

BRIEF BANK INDEX

The Appellate Division of the Federal Public Defender's Office for the Northern District of Florida has compiled this index of issues we have raised in briefs since 1990. We have the brief bank stored on a common drive here in Tallahassee. Following each entry is the client's name, the attorney's initials (either Randy Murrell; Gwen Spivey; Chet Kaufman; Craig Crawford; or Jo Deyo), and the year filed. If no specific brief is referenced (e.g., "reh" for rehearing, or "rep" for reply), the reference is to the initial brief.

This index will be updated periodically. Perhaps the best way to search, besides the index, is to click on Edit/Search for key words. The following are some abbreviations used:

DC - district court	D - defendant	d/n/h - did not have
CA - court of appeals	G - government	w/o - without
JI - jury instruction	FL - Florida	sh/b - should be
DP - due process	CI - confidential informant	

If you do not see a particular issue, we might be able to help locate a brief on that issue. If you want to look at a brief, e-mail Margaret Clemons or Chet Kaufman in Tallahassee, and we will attach it to our reply.

Please feel free to contribute to this brief bank by e-mailing (or mailing diskette) to Margaret Clemons!

If you have any suggestions or problems, please contact one of us.

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Prior Florida conviction for Resisting Arrest with Violence and two Indiana convictions for Battery with physical injury are not ACCA violent felonies (Colon-GS-2011)

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DC erred in imposing ACCA & CO sentence where priors insufficient (RudolphJ-JH-2014)

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DC clearly erred in finding D competent when both drs. said not, and one conditioned

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DC failed to apply clear FL law, denying DP (Bush reh-GS-2001)

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Buy-sell Relationship. D sold to individuals, not consp. to distr. (V. Smith-GS-2002)

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Single v. Multiple. DC erred in finding MS drug seizure was connected to FL conspiracy which ended 10 mos. earlier & no evid. Connected them (Plummer-CK-2009)

G failed to prove sgl. conspiracy; evid. showed numerous people acting independently altho in same place doing same thing(Clarke-JD-1993; Biggins-JD-1996)

D only supplied a few times in South TX; most activities were people importing from Belize to FL, then from TX to FL.(Esparza-JD-1994)

Evid. showed 3 conspiracies, no overlap exc. supplier, 2 earlier & more trips; prej. variance - See coDef's brief (constr. amend. viol. DP)(Tranmer-JD-1994)

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Challenging commerce clause basis for 18 USC 922(g) conviction for gun poss'd in FL but manufact'd 96 yrs. ago in other state (Shivers-CK-2005)

Hobbs Act invalid exercise of commerce clause power, evidence insufficient, and JI improper (Ellington-JD-1996)

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Ex Post Facto Retro. Applic. Of onerous interpret. Of ambiguous statute, 18 USC 3624(b)(1), to

disadvantage D whose offense was commit'd before adoption of that interpret. (Guanipa-CK-2005)

Fair Trial. DC violated due process and right to fair trial by *sua sponte* comment to jury that most closely aligned codefendant had pleaded guilty mid-trial, with no notice to defense and no caution or limitation about its use (RodriguezW-GS-2014)

DC violated due process and rts to fair trial and present defense by excluding the abandonment theory of defense (Preacher-CK-2010)

D denied fair trial based on combined prejudice of improper & prejudicial cross-examination about prior conviction and closing argument (Ratliff-GS-2009)

D denied fair trial based on cumul. prej. from prosecutor's opening, closing, and witness exam. re: motorcycle gang and to ignore JI & re: unchg'd crimes. . . (AdamsB-GS-2008)

DC's adherence to *Matthews* and admission of evidence of unrelated prior crimes under Rule 404(b) evidence denied 5A due process & fair trial (JohnsonE-CK-2006)

Model brief on *Crawford v. Washington* retroactivity & related issues (Crawfordbrief-2004)

Cumulative effect of errors denied DP (Badia-GS-2003; Watts-GS-2001; Bush-GS-2002; R. Hall-CK-2002)

D den. DP & fair trial by DC's failure to protect const. rts. & G misconduct. (Sepulveda-GS-2002)

Denied fair trial by numerous errors, incl. den. of subpoenas, interpreter, clean clothing, baths, access to library (Sepulveda-GS-2002)

Viol'd by DC JI re: defense of justification and by cumul. effect of testimony, comment, and argument (Sinkfield-RM-2001)

DC failed to apply clear FL law, denying DP (Bush reh-GS-2001)

Fourth Amendment (see separate Search and Seizure heading)

Fifth Amendment. Almendarez-Torres, Harris, Apprendi (JamesS-CC-2011; Stevenson-GS-2010)

Almendarez-Torres/Apprendi re: prior convictions (Bowden-GS-2008)

DC viol'd by includ'g privil'd info in PSI (Pierre-CK-2004)

Miranda violation; functional equivalent of pre-Miranda questioning; exploitation of unlawfully

seized evidence (BradleyA-CK-2003)

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Grand Jury Clause - Almendarez-Torres/Apprendi re: prior convictions . . . (Bowden-GS-2008)

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Apprendi, as to prior conv. under 18/924(c)(Durham-GS-2001; V. Smith-GS-2002)

Overbreadth. 18 USC 911 is facially overbroad & viol. 1st Am. (Silva-Nava-CK-2007)

Child Pornography Prevention Act of 1996 (CPPA) overbroad under *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); it criminalizes possession of images of minors in sex. act. even if no minors actually involv'd (Cheathem-CK-2004)

Separation of Powers - Misd. conv. for violating Nat’l Park Serv. driving regulations sh/be vacated because regulatory scheme on face violates nondelegation doctrine . . (Bergen-CK-2003; BrownB-CK-2003)

Sixth Amendment

Alleyne: District court erred under Alleyne by allowing prosecution under 924(e) where ACCA not charged in indictment or proved to jurors BRD.....(Green-CK-2014)

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DC correctly granted habeas and ruled that state had violated 6A rights by denying right to cross-examine alleged victim with identical prior false allegations (W. Baker-CK-2010)

DC violated due process and rts to fair trial and present defense by excluding the abandonment theory of defense (Preacher-CK-2010)

DC abused discretion in denying motion for substitution of counsel (Gee-GS-2008)

DC failed to ensure waiver of counsel was know., intell. & volun. (Talley-CK-2008)

6A viol’d by using acquitted conduct in sentencing (WhiteRoger-

2008)

DC viol'd 6A by excluding justification/necessity defense to felon-in-poss. chg.. (Rice-GS-2007)

DC comm'd plain error viol. Of 6A & *Shepard* by consider'g improper evid. To establish facts about prior offenses in support of ACCA sentence (Holland-CK-2006)

D entitled to new trial/dismissal cuz FBI CI interfered in atty-client relationship . . (Le-GS-2006)

Whether *Blakely* made USSG unconstitutional?
(BushCrt-GS-2004; Hanna-GS-2004; ScottJ-CK-2004)

D provided ineffec. assis. by failure to promptly resolve entrapment issue, resulting in loss of third point for acceptance under 3C1.1 (Cash-GS-2004)

Govt. interfered w/DP and right to defense by intimidating defense witness not to testify w/5A priv. against self-incrimination (Snelling-CK-2004)

DC erred in admitting 911 call, and G transcript, as it was critical to element of identity and deprived D of 6A rt. of cross-examination (*Crawford v. Wash.*) (AndrewsT-GS-2004)

Counsel denied w/o adeq. inquiry & based on seized assets (Sepulveda-GS-2003)

Faretta inquiry necessary before allowing "hybrid representation" or letting D act as co-counsel (V. Smith-GS Rep. 2002)

DC viol'd 6A rt. to conflict-free counsel by den. PD's mot. to withdraw and appt. panel atty. to cross G witness also repre'd by PD (N. Bailey-RM-2002)

DC d/n conduct full & adeq. *Faretta* inquiry (Evans-GS-2006; RodriguezR-CK-2002)

Rt. to counsel in misd. Cases extends to probation sentences (Collette-CK-2002)

DC erred in req'ng D to wear both stun belt and leg shackles w/o G showing necessary, least restrictive altern., and no record of efforts to hide from jury; viol'd 5A & 6A (Durham-GS-2001)

DC erred in req'ng pro se D to wear stun belt w/o hng. or evid.. (Sepulveda-GS-2001)

DC erred in denying counsel w/o adequate inquiry & record that D cd. afford to hire counsel, based on "hidden assets" never proven (Sepulveda-GS-2001)

D denied DP when denied counsel at resentencing (2254 claim). (Hall-GS-

2000)

Testify, Right to. Fund.const. rt; DC d/n adv. D of rt. or conduct record inquiry whether waiver valid (S. Gordon-CC-1996; McFarland-CC-1997; Dewalker-CC-1996)

CONTEMPT DC order erred by omitting statutory 180-day maximum (Swaine-GS-2010)

DC erred by disregarding D's inability to purge civil contempt (McClamma-CK-2004)

CONTINUANCE

Denial of continuance error where it deprived D of critical witness (RodriguezM-CK-2011)

Denial of cont. for sent. error/atty. had not met with D (Durham-GS-2001)

Denial of cont. to compel witness attendance (D. Jackson-GS-2000)

Denial of continuance error; only 34 days to prepare for trial (McFarland-CC-1997)

CONTROLLED SUBSTANCE SENT. ENHANCEMENT: district court miscalculated advisory guideline range by increasing his base offense level under §2K2.1(a)(3) based upon 2009 conviction for violating fla. Stat. §893.13, which is not a "controlled substance offense" as defined in §4B1.2. (Chandler-DJ-2014)

COURTS

Denied fair trial by numerous errors, incl. den. of subpoenas, interpreter, clean clothing, baths, access to library (Sepulveda-GS-2002)

Judge questioning witness was inflam., prej., and partial (Dewalker-CC-1996)

DC implicitly called defense witness a liar in front of jury, becoming advocate for G and losing appearance of impartiality. (Deedrick-CC-1998)

Improper comment by judge (Biggins-JD-1996)

CROSS-EXAMINATION

Model brief on *Crawford v. Washington* retroactivity & related issues (Crawfordbrief-2004)

Improp. to cross D's wife re: employ. as exotic dancer & prior conv. (Asters-JD-2000)

DEPORTATION

DC should not order deportation, only release to INS (Difflerant-JD-1996;

Grenhagen-CC-1997)

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DC cd/n sua sponte raise affirmative defense for G (Davenport & cert-GS-2000)

DOUBLE JEOPARDY

DC erred in denying motion to dismiss possession count, as it violated Double Jeopardy when combined with the receipt (of CP) count; rev'g precedent . . (Peacock-GS-2010; Morin-GS-2010)

See CARJACKING, SENTENCING

Conspiracies. 2 conspiracies WITD marij. really same offense/different dates . (Bacon-JD-1994)

Convictions. Conv. on 2 cts. possession of same firearm is Double Jeopardy - can charge both but not convict of both (Spear-JD-1995; T. Brown-JD-1996)

Mistrial. DC declared mistrial for defense cross-exam question viol'd double jeopardy; question proper to expose bias of witness (Deedrick-CC-1998)

Punishments. Subseq. prosecution for witness retaliation, already used to enhance underlying drug offense, violated Double Jeopardy. (Gainer-JD-1994)

DRUGS

Cocaine Base. Statutes and guidelines void for vagueness; alternatively the definitions are ambig. and thus rule of lenity requires less severe penalties (A. White-JD-1995)

