***, 721 F.3d 1236 (10th Cir. 2013) The police stopped the defendant's vehicle for a motor vehicle offense that did not actually occur. In short, the police thought the defendant had made an illegal left turn, when, in fact, there was nothing illegal about the method by which he made the turn. (The law related to which lane a car must enter when making a left turn). This mistake of law on the part of the officer rendered the stop improper and any evidence discovered thereafter should have been suppressed. The Tenth Circuit distinguished mistakes of fact on the part of law enforcement officers which, if reasonable, will not lead to suppression of the evidence.

***United States v. Clarkson***, 551 F.3d 1196 (10th Cir. 2009) In this Tenth Circuit decision, decided one week prior to the decision in Herring, the Tenth Circuit held that the use of an improperly trained drug-sniffing dog cannot serve to invoke the good faith exception to the exclusionary rule. Thus, if a dog is not properly trained, but a police officer relies in good faith on the dog's alert – not knowing that the dog was not properly trained – the evidence will be subject to the exclusionary rule.

***United States v. Cole***, 444 F.3d 688 (5th Cir. 2006) The defendant stopped at a stop sign just shy of the cross walk, but over the solid white line. He claimed that this did not violate Texas law. The government argued that the traffic stop was valid regardless of the actual Texas law, because the officer, in good faith, thought that the law required the defendant to stop before the solid white line. The Fifth Circuit held that a good faith mistake as to the law was not a cure for an invalid stop.

**United States v. Chanthaxouxat**, 342 F.3d 1271 (11th Cir. 2003) The police pulled over the defendant's car because the officer believed that the defendant was in violation of a municipal law that required an inside rear-view mirror. Actually, there was no such law. This rendered the stop illegal and the officer's good faith did not rescue the government. An officer's good faith mistake of fact may support a stop, but a mistake regarding the law cannot support an illegal stop and the evidence derived from the stop must be suppressed.

***SEARCH AND SEIZURE (Arrest – Material Witness Warrant)***

***United States v. Awadallah***, 349 F.3d 42 (2d Cir. 2003) The Second Circuit extensively reviews the law relating to material witness warrants (18 U.S.C. § 3144), concluding that a material witness warrant may be used to detain a person whose testimony at the grand jury is required by the government.

***SEARCH AND SEIZURE (Arrest – Pretext Arrests) SEE ALSO: SEARCH AND SEIZURE (HIGHWAY STOPS)***

***United States v. Orozco***, 858 F.3d 1204 (9th Cir. 2017) The defendant's truck was pulled over because the police received a tip that he was hauling drugs. There was insufficient basis under Terry to stop the truck, so the government relied on the administrative warrant exception to support the legality of the stop (which led to a consent search). The Ninth Circuit held that the evidence was clear that the police did not pull the truck over on the basis of the administrative search provisions, but solely based on the tip. This was a classic "pretextual" stop and therefore the stop was not legitimate and the resulting consent to search was invalid. The Court emphasized that in the context of administrative searches (and roadblocks), the actual motive of the police does matter.

***United States v. Hill***, 131 F.3d 1056 (D.C. Cir. 1997) The police officer testified that he stopped the defendant's vehicle, because he did not see a VIN on his temporary tag. At the suppression hearing, the defendant offered evidence that he did have a temporary tag and it was issued with an appropriate VIN. When offered into evidence, moreover, the temporary tag did have a VIN. The trial court concluded that the police "believed" that the car did not have a lawful tag, and, relying on Whren v. United States, concluded that the stop was lawful. This was incorrect. The officer's naked belief is not sufficient, standing alone, to justify a stop, if the belief is not reasonable. The trial court failed to make any finding whether the officer's "belief" was objectively reasonable. A pure subjective test is not appropriate.

***SEARCH AND SEIZURE (Arrest – Probable Cause) SEE ALSO: SEARCH AND SEIZURE (COLLECTIVE KNOWLEDGE DOCTRINE)***

***Devenpeck v. Alford***, 543 U.S. 146 (2004) If the police have probable cause to arrest a defendant based on certain facts known to the officer, the arrest is valid, even if the police tell the defendant that he is being charged with some other (unrelated) offense. In this case, the police arrested the defendant and told him he was being charged with violating the state Privacy Act (the defendant was recording his conversation with the police officer). Actually, the law dictated that the defendant had not committed a violation of the Privacy Act. Nevertheless, at the time of the arrest, the police were also aware that there was probable cause to arrest the defendant for impersonating a police officer and obstruction of a law enforcement officer. The Supreme Court holds that the existence of probable cause to arrest the defendant for an offense – even an offense that was not the offense that actually prompted the arrest – supports the arrest. The Court reached this conclusion, stressing that the Court has repeatedly held that the motivation of a police officer is not a relevant inquiry in assessing probable cause: rather the objective facts known to the police officer is the focus of the probable cause determination. The Court’s decision was unanimous.

***Maryland v. Pringle***, 540 U.S. 366 (2004) The police stopped a vehicle for speeding. The driver consented to a search of the car. Cash and drugs were found. Two other occupants of the car were arrested. The Supreme Court held that the evidence found during the consensual search was sufficient to justify the arrest of the two passengers. Therefore, the passenger’s subsequent confession was admissible.

***United States v. Evans***, 851 F.3d 830 (8th Cir. 2017) A woman called the police and said that she was raped the night before and the man was at bus stop near the apartment. She generally described the perpetrator’s weight and height and explained that she was wearing red tennis shoes. She was not able to describe his face and vaguely described a scar on his abdomen. The defendant was arrested. The District Court held that the information provided by the “victim” including issues about her credibility (not revealing how she came to meet the man and agree to meet him in an apartment stairway), did not rise to the level of probable cause. The Eighth Circuit affirmed.

***United States v. Navedo***, 694 F.3d 463 (3rd Cir. 2012) The police saw the defendant on the porch of his apartment building. Another man came up to the defendant, retrieved a gun from a backpack and showed it to the defendant. The police then approached and both men fled. The police arrested the defendant. The Third Circuit held that there was no probable cause to support the arrest based on the defendant’s flight. Even considering Illinois v. Wardlow, 528 U.S. 119 (2000), the defendant’s conduct was not sufficiently suspicious to support an arrest. Even if the police were permitted to briefly detain the suspect and investigate legitimate suspicions – some of which may arise by virtue of the defendant’s flight, coupled with other circumstances – flight is not a sufficient basis to make an arrest.

***United States v. Struckman***, 603 F.3d 731 (9th Cir. 2010) A neighbor called the police and reported that a white man wearing a black leather jacket had just climbed over a fence in her neighbor’s yard and she could not see who it was, but the neighbors were not home. The police went to the location, looked over the fence and promptly detained with guns drawn the defendant, who fit the description and was walking around in the backyard. He was searched and a gun was found. They then determined that he lived at that house; and also learned that he was a convicted felon who could not possess a firearm. The Ninth Circuit held (1) there was no probable cause to arrest the defendant – despite the report from the neighbor, the police should have asked the defendant his name and obtained information about where he lived before arresting him; (2) there were no exigent circumstances to support the arrest and search; (3) the backyard was part of the cartilage of the house.

***United States v. Valentine***, 539 F.3d 88 (2d Cir. 2008) The police made a control delivery of boxes (which they knew contained drugs, hidden in some furniture), to an apartment in which the defendant was apparently residing. The boxes were not addressed to the defendant, however. It was apparent that he knew the addressee, but there was no information linking him to the drugs. Based on the information known to the agents, there was no probable cause to arrest the defendant.

***United States v. Collins***, 427 F.3d 688 (9th Cir. 2005) A target of a stolen check ring agreed to meet undercover agents and provide more stolen checks to them. The target arrived in his car and parked in a parking lot. Two other cars simultaneously pulled up and parked on either side of the target’s car. Shortly thereafter, the defendant was seen talking to the driver of one of the other cars. It was not clear from where he came, though he may have come from the other car. This information was not sufficient to support an arrest of the defendant.

***United States v. Myers***, 308 F.3d 251 (3rd Cir. 2002) The police were called to an apartment regarding a disturbance. When the police arrived, a young girl was on the front step, and she told the officer that her mother and her boyfriend were inside fighting, and the boyfriend had a gun. The officer entered the apartment and after finding the defendant behind a door arrested him. The officer observed the defendant throw a bag on the ground. The defendant was handcuffed, and the woman was brought downstairs. The officer then went back upstairs and opened the bag, finding a gun. The Third Circuit held that there was no probable cause to arrest the defendant, and even if there had been probable cause, the search of the bag was not incident to the

arrest and was therefore unlawful. Regarding probable cause, at most there was some indication that there had been a simple assault, but that had not occurred in the officer's presence and thus he could not arrest the defendant for that offense. Regarding the search, with the defendant handcuffed and immobilized, there was no need to search the bag.

***United States v. Kithcart***, 134 F.3d 529 (3rd Cir. 1998) The police received a report of several armed robberies. One of the robberies involved two black males in a Z-28, or a Camaro. About ten minutes later, an officer observed a black Nissan with one black male driving. She pulled behind the car and when the car ran a red light, she stopped the vehicle and then realized that there were two occupants. The occupants were ordered to exit the car and were searched. A gun was found in the defendant's possession, and he was charged with possession of a weapon by a convicted felon. Searching the occupants could not be supported on the basis of a search incident to arrest, because there was no probable cause to support an arrest. In short, the fact that two black men were driving a sports car in the general vicinity of a robbery did not support the arrest of every black sports car with two black occupants. Upon remand, the trial court again denied the motion to suppress and in an unreported decision, that decision was affirmed. 34 Fed. Appx. 872 (3rd Cir. 2002).

***United States v. Ho***, 94 F.3d 932 (5th Cir. 1996) The defendant was approached at an airport because of his suspicious appearance and itinerary. He initially gave consent to a search of his portfolio. As the officer was looking through the portfolio, he discovered a blank white plastic card. At that point, the defendant abruptly withdrew his consent by grabbing the portfolio back. The officer grabbed the white card and saw a magnetic strip on the back, which indicated that it was a fraudulent card. However, the discovery of the magnetic strip on the back only occurred after the defendant had revoked his consent and thus could not be considered. Prior to noticing the magnetic strip, moreover, probable cause did not exist to arrest the defendant and continue the search on a search incident to arrest theory. The district court erred in denying the motion to suppress.

***United States v. Jackson,*** 818 F.2d 345 (5th Cir. 1987) The defendant was arrested pursuant to an arrest warrant. However, the warrant failed to establish the reliability, veracity, and basis of knowledge of the informant who provided the incriminating information.

***United States v. Levy***, 990 F.2d 971 (7th Cir. 1993) A local ordinance outlawed face-to-face solicitations. In this case, a telemarketer called a billiards parlor operator and asked for a twenty-five-dollar donation for the Police Federation. The billiards operator agreed. The telemarketer sent a runner to pick up the donation and the police met him there, arrested him and found a gun in his possession. He was charged with a 922(g) violation (possession of a firearm by a convicted felon). Because the defendant had not violated the ordinance, however, there was no probable cause to arrest him and the search incident was improper. The evidence should have been suppressed.

***United States v. Ingrao***, 897 F.2d 860 (7th Cir. 1990) The Seventh Circuit concludes that there was not probable cause to arrest the defendant. Most of the evidence upon which the trial court relied related to another individual. The police had maintained surveillance on the other individual's house. The defendant was seen exiting the house with a gym bag. Never, however, were the defendant and the other individual seen together. In order to find probable cause based on association with persons engaging in criminal activity, some additional circumstances from which it is reasonable to infer participation in the criminal enterprise must be shown. The mere fact that the defendant was carrying a bag does not add significantly to any already existing suspicion by the police. Furthermore, the defendant's "furtive gestures" were not sufficient additional information to justify the arrest of the defendant.

***McIntosh v. Arkansas Republican Party***, 825 F.2d 184 (8th Cir. 1987) The defendant stated his intention to disrupt a meeting of the Arkansas Republican Party. The party contacted the police who arrested the defendant outside the meeting room. This constitutes unlawful arrest, and the Arkansas Republican Party was held liable for a violation of the defendant's civil rights. The Court holds that an individual may not be arrested for a future crime.

***United States v. Delgadillo-Velasquez***, 856 F.2d 1292 (9th Cir. 1988) An uncorroborated tip from an untested informant does not give agents probable cause to believe that a fugitive lived at the defendant's apartment or that the defendant was the fugitive. Further, evidence obtained after the arrest could not be considered in assessing probable cause at the time of the seizure.

***United States v. Dimick***, 990 F.2d 1164 (10th Cir. 1993) The defendant was travelling from Los Angeles to St. Louis. He paid for his one-way ticket in cash, remained in his compartment the entire trip; tipped the train conductors with $20 bills; ordered his meals delivered to his compartment; lied about his name when questioned and claimed to have no luggage. Based on this information, the DEA entered his compartment and found a suitcase, which was then subjected to a dog sniff. The dog alerted and narcotics were found in the suitcase. The entry into the train compartment required probable cause which was lacking at that time. Absent probable cause, even with reasonable suspicion, which did exist, the officers could not enter the compartment. This opinion may not have survived a later decision in the Tenth Circuit, United States v. Little, 18 F.3d 1499 (10th Cir. 1994).

***United States v. Anderson,*** 981 F.2d 1560 (10th Cir. 1992) While the defendant's actions and associations with others gave rise to an articulable suspicion, there was not probable cause justifying his arrest. His suspicious activities included being present at a location where marijuana was located, parking his pickup truck near a U-Haul which the police suspected contained marijuana. Later, he drove off in his pickup, driving cautiously.

***Ortega v. Christian,*** 85 F.3d 1521 (11th Cir. 1996) In this civil rights case, the court held that the police lacked probable cause to arrest the plaintiff. The arrest was based on an informant's tip which was not corroborated, there was no showing of the informant's basis of knowledge, and no showing of the informant's prior history in providing information to the police in order to support his credibility.

***United States v. Gonzalez***, 969 F.2d 999 (11th Cir. 1992) The court remanded this case back to the district court to determine if the police officer's misidentification of a person was objectively reasonable and thus, whether there was probable cause to arrest. The fact that the detective made an "honest mistake" is not determinative; the question is whether this honest mistake was reasonable. The court declined to rule whether the arrest, which was based on an anonymous tip, coupled with the corroboration of innocent activity, was based on probable cause, but found that, at best, it presented a close question, depending on the objective reasonableness of the officer's mistaken identity of one of the participants in the innocent activity.

***United States v. Gibson***, 19 F.3d 1449 (D.C. Cir. 1994) Defendant purchased a one-way ticket on an Amtrak train, with cash, several minutes prior to departure time. When he arrived at Union Station, he was approached by the police. He claimed to have been at a funeral, but his clothing did not seem appropriate. He had no identification. When the police called the telephone number listed on the reservation, there was no answer. The Court of Appeals holds that this does not amount to probable cause to arrest, and the arrest and ensuing search were illegal. Even after having his suspicions aroused, the fact that the police frisked the defendant and felt a hard flat object in his pants did not increase the knowledge of the police to the level of probable cause. "The Fourth Amendment stands in the way of the police arresting people simply because they appear suspicious and may be hiding something."

***SEARCH AND SEIZURE (Arrest – What Constitutes an Arrest?)***

***California v. Hodari, D.,*** 499 U.S. 621 (1991) Police officers were patrolling a high-crime area. Several youths fled immediately upon seeing the officers. The officers pursued the youths and after observing one youth throw down a plastic bag, an officer tackled him. The initial pursuit of the youths did not amount to a seizure. The mere show of authority is not tantamount to a seizure, absent some actual physical force being applied.

***Brower v. Inyo County***, 489 U.S. 593 (1989) Law enforcement officers erected a roadblock which was designed to stop a speeding car driven by the defendant. The defendant's car crashed into the tractor trailer which had been placed in such a way that the crash could have been envisioned by the police officers. The Supreme Court holds that this roadblock was a "seizure" for Fourth Amendment purposes and could give rise to a cause of action under 42 U.S.C. §1983.

***United States v. Wrensford,*** 866 F.3d 76 (3rd Cir. 2017) The police were investigating a shooting and located the defendant, who generally fit the description of the shooter. The defendant was handcuffed, his belongings were removed from his pocket, he was taken to the police station and put in a cell. The Third Circuit held that this constituted a de facto arrest. The case was remanded to the district court to determine what fruits of this illegal arrest were required to be suppressed: items found in his pockets, items found near where he was arrested, a DNA sample, an identification of the defendant by a witness at the police station.

***United States v. Reeves***, 524 F.3d 1161 (10th Cir. 2008) The police repeatedly knocked on the defendant's motel room door, after calling him on the phone numerous times. They pounded on the door at least twenty minutes. This amounted to a de facto arrest and because it occurred at the defendant's motel room, was unconstitutional in the absence of a search warrant. The fact that the officers remained outside is not critical. The defendant had been inside and was clearly under the belief that he was required to come out of the house.

***United States v. Virden***, 488 F.3d 1317 (11th Cir. 2007) The police stopped the defendant's car after watching it leave the location where a search was about to occur. Because a drug dog was not available at that location, the police put the defendant in a police car in handcuffs and brought the car to a location two miles away where the dog was located. The Eleventh Circuit held that this exceeded the bounds of a Terry stop and amounted to a seizure requiring probable cause. Because there was no probable cause, the search of the car was unlawful.

***United States v. Lopez-Arias,*** 344 F.3d 623 (6th Cir. 2003) To determine whether an investigative detention has crossed the line and become an arrest, the court considers factors such as the transportation of the detainee to another location, significant restraints on the detainee's freedom of movement involving physical confinement or other coercion preventing the detainee from leaving police custody, and use of weapons or bodily force. In this case, the police crossed the line. The suspects were stopped by four DEA agents brandishing firearms; they were handcuffed; placed into the backseats of separate DEA vehicles; transported from the scene of the stop; read their Miranda rights and questioned. Though there was a reasonable suspicion that the defendants possessed drugs, the government conceded that there was not probable cause. The consent given by the defendant was tainted by the illegal arrest. See also United States v. Heath, 259 F.3d 522 (6th Cir. 2001); United States v. Richardson, 949 F.2d 851 (6th Cir. 1991); United States v. Butler, 223 F.3d 368 (6th Cir. 2000).

***United States v. Acosta-Colon***, 157 F.3d 9 (1st Cir. 1998) A drug dog alerted to suitcases that were destined from Puerto Rico to New York. Agents determined that the bags were checked by people related to the defendant's reservation. When the defendant attempted to board the plane, he and three other passengers were handcuffed and brought to a customs area. Once in an interview room, the defendant was seen attempting to eat some paper (the claim tickets for the suitcases). This occurred about fifteen minutes after he was placed in the room. The bags had 15 kilograms of cocaine. The First Circuit concluded: (1) There was no probable cause for the arrest; (2) There was an articulable suspicion supporting a brief detention; (3) the detention in this case rose to the level of an arrest. The following factors are indicative of an arrest: the defendant was in handcuffs; transported to a different location; detained for more than a momentary period; was never informed of how long he would be detained. Though no factor is outcome determinative, in combination, the circumstances in this case amounted to a de facto arrest. Because there was no probable cause, the evidence should have been suppressed.

***United States v. Babwah,*** 972 F.2d 30 (2d Cir. 1992) The police had an articulable suspicion justifying the stop of defendant's vehicle. However, after the stop and a consent search, there was no basis for continuing the detention. Nevertheless, the police ordered the defendant to return to a house where a large amount of cash was found. This latter aspect of the "stop" amounted to an arrest which was not supported by probable cause.

***United States v. Ceballos***, 812 F.2d 42 (2d Cir. 1987) A counterfeiting suspect left work to accompany secret service agents to their office after being made aware of the urgency of their errand. He was also refused permission to drive to the agents' office alone. This constitutes arrest. It is irrelevant that the agents told him that he was not under arrest. Under the circumstances, a reasonable person would not have felt free to leave.

***United States v. Cagle***, 849 F.2d 924 (5th Cir. 1988) Border patrol agents seized a passenger's suitcase and prevented it from being loaded on the passenger's airline flight. This constitutes a full-scale arrest and not just a detention because the passenger's itinerary was clearly frustrated. The officers failed to use the most diligent, least intrusive investigatory techniques.

***United States v. Johnson***, 846 F.2d 279 (5th Cir. 1988) Although postal inspectors advised the suspect that he was not under arrest, their inquiries took the form of demands and their hostile reactions to the suspect's explanations altered the nature of the contact into an arrest.

***United States v. Richardson***, 949 F.2d 851 (6th Cir. 1991) The police approached the defendant who was standing outside a storage unit which the police believed contained contraband. They asked for his consent to search the unit; the defendant refused. He was placed in the back of the patrol car and told to wait there while the officers questioned defendant's colleague. This amounted to an arrest of the defendant and his subsequent consent to search the storage unit was tainted by this unlawful arrest. In light of the statements of the officers and the circumstances, this was more than a mere Terry stop.

***United States v. Grant***, 920 F.2d 376 (6th Cir. 1991) Border Patrol Agents entered an airplane which was making a one-hour stop in Detroit and, without any articulable suspicion, approached the defendant in the back of the plane. They asked him to identify questions and asked him to produce his green card. Next, they directed him to deplane for further questioning. This conduct of the agents made it apparent to Grant that he was not free to ignore the officers and proceed on his way.

***United States v. Hatfield***, 815 F.2d 1068 (6th Cir. 1987) Defendant was under arrest at the time he was standing with police officers away from his vehicle, was informed that scanners in his vehicle were unlawful and witnessed radioing of another officer to aid and search the vehicle.

***United States v. Novak***, 870 F.2d 1345 (7th Cir. 1989) The defendants were surrounded by law enforcement agents in an enclosed area of an airport. One of the officers drew a gun. The defendant was separated from his travel-mate, who had been handcuffed. The defendant's carry-on luggage, as well as his identification, was taken from him. The defendant was under arrest and his subsequent consent to a search was not voluntary.

***United States v. Longbehn***, 850 F.2d 450 (8th Cir. 1988) A police officer confessed to a crime without having been given adequate Miranda warnings. At the time of the confession, his detention was police-dominated, inherently coercive, and tantamount to a formal arrest. The confession must be suppressed.

***United States v. $191,910.00 in U.S. Currency,*** 16 F.3d 1051 (9th Cir. 1994) When the claimant arrived at the airport, the police relieved him of his carry-on bags that they knew to contain a large amount of currency. The defendant was permitted to leave. Not until two hours later did a drug-sniffing dog alert to the luggage. This was an unreasonably long seizure. In United States v. Place, 462 U.S. 696 (1983), the Supreme Court held that a 90- minute delay was unreasonable. Moreover, the agents did not act diligently in this case. They knew the defendant would be arriving at the airport an hour before the plane arrived; yet arrangements to have the dog on hand were not started until after the defendant arrived.

***United States v. Ricardo, D***., 912 F.2d 337 (9th Cir. 1990) The Ninth Circuit concludes that the detention of the juvenile during field questioning amounted to a de facto arrest. The juvenile was patted down, gripped by the arm, told he was not to run, and directed to the back of one of two patrol cars present at the scene. This conduct transformed the investigatory stop into an arrest.

***United States v. Baron***, 860 F.2d 911 (9th Cir. 1988) Three police officers escorted a drug suspect from the parking lot to the bedroom of an accomplice to determine whether her hands had any fluorescent powder on them which had been placed on the drugs during a controlled delivery. The Court holds that this represents an arrest, necessarily requiring probable cause. The Court went on to hold that probable cause existed.

***United States v. Robertson***, 833 F.2d 777 (9th Cir. 1987) An officer's detention of a defendant at gunpoint was an arrest, not a Terry stop. The defendant was confronted by seven to ten police officers at the time of this "encounter." At no time did the officers check the defendant for weapons, indicating that they knew or suspected that she was not armed, and thus this was not a stop and frisk.

***United States v. Beraun-Panez***, 812 F.2d 578 (9th Cir. 1987) While adhering to the objective test, the Ninth Circuit says that an important consideration is the "arrestee's" alien status. In determining whether a reasonable man would consider himself to have been under arrest, it is proper for the Court to consider whether a reasonable "alien" would believe, after being told that responding to questioning would avoid his deportation, that he was under arrest. In this case, the Court holds that the defendant was under arrest and consequently his interrogation should have been preceded by Miranda warnings.

***United States v. Phillips***, 812 F.2d 1355 (11th Cir. 1987) The Eleventh Circuit repudiates a long line of cases dealing with the definition of arrest and conforms to recent Supreme Court decisions in defining what constitutes an arrest. Rather than the

subjective test previously used which focuses on the state of mind of the defendant and whether he felt free to leave, the Court now adopts an objective, reasonable man standard which focuses on the types of restraints imposed and communications between the police and the defendant. Subjective factors are no longer relevant.

***SEARCH AND SEIZURE (Attenuation)***

***Utah v. Strieff***, 136 S. Ct. 2056 (2016) If a defendant is pulled over for an investigatory stop illegally (there was no articulable suspicion or probable cause to support the stop) and the police determine that there is an outstanding arrest warrant for the defendant, a search incident to arrest is proper and the exclusionary rule does not bar the use of evidence discovered during the search incident to arrest. The illegal stop is too attenuated from the discovery of the evidence that was the product of the legal search incident to arrest.

***United States v. Terry***, 909 F.3d 716 (4th Cir. 2018) The police unlawfully placed a GPS device on the defendant's car without first obtaining a warrant. They subsequently used the data from the device to determine that the defendant was speeding, and on that basis the car was pulled over and ultimately drugs were found in the car. The initial illegal "search' placing the GPS device on the car without a warrant) was not too attenuated from the subsequent discovery of drugs and was, instead, the fruit of the poisonous tree and the evidence should have been suppressed. On the question of standing, the court held that the defendant had standing, as the driver of the car, when the GPS device was placed on the vehicle and though he was a passenger during the subsequent stop (and thus did not have standing to challenge the drugs found in the car, the search was the fruit of the poisonous tree, and the lack of standing does not change that determination.

***United States v. Shrum***, 908 F.3d 1219 (10th Cir. 2018) The defendant's 30-year-old wife died at home and he called 911. The police and medical personnel arrived shortly thereafter, and the wife was taken to the hospital and pronounced dead. The defendant went to the police station and was questioned. The police "secured" the house and for several hours, the defendant's access to the house was limited. During the time the house was "secured" the police entered and took several photographs, some of which revealed the presence of ammunition. The defendant was charged with possession of ammunition by a convicted felon. The Tenth Circuit held that the house was, in fact, seized; there was no probable cause, or even an articulable suspicion, to interfere with the defendant's access to the house and the seizure was therefore unlawful; the unlawful seizure resulted in the discovery of evidence; the discovery of evidence was not attenuated from the illegal seizure. There is no such thing as a "crime scene" investigation exception to the Fourth Amendment. The district court should have suppressed the evidence discovery of the ammunition.

***United States v. Cordero-Rosario***, 786 F.3d 64 (1st Cir. 2015) The initial search warrant stated that the crime under investigation was "lewd actions" and that "in accordance with the interview of the child, there is currently pornography on the defendant's computer. There was no information in the search warrant application about what the child said, how the alleged pornography was related to any offense, how the child knew about the presence of pornography on the computer, or why the affiant believed that pornography was evidence of a crime. The evidence should have been suppressed, because even the good faith exception to the exclusionary rule did not apply to this warrant. Based on the discovery of child pornography during the search of the computer, the police went back to the apartment and secured the wife's consent to search additional computers. The First Circuit held that this was arguably the fruit of the poisonous tree exploiting the first illegal search, but further fact-finding was necessary to develop the record relating to the subsequent consent searches.

***United States v. Brodie,*** 742 F.3d 1058 (D.C. Cir. 2014) The police were waiting outside a house that they planned to search pursuant to a search warrant. While awaiting their colleagues, the defendant was observed leaving the house (the police were not targeting that individual; the target was already in custody). The police approached the defendant and directed him to place his hands on the car (which he did). Shortly thereafter, he fled, discarding drugs and guns while on the run. The D.C. Circuit held (1) the defendant was detained; (2) there was no basis for the detention because, pursuant to Bailey v. United States, 133 S. Ct. 1031 (2013), the police may not detain an individual in connection with the execution of a search warrant unless the detention is at the time when, and at the place where, the search is being executed; (3) the detention was not attenuated from the defendant's flight; and (4) the evidence that the police obtained was the fruit of the unlawful detention.

***United States v. Hernandez,*** 670 F.3d 616 (5th Cir. 2012) The police received a tip that the defendant was harboring illegal aliens. They went to her trailer and started banging on the door and windows and demanding entry. The defendant came to the door and acknowledged that there was an illegal alien inside. The Fifth Circuit concluded that the banging on the doors and windows and demanding entry amounted to a Fourth Amendment violation (an illegal seizure) and the defendant's subsequent statement was not attenuated from that illegal conduct. Therefore, her statement should have been suppressed. The court also held that the statements obtained by witnesses inside (as well as additional evidence) were the fruit of the Fourth Amendment violation, as well and those statements, too, would be suppressed.

***United States v. Shetler,*** 665 F.3d 1150 (9th Cir. 2011) Based on a tip, the police conducted a warrantless search of the defendant's garage (which the district court held was justified by exigent circumstances and was a valid security sweep) and then the police entered the house without a warrant and continued to conduct a search. This latter search was not lawful. The defendant, confronted with evidence that was uncovered during the search, made numerous incriminating statements. The Ninth Circuit held that all statements were the fruit of the poisonous tree and should have been suppressed. The Court further held that the confession was not sufficiently "attenuated" from the illegal search so as to break the causal chain. The fact that he was Mirandized prior to making the statements also did not break the causal chain.

***United States v. Gross***, 662 F.3d 393 (6th Cir. 2011) The police stopped an automobile in which the defendant was a passenger. The stop was found to be improper because there was no articulable suspicion supporting the stop. During the course of the stop, the police learned that there was an arrest warrant for the defendant. The question in the Sixth Circuit was whether the existence of an arrest warrant and the evidence found during a search incident to the arrest was the fruit of the illegal stop, and did the exclusionary rule bar the introduction of the evidence. The Sixth Circuit held that the exclusionary rule did apply, and the evidence would be suppressed. Contrary authority in the Seventh Circuit in United States v. Green, 111 F.3d 515 (7th Cir. 1997), was rejected by the Sixth Circuit.

***United States v. Williams***, 615 F.3d 657 (6th Cir. 2010) The defendant was standing in a housing project with others when a police officer approached and said he was "again trespassing on [housing authority] property." During the following interaction, the defendant acknowledged in response to questions that there might be a warrant out for his arrest, and he also acknowledged carrying a gun. The Sixth Circuit held that the encounter was a seizure for Fourth Amendment purposes. There were two officers, they approached the defendant an immediately accused him of a crime, and there was no basis that would lead the defendant to believe that he could simply walk away from the officers. There was insufficient information known to the police to support the seizure; the defendant's statement was the fruit of that detention; the evidence would be suppressed, even though there was an outstanding arrest warrant.

***United States v. Holmes***, 505 F.3d 1288 (D.C. Cir. 2007) The defendant was seen in an alley by the police at 3:40 in the morning and when the officers approached him, he fled, scaling several fences in the process. The officers followed him and when they caught him, he was frisked, and a set of car keys were discovered and taken from him. The officers then used the car keys' remote door opener to find the car. The defendant then gave consent to search the car and a gun was found in the car. The D.C. Circuit held that taking the keys from the defendant after the frisk violated his Fourth Amendment rights. There was no probable cause to seize the keys and the fruit of that unlawful seizure was the discovery, and ultimately the search, of the vehicle in which the gun was found. The government's argument that the taint of the illegal seizure was purged by the subsequent consent to search was rejected. The attenuation doctrine did not save the search in this case.

***United States v. Hernandez***, 279 F.3d 302 (5th Cir. 2002) Suspicious of a bus traveler, a police officer took her luggage out of the baggage compartment of the bus and handled it, feeling (from the outside) the contents. This violated Bond v. United States, 529 U.S. 334 (2000), which held that such manipulation of luggage amounts to a search. The agent at that point entered the bus and secured the defendant's consent to open the suitcase. This was valid consent. But the consent was not sufficiently attenuated from the initial illegality to remove the taint. Thus, even though the search was conducted pursuant to the defendant's consent, it was still the fruit of the illegal search that preceded it. The officer decided to approach the defendant only after he had felt something suspicious in her suitcase. This invalidates the consent search.

***United States v. Drosten***, 819 F.2d 1067 (11th Cir. 1987) The unlawful entry into a defendant's apartment by police officers which resulted in the discovery of a third person in the apartment made that third person's testimony inadmissible.

***SEARCH AND SEIZURE (Automobiles) SEE ALSO: SEARCH AND SEIZURE (HIGHWAY STOPS)***

***Collins v. Virginia***, --- S. Ct. --- (2018) Even if the police have probable cause to search an automobile (or, as in this case, a motorcycle), the police may not enter the curtilage of a house to search the vehicle without a warrant. The automobile exception does not authorize the search of an automobile at all times and at all places, without a warrant. In this case, the police walked up the defendant's driveway, invading the curtilage of the property, to search the motorcycle.

***Brendlin v. California,*** 127 S.Ct. 2400 (2007) When the police stop a vehicle that has a driver and passenger, the passenger is also "detained" for fourth amendment purposes. Therefore, if there was no basis for the stop, the passenger may contest the admissibility of any fruits of that stop (for which he has standing), such as a statement he made, or evidence seized from his person or personal belongings. Thornton v. United States, 541 U.S. 615 (2004) In New York v. Belton, 453 U.S. 454 (1981), the Court held that the police may conduct a search incident to arrest of the interior of a car whenever an occupant is arrested. In this case, the Court concluded that the same rationale allows the police to search a vehicle, even if the occupant is arrested by the police after exiting the car and is not within reach of the interior of the vehicle.

***Arizona v. Gant***, 129 S. Ct. 1710 (2009) Five years after Thornton was decided, the Supreme Court followed up on the promise of the five Justices in Thornton who expressed displeasure with the scope of Belton, in the case of Arizona v. Gant, 129 S. Ct. 1710 (2009). Though stating that Belton was not expressly overruled, the Court determined that Belton required significant reigning in and held that a search incident to arrest, following an automobile stop, is only permissible "if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest." Thus, if the arrestee is in the back of the patrol car and restrained, the police may not automatically search the passenger compartment of the vehicle, simply because the defendant was arrested in, or immediately after exiting, the vehicle. What matters is the accessibility of the vehicle at the time of the search, not at the time of the arrest. A search may occur, however, even if the arrestee is not within reach of the car if there is "reason to believe" (i.e., not necessarily probable cause) that evidence of the crime for which the defendant is arrested is in the vehicle. In Gant, the defendant was arrested after he exited his vehicle in his driveway. He was arrested based on a warrant for a previous offense. There was no reason to believe that there was any evidence in the vehicle relating to the offense listed in the warrant. He was arrested and handcuffed in the back of the patrol car when the search of his vehicle occurred. The Court held that Belton – as heretofore construed – did not authorize this search and the evidence should have been suppressed.

***Maryland v. Pringle***, 540 U.S. 366 (2004) The police stopped a vehicle for speeding. The driver consented to a search of the car. Cash and drugs were found. Two other occupants of the car were arrested. The Supreme Court held that the evidence found during the consensual search was sufficient to justify the arrest of the two passengers. Therefore, one of the passenger's subsequent confessions was admissible.

***Wyoming v. Houghton,*** 119 S. Ct. 1297 (1999) When the police have probable cause to search a car, they may search all containers in the car, including containers known to belong to passengers, and for which there is no specific probable cause. The Court did not disturb its earlier holding in United States v. DiRe, 332 U.S. 581 (1948), which held that probable cause to search a car does not authorize the search of the person of a passenger.

***Arizona v. Johnson***, 555 U.S. 323 (2009) If the police stop a vehicle lawfully and there is a passenger in the vehicle, if the police have a reason to believe the passenger is armed and dangerous, he may be frisked. This is true, even if the passenger is not believed to have committed any crime.

***Florida v. White***, 119 S. Ct. 1555 (1999) Under Florida state law the police are authorized to seize an automobile for forfeiture purposes. The same law exists with regard to federal forfeitures. In this case, the police observed the defendant, in his vehicle, involved in a drug transaction, but waited several months before seizing the car from a parking lot at defendant's place of employment. They then performed an inventory search. The Court upheld the warrantless seizure and inventory search even though there were no exigent circumstances and the probable cause to seize the vehicle arose several months earlier.

***Maryland v. Wilson,*** 519 U.S. 408 (1997) The police may direct a passenger to exit a vehicle when the car has been stopped for a legitimate reason Ohio v. Robinette, 519 U.S. 33 (1996) If a lawful traffic stop has been made and the basis for the traffic stop has been accomplished, the police may then request consent to search the vehicle without announcing to the driver that he is free to leave.

***Pennsylvania v. Labron***, 518 U.S. 938 (1996) If there is probable cause to search a car, there is no need to show the existence of particular exigent circumstances. That is, the fact that a car is involved is itself justification for dispensing with the search warrant requirement. California v. Acevedo, 500 U.S. 565 (1991) Overruling United States v. Chadwick and Arkansas v. Sanders, the Supreme Court held that if the police have probable cause to search a container in a vehicle, but do not have probable cause to search the rest of the car, the "automobile exception" applies and the police may conduct a warrantless search of the container. In this opinion, the Court reviews the automobile exception and its theoretical underpinnings at length.

***Florida v. Jimeno,*** 500 U.S. 248 (1991) If a person consents to a search of his automobile, an officer may search all closed containers found within the automobile. The officer is not required to make a second request before opening a closed container.

***Knowles v. Iowa***, 119 S. Ct. 484 (1998) When the police make a traffic stop and issue a citation and do not make a custodial arrest, the police may not thereafter conduct a search of the vehicle on the theory that it is a search incident to arrest.

***United States v. Hussain***, 835 F.3d 307 (2d Cir. 2016) If the police do not arrest the occupants of a car, but are engaged in traffic stop, they may not search inside the car unless they meet the standard of Michigan v. Long, 463 U.S. 1032 (1983): the officers must have a reasonable belief based on specific and articulable facts that the suspect was dangerous and the suspect might gain immediate control of weapons thus entitling them to conduct a search inside the car. The information known to the police when they searched the defendant's car in this case did not meet the standard. There was insufficient information to believe that the occupants were armed one defendant had given the police a knife that had been in his pocket and was standing behind the car.

***United States v. Beene,*** --- F.3d --- (5th Cir. 2016) If a car is parked in the driveway of a home even if outside the curtilage, despite the existence of probable cause to search the vehicle such as a dog alert, the police must obtain a warrant unless there are particularized exigent circumstances.

***United States v. Patiutka***, 804 F.3d 684 (4th Cir. 2015) The defendant was pulled over on the Interstate for a traffic offense. The trooper asked him for his driver's license and asked the defendant some identifying information, including the defendant's age. The trooper thought that the defendant gave an answer about his age that was inconsistent with the driver's license. The trooper asked for consent to search the car. Initially, the defendant apparently consented (his foreign accent made it difficult to understand him), but shortly thereafter revoked his consent. At that point, the trooper detained the defendant and began to search again. The district court granted the motion to suppress: (1) there was no probable cause to arrest the defendant (the judge found that there was insufficient evidence that the defendant lied about his birthdate), and therefore no basis for a search incident to arrest; (2) the automobile exception did not apply, because the evidence known to the officers (even the evidence found during the aborted consent search) did not amount to probable cause. All that was found was a credit card reader and three IPads. This does not amount to probable cause to search a car.

***United States v. Noble***, 762 F.3d 509 (6th Cir. 2014) The police were watching the Interstate for a vehicle that was suspected to be involved in a methamphetamine distribution operation. When the vehicle was spotted, an officer pulled behind it. The vehicle crossed a lane line without a proper signal. The officer activated his lights. The officer determined that the tint on the window was too dark. The driver and the passenger (the defendant) were excessively nervous. The driver consented to a search of the vehicle, at which point the passenger/defendant was asked to exit the vehicle and he was frisked. Because there was no basis to believe that he was armed or dangerous, there was no legitimate basis to frisk the defendant and the evidence derived from this frisk should have been suppressed. The facts that the driver and passenger were nervous, and that the vehicle was suspected of being involved in a drug trafficking operation are not sufficient to support a reasonable belief that the passenger was armed or

dangerous, even coupled with the officer's experience that drug dealers are often armed. The court ridicules the notion that any passenger in a car can be frisked if the driver or the vehicle is suspected of being involved in drugs: this would presumably include "a fourth grader, a ninety-five-year-old gentleman with Parkinson's disease, or a judge this court." The law requires individualized suspicion of the person who is to be frisked, not a general belief that someone in the vehicle might possibly be armed.

***United States v. Cervantes***, 703 F.3d 1135 (9th Cir. 2012) A man was seen leaving what was described by the police as a stash house with a white box. That man was later observed giving the box to the defendant. The defendant's car was followed briefly, and the police believed that he engaged in counter-surveillance maneuvers. Later the defendant, with the box was pulled over for a minor technical motor vehicle infraction and the officer could not confirm that he had a valid driver's license. The car was searched, and the box was found to contain cocaine. The government contended that there was probable cause to search the car. The Ninth Circuit disagreed: the officer's testimony that the house was a "stash house" was worth little, because no facts were offered to support that conclusory statement. The claim that the defendant engaged in counter-surveillance was equally unhelpful. The government next argued that the car was subject to impoundment and inventory, but the Ninth Circuit rejected this theory, too, because there was insufficient information that the car was obstructing traffic, or otherwise in need of being impoundment. Moreover, the government did not show that the impoundment was appropriate under California law.

***United States v. McCraney***, 674 F.3d 614 (6th Cir. 2012) The limitations on a search incident to arrest announced in Gant are not limited to situations where the defendant is handcuffed in the rear of a patrol car. Here, the defendants were outside the car, surrounded by several law enforcement officers. A search of the car was not a valid search incident to arrest.

***United States v. Gaines***, 668 F.3d 170 (4th Cir. 2012) Three police officers testified that as the car in which the defendant was a passenger drove past them, they observed a small crack in the windshield. The car was stopped, and the defendant was ordered out of the car and frisked, and the officer felt a gun. The defendant assaulted the police officer and fled, after which he was stopped, and a gun was found in his possession. The district court found that the officers were untruthful when they said that the observed a crack in the windshield and that the stop, therefore, was illegal. The government conceded the illegality of the stop but claimed that the assault of the officer was an intervening event that authorized the search incident to arrest. The Fourth Circuit rejected this argument: the gun was found during the course of the illegal stop and the frisk which was before the defendant engaged in the intervening assault.

***United States v. Powell***, 666 F.3d 180 (4th Cir. 2011) The defendant was a passenger in a car. The driver was stopped, and he had a suspended license. The police asked the defendant/passenger for his license to see if he would be allowed to drive the car. A record check was performed on the defendant's license, and it revealed a prior armed robbery conviction and also a suspended license. The police then frisked the defendant, discovering evidence used in a drug/firearm prosecution. The Fourth Circuit held that the frisk was not lawful, because there was no reasonable basis for believing that the defendant was armed, or dangerous, and therefore no reason to frisk him.

***United States v. Rodgers***, 656 F.3d 1023 (9th Cir. 2011) The police stopped the defendant's car because a quick records check did not show that the registration of the vehicle matched the vehicle color. In the car was the defendant and a young girl. The officer suspected that the young girl was a prostitute. He asked both the defendant and the girl questions, and his suspicions increased. Ultimately, he decided that the girl lied about her age, and he decided to search the car. The Ninth Circuit held that the stop of the vehicle was permissible, as was the prolonged questioning. The search, however, was not lawful. Perhaps there was probable cause to arrest the girl, but there was not probable cause to search the car. There was no basis for believing that there was evidence of a crime in the car.

***United States v. Edwards***, 632 F.3d 633 (10th Cir. 2001) The defendant was arrested on the sidewalk near a parking lot. The court concluded that there was probable cause to support the arrest a belief that the defendant had participated in a bank robbery. The police then searched a rental car, which had been rented by his girlfriend which was in the parking lot. The Tenth Circuit held that the defendant did not have standing to contest the search of the car in general, because he was not on the rental agreement, but he did have standing to challenge the search of the closed suitcases which he owned that were in the trunk of the vehicle. The court also held that the search was not a valid probable cause search of the vehicle, because there was no probable cause to believe that the car contained any evidence. The search was not a valid search incident to arrest, because the defendant was over 100 feet away from the car when he was arrested and he was handcuffed in the back of the patrol car note, this case was decided pre-Gant. This was not an inventory search, because the police conceded that they were searching for evidence and had not decided to impound the car until the evidence was found.

***United States v. Gross***, 662 F.3d 393 (6th Cir. 2011) The police stopped an automobile in which the defendant was a passenger. The stop was found to be improper because there was no articulable suspicion supporting the stop. During the course of the stop, the police learned that there was an arrest warrant for the defendant. The question in the Sixth Circuit was whether the existence of an arrest warrant and the evidence found during a search incident to the arrest was the fruit of the illegal stop, and did the exclusionary rule bar the introduction of the evidence. The Sixth Circuit held that the exclusionary rule did apply, and the evidence would be suppressed. Contrary authority in the Seventh Circuit in United States v. Green, 111 F.3d 515 (7th Cir. 1997), was rejected by the Sixth Circuit.

***United States v. Davis***, 598 F.3d 1259 (11th Cir. 2010) When the defendant's car was searched, Gant had not yet been decided, and the search was valid under then-prevailing law in the Circuit (interpreting Belton to authorize a search anytime there was an arrest of the driver). The question in this case, is whether a pre-Gant search is subject to suppression if the case is

brought to court post-Gant. In other words, if the search was lawful when it was conducted, but subsequent changes in the law rendered it unlawful, should the exclusionary rule be applied. The Eleventh Circuit concluded that the exclusionary rule does not apply in this situation, relying on Illinois v Krull, 480 U.S. 340 (1987) and Herring v. United States, 129 S. Ct. 695 (2009). The Supreme Court affirmed. 131 S. Ct. 2419 (2011).

***United States v. Pena-Montes***, 589 F.3d 1048 (10th Cir. 2009) The police pulled over the car in which the defendant was a passenger because the officer could not see a license plate on the car. Upon approaching the car, the officer saw a dealer plate displayed in the rear window. The officer thought the car might be stolen, because the driver had no paperwork establishing his ownership, but after calling in the VIN number, the officer found no report that the car was reported stolen. Nevertheless, the officer questioned the defendant – the passenger – and decided that his answers to various questions were suspicious and eventually, he was arrested. The police later determined that he was an illegal alien. The Tenth Circuit held that the continued detention of the occupants of the car was not legal. Once the officer saw the dealer tag, there was no basis for detaining them. The officer's testimony that dealer tags are limited circumstances in which a driver test-drives a car was legally incorrect. The officer's mistake of law (as opposed to mistake of fact) could not justify the continued detention of the vehicle's occupants. The court remanded the case to the lower court to assess the extent to which the exclusionary rule would apply in this case i.e., excluding evidence of the defendant's identity and status as an illegal alien.

***United States v. Gonzalez***, 578 F.3d 1130 (9th Cir. 2009) The police searched the defendant's vehicle pursuant to the "search incident to arrest" doctrine after the defendant was handcuffed and removed from the immediate vicinity of the vehicle. At the time the search occurred in this case, the controlling precedent was New York v. Belton which authorized a search in this situation. However, after the search occurred and while the case was pending on appeal, the Supreme Court issued its decision in Arizona v. Gant, which held that the search incident to arrest doctrine did not apply in this situation. The question is whether reliance on prevailing Supreme Court precedent amounts to good faith and therefore obviates the need for the exclusionary rule. The Ninth Circuit held that the good faith exception to the exclusionary rule does not apply in this situation and the evidence was suppressed pursuant to the Gant decision. The "pipeline" rule of retroactivity provides that any change in the law applies to any case then in the pipeline, i.e., still in the process of direct appeal. This case did not survive the decision in Davis v. United States, 131 S. Ct. 2419 (2011).

***United States v. Lopez***, 567 F.3d 755 (6th Cir. 2009) The search incident to arrest in this case violated the rule in Arizona v. Gant. No discussion of a whether a pre-Gant search, which would have been valid under Belton would be upheld on a good faith theory.

***United States v. Caseres***, 533 F.3d 1064 (9th Cir. 2008) The defendant was driving his car and was seen by the police, who thought the car had improper window tinting and that the defendant had not properly signaled a turn. The police followed the defendant but did not activate their emergency lights. The defendant parked his car and started walking towards his house. The police parked behind the defendant's car and then walked to catch up with the defendant who was finally approached on the front lawn of a neighbor. The police told the defendant to stop; he fled. After catching him, the police went back to the car and searched it. This was not proper. This was not a proper inventory search or a proper search incident to arrest.

***United States v. Grigg***, 498 F.3d 1070 (9th Cir. 2007) The police may not stop a car based on information that the driver has committed a misdemeanor in the past that poses no continuing threat to public safety. While the police may stop a car where the driver is believed to have committed a DUI offense, or a breach of the peace that may be ongoing, in this case, the defendant allegedly committed a "noise violation" in the past. This did not support a vehicle stop.

***United States v. Spinner***, 475 F.3d 356 (D.C. Cir. 2007) The police approached the defendant who had parked his car illegally and immediately became suspicious of him, because of his movements inside the car. He stepped out and agreed to be frisked. The police then asked to look in his car, but he denied consent. The police looked in the car, nevertheless, and discovered a gun. The government argued that this "car frisk" was justified under the doctrine of Michigan v. Long, 463 U.S. 1032 (1983). The D.C. Circuit disagreed, concluding that there was insufficient information to support a "frisk" of the car under the standard of Terry. The defendant was outside his car and had already been frisked himself and therefore no risk was posed to the police that necessitated any further searching of the car.

***United States v. Henderson***, 463 F.3d 27 (1st Cir. 2006) In a lengthy opinion carefully reviewing the record of the suppression hearing, the First Circuit held that the trial court erred in making a credibility determination that the officer who made the traffic stop in this case was truthful about the passenger (the defendant) not wearing a seatbelt. Based on the officer's testimony, which was riddled with inconsistencies and contradictions, the district court should have granted the suppression motion.

***United States v. Mosley***, 454 F.3d 249 (3rd Cir. 2006) If the police stop a car without an articulable suspicion, the discovery of contraband in the car must be suppressed, even in a prosecution of a passenger. Though Rakas v. Illinois indicates that the passenger has no expectation of privacy in the car, the passenger's motion to suppress is predicated on his unlawful detention and the fruit of that unlawful detention, rather than on the expectation of privacy in the automobile. The court's opinion runs twenty pages and comprehensively reviews the law of "fruit".

***United States v. Washington***, 455 F.3d 824 (8th Cir. 2006) The police pulled the defendant over because his windshield was cracked. A gun was found, and the defendant was prosecuted for being a felon in possession of a firearm. Driving with a cracked windshield, however, is not a violation of Nebraska State law. Therefore, the stop of the defendant was unlawful, and the discovery of the gun was a fruit of the illegal stop. The government's argument that the officer acted in good faith was rejected:

The mistake of law was not objectively reasonable. The question is not whether the officer subjectively believed that the law was being violated, but whether, from an objective point of view, a belief that the law was being violated was reasonable.

***United States v. McDonald***, 453 F.3d 958 (7th Cir. 2006) The police pulled the defendant over for having his turn signal on when he rounded a curve. This was a not a valid basis for pulling the car over and any evidence found as a result of that stop should have been suppressed. There is no "mistake of law" defense to an improper stop.

***United States v. Cole***, 444 F.3d 688 (5th Cir. 2006) The defendant stopped at a stop sign just shy of the cross walk, but over the solid white line. He claimed that this did not violate Texas law. The government argued that the traffic stop was valid regardless of the actual Texas law, because the officer, in good faith, thought that the law required the defendant to stop before the solid white line. The Fifth Circuit held that a good faith mistake as to the law was not a cure for an invalid stop.

***United States v. Kennedy***, 427 F.3d 1136 (8th Cir. 2005) The defendant's girlfriend said that the defendant "deals" drugs and "keeps" drugs in his car. This did not establish probable cause that the defendant then had drugs in his car. A search of the car was not permissible under the probable cause prong of the automobile exception.

***United States v. Jaquez***, 421 F.3d 338 (5th Cir. 2005) The police received a report of gun shots at a location and that a red car was involved. Fifteen minutes later, an officer pulled over the defendant who was driving a red car in the general vicinity of the reported gun shots. The Fifth Circuit held that there was insufficient information to support the stop of the defendant's car and the subsequent consent search was invalid.

***United States v. Jackson***, 415 F.3d 88 (D.C. Cir. 2005) The police may search the inside of a car incident to an arrest. The trunk, however, may only be searched if there is probable cause to believe that there is contraband or evidence in the trunk. In this case, the defendant was arrested for driving a car with stolen license plates and without a valid driver's license. The police claimed that the trunk might contain evidence that the car was stolen, but the court concluded that stolen license plates on the car does not suggest further evidence in the trunk. Chief Justice Roberts dissented.

***United States v. Green***, 324 F.3d 375 (5th Cir. 2003) The police had a warrant for the defendant's arrest. They followed him home and after he exited his car and was approaching his front door, they approached him and started talking. He then fled. A search of his car was not supported as a search incident to arrest.

**United States v. Maple**, 348 F.3d 260 (D. C. Cir. 2003) The defendant was arrested in his car for speeding and driving with a suspended license. The officer decided not to impound the car and pulled it into a parking lot. He noticed a mobile phone on the floor and opened a console between the bucket seats for the purpose of hiding the phone in there. This amounted to a search and was unlawful.

***United States v. Cooper***, 133 F.3d 1394 (11th Cir. 1998) The driver of a rental car has standing to contest a search of the car, even if the car is overdue to the rental company.

***United States v. Baker***, 221 F.3d 438 (3rd Cir. 2000) The defendant drove to his parole officer in a borrowed car. The defendant admitted to the officer that he did not have a license. This did not authorize the officer to search the trunk of the car. The search of the trunk was not supported by an articulable suspicion.

***United States v. Kimball***, 25 F.3d 1 (1st Cir. 1994) When a police officer effects a stop of a vehicle, all of the occupants have had their freedom of movement restrained, and thus all of the occupants have been seized. The passengers, as well as the driver, may feel that they are not free to leave once they have been stopped by the police. Therefore, if the stop is illegal, fruits of that stop, including evidence found in the car, must be suppressed in a trial involving the passengers of the car. In this case, the stop was lawful.

***United States v. Infante-Ruiz***, 13 F.3d 498 (1st Cir. 1994) The defendant was a passenger in a car which was stopped by local police, who knew that the defendant was wanted in another jurisdiction. In the trunk was the defendant's briefcase. There was no probable cause to search the briefcase based on these facts alone. There was nothing but "conventional wisdom" supporting the officer's belief that incriminating evidence would be found in the defendant's briefcase.

***United States v. Miller,*** 146 F.3d 274 (5th Cir. 1998) The police believed that the defendant was transporting drugs but had no basis for stopping the vehicle other than the fact that the defendant activated his direction signal, but then entered an intersection and did not make a turn. Flashing a turn signal, but not turning, however, is not a criminal offense under Texas law, so stopping the vehicle was not authorized. The defendant's subsequent consent to a search of his vehicle was tainted by this unlawful stop and was not valid.

***United States v. Adams***, 26 F.3d 702 (7th Cir. 1994) The defendant was arrested in the front yard of the house by officers who were prepared to search the house. He was cuffed. Later, the officers searched the defendant's car when they determined which car was his. This is not a proper Belton search. Clearly, the search was not incident to arrest and the officers did not even know the car belonged to the defendant until after he was arrested and cuffed.

***United States v. Hogan***, 25 F.3d 690 (8th Cir. 1994) The police had probable cause to believe that the defendant had drugs or paraphernalia in his house and would have drugs in a pickup truck when he drove to work. A search warrant for the house and the pickup was obtained. The police set up surveillance at the defendant's house; when he left in a car, he was stopped, and his car was seized. There was no probable cause to believe that there were any drugs in the car, however, and the search warrant only covered the house and the pickup. Also, Michigan v. Summers, 452 U.S. 692 (1981), did not support the seizure of the car. There, the Court held that the occupant of a house could be detained during the execution of a search warrant at the house.

Here, however, the defendant was nowhere near his home when he was stopped. The seizure of the car in this case was followed by a dog sniff, which was positive, followed by the execution of another search warrant for the car. Because the dog sniff would not have been possible without the unlawful seizure, the search warrant for the car represented the fruit of the poisonous stop. Finally, even though the car was searched pursuant to a warrant, the officers were not acting in good faith when they unlawfully seized the car and submitted it to a dog sniff. The good faith exception, therefore, did not apply.

***United States v. Ramos-Oseguera,*** 120 F.3d 1028 (9th Cir. 1997) San Francisco's inventory policy required officers to identify all visible property in an impounded vehicle. The policy did not authorize the opening of closed containers to inventory the contents of containers. Here, the police searched the pants pockets of a pair of jeans found in the back seat and found heroin. This was not a lawful inventory search because there was no authorization in the city policy to search the pockets of clothes found in an impounded vehicle. This was also not a valid search incident to arrest, because the search occurred long after the occupants were arrested and were safely in the police station and the car had been towed. A valid search of an automobile incident to arrest must occur roughly contemporaneously with the arrest.

***United States v. Parr***, 843 F.2d 1228 (9th Cir. 1988) The defendant was stopped by a police officer who suspected that he was driving with a suspended license. The suspect was placed in the patrol car. Subsequently, the police officer searched the defendant's car and found various items of contraband. The government contended that this was a lawful arrest, and the search of the car was permissible under the search incident to arrest doctrine. The Ninth Circuit disagreed, holding that this was a lawful Terry stop, which does not authorize a search incident to arrest. The search of the automobile was improper and the Motion to Suppress should have been granted.

***United States v. Vasey***, 834 F.2d 782 (9th Cir. 1987) The defendant was arrested, handcuffed, and placed in a patrol car. Thirty to forty-five minutes later, the officers executed a search on the car contending that it was "incident to the arrest." The Ninth Circuit holds that the evidence should have been suppressed. The Court initially concluded that it was not an inventory search because the subjective intent of the officers was to conduct a search for evidence rather than to conduct a search to inventory the contents. The Court further concluded that it was an improper search incident to arrest because of the amount of time which had expired between the arrest and the search, the inaccessibility of the car to the defendant at the time of the search, and because the defendant was handcuffed and removed from the car at the time of the search.

***United States v. Nielsen,*** 9 F.3d 1487 (10th Cir. 1993) When the defendant's car was pulled over, the officer smelled burnt marijuana. He searched the passenger compartment with the occupant's consent and found nothing. A search of the trunk was not justified.

***United States v. Lugo***, 978 F.2d 631 (10th Cir. 1992) Defendant was arrested for driving with a suspended license. The car was parked in a gas station and the defendant was taken away. The police then inventoried the contents; the officer removed the cover of a speaker in the door panel and located cocaine. This was not a proper search incident to arrest, nor a proper inventory search. It could not be a search incident to arrest, because the defendant had already been taken away in a patrol car.

***United States v. Chadwick***, 433 U.S. 1 (1977). This was not a valid inventory search, because searching inside speakers in door panels is not standard police procedure.

***United States v. Alexander***, 835 F.2d 1406 (11th Cir. 1988) An automobile search requires both probable cause and exigent circumstances. In most cases, however, the fact that an automobile is mobile is sufficient to satisfy the exigency requirement. Nevertheless, in cases in which an automobile is parked in a parking lot and is inaccessible, exigent circumstances may possibly not be found. In this case, however, because the automobile belonged to someone other than the defendant and keys were available to the defendant's brother, exigent circumstances were found to exist.

***United States v. McFadden***, 722 F. Supp. 807 (D.D.C. 1989) The defendant was arrested several blocks from the location of his parked car. A police officer had previously locked the doors to the defendant's vehicle prior to pursuing the defendant. The subsequent warrantless search of the vehicle was not justified by any exception to the warrant requirement.

***SEARCH AND SEIZURE (Border Searches)***

***United States v. Flores-Montano***, 541 U.S. 149 (2004) A search at the border may extend to the interior of a fuel tank. The police may remove, disassemble, and re-assemble the gas tank without any specific justification during a border search. There is no need for the searching agents to have any particularized suspicion in order to justify this type of intrusion.

***United States v. Vergara***, 884 F.3d 1309 (11th Cir. 2018) The defendant entered the country from a cruise ship and had three cell phones. The customs officer decided to search the phones forensically. The Eleventh Circuit held that probable cause is not required to forensically search a cell phone, even post-Riley at the border. The defendant did not challenge the fact that there was reasonable suspicion to support the search.

***United States v. Cotterman***, 637 F.3d 1068 (9th Cir. 2011) The Ninth Circuit holds that a computer that is seized at the border during a routine border search may be transported 170 miles away to a forensic lab for two days for analysis is a proper border search. The court holds, however, that these types of searches will be evaluated on a case-by-case basis and that prolonged seizures may not be appropriate. EN BANC REVIEW GRANTED 3/20/12. The En Banc Court held that this search required a showing of a reasonable suspicion that the computer contained contraband, a showing that the government satisfactorily made in this case, United States v. Cotterman, 709 F.3d 952 (9th Cir. 2013).

***United States v. Rangel-Portillo***, 586 F.3d 376 (5th Cir. 2009) There was no basis for the Border Patrol to stop the defendant's vehicle, even though it occurred not far from the border. The stop was prompted, according to the officer, based on the fact that the occupants of the car did not make eye contact with the police, were sitting in the back seat of the car with the windows rolled up, and were sitting "stiffly." The driver, according to the officer, looked at the officer "too much." These factors, even considered in sum, did not create an articulable suspicion that there was any offense being committed by the occupants of the vehicle.

***United States v. Seljan,*** 547 F.3d 993 (9th Cir. 2008) In this en banc decision, the Ninth Circuit holds that Customs Agents may open Federal Express packages that are destined for overseas and review the contents of written documents. The case contains a detailed discussion of the border search exception. United States v. Whitted, 541 F.3d 480 (3rd Cir. 2008) Before agents may search the passenger cabin of a person arriving on a cruise ship from out of the country, the agents must have reasonable suspicion.

***United States v. Arnold***, 533 F.3d 1005 (9th Cir. 2008) Reasonable suspicion is not required before customs officials may search a laptop or any other electronic storage device of a person entering the country. Customs officers may direct a person to turn on the computer and may then click on various icons and photos without any basis for doing so, other than the border search exception to the search warrant requirement. There is, of course, the possibility that a search will become so destructive, that additional information will be required before customs officers may undertake such a search.

***United States v. Romero-Bustamente***, 337 F.3d 1104 (9th Cir. 2003) 8 U.S.C. § 1357(a)(3) permits Border Patrol Agents to enter any land – but not a dwelling – within twenty-five miles of any external border. In this case, the Ninth Circuit held that the curtilage of a home is included within the exclusion of "dwelling." Therefore, the Border Patrol may not rely on this statutory authority to make a warrantless entry into the curtilage of a suspect's property.

***United States v. Portillo-Aguirre***, 311 F.3d 647 (5th Cir. 2002) After the Border Patrol Agent completed his work of ascertaining bus passengers' immigration status, he would routinely ask about drugs. The court held that a Border Patrol Agent is free to engage in questions about drugs, as long as the questions do not extend the time it takes to conduct the legitimate immigration status check. Once the immigration inquiry is finished, however, any further questioning amounts to a detention without articulable suspicion. See also United States v. Dortch, 199 F.3d 193 (5th Cir. 1999). HOWEVER, note that Dortch's holding has come into question. See United States v. Pack, 622 F.3d 383 (5th Cir. 2010).

***United States v. Rodriguez-Rivas***, 151 F.3d 377 (5th Cir. 1998) If a car is traveling more than 50 miles from the border, the court will be more reluctant to apply the more lenient Brignoni-Ponce standard. Here, the defendant's car was more than 50 miles from the border and there was no basis for stopping the vehicle.

***United States v. De La Cruz-Tapia***, 162 F.3d 1275 (10th Cir. 1998) The Border Patrol Agent justified his stop of the defendant's vehicle based on the type of vehicle; the defendant's failure to look at the agent when he drove by; his abrupt exit from the interstate; his suspicious behavior at a gas station; and the fact that the vehicle had crossed the border three times in the past three days. Considering each of these factors, the lower court concluded that there was no basis for stopping the defendant. The Tenth Circuit affirmed.

***United States v. Moreno-Chaparro***, 180 F.3d 629 (5th Cir. 1998) The Border Patrol Agent did not have reasonable grounds to believe that the defendant had crossed the border. The car in which the defendant was driving was seen 60 miles north of the border and had Texas license plates. The various factors upon which the agent relied in stopping the vehicle (it was registered to a female but driven by a male; it drove through a checkpoint during shift change; the driver acted suspiciously by not looking at the agent as he passed through the checkpoint) were unremarkable facts that did not support stopping the vehicle.

***United States v. Rivas***, 157 F.3d 364 (5th Cir. 1998) When the defendant crossed into the United States in Texas, agents drilled into the frame of his auto-transport truck and discovered cocaine. Under the border-search doctrine, government agents may conduct a "routine search" at the international border or its functional equivalent without probable cause, a warrant, or any suspicion to justify the search. A stop that is not routine requires a reasonable suspicion of wrongdoing. The Fifth Circuit concluded that drilling into the truck was not a routine search. See United States v. Robles, 45 F.3d 1 (1st Cir. 1995). The court also held that a dog's "casting" did not create a reasonable suspicion of wrongdoing. A "casting" is not a full alert, but a "sign of interest" on the part of the dog.

***United States v. Benevento***, 836 F.2d 60 (2d Cir. 1987) A customs agent searched a defendant's luggage for currency without reasonable suspicion. This constitutes a violation of the statutory limitation on currency searches at a border. The search was based solely on hearsay statements of airline personnel to the effect that on prior occasions, one of the defendants had checked luggage with the airline and that luggage had been subjected to a currency search. The agent who searched the luggage in this case was not even aware of the results of the previous search. However, the Second Circuit concludes that there is no exclusionary remedy for a violation of the statute. Note, too, that the statutory limitation was later eliminated. 31 U.S.C. §5317.

***United States v. Jackson***, 825 F.2d 853 (5th Cir. 1987) In this en banc decision, the Fifth Circuit substantially revises its former position on the legality of permanent vehicle check points near the United States-Mexican border. The Court holds that a check point fourteen miles from the border cannot be deemed the "functional equivalent of the border" for Fourth Amendment purposes. The searching of cars at such a checkpoint is not permitted without a search warrant or probable cause.

***Gonzalez-Rivera v. INS***, 22 F.3d 1441 (9th Cir. 1994) The INS officer stopped the defendant's vehicle based solely on his Hispanic appearance. This does not amount to a reasonable suspicion justifying an investigative stop.

***United States v. Brignoni-Ponce***, 422 U.S. 873 (1975). The fact that the defendant, while driving, did not look at the INS officer was entitled to no weight. Also, the officer's claim that he could observe, while driving next to the defendant, that the defendant had a dry mouth and was nervous was not believable.

***United States v. Venzor-Castillo***, 991 F.2d 634 (10th Cir. 1993) The further away from the border that a stop occurs, the less likely that the border search exception will justify a search of a vehicle, pursuant to 8 U.S.C. §1357(a)(3). Though the vehicle in this case was suspicious, the fact that the stop occurred 235 miles from the border, with several towns in between, diminished the basis for believing that the vehicle had come across an international border with illegal aliens.

***United States v. Guillen-Cazares***, 989 F.2d 380 (10th Cir. 1993) The fact that two cars were travelling north on Highway 181, in an apparent effort to circumvent the checkpoint at Truth or Consequences, New Mexico, was not a sufficient basis to stop the vehicle. The fact that the vehicles turned south on I-25 was contrary to what smugglers generally did; the fact that the lead car contained more passengers than the follow-up car was also inconsistent with the smuggler "profile."

***United States v. Miranda-Enriquez***, 941 F.2d 1081 (10th Cir. 1991) The border patrol agent's basis for stopping the defendant's car 100 miles from the border did not amount to a reasonable suspicion.

***United States v. Monsisvais,*** 907 F.2d 987 (10th Cir. 1990) Border patrol agents lacked a reasonable suspicion to justify the stop of a heavily loaded pickup truck bearing a camper shell and out-of-state license plates. The government failed to show that the stretch of highway upon which the pickup truck had been stopped was a frequently used route to by-pass border patrol agents.

***United States v. Mayer***, 818 F.2d 725 (10th Cir. 1987) An airplane which was first detected 58 miles north of the United States-Mexican border was not shown to have actually crossed a border at any time and consequently the search of the plane was not justified under the border exception to the Fourth Amendment.

***SEARCH AND SEIZURE (Cell Phones)***

***Riley v. California,*** 134 S. Ct. 2473 (2014) The Supreme Court decided that a cell phone may not be searched incident to arrest. Neither officer safety, nor the need to preserve evidence justifies the need to dispense with the warrant requirement.

***United States v. Vergara***, 884 F.3d 1309 (11th Cir. 2018) The defendant entered the country from a cruise ship and had three cell phones. The customs officer decided to search the phones forensically. The Eleventh Circuit held that probable cause is not required to forensically search a cell phone, even post-Riley at the border. The defendant did not challenge the fact that there was reasonable suspicion to support the search.

***United States v. Griffith,*** 867 F.3d 1265 (D.C. Cir. 2017) The police had reason to believe that the defendant had participated (perhaps as the getaway driver) in a homicide that occurred a year earlier. The search warrant affidavit reviewed all the facts amounting to probable cause and then sought permission to search the defendant's current apartment (where he had moved after the homicide and a brief stint in jail). The warrant only sought authority to seize cell phones because criminals communicate by phone. During the execution of the search warrant, the defendant threw a gun out the window. The D.C. Circuit held that (1) the warrant was deficient, because there was no probable cause that the defendant even had a cell phone or that it had any incriminating information contained in it; (2) there was no probable cause that a phone would be found in the apartment (as opposed to on his person if he were not present at the apartment when the warrant was executed); (3) the good faith exception to the exclusionary rule did not apply because the warrant was so lacking in probable cause to search or seize a cell phone; (4) the "abandonment" of the gun was the fruit of the execution of the defective search warrant and therefore the gun that was thrown out of the window was subject to the exclusionary rule.

***United States v. Russian***, 848 F.3d 1239 (10th Cir. 2017) The search warrant application in this case requested permission to search two cell phones of the defendant that had already been seized when he was arrested, as well as permission to search his residence. The warrant, however, authorized the police to search the residence and seize cell phones found in the residence, but did not authorize the search of the phones already seized. This warrant did not authorize the search of the phones. The officers acted in good faith, however, so no suppression.

***United States v. Lustig***, 830 F.3d 1075 (9th Cir. 2016) The police seized the defendants cell phone from his car when he was arrested. The police did not obtain a search warrant for 16 months. This was an unreasonable delay and the motion to suppress should have been granted.

***United States v. Camou***, 773 F.3d 932 (9th Cir. 2014) The defendant was stopped in his vehicle and charged with smuggling undocumented aliens. He was brought to the police station where he and one of his passengers were questioned. The passenger admitted that they regularly were engaged in smuggling activity. The police seized the defendant's cell phone and listed it on a property report as seized evidence. Approximately 90 minutes later, the police searched the contents of the phone. The Ninth Circuit held that this was a not proper search incident to arrest search, not a proper exigent circumstances search and not a proper "automobile exception" search. In addition, the court rejected the inevitable discovery doctrine and the good faith exception to the exclusionary rule as reasons not to apply the exclusionary rule.

***United States v. Lopez-Cruz***, 730 F.3d 803 (9th Cir. 2013) The defendant was asked by a federal agent if he could "search" and "look in" his cell phone. The defendant consented. The phone rang and the agent answered the call. The Ninth Circuit held that answering the call exceeded the scope of consent.

***United States v. Wurie***, 728 F.3d 1 (1st Cir. 2013) The defendant was arrested shortly after making a dug sale. He was brought to the police station and a cell phone was seized from him. The First Circuit held that a search of the cell phone's data was not justified by the search incident to arrest exception to the warrant requirement. Though United States v. Robinson, 414 U.S. 218 (1971), permits a "full search" of the person when he or she is arrested, this does not extend to cell phones. The court noted that recent decisions in state courts have also limited cell phone searches: State v. Smith, 920 N.E.2d 949 (Ohio 2009); Smallwood v. State, 2013 WL 1830961 (Florida 2013). The court in Wurie, noted that the current capacity of the cell phone allows it to store up to 64 gigabytes of information. And if the officer searching the phone connects to storage in the Cloud, there is unlimited access to personal information. In addition, cell phones can connect to a webcam in a home, thus converting a search of the phone into a search of the privacy of the house. The United States Supreme Court affirmed Wurie in the Riley decision noted above.

***United States v. Skinner***, 690 F.3d 772 (6th Cir. 2012) A magistrate issued an order directing the phone company to provide "ping" information to law enforcement. The agents were then able to "ping" the target's phone and determine his location while he was en route delivering drugs. The Sixth Circuit held that the defendant had no expectation of privacy in the data emanating from his phone that showed its location. The Sixth Circuit distinguished Jones with the observation that the plurality in Jones relied on the trespass that occurred when the GPS device in that case was planted on the defendant's car. No such intrusion occurred in this case. The court also distinguished Justice Alito's concurring opinion in Jones (which did not rely on the trespass), because the tracking in this case only lasted three days, which does not reach the threshold for "intensive monitoring" that Justice Alito described as sufficient to invoke the Fourth Amendment.

***United States v. Flores-Lopez***, 670 F.3d 803 (7th Cir. 2012) Rejecting limitations placed on cell phone searches that have been advocated by several state appellate courts, the Seventh Circuit held that the police may search a cell phone as part of a search incident to arrest. In this case, the search was limited to determining the cell phone number, though Judge Posner explains that a somewhat more extensive search would also be authorized. The Court did acknowledge, however, that a permissible search is not limitless (comparing the extent to which the police must limit a search to the "minimization" requirement under Title III wiretaps). The Court noted the decisions from several state courts that hold that such searches must be limited in scope due to the amount of personal information that people have on their cell phones.

## *SEARCH AND SEIZURE (COLLECTIVE KNOWLEDGE DOCTRINE)*

***United States v. Massenburg***, 654 F.3d 480 (4th Cir. 2011) The police had no basis for frisking the defendant and the evidence obtained from the frisk should have been suppressed. The police drove to the scene where there was a reported shooting. Four men were seen a few blocks away. No evidence linked them to the shooting. They were responsive when the police approached them. They answered the officers' questions and said that they, too, had heard gunshots. When the police asked for consent to frisk them, two consented, but the defendant declined. This did not provide a basis to conduct a non-consensual frisk. The court also rejected the government's invitation to rely on the "collective knowledge" doctrine based on testimony at the suppression hearing that another officer, who did not actually conduct the frisk, had seen a bulge in the defendant's pocket. The collective knowledge doctrine essentially provides that when one officer knows sufficient information to justify an arrest of a target, if he requests that another officer make the arrest, the knowledge of the first officer is attributed to the second officer for purposes of determining whether there was probable cause to support the arrest. The Fourth Circuit held that the collective knowledge doctrine did not apply in this case, because the searching officer had no reason to believe that any other officer had sufficient information to support the search.

### *SEARCH AND SEIZURE (Community Caretaking Function)*

***United States v. Cervantes***, 703 F.3d 1135 (9th Cir. 2012) Though this decision focuses more on the issue of the propriety of the impounding and inventorying of a car, the Ninth Circuit holds that a lawful impound must satisfy the requirements of the "community caretaking" doctrine. In this case, the police believed that the defendant was involved in a drug deal but did not have sufficient information to arrest him. The police followed him until he committed a traffic violation, after which he was stopped and the police believed (incorrectly, as it turns out) that he was driving without a license. The car was pulled over next to the curb and in a residential area. The prosecution offered no evidence that it was necessary to impound the vehicle, or to inventory its contents. The two kilos of cocaine found in the back should have been suppressed.

***Ray v. Township of Warren***, 626 F.3d 170 (3rd Cir. 2010) In this civil rights case, the Third Circuit holds that the community caretaking exception to the warrant requirement never authorizes the warrantless entry into a house.

***United States v. McGough***, 412 F.3d 1232 (11th Cir. 2005) The defendant was arrested at the door to his house for leaving the child at home unattended. The defendant and the child were placed in the police car and the police then entered the house to get some shoes for the child. While in the house, the police spotted marijuana and a gun. The Eleventh Circuit held that the evidence should have been suppressed. The community caretaking function exception to the search warrant requirement was first articulated in Cady v. Dombrowski, 413 U.S. 433 (1973), a case in which the Court described certain functions of the police that have nothing to do with the detection or investigation of crimes. The Eleventh Circuit held, however, that this case did not present the type of emergency situation that would allow the police to enter a person's house without consent.

***United States v. Erickson***, 991 F.2d 529 (9th Cir. 1993) In Cady v. Dombrowski, 413 U.S. 433 (1973), the Court authorized a warrantless search of a vehicle on the basis that the officers were not attempting to investigate a crime, but were engaged in a community caretaking function, "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Here, the police were investigating a possible burglary; once at the house where the burglary

allegedly occurred, the police pulled back a black plastic cover over a window and discovered marijuana plants growing in the house. The “community caretaking function” doctrine did not authorize this warrantless search. At a minimum, there must be exigent circumstances to authorize such a search and, in this case, the trial court expressly found no exigent circumstances.

***United States v. Bute,*** 43 F.3d 531 (10th Cir. 1994) The police entered a garage because they were suspicious that it may have been vandalized. The officer discovered a methamphetamine lab. This search was not permissible under the supposed “security check” exception to the search warrant requirement and was also not permissible under the “community caretaking” exception, which is only applicable to automobiles.

***SEARCH AND SEIZURE (Computers)***

***United States v. Horton***, 863 F.3d 1041 (8th Cir. 2017) The government utilized a Network Investigative Technique (NIT) to obtain information from the defendant’s laptop computer. Even though some of the information obtained was not within the defendant’s legitimate expectation of privacy, the information was contained on his laptop, for which he did have a legitimate expectation of privacy. The agents obtained a search warrant from a Magistrate in another district, who had no authority to issue a search warrant for a computer in another district. Nevertheless, the agents acted in good faith, so the evidence was not suppressed. See also United States v. Henderson, 906 F.3d 1109 (9th Cir. 2018) (same holding).

***United States v. Griffith***, 867 F.3d 1265 (D.C. Cir. 2017) The police had reason to believe that the defendant had participated (perhaps as the getaway driver) in a homicide that occurred a year earlier. The search warrant affidavit reviewed all the facts amounting to probable cause and then sought permission to search the defendant’s current apartment (where he had moved after the homicide and a brief stint in jail). The warrant only sought authority to seize cell phones, because criminals communicate by phone. During the execution of the search warrant, the defendant threw a gun out the window. The D.C. Circuit held that (1) the warrant was deficient, because there was no probable cause that the defendant even had a cell phone or that it had any incriminating information contained in it; (2) there was no probable cause that a phone would be found in the apartment (as opposed to on his person if he were not present at the apartment when the warrant was executed); (3) the good faith exception to the exclusionary rule did not apply because the warrant was so lacking in probable cause to search or seize a cell phone; (4) the “abandonment” of the gun was the fruit of the execution of the defective search warrant and therefore the gun that was thrown out of the window was subject to the exclusionary rule.

***United States v. Edwards***, 813 F.3d 953 (10th Cir. 2016) The search warrant in this child pornography case alleged that the defendant had scores of images of a prepubescent minor posted on a publicly available site that showed the girl in various suggestive poses. The government conceded that the images were classified as “erotica,” but were not obscene and did not show the girl in sexually explicit poses or positions. Nevertheless, the magistrate issued a search warrant to seize the defendant’s computer. The Tenth Circuit held that the search warrant application did not demonstrate probable cause. But the good faith exception to the exclusionary rule applied.

***United States v. Cordero-Rosario***, 786 F.3d 64 (1st Cir. 2015) The initial search warrant stated that the crime under investigation was “lewd actions” and that “in accordance with the interview of the child, there is currently pornography on the defendant’s computer. There was no information in the search warrant application about what the child said, how the alleged pornography was related to any offense, how the child knew about the presence of pornography on the computer, or why the affiant believed that pornography was evidence of a crime. The evidence should have been suppressed.

***United States v. Raymonda***, 780 F.3d 105 (2d Cir. 2015) The government was aware that the defendant had viewed thumbnails of child pornography for a few seconds. This did not provide a probable cause basis to obtain a search warrant to search his computer nine months later. The testimony at the suppression hearing established that the user may have accessed a website without looking at individual images and that the images would have remained in the temporary Internet cache, but been overwritten within a few days or a month. Thus, the information that the site was accessed months earlier was stale. Leon applied, however, so the evidence was not subject to the exclusionary rule.

***United States v. Ganias***, 755 F.3d 125 (2d Cir. 2014) With a sufficient probable cause basis, government agents obtained a search warrant to seize defendant’s computers and search for files related to two particular corporate entities. The agents made mirror images of the hard drives of the computers and brought them back to the forensic laboratory. At no time did the agents delete anything from the hard drives that were unrelated to the entities listed in the warrant. Over the next two and one-half years, however, the agents determined that the defendant was engaged in other crimes. Aware that they were not permitted to review files other than those listed in the warrant, the agents obtained a second search warrant to examine other files in the mirrored hard drives. The Second Circuit held that the extended retention of the files violated the Fourth Amendment. While an initial seizure of the entire computer may be permissible in some cases; and the government is permitted to conduct the search of the computer off-site (Rule 41(e)(2)(B)), the retention of the files for 2 ½ years knowing that the files were not covered by the warrant violated the principle that searches must be limited by the “to be seized” clause of the warrant in order to avoid the “general searches” that were condemned by the Framers. Permitting the government to seize everything in a computer and retain everything for years despite the absence of any probable cause or authority in the warrant results in suppressing any evidence discovered in the files (even if later authorized by a subsequent warrant) that were not subject to the initial warrant’s “to be seized” clause. The Second Circuit also held that the fact that these files no longer existed on the defendant’s original computers 2 ½ years later is irrelevant. THE SECOND CIRCUIT EN BANC OVERRULED THIS DECISION IN MAY 2016, 824 F.3d 199 (2016), holding that the officers relied on the second search warrant in good faith. The court did not expressly decide whether the second warrant was invalid, holding that even if it were, the officers were acting in good faith. The court did,

however, address a number of issues – practical and philosophical – involved in computer searches. The majority opinion spans 27 pages and the concurring and dissenting opinions go for another 15 pages.

***United States v. Galpin***, 720 F.3d 436 (2d Cir. 2013) The search warrant affidavit provided inadequate probable cause to support the search and seizure of defendant's computer. The application sought a warrant to look for evidence of the violation of a particular New York statute, "and or federal statutes". That statute related to the registration of internet service provider and communications accounts the officer simply cited the wrong code section. The Second Circuit held that this warrant violated the particularity requirement in that it did not properly limit the scope of the search, or, for that matter, the type of evidence that the police were authorized to search for. The Second Circuit emphasized the importance of having proper limits when a computer is the subject of the search. The court also addressed the proper method of "severing" the improper portions of a search warrant from the legitimate clauses. If only limited parts of the warrant are valid (in a warrant that is otherwise sweeping and invalid), suppression of the evidence is appropriate. However, where isolated portions are invalid, the court may uphold the search that is authorized by the legitimate portions of the warrant.

***United States v. Sedaghaty***, 728 F.3d 885 (9th Cir. 2013) The search warrant authorized the seizure and searching of the defendant's computer for tax violations. The agents were aware that the tax violations related to the defendant's terrorist financing efforts. Nevertheless, the search warrant only authorized the seizure of financial documents and tax-related information. Once the agents seized the computers, they searched for any terrorism-related information, including the search history for terrorist sites. The fact that the search warrant incorporated the affidavit did not change the "To Be Seized" clause of the search warrant. While an affidavit can be used to cure a search warrant that appears to be overbroad, in this case, the warrant was quite precise, and the government sought to use the affidavit to broaden the scope of the seizure. The overbroad seizure in this case required that evidence be suppressed that was obtained in violation of the limitations imposed by the warrant.

***United States v. Needham***, 718 F.3d 1190 (9th Cir. 2013) Though the suppression of evidence was not required, because of the good faith exception to the exclusionary rule, the Ninth Circuit holds that evidence that the defendant has engaged in acts of child molestation does not suffice to establish probable cause to issue a search warrant to seize the defendant's computers to search for evidence of child molestation. The officer's expression of his opinion that "individuals who have sexual interest in children often possess child pornography" does not amount to probable cause.

***United States v. Metter***, 860 F.Supp.2d 205 (E.D.N.Y. 2012) In this district court opinion, the judge held that the government waited too long (15 months) to conduct a review of seized and retained electronic evidence in order to determine whether any of the evidence fell outside the scope of the warrant. As a result of this delay all evidence would be suppressed. The fact that the defendant was allowed to get the original computer back (the government had a mirror image) is not determinative, because it is the government's continued invasion of privacy, not the defendant's loss of the computer, that is the fourth amendment concern. "The parties have not provided the Court with any authority, nor has the Court found any, indicating that the government may seize and image electronic data and then retain that data with no plans whatsoever to begin review of that data to determine whether any irrelevant, personal information was improperly seized. The government's blatant disregard for its responsibility in this case is unacceptable and unreasonable."

***United States v. Flores-Lopez***, 670 F.3d 803 (7th Cir. 2012) Rejecting limitations placed on cell phone searches that have been advocated by several state appellate courts, the Seventh Circuit held that the police may search a cell phone as part of a search incident to arrest. In this case, the search was limited to determining the cell phone number, though Judge Posner explains that a somewhat more extensive search would also be authorized. The Court did acknowledge, however, that a permissible search is not limitless comparing the extent to which the police must limit a search to the "minimization" requirement under Title III wiretaps. The Court noted the decisions from several state courts that hold that such searches must be limited in scope due to the amount of personal information that people have on their cell phones.

***United States v. Richards***, 659 F.3d 527 (6th Cir. 2011) Judge Moore issued a concurring opinion in this case that explores the complexity of searches of servers that may be shared by more than one user. The search warrant in this case authorized the search of the server, but nobody realized at the time that the server was used by different users. Even Judge Moore recognized that in this situation, the Leon good faith exception applied.

***Chism v. Washington***, 661 F.3d 380 (9th Cir. 2011) The plaintiff's credit card was used to pay the "hosting fee" for a website the contained child pornography. This information, alone, was not sufficient to support the issuance of a search warrant. This was a civil rights case in which the plaintiffs sued the police for the illegal search.

***United States v. Krupa***, 658 F.3d 1174 (9th Cir. 2011) Though the majority opinion held that the search warrant in this case was sufficient to support the search of the defendant's computers for child pornography based on evidence that the defendant had possession of several computers and one image of a child who was nude was found on one of the computers, a lengthy dissent by Judge Berzon thoroughly reviews the law on this topic and concludes that probable cause did not exist.

***United State v. Doyle***, 650 F.3d 460 (4th Cir. 2011) The search warrant in this case failed to allege that pictures possessed by the resident of a house were pornographic and failed to allege when – or where – the pictures were possessed. This warrant lacked probable cause and did not even survive a good faith Leon review. The probable cause basis of the warrant provided the following: "Three minor children have come forward and stated that [Doyle] has sexually assaulted them at the Doyle residence. One victim [sic] disclosed to an Uncle that Doyle had shown the victim pictures of nude children." This description failed to state that the "nude pictures" were pornographic (i.e., lewd depictions) and because there was no statement of when these events

occurred, the information was stale (the court noted that the notion of staleness when it comes to computer evidence is rarely a basis to deny a search warrant, but in this case, there was no indication of when the pictures existed). In addition, the statement does not indicate where the pictures were shown to the child, so there was scant basis for believing that the evidence sought by the search warrant would be located at the residence, though the appellate court did not base its ultimate conclusion on this flaw in the warrant. With regard to the absence of probable cause, the court also noted that evidence of child molestation does not automatically authorize the search for child pornography.

***Virgin Islands v. John***, 654 F.3d 412 (3rd Cir. 2011) The defendant was known to have committed child molestation. There was no information to support the claim that there would be child pornography on the defendant's computer. Issuing a search warrant for the defendant's computer was not proper and the exclusionary rule applied. The affiant did not allege in the affidavit that there was a known correlation between child molesters and child pornography collectors. The failure to set forth this critical fact in the affidavit rendered the affidavit so lacking in probable cause that no reasonable officer could have relied on the warrant. The court explained that a magistrate may not infer a correlation between child abuse and the presence of evidence on a computer. That is a fact that must be averred in the affidavit. And when it is omitted, the court may not invoke the good faith exception to the exclusionary rule and assume that the officer was aware of this "fact."

***United States v. D'Andrea***, 648 F.3d 1 (1st Cir. 2011) If the defendant's computer was "hacked," this does not qualify as a prior "private search" that deprives the defendant of a reasonable expectation of privacy in the contents of the computer. In this case, a tipster called law enforcement officers to inform them that a person had uploaded child pornography to a cell phone. It was not clear how the tipster was able to view the images, however. Though the defendant had apparently uploaded the images and had attempted to share the images with her "partner," she had inadvertently sent the images to the tipster. The tipster somehow got a hold of the password that enabled her to view the images. The defendant and her partner, however, did not knowingly share the password with the tipster. The agents then investigated by accessing the cell phone website and also viewed the images. The First Circuit remanded the case to the trial court to determine how the tipster initially viewed the images. If the defendant did not "share" the information with the tipster, or "assume the risk" that the tipster would share the information that the defendant shared with her, this did not qualify as a private search that would authorize a subsequent law enforcement search under Jacobsen.

***United States v. Cotterman***, 637 F.3d 1068 (9th Cir. 2011) The Ninth Circuit holds that a computer that is seized at the border during a routine border search may be transported 170 miles away to a forensic lab for two days for analysis is a proper border search. The court holds, however, that these types of searches will be evaluated on a case-by-case basis and that prolonged seizures may not be appropriate. The En Banc Court held that this search required a showing of a reasonable suspicion that the computer contained contraband, a showing that the government satisfactorily made in this case, United States v. Cotterman, 709 F.3d 952 (9 th Cir. 2013).

***United States v. Stabile***, 633 F.3d 219 (3rd Cir. 2011) Rejecting the analysis advocated by Judge Kozinski in Comprehensive Drug Testing, the Third Circuit holds that traditional "plain view" rules permit government agents to search a computer while lawfully executing a search warrant. In this financial crime's investigation, the police uncovered child pornography videos on the defendant's computer. This case also contains a thorough discussion of various other computer search issues, including consent to search another person's computer and the length of time that the computer can be kept by forensic law enforcement agents before conducting the search when the computer is seized pursuant to consent versus when it is seized pursuant to probable cause.

***United States v. Warshak***, 631 F.3d 266 (6th Cir. 2010) The Sixth Circuit concludes that the government is required to obtain a search warrant before it may obtain stored emails from a service provider's computer. The Court also held that to the extent that the Stored Commications Act, 18 U.S.C. § 2703(a) allows the government to obtain such information with only a subpoena, it violates the Fourth Amendment. The court held that a person has a reasonable expectation of privacy in emails that are stored with, or sent or received through, a commercial Internal Service Provider. "The government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause."

***United States v. Comprehensive Drug Testing, Inc.,*** 579 F.3d 989 (9th Cir. 2009), amended on September 13, 2010, 621 F.3d 1162 (en banc) In this en banc decision, the Ninth Circuit set originally set forth specific rules that govern the search of a computer where a warrant specifically authorizes the search of the computer for certain documents. In the amended opinion issued in September 2010, however, Judge Kozinski's opinion was relegated to a concurring opinion. In this case, the warrant authorized the search of the computer to obtain certain patient records. The law enforcement agents, however, searched the entire computer records, claiming that they could not ensure that the target records were not located in other patients' files. Thus, various non-target records were viewed and then seized under the plain view doctrine. The Ninth Circuit held that this type of search beyond the scope of the warrant is unlawful. Among other rules, Judge Kozinski's concurring opinion stated that Magistrates should avoid allowing the government to rely on the plain view doctrine; segregation of records should be handled by a neutral third party; the search protocol should explain the steps that will be taken to avoid reviewing the contents of the computer that are not spelled out in the warrant. Two Circuits have rejected the Ninth Circuit's decision to limit the plain view doctrine in computer search cases: United States v. Mann, 592 F.3d 779 (7th Cir. 2010), and United States v. Williams, 592 F.3d 511 (4th Cir. 2010).

***United States v. Mutschelknaus***, 592 F.3d 826 (8th Cir. 2010) The search warrant in this case authorized the police to search the defendant's home within ten days, and to search any computer seized from the home within 60 days. This was a permissible application of Rule 41 and it was a reasonable component of the search warrant authorization.

***United States v. Frechette***, 583 F.3d 374 (6th Cir. 2009) In this child pornography case, the government succeeded in persuading the Sixth Circuit that there was sufficient probable cause to search the defendant's house and seize his computers. Well worth reading, however, is Judge Moore's spirited dissent in which she decries the "radical view of probable cause" expressed in the majority opinion. She concludes her dissent with the following: "I cannot think of any other circumstance where we have endorsed an invasion of a person's privacy with so few facts from which to draw an inference that the intrusion would likely uncover evidence of a crime . . . As reprehensible as our society finds those who peddle, purchase, and view child pornography, we, as judges, must not let our personal feelings of scorn and disgust overwhelm our duty to ensure the protection of individual constitutional rights. . . . There is no such thing as a fair-weather Constitution – one which offers the harbor of its protections against unreasonable search and seizure only in palatable contexts and only to worthy defendants."

***United States v. Payton,*** 573 F.3d 859 (9th Cir. 2009) The police had a warrant that authorized the seizure of documents and records in connection with a drug investigation. The Ninth Circuit held that this did not justify searching a computer that was found in the location that was searched.

***United States v. Otero***, 563 F.3d 1127 (10th Cir. 2009) The search warrant in this case authorized the seizure of all of the defendant's computers, hard drives, disks, and virtually any other electronic media. The Tenth Circuit held that the warrant failed the particularity requirement. A valid warrant must limit what can be searched for in a computer to evidence of violations of specific laws, or for specific evidence. The evidence would not be suppressed, however, as the government satisfied the Leon good faith standard.

***United States v. Mitchell***, 565 F.3d 1347 (11th Cir. 2009) If the police seize an item such as a computer from a house, based on probable cause (without consent to search it and without a search warrant authorizing the search or seizure), they must seek a warrant promptly. In this case, the police went to the defendant's house and asked if he had any child pornography on his computer. He initially responded, "yes, probably." He did not give the officers consent to seize the computer. Nevertheless, based on probable cause the officer seized the hard drive. He kept the hard drive in his office for several weeks during which time he was on training and was otherwise occupied. Thereafter, twenty-one days after the computer was seized, he obtained a search warrant. The Eleventh Circuit held that this delay was impermissible and suppressed the evidence obtained from the computer. The court noted that personal computers contain a substantial amount of private information and depriving the defendant of the computer that length of time without a warrant violated his Fourth Amendment right to be free from unreasonable searches and seizures. Among other arguments rejected by the Eleventh Circuit, the notion that the search would have taken more than three weeks even if the warrant had been obtained on the day of the seizure, did not support the delay. The court observed that a hard drive of a personal computer is the "digital equivalent of its owner's home, capable of holding a universe of private information." For that reason, a three-week delay in starting the search process was not reasonable.

***United States v. Falso***, 544 F.3d 110 (2d Cir. 2008) The FBI determined that the defendant had a prior conviction from eighteen years ago for misdemeanor child sex abuse and may have accessed a child pornography web site. On the basis of this information, the agent obtained a search warrant to search the defendant's computer for child pornography. The Second Circuit held that this information was not sufficient to authorize a search warrant. However, the court concluded that the evidence was would not be suppressed in light of the officer's good faith in executing a warrant signed by the judge.

***United States v. Hodson***, 543 F.3d 286 (6th Cir. 2008) The fact that the defendant was indisputably a child molester did not provide probable cause to believe that there was child pornography on his computer. The officer, moreover, could not have executed the warrant in good faith, because the application contained virtually no information that would have supported the search for pornography.

***United States v. Arnold***, 533 F.3d 1003 (9th Cir. 2008) Reasonable suspicion is not required before customs officials may search a laptop or any other electronic storage device of a person entering the country. Customs officers may direct a person to turn on the computer and may then click on various icons and photos without any basis for doing so, other than the border search exception to the search warrant requirement. There is, of course, the possibility that a search will become so destructive, that additional information will be required before customs officers may undertake such a search.

***United States v. Forrester***, 512 F.3d 500 (9th Cir. 2008) The police employed a device that enabled them to record the "to and from" location of every email that the defendant sent and received and also recorded the IP address of every website visited by the defendant's computer and the amount of data sent and received from that computer. The Ninth Circuit held that this was not a "search" that required a warrant, analogizing this investigative technique to a pen register, which is not a search.

***Smith v. Maryland***, 442 U.S. 735 (1979). The court noted, however, that if the police actually record the URL of the search (the actual content of a website that was visited), this might constitute a search. Thus, as the court noted, discovering that the suspect visited The New York Times, does not amount to a search. Discovering that that the suspect read a particular article while at that site might constitute a search. Id. at 1049, n. 6.

***Warshak v. United States,*** 490 F.3d 455 (6th Cir. 2007) A comprehensive guide to the Stored Communications Act, 18 U.S.C. § 2701, et seq. RE-HEARING EN BANC GRANTED, 10/9/07. The en banc court vacated the district court's decision on standing grounds. 532 F.3d 521 (6th Cir. 2008). The "guide" provided by the panel opinion, however, is still useful in understanding the structure of the statute. Subsequent decision was issued in December 2010: see above.

***United States v. Heckenkamp,*** 482 F.3d 1142 (9th Cir. 2007) The defendant had an expectation of privacy in his personal computer, even after he connected it to the University network, because there was no announced monitoring policy on the network, the defendant's expectation of privacy was objectively reasonable.

***United States v. Buckner***, 473 F.3d 551 (4th Cir. 2007) The police went to the defendant's house and secured his wife's consent to "mirror image" the computer that was seen on the table in the living room. The wife said that she used the computer occasionally to play solitaire. The agents then used forensic tools to examine the contents of the computer and determined that the defendant had used the computer to engage in various fraudulent acts. The Fourth Circuit held that the consent of the wife was not valid to enable the police to view the password-protected files on the computer, see Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001), but that she had apparent authority to grant consent. Thus, the evidence would not be suppressed.

***United States v. Adjani***, 452 F.3d 1140 (9th Cir. 2006) The court upholds the seizure and subsequent search of a computer that was owned by a person who was present at the defendant's house, but who was not the target of the search warrant. The court holds that the computer was at the target location and the seizure of that computer was not unauthorized by the search warrant. The owner was identified in the search warrant application as a person who associated with the target.

***United States v. Coreas***, 419 F.3d 151 (2d Cir. 2005) The Second Circuit reviews a "Candyman" search that involved searches of dozens of individuals around the country based on their "membership" in an Internet group that purportedly advertised the availability of child pornography. The FBI search warrant affidavit contained numerous erroneous statements about the method by which subscribers became members and whether they automatically received illicit images. The panel indicated that it would have reversed the trial court's denial of the Motion to Suppress, but for a prior decision of another panel that found no Franks violation (or sufficient residual information to support probable cause) and that the prior decision was binding on this panel. The other "Candyman" decisions in which a Franks violation was found to taint the warrant, include United States v. Strauser, 247 F.Supp.2d 1135 (E.D. Mo. 2003); United States v. Perez, 247 F.Supp.2d 459 (S.D.N.Y. 2003); United States v. Kunen, 323 F.Supp.2d 390 (E.D.N.Y. 2004). See also United States v. Bailey, 272 F.Supp.2d 822 (D. Neb. 2003); United States v. Martin, 426 F.3d 68 (2d Cir. 2005).

***United States v. Carey***, 172 F.3d 1268 (10th Cir. 1999) If a search warrant authorizes the search of a computer for drug sales, the police may not search through the hard drive for evidence of child pornography.

***United States v. Gourde***, 382 F.3d 1003 (9th Cir. 2004) – REVERSED BY EN BANC COURT IN MARCH 2006. INCLUDED HERE JUST FOR PURPOSE OF ANALYSIS THAT MAY BE APPROPRIATE IN ANOTHER CASE. The FBI learned about a website that permitted members to download child pornography. Defendant Gourde was determined to have been a member of the web site for two months. The FBI obtained a search warrant, claiming that any member would have had access to the child pornography. The affiant offered various expert opinions about the M.O. for child pornographers on the internet. The Ninth Circuit held that there was no probable cause to search the defendant's house and seize his computers based on this information. Moreover, Leon did not apply, because no officer could have relied in good faith on this warrant. There was no information that Gourde had actually downloaded any files from the website, though the FBI acknowledged that it had the capability of determining whether he did prior to the time the search was executed. See also United States v. Weber, 923 F.2d 1338 (9th Cir. 1990). NOTE: REVERSED BY EN BANC NINTH CIRCUIT DECISION (3/9/06) – 440 F.3d 1065 (9th Cir. 2006) (en banc).

***United States v. Zimmerman***, 277 F.3d 426 (3rd Cir. 2002) The police obtained a search warrant to search the defendant's home to look for child and adult pornography. There was no information in the warrant application that indicated that any pornography would be found in his home, though there was information that one clip of adult pornography was seen in the home months earlier by one (or perhaps more than one) high school student. That information, however, was stale. The police relied for the most part on evidence that the defendant was believed to have molested numerous high school students (he was a high school teacher). The police also offered expert opinion in the warrant application that child molesters often keep child pornography in their houses. The Third Circuit held that the warrant was lacking in probable cause and, in fact, could not even have been executed in good faith, given the absence of any evidence that pornography was then located in the house. The use of a seven page, single spaced, affidavit which never even mentioned child pornography could not reasonably have been relied upon to obtain a search warrant. Addressing the boilerplate "expert" opinion, the court wrote, "Rambling boilerplate recitations designed to meet all law enforcement needs do not produce probable cause . . . Experience and expertise, without more, is insufficient to establish probable cause."

***United States v. Runyan***, 275 F.3d 449 (5th Cir. 2001) The defendant's estranged wife went to the defendant's house to locate some of her personal items. While there, she found disks that contained pornography, as well as pornographic pictures and a vibrator. The wife took the computer and various disks and gave them to the police. The police then reviewed the disks in great detail. The Tenth Circuit analyzed the Supreme Court decisions in Walter v. United States, 447 U.S. 649 (1980) and United States v. Jacobsen, 466 U.S. 109 (1984) and concluded that the appropriate inquiry is whether the government learned something from the police search that it could not have learned from the private searcher's testimony. Courts have distinguished cases in which the police examine containers (or the contents of containers) that the private searcher never examined and cases in which the police examine the evidence in greater detail or with greater thoroughness than the previous examination by the private party. Here, the Fifth Circuit holds (1) the police may not examine a closed container that was not opened by the private searchers unless the police are already substantially certain of what is inside that container based on the statements of the private searchers, their replication of the private search, and their expertise. Examining all of the contents of the disks and zip disks in this case amounted to an unlawful search, because the private searchers did not know the contents of those disks. (2)

the police may search a container – even more thoroughly than a private searcher previously did – assuming the private searcher previously opened and examined the contents of the container. Compare United States v. Rouse, 148 F.3d 1040 (8th Cir. 1998) (holding that police violated fourth amendment when they discovered more items in traveler's bag than previously seen by airline employee who initially opened the bag). The court finally remanded the case to the district court to make findings relevant to the government's claim that the evidence should have been admitted under the independent source / inevitable discovery doctrine. See also United States v. Crist, 627 F.Supp.2d 575 (M.D. Pa. 2008) (prior examination of computer by person who took possession of defendant's computer did not authorize police to utilize forensic tools to conduct more thorough search of same computer).

***SEARCH AND SEIZURE (Consent – Generally)***

United States v. Drayton, 536 U.S. 194, 122 S. Ct. 2105 (2002) Police offices boarded an outgoing bus before departure and asked the passengers for consent to search their luggage. The officer did not inform the passengers that they could decline to give consent. The defendants consented to a search of their luggage and persons. The Eleventh Circuit had held that the consents were not voluntary because of the coercive nature of the interdiction activity, as well as the officers' failure to advise the passengers that they could refuse to consent to a search. The Supreme Court reversed. According to Florida v. Bostick, 501 U.S. 429 (1991), every encounter between the police and a defendant on a bus is not necessarily a "seizure." In this case, the Court held that the failure to advise the passengers of their right to refuse consent did not taint consent that was otherwise voluntarily given. Ohio v. Robinette, 519 U.S. 33 (1996) If a lawful traffic stop has been made and the basis for the traffic stop has been accomplished, the police may then request consent to search the vehicle without announcing to the driver that he is free to leave. Florida v. Bostick, 501 U.S. 429 (1991) Police may board a bus and ask passengers consent to search their carry-on luggage. The fact that the encounter occurs on a bus does not necessarily mean that the passengers are in any way restrained, or unable to say, "No." In this case, the officers specifically advised the passengers that they were free to reject the request. In short, the encounter did not amount to a "seizure" and the ensuing consent was therefore valid. Florida v. Jimeno, 500 U.S. 248 (1991) If a person consents to a search of his automobile, an officer may search all closed containers found within the automobile. The officer is not required to make a second request before opening a closed container.

***United States v. Escamilla***, --- F.3d ---, 16-40333 (5th Cir. 2017) The defendant consented to a search of his cell phone when he was initially arrested. The phone was returned to him, and he was then arrested. After he was arrested and his cell phone was seized and he was placed in jail, the police searched the phone again. The Fifth Circuit held that the initial consent did not carry over to the second search.

***United States v. Spivey***, 861 F.3d 1207 (11th Cir. 2017) The Eleventh Circuit holds that consent obtained through deception is valid consent in this case. The officers came to the defendants' house, claiming to be investigating a burglary at the house, when, in fact, they were investigating the defendants for credit card fraud. The defendants allowed the police into the house. The Eleventh Circuit holds that in this situation, the voluntary consent to allow the police into the house, who were misrepresenting their motive for wanting to come into the house, did not vitiated the consent. A spirited dissent by Judge Martin challenged whether consent that is acquired through deception qualifies a "voluntary" consent to waive one's Fourth Amendment rights.

***United States v. Hoffman***, C.A.A.F. No. 15-0361 (2016) During the course of a search that occurred with the defendant's consent, the agents began the process of taking various computers from the defendant's room. The defendant then revoked his consent. The appellate court held that the revocation of consent required that the agents leave the computers in the room. Because the agents had not yet seized the computers, the defendant had the right and power to revoke his consent.

***United States v. Rahman***, 805 F.3d 822 (7th Cir. 2015) A restaurant owner has a reasonable expectation of privacy in the business area of the restaurant and has standing to contest a warrantless search of the area. In this case, the defendant, the owner of a restaurant that burned down, consented to a search of the basement of the building "for the cause and origin" of the fire that consumed the restaurant and apartments above the restaurant. At the time the search was conducted, however, the investigators already knew that the fire's origin was upstairs, thus the "cause and origin" was not the object of the search in the basement. Cause and origin refer to the location and the "spark" for the fire, not a search for a motive, or a likely perpetrator. In this case, the investigators were looking for circumstantial evidence of the defendant's guilt, such as records, business receipts and a laptop. This search exceeded the scope of the consent that the defendant provided, and the evidence should have been suppressed.

***United States v. Cordero-Rosario***, 786 F.3d 64 (1st Cir. 2015) The initial search warrant stated that the crime under investigation was "lewd actions" and that "in accordance with the interview of the child, there is currently pornography on the defendant's computer. There was no information in the search warrant application about what the child said, how the alleged pornography was related to any offense, how the child knew about the presence of pornography on the computer, or why the affiant believed that pornography was evidence of a crime. The evidence should have been suppressed, because even the good faith exception to the exclusionary rule did not apply to this warrant. Based on the discovery of child pornography during the search of the computer, the police went back to the apartment and secured the wife's consent to search additional computers. The First Circuit held that this was arguably the fruit of the poisonous tree exploiting the first illegal search, but further fact-finding was necessary to develop the record relating to the subsequent consent searches.

***United States v. Robertson***, 736 F.3d 677 (4th Cir. 2013) An officer asked the defendant for permission to search his person. The defendant begrudgingly submitted to what the Fourth Circuit concluded was a "command." The Fourth Circuit held that this did not qualify as consent and the evidence should have been suppressed.

***United States v. Lopez-Cruz***, 730 F.3d 803 (9th Cir. 2013) The defendant was asked by a federal agent if he could "search" and "look in" his cell phone. The defendant consented. The phone rang and the agent answered the call. The Ninth Circuit held that answering the call exceeded the scope of consent.

***United States v. Vazquez***, 724 F.3d 15 (1st Cir. 2013) The police told the defendant that with or without her consent, the police were going to search her house. They claimed to have the authority based on the fact that her boyfriend (who the police erroneously believed lived in the house, too) was on parole and subject to a warrantless search. She consented. This was not valid consent, because it amounted to nothing more than acquiescence to a show of authority (the police did not, in fact, have the authority to conduct a warrantless search), rather than free and voluntary consent. The court noted that the officers' subjective good faith that they had the authority to conduct a warrantless search did not exempt this case from the application of the exclusionary rule. Their good faith was not, according to the First Circuit, reasonable.

