RECURRENT OBJECTION PRESERVATION ISSUES AT TRIAL

Following the guidelines below will help reduce the risk of forfeiting your objections, resulting in plain error review on appeal or even, in some cases, waiving your objections, which usually precludes any review at all. For background citations for these guidelines, see the endnotes.

OBJECTIONS IN GENERAL

Be sure any objections to evidence are **timely and contemporaneous**.[1]

Be sure to **state the ground**. Failure to specify the ground for an objection may result in plain error review on appeal and review may be limited to the specific ground(s) raised in district court.[2]

If you are **objecting to the exclusion of evidence**, make an **offer of proof** of the **substance of the evidence** unless the substance is apparent from the context of questioning.[3]

Do not fail to respond if the court offers you an opportunity to address an issue – silence may be construed as agreement and waiver of issue.[4]

MOTIONS IN LIMINE

Where the court makes a **definitive pretrial ruling admitting or excluding evidence** the issue is preserved for appeal.[5]

Where **no definitive pretrial ruling** has been made, be sure to **renew the objection at trial.**[6]

If the **prosecution violates** the in limine ruling, be sure to **object at that time and move for a mistrial/curative instruction**.

If the court **tentatively denies or delays ruling**, **renew the objection** at trial.[7]

If your **grounds for objection change legally or factually** at the time of admission, **be sure to state any new grounds/new facts at the time the evidence is proffered.**[8]

STATUTORY CHALLENGES

Legal and constitutional claims **must be raised in the district court** (via motion to dismiss and Rule 29) to receive de novo review.[9]

SUPPRESSION

Object to the introduction of the evidence at trial if your suppression motion was **not definitively denied.**[10]

Do not say "no objection" when the evidence is introduced at trial – you can say "subject to my previous motion" or something similar.[11]

If **new evidence** comes out at trial in support of suppression, **renew the motion to suppress at trial.**[12]

Raise every argument in support of the motion to suppress. Failure to raise an argument in support of a motion to suppress results in waiver, not forfeiture, of the issue.[13]

JURY SELECTION AND VOIR DIRE

Always challenge a juror **for cause during voir dire before juror is seated/peremptory challenges raised.**[14]

To preserve a challenge to the court's refusal to strike a juror for cause:
1) use a **peremptory challenge** to strike that juror;
2) use **all your peremptories**;
3) **identify other jurors you would have struck** if you did not have to use peremptories to strike jurors who should have been stricken for cause.

To **preserve a challenge to the court's failure to conduct an adequate voir dire** put the **proposed questions on the record.**

Object to the exclusion of the public from the courtroom during jury selection as a denial of the Sixth Amendment **right to a public trial**. This includes **objecting to conducting individual voir dire in chambers** unless you want the court to use that procedure.[15]

Make a ***Batson*** **challenge** to contest the government's exercise of **a peremptory juror challenge on the basis of race/ethnicity or gender**.

There are **three steps**:
(1) **make a prima facie** showing the challenge was exercised on the basis of

race/ethnicity/gender;
(2) if the court finds a prima facie showing, the **prosecution must offer** a **race/ethnic/gender-neutral basis** for striking the juror in question; and
(3) the trial court must decide whether the defendant has shown **purposeful discrimination**. *Batson v. Kentucky*, 476 U.S. 79 (1986).

A **defendant need *not* be of the same race as the stricken juror to raise a *Batson* challenge**.
Be **explicit** that you are making a ***Batson* challenge**.[16]

CONTINUING OBJECTIONS

Be sure to **make a request for a continuing objection and have the Court allow it.**[17]

HEARSAY ISSUES

- *IN GENERAL*

Review FRE Article VIII

Object at the time hearsay testimony is offered on grounds that **testimony is hearsay and does not fit within a hearsay exception.**

Specifically state a Crawford/Confrontation objection <u>as a Crawford/confrontation</u> objection. A *Crawford* (Confrontation) objection is **not preserved** by simply arguing that testimony is hearsay, or does not fit within a hearsay exception, or is in some other way inadmissible.[18]

- *CO-CONSPIRATOR STATEMENT*

Object to the admission of **co-conspirator statements** both **when hearsay statements are offered**, and **renew the objection at the close of all the evidence**.

Articulate the basis – failure to meet the criteria for admission required by *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977) and FRE 801(d)(2)(e)

Under *Petrozziello*, in order to admit the statement over objection, the trial court must find:
(1) it is **more likely than not** that the **declarant and the defendant** were **members of the conspiracy** when the statement was made, and

(2) the **statement in question was made in furtherance of the conspiracy**.

The trial court may first make this ruling **provisionally**, subject to a final ruling as to whether the co-conspirator exception is satisfied. If the **trial court does not make a final determination**, you must **object to the omission of an express trial-end determination**.

Consider requesting a grant of a **continuing objection** where multiple statements will be admitted over a period of time. Make sure you are specific about any objections particular to that statement, e.g., not in furtherance of the conspiracy.[19]

- ***USE OF SUMMARY/OVERVIEW WITNESS***

Object on grounds testimony is based on **inadmissible hearsay, violates the Confrontation Clause, constitutes impermissible lay opinion testimony (when agent describes alleged roles in offense)**, and/or **improperly endorses government's theory of case.**[20]

- ***EXPERT TESTIMONY OR LAY OPINION TESTIMONY?***

Consider objecting if an **agent's testimony** offered as **lay opinion testimony** may be argued to **be expert testimony offered without compliance with the requirements of FRE 702 or the required notice.**[21]

MOTION FOR MISTRIAL AND CONTINUANCE FOR FAILURE TO DISCLOSE EXCULPATORY EVIDENCE

Request a continuance when **exculpatory evidence** is turned over **late,** in addition to any other remedy you are seeking (e.g., motion for a mistrial).[22]

PROSECUTORIAL MISCONDUCT IN WITNESS EXAMINATION

Object when a prosecutor asks a witness to **comment on the veracity of the testimony of another witness**, stating that ground.[23]

Object when a prosecutor elicits testimony to **bolster testimony** of another government witness, stating that ground.[24]

JUDGMENT OF ACQUITTAL

Be sure to move for a **judgment of acquittal** (arguing that evidence is insufficient as a matter of law). Fed.R.Crim.P.29.[25]

Move both at the close of the government's case and again at the close of the case *if* you later introduce your own evidence.[26]
(Under Rule 29(c), however, you do not have to move for judgment of acquittal before the case is submitted to the jury in order to make a motion after the jury is discharged.)[27]

Renew any grounds given at the close of the case if you also make a motion for judgment of acquittal **after trial.**

It is **safest** to make just a **general Rule 29 sufficiency motion**, or maybe, in the alternative, a general Rule 29 motion that also **specifies grounds, but says that these are merely examples of why the evidence is insufficient.** [Where a Rule 29 motion only articulates specific grounds, all non-specified grounds are waived.][28]

JURY INSTRUCTIONS

Object, using specific grounds, after the court has charged the jury and before the jury begins deliberations.
[It is not enough to object at charge conference and/or submission of instructions; nor is it enough to object simply by referring to the number of the instruction submitted] The court must give counsel an opportunity to object out of the jury's hearing and, if requested, out of the jury's presence.[29]

Propose a cautionary instruction if you think one should be given.[30]

If you move for a **mistrial or to strike** (e.g., due to inadmissible co-conspirator statements), object after a **cautionary instruction** is given that the instruction **is insufficient to cure prejudice.**[31]

CLOSING ARGUMENT

Look for: appealing to **emotions** of jury[32]
burden shifting[33]
comment on D's failure to testify, even if only implied[34]
misstating evidence or improperly using evidence admitted for limited purpose[35]
vouching for government witnesses[36]

Object during argument rather than at the close of argument, **unless** there has been an on-record **agreement** that **objections will be made after argument**.[37]

SENTENCING

Consideration of preservation of sentencing issues may also arise at stages prior to the sentencing hearing. Some of the stages and issues to be considered are:

Plea agreement and change of plea

Are you admitting to something you may want to challenge on appeal?[38]

PSR

Unchallenged portions of PSR (together with plea agreement and colloquy and sentencing hearing) become the factual basis for evaluating claims of procedural or substantive unreasonableness on appeal.[39]

Object to PSR with specificity and, where objection is factual, with "countervailing proof" – e.g. affidavit, proffer of testimony, or other documents.[40]

Sentencing memoranda

Raise issues with specificity in your memorandum, but raising issues in the memorandum will not alone preserve claims of procedural reasonableness; you need to raise objections at sentencing.[41]

Challenge statements in the prosecution's memorandum that you do not want court to consider reliable.[42]

At sentencing

To be safe, you should **object to the substantive unreasonableness** of a sentence at the time it is imposed.[43]

To avoid plain error review you **must** object to **procedural unreasonableness** at the time of sentencing.[44] A general objection that the sentence is procedurally unreasonable will **not** preserve a specific challenge to a particularized finding.[45]

Examples of procedural error include failing to calculate or improperly calculating the guideline sentencing range, treating the guidelines as mandatory, failing to consider 18 U.S.C. §3553(a) factors, selecting a sentence based on clearly erroneous facts, failing to adequately explain the chosen sentence (including an explanation for deviating from the guideline range).[46]

ENDNOTES

[1] *See* Federal Rule of Evidence 103(a)(1); *United States v. Canty*, 37 F.4th 775, 790 (1st Cir. 2022) (review for plain error where counsel did not contemporaneously object to prosecutor's comments);*United States v. Carpenter*, 736 F.3d 619, 630 (1st Cir. 2013) (discussing need for timely and contemporaneous objection in context of objections to closing argument); *United States v. Goodhue*, 486 F.3d 52 (1st Cir. 2007) (discussing need for timely and contemporaneous objection in context of objections at sentencing).. *United States v. Acevedo-Maldonado*, 696 F.3d 150, 156 (1st Cir. 2012) (Court applies plain error review where, although defendant made Confrontation Clause argument in Rule 29 motion he failed to contemporaneously object to challenged testimony; lack of timely objection cannot be cured by trial court's ruling to the contrary.) Note also that arguments raised for the first time in a motion for reconsideration are not preserved for appeal. *United States v. Tanco-Pizarro*, 892 F.3d 472, 479 (1st Cir. 2018); *United States v. Veloz*, 948 F.3d 418, 428 (1st Cir. 2020).

[2] *United States v. Pena*, 24 F.4th 46, 69 n.19 (1st Cir. 2022) (discussing need for specificity of objection; plain error review where there were multitude of possible grounds for objection); *United States v. Ayala-Lugo*, 996 F.3d 51, 57 (1st Cir. 2021) (plain error review where general objection to reasonableness of sentence was not sufficient to give district court notice of the specific issues raised on appeal); *United States v. Corliss*, 919 F.3d 666, 669 (1st Cir. 2019) (unexplained objection to testimony does not preserve an unspecified specific claim raised on appeal); *United States v. Gordon*, 875 F.3d 26 (1st Cir. 2017) (objection to 404 character evidence without articulating ground not preserved because basis of objection could have been relevance or the form of question); *United States v. Monell*, 801 F.3d 34, 46 (1st Cir. 2015) (objection to the witness's testimony as beyond witness' expertise insufficient to preserve the objection to testimony on another ground raised on appeal); *Monell* 801 F.3d at 44 &n.10 (objecting without articulating specific ground for objection to testimony raises questions as to sufficiency of preservation but grounds may have been apparent from record, including motion in limine); *United States v. Hurley*, 842 F.3d 170, 173 (1st Cir. 2016) (reviewing only for plain error because a general objection that marihuana rather than THC was the appropriate comparator in making drug quantity determination for synthetic cannabinoids is not sufficient notice of the specific issue raised on appeal – that cannabinoids contained large quantities of plant matter like marihuana and unlike THC); *United States v. Rivera-Rangel*, 466 F.3d 158, 161-162 (1st Cir. 2006) (objections preserved only as to those presented in district court; also reiterating that lack of specificity in objection to admission of evidence precludes raising more particularized points on appeal).

[3] *Rosa-Rivera v. Dorado Health, Inc.*, 787 F.3d 614, 617 (1st Cir. 2015) (court erred in excluding leading questions but no relief because plaintiff failed to proffer some specific

information counsel might have elicited if permitted use of leading questions).

[4] *United States v. Simon*, 12 F.4th 1, 6061 (1st Cir. 2021) (where court invites response to proposed action, if counsel says nothing silence may be construed as agreement with court's proposal and as waiver of any objection). Stating no objection or approving court's proposed response to jury question constitutes a waiver of objection. *United States v. Velazquez-Fontanez*, 6 F.4th 205, 229 (1t Cir. 2021); *United States v. Perez-Vasquez*, 6 F.4th 180, 203-204 (1st Cir. 2021); *United States v. Corbett*, 870 F.3d 21, 30-31 (1st Cir. 2017).

[5] *See United States v. Almeida*, 748 F.3d 41, 50 (1st Cir. 2014).

[6] *See* Federal Rule of Evidence 103(a) & (b); *United States v. Encarnacion*, 26 F.4th 490, 503-504 (1st Cir. 2022) (failure to object at trial where order on motion in limine concerning expert testimony was conditional forfeits claim of error; review for plain error); *United States v. Lopez- Cotto*, 884 F.3d 1, 13 (1st Cir. 2018) (failure to renew objection to provisional ruling on motion in limine forfeits objection); *United States v. Raymond*, 697 F.3d 32, 37 (1st Cir. 2012) (failure to renew objection at trial to 404(b) evidence conditionally admitted after hearing on motion in limine forfeits claim of error; *United States v. Almeida*, 748 F.3d 41, 50 (1st Cir. 2014) (rulings on pre-trial in limine motion reviewed for plain error where defendant failed to renew objections at trial and failed to argue that the in limine rulings were final rather than tentative).

[7] *See United States v. Grullon*, 996 F.3d 21, 30-31 (1st Cir. 2021) (failure to renew objection to in limine exclusion of evidence waives claim); *United States v. Iwuala*, 789 F.3d 1, 5 (1st Cir. 2015) (concluding motion in limine objection to all evidence regarding individual's reputation and prior bad acts did not preserve the objection for each piece of evidence where the denial of the motion was tentative).

[8] *United States v. Iwuala*, 789 F.3d 1, 7 (1st Cir. 2015) (objection to admission of evidence on one ground does not preserve other grounds for appeal).

[9] *United States v. Neuci-Pena*. 711 F.3d 191, 196-197 (1st Cir. 2013) (where motion to dismiss for lack of jurisdiction was based on one ground in the district court and a different ground on appeal, claim was not properly preserved and would be reviewed for plain error); *United States v. Langston*, 110 F.4th 408, 419 (1st Cir. 2024) (challenge to constitutionality of statute as applied reviewed for plain error where constitutional argument raised for first time on appeal); *United States v. Paz-Alvarez*, 799 F.3d 12, 27 n.14 (1st Cir. 2015) (same); *United States v. Davila-Reyes*, 84 F.4 h 400, 417 (1st Cir. 2023) (en banc) (constitutional claim raised for first time on appeal reviewed for plain error). *But see United States v. Turner*, _F.4th_, 2024 WL 523810 (1st Cir. 2024) (Second

Amendment as applied challenge to felon-in-possession statute waived where not raised in motion to dismiss in district court).

[10] *Lawn v. United States*, 355 U.S. 339, 353-54 (1958).

[11] *Id.*

[12] *United States v. Maldonado-Pena*, 4 F.4th 1, 22 n.13 (1st Cir. 2021); *United States v. Howard*, 687 F.3d 13, 17 (1st Cir. 2012).

[13] *United States v. Reyes*, 24 F.4th 1, 16 n.8 (1st Cir. 2022); *United States v. Lindsey*, 3 F.4th 32, 41-42 (1st Cir. 2021); *United States v. Crooker*, 688 F.3d 1, 9-10 (1st Cir. 2012).

[14] *United States v. McNeill*, 728 F.2d 5, 10 (1st Cir. 1984) (failure to challenge juror during voir dire waives challenge absent clear injustice).

[15] *United States v. Negron-Sostre*, 790 F.3d 295, 299-306 (1st Cir. 2015) (exclusion of public from jury voir dire denies Sixth Amendment right to public trial and is structural error).

[16] *See Porter v. Coyne-Fague*, 35 F.4th 68 (1st Cir. 2022); *Sanchez v. Roden*, 808 F.3d 85 (1st Cir. 2015); *United States v. Mensah*, 737 F.3d 789 (1st Cir. 2013); *United States v. Charlton*, 600 F.3d 43 (1st Cir. 2010) for First Circuit discussions of criteria of and procedures for *Batson* claims.
United States v. Casey, 825 F.3d 1 (1st Cir. 2016) (defendant need *not* be of the same race as the stricken juror to raise a *Batson* challenge).
Scott v. Gelb, 810 F.3d 94, 102 (1st Cir. 2016) (assertion that "this is the fourth person of color that the Commonwealth has challenged" insufficient to support *Batson* claim).

[17] *United States v. Kilmartin*, 944 F.3d 315, 333-334 (1st Cir. 2019) (continuing objection requested and allowed); *United States v. Rivera-Santiago*, 872 F.2d 1073, 1083 (1st Cir. 1989) (absent grant of continuing objection, defendant could preserve issue only by continuing to object when testimony warranted it as the trial progressed).

[18] Un*ited States v. Velazquez-Aponte*, 940 F.3d 785, 801 (1st Cir. 2019); *United States v. Meises*, 645 F.3d 5, 19-20 (1st Cir. 2011); *United States v. Ziskind*, 491 F.3d 10, 13-14 (1st Cir. 2007); *United States v. Angulo-Hernandez*, 565 F.3d 2 (1st Cir. 2009).

[19] *United States v. Ramos-Baez*, 86 F.4th 28, 71-75 (1st Cir. 2023) (discussion of *Petrozziello* requirements and procedures; remand for findings where district court did not make required *Petrozziello* ruling); *United States v. Melo*, 954 F.3d 334, 344-345 (1st Cir. 2020); *United States v. Paz-Alvarez*, 799 F.3d 12, 29 (1st Cir. 2015) (reiterating that if a court

provisionally admits a statement under objection, defendant must object again at close of evidence); *United States v. Ciresi*, 697 F.3d 19, 25-26 (1st Cir. 2012); *United States v. Aviles-Colon*, 536 F.3d 1, 13-14 (1st Cir. 2008); *United States v. Famania-Roche*, 537 F.3d 71, 75-76 (1st Cir. 2008); *United States v. Mangual-Garcia*, 505 F.3d 1, 9 (1st Cir. 2007); *United States v. Geronimo*, 330 F.3d 67, 75 (1st Cir. 2003).

[20] *United States v. Garcia-Sierra*, 994 F.3d 17, 26-29 (1st Cir. 2021) (no plain error with problematic opinion testimony; *United States v. Rodriguez-Adorno*, 695 F.3d 32, 37-40 (1st Cir. 2012) (no plan error); *United States v. Meises*, 645 F.3d 5, 13-18 (1st Cir. 2011); *United States v. Flores-De-Jesus*, 569 F.3d 8, 16-27 (1st Cir. 2009).

[21] *United States v. Montijo-Maysonet*, 974 F.3d 34, 47-50 (1st Cir. 2020); *United States v. Vega*, 813 F.3d 386, 393-395 (1st Cir. 2016); *United States v. Valdivia*, 680 F.3d 33, 56-61 (1st Cir. 2012) (concurrence).

[22] *United States v. Bresil*, 767 F.3d 124, 126-27 (1st Cir. 2014) (holding defendant preserved claim for continuance; late expert disclosure; defendant moved for continuance citing need to investigate and obtain own expert but did not explicitly cite Rule 16. Court rejected government argument that defendant waived claim; held defendant preserved claim and reviewed for abuse of discretion, *but* defendant did not show prejudice); *United States v. Orlandella*, 96 F.4th 71, 98 n.37 (1st Cir. 2024) (claim of prejudice from late disclosure fails where defendant did not request continuance); *United States v. Pomales-Lebron*, 513 F.3d 262, 268 (1st Cir. 2008); *United States v. Mangual-Garcia*, 505 F.3d 1, 5 (1st Cir. 2007), quoting *United States v. Sepulveda*, 15 F.3d 1161, 1178 (1st Cir. 1993) ("As a general rule, a defendant who does not request a continuance will not be heard to complain on appeal that he suffered prejudice as a result of late-arriving discovery."); *United States v. Smith*, 292 F.3d 90, 102-103 (1st Cir. 2002).

[23] *United States v. Reyes*, 24 F.4th 1, 25 and n.16 (1st Cir. 2022); *United States v. Pereira*, 848 F.3d 17, 21-30 (1st Cir. 2017).

[24] *United States v. Padilla-Galarza*, 990 F.3d 60, 82-83 (1st Cir. 2021); *United States v. Valdivia*, 680 F.3d 33, 48-49 (1st Cir. 2012).

[25] *United States v. Venezuela*, 849 F.3d 477, 483-484 (1st Cir. 2017). *See United States v. Marston*, 694 F.3d 131 (1st Cir. 2012); *United States v. Morel*, 885 F.3d 17, 22 (1st Cir. 2018); and *United States v. Tanco-Baez*, 942 F.3d 7, 16 (1st Cir. 2019); *United States v. Facteau*, 89 F.4th 1, 39 n.26 (1st Cir 2023) (discussing general v. specific objections).

[26] *United States v. Freitas*, 904 F.3d 11, 22-23 (1st Cir. 2018) (defendant's sufficiency claim reviewed under clear and gross injustice standard where he made a general acquittal

motion at the close of the government's case but did not renew the motion after presenting evidence in his defense or make a timely post-trial motion).

[27] *United States v. De La Cruz*, 835 F.3d 1, 9 (1st Cir. 2016) (filing a timely post-verdict motion for judgment of acquittal under Rule 29(c) fully preserves rights for de novo review).

[28] *United States v. Norris*, 21 F.4th 188, 199 (1st Cir. 2021) (sufficiency argument concerning knowledge not preserved where original Rule 29 motion did not raise the basis presented on appeal); *United States v. Foley*, 783 F.3d 7,726 (1st Cir. 2015) (sufficiency argument concerning need for signature on HUD documents not preserved where counsel moved for judgment of acquittal on all counts but said in reality only serious issue was venue, and in post-trial motion only argued venue); *United States v. Pena-Lora*, 225 F.3d 17, 26, n.5 (1st Cir. 2000) citing *United States v. Dandy*, 998 F.2d 1344, 1356-57 (6th Cir. 1993) ("Although specificity of grounds is not required in a Rule 29 motion, where a Rule 29 motion is made on specific grounds, all grounds not specified are waived.").
A general Rule 29 motion that specifies grounds, but indicates that the grounds are merely examples, *may* not waive non-specified grounds. Where a trial judge has considered a non-specified ground, the ground is not waived. *United States v. Marston*, 694 F.3d 131 (1st Cir. 2012); *United States v. Foley*, 783 F.3d at 12 (stating "general sufficiency objection accompanied by specific objections preserves all possible sufficiency objections."). *United States v. Tanco-Baez*, 942 F.3d 7, 16 (1st Cir. 2019) (issue preserved where defendant made a general sufficiency challenge as well as advancing various specific arguments).

[29] Fed. R. Crim. Pr. 30(d); *United States v. Roberson*, 459 F.3d 39, 45 (1st Cir. 2006) (specific objection with stated grounds made after charge and before deliberations is required to preserve objection to instruction); *United States v. Weadick* 15 F.4th 1, 14-15 (1st Cir. 2021) (reiterating requirements); *United States v. Perez-Rodriguez*, 13 F.4th 1 (1st Cir. 2021) (failure to lodge post-charge objection to denial of requested entrapment instruction forfeits claim; review for plain error; concurrence urging court in future en banc proceeding to abandon rigid adherence to requirement of post-charge objection); *United States v. Serrano-Delgado*, 29 F.4th 16, 24-26 (1st Cir. 2022) (describing circuit as outlier in requiring post-charge specific objection with stated grounds); *United States v. McPhail*, 831 F.3d 1, 9 (1st Cir. 2016) (finding failure to renew specific objection after instructions were given, particularly in light of court's asking counsel after instructions given if there were any objections, resulted in failure to preserve objection for de novo review).
Failure to comply with the court schedule and submit requested jury instructions in writing at the charge conference held before the government rested has been held to

constitute waiver, even where the defendant orally requested the instruction when the government's case was complete, and before instructions were given. *See United States v. Upton*, 559 F.3d 3 (1st Cir. 2009); s*ee also United States v. Place*, 693 F.3d 219 (1st Cir. 2012) (discussing but declining to decide whether late submission of request for instruction, which was discussed at charge conference and followed after charge with objection for failure to provide, was forfeited); *United States v. Lachmann*, 469 F.2d 1043, 1044 (1st Cir. 1972)(referring by number to a request filed prior to the charge is not sufficient to preserve an objection to the court's failure to give the requested instruction).

[30] Objection to failure to give cautionary instruction is procedurally defaulted if defendant offers no proposed cautionary instruction. *See United States v. Hernandez*, 146 F.3d 30, 34 n.6 (1st Cir. 1998).

[31] *United States v. Machor*, 879 F.2d 945, 950 (1st Cir. 1989) (where final determination is against admitting alleged co-conspirator declaration after it has been provisionally admitted, court should give cautionary instruction or, *upon appropriate motion*, declare mistrial if instruction will not cure prejudice).

[32] *E.g. United States v. Canty*, 37 F.4th 775, 786-787 (1st Cir. 2022); *United States v. Ayala-Garcia*, 574 F.3d 5, 16-19 (1st Cir. 2009).

[33] *E.g. United States v. Diaz-Diaz*, 433 F.3d 128, 134-35 (1st Cir. 2005).

[34] *E.g. United States v. Wihbey*, 75 F.3d 761, 769 (1st Cir. 1996).

[35] *E.g. Canty*, 37 F.4th at 789; *United States v. Azubike*, 504 F.3d 30, 38(1st Cir. 2007).

[36] *E.g. Canty*, 37 F.4th at 788-89; *United States v. Castro-Diaz*, 612 F.3d 53, 66-67 (1 st Cir. 2010); *United States v. Manning*, 23 F.3d 570, 573 (1st Cir. 1994).

[37] *United States v. Wihbey*, 75 F.3d 761, 771 (1st Cir. 1996), comparing *United States v. Sepulveda*, 15 F.3d 1161, 1186-87 (1st Cir. 1993) (where defendant did not object or raise improper prosecutorial argument until motion for mistrial after conclusion of summations, error forfeited and reviewed for plain error only), with *United States v. Mandelbaum*, 803 F.2d 42, 43 (1st Cir. 1986) (objection made after closing arguments was timely enough to preserve error for appeal, although it "should have been made earlier") and *United States v. Levy-Cordero*, 67 F.3d 1002, 1008 n.6 (1st Cir. 1995) (objection after arguments sufficient to preserve issue for appeal where parties had agreed not to object during arguments); *United States v. Carpenter*, 736 F.3d 619, 630 (1st Cir. 2013) (finding defendant preserved three arguments by objecting to them at closing

and highlighting them in brief on new trial motion, but did not preserve fourth argument because he failed to object contemporaneously or to include it in his objections immediately after closing).

[38] *United States v. Romero*, 906 F.3d 196, 206 (1st Cir. 2018) (challenge to ransom enhancement in kidnapping case reviewed at best for plain error (and may have been waived) where defendant admitted to ransom demand as described by government at change of plea).

[39] *United States v. Ramirez-Ayala*, 101 F.4th 80, 87-88 (1st Cir .2024 (court can accept undisputed portion of PSR as finding of fact); *United States v. Colon-De Jesus*, 85 F.4th 15, 21-23 (1st Cir. 2023) (court can rely on unobjected-to portions of PSR setting out sufficiently detailed factual assertions); *United States v. Rivera-Ruiz*, 43 F.4th 172, 184-185 (1st Cir. 2022) (court can rely on undisputed 'information in PSR , but uncorroborated, unsworn hearsay with no other marks of reliability" cannot be relied on); *United States v. Messner*, 37 F.4th 736, 743 (1st Cir. 2022) (court could rely on unobjected-to description of photograph in PSR); *United States v. Gonzalez*, 857 F.3d 46, 61-62 (1st Cir. 2017).

[40] *United States v. Arce-Calderon*, 954 F.3d 379, 382 (1st Cir. 2020) ("merely rhetorical" objection, e.g. defendant's denial that statement included in PSR was made, is insufficient; in those circumstances the district court may still rely on the PSR); *United States v. Occhiuto*, 784 F.3d 862, 868 (1st Cir. 2015) (need for countervailing proof); *United States v. Carrion-Melendez*, 26 F.4th 508, 512-513 (1st Cir. 2022) (where objection raised, mere inclusion of factual allegations in PSR consisting of multiple level hearsay made by unnamed source, not detailed and uncorroborated, does not render them reliable).

[41] *United States v. Ortiz-Mercado*, 919 F.3d 686, 689 (1st Cir. 2019) (sentencing memorandum requesting low end of guidelines did not preserve procedural claim that district court failed to explain why low-end sentence was not sufficient to achieve legitimate goals of sentencing; defendant had reasonable opportunity to object to the alleged error at sentencing); *United States v. Davis*, 923 F.3d 228, 236 (1st Cir. 2019) (concerns about government's conduct in sentencing memorandum did not preserve those concerns were not raised at sentencing).

[42] *United States v. Montalvo-Febus*, 930 F.3d 30, 34 (1st Cir. 2019) (prosecutor's statements in sentencing memorandum and at sentencing, if not adequately challenged by defense where there is full opportunity to respond, may constitute reliable information for court to consider).

[43] *Holguin-Hernandez v. United States*, 589 U.S. 169 (2020) holds that requesting a specific

sentence during a sentencing hearing preserves a challenge to substantive reasonableness (length) on appeal without objection after sentence imposed. But, the Supreme Court has not decided what is sufficient to preserve any particular substantive reasonableness argument. The First Circuit has said that "[b]y arguing for the lowest possible sentence, Ramos properly preserved his challenge to the substantive reasonableness of his sentence." *United States v. Ramos-David*, 16 F.4th 326, 335 (1st Cir. 2021).*See also United States v. Kuljko*, 1 F.4th 87, 98 (1st Cir. 2021) ("This challenge [to the substantive reasonableness of his sentence] must be treated as preserved, and, thus, our review is for abuse of discretion."); *United States v. Wright*, 101 F.4th 109, 117-118 (1st Cir. 2024) (challenge to substantive reasonableness preserved by advocating for sentence shorter than sentence imposed). Prior to *Holguin-Hernandez* the First Circuit had a "somewhat blurred" applicable standard of review noting that while a number of circuits do not require an objection in the district court to preserve a claim that the length of a sentence is substantively unreasonable, the First Circuit has held, without analysis, that plain error review applies in the absence of a district court objection. *United States v. Ruiz-Huertas*, 792 F.3d 223, 228 (1st Cir. 2015). *See also United States v. Contreras-Delgado*, 913 F.3d 232, 239 (1st Cir. 2019); *United States v. Rivera-Berrios*, 902 F.3d 20 (1st Cir. 2018).