Methamphetamine. DC failed to make proper finding (and evidence DID NOT show) that all drugs were d-meth instead of the less severely punished l-meth. . (Hutto-JD-1995; Ramsdale-JD-1995)

DUE PROCESS

Magistrate judge violated due process by accepting a plea where the factual basis did not support conviction of forcible assault under 18 USC 111; also, R. 11 violation (Yonker-GS-2009)

DC denied due process by visible use of restraints, w/o inquiry, where D repeatedly requested to absent himself from trial (Talley-CK-2008)

Denied by refus'g jury instruction on duress/justification defense (Pollock-CK-2006)

Denied by outrageous govt. conduct via FBI's prison CI interfer'g in atty-client relationship; indictment should be dismissed (Le-GS-2006)

D den. DP by being compelled to wear jail garb and stun belt (Sepulveda-GS-2002)

C/n conv. where evidence is only sufficient if court includes consideration of the *opposite* of D's testimony(Lawrence cert-GS-2001)

Arguing court failed to apply clear FL law on element of identity; c/n convict under Assim. Crimes Act on evidence that wd be insuffic. under FL law (Bush/reh.-GS-2001)

DC denial of defendant's mot. to compel G to file 5K1.1 motion, where G refused to file because D exercised right to trial, viol'd 6A - WINNER (Dorsey-2007)

G refusal to file 5K1 viol'd Equal Prot. & DP cuz in bad faith & thus breach of plea agreement & G's stated reasons not rationally related to legit. G ends (D. Hardy cert-GS-2001; Tucker-JD-1993)

Viol'd by ct's extra-judicial contact with govt. about D w/i hrs. after sent'ng, w/o notice; under 28 USC 455(A), ct. was req'd to recuse judge due to bias against D which prejud'd him at sent'ng(Adams-CC-1999)

DUI (FELONY)

Arguing DC failed to apply clear FL law on element of identity (Bush/reh.-GS-2001)

ESCAPE

DC erred in classifying prior escape conviction for failure to return to work release after authorized departure as "crime of violence" under 4B1.2 and ACCA (J. Taylor-GS-2006)

DC erred in denying 7-level reduction under 2P1.1, ruling D d/n "return voluntarily" because he engaged in repeated escapes (to meet wife for sex) and returns (Zucco-GS-2005)

DC erred in applying obstruction enhancement to escape offense (McGuinness-CK-2005)

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EVIDENCE

Admission. Lay opinion testimony of officer re: drug dealers' behavior violated Rule 701 and sh/h/b excluded (JohnsonE-CK-2006)

DC abused discretion in allowing investigator to testify he could find no legitimate source of income for defendant, to prove poss. Was WITD (McCorvey-CK-2006)

Arguing sweat patch evidence inadmissible (RandallG-TM-2004)

DC erred in admitting anonymous 911 call and trans., critical to D's ID .. (AndrewsT-GS-2004)

DC abused disc. In denying expert to corroborate D testimony and refusing to order G to redact from stmt. Reference to irrelevant, old misd. conviction (Franklin-CK-2003)

DC sh/h (in poss. of firearm by conv. felon case) excluded ofr's test. that D matched descrip. by anon. tipster; jury likely viewed as subst. evid. & d/n serve legit. purpose . (N. Bailey-RM-2002)

DC erred in admitting response filed by D under Ct. order & order which included adverse judicial finding going to heart of case (Roberts-CK-2002)

Coconspirator's stmt. not made during or in furtherance of consp. (Coatney-CC-2000)

DC should have admitted picture or direct view of D's physical characteristic to support defense theory that it did not happen; can reopen case after arguments (Dalton-JD-1995)

DC refused to admit evidence of D's mental state, and prevented defense by deciding armed bank robbery was a general intent crime(Hamilton-JD-1996)

DC erred in denying D's request for expert (Pell-CC-1997)

Evidence of drug addiction statement made > 3 months before bank robbery should not have been admitted (Soubble-CC-1998)

Credibility of witness always at issue(Underwood-RMS-2015)

Hearsay - violation of supervised release may not be based solely on *unreliable* hearsay evidence. (Pace-RMS-2017)

Authentication-Rule 901. DC viol'd FRE 901 by admitting alleged letter from D w/no acceptable ID of her signature or writing; agent's opinion not OK (HannaC-GS-2006)

Prejudicial-Rule 403. Admission of statement that D had thought about molesting his own daughters, in 2242(b) case involving fictional minors, and where D did not contest his interest in sex with minors, was marginally relevant, unnec. & overly prejudicial (McGee-GS-2009)

Balancing test - prior possession of firearm.....(B. Sanders-RMS-2016)

Admission of prej. photos viol'd 403/404 (TuckerC-CK-2008)

Admission of child porn violated 403 in possession of child porn case(Collins-RMS-2017)

Numerous incidents of prej. evid. req'd reversal (Badia-GS-2003; Bush-GS-2001)

DC sh/h granted mistrial; D appeared in jail uniform; test. D in prison (V. Smith-GS-2002)

DC erred in adm'g prejudicial hearsay re: alleged coconsp's consciousness of guilt arising from fugitive status (Riley-CK-2002)

DC should have granted mistrial after 404(b) witness, victim in prior identical offense, testified D had raped her (Pimentel-GS-2000)

Rule 404(b). Arguing FL judgment based on nolo plea inadmissible under 404(b)(not an admission of guilt) (Flowers - RMS - 2016) (Green - CK - 2014)

District court abused its discretion under federal rule of evidence 404(b), and erroneously denied motions for mistrial, when it permitted the government, over objection, to introduce a one-page list containing 23 names with personal identifying information, an addressed sealed envelope connected to one name on that list, and various references to additional lists from which jurors could infer unrelated and irrelevant criminal activity.....(Jemmott-CK-2014)

Admission of prej. photos viol'd FRE 403/404(b) (TuckerC-CK-2008)

DC erred under 404(b) in permitting Gov. to introduce a list and envelope that suggest unrelated, irrelevant other crimes (JemmottD-CK-2014)

DC admission of Rule 404(b) evid. of prior unrelated crimes to prove criminal conspiracy violated due process & fair trial under 5A and 6A (JohnsonE-CK-2006)

DC admission of prior unrelated crime as feature of trial made trial unfair (Hicks-CK-2006)

DC admission of evid. Of prior convictions to prove intent under 404(b) was not probative and was unduly prejudicial (McCorvey-CK-2006)

No notice, bad act irrel. to crime charged, & subst. prejudice (Hudson-CC-1998)

Separate shooting incident prejudicial (Lampkin-JD-1996)

DC should exclude 404(b) evidence when intent goes to element D does not contest, juror comment that they should get more for all that they have done, prosecutor's closing argument stresses prejudicial effect (S. Gordon-CC-1996)

Evidence of prior drug charge 13 yrs. ago should not have been admitted in instant conspiracy charge(Lopera-JD-1993)

Evidence of prior drug charge for cocaine that was dropped should not have been admitted in marij. conspiracy case (Esparza-JD-1994)

Evidence of burglary during which gun taken (charge is felon-in-poss) and D's possible connection should not have been admitted(Young-JD-1994)

Traffic stop with drugs in car (Biggins-JD-1996)

Incident 9 yrs prior, little similarity(Difflerant-JD-1996)

eid. gun possession where D charged only with drug poss., not trafficking (Underwood-RMS-2015)

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Singleton. G violated 18 USC 201(c)(2) and Fla Bar Rule 4-3.4(B) by presenting testimony of cooperating witnesses w/whom G had entered plea agreements promising possible leniency, etc (Breland-CC-1998)

Statement against penal interest - admissibility under Rule 804(b)(3)...(***)noting split of authority resolved by Rules Committee **against 11th Circuit**.....(Underwood-RMS-2015)

Sufficiency. The evidence was insufficient to withstand timely motions for judgment of acquittal because proof of possession of the firearm rested principally on an uncorroborated alleged admission.....(Green-CK-2014)

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The district court should have granted a motion for judgment of acquittal due to what the trial judge found to be the substantial lack of credibility of the government's principal witness..... (Mitchell-CK-2013)

Evidence insufficient to show D made misrepresentations, where Govt. specifically declined omissions and jury instructed accordingly (MyersJ-CK-2013)

Evid. Insuff. D viol'd 18 USC 1028A, Aggravated Identity Theft, because statute expressly excludes check forgery (Shanks-GS-2011)

Evidence was insufficient that D viol'd 18 USC 1028A, Aggravated Identity Theft, because stipulated facts did not include the essential element of knowledge, and because 1028A does not include deceased victims (Zuniga-Arteaga-GS-2011)

Evid. insuff. that wife conspired w/husband's fraud (RodriguezM-CK-2011)

Evid. insuff. to prove D viol'd Jury Selection Act, 28 USC 1867, or that he had criminal intent to disclose records, other than legitimate defense effort (Dean-GS-2007)

Evid. insuff. to prove conspiracy/agreement because G proved only that D's wife acquiesced in his pot growing (Akridge-CK-2007)

Evid. insuff. D knew codef. was convicted felon in aiding/abet'g case . . . (Goldsmith-CK-2007)

Evid. insuff. in bank fraud that D *knew* lender was bank (Jack-GS-2006)

Evid. insuff. D knew drugs in tractor-trailer he drove; *Brown* challenge (Ramos-GS-2006)

Evid. Insuff. D had *specific intent to cause* Coast Guard search; government must prove not only that he acted "knowingly and willfully" but also that he "caused" the object . . . (Haun-GS-2006)

evid. Insuff. D *caused* a mailing (mail fraud statute) because mailing not "reasonably foreseeable" (Dennin-RMS-2015)

Insuff. Evid. D had *intent* to support carjacking conv. (Hicks-CK-2006)

Insuff. Evid. of conspiracy where no evid. of knowing and willful participation, i.e., specific intent (Stuckey-GS-2005)

Insuff. Evid. Of Armed Bank Robbery under 18 USC 2113(d) cuz drive-in robber had no d'rous weapon, no pretend weapon, & no object purported to be weapon, only remote to alleged bomb
(HannaC-GS-2006)

Insuff. evid. of conspiracy where no evid. of agreement (Badia-GS-2003)

Same; calls b/w CI and D but no agreement or transaction (Lopera-JD-1993)

JOA sh/h/b granted because no person of ordinary prudence wd/h relied or acted upon hair-brained hoax (K. Gray-CK-2003)

JOA sh/h/b granted under 18 USC 912; DC's stat. interpret. wrong (Dupaquier-CK-2003)

Drug quantity, based on hearsay & conf. evid. (JI Davis-CK-2002)

D sold drugs solo, not in conspiracy with others (V. Smith-GS-2002; Riley-CK-2002; Wallace-JD-1994)

Element of identity under FL law for felony DUI conv.(Bush & reh.-GS-2001)

Drug quantity (Scarlett-GS-2009; Hires-2d appeal-GS-2001; Rosiles-GS-2001)

Insuff. to support min. mand. (Rosiles-GS-2001; Price-GS-2001)

Grand theft to support state conv (Washawitz-GS-1998)

Extreme physical pain to prove assault causing ser. bod. injury. (Thompson-GS-1998)

Scheme to defraud or intent to conceal funds (money laund.) (Majors-JD-1997)

Scheme to defraud or Dr. pract'd outside std. of care or wrote unauth'd prescriptions
.(Abdullah-JD-1997)

Theft of G property (Hill-JD-1996)

Conspiracy or intent to distribute (Biggins-JD-1996)

D transported stolen vehicle in inter. comm. for Dyer Act viol.(S. Gordon-CC-1996)