***United States v. Cotton***, 722 F.3d 271 (5th Cir. 2013) The defendant, when stopped in his car, was asked by the officer if he could search the car. The defendant clearly limited his consent to searching the luggage in the car. The officer pried back the door panel and discovered drugs. This was an unlawful search. The government argued that the police had probable cause to pry open the panel once the officer saw loose screws. However, the discovery of the loose screws did not occur during a lawful consensual examination of the luggage.

***United States v. Shaw***, 707 F.3d 666 (6th Cir. 2013) Officers had an arrest warrant for the occupant of 3171 Hendricks Street. Two houses on the block, however, were identified as 3170 Hendricks Street. The officers knocked on one of the doors and eventually, the occupant allowed the officers in. The officers falsely stated that they had an arrest warrant for an occupant of that house. The officers then searched the house and found cocaine. The consent, which was based in part on the false representation that the officers had a warrant for the occupant of that house, was not consent that authorized the police to search the house. See Bumper v. North Carolina, 391 U.S. 543 (1968).

***O'Neill v. Louisville-Jefferson County Metro Govt***, --- F.3d --- (6th Cir. 11/8/11) The "consent-once-removed" doctrine provides that if a suspect consents to the entry of an undercover agent into his house, this consent also allows the police to enter, while the undercover agent is still in the house, in order to make an arrest. However, once the undercover agent leaves, the consent-once-removed doctrine no longer applies, and officers may not then enter the house. That is what occurred in this civil rights case.

***United States v. Harrison***, 639 F.3d 1273 (10th Cir. 2011) The police went to the defendant's house and explained that they were worried about a bomb being in the house based on a tip, and the safety of the community. Eventually, the defendant consented to a search of his house. In fact, there was no tip that the defendant's safety was in jeopardy – rather, there was tip that the defendant was a drug dealer and had firearms. The consent was tainted by this deception and trickery.

***United States v. Swanson***, 635 F.3d 995 (7th Cir. 2011) The defendant was arrested on a warrant charging him with possession of a weapon in violation of state law. The judge who issued the warrant wrote on the warrant that there would be no bond unless the defendant turned in his gun. When he was arrested, the defendant was told about the bond condition by the arresting officer before he was Mirandized. This statement by the police amounted to interrogation. The defendant responded by telling the police where his guns were in the house. The statement should have been suppressed. Later the defendant was taken to the police station where he received Miranda warnings and he gave a statement. This latter statement was inadmissible pursuant to Seibert. The court also held that the defendant's supposed consent to search his vehicle to find an additional shotgun was involuntary, because the officers serving the arrest warrant stated that he was "ordered" to turn over all guns, thus implying that he had no choice in the matter.

***United States v. McMullin***, 576 F.3d 810 (8th Cir. 2009) The police had consent to enter the defendant's house. The police entered, then went out the back door and arrested the fugitive they were seeking and also the defendant who had followed the police out. Thereafter, without securing consent again, the police re-entered the house. The Eighth Circuit held that the initial consent did not cover the re-entry and the evidence gathered during the second entry was suppressed.

***United States v. Neely***, 564 F.3d 346 (4th Cir. 2009) After the police completed a traffic stop of the defendant, the officer asked if he could "check" the defendant's trunk. The defendant tried to open the trunk from in the car but had trouble finding the switch. He was ordered out of the car and frisked, and the officer then searched the inside of the car and found a weapon. This search exceeded the scope of the consent that was given, and the evidence should have been suppressed.

***United States v. Zavala***, 541 F.3d 562 (5th Cir. 2008) The police may not flip open and examine a motorist's cell phone during a Terry stop. A Terry stop permits a brief frisk to ensure officer safety and not an investigation into the contents of a cell phone, including looking for the subscriber number. The government also argued that the search of the cell phone was permissible as a consent search. After removing the defendant's cell phone from his pocket and putting it on the roof of the car, the agents asked the defendant for consent to search the car. The defendant gave consent. The Fifth Circuit held that this did not give the agents authority to search the cell phone.

***United States v. Hardin***, 539 F.3d 404 (6th Cir. 2008) The police wanted to determine if a suspect was located in a particular apartment. They asked a maintenance man to go to the apartment and inform the occupants that he needed to enter to fix a plumbing problem. He did not obtain the occupants' consent – he simply entered. He then left and told the police that the suspect was there. The Sixth Circuit held that this was not valid consent. First, there was, as a matter of fact, no consent given. Second, the use of a ruse, such as this, is not appropriate, because there was no need to use a ruse to avoid violence or danger. This is

not a case in which the police already had probable cause to enter the house and used the ruse for safety purposes. Moreover, the apartment manager was acting as an agent of the police, so it triggered the exclusionary rule.

***United States v. Hicks***, 539 F.3d 566 (7th Cir. 2008) The police may not make baseless threats that they will get a search warrant if the occupant of a house does not consent to a search. If, in fact, there is no probable cause to get a warrant (or, more specifically, if the police do not reasonably believe that there is probable cause), this type of threat may vitiate any consent that is obtained in response. A remand to further develop the facts on this point was necessary.

***United States v. Castellanos***, 518 F.3d 965 (8th Cir. 2008) The defendant, who was clearly highly intoxicated, arguably permitted the police to enter his residence and sit in the living room. This consent, however, did not authorize the police to then search the entire house, including the defendant's bedroom.

***United States v. Holmes***, 505 F.3d 1288 (D.C. Cir. 2007) The defendant was seen in an alley by the police at 3:40 in the morning and when the officers approached him, he fled, scaling several fences in the process. The officers followed him and when they caught him, he was frisked, and a set of car keys were discovered and taken from him. The officers then used the car keys' remote door opener to find the car. The defendant then gave consent to search the car and a gun was found in the car. The D.C. Circuit held that taking the keys from the defendant after the frisk violated his Fourth Amendment rights. There was no probable cause to seize the keys and the fruit of that unlawful seizure was the discovery, and ultimately the search, of the vehicle in which the gun was found. The government's argument that the taint of the illegal seizure was purged by the subsequent consent to search was rejected. The attenuation doctrine did not save the search in this case.

***United States v. Buckner***, 473 F.3d 551 (4th Cir. 2007) The police went to the defendant's house and secured his wife's consent to "mirror image" the computer that was seen on the table in the living room. The wife said that she used the computer occasionally to play solitaire. The agents then used forensic tools to examine the contents of the computer and determined that the defendant had used the computer to engage in various fraudulent acts. The Fourth Circuit held that the consent of the wife was not valid to enable the police to view the password-protected files on the computer, see Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001), but that she had apparent authority to grant consent. Thus, the evidence would not be suppressed.

***United States v. Lakoskey***, 462 F.3d 965 (8th Cir. 2006) The postal employee brought police officers with him to deliver a package because of his suspicion that the recipient was involved in drug dealing. The package was handed to the defendant at the door. An officer then asked for consent to look in the package, which the defendant adamantly refused. The defendant slammed the security door shut, but the officer continued to ask him to open the package in front of him. The defendant walked away from the door toward the kitchen and the officer came in and followed the defendant. This did not amount to consent and the search was illegal, as were all fruits derived from the search.

***United States v. Buckingham***, 433 F.3d 508 (6th Cir. 2006) The trial court did not adequately resolve the factual question whether the defendant withdrew his consent to search his car. A defendant has the right to withdraw consent, even after initially giving voluntary consent.

***United States v. Gandia,*** 424 F.3d 255 (2d Cir. 2005) The defendant consented to the police entering his kitchen to interview him. Prior to commencing the interview, the police conducted a security sweep of the house. This was improper. The consent did not authorize the police to enter other rooms of the house. A security sweep is not permissible on the basis of a limited consent search.

***United States v. Sanders***, 424 F.3d 768 (8th Cir. 2005) The defendant consented to the police entering his hotel room. However, when the officers started to frisk him, he resisted, clearly signaling his lack of consent to being personally searched. He was then handcuffed, and drugs were found in his pocket. Because he withdrew his consent, the frisk was unlawful.

***United States v. Escobar,*** 389 F.3d 781 (8th Cir. 2004) The police were suspicious of the defendants' bags that were in the baggage compartment of a bus. The bags were removed from the compartment and brought to a room where the defendants were being questioned. The officers told the defendants that a drug dog had alerted to the bags and that there was probable cause to search them (there had been no drug dog and there was not probable cause). The defendants then consented to a search. This was not a valid consent search. The environment was overly coercive and the misrepresentation that there was already probable cause to search tainted the voluntariness of the consent.

***United States v. Cellitti***, 387 F.3d 618 (7th Cir. 2004) The police entered a house in which the defendant and his girlfriend lived based on exigent circumstances. Once inside, the police were given consent by the girlfriend to look for a gun. While looking for the gun, the police found a set of keys which they ultimately determined fit a car. The girlfriend later consented to a search of the car in which they found an assault rifle. The Seventh Circuit held that the defendant had a legitimate expectation of privacy in the car. Moreover, if the girlfriend did not validly consent to a search of the car, then the defendant had standing to contest the search. The girlfriend's consent was not valid, because the girlfriend was improperly in custody when her consent to search the car was obtained.

***United States v. Richardson***, 385 F.3d 625 (6th Cir. 2004) After issuing the driver a warning ticket, the police asked him to "stay where he was" and then approached one of the passengers the owner of the car for consent to search. This direction to the driver amounted to a detention – a detention that had no basis in an articulable suspicion – and amounted to an unlawful stop that tainted any subsequent search, even a consensual search. The detention of the driver amounted to a detention of all the car's occupants.

***United States v. Isiofia***, 370 F.3d 226 (2d Cir. 2004) The defendant was arrested shortly after accepting a controlled delivery of drugs. The police promptly made a protective sweep of the defendant's home and handcuffed him to a chair. Approximately thirty minutes later, while still handcuffed to the chair, the defendant was asked for consent to search the house, which he granted. The Second Circuit affirmed the lower court's decision holding that the consent was involuntary due to the prolonged detention in the house. Among the factors considered by the lower court was the agents' failure to explain what they were looking for; and they were verbally abusive during the course of the detention.

***United States v. Guerrero***, 374 F.3d 584 (8th Cir. 2004) The videotape of the defendant's detention on the side of the road demonstrated that he did not speak English (e.g., Q: "Do you know how fast you were going?" A: "Chicago."). Evidence of a signed Spanish consent form did not establish the defendant's consent to search his vehicle. Because the trooper was not able to communicate with the defendant in Spanish (or ensure that the defendant could read Spanish on the form), the form, by itself, was not enough to prove a voluntary consent.

***United States v. Bautista***, 362 F.3d 584 (9th Cir. 2004) The defendant checked into a hotel room with what the hotel later learned was a stolen credit card. The management called the police and asked them to investigate, though the hotel had not yet made the decision to evict the defendant. The police went to the door, announced who they were and demanded, "Open the door" and then used a pass key to open it. Inside was the defendant's wife, who backed up from the door (which she was opening at the same time the pass key was used to unlock it) and she said, "Come in." They then obtained her consent to search the room and discovered counterfeit paraphernalia. The Ninth Circuit held that the evidence had to be suppressed: First, the defendant had standing, because the hotel had not yet made the determination to evict him and had not terminated his right of occupancy and the police had not yet made the decision to evict him. Both the police and the hotel were still investigating the information relating to the alleged stolen credit card. With regard to the issue of consent, the police officers' command, "Police, open the door!" negated any suggestion of consent. "The government may not show consent to enter from the defendant's failure to object to the entry."

***United States v. Hernandez***, 279 F.3d 302 (5th Cir. 2002) Suspicious of a bus traveler, a police officer took her luggage out of the baggage compartment of the bus and handled it, feeling (from the outside) the contents. This violated Bond v. United States, 529 U.S. 334 (2000), which held that such manipulation of luggage amounts to a search. The agent at that point entered the bus and secured the defendant's consent to open the suitcase. This was voluntary consent. But the consent was not sufficiently attenuated from the initial illegality to remove the taint. Thus, even though the search was conducted pursuant to the defendant's consent, it was still the fruit of the illegal search that preceded it. "The officer decided to approach the defendant only after he had felt something suspicious in her suitcase." This invalidates the consent search.

***United States v. Winningham***, 140 F.3d 1328 (10th Cir. 1998) The defendant was stopped by border patrol agents and told that he was suspected of smuggling aliens. He consented to a search of the van and other than one passenger, nobody was found. The defendant then was told that the agent had information that the defendant was smuggling drugs. The defendant again consented to a search of his van, but it took about five minutes for a drug dog to arrive. The dog jumped into the open door of the van and alerted to the presence of drugs near the rear vent. The defendant did not consent to having the dog enter the vehicle. The trial court suppressed the evidence, concluding that the defendant's consent did not encompass allowing the dog to enter the vehicle. The Court of Appeals affirmed. There was no reasonable suspicion justifying the detention of the driver and the van after the initial search yielded nothing; therefore, the only basis for holding the van for five or six minutes was the driver's consent. The consent that was given, the appellate court concluded, was not voluntary: the driver had been asked to exit the vehicle and stand next to three armed officers. After the initial search ended, the driver was not told that he was free to leave. When the driver started walking away, a law enforcement officer followed him. These factors, taken together, show that any consent given by the driver was not free and voluntary.

***United States v. Thame***, 846 F.2d 200 (3rd Cir. 1988) It was improper for the prosecutor to argue that evidence of guilt could be inferred from the defendant's refusal to consent to the search of his bag.

***United States v. Ho***, 94 F.3d 932 (5th Cir. 1996) The defendant was approached at an airport because of his suspicious appearance and itinerary. He initially gave consent to a search of his portfolio. As the officer was looking through the portfolio, he discovered a blank white plastic card. At that point, the defendant abruptly withdrew his consent by grabbing the portfolio back. The officer grabbed the white card and saw a magnetic strip on the back, which indicated that it was a fraudulent card. However, the discovery of the magnetic strip on the back only occurred after the defendant had revoked his consent and thus could not be considered. Prior to noticing the magnetic strip, moreover, there was not probable cause to arrest the defendant and continue the search on a search incident to arrest theory. The district court erred in denying the motion to suppress.

***United States v. Hurtado***, 905 F.2d 74 (5th Cir. 1990) Overruling prior precedents, the Fifth Circuit holds that the government needs to prove the defendant's consent to search by a preponderance of the evidence. Previously, the Fifth Circuit had required the government to prove the voluntary nature of the consent by clear and convincing evidence.

***United States v. Jones,*** 846 F.2d 358 (6th Cir. 1988) Based on a tip, police approached the defendant on a public street and blocked his car with three police cars. He was asked if he had a gun; he responded that he did not have one with him, but that it was at his house. The court holds that this consent search was invalid: "The overall context and psychological impact of the entire sequence of events, which began with a dramatic stop by three police cars which blocked [the defendant's] means of egress and then escorted him to the search after he was questioned without the benefit of Miranda warnings" rendered the defendant's consent to search involuntary.

***United States v. Shaibu***, 920 F.2d 1423 (9th Cir. 1990) The police knocked on the defendant's door; the defendant came to the door, stepped into the hallway, and listened while the officers identified themselves. Without a word, the defendant then re-entered the apartment with the police following. This does not constitute consent. At no time did the police ask permission to enter nor did they receive an explicit consensual invitation. Free and voluntary consent cannot be found by a showing of mere acquiescence to a claim of lawful authority. A court will not infer consent to enter a person's home from conduct. Had the defendant's sought permission, and the defendant stepped back into the apartment with the door open, the result might have been different. But here, the police never asked, and the defendant never offered his consent. The consent search was not valid.

***United States v. Bosse***, 898 F.2d 113 (9th Cir. 1990) An entry gained by use of a ruse that obscures the true reason for entry cannot be upheld despite the defendant's consent to the entry. In this case, a federal agent hid his true reason for entering the defendant's house with a California state agent who was reportedly making a state licensing inspection. The state agent told the defendant that he was a licensing inspector, and that the federal agent was "with me." In fact, the federal agent desired entry in the house for purposes totally apart from the licensing inspection.

***United States v. $25,000***, 853 F.2d 1501 (9th Cir. 1988) The defendant contended that he did not speak English well enough to consent; there was insufficient evidence to determine if the defendant had freely and voluntarily consented to a search of his bag. A remand was necessary to develop the record.

***United States v. Elliott***, 107 F.3d 810 (10th Cir. 1997) After giving the defendant a traffic ticket, the police officer asked the defendant if he could look in the trunk of the vehicle, but stated, "I don't want to look through each item." The defendant popped the trunk open, and the officer then opened up one bag and looked in. This search exceeded the scope of the defendant's consent.

***United States v. Washington***, 151 F.3d 1354 (11th Cir. 1998) Two federal agents boarded a bus in Jacksonville and, holding their badges above their heads, announced that they would like to see the identification of the passengers. The agents did not tell anyone that they were free to refuse to cooperate, or to refuse to consent to a search. When they approached the defendant, they asked if they could look inside his luggage and then, when the agents saw an unusual bulge in the defendant's pants, asked if they could search him. Again, he consented. The Eleventh Circuit held that this was not a lawful search, because the consent was not freely and voluntarily given. There is no doubt in this case that the encounter began with a "show of authority," because the agent held his badge above his head and identified himself as a federal agent. He announced what he wanted the passengers to do, and what he was going to do. Absent some positive indication that they were free not to cooperate, it is doubtful a passenger would think he or she had the choice to ignore the police presence. Most citizens, the court observed, believe that it is their duty to cooperate with the police. Though the court declined to hold that police must advise suspects of their right to refuse to consent to a search, in this context, this is exactly what was needed. As the court held, "It seems obvious to us that if police officer genuinely wants to ensure that their encounters with bus passengers remain absolutely voluntary, they can simply say so. Without such notice in this case, we do not feel a reasonable person would have felt able to decline the agents' requests."

***United States v. Guapi***, 144 F.3d 1393 (11th Cir. 1998) At the bus station in Mobile, Alabama, two officers boarded the bus and announced that "with the passengers' consent" they were going to quickly search all of the luggage on the bus for contraband. Nobody was told that they could exit the bus with their luggage, or that they were permitted to refuse the request. Though the court stopped short of holding that voluntary consent requires proof that the target was aware of his or her right to refuse consent, in this situation, there was no voluntary consent. The actions of the police, in the language of Florida v. Bostick "would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." Note that this decision predates the United States Supreme Court decision in United States v. Drayton, supra which arguably overruled Guapi, though the Supreme Court did not expressly do so.

***United States v. Tovar-Rico***, 61 F.3d 1529 (11th Cir. 1995) Several police officers entered defendant's apartment with guns drawn and immediately engaged in a protective sweep search. The officers then approached the defendant, who was seated at the dining room table and asked for consent to search the house, advising her that if she refused, a search warrant would be obtained. The defendant's subsequent consent to search was not voluntary.

***United States v. Strickland***, 902 F.2d 937 (11th Cir. 1990) The defendant consented to a search of his vehicle, including consent to search the trunk and luggage. This did not, however, include permission to slash his spare tire to investigate its contents. Nevertheless, what the police learned from their lawful search was sufficient to give them probable cause to continue the search and thereby discover the contraband. The Court holds that when a person gives a general statement of consent to search without express limitations, the scope of the search is, nevertheless, not limitless. Rather, it is constrained by the bounds of reasonableness: What police officers can reasonably interpret the defendant's consent to have encompassed.

***United States v. Blake***, 888 F.2d 795 (11th Cir. 1989) The defendant was approached at an airport by three deputy sheriffs. He was asked if he would consent to a search of his baggage and his person for drugs. The defendant consented. Immediately, without any further consent, one of the officers reached into the defendant's groin region where he did a "frontal touching" "in the area between the legs where the penis would normally be positioned." The officer felt an object and heard a crinkling sound. The defendant was arrested, advised of his Miranda rights and cocaine was found in the crotch area. The Eleventh Circuit reverses the conviction: The government failed to show that the search which was conducted was within the purview of the consent received. The consent given by the Defendant allowing the officers to search his "person" could not, under the circumstances, be construed as authorization for the officers to touch his genitals in the middle of a public area in the Fort Lauderdale airport. Judge

Shoob, concurring, noted that he would have hit the officer if the officer were smaller than him. The court also reviews a number of cases in both the Fifth and Eleventh Circuits which found that consent was not voluntary under certain circumstances.

***United States v. Hodge***, 19 F.3d 51 (D.C. Cir. 1994) The defendant was approached by police officers shortly after he departed the bus station. The defendant was with two companions. When the officers began talking to the three suspects, one of the suspects was found to be carrying a firearm; he was thrown up against a tree and ordered to drop the gun. The other suspect was frisked. Meanwhile, the other defendant was asked for permission to search his bags. According to the officer, he consented. The trial court prohibited the defense from questioning the officers about what was going on with the other two suspects during the supposed consent search. This evidence represented the "surrounding circumstances" which must be considered in gauging whether the consent to search was free and voluntary. This limitation was reversible error, even though the defendant himself described the situation during his testimony. The trial court decided that he believed the officers, not the defendant; therefore, the defendant had a right to elicit testimony about the "environment" of the consent search from the officers on cross-examination.

***SEARCH AND SEIZURE (Consent -- Product of Unlawful Detention, Entry, Prior Search, or Arrest)***

***Florida v. Bostick***, 501 U.S. 429 (1991) Police may board a bus and ask passengers for consent to search their carry-on luggage. The fact that the encounter occurs on a bus does not necessarily mean that the passengers are in any way restrained, or unable to say, "No." In this case, the officers specifically advised the passengers that they were free to reject the request. In short, the encounter did not amount to a "seizure" and the ensuing consent was therefore valid.

***United States v. Delgado-Perez***, 867 F.3d 244 (1st Cir. 2017) Law Enforcement executed an arrest warrant in Puerto Rico for a suspect wanted in New York. There was no reason to believe that any other person, or danger, existed elsewhere in the house where the arrest occurred. A protective security sweep was therefore unnecessary and not consistent with the Fourth Amendment. The fact that the defendant was arrested for a drug offense did not constitute a sufficient basis to conduct a sweep search throughout the house after he was arrested in the front yard. The subsequent consent search was the fruit of this unlawful security sweep, and the results of that search were also required to be suppressed.

***United States v. Beauchamp***, 659 F.3d 560 (6th Cir. 2011) The defendant was walking on the sidewalk in a "high crime area" when the police approached. The defendant was ordered to approach the officer, which he did. The defendant appeared to be nervous. The officer then frisked the defendant to look for weapons. The officer then asked for consent to conduct a search of the defendant's person and the defendant agreed. The officer found drugs inside the defendant's boxers. The Sixth Circuit held that this was a seizure, it was not based on an articulable suspicion and the consent was tainted by the illegal detention.

***United States v. Macias,*** 658 F.3d 509 (5th Cir. 2011) The duration of the traffic stop in this case lasted too long to be justified as a legitimate motor vehicle stop. The state trooper pulled the defendant over because he was not wearing a seat belt. He determined that the defendant did not have proof of insurance. The trooper then questioned the defendant at length about his work history, his itinerary, his purpose for traveling and his health. The defendant's consent to search the vehicle was the product of the illegal detention.

***United States v. Fox***, 600 F.3d 1253 (10th Cir. 2010) The defendant's wife pulled up to her house and was approached by a police officer who was conducting surveillance of the house in particular, the defendant. The officer entered the wife's car and directed her to drive across the street to a parking lot. She was questioned and then asked for consent to search her car. Ultimately, she consented to a search of the house. The Tenth Circuit held that the wife was detained; there was no basis for the detention and the consent to search was the product of this detention. In analyzing the Wong Sun and Brown v. Illinois factors (i.e., whether the illegal detention had dissipated) the court stressed that the officer's conduct was flagrant, and the misconduct was investigatory in design and purpose and was executed "in the hope that something might turn up." The gun found in the house, therefore, should have been suppressed at the defendant's trial.

***United States v. Alvarez-Manzo***, 570 F.3d 1070 (8th Cir. 2009) The police seized a suitcase from underneath an interstate bus during a layover at a bus depot. They brought the suitcase into the bus and asked the passengers to whom it belonged. The defendant eventually said that it was his. He agreed to exit the bus and went with an officer into the bus station. Ultimately, he was arrested based on what was seen in his wallet and a search warrant was obtained to search the bag. The police did not act with the consent or at the direction of any employee of the bus company when they initially took the bag out cabbage compartment and brought it into the bus. This amounted to a seizure and because there was no warrant or probable cause, evidence discovered as a result of the seizure – which was both the contents of the wallet (viewed with the defendant's consent) and the suitcase – was properly suppressed.

***United States v. Urrieta***, 520 F.3d 569 (6th Cir. 2008) After pulling the defendant over for improper registration and weaving, the trooper determined that the defendant had a Mexican driver's license which the trooper incorrectly believed did not authorize the defendant to drive in Tennessee. The trooper wrote a ticket for the registration violation but prolonged the traffic stop based on his erroneous belief that the license was insufficient (and because of his suspicion that the defendant was smuggling drugs). Eventually (twenty-four minutes after the stop commenced), the trooper asked for consent to search the car, which the defendant provided. The Sixth Circuit held that the stop lasted too long, based on the trooper's erroneous understanding of the law and the consent was tainted by the prolonged detention. The court also rejected the government's suggestion that the trooper had a reasonable basis for believing that the defendant was smuggling drugs. The "characteristics" upon which the government relied were not sufficient to amount to a reasonable articulable suspicion. Finally, the court held that even if there was reasonable

suspicion to believe that the defendant was in the country without proper documents, the trooper lacked the authority to investigate this matter.

***United States v. Gomez-Moreno***, 479 F.3d 350 (5th Cir. 2007) After the police made an unlawful "exigent circumstances" search of the defendant's house the defendant consented to a search of the house. The Fifth Circuit held that the consent was the product of the prior illegal search.

***United States v. Johnson***, 427 F.3d 1053 (7th Cir. 2005) The police received an anonymous tip that the defendant was a cocaine dealer and that he lived at a particular location. The police went to the defendant's house and when the defendant's girlfriend came out, she was asked by the police to knock on the door. She did so and the defendant came to the door. The police talked to him briefly, after which he turned around and started walking away, back down the hall. The police pulled out a gun, pointed it at the ground, and cautioned that "this was a matter of officer safety." The defendant stopped in his tracks and returned to the door. He then consented to a search. The Seventh Circuit held, (1) this did amount to a detention; (2) there was no articulable suspicion supporting the detention; (3) the consent to search was a fruit of the unlawful detention.

***United States v. Washington***, 387 F.3d 1060 (9th Cir. 2004) The police went to the defendant's residential hotel room and knocked, with the expectation of gaining the defendant's consent to search the premises. But the defendant stepped outside the door when the police knocked and closed the door behind him. The police (six of them) repeatedly asked for permission to go in the apartment and reminded the defendant that he could be arrested on an unrelated matter. Eventually, the officers made their way inside and ultimately convinced the defendant to consent to a search. The Ninth Circuit found these Fourth Amendment violations: First the officers exceeded a Terry stop in the hallway; then they violated the defendant's rights by not allowing the door to remain closed; then they violated his rights by entering the apartment without his consent; and finally, they violated his rights by moving his jacket to find a small amount of methamphetamine. His subsequent consent to search was tainted by all of these previous violations.

***United States v. Cellitti***, 387 F.3d 618 (7th Cir. 2004) The police entered a house in which the defendant and his girlfriend lived based on exigent circumstances. Once inside, the police were given consent by the girlfriend to look for a gun. While looking for the gun, the police found a set of keys which they ultimately determined fit a car. The girlfriend later consented to a search of the car in which they found an assault rifle. The Seventh Circuit held that the defendant had a legitimate expectation of privacy in the car. Moreover, if the girlfriend did not validly consent to a search of the car, then the defendant had standing to contest the search. The girlfriend's consent was not valid, because the girlfriend was improperly in custody when her consent to search the car was obtained.

***United States v. Fields***, 371 F.3d 910 (7th Cir. 2004) Consent to search a house that occurs after the police unlawfully enter the house may be tainted by the illegal entry if that illegality has not been sufficiently attenuated. The lower court's findings in this case were insufficient to determine if, in fact, the court found that the initial entry was legal or not.

***United States v. Robeles-Ortega***, 348 F.3d 679 (7th Cir. 2003) The police sent an informant into a house to buy cocaine. The informant came out and advised the DEA that the cocaine was in the house. The agents did not attempt to get a search warrant, but, instead, broke down the door with guns drawn. A security sweep of the apartment was conducted and then one of the tenants was asked to consent to a search, which she did. The Seventh Circuit holds that the consent was tainted by the unlawful entry.

***United States v. Chanthaxouxat,*** 342 F.3d 1271 (11th Cir. 2003) The police pulled over the defendant's car because the officer believed that the defendant was in violation of a municipal law that required an inside rear-view mirror. Actually, there was no such law. This rendered the stop illegal and the officer's good faith did not rescue the government. An officer's good faith mistake of fact may support a stop, but a mistake regarding the law cannot support an illegal stop and the evidence derived from the stop must be suppressed.

***United States v. Patzer,*** 277 F.3d 1080 (9th Cir. 2002) The police lacked probable cause to arrest the defendant for DUI. The officer may have believed that the defendant had ingested marijuana, but there was no information suggesting that this impaired his ability to drive which is an element of the DUI offense. Absent probable cause to arrest the defendant, the ensuing search of his automobile could not be justified as a search incident to arrest. Similarly, the defendant's consent was tainted by the unlawful arrest. Finally, the court suppressed the statements made by the defendant that were the product of the illegal arrest.

***United States v. Chan-Jimenez,*** 125 F.3d 1324 (9th Cir. 1997) An officer observed the defendant's pickup truck and was suspicious, though there was no motor vehicle offense observed, or anything particular about the pickup that the officer could identify as being suspicious. The pickup pulled over to the side of the road and the driver raised its hood. The officer pulled in behind and asked the driver for his license and registration. Then, without returning the papers (and without having ever asked if the defendant was having trouble with the vehicle), the officer, hand on his weapon, asked if he could look in the vehicle. The driver consented. This was an unlawful detention. Withholding the papers in this situation prevented the defendant from freely refusing consent and the consent that was given, therefore, was ineffective.

***United States v. Ivy,*** 165 F.3d 397 (6th Cir. 1998) The police knocked on the defendant's door looking for a fugitive. The defendant consented to the officers' entry into the house. The court found that the subsequent search, however, was the product of police coercion and that the defendant did not consent to the search. Among other things, the defendant was detained for over an hour prior to the time that he supposedly consented to a search of his house. The officers also threatened to arrest everybody in the house and put the children in protective custody, and the defendant's girlfriend was handcuffed to a kitchen table.

***United States v. Vega***, 221 F.3d 789 (5th Cir. 2000) The police knocked on the door of a house that they suspected was being used for drug dealing. One person fled out the back door and was then detained. There was no probable cause for his arrest, however. Though he was not the owner or lessee of the house, he consented to a search of the house. The police, arguably, could have believed that he had authority to consent. However, because he was unlawfully detained, the consent was invalid and the defendant who did have standing to contest the search of the house could assert that fourth amendment violation to contest the supposed consent search of the house.

***United States v. McCraw***, 920 F.2d 224 (4th Cir. 1990) The police went to the defendant's hotel room after arresting a person who had just exited the room with cocaine. The officers knocked on the door; the defendant opened the door, but upon seeing the police, he immediately tried to close the door. The police forced their way in. The defendant was arrested and asked if the officers could search the room. Defendant consented. The entry into the room was unlawful and the ensuing purported consent was invalid. The entry was not in hot pursuit and was not justified by exigent circumstances. This case is distinguishable from United States v. Santana, 427 U.S. 38 (1976), because there, when the police arrived, the defendant was in the doorway and quickly retreated upon seeing the police.

***United States v. Miller***, 146 F.3d 274 (5th Cir. 1998) The police believed that the defendant was transporting drugs but had no basis for stopping the vehicle other than the fact that the defendant activated his direction signal, but then entered an intersection and did not make a turn. Flashing a turn signal, but not turning, however, is not a criminal offense under Texas law, so stopping the vehicle was not authorized. The defendant's subsequent consent to a search of his vehicle was tainted by this unlawful stop and was not valid.

***United States v. Caicedo***, 85 F.3d 1184 (6th Cir. 1996) The defendant arrived at the bus station in Cincinnati and a narcotics officer testified that he looked nervous. The officer followed the defendant until he got into the car of another person. The officer approached the car and asked the two if he could talk to them. The defendant (the passenger) got out of the car and – though the evidence was unclear, the appellate court concluded – the officer then frisked him and then asked for consent to search his backpack. The appellate court held that the evidence should have been suppressed. If the frisk occurred before the request for consent, then the defendant was at that time "seized" and there was no basis for this seizure. The ensuing consent, therefore, was invalid and the search of the backpack violated his Fourth Amendment rights.

***United States v. Richardson,*** 949 F.2d 851 (6th Cir. 1991) The police approached the defendant who was standing outside a storage unit which the police believed contained contraband. They asked for his consent to search the unit; the defendant refused. He was placed in the back of the patrol car and told to wait there while the officers questioned defendant's colleague. This amounted to an arrest of the defendant and his subsequent consent to search the storage unit was tainted by this unlawful arrest. In light of the statements of the officers and the circumstances, this was more than a mere Terry stop.

***United States v. Bradley***, 922 F.2d 1290 (6th Cir. 1991) The grand jury returned an indictment against the defendant. The police went to the defendant's house before a warrant was signed or a summons issued. The police knocked on the door; the defendant answered and was told he was under arrest. He consented to a search of his house. This violated Payton and the consent was tainted by the unlawful arrest. (The decision does not indicate that the officers entered the house prior to informing the defendant that he was under arrest).

***United States v. Buchanan***, 904 F.2d 349 (6th Cir. 1990) The police lacked sufficient basis to enter the defendant's home without a search warrant solely on their belief that the defendant's wife would destroy evidence after the defendant was arrested by DEA agents. Because the police were aware that the defendant's wife was at home asleep, there was no reason to believe that she would be aware that the defendant had been arrested and thus there was time to get a search warrant. Furthermore, once the police entered the house without a search warrant, the subsequent consent of the defendant (even assuming he was lawfully arrested) was tainted by this unlawful entry and the police could not rely on a consent search. Finally, the government cannot rely on the "inevitable discovery" exception because the police were not pursuing an alternate line of investigation at the time that the search was conducted. Police who believe they have probable cause to search may not enter the premises and excuse their failure to get a warrant on the basis that they would have gotten one anyway.

***United States v. Jerez***, 108 F.3d 684 (7th Cir. 1997) The police decided to investigate the occupants of a hotel room in Milwaukee on the basis that the car being driven by them had out-of-state plates (Florida plates) and the car was a two-door vehicle. They also learned that the driver had previously been arrested on narcotics charges. At about 11:00 p.m., the officers knocked on the door of the room for several minutes and hearing no reply, then went outside and started knocking on the window. After several minutes, the defendant opened the door and eventually consented to a search of the room. The Seventh Circuit concluded that the knocking on the door and window late at night amounted to a seizure that had no valid basis. The consent was tainted by this unlawful detention.

***United States v. Chan-Jimenez***, 125 F.3d 1324 (9th Cir. 1997) The police pulled behind the defendant's vehicle which was disabled on the side of the road. The officer obtained the defendant's license and registration and found everything in order. Without returning the identification documents back to the defendant, however (and while keeping his hand on his holstered weapon), the officer then asked for consent to search the vehicle. Retaining the documents amounted to a seizure, which was not supported by an articulable suspicion. A subsequent consent to search was not valid: the defendant was not told that he could refuse consent, he was not Mirandized, and he was being unlawfully detained.

***United States v. Gregory***, 79 F.3d 973 (10th Cir. 1996) The defendant was driving on I-70 in Utah when he was observed by a trooper weaving over the shoulder line. The defendant was stopped and following a brief encounter, consented to a search of his

vehicle. The trooper's stop of the vehicle was not lawful. Weaving over the shoulder line one time is not an offense under Utah law and there was insufficient evidence that the defendant was DUI or was a danger to the public. In this case, moreover, the ensuing consent was not untainted by the illegal stop. The court concluded that it was evident that, from the moment the vehicle was stopped, the trooper's sole interest was in viewing the contents of the vehicle.

***United States v. Sandoval***, 29 F.3d 537 (10th Cir. 1994) The defendant was stopped for speeding. He produced his license and registration, which was checked and came back normal. After returning the paperwork to the defendant, the defendant asked if "that is it?" to which the officer responded, "No, wait a minute." The officer decided to ask the defendant some additional questions about his criminal background (he learned during the license check about an arrest for a narcotics violation several years earlier). This questioning amounted to an additional detention, which was not supported by an articulable suspicion. The fact that the defendant had an earlier arrest – and no conviction – for a drug offense, does not justify a Terry stop of any duration. Even though the defendant then gave consent to search the car, this consent occurred after the detention had become unlawful and it was, therefore, not a free and voluntary consent. The evidence should have been suppressed.

***United States v. Fernandez,*** 18 F.3d 874 (10th Cir. 1994) The defendant was stopped on the interstate, because the trooper considered the tinted windows to be in violation of state law and for improper lane travel. The trooper examined the driver's license and issued a citation. However, rather than allowing the defendant to proceed, the trooper held the identification and questioned the driver and then asked for consent to search the car. The search yielded 121 kilograms of cocaine. The Tenth Circuit concluded that there were insufficient facts to support the detention of the defendant beyond the time necessary to examine the license and issue the citation (i.e., nervousness and "unusual behavior"). The subsequent consent to search the vehicle was tainted by the unlawful detention. Among other factors considered in determining whether the consent was free, and voluntary was the trooper's failure to advise the defendant that he had the right to refuse. This case might not be decided the same after the Supreme Court decided Ohio v. Robinette, 519 U.S. 33 (1996). United States v. Walker, 941 F.2d 1086, on rehearing from 933 F.2d 812 (10th Cir. 1991) The defendant was stopped for speeding. The officer then began questioning the defendant about contraband. While holding the defendant's license and registration in his hand, the officer then asked for permission to search the car. Though the defendant consented, the search was invalid. The continued detention of the defendant beyond the time necessary to issue the speeding ticket was not based on any articulable suspicion and the only issue for remand was whether the consent was invalid in light of the illegal detention.

***United States v. Maez***, 872 F.2d 1444 (10th Cir. 1989) The defendant's house was surrounded by SWAT team members all with drawn guns. With the use of loudspeakers, the officers ordered the defendant to exit his home. Because the officers had neither an arrest warrant nor a search warrant, the arrest was illegal pursuant to Payton v. New York. The resulting searches which were undertaken with the consent of the defendants were tainted by the illegal arrest. Statements given by the defendants were also subject to suppression.

***United States v. Tovar-Rico***, 61 F.3d 1529 (11th Cir. 1995) Several police officers entered defendant's apartment with guns drawn and immediately engaged in a protective sweep search. The officers then approached the defendant, who was seated at the dining room table and asked for consent to search the house, advising her that if she refused, a search warrant would be obtained. The defendant's subsequent consent to search was not voluntary.

***SEARCH AND SEIZURE (Consent – Third Party Consent***) Georgia v. Randolph, 126 S.Ct. 1515 (2006) Distinguishing United States v. Matlock, 415 U.S. 164 (1974) and Illinois v. Rodriguez, 497 U.S. 177 (1990), the Supreme Court holds that when co-tenants of a house are at the front door and one consents to a search and the other objects, the police may not enter. The Court noted, however, that if there were exigent circumstance (evidence of abuse, for example), the police could enter.

***Illinois v. Rodriguez***, 497 U.S. 177 (1990) Officers gained entry to the defendant's apartment with the assistance of an individual who told the police that she was one of the occupants of the apartment. She gave consent to the officers to search the apartment. In fact, that individual did not have common authority because she had moved out of the apartment already. The Supreme Court upheld the search: If police officer act in good faith reliance on the apparent authority of an individual to consent to a search of certain premises, the evidence will not be suppressed.

***United States v. Terry***, 915 F.3d 1141 (7th Cir. 2019) The police went to the defendant's house (knowing that he was not home, because they had recently arrested him) and a woman in a bathrobe answered the door. The police asked her for consent to search the house. She consented. In fact, she did not have authority to consent, and despite the fact that the police reasonable believed that she had spent the night there (because she answered the door in her bathrobe), that was not sufficient to demonstrate that the police reasonable believed that she had authority.

***Bonivert v. Clarkston***, 883 F.3d 865 (9th Cir. 2018) In this civil rights case, the police went to the home where there had been a report of a domestic argument. The police called the wife, who was not at home, and she consented to the officer's entrance into the house. The husband, who was at home, objected. Entering the house violated the rule announced in Georgia v. Randolph.

***United States v. Rush***, 808 F.3d 1007 (4th Cir. 2015) A woman called the police and asked that they remove the defendant from her apartment where he had been staying and, according to her, dealing drugs. The woman met the police at a location away from the apartment and gave them consent to enter the apartment and gave them a key. The police went to the apartment and went in. The defendant was asleep in the master bedroom. They woke him up and told him that they had a search warrant to search the apartment. This was not true. But the police said that in order to protect the woman – hiding the fact that she had called the police and gave them permission to enter the apartment. The Fourth Circuit held that (1) searching the apartment was not a proper consent search because the defendant, as an occupant, had the right to object to a consensual search pursuant to

Randolph; and (2) the police could not rely on the good faith exception to the exclusionary rule, because the police did not rely on some other authority in good faith in conducting the search. Deterring the police from lying about the existence of a warrant is the type of case for which the exclusionary rule is particularly appropriate.

***United States v. Cordero-Rosario***, 786 F.3d 64 (1st Cir. 2015) The initial search warrant stated that the crime under investigation was "lewd actions" and that "in accordance with the interview of the child, there is currently pornography on the defendant's computer. There was no information in the search warrant application about what the child said, how the alleged pornography was related to any offense, how the child knew about the presence of pornography on the computer, or why the affiant believed that pornography was evidence of a crime. The evidence should have been suppressed, because even the good faith exception to the exclusionary rule did not apply to this warrant. Based on the discovery of child pornography during the search of the computer, the police went back to the apartment and secured the wife's consent to search additional computers. The First Circuit held that this was arguably the fruit of the poisonous tree exploiting the first illegal search, but further fact-finding was necessary to develop the record relating to the subsequent consent searches.

***United States v. Iraheta***, 764 F.3d 455 (5th Cir. 2014) If a driver consents to the search of his automobile, including all closed containers, and there are suitcases belonging to passengers in the vehicle, if the passengers hear the consent given by the driver and don't object, the consent is valid. However, where, as here, the consent is given outside the earshot of the passengers, the consent is not a valid consent insofar as it purports to consent to the search of passengers' belongings.

***United States v. Peyton***, 745 F.3d 546 (D.C. Cir. 2014) The defendant and his grandmother shared a one-room apartment. The police went to the apartment and asked the grandmother for consent to search a shoebox next to the defendant's bed. The police had been told by the grandmother that the defendant kept his personal property around his bed in the living room. Relying on the grandmother's consent was not reasonable and the search violated the defendant's rights under the Fourth Amendment.

***United States v. Arreguin,*** 735 F.3d 1168 (9th Cir. 2013) The police could not have reasonably relied on the consent of a houseguest to search an entire house. The officers made no effort to inquire whether the person who answered the door had any authority to consent to a search or had unlimited access to the premises.

***United States v. Johnson***, 656 F.3d 375 (6th Cir. 2011) The decision in Georgia v. Randolph applies even if the objecting resident has a "lesser" possessory interest than the consenting resident. In this case, the owner of the house, along with her daughter consented to a search. The daughter's ex-husband, who was living in one of the spare bedrooms, refused to consent. The Sixth Circuit held that Randolph applied, and the police could not rely on the others' consent to enter the house.

***United States v. Hassock***, 631 F.3d 79 (2d Cir. 2011) The police went to an apartment and after knocking on the door, a woman finally answered the door. The police announced that they were looking for Hassock and she mumbled something and eventually said that the police could "look around." The police did not determine who she was, or what authority she had to permit entry into the apartment. The Second Circuit held that this was invalid consent to enter. The Court also spent considerable time discussing whether the police could engage in a Buie protective sweep and reviewed the law concerning the scope and premise for a protective sweep, noting that a protective sweep in some Circuits is limited to instances when either a search warrant is being executed or an arrest is occurring, whereas other Circuits permit a protective search in situations where a consent to search is the predicate for the entry. But that issue was not resolved in this case, because the Court concluded that the entry was unlawful.

***United States v. Taylor***, 600 F.3d 678 (6th Cir. 2010) The police could not have reasonably believed that a female resident of an apartment had authority to consent to the search of a shoebox that was in a closet full of men's clothes, and which belonged to a male houseguest who had just been arrested. If the police are unsure about the consenter's authority to give consent, they must ask about that person's authority, or access to the item being searched, and not simply conduct the search based on the person's general consent.

***United States v. Monghur***, 588 F.3d 975 (9th Cir. 2009) The defendant was in jail and his outbound calls were being taped. The police, listening to the tape, learned that he had a gun hidden in the house where he stayed. They went to the house and secured the consent of the owner to search the house. The police went to a bedroom that belonged to an adult mail and was the room in which the defendant stayed when he slept at the house. The police searched a closed container in that room and located the gun. The lower court held that the owner of the premises did not have authority to consent to a search of that container. The government did not appeal that holding. Rather, the government argued that the defendant lacked an expectation of privacy in the container because in a phone call that he knew was being taped, he revealed the existence of the gun. The Ninth Circuit held that when a defendant unequivocally reveals the contents of a closed container to the police, the defendant does relinquish his expectation of privacy in the container, but in this case, the defendant's statements on the telephone clearly showed that he was trying to disguise what he was talking about and used code. This demonstrated that he maintained an expectation of privacy in the container.

***United States v. Purcell***, 526 F.3d 953 (6th Cir. 2008) The police went to a hotel after receiving a tip that an escapee was there with his girlfriend. The police thought it was possible that methamphetamine was being made in the hotel room. The defendant was arrested outside the room. The girlfriend denied that there was any methamphetamine being manufactured in the room, but when the police quickly looked around, there were drug related items in the room. There was no reason to believe, however, that there was actual manufacturing in progress. Because of the lack of any such information, there was no basis to immediately start searching luggage that was in the room on the basis of exigent circumstances. Moreover, the girlfriend did not have the apparent

authority to consent to a search of the luggage, which did not belong to her. “Apparent authority cannot exist if there is ambiguity as to the asserted authority and the searching officers do not take steps to resolve the ambiguity.”

***Callahan v. Millard County***, 494 F.3d 891 (10th Cir. 2007) Some circuits have held that if a defendant invites a person into his house to sell drugs, and the invitee is an undercover police officer, the defendant cannot complain that pursuant to a pre-arranged signal, the undercover officer “invites” his colleagues into the house to make an arrest. However, where the invitee is a civil informant, rather than an undercover police officer, this rule is not as universal. The Tenth Circuit, in this § 1983 lawsuit held that the police did not have qualified immunity with respect to the claim that they had no lawful basis for entering the house upon the invitation of an informant. THE UNITED STATES SUPREME COURT REVERSED, HOLDING THAT THE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY. 129 S. Ct. 808 (2009). Whether the “consent-once-removed” doctrine will ultimately be rejected, or affirmed by other Circuits, or by the U.S. Supreme Court is not known.

***United States v. Cos***, 498 F.3d 1115 (10th Cir. 2007) The police had an arrest warrant for the defendant. They went to his house and learned that he was not home. A nineteen-year-old girl answered the door and said that she was a friend of the defendant and was visiting the home with her nephew and his friends so they could use the pool. She had no clothes at the home, did not contribute to the rent, and had spent the night there on only a couple occasions. When the police arrived, they simply asked whether Mr. Cos was home, and when told that he was not, they asked, “Can we take a look?” to which she answered, “yes.” The Tenth Circuit held that the girl did not have authority. She also did not have apparent authority. The police did not, in fact, rely on the arrest warrant when they made entry, so the good faith exception to the exclusionary rule did not apply.

***United States v. Buckner***, 473 F.3d 551 (4th Cir. 2007) The police went to the defendant’s house and secured his wife’s consent to “mirror image” the computer that was seen on the table in the living room. The wife said that she used the computer occasionally to play solitaire. The agents then used forensic tools to examine the contents of the computer and determined that the defendant had used the computer to engage in various fraudulent acts. The Fourth Circuit held that the consent of the wife was not valid to enable the police to view the password-protected files on the computer, see Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001), but that she had apparent authority to grant consent. Thus, the evidence would not be suppressed.

***United States v. Groves***, 470 F.3d 311 (7th Cir. 2006) The Seventh Circuit remands this case to the trial court for further findings of fact relating to the “apparent authority” of the person who supposedly gave consent to search the apartment. The police intentionally waited until the defendant, the target of the firearms investigation, left the apartment and then asked the remaining occupant, his girlfriend, if she would consent to a search (a federal magistrate had recently denied the officers’ request for a search warrant). The girlfriend said that she would have to ask her boyfriend, who was not at home. The police persisted, saying that this was between them and her. The trial court held that the girlfriend had apparent authority to consent to a search. The Seventh Circuit remanded for further development of the record.

***United States v. Hudspeth***, 518 F.3d 954 (8th Cir. 2008) The police found child pornography on the defendant’s office computer and asked for his consent to go to his house to examine his home computer. He refused. The police then called his wife and asked if they could come to the house and take the computer. She consented. The initial panel opinion, 459 F.3d 922 (2006), held that this violated the rule announced in Georgia v. Randolph. Though the husband was not a “present” and objecting occupant, this did not sufficiently distinguish Randolph. EN BANC GRANTED 1/04/07 and REVERSED, by en banc court on March 11, 2008, 518 F.3d 954. The en banc court held that because Hudspeth was not a present non-consenting co-tenant, his refusal to consent did not override the wife’s consent.

***United States v. Waller***, 426 F.3d 838 (6th Cir. 2005) The defendant was evicted from one apartment where he was living with friends and asked another friend if he could store some of his belongings in his apartment. The friend agreed. Shortly thereafter, the police obtained an arrest warrant for the defendant and arrested him outside the friend’s apartment. He acknowledged coming out of that apartment. The police obtained the friend’s consent to search the apartment. The police searched throughout the apartment and found guns in what turned out to be the defendant’s suitcase. He was prosecuted for possession of the guns. The Sixth Circuit held that the evidence should have been suppressed. The defendant had standing to challenge the search of his suitcases and the apartment owner did not have actual or apparent authority to search the suitcases. The officers did not reasonably believe that the apartment owner had authority to grant consent to search the defendant’s personal belongings that were stored there.

***United States v. Jimenez***, 419 F.3d 34 (1st Cir. 2005) The lessee of the premises where the defendant had a room did not have authority to consent to a search of the defendant’s room. She explained to the officers that she did not go into that room, and she had no key – the lessee used a butter knife to enter that room.

***United States v. Davis***, 332 F.3d 1163 (9th Cir. 2003) The occupant of an apartment does not have authority to consent to the search of a gym bag owned by another occupant of the apartment. There was no indication that the person giving consent had common authority of the gym bag.

***United States v. Jones***, 335 F.3d 527 (6th Cir. 2003) The police arrested the defendant and asked for consent to search his house. He refused. Later, the police went to the house and asked a handyman who was mopping the floor for consent, and he agreed. Where a primary occupant has denied consent, an employee does not have actual authority to consent to a search. The handyman lacked apparent authority, because the police knew that the primary occupant had already refused to consent to a search. While a person with an equal interest in the residence, such as a spouse or cotenant might give consent after the defendant has refused to do so (but see Georgia v. Randolph), a handyman does not have that authority.

***United States v. James***, 353 F.3d 606 (8th Cir. 2003) The defendant was in jail. He asked a friend to destroy the contents of an envelope that the defendant had given to the friend (it contained computer disks). The police acquired the envelope, and the friend gave the police permission to open it and review the contents. The friend did not have authority to consent to a search of the envelope and the evidence should have been suppressed. The friend was the "custodian" of the envelope, the equivalent of a bailee, and the police were aware that the friend had not been given permission to open the envelope or access the contents of the disks. One does not cede dominion over an item to another just by putting him in possession. United States v. Kelly, 529 F.2d 1365 (8th Cir. 1976); United States v. Welch, 4 F.3d 761 (9th Cir. 1993); United States v. Basinski, 226 F.3d 829 (7th Cir. 2000). See also Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001) (password-protected files on a shared computer are not subject to warrantless search, even by person who shares the computer, but does not have password).

***United States v. Rith***, 164 F.3d 1323 (10th Cir. 1999) The court reviews the law governing when a parent may consent to the search of a son's bedroom in the parents' home. The court concludes that a third party has authority to consent to a search of property if that third party has either (1) mutual use of the property by virtue of joint access, or (2) control for most purposes over the property. The first option is a fact-intensive inquiry which focuses on the actual relationship between the consenter and the property: does the parent, for example, clean the room, visit with the son in the room, or otherwise go into the room without an invitation. The second option is determined from the relationship between the occupant and the consenter. A landlord, for example, does not have control. The nature of the relationship may create a presumption of control, though this presumption may be rebutted. In this case, the presumption was triggered, and it was not rebutted.

***United States v. Fultz***, 146 F.3d 1102 (9th Cir. 1998) The police believed that the defendant was involved in a burglary. They learned that the defendant was living with someone named Kassedyne. The police went to Kassedyne's home and asked for permission to search the house. Kassedyne explained that the defendant's belongings were located in a certain part of the garage, and none of her belongings were intermingled with his. She did not specifically consent to a search of the defendant's belongings. The officers found an illegal firearm in defendant's belongings. The Ninth Circuit concludes: (1) the defendant had an expectation of privacy in the containers that were stored in Kassedyne's garage; (2) there was no evidence in the record to demonstrate that Kassedyne had a right of access to, or had authority or apparent authority to consent to a search of defendant's belongings; (3) the police had no basis for believing that Kassedyne had authority to consent to a search of the defendant's belongings – in fact, they were told by Kassedyne that the items in that part of the garage were the defendant's, and not hers. The officers' mistaken belief of law, as distinguished from a mistaken belief as to the facts, did not support the application of the apparent authority doctrine.

***United States v. Vega***, 221 F.3d 789 (5th Cir. 2000) The police knocked of the door or a house that they suspected was being used for drugs. One person fled out the back door and was then detained. There was no probable cause for his arrest, however. Though he was not the owner or lessee of the house, he consented to a search of the house. The police, arguably, could have believed that he had authority to consent. However, because he was unlawfully detained, the consent was invalid and the defendant who did have standing to contest the search of the house could assert that fourth amendment violation to contest the supposed consent search of the house.

***United States v. Infante-Ruiz***, 13 F.3d 498 (1st Cir. 1994) The defendant was a passenger in a car which was being followed by the police. When the car stopped, the defendant was arrested on an outstanding arrest warrant. The driver was asked for permission to search the car, which he provided. When the trunk was opened, the driver identified one of the briefcases as belonging to the defendant. Though the driver had consented to a search of the car, he did not have the authority to consent to a search of the defendant's briefcase and the officer's search of that briefcase was, therefore, not lawful.

***United States v. Jaras***, 86 F.3d 383 (5th Cir. 1996) The police stopped a car in which there was a driver, and the defendant was a passenger. The driver consented to a search of the car. When the officer opened the trunk, he saw a garment bag and a suitcase. He asked who owned what. The driver said the garment bag was his and the suitcase was the defendant's. The driver watched this exchange, and when asked by the officer what was in the suitcase, he responded, "I don't know." The officer then searched the suitcase. This was an unlawful search. The driver clearly did not have the authority to consent to a search of the suitcase and the defendant never gave his consent. The defendant's silence and failure to object does not amount to consent.

***United States v. Ibarra***, 965 F.2d 1354 (5th Cir. 1992)(en banc, equally divided) An overnight guest may consent to the search of a house, but not, as in this case, to the removal of a structural barrier to the attic. The guest simply said "that would be alright" when the police asked if they could search the house. This did not authorize the removal of large wooden boards which blocked access to the attic.

***United States v. Roark***, 36 F.3d 14 (6th Cir. 1994) The defendant lived in a house behind his sister's house. The sister owned both houses. The police went to the sister's house and asked permission to search her residence. She consented. This did not authorize the police to search the house in which the defendant resided. This search exceeded the scope of consent given by the sister.

***United States v. Johnson***, 22 F.3d 674 (6th Cir. 1994) The police went to an apartment where a 14-year-old girl had been kidnapped and held for several days. When the police arrived, the girl answered the door, but she was unable to let the officers in or escape, because of a locked iron gate. The police broke open the iron gate. The girl then "consented" to a search of the apartment – the defendant was not at home. This was not a valid consent search. The girl did not have the authority to consent to a search of the apartment. The fact that she was locked in established that she was not free to come and go and hence invite others to do the same. Moreover, there was no evidence that she had any authority to enter the closet where the guns were

located. There were also no exigent circumstances justifying the warrantless search. Because the defendant was not present, the apartment could have been secured and a search warrant obtained.

***White Fabricating Company v. United States,*** 903 F.2d 404 (6th Cir. 1990) The government has the burden to prove the voluntary consent to a search or seizure and must do so by a preponderance of the evidence. The party giving consent must have "sufficient authority" over the property or premises to consent to the search, or at least the government officers making the search must have a reasonable belief that the person giving consent has that authority. The record in this case failed to show that the agents of the owners of the property had the authority or that the police reasonably believed they had the authority, and an additional hearing was necessary.

***United States v. Rodriguez***, 888 F.2d 519 (7th Cir. 1989) The defendant's wife consented to the search of a room, but the record did not demonstrate that she had authority to consent to the opening of a briefcase and a file cabinet inside the room. A remand was appropriate to determine the extent of the wife's authority.

***United States v. Fultz***, 146 F.3d 1102 (9th Cir. 1998) The defendant was evicted from his apartment and packed his belonging in garbage bags and cardboard boxes. He brought his belongings to a woman's house who allowed him to move in. The woman who owned the house purportedly gave consent to the police to look inside the cardboard boxes. However, she did not have authority herself to look in the boxes and the fact that she had full use and access to the garage in which the boxes were stored did not mean that she had the right to go into the boxes or authorize the officers' entry into the boxes. Finally, the officers had no reason to believe that the friend had the authority to enter the boxes, so they could not rely on the apparent authority doctrine.

***United States v. Dearing,*** 9 F.3d 1428 (9th Cir. 1993) The police should have realized that the baby sitter did not have authority to consent to a search of the defendant's bedroom, in which the police found a machine gun. Even though the sitter had access to the bedroom on prior occasions, there was insufficient evidence that the sitter was authorized to enter that room.

***United States v. Welch***, 4 F.3d 761 (9th Cir. 1993) The defendant and her boyfriend were detained at a casino in Las Vegas. The boyfriend gave consent to the officers to search their car. In a woman's purse in the trunk, the officers located counterfeit bills. This was not a valid consent search. Though the boyfriend had the authority to consent to a search of the car, the officers could not have reasonably believed that he had consent to search the woman's purse, which obviously belonged to the defendant. Under Illinois v. Rodriguez, the boyfriend had neither actual, nor apparent authority to consent to the search of the purse.

***United States v. Salinas-Cano***, 959 F.2d 861 (10th Cir. 1992) The defendant frequently stayed at his girlfriend's house. When he arrived there, he brought his suitcase and left it in his room. After his arrest, the police went to the apartment. The girlfriend gave her consent to a search of the apartment. The police knew, however, that the closed suitcase was not hers. She lacked the authority to consent to the search of the suitcase and the officer knew it. The search was invalid. "When a guest in a private home has a private container to which the homeowner has no right of access . . . the homeowner . . . lacks the power to give effective consent to the search of the closed container." United States v. Karo, 468 U.S. 705, 725-26 (1984)(O'Connor, J., concurring).

***United States v. Whitfield***, 939 F.2d 1071 (D.C. Cir. 1991) Relying on Illinois v. Rodriguez, 497 U.S. 177 (1990), the district court concluded that the police reasonably believed that the defendant's mother had authority to give consent to enter the son's bedroom in her house. The D.C. Circuit disagrees and reverses: the officers were laboring under a mistake of law, not a mistake of fact. There was no reason for the officers to believe that the mother had authority to consent to the search of her 29-year-old son's room which he occupied in the house. The officers cannot be said to have acted in good faith if, with faced with an ambiguous situation, they proceed without making further inquiry.

**SEARCH AND SEIZURE (Curtilage)**

***Florida v. Jardines***, 133 S. Ct. 1409 (2013) The police, based on an unverified tip, brought a drug-sniffing dog up the sidewalk to the front door of the defendant's house. The dog alerted and the police then obtained a search warrant. The Supreme Court held that bringing the dog up to the front door was a search because it amounted to a trespass onto the defendant's property for the purpose of conducting a search. The Court held that the police entered the curtilage of the home, and, unlike open fields, this is an area of the home that must remain free from unwarranted intrusions by the police that are conducted for the purpose of searching for evidence.

***Collins v. Virginia,*** --- S. Ct. --- (2018) Even if the police have probable cause to search an automobile (or, as in this case, a motorcycle), the police may not enter the curtilage of a house to search the vehicle without a warrant. The automobile exception does not authorize the search of an automobile at all times and at all places, without a warrant. In this case, the police walked up the defendant's driveway, invading the curtilage of the property, to search the motorcycle.

***United States v. Alexander,*** --- F.3d --- (2d Cir. 2018) The area near the back of the defendant's house, where he barbecued and sat with friends was within the curtilage of the house and a warrantless entry into this area violated the Fourth Amendment.

***United States v. Lundin***, 817 F.3d 1151 (9th Cir. 2016) Acting on the basis of a BOLO, but without an arrest warrant, the police went to the defendant's home at 4:00 a.m. and started knocking on the door. They heard a crashing noise near the rear of the home and ran around back and stopped the defendant who was in the backyard. They then looked inside the house and found two handguns. The Ninth Circuit ordered that the evidence must be suppressed: (1) the government could not rely on the exigent circumstances exception, because the police were not allowed to be where they were located when the exigent circumstances arose (i.e., they heard the crashing noise); (2) while the police may walk up to the front door of a house and engage in a

"knock-and-talk," that exception to the rule that bars police from entering the curtilage of the home does not apply at 4:00 a.m. when nobody would expect visitors to appear and knock on the door; (3) in addition, walking up to the front door to make a warrantless arrest is not a permissible purpose and Jardins provides that the police may not enter the curtilage of the home for investigative purposes; (4) the security sweep of the house was not justified, because the defendant was already handcuffed and any further security measures in the house were not necessary; (5) the inevitable discovery doctrine did not apply, because the officers were not in the process of obtaining a search warrant when the illegal searches occurred.

***United States v. Whitaker,*** 820 F.3d 849 (7th Cir. 2016) The Seventh Circuit extends Jardines to the hallway of an apartment building. The police brought a dog to the apartment complex and walked the dog down a hallway. When the dog alerted to a particular apartment, the police obtained a warrant for that room. The court held that the initial use of the dog was a "search" under Jardines that needed a warrant. United States v. Hopkins, 824 F.3d 726 (8th Cir. 2016) Same holding as in Burston, below. Same cop, same dog, same apartment complex.

***United States v. Burston***, 806 F.3d 1123 (8th Cir. 2015) The police brought a dog to the defendant's house and while the police remained outside the curtilage, allowed the dog to walk up to the house and sniff at the windows. This violated the rule announced in Jardines.

***United States v. Perea-Rey***, 680 F.3d 1179 (9th Cir. 2012) A border patrol agent followed a man crossing the border up to the house of the defendant. The agents followed the man (unbeknownst to him) through the gated front entrance to the property and into the carport. This was an unlawful search: entering the carport amounted to entering the curtilage of the property. The court also held that the good faith of the officer in pursuing the illegal alien was not a basis to exempt this case from the exclusionary rule. The court noted that the good faith intention of the officer is not a proper factor to consider in deciding whether a Fourth Amendment search is illegal. Thus, the government's suggestion that the officer was engaged in a proper "knock-and-talk" was not persuasive: the officer's conduct was not consistent with the conduct of an officer who would simply go up to the front door of a house and knock in order to speak to the occupant.

***United States v. Wells,*** 648 F.3d 671 (8th Cir. 2011) The police entered the curtilage of the defendant's property – and did so without a warrant – when they walked up the driveway and into the backyard from where they could look into the windows of an "outbuilding."

***Coffin v. Brandau***, 642 F.3d 999 (11th Cir. 2011) In this civil rights case, the en banc Eleventh Circuit held that the plaintiffs had an expectation of privacy in the attached garage that had one wall common to their house and a door that was capable of fully closing, though it was open when the police initially arrived.

***United States v. Struckman***, 603 F.3d 731 (9th Cir. 2010) A neighbor called the police and reported that a white man wearing a black leather jacket had just climbed over a fence in her neighbor's yard and she could not see who it was, but the neighbors were not home. The police went to the location, looked over the fence and promptly detained (with guns drawn) the defendant, who fit the description and was walking around in the backyard. He was searched and a gun was found. They then determined that he lived at that house; and also learned that he was a convicted felon who could not possess a firearm. The Ninth Circuit held (1) there was no probable cause to arrest the defendant – despite the report from the neighbor, the police should have asked the defendant his name and obtained information about where he lived before arresting him; (2) there were no exigent circumstances to support the arrest and search; (3) the backyard was part of the curtilage of the house.

***United States v. Gentry***, 839 F.2d 1065 (5th Cir. 1988) A search warrant was directed at a rural address. The Court holds that this does not extend to vehicles which were detained at the perimeter of the property. An officer forcibly led the vehicle to a place within the territorial scope of the warrant. This did not authorize a search of the vehicle.

***United States v. Jenkins***, 124 F.3d 768 (6th Cir. 1997) The area of the defendants' backyard that was searched without a warrant was within the curtilage of the house and the seizure of evidence in this area violated the defendants' Fourth Amendment rights. The backyard was in the same fenced in area as the house; and the area was clearly separated from the adjoining fields. Introducing the evidence seized from this area, however, was harmless error.

***United States v. Depew***, 8 F.3d 1424 (9th Cir. 1993) A law enforcement agent, posing as a passerby with car trouble, entered the property of the defendant. The lower court held that the agent never intruded within the curtilage of the property. The appellate court disagreed, holding that the area fifty feet from the house (and six feet from the garage in which the marijuana was located) was within the curtilage of the house. This spot was within the curtilage, even though there was a fence between the agent and the defendant's home.

## *SEARCH AND SEIZURE (DOGS)*

***Illinois v. Caballes,*** 125 S. Ct. 834 (2005) The defendant was stopped for a routine speeding violation. While the car was stopped and the trooper was preparing a warning ticket, another officer walked a drug dog around the car. The dog alerted; the car was searched based on probable cause; drugs were found. The Supreme Court held that this was permissible. A dog alert is not a "search" and in this case, the time it took to walk the dog around the car did not prolong the stop. Thus, there was no Terry violation and no need for a warrant or an articulable suspicion to authorize the use of the dog.

***Florida v. Jardines***, 133 S. Ct. 1409 (2013) The police, based on an unverified tip, brought a drug-sniffing dog up the sidewalk to the front door of the defendant's house. The dog alerted and the police then obtained a search warrant. The Supreme Court held that bringing the dog up to the front door was a search because it amounted to a trespass onto the defendant's property for

the purpose of conducting a search. The Court held that the police entered the cartilage of the home, and, unlike open fields, this is an area of the home that must remain free from unwarranted intrusions by the police that are conducted for the purpose of searching for evidence.

***Florida v. Harris***, 133 S. Ct. 1050 (2013) In this unanimous decision of the Supreme Court, the Justices held that a dog alert can amount to probable cause. A per se rule, which had been adopted by the Florida Supreme Court (and supposedly based on the Fourth Amendment) that required certain evidence to be introduced to support the legitimacy of the dog alert, was rejected by the Court. Whether a particular dog's alert amounts to probable cause in any given case must be evaluated by the trial court on a case-by-case basis and is not subject to any rigid rules.

***United States v. Whitaker***, --- F.3d --- (7th Cir. 2016) The Seventh Circuit extends Jardines to the hallway of an apartment building. The police brought a dog to the apartment complex and walked the dog down a hallway. When the dog alerted to a particular apartment, the police obtained a warrant for that room. The court held that the initial use of the dog was a "search" under Jardines that needed a warrant.

***United States v. Burston***, 806 F.3d 1123 (8th Cir. 2015) The police brought a dog to the defendant's house and while the police remained outside the curtilage, allowed the dog to walk up to the house and sniff at the windows. This violated the rule announced in Jardines.

***United States v. Funds in the Amount of $100,120.00***, 730 F.3d 711 (7th Cir. 2013) In this forfeiture case, among other factors, the government relied on a drug dog alert to the currency to establish that the funds that were seized by agents was connected to drug dealing. The government relied on studies that it claimed showed that what drug dogs smelled on currency was only recent contact with cocaine, because the dogs were detecting something that quickly evaporates. The defense introduced contrary evidence, and relied on the generally- known contamination theory, that is, that most currency has trace amounts of cocaine. The Seventh Circuit held that this dispute foreclosed granting summary judgment to the government, because the disputed facts regarding what drug dogs alert to required resolution by the trier of fact. The defense also mounted a successful attack on the dog's certification, including demonstrating that during training sessions, the dog could not differentiate between pure cocaine and cutting agents that might be added to cocaine, and that these cutting agents might be present on money without cocaine. This case includes an excellent primer on methods of challenging drug dog alerts.

***United States v. Thomas***, 726 F.3d 1086 (9th Cir. 2013) When the government relies on a drug dog alert in support of a search, the defendant has the right to request discovery about the dog's training. The Ninth Circuit has held that the government is obligated to disclose the handler's log, as well as training records and score sheets, certification records, and training standards and manuals pertaining to the dog. In this case, the records provided to the defense were so heavily redacted that the discovery was insufficient. A remand was required to determine what information was redacted.

***United States v. Sharp***, 689 F.3d 616 (6th Cir. 2012) During a canine walk-around, the dog jumped into the car and alerted. The Sixth Circuit held that this "entry" into the car did not amount to a search that invalidated the subsequent search that was based on the alert.

***United States v. Cedano-Arellano***, 332 F.3d 568 (9th Cir. 2003) The government is obligated to provide all records relating to a drug-detecting dog's training and certification. The court held that the records should have been produced under both Rule 16(a)(1)(E) and Rule 16(a)(1)(F).

***United States v. Clarkson***, 551 F.3d 1196 (10th Cir. 2009) In this Tenth Circuit decision, decided one week prior to the decision in Herring, the Tenth Circuit held that the use of an improperly trained drug-sniffing dog cannot serve to invoke the good faith exception to the exclusionary rule. Thus, if a dog is not properly trained, but a police officer relies in good faith on the dog's alert – not knowing that the dog was not properly trained – the evidence will be subject to the exclusionary rule.

***SEARCH AND SEIZURE (Execution of Search Warrant) SEE ALSO: SEARCH AND SEIZURE (PLAIN VIEW)***

***Muehler v. Mena***, 544 U.S. 93, 125 S. Ct. 1465 (2005) The police did not violate the plaintiff's civil rights when they detained her for two to three hours during the execution of a search warrant at her house they were looking for a dangerous gang member and evidence of a drive-by shooting.

***Wilson v. Layne***, 119 S. Ct. 1692 (1999) Bringing third parties, including the media, along with the police when a search warrant is executed (not for the purpose of assisting the police in the execution of the warrant), violates the Fourth Amendment.

***Maryland v. Garrison***, 480 U.S. 79 (1987) Officers who were executing a search warrant and who were put on notice of a risk that they had entered a home that was unconnected with the illegal activity described in the warrant had an immediate duty to retreat.

***Bailey v. United States***, 133 S. Ct.1031 (2013) Though Michigan v. Summers, 452 U.S. 692 (1981), permits the police to detain people who are at the scene that is the target of a search warrant, in this case the police followed individuals who left the scene prior to the search and detained them about a mile away, without any information that they were subject to a Terry stop. The Supreme Court held that this amounted to an unlawful detention that necessitated the suppression of any evidence derived from the stop of the individuals.

***United States v. Griffith***, 867 F.3d 1265 (D.C. Cir. 2017) The police had reason to believe that the defendant had participated perhaps as the getaway driver in a homicide that occurred a year earlier. The search warrant affidavit reviewed all the facts amounting to probable cause and then sought permission to search the defendant's current apartment (where he had moved

after the homicide and a brief stint in jail). The warrant only sought authority to seize cell phones because criminals communicate by phone. During the execution of the search warrant, the defendant threw a gun out the window. The D.C. Circuit held that (1) the warrant was deficient, because there was no probable cause that the defendant even had a cell phone or that it had any incriminating information contained in it; (2) there was no probable cause that a phone would be found in the apartment (as opposed to on his person if he were not present at the apartment when the warrant was executed); (3) the good faith exception to the exclusionary rule did not apply because the warrant was so lacking in probable cause to search or seize a cell phone; (4) the "abandonment" of the gun was the fruit of the execution of the defective search warrant and therefore the gun that was thrown out of the window was subject to the exclusionary rule.

***United States v. Welch,*** 811 F.3d 275 (8th Cir. 2016) The FBI employed a device that allowed it to trace the places to which child pornography was sent from a particular site. The agents obtained a search warrant to use this device. The Eighth Circuit assumes for the sake of argument that the execution of this warrant should have resulted in furnishing a copy of the warrant on the defendant, whose IP address was discovered through the use of this device. But exclusion of evidence was not an appropriate remedy for this Rule 41(f)(1)(C) violation.

***United States v. Sedaghaty***, 728 F.3d 885 (9th Cir. 2013) The agents obtained a search warrant to search the defendant's computer for evidence of tax fraud. They searched the computer for evidence of his role in furnishing support to a terrorist organization, as well. The government claimed that the search warrant application specifically stated that the defendant was suspected of furnishing financial support to a terrorist organization. Nevertheless, the warrant only authorized a search for tax fraud evidence.

***United States v. Brodie***, 742 F.3d 1058 (D.C. Cir. 2014) The police were waiting outside a house that they planned to search pursuant to a search warrant. While awaiting their colleagues, the defendant was observed leaving the house the police were not targeting that individual; the target was already in custody. The police approached the defendant and directed him to place his hands on the car (which he did). Shortly thereafter, he fled, discarding drugs and guns while on the run. The D.C. Circuit held (1) the defendant was detained; (2) there was no basis for the detention because, pursuant to Bailey v. United States, 133 S. Ct. 1031 (2013), the police may not detain an individual in connection with the execution of a search warrant unless the detention is at the time when, and at the place where, the search is being executed; (3) the detention was not attenuated from the defendant's flight; and (4) the evidence that the police obtained was the fruit of the unlawful detention.

***United States v. Lazar***, 604 F.3d 230 (6th Cir. 2010) The Sixth Circuit held that the warrant sufficiently directed the searching officers to seize certain patient records. The officers' seizure of other records, however, was not permissible. See Groh v. Ramirez, 540 U.S. 551 (2004).

***United States v. Payton***, 573 F.3d 859 (9th Cir. 2009) The police had a warrant that authorized the seizure of documents and records in connection with a drug investigation. The Ninth Circuit held that this did not justify searching a computer that was found in the location that was searched.

***United States v. Garcia***, 496 F.3d 495 (6th Cir. 2007) When executing a search warrant for drugs, the police may not seize receipts and other financial documents that are later analyzed and determined to be evidence of unexplained wealth. The documents were not "readily apparent" to be evidence of a crime, and thus did not fall within the plain view exception. The court also rejected the government's claim that it could legitimately seize a map with certain locations circled, and a notebook/journal, that was later determined to be records of drug deals.

***United States v. Hector***, 474 F.3d 1150 (9th Cir. 2007) The Ninth Circuit holds that the failure to leave a copy of the search warrant with the occupants of the location is not grounds to suppress the evidence. In part, the court relied on the decision in Hudson v. Michigan, which eliminated the exclusionary rule in cases in which the police violate the knock and announce rule.

***United States v. Angelos***, 433 F.3d 738 (10th Cir. 2006) Though the FBI and the AUSA intended to get a search warrant that would have allowed the agents to search the defendant's car and house (and there was, in fact, probable cause to search both the car and the house), they mistakenly submitted a search warrant that only identified a safe in the house and the car as the target of the search. Searching the entire house was therefore impermissible. Moreover, because the search warrant clearly only authorized the search of the car and the safe, the good faith exception to the exclusionary rule did not apply. In re Search Warrants Issued on April 26, 2004, 353 F.Supp.2d 584 (D. Md. 2004) Even pre-indictment, the target of a search has a right to see the affidavit that was used to obtain a search warrant. Only if the government can present evidence of a compelling need to keep the affidavit under seal is it entitled to do so. The District Court relied on the Fourth Amendment's reasonableness requirement. See also United States v. Sealed Search Warrants, 868 F.3d 385 (5th Cir. 2017).

***United States v. Ritter***, 416 F.3d 256 (3rd Cir. 2005) The police obtained a search warrant for a house, but learned after entering that it was a multi-dwelling structure. The proper course of conduct was for the police to return to the magistrate and seek a more particularized warrant. In deciding whether to suppress any evidence, the question is what the police observed prior to determining that the house was a multi-dwelling structure. See Maryland v. Garrison, 480 U.S. 79 (1987).

***Doe v. Groody***, 361 F.3d 232 (3rd Cir. 2003) The warrant particularly described the location to be searched and the people who were to be searched at that location. The attached, and incorporated affidavit included additional people that the affiant believed should be searched. The affidavit could not broaden the scope of the narrowly drawn search warrant and searching other people at the location was improper. (This is a civil rights case that was brought by other people at the premises who claimed that searching them violated their fourth amendment rights).

***United States v. Keszthelyi,*** 308 F.3d 557 (6th Cir. 2002) After the police executed a search warrant at the defendant's house – and found only a small number of drugs – they went back the following day. More drugs were found. The Sixth Circuit holds that the agents should have obtained a new search warrant. The second search was not a continuation of the first search. The court concluded, however, that the evidence inevitably would have been discovered.

***United States v. Carey***, 172 F.3d 1268 (10th Cir. 1999) If a search warrant authorizes the search of a computer for drug sales, the police may not search through the hard drive for evidence of child pornography.

***Ayeni v. Mottola***, 35 F.3d 680 (2d Cir. 1994) A government agent invited a news crew to accompany him when he executed a search warrant. This was a violation of the defendant's rights and a Bivens action could be brought against the agent. 18 U.S.C. §3105 provides that agents may use the services of a private person to help in the execution of a search warrant. But the news crew was not helping in the execution of the search warrant. The subsequent decision in Wilson v. Layne, discussed above affirmed that it is unconstitutional to bring in a news crew, but held that the officers were entitled to qualified immunity.

***Buonocore v. Harris***, 65 F.3d 347 (4th Cir. 1995) The police executed a search warrant at the defendant's house and invited an employee to come along to try to identify stolen property. The search warrant, however, only authorized a search for unregistered firearms. The conduct on the part of the police violated the defendant's rights under the Fourth Amendment and his §1983 action could proceed. This case includes a lengthy analysis of 18 U.S.C. §3105, which sets out who may execute a warrant.

***United States v. Nelson***, 36 F.3d 758 (8th Cir. 1994) The police learned that the defendant was arriving at an airport and would be carrying heroin. They obtained a search warrant to search the defendant's body. Before the search was over, the police had brought the defendant to a hospital where a rectal examination and search was conducted, following which an endoscopic procedure was used to extract a packet of heroin from the defendant's stomach. The execution of the search warrant exceeded that which was authorized. A search of a defendant's body does not include body cavity searches. The good faith doctrine, moreover, did not apply.

***United States v. Sherrill***, 27 F.3d 344 (8th Cir. 1994) The police had a search warrant for the defendant's residence. The police observed the defendant leave the house, then stopped him, handcuffed him, and asked him to "help them execute the search." This detention was not justified by Michigan v. Summers, 452 U.S. 692 (1981), because the stop occurred at a location remote from the location of the search. However, suppression of evidence was not necessary, because there was probable cause to arrest the defendant.

***United States v. Robbins***, 21 F.3d 297 (8th Cir. 1994) The police obtained a search warrant to seize certain documents from the defendant's business. While executing the search warrant, the police seized the defendant's wallet, but did not look into it until months later, when they discovered incriminating documents. This was an unlawful search. The search warrant permitted a search of the wallet's contents during the initial search, but not its seizure since the wallet itself was not listed as an item in the warrant which could be seized.

***United States v. Foster***, 100 F.3d 846 (10th Cir. 1996) The police obtained a search warrant to search for marijuana and four specifically described weapons at the defendant's house. When the searching party left, the federal agents seized thirty-five items from the house, including marijuana and guns, and local agents seized dozens of items, including tools, televisions, stereos, clothes, lawnmowers, knives, coins, jewelry, and cameras. The officers conceded during the suppression hearing that their policy was to take anything of value. The Tenth Circuit holds that this total disregard for the limitations of the warrant necessitated suppressing all evidence seized, including the drugs and guns.

***United States v. Medlin***, 842 F.2d 1194 (10th Cir. 1988) During the course of a search conducted pursuant to a federal search warrant, a state deputy sheriff seized numerous stolen items which had no relationship whatsoever to the object of the search. The Court holds that everything which was seized would be suppressed. The reason for the exclusion of all evidence was the executing officers' "flagrant disregard" for the terms of the warrant.

***SEARCH AND SEIZURE (Exigent Circumstances) SEE ALSO: SEARCH AND SEIZURE (SECURITY SWEEP)***

***Kentucky v. King***, 131 S. Ct. 1849 (2011) The Supreme Court held that the exigent circumstances exception to the search warrant requirement applies even if the law enforcement agents "created" the exigency, unless the agents created the exigency by engaging or threatening to engage in conduct violating the Fourth Amendment. The fact that certain legal investigative techniques may create an exigent circumstance, even if it is foreseeable, does not foreclose reliance on that exception to the search warrant requirement. In King, the police smelled marijuana coming from an apartment. The police knocked on the door loudly, announcing that they were the police. They then heard noise indicating that evidence might be destroyed, and the police entered. The Court held that there was nothing about the officers' conduct that foreclosed reliance on the exigent circumstance's exception to the search warrant requirement though the case was remanded for further factfinding by the trial court.

***Brigham City, Utah v. Stuart***, 126 S. Ct. 1943 (2006) The police may enter a house pursuant to the exigent circumstances exception if there is an objectively reasonable belief that entry is necessary to render aid to an injured person, or to prevent imminent injury to someone inside. The subjective motivation of the officers (i.e., whether they are entering to render aid or to make an arrest), is not relevant: what matters are the objective facts that are known to the officers and whether those objective facts support the need to enter to render aid.

***Arizona v. Hicks***, 480 U.S. 321 (1987) The police, under the exigent circumstance's exception to the warrant requirement, entered the apartment where a shooting occurred. While there, the police decided to search the apartment for evidence of the

possession of stolen property. During the course of this search, the police lifted up a stereo to examine the serial numbers. This constituted a search which was not justified by the initial warrantless search of the premises.

***United States v. Lundin,*** 817 F.3d 1151 (9th Cir. 2016) Acting on the basis of a BOLO, but without an arrest warrant, the police went to the defendant's home at 4:00 a.m. and started knocking on the door. They heard a crashing noise near the rear of the home and ran around back and stopped the defendant who was in the backyard. They then looked inside the house and found two handguns. The Ninth Circuit ordered that the evidence must be suppressed: (1) the government could not rely on the exigent circumstances exception, because the police were not allowed to be where they were located when the exigent circumstances arose (i.e., they heard the crashing noise); (2) while the police may walk up to the front door of a house and engage in a "knock-and-talk," that exception to the rule that bars police from entering the curtilage of the home does not apply at 4:00 a.m. when nobody would expect visitors to appear and knock on the door; (3) in addition, walking up to the front door to make a warrantless arrest is not a permissible purpose and Jardines provides that the police may not enter the curtilage of the home for investigative purposes; (4) the security sweep of the house was not justified, because the defendant was already handcuffed and any further security measures in the house were not necessary; (5) the inevitable discovery doctrine did not apply, because the officers were not in the process of obtaining a search warrant when the illegal searches occurred.

***United States v. Camou***, 773 F.3d 932 (9th Cir. 2014) The defendant was stopped in his vehicle and charged with smuggling undocumented aliens. He was brought to the police station where he and one of his passengers were questioned. The passenger admitted that they regularly were engaged in smuggling activity. The police seized the defendant's cell phone and listed it on a property report as seized evidence. Approximately 90 minutes later, the police searched the contents of the phone. The Ninth Circuit held that this was a not proper search incident to arrest search, not a proper exigent circumstances search and not a proper "automobile exception" search. In addition, the court rejected the inevitable discovery doctrine and the good faith exception to the exclusionary rule as reasons not to apply the exclusionary rule.

***United States v. Nora***, 765 F.3d 1049 (9th Cir. 2014) The police observed the defendant with a gun in his hand on the street and later on his porch. He retreated into his house. The police ordered him to come out of the house. This was improper: the police need a search warrant or an arrest warrant to enter a house or to order someone to exit the house. Possession of a loaded gun is, at most, a misdemeanor in California. The police had no basis for believing that the defendant posed a danger or was committing a felony by possessing the gun.

***United States v. Mallory***, 765 F.3d 373 (3rd Cir. 2014) The police chased a man with a gun into a house. This was a permissible hot pursuit exigent circumstances entry into the house. However, after the defendant was handcuffed and in control of the officers and a security sweep of the house was accomplished, there was no need for any further warrantless searching of the house including for the weapon and the discovery of the gun during this further search should have been suppressed.

***White v. Stanley***, 745 F.3d 237 (7th Cir. 2014) The smell of marijuana, without more, does not provide an exigent circumstance that justifies an immediate warrantless entry into a house. The court noted that this is particularly true in states where medical marijuana laws have been enacted.

***United States v. Timmann,*** 741 F.3d 1170 (11th Cir. 2013) A neighbor called the police and reported that there was a bullet hole in a wall adjacent to the caller's apartment. There were no reports of gunshots. The police went to the scene and knocked on the defendant's door and there was no answer. The next day, the police returned to the scene and entered the apartment. The Eleventh Circuit held that there were no exigent circumstances justifying the entry into the apartment indeed, the police waited until the next day to force entry into the apartment and the evidence found during that warrantless entry the police found guns should have been suppressed.

***United States v. Yengel***, 711 F.3d 392 (4th Cir. 2013) The police went to the defendant's house in response to a domestic disturbance call. The wife had left by the time the police arrived and the defendant agreed to talk to the police on the front porch. During this conversation, the police learned that the defendant had a grenade in the house. Without pausing to obtain a warrant, the police went into the house, found various guns in one part of the house, and pried open a closet door and found other explosives there. The Fourth Circuit held that exigent circumstances did not support this warrantless entry into the house.

***United States v. Delgado***, 701 F.3d 1161 (7th Cir. 2012) The police responded to a report of gunshots. When they arrived at the scene, they saw one man (the defendant) running toward an apartment building. Next, the police were told by a bystander that his cousin had been shot and that he was hiding in a particular apartment. The police went to the apartment and the shooting victim, and the defendant came to the door. The victim had a graze wound on his arm. The police were not given any information that there were any guns in the apartment or any perpetrator of the shooting. The police were not told that the shooting had occurred in the apartment. Neither the victim, nor the defendant was armed. After detaining the defendant, the police entered the apartment, later arguing that exigent circumstances justified the warrantless entry. The Seventh Circuit held that exigent circumstances did not authorize the warrantless entry and the evidence located in the apartment should have been suppressed.

***United States v. Ramirez***, 676 F.3d 755 (8th Cir. 2012) The police believed that the occupants of a hotel room had heroin in their possession. The police knocked on the door; the occupants opened the door and then immediately shut it when they saw the police were there. The Eighth Circuit held that this did not authorize the police to enter under the exigent circumstance's theory. Prior to knocking on the door, there was no evidence that the occupants were aware that the police were there or that any evidence was being destroyed. The occupants have the right to refuse to allow the police to enter and this is what the Kentucky v. King Court held), and the mere act of shutting the door was not sufficient to establish that there were exigent circumstances i.e., that the occupants were about to destroy evidence.

***United States v. Simmons***, 661 F.3d 151 (2d Cir. 2011) The defendant's roommate called the police and said that the defendant had a gun and he requested that the police come to the apartment to help him retrieve his property from inside the apartment. The police went to the apartment and asked the defendant about the presence of a gun, and the defendant told them it was in his room. The police went into the room and retrieved the gun, leading to the defendant's prosecution for possession of a firearm by a convicted felon. The Second Circuit held that the un-Mirandized questioning was proper pursuant to Quarles, but the entry into the bedroom was not supported by exigent circumstances or any other exception to the warrant requirement which is especially important in the context of the search of a home. The evidence should have been suppressed.

***United States v. Hill***, 649 F.3d 258 (4th Cir. 2011) The information known to the police was not sufficient to support a reasonable belief that the target of an arrest warrant was present in the residence that they entered. There were also no exigent circumstances to justify the entry into the residence, despite apparent damage to the door frame that the police observed when they arrived.

***United States v. Martinez,*** 643 F.3d 1292 (10th Cir. 2011) A 911 operator received a "static" only call. There was nobody on the line, just static. An officer was dispatched to the house. When the police arrived, there was no sign of any emergency, or even an occupant in the house. The police looked into the house from a sliding glass door and saw various boxes of electronic equipment and the house appeared somewhat disheveled. The police then entered, announced their presence, and asked if anybody was home nobody was in the house and conducted a sweep search, during which they found drugs and child pornography. When they exited the home, the defendant drove up and he was questioned and made incriminating statements. The police then secured a search warrant. The Tenth Circuit affirmed the decision of the trial court suppressing all the evidence on the basis that there was no exigency that supported the warrantless entry into the house and the defendant's statement was the fruit of that unlawful statement. Thus, the search warrant was the fruit of the poisonous tree.

***United States v. Etchin,*** 614 F.3d 726 (7th Cir. 2010) The police were provided information from a recently arrested individual that the supplier of drugs was located at a certain residence. The police went to that residence, knocked on the door and were denied consent to enter. The police entered despite the occupant's refusal to consent. The police then secured the property and awaited the arrival of a search warrant. The Seventh Circuit held that there were no exigent circumstances supporting this entry. However, pursuant to Segura v. United States, 468 U.S. 796 (1984), the seizure of the house was permissible because there was probable cause to believe there were drugs in the house.

***United States v. Struckman,*** 603 F.3d 731 (9th Cir. 2010) A neighbor called the police and reported that a white man wearing a black leather jacket had just climbed over a fence in her neighbor's yard and she could not see who it was, but the neighbors were not home. The police went to the location, looked over the fence and promptly detained (with guns drawn) the defendant, who fit the description and was walking around in the backyard. He was searched and a gun was found. They then determined that he lived at that house; and also learned that he was a convicted felon who could not possess a firearm. The Ninth Circuit held (1) there was no probable cause to arrest the defendant – despite the report from the neighbor, the police should have asked the defendant his name and obtained information about where he lived before arresting him ; (2) there were no exigent circumstances to support the arrest and search; (3) the backyard was part of the cartilage of the house.

***United States v. Menchaca-Castruita***, 587 F.3d 283 (5th Cir. 2009) The defendant's landlord entered the defendant's house and saw marijuana in plain view on the floor. The landlord promptly called the police from the driveway. The defendant came out of the house, assaulted the landlord and then fled in his car before the police arrived. The police then arrived and entered the house without a warrant. The Fifth Circuit held that exigent circumstances did not justify entering the house without a warrant. The officers had no reason to believe that they were investigating a violent drug-trafficking ring; there was no evidence that the defendant had a firearm, or that there was a firearm or anybody else located in the house; or that there was any risk that the evidence was at risk of being destroyed. There was time to obtain a warrant and no reason not to do so.

***United States v. Washington***, 573 F.3d 279 (6th Cir. 2009) The police had information that a trespasser was residing in an apartment. This did not provide a basis for bursting into the apartment. There were no exigent circumstances, or hot pursuit of the suspect.

***United States v. Purcell***, 526 F.3d 953 (6th Cir. 2008) The police went to a hotel after receiving a tip that an escapee was there with his girlfriend. The police thought it was possible that methamphetamine was being made in the hotel room. The defendant was arrested outside the room. The girlfriend denied that there was any methamphetamine being manufactured in the room, but when the police quickly looked around, there were drug related items in the room. There was no reason to believe, however, that there was actual manufacturing in progress. Because of the lack of any such information, there was no basis to immediately start searching luggage that was in the room on the basis of exigent circumstances. Moreover, the girlfriend did not have the apparent authority to consent to a search of the luggage, which did not belong to her. "Apparent authority cannot exist if there is ambiguity as to the asserted authority and the searching officers do not take steps to resolve the ambiguity."

***United States v. Troop***, 514 F.3d 405 (5th Cir. 2008) Border patrol agents tracked illegal aliens into a house. They then entered the house without a warrant, claiming that they had exigent circumstances because there was the possibility that the aliens were ill or suffering from heat exhaustion. The Tenth Circuit held that exigent circumstances did not justify the warrant entry into the house.

***United States v. Mowatt***¸ 513 F.3d 395 (4th Cir 2008) The police went to the defendant's door and smelled marijuana and heard loud music. They knocked on the door and when the defendant cracked the door open, the demanded entry, including grabbing the defendant, who they believed was hiding something behind his back while he was standing at the door. There were no

exigent circumstances that required the police to demand entry into the apartment. See Johnson v. United States, 333 U.S. 10 (1948) (smell of drugs in house does not create exigency justifying warrantless entry). But see Kentucky v. King, noted above, which expressly abrogates this opinion.

***United States v. Collins***, 510 F.3d 697 (7th Cir. 2007) The police who did not have a search warrant knocked on the defendant's door and after 20 seconds, heard someone inside say, "The police are at the door." This did not provide exigent circumstances to enter the house.

***United States v. Ellis***, 499 F.3d 686 (7th Cir. 2007) The police went to the defendant's home to conduct a "knock and talk." The defendant answered the door and denied that anybody was in the house or that he lived there. Another officer at a side door heard moving around in the house and entered the house. The officer at the front door did not communicate information relating to what the defendant said, to the officer at the side door. The mere sound of "movement in the house" is not enough to amount to probable cause that evidence was being destroyed or hidden. There was no probable cause basis for the officer at the side door to justify his entry and thus the exigent circumstances exception to the requirement of obtaining a search warrant did not apply.

***United States v. Gomez-Moreno***, 479 F.3d 350 (5th Cir. 2007) The police had reason to believe that a house was a "stash house" for illegal aliens. They went to the house to conduct a "knock and talk". A large group of officers in the front and back, as well as a helicopter overhead arrived at the residence. When a commotion ensued, the police yelled, "Police, open the door." When a man came out and ran back in, the police followed him in with their guns drawn. The Fifth Circuit concluded that the exigent circumstances exception to the search warrant requirement did not apply, because the exigency was entirely caused by the unnecessary conduct of the police. If there was probable cause (and the court did not decide whether there was, or not), a search warrant should have been obtained. The purpose of a "knock and talk" (or at least a legitimate knock and talk), is not to create a show of force that prompts a response, but rather to make an investigatory inquiry or to seek consent. The conduct of the police in this case caused the exigency and this is not a legitimate basis to conduct a warrantless search of a house. See also United States v. Vega, 221 F.3d 789 (5th Cir. 2000). Not clear if this decision would survive Kentucky v. King.

***United States v. McClain,*** 444 F.3d 556 (6th Cir. 2005) The police entered the defendant's house, believing that a burglary might be in progress. There was very little information that supported this belief, other than the fact that the front door was slightly ajar and a report from a neighbor that there was light in the house and the house had been vacant for several weeks. This was an insufficient basis for an exigent circumstance's entry. The court held, however, that a subsequently obtained search warrant on the basis of what was seen in the house during the exigent circumstances search could be validated under the good faith exception to the exclusionary rule. A lengthy dissent from the denial of rehearing en banc argues at length why the good faith exception should not apply in this situation. 444 F.3d 537.

***United States v. Coles***, 437 F.3d 361 (3rd Cir. 2006) The Third Circuit decided that the exigent circumstances exception to the search warrant requirement may not be invoked if the police create the exigency (in this case by knocking on the hotel room door and announcing that they were the police) that triggers their need to enter the premises without a warrant. In this case, the police should have maintained surveillance of the hotel room and obtained a warrant.

***United States v. Chambers***, 395 F.3d 563 (6th Cir. 2005) The police went to the defendant's door, and she immediately retreated and yelled to the occupants inside, "Police." The government argued that this created exigent circumstances to support a warrantless entry. The Sixth Circuit disagreed. The woman simply exercised her constitutional right not to permit entry to officers who had no search warrant and this, alone, did not create an exigency supporting a warrantless search. Moreover, any exigency was created by the officer's attempt to enter the residence without a search warrant. Evidence of the drug lab found in the house should have been suppressed. This case did not survive the decision in Kentucky v. King, 131 S. Ct. 1849 (2011).

***United States v. Deemer,*** 354 F.3d 1130 (9th Cir. 2004) There were no exigent circumstances justifying the entry into defendant's hotel room. The police had received a 911 call but could not determine from which room in the hotel the call had been made. When the police knocked on the door of the room in which the defendant was an occupant, a woman answered the door and said everything was ok and she had not called 911. The police said they wanted to look inside and walked in, discovering a methamphetamine laboratory.

***United States v. Williams***, 354 F.3d 497 (6th Cir. 2003) The landlady of the defendant's residence was concerned that there might be a water leak at the premises because of the high-water bill. The landlady went to the premises and walked around but found no leak – though she did find some suspicious plants. She called the DEA and they came back with her to the apartment and then claimed to go inside with her a second time to look again for a water leak. Of course, they found no leak, but did find a substantial quantity of marijuana. The Sixth Circuit held that there were no exigent circumstances i.e., a water leak that justified the law enforcement entry into the premises. Had there really been an emergency or even a perceived emergency, the landlady would have called a plumber, not the DEA.

***United States v. Davis***, 290 F.3d 1239 (10th Cir. 2002) The police received a domestic disturbance call and went to the defendant's house. He answered the door, intoxicated, and said his wife was not home. The wife then appeared and said that they had been arguing. The defendant went back into the house, and neither the defendant, nor the wife consented to an entry by the police. Nevertheless, they entered and found stolen firearms and drugs. The Tenth Circuit holds that exigent circumstances did not support the warrantless entry. The officers knew that the defendant had no history of violence and there was no basis for believing that his retreat into the house was cause for concern from a safety point of view. The court rejected the government's invitation to create a broader exigent circumstances rule for domestic violence cases.

***United States v. Conner***, 127 F.3d 663 (8th Cir. 1997) The police received a tip that two burglars were at a motel. Six officers went to the motel and went to the room in front of which the burglars' car was parked. The police knocked on the door and yelled, "Open up." When one of the defendants opened the door, the police observed through the open door various coins they knew a coin collection had been stolen in the burglary. The officers pulled their weapons and arrested both defendants. They then obtained a search warrant on the basis of what they observed in the room. The trial court correctly granted a motion to suppress. Though the police did not enter the room in order to see the coins, when they ordered the occupants to open the door, and thereby gained the ability to see in the room, this amounted to a search. Demanding that the occupants open the door did not amount to a consent search and there were no exigent circumstances necessitating the immediate entry into the room. The search pursuant to the search warrant was not salvaged by Leon, because the information contained in the application (the observations that were gained through the illegal entry), negate the existence of good faith. Finally, the officers would not have inevitably discovered the evidence, because absent the illegal entry, no other investigatory effort was underway to obtain a search warrant for the motel room.

***United States v. Anderson***, 154 F.3d 1225 (10th Cir. 1998) The government made a controlled delivery of what the defendant believed to be a child pornographic tape to the defendant. Unbeknownst to the defendant, the tape was blank. When he obtained the tape and went into his office, the police followed shortly thereafter, later justifying this warrantless entry on the basis that the defendant might destroy that tape, as well as the rest of his collection once he discovered the police were present. The court holds that the circumstances were not exigent – except to the extent that the police created the exigency by first knocking on the door to alert the defendant to their presence.

***United States v. Beltran***, 917 F.2d 641 (1st Cir. 1990) Police were aware for three hours that a suspect was involved in a drug transaction at her apartment. There was no excuse for not obtaining a search warrant at that time even if they decided to delay executing it until later in the day. There were no exigent circumstances justifying the warrantless entry of the suspect’s apartment to arrest her.

***United States v. Curzi***, 867 F.2d 36 (1st Cir. 1989) The officers saw the subject of an arrest warrant leave and re-enter a house. They waited two hours, then ordered all occupants of the house to exit. No effort was made to obtain a search warrant during this two-hour period. After the occupants exited, the defendant was arrested, and the officers entered the house to conduct a protective sweep. No exigent circumstances justified the search of the house at that time in light of the agents’ failure to obtain a search warrant during the two hours that the house was kept under surveillance. The holding in this case was governed by the decision in Steagald v. United States, 451 U.S. 204 (1981). That is, an arrest warrant for a visitor of a house is not a sufficient basis to search the house.

***Singer v. Court of Common Pleas, Bucks County, PA***, 879 F.2d 1203 (3rd Cir. 1989) No exigent circumstances justified the warrantless entry into the defendant’s house where there was a report of domestic violence. Although domestic violence is certainly a serious matter, the victims of the alleged assault were no longer in the house when the officers executed the search. The defendant assaulted the police officer who entered the house. Because the officer had no right to be there, the defendant could not be convicted, under Pennsylvania law, of aggravated assault on a police officer.

***United States v. Campbell***, 945 F.2d 713 (4th Cir. 1991) There was no basis for executing a warrantless search at the defendant’s residence. The officers delayed the search for more than an hour after determining that drugs were on the premises.

***United States v. McCraw***, 920 F.2d 224 (4th Cir. 1990) The police went to the defendant’s hotel room after arresting a person who had just exited the room with cocaine. The officers knocked on the door; the defendant opened the door, but upon seeing the police, he immediately tried to close the door. The police forced their way in. The defendant was arrested and asked if the officers could search the room. Defendant consented. The entry into the room was unlawful and the ensuing purported consent was invalid. The entry was not in hot pursuit and was not justified by exigent circumstances. This case is distinguishable from United States v. Santana, 427 U.S. 38 (1976), because there, when the police arrived, the defendant was in the doorway and quickly retreated upon seeing the police.

***United States v. Richard***, 994 F.2d 244 (5th Cir. 1993) The police were looking for a suspect in a motel. The officers knocked on the door and the occupants answered, “O.K.” but did not immediately open the door. The police heard whispering and drawers opening and closing. When the doorknob turned, the police forced their way in. This was not a proper exigent circumstances search. The police caused the exigency by going to the room without a warrant and announcing their presence. The police did not have evidence that contraband was in the room and the officers could have “covered” the entrance until a search warrant could be obtained. This case needs to be re-examined in light of Kentucky v. King. United States v. Johnson, 22 F.3d 674 (6th Cir. 1994) The police went to an apartment where a 14-year-old girl had been kidnapped and held for several days. When the police arrived, the girl answered the door, but she was unable to let the officers in (or escape) because of a locked iron gate. The police broke open the iron gate. The girl then “consented” to a search of the apartment – the defendant was not at home. This was not a valid consent search. The girl did not have the authority to consent to a search of the apartment. The fact that she was locked in established that she was not free to come and go (and hence invite others to do the same). There were also no exigent circumstances justifying the warrantless search. Because the defendant was not present, the apartment could have been secured and a search warrant obtained.

***United States v. Ogbuh***, 982 F.2d 1000 (6th Cir. 1993) The defendants waited in a hotel room for two days for the seller of heroin. The seller was then intercepted by federal agents at the airport and immediately agreed to cooperate. The agents did not get a warrant, instead immediately entering the hotel room with the seller. Exigent circumstances did not justify this warrantless

search. The one-hour delay it would have taken to get a warrant was not so long, given the purchasers' willingness to wait for two days for the seller. Moreover, it should not have taken an hour to get a warrant. The government cannot erect barriers to getting a warrant expeditiously (requiring an AUSA's approval before an agent goes to a magistrate), and then use this hurdle as an excuse for not getting a warrant at all.

***United States v. Straughter***, 950 F.2d 1223 (6th Cir. 1991) Several members of a conspiracy had been arrested and others were known to be at large. The police did not have specific information that anybody was in a particular house, however. The entry into this house, without a warrant, was not justified by the exigent circumstance's exception. There must be an objectively reasonable belief that someone is in the apartment and that the destruction of evidence is imminent.

***United States v. Radka***, 904 F.2d 357 (6th Cir. 1990) Agents must have affirmative proof of the likelihood of destruction of evidence in order to justify a warrantless entry. In this case the police had ascertained the relationship between drugs and this residence by virtue of having stopped a car eight miles away. It is unlikely that any occupants of the residence were aware of this arrest and thus likely to immediately destroy evidence.

***United States v. Buchanan***, 904 F.2d 349 (6th Cir. 1990) The police lacked sufficient basis to enter the defendant's home without a search warrant solely on their belief that the defendant's wife would destroy evidence after the defendant was arrested by DEA agents. Because the police were aware that the defendant's wife was at home asleep, there was no reason to believe that she would be aware that the defendant had been arrested and thus there was time to get a search warrant. Furthermore, once the police entered the house without a search warrant, the subsequent consent of the defendant even assuming he was lawfully arrested was tainted by this unlawful entry and the police could not rely on a consent search. Finally, the government cannot rely on the "inevitable discovery" exception because the police were not pursuing an alternate line of investigation at the time that the search was conducted. Police who believe they have probable cause to search may not enter the premises and excuse their failure to get a warrant on the basis that they would have gotten one anyway.

***United States v. Templeman***, 938 F.2d 122 (8th Cir. 1991) Police officers sent an informant into a house with a package of cocaine which had a beeper inside. The police entered the house without a warrant. This was improper – there was no reason why the police could not have obtained a warrant before delivering the drugs.

***United States v. Duchi***, 906 F.2d 1278 (8th Cir. 1990) The police set up a controlled delivery of a UPS package in which cocaine had been found. There was no reason that the police could not have obtained a search warrant prior to making the delivery, therefore, there were no exigent circumstances justifying the entry into the recipient's home after making the delivery. The requirement of obtaining a warrant applied even though the defendant had earlier hidden drugs immediately after receiving it. There was no reason that the police could not have obtained a warrant and immediately gone in when the delivery was made.

***United States v. Suarez***, 902 F.2d 1466 (9th Cir. 1990) The mere subjective belief of law enforcement agents that danger exists in the premises does not justify a warrantless search based on exigent circumstances. The agents must be capable of pointing to specific and articulable facts supporting their belief that other dangerous persons may currently be in the building or elsewhere on the premises in order to justify a warrantless entry. Mere speculation does not suffice.

***United States v. George***, 883 F.2d 1407 (9th Cir. 1989) The defendant was suspected of being the perpetrator of a series of bank robberies. While the police were outside his house maintaining surveillance, they learned that he had just perpetrated another robbery. While waiting for his return, the police went to a pay phone to check on the status of the case. Upon their return to the house, they found that the defendant had returned home, and his car was parked out front. Without consent and without either an arrest, or search warrant, the officers entered the house. This was unlawful. Because the defendant was unaware of the police officers' presence, there were no exigent circumstances justifying this warrantless entry. Following the entry, the defendant was shot and brought to the hospital. His wife subsequently consented to a search of the house. Though the initial entry was unlawful, the wife's subsequent consent was not tainted by the initial unlawful entry and the evidence was therefore admissible.

***United States v. Holzman***, 871 F.2d 1496 (9th Cir. 1989) Based on their suspicion that accomplices were located in certain hotel rooms, the police entered and searched the rooms. There were no exigent circumstance justifying this warrantless entry. A remand was required to determine whether a subsequent search, undertaken pursuant to a search warrant, was tainted by this initial unlawful entry.

***United States v. Warner***, 843 F.2d 401 (9th Cir. 1988) A police officer was advised by defendant's landlord that chemicals were being stored in the defendant's garage. Experts testified at the suppression hearing that these chemicals are quite volatile and could explode in the hot weather. However, the police officer had only limited knowledge of the explosive potential of the chemicals and thus, his exigent circumstances search of the garage was unlawful.

***United States v. Howard***, 828 F.2d 552 (9th Cir. 1987) The delivery and storage of chemicals in a detached garage did not provide probable cause for believing that a drug laboratory was being maintained in the house or that there was a risk of fire or explosion in the house justifying the warrantless securing of the home.

***United States v. Alvarez***, 810 F.2d 879 (9th Cir. 1987) Federal agents had between an hour and a half and two hours from the time they learned that the defendant was waiting for a shipment of cocaine in a hotel room until they arrested him after breaking into his room. The police had time to obtain a warrant and thus the exigent circumstances did not authorize this entry. Furthermore, they could have simply obtained an arrest warrant which would have justified the warrantless intrusion into the apartment.

*United States v. Anderson*, 981 F.2d 1560 (10th Cir. 1992) The police could not state with certainty that anybody was left in a house in which there was believed to be marijuana when other conspirators were arrested. Fearful that others were still in the house who would be alerted, the police entered to preclude the destruction of evidence. This was improper. Even absent continuous surveillance, the police must do more than merely suspect that other conspirators remain in the house who may destroy evidence before they can rely on the exigent circumstance's exception.

***United States v. Aquino***, 836 F.2d 1268 (10th Cir. 1988) The Tenth Circuit holds that if there is time after learning of probable cause to search a house for the agents to obtain a warrant, they should do so. In this case, a rather "long time between the time probable cause arose and the time the entry was made" elapsed, but the Court held that the warrantless search was nevertheless justified.