[44] *United States v. Gierbolini-Rivera*, 900 F.3d 7 (1st Cir. 2018) (plain error standard of review applies where defendant fails to preserve objection to the procedural reasonableness of a sentence in the district court); *United States v. Hassan-Saleh-Mohamad*, 930 F.3d 1 (1st Cir. 2019) (stating "We would preserve the record for purposes of an appeal for unreasonableness of sentence" did not preserve specific reasonableness challenges to failure to properly consider §3553(a) factors); *United States v. Sayer*, 916 F.3d 32 (1st Cir. 2019) (stating "I would like to object to the upward variance… to preserve all of [defendant's] appeal rights" did not preserve claim that court failed to adequately explain the rational for chosen sentence); *United States v. Sosa-Gonzalez*, 900 F.3d 1 (1st Cir. 2018) ("We object to the sentence because we believe is unreasonable" did not preserve arguments that court failed to consider all relevant §3553(a) factors and did not adequately explain reasons for sentence); *United States v. Rios-Rivera*, 913 F.3d 38, 44-45 (1st Cir. 2019) (noting that defendant had opportunity to object to any procedural deficiency when court asked, after announcing sentence, if there was "anything else" counsel wished to discuss); *United States v. Ortiz-Mercado*, 916 F.3d 686 (1st Cir. 2019) (argument for sentence at lower end of guideline range in sentencing memorandum does not preserve claim of procedural error in failing to adequately explain reason for sentence).

[45] *United States v. Valle-Colon*, 21 F.4th 44, 48 n.2 (1st Cir. 2021); *United States v. Garcia-Mojica*, 955 F.3d 187, 192 (1st Cir. 2020). But to preserve claim of procedural error objection "need not be framed with exquisite precision." *United States v. Rivera-Berrios*,

968 F.3d 130, 134 (1st Cir. 2020). *See also United States v. Perez-Delgado* 99 F.4th 13, 20-21 (1st Cir. 2024) (objection to sentence and specific reference to sentence being above GSR sufficiently specific to preserve challenge to sentence as procedurally unreasonable for failure to provide adequate explanation); *United States v. Colon-Cordero*, 91 F.4th 41, 49-50 (1st Cir. 2024) (procedural sentencing error claims preserved where sentencing transcript makes it "contextually clear defense counsel's objections sufficiently called the district court's attention to the perceived sentencing problems that now form the basis of the appellate arguments"); *United States v. Melendez-Hiraldo*, 82 F.4th 48, 53-54 (1st Cir. 2023) (objection alerting court to perceived deficiency in justification for upward variance preserved procedural claims that court failed to provide specific reasons/did not identify reasons for variance but did not preserve other procedural claims); *United States v. Acevedo-Vazquez*, 977 F.3d 85 (2020) (objecting that sentence did not sufficiently take into consideration defendant's mental illness, need for drug treatment and facts and circumstances leading to offense adequately preserved argument that sentence was procedurally unreasonable because the court abandoned its discretion by not considering the specific circumstances warranting a partially concurrent sentence).

[46] *United States v. Melendez-Hiraldo*, 82 F.4th 48, 53 (1st Cir. 2023); *United States v. Sayer*, 916 F.3d 32, 37 (1st Cir. 2019).

STANDARDS OF REVIEW

The standard of review may determine the outcome of your appeal. Below is a list of standards and some cases discussing when they apply.
THIS IS NOT A COMPLETE LIST

De novo – reviewed with no deference to the decision below

Applied for purely legal question in interpretation of assertedly controlling legal precedent

United States v. Chin, 913 F.3d 251 (1st Cir. 2019)

Applied for preserved claims of constructive amendment and prejudicial variance

United States v. Katana, 93 F.4th 521 (1st Cir. 2024)
United States v. McBride, 962 F.3d 25 (1st Cir. 2020)

Applied for preserved objections to government's closing argument

United States v. Perez-Greaux, 83 F.4th 1 (1st Cir. 2023)
United States v. Cruz-Rivera, 14 F.4th 32 (1st Cir. 2021)

Applied for preserved questions of legal interpretation of sentencing guidelines, such as loss-calculation methodology

United States v. Chan, 981 F.3d 39 (1st Cir. 2020)
United States v. Mayendia-Blanco, 905 F.3d 26 (1st Cir. 2018)
United States v. Cohen, 887 F.3d 77 (1st Cir. 2018)

Applied to sentencing court's interpretation and application of sentencing guidelines for preserved challenge to procedural reasonableness

United States v. Carvajal, 85 F.4th 602 (1st Cir. 2023)
United States v. Severino-Pacheco. 911 F.3d 14 (1st Cir. 2018)
United States v. Brown, 26 F.4th 48, 65-66 (1st Cir. 2022)

Applied for preserved claims of instructional error to questions about "whether the instructions conveyed the essence of the applicable law"/correctly stated the law

United States v. Santononasto, 100 F.4th 62 (1st Cir. 2024)
United States v .Facteau, 89 F.4th 1 (1st Cir. 2023)
United States v. Correia, 55 F.4th 12 (1st Cir. 2022)
United States v. McLellan, 959 F.3d 442 (1st Cir. 2020)
United States v. Tkhilaishvili, 926 F.3d 1 (1st Cir. 2019)
United States v. Freitas, 904 F.3d 11 (1st Cir. 2018)

United States v. Sabean, 885 F.3d 27 (1st Cir. 2018)

Applied for preserved denial of Rule 29 motion for judgment of acquittal
United States v.DeQuattro, 118 F.4th 424 (1st Cir. 2024)
United States v.Santononasto, 100 F.4th 62 (1st Cir. 2024)
United States v. Belanger, 890 F.3d 13 (1st Cir. 2018)

Applied for preserved claim of misjoinder under Rule 8
United States v. Sabean, 885 F.3d 27 (1st Cir. 2018)
United States v. Azor, 881 F.3d 1 (1st Cir. 2017)

Applied for preserved challenges to legal conclusions in ruling on motion to suppress (including ultimate constitutional determinations and ultimate decision to grant or deny motion)
United States v. Mulkern, 49 F.4th 623 (1st Cir. 2022)
United States v. Gottesfeld, 18 F.4th 1 (1st Cir. 2021)
United States v. Centeno-Gonzalez, 989 F.3d 36 (1st Cir. 2021)
United States v. Flores, 888 F.3d 537 (1st Cir. 2018)
BUT NOTE *United States v. Tiru-Plaza*, 766 F.3d 111 (1st Cir. 2014) discussing de novo review of legal conclusions in context of motion to suppress as encompassing appropriate weight to inferences drawn by district and on-scene law enforcement and citing *Ornelas v. United States*, 517 U.S. 690 (1986)

Abuse of discretion –generally a deferential standard suggesting latitude to the decisionmaker below; a test of reasonableness

NOTE: A material error of law always amounts to an abuse of discretion
United States v. Navarro-Santisteban, 83 F.4th 44 (1st Cir. 2023)
United States v. Baptiste, 8 F.4th 39 (1st Cir. 2021)
United States v. Irizarry-Colon, 848 F.3d 61 (1st Cir. 2017)
United States v. Walker, 665 F.3d 212 (1st Cir. 2011)

In reviewing a sentence, abuse of discretion is defined as "a multi-dimensional test that requires us to assess 'factual findings for clear error, arguments that the [sentencer] erred in interpreting or applying the guidelines de novo, and judgment calls for abuse of discretion simpliciter,'"
United States v. Romero, 906 F.3d 196 (1st Cir. 2018)
United States v. Ramirez-Frechel, 23 F.4th 69 (1st Cir. 2022)
United States v. Flores-Machicote, 706 F.3d 16 (1st Cir. 2013)

Applied for preserved challenges to procedural reasonableness of sentence

United States v. Poliero, 81 F.4th 96 (1st Cir 2023)
United States v. Brown, 26 F.4th 48 (1st Cir. 2022)
United States v. Vargas-Martinez, 15 F.4th 91 (1st Cir. 2021)
United States v. Ilarraza, 963 F.3d 1 (1st Cir. 2020)
United States v. Gierbolini-Rivera, 900 F.3d 7 (1st Cir. 2018)

NOTE that a general objection to the procedural reasonableness of a sentence will not preserve a specific challenge to a sentencing court's particularized findings. *United States v. Garcia-Mojica*, 955 F.3d 187 (1st Cir. 2020)

Applied for preserved challenge to substantive reasonableness of sentence
United States v. Vinas, 106 F.4th 147 (1st Cir. 2024)
United States v. Colon-De Jesus, 85 F.4th 15 (1st Cir. 2023)
United States v. Flores-Nater, 62 F.4th 652 (1st Cir. 2023)
United States v. Vargas-Martinez, 15 F.4th 91 (1st Cir. 2021)
United States v. Padilla-Galarza, 990 F.3d 60 (1st Cir. 2021)
United States v. Chisholm, 940 F.3d 119 (1st Cir. 2019)

Applied for preserved challenges to procedural and substantive reasonableness of sentence
United States v. Sosa-Gonzalez, 900 F.3d 1 (1st Cir. 2018)

May apply for unpreserved claim that sentence was substantively unreasonable
United States v. Ruiz-Huertas, 792 F.3d 223 (1st Cir. 2015)
United States v. Rivera-Berrios, 902 F.3d 20 (1st Cir. 2018)
United States v. Contreras-Delgado, 913 F.3d 232 (1st Cir. 2019)

Applied for district court rulings on speedy trial motions
United States v. Lara, 970 F.3d 68 (1st Cir. 2020)
United States v. Handa, 892 F.3d 95 (1st Cir. 2018)
United States v. Irizarry-Colon, 848 F.3d 61 (1st Cir. 2017)
United States v. Carpenter, 781 F.3d 599 (1st Cir. 2015) (noting tension with de novo review for legal rulings in denial of motion to dismiss under Speedy Trial Act and for whether prison officials violated Eighth Amendment)

Applied for preserved challenges to seating of juror
United States v. Kuljko, 1 F.4th 87 (1st Cir. 2021)

Applied for preserved challenges to evidentiary rulings
United States v.Jackson, 58 F.4th 541 (1st Cir. 2023)
United States v. Ramirez-Frechel, 23 F.4th 69 (1st Cir. 2022)
United States v. Rosario-Perez, 957 F.3d 277 (1st Cir. 2020)

Applied to preserved challenge to denial of motion to withdraw guilty plea
United States v. Nieves-Melendez, 58 F.4th 569 (1st Cir. 2023)

Applied for preserved challenges to protective order
United States v. Padilla-Galarza, 990 F.3d 60 (1st Cir. 2021)

Applied for denial of severance motion under Rule 14
United States v. Sabean, 885 F.3d 27 (1st Cir. 2018)

Applied for preserved challenge to denial of motion for reconsideration
United States v. Veloz, 948 F.3d 418 (1st Cir. 2020)
United States v. Valenzuela, 849 F.3d 477 (1st Cir. 2017)

Applied for preserved claims of instructional error to questions about "whether the [judge's] choice of language was unfairly prejudicial"/tended to "confuse or mislead jury on controlling issues"/ wording and form of instruction
United States v. Cantwell, 64 F.4th 396 (1st Cir. 2023)
United States v. Correia, 55 F.4th 12 (1st Cir. 2022)
United States v. Freitas, 904 F.3d 11 (1st Cir. 2018)
United States v. Sabean, 885 F.3d 27 (1st Cir. 2018)

Applied for preserved challenge to restitution order (with subsidiary fact findings reviewed for clear error and abstract legal questions reviewed de novo)
United States v. Cardozo, 68 F.4th 725 (1st Cir. 2023)
United States v. De Jesus-Torres, 64 F.4th 33 (1st Cir. 2023)
United States v. Padilla-Galarza, 990 F.3d 60 (1st Cir. 2021)

Applied to preserved challenge to district court's decision to revoke supervised release
United States v. Navarro-Santisteban 83 F.4th 44 (1st Cir. 2023)
United States v. Rodriguez, 919 F.3d 629 (1st Cir. 2019)

Manifest abuse of discretion

Applied to review of denial of Rule 33 motion for new trial
United States v. Gonzalez-Perez, 778 F.3d 3 (1st Cir. 2015)
United States v. Carpenter, 781 F.3d 599 (1st Cir. 2015)

Applied to review of denial of mistrial motion
United States v. Santiago, 62 F.4th 639 (1st Cir. 2023)
United States v. Chisholm, 940 F.3d 119 (1st Cir. 2019)

United States v. Trinidad-Acosta, 773 F.3d 298 (1st Cir. 2014),
superseded on other grounds
BUT SEE *United States v. Padilla-Galarza*, 990 F.3d 60 (1st Cir. 2021) describing standard simply as abuse of discretion

Clear error – not reverse "absent 'a strong, unyielding belief that a mistake has been made.'"

United States v. Gomez-Encarnacion, 885 F3d 52 (1st Cir. 2018)
United States v. Cohen, 887 F.3d 77 (1st Cir. 2018)

Applied for reviewing district court's underlying finding of fact. As long as factual inferences are rational there is no clear error; choice among rational but competing inferences cannot be clearly erroneous
United States v. Colon-Cordero, 91 F.4th 41 (1st Cir. 2024) (sentencing)
United States v. Brown, 26 F.4th 48, 65-66 (1st Cir. 2022) (sentencing)
United States v. Flores, 888 F.3d 537 (1st Cir. 2018) (suppression)

Plain error –four part test applied when issue raised on appeal has not been preserved below. Appellant must show: 1) error; 2) that is clear or obvious; 3) that affected appellant's substantial rights (prejudice); and 4) that seriously impaired the fairness, integrity, or public reputation of judicial proceedings (outcome akin to miscarriage of justice)

United States v. Bruno-Cotto, 119 F.4th 201 (1st Cir. 2024)
United States v. Burgos-Balbuena, 113 F.4th 112 (1st Cir. 2024)
United States v. Vicente, 909 F.3d 20 (1st Cir. 2018)
United States v. Romero, 906 F.3d 196 (1st Cir. 2018)

Applied for unpreserved evidentiary challenges
United States v. Benjamin-Hernandez 49 F.4th 580 (1st Cir. 2022)
United States v. Melo, 954 F.3d 334 (1st Cir. 2020)
United States v. Belanger, 890 F.3d 13 (1st Cir. 2018)

Applied for unpreserved claim of prosecutorial misconduct in closing argument
United States v. Perez Soto, 80 F.4th 50 (1st Cir. 2023)
United States v. Canty, 37 F.4th 775 (1st Cir. 2022)

United States v. Padilla-Galarza, 990 F.3d 60 (1st Cir. 2021)

Applied for unpreserved challenge to constitutionality of statute
United States v. Davila-Reyes, 84 F.4th 400 (1st Cir. 2023) (en banc)
United States v. Rios-Rivera, 913 F.3d 38 (1st Cir. 2019)

Applied to unpreserved claim of constructive amendment
United States v. Rosario-Perez, 957 F.3d 277 (1st Cir. 2020)

Applied for unpreserved ground in support of motion for new trial
United States v. Canty, 37 F.4th 775 (1st Cir. 2022)
United States v. Ponzo, 913 F.3d 162 (1st Cir. 2019)

Applied for unpreserved claim that guilty plea was not knowing, intelligent, voluntary
United States v. Valdez, 88 F.4th 334 (1st Cir. 2023)
United States v. Scott, 877 F.3d 30 (1st Cir. 2017) (also noting possibility of de novo review for other claims of involuntariness)

Applied for unpreserved suppression argument
United States v. Rasberry, 882 F.3d 241 (1st Cir. 2018)

Applied for unpreserved challenge to jury instructions
United States v. Facteau, 89 F.4th 1 (1st Cir. 2023)
United States v. Weadick, 15 F.4th 1 (1st Cir. 2021)
United States v. Padilla-Galarza, 990 F.3d 60 (1st Cir. 2021)

Applied for unpreserved claim that sentence was substantively unreasonable
United States v. Ruiz-Huertas, 792 F.3d 223 (1st Cir. 2015)
BUT SEE *United States v. Contreras-Delgado*, 913 F.3d 232 (1st Cir. 2019), stating that whether substantive reasonableness claims are preserved despite the absence of an objection in the district court is an open question in this Circuit

Applied for unpreserved claim that sentence was procedurally unreasonable
United States v. Delgado, 106 F.4th 185 (1st Cir. 2024)
United States v. Ramirez-Ayala, 101 F.4th 80 (1st Cir. 2024)
United States v. Morales-Cortijo, 65 F.4th 30 (1st Cir. 2023)
United States v. Cadden, 51 F.4th 32 (1st Cir. 2022)
United States v. Vargas-Martinez, 15 F.4th 91, 98 (1st Cir. 2021)
United States v. Gierbolini-Rivera, 900 F.3d 7, 12-13(1st Cir.2018)
United States v. Sosa-Gonzalez, 900 F.3d 1 (1st Cir. 2018)

NOTE: general objection that sentence was procedurally unreasonable does not

preserve specific challenge to particularized finding.
United States v. Morales-Velez, 100 F.4th 334 (1st Cir. 2024)
United States v. Sayer, 916 F.3d 32 (1st Cir. 2019)

NOTE: Error in sentencing defendant under incorrect guideline range "can, and most often will, be sufficient to [meet the third prong by] show[ing] a reasonable probability of a different outcome absent the error."
Molina-Martinez v. United States, 136 S.Ct. 1338, 1345 (2016)
United States v. Vicente, 909 F.3d 20, 23 (1st Cir. 2018)

Applied to unpreserved challenge to relevant conduct determination
United Staes v. Nieves-Melendez, 58 F.4th 569 (1st Cir. 2023)

Applied where defendant shifted theory on appeal as to why district court's drug quantity calculation was incorrect
United States v. Pinkham, 896 F.3d 133 (1st Cir. 2018)

Applied for unpreserved challenge to restitution amount
United States v. Gonzalez-Calderon, 920 F.3d 83, 85 (1st Cir. 2019)

Applied for unpreserved challenge to condition of supervised release
United States v. Morales-Cortijo, 65 F.4th 30 (1st Cir. 2023)

Applied for unpreserved claim of structural error
Untied States v. Norrris
United States v. Lara, 970 F.3d 68 (1st Cir. 2020)

Applied for unpreserved claim government breached plea agreement
United States v. Burgos-Balbuena, 113 F.4th 112 (1st Cir. 2024)

Clear and gross injustice – a particularly exacting variant of plain error review

Applied for reviewing general sufficiency of evidence motion made at the close of the government's case but not renewed after the presentation of defense evidence or in a timely post-verdict motion.
United States v. Freitas, 904 F.3d 11 (1st Cir. 2018)

Applied for unpreserved sufficiency of evidence challenge
United States v. Boyrie-Laboy, 99 F.4th 39 (1st Cir. 2024)
United States v. Vazquez-Rosario, 45 F.4th 65 (1st Cir. 2022)

United States v. Lara, 970 F.3d 68, 86 (1st Cir. 2020)

Harmless error -relief not warranted so long as court able to conclude with high degree of confidence:

that error did not affect outcome of trial/ contribute to verdict
that district court would have imposed same sentence absent error

Applied for erroneous evidentiary rulings

United States v. Villa-Guillen, 102 F.4th 508 (1st Cir. 2024)
United States v. Rathbun, 98 F.4th 40 (1st Cir. 2024)
United States v. Garcia-Sierra, 994 F.3d 17 (1st Cir. 2021)
United States v. Kilmartin, 944 F.3d 315, 338 (1st Cir. 2019)

Applied for preserved objection of prosecutorial misconduct

United States v. Simon, 12 F.4th 1 (1st Cir. 2021)
United States v. Kulijko, 1 F.4th 87 (1st Cir. 2021)
United States v. Pereira, 848 F.3d 17, 21 (1st Cir. 2017)

Applied for preserved objection to incorrect jury instruction

United States v. O'Donovan, _F.4th_, 2025 WL 99836 (1st Cir. 2025)
United States v. Minor, 31 F.4th 9 (1st Cir. 2022)
United States v. McLellan, 959 F.3d 442 (1st Cir. 2020)

Applied for significant procedural error in sentencing

United States v. Reyes-Correa, 81 F.4th 1 (1st Cir. 2023)
United States v. Walker, 89 F.4th 173 (1st Cir. 2023)
United States v. Tavares, 705 F.3d 4 (1st Cir. 2013)

Where an error is **constitutional**, it is harmless when it appears **beyond a reasonable doubt** that the error did not contribute

to the verdict.

Mitchell v. Esparza, 540 U.S. 12 (2003)
United States v. Daniells, 79 F.4th 57 (1st Cir. 2023)

"to the result of which the appellant complains."

United States v. Trahan, 111 F.4th 185 (1st Cir 2024)
United States v. Velazquez-Fontanez, 6 F.4th 205, 222-223 (1st Cir. 2021)
United States v. McIvery, 806 F.3d 645 (1st Cir. 2015)
United States v. Harakaly, 734 F.3d 88 (1st Cir. 2013)

Sliding scale – underlying facts reviewed for clear error and application of sentencing guidelines to those facts on a sliding scale, with increasing scrutiny the more law-driven the lower court's decision

United States v. Rogers, 17 F.4th 229 (1st Cir. 2021)
United States v. Matthews, 749 F.3d 99 (1st Cir. 2014)

Applied for reviewing district court's application of sentencing guidelines to facts found by court.

United States v. Tirado-Nieves, 982 F.3d 1 (1st Cir. 2020)
United States v. Newton, 972 F.3d 18 (1st Cir. 2020)
United States v. Oliveira, 907 F.3d 88 (1st Cir. 2018)

WAIVER AND FORFEITURE

Overview

Failure to preserve a claim of error in the trial court will result in either waiver, ordinarily precluding appellate review, or forfeiture, limiting appellate review to plain error. Waiver is the "intentional relinquishment of a known right." *Johnson v. Zerbst* ,304 U.S. 458, 464 (1938). Forfeiture arises when a party fails to raise or properly preserve an issue as the result of some form of neglect. *See e.g. United States v. Olano*, 507 U.S. 725 (193) (discussing elements of plain error review). As the First Circuit recently explained:

> For a defendant to waive a claim such that it will receive no appellate consideration, the record must show that the defendant intended to forgo a known right. United States v. Eisom, 585 F.3d 552, 556 (1st Cir. 2009) (citing United States v. Olano, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), and United States v. Rodriguez, 311 F.3d 435, 437 (1st Cir. 2002)). But where the record reveals only a failure to bring forth a claim because of "something less deliberate" such as **"oversight, inadvertence, or neglect in asserting a potential right,"** the defendant has only forfeited the claim. Id. (citing United States v. Staples, 202 F.3d 992, 995 (7th Cir. 2000)). A forfeited claim will be considered on appeal but only for plain error. Id. (citing Olano, 507 U.S. at 733-34, 113 S.Ct. 1770, and Rodriguez, 311 F.3d at 437).

United States v. Bruno-Cotto, 119 F.4th 201, 206 (1st Cir. 2024). However, "courts may excuse waivers and disregard stipulations where justice so requires." *United States v. Torres-Rosario*, 658 F.3d 110, 116 (1st Cir. 2011). The First Circuit has also acknowledged that "[c]ourts are not always consistent in their use of the term waiver." *United States v. Torres-Rosario*, 658 F.3d 110, 115 (1st Cir. 2011).

> Waiver can be based on an affirmative assertion or on remaining silent.
>
> …"when a party explicitly affirms a fact in the district court, that party risks waiving 'both existing and yet-to-be-recognized rights.' " United

> States v. Orsini, 907 F.3d 115, 119 (1st Cir. 2018) (quoting United States v. Bauzó-Santiago, 867 F.3d 13, 24 (1st Cir. 2017)). In addition to an explicit affirmation that abandons a right, this court has made clear "that, 'when the "subject matter [is] unmistakably on the table, and the defense's silence is reasonably understood only as signifying agreement that there was nothing objectionable," the issue is waived on appeal.' " United States v. Corbett, 870 F.3d 21, 30–31 (1st Cir. 2017) (quoting United States v. Soto, 799 F.3d 68, 96 (1st Cir. 2015)).

United States v. Ngomba, No. 23-1529, 2024 WL 4578190, at *1 (1st Cir. July 9, 2024).

Plain error review applies where a claim has not been properly preserved due to some form of neglect. It requires the appellant to show: 1) error; 2) that is clear or obvious; 3) that affected appellant's substantial rights (prejudice); and 4) that seriously impaired the fairness, integrity, or public reputation of judicial proceedings (outcome akin to miscarriage of justice). *See Bruno-Cotto*, 119 F.4th at 206.

Waiver

Waiver can arise in a number of contexts. Examples are described below.

Explicit and specific concession

Counsel's concession at sentencing, without reservation, that client was an armed career criminal under the statute was a waiver. *Torres-Rosario*, 658 F.3d at 116. The court stated that "[i]f a lawyer wishes to preserve a possible claim despite an express concession or stipulation, identifying and reserving the claim is the customary approach." *Id*. However, the court excused the waiver where a change in law subsequent to defendant's sentencing raised the likelihood that the government could not establish that defendant was an armed career criminal, found plain error, vacated the sentence, and remanded for resentencing. *See also*, *United States v. Bauzo-Santiago*,

867 F.3d 13 (1st Cir. 2017) (recognizing discretion to excuse waiver but not reaching issue where defendant could not establish plain error).

Counsel's statement that he "ha[d] no problem" with court's proposed response to jury question waived any challenge to court's response. *United States v. Corbett*, 870 F.3d 21 (1st Cir. 2017).

Counsel's concession that sentence "certainly cannot be concurrent" with sentence imposed in another case waived argument that district court erred in failing to recognize authority to impose concurrent sentence. *United States v. Lasanta-Sanchez*, 681 Fed.Appx. 32 (1st Cir. 2017).

Counsel's statements that court could impose the statutory maximum for revocation of supervised release waived claim that court had to subtract terms of imprisonment imposed on prior revocations. *United States v. Ruiz-Valle*, 68 F.4th 741 (1st Cir. 2023).

Counsel's agreement to district court's decision to not provide indictment to jury and to verdict form waived challenges to withholding of indictment and verdict form on appeal. *United States v. Chen*, 998 F.3d 1 (1st Cir. 2021)

Guilty plea

A guilty plea is another example of waiver by explicit and specific concession. In a proper Rule 11 colloquy a defendant explicitly and personally acknowledges that she is knowingly and intentionally relinquishing known rights. *See* F.R.Cr.P. 11(b)(1)(A-F). However, a guilty plea does not waive a challenge to the constitutionality of the statute of conviction. *Class v. United States*, 583 U.S. 174 (2018).

Appeal Waiver

A plea agreement may include an explicit waiver of the right to challenge the conviction and/or the sentence and/or bring a collateral attack. The First Circuit has sanctioned the use of appellate waivers in criminal cases. *United States v. Teeter*. 257 F.3d 14 (1st Cir. 2001). The terms and scope of the waiver must be clearly set out in the agreement. The waiver must be voluntary and knowing. *Id*. at 24. The court may decline to honor the waiver if denying a right to appeal would "work a miscarriage of justice." *Id*. at 25. *See also United States v. Andruchuk*, 122 F.4th 17 (1st Cir. 2024); *United States v. Thompson*, 62 F.4th 37 (1st Cir. 2023); *United States v. Boudreau*, 58 F.4th 26 (1st Cir. 2023); *United States v. Staveley*, 43 F.4th 9 (1st Cir. 2022); *United States v. Pacheco*, 921 F.3d 1 (1st Cir. 2019); *United States v. Ortiz-Vega*, 860 F.3d 20 (1st Cir. 2017).

The court will "rely on basic contract interpretation principles, construing the agreement where possible to give effect to every term and phrase, and construing any ambiguities in favor of allowing the appeal to proceed" in determining the scope of an appeals waiver. *United States v. Spinks*, 63 F.4th 95 (1st Cir. 2023).

Withdrawal of claim or objection

After arguing in motion for judgment of acquittal that a particular ownership interest was not property within the meaning of the Hobbs Act, at argument counsel agreed with district court that there was no property problem. Since the property argument was withdrawn it was waived and could not be resurrected on appeal. *United States v. Tkhilaishvili*, 926 F.3d 1 (1st Cir.2019).

After raising objection to relevant conduct determination in objections to PSR and at sentencing conference, counsel stated at sentencing that the relevant conduct determination in the PSR was no longer disputed. The explicit withdrawal constituted a waiver of the issue. *United States v. Eisom*, 585 F.3d 552 (1st Cir. 2009).

Waiver in appellate briefing

Failure to raise an argument in an opening brief waives that issue on appeal. *United States v. Carvajal*, 85 F.4th 602 (1st Cir. 2023); *United States v. De la Cruz*, 998 F.3d 508 (1st Cir. 2021; *United States v. Mayendia-Blanco*, 905 F.3d 26 (1st Cir. 2018). Addressing an argument in a reply brief comes too late. *United States v. Freitas*, 904 F.3d 11 (1st Cir. 2018)

The failure to sufficiently develop an argument on appeal waives that issue. "Issues averted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). What constitutes "sufficient development" has not been defined with any degree of precision. For discussions of insufficient development *see e.g*: *United States v. Candelario*, 105 F.4th 20 (1st Cir. 2024); *United States v. McGlashan*, 78 F.4th 1 (1st Cir. 2023); *United States v. Boudreau*, 58 F.4th 26 (1st Cir. 2023); *United States v. Diggins*, 36 F.4th 302 (1st Cir. 2022); *United States v. Gonzalez*, 981 F.3d 11 (1st Cir. 2020); *United States v. Freitas*, 904 F.3d 11 (1st Cir. 2018); *United States v. Sevilla-Oyola*, 770 F.3d 1 (1st Cir. 2014); *United States v. Williams*, 630 F.3d 44 (1st Cir. 2010); *United States v. Ramirez-Ferrer*, 1995 WL 237041 (1st Cir. 1995).