No intent to poss firearm; felon found & pawned it(Walton cert-JD-1993)

Under Assim'd Crimes Act, DC should use FL rules re: sufficiency & circumstantial evidence(Vinson-JD-1994)

D took action or had intent to destroy fishing vessel (Cathcart-JD-1994)

D had no intent to steal knife from military base (Parker-JD-1994)

Effect on inter. comm. of local robbery & evid. jury thought insuff. (Lane-JD-1994)

Consent, so no kidnapping (Dix-JD-1994)

Mere presence of gun, not constr. poss. (H. White-JD-1995; Walker-JD-1996)

No finan. inst. for bank fraud and D d/n impede RTC (Heaver-JD-1995)

Knowing possession or intent to distribute (Pryor-JD-1995)

Intent to possess unregistered shortbarrelled shotgun (Morin-JD-1996)

Variance. Evid. varied from indictment; mult. conspiracies (Biggins-JD-1996)

FINE

DC erred in believing no discretion to waive fine under 21 USC 844(a) (J. Smith-GS-2003; Outlaw-CK-2003)

DC clearly erred in imposing fine when D had no ability to pay (McCorvey-CK-2006; McGuinness-CK-2005; Zion-GS-2003; Huggins-CK-2002; Cheek-CC-2000; Duarte-Cuevas/K. Crystal-GS-2000)

DC clearly erred imposing fine based on D’s silence; must consider dependents’ support (Wesner & reheb-GS-2002)

FIREARMS

Carrying/924(c). Facially unconstitutional; and violates 2d Amendment . (924cbriefexcerpt.pdf)

Indict. defective; d/n allege “2d or subseq. conv”(Durham-GS-2001)

Insuff. evid. that semi-automatic assault weapon (Durham-GS-2001)

Jl defective for omitting statutory definitions(Durham-GS-2001)

DC sh/h/given requested “carry” instruction; evid. d/n show D carried firearm, in light of *Bailey* (B. Pyle-JD-1995; Hutto-JD-1995)

D d/n knowingly carry firearm or reas. foresee co-D’s firearm (St. Victor-JD-1998)

D d/n carry or use firearm dur. drug off; DC’s availability test (w/i reach & immed. avail. for use) was improper.(Resha-CC-1997)

Commerce Clause. 922(g) conviction violates 2d Amendment (924cbriefexcerpt.pdf)

Challenging commerce clause basis for 18 USC 922(g) conviction for gun poss’d in FL but

manufact'd 96 yrs. ago in other state (Shivers-CK-2005)

Dealer. Sale to underage buyer incl. element of willfulness; & JI on knowl. of falsity (H. Hudson-CC-1998)

False statement. D cd/n/be conv'd where prior dv misd. conv. uncounseled (L. Brown-GS-2000)

Insuff. that D had intent/ability/knowledge prior conv. was felony (J. Lawrence-GS-2000)

Felon-in-Possession; Invalid under Commerce Clause.

DC correctly distinguished precedent; D did not have prior state "conviction" where he pled guilty, adjud. was withheld, and he successfully completed probation (Santiago-GS-2009)

Ct. should extend application of justification defense to felon-in-poss. chg. to include D's defense of third party (Rice-GS-2007)

Stat. unconstitutional; invalid exercise of commerce clause power (Sinkfield-RM-2001; H. White's supp brief-JD-1995; Walker-JD-1996; Morin-JD-1996)

Out-of state mfr. insuff. proof of fed nexus (Walker-JD-1996)

Same, especially since evidence showed gun in FL for more than 20 yrs. (for felon-in-poss and for possession stolen firearm) (Morin-JD-1996)

Improper intrusion into state power (E. Gordon-JD-1997)

Felon-in-Possession; Unconst. on face; because neither 922(g) nor 921 defines commerce as inter. or foreign (M. Stephens/F. Miller/Nichols/L. Richbourg-CC-1996)

Possession Unregistered Firearm; not "crime of violence" under 4B1.2 (Owens-GS-2005)

FORFEITURE DC erred in absence of sufficient proof connecting real property forfeited to crimes committed in camper trailer that had been moved (L. Mann-CK-2011)

DC erred in denying JOA on forfeiture (Sepulveda-GS-2002)

DC erred in not considering 21 USC §§ 853(d)&(n), and 18 USC 3572 before ordering forfeiture of D's home where siblings lived and he had dependent child (Cromwell-GS-2008)

HABEAS

DC correctly granted habeas and ruled that state appellate court’s harmless error ruling was based on unreas. factual determination which had subst. and injurious effect. . . . (W. Baker-CK-2010)

Apprendi claim was exhausted in state courts, if only because state argued it in state appellate court; appellant did not have to raise it himself personally (Knight-GS-2008)

Amend. filed after 4/27/97 should “relate back” & be timely (J. Davenport-GS-2000)

Proced. default sh/n preclude relief cuz G failed to raise it previously, it wd/be inefficient, and it wd cause miscarriage of justice (Resha-CC-1997)

TOLLING - Fla. Rule Crim. P. 3.800(c)(M. Rogers - RMS - 2016)

HABEAS (Rule 60(b)): Martinez v. Ryan, entitles D to relief from the denial of his habeas petition under federal rule of civil procedure 60(b)(5) such that the district court should excuse his procedural default barring his ineffective-assistance-of- trial-counsel claim(Quintero-CK-2014)

IMMIGRATION . . . G failed to prove D qualified for elevated stat. max. sentence because he committed offenses “after admission” to US as req’d by INA (Sarwar-CK-2009)

INDICTMENT

Material variance in date alleged (predated trial) (Roberts-CK-2002)

Evidence varied from & constructively amended indictment (R. Fenelon-JD-1997)

D sh/n/h/b forced to trial 12 days after super. indict. filed (J. Mejia-JD-1995)

INEFFECTIVE ASSISTANCE OF COUNSEL

D denied effec. assist. of counsel under *Cronic* at jury selection due to conflict and desire to have different counsel; counsel failed to act as counsel(T. Watts-GS-2001)

D denied effective assistance due to bad advice re: sentencing consequences after trial - would have otherwise gone to trial rather than enter plea.....(Holley -RMS-2017)

INSANITY

DC clearly erron. in denying insanity acquittee’s mot. for release (Frank-GS-2002)

DC sh/h granted JOA; D had 6 mental health experts he suffered from psychotic disorder that can affect ability to appreciate wrongfulness of acts. (L. Trac-JD-

1994)

INVITED ERROR

AFPD did not invite error by communicating to court Probation Officer’s wrongful conclusion that a pre-1989 offense had no guidelines range to be calculated (RB) (Whitfield - KS-2015)

JUDGMENT

Clerical error in judgment must be corrected (Issue IV) (S. James-CC-2011)

JURISDICTION

DC w/o subj. matter juris. thru ACA for DUI where regs indicate fed. govt’s intent to exclude state DUI statute (YatesB-CK-2006)

DC w/o juris. under Assim. Cr. Act where not cited or alleged (Doda-GS-2003)

DC w/o juris. under 36 CFR as improper delegation of legislative authority . (Bergen-CK-2003; Brown-CK-2003; Doda-GS-2003)

DC w/o juris. over military base where state never ceded juris (Bush-GS-2001)

DC d/n/h juris. to sent. D under 21/841, incl. min. mand. sent., where indict. failed to allege drug quantity(J. Wims/N. Price cert-GS-2001; Asters-JD-2000)

JURY

Batson. No proper inquiry = erroneous finding of no racial motivation (J. Hill-JD-1996)

Composition. Systematic excl. of blacks from venire viol’d 6A & Jury Service & Selection Act(Thompson-GS-1998)

Inconsistent Verdicts. DC sh/h granted JOA; all agreed legally inconsistent; 2 jury Qs revealed it d/n think G proved case; & juror Q’d poll after verdicts(B. Lane-JD-1994)

Verdicts inconsistent because facts which must be assumed for acquittals d/n support guilty verdict(Dalton-JD-1995)

Number of Jurors. DC’s excusal of juror after delib. began & proceed’g w/11 jurors error since jury deadlocked, trial short, etc.(H. Hills-JD-1990)

Misconduct. DC erred by fail’g to hold hng. or invest. alleged misconduct. when cred. and uncontra’d evid. jury subjected to outside influence - G agent (J. Van Riper-CC-2000)

Selection. DC abused its discretion in granting G challenge for cause for juror who expressed concern, not bias, accepted court’s explanations, and claimed impartiality . . (A. Lewis-GS-2009)

D's conviction viol'd Jury Selection Act and 5th and 6th amendments cuz only engaged in legitimate efforts to challenge jury composition and no crim. intent . (Dean-GS-2007)

D denied fair trial cuz wore **jail garb** at jury selection & TC d/n give curative instruc. (T. Watts-GS-2001)

D denied fair trial cuz DC failed to conduct inquiry into **publicity** (T. Watts-GS-2001)

JURY INSTRUCTIONS

11th Cir. Pattern Jury Instructions for Mail Fraud are WRONG on element of causing a mailing by another(DENNIN-RMS-2015)

DC erred in subjective and inconsistent JI on reasonable doubt (JamesS-CC-2011)

DC violated due process and rts to fair trial and present defense by excluding the abandonment theory of defense (Preacher-CK-2010)

DC viol'd due process by denying JI that duress/justification defense can be supported by D's reasonable, even if erroneous, fear of immed. death or ser. bodily harm (Pollock-CK-2006)

DC erred by refusing to instruct jury on lesser offense of simple poss. (McCorvey-CK-2006)

DC erred by giving instr. different from pattern on assault (JonesT-CK-2006)

DC erred by refusing to instruct jury that one count had been dismissed, and instead giving instr. which implied count was still active and by refusing curative instr. To improper prosecutorial closing argument (Overton-GS-2004)

DC erred by deviating from *Brown* and pattern JI, by JI to disregard whether reason. person wd/h known this was a hoax (K. Gray-CK-2003)

DC erred by JI on lesser included off., depriving D of right to choose defense strategy.
. (R. Hall-CK-2002)

924(c) instruction defective for omitting statu. defin. (Durham-GS-2001)

DC viol'd DP/fair trial w/JI that defense of justification could "only arise under extra-ordinary circum." (Sinkfield-RM-2001)

Instr. that G d/n/h to prove D member of scheme was erron (Coatney-CC-2000)

Fail. to instruct on mail fraud, one obj. of multi-obj. consp. (Adams-CC-1999)

Deliberate ignorance instr. not supported by evidence (Difflerant-JD-1996)

DC erred in instr’g jury to cont. deliberate after inconsistent verdicts and questions showed jury d/n think G proved elem; coercive in totality of circum. (B. Lane-JD-1994)

DC sh/h given D’s req’d JI re: mere presence not constructive poss(H. White-JD-1995)

See Firearms - D’s req’d instr. for “carry” under 924(c) (B. Pyle-JD-1995)

DC d/n instr. on mens rea req’d for poss. of unregis’d shortbarrelled shotgun was reversible error(Morin-JD-1996)

DC d/n give JI explaining structure requirement in racketeering enter. (Clarke-JD-1993)

DC erred in denying Alvarez limit. for coconsp. Pinkerton liability for unintended offense(Clarke-JD-1993)

JI “induce” sex (under 18) 2422(b) erroneous on “attempt to overcome will”..... (Matlack-RS-2016); also (Grafton-RS-2016)

JUVENILE

Transfer. DC erred in transf’g juv. for adult pros. cuz some facts in order inaccurate & it failed to consider significant facts (E. Kimble-JD-1994)