***United States v. Bonitz***, 826 F.2d 954 (10th Cir. 1987) The presence of 22 cans of black powder in the defendant's bedroom did not constitute exigent circumstances justifying a two-hour inventory-type search of the bedroom. During the course of the search, the police officers exhibited no particular concern for their own safety.

***United States v. Tovar-Rico***, 61 F.3d 1529 (11th Cir. 1995) Though various law enforcement agents were arresting people around the apartment where the target was located, this, alone, did not create exigent circumstances justifying the entry into the apartment. There was no evidence that people in the apartment were aware of the activities going on outside.

***United States v. Lynch,*** 934 F.2d 1226 (11th Cir. 1991) The mere presence of contraband does not give rise to exigent circumstances to search a house without a warrant. The arrest of co-conspirators away from a residence does not justify entering the premises without a warrant if the occupants are unaware of their colleagues' arrest. The error in admitting the evidence in this case, however, was harmless.

***United States v. Tobin***, 923 F.2d 1506 (11th Cir. 1991) In an en banc decision, the Eleventh Circuit extensively reviews the law governing exigent circumstances searches. The court concludes that the search in this case was supported by exigent circumstances. The court notes, however, that circumstances are not normally considered exigent where the suspects are unaware of police surveillance and that a warrantless search is illegal when police possess probable cause but instead of obtaining a warrant create exigent circumstances.

***United States v. Hernandez-Cano***, 808 F.2d 779 (11th Cir. 1987) The possibility that luggage may have contained explosives was not an exigent circumstance allowing a warrantless search. Although the police officer may have been justified in seizing the suitcase to prevent loss or destruction, a warrant should have been required to open it.

***United States v. Timberlake***, 896 F.2d 592 (D.C. Cir. 1990) Though an officer claimed to have smelled PCP, and was aware that PCP was dangerous and explosive, the officer did not testify that he faced any dangerous circumstance which would have justified a warrantless and non-consensual entry into the defendant's apartment.

***SEARCH AND SEIZURE (Expectation of Privacy) See also: Search and Seizure (Standing)***

***Klen v. City of Loveland***, 661 F.3d 498 (10th Cir. 2011) In this civil rights case, the Tenth Circuit held that the plaintiffs arguably had an expectation of privacy in a commercial building under construction.

***Coffin v. Brandau***, 642 F.3d 999 (11th Cir. 2011) In this civil rights case, the en banc Eleventh Circuit held that the plaintiffs had an expectation of privacy in the attached garage that had one wall common to their house and a door that was capable of fully closing, though it was open when the police initially arrived.

***United States v. Werra***, 638 F.3d 326 (1st Cir. 2011) The defendant occupied the third floor of a dwelling that housed numerous individuals. The dwelling was not a single-family home (numerous individuals lived in the house); nor was it a multi-family apartment. It was more akin to a fraternity house. The First Circuit concluded that the defendant, who rented one floor (which had its own kitchenette, bedroom, and bathroom, had an expectation of privacy in the house and standing to contest the warrantless entry into the house by the police.

***United States v. Warshak,*** 631 F.3d 266 (6th Cir. 2010) The Sixth Circuit concludes that the government is required to obtain a search warrant before it may obtain stored emails from a service provider's computer. The Court also held that to the extent that the Stored Commination's Act, 18 U.S.C. § 2703(a) allows the government to obtain such information with only a subpoena, it violates the Fourth Amendment. The court held that a person has a reasonable expectation of privacy in emails that are stored with, or sent or received through, a commercial Internal Service Provider. "The government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause."

***Johnson v. United States***, 604 F.3d 1016 (7th Cir. 2010) Trial counsel did not file a motion to suppress evidence seized from the car that the defendant was driving, because he believed that the defendant did not have an expectation of privacy, due to the fact that he did not own the car and had borrowed it. This was legally incorrect: the driver of a car that he has borrowed from another has a reasonable expectation of privacy in the vehicle. The attorney's second justification for not filing the motion – he wanted to argue at trial that the drugs did not belong to his client, because the car was borrowed – was not a basis to fail to file the motion to suppress, because if he won the motion to suppress, there would be no trial, and if he lost the motion to suppress, he could still disavow ownership or knowledge of the drugs. Finally, the attorney's fear that the defendant's testimony at a suppression hearing could be used against him at trial would be foreclosed by Simmons v. United States, 390 U.S. 377 (1968).

***United States v. Larios***, 593 F.3d 82 (1st Cir. 2010) Agents learned that the defendant and others were intending to conduct a drug deal in a hotel room. Without a warrant, the agents installed concealed an audio/video recording device in the room. At one

point, the defendant and another conspirator were in the room without any undercover agent and their conversation was recorded. The First Circuit held that the defendant did not have an expectation of privacy in the statements he made while in the hotel room and therefore Title III did not apply. 18 U.S.C. § 2510(2) defines an “oral communication” as “any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” This definition parallels the Fourth Amendment jurisprudence of expectation of privacy. Because the defendant did not have an expectation of privacy in the hotel room, which he occupied for a brief period of time for the sole purpose of dealing in drugs, he did not have an objectively reasonable expectation of privacy in the conversations he had in the room during the drug deal. The court does cite several cases from other jurisdictions that held that a defendant did have an objectively reasonable expectation of privacy in this situation, but distinguished those cases. See, e.g., United States v. Nerber, 222 F.3d 597 (9th Cir. 2000); United States v. Padilla, 520 F.2d 526 (1st Cir. 1975).

***United States v. Monghur***, 588 F.3d 975 (9th Cir. 2009) The defendant was in jail and his outbound calls were being taped. The police, listening to the tape, learned that he had a gun hidden in the house where he stayed. They went to the house and secured the consent of the owner to search the house. The police went to a bedroom that belonged to an adult mail and was the room in which the defendant stayed when he slept at the house. The police searched a closed container in that room and located the gun. The lower court held that the owner of the premises did not have authority to consent to a search of that container. The government did not appeal that holding. Rather, the government argued that the defendant lacked an expectation of privacy in the container because in a phone call that he knew was being taped, he revealed the existence of the gun. The Ninth Circuit held that when a defendant unequivocally reveals the contents of a closed container to the police, the defendant does relinquish his expectation of privacy in the container, but in this case, the defendant’s statements on the telephone clearly showed that he was trying to disguise what he was talking about and used code. This demonstrated that he maintained an expectation of privacy in the container.

***United States v. Washington***, 573 F.3d 279 (6th Cir. 2009) The fact that the police were aware that drugs were being distributed from an apartment did not mean that the defendant did not have an expectation of privacy in the apartment. The Fourth Amendment is not limited to innocent people.

***United States v. Young***, 573 F.3d 711 (9th Cir. 2009) The defendant had a reasonable expectation of privacy in the hotel room in which he was staying. Though the hotel staff may have had the intention of evicting him when security officer located a gun in his backpack in the room, because the defendant had not been evicted or told that he had been evicted, he still had an expectation of privacy in the room.

***United States v. SDI Future Health, Inc***., 568 F.3d 684 (9th Cir. 2009) A corporation has standing to contest a search of any of the corporate premises. Individual officials, however, only have standing with respect to particular offices and areas of the workplace, despite their ownership interest in the offices.

***United States v. Zavala***, 541 F.3d 562 (5th Cir. 2008) A defendant has a reasonable expectation of privacy regarding the contents of a cell phone.

***United States v. Olivares-Rangel***, 458 F.3d 1104 (10th Cir. 2006) If a defendant is illegally seized or arrested and as the result of that illegal arrest, the defendant makes a statement, the defendant’s identity is learned, and his illegal status is ascertained, the court may suppress all the evidence. The suppression of the defendant’s statement is governed by Brown v. Illinois, 422 U.S. 590 (1975). The suppression of the identity evidence as well as the defendant’s “A-file” is more complicated. The government argued that INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), holds that the identity of the defendant may never be suppressed. The Tenth Circuit rejected this argument. The defendant, himself, may not be suppressed (i.e., he may be brought to court), but evidence derived from the illegal detention may be suppressed, including fingerprint evidence in certain circumstances (see Davis v. Mississippi, 394 U.S. 721 (1969); Hayes v. Florida, 470 U.S. 811 (1985)) and independently created and maintained government records. The fact that the defendant does not have an expectation of privacy in the government records is not relevant. The standing issue focuses on the defendant’s rights regarding the illegal arrest. The defendant need not have an expectation of privacy in the fruits that are the result of the unlawful arrest. In other words, the defendant is not required to prove an expectation of privacy in both the primary violation and the fruits. If his expectation of privacy was violated, the fruits of that violation may be suppressed, regardless of whether the fruits are discovered in a place for which the defendant does not have an expectation of privacy.

***United States v. Mosley***, 454 F.3d 249 (3rd Cir. 2006) If the police stop a car without an articulable suspicion, the discovery of contraband in the car must be suppressed, even in a prosecution of a passenger. Though Rakas v. Illinois indicates that the passenger has no expectation of privacy in the car, the passenger’s motion to suppress is predicated on his unlawful detention and the fruit of that unlawful detention, rather than on the expectation of privacy in the automobile. The court’s opinion runs twenty pages and comprehensively reviews the law of “fruit”.

***United States v. Waller***, 426 F.3d 838 (6th Cir. 2005) The defendant was evicted from one apartment where he was living with friends and asked another friend if he could store some of his belongings in his apartment. The friend agreed. Shortly thereafter, the police obtained an arrest warrant for the defendant and arrested him outside the friend’s apartment. He acknowledged coming out of that apartment. The police obtained the friend’s consent to search the apartment. The police searched throughout the apartment and found guns in what turned out to be the defendant’s suitcase. He was prosecuted for possession of the guns. The Sixth Circuit held that the evidence should have been suppressed. The defendant had standing to challenge the search of his suitcases and the apartment owner did not have actual, or apparent authority to search the suitcases. The officers did not

reasonably believe that the apartment owner had authority to grant consent to search the defendant's personal belongings that were stored there.

***United States v. Neely***, 345 F.3d 366 (5th Cir. 2003) The defendant was a suspect in a bank robbery. After the robbery, he went to the hospital with a gunshot wound. The police went to the hospital and retrieved his clothing, which had been cut off of him and placed in a bag in a storage room. The Fifth Circuit held that he had a property interest in the clothes and the police could not "seize" the clothes, even if he did not have a privacy interest in the place that was searched.

***United States v. Anderson***, 154 F.3d 1225 (10th Cir. 1998) The police entered the defendant's business after they determined that he took some videotapes into the office the tapes had been delivered by an undercover agent and purportedly contained child pornography. There was no warrant for the business. The Tenth Circuit holds that the defendant had an expectation of privacy in the business and in the empty office which the agents entered. "Given the great variety of work environments . . . the question whether an employee has a reasonable expectation of privacy in his work area must be addressed on a caseby-case basis."

***O'Connor v. Ortega***, 480 U.S. 709 (1987). An employee is more likely to have standing to challenge the seizure of personal items or the search of an area where personal items are stored than the search or seizure of work-related documents or materials. Moreover, an employee has a greater expectation of privacy in items in his immediate control, regardless of the business connection he may or may not have to the room where the items are found. In this case the pornographic tape was brought into the office by the defendant, and he took steps to ensure his privacy while viewing the tape.

***United States v. Infante-Ruiz***, 13 F.3d 498 (1st Cir. 1994) The defendant placed his briefcase in the trunk of a car being driven by a colleague. This did not deprive the defendant of a legitimate expectation of privacy in the briefcase, even though he allowed his colleague to drive with the briefcase when the defendant was not present, and even though he permitted his colleague to place objects in the briefcase.

***United States v. Mancini***, 8 F.3d 104 (1st Cir. 1993) An ex-mayor placed his appointment calendars in a box which was then stored in the archives attic of the city building. He retained an expectation of privacy in this box. He clearly labeled the box, and it was understood that these were his papers and were not accessible to the public or anyone else.

***United States v. Cardona-Sandoval***, 6 F.3d 15 (1st Cir. 1993) In a small boat, such as the 43-foot sportfishing boat involved in this case, all crewmembers have standing to contest a search anywhere in the boat.

***United States v. Pena***, 961 F.2d 333 (2d Cir. 1992) Someone who borrows a car may have standing to contest a search of the vehicle – that is, may have a reasonable expectation of privacy in the vehicle. A remand, however, was required to determine whether the defendant's expectation of privacy extended to the door panels, inside of which the cocaine was found.

***United States v. Villarreal***, 963 F.2d 770 (5th Cir. 1992) Defendants were recipients of 55-gallon drums which were labeled "phosphoric acid" but which actually contained marijuana. Despite using a fake name on the shipping documents, the defendants retained an expectation of privacy in the contents of the drums.

***Husband v. Bryan***, 946 F.2d 27 (5th Cir. 1991) The defendant had an expectation of privacy in the land beneath a pasture. The open field doctrine did not apply.

***United States v. Sylvester***, 848 F.2d 520 (5th Cir. 1988) A defendant has an expectation of privacy in a "hunting box" even though its contents are generally known to the public. Though the police and the public may believe that there is ammunition, beer, and chewing tobacco in such boxes, the rule, nevertheless, is that the defendant had an expectation of privacy in any container and the contents cannot be seized unless they are in plain view, or a search warrant is obtained to open the box.

***United States v. Fultz***, 146 F.3d 1102 (9th Cir. 1998) The defendant was evicted from his apartment and packed his belonging in garbage bags and cardboard boxes. He brought his belongings to a woman's house who allowed him to move in. The defendant had a reasonable expectation of privacy in the boxes.

***United States v. Gooch***, 6 F.3d 673 (9th Cir. 1993) A tent pitched in a public campground may not be searched without a search warrant. The occupant has a reasonable expectation of privacy in his tent.

***United States v. Most***, 876 F.2d 191 (D.C. Cir. 1989) The defendant was followed to a grocery store by a police officer who believed he was acting suspiciously. The defendant carried a bag into the store and checked it with the clerk behind the counter. When the defendant left the store, he asked the clerk to continue watching it. After the defendant left, the police went into the store, retrieved the bag from the clerk, and based on touching the contents, opened the bag and discovered cocaine. The government argued that the bag was abandoned when the defendant left the store. The Court of Appeals disagrees. The defendant did not leave the object unattended in a public place; the law does not insist that a person assertively clutch an object in order to retain the protection of the Fourth Amendment. In light of the defendant's insistence that the clerk continue to watch the bag after he left, it is clear the defendant did not abandon his expectation of privacy in the bag.

***SEARCH AND SEIZURE (Franks v. Delaware)***

***United States v. Perkins***, 850 F.3d 1109 (9th Cir. 2017) The defendant was detained by Canadian authorities and the authorities found two images of children partially clothed on his computer. The images, however, according to the Canadian police, did not qualify as child pornography, because neither appeared to be focused on the breasts or in one picture the partially visible vagina. The Canadian authorities released the defendant but sent the report including the conclusion that the images did not constitute child pornography to American agents. In the U.S., the agent prepared a search warrant that simply said that the

Canadian authorities found child pornography on the defendant's computer, which displayed naked young girls, including their breasts and in one case the vagina. The U.S. warrant did not include the other findings by the Canadian authorities or provide a detailed description that was contained in the Canadian report. The images were not submitted to the U.S. Magistrate in connection with the search warrant application. The Ninth Circuit reversed the district court: This was a Franks violation that necessitated granting the motion to suppress. Even given the fact that the defendant two prior sex offense convictions involving children, the false information provided by the agent negated the existence of probable cause.

***United States v. Ortega***, 854 F.3d 818 (5th Cir. 2017) The search warrant stated that the informant had previously provided to the affiant credible and reliable information. This was false. The affiant had been told by another officer that the informant had previously provided credible and reliable information, but the affiant had not received any information previously from the informant. The Fifth Circuit held that a remand was necessary to determine if the affiant made the false statement in the affidavit with the necessary intent under Franks. If so, the evidence would be suppressed.

***United States v. Lull***, 824 F.3d 109 (4th Cir. 2016) The confidential informant was sent into the target's house with money to make a controlled buy. When he came out, he gave some of the "change" to the police, as well as the drugs that were purchased, but $20 was unaccounted for. The police asked where the $20 was. The informant responded that he gave it to the target. He was strip-searched and $20 was found in his underpants. He was immediately "fired" as an informant. The police then prepared a search warrant application for the target's house, relying on the information from the informant, as well as the circumstances of the controlled buy – but not the $20 theft. The Fourth Circuit held that this was at least a reckless omission of fact that tainted the search warrant application and the motion to suppress should have been granted. A dissenting judge wrote that the omission was improper but wrote that all judges know that informants are unreliable to some extent or another and thus, the omission was not material. The dissenting judge wrote: "Magistrates and judges, state and federal, know from experience and common sense that drug abusers who cooperate with law enforcement officers are notoriously unreliable human beings, burdened as they typically are with barely manageable affronts to their inherent human dignity, including but not limited to addictions, debts incurred to service those addictions, and criminal convictions, all coupled with dissolved and dissolving family and personal relationships. Investigator Welch should have disclosed the informant's post-controlled-buy arrest and the reasons for it; as the majority opinion cogently explains, his excuse for not doing so cannot be credited. But even if he had made the disclosure, no judge with experience issuing warrants would have refused to issue the search warrant in this case."

***United States v. Tanguay***, 787 F.3d 44 (1st Cir. 2015) If a police officer is told by fellow officers that an informant is "quirky" and has had a few scrapes with the law, an affiant has a duty to investigate prior to relying on that informant in a search warrant affidavit that fails to reveal this information. An affiant, once red flags are seen, has a duty to investigate, particularly when the informant is the sole basis for obtaining a search warrant. Remand for further development of the record was necessary in this case.

***United States v. Glover***, 755 F.3d 811 (7th Cir. 2014) The failure of the search warrant application to reveal any information about the informant rendered it devoid of probable cause. Though a close call, the exclusionary rule would not apply because of Leon. However, because of the absence of information about the informant's credibility, a Franks hearing was necessary to determine whether the omission of this information would taint the search warrant. The informant, unbeknownst to the magistrate, had more than a dozen prior criminal convictions, including several while he was working as an informant. He was also a gang member and was receiving payments from the police department.

***United States v. Gifford***, 727 F.3d 92 (1st Cir. 2013) The police obtained a search warrant for the defendant's house to search for a marijuana grow operation. The basis for the search was (1) an informant's tip; (2) information that the electricity usage at the defendant's house exceeded the neighbor's electricity usage; and (3) an officer visited the house and smelled burnt marijuana when the defendant opened the door. The First Circuit upheld the lower court's decision granting the motion to suppress. Regarding the informant's information, other than the statement that the informant was reliable, no information was provided in the warrant to support the claim that the informant was, in fact, reliable. There was also no information about the informant's basis of knowledge. Regarding the electricity usage, the lower court found that the officer was reckless in failing to include in the warrant application information that the neighbor's house was considerably smaller and the fact that the defendant had a horse boarding business on the premises; this was a Franks violation that altered the probable cause calculus. The smell of marijuana was not necessarily indicative of a grow operation.

***United States v. McMurtrey,*** 704 F.3d 502 (9th Cir. 2013) If a sufficient showing has been made by the defense to prompt a Franks v. Delaware hearing, the court should conduct the hearing, rather than allowing the government to summarily respond to the allegations with an abbreviated showing that the error in the affidavit was illusory. In this case, the government introduced the testimony of the affiant, who explained the apparent discrepancy and the court then concluded that the affidavit was sufficient, without allowing the defense an opportunity to explore the issue further. A remand for a full hearing was required.

***United States v. Brown***, 631 F.3d 638 (3rd Cir. 2011) The district court granted a motion to suppress on grounds of a Franks v. Delaware violation and the Third Circuit affirmed. The search warrant application stated the several witnesses observed the defendant's vehicle meet up with a stolen van that was used to flee from an armed robbery. No such evidence existed. The Third Circuit held that in reviewing the lower court's decision whether a false statement in an application was made with "reckless disregard for the truth" the appellate court should employ the clear error standard.

***United States v. Tate***, 524 F.3d 449 (4th Cir. 2008) The defendant made an adequate Franks showing to require an evidentiary hearing. The search warrant affidavit stated that the probable cause was derived from evidence obtained from a trash pull from

garbage bags easily accessible in the back yard. The defendant's Franks showing established that the garbage bags were only accessible if the police trespassed on the defendant's property through a fence. Because this allegation, if proven, would have tainted the warrant, the lower court erred in failing to conduct an evidentiary hearing.

***United States v. West***, 520 F.3d 604 (6th Cir. 2008) Two search warrants were issued in this case. The first was devoid of probable cause, because it contained bare bones assertions about the defendant (all of which were based on hearsay statements that the affiant learned from other officers and individuals). The warrant also failed to link any criminal activity on the part of the defendant with the location that the police wanted to search. The warrant did not even satisfy the Leon good faith standard. The second warrant set forth facts that an informant told the affiant that the defendant confessed to a murder and the body could be found in a well at a certain location; the warrant sought authorization to search the defendant's van. The affiant, however, failed to reveal that the informant was serving time in federal custody and that the police went to the location where the body was supposedly located and found nothing – not even a well.

***United States v. Rice***, 478 F.3d 704 (6th Cir. 2007) The Leon good faith exception to the exclusionary rule does not apply to Title III wiretap cases. Because suppression is a statutory remedy, the court-made exception to the court-created exclusionary rule in other search cases, does not apply. In this case, the warrant application contained misrepresentations and recklessly made false statements which, when corrected, negated the necessity requirement for a wiretap. The court also upheld the trial court's finding that various boilerplate representations about alternative methods were not useful in a wiretap application.

***United States v. Harris***, 464 F.3d 733 (7th Cir. 2006) The defendant made a sufficient showing to entitle him to a Franks hearing. The district court erred in refusing to conduct a hearing on the basis of additional information that was supplied to the court by the government (i.e., information supplied in response to the defendant's Motion to Suppress) about the circumstances leading up to the application of the search warrant.

***United States v. Coreas,*** 419 F.3d 151 (2d Cir. 2005) The Second Circuit reviews a "Candyman" search that involved searches of dozens of individuals around the country based on their "membership" in an Internet group that purportedly advertised the availability of child pornography. The FBI search warrant affidavit contained numerous erroneous statements about the method by which subscribers became members and whether they automatically received illicit images. The panel indicated that it would have reversed the trial court's denial of the Motion to Suppress, but for a prior decision of another panel that found no Franks violation (or sufficient residual information to support probable cause) and that the prior decision was binding on this panel. The other "Candyman" decisions in which a Franks violation was found to taint the warrant, include United States v. Strauser, 247 F.Supp.2d 1135 (E.D. Mo. 2003); United States v. Perez, 247 F.Supp.2d 459 (S.D.N.Y. 2003); United States v. Kunen, 323 F.Supp.2d 390 (E.D.N.Y. 2004). See also United States v. Bailey, 272 F.Supp.2d 822 (D.Neb. 2003); United States v. Martin, 426 F.3d 68 (2d Cir. 2005); United States v. Shields, 458 F.3d 269 (3rd Cir. 2006).

***United States v. Gonzalez, Inc.,*** 412 F.3d 1102 (9th Cir. 2005) The information in the wiretap affidavit did not satisfy the necessity requirement of the wiretap statute. In addition, the application suffered from a Franks violation. With regard to the Franks violation, the defendants offered sufficient information relating to the false statements and the materiality of the false statements in their pleadings to prompt the trial court to grant a hearing which the district court did conduct. Regarding the necessity issue, the normal investigative techniques available to the government had not been exhausted; moreover, if traditional investigative procedures were used, there would have been no need for a wiretap.

***United States v. Hammond***, 351 F.3d 765 (6th Cir. 2003) A considerable amount of the information in the search warrant affidavit was incorrect. The remaining information was not sufficient to support a probable cause determination.

***United States v. Alvarez***, 127 F.3d 372 (5th Cir. 1997) The defendant showed a videotape to a police officer. The video depicted a minor who briefly exposed her breast. The officer applied for a search warrant, stating that the defendant had shown him a video that contained a minor engaged in sexual conduct. The officer later testified that he was basing this on the state law that defined sexual conduct as including "lewd exhibition of the genitals," and his belief that breasts were genitals. The evidence should have been suppressed based on this recklessly false search warrant affidavit. Among other problems, there was no reason why the officer could not have set forth the basic facts in the affidavit i.e., exactly what he observed on the video, rather than simply giving his conclusion that what he observed qualified as sexual conduct.

***Hale v. Fish***, 899 F.2d 390 (5th Cir. 1990) An application for an arrest warrant contained materially false statements. Furthermore, the affidavit failed to reveal statements obtained from other witnesses which contradicted the statements which were offered in support of the arrest warrant. Absent the material misstatements, and including the omitted statements which were exculpatory, there was no probable cause to support the arrest.

***United States v. Bennett***, 905 F.2d 931 (6th Cir. 1990) The police obtained a search warrant on the basis of an affidavit which recited the information received from a confidential informant that the defendant was manufacturing and selling marijuana out of his house. The search of the residence revealed no marijuana but did reveal the presence of firearms in the house. The affidavit was false, however, in that it stated that the informant claimed to have actually seen marijuana in the house and in the defendant's barn. At the suppression hearing, the officer acknowledged that the informant did not, in fact, tell him that he had seen marijuana in the house, or in the barn; rather, he had simply gone to the house and purchased marijuana from the defendant, without knowing exactly where the marijuana was kept. The Sixth Circuit concludes that these constitute materially false statements by the affiant and the search warrant, absent these statements, was not backed up by probable cause. The motion to suppress should have been granted.

***United States v. Bowling***, 900 F.2d 926 (6th Cir. 1990) After obtaining a search warrant in good faith, officers learned that certain facts contained in the affidavit were not correct and would have cast a doubt on the existence of probable cause. The Sixth Circuit holds that in such circumstances the appropriate course of action is for the agents to return to the Magistrate and obtain a new warrant if the Magistrate feels that probable cause still exists. In this case, prior to executing the search warrant, other law enforcement officers obtained the subject's consent to search the property and did not find any of the evidence and contraband which the agents had stated were present on the property in their search warrant application. The Court goes on to hold that such a search does not pass the Leon test of good faith. The law was clear that probable cause must exist both when the warrant is applied for and when it was executed. The officers knew that probable cause was questionable when they executed the warrant and thus, they did not act in objective good faith.

***United States v. Baxter***, 889 F.2d 731 (6th Cir. 1989) A police officer applied for a search warrant stating that a confidential informant had advised him that drugs were at a certain location. In fact, there was no confidential informant, but rather an anonymous phone caller. The anonymous caller had not, contrary to what the police officer stated in the affidavit, provided any reliable information in the past. The Sixth Circuit holds that this constitutes a Franks violation and under Leon, there is no good faith exception to the exclusionary rule in cases where the police officer intentionally makes misstatements in the search warrant affidavit.

***United States v. Residence Appeal of Lewallen***, 805 F.2d 256 (7th Cir. 1986) The Seventh Circuit suggests that it will adopt a new standard in reviewing district courts' determinations that a misrepresentation in a search warrant affidavit was made with reckless disregard for the truth. In the future, the Seventh Circuit will review such a determination with independent judgment in determining whether the record established reckless disregard for the truth with convincing clarity. In the future, therefore, the "clearly erroneous" standard will not be employed in reviewing the district courts' decisions on such questions.

***United States v. Jacobs***, 986 F.2d 1231 (8th Cir. 1993) The police believed that a package shipped by Federal Express contained drugs. They subjected the package to a dog sniff. The dog indicated some interest in the package but did not give a positive alert. On the warrant application, however, the affiant stated that the dog showed an interest in the package but failed to reveal that this did not amount to an alert – and that the dog did not, in fact, alert to the package. This violated Franks and required suppression of the evidence uncovered during the ensuing search.

***United States v. Hall***, 113 F.3d 157 (9th Cir. 1997) A state trooper took an informant to a magistrate to obtain a search warrant of the defendant's trailer. The informant, under oath, told the magistrate that his source of supply was the defendant, and he lived at the trailer. The informant and the trooper did not tell the magistrate about the informant's criminal history, including his probation violation for making death threats to a wounded police officer and his conviction for falsely reporting a crime. The search warrant was tainted by this Franks violation and the evidence should have been suppressed.

***United States v. Barton***, 995 F.2d 931 (9th Cir. 1993) The government's destruction of evidence prior to an evidentiary hearing on a motion to suppress alleging a Franks v. Delaware violation must be analyzed under the principles of Brady and Arizona v. Youngblood to determine if the defendant's right to due process has been violated. Thus, if the evidence was exculpatory – in the sense of supporting the Franks violation – and the government acted in bad faith in destroying the evidence, a due process violation might be found.

***United States v. DeLeon,*** 979 F.2d 761 (9th Cir. 1992) The search warrant affidavit omitted material facts which, if included, would have negated the probable cause basis for searching the premises. The fact that the person who deliberately omitted information was not the affiant, but another law enforcement agent, is not critical. What matters is that the government, generally, deliberately kept material information from the issuing magistrate. "Police cannot insulate one officer's deliberate misstatements merely by relaying it through an officer-affiant personally ignorant of its falsity." In this case, one agent was aware that one of the three witnesses who had been to the location had not seen or smelled any marijuana in the location sought to be searched. The agent failed to tell this fact to the affiant, who then wrote in the affidavit that all three men saw the marijuana. Had this information been included in the affidavit, there would not have been probable cause to search the premises.

***United States v. Johns,*** 851 F.2d 1131 (9th Cir. 1988) The defendants offered expert testimony, as well as their own affidavits, to establish that there was no possibility that any narcotics agent had smelled what the agent claimed to have smelled in his search warrant affidavit. This was sufficient evidence to require a Franks hearing to determine whether the agent included deliberately false information in his affidavit to search a storage compartment.

***United States v. Simpson***, 813 F.2d 1462 (9th Cir. 1987) In an affidavit used to obtain a wiretap, misrepresentations were made about the necessity for the wiretap. In particular, the affidavit failed to reveal that an informant had established a close relationship with the target and had been present on several occasions while the target conducted business with other members of the alleged drug ring. These omissions constitute a violation of Franks v. Delaware and tainted the wiretap application.

***SEARCH AND SEIZURE (Fruits) SEE ALSO: SEARCH AND SEIZURE (Consent -- Product of Unlawful Detention, Entry or Arrest); SEARCH AND SEIZURE (Attenuation)***

***Brendlin v. California***, 127 S.Ct. 2400 (2007) When the police stop a vehicle that has a driver and passenger, the passenger is also "detained" for fourth amendment purposes. Therefore, if there was no basis for the stop, the passenger may contest the admissibility of any fruits of that stop for which he has standing, such as a statement he made, or evidence seized from his person or personal belongings.

***New York v. Harris***, 495 U.S. 14 (1990) The police violated Payton v. New York, by entering the defendant's apartment and arresting him without a search, or an arrest warrant. While in the apartment, the defendant made an incriminating statement. He was then removed from the apartment and made additional incriminating statements. The Supreme Court holds that the statements made outside the apartment need not be suppressed.

***United States v. Terry***, 909 F.3d 716 (4th Cir. 2018) The police unlawfully placed a GPS device on the defendant's car without first obtaining a warrant. They subsequently used the data from the device to determine that the defendant was speeding, and, on that basis, the car was pulled over and ultimately, drugs were found in the car. The initial illegal "search' (placing the GPS device on the car without a warrant) was not too attenuated from the subsequent discovery of drugs and was, instead, the fruit of the poisonous tree and the evidence should have been suppressed. On the question of standing, the court held that the defendant had standing, as the driver of the car, when the GPS device was placed on the vehicle and though he was a passenger during the subsequent stop and thus did not have standing to challenge the drugs found in the car, the search was the fruit of the poisonous tree, and the lack of standing does not change that determination.

***United States v. Delgado-Perez***, 867 F.3d 244 (1st Cir. 2017) Law Enforcement executed an arrest warrant in Puerto Rico for a suspect wanted in New York. There was no reason to believe that any other person, or danger, existed elsewhere in the house where the arrest occurred. A protective security sweep was therefore unnecessary and not consistent with the Fourth Amendment. The fact that the defendant was arrested for a drug offense did not constitute a sufficient basis to conduct a sweep search throughout the house after he was arrested in the front yard. The subsequent consent search was the fruit of this unlawful security sweep, and the results of that search were also required to be suppressed.

***United States v. Wrensford***, 866 F.3d 76 (3rd Cir. 2017) The police were investigating a shooting and located the defendant, who generally fit the description of the shooter. The defendant was handcuffed, his belongings were removed from his pocket, he was taken to the police station and put in a cell. The Third Circuit held that this constituted a de facto arrest. The case was remanded to the district court to determine what fruits of this illegal arrest were required to be suppressed: items found in his pockets, items found near where he was arrested, a DNA sample, an identification of the defendant by a witness at the police station.

***United States v. Griffith***, 867 F.3d 1265 (D.C. Cir. 2017) The police had reason to believe that the defendant had participated perhaps as the getaway driver in a homicide that occurred a year earlier. The search warrant affidavit reviewed all the facts amounting to probable cause and then sought permission to search the defendant's current apartment (where he had moved after the homicide and a brief stint in jail). The warrant only sought authority to seize cell phones because criminals communicate by phone. During the execution of the search warrant, the defendant threw a gun out the window. The D.C. Circuit held that (1) the warrant was deficient, because there was no probable cause that the defendant even had a cell phone or that it had any incriminating information contained in it; (2) there was no probable cause that a phone would be found in the apartment (as opposed to on his person if he were not present at the apartment when the warrant was executed); (3) the good faith exception to the exclusionary rule did not apply because the warrant was so lacking in probable cause to search or seize a cell phone; (4) the "abandonment" of the gun was the fruit of the execution of the defective search warrant and therefore the gun that was thrown out of the window was subject to the exclusionary rule.

***United States v. Gorman***, 859 F.3d 705 (9th Cir. 2017) A police officer stopped the defendant without sufficient articulable suspicion and then prolonged the stop to the point that it amounted to an illegal detention. Finding no evidence during this encounter, the officer radioed ahead to another officer and told him to get a drug dog and stop the defendant again. The second officer had a dog ready when he stopped the car and the dog promptly alerted, providing probable cause to search the vehicle. The Ninth Circuit held that the second stop was the fruit of the initial illegal stop. The evidence was suppressed.

***United States v. Ramirez-Rivera***, 800 F.3d 1 (1st Cir. 2015) Based on information from an informant who had not previously been known to the police, the police went to the defendant's house to search for a fugitive. Without a search warrant, the police entered the house and arrested the fugitive, as well as the defendant on the basis that he was harboring the fugitive and found guns. The defendant was then brought to the police station where he made a statement. The First Circuit held that entering the house without a warrant was illegal: there were no exigent circumstances; and there was no probable cause, because the informant's information was not corroborated in any meaningful way, other than confirming the description of the house. The good faith exception to the exclusionary rule did not apply, at least in part because of the egregiousness of the violation, but also because the police testified that the reason they did not get a warrant is because it required more confirming evidence (thus revealing that the police knew that they did not have probable cause and were intentionally proceeding with the intention of not getting a search warrant which could not be obtained based on the lack of sufficient information). The evidence found during the search, as well as the defendant's statement should have been suppressed as fruit of the poisonous tree.

***United States v. Cordero-Rosario***, 786 F.3d 64 (1st Cir. 2015) The initial search warrant stated that the crime under investigation was "lewd actions" and that "in accordance with the interview of the child, there is currently pornography on the defendant's computer. There was no information in the search warrant application about what the child said, how the alleged pornography was related to any offense, how the child knew about the presence of pornography on the computer, or why the affiant believed that pornography was evidence of a crime. The evidence should have been suppressed, because even the good faith exception to the exclusionary rule did not apply to this warrant. Based on the discovery of child pornography during the search of the computer, the police went back to the apartment and secured the wife's consent to search additional computers.

The First Circuit held that this was arguably the fruit of the poisonous tree exploiting the first illegal search, but further fact-finding was necessary to develop the record relating to the subsequent consent searches.

***United States v. Brodie***, 742 F.3d 1058 (D.C. Cir. 2014) The police were waiting outside a house that they planned to search pursuant to a search warrant. While awaiting their colleagues, the defendant was observed leaving the house the police were not targeting that individual; the target was already in custody. The police approached the defendant and directed him to place his hands on the car which he did. Shortly thereafter, he fled, discarding drugs and guns while on the run. The D.C. Circuit held (1) the defendant was detained; (2) there was no basis for the detention because, pursuant to Bailey v. United States, 133 S. Ct. 1031 (2013), the police may not detain an individual in connection with the execution of a search warrant unless the detention is at the time when, and at the place where, the search is being executed; (3) the detention was not attenuated from the defendant's flight; and (4) the evidence that the police obtained was the fruit of the unlawful detention.

***United States v. Hernandez***, 670 F.3d 616 (5th Cir. 2012) The police received a tip that the defendant was harboring illegal aliens. They went to her trailer and started banging on the door and windows and demanding entry. The defendant came to the door and acknowledged that there was an illegal alien inside. The Fifth Circuit concluded that the banging on the doors and windows and demanding entry amounted to a Fourth Amendment violation (an illegal seizure) and the defendant's subsequent statement was not attenuated from that illegal conduct. Therefore, her statement should have been suppressed. The court also held that the statements obtained by witnesses inside as well as additional evidence were the fruit of the Fourth Amendment violation, as well and those statements, too, would be suppressed.

***United States v. Gaines***, 668 F.3d 170 (4th Cir. 2012) Three police officers testified that as the car in which the defendant was a passenger drove past them, they observed a small crack in the windshield. The car was stopped, and the defendant was ordered out of the car and frisked, and the officer felt a gun. The defendant assaulted the police officer and fled, after which he was stopped, and a gun was found in his possession. The district court found that the officers were untruthful when they said that the observed a crack in the windshield and that the stop, therefore, was illegal. The government conceded the illegality of the stop but claimed that the assault of the officer was an intervening event that authorized the search incident to arrest. The Fourth Circuit rejected this argument: the gun was found during the course of the illegal stop and the frisk which was before the defendant engaged in the intervening assault.

***United States v. Shetler,*** 665 F.3d 1150 (9th Cir. 2011) Based on a tip, the police conducted a warrantless search of the defendant's garage which the district court held was justified by exigent circumstances and was a valid security sweep and then the police entered the house without a warrant and continued to conduct a search. This latter search was not lawful. The defendant, confronted with evidence that was uncovered during the search, made numerous incriminating statements. The Ninth Circuit held that all statements were the fruit of the poisonous tree and should have been suppressed. The Court further held that the confession was not sufficiently "attenuated" from the illegal search so as to break the causal chain. The fact that he was Mirandized prior to making the statements also did not break the causal chain.

***United States v. Martinez,*** 643 F.3d 1292 (10th Cir. 2011) A 911 operator received a "static" only call. There was nobody on the line, just static. An officer was dispatched to the house. When the police arrived, there was on sign of any emergency, or even an occupant in the house. The police looked into the house from a sliding glass door and saw various boxes of electronic equipment and the house appeared somewhat disheveled. The police then entered, announced their presence, and asked if anybody was home nobody was in the house and conducted a sweep search, during which they found drugs and child pornography. When they exited the home, the defendant drove up and he was questioned and made incriminating statements. The police then secured a search warrant. The Tenth Circuit affirmed the decision of the trial court suppressing all the evidence on the basis that there was no exigency that supported the warrantless entry into the house and the defendant's statement was the fruit of that unlawful statement. Thus, the search warrant was the fruit of the poisonous tree.

***United States v. Werra,*** 638 F.3d 326 (1st Cir. 2011) The police had a warrant to arrest an individual and had information that the person was seen at a particular residence. The police went there, asked permission to enter (which was denied) and then entered without permission. The target of the warrant was not there, but the defendant was. He was frisked and a gun was found. The First Circuit held that the entry was unlawful, because the information known to the police did not amount to a reasonable belief that the target of the warrant was within. Because the officers entered unlawfully, there was no lawful basis to frisk the defendant and the gun found in his possession should have been suppressed.

***United States v. Gross***, 662 F.3d 393 (6th Cir. 2011) The police stopped an automobile in which the defendant was a passenger. The stop was found to be improper because there was no articulable suspicion supporting the stop. During the course of the stop, the police learned that there was an arrest warrant for the defendant. The question in the Sixth Circuit was whether the existence of an arrest warrant and the evidence found during a search incident to the arrest was the fruit of the illegal stop and did the exclusionary rule bar the introduction of the evidence. The Sixth Circuit held that the exclusionary rule did apply, and the evidence would be suppressed. Contrary authority in the Seventh Circuit in United States v. Green, 111 F.3d 515 (7th Cir. 1997), was rejected by the Sixth Circuit.

***United States v. Villa-Gonzalez***, 623 F.3d 526 (8th Cir. 2010) If physical evidence is seized as the result of a confession that was obtained in violation of Miranda, the physical evidence is not suppressed.

***United States v. Patane***. However, if physical evidence is seized as the result of a confession that was obtained pursuant to an illegal detention and therefore a Fourth Amendment violation, then the physical evidence is the fruit of the Fourth Amendment violation and is suppressed pursuant to Wong Sun v. United States.

***United States v. Cha***, 597 F.3d 995 (9th Cir. 2010) The police seized the defendant's house and held it for twenty-four hours (not allowing the defendant to enter), while a search warrant was obtained. This was too long, and the evidence obtained from the search that was conducted thereafter should have been suppressed, even though it could not be said that the search, or the discovery of the evidence was the "fruit" of the illegal seizure. The court also rejected the government's effort to extend the Herring good faith exception to the exclusionary rule to this situation.

***United States v. Olivares-Rangel***, 458 F.3d 1104 (10th Cir. 2006) If a defendant is illegally seized or arrested and as the result of that illegal arrest, the defendant makes a statement, the defendant's identity is learned, and his illegal status is ascertained, the court may suppress all the evidence. The suppression of the defendant's statement is governed by Brown v. Illinois, 422 U.S. 590 (1975). The suppression of the identity evidence as well as the defendant's "A-file" is more complicated. The government argued that INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), holds that the identity of the defendant may never be suppressed. The Tenth Circuit rejected this argument. The defendant, himself, may not be suppressed (i.e., he may be brought to court), but evidence derived from the illegal detention may be suppressed, including fingerprint evidence in certain circumstances (see Davis v. Mississippi, 394 U.S. 721 (1969); Hayes v. Florida, 470 U.S. 811 (1985)) and independently created and maintained government records. The fact that the defendant does not have an expectation of privacy in the government records is not relevant. The standing issue focuses on the defendant's rights regarding the illegal arrest. The defendant need not have an expectation of privacy in the fruits that are the result of the unlawful arrest. In other words, the defendant is not required to prove an expectation of privacy in both the primary violation and the fruits. If his expectation of privacy was violated, the fruits of that violation may be suppressed, regardless of whether the fruits are discovered in a place for which the defendant does not have an expectation of privacy.

***United States v. Mosley***, 454 F.3d 249 (3rd Cir. 2006) If the police stop a car without an articulable suspicion, the discovery of contraband in the car must be suppressed, even in a prosecution of a passenger. Though Rakas v. Illinois indicates that the passenger has no expectation of privacy in the car, the passenger's motion to suppress is predicated on his unlawful detention and the fruit of that unlawful detention, rather than on the expectation of privacy in the automobile. The court's opinion runs twenty pages and comprehensively reviews the law of "fruit".

***United States v. Hudson***, 405 F.3d 425 (6th Cir. 2005) The police had an arrest warrant for the defendant but could not find him. The police made a warrantless, illegal stop of a car being driven by the defendant's girlfriend and discovered that the defendant was in the car. He was searched. The Sixth Circuit held that this was an illegal search. Because the stop was illegal, the search of the defendant was the fruit of that illegality, despite the fact that the police had a warrant for the defendant.

***United States v. Garcia-Beltran,*** 389 F.3d 864 (9th Cir. 2004) The defendant was arrested without probable cause. He was then fingerprinted for reasons unclear in the record. The fingerprint revealed that the defendant was an illegal alien. Because the record was unclear regarding the reason that he was fingerprinted, a remand was required to develop the facts. If the fingerprints were taken as part of the investigation of the defendant, then the evidence should have been suppressed as a fruit of the illegal arrest. Davis v. Mississippi, 394 U.S. 721 (1969) and Hayes v. Florida, 470 U.S. 811 (1985). The court reached the same holding in United States v. Ortiz-Hernandez, 427 F.3d 567 (9th Cir. 2005).

***United States v. Johnson***, 380 F.3d 1013 (7th Cir. 2004) The Seventh Circuit, in a decision by Judge Posner, holds that both the independent source doctrine and the inevitable discovery doctrine do not apply where the alternative source of information was derived from another illegal search and one for which the defendant has no standing to complain. In this case, the defendant and others were sitting in his parked car when two police officers approached. The police ordered the three occupants to exit the vehicle, though there was no articulable suspicion or probable cause. Contraband was found under the defendant's seat and other contraband was found in the other people's possession. The police then searched the trunk of the car and found counterfeit money. The government argued that the search under the seat and in the trunk would inevitably have occurred as a result of the illegal evidence seized from the other people. The defendant contended that even though he lacked standing to challenge the search of the other people, the government could not rely on that illegal seizure and argue that the illegal search of the trunk would have occurred as a result of those other illegal searches or that there was an independent source for the evidence found in the illegal trunk search. Judge Posner wrote, in essence, that two wrongs do not make a right.

***United States v. Hernandez***, 279 F.3d 302 (5th Cir. 2002) Suspicious of a bus traveler, a police officer took her luggage out of the baggage compartment of the bus and handled it, feeling from the outside the contents. This violated Bond v. United States, 529 U.S. 334 (2000), which held that such manipulation of luggage amounts to a search. The agent at that point entered the bus and secured the defendant's consent to open the suitcase. This was valid consent. But the consent was not sufficiently attenuated from the initial illegality to remove the taint. Thus, even though the search was conducted pursuant to the defendant's consent, it was still the fruit of the illegal search that preceded it. The officer decided to approach the defendant only after he had felt something suspicious in her suitcase. This invalidates the consent search.

***United States v. Vasquez de Reyes***, 149 F.3d 192 (3rd Cir. 1998) The police received a tip that three undocumented aliens were at a bar. The INS went to the bar and detained the defendant who did not meet the description of any of the subjects. The result of stopping the defendant was the discovery that she had engaged in immigration marriage fraud the evidence included the defendant's confession; and a statement by the defendant's supposed husband. The government contended that this would inevitably have been discovered during routine INS investigation when the defendant applied for a residency permit. The Third Circuit held that this was not the type of inevitable discovery envisioned by Nix v. Williams, 467 U.S. 431 (1984). Though the inevitable discovery rule is not necessarily limited to the discovery of physical evidence, it is not applicable to a subsequent

confession, or statement of another witness, the inevitability of which is far from certain. (Note that the court did not analyze in any detail whether the exclusionary rule – or the fruit of the poisonous tree doctrine – should operate to bar the testimony of the putative husband, whose identity was discovered only through the detention of the defendant. In other words, it was assumed, but not explained, that all evidence, including other witnesses' testimony, could be barred as the fruit of the poisonous tree. See United States v. Ceccolini).

***United States v. Johns***, 891 F.2d 243 (9th Cir. 1989) The defendant was stopped and questioned at an airstrip. There was neither probable cause nor an articulable suspicion justifying this stop. As a result of the stop, the police learned the identity of the defendant and with that information later discovered marijuana at the house of one of his known associates. The Court of Appeals holds that the illegally obtained identification significantly directed the investigation which led to the discovery of the marijuana. The illegal stop was the impetus for the chain of events leading to the marijuana and thus was too closely and inextricably linked to the discovery for the taint of the illegal arrest to have dissipated.

***United States v. Ramirez-Sandoval***, 872 F.2d 1392 (9th Cir. 1989) A police officer ordered occupants of a van to exit the van based on his suspicion that they were engaged in drug dealing. After the occupants were out of the car, the officer reached inside and pulled a piece of paper out from behind the visor. He read one of the names off the piece of paper which elicited a confession from another defendant that he was an illegal alien and the name and corresponding number on the paper referred to the amount of money he paid to be illegally transported across the border. The court held that the search of the van was unlawful and thus the defendant's confession was the fruit of an unlawful search. The government's contention that the confession was attenuated from the unlawful search was rejected. The illegally obtained evidence was clearly used by the officer in questioning the witness and eliciting the confession; there was virtually no elapsed time between the illegal search and the onset of questioning. Finally, the witnesses were not known to the investigating officers, unlike the witness in United States v. Ceccolini, 435 U.S. 268 (1978), in which the Supreme Court explained the attenuation doctrine.

***United States v. Drosten***, 819 F.2d 1067 (11th Cir. 1987) The unlawful entry into a defendant's apartment by police officers which resulted in the discovery of a third person in the apartment made that third person's testimony excludable.

***SEARCH AND SEIZURE (Good Faith / Leon)***

***Heien v. North Carolina***, 135 S. Ct. 530 (2014) A good faith mistake of law by a law enforcement officer does not render an arrest, or detention unreasonable under the Fourth Amendment. Even prior to the decision whether the exclusionary rule should apply, the court must consider that a Fourth Amendment violation requires that the arrest or detention be "unreasonable". And if the police officer has made an objectively reasonable mistake of law, then the detention of a suspect is not unreasonable. In Heien, the police officer stopped the defendant because he had only one working brake light. Under North Carolina law, cars are only required to have one working brake light. The parties agreed that the officer's mistake of law was reasonable. The defense claimed, however, that a mistake of law by a law enforcement officer renders a detention unreasonable for Fourth Amendment purposes. The Supreme Court disagreed. For the same reason that a reasonable mistake of fact does not render a detention unreasonable, a detention prompted by a reasonable mistake of law is also not an unreasonable detention.

***Arizona v. Evans***, 514 U.S. 1 (1995) Because of a clerical error, a computer showed that there was an outstanding arrest warrant for the defendant. He was arrested and a bag of marijuana was found. The Court holds that the good faith exception to the exclusionary rule applies in this context. Thus, if the police are acting in objectively reasonably good faith in arresting the defendant, a search incident to that arrest will be upheld, even if the arrest was later determined to be invalid because of a clerical error.

***Herring v. United States***, 129 S. Ct. 695 (2009) Sheriff's Deputies in one county were told by a clerk in a neighboring county that there was a warrant for the defendant's arrest. This was inaccurate. The neighboring county Sheriff personnel had negligently failed to erase the warrant from the computer system when it had been withdrawn. The question in this case is whether Arizona v. Evans, which applies to negligent errors by court personnel also applies in this situation, where the negligence is committed by law enforcement personnel. The Supreme Court held that the exclusionary rule would not be applied in this situation. Excluding the evidence derived from the improper arrest would not deter police misconduct since negligence is not deterred by "punishing" the police. There was no evidence of systematic errors by the neighboring county's sheriff's department.

***Davis v. United States***, 131 S. Ct. 2419 (2011) A search that was conducted in accordance with the prevailing law (Belton), would not be subject to the exclusionary rule on the basis of Gant, which was decided while the matter was still on direct appeal. The good faith exception to the exclusionary rule applies in this situation.

***United States v. Knox***, 883 F.3d 1262 (10th Cir. 2018) Disagreeing with the decisions of the Fourth, Eighth and Eleventh Circuits, the Tenth Circuit held that in considering whether the good faith exception to the exclusionary rule applies to an inadequate search warrant application, the reviewing court may not consider information known to the affiant, but not revealed to the magistrate. The good faith exception only applies if the information provided to the magistrate satisfied the objective good faith standard, not whether the officer had sufficient information, but failed to provide it either orally or in the affidavit to the magistrate.

***United States v. Griffith***, 867 F.3d 1265 (D.C. Cir. 2017) The police had reason to believe that the defendant had participated (perhaps as the getaway driver) in a homicide that occurred a year earlier. The search warrant affidavit reviewed all the facts amounting to probable cause and then sought permission to search the defendant's current apartment where he had moved

after the homicide and a brief stint in jail. The warrant only sought authority to seize cell phones because criminals communicate by phone. During the execution of the search warrant, the defendant threw a gun out the window. The D.C. Circuit held that (1) the warrant was deficient, because there was no probable cause that the defendant even had a cell phone or that it had any incriminating information contained in it; (2) there was no probable cause that a phone would be found in the apartment (as opposed to on his person if he were not present at the apartment when the warrant was executed); (3) the good faith exception to the exclusionary rule did not apply because the warrant was so lacking in probable cause to search or seize a cell phone; (4) the "abandonment" of the gun was the fruit of the execution of the defective search warrant and therefore the gun that was thrown out of the window was subject to the exclusionary rule.

***United States v. Brown,*** 826 F.3d 375 (6th Cir. 2016) Though there was probable cause to search the defendant's car; and though there was some evidence to believe that the defendant was involved in a heroin distribution conspiracy, there was insufficient information provided in the search warrant affidavit to justify a search of the defendant's house. There was no information that he ever sold heroin, or possessed heroin in his house. Instead, the agents relied only on their knowledge about what types of items are typically found in a drug dealer's house. The connection between the residence and the evidence of criminal activity must be specific and concrete, not "vague" or "generalized." This is an inadequate basis to issue a search warrant. The good faith exception to the exclusionary rule did not apply in this case, because the application "was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."

***United States v. Vasquez-Argarin,*** 821 F.3d 467 (3rd Cir. 2016) If the police have an arrest warrant for a person who resides at a certain location, all that is required to enter the premises is the arrest warrant. If the person for whom the arrest warrant was issued is simply present at a location, the police must obtain a search warrant in addition to the arrest warrant to enter the premises. The level of information known to the police that the person resides at the location must rise to the level of probable cause in order to obviate the need for a search warrant. The information known to the police in this case was insufficient to meet this threshold. The court noted that there is a wide divergence in the circuits regarding the level of knowledge that the police must have. Some courts require less than probable cause reason to believe, others require probable cause. The Third Circuit also held that the good faith exception to the exclusionary rule did not apply in this case, because the police were not relying on binding precedent, or a search warrant when they entered the house.

***United States v. Stanbridge***, 813 F.3d 1032 (7th Cir. 2016) The police stopped the defendant because he did not signal for 100 feet prior to parking along the curb. The district court held that the defendant did not commit a motor vehicle offense, but the officer's mistake of law was reasonable, so the exclusionary rule did not apply. The Seventh Circuit reversed: Reviewing the state law, the court concluded that when a turn is made, a 100-foot pre-turn signal is required, but not when a driver is changing lanes from a driving lane to the curb parking space. The law is not sufficiently ambiguous that the police could reasonably misunderstand it. Heien does not apply.

***United States v. Rush,*** 808 F.3d 1007 (4th Cir. 2015) A woman called the police and asked that they remove the defendant from her apartment where he had been staying and, according to her, dealing drugs. The woman met the police at a location away from the apartment and gave them consent to enter the apartment and gave them a key. The police went to the apartment and went in. The defendant was asleep in the master bedroom. They woke him up and told him that they had a search warrant to search the apartment. This was not true. But the police said that in order to protect the woman – hiding the fact that she had called the police and gave them permission to enter the apartment. The Fourth Circuit held that (1) searching the apartment was not a proper consent search because the defendant, as an occupant, had the right to object to a consensual search pursuant to Randolph; and (2) the police could not rely on the good faith exception to the exclusionary rule, because the police did not rely on some other authority in good faith in conducting the search (such as in Leon or Davis). Deterring the police from lying about the existence of a warrant is the type of case for which the exclusionary rule is particularly appropriate.

***United States v. Cordova***, 792 F.3d 1220 (10th Cir. 2015) The search warrant in this case was so devoid of probable cause – it was based on stale information, information that did not relate to the defendant, information about marijuana that was seized on the highway that was supposedly destined to another location at which the defendant formerly lived – that no reasonable officer could have believed that the warrant was valid. The warrant did not pass the Leon test.

***United States v. Alvarado-Zarza***, 782 F.3d 246 (5th Cir. 2015) A Texas statute requires that a turn signal be activated at least 100 feet prior to making the turn. In this case, the defendant activated his turn signal less than 100 feet prior to changing lanes, but more than 100 feet from where the turn actually occurred. The Texas police officer stopped the vehicle on the basis that the defendant violated the 100-foot rule by failing to activate his signal prior to changing lanes. The Fifth Circuit, in this post-Heien decision held that the officer's mistake of law applying the 100-foot rule to the change of lanes, rather than the actual turn was not reasonable and his possible mistake about whether the turn itself was less than 100-feet from the point that the signal was activated was also not reasonable. The stop of the vehicle was improper, and the evidence discovered as a result of the stop should have been suppressed.

***United States v. Cordero-Rosario***, 786 F.3d 64 (1st Cir. 2015) The initial search warrant stated that the crime under investigation was "lewd actions" and that "in accordance with the interview of the child, there is currently pornography on the defendant's computer. There was no information in the search warrant application about what the child said, how the alleged pornography was related to any offense, how the child knew about the presence of pornography on the computer, or why the affiant believed that pornography was evidence of a crime. The evidence should have been suppressed, because even the good faith exception to the exclusionary rule did not apply to this warrant. Based on the discovery of child pornography during the

search of the computer, the police went back to the apartment and secured the wife's consent to search additional computers. The First Circuit held that this was arguably the fruit of the poisonous tree exploiting the first illegal search, but further fact-finding was necessary to develop the record relating to the subsequent consent searches.

***United States v. Ramirez-Rivera***, 800 F.3d 1 (1st Cir. 2015) Based on information from an informant who had not previously been known to the police, the police went to the defendant's house to search for a fugitive. Without a search warrant, the police entered the house and arrested the fugitive, as well as the defendant on the basis that he was harboring the fugitive and found guns. The defendant was then brought to the police station where he made a statement. The First Circuit held that entering the house without a warrant was illegal: there were no exigent circumstances; and there was no probable cause, because the informant's information was not corroborated in any meaningful way, other than confirming the description of the house. The good faith exception to the exclusionary rule did not apply, at least in part because of the egregiousness of the violation, but also because the police testified that the reason they did not get a warrant is because it required more confirming evidence (thus revealing that the police knew that they did not have probable cause and were intentionally proceeding with the intention of not getting a search warrant which could not be obtained based on the lack of sufficient information). The evidence found during the search, as well as the defendant's statement should have been suppressed as fruit of the poisonous tree.

***United States v. Hill***, 776 F.3d 243 (4th Cir. 2015) The defendant was on supervised release. Nothing in the conditions of his supervised release amounted to a waiver of his Fourth Amendment rights. He was required to allow a probation officer to visit him in his home and was required to alert the probation officer if he moved. The defendant failed to notify his probation officer when he moved. The officer went to his new house with law enforcement officers and after arresting him for moving without notifying the probation department, the officers brought in a drug-detecting dog. This was an illegal search and the evidence should have been suppressed (unless, on remand, the government could make a showing that the independent source rule applied). Moreover, the good faith exception to the exclusionary rule did not apply.

***United States v. Bershchansky***, 788 F.3d 102 (2d Cir. 2015) The agents signed a search warrant application verifying in detail that they wanted to search Apartment 2 at a certain location where the defendant supposedly lived and where his computer IPS address was located. The warrant was issued. When the agents arrived, they realized that the defendant lived in Apartment 1. They searched that apartment. The Second Circuit held that the search was improper and was not conducted in good faith. This was not a case of a mere typographical error.

***United States v. Camou,*** 773 F.3d 932 (9th Cir. 2014) The defendant was stopped in his vehicle and charged with smuggling undocumented aliens. He was brought to the police station where he and one of his passengers were questioned. The passenger admitted that they regularly were engaged in smuggling activity. The police seized the defendant's cell phone and listed it on a property report as seized evidence. Approximately 90 minutes later, the police searched the contents of the phone. The Ninth Circuit held that this was a not proper search incident to arrest search, not a proper exigent circumstances search and not a proper "automobile exception" search. In addition, the court rejected the inevitable discovery doctrine and the good faith exception to the exclusionary rule as reasons not to apply the exclusionary rule.

***United States v. Vazquez***, 724 F.3d 15 (1st Cir. 2013) The police told the defendant that with or without her consent, the police were going to search her house. They claimed to have the authority based on the fact that her boyfriend (who the police erroneously believed lived in the house, too) was on parole and subject to a warrantless search. She consented. This was not valid consent, because it amounted to nothing more than acquiescence to a show of authority the police did not, in fact, have the authority to conduct a warrantless search, rather than free and voluntary consent. The court noted that the officers' subjective good faith that they had the authority to conduct a warrantless search did not exempt this case from the application of the exclusionary rule. Their good faith was not, according to the First Circuit, reasonable.

***United States v. Nicholson***, 721 F.3d 1236 (10th Cir. 2013) The police stopped the defendant's vehicle or a motor vehicle offense that did not actually occur. In short, the police thought the defendant had made an illegal left turn, when, in fact, there was nothing illegal about the method by which he made the turn. The law related to which lane a car must enter when making a left turn. This mistake of law on the part of the officer rendered the stop improper and any evidence discovered thereafter should have been suppressed. The Tenth Circuit distinguished mistakes of fact on the part of law enforcement officers which, if reasonable, will not lead to suppression of the evidence.

***United States v. Underwood***, 725 F.3d 1076 (9th Cir. 2013) The Ninth Circuit concludes that a state search warrant for the defendant's house lacked probable cause and also was so deficient, that the Leon good faith exception to the exclusionary rule did not apply. The warrant application simply recited the contents of a related federal search warrant affidavit which was used to search other conspirators' houses and, with regard to the defendant, noted that he had been seen delivering crates to alleged co-conspirators in a suspicious manner three months earlier and a personal-use amount of marijuana was observed in his house. Additional conclusory opinions were of no value in establishing probable cause.

***United States v. Harrison***, 689 F.3d 301 (3rd Cir. 2012) The Third Circuit noted that if the police make a reasonable mistake of fact such as whether an apartment is abandoned, as in this case, that does not negate probable cause. A mistake of law, on the other hand, is per se unreasonable.

***United States v. Shaw***, 707 F.3d 666 (6th Cir. 2013) The police had an arrest warrant for Ms. Brown, located at 3171 Hendricks Ave. They went to the general area and found two houses across the street from each other, both of which had the number 3170. Rather than further investigating the situation, the police chose the house that appeared to be occupied, knocked on the door and announced that they had a warrant, went in, conducted a sweep search, and found cocaine. The occupant, Mr. Shaw, was

arrested and prosecuted for the cocaine. The house was not 3171 Hendricks and Ms. Brown did not live in Shaw's house. The Sixth Circuit held that the evidence should be suppressed. There was no basis to enter that house; there was no basis to search that house; the officers were not acting in good faith when they said that they had a warrant for that house, or when they remained in the house after determining that it was the wrong house.

***United States v. Voustianiouk***, 685 F.3d 206 (2d Cir. 2012) The police had a search warrant to search the first-floor apartment at a certain address. When they arrived, they realized that the defendant lived in the second-floor apartment so they went there and conducted a search. The Second Circuit held that this amounted to a warrantless search that would not be saved by the good faith exception to the exclusionary rule.

***United States v. Grant***, 682 F.3d 827 (9th Cir. 2012) The police did not make a colorable claim that a weapon used in a homicide was likely to be found at the defendant's house. The defendant, who lived in the house was not tied to the homicide and his son, who may have been involved, was not shown to have gone to the defendant's house, or had the gun brought there. Even the good faith exception to the exclusionary rule did not resurrect this flawed search warrant.

***Virgin Islands v. John***, 654 F.3d 412 (3rd Cir. 2011) The defendant was known to have committed child molestation. There was no information to support the claim that there would be child pornography on the defendant's computer. Issuing a search warrant for the defendant's computer was not proper and the exclusionary rule applied. The affiant did not allege in the affidavit that there was a known correlation between child molesters and child pornography collectors. The failure to set forth this critical fact in the affidavit rendered the affidavit so lacking in probable cause that no reasonable officer could have relied on the warrant. The court explained that a magistrate may not infer a correlation between child abuse and the presence of evidence on a computer. That is a fact that must be averred in the affidavit. And when it is omitted, the court may not invoke the good faith exception to the exclusionary rule and assume that the officer was aware of this "fact."

***United State v. Doyle***, 650 F.3d 460 (4th Cir. 2011) The search warrant in this case failed to allege that pictures possessed by the resident of a house were pornographic and failed to allege when – or where – the pictures were possessed. This warrant lacked probable cause and did not even survive a good faith Leon review. The probable cause basis of the warrant provided the following: "Three minor children have come forward and stated that [Doyle] has sexually assaulted them at the Doyle residence. One victim [sic] disclosed to an Uncle that Doyle had shown the victim pictures of nude children." This description failed to state that the "nude pictures" were pornographic i.e., lewd depictions and because there was no statement of when these events occurred, the information was stale the court noted that the notion of staleness when it comes to computer evidence is rarely a basis to deny a search warrant, but in this case, there was no indication of when the pictures existed. In addition, the statement does not indicate where the pictures were shown to the child, so there was scant basis for believing that the evidence sought by the search warrant would be located at the residence, though the appellate court did not base its ultimate conclusion on this flaw in the warrant. With regard to the absence of probable cause, the court also noted that evidence of child molestation does not automatically authorize the search for child pornography.

***United States v. Master***, 614 F.3d 236 (6th Cir. 2010) The defendant lived in Coffee County. The police believed that he lived in Franklin County. A Franklin County judge issued a search warrant. The Sixth Circuit held that if a state judge does not have authority under state law to issue a search warrant for a particular location, the execution of the warrant violates the Fourth Amendment and the evidence must be suppressed, even in a federal court. This is not a case like Virginia v. Moore, 553 U.S. 164 (2008), in which the violation does not implicate the Fourth Amendment and only violates a state law. However, the Sixth Circuit also concluded that pursuant to Herring, the lower court must weigh the cost of suppression against the benefit of deterrence. Because the officers apparently believed that the property was located in the county where the judge was located, they acted in good faith and if this is satisfactorily established at a hearing, the exclusionary rule should not apply.

***United States v. Davis***, 598 F.3d 1259 (11th Cir. 2010) When the defendant's car was searched, Gant had not yet been decided, and the search was valid under then-prevailing law in the Circuit (interpreting Belton to authorize a car anytime there was an arrest of the driver). The question in this case, is whether a pre-Gant search is subject to suppression if the case is brought to court post-Gant. In other words, if the search was lawful when it was conducted, but subsequent changes in the law rendered it unlawful, should the exclusionary rule be applied. The Eleventh Circuit concluded that the exclusionary rule does not apply in this situation, relying on Illinois v Krull, 480 U.S. 340 (1987) and Herring v. United States, 129 S. Ct. 695 (2009). CERT GRANTED and the United States Supreme Court affirmed. 131 S. Ct. 2419 (2011).

***United States v. Cha***, 597 F.3d 995 (9th Cir. 2010) The police seized the defendant's house and held it for twenty-four hours (not allowing the defendant to enter), while a search warrant was obtained. This was too long, and the evidence obtained from the search that was conducted thereafter should have been suppressed, even though it could not be said that the search or the discovery of the evidence was the "fruit" of the illegal seizure. The court also rejected the government's effort to extend the Herring good faith exception to the exclusionary rule to this situation.

***United States v. Pena-Montes***, 589 F.3d 1048 (10th Cir. 2009) The police pulled over the car in which the defendant was a passenger because the officer could not see a license plate on the car. Upon approaching the car, the officer saw a dealer plate displayed in the rear window. The officer thought the car might be stolen, because the driver had no paperwork establishing his ownership, but after calling in the VIN number, the officer found no report that the car was reported stolen. Nevertheless, the officer questioned the defendant – the passenger – and decided that his answers to various questions were suspicious and eventually, he was arrested. The police later determined that he was an illegal alien. The Tenth Circuit held that the continued detention of the occupants of the car was not legal. Once the officer saw the dealer tag, there was no basis for detaining them.

The officer's testimony that dealer tags are limited circumstances in which a driver test-drives a car was legally incorrect. The officer's mistake of law as opposed to mistake of fact could not justify the continued detention of the vehicle's occupants. The court remanded the case to the lower court to assess the extent to which the exclusionary rule would apply in this case i.e., excluding evidence of the defendant's identity and status as an illegal alien.

***United States v. Clarkson***, 551 F.3d 1196 (10th Cir. 2009) In this Tenth Circuit decision, decided one week prior to the decision in Herring, the Tenth Circuit held that if a drug-sniffing dog is not properly trained, but a police officer relies in good faith on the statement of another officer that the dog is properly trained, the evidence will be subject to the exclusionary rule, because a police officer's reliance on another police officer who provides erroneous information is not covered by Arizona v. Evans. Again, however, this decision was issued prior to Herring.

***United States v. Hodson***, 543 F.3d 286 (6th Cir. 2008) The fact that the defendant was indisputably a child molester did not provide probable cause to believe that there was child pornography on his computer. The officer, moreover, could not have executed the warrant in good faith, because the application contained virtually no information that would have supported the search for pornography.

***United States v. Valadez-Valadez***, 525 F.3d 987 (10th Cir. 2008) The Tenth Circuit holds that stopping a vehicle because it is proceeding 10 mph below the speed limit is not a valid traffic stop in the absence of evidence that the defendant is obstructing or impeding the flow of traffic. In this case, the officer was laboring under a mistake of law (as opposed to a mistake of fact) about whether the defendant's speed must be impeding the flow of traffic before an offense is being committed. A mistake of law does not justify a stop which is not legally permissible. "An officer's failure to understand the plain and unambiguous law he is charged with enforcing is not objectively reasonable."

***United States v. West***, 520 F.3d 604 (6th Cir. 2008) Two search warrants were issued in this case. The first was devoid of probable cause, because it contained bare bones assertions about the defendant all of which were based on hearsay statements that the affiant learned from other officers and individuals. The warrant also failed to link any criminal activity on the part of the defendant with the location that the police wanted to search. The warrant did not even satisfy the Leon good faith standard. The second warrant set forth facts that an informant told the affiant that the defendant confessed to a murder and the body could be found in a well at a certain location; the warrant sought authorization to search the defendant's van. The affiant, however, failed to reveal that the informant was serving time in federal custody and that the police went to the location where the body was supposedly located and found nothing – not even a well.

***United States v. Rice***, 478 F.3d 704 (6th Cir. 2007) The Leon good faith exception to the exclusionary rule does not apply to Title III wiretap cases. Because suppression is a statutory remedy, the court-made exception to the court-created exclusionary rule in other search cases, does not apply. In this case, the warrant application contained misrepresentations and recklessly made false statements which, when corrected, negated the necessity requirement for a wiretap. The court also upheld the trial court's finding that various boilerplate representations about alternative methods were not useful in a wiretap application.

***United States v. Luong,*** 470 F.3d 898 (9th Cir. 2006) The linchpin of the basis for obtaining the search warrant was an unverified tip that someone arriving on a plane from overseas was a chemist who was involved in methamphetamine manufacturing. The affidavit did not even identify who the suspect was. There was insufficient probable cause to support the issuance of a search warrant and the affidavit was so lacking in probable cause that Leon did not apply. The Ninth Circuit also held that where a search warrant application is so lacking in probable cause, the court would not consider any supposed oral communications made by the affiant to the issuing magistrate in deciding whether Leon would resurrect the warrant.

***United States v. McPhearson***, 469 F.3d 518 (6th Cir. 2006) The bare bones search warrant stated that a person was arrested in front of his house and that he had drugs in his pocket was so deficient in setting forth probable cause that drugs could be found in the house that even the good faith exception to the exclusionary rule could not resurrect the search. United States v. Washington, 455 F.3d 824 (8th Cir. 2006) The police pulled the defendant over because his windshield was cracked. A gun was found, and the defendant was prosecuted for being a felon in possession of a firearm. Driving with a cracked windshield, however, is not a violation of Nebraska State law. Therefore, the stop of the defendant was unlawful, and the discovery of the gun was a fruit of the illegal stop. The government's argument that the officer acted in good faith was rejected: The mistake of law was not objectively reasonable. The question is not whether the officer subjectively believed that the law was being violated, but whether, from an objective point of view, a belief that the law was being violated was reasonable.

***United States v. Herrera,*** 444 F.3d 1238 (10th Cir. 2006) A state administrative law permitted the inspection of any vehicle weighing over 10,000 pounds. The police officer in this case believed that the defendant's pickup truck weighed over 10,000 pounds and stopped the vehicle to perform an inspection. Actually, the truck did not weigh over 10,000 pounds. The officer's mistake of fact rendered the search unlawful. In contexts of searches other than administrative searches, a reasonable mistake of fact does not render a search unlawful. But with regard to administrative searches, because the exception to the warrant requirement is based on the "target's" acquiescence to being searched by engaging in the administratively regulated activity, the officer's mistake of fact cannot be used as a basis for obviating the requirement of probable cause. In short, the defendant, by driving a vehicle that did not weigh over 10,000 pounds, did not knowingly engage in activity that was pervasively regulated.

***United States v. Cole***, 444 F.3d 688 (5th Cir. 2006) The defendant stopped at a stop sign just shy of the cross walk, but over the solid white line. He claimed that this did not violate Texas law. The government argued that the traffic stop was valid regardless of the actual Texas law, because the officer, in good faith, thought that the law required the defendant to stop before the solid white line. The Fifth Circuit held that a good faith mistake as to the law was not a cure for an invalid stop.

***United States v. Hython***, 443 F.3d 480 (6th Cir. 2006) The search warrant application revealed that a controlled purchase of cocaine occurred at the target location, but nowhere in the warrant did the affiant reveal when this controlled purchase occurred. Therefore, the information in the warrant application was stale and there was no probable cause to search the premises. Moreover, the Leon good faith exception did not apply. In reaching the Leon conclusion, the Sixth Circuit noted that whether an officer could objectively rely on the warrant as being valid, the court held that the inquiry is limited to the four corners of the affidavit. Thus, what the affiant actually knew (but did not recite in the affidavit) cannot be considered in the good faith analysis.

***United States v. Angelos***, 433 F.3d 738 (10th Cir. 2006) Though the FBI and the AUSA intended to get a search warrant that would have allowed the agents to search the defendant's car and house (and there was, in fact, probable cause to search both the car and the house), they mistakenly submitted a search warrant that only identified the car as the target of the search. Searching the house was therefore impermissible. Moreover, because the search warrant clearly only authorized the search of the car, the good faith exception to the exclusionary rule did not apply.

***United States v. Frazier***, 423 F.3d 526 (6th Cir. 2005) When deciding whether an invalid search warrant may be resurrected under the good faith Leon rationale, the Sixth Circuit previously held Laughton, below that only information in the affidavit may be considered in making the good faith determination. In this case, however, the court extended Laughton and held that other information actually conveyed to the magistrate by the affiant may also be considered in evaluating the affiant's good faith.

***United States v. Laughton***, 409 F.3d 744 (6th Cir. 2005) The fact that the officer knew more facts than he recited in the warrant application is not relevant to the good faith analysis. The question to be decided in assessing whether the warrant which is facially invalid could be rescued by Leon is whether a reasonable officer would have believed in the validity of the warrant and the existence of probable cause, not whether the officer in this case actually had sufficient information which he simply did not recite in the application. The Eleventh Circuit reached a contrary result in United States v. Martin, 297 F.3d 1308 (11th Cir. 2002).

***United States v. Gonzales***, 399 F.3d 1225 (10th Cir. 2005) The defendant's car was searched after it was involved in a car accident. Ammunition was found, but no gun. A search warrant was issued, but the application never explained the basis for searching the specific location that the affiant wanted to search. The search warrant failed not only to establish probable cause, but also failed the good faith standard. "For good faith to exist, there must be some factual basis connecting the place to be searched to the defendant or suspected criminal activity."

***United States v. Gourde***, 382 F.3d 1003 (9th Cir. 2004) REVERSED BY EN BANC COURT – 440 F.3d 1065 (9th Cir. 2006). The FBI learned about a website that permitted members to download child pornography. Defendant Gourde was determined to have been a member of the web site for two months. The FBI obtained a search warrant, claiming that any member would have had access to the child pornography. The affiant offered various expert opinions about the M.O. of child pornographers on the internet. The Ninth Circuit held that there was no probable cause to search the defendant's house and seize his computers based on this information. Moreover, Leon did not apply, because no officer could have relied in good faith on this warrant. There was no information that Gourde had actually downloaded any files from the website, though the FBI acknowledged that it had the capability of determining whether he did prior to the time the search was executed. See also United States v. Weber, 923 F.2d 1338 (9th Cir. 1990). REVERSED BY EN BANC COURT.

***United States v. Chanthaxouxat***, 342 F.3d 1271 (11th Cir. 2003) The police pulled over the defendant's car because the officer believed that the defendant was in violation of a municipal law that required an inside rear-view mirror. Actually, there was no such law. This rendered the stop illegal and the officer's good faith did not rescue the government. An officer's good faith mistake of fact may support a stop, but a mistake regarding the law cannot support an illegal stop and the evidence derived from the stop must be suppressed.

***United States v. Parker***, 373 F.3d 770 (6th Cir. 2004) The magistrate who issued the search warrant in this case was a part-time employee of the local jail in an administrative capacity. She did not qualify as a "neutral and detached magistrate" as required by the Fourth Amendment and the Leon good faith exception to the exclusionary rule did not apply. Among other reasons, the judge had an interest in the outcome of the proceedings because of her work as the chief lieutenant deputy jailor for financial matters including the collection of fees and billings for housing inmates and for trying to secure the financial stability of the jail. See Tumey v. Ohio, 273 U.S. 510 (1927).

***United States v. DeGasso***, 369 F.3d 1139 (10th Cir. 2004) Though the police were justified for other reasons in stopping the defendant's vehicle, one of the purported justifications was invalid. The police officer mistakenly believed that the defendant was violating a local law which regulated the use of fog lamps on cars. The highway patrol officer mistakenly believed that the use of fog lamps was improper during daylight hours unless the weather conditions required their use. Actually, the use of fog lamps is only outlawed if they are used in lieu of regular headlights during the nighttime. The Tenth Circuit held that even though the officer acted in good faith, this was not a valid basis for stopping a car and is not excused by the officer's supposed good faith.

***United States v. Hammond***, 351 F.3d 765 (6th Cir. 2003) Because of the Franks v. Delaware violations that tainted the search warrant, the court concluded that the officer could not have acted in good faith in executing the search warrant. "The number of falsehoods and half-truths told are substantial and reflect, at very least, a reckless disregard for the truth."

***United States v. Conner***, 127 F.3d 663 (8th Cir. 1997) The police received a tip that two burglars were at a motel. Six officers went to the motel and went to the room in front of which the burglars' car was parked. The police knocked on the door and yelled, "Open up." When one of the defendants opened the door, the police observed through the open door various coins they knew a

coin collection had been stolen in the burglary. The officers pulled their weapons and arrested both defendants. They then obtained a search warrant on the basis of what they observed in the room. The trial court correctly granted a motion to suppress. Though the police did not enter the room in order to see the coins, when they ordered the occupants to open the door, and thereby gained the ability to see in the room, this amounted to a search. Demanding that the occupants open the door did not amount to a consent search and there were no exigent circumstances necessitating the immediate entry into the room. The search pursuant to the search warrant was not salvaged by Leon, because the information contained in the application (the observations that were gained through the illegal entry), negate the existence of good faith. Finally, the officers would not have inevitably discovered the evidence, because absent the illegal entry, no other investigatory effort was underway to obtain a search warrant for the motel room.

***United States v. Moreno-Chaparro***, 180 F.3d 629 (5th Cir. 1998) A border patrol agent improperly stopped the defendant's car. The government urged the court to recognize that the agent acted in good faith. However, there are only three good faith exceptions to the exclusionary rule, reliance on a statute found to be unconstitutional; reliance on an outdated computer-generated warrant report; and reliance on a search warrant issued by a magistrate. Application of the good faith exception to the exclusionary rule to a warrantless stop of a vehicle without an articulable suspicion or probable cause is not proper.

***United States v. Fuccillo***, 808 F.2d 173 (1st Cir. 1987) The search warrant in this case authorized the seizure of cartons of women's clothing, the contents of those cartons, without identifying the contents of the cartons, and control slips identifying the stores intended to receive those cartons. The vice with this warrant was the failure to specify what types of clothing were subject to seizure – that is what clothing was believed to have been stolen and thus within the parameters of the search warrant affidavit. The Court holds that the warrant was overbroad on its face and that the good faith exception did not apply because of the obvious infirmity of the warrant.

***United States v. Reilly***, 76 F.3d 1271 (2d Cir. 1996) The police entered the defendant's property and observed marijuana growing in a cottage. Armed with this information, the police went to a magistrate and acquired a search warrant. The district court granted the motion to suppress, and the Second Circuit affirmed. First, the court held that the cottage was within the curtilage of the property and the initial search was unlawful. The court then held that the subsequent efforts of the police to secure a search warrant did not trigger the good faith exception to the exclusionary rule. The police failed to reveal essential facts to the magistrate about their prior conduct, and the layout of the property when they obtained the search warrant. The court also cited numerous cases – but did not explicitly adopt this view – holding that the good faith exception should never apply where the police obtain a search warrant with evidence that was obtained during a warrantless and unlawful search.

***United States v. Wilhelm***, 80 F.3d 116 (4th Cir. 1996) The affidavit in support of the search warrant relied entirely on the statements of a tipster who the affiant/officer had never met and who was not known to be reliable. The unsupported conclusions of the officer that the informant was reliable, mature and a concerned citizen were not sufficient, since the officer had no basis for asserting that the tipster was either reliable, mature, or concerned. The affidavit was so defective that the good faith exception to the exclusionary rule did not apply.

***United States v. Weaver***, 99 F.3d 1372 (6th Cir. 1996) An informant went to the defendant's house with $100 of government money to attempt to buy marijuana. The government agents did not provide surveillance, or in any other way corroborate the informant's statement that he did, in fact, buy the marijuana at that location. This information did not support the issuance of a search warrant. Nowhere in the affidavit did the affiant disclose where the marijuana was kept or stored, the quantity of marijuana in the house, or any other particularized information that would have supported the belief that there was currently marijuana on the property. Also, the affidavit did not provide any information about the informant's reliability, other than boilerplate language about his being reliable in the past. For example, the affidavit did not say that the informant's past reliability related to drug cases. Finally, the corroboration of innocent details, such as the name on the utility's records for the residence, was meaningless. The court also held that when a police officer supplies a bare bones affidavit which is insufficient, and then executes the warrant himself, he cannot rely on the good faith exception to the exclusionary rule. Here, the officer attempted no meaningful corroboration of the informant's information and conducted no other independent investigation, other than learning the identity of the occupant of the residence. The unlawful search, therefore, was not saved by Leon.

***United States v. Leake***, 998 F.2d 1359 (6th Cir. 1993) An unknown tipster informed the police that marijuana was in the defendant's basement. The tip was not "rich" in detail; he did not identify the occupants by name; he failed to state when he "smelled" the marijuana in the house; and no future conduct was accurately predicted as in Gates. Also, the corroboration of the tip was virtually meaningless. The court held that Leon did not rescue this search.

***United States v. Bowling***, 900 F.2d 926 (6th Cir. 1990) After obtaining a search warrant in good faith, officers learned that certain facts contained in the affidavit were not correct and would have cast a doubt on the existence of probable cause. The Sixth Circuit holds that in such circumstances the appropriate course of action is for the agents to return to the Magistrate and obtain a new warrant if the Magistrate feels that probable cause still exists. In this case, prior to executing the search warrant, other law enforcement officers obtained the subject's consent to search the property and did not find any of the evidence and contraband which the agents had stated were present on the property in their search warrant application. The court goes on to hold that such a search does not pass the Leon test of good faith. The law was clear that probable cause must exist both when the warrant is applied for and when it is executed. The officers knew that probable cause was questionable when they executed the warrant and thus, they did not act in objective good faith.

***United States v. Baxter***, 889 F.2d 731 (6th Cir. 1989) A police officer applied for a search warrant stating that a confidential informant had advised him that drugs were at a certain location. In fact, there was no confidential informant, but rather an anonymous phone caller. The anonymous caller had not, contrary to what the police officer stated in the affidavit, provided any reliable information in the past. The Sixth Circuit holds that this constitutes a Franks violation and under Leon, there is no good faith exception to the exclusionary rule in cases where the police officer intentionally makes misstatements in the search warrant affidavit.

***United States v. Fletcher***, 91 F.3d 48 (8th Cir. 1996) The factors upon which the government relied in support of the detention of the defendant's luggage at an airport were not sufficient. However, having detained the bags, the officers then obtained a search warrant and the good faith exception to the exclusionary rule applied. The court held that if facts are learned during an illegal detention that are then used to acquire a search warrant, the Leon good faith rule may still apply. "The relevant inquiry is whether the facts surrounding reasonable suspicion are close enough to the line of validity that the police officers were entitled to a belief in the validity of the warrant and the existence of reasonable suspicion."

***United States v. O'Neil***, 17 F.3d 239 (8th Cir. 1994) The defendant and his brother arrived at a bus station in Minnesota from a source city, Chicago. The defendant and his brother walked immediately and briskly to the exit and were carrying athletic type bags. The brother had both of the bus tickets; the defendant, when confronted by drug agents, began sweating profusely. The police seized the bag, and the defendant immediately stated that it contained cocaine. The police brought the bag to a canine dog which alerted. The magistrate then issued a warrant. The appellate court held that the seizure was not supported by an articulable suspicion. The government then argued that because there was a warrant to support the search, the good faith exception to the exclusionary rule should apply. The Eighth Circuit disagreed: if the evidence presented to a magistrate is derived from an unlawful warrantless search, then the government cannot rely on the good faith exception, even if the warrant is issued by a neutral and detached magistrate. In this case, however, the defendant's confession was independent of the seizure.

***United States v. Decker***, 956 F.2d 773 (8th Cir. 1992) After making a controlled delivery of drugs to the defendant's house, the police went to a magistrate to obtain a search warrant for the home. The form used for the search warrant, however, referred to stolen property and only allowed the search of the package. The judge testified at the suppression hearing that he really never looked at the warrant; he simply listened to the officer explain why he thought the UPS package contained drugs. In this context, the judge was a mere "rubber stamp" and as such the government failed to show that the issuing judge was a neutral and detached magistrate. The officers could not act in good faith in reliance on this warrant.

***United States v. Weber***, 915 F.2d 1282 (9th Cir. 1990) The defendant's house was searched pursuant to a search warrant which was directed at the presence of obscene material in the defendant's home. The search warrant, however, allowed officers to search for a wide variety of magazines and advertising materials, none of which was backed up by probable cause. The only evidence against this defendant was the fact that a couple of ads addressed to him apparently depicted child pornography. The affiant's statement about the "proclivities of pedophiles" did not support a wall-to-wall search of the house. The affidavit simply did not support a search for child pornography in general. The court rejected certain aspects of the warrant as "rambling boiler-plate recitations designed to meet all law enforcement needs." Finally, the court concludes that the good faith exception to the exclusionary rule did not apply. The court's amended decision, 923 F.2d 1338, did not alter the result.

***United States v. Hove,*** 848 F.2d 137 (9th Cir. 1988) In the affidavit in support of the search warrant, the police officers failed to link the suspect with the residence which was sought to be searched. This inadvertent failure to link the suspect to the premises rendered the affidavit insufficient and the officers could not have relied on it in good faith in searching the premises. This absence of good faith exists even though the officer in fact knew the link between the suspect and the residence.

***United States v. Washington,*** 797 F.2d 1461 (9th Cir. 1986) Sections of the federal warrant in this case which authorized the seizure of documents showing an employer/employee relationship between persons named and unnamed and evidence of defendant's association with anyone did not meet the particularity requirement of the Fourth Amendment. Furthermore, the search warrant was so facially deficient that officers could not have acted in "objectively reasonable" reliance upon them.

***United States v. Scales***, 903 F.2d 765 (10th Cir. 1990) Leon does not apply to searches which were not performed in reliance on a warrant. Police officers seized a defendant's luggage and held it for seven hours prior to having it sniffed by a drug detection dog. It took another fourteen hours to obtain a search warrant. Because the pre-sniff detention was too long, the police could not rely on the "good faith exception" to the exclusionary rule.

***United States v. Ellis***, 971 F.2d 701 (11th Cir. 1992) A search warrant directed the police to the wrong address. When they arrived there, the occupant told them where to go to find the target location. Because the information in the warrant did not adequately describe the place to be searched, the warrant failed the particularity test. Furthermore, the officers did not execute the warrant in good faith, because the officers did not actually know the correct location such as those cases where the warrant simply has a typographical error, but the officer knew the correct location to be searched. Here, uncertain where the defendant lived, the officers simply accepted the word of the occupant of the first house.

***United States v. Taxacher***, 902 F.2d 867 (11th Cir. 1990) In judging whether the good faith exception to the exclusionary rule applies, the question is whether a police officer's belief in the existence of probable cause underlying a search warrant was objectively reasonable from the viewpoint of a reasonable officer, not a reasonable jurist.

***SEARCH AND SEIZURE (GPS DEVICES and CELL SITE LOCATION INFORMATION)***

***United States v. Jones***, 132 S. Ct. 945 (2012) The Supreme Court affirmed the decision of the D.C. Circuit in United States v. Maynard, though on somewhat different grounds. In the majority decision, the Court held that placing a GPS device on a car a trespass, coupled with the effort to acquire information by exploiting that trespass, constitutes a search. The Court held that placing the device on the car was a form of "trespass" and under traditional and historical Fourth Amendment jurisprudence a trespass qualifies as a search if the trespass is conducted for the purpose of acquiring information. In a concurring opinion, which also garnered five votes, Justice Alito questioned the trespass theory, but held that the continuous monitoring of the defendant's car for 28 days amounted to a search.

***Grady v. North Carolina***, 135 S. Ct. 1368 (2015) Placing a GPS device on a probationer as part of his sex offender registry conditions is a Fourth Amendment search that requires application of the "reasonableness" requirement of the Fourth Amendment.

***United States v. Thompson***, 866 F.3d 1149 (10th Cir. 2017) Four months prior to the oral argument in Carpenter, the Tenth Circuit holds that the third-party doctrine governs the analysis regarding the constitutionality of § 2703(d).

***United States v. Stimler***, 864 F.3d 253 (3rd Cir. 2017) In anticipation of the Supreme Court decision in Carpenter, the Third Circuit reiterates that the third-party doctrine does not bar a challenge to CSLI searches. However, also consistent with Third Circuit precedent, the Court holds that the government made an adequate showing pursuant to § 2703(d) for disclosure of the information.

***United States v. Carpenter***, 819 F.3d 880 (6th Cir. 2016) The Sixth Circuit joins other Circuits and holds that obtaining records from a cell tower is not a fourth amendment search.

***United States v. Graham***, 824 F.3d 421 (4th Cir. 2016) The Fourth Circuit, en banc, concludes that a search warrant is not necessary for law enforcement to collect historical cell site information from the provider, pursuant to 18 U.S.C. § 2703.

***United States v. Davis***, 785 F.3d 498 (11th Cir. 2015) (en banc) Reversing the panel opinion, the en banc Eleventh Circuit holds that 18 U.S.C. § 2703 is not unconstitutional and there is no constitutional requirement that law enforcement establish probable cause, or obtain a search warrant, prior to obtaining historical cell tower information.

***In re Application of the United States for Historical Cell Site Data***, 724 F.3d 600 (5th Cir. 2013) The Fifth Circuit holds that for historical cell site data (this opinion does not involve real time cell site data), the government may rely on a § 2703(d) application to the court and it is not necessary to establish probable cause in order to obtain such information from a cell phone provider. The data requested applied to data generated when the phone was in service and when it was idle, but the government told the court that the providers do not keep records when the phone is in an idle state. Thus, only information relating to when a phone is in service was sought by the application. The Fifth Circuit rejected the Third Circuit approach (see below), which held that the Magistrate could require a showing of probable cause. The Fifth Circuit held that the statute is mandatory and directs the court to issue the order upon a showing that the information is needed for an ongoing investigation. In United States v. Guerrero, 768 F.3d 351 (5th Cir. 2014), the court held that the Supreme Court decision in Riley which held that the police need a search warrant to search a cell phone, has no impact on the Fifth Circuit's earlier ruling that held that obtaining GPS tracking information is not a Fourth Amendment search.

***United States v Pineda-Moreno***, 688 F.3d 1087 (9th Cir. 2012) The Ninth Circuit, in a decision that predated Jones, held that attaching a GPS device to a vehicle was not a search. The Supreme Court remanded that decision in light of Jones for reconsideration. This is the decision that reconsidered the holding in light of Jones. This time, the Ninth Circuit held that the officers acted in good faith reliance on existing law when they attached the GPS device to the vehicle and therefore, the evidence would not be suppressed.

***United States v. Skinner***, 690 F.3d 772 (6th Cir. 2012) A magistrate issued an order directing the phone company to provide "ping" information to law enforcement. The agents were then able to "ping" the target's phone and determine his location while he was en route delivering drugs. The Sixth Circuit held that the defendant had no expectation of privacy in the data emanating from his phone that showed its location. The Sixth Circuit distinguished Jones with the observation that the plurality in Jones relied on the trespass that occurred when the GPS device in that case was planted on the defendant's car. No such intrusion occurred in this case. The court also distinguished Justice Alito's concurring opinion in Jones which did not rely on the trespass, because the tracking in this case only lasted three days, which does not reach the threshold for "intensive monitoring" that Justice Alito described as sufficient to invoke the Fourth Amendment.

***In re Application of U.S. for Records From Provider of Electronic Communication Service***, 620 F.3d 304 (3rd Cir. 2010) The Third Circuit canvasses the law regarding the government's effort to obtain Cell Site Location Information ("CSLI") from a provider. The government sought records that would show where a certain cell phone was located at various times, based on the cell tower data. The appellate court considers what statute governs the government's request Stored Communications Act, 18 U.S.C. § 2703(d) and what the government must show (specific and articulable facts establishing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information from a cell tower are relevant and material to an ongoing criminal investigation). The court distinguished United States v. Knotts, 460 U.S. 276 (1983), because the CSLI will not reveal information about what is occurring in a home, which the court views as the limit of Knotts' holding. The court holds that the trial court may require a warrant.

***SEARCH AND SEIZURE (Highway Stops)***

***Rodriguez v. United States***, 135 S. Ct. 1609 (2015) The Supreme Court emphasized that the tolerable duration of a traffic stop is determined by the legitimate mission of the stop: a traffic stop may not be prolonged – even for a few minutes – in order to engage in a criminal investigation. In Rodriguez, the defendant was pulled over on the Interstate for driving on the shoulder. After concluding the traffic stop procedures checking the license and registration and issuing a warning, the officer asked for permission to walk his dog around the car. The defendant declined this invitation. The officer detained the defendant nevertheless and deployed the dog. The time that elapsed from the issuance of the traffic warning until the dog alerted was approximately seven or eight minutes. The Supreme Court condemned the stop and ordered that the evidence be suppressed: Though the police may engage in an unrelated investigation during the course of a legitimate highway stop (such as asking questions about the defendant's itinerary), the stop may not be prolonged absent reasonable suspicion or probable cause. Whether the officer expeditiously concludes the traffic related investigation or not, the stop may not be prolonged to conduct a general criminal investigation.

***Utah v. Strieff***, 136 S. Ct. 2056 (2016) If a defendant is pulled over for an investigatory stop illegally (there was no articulable suspicion or probable cause to support the stop) and the police determine that there is an outstanding arrest warrant for the defendant, a search incident to arrest is proper and the exclusionary rule does not bar the use of evidence discovered during the search incident to arrest. The illegal stop is too attenuated from the discovery of the evidence that was the product of the legal search incident to arrest.

***Heien v. North Carolina***, 135 S. Ct. 530 (2014) A good faith mistake of law by a law enforcement officer does not render an arrest, or detention unreasonable under the Fourth Amendment. Even prior to the decision whether the exclusionary rule should apply, the court must consider that a Fourth Amendment violation requires that the arrest or detention be "unreasonable". And if the police officer has made an objectively reasonable mistake of law, then the detention of a suspect is not unreasonable. In Heien, the police officer stopped the defendant because he had only one working brake light. Under North Carolina law, cars are only required to have one working brake light. The parties agreed that the officer's mistake of law was reasonable. The defense claimed, however, that a mistake of law by a law enforcement officer renders a detention unreasonable for Fourth Amendment purposes. The Supreme Court disagreed. For the same reason that a reasonable mistake of fact does not render a detention unreasonable, a detention prompted by a reasonable mistake of law is also not an unreasonable detention.

***Navarette v. California***, 134 S. Ct. 1683 (2014) A 911 caller who did not identify herself, told the dispatcher that a specific vehicle had just run her off the road. The police went to the highway and saw the described vehicle, followed it for a few minutes (observing no traffic infractions) and then stopped the vehicle. Drugs were located in the car. The Supreme Court held that the traffic stop was permissible under the Fourth Amendment. Because the caller correctly identified the vehicle – a fact verified the police who later observed the vehicle traveling in the direction described by the caller; and because the caller would know that his or her cell phone could be traced, there was sufficient indicia of reliability to authorize the stop. Four Justices dissented.

***Brendlin v. California***, 127 S. Ct. 2400 (2007) When the police stop a vehicle that has a driver and passenger, the passenger is also "detained" for fourth amendment purposes. Therefore, if there was no basis for the stop, the passenger may contest the admissibility of any fruits of that stop (for which he has standing), such as a statement he made, or evidence seized from his person or personal belongings.

***Illinois v. Caballes***, 125 S. Ct. 834 (2005) The defendant was stopped for a routine speeding violation. While the car was stopped and the trooper was preparing a warning ticket, another officer walked a drug dog around the car. The dog alerted; the car was searched based on probable cause; and drugs were found. The Supreme Court held that this was permissible. A dog alert is not a "search" and in this case, the time it took to walk the dog around the car did not prolong the stop. Thus, there was no Terry violation and no need for a warrant or an articulable suspicion to authorize the use of the dog.

***United States v. Arvizu***, 534 U.S. 266 (2002) The Supreme Court reversed the Ninth Circuit which had categorically held that various innocent factors could not be considered by the police in assessing whether there was an articulable suspicion supporting a stop of a vehicle on the road. In this case, the officer's suspicions were aroused by the location of the vehicle in the desert of rural Arizona; the vehicle slowed when it approached the officer; children in the minivan waved at the officer in a manner that struck the officer as unusual; and the driver did not acknowledge the officer's presence. The Ninth Circuit had held that these factors could not even be considered by the court in determining whether there was a basis for stopping the vehicle. The Supreme Court unanimously held that under the totality of the circumstances test, all facts may be considered by the court in reviewing the officer's basis for stopping a vehicle. The Court also noted that the officer was entitled to assess the situation in light of his specialized training and familiarity with the customs of the area's inhabitants.

***United States v. Campbell***, --- F.3d --- (11th Cir. 2019) Rodriguez led the Eleventh Circuit to condemn a traffic stop in this recent Eleventh Circuit decision. The defendant in Campbell was stopped on I-20 in Georgia on the basis that his direction signal light was blinking too rapidly, indicating a possible malfunction of the wiring or a bulb. The police officer asked the driver a number of questions about his destination and decided to write him a warning ticket because of the malfunctioning light. The officer then asked a few questions focusing on whether the driver had any contraband in the car, including drugs, counterfeit items, or guns or "dead bodies." These questions were not normal inquiries addressing traffic safety issues. The Eleventh Circuit held that asking these questions prolonged the stop – albeit just for 25 seconds – but that any delay violated Rodriguez, because there is no de minimis exception to the Fourth Amendment. In Campbell, a total of six minutes and seven seconds elapsed from the time the stop was made until the driver consented to the search. Nevertheless, the 25-second delay caused by the

questioning unrelated to the traffic stop rendered the stop illegal. The court went on to hold that the good faith exception to the exclusionary rule applied, because Rodriguez had not been decided at the time the traffic stop was made in Campbell.

***United States v. Bowman***, 884 F.3d 200 (4th Cir. 2018) In a lengthy opinion, the Fourth Circuit holds that adding up numerous factors that did not establish reasonable suspicion to prolong a stop results in nothing more than an absence of reasonable suspicion. Therefore, prolonging a stop based on an anonymous tip, plus the driver's nervousness and inability to exactly recite his itinerary violated the Fourth Amendment.

***United States v. Rodriguez-Escalera***, --- F.3d --- (7th Cir. 2018) There was insufficient information known to the trooper to prolong a traffic stop beyond the time it was necessary to accomplish the mission of the traffic stop. The driver and passenger provided inconsistent statements about the couple's travel plans. The presence of a strong odor of air fresheners did not add to the level of reasonable suspicion.

***United States v. Gorman***, 859 F.3d 705 (9th Cir. 2017) A police officer stopped the defendant without sufficient articulable suspicion and then prolonged the stop to the point that it amounted to an illegal detention. Finding no evidence during this encounter, the officer radioed ahead to another officer and told him to get a drug dog and stop the defendant again. The second officer had a dog ready when he stopped the car and the dog promptly alerted, providing probable cause to search the vehicle. The Ninth Circuit held that the second stop was the fruit of the initial illegal stop. The evidence was suppressed.

***United States v. Orozco***, 858 F.3d 1204 (9th Cir. 2017) The defendant's truck was pulled over because the police received a tip that he was hauling drugs. There was insufficient basis under Terry to stop the truck, so the government relied on the administrative warrant exception to support the legality of the stop which led to a consent search. The Ninth Circuit held that the evidence was clear that the police did not pull the truck over on the basis of the administrative search provisions, but solely based on the tip. This was a classic "pretextual" stop and therefore the stop was not legitimate and the resulting consent to search was invalid. The Court emphasized that in the context of administrative searches (and roadblocks), the actual motive of the police does matter.

***United States v. Lopez,*** 849 F.3d 921 (10th Cir. 2017) The police pulled the defendants' car over for speeding. After determining that the driver had a valid license and asking some questions to the driver and passenger, the officer returned the papers to the driver and began to walk away, but then turned back and asked for consent to search, which was denied. The officer then summoned a drug dog, which took twenty minutes to arrive. The government contended that there was sufficient basis to detain the driver and passenger because (1) nervousness; (2) unusual travel itinerary; (3) the passenger asked the police not to look in the backseat because it was too messy (it was not messy). The Tenth Circuit held that these factors did not rise to the level of an articulable suspicion justifying prolonging the stop. The court also held that both the driver and the passenger had standing to object to the prolonged stop and the evidence would be suppressed for both of them.

***United States v. Paniagua-Garcia,*** 813 F.3d 1013 (7th Cir. 2016) The police saw the defendant "fiddling" with a cell phone. It is a violation of Indiana state law to "text-while-driving" but it is not a violation to talk on the phone or use GPS. The Seventh Circuit holds that the officer's observation did not amount to an articulable suspicion that the defendant was violating the texting-while-driving prohibition.

***United States v. Williams***, 808 F.3d 238 (4th Cir. 2015) The defendant was the driver of a car driving on I-85. When stopped for speeding, the officer initially decided to have the defendant take a breath test (which the defendant passed). The driver said that he and his companion were heading to Charlotte. The passenger said the same thing. (At an initial suppression hearing, the officers testified that there was a second car that was stopped that was driving in tandem with the defendant's car and that the driver of that car disavowed knowing the defendant; though the defendant said that the other driver was his brother. When a tape of the stop of the other car was located, it revealed that the officer was wrong in his testimony and that the driver of that car expressly acknowledged that the other car was being driven by his brother). The defendant was unable to provide a permanent home address where he lived in New York. Eventually, the officer asked for consent to search, which the defendant refused. The officers then detained the defendant while a drug dog was summoned. The delay lasted two minutes, after which the drug dog alerted. The Fourth Circuit held that any detention beyond the time it takes to complete the stop's mission is unconstitutional, and there was insufficient information to rise to the level of articulable suspicion to justify the detention for two minutes. The government's argument (that the use of a rental car; driving on the Interstate after midnight; driving on a known drug corridor, I-85; and the inability to specify a permanent home address), were rejected by the court as insufficient factors to justify a detention.

***United States v. Patiutka***, 804 F.3d 684 (4th Cir. 2015) The defendant was pulled over on the Interstate for a traffic offense. The trooper asked him for his driver's license and asked the defendant some identifying information, including the defendant's age. The trooper thought that the defendant gave an answer about his age that was inconsistent with the driver's license. The trooper asked for consent to search the car. Initially, the defendant apparently consented (his foreign accent made it difficult to understand him), but shortly thereafter revoked his consent. At that point, the trooper detained the defendant and began to search again. The district court granted the motion to suppress: (1) there was no probable cause to arrest the defendant (the judge found that there was insufficient evidence that the defendant lied about his birthdate), and therefore no basis for a search incident to arrest; (2) the automobile exception did not apply, because the evidence known to the officers (even the evidence found during the aborted consent search) did not amount to probable cause. All that was found was a credit card reader and three iPads. This does not amount to probable cause to search a car.

***United States v. Wilbourn***, 799 F.3d 900 (7th Cir. 2015) Law enforcement was aware of extensive evidence linking the defendant to drug dealing, including recent activities earlier in the day. The government failed to present any evidence, however, that law enforcement's knowledge of the defendant's activities was ever communicated to the two officers who stopped the car in which the defendant was a passenger. While there was sufficient information known to law enforcement generally because there was no evidence that the police who stopped the vehicle had any articulable suspicion, the evidence derived from the stop should have been suppressed.

***United States v. Flores***, 798 F.3d 645 (7th Cir. 2015) In this post-Heien v. North Carolina decision, the Seventh Circuit held that the officer's belief that the defendant's vehicle was being operated in violation of the state license plate law was unreasonable and, therefore, the stop of the vehicle was not justifiable, and the resulting search of the car was the fruit of the unlawful stop. The frame around the license plate obscured in a minimal way, one letter of the "Baja California" words on the plate. The frame was typical of the frames provided by car dealers and did not violate the state law.

***United States v. Alvarado-Zarza,*** 782 F.3d 246 (5th Cir. 2015) A Texas statute requires that a turn signal be activated at least 100 feet prior to making the turn. In this case, the defendant activated his turn signal less than 100 feet prior to changing lanes, but more than 100 feet from where the turn actually occurred. The Texas police officer stopped the vehicle on the basis that the defendant violated the 100-foot rule by failing to activate his signal prior to changing lanes. The Fifth Circuit, in this post-Heien decision held that the officer's mistake of law (applying the 100-foot rule to the change of lanes, rather than the actual turn) was no reasonable and his possible mistake about whether the turn itself was less than 100- feet from the point that the signal was activated was also not reasonable. The stop of the vehicle was improper, and the evidence discovered as a result of the stop should have been suppressed.

***United States v. Evans***, 786 F.3d 779 (9th Cir. 2015) After completing the normal traffic stop inquiry, the police prolonged the stop of the defendant in order to determine if he was properly registered as an ex-felon. This was an unconstitutional extension of the stop see Rodriguez, annotated above. and rendered the resulting discovery of evidence subject to suppression.

***United States v. Iraheta,*** 764 F.3d 455 (5th Cir. 2014) If a driver consents to the search of his automobile, including all closed containers, and there are suitcases belonging to passengers in the vehicle, if the passengers hear the consent given by the driver and don't object, the consent is valid. However, where, as here, the consent is given outside the earshot of the passengers, the consent is not a valid consent insofar as it purports to consent to the search of passengers' belongings.

***United States v. Noble,*** 762 F.3d 509 (6th Cir. 2014) The police were watching the Interstate for a vehicle that was suspected to be involved in a methamphetamine distribution operation. When the vehicle was spotted, an officer pulled behind it. The vehicle crossed a lane line without a proper signal. The officer activated his lights. The officer determined that the tint on the window was too dark. The driver and the passenger the defendants were excessively nervous. The driver consented to a search of the vehicle, at which point the passenger/defendant was asked to exit the vehicle and he was frisked. Because there was no basis to believe that he was armed or dangerous, there was no legitimate basis to frisk the defendant and the evidence derived from this frisk should have been suppressed. The facts that the driver and passenger were nervous, and that the vehicle was suspected of being involved in a drug trafficking operation are not sufficient to support a reasonable belief that the passenger was armed or dangerous, even coupled with the officer's experience that drug dealers are often armed. The court ridicules the notion that any passenger in a car can be frisked if the driver or the vehicle is suspected of being involved in drugs: this would presumably include "a fourth grader, a ninety-five-year-old gentleman with Parkinson's disease, or a judge this court." The law requires individualized suspicion of the person who is to be frisked, not a general belief that someone in the vehicle might possibly be armed.

***United States v. $45,000.00***, 749 F.3d 709 (8th Cir. 2014) A police officer stopped the defendant's vehicle on the basis that he could not read the state on the license plate and because the defendant exited the Interstate on an exit that was unusual for an interstate traveler the defendant was heading to Utah and was passing through Nebraska because it had no services at the exit. After giving the defendant a citation for the unreadable license plate, the officer deployed a drug dog. The dog alerted and the police found $45,000 in currency. The officer later conceded that once he came within 100 feet of the car, he could see the license plate said "Utah," though the state name was partially obscured. Thus, there really was no violation that prompted the initial stop. The Eighth Circuit held that if there was no actual violation, the stop was improper. Because the license plate was readable within 100 feet, the stop was improper. The defendant's decision to use a particular exit, while possibly characterized as unusual, added little to the probable cause basis for detaining him.