The failure to address meeting the applicable standard of review constitutes waiver of the unpreserved claim. *United States v. Cordero-Velazquez*, 124 F.4th 44 (1st Cir. 2024); *United States v. Vazquez-Rosario*, 45 F.4th 565 (1st Cir. 2022).

Plain error

Where plain error review applies "[a] party who claims plain error must carry the devoir of persuasion as to all four…elements." *United States v. Pinkham*, 896 F.3d 133, 136-37 (1st Cir. 2018). *See also United States v. Rivera-Morales*, 961 F.3d 1, 12-13 (1st Cir. 2020).

Generally, showing that a legal error is "clear or obvious" requires providing "controlling precedent resolving the disputed issue in [appellant's] favor." *United States v. Rivera-Morales*, 961 F.3d 1, 13 (1st Cir. 2020); *United States v. Delgado-Sanchez*, 849 F.3d 1 (1st Cir. 2017). "[A] district court's choice between two equally plausible but conflicting outcomes cannot constitute plain error." *United States v. Sansone*, 90 F.4th 1, 8 (1st Cir. 2024).

Showing a clear or obvious error "affected [appellant's] substantial rights" ordinarily requires showing prejudice - "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Rosales-Mireles v. United States*, 585 U.S. 129, 134-135 (2018) (interior quotation marks omitted). Appellant "must provide an affirmative answer to the inquiry with "'some level of certainty and particularity.'" *United States v. Padilla-Galarza*, 990 F.3d 60, 84 (1st Cir. 2021). *See also*, *e.g. United States v. Cortes-Lopez*, 101 F.4th 120, 134 (1st Cir. 2024) (government breach of

plea agreement); *United States v. Canty*, 37 F.4th 775, 790-791 (1st Cir. 2022) (prosecutorial misconduct in closing argument).

Whether the fourth prong has been met "is guided by [the court's fundamental concern with 'the public legitimacy of our justice system[,] [which] relies on procedures that are "neutral, accurate, consistent, trustworthy, and fair."'" *United States v. Perez-Rodriguez*, 13 F.4th 1, 16 (1st Cir. 2021).

FIRST CIRCUIT CASE UPDATE

BRIEF SUMMARIES OF FIRST CIRCUIT CASES FROM 01/01/2023-12/31/2024

Some of the issues addressed in First Circuit cases decided between 01/01/23 and 12/31/2024 are categorized below. The brief summaries of the cases, in reverse chronological order, follow the listings.

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03/28/24 United States v. Condron, 98 F.4th 1
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12/27/24 – Cockerham v. Boncher, 2024 WL 5232696 – § 2241 petition brought in D-MA of individual committed by D-Miss under § 4243 (NGRI). Court affirms ruling below that petitioner cannot raise a claim for "discharge" under § 4247(h) in a habeas petition and must bring claim before committing court. Vacates and remands district court's ruling that petitioner cannot amend petition to bring distinct claims challenging the suitability of the facility in which he is confined. A civilly committed person remains free to raise claims of illegality other than those that § 4247(h) was put in place to address in habeas. Proposed amended petition argues that Devens is not a "suitable" facility under § 4247(i)(c), alleges a due process claim, and seeks placement in a suitable facility. Rejects Gov argument that these claims are "inextricable intertwined" with the type of claim § 4247(h) is designed to address. This is distinct relief from discharge from confinement and thus, even if § 4247(h) is the proper mechanism by which to seek discharge, nothing incongruous about challenging the "manner of execution" in a § 2241 petition. **As issue not clearly address below, case remanded to address whether "suitability" claim is cognizable under § 4247(h).**

12/27/24 – United States v. Turner, 124 F.4th 69 – **Second Amendment as-applied challenge to § 922(g)(1) count waived by failing to timely move to dismiss** and failing to show good cause for failure. Argument only raised before the district court as part of sentencing. Although Rule 12(b)(3) does not cover motions asserting that the court lacks jurisdiction, a challenge to a statute of conviction on Constitutional grounds is not jurisdictional. **No procedural or substantive unreasonableness** in 210-mo top-of-range (180-210 GSR) sentence for serial bank robber. No abuse of discretion in district court's conclusion that it was not going to rule on the threat-of-death (USSG § 2B1.3(b)(2)) enhancement because GSR was determined by armed-career-criminal designation and offense level of robbery count would not have made a difference in applicable GSR. No reason to conclude district court overlooked mitigating factors where they were the subject of sentencing arguments and court remarked on them. Sufficient explanation for within-guideline sentence. No procedural error in district court's rejection of D's statement at allocution about Probation's failure to help him prior to the bank robbery. A court is not required to accept a D's explanation about why he committed a crime or what factors mitigate criminal behavior. No substantive unreasonableness in within-GL

sentence for four-time bank robber. No indication district court assigned excessive weight to D's criticisms of Probation. **No plain procedural error in sentencing D to consecutive revocation sentence**, where record does not demonstrate court believed it was required to impose consecutive sentence and court stated that it was doing so to impose additional punishment because D committed new federal crime while on supervised release.

12/23/24 – United States v. Cordero-Velázquez, 124 F.4th 44 – **No procedural or substantive unreasonableness in upward variance** of 48 months (TOL 19 CHC I, GSR 30-37 mo) in § 922(o) case for possession of a Glock handgun modified to be automatic. Argument that district court should not have varied upward due to its disagreement with the guidelines' treatment of modified machine guns waived where D failed to raise this specific issue below, failed to raise argument in opening brief and failed to address district court's Kimbrough rationale. Challenge to district court's consideration of Puerto Rico's firearms problem waived where counsel objected at sentencing to the court's consideration of generalized factors but conceded that court may consider the community-based factors outlined in Flores-Machicote. Regardless of waiver, while court "may have lingered longer than necessary on community characteristics," sentencing grounded in case-specific factors where court noted that D admitted to previously firing this weapon and sharing it with co-D "add[ing] to the already pervasive problem of illegal possession of machine guns in Puerto Rico." **Adequate explanation for the upward variance** where court noted D's history of using marijuana, repeated violations of pretrial release, admission that he previously fired the weapon and shared it with co-D, and amount of ammunition and high-capacity magazines present. **No reason to conclude district court overlooked potentially mitigating factors** where he noted he had reviewed mental health evaluation and considered it for sentencing, and recognized D's GED and positive employment history. Court did not penalize defendant for his mental health condition by stating that sentencing disparity with co-D was due to D's status as a prohibited person due to mental health condition resulting in a higher BOL. Although record did not reveal D had ever been committed to a mental health institution or adjudicated as a mental defective as required to be a "prohibited person," D did not challenge this aspect of sentencing and thus Court did not consider whether the district court correctly determined D was a prohibited person. **No substantive unreasonableness**

based on sentencing disparity where defendant was a prohibited person, he admitted to previously firing the weapon, and repeatedly violated conditions of pretrial release.

12/17/24 – United States v. Goncalves, 123 F.4th 580 – Important. **Error in applying 2-level role in the offense enhancement for being a manager or supervisor (USSG § 3B1.1(c)).** When imposition of the enhancement is based on proof of direction, it is not enough to prove that an order was given. Rather, to prove that authority and control was exercised over another participant, there must be proof both that an order was given and that it was obeyed by the other participant. District court found that D instructed his co-D cousin to do something when he texted cousin who was waiting inside a Burger King to meet with buyer and requested that cousin ask buyer when he would arrive. **However, nothing in the PSR or elsewhere in the record furnished an obvious basis for the district court's decision that defendant's instruction was obeyed**. **Dissent argues that proper standard of review is whether district court committed clear error**, that record is clear that that the transaction took place as planned soon after the instruction was issued, and that plausible inference is that cousin obeyed the instruction. **Dissent disputes that a showing of orders given and obeyed is the only way to meet the standard and suggest that evidence that the cousin was subservient to D is sufficient**.

12/06/24 – United States v. Torres-Estrada, 122 F.4th 483 – In 2255, **no ineffective assistance of counsel in relation to plea-bargain negotiations** with the United States, despite the fact that counsel overstepped his role as local counsel during plea-bargaining process, made unauthorized counteroffer during negotiation session with AUSA, independently and secretly met with D to persuade him to demand a lower proposed counteroffer than what he had previously agreed to with the joint defense team, attempted to meet independently with the government without lead attorneys and, after lead attorneys withdrew, overstated or potentially misrepresented the status of plea negotiations when he told D that government was still considering counteroffer. **Local counsel's conduct at negotiation session with USAO was not deficient**, despite interrupting and undercutting lead counsel by making a counteroffer of 13 years and, when rejected, 13.5 years, which was below counteroffer client had agreed to with lead attorneys, where D had originally authorized local counsel to pursue the 13-year counteroffer prior to intercession of lead attorneys, and AUSA said he would think about 13.5 year offer at meeting. Given AUSA's stated willingness to consider counteroffer, one could reasonably say that **local**

attorney's discourteous but aggressive tactics advanced the plea negotiations and were "within the range of competence demanded of attorneys in criminal cases." Even if local attorney's disregard of client's previously agreed-upon plan with lead attorney for the negotiation session was deficient performance, **no prejudice** where local attorney's conduct did not result in termination of plea-bargain process, AUSA said he would think about counteroffer and continued discussion of a possible lower sentencing proposal, and Gov's original plea offer remained on the table two-weeks later. **Record failed to show that local counsel's meeting-related tactics affected the outcome of the plea process as required to satisfy Strickland's prejudice prong**. Local counsel's advice that a) the government would be more willing to accept a favorable counteroffer after the trial of first group of conspirators; b) he could secure a better plea offer than New York-based lead counsel; c) D should dismiss lead counsel to give local counsel time to negotiate a better deal; and d) the rejected counter-offer of 13.5 years was still being considered by the government when that represented local counsel's hope but not necessarily reality **amounted to a subjective assessment about the possible outcome of the plea-negotiation process rather than a guarantee of a particular outcome, and thus was distinguishable from Lafler**. Local counsel's performance cannot be evaluated based on what transpired later. If government had been unable to develop sufficient evidence to charge D in second indictment, local counsel's effort to extend plea negotiations on first indictment may have had a more favorable outcome. **Local counsel's advice considered in isolation** (apart from contrary advice offered by New York attorneys) w**as not so patently unreasonable that no competent attorney would have made it.** Neither the fact that his attorneys conflicted in their advice nor the fact that D felt confused and nervous when faced with that conflicting advice means local counsel's performance was deficient. Assuming local attorney did misrepresent the fact that government was still considering counteroffer of 13.5 years during the time-period after New York counsel withdrew, and even if those misrepresentations amounted to deficient performance, no prejudice where the statements, given their timing, had no impact on the loss of the government's offer. D could not establish reasonable probability that, but for local counsel's repeated assurances that Gov was still deliberating on counteroffer, D would have abandoned his commitment to local counsel's aggressive strategy and the goal of obtaining some better deal, before the government's offer was off the

table. **D failed to show he would have accepted G's counteroffer before the prosecution cancelled it.**

11/25/24 – United States v. Andruchuk, 122 F.4th 17 – **No miscarriage of justice excusing appeal waiver.** D agreed to surrender his right to appeal "if the sentences imposed by the court are within or below the GSR as determined by the court." Court declines to read the waiver as implicitly limited to sentences within or below the GSR *correctly* determined by the court, as this would negate the benefit conferred on the government by the waiver. Waiver was knowing and voluntary where text was clear, district court emphasized waiver at change of plea hearing, and D acknowledged that he understood. **No miscarriage of justice excusing appeal waiver where court applied BOL of 20 pursuant to USSG § 2K2.1** because offense involved a semiautomatic firearm capable of accepting a large capacity magazine. District court did not plainly err in calculating a BOL of 20 where D agreed that offense involved semi-automatic firearms capable of accepting a large capacity magazine including several firearms capable of carrying more than 15 rounds of ammunition, court appropriately accepted those undisputed statements as findings of fact, D did not object and agreed that offense level was properly calculated. D's total acquiescence robbed Gov of any incentive to develop the factual record with greater particularity to establish how many firearms satisfied the definition of large capacity magazine contained in application note (c) (capable of carrying more than 15 rounds of ammunition). Record independently supports inference that definition was satisfied, and no substantial reason to doubt D qualified for GL range. Case does not require court to explicate precise relationship between miscarriage of justice standard and plain error standard. Here, the absence of any showing of clear or obvious error defeats any claim of plain error. **Defendant's claim of miscarriage of justice due to ineffective assistance of counsel is based on undeveloped record**, thus appeal dismissed without prejudice to D's right to bring claim in a collateral proceeding.

11/20/24 – United States v. Bailey, 121 F.4th 954 – **Claim § 922(g)(1) charge unconstitutional waived** where D failed to move to dismiss on Second Amendment grounds under FRCP 12(b)(3) and did not attempt to demonstrate good cause for failing to move to dismiss indictment. **No plain error in court's determination that plea voluntary** despite D's mental health conditions and medications. No clear or obvious error in district court's explanation of the charge. No basis to conclude D would have elected to go to trial had court explained that aiding and abetting

theory required proof that he knew co-D was a convicted felon. **87-mo above-GL sentence not procedurally or substantively unreasonable**. D's general objection to district court's upward departure under § 4A1.3 did not preserve his specific argument that court erroneously relied on outdated convictions for minor, dissimilar misconduct. **No plain error as there is no requirement for court to make specific findings** about which of the prior convictions represent "similar, or serious dissimilar, criminal conduct" **in making §4A1.3 determination**. D failed to show it was likely he would have received a lower sentence if the district court had excluded trespass and disorderly conduct convictions from consideration, given the length of D's record and court's stated objectives of public protection and deterrence. **Explanation for upward departure not inadequate** because it failed to address mental health where D did not specifically argue that mental health explained prior criminal conduct, and instead focused on his history of substance abuse, which court addressed. Any error in explanation for upward departure harmless where D has not shown court would impose a lower sentence if remanded: **As court's explanation for upward departure would be sufficient reason to imposing an upward variance under 3553(a), any error harmless**. **Any error in district court noting D's arrest record did not affect his substantial rights**, as reference to arrest record was provided during a summary of the PSR section describing criminal history and it was apparent that D's convictions motivated decision to depart upward. No error in court's statement that multiple women had obtained restraining orders against D, as this was accurate despite possible government misstatement about the number of women who had done so and because D did not seek to clarify during sentencing. No clear error in court's statement that it was thinking about "the victim's of [D's] crime" where instant crime was victimless as statement was a prefatory remark to the subsequent sentencing explanation focusing on the seriousness of D's criminal history, likelihood of recidivism and need for deterrence. **Sentence not substantively unreasonable** where court explained that criminal history score did not accurately capture seriousness of criminal history and likelihood of recidivism given persistent criminality and that instant offense involved an assault rifle. Sentence within universe of reasonable sentencing outcomes.

11/20/24 – United States v. Millette, 121 F.4th 946 – **Special supervised release condition that D not associate with persons under 18 except "in the presence of" a responsible adult violated** where D slept in different bed

in the same room with 15 year-old daughter while D's mother was elsewhere in the home. "In the presence of" requires more than that the "responsible adult" be in a different room while D has prolonged contact with a minor in his bedroom. Presence means a person's immediate vicinity. **Rule of lenity inapplicable** to violation of condition where there is no grievous ambiguity that cannot otherwise be resolved. No abuse of discretion in reimposing condition where it is reasonably related to D's specific offense and history and characteristics where D had two convictions for child pornography, admitted child pornography was a life-long problem for him, internet activity showed searches for inappropriate material, and D was unable or unwilling to understand that it was wrong to sleep in his bedroom with his 15 year-old daughter without a supervisor. District court's explanation for reimposing the special condition was adequate. **Special condition does not overly restrict D's constitutional interest in parenting** where it does not impose an outright ban on contact and he had regular supervised visits with daughter.

10/22/24 – United States v. Santana-Avilés, 120 F.4th 7 – District court's conclusion that D's proffered statements "I didn't do nothing" and "it wasn't me" in trial for assault on a correctional officer were not **excited utterances under FRE 803(2)** because statements did not relate to the startling event and were not made while under stress of the startling event was "dubious" and "less than compelling". However, **any error harmless** where statements were in direct contradiction to the testimony of several officers and their conclusory and self-serving nature suggests they would have been of such little probative weight that their admission would have no effect on the trial**. Admission of email documenting problems with the prison's video system under FRE 801(d)(1)(B)(i) to rebut an express or implied charge of recent fabrication not an abuse of discretion** where court reasonably found that D's cross-examination attempted to give the impression that witness had fabricated his testimony and that was a central defense theory.

10/22/24 – United States v. Bruno-Cotto, 119 F.4th 201 – **No procedural or substantive unreasonableness in above-guideline 208 mo sentence** (GSR 151-188) for carjacking and kidnapping where D participated in a "multi-day crime spree" that included multiple victims and repeated sexual assault of one victim. Challenge to district court's reliance on victim and co-D hearsay statements in the PSR forfeited but not waived. No clear or obvious error in relying on hearsay statements where D did not object to any information in the PSR, and no information that statements were so

apparently unreliable that district court plainly erred by not sua sponte disregarding them. Statements by co-defendants implicated them in criminal activity, which is an indicia of reliability. Statements were generally consistent with each other and defendant admitted to some of the key information in the PSR which originally came from victims and co-defendants. Claims of unreliability that, at best, may or may not have succeeded if timely raised do not establish the clear or obvious error necessary to prevail on plain error review. **No substantive unreasonableness due to sentencing disparity where** PSR demonstrates meaningful difference in conduct between D and Co-D where D where D sexually assaulted victim multiple times as opposed to once and D assumed more of a leadership role. Court rejected D's argument that he cannot be penalized for having more of a leadership role because he did not receive an upward role-in-the-offense adjustment under USSG 3B1.1. Question is not whether he should have received a guideline enhancement, but whether his conduct demonstrated a comparably larger leadership role than the co-D such that the district court could rely on that difference to impose varying sentencings consistent with § 3553(a)(6). No abuse of discretion where district court adequately weighed mitigating factors and concluded that, even after accounting for D's personal circumstances, a sentence above the guideline was warranted.

10/21/24 – Etienne v. Edmark, 119 F.4th 194 – **State habeas first degree murder case**. **No unreasonable application of Brady in** NH Supreme Court's decision that petitioner was not prejudiced by prosecution's withholding of proffer letter for a government witness that contradicted witness's testimony that he had not received a plea deal on unrelated drug charges. NH SC's conclusion that evidence of proffer letter would not have altered outcome because even if impeachment caused jury to disregard that witness's testimony altogether, there was overwhelming additional evidence of premeditation before the jury from other witnesses, was sufficient to affirm the denial of habeas relief.

10/15/24 – United States v. Sirois, 119 F.4th 143 – **Affirming district court's denial of Ds' motion to enjoin prosecution under the federal controlled substances act pursuant to the Rohrabacher-Farr amendment**, which prevents DOJ funds from being used for prosecutions if doing so prevents a state from giving practical effect to its medical marijuana law. Party seeking injunction under the amendment bears the burden of demonstrating that the challenged DOJ action would prevent a state from giving practical effect to its medical marijuana laws. No Fifth Amendment

problem allocating the burden to the defendant in this context. Although a party need not demonstrate "strict compliance" with all a state's laws and regulations that make the possession, cultivation or distribution of medical marijuana lawful to enjoin federal prosecution, it must demonstrate substantial compliance. Here, where DOJ introduced evidence of defendants' alleged noncompliance, Ds must demonstrate that, notwithstanding this evidence it is more likely than not they were in substantial compliance with the act and its associated regulations. No abuse of discretion in denial of injunction where Gov introduced evidence business operated as a collective in violation of regulations, and that D directed employee to conduct black market sales and D did not introduce countervailing evidence or develop argument that operating as a collective was only technical noncompliance. Fact that D failed to show by a preponderance that he was not operating shop as a collective and that he failed to show that he engaged in no black market sales was manifest in the record. Similarly, co-D failed to counter evidence that the shop operated as a collective, that she used unregistered workers to assist her in growing marijuana and other aspects of her role in business operations that violated regulations.

09/30/24 – Watson v. Edmark, 118 F.4th 456 – State habeas case in felony sale of a controlled drug with death resulting. Evidence at trial included forensic toxicologist, who explained that testing conducted by colleagues revealed a certain level of fentanyl and its metabolites in the victim's blood. **No unreasonable determination of facts** in New Hampshire SC's conclusion that toxicologist reviewed all the documentation including chain of custody, ensured information had been correctly entered into the computer system, personally reviewed actual instrument data and ensured it had been accurately entered into computer, actually reviewed testing results, issued and signed toxicology report that described the testing results and testified that report accurately reflected his findings and conclusions. **No unreasonable application of Supreme Court Confrontation Clause precedent** where doctor 1) signed report describing the testing results; 2) authored report himself, which was full of his own analysis and conclusions based upon data from the test results, which distinguishes case from Smith v. Arizona, and 3) numerous federal and state courts found no Confrontation Clause violation under similar circumstances. Despite existence of contrary authority, there is ample room for fair minded disagreement in this area of the law. Thus D failed

to show that state's application of clearly established federal law was unreasonable.

09/30/24 – United States v. Jackson, 118 F.4th 447 – Important – **Leon good faith** found in search of church and attached rectory. Property was described as accurately as could reasonably be expected despite some question about whether the rectory was a **single or multi-unit building.** Warrant not so facially deficient in failing to particularize place to be searched or things to be seized that the executing officers could not presume it valid. Affidavit not so lacking in indicia of probable cause where it described multiple observations over time of a specific IP address sharing network sharing and downloading files of child pornography on a peer-to-peer file network, descriptions of the child pornography, detective's investigation into ownership of IP address, how detective determined IP address was affiliated with church, and described visit to church grounds, including rectory**. Defendant did not reserve the right to appeal the district court's denial of his motion for reconsideration in conditional plea agreement** where language stated that defendant could only raise the specific suppression issues addressed in the district court's November 14, 2022 order and would not be allowed to raise other suppression claims on appeal.

09/27/24 – United States v. Dequattro, 118 F.4th 424 – Important. **Convictions under 18 U.S.C. § 666 reversed**. Facts: (1) Indian Tribal Council created entity called a "Gaming Authority;" (2) Gaming Authority hired an architect to design a casino to be built on tribe's land; (3) Tribal Council received federal funds, but the Gaming Authority did not; and (4) in order to maintain good relations w/ Gaming Authority, architect paid bribes to leader of the Authority. Indictment charged federal-program bribery, on theory that: (1) contract, between the architect and the Gaming Authority, implicated the "business" of a tribal council; (2) that received federal funds; (3) thereby bringing the case within scope of the federal-program bribery statute. **Evidence insufficient to show that the contract between the architect and the Gaming Authority, implicated "business" of the Tribal Council**. Even if Gaming Authority qualifies as an "arm" of the Tribe for sovereign immunity purposes, does not suffice to make Gaming Authority's contract with Company the Tribe's "business" for the purpose of § 666. **District court's judgment of acquittal notwithstanding the verdict of Hobbs Act counts reversed. Native American leaders like Co-D (Chairman of the Tribal Council) are "public officials" for purposes of "under color of official right" prong of Hobbs Act extortion**. Evidence

sufficient for a rational jury to find that co-D intended to effect a quid pro quo in exchange for specific official acts to protect architect's contract from termination.

09/24/24 – United States v. Acevedo-Osorio 118 F.4th 117 – Important. **Government breached the terms of the plea agreement**, which called for the parties to jointly request a mandatory minimum sentence of 120 mo. in coercion and enticement of a minor case where GL range was 292-365 mo., where Gov's sole statement at sentencing was that "on behalf of the government, we would be recommending 120 months pursuant to the plea agreement." Gov's failure to offer a minimal explanation for recommending a dramatic downward variance was not reasonably consistent with making the agreed-upon recommendation and deprived D of the benefit of his bargain. Gov's failure to explain its sentencing recommendation was "tantamount to a repudiation of the agreement." However, **error was not clear and obvious** in light of existing case law where those cases involved affirmative conduct by the government, as opposed to the government's omission here, and thus fails on plain error review. **No procedural error** in relying on V's unverified statements in the PSR to support district court factfinding and challenge to two specific enhancements. While D lodged **generalized objection** to this information as unreliable in PSR, he **did not provide countervailing evidence.** Santiago-Colon is not distinguishable. V's statements are consistent with minimal information D admitted in the plea agreement relating to soliciting and receiving explicit images from D. District Court's reliance on V's statements in the PSR was not clearly erroneous. **No abuse of discretion in imposing supervised release condition that D not have unsupervised contact with his children**. Record offers a reasonable explanation for restricting D's contact with children, conditions do not comprise an outright ban, there is no basis to believe probation will unreasonably withhold permission, and restriction can be modified in the future if mental health treatment provider and the children's mothers deem it appropriate.

09/24/24 – United States v. Martínez-Hernández, 118 F.4th 72 – In prosecution of inmate for murder-for-hire of prison guard, **evidence sufficient** for § 1114(a) (murder of a federal officer); § 1117 (conspiracy to commit murder); § 1858 (aiding and abetting a murder for hire) § 924(c) & (j) (aiding and abetting the use of a firearm in relation to murder for hire in prosecution). Where Gov relied on vehicle used by gunman as facility of interstate commerce for § 1958(a) conviction, no requirement that Gov show that vehicle be brought to Puerto Rico for the purpose of furthering

murder plan. Challenge to firearms counts waived and record supports finding that D knew a firearm would be used to murder V. **Brady claim was neither waived nor forfeited** where defense had been requesting production of prison logbook for three years, Gov was instructed by the court during trial to immediately produce it if and when found, logbook was found on day of closing arguments, but D said he was ready to proceed given court's repeated assurance that he was not waiving any Brady arguments he might have once logbook was examined. **No manifest abuse of discretion in district court's denial of Rule 33 motion based on alleged Brady violation** where logbook would not have meaningfully added to defense's ability to challenge witnesses' testimony where logbook does not directly contradict witnesses' testimony because, although logbook did not show "shakedowns" of cells that allegedly provided part of the motive for the killing, V was part of special investigatory unit at the prison and searches by that unit were recorded in another system and logbook otherwise had limited probative value. **D failed to show a reasonable probability that the result of the proceeding would have been different** had logbook been timely disclosed. Improper admission of co-conspirator statements waived for lack of development because D did not identify specific statements. No abuse of discretion in court's denial of motion to dismiss indictment due to government misconduct. No cumulative error.

09/23/24 – St. Jean v. Marchilli, 116 F.4th 71 – Important. In state habeas case, **unreasonable application of Supreme Court Bruton precedent,** Gray v. Maryland, where redacted portions of co-D's statement were facially incriminating and jury could readily infer that redactions referred to the petitioner where murder was committed by three people, only two were on trial, and third person's name appeared unredacted elsewhere in the transcript. Redactions were directly incriminating even without being linked with evidence introduced later at trial. Bruton violation existed where deletions obvious in transcript even though transcript was only read to the jury and not introduced into evidence, and even if admitted recording did not make the deletions obvious. **However, no actual prejudice where co-D's statements did not have a substantial and injurious effect or influence in determining the jury's verdict** given the totality of other evidence including blood on petitioner's clothes, his ownership of a knife, cuts on his hands, and inconsistent statements to others about how they occurred. No unreasonable application of Supreme Court precedent in SJC's ruling that trial court had erred in refusing to

allow petitioner to cross-examine medical examiner about the wounds on his hands but that petitioner had been unable to demonstrate prejudice. None of SJC's rulings on instructional error provide ground for habeas relief: 1) No unreasonable determination of the facts in SJC's conclusion that jury instructions as a whole conveyed that intent to steal must coincide with the act of force. No unreasonable application of Matthews v. United States in same conclusion. **Matthews' language that a defendant is entitled to an instruction as to any recognized defense that exists is dicta and has never been applied to any defense outside entrapment**; 2) No unreasonable determination of the facts in SJC's conclusion that trial judge did not err in refusing to give an instruction on the use of a motor vehicle without authority as a lesser-included offense of armed robbery where evidence showed petitioner stole more than just the motor vehicle from the victim; 3) No unreasonable determination of facts in SJC's conclusion that trial judge did not err in refusing to give a humane practice instruction regarding the voluntariness of defendant's statements where voluntariness of defendant's statements did not remain a live issue at trial. No unreasonable determination of facts in SJC's conclusion that trial judge's statements regarding the anniversary of 9/11 did not prejudice petitioner. **Dissent would grant petition finding petitioner established prejudice.**

09/13/24 – United States v. Donovan, 116 F.4th 1 – **No plain error in allowing witness to invoke blanket Fifth Amendment privilege** in prosecution for § 922(g)(1) where defendant subpoenaed witness to testify that she owned the firearm defendant was charged with possessing. No clear or obvious error in district court's finding that there was a reasonable possibility witness's answers would have exposed her to criminal liability under 18 U.S.C. 922(d)(1), which makes it unlawful to knowingly furnish a firearm to a person previously convicted of a felony, where witness was the purported owner of the shotgun; she lived with D and was his girlfriend; D had been previously convicted of a felony; witness likely knew of his conviction given that she met his probation officer while D was serving a sentence of supervised release; and witness's shotgun was in D's constructive possession because it was in his car. **Argument that district court erred in failing to provide limiting instructions under FRE 404(b) waived** where D made objections to the evidence and filed proposed limiting instructions prior to trial but did not reassert his objections or request or provide limiting instructions during trial and did not raise timely, contemporaneous objections at the time the assertedly problematic

evidence was introduced. No error in applying two-level increase under USSG § 2K2.1(b)(1)(A) for 3-7 firearms. Preponderance of the evidence demonstrated that each of two oil filters was a **firearm silencer within the meaning of 18 U.S.C. § 921(a)(25)** where holes were drilled through the middle of the oil filters, ATF firearms expert testified that holes would serve "no real purpose" if either filter were to be used as an oil filter, and other evidence indicated the oil filters were intended to facilitate the assembly or fabrication of a firearm silencer.

09/13/24 - United States v. Encarnación-Báez, 2024 WL 4182868 – Defendant **forfeited** argument that district court committed procedural error by not explicitly addressing mitigating factors by failing to raise it at the time of sentencing. Argument **waived** on appeal where brief does not even attempt to argue plain error. **No plain procedural unreasonableness** where district court said it had considered the remarks by the defendant's counsel and defendant's allocution, both of which described the mitigating factors at issue, and then imposed a below-guidelines 87-month sentence (GL 135-168). The record examined as a whole reflects that court did not overlook or ignore mitigating factors. Fact that district court does not share the defendant's view of the salience of mitigating factors does not amount to procedural error. Claim of substantive error is preserved where defendant argued for a lower sentence than district court imposed. **No substantive unreasonableness** in below-guideline sentence on these facts.