MAGISTRATE

Magis. d/n/h auth., w/o D’s consent, to preside over plea(L. Tibbits-RM-2002)

MIRANDA AND VOLUNTARINESS

Miranda. Waiver not valid(E. Carter-JD-1995)

Agent’s statement re: D’s silence was improper (Tran-CK-2005; W. Pyle-JD-1995)

Edwards. Edwards req. supp. where co-D cooperates & gets stmts in trying to persuade D to cooperate (T. Arrellano/ini & cert-CC-1997)

MISDEMEANORS

Conv. For viol’g Nat’l Park Serv. Admin. Traffic regul. Must be vacated cuz regulatory scheme on face violates nondelegation doctrine of separ. Of powers (BrownB-CK-2002)

NEW TRIAL

Untimely motion related back to timely mot. so DC had juris. (J. Culliver-JD-1999)

Key witness' recantation requires new trial (J. Culliver-JD-1999)

Proof that G witness lied about impor. overt act req. new trial (Tranmer-JD-1994)

G witness arrested for armed robbery (Spear-JD-1995)

PERJURY

Evid. insuff. given disclaimer "to best of knowl." and stmt. literally truthful; evid. of materiality insuff; DC erred by denying JI that literally true stmt. is defense and pro se stmt. not judged by same std. as pleading by lawyer (Roberts-CK-2002)

PHOTOGRAPHS

Inflammatory. DC erred in admit' gory photos; irrel. & cumul. (Clarke-JD-1993)

PLAIN ERROR

Incorrectly calculated base offense level, and sentence well above correct range, affects defendant's substantial rights; distinguishing *Rodriguez* (Pantle reb-GS-2011)

CA sh address const. chall. to stat., tho not made in DC(M. Stephens/reheb-CC-1996)

CA can address sent. error w/o objec. if subst. & illeg. sent. (Payne/rep-JD-1990)

PLEAS/RULE 11 D sh/b allowed to w/draw plea where not properly advised that he faced a mandatory life sentence under 851 enhancement (& due process viol) (B. Stevenson-GS-2010)

D should be allowed to w/draw plea where ? Whether prior offense qualified for mandatory minimum should be determined by jury not judge (Apprendi)(Sam Johnson-RS-2016)

FL L&L molestation not categorically "sexual abuse" for MM sentence. (Sam Johnson-RS-2016)

D sh/b allowed to w/draw plea where not properly informed that sentences could be imposed consecutively (Olmeda-CK-2010)

Magis. cd/n preside over plea w/o D's consent (L. Tibbits-RM-2002)

Conditional plea. Whether unconditional guilty plea was not entered knowingly and voluntarily, where appellant he told the district court before sentencing he wanted to appeal the denial on the merits of his motion to suppress. (Pina-CK 2014)

Factual basis. Magistrate judge violated due process & R. 11 by accepting plea where factual basis did not support violation of 18 USC 111 & d/n explain elements (Yonker-GS-2009)

Rule 11. DC comm'd **plain error** by mis-advice as to maximum penalty where plea agreement contained same error and D was sent'd to more years (PhelpsD-CK-2013; Nelson-CK-2009; G. Day-GS-2009)

DC comm'd **plain error** viol'g R. 11 colloquy; omitting elements . (Yonker-GS-2009; G. Senn-GS-2004; B. McCombs-GS-2003; C. Johnson-GS-2003; B. Longmire-GS-2003)

DC committed plain error when it allowed unconditional guilty plea when appellant told the district court before sentencing he wanted to appeal the denial on the merits of his motion to suppress. (Pina-CK 2014)

DC comm'd plain error in failing to identify state laws violated in revocation proceeding, in violation of due process and Rule 11 (D. Levitan-CK-2009)

DC erred cuz no factual basis for plea (Evans-GS-2006)

DC must inform D of minimum mandatory sentence (Bass-CC-1998)

DC must inform D restitution wd/be ordered (M. Moore-CC-1997)

DC has affirm. duty to inform D rt. testify before G plea. (J. Nichols/F. Miller/C. Johnson-CC-1996)

Specific performance. D entitled to specific performance or withdrawal cuz G violated plea agreement "not to recommend a specific sentence" by extensive argument for upward departure and upward variance; standard of review *de novo* v. plain error (Girard-GS-2011)

D entitled to spec. perform. cuz G viol'd Plea Agreement "not to recommend a specific sentence" by sent'g memo arguing for consec. sent. (J. Thomas-GS-2007)

D entitled to spec. perform. cuz G agreed he provided subst. assist. and refused to file motion for reasons outside scope of Agreement; may not refuse to file for reasons not covered by At but only by separate informant At (S. Griffin-GS-2003)

D entitled to spec. perform. of plea agree. cuz DC adv'd max term of super. rel. was 4 years, then imposed 8 yrs. (**G agreed**). (C. Stevenson-GS-1999)

Spec. perform. req'd, or w/drawal of plea, where G induced plea then refused fair oppor. at subst. assis., cuz agent's opinion, when plea offered, D lied in 1st trial, & G ignored polygraph D was truthful (R. Hardy/reheb/cert-GS-2001)

Voluntariness. Not know. & volun. cuz admit'd kidnapping but not rape; also insuff. factual

basis for all elements (J. Lewis-JD-1996)

Withdrawal. DC erred in denying mot. w/draw, after general remand for resentencing, w/o hng, despite evidence counsel was horribly misguided about conseq. of plea . . . (Jerchowder-CK-2012)

DC erred in denying mot. w/draw; plea colloquy was confusing and misleading re: mandatory life sentence; subst. emotional pressure to plead w/jury waiting . . . (Carroll-GS-2004)

DC erred in denying mot. w/draw where D was not aware of career criminal and consecutive sentencing issues, claimed innocence, complained of atty's ineffectiveness, and needed time for newly appointed counsel to investigate (HowardD-CK-2004)

DC sh/h allowed because of disputed facts and D d/n understand nature of charge (E. Gordon-CC-1996)

Miscellaneous. Plea agreement Condition Precedent that “null and void” if proffer rej’d; unconst. motive incl. fraudulent inducement (R. Hardy/rehen/cert-GS-2001)

PROBATION

Conditions. Drug treatment cond. inappro.; off. not drug-related & no circum. supported need for such condition (S. Medeiros-JD-1994)

PROSECUTORIAL MISCONDUCT

Evidence. D denied fair trial by G evid. Re: motorcycle gang (AdamsB-GS-2008)

Threatening G witness w/loss of child; w/DC errors, den. fair trial (T. Watts-GS-2001)

Closing Argument. D denied fair trial by G opening & closing re: motorcycle gang, uncharged crimes, and telling jury to ignore JI on defense (AdamsB-GS-2008)

DC sh/h granted mistrial for comment on D’s failure to testify and impugning character of defense counsel (weak; obj. but no mot.) (JacksonD-GS-2006)

DC erred in not giving curative instr/plain error (Mallory-CK-2004)

Impeachment of D & argument re: inflam. nature of prior crimes (Phillips-GS-2004)

DC erred by refusing to give curative instruction/preserved (Overton-GS-2004)

Golden Rule viol., impugned char. of def. counsel, & unchg'd crimes (Durham-GS-2001)

Rebuttal argu. improper comment on silence (O'Neail-CC-2001)

G closing that D case ridiculous, D influ'd witnesses to lie, maligned defense counsel, etc., was improper(Deedrick-CC-1998)

G closing that D & witness lied, expressed pers. opinion, improper (Soubble-CC-1998)

Cumul. effect of the G's closing (vouching for cred.of G witness; Golden Rule viol.; misstating law; arguing fact outside evid. & specif. excl.; intruding upon province of jury; expressing pers. opinion) viol'd D's rt. to fair trial. (L. Richbourg-CC-1996)

Personal opinion bad(McFarland-CC-1997)

Statement of law in opening, vouching for witness in closing, etc (A. Scott-JD-1997)

Arguing law in opening & vouching for G's case in closing (J. Linton-JD-1994)

Argu. D cd/h presented witnesses improper burden-shifting (A. White-JD-1995)

Argu. & comments about evils of crack and sweet town of Havana(Demonick-JD-1995)

Burden-shifting remark and misstatement of fact requires new trial (H. Hills-JD-1990)

RACKETEERING

Enterprise. G d/n show structure req'd by USSC, & DC d/n give JI explaining structure requirement(Clarke-JD-1993)

RESTITUTION

DC erred in imposing restitution in mortgage fraud, in calculating fair market value on date of bank's resale instead of on date of foreclosure (Pool-GS-2012)

DC plainly erred, imposed illegal sentence, by ordering restitution greater than evidence as result of higher PSI amt., and contrary to 18 USC 3663A(b) (HannaC-GS-2006)

DC erred by relying on PO's legally incorr. std. re: restitution liability and by failing to resolve critical factual dispute on restitution (T. Ross-CK-2004)

Improper because included amts. for uncharged offenses (D. Bowers-CC-1997)

DC must consider D's future ability to pay (M. Russell-JD-1995; Hamilton-JD-1996)

Illegal - involved uncharged acts & G d/n prove amt. by prepond.(C. Lehman-JD-1993)

RETURN PROPERTY/RULE 41

DC erred in summarily denying motion w/o evid. or findings (Faught-CK-2003)

ROBBERY

DC erred in denying JOA under 18 USC 2113(d) cuz drive-in robber had no d'rous weapon, no pretend weapon, & no object purported to be weapon, only remote to alleged bomb
(HannaC-GS-2006)

SEARCH & SEIZURE

Officer encouragement given to impel a common carrier to open parcels without a warrant turned a private search into a Government search subject to the Fourth Amendment(N. Emile-CK-2015)

G d/n show reason. suspicion that knock & announce wd/h/b futile, created danger to police, or inhibited effectiveness; commando-style raid, 3 SWAT teams drove truck through D's fence, used diversion explosions, and shot D's dog(C. Coleman-RM-2002)

Abandonment. Bags not aband'd when LEO knew D's prop.(A. Scott-JD-1997)

Consent.

Govt. agreed no consent where officers "ordered" door opened (Duhon-GS-2012)

DC applied wrong standard; ofrs viol'd **limited consent** to enter home w/o warrant; reasonable homeowner wd/n/h understood she & family & guests wd/be handcuffed . . . (Simpson-GS-2007)

CA rev'd denial of supp. motion where police handcuffed D in his yard, admitt'd no safety or flight concerns and not even reas. suspicion of criminal activity, precluding him from entering his residence to get his identification and giving him no choice but to consent to let them enter and search his room or go to jail to get fingerprinted; consent invalid (Mansell-GS-2004)

DC finding that consent valid clearly erron. cuz ofr. test'd he entered home without **consent**; no **intervening circum.** where D h-cuffed, in underwear, for 30" on sofa(Peters-GS-2003)

G failed to prove ofrs. reason. believed sister gave valid consent to search of brother's bedroom
(BradleyA-CK-2003)

Bus passenger unlawfully searched; frisked w/o adv. rt. to refuse consent or waiting on response when permis. asked; mere acquiescence not consent (C. Drayton/cert-GS-2002)

Alleged consent invalid cuz no **intervening circum.** to remove taint of **prior illegality** . . .