***United States v. Saafir***, 754 F.3d 262 (4th Cir. 2014) The police stopped the defendant for a motor vehicle infraction. Dispatch advised the officer that the defendant was a gang member with prior convictions, but no outstanding warrants. The police asked for consent to search the car, but the defendant refused. Then, based on the observation of a "flask" which the officer believed contained alcohol, the officer advised the defendant that they had probable cause to search the vehicle with or without his content. This was not true. The defendant then sighed, and when asked if there was "something in the car" the defendant responded, that there might be; there "might be" a gun and it "might" be under the seat. In fact, there was no evidence that the flask actually contained alcohol. The probable cause that existed to search the car defendant's acknowledgement that he had a gun in the car was the product of the false assertion that the police would search without a warrant based on the presence of the alcohol in the flask. As in Bumper v. North Carolina, 391 U.S. 543 (1968), which consent was the product of a false assertion of authority to search, the existence of probable cause in this case was the product of a false assertion of authority to search.

***United States v. Nicholson***, 721 F.3d 1236 (10th Cir. 2013) The police stopped the defendant's vehicle or a motor vehicle offense that did not actually occur. In short, the police thought the defendant had made an illegal left turn, when, in fact, there was nothing illegal about the method by which he made the turn. The law related to which lane a car must enter when making a left turn. This mistake of law on the part of the officer rendered the stop improper and any evidence discovered thereafter should have been suppressed. The Tenth Circuit distinguished mistakes of fact on the part of law enforcement officers which, if reasonable, will not lead to suppression of the evidence.

***United States v. Uribe,*** 709 F.3d 646 (7th Cir. 2013) The defendant was driving a blue Nissan on the Interstate and there was no evidence that he was violating any motor vehicle law. A police officer driving behind him, however, determined that the car was actually registered to a white Nissan. The officer pulled the defendant over and thereafter, a canine alerted to the vehicle. The trial court determined that there was no basis for the stop and the Seventh Circuit agreed. The color of a vehicle is irrelevant because an owner may point his car without changing the registration information.

***United States v. Murphy***, 703 F.3d 182 (2d Cir. 2012) The trial court's findings of fact, which included the finding that the trooper stopped the defendant's vehicle without having observed a traffic violation, were not clearly erroneous and therefore, the suppression of evidence was proper. The defendant's consent to search the car was tainted by the unlawful detention.

***United States v. Sowards***, 690 F.3d 583 (4th Cir. 2012) An officer's testimony that he visually determined that a driver was traveling five miles per hour over the speed limit did not establish probable cause to support the stop of the defendant's car. The officer did not "pace" the car, or use his radar equipment, but only visually estimated the speed and his testimony at the suppression hearing showed that he was not trained to do so.

***United States v. Neff,*** 681 F.3d 1134 (10th Cir. 2012) The defendant exited the highway immediately after he passed a "checkpoint sign" that alerted drivers that a drug dog would sniff cars farther ahead. The Tenth Circuit concluded that the defendant's exiting the highway in apparent response to this this "ruse-checkpoint" tactic did not provide sufficient information to justify a stop in this case.

***United States v. Lewis***, 672 F.3d 232 (3rd Cir. 2012) The police received information from a reliable informant that firearms were in a white Toyota that had a license plate that included the numbers "181." The informant did not relay his basis of knowledge, or whether the firearms were illegally possessed. The police stopped the vehicle. A gun was found on the defendant. Later, the officers determined that the vehicle had illegally tinted windows. The Third Circuit held that the traffic stop could not be supported by the illegal tint, because even though that might have been a valid basis for stopping the vehicle, the officers were not aware of that offense when the vehicle was stopped. The informant's information was also insufficient to support the stop. It is not illegal to possess a firearm, consequently, the mere fact that a firearm is in a vehicle is not a legitimate basis to stop the vehicle.

***United States v. Macias***, 658 F.3d 509 (5th Cir. 2011) The duration of the traffic stop in this case lasted too long to be justified as a legitimate motor vehicle stop. The state trooper pulled the defendant over because he was not wearing a seat belt. He determined that the defendant did not have proof of insurance. The trooper then questioned the defendant at length about his work history, his itinerary, his purpose for traveling and his health. The defendant's consent to search the vehicle was the product of the illegal detention.

***United States v. Digiovanni***, 650 F.3d 498 (4th Cir. 2011) The defendant was pulled over based on a traffic violation. Yet, the police spent the first fifteen minutes of the stop talking about drugs and the defendant's itinerary and did nothing to pursue the typical traffic violation procedures. The Fourth Circuit held that even though the entire stop, prior to the discovery of drugs, lasted only fifteen minutes, a Terry stop must not only be limited in terms of duration, but also in scope. In short, the police must act reasonably, and this includes a component of acting diligently to pursue the legitimate basis of the stop. The detention in this case was not proper. The officer's claim that he had a reasonable suspicion based on various facts – there were two shirts hanging in the back of the car; there was a hygiene bag in the back seat; the car was clean; the defendant's hands were trembling while he was being questioned – were rejected as providing any basis for the prolonged stop.

***United States v. Raney***, 633 F.3d 385 (5th Cir. 2011) The Fifth Circuit concludes that there was no violation of the Texas motor vehicle code that justified the police officer's stop of the defendant. All evidence derived from the stop should have been suppressed.

***United States v. Olivares-Pacheco***, 633 F.3d 399 (5th Cir. 2011) Two hundred miles from the border, the border patrol agents saw the defendant driving a Chevy truck with numerous passengers. Nobody made eye contact with the agents, but all of the passengers looked the opposite direction when one of the passengers pointed to something on the other side of the road. The police also saw some "brush" under the vehicle. The Fifth Circuit concluded that these two factors, even coupled with the agents' experience, were not sufficient to support the stop of the vehicle. "If we were to affirm the district court['s denial of the suppression motion] in this case, we would be doing so based on facts of an unprecedented suspicions less nature."

***United States v. Foster***, 634 F.3d 243 (4th Cir. 2011) The Fourth Circuit condemns the government's use of post hoc explanations to justify a police officer's detention of a defendant. Relying on such observations as "sudden hand movement in the car" and "suddenly appearing from crouched position" are not valid bases for stopping a defendant and then claiming that these were factors that justified the stop. The Court suppressed the evidence found during a search that followed a stop based on these circumstances.

***United States v. Prokuper,*** 632 F.3d 460 (8th Cir. 2011) The police set up a fake roadblock warning advising drivers on the interstate of a forthcoming road block. The defendant exited prior to the designated location. The police then pulled the defendant over. On the recorded encounter between the defendant and the officer, the officer said that the defendant used his turn signal when he turned off the exit ramp onto the county road, but not when he exited the interstate. At the suppression hearing, the officer acknowledged that he did not see the defendant actually exit the interstate and that the traffic stop was based on the failure to use his turn signal when he turned on the county road. The officer could not explain his contemporaneous statement that he made during the recorded stop. The district court simply found a valid stop based on the failure to use a turn signal when the turn was made on the county road. The Eighth Circuit reversed. There was no way to reconcile the officer's testimony at the hearing and his statement on the tape.

***United States v. Pena-Montes***, 589 F.3d 1048 (10th Cir. 2009) The police pulled over the car in which the defendant was a passenger because the officer could not see a license plate on the car. Upon approaching the car, the officer saw a dealer plate displayed in the rear window. The officer thought the car might be stolen, because the driver had no paperwork establishing his ownership, but after calling in the VIN number, the officer found no report that the car was reported stolen. Nevertheless, the officer questioned the defendant – the passenger – and decided that his answers to various questions were suspicious and eventually, he was arrested. The police later determined that he was an illegal alien. The Tenth Circuit held that the continued detention of the occupants of the car was not legal. Once the officer saw the dealer tag, there was no basis for detaining them. The officer's testimony that dealer tags are limited circumstances in which a driver test-drives a car was legally incorrect. The officer's mistake of law as opposed to mistake of fact could not justify the continued detention of the vehicle's occupants. The court remanded the case to the lower court to assess the extent to which the exclusionary rule would apply in this case i.e., excluding evidence of the defendant's identity and status as an illegal alien.

***United States v. Gross***, 550 F.3d 578 (6th Cir. 2008) A sheriff's deputy stopped the defendant's vehicle on the Interstate on the basis that it appeared to be straddling two lanes of traffic. The officer's testimony, however, revealed that the defendant was essentially changing lanes, though it took some distance to complete the lane change (100 yards). The Sixth Circuit held that the testimony of the officer, even if believed in its entirety, did not establish a violation of the traffic laws that would support a stop of the vehicle. The resulting consent to search was invalid and the evidence should have been suppressed.

***United States v. Peralez***, 526 F.3d 1115 (8th Cir. 2008) The traffic stop of the car in which the defendant was riding lasted too long. The police officer asked various drug interdiction questions that doubled the length of time that the stop would have lasted had he confined himself to the motor vehicle infraction questions. However, this did not support suppression of the evidence, because a drug dog alerted to the vehicle during this period of questioning.

***United States v. Valadez-Valadez***, 525 F.3d 987 (10th Cir. 2008) The Tenth Circuit holds that stopping a vehicle because it is proceeding 10 mph below the speed limit is not a valid traffic stop in the absence of evidence that the defendant is obstructing or impeding the flow of traffic. In this case, the officer was laboring under a mistake of law as opposed to a mistake of fact, about whether the defendant's speed must be impeding the flow of traffic before an offense is being committed. A mistake of law does not justify a stop which is not legally permissible. "An officer's failure to understand the plain and unambiguous law he is charged with enforcing is not objectively reasonable."

***United States v. Blair***, 524 F.3d 740 (6th Cir. 2008) The police stopped the defendant both because he had an inoperable taillight and because they thought he was involved in drug activity. Based on the evidence developed at the hearing, the court concluded that there was insufficient basis to stop the defendant based on any drug suspicion, but there was sufficient information to stop him based on the taillight violation. However, the stop lasted too long based on a taillight violation. After the information was obtained that was necessary to issue a citation, the police asked for consent to search the car (which was denied) and then said that they would detain the defendant until a drug dog arrived. This prolonged the stop beyond what was justified by a taillight infraction.

***United States v. Urrieta***, 520 F.3d 569 (6th Cir. 2008) After pulling the defendant over for improper registration and weaving, the trooper determined that the defendant had a Mexican driver's license which the trooper incorrectly believed did not authorize the defendant to drive in Tennessee. The trooper wrote a ticket for the registration violation but prolonged the traffic stop based on his erroneous belief that the license was insufficient and because of his suspicion that the defendant was smuggling drugs. Eventually twenty-four minutes after the stop commenced, the trooper asked for consent to search the car, which the defendant provided. The Sixth Circuit held that the stop lasted too long, based on the trooper's erroneous understanding of the law and the consent was tainted by the prolonged detention. The court also rejected the government's suggestion that the trooper had a reasonable basis for believing that the defendant was smuggling drugs. The "characteristics" upon which the government relied were not sufficient to amount to a reasonable articulable suspicion. Finally, the court held that even if there was reasonable suspicion to believe that the defendant was in the country without proper documents, the trooper lacked the authority to investigate this matter.

***United States v. Henderson***, 463 F.3d 27 (1st Cir. 2006) In a lengthy opinion carefully reviewing the record of the suppression hearing, the First Circuit held that the trial court erred in making a credibility determination that the officer who made the traffic stop in this case was truthful about the passenger (the defendant) not wearing a seatbelt. Based on the officer's testimony, which was riddled with inconsistencies and contradictions, the district court should have granted the suppression motion.

***United States v. Guerrero-Espinoza***, 462 F.3d 1302 (10th Cir. 2006) The defendant was a passenger in a car that was stopped on the Interstate for a motor vehicle offense. After the warning ticket was given to the driver, but before he returned to the car,

the trooper began questioning the defendant. This was not a consensual continuation of the stop and was not authorized by any reasonable articulable suspicion.

***United States v. Jenson***, 462 F.3d 399 (5th Cir. 2006) The police pulled the defendant over for speeding and the officer's suspicion was aroused by varying stories told by the defendant and his passenger about what they were doing and where they worked. Some of the questioning occurred after the warning was issued. The police asked for permission to search the car, which was granted. Prior to starting the search, the police started to frisk the defendant, but he resisted, which prompted the officer to draw his weapon and order the defendant to raise his arms. The defendant was searched, and a small gun was found. The Fifth Circuit held that the detention lasted longer than was justified by the information known to the police and that the consent to search was invalid, thereby also invalidating the decision to frisk the defendant.

***United States v. Washington***, 455 F.3d 824 (8th Cir. 2006) The police pulled the defendant over because his windshield was cracked. A gun was found, and the defendant was prosecuted for being a felon in possession of a firearm. Driving with a cracked windshield, however, is not a violation of Nebraska State law. Therefore, the stop of the defendant was unlawful, and the discovery of the gun was a fruit of the illegal stop. The government's argument that the officer acted in good faith was rejected: The mistake of law was not objectively reasonable. The question is not whether the officer subjectively believed that the law was being violated, but whether, from an objective point of view, a belief that the law was being violated was reasonable.

***United States v. Cole***, 444 F.3d 688 (5th Cir. 2006) The defendant stopped at a stop sign just shy of the cross walk, but over the solid white line. He claimed that this did not violate Texas law. The government argued that the traffic stop was valid regardless of the actual Texas law, because the officer, in good faith, thought that the law required the defendant to stop before the solid white line. The Fifth Circuit held that a good faith mistake as to the law was not a cure for an invalid stop.

***United States v. Hudson***, 405 F.3d 425 (6th Cir. 2005) The police had an arrest warrant for the defendant but could not find him. The police made a warrantless, illegal stop of a car being driven by the defendant's girlfriend and discovered that the defendant was in the car. He was searched. The Sixth Circuit held that this was an illegal search. Because the stop was illegal, the search of the defendant was the fruit of that illegality, despite the fact that the police had a warrant for the defendant.

***United States v. Edgerton***, 438 F.3d 1043 (10th Cir. 2006) A trooper pulled the defendant's car over because the tag was not visible. Upon approaching the car, the trooper saw that the temporary tag was in the rear window. This complied with state law requirements. Nevertheless, the trooper asked for the driver's license and registration and after reviewing it, asked for consent to search the car, which was given. Drugs were then found in the trunk. The Tenth Circuit reversed: once the trooper determined, while walking up to the car, the tag was proper, he should have explained to the defendant the reason for the initial stop and then allowed her to continue on her way without requiring her to produce her license and registration. See also United States v. McSwain, 29 F.3d 558 (10th Cir. 1994).

***United States v. Davis***, 430 F.3d 345 (6th Cir. 2005) When a drug dog failed to alert to the defendant's car, which had been stopped on the highway, the police summoned a second drug dog. This unlawfully prolonged the duration of the stop initially prompted by a speeding charge.

***United States v. Laughrin***, 438 F.3d 1245 (10th Cir. 2006) Knowledge of a person's prior criminal involvement is alone insufficient to give rise to the requisite reasonable suspicion supporting a traffic stop. In this case, the officer testified that he had stopped the defendant repeatedly in the past for driving without a license, or on a suspended license. On that basis, when the officer saw the defendant driving, he pulled him over. This was an unlawful stop. The officer's encounter with the defendant was more than twenty-two weeks previously and this was too long a time to presume that the defendant's license was still suspended. The information known to the officer, therefore, was too stale to support a stop of the defendant's vehicle.

***United States v. Jaquez***, 421 F.3d 338 (5th Cir. 2005) The police received a report of gun shots at a location and that a red car was involved. Fifteen minutes later, an officer pulled over the defendant who was driving a red car in the general vicinity of the reported gun shots. The Fifth Circuit held that there was insufficient information to support the stop of the defendant's car and the subsequent consent search was invalid.

***United States v. Richardson,*** 385 F.3d 625 (6th Cir. 2004) After issuing the driver a warning ticket, the police asked him to "stay where he was" and then approached one of the passengers the owner of the car for consent to search. This direction to the driver amounted to a detention – a detention that had no basis in an articulable suspicion – and amounted to an unlawful stop that tainted any subsequent search, even a consensual search. The detention of the driver amounted to a detention of all the car's occupants.

***United States v. DeGasso***, 369 F.3d 1139 (10th Cir. 2004) Though the police were justified for other reasons in stopping the defendant's vehicle, one of the purported justifications was invalid. The police officer mistakenly believed that the defendant was violating a local law which regulated the use of fog lamps on cars. The highway patrol officer mistakenly believed that the use of fog lamps was improper during daylight hours unless the weather conditions required their use. Actually, the use of fog lamps is only outlawed if they are used in lieu of regular headlights during the nighttime. The Tenth Circuit held that even though the officer acted in good faith, this was not a valid basis for stopping a car and is not excused by the officer's supposed good faith.

***United States v. Valenzuela,*** 365 F.3d 892 (10th Cir. 2004) The police stopped a Cadillac and discovered 250 pounds of marijuana. The police believed that a pickup truck had been driving in tandem with the Cadillac and later stopped that vehicle. The pickup drove in close proximity to the Cadillac for twenty-five miles, including through two cities; both cars had Arizona license plates (this was occurring in New Mexico); the appearance of the cars suggested that they were involved in drug

smuggling. The appellate court held that the information known to the police was insufficient to support stopping the pickup. Though United States v. Arvizu requires the court to consider all the factors together, the court warned that it would not pile hunch upon hunch.

***United States v. Chanthaxouxat***, 342 F.3d 1271 (11th Cir. 2003) The police pulled over the defendant's car because the officer believed that the defendant was in violation of a municipal law that required an inside rear-view mirror. Actually, there was no such law. This rendered the stop illegal and the officer's good faith did not rescue the government. An officer's good faith mistake of fact may support a stop, but a mistake regarding the law cannot support an illegal stop and the evidence derived from the stop must be suppressed.

***United States v. Boyce***, 351 F.3d 1102 (11th Cir. 2003) The defendant was stopped on the Interstate. His license was checked, and the officer issued a warning citation and then asked for consent to search the vehicle. The defendant declined to consent. The officer then summoned a drug dog and instituted a warrant check. Though in United States v. Purcell, 236 F.3d 1274 (11th Cir. 2001), the court held that a warrant check that prolongs a stop is permissible, in that case, the warrant check was instituted as part of the normal traffic stop, whereas in this case, it was only initiated after the defendant declined to consent to a warrantless search. Here, the drug dog arrived in about six minutes, but the prolonged stop was unlawful, and the ensuing search was unlawful.

***United States v. Perkins***, 348 F.3d 965 (11th Cir. 2003) The defendants' car was pulled over for drifting over the shoulder lane marker. This was permissible and a driver license check was also permissible. During this time, the officer questioned the driver and the passenger about their itinerary. Their answers were arguably inconsistent, and the officer testified that the defendant was extremely nervous during the questioning. Based on the inconsistent statements as well as the defendant's nervousness, the officer decided not to allow the defendants to leave and summoned a drug dog. The Eleventh Circuit held that the duration of the detention did not per se violate the Fourth Amendment, but there was no reasonable suspicion justifying any detention after the warning ticket for the lane violation. The appellate court concluded that nervousness can be explained by the "unsettling show of authority" that can create substantial anxiety with every traffic stop.

***Joshua v. Dewitt***, 341 F.3d 430 (6th Cir. 2003) The defendant was stopped for speeding and the trooper determined that he, along with his passenger were acting nervous and suspicious. The trooper called his dispatcher and was told that the defendant was listed as a suspicious person who was believed to be a drug courier in a "Read & Sign" book maintained by the police department. Based on this information, the trooper detained the defendant while waiting for a canine to arrive. The dog arrived forty-two minutes later. Drugs were found on the passenger, who implicated the defendant. State trial counsel failed to challenge the legitimacy of the Read and Sign book that prompted the detention. Instead, he simply challenged the length of the detention. Based on United States v. Hensley, 469 U.S. 221 (1985), a detention based on a "flyer" or something else akin to a "Read and Sign" book requires proof that the author of the flyer had reasonable suspicion to list the suspect as a criminal. In this case, however, the state offered no proof that the Read and Sign book was based on reliable information. Moreover, the state's contention that the defendant's nervousness justified a detention was meritless. Nervousness may be a basis for an articulable suspicion, but only when it is coupled with evasive behavior. The state trial lawyer's failure to challenge the stop and search on this basis was ineffective assistance of counsel. The Sixth Circuit also noted that Hensley is not limited to initial stops, but also covers situations in which a stop is prolonged based on this type of information. The Sixth Circuit concludes that not only was trial counsel ineffective, but appellate counsel was, as well.

***United States v. Childs***, 277 F.3d 947 (7th Cir. 2002) (en banc) In this en banc decision, the Seventh Circuit holds that the nature of the questions that are asked a driver who is stopped for a motor vehicle infraction does not alter a lawful stop into an unlawful stop, unless the questioning has the effect of lengthening the detention beyond what would be justified by the traffic infraction.

***United States v. Patzer,*** 277 F.3d 1080 (9th Cir. 2002) The police lacked probable cause to arrest the defendant for DUI. The officer may have believed that the defendant had ingested marijuana, but there was no information suggesting that this impaired his ability to drive which is an element of the DUI offense. Absent probable cause to arrest the defendant, the ensuing search of his automobile could not be justified as a search incident to arrest. Similarly, the defendant's consent was tainted by the unlawful arrest. Finally, the court ordered suppressed the statements made by the defendant that were the product of the illegal arrest.

***United States v. Yousif***, 308 F.3d 820 (8th Cir. 2002) The police set up a fake "drug interdiction" roadblock, alerting drivers that it was located farther down the highway. Between the location of the notice and the supposed checkpoint was an exit with no services for motorists. The police then stopped the cars that exited. The checkpoint in this case occurred prior to the Supreme Court's decision in Indianapolis v. Edmond, 531 U.S. 32 (2000). The Eighth Circuit concluded that the fact that the defendant exited the highway after seeing a drug checkpoint sign, even when viewed in combination with other factors, was not a sufficient basis for stopping the vehicle.

***United States v. Townsend***, 305 F.3d 537 (6th Cir. 2002) The facts known to the state highway patrol officer were not sufficient to justify a prolonged stop. The facts were: the defendant promptly raised his hands in the air when stopped and promptly had his documentation ready to give to the officer; he readily admitted driving over the speed limit; he said he was driving to his sister's house but did not know the address and was going to call her when he arrived. Moreover, the police saw food wrappers in the car, three cell phones and a bible. The officer also felt a "roll of money" when he frisked the defendant. The Sixth Circuit upheld the lower court's decision suppressing the search. Even after United States v. Arvizu, 534 U.S. 266 (2002), the courts are not obligated to defer to the police officer's experience in evaluating the lawfulness of a detention.

***United States v. Beck***, 140 F.3d 1129 (8th Cir. 1998) The defendant was stopped on the Interstate for following another vehicle too closely. When the officer explained the basis of the stop to the defendant, he appeared nervous. He was driving a rental car rented by his wife and had started his trip in California a source state. He had fast food trash on the front passenger floorboard. No luggage was observed in the back seat. After the defendant was given a warning ticket, the officer told him he was free to leave and started walking back to his car. He stopped, however, and asked the defendant if he had any guns or drugs. The defendant answered, "No." The officer then asked for consent to search the car and the defendant asked why, after which the officer and defendant engaged in a colloquy. The defendant asked what would happen if he refused consent. The officer responded that he would walk a drug dog around the car. A drug dog arrived and was walked around the car. He alerted. Thereafter, the defendant admitted having some drugs in his briefcase. The Eighth Circuit reversed the conviction. The detention of the driver, without his consent, after the warning ticket was given to him and he asked what would happen if he refused consent, was unlawful. When the officer told him that even if he did not consent, a drug dog would be walked around the outside of the car, the defendant could not reasonably believe that he was free to leave. The facts known to the police at that time did not create a reasonable articulable suspicion that the defendant had any contraband in the car, so there was no lawful basis for detaining the defendant. The court reviewed the factors, outlined above, and concluded that the starting point of the defendant's travel California is not suspicious the court reviewed the case law, showing that dozens of states and cities around the country have been identified in other cases as "source cities". Fast food wrappers, moreover, are hardly uncommon in vehicles traveling across country. Also, nervousness is not uncommon in people when confronted by law enforcement officers. Finally, the driver's explanation that he was going to North Carolina to look for a job was not suspicious.

***United States v. Winningham***, 140 F.3d 1328 (10th Cir. 1998) The defendant was stopped by border patrol agents and told that he was suspected of smuggling aliens. He consented to a search of the van and other than one passenger, nobody was found. The defendant then was told that the agent had information that the defendant was smuggling drugs. The defendant again consented to a search of his van, but it took about five minutes for a drug dog to arrive. The dog jumped into the open door of the van and alerted to the presence of drugs near the rear vent. The defendant did not consent to having the dog enter the vehicle. The trial court suppressed the evidence, concluding that the defendant's consent did not encompass allowing the dog to enter the vehicle. The Court of Appeals affirmed. There was no reasonable suspicion justifying the detention of the driver and the van after the initial search yielded nothing; therefore, the only basis for holding the van for five or six minutes, was the driver's consent. The consent that was given, the appellate court concluded, was not voluntary: the driver had been asked to exit the vehicle and stand next to three armed officers. After the initial search ended, the driver was not told that he was free to leave. When the driver started walking away, a law enforcement officer followed him. These factors, taken together, show that any consent given by the driver was not free and voluntary.

***United States v. Miller***, 146 F.3d 274 (5th Cir. 1998) A deputy sheriff was patrolling the highway, looking for vehicles engaged in traffic violations so that he could pursue drug interdiction. The deputy observed the defendant driving a motor home with its left turn signal on, but the vehicle neither made a left turn, nor changed lanes. For this reason, the deputy pulled the defendant over. After issuing the defendant a warning citation, he asked for consent to search the vehicle and the defendant agreed. Eighty kilograms of marijuana were found. The district court admitted the evidence. The Fifth Circuit reversed: driving with a left turn signal on (without making a left turn at the first intersection) is not a violation of Texas law and there was, therefore, no basis for stopping the vehicle. The defendant’s consent to search was not valid in light of the illegal stop. The Court observed that the flip side of the decision in Whren v. United States, 517 U.S. 806 (1996) (allowing the stop of a vehicle for a traffic-related offense, even if the real motivation of the officer is to search for drugs), is that only a valid objectively grounded traffic-related detention can support such a stop.

***United States v. Jones***, 149 F.3d 364 (5th Cir. 1998) The defendant’s vehicle, with fresh mud on it, was observed driving north, approximately 80 miles north of the Mexico – Texas border. The Fifth Circuit held that the evidence supporting the stop of the vehicle and the discovery of marijuana was insufficient. First, the court held that there was insufficient justification for believing that the vehicle had recently crossed the border. The court also noted, with considerable skepticism, the government’s argument that the reason that the Border Patrol agent was suspicious, was because the defendant did not look like a smuggler – thus raising the agent’s suspicion that he was a cleverly disguised smuggler. Also, the court rejected the government’s contention that the defendant was acting suspicious because he frequently glanced back at the agent, who was tailgating him for several miles, prior to the stop.

***United States v. Salzano,*** 158 F.3d 1107 (10th Cir. 1998) The defendant was stopped while driving a motor home. The officer initially stopped the vehicle because it strayed off the road. When the officer questioned the defendant, he found him to be nervous and also determined that the rental papers indicated that there were supposed to be three occupants and the defendant was alone. The officer was also suspicious that the defendant had rented a motor home to drive across country and that the trip had originated in California. His suspicions were further aroused by the scent of evergreen in the vehicle. He requested permission to search the vehicle and the defendant declined. The officer then summoned a drug dog which arrived twenty-seven minutes later. The Tenth Circuit holds that the detention of the defendant for 27 minutes was not supported by an articulable suspicion and reverses the denial of the motion to suppress. The court declined to accept the government’s invitation to find more suspicion in the aggregate of these factors, than the sum of its parts: “It is impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation.”

***United States v. Mesa,*** 62 F.3d 159 (6th Cir. 1995) The defendant and a passenger in her car were stopped for speeding. The defendant was placed in the back of the patrol car which would not open from the inside. The officer issued the citation, but

rather than letting the defendant out, he then questioned the two about their destination. He believed that they acted nervously and gave slightly inconsistent stories about their reasons for travelling. He requested consent to search the car and though a drug dog did not alert, the search continued. Eventually, the police discovered cocaine in the back. This was an unlawful search. Once the traffic citation was issued, the police should have immediately released the defendant. This was an unlawful detention after the citation was issued. The Sixth Circuit has suggested, in a later opinion, that the Mesa decision is no longer good law, following the decision in Ohio v. Robinette, 519 U.S. 33 (1996). See United States v. Burton, 334 F.3d 514 (6th Cir. 2003).

***United States v. Garcia***, 23 F.3d 1331 (8th Cir. 1994) The defendants were driving on the interstate in a rental car. The driver veered off the road onto the shoulder and a trooper pulled the vehicle over. The defendants were Hispanic. One defendant stated that they were moving to El Paso with furniture; the other stated that they were simply taking the furniture there. The trooper reviewed the defendants' identification and received consent to search the cargo area of the vehicle which he did. He radioed in for a computer check of the defendants, but there was a delay in obtaining this report. He allowed the defendants to leave. Later, he received a report that one of the defendants had a prior firearms violation. He called ahead and asked that the vehicle be stopped again. He went to the scene and asked for further consent to search the car, which he obtained. This was an illegal stop. There was no basis for stopping the truck a second time. There was no information derived during the first stop which created an articulable suspicion justifying a second search – including the subsequent discovery that one of the defendants had a criminal record.

***United States v. Rodriguez,*** 976 F.2d 592 (9th Cir. 1992) The defendant, a Hispanic, drove on the Interstate past where two agents were sitting in their marked cars. The defendant did not acknowledge the agents' presence and appeared nervous as he drove past. The officers testified that the car appeared to go over bumps "sluggishly" thus indicating that it was weighted down with something. The court rejected these bases for stopping the vehicle: "In short, the agents in this case saw a Hispanic man cautiously and attentively driving a 16-year-old Ford with a worn suspension, who glanced in his rear-view mirror while being followed by agents in a marked Border Patrol car. This profile could certainly fit hundreds or thousands of law-abiding daily users of the highways of Southern California." The court concluded, "We are not prepared to approve the wholesale seizure of miscellaneous persons, citizens or non-citizens, who are seen driving any place near the Mexican border – driving with caution and circumspection – in the absence of well-founded suspicion based on particular, individualized, and objectively observable factors which indicate that the person is engaged in criminal activity."

***Nicacio v. United States Immigration Naturalization Service***, 797 F.2d 700 (9th Cir. 1986) The I.N.S. could not stop the vehicle to search for illegal aliens merely based upon the appearance and dress factors such as Hispanic appearance, work clothing, dirty, unkempt appearance and "lean and hungry look."

***United States v. Salzano,*** 158 F.3d 1107 (10th Cir. 1998) The defendant was stopped on the interstate, driving a motor home, after it strayed onto the shoulder. The trooper detained the defendant for twenty-seven minutes while awaiting the arrival of a drug dog. The information known to the trooper did not amount to an articulable suspicion. The information upon which the government relied to justify the stop were: the driver was nervous; the unusual decision to rent a mobile home to drive across country; the fact that there was more than one person listed on the rental agreement, but the defendant was alone; and other innocuous factors.

***United States v. Wood***, 106 F.3d 942 (10th Cir. 1997) The defendant was pulled over on I-70 for speeding. The driver rented the car in California and said that he was unemployed, but was enjoying the drive back to Topeka, after traveling to California with his sister. He appeared nervous. The trooper determined that he had a narcotics conviction. This was not sufficient information to justify a detention of the vehicle while waiting for a drug dog to arrive. The court noted that the presence of fast-food wrappers in the car, as well as maps on the passenger seat did not add to the articulable suspicion calculus.

***United States v. Gregory***, 79 F.3d 973 (10th Cir. 1996) The defendant was driving on I-70 in Utah when he was observed by a trooper weaving over the shoulder line. The defendant was stopped and following a brief encounter, consented to a search of his vehicle. The trooper's stop of the vehicle was not lawful. Weaving over the shoulder line one time is not an offense under Utah law and there was insufficient evidence that the defendant was DUI or was a danger to the public. In this case, moreover, the ensuing consent was not untainted by the illegal stop. The court concluded that it was evident that, from the moment the vehicle was stopped, the trooper's sole interest was in viewing the contents of the vehicle.

***United States v. Angulo-Fernandez***, 53 F.3d 1177 (10th Cir. 1995) The police approached the defendant who was on the side of the road with his car which was apparently disabled. After a brief discussion, the officer requested the registration for the vehicle, as well as the defendant's driver's license, which was provided. There were no problems in the "records check." The evidence did not reveal whether the officer then returned the documentation to the defendant. The officer did request an opportunity to search the car, however. A search revealed a considerable quantity of cocaine. The trial court erroneously failed to decide whether the consent was voluntary, in light of the length of the preceding encounter, and did not indicate whether the defendant was in possession of his documents, and thus free to leave.

***United States v. Jones***, 44 F.3d 860 (10th Cir. 1995) In this case, where the defendant was stopped on the highway and questioned, one of the reasons that the officer testified that he had an articulable suspicion that the car was carrying contraband was that the driver did not appear nervous, suggesting that she had prior experience with being stopped. The Tenth Circuit agreed that this was a factor which the officer could consider in assessing whether there was an articulable suspicion justifying further investigation.

***United States v. McSwain***, 29 F.3d 558 (10th Cir. 1994) A trooper stopped the defendant's vehicle because it was unclear whether his temporary tag had expired. Upon approaching the vehicle, it was immediately apparent to the trooper that the tag had not expired. Nevertheless, the trooper questioned the defendant about his itinerary and requested to see his license and registration. The trooper then asked his dispatcher to run a computer check on the defendant, which revealed a record for drug and gun violations. The trooper returned to the defendant and asked for permission to search the vehicle, which the defendant gave. This was an invalid consent, based on a stop which exceeded the scope of a permissible Terry stop. By the time the trooper asked for the defendant's identification and registration, he had already dispelled all basis for the stop – the temporary tag's expiration date.

***United States v. Sandoval***, 29 F.3d 537 (10th Cir. 1994) The defendant was stopped for speeding. He produced his license and registration, which was checked and came back normal. After returning the paperwork to the defendant, the defendant asked if "that is it?" to which the officer responded, "No, wait a minute." The officer decided to ask the defendant some additional questions about his criminal background (he learned during the license check about an arrest for a narcotics violation several years earlier). This questioning amounted to an additional detention, which was not supported by an articulable suspicion. The fact that the defendant had an earlier arrest – and no conviction – for a drug offense, does not justify a Terry stop of any duration. Even though the defendant then gave consent to search the car, this consent occurred after the detention had become unlawful and it was, therefore, not a free and voluntary consent. The evidence should have been suppressed.

***United States v. Fernandez***, 18 F.3d 874 (10th Cir. 1994) The defendant was stopped on the interstate, because the trooper considered the tinted windows to be in violation of state law and for improper lane travel. The trooper examined the driver's license and issued a citation. However, rather than allowing the defendant to proceed, the trooper held the identification and questioned the driver and then asked for consent to search the car. The search yielded 121 kilograms of cocaine. The Tenth Circuit concluded that there were insufficient facts to support the detention of the defendant beyond the time necessary to examine the license and issue the citation (i.e., nervousness and "unusual behavior"). The subsequent consent to search the vehicle was tainted by the unlawful detention. Among other factors considered in determining whether the consent was free, and voluntary was the trooper's failure to advise the defendant that he had the right to refuse.

***United States v. Walker***, 941 F.2d 1086, on rehearing from 933 F.2d 812 (10th Cir. 1991) The defendant was stopped for speeding. The officer then began questioning the defendant about contraband. While holding the defendant's license and registration in his hand, the officer then asked for permission to search the car. Though the defendant consented, the search was invalid. The continued detention of the defendant beyond the time necessary to issue the speeding ticket was not based on any articulable suspicion and the only issue for remand was whether the consent was invalid in light of the illegal detention.

***United States v. Valdez***, 931 F.2d 1448 (11th Cir. 1991) Police were following a car which they believed contained narcotics. The car made a right turn at a red light which caused a car coming from the left to slow down. The police followed the car another eighteen blocks and then stopped the vehicle for the traffic offense of interfering with another car's right-of-way. This was an invalid pretext stop. The officer who made the stop testified that he had been told by narcotics officers to follow the car and make a stop. "In determining when an investigatory stop is unreasonably pretextual, the proper inquiry is not whether the officer could validly have made the stop but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose." This case would probably be decided differently after Whren v. United States, 517 U.S. 806 (1996).

***United States v. Campbell***, 920 F.2d 793 (11th Cir. 1991) The police received a tip from an informant that the defendant would be hauling marijuana into Montgomery, Alabama in a particular pickup truck. When the truck arrived at the designated location, the police arrested the occupants and brought the pickup to the police station where it was sniffed by one dog who did not alert, then another dog, who did. The defendant then consented to a search of the car. The search was illegal. The information supplied by the informant was not sufficient to rise to the level of probable cause. At most, pursuant to Alabama v. White, the police had sufficient information to conduct an investigatory stop. Here, however, the length of the detention was beyond a mere Terry stop. The consent was clearly the product of the illegal detention.

***United States v. Tapia***, 912 F.2d 1367 (11th Cir. 1990) The defendant was stopped on Interstate 59 travelling towards Birmingham, Alabama. The officer claimed to have had a reasonable suspicion based on the fact that the vehicle had out of-state plates, the driver was Mexican and appeared to be nervous or shaking during the initial confrontation with the trooper. The officer also stated that the vehicle appeared to have few pieces of luggage. This does not constitute "reasonable suspicion" and did not justify the detention of the driver and the subsequent consent form signed by the defendant was invalid.

***United States v. Strickland***, 902 F.2d 937 (11th Cir. 1990) The defendant consented to a search of his vehicle, including consent to search the trunk and luggage. This did not, however, include permission to slash his spare tire to investigate its contents. Nevertheless, what the police learned from their lawful search was sufficient to give them probable cause to continue the search and thereby discover the contraband. The court holds that when a person gives a general statement of consent to search without express limitations, the scope of the search is, nevertheless, not limitless. Rather, it is constrained by the bounds of reasonableness: What police officers can reasonably interpret the defendants consent to have encompassed.

***United States v. Miller***, 821 F.2d 546 (11th Cir. 1987) The Eleventh Circuit follows the Smith decision in holding that this highway stop was a mere pretext to search for drugs because of the occupants' fitting the drug courier profile on the highway.

***United States v. Smith***, 799 F.2d 704 (11th Cir. 1986) The Eleventh Circuit holds that a highway stop by Trooper Vogel was clearly a pretextual stop. Though the officer stated that there may have been a one-inch weave over the center line, the Court

finds that the sole purpose of the stop was a search for drugs which was not supported by any articulable suspicion or probable cause.

***SEARCH AND SEIZURE (Incident to Arrest)***

***Riley v. California***, 134 S. Ct. 2473 (2014) The Supreme Court decided that a cell phone may not be searched incident to arrest. Neither officer safety, nor the need to preserve evidence justifies the need to dispense with the warrant requirement.

***Thornton v. United States***, 541 U.S. 615 (2004) In New York v. Belton, 453 U.S. 454 (1981), the Court held that the police may conduct a search incident to arrest of the interior of a car whenever an occupant is arrested. In this case, the Court concluded that the same rationale allows the police to search a vehicle, even if the occupant is arrested by the police after exiting the car and is not within reach of the interior of the vehicle.

***Arizona v. Gant***, 129 S. Ct. 1710 (2009) Five years after Thornton was decided, the Supreme Court followed up on the promise of the five Justices in Thornton who expressed displeasure with the scope of Belton, in the case of Arizona v. Gant, 129 S. Ct. 1710 (2009). Though stating that Belton was not expressly overruled, the Court determined that Belton required significant reigning in and held that a search incident to arrest, following an automobile stop, is only permissible "if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest." Thus, if the arrestee is in the back of the patrol car and restrained, the police may not automatically search the passenger compartment of the vehicle, simply because the defendant was arrested in, or immediately after exiting, the vehicle. What matters is the accessibility of the vehicle at the time of the search, not at the time of the arrest. A search may occur, however, even if the arrestee is not within reach of the car if there is "reason to believe" i.e., not necessarily probable cause that evidence of the crime for which the defendant is arrested is in the vehicle. In Gant, the defendant was arrested after he exited his vehicle in his driveway. He was arrested based on a warrant for a previous offense. There was no reason to believe that there was any evidence in the vehicle relating to the offense listed in the warrant. He was arrested and handcuffed in the back of the patrol car when the search of his vehicle occurred. The Court held that Belton – as heretofore construed – did not authorize this search and the evidence should have been suppressed.

***Utah v. Strieff***, --- S. Ct. --- (2016) If a defendant is pulled over for an investigatory stop illegally there was no articulable suspicion or probable cause to support the stop and the police determine that there is an outstanding arrest warrant for the defendant, a search incident to arrest is proper and the exclusionary rule does not bar the use of evidence discovered during the search incident to arrest. The illegal stop is too attenuated from the discovery of the evidence that was the product of the legal search incident to arrest.

***Birchfield v. North Dakota***, --- S. Ct. --- (2016) The Fourth Amendment is violated if a defendant who refuses to take a blood test after having been arrested for DUI, is prosecuted for the refusal. But it is not a Fourth Amendment violation if the police demand that the defendant take a breath test. A blood test, unlike a breath test, is too intrusive to be subject to an implied consent provision. Compare Maryland v. King. Smith v. Ohio, 494 U.S. 541 (1990) In a per curium opinion, the Supreme Court holds that evidence found during a purported search incident to arrest cannot be relied upon to justify the arrest. The Supreme Court holds, "Justifying the arrest by the search and at the same time the search by arrest just will not do." It is axiomatic that an incident search may not precede an arrest and serve as part of its justification.

***Knowles v. Iowa***, 119 S. Ct. 484 (1998) When the police make a traffic stop and issue a citation and do not make a custodial arrest, the police may not thereafter conduct a search of the vehicle on the theory that it is a search incident to arrest.

***United States v. Patiutka,*** 804 F.3d 684 (4th Cir. 2015) The defendant was pulled over on the Interstate for a traffic offense. The trooper asked him for his driver's license and asked the defendant some identifying information, including the defendant's age. The trooper thought that the defendant gave an answer about his age that was inconsistent with the driver's license. The trooper asked for consent to search the car. Initially, the defendant apparently consented (his foreign accent made it difficult to understand him), but shortly thereafter revoked his consent. At that point, the trooper detained the defendant and began to search again. The district court granted the motion to suppress: (1) there was no probable cause to arrest the defendant the judge found that there was insufficient evidence that the defendant lied about his birthdate, and therefore no basis for a search incident to arrest; (2) the automobile exception did not apply, because the evidence known to the officers even the evidence found during the aborted consent search did not amount to probable cause. All that was found was a credit card reader and three iPads. This does not amount to probable cause to search a car.

***United States v. Camou***, 773 F.3d 932 (9th Cir. 2014) The defendant was stopped in his vehicle and charged with smuggling undocumented aliens. He was brought to the police station where he and one of his passengers were questioned. The passenger admitted that they regularly were engaged in smuggling activity. The police seized the defendant's cell phone and listed it on a property report as seized evidence. Approximately 90 minutes later, the police searched the contents of the phone. The Ninth Circuit held that this was a not proper search incident to arrest search, not a proper exigent circumstances search and not a proper "automobile exception" search. In addition, the court rejected the inevitable discovery doctrine and the good faith exception to the exclusionary rule as reasons not to apply the exclusionary rule.

***United States v. McCraney***, 674 F.3d 614 (6th Cir. 2012) The limitations on a search incident to arrest announced in Gant are not limited to situations where the defendant is handcuffed in the rear of a patrol car. Here, the defendants were outside the car, surrounded by several law enforcement officers. A search of the car was not a valid search incident to arrest.

***United States v. Camacho***, 661 F.3d 718 (1st Cir. 2011) The police went to the scene of a street brawl and saw two people walking on the sidewalk. Suspicious that they had been involved in the brawl, the police pulled their car in front of the defendant, stopping him and then frisked the defendant and felt a gun. The defendant pushed the officer's hand away, after which the defendant was arrested. The First Circuit concluded that the initial encounter was a seizure; there was no lawful basis for the seizure i.e., there was no articulable suspicion; the frisk was not proper; the discovery of the weapon was not the result of a valid search incident to arrest.

***United States v. Edwards***, 666 F.3d 877 (4th Cir. 2011) The police arrested the defendant and then unbuckled his pants, pulled out his underwear and when they saw a baggie tied around his penis, they used a knife to remove it. The Fourth Circuit held that this was an unreasonable strip search and search incident to arrest, that violated the defendant's rights under the Fourth Amendment.

***United States v. Curtis***, 635 F.3d 704 (5th Cir. 2011) The Fifth Circuit concludes that the police may search a cell phone, including text messages when a defendant is arrested in possession of the cell phone. The appellate court reviews the precedent in numerous circuits before reaching this decision.

***United States v. Gross***, 662 F.3d 393 (6th Cir. 2011) The police stopped an automobile in which the defendant was a passenger. The stop was found to be improper because there was no articulable suspicion supporting the stop. During the course of the stop, the police learned that there was an arrest warrant for the defendant. The question in the Sixth Circuit was whether the existence of an arrest warrant and the evidence found during a search incident to the arrest was the fruit of the illegal stop and did the exclusionary rule bar the introduction of the evidence. The Sixth Circuit held that the exclusionary rule did apply, and the evidence would be suppressed. Contrary authority in the Seventh Circuit in United States v. Green, 111 F.3d 515 (7th Cir. 1997), was rejected by the Sixth Circuit.

***United States v. Maddox***, 614 F.3d 1046 (9th Cir. 2010) If a defendant has been arrested, handcuffed, and placed in a police car, the police may not then search a container that was taken from the defendant's possession under the search incident to arrest theory. In this case, the defendant's key chain was taken from him and after the defendant was arrested and secured, the police opened a small vial that was attached to the chain. While the key chain was in the defendant's possession at the time of the defendant's arrest, it was not within his reach after he was arrested and detained in the police car and at that point a search incident to arrest of the key chain was not valid.

***United States v. Caseres,*** 533 F.3d 1064 (9th Cir. 2008) The defendant was driving his car and was seen by the police, who thought the car had improper window tinting and that the defendant had not properly signaled a turn. The police followed the defendant but did not activate their emergency lights. The defendant parked his car and started walking towards his house. The police parked behind the defendant's car and then walked to catch up with the defendant who was finally approached on the front lawn of a neighbor. The police told the defendant to stop; he fled. After catching him, the police went back to the car and searched it. This was not proper. This was not a proper inventory search or a proper search incident to arrest.

***United States v. Hudson***, 405 F.3d 425 (6th Cir. 2005) The police had an arrest warrant for the defendant, but could not find him. The police made a warrantless, illegal stop of a car being driven by the defendant's girlfriend and discovered that the defendant was in the car. He was searched. The Sixth Circuit held that this was an illegal search. Because the stop was illegal, the search of the defendant was the fruit of that illegality, despite the fact that the police had a warrant for the defendant.

***United States v. Patzer***, 277 F.3d 1080 (9th Cir. 2002) The police lacked probable cause to arrest the defendant for DUI. The officer may have believed that the defendant had ingested marijuana, but there was no information suggesting that this impaired his ability to drive which is an element of the DUI offense. Absent probable cause to arrest the defendant, the ensuing search of his automobile could not be justified as a search incident to arrest. Similarly, the defendant's consent was tainted by the unlawful arrest. Finally, the court ordered suppressed the statements made by the defendant that were the product of the illegal arrest.

***United States v. Myers***, 308 F.3d 251 (3rd Cir. 2002) The police were called to an apartment regarding a disturbance. When the police arrived, a young girl was on the front step, and she told the officer that her mother and her boyfriend were inside fighting, and the boyfriend had a gun. The officer entered the apartment and after finding the defendant behind a door arrested him. The officer observed the defendant throw a bag on the ground. The defendant was handcuffed, and the woman was brought downstairs. The officer then went back upstairs and opened the bag, finding a gun. The Third Circuit held that there was no probable cause to arrest the defendant, and even if there had been probable cause, the search of the bag was not incident to the arrest and was therefore unlawful. Regarding probable cause, at most there was some indication that there had been a simple assault, but that had not occurred in the officer's presence and thus he could not arrest the defendant for that offense. Regarding the search, with the defendant handcuffed and immobilized, there was no need to search the bag.

***United States v. Johnson***, 16 F.3d 69 (5th Cir. 1994), aff'd on rehearing, 18 F.3d 293 (5th Cir. 1994) The defendant was in his office which was approximately ten feet by twelve feet. Law enforcement officers served him with an arrest warrant. Approximately eight feet from where he was sitting was the defendant's briefcase. The officer opened the briefcase claiming that it was a search incident to the arrest. The Fifth Circuit holds that the briefcase was not within the reach of the defendant at the time of the arrest; therefore, it was not a valid search incident to arrest. The defendant was never handcuffed, and the officer conceded that he did not fear that the defendant had a gun, or that he would destroy evidence. His search of the briefcase was "just good police work." Well, not really. The Fifth Circuit reversed based on this "police work."

***United States v. Strahan***, 984 F.2d 155 (6th Cir. 1993) The defendant was arrested approximately thirty feet away from his car. The police searched his glove compartment. This was not a proper search incident to arrest. Even though the police observed the defendant exit his vehicle shortly before his arrest, the glove compartment was not accessible to him and thus could not be searched without a warrant. While Belton allows a search of the entire contents of the car, even after the defendant is removed, the initial stop must occur when the defendant is in the car.

***United States v. Levy***, 990 F.2d 971 (7th Cir. 1993) A local ordinance outlawed face-to-face solicitations. In this case, a telemarketer called a billiards parlor operator and asked for a twenty-five-dollar donation for the Police Federation. The billiards operator agreed. The telemarketer sent a runner to pick up the donation and the police met him there, arrested him and found a gun in his possession. He was charged with a 922(g) violation possession of a firearm by a convicted felon. Because the defendant had not violated the ordinance, however, there was no probable cause to arrest him, and the search incident was improper. The evidence should have been suppressed.

***United States v. Berkowitz,*** 927 F.2d 1376 (7th Cir. 1991) When the police come to the door to arrest the person who lives in the house, a search incident to arrest inside the house would only be permissible if the arrest occurred inside the house and police were lawfully in the house. If, however, the police come to the house and after the defendant opens the door, the police barge in and make an arrest, the entry was unlawful, and the ensuing search would be illegal. In short, the police must have a warrant to make an arrest inside the defendant's home unless the defendant acquiesces to the officer's entry after learning of his intent to make an arrest.

***United States v. Shephard***, 21 F.3d 933 (9th Cir. 1994) State officers were given verbal authority by a probation officer to arrest a probationer for violation of the terms of probation. After arresting him, the officers received permission by the probationer to go into his room and retrieve his wallet. While in the room, they discovered a gun. He was prosecuted in federal court for possession of the weapon. Because the arrest by state agents was illegal under state law (the police need a written order to arrest a probationer, not verbal authority), and because the search was sufficiently linked to the unlawful arrest, the evidence should have been suppressed. The federal court looks to state law to determine if an arrest by a state officer for a state offense is lawful. Ker v. California, 374 U.S. 23 (1963).

***United States v. Mota***, 982 F.2d 1384 (9th Cir. 1993) The State of California does not permit a custodial arrest based on an infraction such as selling corn-on-the-cob without a license. In this case, the state agents arrested the defendants and then during a search, discovered counterfeit currency. The federal government could not use the evidence because the search incident to arrest was invalid insofar it was predicated on an illegal arrest under state law.

***United States v. Parr***, 843 F.2d 1228 (9th Cir. 1988) The defendant was stopped by a police officer who suspected that he was driving with a suspended license. The suspect was placed in the patrol car. Subsequently, the police officer searched the defendant's car and found various contraband. The government contended that this was a lawful arrest, and the search of the car was permissible under the search incident to arrest doctrine. The Ninth Circuit disagreed, holding that this was a lawful Terry stop, which does not authorize a search incident to arrest. The search of the automobile was improper and the Motion to Suppress should have been granted.

***United States v. Vasey***, 834 F.2d 782 (9th Cir. 1987) The defendant was arrested, handcuffed, and placed in a patrol car. Thirty to forty-five minutes later, the officers executed a search of the car contending that it was "incident to arrest." The Ninth Circuit holds that the evidence should have been suppressed. The court initially concluded that it was not an inventory search because the subjective intent of the officers was to conduct a search for evidence rather than to conduct a search to inventory the contents. The court further concluded that it was an improper search incident to arrest because of the amount of time which had expired between the arrest and the search, the inaccessibility of the car to the defendant at the time of the search, and because the defendant was handcuffed and removed from the car at the time of the search.

***United States v. Lugo***, 978 F.2d 631 (10th Cir. 1992) Defendant was arrested for driving with a suspended license. The car was parked in a gas station and the defendant was taken away. The police then inventoried the contents; the officer removed the cover of a speaker in the door panel and located cocaine. This was not a proper search incident to arrest, nor a proper inventory search. It could not be a search incident to arrest, because the defendant had already been taken away in a patrol car. United States v. Chadwick, 433 U.S. 1 (1977). This was not a valid inventory search, because searching inside speakers in door panels is not standard police procedure.

***United States v. Bonitz***, 826 F.2d 954 (10th Cir. 1987) The defendant was arrested for purchasing a gun by a convicted felon. Following his arrest and being handcuffed, the police searched some plastic cases which were found in the bedroom of his house. They claimed the search was necessary under the exigent circumstance exception and as an incident to the arrest. The first rationale was untrue because the police officers spent two hours inventorying the entire house and exhibited no particular fear for their own safety. The search was also not justified as an incident to arrest because the defendant was already handcuffed and taken into custody at the time that the police officers conducted a search of his bedroom and the containers found therein.

***United States v. Ford***, 56 F.3d 265 (D.C. Cir. 1995) Under Maryland v. Buie, two types of searches for people are permissible in connection with the arrest of a suspect: (1) a search of areas adjacent to the scene of the arrest, regardless of any likelihood of finding evidence; and (2) a search of other areas where there is a reasonable suspicion of finding someone who poses a threat to the officers. In this case, the officers, while looking in adjacent areas, discovered a gun clip. This did not authorize the officers

to look behind a window shade, or under a mattress, because in neither location were the officers likely to discover any other person who posed a threat to the officers. The gun found behind the window shade, therefore, should have been suppressed.

***United States v. $639,558***, 955 F.2d 712 (D.C. Cir. 1992) Defendant was arrested on an Amtrak train after a dog alerted to his luggage. He was handcuffed, removed from the train, and brought to the Amtrak security office where he was handcuffed to a chair. The officers then contemplated what to do and after consulting with an AUSA, they decided to open the luggage. The opening of the luggage occurred at least thirty minutes after the arrest. This was not a valid search incident to arrest. The luggage was in the exclusive control of the police.

***United States v. Fafowora***, 865 F.2d 360 (D.C. Cir. 1989) Police officers had probable cause to believe that the defendant was engaged in "countersurveillance" and thus could arrest the defendant during the course of a narcotics transaction. The subsequent search of the defendant's vehicle could not be authorized under a search incident to arrest, however, since the car was not within the "immediate surrounding area" of the defendant. However, the car could be forfeited and thus an inventory search was proper.

***SEARCH AND SEIZURE (Independent Source)***

***Murray v. United States***, 487 U.S. 533 (1988) The police unlawfully entered private premises and observed marijuana. The police left the scene and went to a Magistrate to obtain a search warrant. They did not tell the Magistrate about the prior entry or about their observations made inside the premises. The Magistrate issued a search warrant and the police searched and seized the evidence. The Supreme Court holds that the independent source rule exonerates the police from the misconduct of unlawfully entering the premises and saves the search. That is, because the Magistrate was not aware of the illicit entry, the search warrant was valid, and the police officers were permitted to execute the search warrant. However, the Court also holds that the District Court must determine whether the police officers were motivated to go to the Magistrate because of their discovery of the marijuana during the illegal entry. If the police officers were so motivated, then the search warrant does not constitute an independent source and the evidence must be suppressed.

***United States v. Siciliano***, 578 F.3d 61 (1st Cir. 2009) This case contains a detailed analysis of the independent source doctrine. The police suspected that the defendant was engaged in manufacturing MDMA. Not confident that they had sufficient information to obtain a search warrant, the police went to the defendant's apartment and asked if they could talk with him. He consented. Several agents then entered the apartment and began a "sweep search" and located various items of evidence which supported their suspicion of drug manufacturing. The defendant then demanded that the agents leave and, based in part on the information acquired during the sweep search, the police obtained a search warrant. The government agreed that the sweep search was invalid but argued that the independent source doctrine saved the search. The First Circuit and the district court disagreed and held that all evidence obtained through the execution of the search warrant would be suppressed. The agents were prompted to obtain the search warrant based on what they saw during the illegal search. The fact that the agents had already drafted an affidavit before they went to the apartment does not contradict the lower court's finding.

***United States v. Johnson***, 380 F.3d 1013 (7th Cir. 2004) The Seventh Circuit, in a decision by Judge Posner, holds that both the independent source doctrine and the inevitable discovery doctrine do not apply where the alternative source of information was derived from another illegal search and one for which the defendant has no standing to complain. In this case, the defendant and others were sitting in his parked car when two police officers approached. The police ordered the three occupants to exit the vehicle, though there was no articulable suspicion or probable cause. Contraband was found under the defendant's seat and other contraband was found in the other people's possession. The police then searched the trunk of the car and found counterfeit money. The government argued that the search under the seat and in the trunk would inevitably have occurred as a result of the illegal evidence seized from the other people. The defendant contended that even though he lacked standing to challenge the search of the other people, the government could not rely on that illegal seizure and argue that the illegal search of the trunk would have occurred as a result of those other illegal searches or that there was an independent source for the evidence found in the illegal trunk search. Judge Posner wrote, in essence, that two wrongs do not make a right.

***United States v. Lin Lyn Trading Co***., 149 F.3d 1112 (10th Cir. 1998) The government conceded that it improperly seized a notepad from the defendant that contained attorney-client communications. It claimed, however, that other evidence was derived from an independent source. The Tenth Circuit holds that the lower court's decision granting the motion to suppress was supported by the evidence.

***Hamilton v. Nix,*** 809 F.2d 463 (8th Cir. 1987) The police were aware of a witness who could provide important evidence about the criminal conduct in this case. Before interviewing this witness, however, the police had questioned the defendant in an improper manner: They had made various promises of leniency and help in exchange for a confession. A panel of the Eighth Circuit originally held that the improper interrogation tainted the evidence obtained from the witness. However, the court en banc holds that because the evidence would have been obtained through an "independent source" it represents an exception to the "fruit of the poisonous tree" doctrine. The Court holds that under Ceccolini, the evidence is admissible because the witness was known to the police and would have been discovered even absent the improper interrogation of the defendant. The court also reviews more recent U.S. Supreme Court decisions, e.g., Nix v. Williams, 467 U.S. 431 (1984) in this lengthy analysis of the attenuation and independent source doctrines.

***SEARCH AND SEIZURE (Inevitable Discovery)***

***Murray v. United States***, 487 U.S. 533 (1988) The police unlawfully entered private premises and observed marijuana. The police left the scene and went to a Magistrate to obtain a search warrant. They did not tell the Magistrate about the prior entry or about their observations made inside the premises. The Magistrate issued a search warrant and the police searched and seized the evidence. The Supreme Court holds that the independent source rule exonerates the police from the misconduct of unlawfully entering the premises and saves the search. That is, because the Magistrate was not aware of the illicit entry, the search warrant was valid, and the police officers were permitted to execute the search warrant. However, the Court also holds that the District Court must determine whether the police officers were motivated to go to the Magistrate because of their discovery of the marijuana during the illegal entry. If the police officers were so motivated, then the search warrant does not constitute an independent source and the evidence must be suppressed.

***United States v. Lundin***, 817 F.3d 1151 (9th Cir. 2016) Acting on the basis of a BOLO, but without an arrest warrant, the police went to the defendant's home at 4:00 a.m. and started knocking on the door. They heard a crashing noise near the rear of the home and ran around back and stopped the defendant who was in the backyard. They then looked inside the house and found two handguns. The Ninth Circuit ordered that the evidence must be suppressed: (1) the government could not rely on the exigent circumstances exception, because the police were not allowed to be where they were located when the exigent circumstances arose (i.e., they heard the crashing noise); (2) while the police may walk up to the front door of a house and engage in a "knock-and-talk," that exception to the rule that bars police from entering the curtilage of the home does not apply at 4:00 a.m. when nobody would expect visitors to appear and knock on the door; (3) in addition, walking up to the front door to make a warrantless arrest is not a permissible purpose and Jardines provides that the police may not enter the curtilage of the home for investigative purposes; (4) the security sweep of the house was not justified, because the defendant was already handcuffed and any further security measures in the house were not necessary; (5) the inevitable discovery doctrine did not apply, because the officers were not in the process of obtaining a search warrant when the illegal searches occurred.

***United States v. Camou***, 773 F.3d 932 (9th Cir. 2014) The defendant was stopped in his vehicle and charged with smuggling undocumented aliens. He was brought to the police station where he and one of his passengers were questioned. The passenger admitted that they regularly were engaged in smuggling activity. The police seized the defendant's cell phone and listed it on a property report as seized evidence. Approximately 90 minutes later, the police searched the contents of the phone. The Ninth Circuit held that this was a not proper search incident to arrest search, not a proper exigent circumstances search and not a proper "automobile exception" search. In addition, the court rejected the inevitable discovery doctrine and the good faith exception to the exclusionary rule as reasons not to apply the exclusionary rule.

***United States v. Stokes***, 733 F.3d 438 (2d Cir. 2013) The police had reason to believe that the defendant was responsible for a homicide, but did not seek an arrest warrant for strategic reasons having to do with state law that would prohibit any questioning after the issuance of an arrest warrant. The police went to the defendant's hotel room and entered the open door. While handing him his pants to get dressed, the police saw a gun in a duffle bag. The Second Circuit held the entry was unlawful. If the police had an arrest warrant, entry into the hotel room may have been permissible, but absent an arrest warrant, entering the room was not permissible and only an arrest in a public place would have been permissible absent consent to enter. The government also failed in its effort to invoke the inevitable discovery doctrine, because the guns in the duffle bag would not inevitably have been discovered: if the police had waited for the defendant to exit the room, it is certainly possible that he would have left without the guns, been arrested and taken away, in which case the guns would not have been discovered. It is also possible the defendant's companion might have left the hotel room first, with the guns, and there was no basis to arrest or search her. These contingencies were possible and rendered the inevitable discovery doctrine inapplicable.

***United States v. Quinney***, 583 F.3d 891 (6th Cir. 2009) The police conducted a brief consent search and saw, in the defendant's room, a printer. They then left the premises but learned later that day that the printer may have been used to produce counterfeit currency. The agents returned to the premises and without consent (or a warrant) seized the printer. At the hearing on the motion to suppress, the government relied on the inevitable discovery doctrine. The Sixth Circuit rejected this theory, because the agents were not in the process of obtaining a warrant when the illegal search and seizure occurred. Merely stating that they "would have" and "could have" obtained a warrant does not invoke the inevitable discovery doctrine.

***United States v. Tejada***, 524 F.3d 809 (7th Cir. 2008) The police lawfully arrested the defendant in his home. Pursuant to a lawful search incident to arrest, they searched an entertainment cabinet that was within reach of the defendant. Inside the cabinet, they found a blue bag that had another bag inside it. The court held that searching that bag was not a proper search incident to arrest because it was not accessible to the defendant at the time of his arrest. However, the police knew the bag contained contraband, because the defendant (shortly before) had offered to sell drugs to an undercover agent and the bag contained the drugs that he offered to sell. Judge Posner, writing for the Seventh Circuit, held that the inevitable discovery doctrine was satisfied. It is not necessary that a search warrant actually be in the process of being obtained. That is, in fact, one method of satisfying the inevitable discovery hurdle; but another circumstance is where, as here, the police actually know that the container contains contraband when they search it. As Judge Posner put it, "there isn't even a shadow of a doubt" that had they requested a search warrant for the bag, it would have been authorized.

***United States v. Virden***, 488 F.3d 1317 (11th Cir. 2007) The police stopped the defendant's car after watching it leave the location where a search was about to occur. Because a drug dog was not available at that location, the police put the defendant in a police car in handcuffs and brought the car to a location two miles away where the dog was located. The Eleventh Circuit held that this exceeded the bounds of a Terry stop and amounted to a seizure requiring probable cause. Because there was no

probable cause, the search of the car was unlawful. Nor would this evidence have been inevitably discovered because no investigation was ongoing relating to the defendant or his car at the time that the unlawful search occurred.

***United States v. Heath***, 455 F.3d 52 (2d Cir. 2006) Illegally obtained evidence will be admissible under the inevitable discovery exception to the exclusionary rule only where a court can find, with a high level of confidence, that each of the contingencies necessary to the legal discovery of the contested evidence would be resolved in the government's favor. In this case, the district court employed the incorrect standard, and a remand was necessary to determine if the evidence would have been discovered but for the illegal arrest. This case contains a lengthy discussion of the inevitable discovery doctrine.

***United States v. Johnson***, 380 F.3d 1013 (7th Cir. 2004) The Seventh Circuit in a decision by Judge Posner, holds that both the independent source doctrine and the inevitable discovery doctrine do not apply where the alternative source of information was derived from another illegal search (and one for which the defendant has no standing to complain). In this case, the defendant and were sitting his parked car when two police officers approached. The police ordered the three occupants to exit the vehicle, though there was no articulable suspicion or probable cause. Contraband was found under the defendant's seat and other contraband was found in the other people's possession. The police then searched the trunk of the car and found counterfeit money. The government argued that the search under the seat and in the trunk would inevitably have occurred as a result of the illegal evidence seized from the other people. The defendant contended that even though he lacked standing to challenge the search of the other people, the government could not rely on that illegal seizure and argue that the illegal search of the trunk would have occurred as a result of those other illegal searches (or that there was an independent source for the evidence found in the illegal trunk search). Judge Posner wrote, in essence, that two wrongs do not make a right.

***United States v. James***, 353 F.3d 606 (8th Cir. 2003) The defendant was in jail. He asked a friend to destroy the contents of an envelope that the defendant had given to the friend (it contained computer disks). The police acquired the envelope, and the friend gave the police permission to open it and review the contents. After rejecting the government's argument that the friend validly consented, the court also rejected the government's inevitable discovery argument. There was no alternative then-existing investigation that inevitably would have led to a search warrant for the disks.

***United States v. Villalba-Alvarado***, 345 F.3d 1007 (8th Cir. 2003) The police had a search warrant for the defendant's property. He was arrested a short distance away and questioned about the location of contraband in the house. He answered the questions, revealing where drugs and money were hidden behind a secret panel in the house. The statements were obtained in violation of Miranda. The Eighth Circuit initially holds that the physical fruit of a Miranda violation should not be suppressed. The Supreme Court later agreed with this holding, United States v. Patane. The Eighth Circuit also held, however, that if it were wrong in this holding (which it wasn't), the inevitable discovery doctrine would not apply, because there was insufficient showing that the drugs and money would have been found, even in executing the search warrant, absent the defendant's statement. The fact that a drug dog was present and might have been used and might have discovered the secret panel was not sufficient to prove the inevitability of the discovery.

***United States v. Conner***, 127 F.3d 663 (8th Cir. 1997) The police received a tip that two burglars were at a motel. Six officers went to the motel and went to the room in front of which the burglars' car was parked. The police knocked on the door and yelled, "Open up." When one of the defendants opened the door, the police observed through the open door various coins they knew a coin collection had been stolen in the burglary. The officers pulled their weapons and arrested both defendants. They then obtained a search warrant on the basis of what they observed in the room. The trial court correctly granted a motion to suppress. Though the police did not enter the room in order to see the coins, when they ordered the occupants to open the door, and thereby gained the ability to see in the room, this amounted to a search. Demanding that the occupants open the door did not amount to a consent search and there were no exigent circumstances necessitating the immediate entry into the room. The search pursuant to the search warrant was not salvaged by Leon, because the information contained in the application the observations that were gained through the illegal entry, negate the existence of good faith. Finally, the officers would not have inevitably discovered the evidence, because absent the illegal entry, no other investigatory effort was underway to obtain a search warrant for the motel room.

***United States v. Vasquez de Reyes,*** 149 F.3d 192 (3rd Cir. 1998) The police received a tip that three undocumented aliens were at a bar. The INS went to the bar and detained the defendant who did not meet the description of any of the subjects. The result of stopping the defendant was the discovery that she had engaged in immigration marriage fraud (the evidence included the defendant's confession; and a statement by the defendant's supposed husband). The government contended that this would inevitably have been discovered during routine INS investigation when the defendant applied for a residency permit. The Third Circuit held that this was not the type of inevitable discovery envisioned by Nix v. Williams, 467 U.S. 431 (1984). Though the inevitable discovery rule is not necessarily limited to the discovery of physical evidence, it is not applicable to a subsequent confession, or statement of another witness, the inevitability of which is far from certain. (Note that the court did not analyze in any detail whether the exclusionary rule – or the fruit of the poisonous tree doctrine – should operate to bar the testimony of the putative husband, whose identity was discovered only through the detention of the defendant. In other words, it was assumed, but not explained, that all evidence, including other witnesses' testimony, could be barred as the fruit of the poisonous tree. See United States v. Ceccolini).

***United States v. Lang***, 149 F.3d 1044 (9th Cir. 1998) Though there is authority for a contrary position in other Circuits, the Ninth Circuit concludes that inevitable discovery rulings are mixed questions of law and fact that nevertheless should be reviewed under a clearly erroneous standard.

***United States v. Madrid***, 152 F.3d 1034 (8th Cir. 1998) After the defendant and his colleague were arrested making a drug sale, the colleague told the police that some of the drugs came from the defendant's house and that more drugs were left there. The police went back to that location and "secured" the home which involved detaining four occupants, and searching the house, including requiring each of the occupants to empty their pockets. The agents then endeavored to get a search warrant, including in the application information obtained during the search. The Court refused to allow the evidence to be admitted under an inevitable discovery theory. The blatant violation of the defendant's rights prior to getting a search warrant doomed the search. The court distinguished both Segura v. United States, 468 U.S. 796 (1984) and Murray v. United States, 487 U.S. 533 (1988). In Segura and Murray, the warrant did not contain any information learned during the illegal search. Moreover, "the offensiveness of the officers' actions in this case was not limited to the seizure of premises but extends to the detention of occupants and the continued, prolonged, illegal search by wandering officers."

***United States v. Allen***, 159 F.3d 832 (4th Cir. 1998) The police entered a bus and questioned the occupants about their luggage. The defendant was asked if he had any bags and he pointed to a knapsack. The police pulled down the knapsack and asked for permission to search it. The defendant consented and the police found marijuana in the bag. The defendant was arrested. After he was removed from the bus, the police found another duffel bag which none of the other passengers claimed. The police searched that bag and found cocaine. The lower court upheld the search of the duffel bag on the theory that its discovery would inevitably have been discovered. The trial court reasoned that if nobody claimed the bag, the police would have brought a drug-detecting dog to sniff the bag and if he alerted, the police would then obtain a search warrant and locate the cocaine. The Fourth Circuit reversed. There was insufficient evidence that a drug dog would have been summoned. In fact, testimony at the hearing demonstrated that there was a dog present, but that the dog had never been used inside the bus before it had previously been used to sniff the undercarriage of the bus. Moreover, the inevitable discovery doctrine does not apply where the police were not already in the process of obtaining a search warrant when the illegal search occurred. Under the government's theory, whenever there is probable cause, the inevitable discovery doctrine would apply. That is not the purpose of the inevitable discovery doctrine.

***United States v. Infante-Ruiz***, 13 F.3d 498 (1st Cir. 1994) The defendant was a passenger in a vehicle which was stopped by the police. The police arrested him on an outstanding warrant from another state. The police obtained the driver's consent to search the trunk, where they found the defendant's briefcase. They opened the briefcase and found a gun. The court held that this search was not a proper consent search, nor supported by probable cause. The government argued that the weapon inevitably would have been discovered pursuant to an inventory search. The government failed to show, however, that without the discovery of the gun the car would have been seized. Therefore, the briefcase would not have been discovered.

***United States v. Cabassa***, 62 F.3d 470 (2d Cir. 1995) The police received information that drugs were being stored at a particular location. Several agents went to the U.S. Attorney's office to prepare a search warrant application, while other agents went to the apartment. Concerned that they would be seen, the agents at the scene entered the apartment and discovered evidence. Shortly thereafter, the agents at the U.S. Attorney's office called the agents at the scene and said they needed additional information about the source of the information, etc. Meanwhile the occupant of the house consented to a search and at that point, the effort to obtain a search warrant was abandoned. The inevitable discovery doctrine did not resurrect this search. It was not clear that a warrant would have been obtained, nor was it certain that the evidence would still be at the location at the time that a warrant was obtained.

***United States v. Gorski,*** 852 F.2d 692 (2d Cir. 1988) The defendant was arrested and after he was handcuffed his suitcase was searched. There were no exigent circumstances justifying a search incident to arrest. The government claimed that the search could be justified as an inventory search or under the inevitable discovery doctrine. However, the government failed to introduce evidence that all suitcases were in fact inventoried at the FBI agent's office where the defendants were ultimately taken. In the absence of such evidence that the bag would have been opened at that location, the cocaine found in the suitcase would not inevitably have been discovered and the search could not be justified under either an inventory or inevitable discovery theory.

***United States v. Thomas,*** 955 F.2d 207 (4th Cir. 1992) Police entered a hotel room, suspecting that the occupants were engaged in drug dealing. They searched and found thousands of dollars in bank wrappers. They then set up surveillance, questioned the first person to enter the room and when he implicated his partner, the police reentered the room and "re-discovered" the money. This evidence was not admissible under the inevitable discovery doctrine. The money would not inevitably have been discovered. The court agreed with other circuits which have held that the doctrine requires the fact that makes discovery inevitable arise from circumstances other than those disclosed by the illegal search itself.

***United States v. Wilson***, 36 F.3d 1298 (5th Cir. 1994) The police went to a hotel room to check out an informant's tip. Once inside the hotel room, one of the officers looked in the bathroom and found some checks in a wastebasket. The officer seized the checks. The officer then asked for consent to search the room. One of the occupants said that was fine. The seizure of the checkbooks could not be justified by the inevitable discovery doctrine. The government was not actively pursuing an independent line of investigation that inevitably would have resulted in the discovery of the checkbooks.

***United States v. Leake,*** 95 F.3d 409 (6th Cir. 1996) Evidence seized from the defendant's house had been ordered suppressed due to an illegal search. The question before the court was whether derivative evidence should also be suppressed. The government argued that the evidence would inevitably be discovered. It also argued that it had an independent source for the discovery of the evidence. The Sixth Circuit disagreed with both theories. Among other conclusions, the court held that the government could not introduce evidence which derived from questioning witnesses who were identified during the illegal search.

***United States v. Buchanan***, 904 F.2d 349 (6th Cir. 1990) The police lacked sufficient basis to enter the defendant's home without a search warrant solely on their belief that the defendant's wife would destroy evidence after the defendant was arrested by DEA agents. Because the police were aware that the defendant's wife was at home asleep, there was no reason to believe that she would be aware that the defendant had been arrested and thus there was time to get a search warrant. Furthermore, once the police entered the house without a search warrant, the subsequent consent of the defendant even assuming he was lawfully arrested was tainted by this unlawful entry and the police could not rely on a consent search. Finally, the government cannot rely on the "inevitable discovery" exception because the police were not pursuing an alternate line of investigation at the time that the search was conducted. The police who believed they had probable cause to search may not enter the premises and excuse their failure to get a warrant on the basis that they would have gotten one anyway.

***United States v. Madrid***, 152 F.3d 1034 (8th Cir. 1998) The police arrested the defendant at a convenience store where a drug transaction was planned to occur. The police then decided that they wanted to search the defendant's house. So that is just what they did. However, they did so without obtaining a warrant, though they started the warrant application process while they were in the house rummaging through the defendant's papers and detaining the other occupants of the house. This was not a lawful "securing of the house" pursuant to Segura v. United States, 468 U.S. 796 (1984), and the inevitable discovery doctrine did not undo this violation of the Fourth Amendment. The court noted that the Fourth Amendment contains a "warrant" requirement, not a "warrant application" requirement.

***United States v. Marts***, 986 F.2d 1216 (8th Cir. 1993) The police announced their presence and entered the defendants' house five seconds thereafter. This violated the knock and announced rule and was not salvaged by the good faith exception to the exclusionary rule. Also, the inevitable discovery rule has no application in this context because the knock and announce rule would be rendered meaningless.

***United States v. Mejia,*** 69 F.3d 309 (9th Cir. 1995) The inevitable discovery doctrine does not apply in a case in which the police had probable cause to search the premises but made no effort to secure a search warrant. To accept this argument would, in effect, eliminate the warrant requirement entirely.

***United States v. Boatwright,*** 822 F.2d 862 (9th Cir. 1987) Police officers and a probation officer were hunting for the probationer. When they arrived at his house, they saw him coming out of a nearby garage reeking of chemicals. The garage smelled the same. The police officer decided to enter the garage where they found the defendant, the probationer's brother, involved in concocting some brew. The search of the garage was improper, and evidence seized must be suppressed. There was no independent means by which the police would inevitably have searched the garage and acquired the evidence there. Nothing outside of the unlawful search itself made likely the discovery of the weapons which were found in that garage and for which the defendant was on trial. The court holds, however, that the inevitable discovery doctrine applies not only where an independent investigation is already in progress. But here, not only was there no independent investigation under way, but there were also no seeds for such an investigation.

***United States v. $639,558,*** 955 F.2d 712 (D.C. Cir. 1992) Defendant was arrested on an Amtrak train after a dog alerted to his luggage. Without opening the suitcase, the defendant was handcuffed, removed from the train and brought to the Amtrak security office where he was handcuffed to a chair. The officers then contemplated what to do and after consulting with an AUSA, they decided to open the luggage. The opening of the luggage occurred at least thirty minutes after the arrest. The court rejected the search incident to arrest theory, and also rejected the theory that the luggage would have been searched pursuant to the inventory exception and thus the inevitable discovery doctrine applied: The opening of the suitcase as part of an inventory would only have happened if the defendant was being processed as part of his arrest at the jail. This would not have happened until after the police learned what was in the suitcase. Thus, the luggage was not inevitably bound to be inventoried – not unless the contents were known. The case contains a lengthy analysis of the inevitable discovery doctrine, including in dictum suggesting that the doctrine should not apply to "primary evidence" as opposed to derivative evidence. Primary evidence is the evidence directly obtained by the constitutional violation. Derivative evidence is the evidence which was later discovered by exploiting something learned by the constitutional violation, but would have been discovered inevitably, even without the constitutional violation.

***SEARCH AND SEIZURE (Informants)***

***United States v. Ramirez-Rivera***, 800 F.3d 1 (1st Cir. 2015) Based on information from an informant who had not previously been known to the police, the police went to the defendant's house to search for a fugitive. Without a search warrant, the police entered the house and arrested the fugitive, as well as the defendant on the basis that he was harboring the fugitive and found guns. The defendant was then brought to the police station where he made a statement. The First Circuit held that entering the house without a warrant was illegal: there were no exigent circumstances; and there was no probable cause, because the informant's information was not corroborated in any meaningful way, other than confirming the description of the house. The good faith exception to the exclusionary rule did not apply, at least in part because of the egregiousness of the violation, but also because the police testified that the reason they did not get a warrant is because it required more confirming evidence thus revealing that the police knew that they did not have probable cause and were intentionally proceeding with the intention of not getting a search warrant which could not be obtained based on the lack of sufficient information. The evidence found during the search, as well as the defendant's statement should have been suppressed as fruit of the poisonous tree.

***United States v. Glover***, 755 F.3d 811 (7th Cir. 2014) The failure of the search warrant application to reveal any information about the informant rendered it devoid of probable cause. Though a close call, the exclusionary rule would not apply because of

Leon. However, because of the absence of information about the informant's credibility, a Franks hearing was necessary to determine whether the omission of this information would taint the search warrant. The informant, unbeknownst to the magistrate, had more than a dozen prior criminal convictions, including several while he was working as an informant. He was also a gang member and was receiving payments from the police department.

***United States v. Gifford***, 727 F.3d 92 (1st Cir. 2013) The police obtained a search warrant for the defendant's house to search for a marijuana grow operation. The basis for the search was (1) an informant's tip; (2) information that the electricity usage at the defendant's house exceeded the neighbor's electricity usage; and (3) an officer visited the house and smelled burnt marijuana when the defendant opened the door. The First Circuit upheld the lower court's decision granting the motion to suppress. Regarding the informant's information, other than the statement that the informant was reliable, no information was provided in the warrant to support the claim that the informant was, in fact, reliable. There was also no information about the informant's basis of knowledge. Regarding the electricity usage, the lower court found that the officer was reckless in failing to include in the warrant application information that the neighbor's house was considerably smaller and the fact that the defendant had a horse boarding business on the premises; this was a Franks violation that altered the probable cause calculus. The smell of marijuana was not necessarily indicative of a grow operation.

***United States v. Bell***, 585 F.3d 1045 (7th Cir. 2009) The informant who provided information to the police did not reveal how he knew the target of the search, or what he was doing at the target's house. The informant told the police that he had been at the defendant's house and seen cocaine there, but the police did nothing to corroborate this information. This did not amount to probable cause; but the good faith exception to the exclusionary rule applied.

***United States v. Higgins***, 557 F.3d 381 (6th Cir. 2009) The information provided to the Magistrate about the informant's reliability and any corroboration of his allegations that the defendant supplied him the drugs with which he was caught was insufficient to provide a probable cause basis to search the defendant's house. Not only was the informant's veracity insufficiently revealed: the affidavit also failed to reveal any connection between the drugs that were allegedly acquired from the defendant, and the defendant's house. The affidavit did not say that the informant had ever been in the defendant's house or seen drugs in the defendant's house. Despite these flaws in the affidavit, the good faith exception to the exclusionary rule applied.

***United States v. Hammond***, 351 F.3d 765 (6th Cir. 2003) The information supplied by an informant was vague, not obviously reliable, and entirely unsupported by any independent investigation on the part of the police. Even though the information was offered by a neighbor of the defendant, there was still no statement by the affiant that the informant was reliable. Nor was there any corroboration of the information provided by the informant in fact, vast amounts of the search warrant affidavit were subject to a valid Franks v. Delaware challenge.

***United States v. Wilhelm***, 80 F.3d 116 (4th Cir. 1996) The affidavit in support of the search warrant relied entirely on the statements of a tipster who the affiant/officer had never met and who was not known to be reliable. The unsupported conclusions of the officer that the informant was reliable, mature and a concerned citizen were not sufficient, since the officer had no basis for asserting that the tipster was either reliable, mature, or concerned. The affidavit was so defective that the good faith exception to the exclusionary rule did not apply.

***United States v. Jackson***, 818 F.2d 345 (5th Cir. 1987) The affidavit in this case failed to establish probable cause for the defendant's arrest. The affidavit relied on the statement of an informant who failed to indicate the basis of his knowledge and failed to indicate that the defendant who took possession of stolen property was aware of the burglary which the informant had committed.

***United States v. Barrington***, 806 F.2d 529 (5th Cir. 1986) A conclusory affidavit does not establish probable cause for the issuance of a search warrant. The affidavit here stated only that the affiant had received information from a confidential informant who had provided information in the past leading to an arrest and conviction.

***United States v. Weaver***, 99 F.3d 1372 (6th Cir. 1996) An informant went to the defendant's house with $100 of government money to attempt to buy marijuana. The government agents did not provide surveillance, or in any other way corroborate the informant's statement that he did, in fact, buy the marijuana at that location. This information did not support the issuance of a search warrant. Nowhere in the affidavit did the affiant disclose where the marijuana was kept or stored, the quantity of marijuana in the house, or any other particularized information that would have supported the belief that there was currently marijuana on the property. Also, the affidavit did not provide any information about the informant's reliability, other than boilerplate language about his being reliable in the past. For example, the affidavit did not say that the informant's past reliability related to drug cases. Finally, the corroboration of innocent details, such as the name on the utility's records for the residence, was meaningless. The court also held that when a police officer supplies a bare bones affidavit which is insufficient, and then executes the warrant himself, he cannot rely on the good faith exception to the exclusionary rule. Here, the officer attempted no meaningful corroboration of the informant's information and no other independent investigation, other than learning the identity of the occupant of the residence. The unlawful search, therefore, was not saved by Leon.

***United States v. Leake***, 998 F.2d 1359 (6th Cir. 1993) An unknown tipster informed the police that marijuana was in the defendant's basement. The tip was not "rich" in detail; he did not identify the occupants by name; he failed to state when he "smelled" the marijuana in the house; and no future conduct was accurately predicted, as in Gates. Also, the corroboration of the tip was virtually meaningless.

***United States v. Campbell,*** 920 F.2d 793 (11th Cir. 1991) The police received a tip from an informant that the defendant would be hauling marijuana into Montgomery, Alabama in a particular pickup truck. When the truck arrived at the designated location, the police arrested the occupants and brought the pickup to the police station where it was sniffed by one dog who did not alert, then another dog, who did. The defendant then consented to a search of the car. The search was illegal. The information supplied by the informant was not sufficient to rise to the level of probable cause. At most, pursuant to Alabama v. White, the police had sufficient information to conduct an investigatory stop. Here, however, the length of the detention went beyond a mere Terry stop. The consent was clearly the product of the illegal detention.

***SEARCH AND SEIZURE (Inventory Searches – Impoundment)***

***Florida v. Wells***, 495 U.S. 1 (1990) Police officers searched a locked suitcase removed from a trunk of an impounded car and pried it open after the driver was arrested on charges of DUI. There were no policies for that jurisdiction addressing a need to inventory closed containers when a car was impounded after a DUI arrest. The Supreme Court holds that this is not a valid inventory search.

***Colorado v. Bertine***, 479 U.S. 367 (1987) The Supreme Court holds that law enforcement officers may conduct an inventory search of closed containers which are found in an automobile so long as the inventory is carried out pursuant to standard police procedures that require the opening of such containers and is not conducted in a bad faith effort solely at investigating criminal conduct.

***United States v. Johnson***, 889 F.3d 1120 (9th Cir. 2018) Following its earlier decision in United States v. Orozco, 858 F.3d 1204 (9th Cir. 2017), The Ninth Circuit holds that the police officer's motive in performing an administrative, inventory search, is relevant in determining the reasonableness and lawfulness of the search. If, as here, the officer testifies that he conducted the search in his search for evidence of a crime, the search is not a lawful inventory / administrative search.

***United States v. Sanders***, 796 F.3d 1241 (10th Cir. 2015) If a defendant is arrested and his car is parked on private property, the car may not be impounded unless the car poses a threat to public safety or there is a standardized policy that addresses non-pretextual community-caretaking concerns. See South Dakota v. Opperman, 428 U.S. 364 (1976). The impoundment in this case was not justified under these standards.

***United States v. Cervantes***, 703 F.3d 1135 (9th Cir. 2012) A man was seen leaving what was described by the police as a stash house with a white box. That man was later observed giving the box to the defendant. The defendant's car was followed briefly, and the police believed that he engaged in counter-surveillance maneuvers. Later the defendant, with the box was pulled over for a minor technical motor vehicle infraction and the officer could not confirm that he had a valid driver's license. The car was searched, and the box was found to contain cocaine. The government contended that there was probable cause to search the car. The Ninth Circuit disagreed: the officer's testimony that the house was a "stash house" was worth little, because no facts were offered to support that conclusory statement. The claim that the defendant engaged in counter-surveillance was equally unhelpful. The government next argued that the car was subject to impoundment and inventory, but the Ninth Circuit rejected this theory, too, because there was insufficient information that the car was obstructing traffic, or otherwise in need of being impoundment. Moreover, the government did not show that the impoundment was appropriate under California law.

***United States v. Taylor***, 636 F.3d 461 (10th Cir. 2011) After impounding the defendant's vehicle, the police found drugs. The police relied on the inventory exception to the search warrant requirement. However, the inventory that was prepared by the police simply listed the contents of the vehicle as "miscellaneous tools" which showed that the police were not seriously inventorying the contents for a legitimate purpose. The drug evidence should have been suppressed.

***United States v. Edwards***, 632 F.3d 633 (10th Cir. 2001) The defendant was arrested on the sidewalk near a parking lot. The court concluded that there was probable cause to support the arrest a belief that the defendant had participated in a bank robbery. The police then searched a rental car, which had been rented by his girlfriend which was in the parking lot. The Tenth Circuit held that the defendant did not have standing to contest the search of the car in general, because he was not on the rental agreement, but he did have standing to challenge the search of the closed suitcases which he owned that were in the trunk of the vehicle. The court also held that the search was not a valid probable cause search of the vehicle, because there was no probable cause to believe that the car contained any evidence. The search was not a valid search incident to arrest, because the defendant was over 100 feet away from the car when he was arrested and he was handcuffed in the back of the patrol car (note, this case was decided pre-Gant). This was not an inventory search, because the police conceded that they were searching for evidence and had not decided to impound the car until the evidence was found.

***United States v. Proctor***, 489 F.3d 1348 (D.C. Cir. 2007) The defendant was arrested for DUI. An officer promptly searched the car and found a gun. The defendant contended that the search did not comply with the D.C. impound and inventory procedures. Indeed, it did not. Though the officer testified that there was a new and improved procedure that authorized him to search the car immediately after the arrest (even though the written policy did not even authorize impoundment in every case), the court concluded that this was not the official policy which the police must obey in order to invoke the inventory search exception to the search warrant requirement.

***United States v. Kennedy***, 427 F.3d 1136 (8th Cir. 2005) The defendant's girlfriend said that the defendant "deals" drugs and "keeps" drugs in his car. This did not establish probable cause that the defendant then had drugs in his car. The police also searched the car pursuant to their inventory policy, but the policy only directed the police to search containers in the car. The

search in this case involved searching behind a speaker in the trunk – the place where the girlfriend revealed that the defendant stored his drugs. This was not a proper inventory search.

***Miranda v. City of Cornelius***, 429 F.3d 858 (9th Cir. 2005) In this § 1983 case, the plaintiffs challenged the police officer's decision to impound a vehicle which was lawfully parked on the plaintiff's private property when the plaintiff was arrested for a motor vehicle offense. The Ninth Circuit held that impounding the vehicle was not permissible.

***United States v. Maple***, 348 F.3d 260 (D. C. Cir. 2003) The defendant was arrested in his car for speeding and driving with a suspended license. The officer decided not to impound the car and pulled it into a parking lot. He noticed a mobile phone on the floor and opened a console between the bucket seats for the purpose of hiding the phone in there. In the console, he discovered a gun. This amounted to a search and was unlawful. This was not a valid inventory search, moreover, because there was no departmental policy that authorized this type of search of un-impounded vehicles.

***United States v. Best***, 135 F.3d 1223 (8th Cir. 1998) After the trooper stopped the defendant's car, she determined that the defendant was driving with a suspended license. Prior to the arrival of a tow truck, the trooper noticed that the windows would not roll down properly. She shined her flashlight into the door panel and saw a bundle of marijuana. This was not a lawful inventory search. The inventory policy of the trooper's department did not provide for searching inside door panels of cars that were to be impounded.

***United States v. Gorski***, 852 F.2d 692 (2d Cir. 1988) The defendant was arrested and after he was handcuffed his suitcase was searched. There were no exigent circumstances justifying a search incident to arrest. The government claimed that the search could be justified as an inventory search or under the inevitable discovery doctrine. However, the government failed to introduce evidence that all suitcases were in fact inventoried at the FBI agent's office where the defendants were ultimately taken. In the absence of such evidence that the bag would have been opened at that location, the cocaine found in the suitcase would not have been inevitably discovered and the search could not be justified under either an inventory or inevitable discovery theory.

***United States v. Salmon***, 944 F.2d 1106 (3rd Cir. 1991) Following the defendant's arrest, his car was seized for forfeiture under state law. The car was then inventoried. The state agency that seized the car, however, had no policy on the method of conducting inventories of seized-for-forfeiture cars. The case might be different if federal agents had seized the car, because under the federal forfeiture laws, title to the car passes to the government when the car is used in an unlawful manner, whereas under the state's law, title does not pass to the state until after a hearing.

***United States v. Showalter***, 858 F.2d 149 (3rd Cir. 1988) A drug agent accompanied United States Marshals during the civil forfeiture inventory of residential premises. This was improper. The marshals were entitled to conduct an inventory of the property which they had seized but there was nothing in the seizure warrant permitting agents access to the house to see what was in plain view. Nor does this satisfy the requirements of an inventory search since privacy rights at home are far greater than those in a car, and there was no evidence that it was uniform or standard procedure for DEA agents to accompany marshals to inventory the goods in a house which had been seized.

***United States v. Hahn***, 922 F.2d 243 (5th Cir. 1991) After seizing the defendant's car, IRS agents searched its contents under an inventory rationale. However, the IRS had no standards or procedures regarding the inventorying of cars, thus this search was illegal. The fact that the IRS agents complied with local police guidelines was irrelevant because the agents, at the time, were not aware of those procedures.

***United States v. Duguay***, 93 F.3d 346 (7th Cir. 1996) The court recognized that the police must have a legitimate basis not only for inventorying a vehicle, but also for impounding the vehicle. Here, the police failed to show an established departmental policy for the impoundment of the vehicle. Moreover, there were other people around who were available to drive the car, including the defendant's girlfriend and brother.

***United States v. Marshall***, 986 F.2d 1171 (8th Cir. 1993) Though defendant's vehicle was properly impounded, the government failed to prove that the law enforcement agency had standardized procedures for inventorying the contents of seized cars. Also, it was evident that the police were motivated by their investigation of the defendant for drug and gun-related crimes.

***United States v. Ramos-Oseguera***, 120 F.3d 1028 (9th Cir. 1997) San Francisco's inventory policy required officers to identify all visible property in an impounded vehicle. The policy did not authorize the opening of closed containers to inventory the contents of containers. Here, the police searched the pants pockets of a pair of jeans found in the back seat and found heroin. This was not a lawful inventory search because there was no authorization in the city policy to search the pockets of clothes found in an impounded vehicle.

***United States v. Johnson***, 936 F.2d 1082 (9th Cir. 1991) The police violated the state inventory policy in searching the locked trunk of a seized automobile. The federal agents could not rely, therefore, on that established policy to justify the inventory search of the car.

***United States v. Wanless***, 882 F.2d 1459 (9th Cir. 1989) The Washington State courts have imposed certain requirements on officers making inventory searches. These requirements must be complied with before the fruits of such a search may be introduced in federal court. This is because an inventory search must comply with the local standards and practices or it cannot, by definition, be a valid inventory search.

***United States v. Haro-Salcedo***, 107 F.3d 769 (10th Cir. 1997) Though the defendant's car was properly impounded, the inventory search was not proper. The agent who conducted the search conceded that he searched the vehicle for investigative

purposes. He also acknowledged that he was unfamiliar with the procedures and policy of the local law enforcement agency which had impounded the vehicle. Finally, the office never completed an inventory form listing the contents of the car. The court concluded, however, that the evidence would inevitably be discovered when the impounding agency performed a proper inventory search.

***United States v. Lugo,*** 978 F.2d 631 (10th Cir. 1992) Defendant was arrested for driving with a suspended license. The car was parked in a gas station and the defendant was taken away. The police then inventoried the contents; the officer removed the cover of a speaker in the door panel and located cocaine. This was not a proper search incident to arrest, nor a proper inventory search. It could not be a search incident to arrest, because the defendant had already been taken away in a patrol car. United States v. Chadwick, 433 U.S. 1 (1977). This was not a valid inventory search, because searching inside speakers in door panels is not standard police procedure.

***Sammons v. Taylor***, 967 F.2d 1533 (11th Cir. 1992) In this civil rights action, the Eleventh Circuit sets forth the standard for an inventory search. The plaintiff, complaining about an "unnecessary" inventory search, argued that impoundment, followed by an inventory search, is only appropriate when there is no alternative means of disposing of the car. The court rejected this argument: Even if an arrestee's car is not impeding traffic or otherwise presenting a hazard, a law enforcement officer may impound the vehicle, so long as the decision to impound is made on the basis of standard criteria and on the basis of "something other than suspicion of evidence of criminal activity."

***United States v. Khoury***, 901 F.2d 948 (11th Cir. 1990) Following the defendant's arrest, the police leafed through a spiral notebook found in the trunk of the car. Later, the agent came back to the notebook and more thoroughly examined it. This was not a proper inventory search. A search warrant should have been obtained before the officer went back to the notebook to study it in depth. An inventory search is not a surrogate for investigation and the scope of the inventory search may not exceed that necessary to accomplish the ends of the inventory. It is clear that the second examination of the notebook was conducted for investigatory purposes, not merely to inventory items found in the car.

***SEARCH AND SEIZURE (Knock and Announce)***

***Hudson v. Michigan***, 126 S. Ct. 2159 (2006) When the police violate the knock-and-announce rule, the appropriate remedy is not suppression of the evidence. Though there is obviously a deterrent component to the exclusionary rule, the knock-and-announce rule is not principally designed to prevent the government from seeing or obtaining evidence in the house (i.e., the purpose of the rule is not to enable the homeowner to destroy the evidence), suppressing the evidence is not an appropriate remedy.

***United States v. Banks***, 540 U.S. 31 (2003) The Supreme Court held that waiting 15 – 20 seconds prior to forcibly entering a house was permissible under both the federal knock and announce statute and the Constitution. The Court held that the standard of "reasonableness" was the only appropriate yardstick in gauging whether the police waited an appropriate length of time prior to entering the apartment when nobody responds to knocking on the front door. What matters are the facts known to the police (thus, the fact that the defendant was in the shower – unbeknownst to the officers – is not relevant). The officers may break open the door if they reasonably believe that they have been denied admission into the house.

***United States v. Ramirez***, 523 U.S. 65 (1998) A no-knock entry is justified if police have a reasonable suspicion that knocking and announcing their presence before entering would be dangerous or futile or inhibit the effective investigation of the crime. Here, with good reason, the police obtained a no-knock warrant. The police executed the warrant by breaking open a garage window and announcing their presence. Excessive or unnecessary property destruction during a search may violate the Fourth Amendment, even though the entry itself is lawful. 18 U.S.C. §3109, which authorizes the breaking of windows where the police are denied admittance, does not prohibit the breaking of a window, as in this case, even in circumstances where admittance is not denied. Where, as here, the police act reasonably, this satisfies the Fourth Amendment and §3109.

***Richards v. Wisconsin***, 520 U.S. 385 (1997) The Fourth Amendment does not authorize a blanket exception to the knock and announce rule (the constitutional requirement recognized in Wilson v. Arkansas) in all felony drug investigations. While the magistrate, in an appropriate case, may authorize an entry without knocking and announcing, there must be a showing to authorize this method of gaining entry, as opposed to a per se exception created by the state supreme court in Wisconsin to the knock and announce rule in all cases of a general category.

***Wilson v. Arkansas,*** 514 U.S. 927 (1995) The knock and announce rule, which has its roots in the common law, is part of the fabric of the Fourth Amendment and in some cases, the failure to knock and announce can render a search violative of the Fourth Amendment.

***United States v. Weaver***, 808 F.3d 26 (D.C. Cir. 2015) Though Hudson v. Michigan held that the exclusionary rule did not apply when officers violate the knock and announce rule when executing a search warrant, the DC Circuit holds in this case that the exclusionary rule does apply when the entry is not pursuant to a search warrant, but while executing an arrest warrant. Hudson premised its holding on the inevitability of the search occurring, and thus the evidence would be found, had the officers knocked and announced prior to executing the search warrant. But the inevitability of conducting a search is not present when the entry is made pursuant to an arrest warrant.

***Trent v. Wade***, 776 F.3d 368 (5th Cir. 2015) Even if an officer is engaged in hot pursuit of a suspect to a home, this does not necessarily eliminate the knock and announce rule, which is designed to protect the safety not only of the suspect and the officer, but also other occupants of the house.

***United States v. Neilson***, 415 F.3d 1195 (10th Cir. 2005) Law enforcement officers did not have an objectively reasonable basis for believing that the no-knock provision in the search warrant was valid. Though there was some information known to the police that weapons and drugs were inside, there was no evidence of violence and a prior search at the premises did not involve any violence, even though guns were found at that time. Moreover, though there was probable cause that a small amount of drugs were at the scene apparently personal use quantities, there was no indication that any trafficking occurred at the house.

***United States v. Smith***, 386 F.3d 753 (6th Cir. 2004) Officers must have more than a mere hunch before they can claim that exigent circumstances support the issuance of a no-knock warrant. The fact that drugs and guns are known to be in the house and that one of the occupants is known to be a biker is not sufficient to support the issuance of a no-knock warrant. Wilson v. Arkansas, 514 U.S. 927 (1995); Richards v. Wisconsin, 520 U.S. 385 (1997). The warrant in this case also did not satisfy the good faith standard of Leon. Among other things, the warrant in this case did not, in fact, authorize a no-knock entry though one was requested, and it was arguable that the magistrate intended to grant that authority.

***United States v. Bates***, 84 F.3d 790 (6th Cir. 1996) The mere fact that officers are aware that there are firearms inside a house is not sufficient, alone, to justify entering with a warrant without knocking and announcing. Absent more, such as knowledge that an occupant has a record of violence; prior threats to an officer's safety; or a verified reputation of an occupant's violent tendencies, the police must still knock and announce, even if they know that there are drugs and guns inside. The court also held that the mere possibility that the occupants might destroy drugs inside the apartment is not enough to violate §3109, or the Fourth Amendment's common law knock and announce requirement.

***United States v. Marts***, 986 F.2d 1216 (8th Cir. 1993) The police announced their presence and entered the defendants' house five seconds thereafter. This violated the knock and announced rule and was not salvaged by the good faith exception to the exclusionary rule. Also, the inevitable discovery rule has no application in this context because the knock and announce rule would be rendered meaningless.

***United States v. Zermeno,*** 66 F.3d 1058 (9th Cir. 1995) The trial court did not clearly err in holding that the police violated the federal knock and announce rule, 18 U.S.C. §3109. The police approached the front door of the defendant's house and yelled, "Open the door." Before the defendant could reach the door, the police had commenced using a battering ram. The fact that this was a narcotics investigation did not establish, without more, that there were exigent circumstances justifying the agents' conduct.

***United States v. Becker***, 23 F.3d 1537 (9th Cir. 1994) A SWAT team kicked in the door of the defendant's home in order to execute a search warrant. The government argued that there was fear of an active methamphetamine lab on the premises, as well as volatile chemicals. At co-conspirators' homes, there were also loaded weapons found during searches. None of these factors justified a search without notification. There was no information then known to the police that there actually was an operating methamphetamine laboratory at the home. Also, the fact that the co-conspirators had been arrested suggests that the defendant would have dismantled his laboratory, assuming that there was one previously in existence. Finally, the fact that co-conspirators had guns does not support an entry without notice.

***United States v. Mendonsa***, 989 F.2d 366 (9th Cir. 1993) Though the police heard noise inside, were aware that one of the occupants was a parolee from an armed robbery conviction, and that drug activity was known to have occurred at the location, this did not excuse a violation of the knock and announce requirement.

***United States v. Moore***, 91 F.3d 96 (10th Cir. 1996) The police approached the defendant's house with a search warrant and within three seconds of announcing their presence battered the door down. This violated the constitutional requirement that the police knock and announce. Even if the police were aware of the existence of guns in the house, this was not sufficient, absent any proof that the officers were concerned about their safety.

***United States v. Stewart***, 867 F.2d 581 (10th Cir. 1989) Exigent circumstances did not justify a SWAT Team's use of a steel battering ram and stun grenade to serve a residential search warrant. There was no knowledge on the part of officers that such force was required. All evidence seized during the course of the ensuing search was suppressed. The mere fact that drug dealers commonly carry firearms and may destroy evidence does not excuse compliance with the knock and announce rule.

***SEARCH AND SEIZURE (Neutral and Detached Magistrate)***

***United States v. Horton***, 863 F.3d 1041 (8th Cir. 2017) The government utilized a Network Investigative Technique (NIT) to obtain information from the defendant's laptop computer. Even though some of the information obtained was not within the defendant's legitimate expectation of privacy, the information was contained on his laptop, for which he did have a legitimate expectation of privacy. The agents obtained a search warrant from a Magistrate in another district, who had no authority to issue a search warrant for a computer in another district. Nevertheless, the agents acted in good faith, so the evidence was not suppressed.

***United States v. Krueger,*** 809 F.3d 1109 (10th Cir. 2015) A magistrate judge in Kansas issued a search warrant to search the defendant's home in Kansas. When the agents arrived to conduct the search, the defendant was not present, and his roommate explained that the defendant (and his laptop) were in Oklahoma. The agent sought a new search warrant for the Oklahoma location from a Kansas Magistrate Judge. The Kansas Magistrate Judge issued the warrant. This violated Rule 41(b)(1) and the Tenth Circuit held that suppressing the evidence was required. United States v. Master, 614 F.3d 236 (6th Cir. 2010) The defendant lived in Coffee County. The police believed that he lived in Franklin County. A Franklin County judge issued a search warrant. The Sixth Circuit held that if a state judge does not have authority under state law to issue a search warrant for a

particular location, the execution of the warrant violates the Fourth Amendment and the evidence must be suppressed, even in a federal court. This is not a case, like Virginia v. Moore, 553 U.S. 164 (2008), in which the violation does not implicate the Fourth Amendment and only violates a state law. However, the Sixth Circuit also concluded that pursuant to Herring, the lower court must weigh the cost of suppression against the benefit of deterrence. Because the officers apparently believed that the property was located in the county where the judge was located, they acted in good faith and if this is satisfactorily established at a hearing, the exclusionary rule should not apply.

**United States v. Parker**, 373 F.3d 770 (6th Cir. 2004) The magistrate who issued the search warrant in this case was a part-time employee of the local jail in an administrative capacity. She did not qualify as a "neutral and detached magistrate" as required by the Fourth Amendment and the Leon good faith exception to the exclusionary rule did not apply.

***SEARCH AND SEIZURE (Nexus between crime and place to be searched)***

***United States v. Griffith***, 867 F.3d 1265 (D.C. Cir. 2017) The police had reason to believe that the defendant had participated (perhaps as the getaway driver) in a homicide that occurred a year earlier. The search warrant affidavit reviewed all the facts amounting to probable cause and then sought permission to search the defendant's current apartment (where he had moved after the homicide and a brief stint in jail). The warrant only sought authority to seize cell phones because criminals communicate by phone. During the execution of the search warrant, the defendant threw a gun out the window. The D.C. Circuit held that (1) the warrant was deficient, because there was no probable cause that the defendant even had a cell phone or that it had any incriminating information contained in it; (2) there was no probable cause that a phone would be found in the apartment (as opposed to on his person if he were not present at the apartment when the warrant was executed); (3) the good faith exception to the exclusionary rule did not apply because the warrant was so lacking in probable cause to search or seize a cell phone; (4) the "abandonment" of the gun was the fruit of the execution of the defective search warrant and therefore the gun that was thrown out of the window was subject to the exclusionary rule.

***United States v. Abernathy***, 843 F.3d 243 (6th Cir. 2016) The search warrant affidavit stated that the police conducted a "trash pull" at the defendant's residence and found marijuana residue. This evidence, alone, was insufficient to establish that evidence of drug trafficking could be found at the residence. See United States v. McPhearson, 469 F.3d 518 (6th Cir. 2006), noted below.

***United States v. Brown***, 826 F.3d 375 (6th Cir. 2016) Though there was probable cause to search the defendant's car; and though there was some evidence to believe that the defendant was involved in a heroin distribution conspiracy, there was insufficient information provided in the search warrant affidavit to justify a search of the defendant's house. There was no information that he ever sold heroin, or possessed heroin in his house. Instead, the agents relied only on their knowledge about what types of items are typically found in a drug dealer's house. The connection between the residence and the evidence of criminal activity must be specific and concrete, not "vague" or "generalized." This is an inadequate basis to issue a search warrant. The good faith exception to the exclusionary rule did not apply in this case, because the application "was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."

***United States v. Cordero-Rosario***, 786 F.3d 64 (1st Cir. 2015) The initial search warrant stated that the crime under investigation was "lewd actions" and that "in accordance with the interview of the child, there is currently pornography on the defendant's computer. There was no information in the search warrant application about what the child said, how the alleged pornography was related to any offense, how the child knew about the presence of pornography on the computer, or why the affiant believed that pornography was evidence of a crime. The evidence should have been suppressed, because even the good faith exception to the exclusionary rule did not apply to this warrant. Based on the discovery of child pornography during the search of the computer, the police went back to the apartment and secured the wife's consent to search additional computers. The First Circuit held that this was arguably the fruit of the poisonous tree exploiting the first illegal search, but further fact-finding was necessary to develop the record relating to the subsequent consent searches.

***United States v. Grant***, 682 F.3d 827 (9th Cir. 2012) The police did not make a colorable claim that a weapon used in a homicide was likely to be found at the defendant's house. The defendant, who lived in the house, was not tied to the homicide and his son, who may have been involved, was not shown to have gone to the defendant's house, or had the gun brought there. Even the good faith exception to the exclusionary rule did not resurrect this flawed search warrant.