08/27/24 - United States v. Elliot, 113 F.4th 168–**No abuse of discretion in within-range 120 mo sentence** (GSR 108-135). Court did not abuse discretion in applying 6 level 3A1.2(c)(1) enhancement for assaulting a police officer during the offense or in flight. **No clear error in district court's reliance on officer's testimony at sentencing hearing to support enhancement** despite the fact that a) officer did not claim to see D carrying a firearm during the chase; b) security footage did not capture assault; c) officer failed to turn on body camera until after assault; d) supervisor and dispatcher's reports did not mention assault; and e) officer was previously disciplined for dishonesty. Fact that officer did not see weapon until it was pointed at him and failed to turn on body camera amount to, at most, the absence of corroborating evidence. Security showed what appeared to be firearm in defendant's hand as he exited his car and firearms were recovered near his route and at the point of arrest. No clear error in court drawing reasonable inferences based on the evidence. **No substantive unreasonableness in within GL sentence**. Sentence reflected a plausible

sentencing rationale and a defensible result. Stated reasons were sufficient justification for sentence imposed because they reflected seriousness of offense and need to afford adequate deterrence, protect the public from further crimes, and promote respect for the law.

08/26/24 – United States v. Gonzalez, 113 F.4th 140 - **Important**. In reversal of grant of suppression, **Leon good faith found** in search of two-family home for evidence relating to four-year investigation of counterfeit oxycontin operation despite the fact that owner of the home who lived in one of the units had recently moved. District court had concluded that no probable cause existed because defendant had moved out of the house, there was very little if any suspicious activity there after the move, and the pill-making equipment was highly portable. On de novo review, Court held that a **reasonable officer could have concluded that warrant was valid** and that defendant had little reason to move pill-making operation where defendant still owned the home and continued to visit, defendant moved only fifteen minutes away, his unit was empty, the remaining occupants also appeared to be involved in the operation, the other operational hub, a co-defendant's shop, was located nearby, and the affidavit described an ongoing drug operation that was active one month before the search. Fact that affidavit was 64 pages and that affidavit and warrant bear the same date was **not sufficient to establish that magistrate wholly abandoned her judicial role,** particularly where magistrate had previously issued a search warrant for the same property one month earlier which was not executed, and new warrant affidavit was substantially similar. Vacated and remanded for defendant to develop Franks argument

08/23/24 – United States v. Burgos-Balbuena, 113 F.4th 112 – **No plain error breach of plea agreement**. D with six previous illegal reentries pled to illegal reentry. In plea agreement parties calculated a TOL of 15 but did not stipulate to a CHC and agreed to jointly recommend 18 months. PSR calculated GSR 30-37 months (TOL 17, CHC III). Court accepted the PSR's conclusions and sentenced D to 37 months. **Gov't did not "implicitly repudiate" the plea agreement** at sentencing hearing where it said that it "stands by its recommendation in the plea agreement," agreed with the reasons offered by D counsel rather than "repeat them for the record," and emphasized that D immediately accepted responsibility. No evidence here of govt subtly advocating for a harsher sentence. Absent an express statement in the plea agreement, Gov't was not required to do more to justify sentence. Gov't was not required to inform Court that Co-D received a 21-month sentence from a different judge. No authority for

requiring the gov't to flag potential sentencing disparities to avoid breaching a plea agreement, absent any express duty to do so. Even assuming such a duty exists, Court cannot assess D's sentencing disparity claim because D provided no information about Co-D's sentencing proceeding. **No plain procedural unreasonableness** where court gave lengthy explanation, emphasizing defendant's past offenses and the dangerous boat chase, plea agreement discussed mitigating factors, court stated it had reviewed plea agreement and the discussion at the hearing consisted of defendant's acceptance of responsibility and mitigating factors. **No plain error where** defendant would have been in the same criminal history category even if score calculated incorrectly. **No substantive unreasonableness** where sentence within the guideline range, district court offered a plausible sentencing rationale, and defendant was a "repeat offender who, in the instant offense, placed federal agents in serious peril while evading arrest."

08/23/24 - United States v. Rodriguez, 115 F.4th 24 - **Probable cause for warrant** to search phone based on statements from two confidential informants that spoke directly to investigators, confirmed similar information about D's gang affiliation and criminal activity, observed some of D's criminal activities first-hand, included extensive details for information not based on direct observation, and where gov't corroborated some details with independent information. Wiretap application based partially on results from phone search **not fruit of the poisonous tree**. Wiretap application made **showing of necessity** where it explained that sophisticated organizations remain wary of other methods, gov't had tried and failed to introduce 2 separate CI's into organization, and a CI posing as a buyer could learn only so much about he structure of the conspiracy and identities of those involved. District court did not err finding gov't satisfied necessity requirement by offering specific and reasonable explanations why other investigative techniques would have been too dangerous or insufficient to achieve investigative goals. No abuse of discretion in admitting police officer testimony as **lay opinion testimony under FRE 701** re: coded language used during drug transaction. **No abuse of discretion in admitting testimony** that officer was a member of the "gang unit." Any error **harmless** where, aside from a few references to a "gang unit," there was no indication gov presented its case to suggest that conspiracy was organized by a gang or D was acting as member of a gang, and majority of evidence involved D's communications and cocaine recovered from physical searches. **No error in refusing to instruct on**

cross-racial identification of co-D. As long as D engaged in conspiracy, immaterial that others may have been misidentified in particular encounters. **No plain error in refusing to give a buyer-seller instruction** where meat of the requested instruction was substantially covered elsewhere in court's charge. **No clear error in court's drug quantity calculation** despite D's claim of double-counting, and any error harmless because it would not affect total offense level. **No clear error applying in 3B1.1 enhancement** for being an organizer or leader. Facts plausibly support inference that Melendez acted as an organizer where he "planned the criminal activity, structured the deals, received the proceeds, engaged in recruitment, and coordinated the activities of various henchmen."

08/22/24 – United States v. Moran-Stenson, 115 F.4th 11– **Important**. D's Maine drug trafficking prior, Me. Rev. Stat. Ann. Tit. 17-A § 1103(1-A) (A), was a **controlled substance offense** and district court properly applied 2K2.1(a)(4)(A) enhancement. Use of **modified categorical approach** correct because 1103 is **divisible by drug type**. Significant to divisibility inquiry that Maine cases consistently described the particular type of scheduled drug as an element of the § 1103 offense and noted that the state's various drug schedules correlate to different punishments. Maine cases require proof that the defendant trafficked a specific drug, not just that he trafficked a non-specific "schedule W" drug. Similar to the Rhode Island statutes at issue in Swaby v. Yates, Maine's drug schedules cannot be construed as illustrative examples when they are exhaustive lists that are keyed to punishments for varying classes of drugs. Abdulaziz does not foreclose this result. **The Court had no reason to address the modified categorical approach in Abdulaziz** because the government never argued that the modified categorical approach could be deployed.

08/14/24 - United States v. Rivera-Gerena, 112 F.4th 67 – Downwardly variant 147 mo sentence (GSR 262-327) for conspiracy to possess with intent to distribute cocaine on board a vessel **not procedurally or substantively unreasonable. No plain error procedural unreasonableness** where court twice stated it had considered 3553(a) factors, explicitly discussed several mitigating factors defendant claims it ignored, varied downward by more than 100 months from the bottom of the GSR, as well as recommended RDAP and granted appellant's request for voluntary surrender to spend Christmas with his family, which demonstrated court was sensitive to mitigating factors. Court took pains to explain why certain 3553(a) factors counseled in favor of a sentence that was slightly higher than recommended by the parties. **No substantive unreasonableness** in

sentence. Plausible rationale given for sentence where court explained that seriousness of the crime, defendant's criminal history, and the need to avoid unwanted sentencing disparities counseled a slightly higher sentence than recommended by the parties. It is rare for a reviewing court to find a below-the-range sentence substantively unreasonable. This case falls within the wide universe of sentencing outcomes.

08/12/24 – United States v. Kumar, 112 F.4th 30 – **No error applying fraud cross-reference in USSG 2N2.1(c)(1)** in conspiracy to smuggle misbranded drugs into the United States. Defendant oversaw call centers in India where company's representatives made a variety of false statements to U.S. customers. Defendant gave directions to call center managers about customer contacts, customer service, and the tone of the conversations. **Facts satisfy the elements of relevant conduct** in a conspiracy: Fraudulent statements were within the scope of D's activity because they were made under his management, were made in furtherance of the criminal activity because they were intended to induce customers into ordering drugs D was conspiring to sell, and were reasonably foreseeable because D was responsible for directing call center operations. Even if fraudulent statements were not directly connected to the importation of the drugs, they were connected to the conspiracy to import the drugs. **No clear error in adopting govt estimate of amount charged per pill** where govt provided extensive information about its research on the historical prices of pharmaceuticals in India and sold online, defendant did not challenge that research, and data showed pills being sold for both more and less than govt estimate. **No clear error in adopting gov't estimate of 3.8 million pills** despite the fact that spreadsheets attached to govt sentencing memoranda only established 1 million where govt represented the exhibits were a representative sample, described how it performed its loss calculations, and represented its analysis was not complete. **Court declines to adopt a rule that the only acceptable way the government could have established that chart in PSR was a reasonable estimate was to have attached all the underlying data**. Govt did not cross the line from permissible estimation to impermissible speculation. Sentencing court relied on govt's detailed explanation of its calculation and a number of sample spreadsheets in concluding it has satisfied its burden of establishing the quantity of pills.

08/08/24 – United States v. Trahan, 111 F.4th 185 – **Important** – Prior MA conviction for possession of "visual material of a child depicted in sexual conduct" **(M.G.L. c. 272 § 29C) triggers 18 U.S.C. 2252A(b)(2)'s mandatory**

minimum. MA statute **"relates to"** "the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography" despite that MA statute's definition of "sexual conduct" broader than 18 U.S.C. 2256(2)(A)'s definition of "sexually explicit conduct." Court joins 4 of 6 circuits holding that inclusion of phrase "relating to" means that a state definition need not be a perfect match with the federal definition of child pornography to trigger sentence enhancement. **Categorical match between the state and federal definitions of child pornography not required**. Arg that the phrase "relating to" applies only to the actions in § 2252A(b)(2) ("production, possession, etc…") and not CP definition is **forfeited and waived** as D did not raise below. Argument fails even on **plain error review**, as there is no textual indication that "relating to" refers exclusively to the listed actions. Statutory context and legislative history compel conclusion that "relating to" modifies both the listed action and the statutorily defined noun (child pornography). Mellouli does not require a narrow reading, as it turns not on the definition of "relating to" but on the particular statute's surrounding text and history. Section 29C's definition of "visual material of child depicted in sexual conduct" relates to the federal definition of "child pornography" as the core purposes of the statutes are the same. **Arg that it was Alleyne error** to impose consecutive sentence without specifically charging a violation of 18 U.S.C. 3147 **insufficiently developed and waived**. **Any Alleyne error** for not specifically charging fact that D was on pretrial release at the time he committed count 3 **harmless** as there was overwhelming evidence of uncharged fact.

08/05/24 – United States v. Gonzalez-Rivera, 111 F.4th 150 – **No procedural or substantive unreasonableness** in 292-month downwardly variant sentence for CP production and knowingly transporting a minor with intent to engage in criminal activity. **No procedural error in district court's rejection of argument that sentence would result in unwanted disparity** among similarly situated defendants in the District of Puerto Rico. District court did not refuse to consider local cases, but recognized that sentencing disparity primarily concerns national disparities but could occur in a cohort of local cases. Court supportably found that the District of Puerto Rico cases that the appellant claimed were comparable were actually "very different." **No substantive unreasonableness** in sentence beneath the bottom of the guideline range where defendant did not present any information about the criminal histories or offense levels of proposed comparators and conceded that he did not have all the relevant

information regarding these sentences. On this record sentence imposed was premised on a plausible sentencing rationale and reached a defensible below-the-range result. **Restitution challenge dismissed for want of jurisdiction** where defendant's notice of appeal predated the deferred restitution order, despite the fact that it appeared that neither defendant nor any attorney working on his behalf had been served with government's motion to amend or correct the judgment to include restitution because district court had granted attorney's motion to withdraw after notice of appeal filed.

08/05/24- United States v. Reardon, 111 F.4th 142 – **No procedural or substantive unreasonableness** in top-of-the range sentence for bank fraud defendant in supervised release revocation. **No plain procedural unreasonableness** where transcript established that district court considered relevant sentencing factors of 18 U.S.C. § 3583(e) and did not emphasize § 3553(a)(2)(A) factors in lieu of § 3583(e) factors. Court's emphasis on defendant's disregard for the court's directives and concern that he would violate in the future if the sentencing was too light related to the § 3583(e) factor "history and characteristics of the defendant." Court's statement that it was "mindful of all of the mitigating factors" and its specific referral to some of the mitigation factors was sufficient on plain error review to find that court considered defendant's proffered mitigation. No substantive unreasonableness where, although defendant presented evidence that he made some effort to comply with a few of the conditions, his efforts to comply were not particularly robust. Defendant's attempts to comply did not undermine court's well-reasoned finding that he violated the conditions in a "relatively flamboyant way," which warranted a top-of-the-range sentence. Argument as to sentencing disparity **waived for lack of development**.

08/02/24 - United States v. Langston, 110 F.4th 408 – On **plain error review, D failed to show that 922(g)(1) clearly and obviously violated the Second Amendment as applied to him** where he had prior state convictions for theft and drug trafficking. Error is not plain because there is no binding on-point precedent and Rahimi does not compel the conclusion that 922(g)(1) is unconstitutional as applied to defendant where Rahimi joined other SC 2A cases in reiterating the presumptive lawfulness of the felon-in-possession statute, albeit in dicta. **No plain error denying potential alternative argument that 922(g)(1) is unconstitutional as applied to all individuals with nonviolent underlying convictions** as it was unclear whether D with prior conviction for heroin trafficking fell within this

category, and where govt represented it would file superseding indictment which included D's prior domestic violence assault conviction. **Reasonable suspicion for stop** of D outside bar based on various accounts received from three informants: Two 911 calls from the same tipster, who identified himself in the second call, the officers' conversation with the bar bouncer, which validated the details from the tipster's first call, a call from the bar manager, relaying information from an unknown source that defendant had gotten a gun from his car and returned to bar, and officers' observations at the scene. Court not required to disregard information about a fight at the bar earlier in the night involving D just because they had already conducted some initial investigation. Not error to consider anonymous, uncorroborated hearsay tip that D had gun. Totality of the information gave rise to a reasonable suspicion that D was about to engage in criminal activity, public fighting, potentially with a gun. **No plain error applying 2K2.1(b)(6)(B) enhancement** for possessing a firearm in connection with another felony offense where D was charged by state with an assault on an officer in connection with this incident. **No abuse of discretion admitting police report and casino records** as evidence that defendant violated pretrial release conditions by drinking at a casino. **No error in failure to give two-level reduction for acceptance of responsibility** based on defendant's violation of bail conditions for drinking at a casino and becoming disruptive and non-cooperative with police, where court based its decision on overall similarities between the pretrial release incident and incident underlying criminal charges.

08/01/24 - United States v. Carbone, 110 F.4th 361 - **No abuse of discretion in court's denial of D's motion continue deposition** for 30 days of elderly, sick victim in fraud case where court ordered parties to confer and come up with expeditious but reasonable alternative date, gov's subsequent proposed date was only 5 days before D's subsequent proposed date, and D could not point to specific, concrete ways court's denial of continuance motion prejudiced her defense. Generalized claims about lack of time to prepare and speculation that additional time might have provided D with more time to discover additional information about victim's finances do not suffice to make showing of substantial prejudice. **No error in granting G motion to admit V's deposition testimony** at trial. **No abuse of discretion in declining to hold competency hearing** before admitting V's deposition given the latitude normally afforded to the district court on how best to assess witness competency, and D's failure to sufficiently demonstrate that special treatment of a competency hearing was

warranted. Where D's initial MTC deposition did not focus on any reservations about V's then-present mental capacity, D did not challenge V's competency to testify at time of deposition, D did not avail herself of opportunity to speak with V's doctor or seek access to medical records and D did not file MIL seeking to bar admissibility of deposition on competency grounds, D failed to meet burden to overcome FRE 601's burden to show witness was incompetent. **Argument that not allowing D access to V's medical records requires reversal waived for lack of development**. **No abuse of discretion in district court's decision to admit deposition** despite D's claim that counsel lacked adequate opportunity to cross-examine V where D could not establish prejudice. **No error denying motion to exclude 404(b) testimony** for lack of sufficient notice four days prior to trial where gov't learned of rebuttal witness's existence after interviewing defense witness first identified in defendant's pretrial filing, promptly notified defendant of its intention to call rebuttal witness, the 404(b) notice was provided 2 days after receiving defendant's witness list and there was no indication gov't intentionally withheld information from D or was negligent or dilatory in conducting pretrial investigation. **No 404(b) error** in admitting evidence from rebuttal witness that D had stolen cash from V's home safe on multiple occasions to buy prescription pills and that D previously suffered from a substance use disorder where evidence was specially relevant to motive and rebutted D's claim of innocence by providing a possible explanation for the funds' disappearance.

07/31/24 – United States v. Vázquez Rijos,119 F.4th 94 – In conspiracy to commit murder for hire of wealthy businessman husband, evidence sufficient to find wife's sister and wife's sister's boyfriend guilty. No manifest abuse of discretion in failing to sever wife's sister and wife's sister's boyfriend's case from wife's, who was also charged. "Flight evidence" of wife's move oversees did not substantially affect the verdict and was at most harmless error. Email objected to at trial as forbidden character evidence cannot be challenged as hearsay on appeal as "legal theories not raised squarely in the lower court cannot be broached for the first time on appeal." No error in admitting post-murder emails between wife and sister as, even if defendants are correct about conspiracy's end point, a defendants' conduct after a crime can be relevant and here email relevant as it touched on efforts to get money from husband's estate, involvement of conspirator and need to pay hitman. Email not unfairly prejudicial. Separate email from brother that they had "planned everything" nonhearsay as it was

provided for context to show a reaction that indicates need for a cover up and also not prejudicial. Certain judicial bias arguments waived due to inadequate briefing. Judge's question to witness clarifying that wife would become partner to business if husband died involved information jury already knew and prompt curative instruction eliminated potential for prejudice. Judge's comment to brother of individual previously accused that brother must have been elated to receive letter from triggerman confessing to murder was stricken from the record, which sufficed to alleviate any prejudice. No error in judge's use of the phrase "repeat performance" to limit repetitive questioning. Even if judge's demeanor came close to legal lines, it did not cross them. No prejudice for judge's question to testifying defendant that judge withdrew. **No abuse of discretion in judge's taking judicial notice that the triggerman who testified for the government was competent to plead guilty on a date in 2008 and so instructing jury with appropriate caveat that they may or may not accept noticed fact as conclusive**. **Judicial notice did not preempt jury factfinding on witness's credibility where focus of judicial notice was on witness's competence to plead guilty in 2008, not testimonial credibility in 2018.** Defendant (wife) waived argument that government's comment in closing that cellphones and cars are facilities of interstate commerce constructively amended the indictment. No constructive amendment in instruction that defendant (wife) stood trial only for counts in first indictment but that jury could consider overt acts in the second superseding indictment. Defendant (wife's sister) waived constructive amendment argument. No prejudicial variance in witness's testimony that defendant (wife's sister) was at particular meeting place. **Omitting aggravating element in the indictment that death resulted from the charged crime harmless where jury instructions incorporated that element, and the fact that triggerman witness murdered V was not contested at trial**. Element was uncontested and supported by overwhelming evidence such that the jury verdict would have been the same absent the error. Various appeals of post-trial motions regarding Brady/Giglio and triggerman's 2019, 2020 and 2021 competency evaluation are untimely or not preserved. **Partial dissent would vacate the convictions of two of the conspirators because district court's statement that it was taking judicial notice of fact that triggerman was competent to plead guilty in 2008 was intrusion into jury's factfinding, improperly boosted his credibility and prejudiced the defendants**.

07/30/24 – United States v. D'Angelo, 110 F.4th 42 - **No abuse of discretion in denial of compassionate release on 3553(a) grounds** where D "committed

a frightening and life-endangering offense [bank robbery], had a significant criminal history, and accumulated a tumultuous disciplinary record while incarcerated." District court could reasonably conclude that D posed a danger to the community if released per § 3553(a)(2)(C). Court's denial premised on dangerousness does not mean it overlooked remaining 3553(a) factors or D's other mitigating arguments. Court order discussed D's mental health struggles and brain injury, noting they affected D's impulse control, which impacted his dangerousness. Court recognized that D no longer qualified as a career offender, and acknowledged D's revised guideline range before explaining why the § 3553(a) factors did not favor reducing his sentence. Court's order indicates that it implicitly weighed all the relevant factors and evidence, yet reasonably concluded that D's potential dangerousness under 3553(a) outweighed all else. Even if the district court erroneously believed it was constrained by the applicable policy statement in 1B1.13, its independent, § 3553(a)-based denial rendered any error harmless. Because district court did not err in its 3553(a) analysis, **any alleged errors in its failure to find extraordinary and compelling circumstances harmless** as the law is clear that a court may deny compassionate release if a defendant fails at any step.

07/25/24 – United States v. Rosario-Merced, 109 F.4th 77 - **No procedural or substantive unreasonableness** in upwardly variant total sentence 33 mo. above high end of GSR for possessing cocaine with intent to distribute and 924(c). Court did not commit error by considering additional contraband D possessed together with Puerto Rico's high murder rate, although Court "might be more skeptical" had court relied upon high murder rate alone. Additional contraband can justify an above-GL sentence where D possessed more ammunition or magazines than might be expected in a typical unlawful possession case, however sentences "should not be determined by just counting bullets." Quantity is one factor to be considered among many others. District court did not err in finding that fact that D constructively possessed 107 rounds of ammunition, 4 magazines and another weapon differentiated his case from garden-variety 924(c). **District court's discussion of community characteristics not improper** where they were considered alongside other individualized factors (the additional firearms) and where they were discussed with an eye toward general deterrence, a permissible 3553(a) factor. **Constructive possession argument** raised for the first time during oral argument **waived**. **No substantive unreasonableness** where court gave sound and

legally permissible reason for above-guideline sentence. The additional firearm, ammunition and magazines distinguished D's case from mine-run 924(c) case and supported upward variance.

07/22/24 – United States v. Carmona-Alomar, 109 F.4th 60 - **No procedural or substantive unreasonableness** in upwardly variant (60 mo; GSR 37-46) sentence for **felon in possession** and **possession of a machinegun. No procedural unreasonableness in court's statement** that "an ordinary machinegun case is a case where someone possesses a machinegun and really has no criminal history." Court's statement was in context of discussing Rivera-Berríos and García-Pérez line of cases re: when court could consider community-based concerns about machinegun violence to vary upward. In context, statement expressed court's view that D's machinegun prior was a "special characteristic" that removed his case from the mine-run and reflects correct view of the law that case-specific factors must be present to justify reliance on community characteristics to support upwardly variant sentence. **No procedural unreasonableness** where district court's variance rested on more than D's prior history in a general sense, but on **previous conviction for the same conduct**, which was not a factor taken into account in the GL. **No procedural error** in court referring to and explaining that it gave some weight to other factors that are taken into account in GL calculation in its sentence explanation. **No procedural unreasonableness in court relying partly on statistics** re: the incidence of firearms offenses in Puerto Rico where court anchored its reliance on its understanding of Puerto Rico's machinegun problem within the specific characteristics of D's Carmona's offense, stating that D's status as a second-time 922(g) and (o) offender "showed the problem that there is out there with young people with illegal machine guns." Argument that court erred denying MTC in response to govt's late filing of crime statistics **waived for lack of development**. **No substantive unreasonableness** where court explained that it believed that longer firearm sentences have deterrent effect in connection with D's status as a second-time 922(g) and (o) offender who had demonstrated a lack of remorse, and sentence within the universe of reasonable sentences. **No substantive unreasonableness** in upwardly variant 2 year (GSR 12-18 mo) sentence for SR revocation. Sentence roughly proportionate to D's breach of trust" where this was D's second indictment for the same charge.

07/22/24 – United States v. López-Felicie, 109 F.4th 51 - **No procedural or substantive unreasonableness** in upwardly variant (72 mo; GSR 12-18 mo) sentence for bank larceny involving shootout with police during flight. On **plain**

error review, court did not base upward variance on facts already taken into account by enhancements USSG 3C1.2 (reckless endangerment during flight) or USSG 2B1.1(b)(16) (possession of a dangerous weapon). **No procedural error in court's justification for its choice to vary upward**. Judge explained in detail why D's situation was different from the ordinary situation covered by the enhancements: USSG 3C1.2 does not contemplate the discharge of a firearm on a public street nor account for the risk to many people in a public setting (driving at high speed during flight typically sufficient to trigger); USSG 2B1.1(b)(16) does not contemplate the risk caused by the reckless discharge of a firearm aimed at police on a public street (mere possession of weapon typically sufficient to trigger). **No clear error in any factual findings supporting the enhancements**. No clear error in court's finding that D had constructive possession of firearm recovered from the woods where D did not dispute constructive possession and firearm was covered with D's blood. No clear error in court's finding that Lopez and/or his co-defendants shot at police where this was not disputed. No clear error in inference that they "had no other reason to shoot at officers" "absent an intent to accomplish their criminal venture and to kill and maim." **No procedural or substantive error for failing to consider** individual characteristics, expressions of remorse or family and economic situation where court stated that it considered the relevant factors under 3553(a), and had read the sentencing memorandum and the letters and at sentencing noted D's age, family situation, educational and work history and lack of prior record.

07/18/24 – United States v. Figuroa-Roman, 2024 WL 3458104 – **Upwardly variant sentence for aiding and abetting carjacking vacated and remanded for clarification** where district court's statement that defendant's "association with convicted felons" was among the factors it had balanced was unclear as there was no evidence that his codefendants were felons prior to the instant offense. Standard of review uncertain where it was not clear whether statement was a reference to a certain fact, a new finding of fact or something else. Without understanding what district court meant by comment, Court cannot assess whether and to what end it affected sentencing.

07/16/24 – United Sates v. Rodriguez-Pena, 108 F.4th 12 – **District court acted within its discretion** in finding **defendant did not offer an extraordinary and compelling reason for sentence reduction**. Holistic approach of Ruvalcaba is flexible, but has limits. Analysis should be shaped by the arguments advanced by defendants. Although defendant argued

rehabilitation while incarcerated warranted release under 3553(a), an argument for including a factor in the 3553(a) analysis differs from an argument that factor should constitute an extraordinary and compelling reason for compassionate release under 3582(c)(1)(A). As defendant did not offer his rehabilitation as an extraordinary and compelling reason for release, court did not err in focusing on defendant's risk from COVID-19 in its analysis. Assuming court erred in not expressly applying the holistic test from Ruvalcaba, error was harmless. No error in court's conclusion that defendant's risk from COVID-19 was neither "beyond the mine run" nor "powerful and convincing" where district court weighed the evidence presented to it and found that defendant's health, vaccination status, and institution's then-existing conditions outweighed the virus's risks to him. Where court specifically rejected defendant's contentions about ineffectiveness of vaccines and institution's conditions, defendant's competing view is not sufficient to demonstrate error.

07/15/24 – United States v. Foistner, 2024 WL 3413644 – **No deprivation of fair trial on grounds of judicial bias**. No bias in judge's pretrial comment that D expert's expected testimony was "not contested" where prosecutors did not contest the substance of expert's opinion. No bias in pretrial remark that D likely had no basis to seek to exclude documents where court invited D to file a motion in limine and D did not. No bias in court's bench-trial statement agreeing with gov't that one possible reason D claimed so much loss to carry forward was to execute a "fraud scheme" when court also said that perhaps the defense expert had a sound explanation and it would not find guilt "based on some suspicion" involving loss carry-forward. **Argument that court overstepped judicial role** at bench trial by questioning witnesses, giving witness answers, cutting off cross and having extended talks with prosecution **waived for lack of development**. **No error in failure to continue start of trial** so D expert could recover from COVID and be present during gov't case where court offered to make Zoom recording of trial, said he would wait until expert recovered before hearing his testimony, and D raised no further objection. **No error in limiting expert testimony** where D wrongly tried to elicit testimony beyond the scope of the expert disclosures. Argument that court should have granted a further continuance due to D's medical issues **waived for lack of development**. Argument that court wrongly limited D's ability to develop defense that specific people conspired to have him prosecuted **waived for lack of development**. **No error in failure to hold evidentiary hearing on restitution** where D never proffered what

evidence it would present at hearing, failed to carry burden of demonstrating need for hearing and D's speculative waste theory that bankruptcy trustee/ creditor bank were responsible for reduction in property value contradicted by Robers v. United States, which held a judge must reduce the restitution "by the amount of money the V received in selling the collateral, not the value of the collateral when the V received it."

07/11/24 – United States v. Mendes, 107 F.4th 22 - **No procedural unreasonableness in 30 mo upwardly variant supervised release sentence** (GSR 5-11 mo) for D's third SR revocation. A sentencing court does not abuse its discretion when it relies on D's repeated SR violations to impose an upward variance. **Court provided plausible and coherent rationale by emphasizing D's serial noncompliance** with conditions of SR. Extent of variance commensurate with extent of D's serial violations where D accumulated no fewer than 14 individual violations across the three revocations, several within weeks of a prior revocation. **No procedural unreasonableness** on grounds that court relied on unproven criminal conduct where court's reference to D's past dealings with fentanyl were about original offense, not conduct underlying withdrawn violation. **No improper reliance on community-based considerations** where court discussed the general danger associated with fentanyl not any heightened danger to the specific community and referred to D's past to admonish him for repeatedly violating SR and abusing the "break" he had previously received rather than using fentanyl's dangerousness to support upwardly variant sentence. **No procedural unreasonableness** where record showed district court did not consider withdrawn violation at sentencing. **No unauthorized upward departure** under USSG 7B1.4 where clear that court imposed a variance rather than a departure despite the fact that it used the term "depart" when it asked Gov't whether there was a restriction for the court to "upwardly depart" when discussing effect of withdrawn violation on GL range.