(W. Jackson-GS-2000)

D denied giving consent; LEO dispute; DC d/n consider argu. that D's bad medical condition sh/n/b consent (C. Jones/cert-JD-1993)

Encounters. Dist'g 3 levels of LE/citizen encounters: consensual; *Terry*-type stops; and full-scale arrests; LEO ordering D to approach & produce ID, & searching backpack is seized (M. Stephens-CC-1996)

Inevitable Discovery. Doctrine d/n/apply if LEO d/n prove car wd/h/b part of inventory search; req. G prove indep. invest., & applies only to deriv. evid. (Arrellano-CC-1997)

Pretextual Stop. Stop for bald tire is pretextual when in fact stopped to retrieve money from controlled buy (E. Brunson2(cocaine)-JD-1994)

Probationer. DC erred; no basis existed for warrantless search of probationer's home, especially when probation contained no search condition (A. Carter-CK-2008)

Reasonable Suspicion. DC erred; no reason. suspicion probationer was involved in criminal activity (A. Carter-CK-2008)

Seizure. Bus passenger seized by delay of bus; ofr. leaning across D to search seatmate. (C. Drayton/cert-GS-2002)

LEO ordering D to approach & produce ID, & searching pack (M. Stephens-CC-1996)

Standing. Altho D denied it was his room, sh/h standing cuz LEO believed D's room, D's property in room (Crittenden Order 2010; C. Jones/cert-JD-1993)

Terry Stop. Use of handcuffs converted stop into arrest, w/o probable cause, where there were no particularized reasons to make handcuffs reasonable (S. Thomas-GS-2002)

LEO chased & struggled w/D who was talking to dealer; mt/be reason. susp. for Terry stop but arrest when caught & restrained; no probable cause; D dropped bag w/gun only after seized (A. Bailey-JD-1995; *see also* M. Stephens-CC-1996)

Traffic Stop. DC denial of suppression violated *Arizona v. Gant*; alternatively, case should be distinguished from *Davis* cuz not a routine traffic stop; no good faith excep . . . (Owens-GS-2010)

In routine traffic stop, ofr. w/o suspicion of weapons or drugs could not pat down passenger; consent to search vitiated by unconst. patdown (JohnsonB-CK-2004)

Warrant. Motion to suppress sh/h/b granted because application for warrant did not establish

veracity and reliability of confidential source and was stale (Deering-GS-2008)

Motion to suppress sh/h/b granted after *Franks v. Delaware* hearing based on omissions in search warrant affidavit (Dorsey-2007)

Affidavit to search car D drove to drug delivery w/o probable cause (JacksonD-GS-2006)

DC erred; no prob. cause cuz stale & w/o CI's veracity (McDuffie-GS-2004; JacksonT-CK-2003)

Whether search valid when Govt. c/n produce warrant (Pratt-CK-2005)

Ofrs. Entered w/o knocking, w/guns drawn, based on ofrs' subjective fear D mt. resist and children in home mt. be harmed (C. Robinson-CK-2003)

Improper exec. by SWAT mid-night viol'd 4th Am. (C. Coleman-RM-2002)

No PC as to D's residence (B. Pyle-JD-1995; Asters-JD-2000)

Affidavit insuff. cuz CI's veracity not corroborated. (Brundidge-CC-1998)

Info in affid. presented w/reck. disreg. for truth; other info not PC (G. Nguyen-JD-1997)

Overbroad warrant; no prob. cause; & search itself overbroad (Majors-JD-1997)

Affid. insuff. PC to search D's home; facts about biz (M. Russell-JD-1995)

Stale info, & anon. info that was innocent public facts, insuff. for warrant . (C. Pearson-JD-1995; Young-JD-1994)

Probable cause that D committed gun crime & knowledge of where D lived does not justify warrant to search D's home without specific nexus between crime and home. (Hamda -RS-2015)

Warrantless Search of Car. Impoundment improper because FHP has no written policy covering situation where a licensed driver is available to assume control (BurdE-GS-2013)

No consent, exig. circum., probable cause, & not incid. to arrest (Durham-GS-2001; CarterJ-GS-2011)

Earlier controlled buy mt give PC but no exigent circum. (E. Brunson2-JD-1994)

Warrantless Search of Home. Govt. agreed no consent where officers "ordered" occupants to open the door; arguing no exigent circumstances where officers who purportedly went to home to do a "welfare check" on mother and newborn, after relative took toddler to hospital with severe injuries, where there was no evidence mother and newborn were in any danger; arguing

defendant’s attempt to exit rear window was not “risk of flight” where officers ordered him to stay inside and open the door; and where officers had no probable cause he had committed any crime, since no one alleged he had abused toddler. . . (Duhon Reply-GS-2012; Duhon-GS-2012)

No **exigent** circumstances where cops claimed it was an emergency because of shooting in vicinity; neither was it a legitimate “**protective sweep**” (Crittenden Order-2010)

W/less entry of home based on information from crack salesman of unproven reliability that a crack “cook” was about to be done and officers’ fear it would be sold before a warrant cd be obtained was insuff. “exigency” under *Reid* . . . (D. Walker-GS-2010)

W/less search of **deer stand** in locked hunting compound and of sealed, unmarked, opaque package inside stand (Siau-CK-2008)

DC erred because ofrs. had no rt. to ignore “No Trespassing” signs at D’s gate; and ofrs. had no reasonable basis to rely on “apparent authority” of third party when they failed to inquire about his identity and authority; and “limited authority” which DC held third party had to invite ofrs. to home cd/n override posted signs (Carroll-GS-2004)

Alleged emergency w/o confirm. (R. Davis-CK-2002)

Alleged consent invalid cuz no **intervening circum.** to remove taint of **prior illegality** (W. Jackson-GS-2000)

Search of area near D, & rest of home, while executing DV injunction, was w/o warrant; & no exception to warrant rule applies (H. White-JD-1995)

SECURITY

DC erred by compelling *pro se* D to wear stun belt; no hng.(Sepulveda-GS-2002)

DC erred by compelling D to wear stun belt, w/o evid. that least restrictive alternative; D had history of escapes from jails, not in-court disruption or danger to participants; viol’d rts. under 5A & 6A (Durham-GS-2001)

SENTENCING

Sentencing factor Manipulation (outrageous gov. conduct)(Matlack-RS-2016) also (Lange-RMS-2016).

Mid-range sentence procedur. & subst. unreasonable where no explanation (RudolphJ-JH-2014)

DC imposed proced. and subst. unreason. sentence where elderly D provided subst. assis. and G did not oppose his request for a sentence in the original guide. range (before the 10-year MM was calculated), even though the sentence was below the higher range, especially where DC did

not give any more than a rote explanation for sentence (MooreJ-CK-2013)

DC committed significant procedural error by failing to acknowledge his mitigation arguments or explain mid-range sentence (WorthamR-GS-2013)

DC clearly erred in imposing sentence enhancement where disputed record d/n establish and DC made no findings on enhancement (BollesC-CK-2012)

DC erred by mis-calculating criminal history, relying on prior conv. to which the D obj'd and which the Govt failed to prove, also creating a proced. unreas. sentence . . . (Roebuck-GS-2012)

DC erred in relying on unsubstantiated factual averments in the PSI that the Govt failed to substantiate despite D's objections (AndersonL-CK-2011)

DC erred, resulting in procedurally unreasonable sentence, by basing upward departure and upward variance on speculation w/o evidence D had committed other crimes . (Girard-GS-2011)

Sentence was procedurally unreasonable and violated 3553(c) because DC d/n find on the record that it was "sufficient, but not greater than necessary" (Zola-Aguilar-CK-2011)

DC erred by using self-contradictory rationales in imposing sentence and stating in written reasons that downward variance was "not statutorily authorized" (A. Wilson-CK-2011)

Mandatory minimums unconst.; *Harris & 841/851* challenges (DeLaRosaInt-2010)

Lower MM and range applies at resentencing under **Fair Sentencing Act** . . (Bowden3-GS-2011)

Guideline sentence was proc. & subst. unreasonable given D's individual characteristics, lack of empirical basis for and arbitrariness of guideline, & low recidivism risk, and DC failed to comment on or address arguments and evidence (McGee-GS-2009)

DC violated mandate rule or "law of the case" and 18 USC 3742(g)(2) by reimposing same sentence; and improper upward departure (HarrisonV-GS-2009)

DC has authority under 3553(a) to impose sentence below stat. Min/mand.; i.e., 3553(a) trumps 924(e) . (McCray-GS-2007); also trumps 924(e) prohibition on probation . (Mangaroo-GS-2007)

DC denial of disclosure of PO's recommendation viol'd due process (Rea-Herrera-2007)

DC erred in sent'g determinations for which G intro'd no evid. & D obj'd (LakeS-CK-2007)

DC failure to expressly find sentence “not greater than necessary” under 3553(a) rendered it proced. and substantively unreasonable (HarrisD-GS-2007; Crandall-CK-2006)

DC erred by viol’g stat. mandate under 3553(c)(1) that it state reason for placement of sentence within guideline range, if sentence more than 24 months, and under 3553(a) that the sentence be no greater than necessary, or the “minimally necessary” sentence . . . (Garcia-Delgado-GS-2006)

DC erred by viol’g stat. mandate under 3553(a) that the sentence be no greater than necessary, or the “minimally necessary” sentence (Montelongo-GS-2006; Alexander-GS-2006)

DC committed plain error under *Heath*, 419 F.3d 1312, by delegating to probation officer decision whether D would have to participate in treatment or counseling; (Nash) by delegating risk notif. to third parties; and (Carroll) violating Art. III, US Const, by delegating sex offender treatment decision, & was unreasonable (CarrollM-CK-2013; Skyles-GS-2005; Hunt-GS-2005; Nash-GS-2005; Francis-CK-2006)

DC erred by refusing to correct PSI, when G failed to present reliable and specific evidence to support firearm allegation, under Fed.R.Crim.P. 32 (Jenkins-GS-2004)

DC had authority, after granting belated appeal habeas under 2255, to resentence *de novo* and effectuate intervening change in law (Cash-GS-2004)

DC erred by permit’g privil’d info in PSI, when barred by proffer agreement, priv. against self-incrimination, and rules of procedure and evidence (Pierre-CK-2004)

DC comm'd reversible, plain error by failing to accord D's rt. of allocution at sentence and imposing sentence above minimum (Limon-Juarez-GS-2003)

DC plainly erred in adopting PSI, which erroneously applied felony sent. range, so unclear whether DC knew max. prison was one year for misd. v. 5 yrs. for felony (Boyington-GS-2003)

DC relied on inadeq. record; viol’d *Fuentes*, and miscalculated guide. w/sent. consec. to undischarged state sentence (Dupaquier-CK-2003)

DC erred in denying new PSI and resentencing hearing after appellate court dism’d conv. on one count (L. Spear-WC-2003)

DC erred in sent. under guidelines &/or unsupported enhancements (Sepulveda-GS-2002)

DC erred in making sent. consec., cuz related offense, & in sent. at top of range(Durham-GS-2001)

DC erred in concluding sent. at top of range req'd by statute & DC had no discretion (**G agreed**) .
(C. Stevenson-GS-1999)

Aberrant Behavior. DC erred as matter of law in denying downward departure under 5K2.20, when D met criteria, based on speculation and failed to state reasons (MurphyJ-GS-2011)

Abuse of Position of Trust.
D d/n/h such position; no discretion/auth, etc. (RichardsonH-GS-2003; S. Hill-JD-1997)

Acceptance of Responsibility. DC clearly erred in denying 3-level reduction because D denied committing separate offense that was not relevant conduct (Denmark-GS-2010)

DC clearly erred in denying 2-level reduction under 3E1.1(a) based on reasons reserved to 1-level reduction under 3E1.1(b) (Pruett-CK-2008)

Sh/b given if D adm'd everything exc. education (Yue-CK-2005)