***United State v. Doyle***, 650 F.3d 460 (4th Cir. 2011) The search warrant in this case failed to allege that pictures possessed by the resident of a house were pornographic and failed to allege when – or where – the pictures were possessed. This warrant lacked probable cause and did not even survive a good faith Leon review. The probable cause basis of the warrant provided the following: "Three minor children have come forward and stated that [Doyle] has sexually assaulted them at the Doyle residence. One victim [sic] disclosed to an Uncle that Doyle had shown the victim pictures of nude children." This description failed to state that the "nude pictures" were pornographic (i.e., lewd depictions) and because there was no statement of when these events occurred, the information was stale (the court noted that the notion of staleness when it comes to computer evidence is rarely a basis to deny a search warrant, but in this case, there was no indication of when the pictures existed). In addition, the statement does not indicate where the pictures were shown to the child, so there was scant basis for believing that the evidence sought by the search warrant would be located at the residence, though the appellate court did not base its ultimate conclusion on this flaw in the warrant. With regard to the absence of probable cause, the court also noted that evidence of child molestation does not automatically authorize the search for child pornography. ***United States v. Roach***, 582 F.3d 1192 (10th Cir. 2009) The search warrant affidavit documented years of gang activity by numerous members of the gang. The incidents involving the defendant were numerous, but the last identified offense was years prior to the issuance of the warrant. The warrant was issued for the

defendant's girlfriend's house, where he was believed to be living. The only link to the house was the assertion in the affidavit that the officers believed that he was living there. The Tenth Circuit held that the information was insufficient, as well as being stale, to support a search warrant for the house. But the search was saved by the good faith exception to the exclusionary rule.

***United States v. Higgins***, 557 F.3d 381 (6th Cir. 2009) The information provided to the Magistrate about the informant's reliability and any corroboration of his allegations that the defendant supplied him the drugs with which he was caught was insufficient to provide a probable cause basis to search the defendant's house. Not only was the informant's veracity insufficiently revealed: the affidavit also failed to reveal any connection between the drugs that were allegedly acquired from the defendant, and the defendant's house. The affidavit did not say that the informant had ever been in the defendant's house or seen drugs in the defendant's house. Despite these flaws in the affidavit, the good faith exception to the exclusionary rule applied.

***United States v. Hodson***, 543 F.3d 286 (6th Cir. 2008) The fact that the defendant was indisputably a child molester did not provide probable cause to believe that there was child pornography on his computer. The officer, moreover, could not have executed the warrant in good faith, because the application contained virtually no information that would have supported the search for pornography.

***United States v. West***, 520 F.3d 604 (6th Cir. 2008) Two search warrants were issued in this case. The first was devoid of probable cause, because it contained bare bones assertions about the defendant (all of which were based on hearsay statements that the affiant learned from other officers and individuals). The warrant also failed to link any criminal activity on the part of the defendant with the location that the police wanted to search. The warrant did not even satisfy the Leon good faith standard. The second warrant set forth facts that an informant told the affiant that the defendant confessed to a murder and the body could be found in a well at a certain location; the warrant sought authorization to search the defendant's van. The affiant, however, failed to reveal that the informant was serving time in federal custody and that the police went to the location where the body was supposedly located and found nothing – not even a well.

***United States v. McPhearson***, 469 F.3d 518 (6th Cir. 2006) The bare bones search warrant which stated that a person was arrested in front of his house and that he had drugs in his pocket was so deficient in setting forth probable cause that drugs could be found in the house that even the good faith exception to the exclusionary rule could not resurrect the search.

***United States v. Frazier***, 423 F.3d 526 (6th Cir. 2005) The information provided by confidential informants linked the defendant to drug dealing but did not link the defendant's premises to the illegal activity. There was no probable cause based on the search warrant affidavit to search the premises. Nevertheless, the officers acted in good faith and the evidence would not be suppressed.

***United States v. Laughton***, 409 F.3d 744 (6th Cir. 2005) The search warrant in this case was woefully inadequate in establishing any nexus between certain criminal activity that a CI reported and that the officer supposedly corroborated and the location that the search warrant targeted. The warrant simply said that the CI reported buying drugs not from whom, or where and that the officer corroborated the CI's statements. The search warrant application then sought permission to search a particular location but failed to link that location to the CI. Not only was the warrant defective, but reliance on it by the police was not reasonable and the exclusionary rule applied, notwithstanding Leon.

***United States v. Gourde***, 382 F.3d 1003 (9th Cir. 2004) REVERSED BY en banc COURT. The FBI learned about a website that permitted members to download child pornography. Defendant Gourde was determined to have been a member of the web site for two months. The FBI obtained a search warrant, claiming that any member would have had access to the child pornography. The affiant offered various expert opinions about the M.O. of child pornographers on the internet. The Ninth Circuit held that there was no probable cause to search the defendant's house and seize his computers based on this information. Moreover, Leon did not apply, because no officer could have relied in good faith on this warrant. There was no information that Gourde had actually downloaded any files from the website, though the FBI acknowledged that it had the capability of determining whether he did prior to the time the search was executed. See also United States v. Weber, 923 F.2d 1338 (9th Cir. 1990). REVERSED BY EN BANC COURT IN 2006. – 440 F.3d 1065 (9th Cir. 2006) (en banc).

***United States v. Carpenter***, 360 F.3d 591 (6th Cir. 2004) Information contained in the search warrant established that marijuana was found growing near a residence and that a road was seen from the location where the marijuana was seen and the residence. This information did not amount to probable cause to believe that evidence of a crime could be found in the residence. The officers acted in good faith, however, in relying on the search warrant.

***United States v. Zimmerman***, 277 F.3d 426 (3rd Cir. 2002) The police obtained a search warrant to search the defendant's home to look for child and adult pornography. There was no information in the warrant application that indicated that any pornography would be found in his home, though there was information that one clip of adult pornography was seen in the home months earlier by one (or perhaps more than one) high school student. That information, however, was stale. The police relied for the most part on evidence that the defendant was believed to have molested numerous high school students (he was a high school teacher). The police also offered expert opinion in the warrant application that child molesters often keep child pornography in their houses. The Third Circuit held that the warrant was lacking in probable cause and, in fact, could not even have been executed in good faith, given the absence of any evidence that pornography was then located in the house. The use of a seven page, single spaced, affidavit which never even mentioned child pornography could not reasonably have been relied upon to obtain a search warrant. Addressing the boilerplate "expert" opinion, the court wrote, "Rambling boilerplate recitations designed to meet all law enforcement needs do not produce probable cause . . . Experience and expertise, without more, is insufficient to establish probable cause."

***United States v. Ricciardelli***, 998 F.2d 8 (1st Cir. 1993) Postal inspectors mailed a child pornography tape to the defendant at a P.O. Box and obtained an anticipatory warrant from the Magistrate. Though the Constitution does not forbid anticipatory warrants per se, the magistrate must be sure that the triggering event is certain, leaving no discretion to the searching agents, and second, the contraband must be on a sure and irreversible course to its destination. In this case, however, the triggering event was not the arrival of the tape at the house, but the defendant's receipt of the tape, wherever that might occur – in this case, the post office. Because the warrant did not specifically and expressly require that the tape be delivered to the house before the warrant was executed it just required that the defendant obtain possession of the tape), it failed to satisfy the critical nexus requirement. The officers could not have relied on this warrant in good faith.

***United States v. Lalor,*** 996 F.2d 1578 (4th Cir. 1993) An informant stated that the defendant was frequently selling drugs at the corner of Northern Parkway and Loch Raven Boulevard. A second informant provided the same information and told the officer what the defendant's home address was. The officer confirmed that the defendant lived at that location and also saw the defendant's car at the location where the sales allegedly occurred. In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched, Zurcher v. Stanford Daily, 436 U.S. 547 (1978). See also United States v. Ramos, 923 F.2d 1346 (9th Cir. 1991); United States v. Stout, 641 F. Supp. 1074 (N.D. Cal. 1986). Nevertheless, the officer acted in good faith in executing the search in this case.

***United States v. Brown***, 951 F.2d 999 (9th Cir. 1991) Though there was considerable evidence that members of a law enforcement narcotics team were corrupt and that members stole evidence, including money, which was seized, this did not authorize the search of each member's house. There was not enough specific information dealing with each member's culpability to justify the search of every house. Also, the narcotics unit was not a "wholly illegitimate" organization, thus justifying the search of every member's residence. Nevertheless, the officers consulted with an AUSA before obtaining the search warrant and acted in good faith, thus the evidence would not be suppressed.

***United States v. Hove***, 848 F.2d 137 (9th Cir. 1988) In the affidavit in support of the search warrant, the police officers failed to link the suspect with the residence which was sought to be searched. This inadvertent failure to link the suspect to the premises rendered the affidavit insufficient and the officers could not have relied on it in good faith in searching the premises. This absence of good faith exists even though the officer in fact knew the link between the suspect and the residence.

***SEARCH AND SEIZURE (Particularity of Place to Be Searched)***

***Maryland v. Garrison***, 480 U.S. 79 (1987) Officers who were executing a search warrant and who were put on notice of a risk that they had entered a home that was unconnected with the illegal activity described in the warrant had an immediate duty to retreat.

***United States v. McLellan***, 792 F.3d 200 (1st Cir. 2015) The First Circuit, citing Garrison, noted that if officers while executing a warrant, realize that the warrant incorrectly identified the place to be searched, or that the place being searched was a multi-dwelling house, they have a duty to discontinue the search.

***United States v. Bershchansky***, 788 F.3d 102 (2d Cir. 2015) The agents signed a search warrant application verifying in detail that they wanted to search Apartment 2 at a certain location where the defendant supposedly lived and where his computer IPS address was located. The warrant was issued. When the agents arrived, they realized that the defendant lived in Apartment 1. They searched that apartment. The Second Circuit held that the search was improper and was not conducted in good faith. This was not a case of a mere typographical error.

***United States v. Shaw***, 707 F.3d 666 (6th Cir. 2013) The police had an arrest warrant for Ms. Brown, located at 3171 Hendricks Ave. They went to the general area and found two houses across the street from each other, both of which had the number 3170. Rather than further investigating the situation, the police chose the house that appeared to be occupied, knocked on the door and announced that they had a warrant, went in, conducted a sweep search, and found cocaine. The occupant, Mr. Shaw, was arrested and prosecuted for the cocaine. The house was not 3171 Hendricks and Ms. Brown did not live in Shaw's house. The Sixth Circuit held that the evidence should be suppressed. There was no basis to enter that house; there was no basis to search that house; the officers were not acting in good faith when they said that they had a warrant for that house, or when they remained in the house after determining that it was the wrong house.

***United States v. Voustianiouk***, 685 F.3d 206 (2d Cir. 2012) The police had a search warrant to search the first-floor apartment at a certain address. When they arrived, they realized that the defendant lived in the second-floor apartment, so they went there and conducted a search. The Second Circuit held that this amounted to a warrantless search that would not be saved by the good faith exception to the exclusionary rule.

***United States v. Clark,*** 638 F.3d 89 (2d Cir. 2011) The search warrant authorized the police to search the premises located at a certain address which was described as a "multi-family" dwelling. The warrant did not specify which unit to search, nor did it reveal how many units were present in this "multi-family" dwelling. The warrant lacked probable cause to the extent that it authorized a search of the entire structure at that address. However, the Second Circuit concluded that Leon saved the search.

***United States v. Ritter***, 416 F.3d 256 (3rd Cir. 2005) The police obtained a search warrant for a house but learned after entering that it was a multi-dwelling structure. The proper course of conduct was for the police to return to the magistrate and seek a more particularized warrant. In deciding whether to suppress any evidence, the question is what the police observed prior to determining that the house was a multi-dwelling structure. See Maryland v. Garrison, 480 U.S. 79 (1987).

***United States v. Schroeder***, 129 F.3d 439 (8th Cir. 1997) The police had a search warrant that particularly described a certain location, including a mobile home on the property, as well as a vehicle. The police disobeyed the clear description in the warrant, however, and entered another mobile home (albeit owned by the same person as the target mobile home). The police did not act reasonably in executing the search warrant in the manner they did and therefore the good faith exception to the exclusionary rule did not apply.

***United States v. Curry***, 911 F.2d 72 (8th Cir. 1990) The search warrant in this case failed to identify the place which was subject to be searched. However, the affidavit did identify the location. Nevertheless, the search warrant did not incorporate the affidavit specifically. A second search warrant, which did identify the location, was based on evidence uncovered during the execution of the first search warrant. The second search warrant was also invalid because based on unlawfully obtained evidence. The Eighth Circuit, however, holds that the searches were undertaken by the officers in good faith and thus the exclusionary rule was not applicable.

***United States v. Collins***, 830 F.2d 145 (9th Cir. 1987) The search warrant did not describe the place to be searched with sufficient particularity. The search warrant gave a numbered street address and also stated that the house was the last one on the west side of the street. The number did not correspond with the last house on the west side of the street. The officers searched both houses: The one at the correct street number and the one at the end of the west side of the street. The court holds that the search warrant failed the particularity requirement.

***United States v. Ellis,*** 971 F.2d 701 (11th Cir. 1992) A search warrant directed the police to the wrong address. When they arrived there, the occupant told them where to go to find the target location. Because the information in the warrant did not adequately describe the place to be searched, the warrant failed the particularity test. Furthermore, the officers did not execute the warrant in good faith, because the officers did not actually know the correct location such as those cases where the warrant simply has a typographical error, but the officer knew the correct location to be searched. Here, uncertain where the defendant lived, the officers simply accepted the word of the occupant of the first house.

***SEARCH AND SEIZURE (Particularity of Things to be Seized)***

***Groh v. Ramirez***, 540 U.S. 551 (2004) Though the search warrant application and the supporting affidavit both listed the types of items that the officers intended to seize, the search warrant itself did not list any items that were authorized to be seized and failed to incorporate the affidavit or application. The Court held that when an affidavit is needed to render the search warrant itself valid, the affidavit must be served on the person who is being searched at the time the warrant is served. The Supreme Court held that the search was unlawful, and the agent could be sued by the homeowners.

***United States v. Dunn***, --- Fed.Appx. ---, 2017 WL 6349439 (10th Cir. 2017) The “to be seized clause” stated, “Items to be searched for and seized include but are not limited to” followed by a list of categories. This allowed the agents to search for and seize anything. The warrant was overbroad and not subject to the good faith exception. A phrase “not limited to” may be applied to a limited category, but not the entire search. See also Cassady v. Goering, 567 F.3d 628 (10th Cir. 2009).

***United States v. Russian***, 848 F.3d 1239 (10th Cir. 2017) The search warrant application in this case requested permission to search two cell phones of the defendant that had already been seized when he was arrested, as well as permission to search his residence. The warrant, however, authorized the police to search residence and seize cell phones found in the residence, but did not authorize the search of the phones already seized. This warrant did not authorize the search of the phones. The officers acted in good faith, however, so no suppression.

***United States v. Franz***, 772 F.3d 134 (3rd Cir. 2014) The warrant presented to the target at the time the search is executed must contain a list of the items to be seized. The failure to have a particularized list in this case was a constitutional violation, but the officers executed the warrant in good faith.

***United States v. Galpin***, 720 F.3d 436 (2d Cir. 2013) The search warrant affidavit provided inadequate probable cause to support the search and seizure of defendant’s computer. The application sought a warrant to look for evidence of the violation of a particular New York statute, “and or federal statutes”. That statute related to the registration of internet service provider and communications accounts (the officer simply cited the wrong code section). The Second Circuit held that this warrant violated the particularity requirement in that it did not properly limit the scope of the search, or, for that matter, the type of evidence that the police were authorized to search for. The Second Circuit emphasized the importance of having proper limits when a computer is the subject of the search. The court also addressed the proper method of “severing” the improper portions of a search warrant from the legitimate clauses. If only limited parts of the warrant are valid (in a warrant that is otherwise sweeping and invalid), suppression of the evidence is appropriate. However, where isolated portions are invalid, the court may uphold the search that is authorized by the legitimate portions of the warrant.

***United States v. Rosa***, 626 F.3d 56 (2d Cir. 2010) The search warrant authorized the agents to seize all computers and other hardware. The application specified that the agents were looking for child pornography. The application, however, was not incorporated into the search warrant. The Second Circuit agreed that the search of the computers was improper, because of the lack of particularity regarding what the agents were searching for. Nevertheless, the exclusionary rule did not apply, because the agents did, in fact, know what they were looking for and acted in good faith.

***Cassady v. Goering***, 567 F.3d 628 (10th Cir. 2009) A search warrant that authorized the seizure of all possible evidence of any crime was overbroad. The overbreadth of the warrant in this case rendered the entire warrant defective (regardless of the

manner in which the warrant was actually executed). Note that this is a civil case, so the question did not focus on suppressing evidence, but rather on the liability of the sheriff for executing the warrant.

***United States v. SDI Future Health, Inc.,*** 568 F.3d 684 (9th Cir. 2009) The search warrant was overbroad with respect to certain categories of documents that the agents were required to seize. The Ninth Circuit held that his is not technically a "particularity" defect, because the warrant was particular – it was just too broad. However, the Court held that suppression of those categories of documents was sufficient to cure the defect. This was not a case in which total suppression was required, as in United States v. Kow, 58 F.3d 423 (9th Cir. 1995); United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982) and United States v. Spilotro, 800 F.2d 959 (9th Cir. 1986).

***United States v. Angelos***, 433 F.3d 738 (10th Cir. 2006) Though the FBI and the AUSA intended to get a search warrant that would have allowed the agents to search the defendant's car and house (and there was, in fact, probable cause to search both the car and the house), they mistakenly submitted a search warrant that only identified a safe in the house and the car as the target of the search. Searching the entire house was therefore impermissible. Moreover, because the search warrant clearly only authorized the search of the car and the safe, the good faith exception to the exclusionary rule did not apply. The evidence suppressed, however, was limited to the evidence that was seized that was not located in the car or safe.

***San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose,*** 402 F.3d 962 (9th Cir. 2005) A search warrant that authorized the seizure of "any evidence of gang affiliation" was too broad and the execution of the warrant was so abusive including shooting dogs that the officers would not be entitled to qualified immunity.

***United States v. Bridges,*** 344 F.3d 1010 (9th Cir. 2003) There was probable cause to search the defendant's office based on the information in the application that documented his efforts to provide illegal tax advice to various clients, including undercover agents. The search warrant in this case, however, was overly broad. It listed, among the items to be seized, "All records . . . documents . . . computer hardware and software . . ." Though this list was detailed, it was too expansive. There was simply no boundary to what could be seized. In addition, the warrant did not specify the crimes that were the subject of the search (nor did the warrant incorporate the application) so there was no limitation in that manner. Though the application was detailed, the warrant was not. All evidence should have been suppressed. (No discussion of Leon).

***Doe v. Groody***, 361 F.3d 232 (3rd Cir. 2003) The warrant particularly described the location to be searched and the people who were to be searched at that location. The attached and incorporated affidavit included additional people that the affiant believed should be searched. The affidavit could not broaden the scope of the narrowly drawn search warrant and searching other people at the location was improper. (This is a civil rights case that was brought by other people at the premises who claimed that searching them violated their fourth amendment rights).

***United States v. Shugart***, 117 F.3d 838 (5th Cir. 1997) Though the good faith exception to the exclusionary rule applied, the search warrant in this case insufficiently specified the items to be seized. The warrant was a boilerplate narcotics search warrant (focusing on items relating to the possession and distribution of drugs), but the agents were actually looking for narcotics manufacturing evidence.

***In re Grand Jury Investigation Concerning Solid State Devices, Inc***., 130 F.3d 853 (9th Cir. 1997) The government established probable cause that certain practices of the target corporation were fraudulent. Indeed, there was information that the company "routinely" engaged in fraudulent practices. Nevertheless, the corporation itself was not pervaded by fraud, in the sense that the corporation had little legitimate business. Therefore, a warrant which resulted in the seizure of approximately 90% of the corporation's records over a five-year period, including 2,000 file drawers, was overbroad and the target's motion for return of seized property should have been granted.

***United States v. McGrew,*** 122 F.3d 847 (9th Cir. 1997) The agents provided an affidavit in support of a search warrant which set forth probable cause to search the defendant's residence. The warrant, however, contained no limitation whatsoever on what could be seized: it simply authorized the agents to search the defendant's residence. The affidavit was not attached to the warrant though it was incorporated by reference, at least one of the searching agents did not know the contents of the affidavit, and the affidavit was not served on the defendant at the time of the search. The government explained that it did not want to disclose the identity of the confidential informants. This was an unlawful "general" search and was not saved by Leon. The requirement of particularity serves two functions: the agents are informed of the limitation relating to what they can seize, and the target is informed of what the agents are entitled to seize. Neither goal was achieved in this case.

***United States v. Falon***, 959 F.2d 1143 (1st Cir. 1992) When a corporation is entirely consumed by fraud, an "all records" search is permissible. Similarly, when an individual runs his business, not in a corporate form, but in an entirely illegitimate manner, an "all records" search is permissible. However, when the target of such a search is the person's home, an "all records" search is not appropriate. In such cases, the warrant should specify business-related documents in order to minimize the seizure of the defendant's personal non-business-related documents. The appropriate remedy is partial suppression – suppression of those items which should not have been seized.

***United States v. Fuccillo,*** 808 F.2d 173 (1st Cir. 1987) The search warrant in this case authorized the seizure of cartons of women's clothing, the contents of those cartons, without identifying the contents of the cartons, and control slips identifying the stores intended to receive those cartons. The vice with this warrant was the failure to specify what types of clothing were subject to seizure – that is, what clothing was believed to have been stolen and thus within the parameters of the search warrant

affidavit. The Court holds that the warrant was overbroad on its face and that the good faith exception did not apply because the obvious infirmity of the warrant.

***United States v. George***, 975 F.2d 72 (2d Cir. 1992) A search warrant which authorized the seizure of various items and "any other evidence relating to the commission of a crime" was not sufficiently particular. An officer could not rely on this warrant in good faith. There was no limiting language in the warrant indicating what "crimes" were the focus of the search. Furthermore, a sufficiently particular affidavit does not cure an overbroad warrant: resort to an affidavit to remedy a warrant's lack of particularity is only available when it is incorporated by reference in the warrant itself and attached to it.

***United States v. Buck***, 813 F.2d 588 (2d Cir. 1987) The search warrant in this case authorized the search and seizure of any papers, things or property of any kind relating to the robbery and murder under investigation. The court holds that this type of warrant is insufficiently particular and is invalid under the Fourth Amendment. However, it is not so facially invalid as to render the police officer's reliance on it unjustified. Therefore, the good faith exception saves the search in this case.

***United States v. Beaumont***, 972 F.2d 553 (5th Cir. 1992) If a search warrant fails to particularize the items to be seized, but specifically incorporates the affidavit which provides the necessary specificity, the warrant is lawful. But if the warrant does not specifically incorporate the affidavit, then the affidavit does not cure the defective warrant. Nevertheless, the good faith exception to the exclusionary rule applies. Massachusetts v. Sheppard, 468 U.S. 981 (1984).

***Rickert v. Sweeney***, 813 F.2d 907 (8th Cir. 1987) The search warrant in this case authorized an IRS agent to search and seize various business records belonging to taxpayers and constituting evidence of violations of the general conspiracy statute and of the general tax evasion statute. This is insufficiently particularized to satisfy the Fourth Amendment.

***United States v. Kow***, 58 F.3d 423 (9th Cir. 1995) A search warrant authorized the seizure of virtually every document at the target corporation's office. The warrant did not limit the time period of relevant documents, did not provide any limiting language to the broad categories of items to be seized and did not even specify the nature of the fraud which was supposedly evidenced in the documents. The government would not be permitted to use evidence which was lawfully seized: the court would not sever the overbroad portions. Indeed, each of the categories of documents was overbroad. Finally, this was not a search warrant which could be rescued by the good faith exception to the exclusionary rule. Even though two AUSA's, a magistrate, and the agents believed that the warrant was valid, the court concludes that no reasonable agent could have relied on the warrant in good faith.

***United States v. Van Damme***, 48 F.3d 461 (9th Cir. 1995) The police had probable cause to obtain a search warrant. However, the warrant instructed the officers to seize items set forth in attachment #1, but there was no attachment. The only attachment which existed accompanied the search warrant application. In this situation, the officers could not seize anything other than what was obviously contraband in plain view.

***United States v. Clark***, 31 F.3d 831 (9th Cir. 1994) The search warrant authorized the seizure of narcotic controlled substances, drug paraphernalia, marijuana cultivation equipment, instructions, notes, cultivation magazines, currency, documents and records and fruits and instrumentalities of a violation of Title 21 U.S.C. §841(a)(1). This latter clause was too overbroad; it provided to the executing officers no guidance as to what was to be seized. This provision was not saved by Leon. All evidence seized pursuant to this clause of the warrant would be suppressed.

***United States v. Weber***, 915 F.2d 1282 (9th Cir. 1990) The defendant's house was searched pursuant to a search warrant that was directed at the presence of obscene material in the defendant's home. The search warrant, however, allowed officers to search for a wide variety of magazines and advertising materials, none of which was backed up by probable cause. The only evidence against this defendant was the fact that a couple of ads addressed to him apparently depicted child pornography. The affiant's statement about the "proclivities of pedophiles" did not support a wall-to-wall search of the house. The affidavit simply did not support a search for child pornography in general. The court rejected certain aspects of the warrant as "rambling boiler-plate recitations designed to meet all law enforcement needs." Finally, the court concludes that the good faith exception to the exclusionary rule did not apply. The court amended the opinion at 923 F.2d 1338 (9th Cir. 1990).

***United States v. Stubbs***, 873 F.2d 210 (9th Cir. 1989) The search warrant in this case was overbroad. There was no reference to criminal activity; it only described generic categories of documents without any effort to specifically describe the items which the officers could have seized under a probable cause standard.

***United States v. Spilotro***, 800 F.2d 959 (9th Cir. 1986) The search warrant in this case authorized the search of a jewelry store and the seizure of all notebooks, notes, documents, address books, and other records; safety deposit boxes, keys, cash, gemstones and other items of jewelry and other assets, all of which were evidence of the violations of thirteen enumerated statutes. Because the law enforcement officers could have been more particular in regard to what they believed was evidence or contraband, the search warrant in this case was invalid. Furthermore, because the search warrant was not attached to the affidavit, it was not permissible to cure the defects in the warrant by referring to the affidavit. Finally, because the warrant was facially deficient, the police officers could not have relied upon it in good faith and therefore the evidence was suppressed. The court also discusses the government's argument that even though portions of the search warrant were broad, the items which were seized pursuant to the search warrant paragraphs which were not overbroad could still be used as evidence. The court rejects this argument: The search warrant was overbroad through and through. No items were specifically identified in the search warrant; consequently, nothing could be seized lawfully. The court also rejects the government's argument that certain items were found in plain view and could be used in evidence under that rule. The court holds that because the warrant was overbroad,

the police officers had no right to be in the jewelry store and consequently had no right to have a “plain view” of the items which were obviously illegal.

***United States v. Washington***, 797 F.2d 1461 (9th Cir. 1986) Sections of the federal warrant in this case which authorized the seizure of documents showing an employer/employee relationship between persons named and unnamed and evidence of defendant’s association with anyone, did not meet the particularity requirement of the Fourth Amendment. Furthermore, the search warrant was so facially deficient that officers could not have acted in “objectively reasonable” reliance upon it.

***United States v. Leary***, 846 F.2d 592 (10th Cir. 1988) A search warrant authorized agents to seize a broad range of records “relating to” violations of federal export laws. The affidavit only suggested a violation of the export laws relating to the export of a particular type of equipment to a particular foreign country. The warrant was thus overbroad and could not be saved by the “good faith” doctrine. The agents who executed the search warrant paid little heed to the few limits which were placed on the warrant.

***United States v. Medlin***, 842 F.2d 1194 (10th Cir. 1988) During the course of a search conducted pursuant to a federal search warrant, a state deputy sheriff seized numerous stolen items which had no relationship whatsoever to the object of the search. The court holds that everything which was seized would be suppressed. The reason for the exclusion of all evidence was the executing officers’ “flagrant disregard” for the terms of the warrant.

***Search and Seizure (Plain View)***

***Minnesota v. Dickerson***, 508 U.S. 366 (1993) The police frisked the defendant after he was stopped for engaging in “evasive” behavior. The police officer conducted a Terry frisk. While frisking the defendant, the officer felt an object which was clearly not a weapon, but which felt like it might be contraband. The Supreme Court held that an officer who is engaged in a legal Terry frisk of a subject may seize an object which the officer realizes immediately to be contraband. This is the “plain touch” analogue to the “plain view” exception. That is, the officer need not limit his seizures to weapons if he is immediately aware that he is touching contraband. Applying the rule to this case, however, the Court concluded that the officer was not immediately aware that he was touching contraband. Rather, “the officer determined that the lump was contraband only after squeezing, sliding and otherwise manipulating the contents of the defendant’s pocket – a pocket which the officer already knew contained no weapon.” The seizure, therefore, was not authorized by the “plain touch” exception.

***Horton v. California***, 496 U.S. 128 (1990) The Fourth Amendment does not prohibit the warrantless seizure of evidence in plain view even though the discovery of the evidence was not inadvertent. Although inadvertence is a characteristic of most legitimate plain view seizures, it is not a necessary condition. An officer obtained a search warrant to look for the proceeds of an armed robbery. The officer was also aware of weapons that were used during the course of the robbery, but the warrant did not authorize the officer to search for or seize any weapons. The officer did however seize weapons while searching through the defendant’s house. He testified that while he was searching for the proceeds, he also was interested in finding other evidence connecting the defendant to the robbery. Thus, the seized evidence was not discovered “inadvertently.” Nevertheless, the evidence was admissible. The police were executing a lawful search warrant at the time that these items were discovered. It was immediately apparent to the officer that these items constituted incriminating evidence, and thus they were permitted to seize them. In short, the search was authorized by the warrant, the seizure was authorized by the Plain View Doctrine.

***Arizona v. Hicks***, 480 U.S. 321 (1987) During the course of a search executed under the exigent circumstance’s exception, police officers lifted up a stereo in order to record the serial number. The police officers believed that the stereo equipment was stolen and needed to get the serial number to confirm this. At trial, the State argued that the stereo was in plain view and thus no search warrant was required even though the search went beyond that which was justified by the exigent circumstances. The Supreme Court reverses: Though the stereo may have been in plain view, lifting it up and looking at the serial number was not part of a plain view search.

***United States v. Lewis,*** 864 F.3d 937 (8th Cir. 2017) The defendant was an employee at a Tattoo shop. The police were looking for a suspect and entered the premises and went into a work area where the defendant was located. After entering, the police saw a gun in a holster and seized it. Almost immediately after seizing it, the defendant acknowledged that he was a convicted felon. The Eighth Circuit held that the seizure of the gun was not supported by either the plain view exception because at the moment of the seizure there was no probable cause to believe that the gun was illegally possessed, and was not justified by officer safety, because there was no reason to be fearful of the gun on the shelf in a holster.

***United States v. Carey***, 836 F.3d 1092 (9th Cir. 2016) The police had a lawful wiretap to listen to “T-14” which was believed to be Escamilla’s phone. After a few days, however, the police realized that someone else was using that phone and the calls – though drug-related – were not related to Escamilla’s drug conspiracy. The Ninth Circuit holds that the “plain hearing” exception to the warrant requirement applies. As in the case of a search, the police do not suffer the consequences of the exclusionary rule if incriminating calls are heard by police who are lawfully listening to a intercepted calls. But, also consistent with “plain view” jurisprudence, once the police realize that they are listening to calls that were not the basis for the probable cause showing (or the wiretap order), they must stop listening and seek a new wiretap order. See Maryland v. Garrison, 480 U.S. 79 (1987).

***United States v. Gordon***, 741 F.3d 64 (10th Cir. 2014) The police properly entered a house after receiving a domestic violence call. Once in the house, the police also properly seized a shotgun seen in plain view in order to protect everybody present. Once the defendant was removed from the scene, however, the continued seizure of the shotgun was not permissible. During the time that the police continued this improper seizure, they learned that the defendant was a convicted felon. While holding that the

seizure was a constitutional violation, the appellate court also concluded that the violation was de minimus and therefore excluding the evidence was not required.

***Gentry v. Sevier***, 597 F.3d 838 (7th Cir. 2010) The defendant was walking with a wheelbarrow through a neighborhood late at night. The police were called. When the police arrived, they summoned the defendant over to their car and told him to "keep his hands up." This amounted to a seizure, which was not supported by an articulable suspicion. The officer then patted down the defendant, locating a garage opener. There was no basis for this frisk: there was no reason to believe the defendant was armed or dangerous and he was not subject to a legitimate arrest or detention. Moreover, there was no basis to keep the garage door opener and thereafter walk down the street seeing if it opened any garage in the neighborhood, because it was not a weapon, or apparent to be contraband. Finally, the search of the wheelbarrow was illegal. Though some items on the top of the pile in the wheelbarrow were subject to plain view, other items below the surface could only be seen when the officer probed beneath the surface. The defendant's trial counsel was ineffective in failing to move to suppress the fruits of the search.

***United States v. Lemus***, 596 F.3d 512 (9th Cir. 2010) The majority opinion in this case approved an exigent circumstances or security sweep search that resulted in the plain view discovery of a gun. The full court refused to hear the case en banc. However, in a lengthy dissent to the denial of en banc review, Judge Kozinski decried the excessive reliance by the government on the plain view doctrine to justify seizures of evidence that never should have been in the plain view of the government because of the pretextual reliance on other search warrant exceptions. Judge Kozinski's dissent includes the following passages: "Whatever may have been left of the Fourth Amendment . . . is now gone. The evisceration of this crucial constitutional protector of the sanctity and privacy of what Americans consider their castles is pretty much complete. Welcome to the fishbowl. . . . How has it come to this? There's a simple answer: Plain view is killing the Fourth Amendment. Because our plain view case law is so favorable to the police, they have a strong incentive to maneuver into a position where they can find things in plain view, or close enough to lie about it." It is worth noting that Judge Kozinski also condemned the plain view doctrine in his majority opinion in Comprehensive Drug Testing, infra, in connection with the searches of computers.

***United States v. Comprehensive Drug Testing, Inc***., 579 F.3d 989 (9th Cir. 2009) (en banc) In this en banc decision, amended in September 2010, the Ninth Circuit originally set forth specific rules that govern the search of a computer where a warrant specifically authorizes the search of the computer for certain documents. In this case, the warrant authorized the search of the computer to obtain certain patient records. The law enforcement agents, however, searched the entire computer records, claiming that they could not ensure that the target records were not located in other patients' files. Thus, various non-target records were viewed and then seized under the plain view doctrine. The Ninth Circuit held that this type of search beyond the scope of the warrant is unlawful. Among other rules, Judge Kozinski, in his concurring opinion, wrote that Magistrates should avoid allowing the government to rely on the plain view doctrine; segregation of records should be handled by a neutral third party; the search protocol should explain the steps that will be taken to avoid reviewing the contents of the computer that are not spelled out in the warrant.

***United States v. Garcia***, 496 F.3d 495 (6th Cir. 2007) When executing a search warrant for drugs, the police may not seize receipts and other financial documents that are later analyzed and determined to be evidence of unexplained wealth. The documents were not "readily apparent" to be evidence of a crime, and thus did not fall within the plain view exception. The court also rejected the government's claim that it could legitimately seize a map with certain locations circled, and a notebook/journal, that was later determined to record drug deals.

***United States v. Cellitti***, 387 F.3d 618 (7th Cir. 2004) The police entered a house in which the defendant and his girlfriend lived based on exigent circumstances. Once inside, the police were given consent by the girlfriend to look for a gun. While looking for the gun, the police found a set of keys which they ultimately determined fit a car. In one holding, the court concluded that the police did not seize the key under the plain view doctrine, because there was no reason to believe that the key was evidence of a crime. The girlfriend later consented to a search of the car in which they found an assault rifle. The Seventh Circuit held that the defendant had a legitimate expectation of privacy in the car. Moreover, if the girlfriend did not validly consent to a search of the car, then the defendant had standing to contest the search. The girlfriend's consent was not valid, because the girlfriend was improperly in custody when her consent to search the car was obtained.

**United States v. McLevain**, 310 F.3d 434 (6th Cir. 2002) The police had a warrant that authorized the entry into the defendant's house to search for a fugitive. While in the house, the agents saw a "twist tie," a cut cigarette filter, and spoon with residue. The officers believed that these items were methamphetamine paraphernalia. The Sixth Circuit holds that the seizure of these items and using them as support for another search warrant was not authorized by the plain view doctrine, because the fact that the items were contraband, or evidence of a crime was not immediately apparent. The court noted that there was no nexus between the items that were seized and the search warrant that gained the officers access to the house; the items might be characterized as "odd" but were not clearly contraband; and the information known to the police at the time of the seizure could not support a determination that the items were evidence of criminal activity.

***United States v. Rutkowski***, 877 F.2d 139 (1st Cir. 1989) Because the platinum strips which were discovered by the police behind a wall of insulation were not immediately known to the officers to be incriminating, their seizure was not authorized under the plain view doctrine.

***United States v. Jenkins***, 124 F.3d 768 (6th Cir. 1997) The police improperly entered the curtilage of the defendants' home their backyard and seized items of evidence that were introduced at trial. This was not a lawful plain view search, because the

entry into the backyard was not lawful and, therefore, the government could not prove that the items of evidence were viewed by an officer lawfully located in a place from which the object could be seen.

***United States v. Beal***, 810 F.2d 574 (6th Cir. 1987) During the course of a search of a house and a seizure of a dresser, the police officers seized ten guns. These items looked like pens but were actually guns. The only thing which made them illegal was that they did not have a serial number as required by federal law. This was not immediately apparent to the police officers who seized the items. Consequently, the plain view doctrine did not justify the seizure in this case.

***United States v. Brown,*** 79 F.3d 1499 (7th Cir. 1996) Where the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object – i.e., if its incriminating character is not immediately apparent – the plain view doctrine cannot justify its seizure. Here, the police saw a metallic, chrome object in a bag, and thought, but did not know, that it was a gun. Only after the bag was opened was it apparent that it was a gun. This was not a proper plain view seizure.

***United States v. Spilotro***, 800 F.2d 959 (9th Cir. 1986) The police officers during the course of executing a search warrant which was facially overbroad found certain evidence which was obviously sizable. The court holds that if the search warrant is overbroad, the police officers have no right to be where they are, and thus the plain view doctrine has no application.

***Winters v. Board of County Commissioners of Osage,*** 4 F.3d 848 (10th Cir. 1993) The police had reason to believe that a stolen ring was at a particular pawnshop. A state regulation permitted warrantless "examinations" of the place of business of pawnshops, but not the seizure of items. The police went to the pawnshop and asked a clerk to give the ring to the officer to be examined. The officer then seized it because it fit the description. This was not a valid seizure under the regulation, because seizures are not permitted by the regulation. It was not a valid plain view seizure, because the officer did not have the right to be in possession of the ring, or even to have warrantless access to it, so the officer could not claim that the discovery of the item occurred at a time when he was lawfully where he was supposed to be. The pawnshop had a viable §1983 action because of this seizure.

***United States v. Donnes***, 947 F.2d 1430 (10th Cir. 1991) The police found a lens case in close proximity to a syringe. The lens case was not known to contain drugs and thus the opening of the case could not be justified by the plain view doctrine. Unlike a gun case, the police had no basis for opening the container after inadvertently discovering it.

***SEARCH AND SEIZURE (Pre-Search Seizure)***

***Bailey v. United States,*** --- S. Ct. – (2013) Though Michigan v. Summers, 452 U.S. 692 (1981), permits the police to detain people who are at the scene that is the target of a search warrant, in this case the police followed individuals who left the scene prior to the search and detained them about a mile away, without any information that they were subject to a Terry stop. The Supreme Court held that this amounted to an unlawful detention that necessitated the suppression of any evidence derived from the stop of the individuals.

***United States v. Pratt***, 915 F.3d 246 (4th Cir. 2019) The police seized a cell phone from the defendant when he was arrested but waited 31 days to get a search warrant to examine the contents. The Fourth Circuit held that this violated the Fourth Amendment. The initial seizure was appropriate, but the delay in seeking a warrant was unjustified by any governmental interest. The contents of the phone should have been suppressed. (The Fourth Circuit relied primarily on the decision in Mitchell, discussed below).

***United States v. Shrum***, 908 F.3d 1219 (10th Cir. 2018) The defendant's 30-year-old wife died at home, and he called 911. The police and medical personnel arrived shortly thereafter, and the wife was taken to the hospital and pronounced dead. The defendant went to the police station and was questioned. The police "secured" the house and for several hours, the defendant's access to the house was limited. During the time the house was "secured" the police entered and took several photographs, some of which revealed the presence of ammunition. The defendant was charged with possession of ammunition by a convicted felon. The Tenth Circuit held that the house was, in fact, seized; there was no probable cause, or even an articulable suspicion, to interfere with the defendant's access to the house and the seizure was therefore unlawful; the unlawful seizure resulted in the discovery of evidence; the discovery of evidence was not attenuated from the illegal seizure. There is no such thing as a "crime scene" investigation exception to the Fourth Amendment. The district court should have suppressed the evidence discovery of the ammunition.

***United States v. Watson***, 703 F.3d 684 (4th Cir. 2013) The police had probable cause to believe that drugs were being distributed from a convenience store. The defendant lived on the second floor of the store. After watching another man engaged in what appeared to be drug dealing at the store, the police detained the defendant as he was seen leaving the premises and started the process of obtaining a search warrant. The detention lasted for four hours. During this time, the defendant made an incriminating statement, and a gun was found in his room when the warrant was later executed. The Fourth Circuit, distinguishing Illinois v. McArthur, held that the detention was invalid, and the evidence was suppressed. Unlike in McArthur, the police did not have probable cause to believe that the defendant was involved in the drug dealing.

***United States v. Cha***, 597 F.3d 995 (9th Cir. 2010) The police seized the defendant's house and held it for twenty-four hours (not allowing the defendant to enter), while a search warrant was obtained. This was too long and the evidence obtained from the search that was conducted thereafter should have been suppressed, even though it could not be said that the search or the discovery of the evidence was the "fruit" of the illegal seizure. See Illinois v. McArthur, 531 U.S. 326 (2001) and Segura v. United States, 468 U.S. 796 (1984). Though the evidence was not discovered as the fruit of the illegal seizure, the discovery of the

evidence was the direct result of the constitutional violation. The court also rejected the government's effort to extend the Herring good faith exception to the exclusionary rule to this situation.

***United States v. Mitchell,*** 565 F.3d 1347 (11th Cir. 2009) If the police seize an item such as a computer from a house, based on probable cause (without consent to search it and without a search warrant authorizing the search or seizure), they must seek a warrant promptly. In this case, the police went to the defendant's house and asked if he had any child pornography on his computer. He initially responded, "yes, probably." He did not give the officers consent to seize the computer. Nevertheless, based on probable cause the officer seized the hard drive. He kept the hard drive in his office for several weeks during which time he was on training and was otherwise occupied. Thereafter, twenty-one days after the computer was seized, he obtained a search warrant. The Eleventh Circuit held that this delay was impermissible and suppressed the evidence obtained from the computer. The court noted that personal computers contain a substantial amount of private information and depriving the defendant of the computer that length of time without a warrant violated his Fourth Amendment right to be free from unreasonable searches and seizures. Among other arguments rejected by the Eleventh Circuit, the notion that the search would have taken more than three weeks even if the warrant had been obtained on the day of the seizure, did not support the delay. The court observed that a hard drive of a personal computer is the "digital equivalent of its owner's home, capable of holding a universe of private information." For that reason, a three-week delay in starting the search process was not reasonable.

***United States v. Ward***, 144 F.3d 1024 (7th Cir. 1998) The defendant checked his suitcase, which contained a kilogram of cocaine, on a bus from L.A. to Indianapolis, but did not board the bus. He flew to Indianapolis and awaited the arrival of the bus. When the bus stopped in St. Louis, the police became suspicious of the bag and took it out of the luggage compartment and asked the passengers if anybody claimed it. Nobody did, and the police confirmed that none of the passengers were heading for Indianapolis. The bag was taken out of the bus and the bus departed. Later, a drug dog alerted to the bag and a warrant was obtained. The Seventh Circuit concludes in this case that the luggage was "seized" when it was taken off the bus; however, there was a reasonable suspicion justifying the seizure. Relying on United States v. Place, 462 U.S. 696 (1983), the court held that detaining luggage is the same as detaining a traveler and must be supported by an articulable suspicion. See also United States v. Puglisi, 723 F.2d 779 (11th Cir. 1984). This rule applies even if, as in this case, the traveler was not accompanying his luggage, because the detention would have deprived the traveler of his luggage at the ultimate destination. See United States v. Van Leeuwen, 397 U.S. 249 (1970) (detaining mail is not unlawful if it is delivered the next day). Because there was an articulable suspicion, however, the dog alert and the execution of a search warrant was permissible.

***United States v. Madrid***, 152 F.3d 1034 (8th Cir. 1998) After the defendant and his colleague were arrested making a drug sale, the colleague told the police that some of the drugs came from the defendant's house and that more drugs were left there. The police went back to that location and "secured" the home which involved detaining four occupants, and searching the house, including requiring each of the occupants to empty their pockets. The agents then endeavored to get a search warrant, including in the application information obtained during the search. The Court refused to allow the evidence to be admitted under an inevitable discovery theory because of the blatant violation of the defendant's rights prior to getting a search warrant. The court distinguished both Segura v. United States, 468 U.S. 796 (1984) and Murray v. United States, 487 U.S. 533 (1988). In Segura and Murray, the warrant did not contain any information learned during the illegal search. Moreover, "the offensiveness of the officers' actions in this case is not limited to the seizure of premises but extends to the detention of occupants and the continued, prolonged, illegal search by wandering officers."

***SEARCH AND SEIZURE (Private Search)***

***United States v. Ackerman***, 831 F.3d 1292 (10th Cir. 2016) The National Center for Missing and exploited Children (NCMEC) is a private non-profit entity that provides information about missing children and maintains records about child pornography victims. Nevertheless, it receives government funding, receives directions from Congress, and has unique law enforcement powers not enjoyed by private citizens. The Tenth Circuit concludes, therefore, that for Fourth Amendment purposes, NCMEC is a state actor and must obtain a search warrant before conducting a search. In this case, NCMEC opened emails from the defendant and provided them to the government.

***United States v. Sparks***, 806 F.3d 1323 (11th Cir. 2015) The defendant inadvertently left a cell phone at a Walmart and an employee reviewed the contents prior to bringing the phone to the police station: "[O]nce an individual's expectation of privacy in particular information has been frustrated by a private individual, the Fourth Amendment does not prohibit law enforcement's subsequent use of that information even if obtained without a warrant . . . As a result, a warrantless law-enforcement search conducted after a private search violates the Fourth Amendment only to the extent to which it is broader than the scope of the previously occurring private search." The court insisted that the limitation must be strictly applied. Even if the private party scrolls through the contents of a cell phone "photo album" and sees that there are videos in the album, law enforcement may not then engage in a warrantless viewing of the videos unless the video was previously viewed by the private party. Id. at 1336.

***United States v. Lichtenberger,*** 786 F.3d 478 (6th Cir. 2015) The defendant's girlfriend viewed child pornography on the defendant's computer. The police were summoned, and the girlfriend showed the officer the contents of the computer, but not just the portion that she had previously viewed. When the police were examining the computer with the girlfriend, at that point she was acting as an agent of the police. The search of the computer with the girlfriend was not valid under the "private search" doctrine, which only allows the police to view what the private searcher has already viewed prior to police involvement. The Sixth Circuit held that the police may only view what they know "to a virtual certainty" was viewed by the private searcher.

***United States v. Mazzarella***, 784 F.3d 532 (9th Cir. 2015) The defendant was convicted of bank fraud. At a subsequent trial relating to other defendants, a key witness (employee of the defendant's company), testified that she obtained documents from the defendant's company at the request of the FBI and also related that she had been urged to do so with the lure of not being prosecuted. The disclosure of this possible Fourth Amendment violation and Brady information necessitated that the district court conduct a full evidentiary hearing.

***United States v. Booker***, 728 F.3d 535 (6th Cir. 2013) The defendant was arrested on charges that he possessed marijuana. The police became suspicious that he was hiding drugs in his rectum and brought him to a hospital. There, a doctor administered drugs that paralyzed the defendant for a few minutes, during which time a rectal examination was conducted that yielded crack cocaine. The Sixth Circuit held that this search shocked the conscience, just as the search in Rochin v. California 342 U.S. 165 (1942) and Winston v. Lee, 470 U.S. 753 (1985) did, and held that the evidence should have been suppressed. The doctor was acting as an agent of the police (he did not obtain consent to perform the medical procedure and did not give the defendant the option of simply using the toilet).

***United States v. D'Andrea***, 648 F.3d 1 (1st Cir. 2011) If the defendant's computer was "hacked," this does not qualify as a prior "private search" that deprives the defendant of a reasonable expectation of privacy in the contents of the computer. In this case, a tipster called law enforcement officers to inform them that a person had uploaded child pornography to a cell phone. It was not clear how the tipster was able to view the images, however. Though the defendant had apparently uploaded the images and had attempted to share the images with her "partner," she had inadvertently sent the images to the tipster. The tipster somehow got a hold of the password that enabled her to view the images. The defendant and her partner, however, did not knowingly share the password with the tipster. The agents then investigated by accessing the cell phone website and also viewed the images. The First Circuit remanded the case to the trial court to determine how the tipster initially viewed the images. If the defendant did not "share" the information with the tipster, or "assume the risk" that the tipster would share the information that the defendant shared with her, this did not qualify as a private search that would authorize a subsequent law enforcement search under Jacobsen.

***United States v. Oliver***, 630 F.3d 397 (5th Cir. 2011) If a private person opens a container belonging to the defendant and views the contents and then calls the police, who also view the contents, the "private search" doctrine provides that the search conducted by the police does not violate the Fourth Amendment, because the defendant no longer has a reasonable expectation of privacy in the container. In this case, the court holds that this doctrine applies, even if the police were not aware that the private party had previously searched the container. The expectation of privacy evaporates by virtue of the private search, not the police officer's awareness of the private search.

***United States v. Hardin***, 539 F.3d 404 (6th Cir. 2008) The police wanted to determine if a suspect was located in a particular apartment. They asked a maintenance man to go to the apartment and inform the occupants that he needed to enter to fix a plumbing problem. He did not obtain the occupants' consent – he simply entered. He then left and told the police that the suspect was there. The Sixth Circuit held that this was not valid consent. First, there was, as a matter of fact, no consent given. Second, the use of a ruse, such as this, is not appropriate, because there was no need to use a ruse to avoid violence or danger. This is not a case in which the police already had probable cause to enter the house and used the ruse for safety purposes. Moreover, the apartment manager was acting as an agent of the police, so it triggered the exclusionary rule.

***United States v. Williams***, 354 F.3d 497 (6th Cir. 2003) The landlady of the defendant's residence was concerned that there might be a water leak at the premises because of the high-water bill. The landlady went to the premises and walked around but found no leak – though she did find some suspicious plants. She called the DEA and they came back with her to the apartment and then claimed to go inside with her a second time to look again for a water leak. Of course, they found no leak, but did find a substantial quantity of marijuana. The Sixth Circuit rejected the government's argument that this was a "private search." First, the court held that it would extend Jacobsen to a private residence. That is, even if a private search has resulted in the discovery of contraband, the police may not follow up by conducting a subsequent search which exceeded the search undertaken by the private searchers, and thus was not legitimated by the prior private search.

***United States v. Runyan***, 275 F.3d 449 (5th Cir. 2001) The defendant's estranged wife went to the defendant's house to locate some of her personal items. While there, she found disks that contained pornography, as well as pornographic pictures and a vibrator. The wife took the computer and various disks and gave them to the police. The police then reviewed the disks in great detail. The Tenth Circuit analyzed the Supreme Court decisions in Walter v. United States, 447 U.S. 649 (1980) and United States v. Jacobsen, 466 U.S. 109 (1984) and concluded that the appropriate inquiry is whether the government learned something from the police search that it could not have learned from the private searcher's testimony. Courts have distinguished cases in which the police examine containers or the contents of containers, that the private searcher never examined and cases in which the police examine the evidence in greater detail or with greater thoroughness than the previous examination by the private party. Here, the Fifth Circuit holds (1) the police may not examine a closed container that was not opened by the private searchers unless the police are already substantially certain of what is inside that container based on the statements of the private searchers, their replication of the private search, and their expertise. Examining all of the contents of the disks and zip disks in this case amounted to an unlawful search, because the private searchers did not know the contents of those disks. (2) the police may search a container – even more thoroughly than a private searcher previously did – assuming the private searcher previously opened and examined the contents of the container. Compare United States v. Rouse, 148 F.3d 1040 (8th Cir. 1998) (holding that police violated fourth amendment when they discovered more items in traveler's bag than previously seen by airline employee who initially opened the bag). The court finally remanded the case to the district court to make findings

relevant to the government's claim that the evidence should have been admitted under the independent source / inevitable discovery doctrine. See also United States v. Crist, 627 F.Supp.2d 575 (M.D. Pa. 2008) (prior examination of computer by person who took possession of defendant's computer did not authorize police to utilize forensic tools to conduct more thorough search of same computer).

***United States v. Rouse***, 148 F.3d 1040 (8th Cir. 1998) The defendant checked his luggage at the airport, but then left the airport without boarding the plane. Airline personnel at the arriving city retrieved the baggage and opened the suitcase, discovering blank social security cards and a number of identification cards. The airline employee called the police, who further searched the suitcases, discovering a laminating machine and material for laminating cards. Relying on United States v. Jacobsen, 466 U.S. 109 (1984), the court held that the police lawfully seized the cards, but the defendant retained an expectation of privacy in the bags and the further searching of his baggage by the police violated a reasonable expectation of privacy and the laminating machine and paraphernalia should have been suppressed.

***United States v. Knoll***, 16 F.3d 1313 (2d Cir. 1994) A private citizen burglarized an attorney's office, removing boxes of documents, in order to trade information for a lighter sentence in his case. The burglar brought certain documents to the AUSA, who expressed dissatisfaction. The burglar then went through the boxes again without returning to the law office and brought more incriminating documents to the AUSA. It was not disputed that the government was in no way involved in the actual burglary. Nevertheless, the AUSA's tacit suggestion that a further search of the documents was necessary – assuming this was what happened – might have amounted to a search with sufficient government involvement to come within the Fourth Amendment. A remand to further inquire into the circumstances was necessary. A search is a search by a federal official if he had a hand in it and so long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it. It is immaterial whether the government originated the idea for a search or joined it while it was in progress. The government may become a party to a search through nothing more than tacit approval.

***United States v. Ross,*** 32 F.3d 1411 (9th Cir. 1994) The government's involvement in promulgating the FAA guidelines to combat hijacking is so pervasive "as to bring any search conducted pursuant to that program within the reach of the Fourth Amendment." Thus, when an airline employee searches a passenger's baggage at the ticket counter because of certain characteristics of the traveler (paid in cash, produced no identification) this is a search which must be scrutinized under Fourth Amendment standards.

***United States v. Reed,*** 15 F.3d 928 (9th Cir. 1994) In determining whether a search was wholly private, or was sufficiently governmental to trigger the Fourth Amendment, the court should consider whether the government knew of and acquiesced in the intrusive conduct; and whether the party performing the search intended to assist law enforcement efforts or further his own ends. In this case, a motel owner called the police and explained that he thought that one of his guests was dealing drugs out of the room. He requested that officers come to the room while he entered the room. They complied. He entered the room and "snooped" through a briefcase and dresser drawers. This was a governmental search. The hotel owner would have been permitted to enter the room to ensure that there was no damage to property; but here, he was clearly looking for evidence and doing so to help the police. The fact that the private person is attempting to ensure that no criminal activity is occurring on the premises is not an "independent motivation" which would make this a private search. Finally, the fact that the police did not instigate, or encourage the search is not consequential. The officers in this case acted as "lookouts."

***United States v. Mulder***, 808 F.2d 1346 (9th Cir. 1987) A hotel security officer searched a bag which was left in a hotel room and seized tablets which were found in the bag. The tablets were turned over to the DEA which conducted tests to determine whether they were an illegal substance. Though a hotel security officer is not part of the government for purposes of the Fourth Amendment, the DEA is. The tests run on the drugs constituted an invalid search of the items and were illegal under the Fourth Amendment.

***Search & Seizure (Probable Cause)***

***Ilinois v. Gates***, 462 U.S. 213 (1983) An issuing magistrate is simply to make a practical commonsense decision of whether, given all the circumstances set forth in the search warrant application affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

***Florida v. Harris***, 133 S. Ct. 1050 (2013) In this unanimous decision of the Supreme Court, the Justices held that a dog alert can amount to probable cause. A per se rule, which had been adopted by the Florida Supreme Court (and supposedly based on the Fourth Amendment) that required certain evidence to be introduced to support the legitimacy of the dog alert, was rejected by the Court. Whether a particular dog's alert amounts to probable cause in any given case must be evaluated by the trial court on a case-by-case basis and is not subject to any rigid rules.

***United States v. Edwards***, 813 F.3d 953 (10th Cir. 2016) The search warrant in this child pornography case alleged that the defendant had scores of images of a prepubescent minor posted on a publicly available site that showed the girl in various suggestive poses. The government conceded that the images were classified as "erotica," but were not obscene and did not show the girl in sexually explicit poses or positions. Nevertheless, the magistrate issued a search warrant to seize the defendant's computer. The Tenth Circuit held that the search warrant application did not demonstrate probable cause. But the good faith exception to the exclusionary rule applied.

***United States v. Ramirez-Rivera***, 800 F.3d 1 (1st Cir. 2015) Based on information from an informant who had not previously been known to the police, the police went to the defendant's house to search for a fugitive. Without a search warrant, the police

entered the house and arrested the fugitive, as well as the defendant (on the basis that he was harboring the fugitive) and found guns. The defendant was then brought to the police station where he made a statement. The First Circuit held that entering the house without a warrant was illegal: there were no exigent circumstances; and there was no probable cause, because the informant's information was not corroborated in any meaningful way, other than confirming the description of the house. The good faith exception to the exclusionary rule did not apply, at least in part because of the egregiousness of the violation, but also because the police testified that the reason they did not get a warrant is because it required more confirming evidence thus revealing that the police knew that they did not have probable cause and were intentionally proceeding with the intention of not getting a search warrant which could not be obtained based on the lack of sufficient information. The evidence found during the search, as well as the defendant's statement should have been suppressed as fruit of the poisonous tree.

***United States v. Cordova***, 792 F.3d 1220 (10th Cir. 2015) The search warrant in this case was so devoid of probable cause – it was based on stale information, information that did not relate to the defendant, information about marijuana that was seized on the highway that was supposedly destined to another location at which the defendant formerly lived – that no reasonable officer could have believed that the warrant was valid. The warrant did not pass the Leon test.

***United States v. Raymonda***, 780 F.3d 105 (2d Cir. 2015) The government was aware that the defendant had viewed thumbnails of child pornography for a few seconds. This did not provide a probable cause basis to obtain a search warrant to search his computer nine months later. The testimony at the suppression hearing established that the user may have accessed a website without looking at individual images and that the images would have remained in the temporary Internet cache but been overwritten within a few days or a month. Thus, the information that the site was accessed months earlier was stale. Leon applied, however, so the evidence was not subject to the exclusionary rule.

***United States v. Cordero-Rosario***, 786 F.3d 64 (1st Cir. 2015) The initial search warrant stated that the crime under investigation was "lewd actions" and that "in accordance with the interview of the child, there is currently pornography on the defendant's computer. There was no information in the search warrant application about what the child said, how the alleged pornography was related to any offense, how the child knew about the presence of pornography on the computer, or why the affiant believed that pornography was evidence of a crime. The evidence should have been suppressed, because even the good faith exception to the exclusionary rule did not apply to this warrant. Based on the discovery of child pornography during the search of the computer, the police went back to the apartment and secured the wife's consent to search additional computers. The First Circuit held that this was arguably the fruit of the poisonous tree (exploiting the first illegal search), but further fact-finding was necessary to develop the record relating to the subsequent consent searches.

***United States v. Glover***, 755 F.3d 811 (7th Cir. 2014) The failure of the search warrant application to reveal any information about the informant rendered it devoid of probable cause. Though a close call, the exclusionary rule would not apply because of Leon. However, because of the absence of information about the informant's credibility, a Franks hearing was necessary to determine whether the omission of this information would taint the search warrant. The informant, unbeknownst to the magistrate, had more than a dozen prior criminal convictions, including several while he was working as an informant. He was also a gang member and was receiving payments from the police department.

***United States v. Gifford***, 727 F.3d 92 (1st Cir. 2013) The police obtained a search warrant for the defendant's house to search for a marijuana grow operation. The basis for the search was (1) an informant's tip; (2) information that the electricity usage at the defendant's house exceeded the neighbor's electricity usage; and (3) an officer visited the house and smelled burnt marijuana when the defendant opened the door. The First Circuit upheld the lower court's decision granting the motion to suppress. Regarding the informant's information, other than the statement that the informant was reliable, no information was provided in the warrant to support the claim that the informant was, in fact, reliable. There was also no information about the informant's basis of knowledge. Regarding the electricity usage, the lower court found that the officer was reckless in failing to include in the warrant application information that the neighbor's house was considerably smaller and the fact that the defendant had a horse boarding business on the premises; this was a Franks violation that altered the probable cause calculus. The smell of marijuana was not necessarily indicative of a grow operation.

***United States v. Underwood***, 725 F.3d 1076 (9th Cir. 2013) The Ninth Circuit concludes that a state search warrant for the defendant's house lacked probable cause and also was so deficient, that the Leon good faith exception to the exclusionary rule did not apply. The warrant application simply recited the contents of a related federal search warrant affidavit (which was used to search other conspirators' houses) and, with regard to the defendant, noted that he had been seen delivering crates to alleged co-conspirators (in a suspicious manner) three months earlier and a personal-use amount of marijuana was observed in his house. Additional conclusory opinions were of no value in establishing probable cause.

***United States v. Funds in the Amount of $100,120.00***, 730 F.3d 711 (7th Cir. 2013) In this forfeiture case, among other factors, the government relied on a drug dog alert to the currency to establish that the funds that were seized by agents was connected to drug dealing. The government relied on studies that it claimed showed that what drug dogs smelled on currency was only recent contact with cocaine, because the dogs were detecting something that quickly evaporates. The defense introduced contrary evidence, and relied on the generally known contamination theory, that is, that most currency has trace amounts of cocaine. The Seventh Circuit held that this dispute foreclosed granting summary judgment to the government, because the disputed facts regarding what drug dogs alert to required resolution by the trier of fact. The defense also mounted a successful attack on the dog's certification, including demonstrating that during training sessions, the dog could not differentiate

between pure cocaine and cutting agents that might be added to cocaine, and that these cutting agents might be present on money without cocaine. This case includes an excellent primer on methods of challenging drug dog alerts.

***United States v. Needham***, 718 F.3d 1190 (9th Cir. 2013) Though the suppression of evidence was not required, because of the good faith exception to the exclusionary rule, the Ninth Circuit holds that evidence that the defendant has engaged in acts of child molestation does not suffice to establish probable cause to issue a search warrant to seize the defendant's computers to search for evidence of child molestation. The officer's expression of his opinion that "individuals who have sexual interest in children often possess child pornography" does not amount to probable cause.

***United States v. Harrison***, 689 F.3d 301 (3rd Cir. 2012) The Third Circuit noted that if the police make a reasonable mistake of fact (such as whether an apartment is abandoned, as in this case), that does not negate probable cause. A mistake of law, on the other hand, is per se unreasonable.

***United State v. Doyle***, 650 F.3d 460 (4th Cir. 2011) The search warrant in this case failed to allege that pictures possessed by the resident of a house were pornographic and failed to allege when – or where – the pictures were possessed. This warrant lacked probable cause and did not even survive a good faith Leon review. The probable cause basis of the warrant provided the following: "Three minor children have come forward and stated that [Doyle] has sexually assaulted them at the Doyle residence. One victim [sic] disclosed to an Uncle that Doyle had shown the victim pictures of nude children." This description failed to state that the "nude pictures" were pornographic (i.e., lewd depictions) and because there was no statement of when these events occurred, the information was stale (the court noted that the notion of staleness when it comes to computer evidence is rarely a basis to deny a search warrant, but in this case, there was no indication of when the pictures existed). In addition, the statement does not indicate where the pictures were shown to the child, so there was scant basis for believing that the evidence sought by the search warrant would be located at the residence, though the appellate court did not base its ultimate conclusion on this flaw in the warrant. With regard to the absence of probable cause, the court also noted that evidence of child molestation does not automatically authorize the search for child pornography.

***Virgin Islands v. John***, 654 F.3d 412 (3rd Cir. 2011) The defendant was known to have committed child molestation. There was no information to support the claim that there would be child pornography on the defendant's computer. Issuing a search warrant for the defendant's computer was not proper and the exclusionary rule applied.

***United States v. Clark***, 638 F.3d 89 (2d Cir. 2011) The search warrant authorized the police to search the premises located at a certain address which was described as a "multi-family" dwelling. The warrant did not specify which unit to search, nor did it reveal how many units were present in this "multi-family" dwelling. The warrant lacked probable cause to the extent that it authorized a search of the entire structure at that address. However, the Second Circuit concluded that Leon saved the search.

***United States v. $186,416.00***, 590 F.3d 942 (9th Cir. 2009) The search that resulted in the seizure of the money in this case was not lawful. The search was conducted pursuant to a state search warrant that alleged a violation of state law. There was, however, no law against medical marijuana in California, so there was no state law violation. The money was then transferred to the federal government for forfeiture. The illegal search, however, was illegal regardless of the venue in which the forfeiture case was tried and the evidence, including the fruits of the illegal search, could not be used in the federal forfeiture case.

***United States v. Roach***, 582 F.3d 1192 (10th Cir. 2009) The search warrant affidavit documented years of gang activity by numerous members of the gang. The incidents involving the defendant were numerous, but the last identified offense was years prior to the issuance of the warrant. The warrant was issued for the defendant's girlfriend's house, where he was believed to be living. The only link to the house was the assertion in the affidavit that the officers believed that he was living there. The Tenth Circuit held that the information was insufficient, as well as being stale, to support a search warrant for the house. But the search was saved by the good faith exception to the exclusionary rule.

***United States v. Falso,*** 544 F.3d 110 (2d Cir. 2008) The FBI determined that the defendant had a prior conviction from eighteen years ago for misdemeanor child sex abuse and may have accessed a child pornography web site. On the basis of this information, the agent obtained a search warrant to search the defendant's computer for child pornography. The Second Circuit held that this information was not sufficient to authorize a search warrant. However, the court concluded that the evidence would not be suppressed in light of the officer's good faith in executing a warrant signed by the judge.

***United States v. Hodson***, 543 F.3d 286 (6th Cir. 2008) The fact that the defendant was indisputably a child molester did not provide probable cause to believe that there was child pornography on his computer. The officer, moreover, could not have executed the warrant in good faith, because the application contained virtually no information that would have supported the search for pornography.

***United States v. West***, 520 F.3d 604 (6th Cir. 2008) Two search warrants were issued in this case. The first was devoid of probable cause, because it contained bare bones assertions about the defendant (all of which were based on hearsay statements that the affiant learned from other officers and individuals). The warrant also failed to link any criminal activity on the part of the defendant with the location that the police wanted to search. The warrant did not even satisfy the Leon good faith standard. The second warrant set forth facts that an informant told the affiant that the defendant confessed to a murder and the body could be found in a well at a certain location; the warrant sought authorization to search the defendant's van. The affiant, however, failed to reveal that the informant was serving time in federal custody and that the police went to the location where the body was supposedly located and found nothing – not even a well.

***United States v. Virden***, 488 F.3d 1317 (11th Cir. 2007) The police stopped the defendant's car after watching it leave the location where a search was about to occur. Because a drug dog was not available at that location, the police put the defendant in a police car in handcuffs and brought the car to a location two miles away where the dog was located. The Eleventh Circuit held that this exceeded the bounds of a Terry stop and amounted to a seizure requiring probable cause. Because there was no probable cause, the search of the car was unlawful.

***United States v. Kennedy***, 427 F.3d 1136 (8th Cir. 2005) The defendant's girlfriend said that the defendant "deals" drugs and "keeps" drugs in his car. This did not establish that the defendant then had drugs in his car.

***United States v. Luong***, 470 F.3d 898 (9th Cir. 2006) The linchpin of the basis for obtaining the search warrant was an unverified tip that someone arriving on a plane from overseas was a chemist who was involved in methamphetamine manufacturing. The affidavit did not even identify who the suspect was. There was insufficient probable cause to support the issuance of a search warrant and the affidavit was so lacking in probable cause that Leon did not apply. The Ninth Circuit also held that where a search warrant application is so lacking in probable cause, the court would not consider any supposed oral communications made by the affiant to the issuing magistrate.

***United States v. Shaw***, 464 F.3d 615 (6th Cir. 2006) A woman reported to the police that her three-year old child reported that he had been sexually molested by a relative. Based only on that report, the police arrested the defendant (the relative). After his arrest, the relative confessed. The Sixth Circuit held that the second-hand report from the mother was not sufficient to support an arrest. There was no corroborating evidence (a medical examination produced no physical signs of trauma or sexual penetration). The confession was tainted by the unlawful arrest.

***United States v. Gourde,*** 382 F.3d 1003 (9th Cir. 2004) The FBI learned about a website that permitted members to download child pornography. Defendant Gourde was determined to have been a member of the web site for two months. The FBI obtained a search warrant, claiming that any member would have had access to the child pornography. The affiant offered various expert opinions about the M.O. of child pornographers on the internet. The Ninth Circuit held that there was no probable cause to search the defendant's house and seize his computers based on this information. Moreover, Leon did not apply, because no officer could have relied in good faith on this warrant. There was no information that Gourde had actually downloaded any files from the website, though the FBI acknowledged that it had the capability of determining whether he did prior to the time the search was executed. See also United States v. Weber, 923 F.2d 1338 (9th Cir. 1990). REVERSED BY EN BANC COURT: 440 F.3d 1065 (9th Cir. 2006) (en banc).

***United States v. Zimmerman***, 277 F.3d 426 (3rd Cir. 2002) The police obtained a search warrant to search the defendant's home to look for child and adult pornography. There was no information in the warrant application that indicated that any pornography would be found in his home, though there was information that one clip of adult pornography was seen in the home months earlier by one (or perhaps more than one) high school student. That information, however, was stale. The police relied for the most part on evidence that the defendant was believed to have molested numerous high school students (he was a high school teacher). The police also offered expert opinion in the warrant application that child molesters often keep child pornography in their houses. The Third Circuit held that the warrant was lacking in probable cause and, in fact, could not even have been executed in good faith, given the absence of any evidence that pornography was then located in the house. The use of a seven page, single spaced, affidavit which never even mentioned child pornography could not reasonably have been relied upon to obtain a search warrant. Addressing the boilerplate "expert" opinion, the court wrote, "Rambling boilerplate recitations designed to meet all law enforcement needs do not produce probable cause . . . Experience and expertise, without more, is insufficient to establish probable cause."

***United States v. Ricciardelli,*** 998 F.2d 8 (1st Cir. 1993) An anticipatory warrant is permissible. This type of warrant, which authorizes the agents to delay executing the warrant until a triggering event occurs – such as the delivery of contraband to the premises – must establish that the presence of the sought-after item will be on the premises inevitably after the triggering event. Here, however, the search of the premises was authorized upon the delivery of the pornographic tape to the defendant, regardless of where this delivery occurred. This was an invalid anticipatory warrant and was not saved by the good faith exception.

***United States v. Diaz***, 841 F.2d 1 (1st Cir. 1988) An affidavit in support of a search warrant suggested that the defendant engaged in fraudulent transactions with a Department of Agriculture inspector, that is, that the inspector was bribed with cash. The search warrant, on the other hand, authorized the seizure of all bank account records. The First Circuit holds that the search warrant was not supported by probable cause.

***United States v. Hyppolite***, 65 F.3d 1151 (4th Cir. 1995) A defendant's refusal to consent to a search cannot establish probable cause to search. See United States v. Alexander, 835 F.2d 1406, 1409 n.3 (11th Cir. 1988). In this case, the magistrate considered the form in which the defendant declined consent – in a loud and aggressive manner. The court holds that although there may be some cases where the form of a suspect's assertion of rights may support a finding of probable cause, officers and magistrates cannot rely solely on the form in which a suspect asserts constitutional rights to establish probable cause for a search warrant. Nor should such factors be the prominent factors supporting a warrant. The good faith exception to the exclusionary rule applied in this case.

***Bigford v. Taylor***, 834 F.2d 1213 (5th Cir. 1988) A truck was missing its federal inspection safety sticker and the VIN number on the doorjamb had apparently been altered. Nevertheless, the deputy sheriff did not have probable cause to search and seize the truck.

***United States v. Barrington***, 806 F.2d 529 (5th Cir. 1986) A conclusory affidavit does not establish probable cause for the issuance of a search warrant. The affidavit here stated only that the affiant had received information from a confidential informant who had provided information in the past leading to an arrest and conviction.

***United States v. Weaver***, 99 F.3d 1372 (6th Cir. 1996) An informant went to the defendant's house with $100 of government money to attempt to buy marijuana. The government agents did not provide surveillance, or in any other way corroborate the informant's statement that he did, in fact, buy the marijuana at that location. This information did not support the issuance of a search warrant. Nowhere in the affidavit did the affiant disclose where the marijuana was kept or stored, the quantity of marijuana in the house, or any other particularized information that would have supported the belief that there was currently marijuana on the property. Also, the affidavit did not provide any information about the informant's reliability, other than boilerplate language about his being reliable in the past. For example, the affidavit did not say that the informant's past reliability related to drug cases. Finally, the corroboration of innocent details, such as the name on the utility's records for the residence, was meaningless. The court also held that when a police officer supplies a bare bones affidavit which is insufficient, and then executes the warrant himself, he cannot rely on the good faith exception to the exclusionary rule. Here, the officer did not attempt any meaningful corroboration of the informant's information and conducted no other independent investigation, other than learning the identity of the occupant of the residence. The unlawful search, therefore, was not saved by Leon.

***United States v. Czuprynski***, 8 F.3d 1113 (6th Cir. 1993) After the police were unsuccessful in convincing two judges to issue a search warrant, a magistrate (who the defendant had tried to have fired from his prior job) finally signed the warrant. The warrant was based entirely on the allegations of the defendant's former law partner who claimed that the defendant/lawyer had marijuana at his home and office. No effort was made to support the allegations of the informant. It was clear that she was angry at having been fired by the defendant. The warrant in this case was not based on probable cause and the officers could not have relied on it in good faith. Reviewing the case en banc, the Sixth Circuit re-affirms its holding that the affidavit did not establish probable cause but held that the officers were acting in good faith when they executed the warrant. 46 F.3d 560 (6th Cir. 1995)(en banc).

***United States v. $7,850,*** 7 F.3d 1355 (8th Cir. 1993) The defendant purchased a ticket with cash to fly from Minneapolis to Nebraska; he carried no identification or baggage; he was seen by the ticket agent to have a large wad of cash; he lied to an officer about whether he had been at the airport the day before (he had been seen there by another officer); a NADDIS report indicated that he had a heroin supplier in Nebraska. These facts did not amount to probable cause to seize the currency. (Because the district court did not consider whether there was an articulable suspicion justifying the seizure, that was not addressed by the appellate court).

***United States v. Clark***, 31 F.3d 831 (9th Cir. 1994) The search warrant affidavit stated that the defendant's home had unusually high electrical usage – but failed to compare it to other residential homes in the area. The affidavit also contained the allegations of an unknown informant that the defendant was associated with a known marijuana cultivator. This information was insufficient to establish probable cause to search the premises. Nevertheless, the good faith exception applied.

***United States v. Brown***, 951 F.2d 999 (9th Cir. 1991) Though there was considerable evidence that members of a law enforcement narcotics team were corrupt and that members stole evidence, including money, which was seized, this did not authorize the search of each member's house. There was not enough specific information dealing with each member's culpability to justify the search of every house. Also, the narcotics unit was not a "wholly illegitimate" organization, thus justifying the search of every member's residence. Nevertheless, the officers consulted with an AUSA before obtaining the search warrant and acted in good faith, thus the evidence would not be suppressed.

***United States v. Weber***, 915 F.2d 1282 (9th Cir. 1990) The defendant's house was searched pursuant to a search warrant which was directed at the presence of obscene material in the defendant's home. The search warrant, however, allowed officers to search for a wide variety of magazines and advertising materials, none of which was backed up by probable cause. The only evidence against this defendant was the fact that a couple of ads addressed to him apparently depicted child pornography. The affiant's statement about the "proclivities of pedophiles" did not support a wall-to-wall search of the house. The affidavit simply did not support a search for child pornography in general. The court rejected certain aspects of the warrant as "rambling boiler-plate recitations designed to meet all law enforcement needs." Finally, the court concludes that the good faith exception to the exclusionary rule did not apply. The court's amended opinion, 923 F.2d 1338 (1990), abides by the initial decision suppressing the evidence.

***United States v. Hove,*** 848 F.2d 137 (9th Cir. 1988) In the affidavit in support of the search warrant, the police officers failed to link the suspect with the residence which was sought to be searched. This inadvertent failure to link the suspect to the premises rendered the affidavit insufficient and the officers could not have relied on it in good faith in searching the premises. This absence of good faith exists even though the officer in fact knew the link between the suspect and the residence.

**United States v. Dimick,** 990 F.2d 1164 (10th Cir. 1993) The defendant was travelling from Los Angeles to St. Louis. He paid for his one-way ticket in cash, remained in his compartment the entire trip; tipped the train conductors with $20 bills; ordered his meals delivered to his compartment; lied about his name when questioned and claimed to have no luggage. Based on this information, the DEA entered his compartment and found a suitcase, which was then subjected to a dog sniff. The dog alerted and narcotics were found in the suitcase. The entry into the train compartment required probable cause which was lacking at that time. Absent probable cause, even with reasonable suspicion, which did exist, the officers could not enter the compartment. This case was overruled by the Tenth Circuit later, not on the issue of probable cause, but on the defendant's expectation of privacy in a train compartment. United States v. Little, 18 F.3d 1499 (10th Cir. 1994).

***United States v. Maxwell,*** 920 F.2d 1028 (D.C. Cir. 1990) In order for an affidavit to be viewed as limiting the scope of a warrant, the warrant must not only attach the affidavit, but must also contain "suitable words of reference" evidencing the magistrate's explicit intention to incorporate the affidavit. Only in this way will the warrant be sufficiently limited to allow it to pass the probable cause test. That is, the warrant may be overbroad if it is not limited by the accompanying affidavit.

***SEARCH AND SEIZURE (Probationer / Parolee / Pretrial Release)***

***Samson v. California,*** 126 S. Ct. 2193 (2006) A California law that permits a warrantless search of a parolee at any time, with or without cause is constitutional. A parolee has substantially diminished rights to privacy, given his voluntary decision to serve his sentence outside the confines of a prison.

*United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587 (2001) The Supreme Court held that the police may invoke a search warrant waiver clause in a probationer's, or parolee's sentence to conduct a warrantless search, even if the search is based simply on reasonable suspicion and is motivated by a concern with the investigation of other criminal activity, not just a possible parole, or probation violation. See also Griffin v. Wisconsin, 483 U.S. 868 (1987).

***Griffin v. Wisconsin***, 483 U.S. 868 (1987) The Supreme Court holds that a search of a probationer's house does not have to be predicated on a search warrant or probable cause. Rather, the Wisconsin regulation in this case which requires "reasonable grounds" to believe the presence of contraband and the approval of a probationer officer's supervisor, is a valid exception to the Fourth Amendment's search warrant requirement. Dispensing with the search warrant requirement is reasonable in order to avoid interfering with the probation system and the right of a probation officer rather than a magistrate to make decisions about the probationer's conduct.

***United States v. Job***, 851 F.3d 889 (9th Cir. 2017) Police officers must know about a probationer's Fourth Amendment search wavier before they conduct a search in order for the waiver to serve as a justification for the search. In addition, a waiver of the Fourth Amendment only applies if the defendant was on probation for a violent offense. This opinion was reissued at 871 F.3d 852 (9th Cir. 2017).

***United States v. Lara,*** 815 F.3d 605 (9th Cir. 2016) Even if a defendant signs a Fourth Amendment waiver as part of a plea, a probation officer may not randomly look through the contents of a probationer's cell phone absent any articulable suspicion.

***United States v. Hill***, 776 F.3d 243 (4th Cir. 2015) The defendant was on supervised release. Nothing in the conditions of his supervised release amounted to a waiver of his Fourth Amendment rights. He was required to allow a probation officer to visit him in his home and was required to alert the probation officer if he moved. The defendant failed to notify his probation officer when he moved. The officer went to his new house with law enforcement officers and after arresting him for moving without notifying the probation department, the officers brought in a drug-detecting dog. This was an illegal search, and the evidence should have been suppressed (unless, on remand, the government could make a showing that the independent source rule applied). Moreover, the good faith exception to the exclusionary rule did not apply.

***United States v. Grandberry,*** 730 F.3d 968 (9th Cir. 2013) Though Samson determined that a parolee's reduced expectation of privacy allows for warrantless searches of a parolee, a law enforcement officer may not conduct a warrantless search of premises without probable cause to believe that the parolee does, in fact, live at that location. The information known to the police in this case was insufficient to meet this burden.

***United States v. King***, 687 F.3d 1189 (9th Cir. 2012) (en banc) The Ninth Circuit summarily declared (without further explanation) that the Fourth Amendment is not the same for probationers and for parolees. The court overruled several Ninth Circuit precedents and wrote, "These cases conflict with the Supreme Court's holding that 'parolees have fewer expectations of privacy than probationers.' Samson v. California, 547 U.S. 843, 850 (2006)."

***United States v. Freeman,*** 479 F.3d 743 (10th Cir. 2007) The search of defendant's house was not conducted by any parole officers and no parole officer instructed the police to conduct the search. This does not qualify as a "special needs" search according to Griffin v. Wisconsin and unlike the California law at issue in Knights and Samson, the Kansas law that applied in this case did not authorize any law enforcement officer to conduct a warrantless search; it only authorized probation and parole officers to conduct such searches.

***United States v. Howard***, 447 F.3d 1257 (9th Cir. 2006) The defendant was a parolee whose condition of parole empowered the police to make warrantless searches of his residence. In order to invoke this provision, the police had to have probable cause to believe that the place being searched was, in fact, the defendant's residence. The place that was searched in this case was not known to the police to be the residence of the defendant. The defendant was seen exiting the apartment and was stopped; thereafter the apartment was searched. The Ninth Circuit held that because the police had insufficient information to believe that the apartment was defendant's residence, the warrantless search was improper.

***United States v. Henry***, 429 F.3d 603 (6th Cir. 2005) A probation officer visited the defendant's house and went in for a probationary (not an investigatory) purpose – that is, to ensure that the defendant actually lived there, as he had reported. The Sixth Circuit held that the entry into the house was not reasonable, because there was no reasonable suspicion to support the belief that the defendant did not live there, as he reported and therefore there was no reasonable basis to believe that he had violated a condition of his probation.

***United States v. Scott***, 450 F.3d 863 (9th Cir. 2006) A defendant had been released on bail in state court, subject to the condition that he be subject to warrantless searches of his home, even without probable cause. The state police invoked this

provision, searched his home, and found a gun that was then used as the basis for a federal prosecution. The Ninth Circuit held that releasing a person on bond subject to his willingness to be searched without probable cause violated the Fourth Amendment. The same applies to a drug test that was taken as a result of being released on bail. Because there was no probable cause to test the defendant for drugs, the warrantless testing of his blood was also unconstitutional.

***United States v. Crawford***, 323 F.3d 700 (9th Cir. 2003) Even when acting pursuant to a "fourth amendment waiver" that was executed pursuant to a defendant's parole, the police require at least reasonable suspicion before they may enter a defendant's house. On rehearing en banc, 372 F.3d 1048 (2004), the court assumed that this holding was true, without deciding whether it was, but held that the resulting confession was the not subject to suppression.

***United States v. Carnes, 309*** F.3d 950 (6th Cir. 2002) The Michigan defendant in this case was subject to a condition of parole that provided that parole officers could conduct a warrantless search based on reasonable cause to believe a violation of parole occurred. This only authorizes a warrantless search where the police are motivated by a concern with a violation of parole, not some other purpose. The parole condition was different than the condition that was the subject of United States v. Knights, 534 U.S. 112, 122 S. Ct. 587 (2001). In Knights, the police were authorized by the parole condition to search "without suspicion" while the defendant was on parole. As in limited other situations, in this area of the Fourth Amendment, the police officer's motivation is relevant to the lawfulness of the search.

***United States v. Baker***, 221 F.3d 438 (3rd Cir. 2000) A consent form signed by Pennsylvania parolees provides that they will consent to any search of their person, property, or residence, without a warrant. State precedents suggested a condition that the parole officer must have reasonable suspicion to justify any search of the parolee's person, property, or residence. The Third Circuit concludes that the Pennsylvania courts would, if called upon to decide this question, hold that there is a state law requirement that there be reasonable suspicion prior to any such search. Because there was no reasonable suspicion, the fruits of the search in this case had to be suppressed. Note that this decision predates United States v. Knights, 534 U.S. 112, 122 S. Ct. 587 (2001), which held that a search warrant waiver was permissible regardless of whether a search is related to the conditions of probation, or the investigation of a new offense by the probationer.

***SEARCH AND SEIZURE (Return of Seized Property – Fed.R.Crim.P. 41(g))***

***United States v. Gladding***, 775 F.3d 1149 (9th Cir 2015) The defendant was convicted of possessing child pornography on his computer. He filed a motion for the return of the non-contraband contents of his computer, including family photographs. The Ninth Circuit held that the defendant was entitled to have this property returned. Note that the forfeiture order in this case only resulted in the forfeiture of contraband files.

***United States v. Cardona-Sandoval***, 518 F.3d 13 (1st Cir. 2008) Following his conviction and sentence, the defendant sought the return of certain seized property, including his clothes and other items of non-contraband. The government simply responded with a general statement that the property was destroyed pursuant to departmental policy. The First Circuit held that this was an inadequate response. There must be some evidence of notice to the defendant of the impending destruction of the property and specific information about the property in question, rather than a general non-specific response.

***Krimstock v. Kelly,*** 464 F.3d 246 (2d Cir. 2006) This civil rights case challenged the procedures (or lack thereof) of the state seizing an automobile for evidence and holding it for an unlimited amount of time. The Second Circuit (considering the case for the third time) concluded that the state must seek court approval to hold a vehicle, though this may be done ex parte.

***United States v. Wright***, 361 F.3d 288 (5th Cir. 2004) The statute of limitations for filing a Rule 41(g) motion for return of seized property (alleging, for example, insufficient notice prior to forfeiture) is six years from the date the defendant was on reasonable notice about the forfeiture.

***United States v. Albinson***, 356 F.3d 278 (3rd Cir. 2004) The government's response to the defendant's motion for return of seized property which simply said that the property was lost, destroyed or misplaced, or given to a third party, was insufficient to prompt the summary denial of the defendant's motion. A hearing should have been held to make further inquiry.

***United States v. Pantelidis***, 335 F.3d 226 (3rd Cir. 2003) In the unusual posture of this case, the claimant had a right to appeal the trial court's denial of his Rule 41(g) motion for return of seized property. The money that was seized constituted "substitute assets" under the forfeiture law and, therefore, was not actually part of a pending criminal case. Thus, the decision to deny the return of the money was independent of the criminal case and amounted to a final order for appellate jurisdiction purposes.

***In re Grand Jury Investigation Concerning Solid State Devices, Inc***., 130 F.3d 853 (9th Cir. 1997) The government established probable cause that certain practices of the target corporation were fraudulent. Indeed, there was information that the company "routinely" engaged in fraudulent practices. Nevertheless, the corporation itself was not pervaded by fraud, in the sense that the corporation had little legitimate business. Therefore, a warrant which resulted in the seizure of approximately 90% of the corporation's records over a five-year period, including 2,000 file drawers, was overbroad and the target's motion for return of seized property should have been granted.

***Soviero v. United States***, 967 F.2d 791 (2d Cir. 1992) Following his conviction on certain counts, the defendant moved for the return of the software and hardware which had been seized when he was arrested. The government ignored the motion, and the DEA destroyed the items. The Second Circuit holds that Rule 41(e) was the appropriate vehicle for seeking the return of the seized items and the government should not have destroyed the evidence, thereby depriving the defendant of the ability to prove that it was not contraband. If the government did this in bad faith, the defendant was entitled to damages. ***United States Postal Service v. C.E.C. Services,*** 869 F.2d 184 (2d Cir. 1989) The defendant had been under investigation by a grand jury at the time

that certain property was seized pursuant to a search warrant. The District Court held that he was not entitled to return of the property. After the grand jury investigation was concluded, the defendant was entitled to appeal the decision denying the return of the property. Because there was no longer a grand jury proceeding, there was no danger of interfering with the investigation.

***United States v. Roberts***, 852 F.2d 671 (2d Cir. 1988) The good faith exception to the exclusionary rule applies to Rule 41(e) motions which have been instituted for the return of property seized pursuant to a warrant which the claimant contends was deficient.

***United States v. Garcia***, 65 F.3d 17 (4th Cir. 1995) Rule 41(e) may be used to seek the return of seized property after trial has ended. The proper venue is the district in which the property was seized, not the district in which the case was tried. Venue in the district in which the case was tried only exists during the pendency of the criminal charges.

***White Fabricating Company v. United States,*** 903 F.2d 404 (6th Cir. 1990) The Sixth Circuit concludes that a district court may entertain a Rule 41(e) motion even before criminal charges have been filed.

***J.B. Manning Corp. v. United States***, 86 F.3d 926 (9th Cir. 1996) Rule 41(e), which provides for the return of seized property, does not include a “good faith” Leon exception. Prior to 1989, the Rule provided that any property returned could not be introduced in evidence (thus, the rule was equivalent to the exclusionary rule). Now, however, this provision is not included. Consequently, the court can order the government to return property, or copies of documents, without necessarily holding that the property is inadmissible. Therefore, the premise of Leon is not implicated and there is no reason not to return property that was seized pursuant to a search warrant that is overly broad or otherwise not supported by probable cause.

***United States v. Clagett***, 3 F.3d 1355 (9th Cir. 1993) Money was seized from a residence. After notice was served on the occupants of the house and published in USA Today, the government administratively forfeited the currency. Later, the defendant filed a Rule 41(e) motion, contending that service was not proper as to him and because there were no pending forfeiture proceedings, he could rely on Rule 41(e). The Ninth Circuit agreed that he should be entitled to show inadequate service and notice.

***Purcell v. United States***, 908 F.2d 434 (9th Cir. 1990) A claimant is entitled to attorney’s fees under the Equal Access to Justice Act in connection with a Rule 41(e) motion for return of seized property. The fact that investigation is pending does not mean that a 41(e) motion is a criminal proceeding exempt from EAJA awards.

***Floyd v. United States***, 860 F.2d 999 (10th Cir. 1988) The defendant filed a Rule 41(e) motion prior to the initiation of forfeiture proceedings. The court holds that Rule 41(e) represents an equitable remedy and that the claimant may not use such a remedy if he has an adequate remedy at law or is unable to demonstrate irreparable injury. Because no findings were made by the lower court on either of these issues, the case was remanded.

***In re Smith***, 888 F.2d 167 (D.C. Cir. 1989) A claimant was entitled to the return of money which was seized from him pursuant to a consensual search. Although a grand jury proceeding was in progress, this alone was not a sufficient basis for keeping the money.

***SEARCH AND SEIZURE (Road Blocks)***

***Illinois v. Lidster***, 540 U.S. 419 (2003) After a hit-and-run accident that occurred one week earlier, the police set up a roadblock to ask motorists if they knew anything about the accident. The Supreme Court held that this roadblock was permissible. Characterizing the “stop” as an informational checkpoint, the Court distinguished Indianapolis v. Edmond, 531 U.S. 32 (2000), because in that case, the vehicles were stopped for the purpose of investigating whether the occupants were engaged in criminal activity. In this case, in contrast, there was no intent to uncover crimes committed by the occupants of the stopped vehicles. The defendant in this case was convicted of DUI, because his state of inebriation was apparent when he was stopped.

***Michigan Department of State Police v. Sitz***, 496 U.S. 444 (1990) The Michigan State Police Department established a highway sobriety check point with guidelines governing check point operations, site selection and publicity. Significantly, uniformed officers stopped every vehicle which went through the check point. In cases where an officer detects signs of intoxication, the motorist is directed to a location out of the traffic flow where another officer checks the driver’s license and registration and, if warranted, conducts further sobriety tests. This program satisfied the Fourth Amendment’s requirement that detentions be reasonable.

***United States v. Soto-Zuniga***, 837 F.3d 992 (9th Cir. 2016) The trial court erred in denying the defendant’s discovery request that sought information about the immigration checkpoint where the defendant was stopped and arrested. The defendant claimed that the immigration checkpoint was used to engage in drug interdiction, rather than legitimate immigration investigation.

***United States v. Bowman***, 496 F.3d 685 (D.C. Cir. 2007) There was insufficient evidence offered by the government that the roadblock was instituted for a legitimate motor vehicle related purpose. The testimony of one officer on the scene was not sufficient. The officer acknowledged that his “team” was involved in general crime prevention, focusing on guns and drugs.

***United States v. Yousif***, 308 F.3d 820 (8th Cir. 2002) The police set up a fake “drug interdiction” roadblock, alerting drivers that it was located farther down the highway. Between the location of the notice and the supposed checkpoint was an exit with no services for motorists. The police then stopped the cars that exited. The checkpoint in this case occurred prior to the Supreme Court’s decision in Indianapolis v. Edmond, 531 U.S. 32 (2000). The Eighth Circuit concluded that the fact that the defendant exited the highway after seeing a drug checkpoint sign, even when viewed in combination with other factors, was not a sufficient basis for stopping the vehicle.

***United States v. Huguenin***, 154 F.3d 547 (6th Cir. 1998) The police posted a sign that there was a DUI checkpoint 2 miles ahead. An exit was on the interstate just past this sign. The roadblock was actually set up at the exit – the officers believed that people who exited the interstate after seeing the signs were the people they wanted to intercept. But the real reason for the roadblock was to find drugs, not intoxicated drivers, as evidenced by the fact that there were no DUI detecting devices, but there was a drug dog and drug interdiction officers. The court concluded that the primary purpose for this roadblock was not to ensure the safety of the highways – that is, to intercept drunk drivers – but was to find people transporting drugs. This is not a lawful purpose for a roadblock and the evidence obtained after stopping the defendant's vehicle should have been suppressed.

***United States v. Maestas***, 2 F.3d 1485 (10th Cir. 1993) Even in the context of a lawful roadblock, the defendant may be able to establish that his arrest was pretextual. In order to establish an unlawful pretext arrest, the defendant must establish that the criteria set forth for conducting the roadblock were ignored or violated in some way. The defendant in this case, however, failed to meet this burden.

***United States v. Morales-Zamora***, 974 F.2d 149 (10th Cir. 1992) While the roadblock purported to be a mere license and registration check, in fact, the police had a canine dog walk around and sniff at every stopped vehicle. This was an unlawful roadblock.

***SEARCH AND SEIZURE (Security Sweep) SEE ALSO: SEARCH AND SEIZURE (EXIGENT CIRCUMSTANCES)***

***Maryland v. Buie***, 494 U.S. 325 (1990) Police officers effecting a lawful arrest of a criminal suspect in his home may conduct a limited protective sweep of the residence if the police have a reasonable belief that other people who pose a danger to those at the arrest scene are located in other parts of the house.

***United States v. Delgado-Perez***, 867 F.3d 244 (1st Cir. 2017) Law Enforcement executed an arrest warrant in Puerto Rico for a suspect wanted in New York. There was no reason to believe that any other person, or danger, existed elsewhere in the house where the arrest occurred. A protective security sweep was therefore unnecessary and not consistent with the Fourth Amendment. The fact that the defendant was arrested for a drug offense did not constitute a sufficient basis to conduct a sweep search throughout the house after he was arrested in the front yard.

***United States v. Nelson***, 868 F.3d 885 (10th Cir. 2017) The police arrested the defendant in a friend's home. There was no information supporting a belief that there were other people in the home or that there was any danger to the police. Searching the rest of the house under the "protective sweep" doctrine was not justified and the discovery of a gun in another room was a violation of the Fourth Amendment.

***United States v. Lundin***, 817 F.3d 1151 (9th Cir. 2016) Acting on the basis of a BOLO, but without an arrest warrant, the police went to the defendant's home at 4:00 a.m. and started knocking on the door. They heard a crashing noise near the rear of the home and ran around back and stopped the defendant who was in the backyard. They then looked inside the house and found two handguns. The Ninth Circuit ordered that the evidence must be suppressed: (1) the government could not rely on the exigent circumstances exception, because the police were not allowed to be where they were located when the exigent circumstances arose (i.e., they heard the crashing noise); (2) while the police may walk up to the front door of a house and engage in a "knock-and-talk," that exception to the rule that bars police from entering the curtilage of the home does not apply at 4:00 a.m. when nobody would expect visitors to appear and knock on the door; (3) in addition, walking up to the front door to make a warrantless arrest is not a permissible purpose and Jardines provides that the police may not enter the curtilage of the home for investigative purposes; (4) the security sweep of the house was not justified, because the defendant was already handcuffed and any further security measures in the house were not necessary; (5) the inevitable discovery doctrine did not apply, because the officers were not in the process of obtaining a search warrant when the illegal searches occurred.

***United States v. White***, 748 F.3d 507 (3rd Cir. 2014) The police responded to a domestic disturbance call involving a father and daughter. When the police arrived, the father/defendant came outside, was handcuffed, and placed in the patrol car. The daughter then came out and when asked, said that nobody else was in the house. The police entered the house and located two guns. This entry was not a legitimate security sweep. There were no exigent circumstances or reason to believe that anybody in the house posed a danger to the police; nor were there apparently any exigent circumstances that justified a warrantless entry into the house, though a remand on this issue was appropriate to further develop the record.

***United States v. Hassock,*** 631 F.3d 79 (2d Cir. 2011) The police went to an apartment and after knocking on the door, a woman finally answered the door. The police announced that they were looking for Hassock and she mumbled something and eventually said that the police could "look around." The police did not determine who she was, or what authority she had to permit entry into the apartment. The Second Circuit held that this was invalid consent to enter. The Court also spent considerable time discussing whether the police could engage in a Buie protective sweep and reviewed the law concerning the scope and premise for a protective sweep, noting that a protective sweep in some Circuits is limited to instances when either a search warrant is being executed or an arrest is occurring, whereas other Circuits permit a protective search in situations where a consent to search is the predicate for the entry. But that issue was not resolved in this case, because the Court concluded that the entry was unlawful.

***United States v. Archibald***, 589 F.3d 289 (6th Cir. 2009) Several officers went to the defendant's residence to serve an arrest warrant. They knocked on front door. An officer could hear someone moving around inside. A male voice from inside asked, "Who is it?" The officers identified themselves. Nobody opened the door, but the police could hear move movement inside. The officers could not determine how many people were inside, or if there was more than one person. The officers testified, however,

that they “always assume” that there are more people inside. Eventually, the defendant opened the front door, and he was pulled out and arrested. Two officers immediately entered the house and located a gun which was the basis for obtaining a search warrant and the prosecution of the defendant for possession of the weapon. The Sixth Circuit held that the security sweep was not justified by the information known to the police and held that the search warrant was therefore based on illegally obtained evidence.

***United States v. Walker***, 474 F.3d 1249 (10th Cir. 2007) The police went to the defendant’s house after receiving a report of a fight. When they arrived, the defendant screamed out that he had a gun. The police entered the house and handcuffed him and took him out. They then searched the house and found guns which led to the defendant’s prosecution for being a felon in possession of a firearm. The Tenth Circuit holds that a security sweep could not be the justification for the search, because at the time of the search, the defendant had not been arrested and a Buie search is only permissible after someone is arrested. The case was remanded to the district court for the purpose of determining whether exigent circumstances might have justified the warrantless search of the house.

***United States v. Waldner***, 425 F.3d 514 (8th Cir. 2005) The police came to the defendant’s house to serve a protective order. They knocked on the door and eventually the defendant answered. He was instructed by the police that he was required to vacate the premises immediately. The officer accompanied him back into the house to gather a few things. While accompanying the defendant in the basement collecting some clothes, the officers entered an office. In the office, the officers saw a gun with a silencer. Because the officers had no reason to believe that there was anybody else in the house, or any weapons that posed a danger to them, there was no basis for searching the office as part of a protective sweep. The purpose of a protective sweep is to ensure the safety of the officers, not to search for guns and contraband. It should be noted, moreover, that Waldner was not under arrest, he was simply being served a protective order.

***United States v. Gandia,*** 424 F.3d 255 (2d Cir. 2005) The defendant consented to the police entering his kitchen to interview him. Prior to commencing the interview, the police conducted a security sweep of the house. This was improper. The consent did not authorize the police to enter other rooms of the house. A security sweep is not permissible on the basis of a limited consent search.

***United States v. Morgan Vargas***, 376 F.3d 112 (2d Cir. 2004) The police went to the defendant’s hotel room, and he let them in. The agents exhibited no particular fear for their safety – they did not even frisk the defendant. However, noticing an open door to the bathroom, the police went in, despite the defendant’s protest. This was not a legitimate “protective sweep” search envisioned by Maryland v. Buie. The police offered no evidence that they had an articulable suspicion that the bathroom was occupied by any other person who posed a danger to them.

***United States v. Carter***, 360 F.3d 1235 (10th Cir. 2004) The police had no basis for conducting a security sweep of the defendant’s garage. There was no information that other people were at the house, or capable of hiding or destroying evidence. A remand was necessary to determine if the defendant’s consent to search the garage was tainted by the previous unlawful security sweep that had been conducted.

***United States v. Paradis***, 351 F.3d 21 (1st Cir. 2003) After the defendant was handcuffed and removed from the apartment in which he was found with his girlfriend, the police performed what they claimed was a protective sweep. However, the apartment had already been searched and the defendant found, so there was no reasonable basis for believing that any other person was in the apartment.

***United States v. Curzi***, 867 F.2d 36 (1st Cir. 1989) The officers saw the subject of an arrest warrant leave and re-enter a house. They waited two hours, then ordered all occupants of the house to exit. No effort was made to obtain a search warrant during this two-hour period. After the occupants exited, the defendant was arrested, and the officers entered the house to conduct a protective sweep. No exigent circumstances justified the search of the house at that time in light of the agents’ failure to obtain a search warrant during the two hours that the house was kept under surveillance. The holding in this case was governed by the decision in Steagald v. United States, 451 U.S. 204 (1981). That is, an arrest warrant for a visitor of a house is not sufficient basis to search the house.

***United States v. Blue***, 78 F.3d 56 (2d Cir. 1996) Though the police had a basis to detain the defendant, in his apartment, during the course of arresting another individual, a sweep search that included looking between the mattress and the box springs was not authorized and evidence found there should have been suppressed.

***United States v. Colbert***, 76 F.3d 773 (6th Cir. 1996) The police were staking out an apartment and arrested the defendant when he exited the apartment and was about to enter his car. Even when a suspect is arrested outside his home, the police may conduct a sweep search of the home if there is an articulable suspicion that the officers were in danger from someone inside the apartment. But in this case, there was no basis for believing there was anybody left in the apartment, to say nothing of anybody posing a danger to the defendant. The court acknowledged that police are engaged in extremely dangerous work and it might be wise to simply allow the police to do whatever they thought was necessary in any given situation, but the Fourth Amendment does not give the police that kind of freedom, and “as long as [the Fourth Amendment] is in existence, police must carry out their often dangerous duties according to certain prescribed procedures, one of which has been transgressed [in this case].”

***United States v. Akrawi***, 920 F.2d 418 (6th Cir. 1990) Agents went to the defendant’s house to execute an arrest warrant. The defendant answered the door and allowed the agents into the house. Only the defendant’s mother was seen in the house. After

the arrest, the agents remained in the house for forty-five minutes and conducted a protective sweep of the second floor. This was not justified under the circumstances and the evidence found upstairs should have been suppressed.

***United States v. Noushfar***, 78 F.3d 1442 (9th Cir. 1996) The agents arrested the defendants in their apartment, but then conducted a thirty-minute sweep search, including an examination of receipts in a box of documents. This exceeded a permissible sweep search.

***United States v. Hogan***, 38 F.3d 1148 (10th Cir. 1994) An arrest warrant authorized the police to arrest the defendant. He was summoned out of his house. He was arrested outside his house, outside the fence. The police then searched the house for two hours and also seized the defendant's camper, which was later searched with a search warrant. A protective sweep "is not a full search, but rather a quick, cursory inspection of the premises, permitted when police officers reasonably believe, based on specific and articulable facts, that the area to be swept harbors an individual posing danger to those on the arrest scene." The search of the premises in this case was not authorized by the protective sweep exception to the search warrant requirement. However, nothing was learned during the improper protective sweep which tainted the search warrant for the camper which was later obtained.

***United States v. Rodgers***, 924 F.2d 219 (11th Cir. 1991) After arresting the defendant in his front yard, police officers went back to the front door to close it. One officer noticed two handguns on a couch in the front room. He seized the guns but conducted no other search. This was not a valid security sweep search. Nevertheless, the search was valid under the exigent circumstance's exception to the warrant requirement. To be a valid security sweep, the officer must quickly search the premises, particularly in those places where a person might be hiding. Here, the officer did not search the premises at all; he simply entered the trailer and seized the guns. In short, the officer did not enter the premises, "with a reasonable belief based on specific and articulable facts that the area swept harbored an individual posing a danger to the officer or to others."

***United States v. Ford***, 56 F.3d 265 (D.C. Cir. 1995) Under Maryland v. Buie, two types of searches for people are permissible in connection with the arrest of a suspect: (1) a search of areas adjacent to the scene of the arrest, regardless of any likelihood of finding evidence; and (2) a search of other areas where there is a reasonable suspicion of finding someone who poses a threat to the officers. In this case, the officers, while looking in adjacent areas, discovered a gun clip. This did not authorize the officers to look behind a window shade, or under a mattress, because in neither location were the officers likely to discover any other person who posed a threat to the officers. The gun found behind the window shade, therefore, should have been suppressed.

***SEARCH AND SEIZURE (Seizures) SEE ALSO: SEARCH AND SEIZURE (What Constitutes a Search)***

***Bailey v. United States***, --- S. Ct. – (2013) Though Michigan v. Summers, 452 U.S. 692 (1981), permits the police to detain people who are at the scene that is the target of a search warrant, in this case the police followed individuals who left the scene prior to the search and detained them about a mile away, without any information that they were subject to a Terry stop. The Supreme Court held that this amounted to an unlawful detention that necessitated the suppression of any evidence derived from the stop of the individuals.

***United States v. Hill***, 805 F.3d 935 (10th Cir. 2015) The defendant was on a train and had stored a large bag in a compartment at the end of the car in which he was a passenger. A DEA agent who was on drug interdiction duty entered the luggage storage area, retrieved a suspicious-looking bag, and carried it through the passenger area, asking everybody who owned it. The Tenth Circuit held that this was an illegal seizure that necessitated suppressing the evidence that was eventually found in the bag. Removing the bag from the location in which it was stored was an interference of the defendant's possessory interest and the right to control access to the bag. "[B]y taking control of the Coogi bag for his own purpose, i.e., the determination of the bag's owner, [the agent] deprived Hill of his ability to access the bag for his own purposes, on his own time, and at the place where unchecked baggage is properly stowed." The answer might be different if Hill had actually checked his baggage; in this case, however, he was simply storing his "carry-on" bag in the passenger car of the train where he could have accessed it whenever he wanted to.

***United States v. Gordon***, 741 F.3d 64 (10th Cir. 2014) The police properly entered a house after receiving a domestic violence call. Once in the house, the police also properly seized a shotgun seen in plain view in order to protect everybody present. Once the defendant was removed from the scene, however, the continued seizure of the shotgun was not permissible. During the time that the police continued this improper seizure, they learned that the defendant was a convicted felon. While holding that the seizure was a constitutional violation, the appellate court also concluded that the violation was de minimums and therefore excluding the evidence was not required.

***United States v. Alvarez-Manzo***, 570 F.3d 1070 (8th Cir. 2009) The police seized a suitcase from underneath an interstate bus during a layover at a bus depot. They brought the suitcase into the bus and asked the passengers to whom it belonged. The defendant eventually said that it was his. He agreed to exit the bus and went with an officer into the bus station. Ultimately, he was arrested based on what was seen in his wallet and a search warrant was obtained to search the bag. The police did not act with the consent or at the direction of any employee of the bus company when they initially took the bag out cabbage compartment and brought it into the bus. This amounted to a seizure and because there was no warrant or probable cause, evidence discovered as a result of the seizure – which was both the contents of the wallet and the suitcase – was properly suppressed.

***United States v. Virden***, 488 F.3d 1317 (11th Cir. 2007) The police stopped the defendant's car after watching it leave the location where a search was about to occur. Because a drug dog was not available at that location, the police put the defendant

in a police car in handcuffs and brought the car to a location two miles away where the dog was located. The Eleventh Circuit held that this exceeded the bounds of a Terry stop and amounted to a seizure requiring probable cause. Because there was no probable cause, the search of the car was unlawful.

***United States v. Jefferson***, 566 F.3d 928 (9th Cir. 2009) If the police divert an express mail package in order to investigate it for containing contraband, the defendant cannot complain of a Fourth Amendment violation until the government has seized the package beyond the time that the delivery company has contractually agreed to deliver the package. If the police discover (through lawful means) contraband in the package prior to the contractually agreed-upon delivery time, there is no Fourth Amendment violation.