07/11/24 – United States v. González-Santillan, 107 F.4th 12 - **No error in application of obstruction of justice enhancement (USSG 3C1.1)** to D who failed to appear for sentencing and was found 13 years later in the Dominican Republic. App. n. 4(E) explains obstruction includes "willfully failing to appear, as ordered, for a judicial proceeding." No clear error in court's finding of willfulness where D failed to attend scheduled appointment with probation, failed to appear at his sentencing, absconded for 13 years to a different country, did not object to amended PSR's description of the

abscondment and acknowledged abscondment at sentencing hearing. Secondary argument that D was not "under custody" waived for lack of development. Court holds that **"[a]n implied but obvious term of any plea agreement is that defendant show up for sentencing and not flee the jurisdiction**." Thus, D materially breached agreement and subsequently released gov't from specific performance of remaining obligations.

07/11/24 – United States v. Cortez, 108 F.4th 1 - **Warrant affidavit established probable** cause to believe D was participant in RICO conspiracy through his involvement with gang where D was residing in apartment owned by gang member and affidavit described D's prior arrest with gang members, fact that D's brother was believed to supply trafficking operation, electronic communications between D and other members discussing drug trafficking, and recounted how D committed arson to destroy evidence of other crimes and fled while carrying a bag of fentanyl that had been acquired from another gang member. Affidavit provided sufficient factual basis for conclusion that D resided at a co-defendant's apartment and co-defendant allowed D to stay there. Although prior search warrant affidavit for cell phone filed one month earlier had characterized a different apartment as D's home, instant affidavit explained that investigators had gathered more evidence after its execution which indicated that D in fact resided in target apartment. Affidavit not required to specify precise dates D was located at apartment. Observation that D was observed there within the last two weeks and D's vehicle was "most recently observed [there] within the last week" sufficient. **No error in denying Franks hearing where D did not make necessary showing of falsity** where D's attorney filed affidavit stating that a) he was "unable to identify the person setting fire to the vehicle" from footage produced in discovery and b) he was unable to locate a specific text message from discovery where affidavit not accompanied by any offer of proof that law enforcement's statements were false nor that they were intentionally or recklessly so and where D did not argue that, in the absence of either the footage or the text message, the affidavit's remaining context would be insufficient to establish probable cause.

07/3/24 – United States v. Delgado, 106 F.4th 185 - **Upwardly variant supervised release sentence** of 3x high end of the GL range **procedurally reasonable** (36 mo sentence/ GL 4-10 mo). **Sufficiently reliable basis for factual finding** that D was not taking his medication where D twice stated he was not contesting the probation violations and probation motion explained

that D sabotaged his treatment by refusing medication. D's sentencing arguments did not narrow the scope of these admissions: Passing comment that he was "taking his medications" did not revoke or otherwise qualify his broad admissions. If D wanted to walk back his unqualified admission, he needed to do so expressly. **No plain error in district court's reference to off-the-record evidence** that probation paid $8,000 for D's treatment, where court's overall concern was that treatment was doing little to stem D's concerning conduct and specific cost of treatment was a superfluous detail unconnected to the justifications for the sentence. D cannot show that but for the court's consideration of $8,000 figure result would have been different. **Adequate consideration of mitigating arguments** where court stated it had taken 3553(a)factors into consideration and discussed the overall efficacy of D's mental health treatment, despite the fact that it did not specifically address arguments about D's clinical attendance record, positive treatment reports, or employment status. Explanation adequate although court could have provided more detail.

07/1/24 – United States v. Vinas, 106 F.4th 147 - **Important** - Government appeal of time-served sentence for murder-for-hire conviction under 18 U.S.C. 1958 affirmed. Gov't preserved claim that sentence was unreasonably short by arguing for a "substantial sentence" i.e. longer sentence than defendant ultimately received. **Sentence of time served (2 yrs) substantively reasonable** (TOL 34 and stat max 10 years). Government provided no basis to conclude that only a longer sentence would be defensible. **Plausible sentencing rationale where court explained how defendant stood out from the mine-run of criminal defendants** and said that letters submitted in support painted the most "consistently honest portrait" of a defendant the court had ever seen and gave it confidence that defendant would not commit future crimes, would return to being a productive member of society and was deserving of a below-guidelines sentence. **G's more specific arguments not subsumed in general substantive reasonableness challenge**. G waived argument that it could satisfy plain error where did not argue plain error in reply. **Not clear or obvious that district court failed to consider general deterrence** when sentencing transcript read as a whole. **Disparity argument waived** where raised only in footnote in opening brief. No clear or obvious error where G made no request at sentencing to consider relevant comparable sentences thus no basis for concluding court failed to consider them.

06/26/24 United States v. Tilley, 105 F.4th 482 – **No clear error** in findings relied upon in support of **sex-offender treatment supervised release conditions.** D need not be convicted of sex offense for condition to apply, so court reference to "sex-based offenses" in absence of conviction did not demonstrate error. Adequate evidentiary support in record for sex-offender treatment where D was convicted of violating protective order involving minor niece with whom he exchanged sexually-charged text messages, and social worker identified deviant sexual preference as clinical concern and said D would benefit from therapy for sexually problematic behavior. Treatment condition thus reasonably related to goal of protecting public from potential future crimes and provision of necessary treatment. No error in interpretation of text messages where no requirement that protective order itself be related to sexually explicit messages since issue is whether there was any sexually inappropriate behavior. D's uncorroborated claim that he was sharing phone with niece's boyfriend insufficient to show court erred in relying on PSI. No error in characterizing Sex Offender and Treatment Evaluation as identifying community risks in allowing D unsupervised contact with minors where evaluation explicitly recommended no such contact on basis of deceptive polygraph answer. D provided no support for polygraph's unreliability. No error in characterizing criminal history as significant where D had 2005 conviction alleging sexual assault, 2008 protective order conviction involving inappropriate sexual messages to minor, 2008 conviction for escape, and 2019 conviction for robbery.

06/24/24 – United States v. Candelario, 105 F.4th 20 – **No procedural or substantive unreasonableness** in top-of-the-range 175-month sentence for conspiracy to commit Hobbs Act robbery, interference with commerce by violence, and illegally possessing a firearm (§ 924(a)(2)). Argument as to procedural error waived for lack of development Sentence not substantively unreasonable because it was not disproportionately high compared to his codefendants where codefendants were subject to a lower guideline range, codefendant who received the lowest sentence was the least culpable and cooperated with the government, second co-defendant was not a physical aggressor, and third co-defendant received a downward departure for substantial assistance. Dissimilar cooperation is sufficient material difference between defendants to defeat a disparity claim. Rewarding co-defendant with lower sentence is not fundamentally unfair on grounds codefendant at one point lied to investigators about being the shooter, where his testimony on this fact was not the primary source of his

cooperation with the government. Sentence supported by the violent nature of the crime, appellant's criminal history and the need for deterrence. Court adequately considered mitigating factors where it acknowledged them and declined to impose the upward variance requested by the government because of them.

06/21/24 United States v. Abreu, 106 F.4th 1 – Important. D's **MA state prior for enticement of child under 16 (265 sec. 26C) triggered man min 25-year enhancement under 18 USC sec. 2251(e) for prior relating to sexual abuse or abusive sexual contact involving minor or ward**. **MA statute overbroad but divisible depending upon which underlying offense listed in 265 sec. 26C that D intended to commit.** D's underlying enticement offense, **indecent A&B on person 14 or older**, counts as predicate under 2251(e) where list of qualifying predicates is not limited to offenses covered by 18 USC 2241-48. **Rule of lenity inapplicable** where plain meaning interpretation accords with statutory text, sister circuits, and First Circuit precedent. **Sexual abuse** under 2251(e) means (1) the use or mistreatment of an individual so as to injure, hurt, or damage them emotionally or physically, (2) relating to, tending towards, or involving sexual intercourse, or other forms of intimate physical contact. **Abusive sexual contact involving a minor or ward** under 2251(e) means (1) physical contact, (2) of a sexual nature, (3) involving a child (person under 18), (4) so as to injure, hurt or damage them emotionally or physically. **Relating to** is broadly and expansively construed – including any subject that has connection with or reference to topic enumerated by statute. Elements of D's crime amounted to enticing child under 18 to enter, exit, or remain within vehicle, or outdoor space with intent of indecently touching child, meaning touching that has sexual overtones, which has a connection with abusive sexual contact involving a minor. **No Due Process vagueness** problem with statute on grounds it potentially criminalizes kissing, but only if it violates contemporary views of personal integrity and privacy, where D pleaded guilty and admitted to sending sexually explicit messages and photos of his genitalia to 15-year-old and attempting to pick her up from school.

06/17/24 United States v. Aponte-Colon, 104 F.4th 402 – Important. D was arrested on a variety of gun and drug charges. Pursuant to plea agreement, he pleaded guilty to two of the charges, and parties agreed to recommend above-guidelines 84 month sentence on the consecutive 924(c) count (GSR 60), and within-guidelines sentence (10 months) on drug charge. In D's sentencing memorandum, he explained 24-month upwardly variant

sentence request as being cognizant of evidence seized, which included AK pistol and great quantity of extended magazines and ammunition. In govt sentencing memo, it said it was both fulfilling terms of plea agreement and providing full information to court and need not sugarcoat facts. It included photos of evidence, discussed community based factors of gun violence in Puerto Rico and gave statistical data that said demonstrated "a tidal wave of violent armed crime." It also gave statistical data that firearm offenders have higher recidivism rates than other offenders, and violent crime offenders have still higher recidivism rates. It devoted 4 pages to violent crime statistics without alleging D engaged in violent crime, but gave sentencing recommendation saying that 100 months was justified in order to deter D and others in light of Puerto Rico's chronic and acute problem with firearms and violence. Court imposed 120 months, saying that it took into account the serious and acute problem of gun violence and that increased sentences for gun-related offenses decreases gun violence, and high rate of recidivism among firearms offenders also supported imposition of the sentence. **No breach of plea agreement** in government's arguments based on community characteristics and statistics concerning violence where parties agreed to upward variance and government was free to offer reasons supporting that recommendation. Parties' agreement that sheer amount of contraband in case warranted upward variance meant sentencing recommendations were not routine. Govt did not call special attention to evidence in D's case. Case unlike other cases of breach where govt had agreed to within-guidelines, mine-run case and argued that case was exceptional. **No improper reliance or appearance of reliance on D's nationality in sentencing** on grounds court took into consideration problem of gun violence in Puerto Rico where no indication that where D was born played any role in sentencing considerations, and court may consider community-based and geographic factors as related to deterrence. **No procedural unreasonableness on grounds of failure to adequately explain large upward variance in excess of parties' recommended upward variance**. Court said it had identified factors warranting a higher variant sentence including AK-style assault pistol, 123 rounds of 7.62 ammunition for assault weapons used by NATO country military forces, multiple high-capacity magazines, 3 bags and four containers of marijuana, and 29 foil decks of heroin, so it paid heed to particulars of D's case. Guideline only accounted for "firearm". D's own sentencing memorandum conceded quantity of evidence supported upward variance. It could be inferred from record that court reasoned it

was D's driving under influence while possessing loaded firearm and large cache of ammunition that took drug charge out of heartland of relevant sentencing guidelines. Court did not base its decision on factor already taken into account in guidelines, nor was it based entirely on community-centered concerns, but in light of totality of circumstances, with no indication community-centered concerns were given undue weight.

06/06/24 United States v. Mojica-Ramos, 103 F.4th 844 – Important. **Breach of plea agreement** where, in **possession of two machineguns** case, government agreed to recommend within-guidelines sentence and asked for top of guidelines sentence, but **presented court with 250 photos of firearms and drugs, and a video of someone resembling D found on D's cellphone to offer additional evidence of his likely participation in other criminal behavior beyond what was charged, and told court that offense and D's dangerousness should be considered exceptional.** Government's advocacy implied D's case fell outside heartland and so upward variance would be appropriate, contravening agreement to recommend within-guidelines sentence. Government also goaded court into relying on uncharged conduct without providing corroborating evidence that D was involved in crimes depicted in pictures and video on his cellphone. Court sentenced D to upwardly-variant sentence for offenses (72 mos; GSR 37-46) and consecutive stat max sentence for supervised release violation(60 mos; GSR=24-30). Both sentences vacated even though breach only concerned criminal offenses because there was no agreement as to supervised release sentence. Court could not gauge how government breach may have affected the sentencing on supervised release. Remand to different judge.

06/03/24 United States v. Polaco-Hance, 103 F.4th 95 – **No procedural or substantive unreasonableness** in **40% upwardly variant** (72 mos; GSR=41-51) sentence for **felon in possession** and **possession of machinegun**. Court did not solely rely on dangerous nature of machineguns to upwardly vary; the record, including what court said, its written judgment, and government argument at sentencing, indicate that it considered amount of ammunition and high capacity magazines (111 rounds; 5 magazines). Court also implicitly grounded sentence in heightened need for deterrence by quoting Sentencing Guidelines comment that "repeated criminal behavior will aggravate the need for punishment with each recurrence" where govt argued D should receive higher than average sentence because he committed crime 3 months into

release from guideline sentence. In this context, permissible weight given to factor already accounted for in guidelines – inherent dangerousness of machineguns. **Prevalence of gun violence in Puerto Rico** was permissible factor to consider, where **community characteristics** are appropriate considerations when considered along with specific facts of D's offense – i.e, amount of ammunition, high capacity magazines adding to lethalness. **Variance substantively reasonable** where there was **plausible rationale** because amount of ammunition and magazines beyond simple possession can be aggravating factors not accounted for by guidelines, and heightened need for deterrence given commission of offense 3 months after release was not grounded in factors already accounted for by guidelines, and dangerousness of firearm and community factors were also permissibly emphasized. **Defensible resul**t where even though court did not mention mitigating factor that D was breadwinner for his family, where it was discussed in PSR and by defense counsel, inference was that court found mitigating factor unpersuasive, which is insufficient to show abuse of discretion.

06/03/24 United States v. Carmona, 103 F.4th 83 – **Reasonable suspicion** to stop taxi in which D was passenger where agents knew a fentanyl seller coordinated sales with CI via text first from one phone, then 2 months later, from second phone; location data from ping warrant on second phone showed it was frequently located at a residence; agent observed D at residence; 6 days later D coordinated another sale with CI by text from second phone; 9 days later agents watched residence after learning via ping that second phone was there and observed D leave residence with phone in his hand entering taxi. Involvement in past criminal activity can ground permissible Terry stop. **Evidence sufficient** for conspiracy PWID 40 g fentanyl and 5 counts PWID fentanyl. Evidence sufficient that D owned a 3rd phone used for buy in one count where there was testimony that officer went to apartment of a residence, D identified himself and said he was only person who lived there, and when search warrant was executed, D was home alone, only one bedroom was furnished, and officers retrieved a receipt for jewelry identifying D as buyer and listing third phone number as his. Evidence sufficient for buys in other counts using other two phones where extraction report linked phones to third phone and showed all three phones were used by same person, and there were surveillance observations and ping location data placing D and phone 2 at same location. Co-D runner's testimony supporting buy in another count sufficient despite co-D's testimony that on other days D had

called him to pick up smaller amounts of fentanyl from someone else, and co-D did not tell agents about these earlier calls at his proffer. Alleged inconsistency did not concern the buy at issue in the count, and Court of Appeals refrains from credibility judgments. Jury free to consider some parts of witness testimony credible and disregard contradictory part. Evidence sufficient for conspiracy count where govt need not identify all the runners; evidence sufficient that unidentified runners possessed intent given surreptitious nature of deliveries, locations of deliveries, D's willingness to pay for each delivery, size weight and packaging of drugs, payment given in exchange for packages. CI testified exchanges were quick handoffs to ensure everyone got in and out safely and others dod not notice.

05/23/24 United States v. Reardon, 102 F.4th 558 – Important. **Special supervised release condition prohibiting D from all self-employment vacated for lack of explanation of why it was minimum restriction necessary to protect public.** Occupational restrictions in supervised release conditions are subject to heightened standards under USSG 5F1.5 and 18 USSG 3563(b)(5). When Court of Appeals cannot readily discern district court's reasoning, it must vacate, though not necessarily reverse, decision below to give district court opportunity to explain its reasoning. Appeals Court especially inclined to do so when district court does not engage with one of D's primary, non-frivolous arguments at sentencing. The more restrictive a special condition, the greater the justification required. Where D was convicted of bank fraud in connection with making fraudulent **Payroll Protection Program loan applications** using three of his businesses, district court could find that there was reasonably direct relationship between offense conduct and D's occupation as owner of these businesses under USSG 5F1.5(a)(1). Because D's status as business owner was central to bank fraud, district court could have found there was reason to believe that D would engage in similar unlawful conduct if not subject to some restriction on occupation under 5F1.5(a)(2). However, nothing in record mentions requirement under 5F1.5(b) that the ban be the **minimum restriction necessary**, or says that in fact this ban was minimum necessary. Reasoning cannot be inferred from record where govt conceded that a narrower restriction would be reasonable and PSR never cited 5F1.5(b), discussed heightened standard for occupational restrictions, or said anything about whether ban was minimum restriction necessary. Probation appeared to urge broadest possible restriction as precautionary measure. The fact that district court in future may modify

ban has no bearing on validity of ban now. Remand to district court for reexamination of scope of restriction.

05/17/24 United States v. Calderon-Zayas, 102 F.4th 28 – **Upwardly variant** 60 month sentence (GSR=37-46 mos) for **machinegun** possession **not procedurally or substantively unreasonable.** Where mitigating factors were presented to court in PSR, D's sentencing memorandum and in oral argument, no procedural error in failure to consider them – court need not explicitly mention them. No improper reliance on dangerousness of modified pistol for above-guidelines sentence. Court relied not only on general dangerousness of machine guns, but also that D's gun was a pistol modified to fire automatically which the court deemed more dangerous than average machinegun, the problem of gun violence in Puerto Rico, the high recidivism rate for firearm offenders, and need to protect community from D, who committed offense while on supervised release. No substantive unreasonableness where rationale was plausible and 14-month upward variance within wide range of reasonable sentences under circumstances. **No unreasonableness in imposing consecutive top of guideline revocation sentence** without regard to fact that upwardly variant sentence had been imposed on the conviction for the conduct. A presumption of reasonableness is owed to within- guidelines sentence.

05/17/24 United States v. Villa-Guillen, 102 F.4th 508 – Important. In drug conspiracy case, **F.R.E. 403 error** in **admitting letter D sent to court asking it to decide on suppression issue because he wanted to reach an agreement with the government**, and knowing the decision would enable him to make a fair, reasonable and intelligent agreement. **Letter not probative of guilt** where D's interest in plea agreement not relevant to establishing guilt – there are many motivations aside from consciousness of guilt to choose to plead guilty. Innocent D might also logically explore possibility of striking a bargain with the government. **Prejudice** decisively weighed against admission where govt framed letter as confession, letter was redacted to omit request for update on suppression, skewing perception of purpose of letter, and highlighting interest in plea. Prejudice and confusion not mitigated by instruction, which compounded problem. Court took judicial notice of letter and stated that it believed contents of letter could be so accurately and readily determined that it could not reasonably be disputed, and jury could reasonably take it as proven, rather than merely stating the fact that the letter had in fact been sent to the district court. Court commented at sidebar that if the letter were an admission, it wouldn't allow it, but in closing govt characterized it as

admission. Letter **not harmless** where D's defense was that co-conspirators were lying, evidence was not overwhelming, govt argued letter corroborated co-conspirator's testimony, and there was no physical evidence – airline tickets, hotel reservations, cell phone records, seized drugs, or anything else tying D to conspiracy. Letter styled as confession by govt at end of case, magnifying its prejudicial effect by placement and characterization. Evidence that D had attempted to purchase 11 kilos cocaine in Florida during the period of time indictment alleged D was involved in cocaine conspiracy **inadmissible under FRE 401 and 403** where incident was not part of the conspiracy described in the indictment, because that involved transporting drugs from Puerto Rico to New York and did not involve any of the coconspirators. Its only relevance was that it was probative of intent to distribute cocaine, but this would require a **propensity inference.** Admission of evidence **not harmless** where it was only evidence independent of coconspirator testimony other than letter, only evidence upon which two of the government's five witnesses testified, and government emphasized it in closing. District court's ruling limiting cross examination of coconspirator regarding his grand jury testimony on grounds that D was not permitted to **impeach by omission** was error.

05/14/24 United States v. Cruz-Agosto, 102 F.4th 20 – **No plain error breach of plea agreement.** D faced sentencing on felon in possession charge and on supervised release revocation, and parties agreed that TOL was 19 and anticipated CHC would be greater than I. They jointly recommended 37 months for criminal charge and agreed that govt could argue for consecutive 4-month sentence for revocation. PSR came back with CHC of V, so GSR was 57-71 mos. D advocated at sentencing for 37 months, stating that it was joint recommendation, urging court to consider strong familial ties and overrepresentation of criminal history. Govt simply said it was standing by plea agreement and 37-month recommendation. Court imposed high end guideline sentence of 71 months. For revocation, D advocated for 12 month concurrent sentence, and govt said that, while during plea negotiations it had contemplated requesting consecutive 4 month sentence, now that court had sentenced above recommendation, it did not feel comfortable given the agreement asking that revocation be consecutive, so it would leave it to court, because it didn't want to run afoul of the intent of the agreement, which it saw as binding. Court imposed 18-month consecutive high end of guideline sentence. No plain error on conviction sentence where govt did not insinuate circumstances

called for a different sentence than it recommended, or fail to argue something it explicitly promised to, or explicitly argue anything prohibited by plea agreement. No obligation on govt to further explain or advocate for its recommendation for downwardly variant sentence when that is not explicit in plea agreement. Govt had no obligation to repeat mitigating factors recited by D at sentencing. No prejudice in government failure to argue for a revocation sentence of no more than 4-months consecutive where district court considered the government to be recommending a concurrent sentence, and D offered no reason to believe that the court would have sentenced D differently had the government expressly asked for a concurrent sentence.

05/10/24 United States v. Wright, 101 F.4th 109 – **No procedural or substantive unreasonableness** in 360 month upwardly variant sentence in terrorism conspiracy and obstruction case. Even if court **grouped** counts erroneously, any error harmless where court arrived at sentence it imposed in consideration of the seriousness of one of the offenses and the fact that it had to run consecutively to the others. **No presumption of vindictiveness in higher sentence after remand where different sentencing judges were involved.** Where D requested a shorter sentence than the one imposed, he preserved the issue that the sentence is substantively unreasonable because the court did not give an adequate explanation. No plain procedural error of failing to give in open court the reasons for court's imposition of the particular sentence where court explained that, although PSR's view of the GSR was law of the case because that was determination in original sentencing, in its view the GSR was higher – life – and that would affect the judgment about 3553 factors, and the court had to be respectful of the choice Congress made for heavy sentences. It also noted that it would take into account D's deceptive testimony as to his role, that terrorism and obstruction charges worked hand in hand to accelerate each other, and that for general deterrence, a serious sentence was required. Though court did not expressly link these to upward variance, link could be inferred, so no plain error. No substantive unreasonableness in light of those factors discussed. Though court noted mitigating factors, fair inference was that it weighed them less than aggravating factors. Where upward variance was 33 months, approximately 10% over top of GSR, given seriousness of terrorism and obstruction offenses and conduct, court could reasonably view sentence as sufficient but not greater than necessary.

05/10/24 United States v. Cortes-Lopez, 101 F.4th 120 – Important. On plain error review, **government breached plea agreement during sentencing hearing.** Plea agreement in fraud case contemplated 14 level enhancement for agreed-to $749K loss, resulting in 27-33 mos GSR, but parties would jointly recommend 24 month probationary sentence regardless of court's TOL calculation. PSR stated fraud scheme resulted in more than $5.4 million loss, applied 18 level loss enhancement and 6 level enhancement for substantial financial hardship to 25 or more victims. D filed written objection to enhancements as not in line with figures stipulated in plea agreement. Probation responded with explanation and noted that based on information provided by AUSA about number of victims, higher loss amount and inclusion of hardship enhancement were correct. At sentencing, D argued 24 mos was just because it was D's first offense, he accepted responsibility, and pursuant to agreement with SEC resulting from prosecution of the same fraud scheme, he had been working and paying restitution before grand jury indicted him here. The govt said it would first like to highlight the fact that the defendant made objections to the PSR and the government believes that the Probation Office is correct in its assessment of those enhancements. It then said nonetheless the US and defendant entered into a plea agreement wherein parties took into consideration a specific amount of loss, and so the United States is standing by its recommendation of 24 mos probation, $749k restitution. That was its entire argument. Court adopted both PSR enhancements, bringing GSR to 78-97 mos and imposed sentence of 24 mos imprisonment and $5.4 million in joint and several restitution. D suggested 5-year probation sentence so that D could work and make restitution payments, but court rejected suggestion. Govt's overall conduct was breach where govt announced at sentencing that PSR and not plea agreement reflected the correct loss amount, undermining previously bargained for and promised numbers. While govt in general is not required to advocate for agreed-upon sentence, where, as here, there is great disparity between probation's loss amount and lower amount plea deal implicated, and govt assented to probation's figures, court likely was caused to view the government's statement that it stood by the plea agreement as hollow words. Prejudice from breach where D objected to loss amounts and enhancements, court clearly stated it had considered arguments by government, government deprived D of its potential influence over the imposed sentence by neglecting to give any reasons for agreeing to the below guidelines recommendation in the plea agreement. Government violations of plea agreements involve honor of government, public

confidence in the fair administration of justice and effective administration of justice in a federal scheme of government, so fourth prong of plain error satisfied. Vacated and remanded for further proceedings before different judge.

05/09/24 United States v. Ramirez-Ayala, 101 F.4th 80 – **No procedural or substantive unreasonableness** in maximum 24 month **revocation sentence** consecutive to sentence for conviction. Where D did not object to PSR statement that D tested positive for drugs, and urged court to rely on PSR for sentencing, no plain clear error in court's reliance on this statement. Court gave plausible rationale for 3 month upwardly variant sentence based upon nature and circumstance of D's illegal gun possession and supervised release violation history where it noted that D jeopardized public safety with his firearm offenses and flight from law enforcement and that he disregarded law with a string of supervised release violations. Court indicated third violation which was another firearm offense in a series of them breached trust when it said offense serious and that D had pled guilty to similar conduct in previous revocation. Sentence not unreasonable where court considered mitigating factors but did not place more weight on them.

05/03/24 United States v. Morales-Velez, 100 F.4th 334 – In 924(c) plea, **no procedural or substantive unreasonableness** in **upwardly variant** sentence of 120 months, beyond agreed-upon recommended upwardly variant sentence of 96 months (GSR=60 mos). Starting point for court's sentencing determination is guideline range, not parties' recommendation, so evaluation of reasonableness compares variance to guideline sentence. **No error in court's consideration of type of firearm involved – machinegun – where statute and guideline involved – 924(c)(1)(A)(i) and 2K2.4(b) – did not already take type of firearm into consideration** (unlike, say 922(g)). Court also took into account **amount and type of ammunition**. Amount of ammunition found was similar to amounts Court of Appeals previously affirmed as a basis for upward variance, and D provided no evidence below that it was consistent with simple possession. **District court could not rely on type of bullets possessed where there was no information of sufficient reliability to support probable accuracy of claim that bullets were more lethal than ordinary bullets.** However, D failed to raise this specific issue below, and failed to brief plain error in his opening brief, so issue waived. No substantive unreasonableness where there was **plausible explanation** in dangerous nature of machine guns and amount of ammunition. Given factors cited,

60 month variance, twice the guideline, did not fall outside broad universe of reasonable results. It is irrelevant that, had D's conduct been assessed under 2K2.1, a guideline that takes into account type of gun and amount of ammunition, his sentencing range would only have been 51-63 months. That guideline applies to a different offense. **Forfeiture issue under FRCP 41(g)** moot where D reached settlement with government.

04/30/24 United States v. Figaro-Benjamin, 100 F.4th 294 – In case in which D pled guilty, no error in court's reliance at sentencing on co-D's testimony at trial regarding amount of cocaine transported in conspiracy and D's role in the scheme. **No Sixth Amendment right to confrontation at sentencing**. There was **sufficient indicia of reliability** of testimony where judge presiding at trial was the same as the one sentencing D and could assess co-D's credibility, co-D was under oath, and there was corroborating evidence. D had **adequate notice** that testimony would be used where two years before sentencing D requested and was granted transcripts of co-D trial, saying that testimony generated in proceeding was pertinent and especially relevant to his sentencing. Also, PSR specifically cited to portions of co-D's testimony. No clear error in calculating **drug quantity** on basis of both amount physically seized at arrest and testimony of co-D at trial concerning prior trips where drug quantity need not be limited to what is physically seized and co-D's testimony was reliable. Jury finding at co-conspirator's trial of lesser drug quantity did not control at D's sentencing where sentencing judge determined quantity by preponderance. No error in determination D had **supervisor** role where he summoned co-conspirators to apartment by sending taxi to get them to where he was staying so that they could help him get cocaine kilos ready for transportation by vacuum sealing bundles, thus exercising control over another actor. Also, text messages from D to coDs instructing about departure date and necessary preparations they needed to undertake, along with reprimands when his texts were not answered quickly enough. Only minimal control on a single occasion needs be demonstrated to qualify for supervisory role. No plain error procedural unreasonableness in failure to explain sentence where, in imposing low end of guideline sentence, court said it considered the sentencing factors as well as D's counsel's argument, govt argument, and D's allocution. It laid out facts about D, and D's offense, boat trips to transport 267 kilos of cocaine, fact that on one trip D was boat captain. Court levied sentence "to reflect seriousness…etc" On statement of reasons, court noted drug quantity and roles. Explanation adequate,

particularly not obviously or clearly erroneous, for within-guidelines sentence.