DC erred as matter of law in denying based on failure to cooperate *in unrelated case*, which is relevant only to 5K1.1, not 3E1.1 (Gaines-GS-2004)

DC erred as matter of law in denying based on failure/inability to cooperate, which is relevant only to 5K1.1, not 3E1.1 (Hrabovsky-GS-2003)

Sh/b given if D adm'd all elements exc. amt. (P. Smith-JD-1998)

Sh/b given if D adm'd everything exc. d/n remember threat to V (K. James-CC-1996)

Sh/b given if D adm'd everything exc. co-D's name (D. McComas-JD-1995)

Since D admit'd involve. early & offered assist, his FTA for sent. sh justify reduction
(T. Petty-JD-1994)

D pled to 4 bank robberies, 2 armed, in 3 cases; since 2 cases were from MD FL, D sh/h rec'd mult. reductions for acceptance of responsibility (T. Woody-JD-1994)

Reduction Sh/h/b given (Hutto-JD-1995)

Acquitted Conduct. 6A viol'd by using acquitted conduct in sentencing. . . . (WhiteRoger-2008)

Aggravating Role Enhancement. DC clearly erred by applying role enhancement w/o supporting facts, resulting in procedurally unreasonable sentence (KrasnowR-CK-2012)

DC erred by enhancing D's sentence for **Use of Minor** under **3B1.4** where juvenile was instigator and arguably more culpable (Taber-GS-2007)

Evid. insuff. that D played managerial, etc. role (JohnsonP-CK-2007)
alleged accomplice not a criminally culpable "participant" (3B1.1(c))..... (M. Craig-RMS-2016)

DC erred by consider'g privil'd info in applying role enhance. And failing to make G prove facts when PSI challenged (Pierre-CK-2004)

DC erred in role enhancement under **3B1.1** (Pringle-GS-2013 & 2014; Bolles-CK-2012; Limon-Juarez-GS-2003)

D only supplier, no authority or control, so not leader or organizer for enhancement
(J. Mejia-JD-1995; R. Green-JD-1994; D. Clair-JD-1992)

G d/n show D superv' 4+ participants or activity o/w extensive **3B1.1** . . . (G. Demonick-JD-1995)

Armed Career Criminal. (See subsection of same name above)

Assimilated Crimes Act. Statutory max. 5-year sentence under state law, assimilated through 18 USC 7 & 13, cannot be extended upon revoc. Of super. Release (D. English-CK-2009)

Booker. DC comm'd reversible plain error due to stat. & const. violations . (BollesC-CK-2012)

18 USC 3742(g)(1) is invalid post-Booker and -Pepper (Bowden3-GS-2011)

Upward variance was unreasonable, overlooking substantial assistance and over-emphasizing defendant's criminal history (J. Bryant-CK-2011)

CA sh reconsider *Vega-Castillo* in light of circuit conflict . . (Gomez-Carrillo-CK-2010)

Mid-range sentence was unreasonable (Yilmazel-GS-2007)

Upward variance sentence was proced. & subst. Unreasonable (Russo-GS-2008)

Ct. sh reconsider *Castro* in light of *Rita* (disparity re: fast-track cases) . (Huerta-GS-2010; Vega-Castillo-CK-2007)

Sentence quadrupling top of range was unreasonable and unsupported . (Arneto-Anaya-GS-2007)

Sentence to statutory max. life, from 97-121 mo. range, unreasonable (Puente-CK-2007)

Mid-range sentence, 294 mos., was unreason. as mand. 15 was adequate . . (Anderson-GS-2007)

DC unreasonably varied from range to statutory maximum sentence (Ring-CK-

2007)

Sentence was procedurally unreasonable, and unconstitutional, post-Booker, where DC did not even acknowledge, much less discuss, 3553(a) factors (Henry-GS-2006)

DC failed to appro. Consider and weigh all evidence to impose upward variance of life, thus rendering sentencing unreasonable and unconstitutional. (Foster-CK-2006)

DC committed errors that combined to make sentence unreasonable (Segalla-CK-2006)

D d/n abandon issue by raising after initial brief on appeal (OvertonCert-GS-2005)

Inter-circuit conflict over application of plain error standard post-Booker . . (ZionCert-GS-2005)

Carjacking. Improper; no evid. of intent to cause death, etc. (M. Bates-GS-1999)

Career Offender. DC erred in base CO sentence on Florida BOLEO conv . . (Bowden-GS-2010)

Sentencing Commission exceeded statutory authority in defining “controlled substance offense” to include Florida convictions lacking mens rea element (**Plain error**) .. (Holmes-RMS-2015)

Sentencing Commission exceeded statutory authority in defining “controlled substance offense” to include Florida convictions lacking mens rea element (**Preserved**) .. (Pearson-RMS-2016)

Commission did not intend Florida drug crimes to qualify as “controlled substance offenses” because of lack of mens rea..... (Holmes 2015 & Pearson 2016 - RMS)

DC correctly rejected CO treatment in 3582 case, arguing that Sent. Comm’s stingy definition of “related cases” had improperly deprived DC of juris. (Horn-2009)

Tim Cone’s 11th circuit brief on 3582© relief for CO (McFadden-2008)

Prior burglary of unoccupied dwelling not violent under FL law (Dunklin-CK-2009)

Prior escape conviction based on failure to return to work release after authorized departure not “crime of violence” for 4B1.2 or ACCA (J. Taylor-GS-2006)

DC can look beyond definition of prior state offense to determine whether CCF is crime of violence for career offender sentencing (K. Williams-CK-2005)

Poss. Unreg’d Firearm not 4B1.2 “crime of violence”. (Owens-GS-2005)

FL burglary conviction insufficient (memo) (Matthews-2005)

Agg. Stalking not crime of viol. under FL law (Insaugarat-TimCrooks-2003)

DC erred in sent. as CO when G d/n allege priors in indict. or prove at trial . . (Graves-RM-2001)

DC erron. used prior burgl. as predicate offense (R. Haynes-JD-1993)

Concurrent v. Consecutive; Undischarged Term of Imprisonment. DC acted unreasonably in imposing consec. sentence because MD FL prev. ordered them conc. (J. Williams-CK-2009)

DC erred in believing it had **no authority** to order concurrent sentences (Dees-GS-2004)

DC erred in ordering incarcerative sentence consecutive to any *future* sentence; **7B1.3(f)**. . (J. Andrews/Rep.-GS-2003)

DC sh/h applied **5G1.3** (D. Flynn/reh&cert-JD-1995; R. Ellisor-JD-1995; D. McComas-JD-1995)

DC sh/h made sent. conc. to anticipated state sent. as relev. conduct under 5G1.3. . (Spear-JD-1995)

DC unclear whether sent. consecutive to both escape & drug offense & d/n adequately address listed factors(J. Nichol-CC-1996)

Conspiracy. DC erred in finding MS drug seizure connected to FL conspiracy which ended mos. earlier and thus was relevant to safety valve issue (Plummer-CK-2009)

DC d/n incl. 3-level reduc. under **2X1.1(B)(2)** in BOL (Adams-CC-1999)

Continuance. Error to deny brief continuance for D to review PSI (Durham-GS-2001)

CONTROLLED SUBSTANCE OFFENSES

district court miscalculated advisory guideline range by increasing his base offense level under §2K2.1(a)(3) based upon 2009 conviction for violating fla. Stat. §893.13, which is not a "controlled substance offense" as defined in §4B1.2.(Chandler-DJ-2014)

“Principal to attempted” manufacture is not CSO under 4B1.2(b) (LANGE-RMS-2016)

Credit. Anders brief but discussion of credit; AG thru BOP has auth to grant credit; no DC juris. to grant credit at sent. but may on 2255 if exhaust admin rem.(Pratt-JD-1994)

“**Crime of Violence**” FL home invasion robbery does not constitute “crime of violence” under USSG sec. 4B1.2 (Whitehurst-RS-2016)

FL armed robbery not a “crime of violence”. (Burke-RMS-2017)

Criminal History & Calculation.

DC erred proced. and substan. by imposing upward departure under 4A1.3 w/o considering whether next higher CHC was sufficient (BrickerT-JH-2014)

DC erred by mis-calculating criminal history, relying on prior conv. to which the D obj’d and which the Govt failed to prove, also creating a proced. unreas. sentence . . . (Roebuck-GS-2012)

DC erred by failing to state written reasons for upward departure under 4A1.3 and apply amended 2003 std. (Estrada-Flores-GS-2004)

DC viol’d 5th and 6th amend. by calculating sent. using prior uncounseled misd. conv., viol’g Alabama v. Shelton, cuz D not indigent (K. Gray-CK-2003)

DC erred by relying on old VOP warrant, never enforced, to find off. committed while D under "crim. just. sent." (R. Davis-CK-2002)

DC believed it lacked author. to depart based on prior off. signif. overrepresenting crim. history or likelihood he would commit more crimes(Oliver-CK-2002)

Error to score state meth conv. as prior, tho G adm’d underlying act of state conv. was in further. of fed. meth. consp. (W. Gilbert-RM-2001)

FL “jail bed program” imposed as condition of probation does not constitute “sentence of imprisonment” warranting three criminal history points (4A1.1(a))(Colson-RMS-2017)

criminal history points for sent. imposed after original sentencing proceeding (Burke-RMS-2017)

Cross-referencing & Standard of Proof. Cross-ref from kidnapping to sex. abuse BOL requires > prepond. proof cuz sent’g tail wagging offense dog (J. Lewis cert-JD-1997; C. Dix cert-JD-1995)

See also, Firearms (2K2.1); and Sentencing - Firearm enhancements

Departure. Upw. depart. impropr. & extent unreason. (C. Bell-GS-2007; D. Mahoney-GS-1999; J. Lewis-JD-1997)

Upw. depart. from CHC VI must analyze nature of prior off. under 4A1.3 (Dupaquier-CK-2003)

DC improp. departed upward (horizontally) by not providing explicit justif. for reject'g interven'g sent'g ranges (S. Gordon-CC-1996)

Offense mt/h/b nonviol. crime permit'g down. depart. of 5K2.13 (M. Greco-JD-1996)

Upward depart, manner and extent all improper (B. Lampkin-JD-1996)

DC cd/h departed down for comb'd circumstances (age, acceptance, cooperation, emot. cond. & severe child. abuse, & goal of boot camp) or susp'd part of sent to get D in boot camp (J. Craft & rep-JD-1995)

Disparity. DC erred by grossly disparate sent. on identical co-D; G agreed (Ellenburg-CK-2003)

Double Counting. Sent'd enhancements under 2G2.2(b)(3)(F) and (b)(6) improper cuz both based on use of P2P network (NelsonS-GS-2011)

C/n count both phys. inj. under 2J1.2 & phys. restraint of V under 3A1.3 (Izquierdo-JD-1994)

C/n increase crim. sex. abuse off. level for abduction cuz began w/kidnapping off. guide. & switched to sex. abuse off. guide. at direction of kidnapping guide. . . . (J. Lewis cert-JD-1997; C. Dix cert-JD-1995)

Double Jeopardy/Collateral Estoppel. Viol'd when D sent'd using money laund. guide. on consp. verdict after acquitted of subst. ML (Adams-CC-1999)

Downward Departure. DC erred in deter'd no authority to depart down under 5K2.0, where prison camp inmate walked off w/intent to return & suffered admin. penalties in add'n
(Wm. Taylor-CK-2003)

Drug Quantity. DC erred by believing it had no authority to depart downward from career offender guidelines based on crack/powder disparity (Bowden-GS-2010)