***United States v. Neely***, 345 F.3d 366 (5th Cir. 2003) The defendant was a suspect in a bank robbery. After the robbery, he went to the hospital with a gunshot wound. The police went to the hospital and retrieved his clothing, which had been cut off of him and placed in a bag in a storage room. The Fifth Circuit held that he had a property interest in the clothes and the police could not "seize" the clothes, even if he did not have a privacy interest in the place that was searched.

***SEARCH AND SEIZURE (Single Purpose Container Exception)***

***United States v. Gust***, 405 F.3d 797 (9th Cir. 2005) The "single-purpose container" exception to the search warrant requirement traces its origin to Arkansas v. Sanders, 442 U.S. 753 (1979), which noted that certain containers may be searched without a warrant, because their contents are so apparent, for example, a gun case. In a later decision, Robbins v. California, 453 U.S. 420 (1981), the Court observed that this principle was closely related to the plain view doctrine. Robbins was later overruled in United States v. Ross, 456 U.S. 798 (1982). In this case, the Ninth Circuit held that the question of whether a container satisfies this standard should be viewed from the layperson's point of view, not the viewpoint of a trained law enforcement officer, because the issue focuses on the defendant's expectation of privacy. The court concluded that the container in this case could not be readily identified as a gun case and, therefore, the warrantless search was unlawful.

***SEARCH AND SEIZURE (Staleness)***

***United States v. Musgraves***, 831 F.3d 454 (7th Cir. 2016) Though upholding the probable cause foundation for the search warrant on other grounds, the Seventh Circuit held that information about a controlled buy at a location seven months earlier was too stale to authorize a search warrant for that location.

***United States v. Cordova***, 792 F.3d 1220 (10th Cir. 2015) The search warrant in this case was so devoid of probable cause – it was based on stale information, information that did not relate to the defendant, information about marijuana that was seized on the highway that was supposedly destined to another location at which the defendant formerly lived – that no reasonable officer could have believed that the warrant was valid. The warrant did not pass the Leon test.

***United States v. Roach***, 582 F.3d 1192 (10th Cir. 2009) The search warrant affidavit documented years of gang activity by numerous members of the gang. The incidents involving the defendant were numerous, but the last identified offense was years prior to the issuance of the warrant. The warrant was issued for the defendant's girlfriend's house, where he was believed to be living. The only link to the house was the assertion in the affidavit that the officers believed that he was living there. The Tenth Circuit held that the information was insufficient, as well as being stale, to support a search warrant for the house. But the search was saved by the good faith exception to the exclusionary rule.

***United States v. Prideaux-Wentz***, 543 F.3d 954 (7th Cir. 2008) The information known to the police was not sufficiently recent to authorize a search warrant. The police received information via a "cyber tip" that the defendant was obtaining child pornography. The information, however, related to events that occurred two years earlier. Though the courts have held that child pornography is generally kept by the recipients, a two-year gap is too long for probable cause to exist that the evidence is still at that location. Nevertheless, Leon applies, and the court held that the evidence would not be suppressed.

***United States v. Hython***, 443 F.3d 480 (6th Cir. 2006) The search warrant application revealed that a controlled purchase of cocaine occurred at the target location, but nowhere in the warrant did the affiant reveal when this controlled purchase occurred. Therefore, the information in the warrant application was stale and there was no probable cause to search the premises. Moreover, the Leon good faith exception did not apply. In reaching the Leon conclusion, the Sixth Circuit noted that whether an officer could objectively rely on the warrant as being valid, the court held that the inquiry is limited to the four corners of the affidavit. Thus, what the affiant actually knew (but did not recite in the affidavit) cannot be considered in the good faith analysis.

***United States v. Laughrin***, 438 F.3d 1245 (10th Cir. 2006) Knowledge of a person's prior criminal involvement is alone insufficient to give rise to the requisite reasonable suspicion supporting a traffic stop. In this case, the officer testified that he had stopped the defendant repeatedly in the past for driving without a license, or on a suspended license. On that basis, when the officer saw the defendant driving, he pulled him over. This was an unlawful stop. The officer's encounter with the defendant was more than twenty-two weeks previously and this was too long a time to presume that the defendant's license was still suspended. The information known to the officer, therefore, was too stale to support a stop of the defendant's vehicle.

***United States v. Kennedy***, 427 F.3d 1136 (8th Cir. 2005) The defendant's girlfriend said that the defendant "deals" drugs and "keeps" drugs in his car. This did not establish probable cause that the defendant then had drugs in his car.

***United States v. Zimmerman,*** 277 F.3d 426 (3rd Cir. 2002) The police obtained a search warrant to search the defendant's home to look for child and adult pornography. There was no information in the warrant application that indicated that any

pornography would be found in his home, though there was information that one clip of adult pornography was seen in the home months earlier by one (or perhaps more than one) high school student. That information, however, was stale.

***SEARCH AND SEIZURE (Standing) SEE ALSO: Search and Seizure (Expectation of Privacy)***

***Brendlin v. California***, 127 S. Ct. 2400 (2007) When the police stop a vehicle that has a driver and passenger, the passenger is also "detained" for fourth amendment purposes. Therefore, if there was no basis for the stop, the passenger may contest the admissibility of any fruits of that stop (for which he has standing), such as a statement he made, or evidence seized from his person or personal belongings. He may also challenge the fruits of his illegal detention, which may include the search of the car in which he was a passenger.

***Minnesota v. Carter***, 119 S. Ct. 469 (1998) The Supreme Court held that visitors to an apartment whose sole purpose in visiting was to package drugs did not have standing to contest a warrantless search of the apartment. Three Justices dissented, and two concurring Justices (Kennedy and Souter) stated that they believed that any social visitor to a house or apartment would have standing. Thus, five Justices would confer standing on a social visitor, even if not an overnight visitor.

***United States v. Padilla***, 508 U.S. 77 (1993) The Ninth Circuit held that a co-conspirator retained an expectation of privacy in a vehicle which he enlisted another person to drive across the border with contraband. This "coconspirator" standing rule was rejected by the United States Supreme Court. Only if the defendant's own rights were violated may he complain; the privacy rights of co-conspirators are not pertinent. "Participants in a criminal conspiracy may have such expectations or interests, but the conspiracy itself neither adds nor detracts from them."

***Minnesota v. Olson***, 495 U.S. 91 (1990) An overnight guest in a residence has a reasonable expectation of privacy in the residence.

***Byrd v. United States***, --- S. Ct. --- (2018) The defendant was stopped in a rental car. The car was rented by his girlfriend, who gave him permission to drive the rental vehicle, but he was not listed on the rental papers as an authorized driver. Nevertheless, the United States Supreme Court held that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy.

***United States v. Terry***, 909 F.3d 716 (4th Cir. 2018) The police unlawfully placed a GPS device on the defendant's car without first obtaining a warrant. They subsequently used the data from the device to determine that the defendant was speeding, and, on that basis, the car was pulled over and ultimately, drugs were found in the car. The initial illegal "search' (placing the GPS device on the car without a warrant was not too attenuated from the subsequent discovery of drugs and was, instead, the fruit of the poisonous tree and the evidence should have been suppressed. On the question of standing, the court held that the defendant had standing, as the driver of the car, when the GPS device was placed on the vehicle and though he was a passenger during the subsequent stop and thus did not have standing to challenge the drugs found in the car, the search was the fruit of the poisonous tree, and the lack of standing does not change that determination.

***United States v. Walton***, 763 F.3d 655 (7th Cir. 2014) The fact that the defendant had left his home jurisdiction without permission from his parole officer and that he violated the rental car agreement by driving without a valid driver's license did not mean that he did not have standing to challenge a search of the rental car he was driving.

***United States v. Noble***, 762 F.3d 509 (6th Cir. 2014) The police were watching the Interstate for a vehicle that was suspected to be involved in a methamphetamine distribution operation. When the vehicle was spotted, an officer pulled behind it. The vehicle crossed a lane line without a proper signal. The officer activated his lights. The officer determined that the tint on the window was too dark. The driver and the passenger were excessively nervous. The driver consented to a search of the vehicle, at which point the passenger was asked to exit the vehicle and he was frisked. Because there was no basis to believe that he was armed or dangerous, there was no legitimate basis to frisk the defendant and the evidence derived from this frisk should have been suppressed. The officers then obtained a search warrant to search a hotel room where a co-conspirator was located, and more evidence was located. The hotel occupant contested the search on the basis that the frisk was illegal, and that evidence was used to obtain the search warrant. Though the hotel occupant did not have standing to challenge the frisk of the occupant of the vehicle, because the government never raised the standing issue, the issue was waived. The Sixth Circuit reviews the law in other Circuits and holds that the failure to raise the standing issue waives the government's right to contest that issue on appeal.

***United States v. Starks***, 769 F.3d 83 (1st Cir. 2014) The driver of a rental car has standing to contest the stop of the vehicle, even if he is not on the rental agreement as an authorized driver and has no driver's license. The driver has no less right than he would have as a passenger, and a passenger has standing to contest an unlawful stop pursuant to Brendlin v. California. In this case, the person who rented the car permitted the defendant to drive, even though the rental agreement only allowed the renter or a domestic partner to drive the car.

***United States v. Edwards***, 632 F.3d 633 (10th Cir. 2001) The defendant was arrested on the sidewalk near a parking lot. The court concluded that there was probable cause to support the arrest a belief that the defendant had participated in a bank robbery. The police then searched a rental car, which had been rented by his girlfriend which was in the parking lot. The Tenth Circuit held that the defendant did not have standing to contest the search of the car in general, because he was not on the rental agreement, but he did have standing to challenge the search of the closed suitcases which he owned that were in the trunk of the vehicle. The court also held that the search was not a valid probable cause search of the vehicle, because there was no probable cause to believe that the car contained any evidence. The search was not a valid search incident to arrest, because the defendant was over 100 feet away from the car when he was arrested and he was handcuffed in the back of the patrol car (note,

this case was decided pre-Gant). This was not an inventory search, because the police conceded that they were searching for evidence and had not decided to impound the car until the evidence was found.

***United States v. Washington***, 573 F.3d 279 (6th Cir. 2009) The defendant had an expectation of privacy in the apartment in which he was staying. The apartment was his uncle's. Though the apartment was being used for illegal purposes (drug dealing) this does not deprive the defendant of the right to assert standing to challenge an illegal entry and search of the apartment. Additionally, the fact that the uncle was occasionally behind in his rent (and violated the terms of the lease by engaging in illegal conduct in the unit) did not affect the standing issue. Even if the landlord had the ability to evict the tenants, until he does so, the tenant, and his guest, have a reasonable expectation of privacy in the apartment.

***United States v. Hamilton***, 538 F.3d 162 (2d Cir. 2008) The defendant purchased a house and put it in his girlfriend's name, and she lived there. He came and went as he pleased. He actually went there two or three times per weeks for years. The defendant did not have keys to the house. The district court held that the defendant did not have standing to contest the search of the house. The Second Circuit reversed: "There is no authority for the proposition that one need lives in the premises, or exercise control over them, in order to enjoy a privacy interest in those premises."

***United States v. Finley***, 477 F.3d 250 (5th Cir. 2007) The defendant had standing to contest the search of his cell phone, even though the phone had been provided to him by his business.

***United States v. Olivares-Rangel***, 458 F.3d 1104 (10th Cir. 2006) If a defendant is illegally seized or arrested and as the result of that illegal arrest, the defendant makes a statement, the defendant's identity is learned, and his illegal status is ascertained, the court may suppress all the evidence. The suppression of the defendant's statement is governed by Brown v. Illinois, 422 U.S. 590 (1975). The suppression of the identity evidence (as well as the defendant's "A-file") is more complicated. The government argued that INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), holds that the identity of the defendant may never be suppressed. The Tenth Circuit rejected this argument. The defendant, himself, may not be suppressed (i.e., he may be brought to court), but evidence derived from the illegal detention may be suppressed, including fingerprint evidence in certain circumstances (see Davis v. Mississippi, 394 U.S. 721 (1969); Hayes v. Florida, 470 U.S. 811 (1985)) and independently created and maintained government records. The fact that the defendant does not have an expectation of privacy in the government records is not relevant. The standing issue focuses on the defendant's rights regarding the illegal arrest. The defendant need not have an expectation of privacy in the fruits that are the result of the unlawful arrest. In other words, the defendant is not required to prove an expectation of privacy in both the primary violation and the fruits. If his expectation of privacy was violated, the fruits of that violation may be suppressed, regardless of whether the fruits are discovered in a place for which the defendant does not have an expectation of privacy.

***United States v. Mosley***, 454 F.3d 249 (3rd Cir. 2006) If the police stop a car without an articulable suspicion, the discovery of contraband in the car must be suppressed, even in a prosecution of a passenger. Though Rakas v. Illinois indicates that the passenger has no expectation of privacy in the car, the passenger's motion to suppress is predicated on his unlawful detention and the fruit of that unlawful detention, rather than on the expectation of privacy in the automobile. The court's opinion runs twenty pages and comprehensively reviews the law of "fruit".

***United States v. Thomas***, 447 F.3d 1191 (9th Cir. 2006) The Ninth Circuit held that an unauthorized driver of a rental car has standing to contest the search of the car if the authorized driver gave permission to the unauthorized driver to drive.

***United States v. Waller***, 426 F.3d 838 (6th Cir. 2005) The defendant was evicted from one apartment where he was living with friends and asked another friend if he could store some of his belongings in his apartment. The friend agreed. Shortly thereafter, the police obtained an arrest warrant for the defendant and arrested him outside the friend's apartment. He acknowledged coming out of that apartment. The police obtained the friend's consent to search the apartment. The police searched throughout the apartment and found guns in what turned out to be the defendant's suitcase. He was prosecuted for possession of the guns. The Sixth Circuit held that the evidence should have been suppressed. The defendant had standing to challenge the search of his suitcases and the apartment owner did not have actual, or apparent authority to search the suitcases. The officers did not reasonably believe that the apartment owner had authority to grant consent to search the defendant's personal belongings that were stored there.

***United States v. Thomas***, 372 F.3d 1173 (10th Cir. 2004) A social guest – even one who does not spend the night – has standing to challenge a search of an apartment.

***United States v. Bautista,*** 362 F.3d 584 (9th Cir. 2004) The defendant checked into a hotel room with what the hotel later learned was a stolen credit card. The management called the police and asked them to investigate, though the hotel had not yet made the decision to evict the defendant. The police went to the door, announced who they were and demanded, "Open the door" and then used a pass key to open it. Inside was the defendant's wife, who backed up from the door (which she was opening at the same time the pass key was used to unlock it) and she said, "Come in." They then obtained her consent to search the room and discovered counterfeit paraphernalia. The Ninth Circuit held that the evidence had to be suppressed: First, the defendant had standing, because the hotel had not yet made the determination to evict him and had not terminated his right of occupancy and the police had not yet made the decision to evict him. Both the police and the hotel were still investigating the information relating to the alleged stolen credit card. With regard to the issue of consent, the police officers' command, "Police, open the door!" negated any suggestion of consent. "The government may not show consent to enter from the defendant's failure to object to the entry." Note that this decision was limited in a subsequent Ninth Circuit decision, United States v. Cunag, 386 F.3d 888 (9th Cir. 2004).

***United States v. Gomez,*** 276 F.3d 694 (5th Cir. 2001) The police went to a house that had been identified by a tip as a stash house. The police talked to the defendant, who answered the front door. He declined to give consent to search the house but said that the agent could search the garage. The police then searched a truck in the driveway that the defendant had said belonged to his cousin. The question is whether the defendant had standing to contest the legality of the search of the truck. The Fifth Circuit concluded that a homeowner has a reasonable expectation of privacy in a vehicle owned and operated by a third party but parked on the homeowner's driveway. The court stressed that his expectation of privacy was based, in part, on the fact that the truck was part of the unlawful enterprise (storing drugs) in which he took part. The court canvassed the law regarding a homeowner's standing to contest "containers" owned by visitors, even if the homeowner did not know the contents. Many of the decisions uphold a homeowner's expectation of privacy in that situation.

***United States v. Best***, 135 F.3d 1223 (8th Cir. 1998) A driver who is not on the rental agreement, but who has the permission of the person who rented the car to drive the vehicle, has standing to contest a search of the vehicle.

***United States v. Cooper***, 133 F.3d 1394 (11th Cir. 1998) The driver of a rental car which is overdue has standing to contest a search of the vehicle.

***United States v. Blaze***, 143 F.3d 585 (10th Cir. 1998) The defendant was the only person listed on the rental car agreement permitted to drive the car. When the police stopped the car, however, the defendant was not in the car and another person was driving it. He had no standing to contest the search of the car. However, in the car was located a briefcase which belonged to him. The briefcase was locked and was in the locked trunk. Having entrusted the locked briefcase to his associates, the defendant did not abandon his expectation of privacy and he had standing to contest the warrantless search. (Having won the standing issue, the defendant then lost the issue of whether the evidence would inevitably have been discovered).

***United States v. Baker***, 221 F.3d 438 (3rd Cir. 2000) A passenger in a car that he neither owns nor leases typically does not have standing to challenge a search of the car. A person who steals a car has no standing to challenge a search of the car. However, a person who borrows a car has a reasonable expectation of privacy and may challenge a search of the car. Moreover, any discrepancy between the defendant's statement about who owns the car, and the title is not enough to deprive him of an expectation of privacy in the vehicle, assuming it is not shown that the vehicle is stolen.

***United States v. Vega***, 221 F.3d 789 (5th Cir. 2000) The police entered a house that was leased to the defendant after it was placed under surveillance. The government argued that the defendant lacked standing to contest the warrantless entry because one of defendant's colleagues fled, leaving the side door open and, later, when the defendant was questioned, he denied living at the house. The court rejected both these theories. The fact that a door is left open does not defeat the defendant's reasonable expectation of privacy in the premises. And the defendant's denial that he lived there, in the face of interrogation, did not deprive him of standing to contest the warrantless entry into the house. Finally, the fact that the defendant used the premises for illegal purposes did not forfeit his right to contest the search.

***United States v. Kimball***, 25 F.3d 1 (1st Cir. 1994) When a police officer effects a stop of a vehicle, all of the occupants have had their freedom of movement restrained, and thus all of the occupants have been seized. The passengers, as well as the driver, may feel that they are not free to leave once they have been stopped by the police. Therefore, if the stop is illegal, fruits of that stop, including evidence found in the car, must be suppressed in a trial involving the passengers of the car. In this case, the stop was lawful.

***United States v. Cardona-Sandoval***, 6 F.3d 15 (1st Cir. 1993) The crewmembers of a ship laden with drugs had standing to contest a search of the internal structure of the boat. The contraband was secreted in a hollowed-out part of a structural beam. The court found standing based on the cramped nature of the boat, the right of crewmembers to exclude non-crew members from the vessel, and the crewmembers' duty to maintain the security of the boat.

***United States v. Fields***, 113 F.3d 313 (2d Cir. 1997) The police searched an apartment and discovered cocaine. The two defendants who were arrested challenged the legality of the search. One defendant paid the tenant for the privilege of using the apartment and had a key. He had standing. The other defendant was a visitor who had stayed overnight on occasion but was not shown to be an overnight visitor on this occasion. Nevertheless, he had standing, as well. The decision in Minnesota v. Olson, 495 U.S. 91 (1990), is not limited to overnight guests.

***United States v. Osoria,*** 949 F.2d 38 (2d Cir. 1991) Defendant was an overnight guest in the apartment of an acquaintance. Though he had not originally intended to stay overnight, when the acquaintance failed to return home (having been arrested), the defendant went to sleep in a spare bed. The police engaged in a warrantless search of the apartment. The defendant had standing to contest this search. See Minnesota v. Olson, 495 U.S. 91 (1990).

***United States v. Jenkins***, 92 F.3d 430 (6th Cir. 1996) The owner of a tractor-trailer has standing to contest a search of the trailer, even if he is not in possession of the trailer at the time of the search.

***United States v. Sangineto-Miranda***, 859 F.2d 1501 (6th Cir. 1988) Although a casual visitor at an apartment did not have standing to challenge the warrantless search of the apartment, a person who had been afforded unrestricted access to the apartment, "just as any member of the lessee's family," does have standing.

***United States v. Blanco***, 844 F.2d 344 (6th Cir. 1988) A bailee may have an expectation of privacy in portions of a rented automobile for purposes of standing to object to the search of the car.

***United States v. Dumas***, 94 F.3d 286 (7th Cir. 1996) The defendant was in a van that was stopped by a trooper. He argued that the search of his person was a violation of the Fourth Amendment. The government and the lower court held that he did not have standing, because he did not own the vehicle that was stopped. This misses the point. The defendant had standing to contest the search of himself, as well as his seizure when the vehicle was stopped.

***United States v. Garcia***, 897 F.2d 1413 (7th Cir. 1990) The defendant was stopped in a car for speeding. The driver said he had borrowed a car from a friend named McClavio. The police ultimately searched in the doors of the vehicle and found marijuana. The next day, McClavio reported the truck stolen. The Seventh Circuit holds that the driver had standing to contest the search of the vehicle. Because the car was not reported stolen until the next day and may very well have been reported stolen in order to distance McClavio from the occupants of the car, the government failed to sustain its burden of disproving standing by a preponderance of the evidence. In short, the government failed to prove the vehicle was, in fact, stolen.

***United States v. Barry***, 853 F.2d 1479 (8th Cir. 1988) A defendant checked a suitcase full of stolen property at a public baggage claim counter in the name of a proposed buyer. He intended to deliver the claim check to the buyer. He had standing to object to the warrantless entry into the suitcase. Because the defendant had not turned over possession of the goods to the buyer, he still had an expectation of privacy in the suitcase.

***United States v. Echegoyen***, 799 F.2d 1271 (9th Cir. 1986) An invited overnight guest had an expectation of privacy in the residence and thus had standing to contest the search of the home. He had permission to be in the residence at the time of the searches and had an interest in the items seized due to his involvement in the cocaine processing operation located there.

***United States v. Shareef,*** 100 F.3d 1491 (10th Cir. 1996) While an occupant of a car does not have standing to challenge a search of the vehicle, if the passenger is detained unlawfully and the search of the vehicle is the fruit of this unlawful detention, the evidence may be suppressed.

***United States v. Mena***, 863 F.2d 1522 (11th Cir. 1989) The defendant's ship was boarded by law enforcement agents. Pursuant to 46 U.S.C. App. §1903(d) the government argued that only the flag nation of the ship has standing to challenge a search of a vessel. The trial court agreed and barred the defendants from filing a suppression motion. The Eleventh Circuit disagreed: Although there is ambiguity in the statute, the Court held that Congress would have specifically barred defendants from challenging the government's non-compliance with the terms of §1903(a) if that were the congressional intent.

***United States v. Morales***, 847 F.2d 671 (11th Cir. 1988) Defendants were convicted of possession of cocaine while on board a vessel of United States registry. The trial court held that crewmembers did not have standing to seek suppression of evidence seized from the boat. The Court of Appeals reverses: While neither captain nor crew has a legitimate expectation of privacy in an area which is subject to the common access of those legitimately aboard the vessel, crew men do have standing to challenge the search of specific areas such as sleeping quarters and private spaces such as foot lockers and duffel bags. Here, the police officers had to destroy part of the area in which the defendant did have standing in order to get access to the area of the boat where the drugs were found. The Court holds that this gives them standing to challenge the search.

***United States v. Miller***, 821 F.2d 546 (11th Cir. 1987) The driver of a car borrowed from a friend has standing to challenge the search of the car.

***SEARCH AND SEIZURE (Student Searches)***

***Phaneuf v. Fraikin***, 448 F.3d 591 (2d Cir. 2006) The Second Circuit reviews the law governing the legality of student searches (and strip searches) and concludes, based on the information known to school officials, that there was insufficient evidence to support a strip search of the plaintiff. See New Jersey v. T.L.O., 469 U.S. 325 (1985).

***SEARCH AND SEIZURE (Terry Stop – Improper Frisk)***

***Minnesota v. Dickerson***, 508 U.S. 366 (1993) The police frisked the defendant after he was stopped for engaging in "evasive" behavior. The police officer conducted a Terry frisk. While frisking the defendant, the officer felt an object which was clearly not a weapon, but which felt like it might be contraband. The Supreme Court held that an officer who is engaging in a legal Terry frisk of a subject may seize an object which the officer realizes immediately to be contraband. This is the "plain touch" analogue to the "plain view" exception. That is, the officer need not limit his seizures to weapons if he is immediately aware that he is touching contraband. Applying the rule to this case, however, the Court concluded that the officer was not immediately aware that he was touching contraband. Rather, "the officer determined that the lump was contraband only after squeezing, sliding and otherwise manipulating the contents of the defendant's pocket – a pocket which the officer already knew contained no weapon." The seizure, therefore, was not authorized by the "plain touch" exception. Arizona v. Johnson, 555 U.S. 323 (2009) If the police stop a vehicle lawfully and there is a passenger in the vehicle, if the police have a reason to believe the passenger is armed and dangerous, he may be frisked. This is true, even if the passenger is not believed to have committed any crime.

***United States v. Johnson,*** 885 F.3d 1313 (11th Cir. 2018) The police had an articulable suspicion to detain the defendant based on a call reporting a burglary in an apartment complex and the defendant fit the description of the perpetrator. After detaining the defendant, the office frisked him and felt what he thought was a bullet. The officer reached into his pocket and retrieved the bullet and a holster. The Eleventh Circuit held that this was an unlawful search. While the frisk was justified, feeling a bullet did not justify reaching in the pocket and retrieving it.

***United States v. Lewis***, 864 F.3d 937 (8th Cir. 2017) The defendant was an employee at a Tattoo shop. The police were looking for a suspect and entered the premises and went into a work area where the defendant was located. After entering, the police

saw a gun in a holster and seized it. Almost immediately after the police seized it, the defendant acknowledged that he was a convicted felon. The Eighth Circuit held that the seizure of the gun was not supported by either the plain view exception (because at the moment of the seizure there was no probable cause to believe that the gun was illegally possessed), and was not justified by officer safety, because there was no reason to be fearful of the gun on the shelf in a holster.

***United States v. Craddock***, 841 F.3d 756 (8th Cir. 2016) The police were suspicious that the defendant, who was walking near a car that was known to be stolen, was involved in the theft of the vehicle. The officer handcuffed him and frisked him, taking a key fob from his pocket, which opened the stolen vehicle door. The Eighth Circuit held that this was an unlawful frisk, but the key fob was not believed to be a dangerous weapon and was not subject to the plain feel doctrine, because the officer did not have probable cause to believe that it was incriminating evidence. The key fob's incriminating character was not immediately apparent upon plain feel.

***United States v. Monsivais***, 848 F.3d 353 (5th Cir. 2017) The police encountered the defendant on the side of the Interstate, apparently walking away from a disabled truck. The defendant acted nervous, gave an inconsistent answer about his destination, and initially walked away from the police when they activated their blue lights. None of these factors justified frisking the defendant, which amounted to a seizure.

***United States v. Robinson***, 814 F.3d 201 (4th Cir. 2016) In states, such as West Virginia, where possession of a concealed firearm is legal, a tip to the police that a man was seen loading a gun in a parking lot of a convenience store, does not provide a basis for detaining the individual or frisking him. The possession of a weapon is not illegal and there was no reason for the police to believe that the defendant's possession of the weapon made him "dangerous." At the time the police conducted the frisk, the defendant was not known to be a convicted felon. THE EN BANC COURT REVERSED. 846 F.3d 694 (2017).

***United States v. Leo***, 792 F.3d 742 (7th Cir. 2015) A Terry frisk is limited to the defendant's outer clothing or easily accessible belongings in which a weapon might be used to endanger an officer. In this case, the officers detained the defendant and then took his backpack, unzipped it and located a gun inside. This was not a proper frisk. The defendant was already in handcuffs and the officers had already frisked him.

***United States v. Watson***, 787 F.3d 101 (2d Cir. 2015) The police were looking for Butler, who was wanted for committing a robbery. The police were given a photographic of Butler. They stopped Watson, believing him to be Butler. Watson produced identification showing that he was not Butler. Nevertheless, the police frisked him, finding drugs and a gun. The trial court found that the detention of Watson was not reasonable, because the officer's mistaken belief that Watson was Butler was not reasonable. The Second Circuit affirmed.

***United States v. Noble***, 762 F.3d 509 (6th Cir. 2014) The police were watching the Interstate for a vehicle that was suspected to be involved in a methamphetamine distribution operation. When the vehicle was spotted, an officer pulled behind it. The vehicle crossed a lane line without a proper signal. The officer activated his lights. The officer determined that the tint on the window was too dark. The driver and the passenger the defendant were excessively nervous. The driver consented to a search of the vehicle, at which point the passenger/defendant was asked to exit the vehicle and he was frisked. Because there was no basis to believe that he was armed or dangerous, there was no legitimate basis to frisk the defendant and the evidence derived from this frisk should have been suppressed. The facts that the driver and passenger were nervous, and that the vehicle was suspected of being involved in a drug trafficking operation are not sufficient to support a reasonable belief that the passenger was armed or dangerous, even coupled with the officer's experience that drug dealers are often armed. The court ridicules the notion that any passenger in a car can be frisked if the driver or the vehicle is suspected of being involved in drugs: this would presumably include "a fourth grader, a ninety-five-year-old gentleman with Parkinson's disease, or a judge this court." The law requires individualized suspicion of the person who is to be frisked, not a general belief that someone in the vehicle might possibly be armed.

***United States v. Williams***, 731 F.3d 678 (7th Cir. 2013) Though there was a basis for a Terry stop, there was no basis for a frisk, because the absence of sufficient information that the defendant was armed or dangerous.

***United States v. I.E.V.,*** 705 F.3d 430 (9th Cir. 2012) At a border checkpoint, a drug-detecting dog alerted to a vehicle. The occupants were asked to get out and were frisked. The Ninth Circuit held that a dog alert, with no additional evidence that the occupants were armed or dangerous in any way, was not a sufficient basis to authorize a frisk of the occupants.

***United States v. Powell***, 666 F.3d 180 (4th Cir. 2011) The defendant was a passenger in a car. The driver was stopped, and he had a suspended license. The police asked the defendant/passenger for his license to see if he would be allowed to drive the car. A record check was performed on the defendant's license, and it revealed a prior armed robbery conviction and also a suspended license. The police then frisked the defendant, discovering evidence used in a drug/firearm prosecution. The Fourth Circuit held that the frisk was not lawful, because there was no reasonable basis for believing that the defendant was armed, or dangerous, and therefore no reason to frisk him.

***United States v. Camacho***, 661 F.3d 718 (1st Cir. 2011) The police went to the scene of a street brawl and saw two people walking on the sidewalk. Suspicious that they had been involved in the brawl, the police pulled their car in front of the defendant, stopping him and then frisked the defendant and felt a gun. The defendant pushed the officer's hand away, after which the defendant was arrested. The First Circuit concluded that the initial encounter was a seizure; there was no lawful basis for the seizure (i.e., there was no articulable suspicion); the frisk was not proper; the discovery of the weapon was not the result of a valid search incident to arrest.

***United States v. Massenburg,*** 654 F.3d 480 (4th Cir. 2011) The police had no basis for frisking the defendant and the evidence obtained from the frisk should have been suppressed. The police drove to the scene where there was a reported shooting. Four men were seen a few blocks away. No evidence linked them to the shooting. They were responsive when the police approached them. They answered the officers' questions and said that they, too, had heard gunshots. When the police asked for consent to frisk them, two consented, but the defendant declined. This did not provide a basis to conduct a non-consensual frisk. The court also rejected the government's invitation to rely on the "collective knowledge" doctrine, based on testimony that another officer, who did not actually conduct the frisk, had seen a bulge in the defendant's pocket. The Fourth Circuit held that the collective knowledge doctrine did not apply in this case, because the searching officer had no reason to believe that any other officer had sufficient information to support the search.

***United States v. Jones,*** 606 F.3d 964 (8th Cir. 2010) The police saw the defendant walking in a church parking lot, wearing a "hoodie" and clutching his right front pocket. The police approached him and frisked him. There was no basis for this detention or frisk and the discovery of the gun should have been suppressed.

***Gentry v. Sevier,*** 597 F.3d 838 (7th Cir. 2010) The defendant was walking with a wheelbarrow through a neighborhood late at night. The police were called. When the police arrived, they summoned the defendant over to their car and told him to "keep his hands up." This amounted to a seizure, which was not supported by an articulable suspicion. The officer then patted down the defendant, locating a garage opener. There was no basis for this frisk: there was no reason to believe the defendant was armed or dangerous and he was not subject to a legitimate arrest or detention. Moreover, there was no basis to keep the garage door opener and thereafter walk down the street seeing if it opened any garage in the neighborhood, because it was not a weapon, or apparent to be contraband. Finally, the search of the wheelbarrow was illegal. Though some items on the top of the pile in the wheelbarrow were subject to plain view, other items below the surface could only be seen when the officer probed beneath the surface. The defendant's trial counsel was ineffective in failing to move to suppress the fruits of the search.

***United States v. Zavala***, 541 F.3d 562 (5th Cir. 2008) The police may not flip open and examine a motorist's cell phone during a Terry stop. A Terry stop permits a brief frisk to ensure officer safety and not an investigation into the contents of a cell phone, including looking for the subscriber number.

***United States v. Askew***, 529 F.3d 1119 (D.C. Cir. 2008) en banc the police brought a defendant back to the scene of a robbery and unzipped his jacket so the witness could view his clothing under the jacket. Over the course of a forty-five-page opinion which represents an encyclopedic review of Terry jurisprudence, the D.C. Circuit, en banc, held that this amounted to a search for Fourth Amendment purposes. The Court suggested that in some circumstances, unzipping a defendant's jacket may be permissible in this situation, but that there was insufficient information known to the police in this case to justify this procedure. The Court relied principally on Minnesota v. Dickerson, 508 U.S. 366 (1993), in holding that a protective "search" or frisk, is limited to what is necessary to achieve the goal of officer safety, not crime investigation.

***United States v. Davis,*** 530 F.3d 1069 (9th Cir. 2008) The defendant was lawfully frisked when he arrived at the location of premises that were being searched, because the police had a reason to believe that he might be armed. Nevertheless, when the frisk was conducted, a "tin" was located and the officer "manipulated" the tin, even though there was no basis for believing that the tin contained a weapon. This amounted to an improper frisk. The hashish oil that was found should have been suppressed. Harmless error.

***United States v. Hughes***, 517 F.3d 1013 (8th Cir. 2008) The police received a tip that there were two suspicious people trespassing at a specific location. The police went to the scene, but the two men were across the street, waiting at a bus stop. The police approached them and frisked them, finding ammunition. Because the two men were doing nothing improper when the police arrived and at most were previously trespassing, stopping them and frisking them was not permissible.

***United States v. Wilson***, 506 F.3d 488 (6th Cir. 2007) Though the defendant, a passenger in a car, exhibited extreme nervousness when pulled over, this did not justify a frisk and the drugs found in his pocket were properly suppressed by the trial judge.

***United States v. Holmes***, 505 F.3d 1288 (D.C. Cir. 2007) The defendant was seen in an alley by the police at 3:40 in the morning and when the officers approached him, he fled, scaling several fences in the process. The officers followed him and when they caught him, he was frisked, and a set of car keys were discovered and taken from him. The officers then used the car keys' remote door opener to find the car. The defendant then gave consent to search the car and a gun was found in the car. The D.C. Circuit held that taking the keys from the defendant after the frisk violated his Fourth Amendment rights. There was no probable cause to seize the keys and the fruit of that unlawful seizure was the discovery, and ultimately the search, of the vehicle in which the gun was found. The government's argument that the taint of the illegal seizure was purged by the subsequent consent to search was rejected. The attenuation doctrine did not save the search in this case.

***United States v. Garcia***, 496 F.3d 495 (6th Cir. 2007) The police lawfully stopped the defendant's car and properly conducted a frisk. However, it was not proper to seize a pager that was located during the frisk. The pager was not obviously contraband. Harmless error.

***United States v. Flatter***, 456 F.3d 1154 (9th Cir. 2006) The defendant, a postal worker, was suspected of stealing mail. Prior to interviewing him, and fearing that the interview might become confrontational, the investigators frisked the defendant and found incriminating evidence. There was no basis for frisking the defendant, however, because there was no basis for believing that he had a weapon. The frisk was unlawful, and the evidence should have been suppressed.

***United States v. McKoy***, 428 F.3d 38 (1st Cir. 2005) After the police pulled the defendant over in a high crime area, the police noticed that he acted nervous and twice headed for the center console. Based on these observations, the police frisked the defendant. The First Circuit held that this frisk was improper. The defendant's conduct was consistent with a motorist being nervous in connection with a traffic stop and reaching for his license and registration.

***United States v. Glenn***, 152 F.3d 1047 (8th Cir. 1998) Defendant was pulled over for a traffic violation. The police determined that he did not have a driver's license on his person. The defendant was directed to get in the back of the patrol car. Before being placed in the patrol car, however, he was frisked, yielding a gun. There was no basis for frisking the defendant. Law enforcement officers are not permitted to pat down all traffic offenders simply by choosing to place them in the back seat of patrol cars during traffic stops. However, the police inevitably would have learned that the defendant had no license at all. This would have supported an arrest and a search incident to arrest.

***United States v. Schiavo***, 29 F.3d 6 (1st Cir. 1994) The police stopped the defendant's vehicle, believing that he had recently obtained drug "sting" money which an informant had paid for some cocaine to the defendant's underling. When the defendant was stopped, the officer saw a bulge in the defendant's pocket, but could not determine what it was, even after the pat-down. A Dickerson plain-feel seizure was not authorized. Because the nature of the bulge was not immediately apparent to the officer, he could not seize the bag.

***United States v. Jaramillo***, 25 F.3d 1146 (2d Cir. 1994) The police raided a bar and immediately spotted two patrons with weapons. The defendant then exited a bathroom and was frisked. A gun was found. This frisk was not proper. There was no known connection between the defendant and the other patrons and no basis for believing that he was in the possession of any weapon. Moreover, this is not a case in which the officers entered upon private premises at which the officers had the right to conduct a search or make a security check. This case is controlled by Ybarra v. Illinois, 444 U.S. 85 (1979). In a public place, people can only be frisked if there is an articulable suspicion that they are acting suspiciously, or that they possess a weapon.

***United States v. Thomas***, 863 F.2d 622 (9th Cir. 1988) A police officer pulled over the defendant on the basis that he apparently matched the description of a counterfeiting suspect. After the officer blocked the defendant's car, the defendant exited the car and approached the officer. It was immediately apparent that the defendant did not meet the description. Nevertheless, the officer frisked and continued to question the defendant. The continuing detention was unlawful once it was determined that the defendant did not meet the suspect's description. There was no basis for the police officer to fear for his safety.

***United States v. Bonds***, 829 F.2d 1072 (11th Cir. 1987) The Eleventh Circuit defines the conditions which must exist to authorize a Terry stop and a frisk. The two standards are not necessarily the same. In order to authorize a frisk, there must be specific facts supporting a reasonable belief by the frisking officer that he is in danger. This is different than the standard used to determine whether an investigatory stop is permitted. In this case, the Court upholds both the stop and the frisk of the defendants.

***United States v. Meadows,*** 885 F. Supp. 1 (D.D.C. 1995) The police stopped a man on the basis of a lookout which they received. The suspect did not, however, match the description of the lookout. He was frisked and a gun was found. The question in this case is whether the frisk of one of that suspect's companions could be justified on the basis of the "automatic companion frisk" rule. The court holds that the frisk was not lawful in this case. If the police lacked an articulable suspicion to search the first suspect, they could not use information from that unlawful frisk to justify the search of the companion. Otherwise, the police could approach a crowd and start searching everybody. As soon as a weapon was found on one person even if not the first person searched, further frisks would be deemed lawful.

***SEARCH AND SEIZURE (Terry Stop – Invalid Basis for Seizure) SEE ALSO: SEARCH AND SEIZURE (HIGHWAY STOPS)***

***United States v. Arvizu***, 534 U.S. 266 (2002) The Supreme Court reversed the Ninth Circuit which had categorically held that various innocent factors could not be considered by the police in assessing whether there was an articulable suspicion supporting a stop of a vehicle on the road. In this case, the officer's suspicions were aroused by the location of the vehicle in the desert of rural Arizona; the vehicle slowed when it approached the officer; children in the minivan waved at the officer in a manner that struck the officer as unusual; and the driver did not acknowledge the officer's presence. The Ninth Circuit had held that these factors could not even be considered by the court in determining whether there was a basis for stopping the vehicle. The Supreme Court unanimously held that under the totality of the circumstances test, all facts may be considered by the court in reviewing the officer's basis for stopping a vehicle. The Court also noted that the officer was entitled to assess the situation in light of his specialized training and familiarity with the customs of the area's inhabitants.

***Navarette v. California***, 134 S. Ct. 1683 (2014) A 911 caller who did not identify herself, told the dispatcher that a specific vehicle had just run her off the road. The police went to the highway and saw the described vehicle, followed it for a few minutes (observing no traffic infractions) and then stopped the vehicle. Drugs were located in the car. The Supreme Court held that the traffic stop was permissible under the Fourth Amendment. Because the caller correctly identified the vehicle – a fact verified the police who later observed the vehicle traveling in the direction described by the caller; and because the caller would know that his or her cell phone could be traced, there was sufficient indicia of reliability to authorize the stop. Four Justices dissented.

***Utah v. Strieff,*** 136 S. Ct. 2056 (2016) If a defendant is pulled over for an investigatory stop illegally (there was no articulable suspicion or probable cause to support the stop) and the police determine that there is an outstanding arrest warrant for the defendant, a search incident to arrest is proper and the exclusionary rule does not bar the use of evidence discovered during the

search incident to arrest. The illegal stop is too attenuated from the discovery of the evidence that was the product of the legal search incident to arrest.

***Alabama v. White***, 496 U.S. 325 (1990) The police received an anonymous tip that the defendant would exit a particular apartment, at a particular time in a particular vehicle and that she would be going to a particular motel, and that she would be in possession of cocaine. The police went to the location of the apartment, and the suspect did in fact exit the apartment at the appropriate time and enter the vehicle. She was followed heading in the direction of the hotel which the anonymous tipster had identified. She was stopped by the police. The Supreme Court holds that this is a valid Terry stop: Though the tip itself was completely lacking in the necessary indicia of reliability, it was corroborated by the conduct of the suspect, thus providing an articulable suspicion justifying the Terry stop of the defendant.

***Bailey v. United States***, 133 S. Ct. 1031 (2013) Though Michigan v. Summers, 452 U.S. 692 (1981), permits the police to detain people who are at the scene that is the target of a search warrant, in this case the police followed individuals who left the scene prior to the search and detained them about a mile away, without any information that they were subject to a Terry stop. The Supreme Court held that this amounted to an unlawful detention that necessitated the suppression of any evidence derived from the stop of the individuals.

***United States v. Watson***, 900 F.3d 892 (7th Cir. 2018) An anonymous caller called 911 and reported (1) the caller was 14-years old; (2) the caller was calling from a phone borrowed from somebody nearby; (3) the caller said that “some boys” were playing with guns at a specific location. The police went to the scene and blocked the defendant’s car in a parking lot and then searched the defendant and a gun was found. The Seventh Circuit held that the Terry stop was not permissible. Unlike in Navarette, the caller was not using her own phone, and simply reporting possession of a gun is not sufficient to establish that anybody was actually committing a crime. The police acted properly in going to the scene; they exceeded what they could do by immediately seizing the defendant based on the information provided in the 911 call,

***United States v. Job***, 851 F.3d 889 (9th Cir. 2017) The police went to a suspect’s house to either arrest him or conduct a search. When they arrived, another person, the defendant, was exiting the garage. The defendant was not known to the police and though he appeared nervous and was wearing baggy pants, there was no articulable suspicion to support a detention, or a frisk of the defendant. Nor was there any justification for searching the defendant’s car, which was parked in the driveway.

***United States v. Monsivais,*** 848 F.3d 353 (5th Cir. 2017) The police encountered the defendant on the side of the Interstate, apparently walking away from a disabled truck. The defendant acted nervous, gave an inconsistent answer about his destination, and initially walked away from the police when they activated their blue lights. None of these factors justified frisking the defendant, which amounted to a seizure.

***United States v. Robinson***, 814 F.3d 201 (4th Cir. 2016) In states, such as West Virginia, where possession of a concealed firearm is legal, a tip to the police that a man was seen loading a gun in a parking lot of a convenience store, does not provide a basis for detaining the individual or frisking him. The possession of a weapon is not illegal and there was no reason for the police to believe that the defendant’s possession of the weapon made him “dangerous.” At the time the police conducted the frisk, the defendant was not known to be a convicted felon. THE EN BANC COURT REVERSED. 846 F.3d 694 (2017).

***United States v. Paniagua-Garcia***, 813 F.3d 1013 (7th Cir. 2016) The police saw the defendant “fiddling” with a cell phone. It is a violation of state law to “text-while-driving” but it is not a violation to talk on the phone or use GPS. The Seventh Circuit holds that the officer’s observation did not amount to an articulable suspicion that the defendant was violating the texting-while-driving prohibition.

***United States v. Castle***, 825 F.3d 625 (D.C. Cir. 2016) The police regularly patrolled a certain neighborhood in an unmarked pick-up truck and testified at a hearing that people in the neighborhood came to know the truck, and thus knew the occupants were police officer. The defendant was seen by the officers as they approached in their pickup, and he acted in a suspicious manner. The trial court held that because “people in the neighborhood” knew the pickup was occupied by the police, the police had an articulable suspicion that the defendant was engaged in criminal conduct based on his response to the presence of the pickup. The DC Circuit reversed. The notion that “people in the neighborhood” knew the vehicle was not sufficient to establish that the defendant had this knowledge. The fact that the police recognized the defendant as someone who was involved in drug dealing in the past is also not sufficient to authorize a detention. This is nothing more than “rounding up the usual suspects” which is not a basis to detain a person, absent specific facts and circumstances known to the police at the time of the detention that the defendant is engaged in current criminal activity. In addition, the court held that approaching the defendant in an alleyway, touching him and telling him to “hold on a sec” was sufficient to amount to a seizure.

***United States v. Slocumb,*** 804 F.3d 677 (4th Cir. 2015) The police were preparing to execute a search warrant at a location. Across the street in a parking lot of a salvage yard was the officers’ staging area. When they arrived, the defendant and his girlfriend were in the parking lot in two different cars, along with an infant. The defendant was moving a car seat from one car to the other. An officer asked him questions, to which he gave mumbled responses. The area was known to be a high crime area. The officer directed the defendant to remain there while the search was executed. Eventually, the defendant provided a false name to the officers, but the detention was illegal prior to that time. The facts known to the police when the defendant was initially detained – it was high crime area, the business was closed, and the defendant gave mumbled – were not sufficient to justify a detention.

***United States v. Wilbourn,*** 799 F.3d 900 (7th Cir. 2015) Law enforcement was aware of extensive evidence linking the defendant to drug dealing, including recent activist (earlier in the day). The government failed to present any evidence, however, that law enforcement's knowledge of the defendant's activities was ever communicated to the two officers who stopped the car in which the defendant was a passenger. While there was sufficient information known to law enforcement generally, because there was no evidence that the police who stopped the vehicle had any articulable suspicion, the evidence derived from the stop should have been suppressed.

***United States v. Lowe,*** 791 F.3d 424 (3rd Cir. 2015) The police were sent to a location in a high crime area, based on a call that a man had a gun in his waistband. Earlier, there had been a report of shot fired near that location. Several police officers arrived in four marked police cars and immediately ordered the defendant to take his hands out of his pockets. He did not do so, and the officers, at least one of whom had his gun drawn, repeated the demand. The appellate court concluded that the defendant submitted to the show of authority by remaining in place, even though he did not immediately remove his hands from his pockets. The first request constituted a seizure under Terry, and because there was no lawful basis for this seizure – there was not an articulable suspicion that the defendant was engaged, or had engaged, in any criminal conduct – the subsequent frisk was illegal and the gun that was found as a result of the frisk should have been suppressed. The validity of the seizure must be measured at the time of the defendant's submission to the officer's commands.

***United States v. Hill***, 752 F.3d 1029 (5th Cir. 2014) The police were patrolling in a high crime area of the city when they observed the defendant's vehicle backed into a parking space in an apartment complex. The defendant was in the driver's seat and his girlfriend was in the passenger seat. When the police pulled up next to him the girlfriend exited the vehicle and "briskly" walked away. The police directed the defendant to roll down the window it did not work, so he opened the door. He was asked for his driver's license which he did not have and was then ordered out of the car and was frisked. A gun was found in his pocket. The Fifth Circuit held that the police detained the defendant at the point that he was ordered to exit the car. At that point, even though the defendant acknowledged that he did not have a driver's license, there was no basis for detaining the defendant. The fact that these events occurred in a "high crime area" provides no support for detaining the defendant was observed committing no crime or doing anything suspicious. In fact, the police testified that the entire county was a high crime area not the apartment complex in particular.

***United States v. Freeman,*** 735 F.3d 92 (2d Cir. 2013) In Florida v. J.L, 529 U.S. 266 (2000), the Supreme Court held that an anonymous tip was not sufficient to support a Terry stop. In this case, the Second Circuit held that an anonymous tip from a person calling on a cell phone (and whose phone number and the call, were recorded) was also insufficient to support a Terry stop. In addition, when the defendant refused to stop when the police approached him, the fact that he refused to stop and continued to walk away, did not provide an independent basis for seizing him. In short, if there is no basis to stop a person, the fact that the person walks away when the officers attempt to stop him does not justify a stop.

***United States v. Valerio***, 718 F.3d 1321 (11th Cir. 2013) One week after observing the defendant engaged in activity that was sufficiently suspicious that it would have justified a brief detention, the police detained the defendant. During the intervening week, he had been seen engaged in suspicious activity. During the detention a week later, the defendant made an incriminating statement. The Eleventh Circuit held that a Terry stop may not be made after the need for immediate action has ended. The premise of Terry is that the events of the moment require an immediate investigation and detention.

***United States v. Dapolito***, 713 F.3d 141 (1st Cir. 2013) At approximately 2:00 a.m., the police saw the defendant standing in the alcove of a building in downtown Portland, Maine. When questioned, he gave rambling sometimes incoherent answers to questions. When the police called dispatch to determine whether there were any warrants, the response was negative. There was insufficient information to believe that he was engaged in any criminal activity or that he was wanted in any jurisdiction. The district court found that the area was not a high crime area and there was no evidence of recent burglaries that would support a detention of this defendant. The encounter, which lasted twenty minutes, and ultimately involved several officers, rose to the level of a detention when he was repeatedly asked to produce identification and to consent to a search, which he refused. The resulting frisk was the product of this illegal detention.

***United States v. Black,*** 707 F.3d 531 (4th Cir. 2013) The police encountered several men sitting together at a gas station. One man showed the police that he had the gun. There were no other facts known to the police that would support a detention of any of the men. Detaining them and continuing to question them was an unlawful Terry stop and when one of the men got up to leave and was physically restrained by the police, the ensuing search of his person was improper, and the evidence should have been suppressed.

***United States v. De La Cruz***, 703 F.3d 1193 (10th Cir. 2013) ICE agents were looking for Rivera. They stopped a car, believing that Rivera was the driver. Almost immediately, however, they realized that De La Cruz was the driver and not Rivera. However, a passenger in the car jumped out of the car and fled and was determined to be illegally in the country. The agents returned to De La Cruz and continued to detain him and asked for identification. The Tenth Circuit held that continuing to detain De La Cruz, after realizing that he was not Rivera, was not lawful because there was no articulable suspicion to justify his detention. Moreover, the flight of the passenger did not create articulable suspicion to detain De La Cruz, because this did not occur anywhere near the border, so there was no basis to believe that the driver, De La Cruz, was assisting the passenger in entering, or remaining in, the country illegally.

***United States v. Bohman***, 683 F.3d 861 (7th Cir. 2012) The police had reason to believe, but not probable cause, that a cabin was the location of a meth lab. A car exiting the cabin was stopped and eventually, this led to a search of the cabin. The Seventh

Circuit held that stopping the vehicle, solely because it left the location where there was suspicion that a meth lab was operating was not proper. At the time of the stop, there was no information known about that car, or its occupants.

***United States v. Lewis***, 672 F.3d 232 (3rd Cir. 2012) The police received information from a reliable informant that firearms were in a white Toyota that had a license plate that included the numbers “181.” The informant did not relay his basis of knowledge, or whether the firearms were illegally possessed. The police stopped the vehicle. A gun was found on the defendant. Later, the officers determined that the vehicle had illegally tinted windows. The Third Circuit held that the traffic stop could not be supported by the illegal tint, because even though that might have been a valid basis for stopping the vehicle, the officers were not aware of that offense when the vehicle was stopped. The informant’s information was also insufficient to support the stop. It is not illegal to possess a firearm, consequently, the mere fact that a firearm is in a vehicle is not a legitimate basis to stop the vehicle.

***United States v. Gaines***, 668 F.3d 170 (4th Cir. 2012) Three police officers testified that as the car in which the defendant was a passenger drove past them, they observed a small crack in the windshield. The car was stopped, and the defendant was ordered out of the car and frisked, and the officer felt a gun. The defendant assaulted the police officer and fled, after which he was stopped, and a gun was found in his possession. The district court found that the officers were untruthful when they said that the observed a crack in the windshield and that the stop, therefore, was illegal. The government conceded the illegality of the stop but claimed that the assault of the officer was an intervening event that authorized the search incident to arrest. The Fourth Circuit rejected this argument: the gun was found during the course of the illegal stop and the frisk which was before the defendant engaged in the intervening assault.

***United States v. Camacho,*** 661 F.3d 718 (1st Cir. 2011) The police went to the scene of a street brawl and saw two people walking on the sidewalk. Suspicious that they had been involved in the brawl, the police pulled their car in front of the defendant, stopping him and then frisked the defendant and felt a gun. The defendant pushed the officer’s hand away, after which the defendant was arrested. The First Circuit concluded that the initial encounter was a seizure; there was no lawful basis for the seizure (i.e., there was no articulable suspicion); the frisk was not proper; the discovery of the weapon was not the result of a valid search incident to arrest.

***United States v. Beauchamp***, 659 F.3d 560 (6th Cir. 2011) The defendant was walking on the sidewalk in a “high crime area” when the police approached. The defendant was ordered to approach the officer, which he did. The defendant appeared to be nervous. The officer then frisked the defendant to look for weapons. The officer then asked for consent to conduct a search of the defendant’s person and the defendant agreed. The officer found drugs inside the defendant’s boxers. The Sixth Circuit held that this was a seizure, it was not based on an articulable suspicion and the consent was tainted by the illegal detention.

***United States v. Foster***, 634 F.3d 243 (4th Cir. 2011) The Fourth Circuit condemns the government’s use of post hoc explanations to justify a police officer’s detention of a defendant. Relying on such observations as “sudden hand movement in the car” and “suddenly appearing from crouched position” are not valid bases for stopping a defendant and then claiming that these were factors that justified the stop. The Court suppressed the evidence found during a search that followed a stop based on these circumstances.

***United States v. Johnson***, 620 F.3d 685 (6th Cir. 2010) The police received a call that there were suspicious people at an apartment complex. The police went to the scene and saw the defendant, carrying a bag, walking calmly from the yard of the complex to a car. The police ordered him to stop; he kept walking. The police ordered him to stop again; he kept walking until he arrived at the car, opened the passenger door, threw the bag in and then stood still at the open door. The Sixth Circuit held that when he finally stopped, he had been seized. The fact that this was a “high crime area” and that this occurred late at night were not sufficient facts to support the seizure. The fact that the defendant refused to stop when ordered to do so was also not a basis to stop him. First, of course, because there was no basis to order him to stop, it would be peculiar to hold that his failure to comply with an unconstitutional order to stop created a constitutional basis to require him to stop. Second, merely walking away in a non-suspicious manner is not the equivalent of “flight.” Because there was no articulable suspicion to justify the seizure, the resulting frisk and search was unconstitutional, and evidence should have been suppressed.

***United States v. Williams***, 615 F.3d 657 (6th Cir. 2010) The defendant was standing in a housing project with others when a police officer approached and said he was “again trespassing on [housing authority] property.” During the following interaction, the defendant acknowledged in response to questions that there might be a warrant out for his arrest, and he also acknowledged carrying a gun. The Sixth Circuit held that the encounter was a seizure for Fourth Amendment purposes. There were two officers, they approached the defendant an immediately accused him of a crime, and there was no basis that would lead the defendant to believe that he could simply walk away from the officers. There was insufficient information known to the police to support the seizure; the defendant’s statement was the fruit of that detention; the evidence would be suppressed, even though there was an outstanding arrest warrant.

***United States v. Jones***, 606 F.3d 964 (8th Cir. 2010) The police saw the defendant walking in a church parking lot, wearing a “hoodie” and clutching his right front pocket. The police approached him and frisked him. There was no basis for this detention or frisk and the discovery of the gun should have been suppressed.

***United States v. See***, 574 F.3d 309 (6th Cir. 2009) The police pulled into a parking lot and saw the defendant’s vehicle backed into a parking space. The police parked their car directly in front of the defendant’s car so it could not leave. This was a seizure and absent any articulable suspicion to support this seizure, the evidence derived as a result of the seizure should have been

suppressed. The facts that this was a “high crime area” and it was late at night, and it was a dim part of the parking lot were not sufficient to support the detention.

***United States v. Keith***, 559 F.3d 499 (6th Cir. 2009) The police were watching a known drug transaction area. The defendant was seen in a car and a suspicious other person came up to the car and talked to him briefly. The car then drove around the side of the building and the other suspicious person was also seen walking behind the building. The police then stopped the defendant in his car. The court held that this information was not sufficient to support a Terry stop of the vehicle.

***United States v. Hughes,*** 517 F.3d 1013 (8th Cir. 2008) The police received a tip that there were two suspicious people trespassing at a specific location. The police went to the scene, but the two men were across the street, waiting at a bus stop. The police approached them and frisked them, finding ammunition. Because the two men were doing nothing improper when the police arrived (and at most were previously trespassing), stopping them and frisking them was not permissible.

***United States v. Tyler***, 512 F.3d 405 (7th Cir. 2008) The police observed the defendant walking on the sidewalk with an open bottle of beer. Believing that this amounted to a violation of state or municipal law, the officers stopped him, asked for his identification, and eventually dislodged a crown royal bag from under his belt and discovered drugs. Carrying a bottle of beer is not a crime. Therefore, stopping the defendant was unlawful and everything that flowed from this encounter should have been suppressed. In addition, the encounter did involve a seizure, because the police told him he was violating the law, they took his identification and ran a warrant check while holding his identification papers.

***United States v. Reaves***, 512 F.3d 123 (4th Cir. 2008) An anonymous caller’s accurate contemporaneous description of a suspect’s activities is not alone sufficient to establish the reliability of the tipster. Unlike the tipster in Alabama v. White, 496 U.S. 325 (1990), who predicted future behavior, the tipster in this case simply recited what she was currently observing (i.e., the location of the suspect that she claimed was involved in a firearm and drug transaction).

***United States v. Grigg***, 498 F.3d 1070 (9th Cir. 2007) The police may not stop a car based on information that the driver has committed a misdemeanor in the past that poses no continuing threat to public safety. While the police may stop a car where the driver is believed to have committed a DUI offense, or a breach of the peace that may be ongoing, in this case, the defendant allegedly committed a “noise violation” in the past. This did not support a vehicle stop. In deciding whether a past misdemeanor supports a stop, the police must assess the threat posed by the defendant to the safety of the community.

***United States v. Espinoza,*** 490 F.3d 41 (1st Cir. 2007) An ICE agent saw a large van with tinted windows driving near Boston on the Interstate and became suspicious that the van was smuggling illegal aliens. The agent determined that the car was registered to a man whose name he recognized from another investigation. The van had Texas plates. The car stopped near a restaurant and left its engine running. The officer approached the car, asked the driver for identification and ordered the drive to turn off the engine. The First Circuit held that the information known to the agent did not support an investigatory detention. The Court also held that directing the driver to turn off the engine, in this case, amounted to a detention. The First Circuit affirmed the order suppressing all evidence obtained by the detention.

***United States v. Martinez***, 486 F.3d 855 (5th Cir. 2007) The police received a tip that the defendant was a witness to a multiple homicide and might be in possession of the weapons. The defendant and his girlfriend were watched leaving their apartment and were stopped in their vehicle. The girlfriend was asked for consent to search the apartment and guns were found in the apartment, though they had nothing to do with a homicide. The Fifth Circuit concluded that there was insufficient information to support the stop of the defendant’s vehicle and all evidence derived from that stop should have been suppressed. See also United States v. Roch, 5 F.3d 894 (5th Cir. 1993). The court also held that the girlfriend’s consent was the product of the illegal stop and therefore the discovery of the guns was the fruit of the illegal detention.

**United States v. Wright**, 485 F.3d 45 (1ST Cir. 2007) Four unmarked police cars pulled into an area of Boston that was known for its high crime rate. The defendant saw the cars and started running, clutching his pocket. The First Circuit concluded that there was not reasonable suspicion supporting the Terry stop. One flaw in the lower court’s reasoning was that the district court concluded that the defendant was, indeed, fleeing, based on the fact that he had a gun. But the question is what the police observed – their knowledge of a basis to stop the defendant – not what was in the defendant’s mind. The same flaw infected the observation of the “clutching”: the district court concluded that he was apparently clutching a gun, but that was only apparent once it was known that there was, in fact, a gun in his pocket. The officers’ observation did not establish with the same clarity, the existence of a gun.

***United States v. Cohen***, 481 F.3d 896 (6th Cir. 2007) A person called 911 but hung up prior to conveying any message. The police went to the address and saw the defendant’s car near the house. The police stopped his car and after a certain amount of investigation, determined that there was a warrant for his arrest in another state. A search of his car revealed a gun. The Sixth Circuit held that there was not a sufficient basis to stop the defendant.

***United States v. Manzo-Jurado***, 457 F.3d 928 (9th Cir. 2006) Border patrol agents observed several Hispanic males at a football game in Montana near the Canadian border. They decided to investigate their immigrant status and approached them when they were in their car in the parking lot. One agent drew a firearm and another agent reached in the truck and turned off the engine. The facts known to the agents – the suspects were near the border, they spoke Spanish, they appeared to be a work crew – were not sufficient to create an articulable suspicion that they were illegal. Moreover, the defendant’s conduct when he initially observed the agents was not suspicious i.e., he did not avoid contact when he was walking in the parking lot. The court

wrote, “If we were to accept such conduct as suspicious, it would be ‘difficult to imagine what [he] could have done that might not have appeared suspicious to a Border Patrol agent.’”

***United States v. Brown***, 448 F.3d 239 (3rd Cir. 2006) The police received a report that a woman had just been robbed by two African American men, both in their late teens, one about 5’8” and the other about 6’. Shortly thereafter, the police stopped the defendant and his companion coming out of a coffee shop. The two men were 27 and 31 and both had full beards. The two men were ordered to stand against the patrol car and were patted down. The defendant tried to break away at that point. The Third Circuit concludes that prior to the defendant’s attempt to break away, he had already been “seized” for Fourth Amendment purposes and the police did not have an articulable suspicion supporting the stop and the frisk (and the discovery of a gun) was therefore illegal.

***United States v. Mosley***, 454 F.3d 249 (3rd Cir. 2006) If the police stop a car without an articulable suspicion, the discovery of contraband in the car must be suppressed, even in a prosecution of a passenger. Though Rakas v. Illinois indicates that the passenger has no expectation of privacy in the car, the passenger’s motion to suppress is predicated on his unlawful detention and the fruit of that unlawful detention, rather than on the expectation of privacy in the automobile.

***United States v. Monteiro***, 447 F.3d 39 (1st Cir. 2006) The police received information from a gang member who stated that “his relative” had told him that a car with a certain license plate was involved in a shooting. The police ran the tag and identified the owner. About a week later, the police saw the car and stopped it. Inside the car was the defendant, a passenger in the car. A gun was found in the car. The First Circuit, affirming the decision of the district court, held that the police did not have sufficient information to support the detention of the car in which the defendant was a passenger. The information from the gang member’s relative was essentially an anonymous tip that was entitled to little consideration in light of the absence of corroboration.

***United States v. Lopez***, 443 F.3d 1280 (10th Cir. 2006) The police approached the defendant and his colleague who were standing next to their car. There was no articulable suspicion that prompted the police to approach the two individuals. Approaching them, of course, was nothing more than a consensual encounter. However, the officer then requested that the two individuals give him any identification documents that they had i.e., ID card, or driver’s license. The officer took the ID’s back to his car and determined that one of the two had an outstanding warrant. The Tenth Circuit held that the evidence discovered during an ensuing search should have been suppressed. There was no basis for detaining the two individuals and taking the ID’s amounted to a detention.

***United States v. Laughrin***, 438 F.3d 1245 (10th Cir. 2006) Knowledge of a person’s prior criminal involvement is alone insufficient to give rise to the requisite reasonable suspicion supporting a traffic stop. In this case, the officer testified that he had stopped the defendant repeatedly in the past for driving without a license, or on a suspended license. On that basis, when the officer saw the defendant driving, he pulled him over. This was an unlawful stop. The officer’s encounter with the defendant was more than twenty-two weeks previously and this was too long a time to presume that the defendant’s license was still suspended. The information known to the officer, therefore, was too stale to support a stop of the defendant’s vehicle.

***United States v. Johnson***, 427 F.3d 1053 (7th Cir. 2005) The police received an anonymous tip that the defendant was a cocaine dealer and that he lived at a particular location. The police went to the defendant’s house and when the defendant’s girlfriend came out, she was asked by the police to knock on the door. She did so and the defendant came to the door. The police talked to him briefly, after which he turned around and started walking away, back down the hall. The police pulled out a gun, pointed it at the ground, and cautioned that “this was a matter of officer safety.” The defendant stopped in his tracks and returned to the door. He then consented to a search. The Seventh Circuit held, (1) this did amount to a detention; (2) there was no articulable suspicion supporting the detention; (3) the consent to search was a fruit of the unlawful detention.

***United States v. Jaquez***, 421 F.3d 338 (5th Cir. 2005) The police received a report of gun shots at a location and that a red car was involved. Fifteen minutes later, an officer pulled over the defendant who was driving a red car in the general vicinity of the reported gun shots. The Fifth Circuit held that there was insufficient information to support the stop of the defendant’s car and the subsequent consent search was invalid.

***United States v. Hudson***, 405 F.3d 425 (6th Cir. 2005) The police had an arrest warrant for the defendant, but in the past year, had not been able to find him. An anonymous tip alerted the police that the defendant’s girlfriend worked at a particular location and that the defendant would be a passenger in her car when she arrived at work at 3:00 p.m. There was some question whether the tipster really did state that the defendant would be in the car at that particular time. The police confirmed that the girl did work at that location and were aware that the defendant was the girl’s boyfriend. The Sixth Circuit determined that there was insufficient information known to the police to seize the occupants of the car prior to determining that the defendant was an occupant. The decision comprehensively reviews Terry jurisprudence in this type of situation, i.e., anonymous tips of a fugitive’s location. Of course, the absence of an articulable suspicion did not result in dooming the prosecution. Instead, the only consequence was the suppression of evidence discovered as a result of the detention – cocaine found in the defendant’s pocket when he was frisked.

***United States v. Brown***, 401 F.3d 588 (4th Cir. 2005) There was insufficient information known to the police to support a Terry stop of the defendant. The police received a tip that a man was outside an apartment with a gun. The police went to the scene and encountered the defendant who appeared to be under the influence of alcohol. The smell of alcohol, according to state law, is not sufficient evidence to arrest a person for public intoxication. When a disturbance erupted nearby, the police directed the defendant to put his hands on the police car, at which point they observed a gun in his back pocket. The police had no basis to direct the defendant to “assume the position.” See Florida v. J.L., 529 U.S. 266 (2000).

***United States v. Patterson***, 340 F.3d 368 (6th Cir. 2003) The police received a tip that there were drug transactions occurring at a particular street corner – known to the police as a drug hot-spot. The police went there and when they got out of their cars, several people started walking away. This set of circumstances did not provide an articulable suspicion sufficient to support the stop and frisking of the defendant.

***United States v. Uribe-Velasco***, 930 F.2d 1029 (2d Cir. 1991) The police had a suspect under surveillance. He was frequently seen at an apartment building which was also occupied by the defendant. When the police decided to arrest the suspect, they went to the apartment building. When the defendant exited, they approached him and drew their weapons. They asked for, and were given consent, to search his apartment. This was not a proper Terry stop – there was no articulable suspicion justifying the stop of the defendant and his consent was therefore tainted. A remand was necessary, however, to make findings about the exact nature of the encounter between the defendant and the police.

***United States v. Roberson***, 90 F.3d 75 (3rd Cir. 1996) An anonymous caller alerted the police to the fact that a heavy-set black male wearing certain clothing was selling drugs at a certain location. The police went to that location and saw the defendant, who met that description and was observed (at a drug "hot spot") walking over to a parked car and speaking with the occupants. This was not sufficient information to justify a Terry detention of the defendant.

***United States v. Sprinkle,*** 106 F.3d 613 (4th Cir. 1997) The police were in a high crime area and saw a man known to be involved in narcotics sitting in a car. The defendant was then seen getting into the car and the two men appeared to be huddling over something over the console of the car. The police made a Terry stop and were about to frisk the defendant when he ran. Ultimately, the defendant shot at the police officer. The Terry stop was not based on an articulable suspicion of criminal conduct, but the defendant's response – shooting at the police officer – was not "evidence" that would be suppressed.

***United States v. Wilson***, 953 F.2d 116 (4th Cir. 1991) The defendant was encountered by task force agents at the airport. They asked if they could search him. He allowed them to search his carry-on bag and his person, but when they asked to search his coat which he had over his arm, he refused. They persisted. He refused. He walked away and the officers walked with him. At this point, the defendant was "detained" in so far as he would have been aware that he was not "free to leave" in the sense of being free to "break off the encounter." The information known to the police did not give them an "articulable suspicion." Apart from "looking suspicious," coming from a source city, providing only a check cashing card for identification, and misrepresenting his itinerary, the only information known to the police was that there was a visible bulge in the coat pocket. A bulge in a coat pocket – not hidden from view – is not suspicious at all. The only suspicious factor was the lie about where the defendant was coming from. However, it is not clear why this would provide suspicion that the defendant was a courier. That is, why would someone coming from New York carrying drugs lie and state that he was actually coming from Boston? This does not support the inference that he was carrying drugs. The motion to suppress should have been granted.

***United States v. Caicedo***, 85 F.3d 1184 (6th Cir. 1996) The defendant arrived at the bus station in Cincinnati and a narcotics officer testified that he looked nervous. The officer followed the defendant until he got into the car of another person. The officer approached the car and asked the two if he could talk to them. The defendant the passenger, got out of the car and – though the evidence was unclear, the appellate court concluded – the officer then frisked him and then asked for consent to search his backpack. The appellate court held that the evidence should have been suppressed. If the frisk occurred before the request for consent, then the defendant was at that time "seized" and there was no basis for this seizure. The ensuing consent, therefore, was invalid and the search of the backpack violated his Fourth Amendment rights.

***United States v. Mesa***, 62 F.3d 159 (6th Cir. 1995) The defendant and a passenger in her car were stopped for speeding. The defendant was placed in the back of the patrol car which would not open from the inside. The officer issued the citation, but rather than letting the defendant out, he then questioned the two about their destination. He believed that they acted nervously and gave slightly inconsistent reasons for traveling. He requested consent to search the car and though a drug dog did not alert the search continued. Eventually, the police discovered cocaine in the back. This was an unlawful search. Once the traffic citation was issued, the police should have immediately released the defendant. This was an unlawful detention after the citation was issued. The Sixth Circuit has suggested, in a later opinion, that the Mesa decision is no longer good law, following the decision in Ohio v. Robinette, 519 U.S. 33 (1996). See United States v. Burton, 334 F.3d 514 (6th Cir. 2003).

***United States v. Clardy***, 819 F.2d 670 (6th Cir. 1987) The defendant was arrested at the Atlanta Airport as he was about to enter a taxicab. He met one characteristic of the drug courier profile, having arrived from a source city. He was accompanied by an individual who met a number of additional characteristics of the profile. The Court holds that this investigatory stop was not lawful.

***United States v. Green***, 111 F.3d 515 (7th Cir. 1997) The police were looking for a fugitive. They saw a car parked in front of the fugitive's house and decided to stop the vehicle and see if the fugitive was in the car and whether the occupants knew where the fugitive was. Stopping the vehicle was not supported by an articulable suspicion that the occupants were engaged in any criminal conduct. However, after the car was stopped, the police learned that the passenger was also wanted. He was arrested and drugs were found during a search of him. Prosecuting the passenger was not barred.

***United States v. Packer,*** 15 F.3d 654 (7th Cir. 1994) The police received information that there was a suspicious car parked at a particular location. The police went to the scene and found that the car had been parked there for about one hour and the windows were fogged up. This did not amount to an articulable suspicion justifying a Terry stop and the police were not authorized to direct the occupants to exit the car.

***United States v. Chaidez***, 919 F.2d 1193 (7th Cir. 1990) The Seventh Circuit adopts a sliding scale approach to analyzing seizures which do not amount to an arrest. The defendant in this case was stopped, the police drew their weapons, Miranda warnings were given, and a request to consent to a search of the house was made. The Court holds that "the necessary degree of confidence increases with the degree of intrusion." If the intrusion lies somewhere between Terry and arrest, that is, neither a "brief investigatory" stop nor a traditional arrest, more must be shown than simply reasonable suspicion. In this case, the police did have sufficient information to justify their conduct.

***United States v. Green***, 52 F.3d 194 (8th Cir. 1995) The police approached the defendant as she arrived at an airport because she was single, traveling alone, carrying a duffel bag, but no purse, and was taking "counter-surveillance" measures. She agreed to talk with the police but appeared nervous. She had difficulty producing identification or her plane ticket. The police then asked for permission to search the duffel bag which she declined to give. The police would not let her leave, stating that a drug dog was being summoned. At this point, the defendant was in custody. Moreover, there was not sufficient information known to the police at that point to justify the stop.

***United States v. Sherrill***, 27 F.3d 344 (8th Cir. 1994) The police had a search warrant for the defendant's residence. The police observed the defendant leave the house, then stopped him, handcuffed him, and asked him to "help them execute the search." This detention was not justified by Michigan v. Summers, 452 U.S. 692 (1981), because the stop occurred at a location remote from the location of the search. However, suppression of evidence was not necessary, because there was probable cause to arrest the defendant.

***United States v. O'Neil***, 17 F.3d 239 (8th Cir. 1994) The defendant and his brother arrived at a bus station in Minnesota from a source city, Chicago. The defendant and his brother walked immediately and briskly to the exit and were carrying athletic type bags. The brother had both of the bus tickets; the defendant, when confronted by drug agents, began sweating profusely. This information did not justify the officer's seizure of the athletic bag. Becoming nervous when confronted by the police is not an unusual reaction. Though there was insufficient information to seize the bag, the defendant immediately revealed that there was cocaine in the bag, therefore, there was probable cause to obtain a search warrant.

***United States v. Millan***, 912 F.2d 1014 (8th Cir. 1990) The police stopped a traveler based on the fact that he arrived from San Francisco, was among the first to leave the airplane, he had only carry-on luggage, dressed casually, wore a gold necklace, and had long hair. He had purchased his ticket with cash the day before but was travelling under his own name. The Eighth Circuit holds that this information was not sufficient to justify a seizure. Furthermore, the fact that agents noticed "bulges" in his jacket pockets did not justify the seizure.

***United States v. Jefferson,*** 906 F.2d 346 (8th Cir. 1990) Without any articulable suspicion, a trooper parked behind the defendant's rented car, retained the defendant's identification and rental agreement and then asked the driver to join him in the patrol car. Because there was no articulable suspicion justifying this detention, the subsequently discovered drugs should have been suppressed. The fact that the trooper kept the defendant's personal documents changed the encounter from a consensual one, to a detention during which the defendant reasonably would not have felt free to leave.

***United States v. Crawford***, 891 F.2d 680 (8th Cir. 1989) The defendant was seen leaving the apartment complex of a known drug dealer. The police officers were waiting outside for the arrival of a search warrant. When the police followed the defendant's vehicle, he made a number of turns to avoid being tailgated. This does not constitute sufficient grounds to stop the defendant.

***United States v. Garcia-Camacho***, 53 F.3d 244 (9th Cir. 1995) The border patrol agents stop of the defendants' car nearly 300 miles north of the Mexican border was not supported by an articulable suspicion. The agent testified that the suspicion was based on the fact that the passenger initially did not make eye contact with the agent as the driver passed the agent, who was on the side of the road, but the passenger later looked back with a surprised look. Also, the truck appeared to have a heavy load, as if it were carrying illegal aliens. The agent also noted that the defendants were Hispanic males, the driver was traveling faster than the flow of traffic (though he broke no traffic laws) and the truck did not immediately pull over when the agent started to pursue it. These factors, even cumulatively, did not amount to an articulable suspicion.

***United States v. Rodriguez***, 976 F.2d 592 (9th Cir. 1992) The defendant, a Hispanic, drove on the Interstate past where two agents were sitting in their marked cars. The defendant did not acknowledge the agents' presence and appeared nervous as he drove past. The officers testified that the car appeared to go over bumps "sluggishly" thus indicating that it was weighted down with something. The court rejected these bases for stopping the vehicle: "In short, the agents in this case saw a Hispanic man cautiously and attentively driving a 16-year-old Ford with a worn suspension, who glanced in his rear-view mirror while being followed by agents in a marked Border Patrol car. This profile could certainly fit hundreds of thousands of law-abiding daily users of the highways of Southern California." The court concluded, "We are not prepared to approve the wholesale seizure of miscellaneous persons, citizens or non-citizens, who are seen driving any place near the Mexican border – driving with caution and circumspection – in the absence of well-founded suspicion based on particular, individualized, and objectively observable factors which indicate that the person is engaged in criminal activity."

***United States v. Hernandez-Alvarado,*** 891 F.2d 1414 (9th Cir. 1989) The following factors did not create a reasonable suspicion justifying the detention of the defendants: The existence of a two-way antenna, the defendant's residence in a neighborhood known for narcotics activity, indications that the car had been purchased from a dealership associated with drug trafficking, and the large trunk on the car.

***United States v. Robert, L.,*** 874 F.2d 701 (9th Cir. 1989) An investigatory detention cannot be based solely on the defendant's youthfulness and the size of the trunk of the car he was driving.

***United States v. Davis***, 94 F.3d 1465 (10th Cir. 1996) The defendant was known by the police to be a gang member and previously involved in various illegal activities. He was observed in a neighborhood where there had been reports on previous nights of gun fire. There was also a "juice joint" nearby which was known to be a place where liquor was unlawfully sold. When the police observed the defendant, he was ordered to take his hands out of his pockets and stand against a car. This was an illegal detention, because there was no articulable suspicion supporting the detention. Evidence obtained as a result of this detention (the discovery of a gun which he threw into the car) should have been suppressed.

***United States v. Alarcon-Gonzalez***, 73 F.3d 289 (10th Cir. 1996) The law enforcement agents (INS) approached the defendant and his colleague, who were roofing a house and saw the colleague pull out what appeared to be a gun from his vehicle. The agents yelled at the colleague, "Freeze." Immediately thereafter, however, the agents realized that it was a roofing gun that they saw. Nevertheless, the agents-initiated questioning of the defendant. This was an unlawful detention. Once the reason for detaining the defendant was removed the observation of what appeared to be a gun, any questioning was improper.

***United States v. Jones***, 44 F.3d 860 (10th Cir. 1995) In this case, where the defendant was stopped on the highway and questioned, one of the reasons that the officer testified that he had an articulable suspicion that the car was carrying contraband was that the driver did not appear nervous, suggesting that she had prior experience with being stopped. The Tenth Circuit agreed that this was a factor which the officer could consider in assessing whether there was an articulable suspicion justifying further investigation.

***United States v. Jones***, 998 F.2d 883 (10th Cir. 1993) The police received a tip from an informant with whom they had had no prior experience. The tip was that two men with a gun were seen knocking on an apartment door. The police stopped the men driving a Mercedes as described by the informant and there were two children in the car. There was an inadequate basis for conducting this stop and the plain view discovery of cocaine in the car was the fruit of the unlawful stop. Moreover, the police did not have a reasonable suspicion, at the time of the stop, that the car they were stopping was the same car which was seen leaving the scene of the disturbance.

***United States v. Hall***, 978 F.2d 616 (10th Cir. 1992) Based on a tip, the police met the defendant when her train arrived at the station. She was asked for consent to search her luggage which she refused. She had purchased a one-way ticket from Flagstaff to Harrisburg, Pa. She appeared nervous when questioned. On this basis, the officers seized the luggage, but allowed the defendant to leave. This was unlawful. In order to seize the luggage, the police must have the same level of information – reasonable suspicion – as is required to seize the person. United States v. Place, 462 U.S. 696 (1983). The facts in this case did not amount to reasonable suspicion.

***United States v. Millan-Diaz***, 975 F.2d 720 (10th Cir. 1992) The border patrol agent claimed to have stopped defendant's vehicle because of his suspicion that the defendant was smuggling illegal aliens across the border. After approaching defendant's vehicle, however, he determined that the defendant was the only occupant of the car. Because the "suspicion" evaporated upon approaching the vehicle, the subsequent detention was not based on an articulable suspicion, and both the search of the car and the discovery of marijuana in the car were tainted by the illegal stop.

***United States v. Monsisvais,*** 907 F.2d 987 (10th Cir. 1990) Border patrol agents lacked a reasonable suspicion to justify the stop of a heavily loaded pickup truck bearing a camper shell and out-of-state license plates. The government failed to show that the stretch of highway upon which the pickup truck had been stopped was a frequently used route to by-pass border patrol agents.

***United States v. Tapia***, 912 F.2d 1367 (11th Cir. 1990) The defendant was stopped on Interstate 59 travelling towards Birmingham, Alabama. The officer claimed to have had a reasonable suspicion based on the fact that the vehicle had out of-state plates, the driver was Mexican, and appeared to be nervous or shaking during the initial confrontation with the trooper. The officer also stated that the vehicle appeared to have few pieces of luggage. This does not constitute "reasonable suspicion" and did not justify the detention of the driver and the subsequent consent form signed by the defendant was invalid.

***United States v. Bonds***, 829 F.2d 1072 (11th Cir. 1987) The Eleventh Circuit defines the conditions which must exist to authorize a Terry stop and a frisk. The two standards are not necessarily the same. In order to authorize a frisk, there must be specific facts supporting a reasonable belief by the frisking officer that he is in danger. This is different than the standard used to determine whether an investigatory stop is permitted. In this case, the Court upholds both the stop and the frisk of the defendants.

***SEARCH AND SEIZURE (Terry Stop – Prolonged Duration, or Improper Nature, of Seizure) SEE ALSO: SEARCH AND SEIZURE (HIGHWAY STOPS)*** Note: If the question focuses on whether the Terry stop rose to the level of an arrest, see Search and Seizure (Arrest – What Constitutes an Arrest)

***Illinois v. Caballes***, 125 S. Ct. 834 (2005) The defendant was stopped for a routine speeding violation. While the car was stopped and the trooper was preparing a warning ticket, another officer walked a drug dog around the car. The dog alerted; the car was searched based on probable cause; and drugs were found. The Supreme Court held that this was permissible. A dog alert is not a "search" and in this case, the time it took to walk the dog around the car did not prolong the stop. Thus, there was no Terry violation and no need for a warrant or an articulable suspicion to authorize the use of the dog.

***Hiibel v. Sixth Judicial Dist. Court of Nev***., 124 S. Ct. 2451 (2004) The Supreme Court held that the police may require a person to identify himself if he is the subject of a lawful Terry stop; and if he fails to do so, he may be charged and convicted of a "refusal to identify" state offense. In this case, the police suspected that the defendant had been involved in a fight and they approached him and asked him to identify himself. He refused. The Court emphasized that requiring the suspect to identify himself was reasonably related to the basis for the initial detention and thus was a permissible extension of the Terry stop.

***Maryland v. Wilson***, 519 U.S. 408 (1997) The police may direct a passenger to exit a vehicle where the car has been stopped for a legitimate reason.

***Ohio v. Robinette***, 519 U.S. 33 (1996) If a lawful traffic stop has been made and the basis for the traffic stop has been accomplished, the police may then request consent to search the vehicle without announcing to the driver that he is free to leave.

***Arizona v. Johnson,*** 555 U.S. 323 (2009) If the police stop a vehicle lawfully and there is a passenger in the vehicle, if the police have a reason to believe the passenger is armed and dangerous, he may be frisked. This is true, even if the passenger is not believed to have committed any crime.

***United States v. Bey***, 911 F.3d 139 (3rd Cir. 2018) The police stopped a vehicle and two occupants fled. The policed chased one of the fleeing suspects who was wearing a red jacket, had little facial hair and was a light-skinned black male. The police stopped Bey, the defendant in this case, believing that he was one of the fleeing suspects. Bey was wearing a red jacket, but otherwise did not resemble the suspect (he was considerably older, had a full beard and was dark-skinned. The Third Circuit held that it was reasonable to initially detain Bey, but once it was apparent, he was not the person they were looking for, there was no reasonable basis – and articulable suspicion – supporting the detention any longer and the resulting search which revealed a gun was improper and the evidence should have been suppressed.

***United States v. Dapolito***, 713 F.3d 141 (1st Cir. 2013) At approximately 2:00 a.m., the police saw the defendant standing in the alcove of a building in downtown Portland, Maine. When questioned, he gave rambling sometimes incoherent answers to questions. When the police called dispatch to determine whether there were any warrants, the response was negative. There was insufficient information to believe that he was engaged in any criminal activity or that he was wanted in any jurisdiction. The encounter, which lasted twenty minutes, and ultimately involved several officers, rose to the level of a detention when he was repeatedly asked to produce identification and to consent to a search, which he refused. The resulting frisk was the product of this illegal detention.

***United States v. Digiovanni***, 650 F.3d 498 (4th Cir. 2011) The defendant was pulled over based on a traffic violation. Yet, the police spent the first fifteen minutes of the stop talking about drugs and the defendant's itinerary and did nothing to pursue the typical traffic violation procedures. The Fourth Circuit held that even though the entire stop, prior to the discovery of drugs, lasted only fifteen minutes, a Terry stop must not only be limited in terms of duration, but also in scope. In short, the police must act reasonably, and this includes a component of acting diligently to pursue the legitimate basis of the stop. The detention in this case was not proper. The officer's claim that he had a reasonable suspicion based on various facts – there were two shirts hanging in the back of the car; there was a hygiene bag in the back seat; the car was clean; the defendant's hands were trembling while he was being questioned – were rejected as providing any basis for the prolonged stop.

***United States v. Zavala***, 541 F.3d 562 (5th Cir. 2008) The police may not flip open and examine a motorist's cell phone during a Terry stop. A Terry stop permits a brief frisk to ensure officer safety and not an investigation into the contents of a cell phone, including looking for the subscriber number. In a separate holding, the court held that a Terry stop that lasted 90 minutes was too long and was converted into a de facto arrest, for which there was no probable cause.

***United States v. Askew***, 529 F.3d 1119 (D.C. Cir. 2008) en banc the police brought a defendant back to the scene of a robbery and unzipped his jacket so the witness could view his clothing under the jacket. Over the course of a forty-five-page opinion which represents an encyclopedic review of Terry jurisprudence, the D.C. Circuit, en banc, held that this amounted to a search for Fourth Amendment purposes. The Court suggested that in some circumstances, unzipping a defendant's jacket may be permissible, but that there was insufficient information known to the police in this case to justify this procedure. The Court relied principally on Minnesota v. Dickerson, 508 U.S. 366 (1993), in holding that a protective "search" or frisk, is limited to what is necessary to achieve the goal of officer safety, not crime investigation.

***United States v. Urrieta***, 520 F.3d 569 (6th Cir. 2008) After pulling the defendant over for improper registration and weaving, the trooper determined that the defendant had a Mexican driver's license which the trooper incorrectly believed did not authorize the defendant to drive in Tennessee. The trooper wrote a ticket for the registration violation but prolonged the traffic stop based on his erroneous belief that the license was insufficient and because of his suspicion that the defendant was smuggling drugs). Eventually (twenty-four minutes after the stop commenced, the trooper asked for consent to search the car, which the defendant provided. The Sixth Circuit held that the stop lasted too long, based on the trooper's erroneous understanding of the law and the consent was tainted by the prolonged detention. The court also rejected the government's suggestion that the trooper had a reasonable basis for believing that the defendant was smuggling drugs. The "characteristics" upon which the government relied were not sufficient to amount to a reasonable articulable suspicion. Finally, the court held that even if there was reasonable suspicion to believe that the defendant was in the country without proper documents, the trooper lacked the authority to investigate this matter.

***United States v. Virden***, 488 F.3d 1317 (11th Cir. 2007) The police stopped the defendant's car after watching it leave the location where a search was about to occur. Because a drug dog was not available at that location, the police put the defendant

in a police car in handcuffs and brought the car to a location two miles away where the dog was located. The Eleventh Circuit held that this exceeded the bounds of a Terry stop and amounted to a seizure requiring probable cause. Because there was no probable cause, the search of the car was unlawful.

***United States v. Jenson,*** 462 F.3d 399 (5th Cir. 2006) The police pulled the defendant over for speeding and the officer's suspicion was aroused by varying stories told by the defendant and his passenger about what they were doing and where they worked. Some of the questioning occurred after the warning was issued. The police asked for permission to search the car, which was granted. Prior to starting the search, the police started to frisk the defendant, but he resisted, which prompted the officer to draw his weapon and order the defendant to raise his arms. The defendant was searched, and a small gun was found. The Fifth Circuit held that the detention lasted longer than was justified by the information known to the police and that the consent to search was invalid, thereby also invalidating the decision to frisk the defendant.

***United States v. Lopez***, 443 F.3d 1280 (10th Cir. 2006) The police approached the defendant and his colleague who were standing next to their car. There was no articulable suspicion that prompted the police to approach the two individuals. Approaching them, of course, was nothing more than a consensual encounter. However, the officer then requested that the two individuals give him any identification documents that they had i.e., ID card, or driver's license. The officer took the ID's back to his car and determined that one of the two had an outstanding warrant. The Tenth Circuit held that the evidence discovered during an ensuing search should have been suppressed. There was no basis for detaining the two individuals and taking the ID's amounted to a detention. While the police may request a person's identification without detaining him, once the officer takes the ID with him to another location i.e., back to his car, this amounts to a detention.

***United States v. Edgerton***, 438 F.3d 1043 (10th Cir. 2006) A trooper pulled the defendant's car over because the tag was not visible. Upon approaching the car, the trooper saw that the temporary tag was in the rear window. This complied with state law requirements. Nevertheless, the trooper asked for the driver's license and registration and after reviewing it, asked for consent to search the car, which was given. Drugs were then found in the trunk. The Tenth Circuit reversed: once the trooper determined, while walking up to the car that the tag was proper, he should have explained to the defendant the reason for the initial stop and then allowed her to continue on her way without requiring her to produce her license and registration. See also United States v. McSwain, 29 F.3d 558 (10th Cir. 1994).

***United States v. Davis***, 430 F.3d 345 (6th Cir. 2005) When a drug dog failed to alert to the defendant's car, which had been stopped on the highway, the police summoned a second drug dog. This unlawfully prolonged the duration of the stop (initially prompted by a speeding charge).

***United States v. Washington***, 387 F.3d 1060 (9th Cir. 2004) The police went to the defendant's residential hotel room and knocked, with the expectation of gaining the defendant's consent to search the premises. But the defendant stepped outside the door when the police knocked and closed the door behind him. The police, six of them, repeatedly asked for permission to go in the apartment and reminded the defendant that he could be arrested on an unrelated matter. Eventually, the officers made their way inside and ultimately convinced the defendant to consent to a search. The Ninth Circuit found these Fourth Amendment violations: First the officers exceeded a Terry stop in the hallway; then they violated the defendant's rights by not allowing the door to remain closed; then they violated his rights by entering the apartment without his consent; and finally, they violated his rights by moving his jacket to find a small amount of methamphetamine. His subsequent consent to search was tainted by all of these previous violations.

***United States v. Richardson***, 385 F.3d 625 (6th Cir. 2004) After issuing the driver a warning ticket, the police asked him to "stay where he was" and then approached one of the passengers the owner of the car for consent to search. This direction to the driver amounted to a detention – a detention that had no basis in an articulable suspicion – and amounted to an unlawful stop that tainted any subsequent search, even a consensual search. The detention of the driver amounted to a detention of all the car's occupants.

***United States v. Portillo-Aguirre***, 311 F.3d 647 (5th Cir. 2002) After the Border Patrol Agent completed his work of ascertaining bus passengers' immigration status, he would routinely ask about drugs. The court held that a Border Patrol Agent is free to engage in questions about drugs, as long as the questions do not extend the time it takes to conduct the legitimate immigration status check. Once the immigration inquiry is finished, however, any further questioning amounts to a detention without articulable suspicion. See also United States v. Dortch, 199 F.3d 193 (5th Cir. 1999). Note that Dortsch has been limited in its reach. United States v. Pack, 622 F.3d 383 (5th Cir. 2010).

***United States v. Acosta-Colon***, 157 F.3d 9 (1st Cir. 1998) Though the agents had an articulable suspicion justifying the detention of the defendants at the airport after a drug dog alerted to what the agents believed was the luggage of the suspects' companions, the thirty-minute detention, during which time the defendants were handcuffed and missed their flight went too far and amounted to an arrest which required probable cause.

***United States v. Babwah***, 972 F.2d 30 (2d Cir. 1992) The police had an articulable suspicion justifying the stop of defendant's vehicle. However, after the stop and a consent search, there was no basis for continuing the detention. Nevertheless, the police ordered the defendant to return to a house where a large amount of cash was found. This latter aspect of the "stop" amounted to an arrest which was not supported by probable cause.

***United States v. Cagle***, 849 F.2d 924 (5th Cir. 1988) Border patrol agents seized a passenger's suitcase and prevented it from being loaded on the passenger's airline flight. This constitutes a full-scale arrest and not just a detention because the passenger's itinerary was clearly frustrated. The officers failed to use the most diligent, least intrusive investigatory techniques.

***United States v. Mesa***, 62 F.3d 159 (6th Cir. 1995) The defendant and a passenger in her car were stopped for speeding. The defendant was placed in the back of the patrol car which would not open from the inside. The officer issued the citation, but rather than letting the defendant out, he then questioned the two about their destination. He believed that they acted nervously and gave slightly inconsistent reasons for traveling. He requested consent to search the car and though a drug dog did not alert the search continued. Eventually, the police discovered cocaine in the back. This was an unlawful search. Once the traffic citation was issued, the police should have immediately released the defendant. This was an unlawful detention after the citation was issued. The Sixth Circuit has suggested, in a later opinion, that the Mesa decision is no longer good law, following the decision in Ohio v. Robinette, 519 U.S. 33 (1996). See United States v. Burton, 334 F.3d 514 (6th Cir. 2003).

***United States v. Obasa,*** 15 F.3d 603 (6th Cir. 1994) Law enforcement agents approached a passenger who exited a flight from New York to Cincinnati. It was clear that the passenger was with another passenger, as well, who was the defendant in this case. After questioning the initial passenger, the police had an articulable suspicion that the pair was engaged in credit card fraud, but there was no probable cause to make an arrest, however. When the police looked for the defendant, he had disappeared. He was located in a taxi on the Interstate, leaving the airport. He was stopped, put in a patrol car and brought back to the airport. The Sixth Circuit concludes that the confrontation on the highway amounted to an arrest and, because not based on probable cause, was in violation of the defendant's Fourth Amendment rights. This is so, even though the defendant had fled the airport and, when initially approached by the police, denied that he had even been at the airport.

***United States v. Richardson***, 949 F.2d 851 (6th Cir. 1991) The police approached the defendant who was standing outside a storage unit which the police believed contained contraband. They asked for his consent to search the unit; the defendant refused. He was placed in the back of the patrol car and told to wait there while the officers questioned defendant's colleague. This amounted to an arrest of the defendant and his subsequent consent to search the storage unit was tainted by this unlawful arrest. In light of the statements of the officers and the circumstances, this was more than a mere Terry stop.

***United States v. Ricardo, D***., 912 F.2d 337 (9th Cir. 1990) The Ninth Circuit concludes that the detention of the juvenile during field questioning amounted to a de facto arrest. The juvenile was patted down, gripped by the arm, told he was not to run, and directed to the back of one of two patrol cars present at the scene. This conduct transformed the investigatory stop into an arrest.

***United States v. Thomas***, 863 F.2d 622 (9th Cir. 1988) A police officer pulled over the defendant on the basis that he apparently matched the description of a counterfeiting suspect. After the officer blocked the defendant's car, the defendant exited the car and approached the officer. It was immediately apparent that the defendant did not meet the description. Nevertheless, the officer frisked and continued to question the defendant. The continuing detention was unlawful once it was determined that the defendant did not meet the suspect's description. There was no basis for the police officer to fear for his safety.

***United States v. Robertson,*** 833 F.2d 777 (9th Cir. 1987) An officer's detention of a defendant at gunpoint was an arrest, not a Terry stop. The defendant was confronted by seven to ten police officers at the time of this "encounter." At no time did the officers check the defendant for weapons, indicating that they knew or suspected that she was not armed, and thus this was not a stop and frisk.

***United States v. Edwards***, 103 F.3d 90 (10th Cir. 1996) The police were about to execute a search warrant at a house when they observed the defendant, known to be a felon who was in drug rehabilitation, leave the house. His vehicle was pulled over and a brief search revealed nothing. The police then detained him for 45 minutes on the side of the road while the house was searched. Though the initial detention was lawful, the length of the detention exceeded what is permissible for a Terry stop. However, the court concluded that no evidence was obtained as a fruit of this unlawful stop so there was nothing to suppress.

***United States v. McSwain,*** 29 F.3d 558 (10th Cir. 1994) A trooper stopped the defendant's vehicle because it was unclear whether his temporary tag had expired. Upon approaching the vehicle, it was immediately apparent to the trooper that the tag had not expired. Nevertheless, the trooper questioned the defendant about his itinerary and requested to see his license and registration. The trooper then asked his dispatcher to run a computer check on the defendant, which revealed a record for drug and gun violations. The trooper returned to the defendant and asked for permission to search the vehicle, which the defendant gave. This was an invalid consent, based on a stop which exceeded the scope of a permissible Terry stop. By the time the trooper asked for the defendant's identification and registration, he had already dispelled all basis for the stop – the temporary tag's expiration date.

***United States v. Sandoval***, 29 F.3d 537 (10th Cir. 1994) The defendant was stopped for speeding. He produced his license and registration, which was checked and came back normal. After returning the paperwork to the defendant, the defendant asked if "that is it?" to which the officer responded, "No, wait a minute." The officer decided to ask the defendant some additional questions about his criminal background (he learned during the license check about an arrest for a narcotics violation several years earlier). This questioning amounted to an additional detention, which was not supported by an articulable suspicion. The fact that the defendant had an earlier arrest – and no conviction – for a drug offense, does not justify a Terry stop of any duration. Even though the defendant then gave consent to search the car, this consent occurred after the detention had become unlawful and it was, therefore, not a free and voluntary consent. The evidence should have been suppressed.

***United States v. Melendez-Garcia***, 28 F.3d 1046 (10th Cir. 1994) Though the information known to the police provided them with an articulable suspicion, it did not amount to probable cause. When the officers stopped the defendants in the car, however, the officers had weapons drawn, ordered the defendant to throw the keys out of the window and exit the car with hands visible. The defendants were then handcuffed, separated and placed in seatbelts in separate patrol cars. This exercise of force exceeded that which is permissible under Terry. The officers offered no explanation why this amount of force was needed: there was no evidence that the defendants were armed, dangerous, or otherwise deserving of this degree of intrusiveness. A remand was necessary to determine whether a consent to search represented an exploitation of this illegal arrest.

***United States v. Fernandez***, 18 F.3d 874 (10th Cir. 1994) The defendant was stopped on the interstate, because the trooper considered the tinted windows to be in violation of state law and for improper lane travel. The trooper examined the driver's license and issued a citation. However, rather than allowing the defendant to proceed, the trooper held the identification and questioned the driver and then asked for consent to search the car. The search yielded 121 kilograms of cocaine. The Tenth Circuit concluded that there were insufficient facts to support the detention of the defendant beyond the time necessary to examine the license and issue the citation i.e., nervousness and "unusual behavior". The subsequent consent to search the vehicle was tainted by the unlawful detention. Among other factors considered in determining whether the consent was free, and voluntary was the trooper's failure to advise the defendant that he had the right to refuse.

***United States v. King,*** 990 F.2d 1552 (10th Cir. 1993) The police approached defendant's car which was blowing its horn in a traffic jam and noticed a loaded gun on the front seat. Having a loaded gun is legal in New Mexico. The police drew their weapons and ordered the occupants of the vehicle to exit the car. One occupant discarded cocaine in the process and cash was found in the car. While the police might have been justified in attempting to separate the occupants from the gun, the conduct of the police in this case amounted to an arrest. Because there was no probable cause, the fruits of this arrest should have been suppressed. The actions of the police also did not qualify under the Cady v. Dombrowski community caretaking function.

**United States v. Millan-Diaz**, 975 F.2d 720 (10th Cir. 1992) The border patrol agent claimed to have stopped defendant's vehicle because of his suspicion that the defendant was smuggling illegal aliens across the border. After approaching defendant's vehicle, however, he determined that the defendant was the only occupant of the car. Because the "suspicion" evaporated upon approaching the vehicle, the subsequent detention was not based on an articulable suspicion, and both the search of the car and the discovery of marijuana in the car were tainted by the illegal stop.

***United States v. Codd***, 956 F.2d 1109 (11th Cir. 1992) Believing that the defendant had participated in her husband's escape from a federal prison camp, the police detained her at the Houston airport for 2-1/2 hours. This exceeded the scope of a lawful Terry stop and the search of her purse during this time was unlawful. The district court properly suppressed the evidence.

***SEARCH AND SEIZURE (Terry Stop -- What Constitutes a Seizure)***

***Brendlin v. California***, 127 S. Ct. 2400 (2007) When the police stop a vehicle that has a driver and passenger, the passenger is also "detained" for fourth amendment purposes. Therefore, if there was no basis for the stop, the passenger may contest the admissibility of any fruits of that stop for which he has standing, such as a statement he made, or evidence seized from his person or personal belongings.

***Florida v. Bostick***, 501 U.S. 429 (1991) The police may board buses and ask passengers if they would consent to a search of their bags. The question is not whether the passenger would feel free to leave; the question is whether the passenger would feel free to decline the invitation. Compare, INS v. Delgado, 466 U.S. 210 (1984). The court must make a case-by-case determination of whether there was, in fact, a seizure.

***United States v. Monsivais***, 848 F.3d 353 (5th Cir. 2017) The police encountered the defendant on the side of the Interstate, apparently walking away from a disabled truck. The defendant acted nervous, gave an inconsistent answer about his destination, and initially walked away from the police when they activated their blue lights. None of these factors justified frisking the defendant, which amounted to a seizure.

***United States v. Hernandez***, 847 F.3d 1257 (10th Cir. 2017) The police were patrolling in a high crime area and saw the defendant who they thought was suspicious. They pulled alongside him and started asking questions; he answered the questions while continuing to walk. At one point the police asked him to stop so they could continue to talk to him. During the ensuing conversation, the defendant provided his name and a false birthdate, and the police determined that he had an outstanding warrant. The Tenth Circuit held that requesting the defendant to stop so they could continue to ask him questions was a seizure that was not supported by an articulable suspicion. The appellate court affirmed the district court's decision that focused on the fact that this occurred at night, there were no other people present and the police never told the defendant that he was free to decline the request to stop. The court suppressed the evidence found during the search that followed his arrest. (Note the result might be different under Utah v. Strieff, based on the attenuation doctrine; but the court held that the government waived this argument by not raising it earlier).

***United States v. Castle***, 825 F.3d 625 (D.C. Cir. 2016) The police regularly patrolled a certain neighborhood in an unmarked pick-up truck and testified at a hearing that people in the neighborhood came to know the truck, and thus knew the occupants were police officer. The defendant was seen by the officers as they approached in their pickup, and he acted in a suspicious manner. The trial court held that because "people in the neighborhood" knew the pickup was occupied by the police, the police had an articulable suspicion that the defendant was engaged in criminal conduct based on his response to the presence of the pickup. The DC Circuit reversed. The notion that "people in the neighborhood" knew the vehicle was not sufficient to establish

that the defendant had this knowledge. The fact that the police recognized the defendant as someone who was involved in drug dealing in the past is also not sufficient to authorize a detention. This is nothing more than “rounding up the usual suspects” which is not a basis to detain a person, absent specific facts and circumstances known to the police at the time of the detention that the defendant is engaged in current criminal activity. In addition, the court held that approaching the defendant in an alleyway, touching him, and telling him to “hold on a sec” was sufficient to amount to a seizure.

***United States v. Smith,*** 794 F.3d 681 (7th Cir. 2015) Police officers, riding bicycles, blocked the defendant’s path in an alleyway and asked an accusatory question: this was a seizure, not a consensual encounter. The officer did not exchange any introductory comments, or ask the defendant his name, or engage in any other pleasantries prior to posing the accusatory question. One officer had his hand on his gun as they walked towards him.

***United States v. Lowe***, 791 F.3d 424 (3rd Cir. 2015) The police were sent to a location in a high crime area, based on a call that a man had a gun in his waistband. Earlier, there had been a report of shot fired near that location. Several police officers arrived in four marked police cars and immediately ordered the defendant to take his hands out of his pockets. He did not do so, and the officers, at least one of whom had his gun drawn, repeated the demand. The appellate court concluded that the defendant submitted to the show of authority by remaining in place, even though he did not immediately remove his hands from his pockets. The first request constituted a seizure under Terry, and because there was no lawful basis for this seizure – there was not an articulable suspicion that the defendant was engaged, or had engaged, in any criminal conduct – the subsequent frisk was illegal and the gun that was found as a result of the frisk should have been suppressed. The validity of the seizure must be measured at the time of the defendant’s submission to the officer’s commands.

***United States v. Brodie***, 742 F.3d 1058 (D.C. Cir. 2014) The police were waiting outside a house that they planned to search pursuant to a search warrant. While awaiting their colleagues, the defendant was observed leaving the house (the police were not targeting that individual; the target was already in custody). The police approached the defendant and directed him to place his hands on the car (which he did). Shortly thereafter, he fled, discarding drugs and guns while on the run. The D.C. Circuit held (1) the defendant was detained; (2) there was no basis for the detention because, pursuant to Bailey v. United States, 133 S. Ct. 1031 (2013), the police may not detain an individual in connection with the execution of a search warrant unless the detention is at the time when, and at the place where, the search is being executed; (3) the detention was not attenuated from the defendant’s flight; and (4) the evidence that the police obtained was the fruit of the unlawful detention.

***United States v. Hill***, 752 F.3d 1029 (5th Cir. 2014) The police were patrolling in a high crime area of the city when they observed the defendant’s vehicle backed into a parking space in an apartment complex. The defendant was in the driver’s seat and his girlfriend was in the passenger seat. When the police pulled up next to him the girlfriend exited the vehicle and “briskly” walked away. The police directed the defendant to roll down the window it did not work, so he opened the door. He was asked for his driver’s license which he did not have, and was then ordered out of the car and was frisked. A gun was found in his pocket. The Fifth Circuit held that the police detained the defendant at the point that he was ordered to exit the car. At that point, even though the defendant acknowledged that he did not have a driver’s license, there was no basis for detaining the defendant. The fact that these events occurred in a “high crime area” provides no support for detaining the defendant was observed committing no crime or doing anything suspicious. In fact, the police testified that the entire county was a high crime area not the apartment complex in particular.

***United States v. Freeman***, 735 F.3d 92 (2d Cir. 2013) Without a reasonable suspicion, the police approached the defendant and touched his arms. He walked away. The officer then grabbed the defendant around his waist and stopped him. This was a seizure and was not permissible. The fact that the defendant walked away from the officer when the officer first approached him did not provide a basis for seizing him.

***United States v. Jones,*** 678 F.3d 293 (4th Cir. 2012) The police followed the car the defendant was driving into a parking lot and blocked it in. The only basis for this stop was that the car had out-of-state plates, and this was a high-crime area. This was not a sufficient basis to stop the car and the officer’s conduct – blocking in the car – was a seizure. The subsequent discovery of a gun was the fruit of this improper seizure

***United States v. Camacho***, 661 F.3d 718 (1st Cir. 2011) The police went to the scene of a street brawl and saw two people walking on the sidewalk. Suspicious that they had been involved in the brawl, the police pulled their car in front of the defendant, stopping him and then frisked the defendant and felt a gun. The defendant pushed the officer’s hand away, after which the defendant was arrested. The First Circuit concluded that the initial encounter was a seizure; there was no lawful basis for the seizure (i.e., there was no articulable suspicion); the frisk was not proper; the discovery of the weapon was not the result of a valid search incident to arrest.