04/29/24 United States v. Abbas, 100 F.4th 267 – Important. In **wire fraud** and **money laundering/unlawful transactions** case, three of the latter convictions vacated for **improper venue**. **Sufficient evidence** of D's participation in fraud schemes and intent to defraud. D set up and controlled bank accounts receiving money from victims of business email compromise and romance scams. Jury could reasonably conclude that D gave his coconspirators his account information and knew he would receive that money. As for evidence of intent, D implausibly told fraud investigators that he received money from sale of bonds and to buy electronics, but jury heard how victims who sent money did not know D and thought they were buying a house or helping out someone with a name other than D's, and then discovered that the emails were spoofed. Rapid tranferrals of money into D's accounts and accounts overseas bore hallmarks of these kinds of schemes. Businesses set up by D did not engage in ordinary business activities and accounts stayed dormant over many months, acting only to receive and transfer funds. D need not know actual identities of victims of fraud for evidence of his intent. To show D's participation in wire fraud, govt need only prove that use of a wire was foreseeable part of scheme in which D participated, and where D forwarded account information to coconspirators, jury could conclude D would foresee wires to his account. For wire fraud accounts, venue proper because standard for proper venue under wire fraud statute includes any place where wire transmission originated, and two here were sent from Massachusetts. However, victims' wire transfers from Massachusetts to Illinois or California bank accounts set up by D could not be the predicate for venue for D's money laundering convictions because a money launderer must first obtain proceeds before laundering can take place – **wire transfers were transfers to obtain proceeds – they were not transfers of proceeds**. No evidence D had control of the wired funds until they were transferred out of Massachusetts. Rational jury could not conclude that venue was proper in Massachusetts. Where government never relied at trial on a different statutory venue provision to support venue in Massachusetts, court would not speculate as to whether venue was proper under that provision. Counts vacated and remanded. No Double jeopardy involved, so D can be retried on these counts in any proper venue. Evidence sufficient that D conspired to commit money laundering where evidence sufficient that D had knowledge of money's

criminal nature in light of fact that bank investigator told D about suspicious nature of one wire and closed his account, and yet D received funds through identical circumstances a year and a half later. Fact that proceeds included money that did not underlie counts of conviction and exceeded amounts received from victims did not demonstrate insufficiency, proceeds need only include money derived from fraud. Venue proper for money laundering conspiracy where conspiracy venue under 18 USC 1956(i)(2) requires only that an overt act of a coconspirator in furtherance of conspiracy occur in district. Reasonable to conclude D's co-conspirators sent victims emails in Massachusetts to induce them to wire money into D's accounts. No **404(b)** error in admitting evidence concerning other fraud victims who were not the direct basis of the charges in the indictment. Evidence was intrinsic to fraud scheme and relevant in undermining claim that he was innocent, showing same pattern of suspicious conduct. Exclusion of expert testimony on how wire transfer takes place not erroneous where it was not relevant for disproving venue on wire fraud charges – it would tend to prove it as originating in Massachusetts. Testimony also was irrelevant to lack of interstate commerce theory. Waiver of challenge to conspiracy instruction where plain error not argued in opening brief. Sentencing and restitution challenges not addressed where 3 counts were vacated along with D's sentence and restitution order and case remanded so district court could reconfigure its order.

04/29/24 United States v. Dudley, 100 F.4th 74 – In **supervised release revocation,** no clear error in finding violation based on CW testimony that D showed him photos of D sexually abusing D's daughter when she was 4 years old, told him story of abuse, and told him to take device they were on so D's probation officer wouldn't find images. CW also testified that he went with D to meet up with daughter (prohibited by conditions), all went into D's van where D touched daughter's breast and put hand under her dress, whereupon CW left van, waited outside, and later D told him that he had a good time. Testimony was corroborated by other evidence that D sexually abused his daughter, was neither inconsistent nor implausible. CW's motivation for cooperation did not undermine credibility where CW informed his probation officer about D showing him **child porn** before a search warrant for CW's own devices was issued and well before he was arrested and signed cooperation agreement. No abuse of discretion in revoking supervised release on basis of receipt and possession of child porn on grounds only hearsay evidence was offered, where Federal Rules

of Evidence do not apply at supervised release revocation hearings. Statements had sufficient indicia of reliability and were corroborated. No grounds for recusal on basis of ruling judge made during trial for original conviction which Court of Appeals affirmed on appeal. No expression of bias in judge questioning D during his testimony where judges have established right to do so, and here the questions facilitated clear presentation of issues. Exposure of bad facts is not worrisome prejudice. Sentence of stat max two terms of two years to be served consecutively not procedurally or substantively unreasonable where court considered all relevant factors, emphasizing just punishment for D's conduct, fact that there was nothing that deters D and that public needed to be protected from him, and that D lied in his testimony and allocution. In imposing upward variance, court need only identify primary reasons underpinning decision. Sentence not substantively unreasonable given fact record, demonstrated incorrigibility, recidivism and harm inflicted on others. Flagrant and repeated violations of supervised release including engaging in prohibited and sexually inappropriate contact with daughter, using and possessing prohibited electronic devises to view child porn, failing to update sex offender registration and consorting with known felons.

04/26/24 United States v. Rosa-Borges, 101 F.4th 66 – Important. Upwardly variant sentences for conviction and supervised release revocation vacated and remanded because based on **unreliable hearsay**. **No breach of plea agreement** where D and govt agreed to recommend low-to-mid-guideline range sentence, D advocated for low end and said that instance in which he was found at car with guns and ammunition was isolated incident, and govt responded with drawing attention to evidence of 100 rounds of ammunition found the next day at home where D stayed. **Fed.R.Crim.Pr. 32(i)(3)(B)** requirement that court rule on factual disputes in presentence report or conclude ruling unnecessary because court won't take matter into account can be satisfied where record reliably shows judge **implicitly resolved** D's objections. Though judge implicitly resolved D's objections to finding D possessed 130 rounds of ammunition, it was based upon **unreliable hearsay** in sworn statement by D's cousin that D directed him to retrieve ammunition and drugs that did not belong to cousin from home where D stayed. Statement was self-serving, confusing, and contradicted government's version of events. The sole indicator of trustworthiness – seized ammunition matched pistol found in car with D - insufficient to overcome significant inconsistencies.

04/26/24 United States v. Santonastaso, 100 F.4th 62 – **Evidence sufficient** for **false statement** and **attempted witness tampering. Law of the circuit** doctrine precludes consideration of whether to apply stringent **materiality** standard used by Supreme Court in *Maslenjak v. United States*, 582 U.S. 335 for false statements to immigration officials cases (18 USC 1425(a)) to false statements to federal officials cases (18 USC 1001(a)). First Circuit cases post-*Maslenjak* do not use that stringent materiality standard. D did not argue that exceptions to the law of the circuit apply. False statements are material under 1001(a) where they are of a type which would have a natural tendency to influence an investigation in the abstract. Evidence sufficient that D's statements to FAA investigators that he had not stolen a helicopter in 2000 but rather was involved in a special operation with the CIA and DEA, were material to investigation in 2018 to determine whether D had proper qualifications to fly a helicopter he had been flying at that time. Even if unrelated to investigation at hand and genuinely incredible, a reasonable juror could conclude that D intended to misdirect investigators. False denial could have provoked FAA to further investigate purported undercover work or accuracy of database. While evidence not plentiful, it sufficed. No error in court's failure to give instruction based upon *Maslenjak.* Evidence sufficient for attempted witness tampering where D called airport employee telling him not to speak with woman who was investigating him, all while special agents were incidentally present to interview employee regarding D. Assuming the fact that D had a state injunction to keep him from flying in mind rather than a federal investigation when he spoke to airport employee is irrelevant; statute does not require proof of state of mind with respect to whether D knew that officials involved are federal officials or that investigation is a federal investigation. In any event, there was evidence that D knew that the investigation was federal and federal officials were involved.

04/25/24 Casey v. United States, 100 F.4th 34– Important. In **2255**, **no ineffective assistance of counsel** in failure to move for exclusion of inculpatory statements during **improper delay in being brought before magistrate.** Transfer of jurisdiction to FBI from Puerto Rico Police Department marked the beginning of **period of presentment** even if D was still physically in state custody. Facts known early in investigation indicated that criminal activity was chargeable both under Puerto Rico law and federal law, even without later-discovered gun that would support felon-in-possession charge. **Delay in presentment not reasonable on grounds FBI and Puerto**

Rico police's priority was to find missing undercover agent involved with D in planned drug deal alive. Govt made no showing of practical considerations preventing federal agents from meeting prompt presentment requirement while searching for undercover and further investigating. Public safety rationale adopted by district court was directly at odds with the prompt presentment requirement where court recognized police purpose was to extract information about the crime from D. Given number of police and FBI agents involved, no explanation for how D's presentment was necessarily and reasonably delayed. Because no strategic justification for defense counsel not to have moved for exclusion of self-inculpatory statement made to police on grounds of delay in presentment, **counsel's representation fell below an objective standard of reasonableness. While delay in presentment was not justifiable and one set of statements was improperly admitted, insufficient likelihood of prejudice shown** from introduction of that set of D's statements. D said "I am sunk with the evidence" to police in a case in which the issue was whether it was D who shot and killed an undercover agent in the course of a planned drug deal with a supplier. Second set of statements D made to his wife in front of FBI agent that "they have a lot of evidence but they don't have the body" was not excludable because not made pursuant to interrogation. Despite government's frequent mention a trial of first set of statements to police officer, no reasonable probability of a different verdict had counsel successfully moved to suppress that statement where D's admissible statement to wife was similar, the overall strength of the government's case was high, and the defense's case of an alternative suspect had serious weaknesses.

04/22/24 United States v. Boyrie-Laboy, 99 F.4th 39 – Under clear and gross injustice standard, evidence sufficient for robbery conspiracy, conspiracy to steal and convert government property, and theft and conversion of government property. D's counsel explicitly declined to make Rule 29 motion after prosecution rested and after he rested his own case, and also failed to make a post-trial motion for judgment of acquittal. Evidence sufficient that robbery affected interstate commerce where policeman D set out to retrieve purportedly stolen goods that rightfully belonged to Wal-Mart and a department store as part of their sale inventory. He understood goods were manufactured outside Puerto Rico and brought to island in shipping containers, and objective was to keep goods rather than return them to their rightful owners so they could be sold, depleting

stores of assets that would be used to engage in interstate commerce. Evidence sufficient that convictions for stealing and converting a thing of value of the United States where evidence sufficient that stolen goods belonged to United States where there was evidence that the FBI purchased fireworks and electronics and advanced cash that was taken from two houses. Sufficient evidence of intent despite fact D did not keep stolen property or money where what he did with property does not negate intent at the time of the crime. There was evidence he only declined to take his share of stolen items because he did not like quality of goods and was suspicious of undercover agent. Witness testimony that D knew of and was involved in conspiracy sufficed even if some trial testimony could be interpreted as indicating D believed police operation was legal. Argument re: quality of undercover recordings waived where not raised below and plain error not briefed.

04/18/24 United States v. Perez-Delgado, 99 F.4th 13 – Important. Sentence vacated. **Inadequate explanation for sentence that varied upwardly nine years and seven months from GSR.** D pleaded guilty to 924(c) resulting in death, joint recommendation of 300 months, GSR=292-365, sentence imposed was 480 months. In recounting nature and circumstances of offense, court said over 50% of victim's bones were broken, and the victim was then released and shot with his own firearm approximately 6 times by D. The court's explanation for sentence was that "sentence recommended does not reflect seriousness of Mr. Perez's offense, does not promote respect for the law, does not protect the public from additional crimes by Mr. Perez, and does not address the issues of deterrence and punishment." D objected to procedural unreasonableness of sentence and specifically to sentence being over plea agreement and recommended guidelines in PSR. Objection sufficiently specific to preserve procedural unreasonableness in failure to explain why D's sentence was above GSR. The more a sentencing court decides to vary, the more it needs to explain. Court must explain why case differs from norm and must be case-specific and not boilerplate. It may, however, be inferred from sentencing colloquy and parties' arguments in connection with sentencing. But **passing reference to brutal nature of crime is not an individualized explanation specific to D, where beating was inflicted by four co-defendants, each of whom received lesser sentence.** Nor did court put particular emphasis on brutality, making it impossible to tell if this was driving force. Court mentioned D's role as shooter who shot victim six times but did not indicate it was this that justified variance of great magnitude. **Use of**

firearm and victim's death was taken account of by GSR for use of firearm during crime of violence resulting in death.

04/17/24 United States v. Nieves-Diaz, 99 F.4th 1 – Important. Sentence vacated. D pleaded guilty to felon in possession of ammunition, illegal possession of machinegun on basis of possession of "chip" that can convert Glock pistol into machinegun if installed, and PWID. **Error in applying four-level enhancement under 2K2.1(b)(6) for possession of firearm or ammunition in connection with another offense on basis of ammunition found in ziplock bag on top of tall kitchen cabinet close to ceiling. Presumption that firearm found in close proximity to drugs has the potential to facilitate another felony offense, and so warrants application of enhancement, does not similarly apply to ammunition.** Ammunition here, given location, did not facilitate or did not have potential to facilitate drug offense. **The "chip" could not qualify as basis for enhancement as a firearm, because Note 1 of commentary to 2K2.1 defines firearm as it is defined in 18 USC 921(a)(3), which does not include a "chip."** While some sections of guidelines do include a chip as a firearm by referring to what is described in 26 USC 5845(a) as a firearm (which does include a chip), 2K2.1(b)(6)(B) does not. Use of phrase "any firearm" in guideline does not conflict with note, because it could mean "any firearm" described in 921(a)(3). To the extent this is unclear, **rule of lenity** should govern. For supervised release revocation sentence based upon same conduct, it was not error for court to refer to 3553(a)(2)(a) factor – "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense" – even though that 3553(a) factor is not incorporated into 3583(e). Court is not prohibited from considering other pertinent 3553(a) factors. Moreover, court did not solely rely on that factor but also considered factors incorporated into 3583(e) including deterrence and need to protect public. No substantive unreasonableness in revocation sentence at high end of guidelines imposed along with sentences for new offenses that were above guidelines. This was D's third revocation, and court stated there was need to protect community from recurrent high-risk behavior.

04/15/24 United States v. Centariczki, 98 F.4th 381 – **No substantive unreasonableness** in failing to explain upwardly-variant 18 month (GSR=4-10) supervised release revocation sentence. Court said that considering D's repeated violations of supervised release terms and the multiple second chances given by the district court and PO, an above

guideline sentence would hopefully deter him from lifetime of repeating the same harmful conduct. Persistence of violations sufficient to distinguish case from mine-run. Language not boilerplate, it was unambiguous and consistent with the record, emphasizing repetitiveness of violations, multiple second chances, and the fact that latest violation included domestic violence, which involved an admitted hitting of pregnant partner. For variance of this (relatively small) extent, explanation was sufficient.

04/09/24 United States v. Reynolds, 98 F.4th 62 – Important. **First Circuit adopts abatement ab initio doctrine –** when a defendant dies during pendency of direct appeal, the appeal and all proceedings in the prosecution of the underlying indictment are abated from inception. Convictions vacated, indictment dismissed, orders of restitution, criminal forfeiture, and special assessment vacated.

04/05/24 United States v. Rathbun, 98 F.4th 40 – **Attempt to transport and receive explosives, attempt to damage property, and false statement** retrial. Even though govt had abandoned **anti-Semitic motivation theory** it originally propounded, **no abuse of discretion in admitting resident Rabbi's testimony** about characteristics of street where gas container with **Evangelical tract** charred wick was found near entrance to 25-acre Jewish Geriatric Services compound. Rabbi's testimony gave details of area relevant to government's case concerning intimidation factor that was not cumulative of non-resident witnesses, and **no unfair prejudice where no precedent suggests testimony should be rejected because of witness's religious background**, and use of witness did not inject religious bias or suggest anti-Semitic motive. **No abuse of discretion in admitting testimony of members of Evangelical association that produced the tract** concerning tract's distribution where it was relevant as circumstantial evidence of how D potentially had access to tract because his parents had involvement with Evangelical association, and of how D created incendiary device. No unfair prejudice where facts were that charred wick was evangelical tract with blood that matched D's DNA. Court also gave limiting instruction that tract's contents were not to be considered, as opposed to tract's potential access. Argument that cumulative effect of admitting Rabbi and Evangelical members' testimony was prejudicial in light of religiously-tinged statements in government's opening and closing **waived where D did not supply separate standard of review for argument**. Any **404(b)** error in admitting arguably propensity evidence concerning D's drug binge at a motel one month before device was found

was **harmless** given strength of govt evidence regarding D's possession of gas container, his presence in location where device was found at time it was found, DNA evidence on gas container and tract wick, and circumstantial evidence regarding D's access to tract. Evidence of D's behavior at hotel also not central to government case. No cumulative error requiring new trial where errors alleged were either not errors or harmless.

03/28/24 United States v. Condron, 98 F.4th 1 – **Evidence sufficient** for **wire fraud** and **conspiracy to defraud US by obtaining payment for false claims**. D submitted applications to Treasury for grant money in connection with renewable energy projects. Evidence sufficient as to **co-conspirator's state of mind** for conspiracy count where, e.g., she was listed as manager or principle of all companies for which grant applications were made, she signed bills of sale and promissory notes in connection with multi-million dollar transactions for companies despite having limited resources and little or no knowledge about the operations or technology involved in the companies, she was regularly copied on emails, and some of grant funds were deposited into her bank account and used for her personal expenses. Also, she had romantic relationship with D, from which jury could infer knowledge. Evidence sufficient as to substantive wire fraud count where, even if application for grant itself was not fraudulent, it was submitted in furtherance of a scheme that relied on false pretenses. Moreover, misrepresentations could be found in application that stated that significant work of a physical nature had been done on property where all that had been done was that 32,500 WiFi thumb drives had been purchased. A cost estimate D provided that was highly inflated and provided after the application was submitted could shed light on D's intent at the time of the submission of the application. Evidence sufficient that D included material misrepresentations and omissions in response to requests for information concerning application from grant-reviewing organization in furtherance of scheme to defraud. **No constructive amendment or prejudicial variance** in government emphasis on one piece of evidence where no change to elements of charge and no conflation of evidence relevant to charge. No abuse of discretion in **limiting cross-examination** of attorney D used to fill out application forms concerning his **knowledge of the Massachusetts Rules of Professional Conduct** on grounds that it would have created a min-trial about whether the attorney violated the Rules, a distraction in a complex case, and so violate F.R.E. 403. Even if it was improper, D was able to advance good faith defense by

questioning attorney about whether he was serving in an attorney capacity, whether he charged proper contingency fees, what he thought D understood about their relationship, and court otherwise afforded D plenty of opportunity to effectively cross-examine attorney.

03/21/24 United States v. Tsarnaev, 96 F.4th 441 – Important. In Marathon bombing death penalty case, no abuse of discretion in denying **motion to change venue.** Polling indicated several million people in venue open to life sentence; public awareness and attitudes elsewhere not materially different than in Boston; bulk of pretrial publicity true, admissible and uncontested at trial; any untrue information in light of true information minimally prejudicial; attack could be seen not as just on Boston as Boston, but on America; fact that most people had been exposed to publicity does not show prejudice; fact that some jurors had formed impressions of guilt does not show partiality if they can set it aside and decide on evidence; D admitted guilt at trial; fewer than half prospective jurors, and no seated jurors said they had formed opinion that D should die; length of jury selection process – 21 days – not unusual so not indicative of partiality of jurors. **District court failed to adequately explore claims of juror bias brought upon discovery during jury selection of social media postings by two jurors regarding bombings and district court proceedings.** Defense counsel brought facebook posts to court's attention in time for court to investigate and take corrective action before empanelment, and acted **diligently** in light of work of narrowing of over 1000 jurors for death penalty case. D brought **colorable support for claim that biased juror employed dishonesty to make his way onto jury** where one juror's friends on Facebook said to juror that if juror got on trial, D would have no shot in hell, and another told juror to play the part to get onto jury to send D to jail where D would be taken care of, and later, when court asked juror if any of his Facebook friends were commenting about the trial, juror answered no. Failure to pose questions to juror about the reason behind his dishonesty was error. Second juror who tweeted and retweeted several comments on Twitter about the bombings answered question of whether she had posted anything on social media about the case, and she answered I don't believe so. It was likewise error to not inquire into her reason for that answer. Where there were innocuous potential explanations for juror's answers (e.g., misunderstanding about what counts as part of the case, or loss of memory), court would not vacate judgment as opposed to remand for further inquiry. **If faded memories preclude court from being able to**

determine whether a juror should have been excused, a new penalty phase trial will be required. No abuse of discretion in excluding prospective criminal defense lawyer **juror with misgivings about death penalty** who said it should be rare, could conceive of applying it in genocide case, and would not say ahead of seeing evidence that he could apply it in this case. No abuse of discretion in failure to hold hearing mid-trial to determine whether or not information obtained "from witness" came from un-Mirandized statement from D that government assured D it would not rely on, or from another witness, where no evidence to suggest it did, and D was aware of the timing of his statement and police investigation before trial.

03/20/24 United States v. Orlandella, 96 F.4th 71 – In **sexual exploitation** and **transfer of obscene material to a minor** case, **evidence sufficient** for exploitation of minor where evidence sufficient that D persuaded minor to produce sexually explicit videos where record contained numerous examples of D pleading with and urging minor to send him pictures of her engaging in sexually explicit conduct, moments later minor sent him sexually explicit videos, and stated that they were for him. Facts that videos did not show minor's face, no metadata revealed when they were created, one of the videos tracks the description of a video created by another minor, minor's sister, suggesting that it might have been created by sister, and another picture and video track the requests of someone else to the minor, suggesting that she may have made them at that person's request, not D's, did not show insufficiency where government is not required to disprove every hypothesis consistent with innocence. Fact that minor could have been acting voluntarily does not show insufficiency where it is also theory of innocence govt was not required to disprove. Moreover, there was evidence minor voiced hesitance to send videos of engaging in sexually explicit conduct and reasonable jury could find his repeated requests, pleas, and sending her videos of him masturbating persuaded her. Evidence also sufficient for attempt, as it was sufficient that D took substantial step toward persuading minor to produce sexually explicit conduct. **No plain error unanimity instruction** in failure to instruct jury that they must be unanimous as to attempt theory or completed crime theory where no influence on D's substantial rights. Difference between attempt and completed crime is that attempt does not require knowledge of D's age, but completed crime does. Here, evidence of D's knowledge of minor's age was overwhelming. No influence on substantial rights in failure to require unanimity on the image relied upon

on grounds some images may not have been created at D's urging or by different person than minor where COA rejected insufficiency argument regarding possibility that images might have been created at another's behest or by someone else. **Brady** claims waived for failure to brief plain error, but would fail on merits in any case because evidence that minor had communicated with another adult and that minor's sister had similar sexually explicit videos and picture on her cellphone not material because they were cumulative. Witnesses testified to as much at trial. No error in failing to give **missing witness instruction** for minor where D could have called her as a witness, and no evidence she would have testified favorably to government; no evidence she had relationship with govt and unclear she would have testified favorably because she had prior relationship with D. Moreover, D was given opportunity to argue witness's absence to jury and so claim lack of instruction was detrimental was undercut. Any **Miranda** violation harmless beyond a reasonable doubt where D's statements - that he previously used Kik app, might have used it to send pictures and videos, he was the person depicted in his profile picture, he could have taken one of the videos agents showed him and some of the images sent from account to minor depicted his bathroom – went to issue of whether he was person with account communicating with minor's account, and evidence on this point from Kik, comcast, etc was overwhelming. Though statements were confessions of a sort, they were hedged, and his statements did not clearly undermine many of his theories of defense below and on appeal.

03/15/24 United States v. Sastrom, 96 F.4th 33 – Where D's **conditions of supervised release were modified** by court in DMass, and D wanted to challenge the modification, but his **case was transferred from DMass to DConn**, Court of Appeals lacked authority to adjust conditions, could do nothing short of requesting district court to attempt to retrieve case from Connecticut. Where court had no obligation to do this or cross jurisdictional lines, court declined to do so and affirmed. D served sentence for conduct committed while on escape from civil commitment in Connecticut. Probation moved to have conditions of supervised release modified so that upon release from federal sentence, D would have to report to Connecticut psychiatric facility. Court agreed, and made SR run concurrently with civil commitment term. Then PO asked court to transfer jurisdiction to D.Conn, to which neither D not govt objected, and court granted request. Case **not moot** in virtue of fact D has already reported to state custody in psychiatric facility because, were DMass court found to

have abused its discretion in ordering D to report to psychiatric facility, and if district court found on remand that it was inappropriate to modify terms of supervised release, D could then move for **equitable relief** by way of reduction in term of supervised release. Whereas court had jurisdiction to review court's order, it would not act because of practical problem that jurisdiction over supervised release was now in hands of DConn, not DMass, and First Circuit could not order a court in the second circuit to transfer case back. First Circuit could ask district court through informal mechanisms to transfer the case back into DMass, but it is not obligated to do so, especially in case in which likelihood of practical benefit to D is remote. Little benefit to D of shuttling case back and forth between Mass and Conn, D has less than 2 years supervised release remaining, and his liberty, even if supervised release were terminated, would be constrained by his civil commitment order. Connecticut already refused to discharge D from civil commitment.

03/15/24 United States v. MacVicar, 96 F.4th 51 – In **child porn** case, seven-year below guideline sentence (GSR=135-168; govt rec=120) **not procedurally or substantively unreasonable.** No plain error failure to consider D's treatment efforts and need for continued treatment where factors were argued by D at sentencing and specifically acknowledged by district court when it imposed sentence. Need for rehabilitation is only one factor in sentencing calculus, and even if it had failed to mention a mitigating factor, that would not be procedural error. Plausible rationale given for below guideline sentence when court rejected D's request for a no-jail sentence saying that case was nowhere near lower end of spectrum for cp case, and that mitigating factors were outweighed by seriousness of offense and just punishment where there were real victims and conduct fed demand side of market supplying horrible, unspeakable product. Result defensible where D possessed thousands of images spanning nine years which depicted abuse and exploitation of prepubescent children, some under the age of five. No unreasonableness in district court's choice of how much weight to attach to factors related to offense of conviction as versus other sentencing factors.

03/15/24 United States v. Vasquez-Rodrigue, 96 F.4th 41 – In fentanyl conspiracy case, no error in ruling **evidence did not warrant duress instruction because D put herself in situation where it would be probable that she would be subject to duress and because she had reasonable opportunity to escape. No plain error in applying agreed-to legal standard for duress to cases involving only conspiracy.** D voluntarily joined and participated

in drug conspiracy for weeks before she experienced any of the threats she alleged. Crime of conspiracy was already complete by agreeing to collect drug debt payment, coordinating time and place of collection, collecting money and remitting to Mexico and Dominican Republic at direction of coconspirator. D's claim to be unaware of dangers ahead not a defense where duress defense relies not on D's subjective state but rather how a defendant of ordinary firmness and judgment would have experienced situation and acted. Co-defendant for whom D was acting was in jail, they were not engaged, had broken up, had not lived together for a year, and she could have declined to participate. Drug dealers cannot set up duress defenses for their coconspirators by making threats well after the conspirators have joined. Standards for duress defenses apply to conspiracy cases.

03/15/24 United States v. Gerrish, 96 F.4th 67 – No error in denying motion to **suppress** fruits of search where D was subject to **bail conditions**, to which he had agreed, requiring him to **submit to searched without reasonable suspicion**. Bail conditions sound where person on pretrial release has diminished expectation of privacy, and there is legitimate state interest such as insuring integrity of criminal legal process in supervising pretrial releasees.

03/12/24 United States v. Ayala-Vazquez, 96 F.4th 1 – No failure to sentence D in accordance with **Fair Sentencing Act** where D received life sentence after jury returned special verdict form finding D responsible for 280 grams or more of cocaine base. Two counts of the (pre-FSA) indictment charged D with conspiracy and aiding and abetting possession with intent to distribute controlled substances, "to wit, in excess of 50 grams of cocaine base", and the FSA has no such quantity level. However, D was not therefore convicted of non-existent offense of conspiracy and aiding and abetting 50 grams or more of cocaine base. The 50 gram amount was not treated as an element of the offense rather than a means where the indictment only referenced 21 USC 841(a)(1), which does not refer to drug quantities, and the jury instruction did not indicate drug quantity was element of offense. The judgment of conviction does not identify drug amount as part of the nature of the offense, and the PSR stated D was found guilty of conspiracy and aiding and abetting possession with intent to distribute 280 grams of cocaine base, to which D did not object. No error in **compassionate release denial** on grounds that D was **danger to community** where court made that determination pursuant to 3553(a) rather than 1B1.13. No basis for concluding that court made categorical

decision that cases involving violence are precluded from relief. No basis to conclude that court failed to consider risks of COVID to him (it noted D's hypertension and diabetes were being treated, that he received vaccinations, and that COVID protocols were functioning). No basis to conclude that court did not adequately consider mitigating circumstances of age, family support, lack of disciplinary infractions and rehabilitation where D brought these to Court's attention.

03/05/24 Hudson v. Kelly, 94 F.4th 195 – State **habeas** 2d degree murder case. Confrontation Clause challenge to state court ruling that witness was unavailable because he had asserted his Fifth Amendment rights **procedurally defaulted** for failure to raise claim on direct appeal in state court. No **actual innocence** claim to support review of issue on grounds that failure to review would be a miscarriage of justice where petitioner presented no new reliable evidence that was not presented at trial. State court ruling admitting transcript of same unavailable witness's testimony at first trial in second trial, when witness had recanted testimony in a sworn affidavit was not unreasonable under then-prevailing Supreme Court precedent, Ohio v. Roberts. State court ruled that statements were admissible under **hearsay exception for prior recorded testimony**, bore sufficient indicia of reliability, and petitioner was afforded opportunity to impeach witness with recantation affidavit. No unreasonable application of federal law in state court ruling no due process violation where trial judge first told petitioner that 16 jurors would be seated, and he would have 16 **peremptory challenges** according to state law, then after seating 15, decided to stop, and petitioner, who had only exercised 11 of his 16 peremptories, told judge that he had intended to use them to choose a perfect 16th juror and judge noted objection but proceeded to trial. Massachusetts Appeals Court ruled that petitioner was required to show prejudice from denial or impairment of right to peremptory challenge, and that he did not do so. Supreme Court in Ross v. Oklahoma said that right to peremptories is only denied or impaired if D does not receive that which state law provides. If state law requires showing of prejudice, and petitioner did not show prejudice, then there was no denial or impairment of right. No unreasonable application of federal law in denying mistrial when witness unexpectedly identified petitioner at second trial after he could not identify petitioner as shooter at first trial, and prosecutor told defense counsel would not identify petitioner at second trial. Then-existing clearly established Supreme Court law concerning reliability of witness identifications arose in unnecessarily suggestive pre-trial

identifications followed by **in-court identification** or admission of the suggestive pretrial identification procedure. State court is not unreasonable in not extending rationale to separate factual context of surprise, first-time, in-court identification of a defendant by a testifying witness.