DC clearly erred by failing to make adequate findings to support elevated drug quantity based solely on severely impeached codefendant's testimony (Scarlett-GS-2009)

DC erred as matter of law by counting total wt. of mid-manu. solution as "mixture" when only .14 gr. Was controlled subst. (Lefebvre-CK-2003)

DC erred in counting "trash" or residue in meth case (Zion-GS-2003)

Amt. not shown by prepond. (A. Marshall-CC-1998; G. Demonick-JD-1995)

DC d/n carefully consider amt. attribut. to D (Wallace-JD-1994, A. Marshall-CC-1998)

Error to include amt. D not reason. capable of producing(Grenhagen-CC-1997)

DC used vague and unrel. info to deter. qty.; d/n disting. betw. amts. of crack or powder, whether converted or yield when converted (Biggins-JD-1996; similar J. Mejia-JD-1995; P. Smith-JD-1998)

DC d/n convert pounds to kilograms (J. Stalvey-CC-1997)

DC d/n make spec. individ'd findings for each D; combined 3 Ds, so qty too great(Esparza-JD-1994)

Amts. seized at arrest of former co-conspir., after D not as involved if at all, sh/n/h/b incl'd (E. Brunson-JD-1994)

Amts. not part of same course of conduct or common scheme or plan sh/n/b incl'd; req. notice of amt. & spec. find. of fact for sent'g(C. Ferguson-JD-1993)

D d/n/h intent & capability for amts. (Lopera-JD-1993)

Enhancement under 21 USC 851. DC erred in rejecting 851(c)(2) challenge to prior conviction under *Gant* (CarterJ-GS-2011)

DC failed to follow 851(b) procedure by not getting D's confirm. of priors . . (JamesS-CC-2011)

Notice inadequate due to incorrect date of prior conviction and incorrect citation of 841 USC (b)(1)(B); no pre-sent'g amendment (Bowden-GS-2008)

Enhancement for prior drug felony conviction under guidelines or statute

The district court erred in applying the guidelines definition of a controlled substance offense to enhance appellant's sentence based on a post-2002 violation of § 893.13(1)(a), Florida Statutes (X. Jackson-CK-2015)

Sentencing Commission exceeded its authority by defining “controlled substance offense” to include FL offenses lacking mens rea (J. Pearson - RS - 2016)

Escape. 2P1.1(B)(2) defin. of “ret'd volun” sh/n apply only to escapees who d/n conceal or att. to conceal their absence; escape sh/n be entirely excluded from grouping rules; sent. sh/h/b concurr. for instant related escape conv.(K. Bradford-CC-2001)

Fence. 2 levels, under 2B6.1(b)(2) (in business of rec'g & selling stolen prop.) error; D not “fence” & only aided husband who stole & sold prop. (S. Saunders-RM-2002)

Firearm Enhancements. Govt. d/n carry burden under 2D1.1(b)(1) (WhittC-CK-2012)

2K2.1(b)(6)(B): Gov't didn't carry burden of proving use or possession to reach the "in connection with" element (Grice - CK - 2014)

USSG 2K2.1(b)(1) limits number of firearms that may be counted, in sentencing for dealing firearms w/o license and selling to conv'd felon, thus exclud'g add'l guns that can be considered only as relevant conduct under 1B1.3(a) (Crudgington-CK-2011)

DC violated due process, 18 USC 3553(a), and 2D1.1(b)(1) in attributing heightened responsibility to D for coconsp's guns w/o evidence . . . (Plummer-CK-2009)

Firearm enhancement under 2D1.1(b) error where government failed to prove gun in home of ringleader of conspiracy was reasonably foreseeable to drug courier (Kaiser-GS-2009)

DC erred in applying "brandishing" sentencing factor under 18 USC 924(c)(91)(A)(ii) for co-defendant's act, where no proof D knew firearm would be brandished and no evidence linking D to act (HoodD-CK-2004)

Firearm enhancement for "trafficking" in firearms under 2K2.1(b)(5) erroneous absent proof D "knew or had reason to believe" the person to whom he delivered firearms could not lawfully possess them or would use firearms unlawfully (Gallegos-RS-2015)

Minor. DC erred in imposing enhancement for "having unduly influenced minor" under 2G1.3(b)(2)(B), which is same as 2A3.2(b)(2)(B) . . . (HarrisonB-CK-2013; Yilmazel-GS-2007)

2A6.1(b)(2),(b)(5). Post-arrest threats not relevant conduct to offense of mailing threatening letter, so D made only 1 threat under (b)(2), and entitled to (b)(5) reduc. . . . (Sheppard-GS-2007)

2B1.1(b)(11). DC erred in imposed 2-level enhancement for production where no evidence D had produced or even knew who had produced cards (Padron-GS-2012)

2B3.1(b)(2)(E). DC erred; 3 levels under 2B3.1(b)(2)(E) for "brandishing, displaying, or otherwise possessing" a dangerous weapon, versus 2 levels under (F), when no weapon or object was proven (M. Bates-GS-1999)

Gun did not meet Otero test cuz D out of consp. when gun found in house of former co-consp. & no evid. of guns when D involved(E. Brunson-JD-1994)

Inc. for use of gun dur. other felony sh/n apply cuz no evid. facilitated other offense
(R. Page-JD-1995)

D d/n "otherwise use" weapon, merely brandished; mere threats d/n elevate . . (K. James-CC-

1996)

Gun found after conspiracy ended (Melville-JD-1996)

2B3.1(b)(2)(F). CA sh reconsider *Murphy*, 306 F.3d 1087 (11th Cir. 2002), and hold that mere note indicating presence of weapon d/n constitute threat of death (Petho-CK-2005)

2D1.1(b). Plain error to combine 2 categories of weapons under Appl. N. 9; sh/b treated separately, not in combination (Oliver-CK-2002)

Co-consp’s poss. not reason. foresee.; interpreting 2D1.1(b) to shift burden of proof to D violates DP. (Fers-JD-1998)

Others not charged; physically & functionally removed from D so guns not reason. foreseeable(D. Clair-JD-1992; C. Ferguson-JD-1993; also R. Green-JD-1994)

Gun not reason. foresee. to D based on nature of her activity & DC applied blanket policy instead of evaluating her individually (J. Linton-JD-1994)

2G2.2. DC erred in imposing two-level increase under **(b)(3)(F)** and denying related two-level reduction under **(b)(1)** where there was no evidence of distribution, intent to distribute, or other affirmative acts listed in Commentary; double counting with **(b)(6)**, strict liability offense when applied to all CP defendants (Nelson-GS-2011; Peacock-GS-2010)

DC erred in imposing 5-level increase under (b)(5) for “pattern of activity” did not apply where the prior FL conviction was not “sexual act” under commentary (Morin-GS-2010)

DC abused discretion by imposing guideline sentence for CP when guidelines were not based on empirical data and national experience (R.Hughes-CK-2010; Brunette-CK-2009)

2K2.1(a). Prior battery and att. assault not “crimes of violence”; plain error . . (Pantle-GS-2010)

2K2.1(b)(2). Reduction for “lawful sporting purposes or collection” . . . (W. Gothard-GS-2001)

2K2.1(b)(5),(b)(6). 2K2.1(b)(6)(B) d/n apply where firearm and drugs are in separate locked safes (Seals-CK-2011)
Firearm poss’d by D not “in connection with” another felony; 4 levels under 2K2.1(b)(5),(6) improper (Denmark(theft)-GS-2010; Cabezas-CK-2006; Dees-GS-2004; BushH-GS-2004; Skinner-RM-2004; BradshawW-RM-2002)

Cert. on circuit conflict between 11th Cir’s “possession test” under 2K2.1(b)(5) and “facilitation test” of most other circuits (W. Bradshaw/cert-RM-2002)

Increase for use in connection w/other felony improper since D only admit'd poss/gun after other offense; he denied using it in burg; since this was plea, insuff. facts (A. Bailey-JD-1995; see also, R. Page-JD-1995; H. Gilliam-JD-1995 (as to crossref from same § for "in connection w/"; Young-JD-1994-similar in ACCA).

Gun not used in connection w/escape, thus improper increase (J. Nichols-CC-1996)

Fraud. Amt. too speculative cuz cd/n say RTC wd/h gotten higher amt for loans than what Ds settled for (Heaver-JD-1995)

Kidnapping. Switch from kidnapping off. level (cuz other crime comm'd dur. or conn'd w/kidn.) sh/h/b to robb. & carjacking off. level, not crim. sex. abuse, cuz robb/carjacking was real goal & sex. abuse was not feature of incident(J. Lewis cert-JD-1997; C. Dix cert-JD-1995)

Judgment. Oral pronouncement of sentence prevails over conflicting written Judgment (JosephM-GS-2013)

Oral pronouncement prevails over conflicting written Judgment which produces illegal sentence (Novak-CC-2001)

Loss. DC erred by speculating re intended loss w/o suff. & reliable evid. (SealsR-GS-2014)

DC erred by speculating intended loss greater under 2B1.1 than evid. (Stetson-CK-2006)

Amt. must be reduced by benefit rec'd by clients from ins. (Polston-RM-2000)

DC's determ. of tax loss, when only G evid. was IRS agent's guess based on sm. number of returns involved(J. Neeley-CC-1997)

Minor Role Reduction. DC clearly erred in denying a role reduction (McDonaldJ-GS-2012; Keen-RM-2012)

DC clearly erred in denying reduc. under 3B1.2 based on speculation as to add'l trips when all evid. showed only one trip(Parra-GS-2002)

D's activity less than other conspirators so sh/h rec'd minor role deduction. (C. Crittenden-JD-1994)

More Than Minimal Planning. any steps to conceal were not significant (S. Hill-JD-1997)

Obstruction of Justice.

DC erred in applying obstruction enhancement to escape offense (McGuinness-CK-2005)

DC erred in applying obstruction enhancement based on lie re: education (Yue-CK-2005)

DC erred in applying to perjury w/o particul'd findings of fact (Francis-CK-2006;Tran-CK-2005)

Enhancement d/n apply where, even if threats ag. wit. made, no likelihood wit. wd learn of them
..... (K. Bradford-RM-2001)

Incr. improper cuz D's purpose in failing to contact USPO sooner was not to obstruct justice but to have time to secure home for her children. (J. Sheffield-GS-1999)

DC erred in finding obstruc. based on D's perjury at trial (J. Linton-JD-1994; Harvilchuck-JD-1994; see reply and cert for more recent cases from other circuits)

DC erred in finding obstruc. based on perjury cuz insuff. evid. D lied (Heaver-JD-1995); & insuff. findings (Pryor-JD-1995)

DC erred in enhancing for obstruc. for perjury w/o any fact. findings (Wallace-JD-1994; B. Pyle-JD-1995)

Physical contact. Arguing victim-initiated contact was insufficient for three-level enhancement under USSG 2A2.4(b)(1) (D. Sanders-CK-2006)

Plain error. Incorrectly calculated base offense level, and sentence well above correct range, affects defendant's substantial rights; distinguishing *Rodriguez* (Pantle reb-GS-2011)

Post-sentencing Rehabilitation. DC erred in imposing a top-of-the-range sentence, on remand, without commenting on defendant's post-sentencing rehab under *Pepper* (Pringle-GS-2014)

Range Calculation in general. Even a pre-1989 offense has a guidelines range if sentenced later (IB)..... (Whitfield - KS-2015)