***United States v. Beauchamp***, 659 F.3d 560 (6th Cir. 2011) The defendant was walking on the sidewalk in a “high crime area” when the police approached. The defendant was ordered to approach the officer, which he did. The defendant appeared to be nervous. The officer then frisked the defendant to look for weapons. The officer then asked for consent to conduct a search of the defendant’s person and the defendant agreed. The officer found drugs inside the defendant’s boxers. The Sixth Circuit held that this was a seizure, it was not based on an articulable suspicion and the consent was tainted by the illegal detention.

***United States v. Villa-Gonzalez***, 623 F.3d 526 (8th Cir. 2010) The defendants were in custody when they were confronted and questioned on the porch outside their trailer. Several law enforcement officers questioned the brothers. They were accused of being drug dealers. Their identification papers were taken from them. This amounted to a seizure of Fourth Amendment purposes and for Miranda purposes.

***United States v. Johnson***, 620 F.3d 685 (6th Cir. 2010) The police received a call that there were suspicious people at an apartment complex. The police went to the scene and saw the defendant, carrying a bag, walking calmly from the yard of the complex to a car. The police ordered him to stop; he kept walking. The police ordered him to stop again; he kept walking until he arrived at the car, opened the passenger door, threw the bag in, and then stood still at the open door. The Sixth Circuit held that when he finally stopped, he had been seized. Because there was no articulable suspicion to justify the seizure, the resulting frisk and search was unconstitutional, and evidence should have been suppressed.

***United States v. Williams***, 615 F.3d 657 (6th Cir. 2010) The defendant was standing in a housing project with others when a police officer approached and said he was "again trespassing on [housing authority] property." During the following interaction, the defendant acknowledged in response to questions that there might be a warrant out for his arrest, and he also acknowledged carrying a gun. The Sixth Circuit held that the encounter was a seizure for Fourth Amendment purposes. There were two officers, they approached the defendant an immediately accused him of a crime, and there was no basis that would lead the defendant to believe that he could simply walk away from the officers. There was insufficient information known to the police to support the seizure; the defendant's statement was the fruit of that detention; the evidence would be suppressed, even though there was an outstanding arrest warrant.

***United States v. Fox***, 600 F.3d 1253 (10th Cir. 2010) The defendant's wife pulled up to her house and was approached by a police officer who was conducting surveillance of the house (in particular, the defendant). The officer entered the wife's car and directed her to drive across the street to a parking lot. She was questioned and then asked for consent to search her car. Ultimately, she consented to a search of the house. The Tenth Circuit held that the wife was detained; there was no basis for the detention and the consent to search was the product of this detention. The gun found in the house, therefore, should have been suppressed at the defendant's trial.

***Gentry v. Sevier***, 597 F.3d 838 (7th Cir. 2010) The defendant was walking with a wheelbarrow through a neighborhood late at night. The police were called. When the police arrived, they summoned the defendant over to their car and told him to "keep his hands up." This amounted to a seizure, which was not supported by an articulable suspicion. The officer then patted down the defendant, locating a garage opener. There was no basis for this frisk: there was no reason to believe the defendant was armed or dangerous and he was not subject to a legitimate arrest or detention. Moreover, there was no basis to keep the garage door opener and thereafter walk down the street seeing if it opened any garage in the neighborhood, because it was not a weapon, or apparent to be contraband. Finally, the search of the wheelbarrow was illegal. Though some items on the top of the pile in the wheelbarrow were subject to plain view, other items below the surface could only be seen when the officer probed beneath the surface. The defendant's trial counsel was ineffective in failing to move to suppress the fruits of the search.

***United States v. Gross,*** 662 F.3d 393 (6th Cir. 2011) The same officer that was the subject of the opinion in See, infra, was the officer that made the illegal stop in this case. The officer pulled into a parking lot and blocked the vehicle in which the defendant was a passenger. There was no basis for this stop and the evidence obtained as a result of this illegal detention should have been suppressed.

***United States v. See,*** 574 F.3d 309 (6th Cir. 2009) The police pulled into a parking lot and saw the defendant's vehicle backed into a parking space. The police parked their car directly in front of the defendant's car so it could not leave. This was a seizure and absent any articulable suspicion to support this seizure, the evidence derived as a result of the seizure should have been suppressed.

***United States v. Tyler***, 512 F.3d 405 (7th Cir. 2008) The police observed the defendant walking on the sidewalk with an open bottle of beer. Believing that this amounted to a violation of state or municipal law, the officers stopped him, asked for his identification, and eventually dislodged a crown royal bag from under his belt and discovered drugs. Carrying a bottle of beer is not a crime. Therefore, stopping the defendant was unlawful and everything that flowed from this encounter should have been suppressed. In addition, the encounter did involve a seizure, because the police told him he was violating the law, they took his identification and ran a warrant check while holding his identification papers.

***United States v. Espinoza***, 490 F.3d 41 (1st Cir. 2007) An ICE agent saw a large van with tinted windows driving near Boston on the Interstate and became suspicious that the van was smuggling illegal aliens. The agent determined that the car was registered to a man whose name he recognized from another investigation. The van had Texas plates. The car stopped near a restaurant and left its engine running. The officer approached the car, asked the driver for identification, and ordered the driver to turn off the engine. The First Circuit held that the information known to the agent did not support an investigatory detention. The Court also held that directing the driver to turn off the engine, in this case, amounted to a detention. The First Circuit affirmed the order suppressing all evidence obtained by the detention.

***United States v. Washington***, 490 F.3d 765 (9th Cir. 2007) The police approached the defendant in his parked car and asked if he would consent to a search of his person and car. The defendant was asked to get out of his car, "assume the position" and then was frisked and his car was searched. The Ninth Circuit held that at the point the defendant was asked for consent to search the car, the encounter had escalated to a "seizure" that required an articulable suspicion. Among the factors considered by the court were, (1) the manner in which the police directed the defendant to stand to be frisked (blocking his path to leave); (2) recent events in the community in which unarmed black citizens were shot by white police officers and a pamphlet sent out by the police instructing people to comply with officer's directions during traffic stops; (3) the lighting in the area; (4) the fact that there were two officers and the defendant was alone; (5) the failure of the police to advise the defendant that he was free to decline the invitation to consent to a search of his vehicle.

***United States v. Brown***, 448 F.3d 239 (3rd Cir. 2006) The police received a report that a woman had just been robbed by two African American men, both in their late teens, one about 5'8" and the other about 6'. Shortly thereafter, the police stopped the defendant and his companion coming out of a coffee shop. The two men were 27 and 31 and both had full beards. The two men were ordered to stand against the patrol car and were patted down. The defendant tried to break away at that point. The Third Circuit concludes that prior to the defendant's attempt to break away, he had already been "seized" for Fourth Amendment purposes and the police did not have an articulable suspicion supporting the stop and the frisk (and the discovery of a gun) was therefore illegal.

***United States v. Lopez,*** 443 F.3d 1280 (10th Cir. 2006) The police approached the defendant and his colleague who were standing next to their car. There was no articulable suspicion that prompted the police to approach the two individuals. Approaching them, of course, was nothing more than a consensual encounter. However, the officer then requested that the two individuals give him any identification documents that they had (i.e., ID card, or driver's license). The officer took the ID's back to his car and determined that one of the two had an outstanding warrant. The Tenth Circuit held that the evidence discovered during an ensuing search should have been suppressed. There was no basis for detaining the two individuals and taking the ID's amounted to a detention. While the police may request a person's identification without detaining him, once the officer takes the ID with him to another location (i.e., back to his car), this amounts to a detention.

***United States v. Johnson***, 427 F.3d 1053 (7th Cir. 2005) The police received an anonymous tip that the defendant was a cocaine dealer and that he lived at a particular location. The police went to the defendant's house and when the defendant's girlfriend came out, she was asked by the police to knock on the door. She did so and the defendant came to the door. The police talked to him briefly, after which he turned around and started walking away, back down the hall. The police pulled out a gun, pointed it at the ground, and cautioned that "this was a matter of officer safety." The defendant stopped in his tracks and returned to the door. He then consented to a search. The Seventh Circuit held, (1) this did amount to a detention; (2) there was no articulable suspicion supporting the detention; (3) the consent to search was a fruit of the unlawful detention.

***United States v. Chan-Jimenez***, 125 F.3d 1324 (9th Cir. 1997) An officer observed the defendant's pickup truck and was suspicious, though there was no motor vehicle offense observed, or anything particular about the pickup that the officer could identify as being suspicious. The pickup pulled over to the side of the road and the driver raised its hood. The officer pulled in behind and asked the driver for his license and registration. Then, without returning the papers and without having ever asked if the defendant was having trouble with the vehicle, the officer, hand on his weapon, asked if he could look in the vehicle. The driver consented. This was an unlawful detention. Withholding the papers in this situation prevented the defendant from freely refusing consent and the consent that was given, therefore, was ineffective.

***United States v. Richardson***, 385 F.3d 625 (6th Cir. 2004) After issuing the driver a warning ticket, the police asked him to "stay where he was" and then approached one of the passengers (the owner of the car) for consent to search. This direction to the driver amounted to a detention – a detention that had no basis in an articulable suspicion – and amounted to an unlawful stop that tainted any subsequent search, even a consensual search. The detention of the driver amounted to a detention of all the car's occupants.

***United States v. Montilla***, 928 F.2d 583 (2d Cir. 1991) The Second Circuit concludes that in reviewing a trial court's decision about whether a seizure occurred, the appellate court exercises de novo review. The issue poses a legal question, given a certain set of facts.

***United States v. Wilson***, 953 F.2d 116 (4th Cir. 1991) The defendant was encountered by task force agents at the airport. They asked if they could search him. He allowed them to search his carry-on bag and his person, but when they asked to search his coat which he had over his arm, he refused. They persisted. He refused. He walked away and the officers walked with him. At this point, the defendant was "detained" in so far as he would have been aware that he was not "free to leave" in the sense of being free to "break off the encounter." The information known to the police did not give them an "articulable suspicion." Apart from "looking suspicious," coming from a source city, providing only a check cashing card for identification, and misrepresenting his itinerary, the only information known to the police was that there was a visible bulge in the coat pocket. A bulge in a coat pocket – not hidden from view – is not suspicious at all. The only suspicious factor was the lie about where the defendant was coming from. However, it is not clear why this would provide suspicion that the defendant was a courier. That is, why would someone coming from New York carrying drugs lie and state that he was actually coming from Boston? This does not support the inference that he was carrying drugs. The motion to suppress should have been granted.

***United States v. Gonzales,*** 842 F.2d 748 (5th Cir. 1988) A federal agent informed an air traveler that he was "working narcotics" and requested permission to search his carry-on luggage. The Court holds that this constitutes a "seizure" requiring reasonable suspicion under Terry. The Fifth Circuit later held that the Gonzales decision set forth the incorrect burden of proof to establish consent but did not alter the holding regarding what constitutes a seizure. United States v. Hurtado***,*** 905 F.2d 74 (5th Cir. 1990).

***United States v. Caicedo***, 85 F.3d 1184 (6th Cir. 1996) The defendant arrived at the bus station in Cincinnati and a narcotics officer testified that he looked nervous. The officer followed the defendant until he got into the car of another person. The officer approached the car and asked the two if he could talk to them. The defendant (the passenger) got out of the car and – though the evidence was unclear, the appellate court concluded – the officer then frisked him and then asked for consent to search his backpack. The appellate court held that the evidence should have been suppressed. If the frisk occurred before the request for consent, then the defendant was at that time "seized" and there was no basis for this seizure. The ensuing consent, therefore, was invalid and the search of the backpack violated his Fourth Amendment rights.

***United States v. Jerez,*** 108 F.3d 684 (7th Cir. 1997) The police decided to investigate the occupants of a hotel room in Milwaukee on the basis that the car being driven by them had out-of-state plates (Florida plates) and the car was a two-door vehicle. They also learned that the driver had previously been arrested on narcotics charges. At about 11:00 p.m., the officers knocked on the door of the room for several minutes and hearing no reply, then went outside and started knocking on the window. After several minutes, the defendant opened the door and eventually consented to a search of the room. The Seventh Circuit concluded that the knocking on the door and window late at night amounted to a seizure that had no valid basis. The consent was tainted by this unlawful detention.

***United States v. Jefferson,*** 906 F.2d 346 (8th Cir. 1990) Without any articulable suspicion, a trooper parked behind the defendant's rented car, retained the defendant's identification and rental agreement, and then asked the driver to join him in the patrol car. Because there was no articulable suspicion justifying this detention, the subsequently discovered drugs should have been suppressed. The fact that the trooper kept the defendant's personal documents changed the encounter from a consensual one, to a detention during which the defendant reasonably would not have felt free to leave.

***United States v. Chan-Jimenez***, 125 F.3d 1324 (9th Cir. 1997) The police pulled behind the defendant's vehicle which was disabled on the side of the road. The officer obtained the defendant's license and registration and found everything in order. Without returning the identification documents back to the defendant, however (and while keeping his hand on his holstered weapon), the officer then asked for consent to search the vehicle. Retaining the documents amounted to a seizure, which was not supported by an articulable suspicion. A subsequent consent to search was not valid: the defendant was not told that he could refuse consent, he was not Mirandized, and he was being unlawfully detained.

***United States v. Alarcon-Gonzalez***, 73 F.3d 289 (10th Cir. 1996) The law enforcement agents (INS) approached the defendant and his colleague and yelled, "freeze." This "order" amounted to a seizure for Fourth Amendment purposes and the ensuing questioning was the product of this detention.

***United States v. Little,*** 60 F.3d 708 (10th Cir. 1995) A train passenger was seized for Terry purposes when an agent questioned her in her roomette and asked incriminating questions in a manner which indicated that she was not free to leave. The agent also failed to advise the defendant that she was free to decline answering the questions.

***United States v. Lambert***, 46 F.3d 1064 (10th Cir. 1995) The defendant purchased a plane ticket from Los Angeles to Wichita, Kansas with cash. When he arrived in Kansas, DEA agents approached him and asked if they could speak with him. He provided his driver's license which they retained during further questioning. The retention of his driver's license constituted a seizure, which, in this case, was not supported by any articulable suspicion.

***United States v. Hall***, 978 F.2d 616 (10th Cir. 1992) Based on a tip, the police met the defendant when her train arrived at the station. She was asked for consent to search her luggage which she refused. She had purchased a one-way ticket from Flagstaff to Harrisburg, Pa. She appeared nervous when questioned. On this basis, the officers seized the luggage, but allowed the defendant to leave. This was unlawful. In order to seize the luggage, the police must have the same level of information – reasonable suspicion – as is required to seize the person. United States v. Place, 462 U.S. 696 (1983). The facts in this case did not amount to reasonable suspicion.

***United States v. Wood***, 981 F.2d 536 (D.C. Cir. 1992) The police ordered the defendant to "halt right there . . . stop." The defendant complied and dropped his gun. This amounted to a seizure under the standard of California v. Hodari D., 499 U.S. 621 (1991), because there was a show of authority and an act of submission.

***United States v. Jordan***, 951 F.2d 1278 (D.C. Cir. 1991) The record did not support the district court's determination that, at the time the defendant was asked for consent to search his bags, he was not being detained. A remand was necessary, however, to augment the record. Of prime importance is the question were the police in possession of the defendant's identification when they asked for his consent. The test is not whether the defendant himself felt free to leave, but whether the officer's words and actions would have conveyed that to a reasonable person. See California v. Hodari D., 499 U.S. 621 (1991).

***SEARCH AND SEIZURE (Unreasonable Searches)***

***Birchfield v. North Dakota,*** --- S. Ct. --- (2016) The Fourth Amendment is violated if a defendant who refuses to take a blood test after having been arrested for DUI, is prosecuted for the refusal. But it is not a Fourth Amendment violation if the police demand that the defendant take a breath test. A blood test, unlike a breath test, is too intrusive to be subject to an implied consent provision. Compare Maryland v. King.

***United States v. Booker***, 728 F.3d 535 (6th Cir. 2013) The defendant was arrested on charges that he possessed marijuana. The police became suspicious that he was hiding drugs in his rectum and brought him to a hospital. There, a doctor administered drugs that paralyzed the defendant for a few minutes, during which time a rectal examination was conducted that yielded crack cocaine. The Sixth Circuit held that this search shocked the conscience, just as the search in Rochin v. California 342 U.S. 165 (1942) and Winston v. Lee, 470 U.S. 753 (1985) did, and held that the evidence should have been suppressed. The doctor was acting as an agent of the police he did not obtain consent to perform the medical procedure and did not give the defendant the option of simply using the toilet.

***SEARCH AND SEIZURE (Waiver of Motion to Suppress)***

***United States v. Salahuddin,*** 509 F.3d 858 (7th Cir. 2007) After a negotiated plea was aborted because of a misunderstanding by both parties about the possible sentencing consequences, the case was set down for trial in three months and defense

counsel promptly filed a Motion to Suppress. The trial court denied the motion, concluding that it was filed too late. The Seventh Circuit reversed, holding that in this situation, it was an abuse of discretion not to consider the motion. It would not cause delay and the cause of the tardy filing was not attributable to any laziness, or misconduct on the part of any of the lawyers.

***United States v. Gregg***, 463 F.3d 160 (2d Cir. 2006) If a defendant is charged in state and federal court with a criminal offense and enters a guilty plea in state court, this does not waive a fourth amendment challenge in federal court that focuses on the same arrest. The fact that the guilty plea in state court would operate as a waiver of any Fourth Amendment claim in state court does not deprive the defendant of the right to litigate the lawfulness of the stop and search in federal court.

***SEARCH AND SEIZURE (What Constitutes a Search) SEE ALSO: SEARCH AND SEIZURE (Seizures)***

***United States v. Jones***, 132 S. Ct. 945 (2012) The Supreme Court affirmed the decision of the D.C. Circuit in United States v. Maynard, though on somewhat different grounds. In the majority decision, the Court held that placing a GPS device on a car for the purpose of acquiring information constitutes a search for fourth amendment purposes. The Court held that placing the device on the car was a form of “trespass” and under traditional and historical Fourth Amendment jurisprudence, a trespass qualifies as a search if the trespass is conducted for the purpose of obtaining information. In a concurring opinion, which also garnered five votes, Justice Alito questioned the trespass theory, but held that the continuous monitoring of the defendant’s car for 28 days amounted to a search.

***Florida v. Jardines***, 133 S. Ct. 1409 (2013) The police, based on an unverified tip, brought a drug-sniffing dog up the sidewalk to the front door of the defendant’s house. The dog alerted and the police then obtained a search warrant. The Supreme Court held that bringing the dog up to the front door was a search because it amounted to a trespass onto the defendant’s property for the purpose of conducting a search. The Court held that the police entered the curtilage of the home, and, unlike open fields, this is an area of the home that must remain free from unwarranted intrusions by the police that are conducted for the purpose of searching for evidence.

***Illinois v. Caballes***, 125 S. Ct. 834 (2005) The defendant was stopped for a routine speeding violation. While the car was stopped and the trooper was preparing a warning ticket, another officer walked a drug dog around the car. The dog alerted; the car was searched based on probable cause; drugs were found. The Supreme Court held that this was permissible. A dog alert is not a “search” and in this case, the time it took to walk the dog around the car did not prolong the stop. Thus, there was no Terry violation and no need for a warrant or an articulable suspicion to authorize the use of the dog.

**United States v. Karo**, 468 U.S. 705 (1984) Officers conducted a search when they attached a device to a package taken inside a home that signaled when the package was opened.

***Kyllo v. United States***, 533 U.S. 27 (2001) The Supreme Court held that law enforcement’s use of a sophisticated heat detecting device that could gather information regarding the interior of a home that could not otherwise have been obtained without a physical intrusion into the constitutionally protected area did constitute a search. Justice Scalia reasoned that the occupant of the house has a reasonable expectation of privacy regarding the interior of his home. This expectation cannot be defied or diminished by law enforcement’s use of sophisticated technology. The Court was not persuaded by the government’s argument that the heat that was detected was actually outside the house; or by the argument that no “intimate” details about the interior of the house were learned through the thermal imaging device.

***Bond v. United States***, 529 U.S. 334 (2000) The defendant was a passenger on a bus and placed his duffel bag in an overhead rack. A law enforcement officer entered the bus and “physically manipulated” and squeezed the duffel bag. The Supreme Court held that feeling the bag in this manner constituted a search. The Court reasoned that just as a person has a right not to be frisked by police absent an articulable suspicion, a person has a right to expect that his belongings will not be frisked. The Court also acknowledged that other passengers could touch and feel the duffel bag and shove it aside when they placed their luggage in the same overhead rack, and to that extent, the police were not “touching” anything that was not otherwise subject to being touched by the public at large. The Court held, however, that a passenger has a reasonable expectation that other passengers — and hence the police — will not “feel the bag in an exploratory manner.” This is a reasonable expectation that was defined by the conduct of the police.

***United States v. Bain,*** 874 F.3d 1 (1st Cir. 2017) The defendant was detained when he exited a multi-family building. A search of his pockets yielded a key. The police used the key in the locks of the various front doors in the multi-family building to determine which unit the defendant lived in. Testing the key in different locks was a search and using the information that was obtained which unit the defendant lived in to later acquire a search warrant tainted the search warrant.

***United States v. Lundin***, 817 F.3d 1151 (9th Cir. 2016) Acting on the basis of a BOLO, but without an arrest warrant, the police went to the defendant’s home at 4:00 a.m. and started knocking on the door. They heard a crashing noise near the rear of the home and ran around back and stopped the defendant who was in the backyard. They then looked inside the house and found two handguns. The Ninth Circuit ordered that the evidence must be suppressed: (1) the government could not rely on the exigent circumstances exception, because the police were not allowed to be where they were located when the exigent circumstances arose i.e., they heard the crashing noise; (2) while the police may walk up to the front door of a house and engage in a “knock-and-talk,” that exception to the rule that bars police from entering the curtilage of the home does not apply at 4:00 a.m. when nobody would expect visitors to appear and knock on the door; (3) in addition, walking up to the front door to make a warrantless arrest is not a permissible purpose and Jardines provides that the police may not enter the curtilage of the home for investigative purposes; (4) the security sweep of the house was not justified, because the defendant was already handcuffed and

any further security measures in the house were not necessary; (5) the inevitable discovery doctrine did not apply, because the officers were not in the process of obtaining a search warrant when the illegal searches occurred.

United States v. Whitaker, --- F.3d --- (7th Cir. 2016) The Seventh Circuit extends Jardines to the hallway of an apartment building. The police brought a dog to the apartment complex and walked the dog down a hallway. When the dog alerted to a particular apartment, the police obtained a warrant for that room. The court held that the initial use of the dog was a “search” under Jardines that needed a warrant.

***United States v. Burston,*** 806 F.3d 1123 (8th Cir. 2015) The police brought a dog to the defendant’s house and while the police remained outside the curtilage, allowed the dog to walk up to the house and sniff at the windows. This violated the rule announced in Jardines.

***Klayman v. Obama***, 957 F.Supp.2d 1 (D.D.C. 2013) In a decision sure to be appealed, the District Court concludes that the NSA telephone data collection program probably violates the Fourth Amendment. The District Court held that the third-party rule announced in Smith v. Maryland, 442 U.S. 735 (1979), is obsolete in this new technological age where so much data about people is included in records maintained by service providers. The D.C. Circuit reversed in August 2015, on the grounds that the plaintiff failed to establish standing. 800 F.3d 559 (D.C. Cir. 2015).

***United States v. Davis***, 690 F.3d 226 (4th Cir. 2012) The police seized the defendant’s clothing from a hospital room, and this was justified by the plain view exception. This seizure occurred after the defendant was victimized in a separate incident. After his clothes were seized the police extracted DNA from the clothing and tested it. That DNA was entered into a database. Years later, a carjacking occurred that was the subject of this prosecution. The DNA recovered from that crime matched the defendant’s DNA. The Fourth Circuit held that the earlier DNA extraction was a search. The court also held that the seach was not “reasonable.” However, the court ultimately concluded that law enforcement acted in good faith and therefore their exclusionary rule would not apply.

***United States v. Sharp***, 689 F.3d 616 (6th Cir. 2012) During a canine walk-around, the dog jumped into the car and alerted. The Sixth Circuit held that this “entry” into the car did not amount to a search that invalidated the subsequent search that was based on the alert.

***United States v. Maynard,*** 615 F.3d 544 (D.C. Cir. 2010) The long-term use of a GPS device to track the movement of a suspect’s car constitutes a search that requires a search warrant. The GPS device in this case tracked the defendant’s car’s movement 24 hours per day for 28 days. This distinguishes the extent of the invasion of the expectation of privacy in United States v. Knotts. The court also relied on the Kyllo decision which held that a heat-seeking device was subject to the warrant requirement. Finally, the court cited such cases as Georgia v. Randolph, for the proposition that in deciding what is “reasonable” the court must consider the community standards and “societal understandings.” This is the decision that the Supreme Court, in United States v. Jones, discussed above, affirmed.

***United States v. Hardin***, 539 F.3d 404 (6th Cir. 2008) The police wanted to determine if a suspect was located in a particular apartment. They asked a maintenance man to go to the apartment and inform the occupants that he needed to enter to fix a plumbing problem. He did not obtain the occupants’ consent – he simply entered. He then left and told the police that the suspect was there. The Sixth Circuit held that this was not valid consent. First, there was, as a matter of fact, no consent given. Second, the use of a ruse, such as this, is not appropriate, because there was no need to use a ruse to avoid violence or danger. This is not a case in which the police already had probable cause to enter the house and used the ruse for safety purposes. Moreover, the apartment manager was acting as an agent of the police, so it triggered the exclusionary rule.

***United States v. Askew***, 529 F.3d 1119 (D.C. Cir. 2008) en banc the police brought a defendant back to the scene of a robbery and unzipped his jacket so the witness could view his clothing under the jacket. The D.C. Circuit, en banc, held that this amounted to a search for Fourth Amendment purposes. The Court suggested that in some circumstances, unzipping a defendant’s jacket may be permissible in this situation, but that there was insufficient information known to the police in this case to justify this procedure.

***United States v. Maple***, 348 F.3d 260 (D.C. Cir. 2003) The defendant was arrested in his car for speeding and driving with a suspended license. The officer decided not to impound the car and pulled it into a parking lot. He noticed a mobile phone on the floor and opened a console between the bucket seats for the purpose of hiding the phone in there. In the console, he discovered a gun. This amounted to a search and was unlawful. The fact that the officer was not looking for anything did not mean that it was not a “search.” The focus is on whether the actions of the government violate a subjective expectation of privacy that society recognizes as reasonable, not the state of mind of the officer.

***United States v. Conner***, 127 F.3d 663 (8th Cir. 1997) The police received a tip that two burglars were at a motel. Six officers went to the motel and went to the room in front of which the burglars' car was parked. The police knocked on the door and yelled, "Open up." When one of the defendants opened the door, the police observed (through the open door) various coins (they knew a coin collection had been stolen in the burglary). The officers pulled their weapons and arrested both defendants. They then obtained a search warrant on the basis of what they observed in the room. The trial court correctly granted a motion to suppress. Though the police did not enter the room in order to see the coins, when they ordered the occupants to open the door, and thereby gained the ability to see in the room, this amounted to a search. Demanding that the occupants open the door did not amount to a consent search and there were no exigent circumstances necessitating the immediate entry into the room. The search pursuant to the search warrant was not salvaged by Leon, because the information contained in the application the

observations that were gained through the illegal entry, negated the existence of good faith. Finally, the officers would not have inevitably discovered the evidence, because absent the illegal entry, no other investigatory effort was underway to obtain a search warrant for the motel room.

***United States v. Nicholson***, 144 F.3d 632 (10th Cir. 1998) A police officer "felt" the outside of the defendant's carry-on and checked luggage on a bus in such a way that he was able to determine that the bags contained some tightly wrapped bundles. While the touching of a bag's exterior is not a search, in this case, the officer acknowledged that he "manipulated" the bags; this constituted a search. After having his suspicions aroused, the officer asked the bus passengers to whom the bag belonged. Nobody answered. Because of the initial illegal search, this did not amount to an abandonment of the property. ***United States v. Doe***, 61 F.3d 107 (1st Cir. 1995) An airport security officer noticed a dense object in the defendant's carry-on luggage. He pulled it out of the bag (which was legal) and handed it to a DEA agent. The agent then punctured the bag to field test the contents. This was an illegal search which required a warrant. Exigent circumstances and probable cause justify the seizure of a bag such as this but does not justify opening the bag or removing the contents.

***United States v. Knoll***, 16 F.3d 1313 (2d Cir. 1994) A private citizen burglarized an attorney's office in order to find incriminating information to supply to the government. He removed boxes from the office and then brought some documents to the AUSA. The AUSA was not impressed, and the burglar went back to the boxes and retrieved more documents. This further search of the boxes amounted to a search. It is not relevant that the boxes had already been removed from the office without government involvement. If the boxes had not yet been opened, then the opening of the boxes by the burglar may have been with government approval which would invoke the Fourth Amendment.

***United States v. Pierre***, 932 F.2d 377 (5th Cir. 1991) An officer poked his head inside the window of the defendant's car. This was a search according to the panel opinion, and because of the absence of any articulable suspicion, the ensuing consent was unlawful. The en banc court reversed, 958 F.2d 1304 (5th Cir. 1992): Even though sticking his head in the window may have amounted to a search, it was "reasonable." The border patrol agent had the right to question the occupant of the rear of the car and to make eye contact with him, which required him to stick his head in the window.

***United States v. Cuevas-Sanchez***, 821 F.2d 248 (5th Cir. 1987) The police placed a video camera on top of a light pole allowing the police to record all activities in the defendant's backyard. Portions of the backyard were observable from the street; however, there was a ten-foot fence around the back yard. The Fifth Circuit holds that this is an unconstitutional search.

***United States v. Concepcion***, 942 F.2d 1170 (7th Cir. 1991) The police conducted a search by placing a key into a keyhole in an effort to determine if the defendant resided at that location. The key had been seized from the defendant. Though the act of placing the key into the keyhole was a search, no warrant was required.

***United States v. $277,000.00***, 941 F.2d 898 (9th Cir. 1991) In New York v. Class, 475 U.S. 106 (1986), the Supreme Court held that a police officer who had lawfully stopped a vehicle for a motor vehicle violation could move a piece of paper from the dashboard which was covering the VIN (in the process of moving the paper, the officer found a gun under the seat). The Court held that although this was a search, it was minimally intrusive and constitutionally permissible. Here, the defendant's car was parked in his backyard. The police noted that the vehicle had a Mexican license plate. The police could not see the VIN because the car had an opaque car cover. The police removed the car cover and discovered that there were no VIN numbers. The cars were then impounded, and a search of the vehicles unearthed the defendant currency. The Ninth Circuit holds that Class does not control. These vehicles were not on the highway, there were no motor vehicle infractions, and the removal of the opaque car covers was a search.

***United States v. Taketa***, 923 F.2d 665 (9th Cir. 1991) Federal agents entered the private office of a state law enforcement agent to determine whether he was engaged in illegal wiretapping. This was a reasonable search. However, after determining that the officer was engaged in misconduct, the agents then set up video surveillance equipment in the office. This was an illegal search. Once the investigation changed from a reasonable inquiry into work-related misconduct into a search for criminal evidence, a warrant was required.

***United States v. Winsor***, 846 F.2d 1569 (9th Cir. 1988) Police officers who knew that a bank robbery suspect had entered a small residential hotel violated the defendant's Fourth Amendment rights by knocking on the door of a specific room (a room they did not know he was in), requiring him to open the door and then submit to a search. The Ninth Circuit holds that the required opening of the hotel door represented a "search." The Court then held that such a search could only be predicated on probable cause and the police did not have probable cause to believe that the suspect was in that particular room.

***United States v. Cusumano***, 67 F.3d 1497 (10th Cir. 1995) The use of a thermal imager does amount to a search and, therefore, the government must obtain a search warrant prior to scanning a home with such a device. On re-hearing en banc, the court vacated this decision and did not reach the issue of whether an imager amounted to a search, concluding, instead, that there was sufficient probable cause to search the premises even without the thermal imager evidence. 83 F.3d 1247 (10th Cir. 1996).

## *SECURITIES FRAUD*

***Salman v. United States***, --- S. Ct. --- (2016) The Supreme Court affirms the basic rule of Dirks that holds that providing information to a family member or friend constitutes illegal insider trading, because the jury may infer that the tipper personally benefited from making a gift of confidential information to a trading relative.

***United States v. O'Hagan***, 521 U.S. 642 (1997) The "misappropriate theory" of securities fraud involves a corporate "outsider" who violates Rule 10b-5 by misappropriating confidential information for securities trading purposes, in breach of a fiduciary duty owed to the source of the information, rather than to the persons with whom he trades. In this case, the Court holds that this conduct amounts to a criminal violation of the securities laws.

***United States v. Litvak***, 808 F.3d 160 (2d Cir. 2015) Litvak was a securities broker who worked for Jefferies & Company and was involved in selling residential mortgage-backed securities ("RMBS"). He was charged with fraud in connection with his sales of RMBS's. There were three categories of misrepresentations: (1) He lied about the cost at which Jefferies acquired certain RMBS in his effort to convince a purchaser to pay more for the same RMBS's; (2) He lied when he said that he was negotiating for the purchase of certain RMBS's at a certain price in his efforts to re-sell the RMBS's, when, in fact, Jefferies already owned the RMBS's at a lower price than the price he was about to pay to purchase the RMBS's; (3) In the process of purchasing RMBS's, he lied about the price at which he had negotiated to re-sell the RMBS's (falsely saying that the price was less than it actually was) and thereby induced the seller to sell the RMBS's to him at a cheaper price to enable Jefferies to make a profit. On the basis of these representations, Litvak was convicted of securities fraud and also making a false statement to the U.S. Treasury which was overseeing certain RMBS sales in connection with TARP. The Second Circuit reversed the false statement count, based on the failure to prove that Litvak's false statements were material. Though the U.S. Treasury was aware and monitored these types of sales, the Treasury made no "decision" that was affected by the price of the sales. The Second Circuit held, however, that the materiality of the false statements to counterparties was a jury question that could not be decided as a matter of law for purposes of the securities fraud convictions under Rule 10b-5. Litvak argued that the "price" of the RBMS's to Jefferies was not what was important to the counterparties; what mattered was the value. The Second Circuit disagreed, holding that the jury was the proper factfinder on the question of materiality. However, the securities fraud convictions were reversed, because the district court improperly excluded expert testimony offered by Litvak on the topic of materiality. The expert was prepared to testify that a reasonable counterparty would not rely on representations made by Litvak and that they would normally make their own determination of value, rather than relying on Litvak's representation about Jefferies' price in purchasing (or the intended sales price of) the RMBS's. This was the proper subject of expert testimony. Finally, the Second Circuit held that the trial court erred in excluding evidence offered by Litvak that his supervisors permitted these types of sales practices by other brokers, which, according to Litvak, demonstrated his good faith and his lack of intent to defraud. The evidence was relevant to show that Litvak held an honest belief that he was not engaged in improper or illegal conduct.

***United States v. Newman,*** 773 F.3d 438 (2d Cir. 2014) The Second Circuit announced a new standard for insider trading cases, holding that in order to support an insider trading conviction under Section 10(b) of the 1934 Act (15 U.S.C. §78j(b)), the government must prove that the tipper knew that an insider disclosed confidential information and that he did so in exchange for a personal benefit. The decision in Newman did not survive the United States Supreme Court decision in Salman v. United States, --- S. Ct. --- (2016), as noted above.

***United States v. McKye***, 734 F.3d 1104 (10th Cir. 2013) Whether a particular transaction involves a "security" is a mixed question of fact and law that, pursuant to Gaudin, must be submitted to the jury to be decided under the reasonable doubt standard. In this case the judge instructed the jury that a "note" constitutes a security. This was reversible error. Not all notes are securities, so the instruction erroneously explained the law and removed from the jury's consideration whether the notes in this case were securities.

***United States v. Ferguson***, 676 F.3d 260 (2d Cir. 2011) The defendants were charged with securities fraud. In order to prove the materiality of the fraud, the government introduced evidence of charts that showed the fall in stock price on certain days when the fraud was revealed to the investing public. However, there were a number of other scandals and financial problems facing the company and no effort was made to prove what portion of the stock price decline was attributable to the defendants' conduct. Admitting the charts was reversible error. The court noted that the company involved, AIG, was known to the public and it was possible that the jury would infer that the economic downturn in the country was caused by the defendant's conduct.

***United States v. Behrens***, 644 F.3d 754 (8th Cir. 2011) The provision in the securities law (§ 78ff(a)) that provides that a sentence of imprisonment may not be imposed if the defendant can show that he did not know about the regulation he was found to have violated, applies to any securities fraud violation, not just technical securities violations. Thus, a defendant who entered a guilty plea to a violation of § 78j(b) may attempt to prove at sentencing that he was not aware of the regulation he violated.

***United States v. Goyal***, 629 F.3d 912 (9th Cir. 2010) The defendant was charged with securities fraud in connection with the method by which he accounted for certain sales. According to the government, the method violated GAAP. The proof at trial, however, failed to prove that materiality of the misrepresentations that were made on the financial statements. The court also reversed the counts of the indictment dealing with lying to auditors. The basis of the reversal on these counts, in part, was the failure to prove that the defendant had a culpable state of mind (i.e., willful and knowing deception).

***United States v. Kaiser***, 609 F.3d 556 (2d Cir. 2010) The Second Circuit discusses the various interpretations of the term "willfulness" in the context of several different securities fraud offenses, ultimately concluding that the term has different meanings for different violations.

***United States v. Schiff***, 602 F.3d 152 (3rd Cir. 2010) The Third Circuit holds that the government could not rely on an "omissions liability" theory of securities fraud in this case. The government's theory is that the corporate executive failed to disclose the "channel stuffing" practices that the company engaged in. The government's theory was foreclosed by the fact that

there was no allegation in the indictment of misstatements in the SEC filings, which is where the government now alleged the information should have been included.

***United States v. Finnerty***, 533 F.3d 143 (2d Cir. 2008) The evidence was insufficient to prove that the defendant's conduct violated the securities laws. The defendant may have violated certain stock exchange rules, but this does not equate to securities fraud.

***United States v. Cassese***, 428 F.3d 92 (2d Cir. 2005) The Second Circuit affirmed the decision of the district court granting a judgment of acquittal in this securities fraud case. The evidence failed to show that the defendant willfully violated the law.

***United States v. Langford***, 946 F.2d 798 (11th Cir. 1991) In connection with the fraudulent sale of stock, the defendant made numerous mailings. Each such mailing should not have been listed as separate counts of securities fraud. A separate count should only be set forth for each separate sale or purchase of securities.

## *SELECTIVE PROSECUTION SEE: GOVERNMENTAL MISCONDUCT (SELECTIVE PROSECUTION)*
## *SELF DEFENSE*

***United States v. Biggs***, 441 F.3d 1069 (9th Cir. 2006) When a defendant claims that he acted in self-defense, he is required to make out a prima facie case that he reasonably believed that the use of force was necessary to defend himself and that he used no more force than was reasonably necessary in the circumstances. The trial court in this case improperly instructed the jury that the defendant was also required to show that he had no alternative other than the use of force in self-defense.

## *S*EQUESTRATION

***Perry v. Leeke***, 488 U.S. 272 (1989) The Supreme Court reverses the decision of the Court of Appeals regarding the propriety of preventing counsel from speaking with the defendant during a brief recess which occurred while the defendant was on the stand. The Court held that a criminal defendant has no right under the Sixth Amendment's guarantee to effective assistance of counsel to consult with his attorney during such a brief recess when it is clear that the consultation would relate entirely to the defendant's ongoing testimony.

***United States v. Sandoval-Mendoza***, 472 F.3d 645 (9th Cir. 2006) After the defendant testified on direct, an overnight recess occurred. The trial court directed the attorney that he could speak with the defendant, but not about his testimony. The Ninth Circuit held that this violated the defendant's right to counsel. See Geders v. United States, 425 U.S. 80 (1976); Perry v. Leeke, 488 U.S. 272 (1989).

***United States v. Cobb***, 905 F.2d 784 (4th Cir. 1990) A trial court committed reversible error in preventing an attorney from speaking with his attorney during a weekend break. This decision concludes that Perry v. Leeke does not apply to the facts of this case.

***United States v. Farnham***, 791 F.2d 331 (4th Cir. 1986) The District Court permitted two case agents to remain at counsel table with the prosecutor. The Fourth Circuit holds that this is automatic grounds for reversal. No showing of prejudice is required. The rule is that one witness for the prosecution may be permitted to remain in the courtroom as an exception to the rule of sequestration.

***United States v. Pulley***, 922 F.2d 1283 (6th Cir. 1991) Rule 615 does not allow two agents to be exempted from the rule of sequestration. Harmless error.

***United States v. Hobbs,*** 31 F.3d 918 (9th Cir. 1994) Excluding a defense witness because of a violation of the rule of sequestration is a remedy which should be used sparingly. It is a remedy which should be reserved for those cases in which either the defendant or his counsel have contributed to the violation.

***Mudd v. United States***, 798 F.2d 1509 (D.C. Cir. 1986) A trial judge's order to a defense attorney not to speak with his client over a weekend recess concerning the client's testimony deprived the defendant of his Sixth Amendment right to the effective assistance of counsel. An order such as that requires automatic reversal without a showing of any prejudice.

***SEVERANCE (Counts -- Misjoinder)***

***United States v. Hawkins***, 776 F.3d 200 (4th Cir. 2015) The defendant was charged with carjacking and possession of a weapon by a convicted felon. The latter count was based on his possession of a weapon seventeen days after the carjacking and involved a different weapon. Joining these two offenses was error and prejudiced the defendant's defense of the carjacking charge. The offenses did not qualify as "of the same or similar character." Regarding prejudice, the evidence of the firearm possession offense would not have been admissible under Rule 404(b) in the carjacking case had they been charged separately. See also United States v. Holloway, 1 F.3d 307 (5th Cir. 1993).

***United States v. Mann***, 701 F.3d 274 (8th Cir. 2012) Though the failure to sever mis-joined counts was not prejudicial error, there were, nevertheless, misjoinder counts. The defendant was prosecuted for various offenses relating to his efforts to kill a doctor who had been involved in efforts to sanction him the defendant was also a doctor. Numerous counts were included in the indictment relating to that offense, including possession of various weapons, obstruction of justice and causing damage to property. However, also included were counts relating to his possession of other weapons that had no connection to the attempt to kill the victim and which were obtained long before the doctor's troubles with the Medical Board began. Those possession counts were not properly joined with the other counts of the indictment. No prejudice, however, was shown by the misjoinder.

***United States v. Litwok,*** 678 F.3d 208 (2d Cir. 2012) Joining mail fraud and tax evasion counts was prejudicial error in this case. The tax that was avoided was not from income derived from the mail fraud scheme, which is the typical legitimate reason to join such offenses.

***United States v. Shellef***, 507 F.3d 82 (2nd Cir. 2007) Tax charges should ordinarily not be joined with non-tax charges, unless the other offense generated the money for which no taxes were paid, or there is some other logical overlapping evidence that would justify joinder of these offenses. Joining tax charges with charges of fraud which conduct did not generate the unreported income and money laundering was prejudicial and necessitated reversing the conviction. At separate trials, evidence of one crime would not have been admissible in the trial for the other, under Rules 404(b) / 403. Moreover, two defendants were jointly tried, despite the fact that their offenses should not have been joined, therefore, there was improper joinder of defendants, as well.

***United States v. Jawara***, 474 F.3d 565 (9th Cir. 2007) A trial judge must look beyond the categorical nature of the offense in determining whether joinder pursuant to Rule 8(a) is proper. The specific elements of the offenses, as well as the places, times and victims of the crimes should also be considered. The court is limited, however, to the allegations in the indictment, not the proof at trial in evaluating whether joinder is proper. In this case, joinder was improper, but not prejudicial. The indictment joined charges of marriage fraud and immigration fraud, though the charges were not part of a common scheme. These charges were improperly joined. The case contains an extensive review of the law regarding joinder under Rule 8.

***United States v. Sampson***, 385 F.3d 183 (2d Cir. 2004) Defendant was charged with a drug offense committed in 1998 and another offense committed in 2000. He demonstrated that he would testify at a trial involving the 1998 offense, but not the 2000 offense. The Second Circuit concluded that the events surrounding the 2000 incident would not have been admissible in a trial involving just the 1998 transaction, because the defendant contended that he was not the person who was involved in the 1998 event – thus his “intent” was not in issue and the 2000 event could not be introduced to prove his intent. Because the evidence of the 2000 offense would not have been admissible under Rule 404(b) and the defendant demonstrated that he had a plausible basis for testifying at a trial involving just the 1998 offense, the failure to sever the counts was reversible error.

***Bean v. Calderon***, 163 F.3d 1073 (9th Cir. 1998) The Ninth Circuit held that the joinder of two murder charges in one indictment violated the defendant’s right to due process. The evidence on one count was substantial, while the evidence on the other count, involving an entirely separate event, was considerably weaker. Joining these two charges enabled the jury to infer the defendant’s guilt of the weaker charge based on the strength of the evidence on the other charge. The court noted that there is a high risk of undue prejudice whenever joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.

***United States v. Richardson***, 161 F.3d 728 (D.C. Cir. 1998) The improper joinder of DC local threat charges with a federal firearms charge was improper. The improper joinder tainted the firearms charge, as well.

***United States v. Jordan***, 112 F.3d 14 (1st Cir. 1997) The defendant was charged with tax evasion, mail fraud and money laundering. The tax charge arose from the same operative facts as the mail fraud and the money laundering offenses, but, nevertheless, the trial court should have granted the defendant’s motion to sever these charges. The defendant wanted to testify in defense of the tax charge, but desired to remain silent with regard to the other charges. The trial court, in this unusual situation should have granted the motion. The defense to the tax charges involved considerations different from the defense to the fraud charges. The defendant’s state of mind and understanding of tax law was a qualitatively different matter than his claim of innocence of the other charges. Thus, he met the standard of establishing that he had both important information to give concerning one count and strong need to refrain from testifying on the other.

***United States v. Holloway***, 1 F.3d 307 (5th Cir. 1993) The defendant was a suspect in a string of robberies. Months after the last robbery was committed, the defendant was arrested, and he was found in possession of a weapon. The weapon was not connected to any of the robberies. Nevertheless, the government charged the defendant with the robberies and the weapon charge (possession by a convicted felon) in one indictment. The failure to sever counts was prejudicial under Rule 14 and necessitated reversing the conviction. Joinder was inappropriate in the first place under Rule 8(a).

***United States v. Terry***, 911 F.2d 272 (9th Cir. 1990) The government improperly joined drug possession charges with a firearm charge where the two offenses were not part of the same transaction, or part of a common scheme. Furthermore, the charges were not proved by the same evidence. Pursuant to Fed.R.Crim.P. 8(a), this misjoinder was reversible error. In evaluating a Rule 8(a) claim of misjoinder the Court need do no more than examine the indictment. The indictment in this case failed to identify any commonality between the drug offenses and the firearm offenses.

***United States v. Nicely***, 922 F.2d 850 (D.C. Cir. 1991) Defendants were charged in two conspiracies, one to defraud SCT Corporation, the other to launder money provided by an undercover IRS agent. These conspiracies did not have a common end or a shared goal. Furthermore, one defendant was not involved at all in the SCT scheme or conspiracy. The mere fact that conspiracies have overlapping members does not automatically permit their joinder in one indictment. The improper joinder in this case was prejudicial.

***United States v. Vastola***, 670 F.Supp. 1244 (D.N.J. 1987) The defendant was charged with racketeering and weapons charges. There was s substantial possibility of prejudice flowing from the proof of prior felony convictions which would otherwise be admissible during the RICO prosecution. The court ordered that the trial be bifurcated, and at the first stage of the trial, the

racketeering charges would be presented followed by a verdict and then proof of the previous felony convictions in support of the firearms offenses.

***United States v. Gallo***, 668 F. Supp. 736 (E.D.N.Y. 1987) In these twenty-two counts, fourteen-defendant trial, Judge Weinstein ordered seven separate trials. The Court ordered severance of defendants and counts based on a logical grouping of offenses and conspirators.

***United States v. Jones***, 652 F. Supp. 1561 (S.D.N.Y. 1986) It was error to join in one trial charges relating to possession of cocaine with charges relating to conspiracy and substantive fraud counts. There was no relationship between the cocaine offenses and the offenses relating to the scheme to defraud.

***United States v. Permlmutter***, 637 F. Supp. 1134 (S.D.N.Y. 1986) The defendant, an attorney, was entitled to a severance of charges relating to making a false or misleading statement to the grand jury and false statements to the government from eight other transactions which were separated by as much as three years from the transactions in these false statement counts.

***United States v. Braig***, 702 F. Supp. 547 (E.D. Pa. 1989) The defendant was entitled to a severance of mail fraud and Hobbs Act counts. The counts were totally unrelated; the mail fraud involved an insurance claim for damage to his house which never occurred, and the Hobbs Act involved the judge's receipt of $500 from a union official in connection with the judge's professional duties. The offenses differed in time, victim, nature, and facts involved.

United States v. Edwards, 700 F. Supp. 837 (W.D. Pa. 1988) The defendant was charged with various drug-related charges and possession of a firearm after having been previously convicted of a felony. Because the prior felony would not be admissible during the drug trial, the gun and drug charges had to be severed.

***SEVERANCE (Severing Defendants)***

***Zafiro v. United States,*** 506 U.S. 534 (1993) Rule 14 does not require severance as a matter of law whenever the defendants' defenses are antagonistic. Rather, the trial court should assess the evidence and determine if there is a serious risk that a joint trial would compromise a specific trial right or prevent the jury from making a reliable judgment of guilt or innocence.

***United States v. Slatten***, 865 F.3d 767 (D.C. Cir. 2017) This is the Blackwater prosecution relating to the murders committed by military contractors while serving in Iraq. Reversal was required because the trial court refused to sever one defendant's case which was requested in order to introduce the statement of a co-defendant that was inadmissible in a joint trial. Severance is required under Rule 14 if it is necessary in order to assure that a defendant can introduce evidence that would be inadmissible at a joint trial, and which is essential to the defendant's right to a fair trial. The statement of the co-defendant exonerated the defendant. Even though the co-defendant would not have testified at defendant's severed trial, the statement of the co-defendant would have been admissible pursuant to Rule 807, the residual exception to the hearsay rule. The co-defendant's statements to the authorities investigating the shooting contained equivalent circumstantial guarantees of trustworthiness: the co-defendant was speaking pursuant to a grant of immunity; he was implicating himself; his statements were consistent over time. Because the statement of the co-defendant would have been admissible at a separate trial, the trial court erred in denying the severance motion.

***United States v. McRae***, 702 F.3d 806 (5th Cir. 2012) The defendant, a police officer in New Orleans, was tried with two other police officers in a civil rights violation case arising from the Katrina aftermath. The defendant shot a suspected looter. Later, the body was brought to a police station by a "good Samaritan" and two other police officers beat up the good Samaritan, took his car and brought the suspected looter's body to a secluded area and burned it. The officer who originally shot the looter was not involved in the conduct after the shooting. The Fifth Circuit held that a severance should have been granted to the shooter. The spillover effect from the highly prejudicial and inflammatory evidence that was introduced against the other two officers impaired the shooter's ability to get a fair trial.

***United States v. Mannie***, 509 F.3d 851 (7th Cir. 2007) The defendant was denied a fair trial because of the disruptive behavior of his codefendant during trial. The co-defendant constantly interrupted the proceedings and physically assaulted his attorney.

***United States v. Shellef***, 507 F.3d 82 (2nd Cir. 2007) Tax charges should ordinarily not be joined with non-tax charges, unless the other offense generated the money for which no taxes were paid, or there is some other logical overlapping evidence that would justify joinder of these offenses. Joining tax charges with charges of fraud which conduct did not generate the unreported income and money laundering was prejudicial and necessitated reversing the conviction. At separate trials, evidence of one crime would not have been admissible in the trial for the other, under Rules 404(b) / 403. Moreover, two defendants were jointly tried, despite the fact that their offenses should not have been joined, therefore, there was improper joinder of defendants, as well.

***United States v. Tarango***, 396 F.3d 666 (5th Cir. 2005) The defendant's co-defendant was a fugitive and was tried in absentia, but the defendant had to endure a joint trial with the fugitive. The vast majority of the evidence focused on the absent co-defendant. The defendant was prejudiced by this joinder and the trial court correctly granted a Rule 33 Motion for New Trial.

***United States v. Blankenship***, 382 F.3d 1110 (11th Cir. 2004) At great length, the court reviews the law relating to the necessity of granting a severance based on antagonistic defenses, or for reasons of the "denial of a trial right." Ultimately, the court concludes that a severance was not required in this case, despite the level of antagonism of the parties.

***United States v. Cortinas,*** 142 F.3d 242 (5th Cir. 1998) Two defendants' motion to sever, pursuant to Rule 14, should have been granted. Evidence of other defendants' violent crimes rendered their trials unfair, despite cautionary instructions.

***United States v. DiNome***, 954 F.2d 839 (2d Cir. 1992) Numerous defendants were tried for their participation in a vicious enterprise involving murder, narcotics distribution, pornography, firearms distribution, and other offenses. Two defendants' link to this enterprise was the fact that in a previous trial of one of the members of the enterprise in state court, one of these defendants served as a juror and accepted a bribe, and her husband(the other defendant in this trial spent the proceeds of the bribe on a new house. After the trial court granted the Rule 29 motion after a sixteen-month trial on these defendants' i.e., the former juror and his spouse's RICO counts, the court should have severed their trials on remaining counts from that of their co-defendants. The obvious prejudicial spillover effect of trying these two defendants with the members of the criminal enterprise should have prompted the trial court to sever their cases.

***United States v. Serpoosh***, 919 F.2d 835 (2d Cir. 1990) The trial court erred in not severing defendants' trials where their defenses were mutually antagonistic. The test for this basis for severance is: "The jury, in order, to believe the core of testimony offered on behalf of one defendant, must necessarily disbelieve the testimony offered on behalf of his codefendant." Alternatively, defendants must show that the jury will infer that both defendants are guilty solely due to the conflict. The two drug defendants in this case pointed the finger of blame at one another. One of the defendants had to be guilty. A severance should have been granted. Query whether this result would be the same after Zafiro.

***United States v. Casamento***, 887 F.2d 1141 (2d Cir. 1989) This is the appeal of the "pizza connection case." Though upholding the verdicts, the Second Circuit set forth guidelines for future mega-trials. Among other considerations, the district judge should question the propriety of severing counts and defendants in any case where the prosecutor anticipates that a joint trial will exceed four months.

***United States v. Wilson***, 116 F.3d 1066 (5th Cir. 1997) The trial court erred in failing to sever defendant's trial from that of his co-defendants in light of the proof that his co-defendants would not testify at a joint trial but were available to exonerate the defendant at a separate trial.

***United States v. Neal***, 27 F.3d 1035 (5th Cir. 1994) Some of the defendants in this multi-defendant drug prosecution established that had they been tried separately, the lead defendant would have testified at their trial and exculpated them. In this situation, the trial court erred in failing to sever those defendants from the case.

***United States v. Breinig***, 70 F.3d 850 (6th Cir. 1995) The defendant's conviction for tax evasion was reversed because of the trial court's failure to grant the defendant's Rule 14 severance motion. The defendant and his estranged wife were jointly tried for tax evasion. The hostility between the parties at trial necessitated a severance. The wife defended on the ground of diminished capacity and argued to the jury that defendant was manipulative, abusive and adulterous. In separate trials, none of this evidence would have been admissible against the defendant.

***United States v. Davidson***, 936 F.2d 856 (6th Cir. 1991) Davidson was charged with one count of drug trafficking in an indictment which also included nine additional counts against a co-conspirator in the drug venture named Mulligan. Mulligan was also charged with various tax related violations. Davidson was not charged with any of those violations. Mulligan fled prior to trial, and he was tried in absentia. Statements of Mulligan were introduced in which he acknowledged being a drug trafficker. The trial court abused its discretion in refusing to sever the trial of Mulligan in absentia and Davidson. The prejudicial spillover effect denied Davidson a fair trial.

***United States v. Baker***, 98 F.3d 330 (8th Cir. 1996) The trial court erred in refusing to sever defendant's trial from the trial of his codefendant. Both defendants were charged with possessing a poisonous substance used as a weapon. But evidence that was introduced against the co-defendant would not have been introduced against the defendant had he been tried alone. The two were not charged as coconspirators, but the other defendant was charged with conspiring with others to possess the substance on another occasion.

***United States v. Adkins***, 842 F.2d 210 (8th Cir. 1988) A defendant charged with being a participant in a cocaine conspiracy was entitled to a severance from co-defendants who participated only in a tax fraud count of the indictment.

***United States v. Sazenski,*** 833 F.2d 741 (8th Cir. 1987) Two defendants were tried jointly: one for being involved in a marijuana conspiracy, the other for cocaine charges. The evidence did not indicate that the marijuana conspiracy defendant had any connection with the cocaine transaction which occurred five months before the marijuana conspiracy began. Despite this misjoinder, it was harmless error in this case because the evidence of the cocaine would have been admissible in the conspiracy trial to rebut the charge of entrapment.

***United States v. Sherlock***, 962 F.2d 1349 (9th Cir. 1992) The trial court committed reversible error in failing to sever the defendant's trial from that of his co-defendant. The use of the co-defendant's extra-judicial statement which implicated the defendant required a severance.

***United States v. Tootick***, 952 F.2d 1078 (9th Cir. 1991) The trial court erred in not severing the defendants' trials where they had mutually antagonistic defenses. Both defendants blamed the assault entirely on the other defendant. The antagonistic defenses were capitalized upon by the government in its closing argument. Note: This is a pre-Zafiro decision.

***Taylor v. Singletary***, 122 F.3d 1390 (11th Cir. 1997) The trial court granted a severance on the basis of the defendant's motion that only with a severance would his co-defendants testify in his favor. But the trial court then set the defendant's trial to begin first, and the co-defendants refused to testify. This was error of constitutional proportion. Failing to try the co-defendants first violated the defendant's Fifth and Sixth Amendment rights to present a defense.

***United States v. Yizar***, 956 F.2d 230 (11th Cir. 1992) An evidentiary hearing was necessary to evaluate defendant's claim of ineffective assistance of counsel. Among counsel's alleged errors was the failure to interview witnesses which would have revealed that the co-defendant had told the prosecutor that the defendant was innocent. Had counsel learned of this, he may have been entitled to a severance in order to use the co-defendant's testimony pursuant to Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970).

***United States v. Rucker***, 915 F.2d 1511 (11th Cir. 1990) The trial court committed reversible error in denying the defendants' motion to sever their trials. Severance was compelled in this case because the jury, in order to believe the core of testimony offered on behalf of one of the defendants must necessarily have disbelieved the testimony offered on behalf of the co-defendant. In this case there were two related codefendants, one of them owned the vehicle that was stopped and in which contraband had been found and both asserted their ignorance of the contraband. No reasonable juror could have believed both of their stories, for to do so would mean that the contraband had been placed there by some unknown third party, and that neither defendant had thought to investigate this mysterious package which was found at their feet. This case presented an example of a situation where two defendants' stories logically conflicted to the point "that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." Query whether this result would be the same after Zafiro. The subsequent decision in United States v. Blankenship, 382 F.3d 1110 (11th Cir. 2004), held that Rucker did not survive Zafiro.

***United States v. Fernandez***, 892 F.2d 976 (11th Cir. 1989) The government charged numerous defendants with being members of one overall conspiracy. The evidence at trial revealed that there were, in fact, separate conspiracies which were not part of one overall scheme. A mid-trial severance should have been granted to the appellant. Forcing him to continue with the trial in the light of the overwhelming evidence against the other conspirators deprived him of due process.

***United States v. DiBernardo***, 880 F.2d 1216 (11th Cir. 1989) The defendants sought to sever their case from that of a co-defendant in order to utilize the co-defendant's exculpatory testimony. In order to prevail on such a motion, the defendant must establish (1) a bona fide need for the co-defendant's testimony; (2) the substance of the testimony; (3) its exculpatory nature and effects; and (4) the likelihood that the co-defendant will in fact testify if the cases are severed. The trial court found that the defendant had made an adequate showing to justify a severance. However, the trial court then ordered that the defendant's trial precede that of the co-defendant who was to testify. The co-defendant refused to testify, and the defendant was thus deprived of his exculpatory testimony. The Eleventh Circuit, in affirming the grant of habeas corpus relief, found that forcing the defendant to trial first effectively deprived him of the benefit of the severance, which itself was a matter of due process. The error in requiring the defendant to be tried first constituted an abuse of the trial court's discretion which denied him a fair trial.

***United States v. Castro***, 829 F.2d 1038 (11th Cir. 1987) Two separate conspiracies were alleged in this indictment. One involved certificates of deposit while the other involved a scheme to create a fraudulent inventory. The court holds that the charges should have been severed and tried separately. There was a substantial risk that the defendant in a joint trial risked association by jurors with the illegal acts of the other conspiracy and that there would be prejudice by the spillover effect.

***United States v. McLain,*** 823 F.2d 1457 (11th Cir. 1987) The defendant, charged with RICO and collection of unlawful debts was entitled to a severance from the trial of his co-defendant who was charged with possession of cocaine with intent to distribute. There was no evidence connecting the RICO defendant to any of the codefendant drug operations. Note that in United States v. Lane, 474 U.S. 438 (1986), the Court held that Rule 8 misjoinder is subject to harmless error analysis.

***United States v. Gonzalez,*** 804 F.2d 691 (11th Cir. 1986) The Eleventh Circuit reverses a conviction where two defendants who had mutually exclusive and antagonistic defenses were required to stand trial together. In this case, one of the defendants was necessarily incriminated by his co-defendant's version of events. The Court rules that the test in granting a severance on the basis of antagonistic defenses is whether the jury, in order to believe the "core" of the testimony offered by one defendant must necessarily disbelieve that offered by the other defendant. Throughout this trial, one defendant's counsel repeatedly asserted that the other defendant was lying. It is dubious whether this decision survived Zafiro.

## *SEX OFFENDER REGISTRATION AND NOTIFICATION ACT*

***Reynolds v. United States***, 132 S. Ct. 975 (2012) The registration requirements of the federal SORNA do not apply to offenders convicted before the act became effective until the A.G. validly specifies that they do apply. Thus, compliance with the rules for the enactment of an interim rule is a relevant inquiry.

***Carr v. United States***, 130 S. Ct. 2229 (2010) 18 U.S.C. § 2250 does not apply to defendants whose travel was completed before the law was enacted in 2006.

***Unites States v. Haslage***, 853 F.3d 331 (7th Cir. 2017) A defendant has no obligation to report to the state that he is leaving, the fact that he has moved to another state. See Nichols v. United States, 136 S. Ct. 1113 (2016).

***United States v. Ross,*** 848 F.3d 1129 (D. C. Cir. 2017) The defendant was convicted of a sex offense in 1999 and moved from D.C. to Ohio in 2009. The D.C. Circuit holds that the A.G.'s rule which applied SORNA to pre-act offenders was not promulgated until after Ross moved, so it could not be applied to him.

***United States v. Morales***, 801 F.3d 1 (1st Cir. 2015) The Rhode Island offenses that the defendant committed did not qualify as Tier III offenses pursuant to 42 U.S.C. 16911(4)(A). United States v. Brewer, 766 F.3d 884 (8th Cir. 2014) The Eighth Circuit holds that the A.G.'s failure to comply with the Administrative Procedure Act in promulgating the rules about the retroactive requirement for registering rendered the rules invalid.

***United States v. DeJarnette***, 741 F.3d 971 (9th Cir. 2013) Defendant committed a sex offense in the Northern District of California in 2001. He was released from prison in 2006 and in 2008 moved to Georgia. SORNA was enacted in 2006 and the retroactivity provisions were promulgated in 2008. Because he resided in Georgia when the retroactive provisions were enacted, the Ninth Circuit held that he was not required to register in California.

***United States v. Lunsford***, 725 F.3d 859 (8th Cir. 2013) If a convicted sex offender moves from a state to a foreign country, he is not required to alert the state from which he is moving of his change of address. Only changes of residence from one state to another (or an American Territory) require the offender to notify the states involved.

***United States v. Reynolds***, 710 F.3d 498 (3rd Cir. 2013) After this case was remanded from the United States Supreme Court (see above), the Third Circuit concluded that the Attorney General's failure to comply with the Administrative Procedure Act rendered the regulations void, insofar as they required the defendant to register for an offense that occurred prior to the enactment of SORNA. Because the regulations were not promulgated properly, the failure to register would not amount to a criminal offense.

***United States v. Kebodeaux***, 687 F.3d 232 (5th Cir. 2012) (en banc) If a defendant completed his period of supervised release prior to the enactment of SORNA in 2006, he cannot be convicted of the provision making it a crime to fail to update his registration after moving within a state. There is no Constitutional basis for Congress to enact such a law. 18 U.S.C. § 2250(a)(2)(A). The Supreme Court REVERSED: 133 S. Ct. 2496 (2013).

***United States v. Clements***, 655 F.3d 1028 (9th Cir. 2011) SORNA registration requirements did not apply to a defendant who was convicted of a sex offense prior to SORNA's enactment and whose travel predated August 1, 2008. See also United States v. Valverde, 628 F.3d 1159 (9th Cir. 2010).

***United States v. Pietrantonio***, 637 F.3d 865 (8th Cir. 2011) In this SORNA prosecution, the defendant was proved to have moved from Minnesota to Las Vegas and later traveled to Boston. Though the indictment was not duplicitous on its face, because of the manner in which the judge charged the jury, there was a likelihood that the jury may not have unanimously agreed on what conduct of the defendant constituted the offense.

***United States v. Beasley***, 636 F.3d 1327 (11th Cir. 2011) Defendant was not subject to SORNA's registration requirements when he traveled to Georgia and did not registrar, because the DOJ interim rule had not yet been promulgated.

***United States v. Hoang***, 636 F.3d 677 (7th Cir. 2011) The defendant's travel occurred prior to the date that the Attorney General enacted the regulations specifying that all sex offenders must register, regardless of when their predicate offenses occurred. The Seventh Circuit held that the SORNA did not apply to the defendant.

***United States v. Husted***, 545 F.3d 1240 (10th Cir. 2008) The defendant was charged with violating 18 U.S.C. § 2250, which makes it a crime to fail to register as a sex offender after traveling in interstate commerce. Because the defendant's interstate travel occurred prior to the enactment of the Act, he could not be convicted.

## *SEX TOURISM*

***United States v. Weingarten***, 632 F.3d 60 (2d Cir. 2011) The sex tourism statute, 18 U.S.C. §2423, does not make it a crime to travel between two foreign countries with intent to engage in illicit sexual conduct. There must be some territorial nexus to the United States.

***United States v. Jackson,*** 480 F.3d 1014 (9th Cir. 2007) In 2001, the defendant moved to Thailand. In 2003, Congress made it a crime to travel in interstate commerce and engage in illicit sexual conduct. 18 U.S.C. § 2423(c) (commonly known as the PROTECT Act). Though the Ninth Circuit previously upheld the constitutionality of this provision, United States v. Clark, 435 F.3d 1100 (9th Cir. 2006), the question in this case is whether a person can be prosecuted if his travel occurred prior to passage of the Act, but his sexual misconduct occurred after passage of the act. The Ninth Circuit concludes that the Act does not criminalize the defendant's conduct.

## *SPEECH OR DEBATE CLAUSE*

***In re Grand Jury Subpoena***, 571 F.3d 1200 (D. C. Cir. 2009) The grand jury may not subpoena either documents provided by a congressman, or statements made by the Congressman to an ethics panel of Congress.

***United States v. Rayburn House Office Building, Room 2113,*** 497 F.3d 654 (D.C. Cir. 2007) A search of Congressman Jefferson's office violated the Speech or Debate Clause, to the extent that law enforcement officers were permitted to review legislative materials in an effort to find evidence of corruption. In order to conduct such a search, the seized material must first be reviewed by the court, not the agents, to ensure that no legislative materials are reviewed by the agents.

***SPEEDY TRIAL (Constitutional)***

**United States v. Adams, No. 19-1811 (3d Cir. 2022)**

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Adams was not tried until 2017, nearly two years after his arraignment on firearms charges. Rejecting his motions to dismiss on Speedy Trial Act grounds, the district court described "numerous continuances [and] unnecessary motions," caused by Adams's "obstreperous behavior." At one point, because of Adams's demands, the judge canceled a scheduled trial date and did not set a particular date for that future hearing or for trial, without citing 18 U.S.C. 3161(h)(7)(A), which allows district courts to pause the

speedy trial clock by entering a continuance, or state that this continuance would serve the “ends of justice.” Adams also argued that motions in limine filed by the government did not qualify for the Act’s exclusion of “delay resulting from any pretrial motion” under 3161(h)(1)(D), and that his motion for discovery did not toll the clock from its filing through its official disposition.

The Third Circuit affirmed his convictions, concluding those periods of delay were excluded, the district court did not plainly err in failing to instruct the jury on the “knowledge-of-status” element under “Rehaif.” The record makes clear that Adams devised his straw-purchaser scheme precisely because he knew he was a felon who could not lawfully possess firearms. Adams was not tried until 2017, nearly two years after his arraignment on firearms charges. Rejecting his motions to dismiss on Speedy Trial Act grounds, the district court described “numerous continuances [and] unnecessary motions,” caused by Adams’s “obstreperous behavior.” At one point, because of Adams’s demands, the judge canceled a scheduled trial date and did not set a particular date for that future hearing or for trial, without citing 18 U.S.C. 3161(h)(7)(A), which allows district courts to pause the speedy trial clock by entering a continuance, or state that this continuance would serve the “ends of justice.” Adams also argued that motions in limine filed by the government did not qualify for the Act’s exclusion of “delay resulting from any pretrial motion” under 3161(h)(1)(D), and that his motion for discovery did not toll the clock from its filing through its official disposition.
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***United States v. Tigano***, -- F.3d --- (2d Cir. 2018) A seven-year pretrial delay amounted to a Sixth Amendment speedy trial violation. The delay was caused by competency exams, the defense lawyer’s failure to push for trial after plea offers were rejected, as well as the court’s failure to schedule the case for trial.

***United States v. Irizarry-Colon,*** 848 F.3d 61 (1st Cir. 2017) In measuring the length of delay for purposes of the first Barker v. Wingo factor, the starting point is the initial indictment, not a superseding indictment or a new indictment following a dismissal.

***United States v. Velazquez***, 749 F.3d 161 (3rd Cir. 2014) After an initial effort to locate the defendant following his indictment, the government’s experts for the next five years amounted to nothing more than running his name through the NCIC database. The defendant was eventually apprehended after he was arrested on an unrelated charge. The Third Circuit held that his constitutional right to a speedy trial was violated, and he was entitled have his case dismissed with prejudice. The defendant did have an attorney during this time who was aware of the pending charges, but not that an indictment had been returned. Thus, the defendant was aware that there were pending charges and the record was clear that he did not surrender. Nevertheless, the trial court did not find that the defendant was engaged in evasive conduct, though he lived a “transient” lifestyle. The appellate court reasoned that a defendant has no duty to surrender, even if he is aware that there is an arrest warrant, though if he had engaged in evasive conduct, it would be hard to convince the court that his success at evasion would be rewarded with dismissal of the indictment. In the absence of evasive conduct, as in this case, the mere fact that the defendant is aware that he is “wanted” does not preclude him from winning a Speedy Trial motion. Finally, the court concluded that the defendant did not waive his speedy trial claim simply by virtue of his failure to insist on a speedy trial. Because the right to a speedy trial is not triggered until the indictment is returned and the defendant in this case was not shown to have been aware of the indictment, he could not have insisted on his right to a speedy trial.

***United States v. Ferreira***, 665 F.3d 701 (6th Cir. 2011) A three-year delay in bringing a defendant to trial violated the Sixth Amendment guarantee of a speedy trial, even though the defendant was in prison on other charges in another jurisdiction. The cause of the delay was bureaucratic bungling of the habeas corpus ad prosequendum process.

***United States v. Seltzer***, 595 F.3d 1170 (10th Cir. 2010) The feds waited over nearly two years after the initial return of the federal indictment to prepare the case for trial. In the interim, the defendant was awaiting trial in state court for unrelated charges. The Tenth Circuit held that there was insufficient justification for deferring to the state court and held that the defendant’s right to a speedy trial was violated.

***United States v. Battis***, 589 F.3d 673 (3rd Cir. 2009) The federal government indicted the defendant after he was arrested on state charges. Forty-five months elapsed after his federal indictment was returned while the federal prosecutor waited for the state to try the defendant on the state charges. Ultimately the state dismissed the state case. The Third Circuit held that the delay in this case was attributable to the government and prejudice was presumed because of the length of the delay. The court of appeals held that the indictment had to be dismissed.

***United States v. Ray***, 578 F.3d 184 (2d Cir. 2009) The defendant appealed her sentence in 1992. The government and defendant agreed that the appellate court should remand the case, following the issuance of an intervening decision that in both parties’ opinion required re-sentencing. Nothing happened for the next fifteen years. When the defendant was finally re-sentenced, the defendant challenged the proceedings as a violation of her right to a Speedy Trial and to Due Process. The Second Circuit held that this did amount to a Due Process violation and that the proper remedy in this case was to suspend the remainder of the sentence. The Second Circuit noted that after remand from the appellate court, it is not the duty of the defendant to bring himself to court and demand a re-sentencing.

***United States v. Molina-Solorio***, 577 F.3d 300 (5th Cir. 2009) The defendant was serving a federal sentence and escaped. A federal indictment for escape was obtained by the government. A few years later, he was arrested by state authorities on a cocaine charge and was sentenced to three years and after serving a sentence, was sent to ICE custody, and then deported. Five years later he was arrested back in Texas. He was charged with illegal re-entry and shortly thereafter was charged with the escape offense that was initially the subject of an indictment approximately ten years earlier. The Fifth Circuit held that the

defendant's right to speedy trial under the Sixth Amendment was violated. There was no proof that the defendant was actually aware of the indictment, so his failure to "assert his right to a speedy trial" prior to the arrest on the escape charge would not be held against him. The government failed to demonstrate "diligent pursuit" of the defendant during the time between his indictment and the arrest ten years later.

***United States v. Erenas-Luna***, 560 F.3d 772 (8th Cir. 2009) The defendant was arrested and deported shortly thereafter. Later, he was indicted. For three years after he was indicted, the defendant was not arrested, or arraigned, even though the police knew that he had returned to the jurisdiction. The Eighth Circuit held that the three-year delay was presumptively prejudicial, and the lower court erred in failing to presume prejudice. A remand was necessary to permit the government an opportunity to rebut the presumed prejudice.

***United States v. Mendoza***, 530 F.3d 758 (9th Cir. 2008) (revised opinion) The government was aware that the defendant had moved to the Philippines. He was indicted. The only effort the government made to alert him to the indictment was to issue a warrant that would have resulted in his arrest when he returned to the country. Ten years later, the defendant returned to the country. Trying him at that point in time violated his right to a speedy trial under the Sixth Amendment. The court concluded that there was a strong presumption of prejudice which the government failed to rebut.

***United States v. Ingram***, 446 F.3d 1332 (11th Cir. 2006) Reviewing the Barker v. Wingo factors, the Eleventh Circuit held that the defendant's prosecution was barred by the Speedy Trial Clause of the Sixth Amendment. The court noted that although pre-accusation delay may not be considered when determining whether a defendant has made the showing necessary to trigger a presumption of prejudice, any delay prior to indictment may be considered when determining whether the defendant was prejudiced by the overall delay. The four-year delay in this case was sufficient to require dismissal.

***United States v. Woolfolk***, 399 F.3d 590 (4th Cir. 2005) An eight-month delay between the time of the accusation and the return of the indictment was presumptively prejudicial. A remand was necessary for further fact-finding on the constitutional speedy trial claim.

***McNeely v. Blanas***, 336 F.3d 822 (9th Cir. 2003) The defendant filed a habeas corpus challenge to his continued detention in state custody, alleging that his detention for five years without a preliminary hearing or trial violated his constitutional right to a speedy trial. The Ninth Circuit agreed and granted the writ.

***United States v. Bergfeld,*** 280 F.3d 486 (5th Cir. 2002) A five-year delay between the time the indictment was filed (under seal) and the time the defendant was told about the indictment was presumptively prejudicial. The relative weight of the other Barker v. Wingo / Doggett factors is less important once the delay reaches this length. B

**rooks v. Jones,** 875 F.2d 30 (2d Cir. 1989) Following his conviction, there was an eight-year delay prior to the defendant's appeal. Federal habeas relief was warranted in light of this extraordinary delay.

***Simmons v. Beyer***, 44 F.3d 1160 (3rd Cir. 1995) A thirteen-year delay between the defendant's conviction and his first direct appeal violated his right to due process and a speedy trial. Though the Supreme Court has never recognized a right to a speedy appeal, the Third Circuit holds that the Due Process Clause ensures the right to a speedy appeal if the state has chosen to give defendants the right to appeal. "The 13-year delay in this case is an outrage, and that Simmons' appeal as of right 'slipped through the cracks' is shameful." The fact that the cause of the delay was ineffective assistance of counsel by the public defender does not mitigate the damage. The defendant was entitled to a new trial.

***Burkett v. Fulcomer***, 951 F.2d 1431 (3rd Cir. 1991) Twenty-nine months after he was convicted, the defendant was sentenced. Nine months had elapsed between his arrest and his trial. There was no justification for the delay, other than crowded court dockets, which weighs against the government. The court discusses at length the type of "prejudice" which a defendant suffers during post-conviction delay and concludes that the defendant did suffer prejudice during the period of delay, including the defendant's inability to utilize certain rehabilitative services which would have been available after sentencing, as well as the psychological harm suffered by the uncertainty of the incarceration. The remedy provided by the court was to reduce the defendant's sentence by the amount of time he served in various county jails, awaiting sentencing.

***Burkett v. Cunningham***, 826 F.2d 1208 (3rd Cir. 1987) It took five- and one-half years before sentence was imposed for this defendant. He was incarcerated the entire time. The State attributed the delay to crowded court calendars and the court reporter's delay in filing the transcript. The defendant was tried and convicted in 1981. In 1986, he was still in jail awaiting the imposition of sentence. The Court holds that the right to speedy trial includes the right to be tried, sentenced and to have appellate resolution of the case.

***Howell v. Barker***, 904 F.2d 889 (4th Cir. 1990) Twenty-seven months expired between the issuance of an arrest warrant and its actual service. The Fourth Circuit concludes that this delay prejudiced the defendant, and his conviction was vacated. Actual prejudice is not necessary where, as here, there was no justification for the delay between the conclusion of the investigation and the returning of the indictment.

***United States v. Graham,*** 128 F.3d 372 (6th Cir. 1997) The defendants were indicted in 1987 on RICO charges but tried in 1995. This violated their constitutional right to a speedy trial and the convictions were reversed.

***United States v. Smith***, 94 F.3d 204 (6th Cir. 1996) If the government appeals a sentencing decision, an unreasonable delay in resolving this appeal may give rise to a Sixth Amendment speedy trial violation. For example, if the government prevails, a delay may prejudice the defendant in presenting evidence at a resentencing. Also, if the defendant is released prior to the appellate

court's decision, the risk of being re-incarcerated is an important consideration in assessing the prejudice to the defendant from the delay.

***Redd v. Sowders***, 809 F.2d 1266 (6th Cir. 1987) The defendant's lengthy incarceration prior to trial was oppressive and prejudicial. Possible alibi witnesses were no longer available at trial to substantiate the defendant's alibi claim.

***United States v. Pomeroy***, 822 F.2d 718 (8th Cir. 1987) Although an extradition treaty permits Canada to deny surrender of an alleged fugitive to the United States, the government's failure to request surrender of the fugitive in this case precluded the government from relying on that treaty in defending against a speedy trial violation.

***United States v. Shell***, 974 F.2d 1035 (9th Cir. 1992) Though the defense could not identify any specific prejudice, the five-year delay between the time of indictment and the time of defendant's arrest was presumptively prejudicial under the standard of Doggett v. United States, 505 U.S. 647 (1992).

***SPEEDY TRIAL (Statutory)***

***Zedner v. United States***, 547 U.S. 489, 126 S. Ct. 1976 (2006) The Supreme Court holds that a defendant may not prospectively waive indefinitely the provisions of the Speedy Trial Act. Though the defendant signed a document prepared by the court that purported to waive the provisions of the Act, the Supreme Court held that the Act does not permit this kind of prospective waiver. The Court also held that the trial court must make specific findings under § 3161(h)(8), or an "ends of justice" delay will not stop the clock. Finally, the court held that there is no harmless error in this situation.

***United States v. Taylor***, 487 U.S. 326 (1988) The trial court granted the defendant's motion to dismiss the indictment with prejudice because of the government's failure to comply with the Speedy Trial Act. The Supreme Court reverses holding that the trial court did not properly exercise its discretion in deciding whether to grant the motion with, as opposed to without prejudice.

***Bloate v. United States***, 130 S. Ct. 1345 (2010) If a defendant seeks additional time to file pretrial motions, is the period of time between the filing of that motion and the actual filing of the pretrial motions automatically excludable. The Supreme Court held that this period of time is not automatically excludable. Section 3161(h)(1)(D) provides for an automatic exclusion of any period of delay resulting from certain proceedings, including any delay resulting from any pretrial motion, from the fling of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion. This does not include the period of time during which a defendant is given the opportunity to file motions. However, if the court makes express findings that the ends of justice are served by granting a continuance, this is a permissible method of stopping the clock.

***United States v. Tinklenburg,*** 131 S. Ct. 2007 (2011) Any time resulting from the filing of a pretrial motion falls within the exclusion of time for such pretrial motions, regardless of whether the filing of the motion actually results in a delay. 18 U.S.C. § 3161(h)(1)(D). The Sixth Circuit had previously held that only pretrial motions that actually result in a delay toll the clock.

***United States v. Ammar***, 842 F.3d 1203 (11th Cir. 2016) In Ammar, the court reiterated the principle that the parties' agreement to delay trial is not a sufficient basis to invoke (h)(7) and that was, in fact, the only basis upon which the court granted a delay – a one year delay – between the return of the indictment and the trial. The court reversed the conviction and remanded for a determination whether the dismissal should be with, or without, prejudice.

***United States v. Brown***, 819 F.3d 800 (6th Cir. 2016) In order to avoid the 70-day Speedy Trial Act deadline, the court scheduled voir dire to begin just before the deadline but delayed the start of trial until two weeks later. This violated the Speedy Trial Act. The fact that one of the government's witnesses was "in training" was also not a basis for stopping the speedy trial clock. The court also addressed the defendant's assertion of the right to a speedy trial and held that his objections to the continuance were sufficient given the unique facts of the case.

***United States v. Bert***, 814 F.3d 70 (2d Cir. 2016) Eleven months elapsed of non-excludable time during which time the defendant remained in pretrial detention and the district court was holding a suppression motion under advisement (a period that should not have lasted longer than 30 days pursuant to § 3161(h)(1)(H). The Second Circuit set forth the trial court's obligation to consider numerous factors in deciding whether to dismiss with, or without, prejudice. The Act expressly requires the court to consider the seriousness of the offense, the facts and circumstances of the case which led to the dismissal, and the impact of a re-prosecution on the administration of the Act. The Second Circuit disagreed with the lower court's suggestion that the absence of bad faith on the part of the government is dispositive, and also disagreed with the suggestion that if the delay was entirely the court's fault and not the fault of the government, this, too, counsels in favor of a dismissal without prejudice.

***United States v. Ramirez,*** 788 F.3d 732 (7th Cir. 2015) The trial judge complained about his crowded docket and postponed the defendant's trial. Later, the judge entered an order declaring the case complex. The Seventh Circuit held that the Speedy Trial Act was violated and the post hoc rationale for the continuance did not overcome the actual reason announced by the court at the time the continuance was granted.

***United States v. Hicks,*** 779 F.3d 1163 (10th Cir. 2015) A government motion "to set a trial date" stops the Speedy Trial clock for at most thirty days.

***United States v. Hernandez-Meza***, 720 F.3d 760 (9th Cir. 2013) The Speedy Trial court should not have been tolled due to the existence of plea negotiations. There was no notification to the district court that a plea agreement had actually been reached which would have briefly stopped the clock.

***United States v. Ortiz***, 687 F.3d 660 (5th Cir. 2012) Section 3161(h)(3)(A) creates a tolling period resulting from the absence of an essential witness. The absent witness in this case was the defendant's co-conspirator, who fled after initially making a

statement implicating himself and the defendant. The delay in this case resulted in the return of an indictment more than thirty days after the defendant's arrest. The Fifth Circuit held that the co-conspirator was not an essential witness as far as seeking and obtaining an indictment and therefore § 3161(h)(3)(A) did not apply. The absent witness's confession to the police was admissible in the grand jury proceeding and therefore his appearance was not essential.

***United States v. Mathurin***, 690 F.3d 1236 (11th Cir. 2012) The government must obtain an indictment within thirty days of the defendant's first appearance. 18 USC § 3161(h). The time between first appearance and the return of an indictment during which the defense and the prosecutor are engaged in efforts to resolve the case with a plea agreement is not excludable time. Though there are certain periods of excludable time during the thirty-day window e.g., "for other proceedings concerning the defendant", this does not include plea negotiations.

***United States v. Marshall,*** 669 F.3d 288 (D. C. Cir. 2012) The government's motion to permit the introduction of Rule 404(b) evidence did not stop the Speedy Trial clock. Trial counsel was ineffective in failing to move to dismiss the indictment given the violation of the Speedy Trial Act.

***United States v. Huete-Sandoval***, 668 F.3d 1 (1st Cir. 2012) Relying on the Supreme Court decision in Bloate, the First Circuit holds that excluding days for the purpose of allowing the defendant to prepare motions was improper. Only pursuant to (h)(7) may the court exclude a period of time such as this, and only if specific findings are made that such time is necessary for a case-specific reason. The second period that the district court excluded was for 16 days when the defendant said that he was going to file for a continuance to enable him to consider a plea offer. No continuance, however, was ever actually requested. The First Circuit reluctantly held that this period was also not properly excluded. The First Circuit reversed the conviction with directions to dismiss the indictment, though the lower court was permitted to do so without prejudice.

***United States v. Bloate***, 655 F.3d 750 (8th Cir. 2011) On remand from the Supreme Court, the Eighth Circuit held that the Speedy Trial Act was violated and that a document filed by the defendant styled, "Waiver of Pretrial Motions" did not constitute a "motion" which stopped the Speedy Trial clock pursuant to § 3161(h)(1)(D).

***United States v. Burrell***, 634 F.3d 284 (5th Cir. 2011) The government sought a continuance because a critical government witness (law enforcement officer) was scheduled to be on specialized training when the trial was scheduled. The trial court, relying on 18 U.S.C. 3161(h)(3), found that the witness could not, though the exercise of due diligence, be brought to trial by the government. The Fifth Circuit reversed. There was no showing that the government made reasonable efforts to secure the attendance of the witness at trial. There was no evidence concerning where the witness was at training, how many hours he was required to attend, whether he could miss one day for purposes of attending the trial, or what the cost of transportation would be. For the same reason the trial court could not rely on the "ends of justice" tolling period.

***United States v. Alvarez-Perez***, 629 F.3d 1053 (9th Cir. 2010) Several rulings on a Speedy Trial Act dismissal, including holding that the speedy trial clock begins to run upon the filing of an information, even if an indictment is later filed. The court also rejected the government's argument that the defendant waived the speedy trial act error.

***United States v. Larson***, 627 F.3d 1198 (10th Cir. 2010) The trial court repeatedly granted continuances in this case but provided inadequate reasons to justify the ends-of-justice continuances. The indictment should have been dismissed, though a remand to the district court was necessary to determine whether the dismissal should be with, or without, prejudice.

***United States v. Jones***, 601 F.3d 1247 (11th Cir. 2010) When a defendant successfully appeals his conviction, the Speedy Trial Act allows only seventy days between the date that the district court receives the mandate, and the date the defendant's retrial begins. New charges added by a superseding indictment do not reset the speedy trial timetable for offenses either charged in the original indictment or required under double jeopardy principles to be joined with such charges. In this case, following reversal of the conviction, the government investigated additional charges against the defendant before starting the new trial and during this period of time, the 70-day period i.e., non-excludable days expired. The court also explains how to calculate time when various motions are filed some of which were set down for a hearing, some of which were not. The original charges should have been dismissed.

***United States v. Toombs***, 574 F.3d 1262 (10th Cir. 2009) The trial court granted several "ends of justice" continuances. Many of the continuances were granted to enable the defendant to "review newly provided discovery" or for the prosecution to locate a co-defendant and transport him to the jurisdiction. The trial court failed to adequately make case-specific findings to support the various continuances. The fact that many of the continuances were at the request of the defendant is not determinative, because the Speedy Trial Act protects the interest of the public, not just the defendant, in a speedy trial.

***United States v. Henry***, 538 F.3d 300 (4th Cir. 2008) The trial court failed to adequately perform the (h)(8) balancing between the need for a continuance and the public's interest in a speedy trial. A remand was necessary to make findings on the record.

***United States v. Young***, 528 F.3d 1294 (11th Cir. 2008) The defendant was initially indicted for possession of an unregistered silencer. Two months later, the indictment was superseded, and various drug counts were added to the indictment. When the case went to trial, the defendant moved to dismiss the firearm charge, because more than seventy non-excludable days passed prior to the trial on that charge. The Eleventh Circuit held that neither the filing of a superseding indictment, nor a dismissal and reindictment operates to re-start the speedy trial clock.

***United States v. Bryant***, 523 F.3d 349 (D.C. Cir. 2008) The Speedy Trial clock started on the day of the co-defendant's arraignment. The clock did not stop indefinitely when the government filed a motion to permit the introduction of a prior conviction under Rule 609, because the defendant never responded and there was no hearing contemplated by the motion. In the trial

court's pre-Zedner ruling, it also found that there was an "implicit" finding of the need for an "ends of justice" continuance. Zedner does not approve that procedure. In light of the violation of the Speedy Trial Act, the conviction was reversed, and the trial court was obligated to determine whether the dismissal of the indictment would be with, or without, prejudice.

***United States v. Kuper***, 522 F.3d 302 (3rd Cir. 2008) A defendant who has prevailed in a motion to dismiss on the basis of a violation of the Speedy Trial Act, but whose success is tempered by the fact that the dismissal was entered without prejudice, may not appeal that decision to the Court of Appeals. A dismissal without prejudice is not a final order.

***United States v. Lewis***, 518 F.3d 1171 (9th Cir. 2008) When the Ninth Circuit initially reviewed this case, it found that the Speedy Trial Act was violated during one period of delay, and perhaps during another. The case was remanded to determine the facts surrounding the second period of delay and then to dismiss the indictment either with, or without prejudice. The lower court then simply dismissed the indictment without prejudice based on the first period of delay. Because the second period of delay, if it did violate the Act, may have prompted a dismissal with prejudice, the lower court erred in failing to decide about the facts surrounding that delay. In deciding whether to dismiss with, or without prejudice, the court must consider the seriousness of the offense, the facts and circumstances which led to the dismissal, and the impact of re-prosecution on the administration of justice. The Supreme Court, in United States v. Taylor, 487 U.S. 326 (1988), also requires that prejudice to the defendant be considered. In this case, because the lower court failed to make necessary findings about the cause and extent of the delay, the determination of whether the dismissal should be with, or without, prejudice could not properly be made.

***United States v. Williams***, 511 F.3d 1044 (10th Cir. 2007) A defendant may not sign a prospective indeterminate waiver of his rights under the Speedy Trial Act. Also, the district court may not retroactively grant an "ends of justice" continuance. While findings of fact may be entered after the fact, the findings themselves must be made before the continuance is granted.

***United States v. Lopez-Valenzuela,*** 511 F.3d 487 (5th Cir. 2007) The Fifth Circuit held that the date the indictment was returned was the start date for the seventy-day clock, because the defendant had already appeared in court. The government unsuccessfully argued that the date he filed a written waiver of appearance and entered a not guilty plea was the date that started the clock.

***United States v. Stephens,*** 489 F.3d 647 (5th Cir. 2007) In joint defendant cases, if the clock has not run out on one defendant, the clock is tolled "for a reasonable period of time" as to co-defendants. § 3161(h)(7). In this case, a co-defendant entered a guilty plea and the district court tolled the clock for the defendant for seven weeks while the co-defendant's plea was being considered (i.e., prior to sentencing). The Fifth Circuit reversed: delaying the defendant's trial for seven weeks while the co-defendant's plea was being considered was not reasonable. In addition, the defendant's severance motion, which did not require a hearing, only created a thirty-day clock stoppage from the date the motion was taken under advisement. § 3161(h)(1)(J).

***United States v. Sanders***, 485 F.3d 654 (D.C. Cir. 2007) The trial court made inadequate Zedner findings to support the various tolling periods of the speedy trial clock and the only remedy was to reverse the conviction and dismiss the indictment.

***United States v. Suarez-Perez***, 484 F.3d 537 (8th Cir. 2007) The trial court issued a nunc pro tunc order suspending the Speedy Trial clock under the ends of justice provision but provided inadequate reasons. The conviction was set aside, and the indictment was dismissed. The trial court was directed to decide about whether the dismissal should be with, or without, prejudice.

***Greenup v. United States***, 401 F.3d 758 (6th Cir. 2005) When a defendant waives his statutory speedy trial rights, the district court must make a specific finding pursuant to § 3161(h)(8)(A) that the continuance serves the ends of justice. Unless the court considers the factors set forth in the statute, the defendant's waiver is not effective to stop the clock. The Sixth Circuit later ordered that the opinion be "DE published."

***United States v. Woolfolk***, 399 F.3d 590 (4th Cir. 2005) The defendant was in state custody, awaiting state charges. The feds issued an arrest warrant and notified the state that it intended to try the defendant on federal charges. The state proceedings were terminated, but the state continued to hold the defendant, apparently only because of the federal detainer, for another three months. The Fourth Circuit held that this violated the Speedy Trial Act. Where a defendant is kept in state custody without any pending state charges and only on the basis of a federal warrant, the Speedy Trial clock runs and the thirty-day limit for obtaining an indictment is triggered.

***United States v. Lewis,*** 349 F.3d 1116 (9th Cir. 2003) A government's motion to present evidence non-sequentially which was delayed an extensive period of time, did not stop the Speedy Trial clock the entire time, because the defendant requested a hearing on the motion.

***United States v. Watkins***, 339 F.3d 167 (3rd Cir. 2003) The government's failure to indict the defendants on the charges for which they were arrested within thirty days violated the Speedy Trial Act and required dismissal of those charges. Charges on other offenses, however, did not need to be dismissed. Thus, the conspiracy to import drugs offense should have been dismissed, but the substantive importation charge could go forward.

***United States v. Pitner***, 307 F.3d 1178 (9th Cir. 2002) When there is an interlocutory appeal, the 70-day Speedy Trial clock is interrupted, but not restarted. Here, the defendant filed an interlocutory appeal after the trial court denied his motion to dismiss a new indictment which was returned following an earlier mistrial.

***United States v. Johnson***, 120 F.3d 1107 (10th Cir. 1997) When the court invokes the "ends of justice" basis for postponing a trial, the findings in support of this continuance must be made before the time limit expires, though the written order may be entered after the 70-day period expires. In this case, the court's only findings within the time limit, was that a continuance was needed to accommodate the court's schedule. A congested court calendar is not a permissible basis for a § 3161(h)(8)(A) continuance. The indictment should have been dismissed and a remand was necessary for the lower court to determine whether the dismissal should be with, or without prejudice.

***United States v. Lloyd***, 125 F.3d 1263 (9th Cir. 1997) The defendants' first conviction was reversed in September 1994, with the mandate being issued in December 1994. In January 1996 -- over a year later -- the re-trial was held. The Speedy Trial Act requires re-trial within seventy days after the mandate is issued. 18 U.S.C. § 3161(e). Various continuance motions filed by both the government and the defense caused the delay of over a year. The longest delay, however, was occasioned by an (h)(8) continuance for the purpose of ensuring "continuity of counsel." The continuance, however, was not justified by the facts. Vague statements by counsel that a continuance is needed because of scheduling conflicts, vacations and time needed to prepare, may not be the basis for a four-month delay. On remand, the case would be re-assigned to a new judge to decide whether the dismissal should be with, or without prejudice.

***United States v. Gonzales***, 137 F.3d 1431 (10th Cir. 1998) The prosecutor's statement that he could not prepare for trial in the allotted time was not an adequate basis for granting an ends-of-justice Speedy Trial continuance. The prosecutor offered no specifics and the trial itself only lasted three days. The trial court erred in denying the defendant's motion to dismiss. The lower court would have to decide on remand whether the dismissal would be with, or without, prejudice.

***United States v. Alford***, 142 F.3d 825 (5th Cir. 1998) The defendant was initially charged in a two-count indictment. Later, eight more counts were added in a superseding indictment. Trial was held within seventy days of the superseding indictment, but this was more than seventy days from the initial indictment. The first two counts, therefore, should have been dismissed.

***United States v. Barnes***, 159 F.3d 4 (1st Cir. 1998) Violation of the 70-day Speedy Trial Act requirement necessitated dismissal of the indictment (without prejudice). The court explained various provisions of the Act: (a) § 3161(h)(1)(F) exclusions apply to motions; if the motion requires a hearing, all time up to the date the hearing is conducted is excludable, in addition to thirty days thereafter for a decision on the motion. Excludable time for motions that do not require a hearing is thirty days. All told, there were approximately 120 non-excludable days between arraignment and trial. The government’s argument that the defendant waived the provisions of the Act was rejected by the First Circuit: though the defense may not cause a delay and affirmatively waive the provisions of the Act and then claim a violation, a waiver for a discrete period of time does not negate the requirements of the Act for all time.

***United States v. Ramirez***, 973 F.2d 36 (1st Cir. 1992) The trial court properly dismissed the indictment with prejudice in light of the Speedy Trial Act violation. The violation in this case was caused by an eighty-one day delay in ruling on the pretrial motions. Though the offense was serious (500 grams of cocaine), what motivated the court was the fact that the delay was caused by carelessness and a dismissal was necessary as a deterrent measure and to ensure that such delays do not occur in the future. When a delay is caused by the court or the prosecutor, this militates in favor of a dismissal with prejudice.

***United States v. Gambino***, 59 F.3d 353 (2d Cir. 1995) The defendant’s trial was severed from the trial of the co-defendants’ trial. Once the codefendants’ trial ended, the speedy trial clock started running. Also, the fact that the lower court deferred ruling on a Kastigar motion until the conclusion of trial did not toll the statute. In declaring a case complex, the district court may not delay the trial indefinitely: The length of an exclusion for complexity must be not only limited in time, but also reasonably related to the actual needs of the case. The court also notes that a superseding indictment inherits the clock of the original indictment. Finally, the court held that the defendant may not waive the speedy trial act provisions, except in cases where the defendant treats the Act as a game of trial strategy. The court concludes, however, that the failure to dismiss the indictment was harmless error, because the indictment would have been dismissed without prejudice.

***United States v. Giambrone***, 920 F.2d 176 (2d Cir. 1990) The trial court did not err in dismissing the indictment with prejudice. The government was “extremely lax” in complying with the Speedy Trial Act. The first indictment was dismissed without prejudice three months after the initial case was set for trial because of the unavailability of the government’s star witness. The second case was handled at a routine pace, but seventy days expired before the case was set for trial. The trial court did not abuse its discretion in dismissing with prejudice: “A pattern of disregard for the responsibility to bring criminal cases to trial expeditiously has the potential for nullifying the requirements of the Act, for if the government suffers only dismissals without prejudice on motion of the defendant, it in effect gains successive 70-day periods in which to bring the defendant to trial.”

***United States v. Hamilton***, 46 F.3d 271 (3rd Cir. 1995) The government sought to toll the Speedy Trial Act clock because an essential government witness, who was a severed co-defendant, was pleading the Fifth and thus was “unavailable.” This was not proper. A witness who the government may immunize is not “unavailable.”

***United States v. Jones***, 56 F.3d 581 (5th Cir. 1995) Almost a year and a half after arraignment, the defendant was tried. Shortly before the first scheduled trial date, which was set three months after the arraignment, a co-defendant moved for a continuance to complete discovery. The motion was never ruled on by the trial court and over a year passed before the trial was held. Shortly before the trial, the court entered an order “memorializing” his granting the continuance motion. This violated the Speedy Trial Act. A motion for a continuance which is pending for over a year does not create excludable time under §3161(h)(1)(F). Also, the court gave no reason why a continuance for a year was necessary under the ends of justice provision, §3161(h)(8)(A).

***United States v. Johnson***, 29 F.3d 940 (5th Cir. 1994) Two provisions of the Speedy Trial Act were the focus of this case: 18 U.S.C. §3161(h)(1)(F) and §3161(h)(1)(J). Under (F), anytime between the filing of a motion and a hearing on the motion is excludable, even if the delay in holding the hearing is unreasonable. (F) also excludes any time after the hearing during which time the court is "assembling papers," such as post-hearing briefs. Once all the papers have been received, (J) applies and limits the time in which a decision may be made to 30 days. Any time more than 30 days is not excludable. If no hearing is required by a motion, then (F) only allows for 30 days excludable time to rule on the motion.

***Henderson v. United States***, 476 U.S. 321 (1986). In this case, a motion for a bill of particulars (which did not require a hearing) a motion for a pretrial James hearing (which was never held, and thus did not require a hearing) and a motion in limine, were all covered by the subsection (F) 30-day rule. In calculating the 30 days, the matter is deemed submitted on the last day in which briefs are actually filed. Here, the district court permitted too much time to pass. The court of appeals held that the indictment should be dismissed without prejudice.

***United States v. Ortega-Mena***, 949 F.2d 156 (5th Cir. 1991) The defendant filed a Brady motion to which the government responded in one day that there was no exculpatory evidence. Only two days on the clock were tolled by this motion. Also, an "ends of justice" tolling period cannot be predicated on a crowded court docket, even if the court is engaged in a related trial.

***United States v. Castle,*** 906 F.2d 134 (5th Cir. 1990) The government took more than ten days to transport a prisoner to obtain a mental competency exam. The government complained that this was due to budgetary cuts at the United States Marshal's office. The Court stated that this is no excuse. The fact that the government acted reasonably was also not an excuse for failing to comply with the Speedy Trial Act provisions.

***United States v. Velasquez***, 890 F.2d 717 (5th Cir. 1989) The defendant was arrested on May 16. The indictment was not returned until July 19. The government contended that the 30-day limit prescribed by §3161(b) was tolled because a coconspirator's competency was being evaluated during the interim. The Court also sought refuge in the exclusion for "delay resulting from consideration by the Court of a proposed plea agreement," §3161(h)(1)(I). The Court rejects both excuses: Determining the competency of a co-defendant does not provide an excuse for failing to indict the defendant; and because the plea agreement was never submitted to the Court for consideration, that exclusion also does not apply. The Court goes on to hold that only the substantive count for which the defendant was arrested need be dismissed. Thus, the Court may prosecute the defendant for conspiracy but not the substantive offense for which he was arrested.

***United States v. Bigler***, 810 F.2d 1317 (5th Cir. 1987) The failure of the federal government to gain custody of a state prisoner and seek the appointment of a lawyer for him resulted in a violation of the Speedy Trial Act. Excluded from the seventy-day indictment-to-trial period is any period during which the defendant is in state custody awaiting trial on state charges. However, once the state proceedings were concluded, the government delayed in gaining custody of him from the state jurisdiction. Furthermore, the government delayed in finding a lawyer to represent defendant once he was in federal custody.

***United States v. Moran***, 998 F.2d 1368 (6th Cir. 1993) The trial court allowed the defendants two weeks to file suppression motions after arraignment. This was not excludable time under the Speedy Trial Act. Moreover, the thirty days which the Act allows for consideration of motions under advisement was exceeded in this case and the excess time should have been counted on the Speedy Trial clock.

***United States v. Crawford***, 982 F.2d 199 (6th Cir. 1993) The indictment in this case should have been dismissed because of a Speedy Trial Act violation. A continuance was supposedly granted, but there were no findings made as to the reason for the continuance, or the necessity for the continuance.

***United States v. Menzer***, 29 F.3d 1223 (7th Cir. 1994) Following the granting of a mistrial requested by the defense, the government dismissed the indictment and reindicted the defendant on similar charges. The new indictment would proceed under the same speedy trial clock – the clock did not start anew with the new indictment. Thus, the government had seventy days from the date of the granting of the mistrial, pursuant to 18 U.S.C. §3161(h)(1)(F), rather than seventy days from the return of the new indictment.

, 81 F.3d 86 (8th Cir. 1996) The defendant's attorney withdrew on the 72nd day of the ***United States v. Dezeler*** speedy trial clock. This did not stop the clock and because the time had expired prior to the attorney's withdrawal, there was no basis for denying the defendant's motion to dismiss the indictment. In calculating the time, the court noted that pursuant to §3161(h)(1)(J), once a motion is taken under advisement, a decision must be reached within thirty days and any time longer than that is not excluded.

*United States v. Palomba,* 31 F.3d 1456 (9th Cir. 1994) In the criminal complaint, the defendant was charged with mail fraud. The original indictment, however, did not allege mail fraud. A superseding indictment three months later, added the mail fraud counts. This violated the Speedy Trial Act, 18 U.S.C. §3161(b). Trial counsel's failure to move to dismiss these charges amounted to ineffective assistance of counsel.

***United States v. Clymer***, 25 F.3d 824 (9th Cir. 1994) Over 500 days of non-excludable time could not be justified by a post-trial finding of complexity and the need to satisfy the "ends of justice." Moreover, the pendency of pretrial motions does not amount to excludable time, unless the pendency of those motions causes delay. Thus, motions which are pending, and which are held until trial and which do not cause delay, do not create excludable periods of time. The Ninth Circuit concludes, moreover, that the indictment should be dismissed with prejudice.

***United States v. Engstrom***, 7 F.3d 1423 (9th Cir. 1993) After a reversal of the first conviction, the trial court set the case down for trial within the 70-day time limit. Shortly thereafter, however the case was transferred to another district judge which set the case down for trial after the time limit expired. After realizing that the new date was outside the time limit, the judge solicited a motion to continue which the government filed and then granted the motion with a conclusory finding that a continuance was needed to serve the ends of justice. This was a violation of the Speedy Trial Act, and the conviction was reversed.

***United States v. Hoslett***, 998 F.2d 648 (9th Cir. 1993) The routine setting of dates for the filing of pretrial motions does not toll the Speedy Trial clock. Only where the preparation of motions requires extra time and a request for an extension of time has been granted does the clock stop.

***United States v. Delgado-Miranda***, 951 F.2d 1063 (9th Cir. 1991) The defendant has the right to a hearing, and to be represented by counsel at that hearing, when the trial court decides to dismiss a case with, or without prejudice, because of a Speedy Trial Act violation.

***United States v. Torres-Rodriguez,*** 930 F.2d 1375 (9th Cir. 1991) Three days prior to trial, the government obtained a superseding indictment which added a conspiracy and lengthened another conspiracy. According to United States v. Rojas-Contreras, 474 U.S. 231 (1985), "to avoid prejudicing a defendant, a continuance should be granted where there is a meaningful possibility that a superseding indictment will require an alteration or adjustment in the planned defense." With regard to the counts that were added or altered in the superseding indictment, the convictions were reversed.

***United States v. Jordan***, 915 F.2d 563 (9th Cir. 1990) An "ends of justice" continuance needs to be specifically limited in time and specific findings must be made in the record to justify such a continuance under 18 U.S.C. §3161(h)(8)(A). At the commencement of this 33-defendant case, the district court declared that it was a complex case and came within the "ends of justice" exclusion. Though discovery deadlines were later established, the continuance was indefinite in nature. No defendant objected to these orders. The appellate court acknowledged that because of the complexity of the case, some continuance was necessary. However, an indefinite period of excludable time was not justified. The Ninth Circuit also notes that the monitoring of the limitations period is not the exclusive burden of the district judge, the government shares the responsibility for the speedy trial enforcement. As a result of the delay in this case, the convictions were reversed, and the district court would need to determine whether a dismissal of the indictment would be with or without prejudice.

*United States v. Karsseboom,* 881 F.2d 604 (9th Cir. 1989) The trial court dismissed some but not all counts of an indictment. The defendant was reindicted on the counts which were previously dismissed. All counts of the indictment are subject to the clock which was running on the original indictment.

***United States v. White***, 864 F.2d 660 (9th Cir. 1988) When granting a dismissal without prejudice, the trial court must set forth its findings with regard to the factors enumerated in 18 U.S.C. §3162(a)(2). The failure to do so requires a remand.

***United States v. Johnson***, 120 F.3d 1107 (10th Cir. 1997) The only basis for the court's §3161(h)(8) continuance was a crowded court docket; that is, that the court was engaged in another trial and could not try this case when initially set. This basis for stopping the Speedy Trial clock is specifically outlawed by §3161(h)(8)(C).

***United States v. Pasquale***, 25 F.3d 948 (10th Cir. 1994) The defendant entered a guilty plea, but before sentencing, was permitted to withdraw the plea. The speedy trial clock's 70-day period began the day the plea was withdrawn. Several weeks later, a new attorney was appointed. The new attorney requested a continuance for two months in order to prepare the defense. The court granted this motion but made no findings regarding the ends of justice. Even though the attorney requested the continuance, the trial court's failure to make contemporaneous ends of justice findings required that the conviction be set aside, and the indictment dismissed – without prejudice.