02/23/24 United States v. Crater, 93 F.4th 581 – D argued that treating **Touhy** regulations as valid procedural requirements in the criminal context violates Sixth Amendment **compulsory process clause** based on requirement in **Bruen** that government show regulation is consistent with the nation's historical tradition of regulation of process. Court of Appeals rejected argument because Bruen concerned Second Amendment, not Sixth. District court found that it was not clear from D's proffer concerning testimony he sought that it would be relevant, material and vital to the defense, as required by First Circuit precedent, and D did not argue on appeal that it was. Without expressing opinion on constitutionality of Touhy regulations, COA finds no violation of D's right to compulsory process. No error in failure to hold **Daubert** hearing on grounds government expert who testified about virtual currencies did not have undergraduate or graduate degree in computer science, where Fed.R.Evid. 702 permits expert testimony by one who is qualified by knowledge, skill, experience or education.

02/23/24 United States v. Sierra-Jimenez, 93 F.4th 565 – In felon in possession case, no **procedural unreasonableness** in court's mention of heroin found during D's arrest where court never made finding that D possessed heroin, and referred to it as "purported heroin." Nor did court rely on possession of suspected heroin where record showed court stressed conduct occurred while D on supervised release, he had two prior felony convictions for machine gun possession, and this was his third. D did not receive any enhancement or upper variance based on heroin. **No plain breach of plea agreement** in govt failure to specifically make recommendation during revocation for concurrent sentence as agreed upon. D made no showing court would have imposed that sentence. Court was aware of concurrent recommendation through the plea agreement, PSR, and D's advocacy at sentencing hearing. Court rejected recommended concurrent sentence given D's conduct which it said "clearly demonstrated total disregard for the supervision process, lack of interest in becoming a prosocial citizen, and inability to live law-abiding lifestyle after release from prison."

02/23/24 United States v. Rand, 93 F.4th 571 – **No plain procedural, nor substantive unreasonableness** in **upwardly variant** stat max 24-month imprisonment and 24-month supervised release sentence for revocation violations where GSR for violations were 6-12 and 12-18 mos, and govt rec was 12 months. Court provided plausible and coherent rationale for upward variance in saying that fact that D lied to both his substance use treatment program and probation officer coupled with absconding from treatment indicated high likelihood of recidivism and danger to community, and suggested sentence would not sufficiently deter D and protect public. This was not adequately accounted for by guidelines where court noted all of the events took place just two days after D had appeared in front of the court for the original sentencing – totality of individual incidents occurring in rapid succession over brief period of time concerned court. **Failure to provide written statement** of reasons form did not affect D's substantial rights where, due to court's explanation, it's clear that court would have imposed same sentence in writing. No plainly erroneous reliance on prohibited factors where, even though court said that D's conduct was contemptuous of court, sentencing decision primarily focused on deterrence and community protection. Court may consider history of non-compliance. No error in discussing D's need for a structured substance use treatment program, where there was no indication that rehabilitation was the driving force behind or dominant factor in lengthening the sentence. Discussion was in response to D's request for substance use treatment and D's counsel's request for the same because D needed a very serious structured program. No abuse of discretion in sentence imposed where it did not reflect double-counting of factors already considered by guidelines but rather the combination of factors together raised concern about D's dangerousness and need for deterrence. D was not being punished for being candid about relapse, or for single positive drug test, but rather for 4 violations that included lying and absconding. Provision under 3565(b)(4) that revocation should only occur if D tests positive more than three times over the course of a year inapplicable because that applies to probation, not supervised release. D not sentenced simply for being a drug addict. Sentence not unreasonable for failure to follow govt recommendation.

02/22/24 United States v. Katana, 93 F.4th 521 – **Constructive amendment** requires alteration of indictment with respect to a statutory element of the offense. **Variance** does not involve change in the offense charged, but rather occurs where the government relies at trial on different facts than those

alleged in the indictment to prove the same offense. Where indictment alleged conspiracy to commit robbery of Person #1, an individual residing in Rockland, Massachusetts who was engaged in the sale of glass smoking devices, **no constructive amendment** in instructions that govt had to prove that D agreed to obtain the property of Person #1 by means of a robbery on grounds instructions misstated the agreement charged; created a substantial risk that the jury would convict even if it found D only agreed to conduct that was a mere larceny of Person 1's property, rather than a robbery of Person 1 himself; and repeatedly inserted "or her" into definition of robbery, suggesting that robbery did not have to be of Person 1 himself, despite plain language of indictment. (Person #1 was not at home when offense was planned to occur, but his girlfriend was). Nor was there constructive amendment on basis of govt evidence and arguments at trial that D was charged with conspiring to separate person 1 from his property through actual or threatened force to another and that it was the business that was the target of the robbery. Offense both charged in indictment and instructed upon was Hobbs Act robbery, and there was no suggestion that jury could convict on larceny conspiracy. A commonsense and plain reading of indictment indicated Person 1 was targeted in connection with his business. Govt focus at trial on Person 1's home business as target of robbery did not amount to constructive amendment because the identity of the target is not an element of Hobbs Act robbery. No reason to believe that assets connected to a person's business are not also his property. Robbery definition in Hobbs Act and in court instruction made clear proof was required that D conspired to take property from person or in the presence of another. **No prejudicial variance** on grounds government theory at trial was that D conspired to rob girlfriend rather than person named in indictment as target of robbery, or person's business in presence of girlfriend rather than person named in indictment. Commonsense reading of indictment was that person named in the indictment was target of robbery in connection with his business. Govt never argued at trial that coconspirators planned to rob girlfriend rather than to take person's property at his home by actual or threatened force regardless of whether he or someone else was home at the time. No showing that any variance was prejudicial where trial strategy did not support claim of surprise, because it defended against a showing that D knew or understood that someone was in the house. **Evidence sufficient for conspiracy to commit Hobbs Act robbery.** Offense does not require that D intend to take a person's property in the presence of that same person, and evidence could support conclusion that

conspirators believed someone might be at the home on basis that it was reasonable to infer they planned to bring gun, and that they saw a car in the driveway and heard loud music coming from the house. Evidence sufficient that co-Ds knew person targeted ran a business and that was why they targeted his particular home. D stole packages from porch of residence when he went to scout it out.

01/30/24 United States v. De La Cruz, 91 F.4th 550 – **No substantive unreasonableness** in 108-month low end guideline range sentence for possession to distribute fentanyl and heroin. Sentence not substantively unreasonable on grounds that, where this offense involved no violence, the sentence is significantly higher than the average sentence for most crimes of actual or immediate violence. District court noted both the dangerousness of fentanyl and the large amount involved in the offense (9,916 grams fentanyl, 5,833 grams heroin), and sentences of 108 and 120 months for other defendants with similar offenses have been upheld. No grounds for unreasonableness in the fact that someone other than the defendant determined the weight of drugs to which he plead guilty, which was just over the threshold to qualify as a level 36. **No unwarranted disparity** with co-D to whom D referred to as his "driver," demonstrating significant difference in status. Sentence not unreasonable in light of data showing that lengthy incarceration periods do little for deterrence, where only question is whether court abused its discretion, and court wove deterrence into its consideration by finding that dangerousness of fentanyl and large quantity deserved considerable weight.

01/19/24 United States v. Colon-Cordero, 91 F.4th 41 – Important. Sentencing in felon in possession and supervised release revocation based on drug possession and other violations. Sentencing objections for felon in possession case sufficiently preserved when viewed in context of D's entire argument and court's pronouncements. **Sentence procedurally unreasonable where, in imposing upward variance, court failed to explicitly consider mitigating characteristic of D's intellectual disability, which was D's principal argument.** Recitation of reasons for sentence – recommended sentences did not reflect seriousness of offense, promote respect for law, protect public from additional crimes or address deterrence and punishment – was **boilerplate and insufficiently individualized. Nine-month variance is significant amount of time. District court's statement that it considered 3553 factors, PSR and sentencing memoranda; that it mentioned D's age, 10th grade education, employment info, history of drug use, history of anxiety without getting**

treatment, that he was found with ammunition and loaded ghost AR 15-style assault rifle with no serial number, and that D told probation that he liked rifles, was insufficient as an application of sentencing factors or explanation of sentence. It was a mere listing of the facts with no emphasis on particular factors and so it was impossible to tell what the rationale for 15% upward variance from guidelines was. Even if the ghost gun fact could provide an inference to explain the reason for the variance, the court's failure to address D's intellectual disability represents a failure to make an individualized assessment of D. On high-end, consecutive revocation sentence, court's finding that D through his supervision period "constantly" engaged in illegal use of controlled substances was clearly erroneous where he tested negative 15 times during his release, and only tested positive twice in 14 month testing period. No showing by the record that this finding did not affect the length of sentence imposed, even if there was evidence of other violations.

01/17/24 United States v. Arce-Ayala, 91 F.4th 28 -- Important. Judgment vacated. **Guilty plea not knowing where D understood his agreement guaranteed sentence would reflect credit for time served on related non-federal convictions, and statements by defense counsel and court reinforced this belief, but credit could not reduce sentence below man min.** Despite counsel and court statements, related state time served could not reduce sentence below man min under 5G1.3(b) because sentence was already discharged by time of federal sentencing and 5K2.23 cannot be used to sentence below a mandatory minimum. Court stated that D would receive credit for the time he served in state custody, and that it had the power to sentence D either more or less severely than the guideline recommendation, and counsel told D that he could receive credit for state sentence.

01/08/24 United States v. Colcord, 90 F.4th 25 – **No substantive unreasonableness** in low-end 145 month guidelines sentence for knowingly accessing with intent to view **child pornography** images. District court did not conflate D's conduct with those who committed the crimes captured in the images where it specifically referred to **D's role as consumer** adding to demand for child porn, resulting in rippling dysfunction for victims because internet images last forever. District court was aware of its power to downwardly depart based on policy disagreement with child porn guidelines, but within its discretion chose not to because of **number of images** (900), their content of pubescent and pre-pubescent girls, and the effect of the offense on society. Court was required to consider mitigating

circumstances of D's childhood but was not required to give it a particular weight, and it was within court's discretion to find that mitigating factors were outweighed by seriousness of offense, criminal history, and the need to protect the public. Court was not bound to accept the joint recommendation of 120 month sentence. Court did not fail to adequately explain why joint recommendation was not sufficient but no greater than necessary to meet sentencing goals. Pretrial release conditions showing that D posed minimal danger to community was not inconsistent with sentence where courts must consider different factors in pretrial release decision versus sentencing decision. Court found **extensive criminal history** involving sexual abuse of minor, assault, violations of release conditions and protective orders, failure to register and domestic violence warranted within-range sentence.

01/04/24 United States v. Sansone, 90 F.4th 1 – Important. **No plain error procedural unreasonableness** in counting **juvenile adjudication of DYS commitment as sentence of confinement under USSG 4A1.2(d)(2)(A).** Argument has some plausibility because juvenile DYS commitment may result in any one of five outcomes, only two of which include confinement, and the record was not clear here which outcome attached to D's commitment. However, because there was no federal law on issue presented, and there was ambiguity, no plain error. No plain error insufficiency of evidence that D's juvenile adjudications resulted in sentences of confinement of at least 60 days where there were alternative plausible interpretations of the factual record. **No substantive unreasonableness** in top of guideline range sentence for felon in possession offense where D threatened to kill himself, kill a woman with whom he shared a child and kill her relatives. He violated bail conditions and tried to get her to violate hers as well, texted pictures of himself with a gun to his head and fired a shot within 100 yards of her home. District court found offense conduct alarming in the extreme, acknowledged the defendant's challenging life, but emphasized need to provide specific deterrence and protect the public. This was plausible rationale and top of guideline sentence was defensible result.

12/28/23 United States v. Perez, 89 F.4th 247 – Important. **No 4th Amendment violation in search of backpack taken from D as he was being handcuffed.** Prior precedent regarding **search incident to arrest** (*United States v. Eatherton*, 519 F.2d 603(1st Cir. 1975), which would dictate constitutionality of warrantless search of container found on a person being arrested, remains **law of the circuit**. Supreme Court precedent post-

dating *Eatherton* did not address search of items carried by D at time of arrest or dropped upon police command. Exception to law of the circuit doctrine does not apply just because several other circuits have chosen not to follow ne of First Circuit's prior rulings. Suggestion that en banc review would settle whether prior precedent was rightly decided.

12/22/23 Cruzado v. Alves, 89 F.4th 64 – Important. In **2254** case, motion for extension of time to complete a memorandum in support of a certificate of appealability counted as **functional equivalent of a notice of appeal.** It evidenced an intent to appeal in that it requested a date after the notice of appeal was due. It contained the "pertinent information" required by Rule 3 because it named the parties involved, and a liberal construction of the Rule excuses (1) failure to name the court to which appeal is taken when there is only one appellate court to which it could be taken, and (2) failure to designate the judgment appealed from where there is only one possible judgment on the docket for which the motion provided a docket number. Liberal construction of Rule 3 is extended to both counselled and Pro Se petitioners. **No unreasonable application of Supreme Court due process precedent** in permitting introduction of petitioner's interview with police in which he used racial slur where it was probative of motive to commit murder, not unduly prejudicial where court conducted voir dire of potential jurors to eliminate bias, and petitioner did not request limiting instruction.

12/21/23 United States v. Leach, 89 F.4th 189 – In cyberstalking and extortion case, **upwardly variant (42 mos;GSR=32-37mos) sentence not procedurally or substantively unreasonable.** No abuse of discretion in failure to notify D of intent to upwardly vary where there was **no unfair surprise** because facts on which it was based (e.g., sexual trauma suffered by victim, duration of cyberstalking) were in the record. Court's opportunity to inform D of intent to upwardly vary irrelevant. Claim of unfair surprise undercut by **failure to request continuance.** Explanation for upward variance sufficient in identifying factors that the guidelines don't adequately account for given the idiosyncrasies of the case. Record-based factors were severity of sexually-based trauma making one of the victims suicidal, duration of harassment, power dynamics between D and victims, and special role of internet in facilitating anonymity. **Level of justifying detail adequate where scope of variance was modest**. No substantive unreasonableness where facts of case were not mine-run of cyberstalking offenses because of long duration of harassment, degrading sexual acts victim was coerced into, D's conviction on extortion, and interstate threats

of injury to victims' reputations. No plain error in imposing **supervised release condition that D not have contact with children in work without prior probation approval** where, though not charged with any offense against a minor, D exchanged messages that were not overtly sexual with a social media user who had represented herself as 15.

12/19/23 United States v. Walker, 89 F.4th 173 – Important. In thwarted Hobbs Act robbery conspiracy case, no error in applying 1-point **economic loss enhancement** based on intended loss. Conspiracy guideline governing Hobbs Act robbery expressly instructs court to consider intended offense conduct, and this is contained in the guideline itself rather than the commentary, so there is no argument that there is an impermissible expansion of the meaning of the guideline. Loss was not speculative on ground that robbery did not actually take place and there was no way to know whether conspirators would have been successful in taking entire amount of merchandise. Sentencing courts may draw inferences from the actual plan of the conspirators. **Dangerous weapon enhancement does not require proof that D intended to use object as dangerous weapon rather than mere possession of a dangerous weapon**. **Conspiracy guideline's limitation to conduct that was "specifically intended or actually occurred" does not affect this conclusion, since intent requirement applies to possession without more.** No error in failing to apply **incomplete conspiracy reduction** (USSG 2X1.1(b)(2)) where reduction is inapplicable if conspirators were about to complete object of conspiracy but for apprehension or interruption by event beyond their control. No clear error in court finding robbery had progressed far enough to bar reduction where conspirators planned robbery for a week, drove more than 60 miles in separate cars to town where robbery was to take place, and although co-conspirators saw car in driveway of home they planned to rob, they stole items from the front porch, and then purchased tools at a Home Depot to facilitate break-in. No evidence D took steps to withdraw at that time. **Record insufficient to determine whether denial of mitigating role adjustment was error.** In four-person robbery conspiracy, govt conceded that D was less culpable than two other co-conspirators, but district court never identified on the record which participant counted as the average participant in the conspiracy or compared the culpability of D and the third co-conspirator, which would be required for determining role in the offense. Lack of any explanation may suggest court did not perform required inquiry. Vacated and remanded.

12/14/23 United States v. Facteau, 89 F.4th 1 – Multiple misdemeanors under Federal Food, Drug and Cosmetic Act for **commercially distributing an adulterated and misbranded medical device**. Govt alleged device distributed served an **intended use** different from that for which it got FDA approval. **No First Amendment violation** in instructing jury that it could consider truthful, non-misleading speech promoting off-label use as "evidence" in determining whether government proved intent. First Amendment permits use of speech as evidence of crime where law seeks to regulate conduct, not speech. No impermissible content-based regulation of speech in permitting promotional speech but not non-promotional speech to be used as evidence of crime. Notion of "objective intent" went beyond external promotional statements of device manufacturer's officers and employees, so court's instructions to that effect not erroneous. "Intended use" is not so **vague** as to violate 5th Amend. due process rights. Term has not been subject to widely disagreement in interpretation on whether evidence of intended use may only come from external promotional claims, or from broad range of sources. No novel and more expansive interpretation of term allowing evidence from sources outside promotional materials created due process **fair warning** violation. **Evidence sufficient** for misbranding or adulteration in the absence of commercial expression of use accompanying each shipment of device where evidence of intended use can come from broad array of sources outside commercial speech. Moreover, where evidence shows whole point of enterprise was to market adulterated or misbranded device, government need not put forward evidence establishing intended use of each individual shipment of device. Evidence sufficient that D himself participated in crime, as company chief salesman, in introducing misbranded and adulterated device into interstate commerce. **Actus reus** of crime was not, as D contended, making filings with the FDA. Rather, prohibited act is causing misbranded or adulterated device to be introduced. Govt must prove misbranding or adulterating, but not that D himself did that. **No plain error Eighth Amendment excessive fines violation** in $500k fine, 2.5 times recommended guidelines amount. As executive of medical device company, D was within class of persons at whom criminal statute was aimed. Fine was only half the maximum authorized by statute, and his coD received maximum. District court justified its decision by remarking that case was about money, and financial penalty was best way to accomplish general deterrence. Even in absence of evidence of harm to any individual, damage to government's regulatory interests, which

endangers public health and harms govt interest in public confidence in market for products overseen by FDA also justified fine.

12/14/23 United States v. Valdez, 88 F.4th 334 – No abuse of discretion in denying **motion to withdraw guilty plea** on grounds that D pleaded guilty to conspiracy with government agent, which is not a crime. D admitted to arranging a three-way drug deal in which one of the coconspirators was not a government agent. No plain error in denying motion to withdraw guilty plea on grounds it was not knowing and intelligent because D did not understand that one could not illegally conspire with a government agent. Record showed he was aware of identity of non-government agent coconspirator, which government provided to him in discovery. Rule 11 colloquy showed D acknowledged he understood charges and mandatory minimum he faced, discussed charges and case with counsel, and understood consequences of guilty plea. **D waived issue of court's failure to explain why it did not find D eligible for safety valve where counsel and D sought mandatory minimum sentence, despite PSR statement that D qualified for safety valve if he met fifth condition, and district court asked D and counsel repeatedly if they agreed with advisory sentencing range in the PSR, if they had objections, or anything else to bring to court's attention, and they did not.**

12/12/23 United States v. Cowette, 88 F.4th 95 – Important. **Denial of suppression motion partially reversed.** D's statement to police "I guess I'll wait until I have a lawyer" was **request for counsel.** In context, "I guess" was a colloquialism and not an injection of ambiguity. Questions of whether there was subsequent waiver were not addressed by district court because it found D had not invoked right to counsel, so remand to address those issues.

12/12/23 United States v. Menendez-Montalvo, 88 F.4th 326 – Important. In **supervised release revocation** case, **Article 3.1 of Puerto Rico's Domestic Violence Law** is **not a crime of violence** as the term is used in 7B1.1(a)(1) of the US Sentencing Guidelines. The statute plausibly is divisible into separate crimes involving the use of physical and non-physical force. Nevertheless, the minimum degree of physical force sufficient to support a conviction is less than the amount required to satisfy the Guideline definition of crime of violence. Puerto Rico Supreme Court has held that **any degree of force is sufficient for the offense so long as there is the intention of causing damage**. First Circuit has held that where a state statute recognizes that any physical force is sufficient, then it cannot meet the definition of violent felony under federal law. **Court rejects govt**

suggestion that intent to cause physical harm coupled with the use of any amount of force qualifies as violent force as coming "dangerously close to imposing liability based on a person's mindset alone." Remand because classification of D's violation as Grade A was error. District court is permitted on remand to take into consideration serious nature of D's offense as it bears on factors specified in 18 USC 3583(e).

12/07/24 United States v. Cardona, 88 F.4th 69 – In cocaine conspiracy, heroin conspiracy, and money laundering case, **multiplicity** claim raised for first time on appeal without showing of good cause waived. Review of untimely **Rule 12(b)(3)** motion is foreclosed, absent good cause, with no plain error review. Claim that **money laundering act** is **unconstitutionally vague** raised for first time on appeal without showing of good cause likewise waived for same reason, where claim is an objection that indictment failed to state an offense, covered by Rule 12(b)(3). **Evidence sufficient for promotional money laundering** where D did not dispute that evidence at trial showed beyond reasonable doubt that he agreed to purchase heroin with an intent to resell it. D's willingness to enter agreement, along with specific intent to sell heroin, is sufficient to show D intended to promote the carrying on of heroin trafficking. Fact that D's objective was to pay back money he owed to supplier was irrelevant. No problem of **merger** of PWI heroin and money laundering charges where heroin conspiracy may be committed without engaging in financial transaction, thus no double punishment. No plain error in erroneous instruction saying that jury had to find D knew the financial transaction was designed to promote conspiracy to distribute drugs, as opposed to *intended to promote* the conspiracy where court informed jury that in order to convict Ds of conspiracy, jury would have to find that Ds willfully joined the agreement with a specific intent to distribute heroin. Where jury convicted D of heroin conspiracy, they must have found he had specific intent to distribute heroin. With proper instruction, it is not likely that jury would find D had not entered into promotional money laundering conspiracy.

11/22/23 United States v. Irizarry-Sisco, 87 F.4th 38 – **Transportation of a minor** case. No abuse of discretion in admitting minor's hearsay as **excited utterance** where sound of D's car two weeks after allegedly being sexually assaulted could be **startling event**. She became very nervous, started crying, and continued to do so throughout conversation with witness about what D had done to her earlier. Even though minor's statements were made in response to questions put to her, they were **product of**

stress of excitement caused by startling event. Statements **related to** hearing the sound of D's car even though they concerned the sexual assaults of a few weeks earlier because for minor, it was car that drove her to prior assaults at hotels and was now coming for her a third time. No error in admitting witness testimony that witness – minor's aunt - interpreted minor's shrug, facial gesture and smile to mean D had hurt her as **lay opinion.** Witness needed no specialized knowledge to form opinion rationally based on perception of minor's expressions. Witness testimony helpful in that jury not in position to interpret minor's expressions because they were not present and were not close relatives. Opinion was not objectionable by being about an ultimate issue, which is permitted by F.R.E. 704(a), and did not address D's mental state. Statement merely indicated that D hurt minor, not that D unlawfully transported minor with intent to commit a criminal sexual act. Statement did not go to minor's credibility. D's 235 month sentence **not procedurally or substantively unreasonable.** Reliance on **acquitted conduct** for **pattern of prohibited sexual conduct enhancement** not error where court may consider acquitted conduct, and court did not commit clear error where it observed minor's testimony concerning two alleged sexual assaults, as well as neighbor and family testimony, and judge, unlike jury, credited minor's testimony as to both assaults, not just one. No substantive unreasonableness in downward variance from life to 235 months' imprisonment (D was 60 years old). Court gave plausible rationale, and explicitly considered mitigating factors of D's health problems.

11/14/23 United States v. Royle, 86 F.4th 462 – In **child pornography** case, assuming unconstitutionality of first search of D's home undertaken after FBI agent saw D's front door remain open for long period of time and local police entered and saw computer, fruits of later warrant-backed search were admissible under the **independent source doctrine.** Agent testified that what he learned at first search did not at all affect his intent to get a warrant for D's home. Plausibility of testimony supported by emails he exchanged with prosecutor before the initial search. He had drafted an affidavit in support of the search warrant and sent it to prosecutor days earlier, and before the first search he and prosecutor had agreed contents of affidavit were sufficient and planned to submit it for internal approval. Their decision to wait was prompted by administrative issues. No suggestion either believed additional information was needed. Pre-existing intent to obtain warrant is sufficient to support independent source. **No pre-indictment delay due process violation** in delay of

disclosure concerning first search, where no showing of prejudice. No evidence that any police accounts given closer in time to initial search would have meaningfully differed from what they ultimately testified at suppression. Moreover, no demonstration of intentional delay to gain tactical advantage. **Evidence sufficient that D knowingly possessed child porn.** Evidence consisted of child porn images from laptop's deleted files, internet browser screenshots from deleted files containing those child porn images, internet browsing history including information of web addresses visited, title or name of address's webpage, date and time visited, number of times visited, some addresses visited matched superimposed text or file names reflected in child porn images.

11/03/23 United States v. Ramos-Baez, 86 F.4th 28 – Important. **RICO** and **drug conspiracy** case involving several NETA member co-defendants. No failure to state an offense in the indictment on grounds that RICO "enterprise" alleged consisted of mixture of subset of NETAS, the entire NETA membership and two corporate entities. Statutory definition of enterprise is expansive, and argument undeveloped. Indictment also did not fail to state an offense on grounds it conflated NETA organization with individual NETA members. **Evidence sufficient** for "enterprise" element of **RICO conspiracy** where NETA members testified that NETA was hierarchically organized with members, chapters, protocols, and a "maximum" leadership overseeing operations across Puerto Rico prisons, and no requirements that every member be engaged in criminal enterprise where enterprise can have more than one purpose. Evidence sufficient for **jurisdictional** interstate commerce element where enterprise trafficked in drugs and agent testified that cocaine and heroin are not produced in Puerto Rico and marijuana is produced only in limited quantities. Evidence of **single conspiracy** sufficient where there was testimony by members that NETA was cohesive organization with hierarchy overseeing operations across all prisons, "maximum" leadership appointed members as chapter leaders for it at each prison, and chapter leaders conducted affairs at direction of "maximum" leadership. Maximum leaders and chapter leaders engaged in drug trafficking for profit to enrich members and NETA itself, NETA had system of smuggling drugs into prison including rules, incentives and sanctions, and money generated through drug trafficking would be allocated to maximum leaders and chapter leaders, and leaders would invest money to acquire more drugs to traffic and set aside some for NETA events for members. A given member need not know all fellow coconspirators nor participate in every transaction

necessary to fulfill aim of agreement. Evidence sufficient for one coD's participation where there was testimony he functioned as maximum leader, appointing chapter leaders, supervising business practices and reviewing drug profit reports. Proof did not require that D personally profit or participate in use of drug funds. Evidence sufficient that second co-D agreed to participate in enterprise even if he did not have formal leadership position where there was testimony he operated as enforcer, intervened on leadership's behalf to settle disputes about debts regarding drug transactions, trafficked drugs himself on behalf of member to settle a dispute, and instructed new enterprise members on how to manage and keep tabs on drug profits in maximum leadership accounting books. Evidence sufficed that third coD agreed to participate in enterprise, or agreed that member would commit at least two qualifying RICO acts where there was testimony D served in leadership roles requiring him to report to maximum leadership, and he helped maintain relationship with corrupt prison guards to smuggle in contraband. Evidence sufficed to show fourth coD agreed to participate, that he would commit at least two racketeering acts, and that there was connection between enterprise and any drug transaction in which he was involved where there was testimony D was a leader of enterprise, obtained drugs from a NETA prison pot to sell within the prison on behalf of leadership, and was in contact with maximum leader's drug supplier. Evidence sufficient as to drug conspiracy where there was evidence of single overarching conspiracy in member testimony that maximum leaders coordinated use of cellphones within prison to conduct transactions and proceeds from drug sales and incentive payments to use cellphones also went to maximum leadership. Where there was testimony that D paid incentives to leadership of enterprise, enabling D to traffic his personal drugs within prisons, and some of those profits went to enterprise, evidence sufficient that he agreed to join drug conspiracy charged and did not merely traffic with others independent of organization. Even if failure to disclose FBI notes of witness interview was **Giglio** error, no prejudice where inconsistencies between interview statements and testimony concerned only whether NETA trafficked 3 or 5 kilograms through one prison in a given year, and witness's own prison disciplinary history; failure to disclose didn't prevent exploring inconsistencies central to case or witness's credibility. Moreover, other evidence in form of prison phone calls and testimony of other witnesses was overwhelming as to D's guilt. No prejudice from any Giglio error in failing to disclose that witness had misidentified a co-D on a telephone call where its impeachment value was

mostly doubt about witness's familiarity with and testimony about a different co-D, D was able to cross-examine about the misidentification, and evidence against D was overwhelming. No plain Giglio error in delayed disclosure that witness misidentified D as someone else who shared D's nickname where D made no showing why there was reasonable possibility that other person held D's alleged leadership role at prison. **No prejudice from improper closing argument** saying that "if you engage in cellphone trafficking, you aid and abet, and you conspire to engage in drug trafficking" in response to D's argument that cellphone trafficking is not a predicate RICO act. In context, govt statement could be understood not as claim that cellphone trafficking was RICO predicate or even federal crime, but rather that, given NETA's use of cellphones in prison to facilitate RICO predicate drug trafficking, use of the cellphones was evidence of drug trafficking. Moreover, instructions made clear that RICO predicates were drug trafficking offenses. Court gave sufficient **multiple conspiracies instruction** in telling jury it had to find beyond reasonable doubt specific agreement charged in indictment and not some other agreement, and if it found a conspiracy of some kind existed between defendant and some other person, that is not enough – government required to prove beyond reasonable doubt conspiracy specified in indictment. Court gave substance of **mere presence jury instruction** in telling jurors that they had to unanimously agree as to each defendant individually on which type or types of racketeering activity defendant agreed the enterprise would conduct and had to find each D intended to agree and shared general understanding of crime. Court also said mere association insufficient. No error under **F.R.E. 403** in admitting phone call that concerned drug dealing in public housing where case involved drug dealing in prison - call was relevant in demonstrating D's ability to set up with outside supplier even from prison, and was not more prejudicial than probative. No **constructive amendment of the indictment** in admission of this testimony where indictment stated that NETA smuggled drugs into prisons with help of civilians inside and outside the prison. No error in admitting **lay testimony** concerning code words where witness was a member of NETA. Any error in admitting testimony concerning D's nickname in text message was harmless where jury had already heard that it was his nickname without objection, and there was other evidence of D's participation in enterprise. **Remand for failure to make final Petrozziello ruling that coconspirator statements were made by coconspirators in furtherance of conspiracy. Issue preserved where govt told court at end of case that it needed to make final Petrozziello**

ruling, and court simply moved on to other matters. Remand limited to making ruling. No error in failing to credit D for time served on state charge relevant to federal prosecution where D had not begun serving time on that state charge. Court need not compute credit for sentences served at sentencing.