Reasonbleness. Sentence proced. unreas. in illegal reentry case cuz DC failed to make findings on cultural assimilation claim (Hernandez-Mejia-CK-2010)

Sentence unreasonable. (Messick-CK-2007; Bell-GS-2007)

Relevant Conduct. Production of cards by unidentified third party, with no evidence as to D's knowledge or complicity, was not w/i D's scope of agreement (PadronRep-GS-2012)

Post-arrest threats not relevant conduct to offense of mailing threatening communication (Sheppard-GS-2007)

2K2.1(b) Incr. improper cuz based on conduct not relev. to cts. of conv. . . (H. Hudson-CC-1998)

Burgl. D not involved in sh/n/h/b consid'd relevant conduct (Roberson-JD-1998)

D charged & conv'd 1 ct. bank fraud; other bank trans. sh/n/h/b included cuz only sim. in type, not a course of conduct (S. Strickland-JD-1995)

Resentencing. DC authorized to depart downward from new sentencing range after reducing sentence per 18/3582(c)(2) motion based on guidelines range reduction . (W.Crawford-CK-2009)

DC erred in finding D ineligible for reduction based on higher drug quantity it “would have found,” because 3582(c)(2) proceeding is not a *de novo* resentenc'g, “the law of the case” prevents new factual findings, the G waived a higher quantity, and DC can only apply reduced amendment to original findings (E. Taylor-GS-2009)

DC abused discretion in denying 18/3582(c)(2) motion without considering 3553(a) factors, as required by precedent (TBirch-GS-2008; MBryant-GS-2008)

DC abused disc. via internally inconsist. order denying 3582 relief by stating it intended to reduce sentence but failing to do so (DHale-CK-2008)

DC erred by denying 3582 motion under recent crack amend. where D had indeterminate sentence (mand. min. Life) before Rule 35 reduction (C.Smith-CK-2008)

DC d/NOT abuse discr. in reduc'g subst. assis. sentence per crack amend. (DWilliams-CK-2008)

DC order denying crack reduction was too ambiguous for review (Colley-CK-2008)

DC clearly erred in holding D's “sent'g range” was unchanged by crack amend. and thus he was ineligible for reduction under 3582 (BarkerA-RM-2008)

Booker issues (Pratt-CK-2005)

Post-Booker sentence unreasonable (Skidmore-CK-2005; ReevesL-CK-2005)

Robbery. DC sh/n/h incr'd for bodily injury cuz not signif. injury; sh/n/h incr'd for phys. restraint(R. Smith-JD-1995)

Role in Offense. 4-level role adjust. not appro.; D not organizer/dir. . . . (RichardsonH-GS-2003)

Mgr/super. role adj. error cuz D only temp. middleman (J. Stalvey-CC-1997)

D driver w/o control over participants so 3-level managerial incr. error (Fers-JD-1998)

Safety Valve. DC erred in denying based on MS drug seizure mos. after FL conspiracy ended w/o evidence connecting two (Plummer-CK-2009)

Error to deny reduction; D met all cond. where she was **blind mule** w/o knowl. to disclose
..... (M. Duarte-Cuevas-GS-2001)

D was **blind mule** & sh/h/b sent'd under safety valve (N. Johnson-CC-1998)

No evid. D individually respon. for gun; inquiry different than for coconsp. guideline enhancement (C. Pearson-JD-1995)

Sophisticated Means. DC erred in applying enhancement because D's execution and concealment were not espec. elaborate or complex, counterfeiting access devices, making sentence procedurally unreasonable (Jenkins L-CK-2012)

DC erred in applying enhancement because D's execution and concealment were not espec. elaborate or complex . . (Kimbrough-GS-2007; Goodwin-GS-2007)

DC erred in applying enhancement when D's routine acts did not involve espec. complex or intricate scheme (Yue-CK-2005)

Substantial Assistance. G refusal to file 5K1 viol'd Equal Prot. & DP cuz in bad faith & thus breach of plea agreement & G's stated reasons not rationally related to legit. G ends (Tucker-JD-1993; D. Hardy cert-GS-2001)

DC sh/h first reduced on guideline amendment and then on **Rule 35** (Iglesias-JD-1995)

Vulnerable Victim. DC erred in enhanc'g 2 levels for unus. vulner. V, cuz V not *unusually* vulnerable & certainly no more vulner. than D & not reason D entered relationship . . . (Pimentel-GS-2000)

SPEEDY TRIAL

The DC violated the Speedy Trial Act by denying the motion to dismiss made the morning of trial, where 72 non-excludable days had elapsed; the district court's remittal procedure was not excludable under either § 3161(h)(1)(J) or (7)(A) (Wambles-GS-2014)

Stat. & const. rt. to speedy trial; pretrial, trial, sent. & appeal delay (Sepulveda-GS-2002)

D den. 6A rt. to speedy trial & sent; not resent'd for 14 mos. (Adams-CC-1999)

6A rt. to speedy trial, *Barker v. Wingo*, Standard of Review is *de novo*. 376 F3d 1282,1286 (*Walter Smith, PC, should have a brief*)

STANDARD OF REVIEW

Revocation/sentence. Anders brief with SOR for appeal of revocation ruling (abuse of discretion) and sentence (reasonableness) (CurtisA-CK-2010)

Comparing plain error and *de novo* for const. viol. (Husbands Rep-GS-2002)

STATUTE OF LIMITATIONS

Expired, in misdemeanor prosecution under Assim. Crimes Act, after five years under 18 USC 3282; magistrate held no SOL for misd. in federal court (Blanche-GS-2003)

Expired when INS d/n note D's presence w/i 5 yrs. under illegal reentry statute; viol'd by delay betw. 96 ID of D and prosecution as prev. deported alien "found in" US in 10/01. . . .(M. Clarke-CK-2002)

Prosecution not begun w/i 5 yrs. under 21/841 (Sepulveda-GS-2002)

STATUTORY CONSTRUCTION

18 USC 2332a d/n cover anthrax hoaxes; legislative intent absent (Evans-GS-2006)

Two priors comm'd w/i 5 min. sh/be treated as "sgl. crim. episode" under ACCA; conflict w/i circuit & among circuits; legis. intent; rule of lenity; binding precedent (Harrison-GS-2002)

SUPERVISED RELEASE. Consecutive terms proh'd by statute and USSG (Beamon-GS-2008)

SR of 5 yrs illegal; att'd bank robbery was Class C felony w/only 3 yrs. SR . .(Soubble-CC-1998)

Conditions. DC d/n/h authority to modify supervised release, after finding no violation and dismissing petition, or to impose no-contact provision re: girlfriend (WilliamsDo-GS-2013)

DC d/n/h authority to order sale of home as condition when no default in payments; alternatively, it was an abuse of discretion (Gainous-GS-2008)

Plain error under *Heath*, 419 F.3d 1312, to delegate to probation officer decision whether defendant would have to participate in treatment or counseling (Skyles-GS-2005; C. Hunt-GS-2005)

Heath error; plus Std. Cond. 13 vague and overbroad (Nash-GS-2005)

Error to order D to pay child support & arrear (Norris-CC-1997)

Sentence. district court abused its discretion and acted unreasonably in imposing a statutory maximum revocation sentence by relying on declarants' unsworn hearsay statements that the declarants themselves undermined in sworn testimony, and by finding crack cocaine trafficking had been established by another person's possession of 3.8 grams of crack cocaine broken into 25 pieces found in a single small container.....(Pride-CK-2014)

Statutory max. 5-year sentence under state law, assimilated through 18 USC 7 & 13 (Assim. Crimes Act), cannot be extended upon revoc. Of super. Release . (D. English-CK-2009)

DC unreasonably imposed revocation sentence 2-4 times greater than recom'd range primarily because D's orig. sent., as reduced by good time, too short (Crandall-CK-2007)

DC plainly erred by imposing 2-yr. prison plus 2-yr. SR upon revocation, when 18 USC 3583 authorized no more than combined 3-yr. term (Babiak-CK-2004)

Impos. of SR for viol. of SR was abuse of discretion when DC made no findings, D asked for straight prison, and D unable to success. complete SR (WilliamsC-CK-2002)

DC erred in ordering incarcerative sentence consecutive to any *future* sentence; **7B1.3(f)** (J. Andrews-GS-2003)

7B stmt. that sh always be consec. incons. w/5G1.3 (A. Williams-JD-1995)

Standards of review. Anders brief with SOR for appeal of revocation ruling (abuse of discretion) and sentence (reasonableness) (CurtisA-CK-2010)

Unreliable hearsay (Rome - RMS -2017) (Pace - RMS - 2017)

Violation/revocation. Sentence was proced. and subst. unreasonable where post-imprisonment term of supervised release was double the minimum mandatory (Corl-CK-2012)

DC erred in revoking w/o findings and sentence procedurally unreasonable (Morris-GS-2012; Dasher-CK-2012)

DC erred, viol'g due process, in revoking w/o express findings and merely concluding violation had been proven (JohnsonJ-CK-2011; Manning-CK-2010; OliverJW-GS-2010)

DC erred by relying on hearsay in revoking supervision when it was contested and no findings were made (Kimble-CK-2010)

DC abused discretion by revoking without sufficient proof violations were willful, stating reasons for revocation, or stating reasons for reincarceration (Oliver-GS-2009)

DC comm'd plain error in failing to identify state laws violated in revocation proceeding, in violation of due process and Rule 11 (D. Levitan-CK-2009)

DC erred by not balancing interests and inquiring into G's challenged explanation for not bringing key G witness to hearing (K. Johnson-CK-2009)

DC erred by omitting balancing inquiry req'd by Frazier, 26 F.3d 110, before admitting hearsay in revocation hearing (Belser-CK-2006)

DC abused discretion by finding suff. evidence of viol. (C. Hunt-GS-2005)

DC viol'd DP and confront. rt. by relying on out-of-ct stmts of CI w/o estab'g reliable or balancing rts. ag. G's grounds for denying confrontation (T. Jackson-CK-2003)

DC d/n/h **jurisdiction** under 18 USC 3605 because **transfer** incomplete . . . (V. Cook-GS-2003)

DC erred in admitting hearsay and double hearsay as sole evid. of Grade B violation, by making no findings, and by insufficient evidence (M. Washington-CK-2003)

DC erred by failing to make req'd findings to support reincarceration and by imposing a sentence "greater than necessary" to comply with reintegrative purpose of statute . . . (Castanon-GS-2002)

Add'l SR for viol. error; DC made no findings & D unable to successfully complete SR.
(C. Williams-CK-2002)

DC failed to state reasons for finding violation and failing to consider mandatory provision of 18/3563(e) in deciding revoc. was appro. (Gomez-GS-1999)

DC d/n give reasons, & D's uncorrob'd admiss. insuff., for finding violation (C. Rivers-JD-1999)

Same; d/n give adequate findings; hearsay was unrel. & sole basis (A. West-CC-1998)

DC sh consider Ch. 7 SG & give reasons for sent. above SG (I. Johnson-JD-1994;
O. Ingram-JD-1996)

VENUE

Venue for perjury under 18/1621(2) is in dist. where signed, not filed. (Roberts-CK-2002)

ND FL d/n/h venue & juris. cuz CI in Levy Co. jail and D in LA; no overt acts in ND . .
(Lopera-JD-1993)

Improper, minimal contact w/ND by main member of conspiracy; D not involved in that part of consp.; & interest of justice, witnesses, etc. (Esparza-JD-1994)

WITNESSES

Denial of continuance & compulsory process for D wit. who failed to appear at trial
(D. Jackson-GS-2001)