***United States v. Saltzman***, 984 F.2d 1087 (10th Cir. 1993) Though the defendant waived his rights under the Speedy Trial Act to be indicted within 30 days of arrest, this was ineffective. Absent findings by the judge that the ends of justice would be served, the defendant's waiver did not protect the public's right to the speedy disposition of criminal cases. A dismissal without prejudice, however, was the appropriate remedy.

***United States v. Miranda***, 835 F.2d 830 (11th Cir. 1988) A local rule of the Southern District of Florida requires counsel to notify the Court of developments in the case. The defendants failed to comply with this local rule. The Eleventh Circuit holds that this does not preclude a dismissal on speedy trial grounds.

***United States v. McNeil***, 911 F.2d 768 (D.C. Cir. 1990) There is no need that the defendant prove that he suffered actual prejudice in order to obtain relief for a violation of the Speedy Trial Act if the violation resulted from the trial court's erroneous exclusion of time under §3161(h)(3) because of the supposed absence or unavailability of an essential witness. Unlike §3161(h)(8) which specifically requires a finding of prejudice, under §3161(h)(3), there is no requirement that the Court balance the ends of justice against the right of the defendant to a speedy trial. The Court went on to find that the unavailable witness was in fact "not essential" and thus there should have been no excludable time.

## *STATUTE OF LIMITATIONS*

***Smith v. United States***, 133 S Ct. 714 (2013) If a defendant claims that he withdrew from a conspiracy outside the statute of limitations period, he has the burden of proving, by a preponderance of the evidence, this defense.

***United States v Delia***, 906 F.3d 1212 (10th Cir. 2018) Defendant's health care fraud offense targeted a state Medicaid program, not a federal agency or the federal government and therefore the Wartime Suspension of Limitations Act (5 U.S.C. § 3287) did not apply to toll the statute of limitations.

***United States v. Ongaga,*** 820 F.3d 152 (5th Cir. 2016) Marriage fraud, 18 U.S.C. § 1325(c) is not a "continuing offense" and therefore the five-year statute of limitations applies. Two marriage fraud counts of the indictment in this case were reversed on statute of limitations grounds.

***United States v. Tavarez-Levario***, 788 F.3d 433 (5th Cir. 2015) The crime of using a counterfeit immigration document is not a continuing offense and therefore, the 5-year statute of limitations begins to run when the counterfeit document is presented for "use" in this case, for use in gaining employment.

***United States v. Mergen***, 764 F.3d 199 (2d Cir. 2014) The defendant's cooperation agreement contained ambiguous language about a waiver of the statute of limitations for certain offenses. The Second Circuit held that the ambiguity had to be construed against the government and the statute of limitations barred the prosecution of various offenses not specifically identified in the agreement.

***United States v. Grimm***, 738 F.3d 498 (2d Cir. 2013) The defendants were charged with bid-rigging. The conspiratorial agreement occurred more than five years prior to the return of the indictment. Though some of the contract payments occurred within five years of the indictment, the Second Circuit held that these payments were not sufficient to bring the conspiracy within the statute of limitations.

***United States v. Rojas***, 718 F.3d 1317 (11th Cir. 2013) The offense of marriage fraud is completed when the marriage occurs – it is not a continuing offense. Therefore, the statute of limitations begins to run on the date of the marriage.

***United States v. Franco-Samtiago***, 681 F.3d 1 (1st Cir. 2012) The defendant was charged with being a member of a conspiracy that participated in five armed robberies. Only the last robbery occurred within five years of the return of the indictment. The government agreed that the defendant was not involved in the first three robberies. The evidence was sufficient to demonstrate his participation in the fourth. After he was convicted of the conspiracy count, the government conceded at sentencing that he was not involved in the fifth robbery. The First Circuit concluded that the defendant only agreed to participate in one conspiracy and that he could not be held responsible for participating in the overarching conspiracy that involved several other defendants and the other four robberies. Though he agreed to join the conspiracy, the conspiracy that he agreed to join only involved the one robbery that occurred outside the statute of limitations. NOTE: The United States Supreme Court, in Musacchio v. United States, 136 S. Ct. 1737 (2016), held that raising a statute of limitations defense for the first time on appeal was too late and not subject to plain error review.

***United States v. Jenkins***, 633 F.3d 788 (9th Cir. 2011) The government must submit a sworn affidavit when it seeks to toll the statute of limitations pursuant to 18 U.S.C. § 3292 (tolling the limitations period during the government's effort to obtain evidence in a foreign country). See also United States v. Trainor, 376 F.3d 1325 (11th Cir. 2004).

***United States v. Borman***, 559 F.3d 150 (3rd Cir. 2009) The statute of limitations expired on one of the conspiracy counts in the indictment. The conspiracy to receive bribes from contractors in exchange for an award of public benefits was accomplished when the last bribe was received. The fact that the bribes were disguised as "loans" and that the defendant refused to repay the "loan" on a later date did not extend the life of the conspiracy.

***United States v. Turner***, 548 F.3d 1094 (D.C. Cir. 2008) Determining when a conspiracy end is important in numerous contexts, including a defense that the statute of limitations has expired; a claim that a co-conspirator statement was not made during the course of a conspiracy and, as in this case, in deciding which version of the Sentencing Guidelines to apply i.e., a possible Ex Post Facto claim. In this case, the conspirator forged certain documents that enabled them to receive money as the beneficiary of another person who died. The forgery and receipt of the money occurred in 2001. When questioned by the police about these events in 2006, the conspirators lied. The D. C. Circuit held that the conspiracy ended in 2001 when the objects of the conspiracy were achieved. See generally Grunewald v. United States, 353 U.S. 391 (1957); Krulewitch v. United States, 336 U.S. 440 (1949); Lutwak v. United States, 344 U.S. 604 (1953).

***United States v. Seale***, 542 F.3d 1033 (5th Cir. 2008) The defendant allegedly committed the offense of kidnapping in 1964. He was indicted in 2007. Though at the time of the offense, there was no statute of limitations, because kidnapping was considered to be a capital offense in 1964, when the death penalty was eliminated as an option for kidnapping cases (in 1972), the five-year limitations period became applicable. 18 U.S.C. § 3282. The five-year statute of limitations barred the prosecution in this case. EN BANC RECONSIDERATION GRANTED, 550 F.3d 377 and this decision was affirmed without opinion by the en banc court which divided 9-9.

***United States v. Grenier***, 513 F.3d 632 (6th Cir. 2008).The defendants faxed a false statement to the SEC on July 10. A copy of the statement was mailed and received by the SEC on July 11. The statute of limitations period began on July 10.

***United States v. Kozeny***, 541 F.3d 166 (2d Cir. 2008) If the government intends to toll the statute of limitations pursuant to 18 U.S.C. § 3292 to facilitate the acquisition of evidence in a foreign country, the government must apply for tolling prior to the expiration of the statute of limitations.

***United States v. Gunera***, 479 F.3d 373 (5th Cir. 2007) The agents were aware of the defendant's presence in the country more than five years prior to the filing of the charges and the illegal reentry charge, therefore, was barred by the statute of limitations.

The defendant reentered illegally and then applied for temporary protected status. More than five years later, the charges were filed.

***United States v. Arias***, 431 F.3d 1327 (11th Cir. 2005) The defendant introduced sufficient evidence to warrant an instruction on the law of withdrawal from the conspiracy – and thus a statute of limitations defense. The defendant, a doctor, was charged with conspiring with others to defraud Medicare. More than five years prior to the indictment, he wrote a letter to Medicare, stating that he no longer would be a Medicare provider at the facility where the crime was being committed, thus signaling his withdrawal from the conspiracy to other conspirators who had previously relied on his participation in the program as a means to commit the crime.

***United States v. Atiyeh***, 402 F.3d 354 (3rd Cir. 2005) The government's request to toll the statute of limitations for the purpose of obtaining foreign evidence (18 U.S.C. § 3292) must be made before the statute of limitations otherwise expires.

***United States v. Trainor***, 376 F.3d 1325 (11th Cir. 2004) The government may apply for suspension of the statute of limitations when it seeks evidence located outside the country. 18 U.S.C. § 3292(a)(1). In this case, the Eleventh Circuit holds that an unsworn application submitted to a foreign government does not adequately establish that evidence of the charged offense is actually located in the foreign country. Therefore, because the government did not make an adequate showing under § 3292(a)(1), the indictment in this case was dismissed on statute of limitations grounds.

***United States v. Dunne***, 324 F.3d 1158 (10th Cir. 2003) Making a false statement is not a continuing offense for statute of limitations purposes.

***United States v. Reitmeyer***, 356 F.3d 1313 (10th Cir. 2004) When a defendant files a false claim with the government, the clock starts ticking on the statute of limitations. A Major Fraud Act violation is not a continuing offense that includes the period of time when the fruits of the crime are received. The offense makes it a crime to "execute a scheme" to defraud. The execution occurs when the fraudulent claim is submitted.

***United States v. Midgley***, 142 F.3d 174 (3rd Cir. 1998) As part of a plea agreement, the government dismissed certain counts of the indictment. Three years later, while in custody, the defendant filed a successful collateral attack of his conviction. The Third Circuit held that the government could not reinstate the dismissed counts in anticipation of a new trial. The Statute of Limitations had expired in the interim and the government was not entitled to have the trial court simply "re-instate" the dismissed counts, notwithstanding the expiration of the statute of limitations. Nor was the statute "equitably tolled" during the pendency of the defendant's incarceration absent a showing of intentional inducement or trickery by the defendant.

***United States v. Gilbert***, 136 F.3d 1451 (11th Cir. 1998) In a bankruptcy fraud concealment of assets case, the statute of limitations does not begin to run until the debtor is discharged or denied a discharge. 18 US.C. § 3284. Here, the court held that if the defendant converts the corporate bankruptcy from a Chapter 11 to a Chapter 7, thus precluding discharge, the statute of limitations begins to run at that time. The prosecution in this case was barred by the statute of limitations.

***United States v. Meador***, 138 F.3d 986 (5th Cir. 1998) The statute of limitations is tolled during the time that the government is pursuing evidence in a foreign country. 18 U.S.C. § 3292(b). The tolling period ends when "final action" is taken by the foreign country in response to a request for assistance. In this case, the court decided that "final action" occurs when the foreign government regards its efforts as complete and communicates that fact to the United States.

***United States v. Grimmett***, 150 F.3d 958 (8th Cir. 1998) The defendant filed a pretrial motion to dismiss on the grounds that she withdrew from the drug conspiracy more than five years prior to the return of the indictment. The trial court denied the motion, holding that this was a fact question for the jury. The Eighth Circuit reversed: First, the court held that withdrawal from a drug conspiracy starts the statute of limitations clock, even though no overt act is required under 21 U.S.C. § 846. Second, the court held that a statute of limitations defense may be raised by a pretrial motion. If there are no disputed factual issues, then the judge should rule on the motion. If there are disputed factual issues (for example, whether the defendant continued to participate in the conspiracy), the judge may resolve the factual issue, or may defer to the trial jury.

***United States v. Spector***, 55 F.3d 22 (1st Cir. 1995) The defendant urged the prosecutor not to indict him, agreeing in writing to an extension of the statute of limitations for several days. As the next deadline approached, the defendant again agreed in writing to an extension of the statute, but, while the government orally agreed, no agent of the government ever signed the extension. The terms of the agreement provided that it would be effective upon being signed by the parties. The government's failure to sign this agreement was a fatal error and, when the indictment was returned several weeks later, it was barred by the statute of limitations.

***United States v. O'Bryant***, 998 F.2d 21 (1st Cir. 1993) A superseding indictment which supplants a timely filed indictment, still pending, is itself regarded as timely vis-a-vis a given defendant so long as it neither materially broadens nor substantially amends the charges against the defendant. In other words, the superseding indictment relates back to the filing date of the original indictment so long as a strong chain of continuity links the earlier and later charges.

***United States v. Podde***, 105 F.3d 813 (2d Cir. 1997) The defendant was charged with wire fraud and conspiracy. He later entered a guilty plea to CTR violations (as the law was understood pre-Ratzlaf). The plea was accepted, and the defendant was sentenced. Seven years later, after the Supreme Court decided Ratzlaf v. United States, 510 U.S. 135 (1994), the defendant successfully moved to withdraw his guilty plea. The government re-indicted the defendant on the original charges. The Second Circuit concluded that the re-indictment was barred by the statute of limitations.

***United States v. Knoll,*** 16 F.3d 1313 (2d Cir. 1994) The defendants were charged with bankruptcy fraud. 18 U.S.C. §152. Generally, the statute of limitations is five years. However, for cases involving concealment of a bankruptcy estate's assets, the limitations period does not begin until the debtor has been discharged, or a discharge is denied. 18 U.S.C. §3284. In this case, the defendants were charged with making a false declaration in order to conceal assets. This is a different offense than concealing assets. Therefore, the §3284 extended limitations period did not apply, and the limitation period began at the time the false declaration was made, which was more than five years prior to the return of the indictment. The indictment should have been dismissed. Criminal statutes of limitations are liberally construed in favor of repose, and no offense should be construed as continuing a limitations period unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

***United States v. Manges***, 110 F.3d 1162 (5th Cir. 1997) The conspiracy count in this mail fraud indictment was time-barred. The statute of limitations in a conspiracy case runs from the last overt act committed by a member of the conspiracy. In this case, though there was a mailing within the previous five years, the mail was posted by someone other than the defendant. This mailing was sufficient to support a mail fraud conviction but was not an overt act committed by a member of the conspiracy. Therefore, the conspiracy count was time-barred.

***United States v. Craft***, 105 F.3d 1123 (6th Cir. 1997) A statute of limitations defense may be decided by the trial court prior to trial pursuant to Rule 12(b), Fed. R. Crim. P. In this case, the defendant was charged with obstruction of justice and conspiracy to defraud the United States by creating fictitious documents to resurrect a civil action. The only act that occurred within five years of the indictment, however, was the filing of a notice of appeal which challenged the dismissal of the civil action despite the use of the fraudulent documents. The filing of the notice of appeal was not an overt act in furtherance of the conspiracy and, therefore, the statute of limitations barred this prosecution.

***United States v. Payne***, 978 F.2d 1177 (10th Cir. 1992) Defendant was charged with false representations of social security numbers. The last time the defendant presented the false social security number to a payor was more than five years prior to the indictment. Though the payor continued to rely on that number thereafter, the offense is not a "continuing crime" and therefore the statute of limitations barred this prosecution. See Toussie v. United States, 397 U.S. 112 (1970). The offense is complete when the last representation is made, not when the number is last used by someone to whom the representation is made.

***United States v. Edwards***, 968 F.2d 1148 (11th Cir. 1992) Because there was conflicting evidence as to when a drug importation offense was completed, the trial court committed reversible error in refusing to give an instruction on the statute of limitations defense.

***STATUTORY CONSTRUCTION (Rule of Lenity)***

***United States v. Santos***, 128 S. Ct. 2020 (2008) In a 4-1-4 decision, the Supreme Court held that the term "proceeds" in § 1956 refers to "profits" and not gross receipts. Thus, in a gambling case, such as this case, the money that is paid to runners and other participants/employees of the gambling activity does not amount to a transaction in proceeds, because this money does not represent the profit of the gambling venture. Justice Stevens, who provided the fifth vote, limited the holding (perhaps) to cases in which the money is not derived from the sale of contraband. The decision relies principally on the Rule of Lenity.

***Yates v. United States***, 135 S. Ct. 1074 (2015) Employing numerous rules of statutory construction, the Court concluded that the term "tangible object" in 18 U.S.C. § 1519 refers only to tangible objects that record or preserve information such as hard drives and flash drives. It does not apply to tangible objects that do not record or preserve information such as under-size fish, as in this case, that are concealed or destroyed, in order to prevent law enforcement from investigating a crime.

***United States v. Valle,*** 807 F.3d 508 (2d Cir. 2015) The defendant, a NYC police officer was given access through his job to a law enforcement website that allowed him to engage in certain investigations, including access to the NCIC. At home, at night, however, he accessed these sites to track down women who he fantasized raping. He never actually engaged in any such criminal conduct with the women. (See the discussion of this case in the topic Conspiracy). He was prosecuted for violating the Computer Fraud and Abuse Act. One provision of that Act provides that it is a crime to "intentionally access[] a computer without authorization or [to] exceed authorized access and thereby obtain[] information ... from any department or agency of the United States." 18 U.S.C. § 1030(a)(2)(B). The defendant was, in fact, permitted to access the NCIC, so his access to that site, alone, would not be a crime, unless his access for an unauthorized purpose is included in the criminal provision. The Second Circuit holds that the statutes is ambiguous, because "exceeds authorized access" could mean either that the defendant's "purpose" for accessing the site was beyond authorization, or it could mean that the defendant accessed a site that he was not authorized to access. Invoking the rule of lenity, the Second Circuit held that a conviction for accessing a site that the defendant was authorized to access, but not for a proper purpose, is not an offense under the CFAA.

***United States v. Kaluza***, 780 F.3d 647 (5th Cir. 2015) 18 U.S.C. § 1115 provides that, "Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose negligence . . . the life of any person is destroyed . . . shall be imprisoned." The issue in this case, which dealt with the Deepwater Horizon catastrophe, was whether this statute applied to every person employed by a steamboat. The Fifth Circuit, applying various rules of statutory construction – principally the rule of lenity – concluded that the statute was ambiguous and held that the statute does not apply to every employee. The court reasoned that if the statute applied to every person, the terms "every captain, engineer, pilot" would be entirely superfluous.

***United States v. Ashurov***, 726 F.3d 395 (3rd Cir. 2013) It is a crime under 18 U.S.C. §1546, to knowingly making a false statement under oath a document required by the immigration laws. It is also a crime "to knowingly present any such document

which contains any such false statement." This latter section is ambiguous regarding whether the document must be under oath. The word "such" suggests that the document must be under oath, but that second law only refers to a "false statement" being contained in the document. The Third Circuit, applying the Rule of Lenity, holds that the latter provision also requires proof that the document was made under oath.

***United States v. Miller***, 12-6501 (6th Cir. 2013) The defendant, a partner in a real estate investment partnership applied for a loan and falsely stated that the other partners had authorized the loan. This was false. Nevertheless, this did not constitute the crime of identity theft. The identity theft statute requires that the defendant "use" the identifying information to commit a crime (including making a false statement to a bank). The Sixth Circuit, however, relying on the Rule of Lenity, concluded that "use" requires that the defendant falsely claim to be the other person, not simply to lie about the other person's agreement.

***United States v. Izurieta***, 710 F.3d 1176 (11th Cir. 2013) The Eleventh Circuit analyzed a provision of the law that makes it a crime to import goods into United States "contrary to law." 18 U.S.C. § 545. The question the court confronted was "What does 'contrary to law' mean?" The government claimed that the violation of any statute or regulation that governs importing goods is a sufficient foundation for a criminal prosecution. The Eleventh Circuit, however, rejected this broad approach and held that in order to support a criminal prosecution, there must be a showing that Congress intended that a violation of the particular regulation would support a criminal prosecution. Where it is clear that a regulation was designed only to establish civil obligations and penalties, it may not be used to support a criminal prosecution.

***United States v. Costello***, 666 F.3d 1040 (7th Cir. 2012) The girlfriend of an illegal alien was not guilty of harboring under § 1324(a)(1)(A)(iii) simply by virtue of the fact the alien/boyfriend lived in her apartment. There was no evidence that she concealed the boyfriend or shielded him from detection. The court spends considerable time discussing the definition of the word "harboring" and concludes that it means more than simply providing a place to live. Various dictionaries were consulted, as well as Google in this endeavor to figure out the meaning of the word.

***United States v. Introcaso***, 506 F.3d 260 (3rd Cir. 2007) Firearms, such as short-barreled shotguns, that were manufactured prior to 1900, are not covered by the registration act, if the ammunition designed for that weapon is not being manufactured, nor is readily available. The government argued in this case that the ammunition designed for that weapon is not being manufactured, but regular and easily available twelve-gauge shells worked with this particular gun. The Third Circuit held that the statute was ambiguous – it was not clear if the exemption only applied if the ammunition originally designed for the weapon was not available, or if any ammunition that could be used with the weapon was not available. Applying the Rule of Lenity, the court held that the conviction could not be sustained.

## *SUBPOENAS*

***United States v. Llanez-Garcia***, 735 F.3d 483 (6th Cir. 2013) The defense attorney was sanctioned for issuing a Rule 17(c) subpoena that directed the witness to produce documents on a particular date that was not a scheduled court date. No court approval of the early compliance was obtained. The district judge held that the lawyer engaged in misconduct. The Sixth Circuit reversed the sanction order. The case includes a discussion of the conflicting rules regarding the issuance of a Rule 17(c) subpoena. Because the central issue was whether the attorney engaged in conduct that merited sanctions, the court did not conclusively decide whether a Rule 17(c) subpoena necessarily requires court approval. The Sixth Circuit held that this may be decided by district courts through local rules, standing orders, or on a case-by-case basis. For purposes of this case, however, the issue was sufficiently debatable that the attorney did not engage in intentional misconduct and was not acting in bad faith.

***United States v. Bahamonde***, 445 F.3d 1225 (9th Cir. 2006) The Ninth Circuit concluded that the federal regulation that requires the defendant to serve notice upon the United States Attorney, or a designated Department of Homeland Security official before serving a subpoena on an agent employed by Homeland Security is unconstitutional. The regulation, 6 C.F.R. § 5.44 et seq., requires a defendant to notify the U.S. Attorney of the desired testimony, in as much specificity as possible. The Ninth Circuit held that the lack of reciprocity in this discovery provision violated the Due Process concept announced in Wardius v. Oregon, 412 U.S. 470 (1973). A similar regulation governs subpoenas issued to DOJ employees, including FBI and DEA agents. 28 C.F.R. § 16.21.

## *TAPES AND TRANSCRIPTS*

***United States v. Adams***, 722 F.3d 788 (6th Cir. 2013) A judge may not alter a transcript of a difficult-to-understand or unintelligible tape that changes its meaning without prompting by either party. A judge may direct that certain portion of a transcript be removed, because the tape is unintelligible, or may make minor changes that do not alter the meaning. In this case, the judge made over 1,000 changes in the transcripts.

## *TAX OFFENSES*

***Cheek v. United States***, 498 U.S. 192 (1991) In this tax evasion prosecution, the district court erroneously instructed the jury that the defendant could be found guilty of tax evasion if he unreasonably believed that he had no obligation to pay taxes. That is, in order to establish the element of willfulness, the government must prove that the defendant in fact knew that he was evading taxes. A good faith misunderstanding of the law or a good faith belief that one is not violating the law negates willfulness, whether or not that claimed belief or misunderstanding is objectively reasonable.

***United States v. Boitano***, 796 F.3d 1160 (9th Cir. 2015) The defendant, an accountant, had not filed his tax returns in several years. At a scheduled meeting with an IRS agent, he handed over several years' worth of returns that included false information. The agent stamped the returns as having been received. The returns were never "filed" however in the IRS system. The defendant was prosecuted for providing false information on a tax return. Because the return was not filed, however, he could not be prosecuted under 26 U.S.C. § 7206.

***United States v. Miner***, 774 F.3d 336 (6th Cir. 2014) In order to convict a defendant of obstructing or impeding the due administration of federal tax laws (26 U.S.C. § 7212), the government must prove that the defendant was aware of and tried to thwart a pending IRS action and not simply routine administrative procedures such as those required to accept and process tax filings in the ordinary course. The court noted that § 7212's language is identical to 18 U.S.C. § 1503, and the construction of section 1503 in United States v. Aguilar, 515 U.S. 593 (1995), requires an awareness of the proceeding that the defendant is allegedly endeavoring to obstruct.

***United States v. Coplan***, 703 F.3d 46 (2d Cir. 2012) Various counts of conviction in this tax evasion and Klein conspiracy case were reversed on sufficiency grounds. The case involved the prosecution of various employees of Ernst & Young for devising and implementing fraudulent tax shelters.

***United States v. Vallone***, 698 F.3d 416 (7th Cir. 2012) In this lengthy opinion, the Seventh Circuit reviews the law governing good faith defense to charges of tax evasion. Though upholding the convictions, the court provides an extensive discussion of Cheek and the type of evidence that is admissible to prove that the defendant had a belief that his conduct was legal. See in particular, the discussion on page 449 – 460 of the opinion.

***United States v. Litwok***, 678 F.3d 208 (2d Cir. 2012) In order to be guilty of tax evasion, the government must show (1) the existence of a substantial tax debt, (2) willfulness of the nonpayment, and (3) an affirmative act by the defendant, performed with intent to evade or defeat the calculation or payment of the tax. The failure to file a return is not, in itself, sufficient to prove tax evasion. In this case, the defendant's tax evasion conviction on one count was affirmed but on two other counts the evidence was insufficient to show an affirmative act other than the failure to file.

***United States v. Herrera***, 559 F.3d 296 (5th Cir. 2009) The evidence in this case was insufficient to convict the defendant of tax evasion based on the transfer of money from his account into the account of his wife shortly after he was advised that his accounts would be levied. There was insufficient evidence that he orchestrated the transfers or that he willfully shifted the funds to avoid the levies.

***United States v. McKee***, 506 F.3d 225 (3rd Cir. 2007) The evidence was insufficient to prove that the defendant owed taxes during certain years, and consequently there was insufficient evidence to support a conviction for failure to file.

***United States v. Kayser***, 488 F.3d 1070 (9th Cir. 2007) When a defendant is indicted for tax evasion based on failing to report income, he may introduce evidence that there were unreported deductions that offset the income. He may do so, even if the "deductions" were reported in some different manner in the false tax return. In other words, a defense at trial which disproves the existence of a deficiency need not be consistent with the tax return that was filed. The defendant is also entitled to have the jury properly instructed on this theory.

***United States v. Kassouf***, 144 F.3d 952 (6th Cir. 1998) Title 26 U.S.C. § 7212(a) makes it a crime to corruptly endeavor to obstruct and impede the due administration of tax laws. The Sixth Circuit concludes that the government must prove (and allege) that there was a pending proceeding or investigation by the IRS of which the defendant was aware. It is not enough that the defendant engages in conduct that operates to conceal current financial transactions in order to evade tax and prevent IRS detection and scrutiny. Thus, a person who destroys financial records – before being told that his tax returns are to be audited – has not violated this statute.

***United States v. Marsh***, 144 F.3d 1229 (9th Cir. 1998) The defendants were charged with endeavoring to impede and obstruct the IRS. The IRS investigation was being handled out of the Northern District of California. The defendants' obstructive conduct, however, occurred in other districts. Venue was only appropriate where the "endeavor to obstruct" occurred, not where the impact was felt.

***United States v. Peters***, 153 F.3d 445 (7th Cir. 1998) This case contains a comprehensive discussion of the rules that regulate when the IRS civil division is required to cease an audit when the Service determines that a criminal prosecution is indicated. In short, "If, during an examination, an examiner discovers a firm indication of fraud on the part of the taxpayer, the tax return preparer, or both, the examiner shall suspend his activities at the earliest opportunity without disclosing to the taxpayer, the taxpayer's representative, or employees the reason for such suspension."

***United States v. Silkman***, 156 F.3d 833 (8th Cir. 1998) A formal tax assessment that has become administratively final is prima facie evidence of the asserted tax deficiency, and if unchallenged, it may suffice to prove this element of a tax evasion crime. But the assessment is only prima facie proof of a deficiency. The assessed deficiency may be challenged by the defendant accused of tax evasion, and the issue is one for the jury.

***United States v. Adkinson***, 158 F.3d 1147 (11th Cir. 1998) The government failed to prove that the defendants were guilty of a Klein conspiracy. The government's theory was that the defendants conspired to impair the IRS by concealing income from bank loans and by failing to file or filing false tax returns. But the government failed to point to a single conversation among the defendants regarding taxes, much less demonstrating an intent to avoid the payment of taxes. The mere failure to report the receipt of money as income does not, by itself, establish a Klein conspiracy. Moreover, the failure to pay taxes must be shown to

be the object of the conspiracy, not merely a foreseeable consequence of some other conspiratorial scheme. If impeding the IRS is only a collateral effect of an agreement, rather than one of its purposes, than a conviction for a Klein conspiracy cannot stand. In this case, the entire focus of the government's case was the allegation that the defendants engaged in a bank fraud scheme this aspect of the case was reviewed in another decision, 135 F.3d 1363 (11th Cir. 1998). The fact that the defendants endeavored to conceal their supposedly ill-gotten gains does not automatically translate into a Klein conspiracy.

***United States v. Regan,*** 937 F.2d 823 (2d Cir. 1991) The trial court erred in failing to give a particularized good faith defense instruction keyed to the specific facts of this case. The defendants, charged with tax fraud, argued that the transactions were not taxable under their reading of a particular section of the Tax Code. The trial court failed to identify that section in the instructions and failed to explain that if the defendants' theory was believed, they were entitled to an acquittal.

***United States v. Gaumer***, 972 F.2d 723 (6th Cir. 1992) Pursuant to Cheek, the defendant should have been given an opportunity to read tax protestor articles into the record, as well as portions of the Congressional Record and old Supreme Court decisions in order to show the basis of his belief that he was not obligated to pay taxes.

***United States v. Eaken,*** 995 F.2d 740 (7th Cir. 1993) In order to convict a person of tax evasion, the government must prove that the defendant acted willfully, that there was a tax deficiency and an affirmative act constituting an attempt to evade or defeat the payment of the tax. In considering defendant's motion for bond pending appeal, the appellate court, while finding evidence that the defendant was engaged in embezzlement and that he attempted to hide the funds he had embezzled, failed to find any effort to engage in acts designed to defeat the payment of taxes. Attempts to hinder detection of the local crime of embezzlement are not the same as attempting to evade the payment of taxes. Thus, bond pending appeal was appropriate.

***United States v. Harris***, 942 F.2d 1125 (7th Cir. 1991) The defendant received money from a wealthy man who explained that he enjoyed giving money to young women. The woman was the older man's mistress. The failure to report this "income" could not be the basis of a tax evasion charge: she could not form the requisite intent to violate the law, because the law was far from clear that such payments amounted to income.

***United States v. Reynolds***, 919 F.2d 435 (7th Cir. 1991) The defendant was charged with filing a false tax return. He filed a 1040EZ form when he in fact had income other than earned income. However, every statement on the 1040EZ form was truthful, though all his unearned (illegal) income was not listed. This was not sufficient to sustain a false tax return charge. The specific false statement – Line 7 – was not, technically, false. He could be found guilty of tax evasion, but not filing a false return.

***United States v. Sinigaglio,*** 942 F.2d 581 (9th Cir. 1991) 26 U.S.C. §6103(h)(5) provided that the Treasury Department must (upon request) provide information to the defendant about any prospective juror who has been investigated or audited by the IRS if the defendant is charged with a tax offense. The audit history may not be arbitrarily limited by the government (as in this case to the past six years). Though the court does not hold that this is reversible error per se, it was reversible in this case where the voir dire did not eliminate the significant risk of prejudice.

***United States v. Salerno***, 902 F.2d 1429 (9th Cir. 1990) The defendants embezzled millions of dollars from the casino where they were employed. The result of their embezzlement was that the casino ended up filing inaccurate tax returns. The defendants were prosecuted for aiding and abetting the preparation of a false tax return. However, there was no evidence that the employees' embezzlement activities were designed to have the casino file false tax returns. Therefore, the government failed to prove the willfulness requirement of the offense.

***United States v. Harting,*** 879 F.2d 765 (10th Cir. 1989) The trial court erred in failing to give an instruction on good faith in a prosecution for failing to file federal income tax returns. The defendant presented evidence that he believed that he was not required to file a return and that he was acting in good faith.

***United States v. Morris***, 20 F.3d 1111 (11th Cir. 1994) The trial court committed reversible error by failing to instruct the jury on the good faith defense, as requested by the defendant in this prosecution for filing a false income tax return. The court's instruction defining the terms "willfully" and "knowingly" was not an adequate substitute. Among other things, the charge did not explain that a good faith – yet objectively unreasonable – belief in the correctness of the return, would be a complete defense.

***United States v. Lankford,*** 955 F.2d 1545 (11th Cir. 1992) In defense of tax evasion charges, the defendant sought to introduce expert evidence that the money he received could be characterized as a gift rather than a loan. The trial court committed reversible error by excluding this evidence. Such expert testimony is highly relevant to the assessment of whether the defendant willfully violated the tax laws.

***United States v. Pritchett***, 908 F.2d 816 (11th Cir. 1990) The evidence was insufficient to support the defendant's conviction for conspiracy to evade income taxes. The government failed to show that the defendant was aware that his conduct which aided a co-defendant in hiding assets resulted in the other party's attempt to evade taxes.

***United States v. Kaiser***, 893 F.2d 1300 (11th Cir. 1990) The defendant pled guilty to charges of tax evasion and to a charge of filing a false tax return. The fact that he pled guilty did not prevent him from later challenging the conviction on the basis of double jeopardy. Whether the double jeopardy clause barred prosecution for both offenses could be determined from the face of the indictment.

## *TELECOMMUNICATIONS, ALTERING EQUIPMENT*

***United States v. Harrell,*** 530 F.3d 1051 (9th Cir. 2008) In the context of deciding what amounts to contraband (and thus not available to be returned to a claimant pursuant to Rule 41(g)), the Ninth Circuit canvasses the various applicability of 18 U.S.C. § 1029(a)(7), which makes it a crime to knowingly and with intent to defraud, produce, traffic in, or possess a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications services. Various devices possessed by the defendant in this case did not qualify as altered devices under the scope of the statute.

## *TELEPHONE HARASSMENT*

***United States v. Tobin***, 480 F.3d 53 (1st Cir. 2007) The defendant was convicted of violating 47 U.S.C. § 223(a)(1)(D), which makes it a federal crime to make or cause the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number. The defendant, a Republican Party official, hired a company to use technology to continuously call the phone numbers of various Democratic Party offices, thereby tying up their lines on election day. The First Circuit reversed the conviction: the instructions to the jury did not require proof that the called party was harassed, as opposed to inconvenienced. There must be proof of an intent to cause an adverse reaction in the called party in order to violate this statute as written. On the second trip to the First Circuit, the court held that the mens rea element of the offense requires proof that the defendant had the purpose of harassing (and not just knowledge that the probable consequences of his conduct would be harassment). United States v. Tobin, 552 F.3d 29 (1st Cir. 2009).

## *THEFT OFFENSES*

***United States v. Osborne,*** 886 F.3d 604 (6th Cir. 2018) In order to be convicted of a § 641 offense, the property stolen must belong to the U.S. government. In this case the money appropriated by the defendant had been given to the contractor who helped recruit soldiers for the Air National Guard. Once the money was given to the contractor, it lost its federal government character, because even if it were not all spent on recruitment activities, the money was not returned to the government.

***United States v. Jiminez,*** 705 F.3d 1305 (11th Cir. 2013) 18 U.S.C. § 666 is often applied to employees of an entity that receives federal funds and who accepts money (either a bribe or a gratuity) to benefit the payor. The statute also applies, however, to agents of an entity that receives federal funds who misapplies money of the entity. In this case, the defendant encouraged his employer to purchase books that, unbeknownst to his employer, were actually written by the defendant's wife. The defendant failed to reveal his conflict of interest. The Eleventh Circuit held that this was neither an honest service fraud offense, nor a § 666 violation. Skilling foreclosed the theory that a conflict of interest could be the basis for an honest services fraud prosecution. The § 666 offense was invalid, because the defendant was not the person responsible for spending the funds of the agency.

***United States v. Aleynikov***, 676 F.3d 71 (2d Cir. 2012) The defendant, a computer programmer, developed sophisticated "source codes" for the high frequency trading system used by Goldman Sachs. He was offered another job and took the source code with him. He was charged with economic espionage (18 USC § 1832(a)) and a violation of the National Stolen Property Act (18 USC § 2314). The Second Circuit reversed the conviction on both counts. The Stolen Property Act outlaws the theft of "goods, wares, merchandise, securities or money" and the court decided that the source code does not qualify as "goods, wares or merchandise." Relying on the decision in United States v. Bottone, 365 F.2d 389 (2d Cir. 1966), the court held that a person who memorizes a secret formula and sells it to a competitor has now stolen goods. See also Dowling v. United States, 473 U.S. 207 (1985) (Stolen Property Act does not apply to interstate bootleg record operation); United States v. Brown, 925 F.2d 1301 (10th Cir. 1991); United States v. Stafford, 136 F.3d 1109 (7th Cir. 1998). In short, the interstate transportation of stolen intangible property does not violate § 2314. The court also noted that transporting the source code on a flash drive did not alter the result, because the flash drive was not the item alleged to be stolen. Turning to the Economic Espionage Act, the code requires that the defendant transmit information "that is related to or included in a product that is produced for or placed in interstate or foreign commerce." Because the source code was not produced for, or placed in, interstate commerce though it obviously facilitated Goldman Sachs' interstate sales, it could not be the focus of a § 1832 offense.

***United States v. Kapelioujnyj***, 547 F.3d 149 (2d Cir. 2008) The evidence in this § 2315 case was insufficient to prove that the defendant was aware that the stolen properly he was enlisted to help sell was worth at least $5,000.00. The government also failed to prove the interstate commerce element of the offense. Though the stolen property had traveled between New York and New Jersey, the defendant was not, at that time, a member of the conspiracy to sell the stolen property. The fact that the seller was attempting to get others to help sell the stolen item cannot be imputed to the defendant, who was never shown to have entered a conspiracy to sell stolen property across state lines.

***United States v. Lazarenko***, 564 F.3d 1026 (9th Cir. 2009) The defendant obtained money by fraud and deposited it into a specific bank account. Later, money was transferred out of that bank account. The government however, failed to introduce evidence that the same money that went in, was later transferred out. Under 18 U.S.C. § 2314, the government may not simply prove that money went into an account that was obtained by fraud, and sometime in the future money was transferred out, without some effort to trace the money to show that the stolen money was the money that crossed a state line.

***United States v. Sargent***, 504 F.3d 767 (9th Cir. 2007) The defendant, an employee of the Postal Service, stole certain forms from the Postal Service, the result of which was that customers were not required to actually pay for certain bulk mailings. The

forms themselves, however, did not have value in excess of $1,000 and consequently, the theft did not involve a thing valued at more than $1,000.00. The court noted that the forms were not negotiable instruments.

***United States v. Moore***, 504 F.3d 1345 (11th Cir. 2007) The defendants, husband, and wife, were charged with theft of Veterans Benefits. After the death of the mother of one of the defendants, the VA continued to direct deposit his benefits into an account which the defendant then converted to his own use. The defendants contended that they did not realize that they were not entitled to continue to receive the benefits upon the death of the veteran. That is, they claimed that they lacked knowledge that the money was "government funds" that they were using and that they did not take the money "willfully." Based on the evidence presented during the government's case in chief, there was simply no evidence that the defendants were aware that they were not entitled to the money. All that the government proved is that the mother died, the benefits continued to be deposited into the account and the defendants continued to use the money. There was no evidence of any notice to the defendants that they were not entitled to use the money or continue to receive benefits based on the death of the veteran.

***United States v. Ligon,*** 440 F.3d 1182 (9th Cir. 2006) In a case involving theft of government property, the government must prove that the stolen item has "value." 18 U.S.C. § 641. The government failed to prove that the stolen Indian artifacts had value. The government's argument – that the items were shown to have archaeological value – was not sufficient.

***United States v. Morgan***, 393 F.3d 192 (D.C. Cir. 2005) The defendant was the recipient of a stolen computer. He received it in Maryland and had no connection with the computer until he received it in Maryland. He was charged with receiving stolen property. Venue in D.C. was improper.

***United States v. Stafford***, 136 F.3d 1109 (7th Cir. 1998) The defendants carried across state lines codes that enabled them to cash checks. These codes were written down on a piece of paper. This does not amount to a violation of 18 U.S.C. § 2314. That offense requires the interstate transportation of stolen property, securities, or money. The piece of paper with a code written on it is not stolen property, though it enabled the defendants to steal money.

***United States v. Scanzello***, 832 F.2d 18 (3rd Cir. 1987) An indictment which charged the defendant with conspiring to steal goods from interstate shipments can only support a misdemeanor conviction because of the failure to allege the value of the stolen goods.

***United States v. Klingler***, 61 F.3d 1234 (6th Cir. 1995) 18 U.S.C. §641 makes it a federal crime to steal, convert, or embezzle any federal money. 18 U.S.C. §649 makes it a federal crime to fail to deposit federal money which is required to be deposited according to the Secretary of the Treasury. The defendant in this case was a customs broker, a private person who was licensed by the Customs Service to collect duties from importers of goods. She collected the money and stole it. At no time was the money the property of the federal government, despite the fact that it was collected by the defendant to be paid to the federal government. Therefore, the defendant could not be prosecuted under either of these statutes.

***United States v. Howard***, 30 F.3d 871 (7th Cir. 1994) The defendant obtained a loan from the SBA to rebuild his ice cream parlor. The SBA was named as a loss payee on the fire insurance policy. The defendant later removed the SBA from the insurance policy. The shop later burned down, and the defendant kept the proceeds from the insurance company. This did not support a conviction under 18 U.S.C. §641. A defendant cannot convert government property when that which is converted is merely a security interest held by the government.

***Ward v. Lockhart***, 841 F.2d 844 (8th Cir. 1988) Defendant attempted to sell stolen musical instruments. When questioned by the police officer at the pawnshop, the defendant indicated that he had his credentials in his car. Rather than returning to the police officer, the defendant sped away. The defendant also made contradictory statements to the police about his acquisition and possession of the musical instruments. Nevertheless, the Eighth Circuit holds that the circumstantial evidence was insufficient to sustain the defendant's conviction for burglary.

***United States v. Johnson***, 812 F.2d 1329 (11th Cir. 1986) It is not a proper jury instruction to state that the jury would be "justified" in inferring that the possessor of stolen property committed the theft unless the possession is "explained to the satisfaction of the jury." This is an improper charge which shifts the burden of proof.

## *THREATENING THE PRESIDENT*

***United States v. Lincoln***, 403 F.3d 703 (9th Cir. 2005) Title 18, U.S.C. § 871 makes it a crime to threaten the President of the United States. In this case, the defendant's letter did not amount to a "true threat" either in, or out, of context. The court characterized the defendant's letter as a crude means of exercising his First Amendment rights.

## *THREATENING COMMUNICATIONS*

***Elonis v. United States***, 135 S. Ct. 2001 (2015) In order to be guilty of making an unlawful interstate threat, it is not enough that the defendant's rants on Facebook would be perceived by others as threatening. The government must prove that the defendant intended the statements as threats. There must be subjective intent to threaten the listener, which is not satisfied simply with proof that a reasonable listener would feel threatened.

***United States v. Martinez***, 800 F.3d 1293 (11th Cir. 2015) Conviction reversed based on a jury instruction that was erroneous in light of Elonis.

***United States v. Houston***, 792 F.3d 663 (6th Cir. 2015) The defendant was convicted based on an instruction that did not comply with the Elonis standard. This was plain error requiring reversal of the conviction.

***United States v. Heineman***, 767 F.3d 970 (10th Cir. 2014) Anticipating the decision in Elonis, the Tenth Circuit held that unless there is proof that the defendant subjectively intended to instill fear in the recipient, a conviction for violating § 875(c) may not be sustained. See also United States v. Wheeler, 776 F.3d 736 (10th Cir. 2015) (same).

***United States v. Stock***, 728 F.3d 287 (3rd Cir. 2013) The defendant was charged with violating 18 U.S.C. §875. The Third Circuit held that "the word 'threat' in § 875(c) encompasses only communications expressing an intent to inflict injury in the present or future." Thus, a general threat that a person deserves to be killed is not sufficient to prove a threat under §875. In this case, the defendant wrote a post on Craigslist stating that he had been searching for some particular police officer so that he could beat him up, but couldn't find him. He did not say that the search would continue, or that he had any intent to harm him in the future. However, he did state that he wished that the officer would die. The Third Circuit held that this "wish" was sufficient to satisfy the "future intent" element of the offense. The Third Circuit held that the district court had the authority to determine whether the indictment was sufficient to allege an offense, because the precise "threat" made by the defendant was set forth in the indictment.

***United States v. White***, 670 F.3d 498 (4th Cir. 2012) It is a federal crime to transmit interstate "any threat to injure the person of another." 18 U.S.C. § 875. Several counts of conviction were affirmed in this case, but one count was found to have insufficient evidentiary support, because the "threats" did not show an immediate intent to inflict harm on the recipient.

***United States v. Havelock,*** 619 F.3d 1091 (9th Cir. 2010) The statute that makes it a federal crime to mail a threatening communication to another person – 18 U.S.C. § 876(c) – requires that the mailing be to a person, not to an institution, or a company. This case was re-heard with the same holding, 664 F.3d 1284 (9th Cir. 2012).

## *TRANSACTIONAL IMMUNITY*

***United States v. Castaneda***, 162 F.3d 832 (5th Cir. 1998) The defendant entered into an oral transactional immunity agreement that obligated him to "tell everything he knew" about corrupt practices connected with DUI prosecutions in Brownsville, Texas. The government later indicted the defendant, contending that he did not fulfill his obligation. The Fifth Circuit reversed the conviction: the government failed to prove by a preponderance of the evidence that the defendant materially breached. A breach is not material unless the non-breaching party is deprived of the benefit of the bargain. In this case, the defendant provided considerable information about the corruption scheme. Though the defendant omitted to tell the government certain things, the government received the benefit of its bargain, and the relatively insignificant omissions were not sufficient to constitute a breach of the agreement.

## *TRAVEL ACT*

***United States v. Zolicoffer***, 869 F.2d 771 (3rd Cir. 1989) The defendant was convicted of a Travel Act offense based on his acts of trafficking in cocaine. However, there was no evidence that the defendant acted or attempted to act after his interstate travel. The mere act of deplaning and entering a terminal cannot be separated from the actual act of travel and thus an essential element of the offense was missing. The defendant must at least do something to further the illegal activity, though the post-travel activity need not be itself illegal.

***United States v. Montford***, 27 F.3d 137 (5th Cir. 1994) The defendants sought to avoid the reach of Mississippi gambling statutes by gambling on a boat which traveled outside the three-mile limit. They were prosecuted under the Travel Act for traveling in foreign commerce to accomplish the gambling. They were also prosecuted under 18 U.S.C. §1084. The cruise ship, however, did not travel in foreign commerce because it never traveled to another country, or into another country's waters.

***United States v. Roberson***, 6 F.3d 1088 (5th Cir. 1993) In order to constitute a violation of the Travel Act, the defendant's conduct must be part of a criminal enterprise, not just an isolated act of criminality, or even one of many sporadic acts. The government failed in this case to prove the existence of an enterprise.

***United States v. Holcomb***, 797 F.2d 1320 (5th Cir. 1986) The defendant was the accountant for a business which operated a prostitution ring. There was no evidence that the accountant was aware that the prostitutes traveled across state lines. Consequently, the accountant's conviction as an aider and abettor of a travel act violation could not be upheld.

***United States v. Barry***, 888 F.2d 1092 (6th Cir. 1989) The Sixth Circuit holds that the use of the mails in a purely intrastate mailing is not sufficient to constitute a Travel Act violation. 18 U.S.C. §1952(a) punishes the use of any facility in interstate commerce, including the mail, with intent to commit or facilitate unlawful activity. This does not include the use of the mails which do not cross state boundaries.

***United States v. Pollock***, 926 F.2d 1044 (11th Cir. 1991) The evidence failed to support the defendant's Travel Act conviction. The defendant was stopped and searched on I-75 and was found in possession of two kilograms of cocaine. In order to be guilty of violating 18 U.S.C. §1952, the defendant must travel interstate to promote, carry on, or facilitate, any unlawful activity. "Unlawful activity" is defined as "any business enterprise involving narcotics." The government in this case failed to prove that the travel from Florida to Georgia establishes the kind of continuous course of conduct required to establish a "business enterprise" as contrasted with casual and sporadic drug involvement. Merely being familiar with the mechanics of the drug trade and the fact that the defendant had a prior drug conviction, is a far cry from establishing that he was engaged in a continuous course of drug business activity.

***United States v. Bates***, 840 F.2d 858 (11th Cir. 1988) One single act involving the transportation of narcotics across state lines cannot constitute a “business enterprise” as described in the Travel Act, 18 U.S.C. §1952(a)(3). There must be continuous conduct rather than sporadic casual involvement in illegal activity.

***United States v. Jones***, 909 F.2d 533 (D.C. Cir. 1990) Four women were prosecuted under the Travel Act for their participation in a prostitution ring. In order to prosecute someone for using a facility in interstate commerce for the purpose of violating a state law, the prosecution must show the activity was, in fact, unlawful under a specific state law. Furthermore, the government must prove that the defendant had the intent, with respect to each element of the relevant state offense. In instructing the jury in this case, the district court read the prostitution-related statutes of the relevant states, but did not adequately charge the jury, as a state court would, on the elements of those offenses. Because of this failure, all Travel Act convictions in this case were reversed.

## *TRANSCRIPTS*

***United States v. Thompson,*** 482 F.3d 781 (5th Cir. 2007) The trial court erred in permitting the government to play a silent video, while simultaneously showing a scrolling transcript, even though there was no sound coming from the video. The transcript was based on an audio recording that was made at the time of the transaction, but the audio tape was never played for the jury. Harmless error.

***Kennedy v. Lockyer***, 379 F.3d 1041 (9th Cir. 2004) The state trial court’s refusal to provide a transcript of earlier pretrial hearings that preceded the first trial (which resulted in a hung jury) to the indigent defendant violated his constitutional right to due process and required granting a writ. See Britt v. North Carolina, 404 U.S. 226 (1971). Britt is not limited to transcripts of prior trial proceedings.

***United States v. Morales-Madera***, 352 F.3d 1(1st Cir. 2003) When Spanish language tapes are introduced in evidence, the court should also admit English translated transcripts. The transcripts should be introduced in evidence and the court should not instruct the jury that the tapes, and not the transcripts, are the only evidence.

***United States v. Holton***, 116 F.3d 1536 (D.C. Cir. 1997) In great depth, the court reviews the various procedures that have been used around the country in admitting transcripts of undercover tapes. The three approved methods of admitting transcripts: (1) by stipulation of the parties; (2) by the court deciding which of the parties' transcripts is accurate; (3) allowing the jury to consider alternative transcripts offered by both parties. The court also held that the trial court retains the authority to exclude transcripts altogether, or to decline to allow the jury to consider transcripts while deliberating, though the preferred practice is to allow the jury to have the transcript, with appropriate cautionary instructions, during deliberations.

***Fullan v. New York State Corrections Commissioner***, 891 F.2d 1007 (2d Cir. 1989) New York State courts require that a free transcript be given only to indigent appellants who proceed pro se or with assigned as opposed to retained counsel. This violates the defendants’ right to equal protection. If someone else pays for an attorney, the State must still pay for the transcript if the defendant is, in fact, indigent.

***United States v. Pulido***, 879 F.2d 1255 (5th Cir. 1989) The defendant, proceeding in forma pauperis, sought a free transcript of a prior trial which resulted in a mistrial. The Fifth Circuit holds that there is no burden on the defendant to make a showing of particularized need; rather, the court should consider the length of time between the proceedings, whether the same lawyer was involved in the prior case as is involved in the pending litigation, and whether there are adequate available alternatives.

***Riggins v. Rees***, 74 F.3d 732 (6th Cir. 1996) The defendant, who is indigent, already endured two mistrials. Prior to the third trial, he requested transcripts of the first two trials. The state trial court erred in denying this request. Offering the court reporter’s tapes was not an adequate substitute. See generally Britt v. North Carolina, 404 U.S. 226 (1971).

***United States v. Segines***, 17 F.3d 847 (6th Cir. 1994) The parties could not agree on a transcript of the undercover tapes. During an in-camera review of the tape and the government-prepared transcript, the trial judge stated that he couldn’t make out portions of the tape and otherwise indicated that the transcripts were not accurate. Nevertheless, over objection, the court allowed the jury to have the transcripts. This was error. Also, the trial court had permitted the government to introduce a composite tape, and never admitted the original tapes. Nevertheless, during deliberations, the jury asked for the originals, which were furnished to them. This, too, was reversible error: the trial judge had never listened to the originals, and they were never admitted into evidence.

***United States v. Wilson***, 16 F.3d 1027 (9th Cir. 1994) The transcript in this case was so perforated with missing pages, missing volumes of testimony and an unintelligible pagination system that the conviction was reversed, and a new trial ordered.

## *VENUE*

***United States v. Rodriguez-Moreno***, 119 S. Ct. 1239 (1999) A §924(c) firearm offense can be tried in any district where the underlying crime of violence occurred, even if the gun is not possessed or used in that district. In this case, the defendant kidnapped the victim and carried him through various states. In one state, Maryland, the defendant possessed a gun in connection with the kidnapping. The defendant was tried in New Jersey, however, one of the states in which the kidnapping occurred, but not in which the defendant ever possessed the gun. The Court holds that venue was proper in New Jersey.

***United States v. Orona-Ibarra***, 831 F.3d 867 (7th Cir. 2016) The defendant was “found” in Texas by immigration officials. That is where the crime of illegal reentry occurred. Venue was not proper, therefore, in Illinois, where the case was tried. The case had been transferred to Illinois, because that was where he had originally been placed on probation.

***United States v. Auernheimer***, 748 F.3d 525 (3rd Cir. 2014) In this Computer Fraud and Abuse Act prosecution, the Third Circuit held that the government failed to prove that the defendant’s offense occurred in New Jersey and therefore, venue for this prosecution was not proven in New Jersey. The venue defect also affected the identity theft count of the indictment.

***United States v. Cabrales,*** 118 S. Ct. 1772 (1998) A cocaine conspiracy existed in Missouri and proceeds from the cocaine sales were obtained in Missouri. The funds were then transferred to Florida where the money was deposited in a bank and withdrawn in a way that violated CTR laws and therefore constituted both §1956 and §1957 money laundering. The defendant was charged in the Missouri District Court with the money laundering activity in Florida; for purposes of the charges in this appeal, she was not charged with participating in the drug sales in Missouri that generated the tainted funds, or with transferring the money from Missouri to Florida. She deposited and withdrew the money in Florida. Venue for the money laundering offenses was not in Missouri. Though 18 U.S.C. §3237(a) provides that for offenses begun in one district and completed in another, such offenses may be prosecuted in any district in which the offense was begun, continued, or completed, the money laundering offenses in this case were begun, continued, and completed in Florida.

***United States v. Thomas,*** 690 F.3d 358 (5th Cir. 2012) Venue for the attempt crime was not proper in Texas. Though the conspiracy offense could be prosecuted in Texas based on the conduct of defendant’s co-conspirators, the attempt offense could only be prosecuted where the defendant took substantial steps toward the commission of the crime.

***United States v. Jefferson***, 674 F.3d 332 (4th Cir. 2012) Venue for a wire fraud offense is where a telephone call is made, or the recipient is located, not where the “scheme” is devised. The transmission of the call is the actus reus of the offense.

***United States v. Tzolov***, 642 F.3d 314 (2d Cir. 2011) The defendant was charged with securities fraud. The only connection to the Eastern District of New York was the fact that he flew through JFK Airport on the way to meeting with some of the investors who were defrauded. The Second Circuit held that this did not establish venue in the E.D.N.Y.

***United States v. Smith***, 641 F.3d 1200 (10th Cir. 2011) Venue for a false statement prosecution is where the statement was made. In this case, the government sought to prosecute the defendant in the jurisdiction that was the subject matter of the false statement. The government argued that there was a ‘substantial contacts” test for venue. The Tenth Circuit rejected this theory.

***United States v. Foy***, 641 F.3d 455 (10th Cir. 2011) Venue for an attempt crime is not proper in the district where other people involved in the attempted offense engage in the preparatory conduct if the defendant himself does not engage in such conduct in that district. Venue by imputation is appropriate in a conspiracy case, but not in an attempt case.

***United States v. Clenney***, 434 F.3d 780 (5th Cir. 2005) Venue in this kidnapping case was not proper in the district of the child’s primary residence, or the residence of his mother. The court rejected the government’s argument that in a case of international parental kidnapping, venue is proper in the district where the parent whose parental rights were violated resides.

***United States v. Ramirez***, 420 F.3d 134 (2d Cir. 2005) Venue in New York was not proper in this visa and mail fraud case. The defendant submitted documents to the Department of Labor in New York which falsely certified that certain aliens had highly specialized knowledge and that they would be hired by the defendant’s employer. These applications were then submitted with a visa petition to the INS in Vermont. The Second Circuit held that the submission of the applications in New York was merely preparatory to the charged offense of visa fraud.

***United States v. Strain***, 396 F.3d 689 (5th Cir. 2005) Venue in this fugitive harboring case was not proper in the Western District of Texas. Although the defendant was aware that there was a warrant for the fugitive, there was no act of harboring that occurred in the district where the trial was conducted. The mere failure to disclose a witness’s whereabouts does not constitute harboring a fugitive. There must be some affirmative act of concealment or aiding the fugitive in his fugitivity. After rehearing the case, the Fifth Circuit further held that granting a judgment of acquittal was an appropriate albeit not necessarily the exclusive remedy. The court recognized that a remand for trial in the appropriate venue was an alternative remedy. 407 F.3d 379.

***United States v. Morgan***, 393 F.3d 192 (D.C. Cir. 2005) The defendant was the recipient of a stolen computer. He received it in Maryland and had no connection with the computer until he received it in Maryland. He was charged with receiving stolen property. Venue in D.C. was improper.

***United States v. Salinas***, 373 F.3d 161 (1st Cir. 2004) Proper venue for a passport fraud prosecution is in the district where the defendant made the false statement to the Postal Service employee in the process of applying for the passport. Venue is not proper in the district where the passport was processed for issuance.

***United States v. Wood***, 364 F.3d 704 (6th Cir. 2004) The government failed to prove venue with regard to several of the mail fraud counts in this case. Though the scheme to defraud was centered in the district where the charges were brought, the actual mailings involved in the challenged counts did not start, end, or move through that district.

***United States v. Carter***, 130 F.3d 1432 (10th Cir. 1997) Failure to instruct on venue, when requested, is reversible error unless it is beyond a reasonable doubt that the jury's guilty verdict on the charged offense necessarily incorporates a finding of proper venue. Where a defendant is charged in a substantive count and the defendant is never present in the district and the jury is instructed on a constructive possession theory, the failure to instruct on venue may as here be reversible error.

***United States v. Marsh***, 144 F.3d 1229 (9th Cir. 1998) The defendants were charged with endeavoring to impede and obstruct the IRS. The IRS investigation was being handled out of the Northern District of California. The defendants' obstructive conduct, however, occurred in other districts. Venue was only appropriate where the "endeavor to obstruct" occurred, not where the impact was felt.

***United States v. Beech-Nut Nutrition Corp***., 871 F.2d 1181 (2d Cir. 1989) The defendants were charged with placing adulterated and misbranded food products into interstate commerce. The corporate headquarters were located in Pennsylvania; the manufacturing operation was located in the Northern District of New York. They were prosecuted in the Eastern District of New York on the theory that they made phone calls and sent letters to the Eastern District in ordering the main ingredients for the products. The acts of introducing the adulterated juice into interstate commerce were not committed in the Eastern District or caused by them to be committed while they were in the Eastern District. The Second Circuit concludes that because the offense did not begin, continue, or end in that district, reversal was required. Pursuant to 18 U.S.C. §3237(a), the government failed to adequately establish venue in the Eastern District of New York.

***United States v. Frederick,*** 835 F.2d 1211 (7th Cir. 1987) Venue for a witness tampering prosecution is in the district in which the judicial proceeding at which the witness was to testify is located. It does not matter where the conduct of tampering with the witness occurs.

***United States v. Brakke***, 934 F.2d 174 (8th Cir. 1991) 18 U.S.C. §1501 makes it a crime to obstruct a process server. Venue for this offense is only where the obstruction occurs, not where the action is pending which is obstructed. In this respect, §1501 differs from other types of obstruction offenses, such as §1503 and §1512, both of which permit prosecution in the jurisdiction where the proceeding which was obstructed was pending.

***United States v. Corona,*** 34 F.3d 876 (9th Cir. 1994) If a conspiracy is hatched in Nevada, but the substantive offenses are committed in California, the prosecution cannot obtain venue over the substantive offenses in Nevada.

***United States v. Miller***, 111 F.3d 747 (10th Cir. 1997) The trial court erred in failing to instruct the jury that the burden of proving venue was on the government. The defendant was charged with being a member of a conspiracy in Wyoming. The defendant's only conduct occurred in Montana. The evidence suggested that another member of the conspiracy committed overt acts in Wyoming. The co-conspirator, who pled guilty, lived in Wyoming and purchased cocaine from the defendant in Montana. While the evidence may have supported a conviction, the jury must make that decision where the defendant requests an instruction on venue.

## *VERDICT FORM*

***United States v. Gonzales***, 841 F.3d 339 (5th Cir. 2016) Relying in part on the decision in Randolph, below, the court held that a jury's verdict that a defendant was guilty of murder could not be sustained, even though was sufficient evidence to support guilt on a Pinkerton theory though not on a personal theory, because in a special interrogatory, the jury expressly found that he was guilty on a personal theory, not Pinkerton. This case has a lengthy discussion of the use of special interrogatories in criminal cases.

***United States v. Randolph***, 794 F.3d 602 (6th Cir. 2015) The defendant was charged with being a member of a drug conspiracy with various members of his family. On the verdict form, the jury was asked to first mark whether the defendant was "guilty" or "not guilty" of the conspiracy charge and then, "If you unanimously find that a particular controlled substance was not involved in the offense i.e., cocaine, crack cocaine, marijuana, mark 'none' on the appropriate special verdict form." The jury returned a verdict of guilty against Randolph but marked "none" beside each of the three drugs. The Sixth Circuit held that this amounted to an acquittal, because the jury had to find that the conspiracy had as its object at least one of the drugs. This is not a case in which there are inconsistent verdicts which generally do not require a reversal. This was one count of the indictment for which the jury apparently found insufficient evidence with regard to one of the elements of the offense.

***United States v. Ramirez-Castillo***, 748 F.3d 205 (4th Cir. 2014) The jury was provided a verdict form that answered whether certain essential elements were proven, but the verdict form did not ultimately provide an answer to the question whether the defendant was guilty or not guilty. In fact, the verdict form did not even include all the essential elements of the offense possession of a prohibited item in a correctional facility. This was plain error that required setting aside the conviction.

***United States v. Amaya***, 731 F.3d 761 (8th Cir. 2013) The verdict form did not provide a box for the jury to indicate "guilty" or "not guilty" in connection with a money laundering conspiracy count but directed the jurors, if they found the defendant guilty to then answer what the object of the conspiracy was. When the jury returned the verdict, the judge realized the error and then polled the jury, and the jury confirmed that they had found the defendant guilty on that count. Nevertheless, the judge granted a Rule 33 New Trial Motion on the basis of this irregularity. The Eighth Circuit affirmed. The polling of the jury is not an appropriate substitute for the jury returning a unanimous verdict in open court.

***United States v. Jones***, 664 F.3d 966 (5th Cir. 2011) Though the trial court properly defined the mens rea element of the crimes, the verdict form incorrectly asked the jury to decide whether the defendant "knew or should have known" that services that were billed were not actually provided. This was reversible error.

***United States v. Barrett***, 870 F.2d 953 (3rd Cir. 1989) The trial judge instructed the jury that they could return a verdict of guilty, guilty of a lesser-included offense, or not guilty. The verdict form, however, only provided for a verdict of guilty or not guilty. Thus,

when the jury returned a verdict of guilty, it was not possible to determine whether they were convicting him of the charged offense or the lesser-included offense. This requires reversal of the conviction.

***United States v. Perez***, 129 F.3d 1340 (9th Cir. 1997) When the police went to one defendant's apartment to arrest him, he was sitting on the couch. When he stood up, a gun was discovered where he had been sitting. This does not satisfy Bailey's standard for use of a gun. With regard to another defendant, the indictment charged him with using three guns. The sentence would be dramatically different if the defendant used an assault weapon, versus a pistol. In this situation, the trial court must submit a special verdict form to the jury to determine which gun(s) they unanimously agreed the defendant used.

## *VIENNA CONVENTION*

***Osagiede v. United States***, 543 F.3d 399 (7th Cir. 2008) Though the Supreme Court, in Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006) held that suppression of evidence was not a remedy for a violation of the Vienna Convention's requirement (Article 36) that the consulate of a foreign defendant be advised when the defendant is arrested, the opinion did not foreclose the possibility that a defendant could successfully mount an ineffective assistance of counsel claim if, as here, his attorney failed to insist on notification of the consulate. In this case, the consulate could have provided assistance that might have had an impact on his sentence. A remand to develop the facts was required.

## *VIOLENCE IN AID OF RACKETEERING*

***United States v. Banks***, 514 F.3d 959 (9th Cir. 2008) The trial court improperly instructed the jury on the relationship between the defendant's act of violence and the enterprise. 18 U.S.C. § 1959. It is not enough for the defendant to be a member of a gang and to engage in an act of violence. There must be a connection between his act of violence and his status in the gang.

## *WILDLIFE OFFENSES (LACEY ACT)*

***United States v. Hughes***, 795 F.3d 800 (8th Cir. 2015) If wildlife is hunted in violation of state law and transported across state lines, it is a misdemeanor unless the market price of the item is more than $350, in which case it is a felony. "Market price" is the price that a willing buyer would pay a willing seller on the open market. In this case, however, the trial court instructed the jury to determine if the offense was a misdemeanor or a felony there were other measures of market price, including the cost of guide services. This was erroneous and required that the conviction be set aside.

***United States v. Romano,*** 137 F.3d 677 (1st Cir. 1998) The Lacy Act (16 U.S.C. § 3373) outlaws, among other conduct, purchasing wildlife which the purchaser knows were taken in violation of state law. In this case, the question was whether a person could be convicted of this offense if he purchases guiding and outfitting services to facilitate a taking of wildlife that, if effectuated, would be in violation of state law. The court, construing three different provisions of the law, concludes that this is not an offense under the Act.

## *WIRETAP EVIDENCE*

***United States v. Ojeda Rios***, 495 U.S. 257 (1990) The Supreme Court holds that a delay in sealing recorded communications may result in suppression just as a total failure to seal such recordings may necessitate suppression of the evidence. Furthermore, the Supreme Court holds that the government's explanation for failure to seal the recordings promptly must provide an actual reason for the delay and must also explain why the failure must be deemed excusable. The Court went on to hold that a misunderstanding of the law – a misunderstanding as to when the recordings must be sealed – may provide an adequate explanation justifying a failure to seal.

***United States v. Carey,*** 836 F.3d 1092 (9th Cir. 2016) The police had a lawful wiretap to listen to "T-14" which was believed to be Escamilla's phone. After a few days, however, the police realized that someone else was using that phone and the calls – though drug-related – were not related to Escamilla's drug conspiracy. The Ninth Circuit holds that the "plain hearing" exception to the warrant requirement applies. As in the case of a search, the police do not suffer the consequences of the exclusionary rule if incriminating calls are heard by police who are lawfully listening to a intercepted calls. But, also consistent with "plain view" jurisprudence, once the police realize that they are listening to calls that were not the basis for the probable cause showing (or the wiretap order), they must stop listening and seek a new wiretap order. The fact that the wiretap order authorized the interception of people "as yet unknown" did not authorize the continued monitoring of people who were not believed by the agents to be part of the same Escamilla drug conspiracy.

***United States v. Dahda***, 853 F.3d 1101 (10th Cir. 2017) This case discusses at some length the jurisdiction of a judge to issue a wiretap order when the tapped phone is a cell phone and the user leaves the jurisdiction or the state. The Court concludes that if the Wiretap Order, consistent with the statute, authorizes interception of cell phones by a mobile listening device outside the jurisdiction, that is permissible, but an Order may not authorize the interception of a cell phone by a stationary listening post that is outside the jurisdiction.

***United States v. Scurry***, 821 F.3d 1 (D.C. Cir. 2016) When a wiretap is challenged on the basis of the procedures used by law enforcement, the court would order suppression if the violation related to a core concern of the wiretap statute. However, when a challenge is made to the facial validity of the wiretap order, the review is more mechanical: either the order is valid, or it is not. In this case, the wiretap application failed to identify by name the DOJ official who approved the wiretap. This is a facial defect that required suppressing the wiretap evidence.

***Gennusa v. Canova***, 748 F.3d 1103 (11th Cir. 2014) A suspect and her attorney went to a police station to be interviewed. Prior to the interview, the attorney and the suspect were placed in an interview room the suspect was not in custody and were not warned that their conversation would be taped. The Eleventh Circuit held that monitoring the conversation violated the Fourth Amendment rights of the two individuals and that a § 1983 action could be brought, because the deputies were not entitled to qualified immunity for this obvious violation of the Fourth Amendment and the attorney-client privilege.

***United States v. Glover***, 736 F.3d 509 (D.C. Cir. 2013) The D.C. Circuit holds that a judge in one district has no authority to authorize the installation of an electronic listening device in another district. Additionally, this is a "core concern" of the Wiretap statutes and therefore suppression is the appropriate remedy. Finally, there is no good faith exception to the exclusionary rule for violations of this jurisdictional limitation on a judge's authority.

***United States v. North***, 735 F.3d 212 (5th Cir. 2013) In the initial panel opinion, the court held that if neither the cell phone, nor the listening post is within a particular district, that district court may not authorize a wiretap warrant. Later, the court withdrew that opinion and authored a new decision (10/24/13) suppressing the wiretap evidence on the basis that there was insufficient minimization.

***United States v. Lomeli***, 676 F.3d 734 (8th Cir. 2012) The failure in a wiretap application to identify the DOJ official who approved the application, as well as the officer who was making the application rendered the wiretap application defective. Moreover, the good faith exception to the exclusionary rule for wiretap application defects does not apply in this case even though the proper official at DOJ had, in fact, authorized the wiretap. The Eighth Circuit does recognize a good faith exception in some cases, though other Circuits have held that there is no good faith exception to the exclusionary rule.

***United States v. Simels,*** 654 F.3d 161 (2d Cir. 2011) Wiretap evidence that has been ruled inadmissible may be used by the government to impeach the defendant during cross-examination.

***United States v. Amanuel***, 615 F.3d 117 (2d Cir. 2010) The state law enforcement agents failed to comply with the order that authorized wiretap intercepts of a pager. The state judge ordered that the intercepts be recorded digitally, but instead, the police simply maintained a written log of the intercepted images on the pager. The police also failed to properly seal the recorded information. Only a limited exclusionary rule applies pursuant to 18 U.S.C. § 2518(8)(a), though. Just the intercepts are suppressed, not the fruits of those intercepts, including investigative leads and warrants that were based on information learned from the intercepts.

***United States v. Larios***, 593 F.3d 82 (1st Cir. 2010) Agents learned that the defendant and others were intending to conduct a drug deal in a hotel room. Without a warrant, the agents installed concealed an audio/video recording device in the room. At one point, the defendant and another conspirator were in the room without any undercover agent and their conversation was recorded. The First Circuit held that the defendant did not have an expectation of privacy in the statements he made while in the hotel room and therefore Title III did not apply. 18 U.S.C. § 2510(2) defines an "oral communication" as "any communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." This definition parallels the Fourth Amendment jurisprudence of expectation of privacy. Because the defendant did not have an expectation of privacy in the hotel room, which he occupied for a brief period of time for the sole purpose of dealing in drugs, he did not have an objectively reasonable expectation of privacy in the conversations he had in the room during the drug deal. The court does cite several cases from other jurisdictions that held that a defendant did have an objectively reasonable expectation of privacy in this situation but distinguished those cases. See, e.g., United States v. Nerber, 222 F.3d 597 (9th Cir. 2000); United States v. Padilla, 520 F.2d 526 (1st Cir. 1975).

***United States v. Crabtree***, 565 F.3d 887 (4th Cir. 2009) If a private person unlawfully wiretaps a phone, this evidence may not be used by the government at trial. The government's argument that it had "clean hands" does not alter the effect of the exclusionary rule, 18 U.S.C. § 2515.

***United States v. Rice***, 478 F.3d 704 (6th Cir. 2007) The Leon good faith exception to the exclusionary rule does not apply to Title III wiretap cases. Because suppression is a statutory remedy, the court-made exception to the court-created exclusionary rule in other search cases, does not apply. In this case, the warrant application contained misrepresentations and recklessly made false statements which, when corrected, negated the necessity requirement for a wiretap. The court also upheld the trial court's finding that various boilerplate representations about alternative methods were not useful in a wiretap application.

***United States v. Staffeldt***, 451 F.3d 578 (9th Cir. 2006) The wiretap statute requires that a warrant be authorized by the Attorney General or his designee and this authorization must be shown to the judge who is asked to issue the warrant. In this case, the government mistakenly presented to the court a memorandum or authorization that had no relationship to the case for which the warrant was being sought apparently two memoranda of authorization were sent to the wrong AUSA's in different parts of the country. Because of the facial insufficiency of the application, the evidence should have been suppressed. The court noted that the judge who issued the warrant obviously did not review the contents of the application.

***United States v. Yeje-Cabrera***, 430 F.3d 1 (1st Cir. 2005) The First Circuit devotes several pages to a discussion of the necessity requirement of the wiretap statute, including the standard of review that the court should utilize in reviewing the issuance of the wiretap order. The court ultimately adopts a simple "unitary" standard: "Whether the facts set forth in the application were minimally adequate to support the determination that was made."

***United States v. Gonzalez, Inc***., 412 F.3d 1102 (9th Cir. 2005) The information in the wiretap affidavit did not satisfy the necessity requirement of the wiretap statute. In addition, the application suffered from a Franks violation. With regard to the

Franks violation, the defendants offered sufficient information relating to the false statements and the materiality of the false statements in their pleadings to prompt the trial court to grant a hearing which the district court did conduct. Regarding the necessity issue, the normal investigative techniques available to the government had not been exhausted; moreover, if traditional investigative procedures were used, there would have been no need for a wiretap. Finally, the court also held that the owners of business property have standing to contest a wiretap employed at the business, even if the owners themselves were not intercepted by the wiretap.

***United States v. Coney***, 407 F.3d 871 (7th Cir. 2005) A delay of ten days prior to sealing the wiretap tapes was too long. Though the delay was not justified, it was, nevertheless, harmless, and excusable so the evidence would not be suppressed.

***United States v. Mora***, 821 F.2d 860 (1st Cir. 1987) The Court of Appeals for the First Circuit provides a comprehensive analysis of the "sealing" requirement of the federal wiretap statute. The Court concludes that the failure to seal the tapes is grounds for suppression unless a satisfactory explanation for the government's failure is provided. Even if a satisfactory explanation is offered, there must be clear and convincing evidence that there has been no tampering with the tapes. Finally, the government must also prove that the satisfactory explanation illustrates a good faith failure.

***In re United States***, 10 F.3d 931 (2d Cir. 1993) A Title III wiretap application may not be reviewed and considered by a Magistrate. Only a District Judge has the authority to grant such orders.

***United States v. Gerena***, 869 F.2d 82 (2d Cir. 1989) Prior to utilizing wiretap evidence in a publicly filed brief, the government must give notice to the defendants. If the trial court determines that the defendants will be deprived of a fair trial or that their right to privacy will be unjustifiably infringed, the trial court may order that certain portion of the wiretapped evidence be redacted or sealed.

***In re Grand Jury***, 111 F.3d 1066 (3rd Cir. 1997) Individuals who had been illegally wiretapped by another private party had standing to challenge the government's effort to obtain the wiretaps to present to the grand jury. 18 U.S.C. §2515 expressly provides that no illegally obtained wiretap may be used in any proceeding – and this includes the grand jury.

***United States v. Quintero***, 38 F.3d 1317 (3rd Cir. 1994) The hectic schedule of an AUSA is not a satisfactory explanation for failing to comply with the sealing requirement of 18 U.S.C. §2518(8)(a). In this case, the delay was eighteen days from the expiration of the surveillance until the sealing of the tapes.

***Brown v. Waddell***, 50 F.3d 285 (4th Cir. 1995) The police used a pager clone, a device which monitored the pages received by the suspect on his pager. This device was not analogous to a pen register; rather it was more akin to a wiretap and the failure to obtain a proper wiretap authorization required that the evidence be suppressed. The information received on the pager was more than simple telephone numbers. People who paged the suspect often left numeric messages, codes which provided information about the caller or his actions such as the fact that the caller was "en route".

***United States v. Underhill***, 813 F.2d 105 (6th Cir. 1987) The defendants recorded their own phone calls which were made in connection with their gambling operation. Bets which were placed on the phone were recorded in order to head off any arguments with the bookies and bet-placers. The result was the creation of a "gambling record" which itself is forbidden by state law. The wiretap statute forbids the use of any recordings which are made in violation of the law, whether consensual or not. The Sixth Circuit holds that even though the creation of these tapes did constitute a crime, the tapes would not be suppressed at trial.

***United States v. Feiste***, 961 F.2d 1349 (8th Cir. 1992) The trial court suppressed the wiretap evidence because of the failure of the police to immediately seal the tapes, pursuant to 18 U.S.C. §2518(8)(a). The government's excuse for the failure to immediately seal the tapes was more a matter of convenience and the trial court did not err in ordering the tapes suppressed.

***United States v. Carneiro***, 861 F.2d 1171 (9th Cir. 1988) The drug agents failed to employ traditional forms of surveillance in this investigation of several suspected participants in a drug trafficking ring. The affidavit in support of a search warrant failed to satisfy the "necessity" requirement of the federal wiretapping statute. In this case, the government had infiltrated the drug ring, had made undercover purchases of drugs, and had identified a number of the participants in the drug conspiracy. Although wiretaps are not to be used only as a last resort, they cannot be the initial step in a criminal investigation.

***United States v. Simpson***, 813 F.2d 1462 (9th Cir. 1987) The affidavit which was used to obtain a wiretap failed to reveal to the judge that an informant had gained the friendship of the defendant and was able to provide substantial information to the government about the defendant's co-conspirators. The affidavit's failure to reveal this information withheld from the judge critical evidence about the necessity of a wiretap and constituted a Franks violation.

***United States v. Castillo-Garcia***, 117 F.3d 1179 (10th Cir. 1997) Generalities or statements in the conclusory language of the statute are not sufficient to satisfy the necessity requirement of the wiretap statute. In this case, though the initial wiretap was shown to be necessary, subsequent wiretap applications did not sufficiently establish the necessity for the wiretap. A subsequent Ninth Circuit decision held that this decision applied the wrong standard of review de novo for assessing compliance with the necessity requirement and that an abuse of discretion is the proper standard. United States v. Ramirez-Encarnacion, 291 F.3d 1219 (10th Cir 2002).

***United States v. Mondragon,*** 52 F.3d 291 (10th Cir. 1995) Though the initial wiretap application contained a statement that the wiretap met the necessity requirement and the judge found this to be the case in the order, a supplemental request omitted to include this requirement, and no finding was made by the judge. This omission rendered the supplemental wiretap defective. The

appellate court would not assume that the issuing judge considered the information in the initial application and made appropriate findings.

***United States v. Brown***, 872 F.2d 385 (11th Cir. 1989) A state court judge granted a wiretap order pursuant to an application by state authorities. The state law requires that the state applicant set forth a full and complete statement of the action taken by the judge on prior applications for an intercept order. Because of the state agent's failure to comply with the state law, the federal prosecutor could not use the evidence in a federal prosecution.

## *WIRETAP OFFENSES (18 U.S.C. § 2511)*

***United States v. Christensen***, 801 F.3d 970 (9th Cir. 2015) A wiretap offense is committed when a person overhears conversations though prohibited means. A wiretap offense is not committed when a person listens to a recording of those conversations that were improperly intercepted.

***United States v. Simels***, 654 F.3d 161 (2d Cir. 2011) It is a federal offense to possess any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of surreptitious interception of wire, oral, or electronic communications. 18 U.S.C. § 2512. However, the device must be capable of being used. Thus, unlike a firearm, the mere fact that the device is designed to achieve this purpose, if it is inoperable the defendant is not guilty of this offense.

***United States v. Councilman***, 373 F.3d 197 (1st Cir. 2004) The defendant was an employee of a company that was an intermediary in the delivery of e-mails to its customers. The company's customers were book dealers. The defendant company was also a rare book seller. The defendant instructed his employees to intercept and review and then deliver all e-mails that were sent from Amazon.com to the company's book dealer customers. The defendant would then try to gain an advantage over Amazon. The government charged the defendant with violating the Wiretap Act. A panel of the First Circuit held that this conduct did not violate the Wiretap Act. The company's "interception" of the e-mails was not "contemporaneous" with the communication. Re-hearing en banc granted on 10/5/04 and the panel opinion was reversed 418 F.3d 67 (1st Cir. 2005): This did amount to a violation of the Wiretap Act.

***WITNESSES (Access to Government Witnesses)***

***United States v. Moussaoui***, 382 F.3d 453 (4th Cir. 2004) The Fourth Circuit dealt with a number of issues relating to the defendant's right to depose and gain access to government witnesses. This case involves an alleged conspirator in the 9/11 terrorist attacks and his efforts to depose enemy combatants being held at Guantanamo Bay. The court also decided that the Compulsory Process Clause enabled the defendant to call these witnesses in his defense.

***United States v. Gonzales***, 164 F.3d 1285 (10th Cir. 1999) Although the defense has no right under Rule 16 to interview a witness, it has a right to be free from prosecution interference with a witness' freedom of choice about whether to talk to the defense. In this case, the district court directed the government to provide to the defense "face-to-face" access to its confidential witnesses. The government then misled the court about the government's knowledge of the witness's whereabouts. The Tenth Circuit concludes that excluding the witness's testimony was not an appropriate remedy. Less severe sanctions, including allowing the witness to be deposed, or recommending disciplinary proceedings against the government attorneys should have been considered.

***United States v. Bailey***, 834 F.2d 218 (1st Cir. 1987) The defendant was tried for bribing a juror at a prior trial. In preparing for trial, the defendant sought to interview other jurors to determine the character of the juror who made the accusation. The District Court prohibited the defendant from engaging in these interviews. The Court of Appeals reversed: Borrowing from the analysis of Roviaro v. United States, the court concludes that a balancing approach is needed, and that the interest of the government and the jurors in protecting their privacy is weak as compared with the defendant's interest in learning what the panel members gleaned from sitting through a lengthy trial with the accuser/juror.

***United States v. Carrigan***, 804 F.2d 599 (10th Cir. 1986) The prosecution improperly interfered with the defense counsel's access to the witnesses. The trial court ordered that the witnesses be available to be deposed by defense counsel. The Tenth Circuit affirms.

***United States v. Peter Kiewit, Sons' Co***., 655 F. Supp. 73 (D. Colo. 1986) Representatives of the government made statements to witnesses which substantially chilled their willingness to discuss the facts with the defense attorneys. The District Court ordered that the witnesses appear to be deposed by the defendant's counsel.

***United States v. Rogers***, 636 F. Supp. 237 (D. Colo. 1986) The District Court ordered the government to provide a list of witnesses with addresses to the court so that a letter could be written over the judge's signature that explains the witness' rights and recommends that they cooperate with the attorneys for both the prosecution and the defense. This was necessitated by the government lawyers' having sent letters to witnesses asking if they wanted to be added to a "list" that was to be submitted to the court of those who did not wish to be contacted by the defendant.

***WITNESSES (Attorneys)***

***United States v. Kliti,*** 156 F.3d 150 (2d Cir. 1998) The defendant's attorney was a witness to statements made by a key government witness who the attorney previously represented that exculpated the defendant. The trial court erred in failing to conduct a hearing to determine whether this "conflict" i.e., the fact that the attorney was needed as a witness for the defendant necessitated his removal from the case. When the witness denied making the exculpatory statement, the attorney was barred

from offering impeachment evidence, thus depriving the defendant of important evidence in his defense. A remand was required to determine whether the defendant waived his right to conflict-free counsel.

***WITNESSES (Bolstering / Vouching) SEE ALSO: CLOSING ARGUMENT (IMPROPER VOUCHING)***

***United States v. Groysman***, 766 F.3d 147 (2d Cir. 2014) The Second Circuit reversed this health care fraud conviction on the basis of several "egregious" evidentiary errors committed at trial. The defendant was charged with conspiring with a company that supplied durable medical equipment to prepare false invoices. The wholesaler was cooperating and taped many of the conversations, though many were inaudible. The government offered testimony from its case agent for several days at the start of trial. The agent (1) offered inadmissible bolstering testimony by testifying that certain transactions occurred, based only on his interviews of the cooperators – he had no personal knowledge to verify that these transactions occurred; (2) offered a summary chart which was not a summary of voluminous evidence, but simply a recitation of what he was supposedly told by the cooperators, thus violating both the hearsay rules and the bolstering rules and the rule governing the admissibility of summary charts; (3) the use of the agent to summarize the case at the outset was improper because it amounted to opinion testimony. The Second Circuit, as noted above, characterized these evidentiary errors as egregious and supported a plain error standard of review reversal.

***United States v. Hill***, 749 F.3d 1250 (10th Cir. 2014) After the defendant's statement was played in court, the government called an "expert" FBI agent who had training in determining if a person was being truthful or not and he offerd his expert opinion that the defendant was not being truthful. Among other reasons, the agent found the defendant to lack credibility because he said, "I swear to God" and other statements that showed that he invoked his belief system, rather than relying on facts to support his protestations of innocence. The Tenth Circuit held that this was reversible error even in the absence of an objection by the defense attorney. Juries are tasked with making credibility decisions, not government experts.

***United States v. Certified Environmental Services, Inc***., 753 F.3d 72 (2d Cir. 2014) The government is not permitted to introduce the portions of a cooperating witness's plea agreement that bolster the witness's credibility e.g., the witness promises to tell the truth and will suffer consequences if he does not tell the truth and will only receive the benefit of his bargain if he tells the truth, until the defense challenges the credibility of the witness. Thus, assuming the defense does not question the credibility of the witness during opening statement, the prosecution may not raise the issue during the direct examination of the witness and the prosecution may not bolster the credibility of the witness during the opening statement.

***United States v. Johnson***, 529 F.3d 493 (2d Cir. 2008) The DEA agent's testimony was replete with improper hearsay, opinion, vouching, and argumentative testimony. The agent testified about the course of the investigation, declaring, "We found out that . . ." and "We determined that . . ." The agent related what co-conspirators told him when they were first arrested, to explain what he did next in the investigation. He then explained what "corroboration" meant and explained what he did and learned to corroborate what he was told by informants and co-conspirators. He further explained that he was skeptical of what informants told him until he corroborated what they said, and he was then able to ensure that the informants told him the truth. While it may be more interesting to a jury to learn how the police conduct investigations, a substantial amount of this testimony was inadmissible. Because defense counsel did not object, the plain error standard applied, and the Second Circuit held that the inadmissible evidence did not meet this standard.

***United States v. Brooks***, 508 F.3d 1205 (9th Cir. 2007) Testimony from witnesses about the various steps that were taken to secure a wiretap amounted to a form of improper vouching or bolstering, particularly testimony that judges had approved the wiretap applications.

***United States v. Cunningham***, 462 F.3d 708 (7th Cir. 2006) A law enforcement officer testified about all the hurdles that were satisfied in order to obtain a wiretap. This amounted to improper bolstering by implying to the jury that numerous law enforcement officials and agents believed that the defendant was guilty and that there was probable cause to initiate the wiretap.

***United States v. Harlow***, 444 F.3d 1255 (10th Cir. 2006) The prosecutor repeatedly referred to the judge's role in reducing the co-conspirators' sentences, thus encouraging the jury to believe that the judge believed the witnesses. This was error but was cured by the judge's instruction to the jury.

***Earls v. McCaughtry***, 379 F.3d 489 (7th Cir. 2004) The defendant was charged with molesting a six-year-old child. There were no witnesses to the events and no physical evidence corroborating the child's statements. A social worker who interviewed the child and testified as an expert said that she believed the child. This was inadmissible evidence and the attorney's failure to object amounted to ineffective assistance of counsel. In addition, during the videotape of the child prepared by the social worker, the social worker told the child that she believed her and the defendant should not have done that to her. The attorney's failure to redact the tape was ineffective assistance of counsel.

***Snowden v. Singletary***, 135 F.3d 732 (11th Cir. 1998) Permitting an expert witness to testify that 99.5% of children tell the truth in child abuse cases was a denial of fundamental fairness and in the circumstances of this case, where the child's credibility was the central issue, required setting aside the conviction.

***United States v. Sanchez-Lima***, 161 F.3d 545 (9th Cir. 1998) One agent was asked whether he thought another agent was telling the truth. The agent whose veracity was in question was a critical witness relating to the charges in the indictment assault on a federal officer. Even though the agent/witness's veracity was challenged when he testified, the government erred by attempting to rehabilitate him by asking another witness whether the challenged witness was telling the truth. Reversible error.

***United States v. Dwyer***, 843 F.2d 60 (1st Cir. 1988) It was improper for the trial court to instruct the jury that "although an immunized witness may not be prosecuted for past crimes revealed by his testimony, even an immunized witness is subject to prosecution for perjury if he intentionally lies under oath." This amounts to a comment on the credibility of the unindicted co-conspirator's testimony which was given under a grant of immunity.

***United States v. Forrester***, 60 F.3d 52 (2d Cir. 1995) A witness claimed that she told the agent about the defendant's participation in the drug conspiracy and also identified a photograph of the defendant for the agent. The agent then testified that he did not remember the witness saying this or identifying the defendant. Nevertheless, when asked by the prosecutor, the agent gave his opinion that nothing the witness said in court was inconsistent with her statement at the time of the initial interview. The prosecutor claimed that this opinion testimony was admissible "to aid the jury" under Rule 701. This was erroneous. Far from being "helpful," the agent's testimony invaded the traditional province of the jury.

***United States v. Fernandez,*** 829 F.2d 363 (2d Cir. 1987) The credibility of a government witness was not challenged on cross-examination to the extent justifying the admissibility of a cooperation agreement between the government and a witness on re-direct examination. Only after a witness's credibility has been challenged is a plea agreement by that witness admissible. In this case, the witness's credibility was not sufficiently attacked to justify the admissibility of her cooperation agreement.

***United States v. DiLoreto***, 888 F.2d 996 (3rd Cir. 1989) The prosecutor vouched for the credibility of one of his witnesses, relying on evidence that was not in the record. This is reversible per se. The prosecutor explained to the jury that the government "does not put liars on the stand." This requires that the conviction be set aside. In a later opinion, the Third Circuit held that, though it was error to make this argument, such errors are not to be considered reversible per se. United States v. Zehrbach***,*** 47 F.3d 1252 (3rd Cir. 1995).

***United States v. Porter***, 821 F.2d 968 (4th Cir. 1987) It is error to admit into evidence a witness' plea agreement which contains the witness' agreement to take a polygraph test to verify his trial testimony.

***Cooper v. Sowders***, 837 F.2d 284 (6th Cir. 1988) It was improper for an informant to testify that he had been responsible for the conviction of numerous other people.

***United States v. Davis***, 838 F.2d 909 (7th Cir. 1988) A co-conspirator testified that three customers were convicted of offenses relating to the marijuana distribution conspiracy about which she was testifying. This improper bolstering testimony was harmless in this case.

***Maurer v. Department of Corrections***, 32 F.3d 1286 (8th Cir. 1994) This trial pitted the defendant, charged with "date" rape against the alleged victim. The only issue was who was telling the truth about the encounter in the defendant's trailer. The prosecutor asked each of the four prosecution witnesses two of the victim's friends, and two law enforcement officers whether the victim "seemed sincere when she said she was raped." This vouching testimony rendered the trial fundamentally unfair. The prosecutor asked these improper questions only because it was important to bolster the victim's credibility.

***United States v. Cortez***, 935 F.2d 135 (8th Cir. 1991) The government offered the opinion testimony of two police officers that the "snitch" was being truthful. While opinion testimony is admissible to support the witness's character for truthfulness, the opinions in this case were not based on any foundation. Neither officer had spent a full day with the snitch and neither had participated in the investigation of the snitch. The trial court abused its discretion in admitting this testimony – though it was harmless error.

***United States v. Azure***, 801 F.2d 336 (8th Cir. 1986) It is improper to permit an expert witness to testify that in his opinion there is no reason why an alleged victim of child sex abuse was not telling the truth. It is permissible for an expert to testify about a child's ability to separate facts from fiction, by summarizing medical evidence and giving an opinion as to whether that evidence is consistent with sexual abuse; by discussing various patterns in child sex abuse cases and comparing them with patterns in the case at bar. But that is different from allowing an expert to state whether or not a witness is believable. The latter constitutes an improper invasion into the province of the jury.

***United States v. Rudberg***, 122 F.3d 1199 (9th Cir. 1997) The prosecutor repeatedly violated the rule against vouching for his witnesses. First, he asked an FBI agent whether the agent determined that the witness was entitled to a Rule 35 reduction in light of the witness's substantial assistance, and the agent affirmed that the witness was entitled to this benefit. Next, with regard to one witness, the prosecutor elicited testimony that the witness had previously been denied a Rule 35 because he left out some facts in his debriefing, but this time he was being entirely truthful. Finally, the prosecutor explained to the jury in closing argument that witnesses did in fact receive reduced sentences because of their truthful testimony. Each of these instances amounted to improper bolstering and vouching. The conviction was reversed.

***United States v. Frederick***, 78 F.3d 1370 (9th Cir. 1996) The prosecutor improperly bolstered the testimony of a government witness when she argued in closing that the victim's in-court testimony was consistent with what she told law enforcement agents earlier. The witness's prior consistent statements were ruled inadmissible on hearsay grounds when they were offered at trial.

***United States v. Kerr***, 981 F.2d 1050 (9th Cir. 1992) The prosecutor committed plain error in his closing remarks by repeatedly stating that "he didn't think" the witnesses were lying; and "he didn't think the witnesses were hoodwinking" the agents. Even absent objection, these comments necessitated reversing the conviction. The only objection which was made – and was sustained – was when the prosecutor suggested that the judge believed the witness in accepting his plea agreement. The sustained objection, however, was not sufficiently forceful and did not remove the taint of the improper argument.

***United States v. Smith,*** 962 F.2d 923 (9th Cir. 1992) The prosecutor's closing argument amounted to plain error. The prosecutor argued that his job was to present the truth to the jury and that he would prosecute anybody for perjury who told a lie. He also stated that the court would not let him do anything wrong. He repeatedly stated that his job was not to secure a conviction, but only to present the truth and to turn over all favorable evidence to the defense. Because the witness for whom the prosecutor was vouching was a critical witness for the government, this was plain error – that is, reversible error, despite the absence of a contemporaneous objection.

***United States v. Simtob***, 901 F.2d 799 (9th Cir. 1990) While a government witness was on the stand, the prosecutor offered to immunize the witness for any false statements he may previously have made. Because this witness's credibility was pivotal in the case, this constituted improper vouching for the testimony of the witness and required reversal of the conviction.

***United States v. Shaw***, 829 F.2d 714 (9th Cir. 1987) During opening statement, the prosecutor improperly stated that one of the government's witnesses was also facing a robbery charge but that the government had agreed "that as long as he is truthful, we will present his truthful cooperation to the local prosecutor." Obviously, during opening statements, this was not a response to an attack on the witness' credibility. The Ninth Circuit holds that the remark "necessarily implied that the prosecution had some method of determining whether the witness's testimony was truthful, so that it will know whether to present the witness's 'truthful cooperation' to the local authorities."

***United States v. Eyster***, 948 F.2d 1196 (11th Cir. 1991) On cross-examination, a government witness indicated that certain counts of the indictment to which he pled guilty were false – he was not guilty of the charges to which he pled guilty. On re-direct, the prosecutor suggested that there was a typographical error in the plea agreement and thus, the witness only pled guilty to the charges which he was, in fact, guilty of. This re-direct was erroneous: there was no typographical error. The prosecutor's questions were based on evidence not in the record and amounted to improper bolstering of the witness. This was reversible error. In assessing whether this was grounds for reversal, the court noted that "the government's reference to a typographical error was ultimately an outright falsehood designed to mitigate [the witness'] willful perjury."

***United States v. Sorondo***, 845 F.2d 945 (11th Cir. 1988) A law enforcement agent testified that the informant upon which he relied had worked on a number of cases which led to the conviction of well over 100 other defendants. The Eleventh Circuit holds that this is reversible error: "A jury had an obligation to exercise its untrammeled judgment upon the worth and weight of testimony and to bring in its verdict and not someone else's." Significantly, the Eleventh Circuit concludes that this testimony constituted plain error. Although the defendant had objected to this testimony, he had objected only on the grounds of relevance which was not the proper objection.

***United States v. Nanny***, 745 F. Supp. 475 (M.D. Tenn. 1989) During closing argument, the prosecutor referred to military police officers (witnesses in this case) as "unbiased" and individuals who had "no reason to lie." The prosecutor also questioned the defense attorney's challenge of the credibility of these officers stating, "I am a United States Army officer, I represent the government." These statements in closing arguments were prejudicial and inexcusable. These statements of the prosecutor were "foul blows" and necessitated a new trial.

***WITNESSES (Competence of Witness)***

***Harris v. Thompson***, 698 F.3d 609 (7th Cir. 2012) The trial court's decision to exclude a defense witness who was 6-years old based on the child's competence as a witness violated the defendant's Compulsory Process rights to present evidence in his defense. The child had critical exculpatory evidence and the jury should have been allowed to evaluate the credibility issue. The fact that the child believed in the tooth fairy, Santa Claus and Spiderman did not render him unfit to testify. (Part of the child's apparent confusion about who was "real" and who was not "real" was the way that questions were posed, which drew a distinction between characters in movies that were cartoons, or animated, and characters who were played by live actors). The state trial court violated the state statute that placed the burden of proving incompetency of a witness on the state, rather than proving competence of witness on the party calling the witness, as the court did in this case. In addition, the court held that the trial attorney provided ineffective assistance of counsel in failing to properly litigate the competency issue and to interview and prepare the child to testify. This case contains an encyclopedic review of Compulsory Process cases.

***WITNESSES (Exclusion of Witness Whose Testimony Was Coerced)***

***United States v. Dowell***, 430 F.3d 1100 (10th Cir. 2005) In limited circumstances, a defendant may be able to rely on the Due Process Clause to bar the testimony of a witness whose testimony has been coerced improperly by the government. The defendant failed to set forth a sufficient basis for relief in this case, but the court does conclude that circumstances may exist that would entitle a defendant to this relief. The court cites United States v. Gonzales, 164 F.3d 1285 (10th Cir. 1999); People v. Badgett, 895 P.2d 877 (Cal. 1995); LaFrance v. Bohlinger, 499 F.2d 29 (1st Cir. 1974) and State v. Samuel, 643 N.W.2d 423 (Wis. 2002) in support of the principle that a defendant may bar a witness from testifying when he can show that the witness lacks the power of self-determination after having been coerced by the government.

***WITNESSES (Invoking Fifth Amendment)***

***De LiSi v. Crosby***, 402 F.3d 1294 (11th Cir. 2005) A witness who waives his Fifth Amendment privilege with regard to a topic in a judicial proceeding, may not later invoke the privilege, even in a separate legal proceeding, on the same topic. In this case, a prosecution witness previously waived his Fifth Amendment rights regarding possible charges of tax evasion. When cross-examined by the defendant at the defendant's trial, the trial court erred in permitting the witness to invoke his Fifth Amendment rights. Harmless error.

***United States v. Wilmore,*** 381 F.3d 868 (9th Cir. 2004) The government's introduction into evidence of a witness's grand jury testimony, coupled with the lower court's restriction of defendant's cross-examination of that government witness amounted to a violation of defendant's Confrontation Clause rights and necessitated reversal of the conviction. The witness had testified at the grand jury that she had seen the defendant charged with being a felon in possession of a gun in possession of a gun. At trial, she was called as a witness for the government and denied seeing the defendant in possession of the weapon. The government introduced relevant portions of the grand jury testimony and when the witness was confronted by the government with her previous grand jury testimony, she ultimately invoked her Fifth Amendment rights. The judge then instructed defense counsel to avoid asking any questions that would lead to further invocations of the Fifth Amendment. This was erroneous. Because the grand jury testimony was actually introduced in evidence by the government, the defendant could not be limited in his cross-examination of the witness regarding the circumstances of that testimony. More importantly, the introduction of the grand jury testimony amounted to testimony that was not subject to cross-examination, which violated Crawford v. Washington, 124 S. Ct. 1354 (2004).

***WITNESSES (Prosecutor)***

***United States v. Edwards***, 154 F.3d 915 (9th Cir. 1998) The defendant was being prosecuted for drugs that were found in a black nylon bag in the trunk of a car he was driving. The focus of the defense was that there was no link between him and the black nylon bag (the car was not registered to the defendant). During a break in the trial, the prosecutor and his case agent looked into the black nylon bag and the AUSA found a piece of paper with the defendant's name on it. The prosecutor then relied on his case agent to present evidence that he was present when the AUSA found the "smoking gun" in the nylon bag. The Ninth Circuit holds that this was erroneous. A mistrial should have been granted and the prosecutor should have become a witness. The advocate-witness rule applies equally when a prosecutor implicitly testifies to personal knowledge or otherwise attains "witness verity" in a case in which he appears as an advocate for the government. Thus, it would be improper for a government attorney who has independent personal knowledge about facts that will be controverted at the trial to act as prosecutor (1) if he uses that inside information to testify indirectly by implying to the jury that he has special knowledge or insight, or (2) if he is selected as prosecutor when it is obvious he is the sole witness whose testimony is necessary to establish essential facts otherwise not ascertainable. Once the jury in this case learned that the prosecutor had found the receipt, it is almost certain that they attributed the authority of the prosecutor's office to the receipt's discovery. Reversible error

***WITNESSES (Prosecutor or Judge Threatening Defense Witnesses)***

***Earp v. Ornoski***, 431 F.3d 1158 (9th Cir. 2005) The petitioner was entitled to an evidentiary hearing on his claim that the state intimidated and threatened a witness he wanted to call at a hearing on his Motion for New Trial. Though the Ninth Circuit made no findings regarding whether this event actually occurred, the defendant proffered an affidavit from the witness, and he was at least entitled to an evidentiary hearing in support of this allegation, which, if true, might entitled him to relief. Chambers v. Mississippi, 410 U.S. 284 (1973); United States v. Vavages, 151 F.3d 1185 (9th Cir. 1998); Webb v. Texas, 409 U.S. 95 (1972); Williams v. Woodford, 384 F.3d 567 (9th Cir. 2004).

***United States v. Scroggins,*** 379 F.3d 233 (5th Cir. 2004) The court reviewed at length the law relating to threats directed at defense witnesses. Ultimately, the appellate court concluded that the trial court did not err in finding that the defendant failed to prove that his witnesses were intimidated or induced not to testify. However, the court also held that the trial court could have granted a new trial in the interest of justice in light of the witnesses' failure to comply with the defendant's subpoena.

***United States v. Schlei***, 122 F.3d 944 (11th Cir. 1997) Threats from prosecutors, judges, or law enforcement officers which deter a witness from testifying on behalf of a defendant may violate due process. When the defendant presents evidence to the district court that the government intimidated a defense witness, a trial court must grant a hearing to determine whether the allegations of intimidation are true. If the witness did not testify and the allegations of intimidation are true, no prejudice need be shown. If the witness did testify, a hearing may be necessary to determine if, as a result of a government threat, he withheld evidence favorable to the defendant.

***United States v. Blanche***, 149 F.3d 763 (8th Cir. 1998) The court discusses the notion that in some circumstances, if a prosecutor or trial judge threatens a witness thereby inducing the witness to invoke his Fifth Amendment rights, the appropriate remedy may be to judicially immunize the witness. This was not appropriate in this case, however.

***United States v. Vavages,*** 151 F.3d 1185 (9th Cir. 1998) The defendant filed an alibi notice, revealing that his wife would support his claim that he was not in the car that contained drugs. His wife was already the subject of an unrelated criminal prosecution and had entered into a plea agreement in that case. The prosecutor called the wife's attorney and told him that if the wife testified falsely – and he specifically stated that the alibi testimony was considered to be false – he would prosecute her for perjury and the government would withdraw from the plea agreement in her case. The Ninth Circuit held that this type of "threat" violated the defendant's right to due process. Unnecessarily strong admonitions against perjury aimed at discouraging defense witnesses from testifying deprive a criminal defendant of his Sixth Amendment right to Compulsory Process. See Webb v. Texas, 409 U.S. 95 (1972); United States v. Morrison, 535 F.2d 223 (3rd Cir. 1976). Equally troubling was the prosecutor's statement in closing argument that "not one adult" came forward to support the defendant's alibi claim.

***United States v. Viera***, 819 F.2d 498 (5th Cir. 1987) It was reversible error for the prosecutor to advise the defendant's attorney that if one of the defense witnesses testifies, he would either be prosecuted for complicity or be prosecuted for perjury. United States v. Foster, 128 F.3d 949 (6th Cir. 1997) The prosecutor should not have contacted a witness's attorney and warned him that if the witness testified favorable to the defense, the witness's immunity would be revoked. The trial judge should have

conducted a hearing to determine what effect this threat had on the witness who was not located by the defense and did not appear at trial.

***United States v. Arthur***, 949 F.2d 211 (6th Cir. 1991) The trial court warned a witness that anything he said could be used against him, and later stated, “I think it’s not in your best interest to testify because anything you say may be held against you in another prosecution against you for bank robbery.” The witness then refused to testify. This violated the defendant’s right to due process. While warning a witness may be acceptable, the trial judge should not encourage a witness not to testify. See Webb v. Texas, 409 U.S. 95 (1972). The error was not harmless, because this witness would have corroborated defendant’s defense of mistaken identity.

***United States v. Vavages,*** 151 F.3d 1185 (9th Cir. 1998) The defendant filed a notice disclosing his intention of relying on an alibi defense and identifying his witnesses. The prosecutor contacted the witness’s attorney and advised him that he did not believe the defendant’s alibi defense and that if the witness testified falsely, the government could bring perjury charges against her and withdraw from the plea agreement in the witness’s own criminal case. The prosecutor had a total of three or four face-to-face and telephone exchanges with the witness’s attorney concerning the possibility of the witness testifying. Neither the prosecutor nor the attorney suggested that any of the exchanges were unprofessional in tone, and the witness’s attorney admitted that he did not feel personally intimidated by the conversations. Nonetheless, the undisputed consequence of the exchanges was that the witness’s attorney advised his client to assert her Fifth Amendment privilege against self-incrimination to avoid a perjury prosecution for what the prosecutor clearly believed would be false alibi testimony. This violated the defendant’s right to due process. See Webb v. Texas, 409 U.S. 95 (1972). The prosecutor’s error was compounded in this case by arguing in closing argument that no adult came forward to support the alibi and even implicitly noted that the supposed alibi witness was actually sitting in the court and never testified.

***United States v. Heller***, 830 F.2d 150 (11th Cir. 1987) The government substantially interfered with the defendant’s due process rights in this tax evasion case by advising his accountant that if he did not cooperate with the government, he might find himself to be a co-defendant. Shortly after this warning was issued, the accountant advised the government that he would provide testimony against the defendant. The accountant then falsely testified that the defendant concealed facts from him, the accountant, and that the accountant had not heard of the defendant’s method of accounting and that he did not approve of this method. This was all a fabrication on the part of the accountant who had earlier made statements indicating that he was aware not only of the defendant’s accounting methods but had approved them.

***WITNESSES (Threat Evidence)***

***United States v. Morgan***, 786 F.3d 227 (2d Cir. 2015) Evidence that the defendant tried to hire a hitman to kill a government witness informant was too prejudicial to be probative and should have been excluded at trial pursuant to Rule 403.

***United States v. Adams***, 722 F.3d 788 (6th Cir. 2013) The government failed to link up the intimidation of a witness in this vote-buying prosecution to any of the defendants. Admitting this testimony was an abuse of discretion.

***United States v. Mayes***, 370 F.3d 703 (7th Cir. 2004) The government offered evidence that a government witness had received an anonymous threat that if he testified, he and his kids would be killed. This evidence should not have been admitted, but it was harmless error.

***United States v. Vaulin,*** 132 F.3d 898 (3rd Cir. 1997) An informant testified for the government and was asked whether he had ever been threatened while in jail. After objection by the defense, the prosecutor explained at sidebar that he did not mean to imply that the defendants were responsible for the threats, but when questioning resumed and the witness was asked whether the defendants had threatened him, he responded, "Not directly." The prosecutor should not have elicited this testimony in the first place. The supposed purpose -- to explain why the defendant wanted to get a reduction in sentence in exchange for testifying -- did not outweigh the unfair prejudice of this evidence. Harmless error.

***United States v. Thomas***, 86 F.3d 647 (7th Cir. 1996) The trial court erred in admitting evidence of anonymous threats made against a witness. The evidence was not admitted for a lawful purpose – that is, to explain some conduct of the witness such as coming forward late – but was offered in general to help the jury evaluate the witness’s credibility. Such evidence, however, does not help evaluate a witness’s credibility as much as it impinges on the defendant’s right to a fair trial. Harmless error.

***Dudley v. Duckworth***, 854 F.2d 967 (7th Cir. 1988) At the defendant’s state trial, the state asked a witness who was an accomplice of the defendant whether he had received any anonymous threats prior to testifying. The witness stated that he had. Because there was no way to link the anonymous threats to the defendant, this constituted unfair prejudice and required that the defendant’s conviction be set aside.