11/02/23 Quintanilla v. Marchilli, 86 F.4th 1 – State **habeas** child rape and assault case. No unreasonable application of Supreme Court **ineffective assistance of counsel** law. Failure to call one defense witness not ineffective where court found witness not credible, circuit precedent dictates that trial court credibility finding is presumed correct, and petitioner did not rebut it. Failure to introduce pharmacy records purporting to show victim was over age of consent not ineffective where it was not unreasonable determination of fact to find that defense counsel never had pharmacy records, and petitioner did not offer clear and convincing evidence that factual finding was erroneous. No unreasonable application of law in findings that counsel's failure to object to inadmissible evidence was **result of strategy** to illustrate victim's story not credible because it evolved over time and was incredible, and police investigation was incomplete and could not be trusted, and **strategy was not manifestly unreasonable**. No unreasonableness in finding no ineffectiveness in introducing police report alleging that petitioner was gang member where introduction was attempt to show inadequate investigation where counsel elicited testimony that allegations in report were based solely on victim's statements with no attempts to verify. No ineffectiveness in eliciting testimony that victim took restraining order out on petitioner where he also elicited testimony that victim made multiple calls to petitioner after doing so, supporting claim victim not credible. Failure to object to hearsay statements concerning victim's account of what petitioner had done to her not ineffective where counsel elicited them to show inconsistencies and extremity of statements, and support fabrication and unreliability. At minimum fairminded jurists could disagree whether benefits of strategy outweighed risks. State court ruling that there was no prejudice from deficiency in not interviewing certain potential witnesses not unreasonable where testimony was cumulative of testimony elicited from prosecution witnesses who said they never saw injuries to victim before a certain date. Moreover, there was strong evidence and exhibits of victim's injuries after that date, so impeachment value low. Petitioner failed to rebut presumption of correctness of finding

that potential witness petitioner claimed counsel was ineffective for failing to call lied during her testimony.

10/26/23 United States v. Cahill, 85 F.4th 616 – In felon in possession case based on constructive possession theory, no error in **acceptance of guilty plea** on grounds that it was not **knowing and voluntary** where counsel told court that he had discussed and reviewed indictment and prosecution's statement of facts and D confirmed that to court and said counsel had explained nature and elements of charge. Court was not required to explain elements of each charge to D on the record. **No substantive unreasonableness** in upwardly variant 72 month sentence (GSR=30-37 mos) in light of deterrence rationale given D's criminal history (more than dozen convictions) and repeated re-offending soon after conviction. D's age and physical condition were noted by court, and finding that D still posed danger to community was plausible where D possessed guns, which can inflict harm even if owner is enfeebled.

10/26/23 United States v. Carvajal, 85 F.4th 602 – No clear error in failure to give two-level reduction for **acceptance of responsibility** where D went to trial, admitted selling fentanyl in opening, and contested selling cocaine and death resulting from distribution. No pre-trial statement or conduct, such as narrowing the issues for trial and pleading guilty only to selling fentanyl, supported acceptance of responsibility. No error in considering **acquitted conduct** of selling cocaine and resulting death of purchaser of cocaine and fentanyl at sentencing. Supreme Court precedent dictates that consideration of acquitted conduct does not violate due process. No clear error in court's finding by preponderance at sentencing that D caused death. One of 3 experts concluded that death of user was caused by fentanyl rather than by combination of fentanyl and cocaine, and there was substantial evidence that D supplied both fentanyl and cocaine to user. Sentence of 120 months (GSR= 51-63 mos) **not substantively unreasonable** on grounds variance functionally punished him not for his offense of conviction, but rather for his acquitted conduct. D's maximum sentence was 20 years, there was no duplication of factors accounted for by guidelines in consideration of causing death and need for deterrence was not covered by sentence for drug distribution where not all drug distribution results in death. Ten year sentence not unreasonably high where COA had found in another case that 60 month sentence was reasonable for fentanyl distribution resulting in death where initial guidelines were considerably lower there. Where court initially used some

language of **departure** analysis, but later discussed 3553(a) factors and then rested its rationale on 3553(a) variance, it counted as **variance**.

10/24/23 United States v. Colon-De Jesus, 85 F.4th 15 – **No plain procedural or substantive unreasonableness** in 24 month sentence for **supervised release** violation (GSR 18-24; govt rec 18). District court's reliance on unobjected-to PSR for conviction that was basis for violation, stating that D had cocaine seized from him at time of arrest. District court's statement that D was "dealing in" cocaine was ambiguous as between selling and using, and so any error as to that statement was not plain. For substantive unreasonableness claim, if D argues for lower sentence than was given, D need not object to preserve claim as to length of sentence. However, more specific claims that court failed to give case-specific reason and placed undue weight on seriousness of offense are not preserved by just arguing for shorter sentence. Where D did not brief plain error as to these more specific claims in his opening briefs, those claims were waived. Sentence not substantively unreasonable in length where it was within GSR, court explained, after listening to parties, that D possessed 352 rounds, a Glock that was a machine gun, and AK-47 pistol, and eleven magazines of which 4 were high capacity, engaged in conduct while on supervised release showing blatant disregard for po's instructions. D's punishment for conviction for same conduct did not show he was entitled to lighter sentence. Fact that he was on supervised release following a previous firearm conviction, and that he had tested positive for cocaine three times earlier but had not been revoked in favor of being referred for treatment, made maximum sentence a defensible result.

10/23/23 United States v. Anonymous Appellant, 85 F.4th 576 – No error in determination that AA should be **civilly committed** under 18 USC 4246(d) upon expiration of prison sentence. AA had history of violent behavior, delusional beliefs, and lack of adherence to treatment recommendations, and recent violent acts while in prison driven by delusional beliefs. Age and poor health did not diminish risk posed by his mental illness if he obtained a firearm as he said he intended. Delusions and threats are sufficient to prove dangerousness even where respondent never had opportunity to act on them. Fact that AA was incarcerated when violent acts occurred did not show lack of substantial risk of harm when free, because it is more often difficult for someone confined to commit violence than it is for one who is free.

10/16/23 United States v. Donald, 84 F.4th 59 – Important. **No valid Miranda waiver where, after invoking Miranda rights and then seeking to cooperate, D asked agents whether anything he told them could be used against him, officer said no, and D confessed.** Initiating investigation-related communications with law enforcement after asserting rights does not by itself waive Miranda rights. District Court finding that officer did not say no was **clearly erroneous in light of Court of Appeals' review of interview recording.** Valid waiver requires that D knows that government intends to use his statements to secure a conviction.

10/13/23 United States v. Buoi, 84 F.4th 31 – **Evidence sufficient for wire fraud and false statements to a financial institution.** D charged with scheme to defraud and obtain Paycheck Protection Program ("PPP") funds by filing fraudulent **PPP loan** applications with several lenders. **Sufficient evidence of intent to defraud** even if D made truthful statement to one bank not involved in wire fraud counts that he had little payroll and no tax forms. D's theory that he submitted documents as a projection of how he intended to use the proceeds of the loan did not show that evidence as a whole could not lead jury to infer that D knowingly and intentionally lied to lenders by including numerous false statements in applications and supporting documents, giving different figures to different lenders which he said covered the same period, failure to file tax forms with the IRS and backdating forms to make it appear that they had been timely filed, creation of tax forms to mislead lenders and improper use for personal purposes of PPP loans. D's claim of scant evidence of his linguistic or legal proficiency undermined by evidence presented of D's Master's Degree from US university and his choice of English as preferred language for PPP loan applications. **Sufficient evidence that, for false statements to financial institution count, D intended statements to influence bank** where, when bank asked for information about or documents pertaining to the statements, he said he had no such information or documents. Bank's awareness of fraud is irrelevant to question of whether or not D intended to influence bank. Also, additional employees of bank involved in transactions may not have been aware of statements. Ineffective assistance claims would not be addressed on appeal.

10/04/23 United States v. Quiros-Morales, 83 F.4th 79 – **Compassionate release denial** as matter of law on grounds that D did not have serious medical condition, and seriousness of drug offense with related death by murder cross-reference, **vacated** with agreement of parties. Any complex of circumstances, subject to constraints imposed by Congress or courts, may

be considered by district court as basis for compassionate release. Court of Appeals would not itself grant compassionate release where it would usurp the district court's prerogative, so remand to district court to assess motion under appropriate standard.

09/29/23 United States v. Navarro-Santisteban, 83 F.4th 44 – Important. In supervised release revocation, conceded error in considering PO's hearsay testimony over limited confrontation right without first weighing whether it was in interests of justice was harmless, but because it may have affected decision to impose upwardly variant sentence, remand for resentencing on proper record.

09/29/23 United States v. Cheveres-Morales, 83 F.4th 34 – Important. **Use at re-sentencing of D's convictions and sentences occurring after D's original sentencing to increase his guideline sentencing range was plain error.** During initial appeal, govt moved for remand, conceding that district court had erroneously both relied upon arrests and considered pending state charges that had never been included in the PSI Report in imposing an upwardly variant sentence. COA noted the two errors and remanded case "for resentencing." In the meantime, pending state charges had resulted in convictions. Second PSI included these convictions, raising CHC and elevating guidelines. District court re-sentenced, taking those convictions into account. On appeal, COA **sua sponte** requested briefing on whether the resentencing violated the **mandate rule. A court may sua sponte raise issues concerning law of the case. Mandate in this case was best understood as limited to correct errors noted, despite saying "for re-sentencing," where remands generally do not involve de novo sentencing and given the context. Plain error review even where D did not raise issue in opening appellate court where equities of institutional interest in integrity of mandate favored it and where government remand motion would lead reasonable D to expect a lower, rather than higher, sentence. Plain error found where error affected D's substantial rights by producing significantly higher guideline range, and error seriously impaired fairness and integrity of judicial proceeding where government asked COA initially to remand because district court impermissibly relied on aggravating factors, D did not object because he reasonably expected lower sentence, but then after vacating sentence, he received a higher sentence. This was akin to sandbagging and affects public legitimacy.**

09/28/23 United States v. Perez-Greaux, 83 F.4th 1 – Important. Conviction for **possession of machinegun in furtherance of drug crime vacated** and

remanded for **failure to instruct that D had to know firearm had characteristics of a machinegun.** Though 924(c)(1)(B) does not have explicit mens rea element, there is presumption that mens rea applies to elements of federal criminal statutes, and automatic character of firearm is an element. Lengthy (30 year minimum) sentence at issue indicates Congress would not have intended it to be strict liability offense. **Evidence sufficient that D possessed firearm in furtherance of drug crime** where gun was found wrapped in bags on top shelf of children's bedroom closet where it was easily accessible, cocaine was in adjoining room, and, though not necessary to uphold conviction, the firearm was accompanied by magazines and bullets. Moreover D stated that he was storing gun for a drug supplier who gave it to him, from which a jury could infer that supplier gave gun to D when he gave him cocaine, thus advancing or promoting drug trafficking. Jury also heard testimony that drug traffickers often possess firearms for protection of drug trafficking activities. **Evidence sufficient that D knew firearm was machinegun** where there was evidence that D had handled firearm that was visibly altered, that he was familiar with firearms from his possession of firearm periodicals, and that firearm was in bag with 30-round magazine. No evidentiary error in excluding as **collateral evidence** under F.R.E. 608(b) that officer who had seen D with gun from lot adjacent to D's house never got permission to be in lot. No error in admitting photos of bricks of cocaine where they were specially relevant to show intent to distribute. No prejudice from late disclosure of photos right before trial where D could but did not request continuance. **No improper closing argument** on grounds of misstating evidence where govt was inviting jury to make inference from evidence that was admitted. Failure to address plain error in opening brief waived claim concerning unobjected-to statement in closing. No error in failure to grant **Franks hearing** where D offered only **conclusory assertion** that he had never been outside his home with a firearm to attack agent's statement that he had seen D there with firearm. Flat denials of allegations do not amount to substantial preliminary showing required by Franks.

09/21/23 United States v. Melendez-Hiraldo, 82 F.4th 48 – **No procedural or substantive unreasonableness** in imposing 194 month **upwardly variant** sentence where guideline was 120 months and joint recommendation was 164 months, after guilty plea to felon in possession offense that took place during kidnaping and murder. While court has obligation to explain adequately its chosen sentence, it does not have independent obligation to

explain decision not to adopt a joint recommendation. While court's explicit explanation for upward variance was generic, reciting 3553 factors of not reflecting seriousness of offense, promoting respect for law, and protecting public from future crimes by D, court also recounted details of murder and D's part in giving revolver to person who shot victim, indicating that recommended sentence and guideline failed to account for gravity of the offense. Explanation adequate where guidelines reflected minimum sentence regardless of crime of violence involved, and here a death resulted. By arguing for shorter sentence, D preserves challenge to its substantive reasonableness. Sentence substantively reasonable based on premeditated murder, as well as D's history of committing crimes while on escape status, history of firearms offenses, and lengthy criminal record. Objections not preserved below for which **plain error was not briefed are waived**.

09/14/23 United States v. A.R., 81 F.4th 13 – No error in ordering detention for multiple carjackings rather than probation in **delinquency proceedings** under 18 USC 5031-5042. Even though court at admission hearing **incorrectly said that a substantial assistance motion from the government was required** before the court could consider juvenile's **cooperation**, at disposition hearing it did in effect take cooperation into consideration: it acknowledged reading juvenile's disposition memorandum which recounted cooperation in detail, it was aware that govt and juvenile jointly recommended probation rather than detention given the cooperation, and it acknowledged that juvenile timely accepted responsibility for offense which led to offense level being reduced. Where juvenile affirmatively agreed in district court to PSR rather than comprehensive study, issue of whether comprehensive study should have been ordered was **waived**. **No improper weight put on 3553(a)** factors in juvenile proceeding where **Federal Juvenile Delinquency Act has objectives of both rehabilitation and protecting society**. First Circuit unlike other circuits rejects view that court must select least restrictive sentence that would achieve rehabilitation. Court explicitly considered need to protect society in describing carjackings at gunpoint, and considered rehabilitation in recommendation of job placement program, vocational training, GED programs and mental health treatment, and saying that real acceptance of responsibility entailed some detention. **No substantive unreasonableness** in period of detention followed by term of juvenile delinquent supervision. Other issue agreed to by govt re: miscalculation of length of disposition ordered and error regarding

applicable statutory max under juvenile statute. **Remand** for amended judgment only was appropriate where Circuit was unpersuaded district court would have opted for less detention had it realized its mistake, because court said it intended to place juvenile in detention until his 21st birthday. **Remand** also to hear from government what the options are for juvenile's place of detention (he was placed 2000 miles from home), and for district court to make recommendation as to placement if it chose to do so (it is not required under statute).

08/31/23 United States v. Reyes-Correa, 81 F.4th 1 – Important. **Upwardly variant** statutory maximum 36-month **revocation sentence** for Grade C violations with 3-9 month guideline (parties recommendation=12mos; probation recommendation=9mos) **procedurally unreasonable for court's failure to justify.** No error in court's **ex parte receipt from probation of videos of D using synthetic cannabinoids** where they were not new information and D had notice and access to them. No error in court's asking for probation's "wording" of its nine-month sentence recommendation; moreover, any error harmless where despite probation recommendation, court imposed 36 month sentence. **Procedural reasonableness objection was preserved** where D objected to videos as a matter of procedure, said that D's violations were grade C and not equal to someone who has committed a crime, and that court failed to take into account D's mental health issues and progress in treatment. These objections implied that court's decision rested on improper grounds**. Inadequate grounds given for upward variance 400x the top of the applicable guideline range.** Generic recitation of sentencing factors insufficient. No fair inference from sentencing record supplied grounds where court merely recited facts in record and gave no particular emphasis. Statement that probation had extinguished every resource in trying to address addiction and mental health issues insufficient to show grounds for variance. Nothing in record showed how D's case differed from mine-run. Where govt and D agreed on upwardly variant 12 month sentence, unclear why that was not sufficient variance. In imposing maximum, court left no room for harsher sentences for those with higher criminal history categories and more serious violations. Case is about person with substance abuse disorder, which is not an unusual circumstance and not one inherently deserving of additional punishment. Court of Appeals did not make definitive statement that upward variance is unwarranted here; rather, because of Court of Appeals' inability to infer a reason for upwardly variant sentence

from the nature and circumstances of the offense, the failure to justify sentence was abuse of discretion. Vacated and remanded.

08/30/23 United States v. Poliero, 81 F.4th 96 – No clear error in applying 4-level **role in the offense enhancement** (USSG 3B1.1(a)). D instructed others about how and when to send, parcel out, and collect money in exchange for drugs, and recruited at least one other person to traffic drugs for organization. **No temporal requirement that D exercise control for a particular duration of time in order to qualify for enhancement**.

08/30/23 United States v. Vaquerano, 81 F.4th 86 -- In MS-13 **RICO** case, no error in imposing **use of a minor enhancement** (USSG 3B1.4) on D who was **18 years old at time of offense**. **Sentencing Commission did not exceed its authority in dropping a 21-year-old age limit for application of the enhancement that was in Congressional directive to Commission to promulgate guideline for use of minor**. Commission sent statement of reasons to Congress, saying that it promulgated guideline in somewhat broader form than in directive, thereby invoking its broad authority to promulgate guidelines. Guideline not "at odds" with directive where directive said enhancement would apply to Ds 21 years of age or older, but did not say D must be 21 or older. While Congress considered and rejected some of the other amendments proposed at the same time as the minor use amendment, it did not modify or disapprove of this amendment. Sentence of 516 months **not substantively unreasonable**. Plausible rationale where court found D played leading role in luring murder victim to site and participated in brutal murder, twice previously attempted to murder others, and energetically recruited other teenagers to join the gang. Court took into account D's age, traumatic childhood, and addiction to drugs, prompting a sentence 7 years lower than court initially considered. Length defensible as responsive to 3553(a) factors. Supreme Court precedent against life without possibility of parole for juvenile defendants not dispositive where sentence was discretionary, not mandatory. First Circuit has rejected notion that Supreme Court decision to draw line between juvenile and adult defenders at age 18 should be extended to 18-20-years age range.

08/29/23 United States v. Gutierrez, 79 F.4th 198 – In MS-13 **RICO** case, no error in imposing **use of a minor enhancement** (USSG 3B1.4). Under circuit precedent, **enhancement applicable where use of minor is reasonably foreseeable to D. (There is circuit split on issue).** No law of the circuit exception applicable. Argument that D did not affirmatively use minor

waived where raised for the first time in appellate reply brief. **No unwarranted sentencing disparity in applying use of minor enhancement** where only relevant comparator D provided who received enhancement was a minor himself, so not similarly situated.

08/28/23 United States v. Carrasco, 79 F.4th 153 – **Evidence sufficient for federal program bribery** (18 USC 666). D, attorney retained by municipalities was alleged to have taken payments in connection with awards of contracts by the municipalities. Evidence sufficient that D was **agent** of a local government on basis of contracts with three municipalities authorizing him to provide legal representation to the municipalities in Puerto Rico courts and administrative and investigative agencies. D need only be authorized to act, and not actually act to qualify as agent. Whether or not an **official act** is an element of the statute, evidence of an official act was sufficient where there was testimony by owner of consulting firm that he had contracts with the municipalities, that contracts were not awarded by bidding but instead after negotiation with municipal government, that he made payments to D in exchange for access, protection and back-watching, that he believed that D had total access to and influence over the mayors, that he understood D would in exchange for payments ensure that he received the contracts and that he understood D to be soliciting by asking for loose change in connection with receipt of the contracts. There were also checks made out by owner to D that owner testified were in connection with the contracts. No **404(b)** error in admitting evidence of other illicit but uncharged payments to D by owner where they were probative of D's **intent and modus operandi**. Evidence was not merely marginally relevant, there was not compelling, alternative evidence to use to show intent, and it is unclear how much evidence would "flood the jury" in such a way that it constituted propensity evidence. Any impropriety in admitting portions of owner's **testimony characterizing the content of interactions with D and recorded conversations with him was harmless** where it was only a part of owner's testimony, and owner's testimony was only a part of case. Testimony also included specific references to bribes and contracts; there was evidence of checks from owner to D and testimony about those checks, and there were incriminating transcripts of conversations between owner and D. No error in **obstruction enhancement** where there was recorded conversation between owner and D in which D attempted to convince owner to keep silent, invoke atty-client privilege, or lie to FBI. D counted as **public official** for purposes of enhancement under 2C1.1(a)(1) based on owner

testimony detailing D's relationships with the mayors of the municipalities, showing that D participated so substantially in government operations so as to possess de facto authority to make government decisions. No error in enhancement based upon involvement of elected public official or any public official in a high level decision-making or sensitive position (USSG 2C1.1(b)(3)) where evidence supported conclusion that D was, and that offense involved mayors of municipalities. **No unwarranted national disparity in sentence** based on **nation-wide average sentence** for bribery offenses where statistics on bribery sentences included sentences under a number of different statutes that were not the statute under which D was convicted. **No unwarranted disparity** between D's 120 month sentence and pre-trial diversion given to owner where owner cooperated and D did not. **Statutory maximum sentence (one month below lower end of calculated guideline range) not substantively unreasonable** where court stated it took into account mitigating factors of D's age and medical conditions and letters of support but noted it was not honest nor showed integrity for attorney to do what D did for five years in accepting bribes, covering up scheme or telling someone to lie about bribe scheme.

08/23/23 United States v. Falcon-Nieves, 79 F.4th 116 – Important. With government agreement, Ds' convictions **vacated for denial of motion to sever** from coD charged with fraud against Puerto Rico House of Representatives. Neither D was implicated in that fraud, there were days of evidence at trial devoted to it, much of it would not have been admissible against Ds in separate trial, and First Circuit had already vacated the conviction of another coD in the trial for the same reason. **Clear and gross injustice** in **federal program bribery** conviction where **evidence insufficient to show** that Authority for which D worked actually received federal assistance in excess of $10k for the year, which is **jurisdictional element** of charge. Even if there was evidence that a contract for sufficient amount was signed and some of the benefits were provided, no evidence requisite amount was received. **Evidence sufficient on one, but insufficient on two other honest services wire fraud convictions.** Evidence sufficient that benefits received were not "too paltry" to be evidence of an exchange for services. D received 8 to 10 meals, assistance with appointment of person D wanted in position of Authority director, invitation to closed political fundraiser with that person, and a Montblanc pen. No evidence that substantial assistance D provided to company to secure contract with Authority was standard

practice. Evidence sufficient that at the time D accepted the benefits, she understood they were in exchange for official acts regarding contract proposal where she discussed contract proposal with person providing benefits during the same time she was receiving them. Evidence sufficed to show D committed **official act** by advising official to recommend contract to Authority's leadership. Even if favorable treatment of contract proposal would benefit government Authority, where favorable treatment was given in exchange for things of value, it deprived public of D's honest services. **Evidence insufficient** that D took any action in regard to job fair that companies affiliated with alleged briber were to take part in, so evidence insufficient that she took any official act with regard to job fair. For reasons above, evidence sufficient that D **conspired to commit honest services fraud** with respect to promoting contract proposal, but insufficient for federal program bribery conspiracy and for conspiracy to commit honest services fraud with respect to job fair. Where govt charged large **overarching hub and spoke conspiracy** as involving agreement with particular other to commit all three substantive offenses, there was **prejudicial variance.** No evidence D knew of participation of alleged co-conspirator in any scheme. **Variance was prejudicial** because of **evidentiary spillover**. D was charged in large conspiracy with alleged coconspirator, and jury was presented with evidence against alleged coconspirator of conduct in which D did not participate or have knowledge of. Evidence was presented chronologically as opposed to separately against each defendant. Even if evidence sufficient so that D could be found guilty of honest fraud conspiracy with regard to contract, evidence not sufficiently ample to eliminate risk that jury based its conviction on evidence of unrelated offense. Where extensive evidence was presented against alleged coconspirator in a way that did not clearly delineate between evidence against him and evidence against D, that evidence was prejudicial to D. Evidence sufficient that D participated in honest services fraud conspiracy along with two others with respect to contract. **Evidence sufficient as to one D and insufficient as to another (sister D) for aiding and abetting extortion**. Victim complained to one D that his work payments from government Authority where sister D worked were delayed. D then demonstrated to victim by phone call that she could expedite payments, told victim that she no longer owed him payment for some work he had done for her independently, expedited all of his payments for work done for authority, and asked for percentage of those payments. Jury could find from this evidence that D intended to communicate to victim that she controlled his payments and that victim

had **reasonable fear** that D would have his payments from authority delayed, reduced or cancelled if he did not comply with requests for percentage payments and erasure of debt. Delayed, reduced or cancelled payments count as "**economic loss**". Even if it was sister D who arranged to have victim's payments expedited, **evidence insufficient** that sister D knew call was made in front of victim or that any other show of influence was made. Evidence of cash deposits made to sister D's bank account during this period insufficient to show that they came from victim. Evidence insufficient that any cash deposited came from issuance of payments from authority and were out of fear of economic loss. Evidence against sister D that she knew D was using fear of economic loss to obtain victim's property insufficient and so insufficient to show that sister D knew extortion was taking place.

08/22/23 United States v. Daniells, 79 F.4th 57– Important. In **receipt of firearm while under felony indictment** (922(n)) and **dealing in firearms without a license** (922(a)) case, receipt conviction vacated for **"willfully" instruction error**; remand for evidentiary hearing on **ineffectiveness due to actual conflict**; and **sentence vacated** for erroneous **firearms trafficking** enhancement. Massachusetts **criminal complaint** against D signed by police officer counted as being "**under indictment**" for purposes of 922(n). Evidence sufficient D knew criminal complaints against him rendered him "under indictment" where, even though he had bought guns himself before, he began using straw purchasers right after the criminal complaints; he wanted to conceal his conduct from ATF agents, which was very conduct statute prohibits (receipt of firearms); he knew about 922(n) from ATF questionnaires he earlier completed; and he was experienced in dealing in firearms on the black market and thus would be familiar with federal firearms laws. **Instruction that acting "willfully" meant acting "with the intent or bad purpose to disobey or disregard the law" and "the intent to do something the law forbids" did not adequately convey that government had to prove in this case that D knew that the conduct of receiving the firearm was unlawful at the time he received it.** Instruction permitted finding he was doing something independent of receipt that was unlawful at the time he was given it - i.e., dealing in firearms, with which he was also charged. Error not harmless beyond a reasonable doubt where there was enough circumstantial evidence to support a juror's finding that D knew that something else he was contemporaneously intending to do (deal in firearms) was forbidden by law. No **ineffective assistance** in advising D to provide name of

witness and iphone passcode to government where no showing that govt would not have obtained information otherwise, and thus no prejudice. **Error in denying evidentiary hearing on successor counsel's conflict of interest where counsel was being investigated for engaging in improper communications with witnesses, discouraging cooperation with government in D's case.** D made showing of viable tactics counsel did not undertake in suppression hearing in failing to cross prior counsel concerning passcode and failing to put on expert concerning likelihood that Apple would help unlock iphone. Successor counsel may have had incentive to pursue D's defense less vigorously in order to avoid provoking government into action against him. **Error to apply firearms trafficking enhancement** (USSG 2K2.1(b)(5)) absent showing that D transferred two or more firearms to **single recipient**.

08/22/23 United States v. Williams, 80 F.4th 85 – Important. **Maine robbery with the use of a dangerous weapon (ME Rev Stat Ann 17-A, secs 651(1)(B) & 1252(4)) is a crime of violence**. Court was permitted to look at a plea transcript to determine whether D was convicted of an indivisible offense where it did not look to the transcript to determine what mens rea was involved or what type of weapon was used. Court permitted to look to plea transcript to determine what the elements of the offense were even though plea was an **Alford** plea; there was no reliance on prosecutor's recitation of facts, as opposed to admission to elements explained by state court. District court correctly found that D was convicted of **Maine robbery with the use of a dangerous weapon** where state court asked D if he understood that government would have to prove that he used a dangerous weapon, along with the other elements of the Maine statute. **Supreme Court decisions Taylor and Borden do not undermine First Circuit precedent that MA ADW is a crime of violence.**

08/22/23 United States v. Munoz-Martinez, 79 F.4th 44 – Important. **Evidence insufficient for RICO conspiracy** where evidence insufficient that police officer D's conduct in agreeing to steal and stealing from homes while executing search warrants constituted the predicate racketeering **extortion and extortion conspiracy** charged. Extortion under Puerto Rico law requires that D compel another person to deliver property, and ordinary meaning of that phrase necessarily implies victim's **active acquiescence in consent**, even if grudgingly. Federal definition of extortion likewise requires consent. No evidence D agreed that he and alleged coconspirator agreed to induce victim to consent to deliver victim's gold chain; evidence was D told other officer to take chain and he did so, handed it to D, D

pocketed it, sold it, and split proceeds. Victim was unaware this was happening. Even a general practice of unilateral, secretive takings would not constitute extortion rather than **simple larceny** without any evidence of consent or inferred consent based on victims' awareness. No evidence likewise that D substantively extorted on another occasion where evidence was that D took victim's money from victim's kitchen cabinet after victim had been removed from room and out of sight. Evidence that victim knew money would be taken was equivocal. Victim's physical detainment not sufficient where it could not be inferred that he was aware that the money was being taken at the time and that he voluntarily abandoned control of it, and victim's objection to being removed from the kitchen reasonably interpreted as showing he did not consent to theft he suspected might occur. Fact of search warrants did not show victim consent to displacement of property. No evidence warrants purported to authorize seizure of items D stole.

08/22/23 United States v. Potter, 78 F.4th 486 – Important. Grant of **suppression affirmed**. In **traffic stop** case, **no reasonable mistake of fact** where police stopped D for failing to use turn signal and district court found that road did not require a lane change, so **New Hampshire signaling statute** did not require a signal. While traffic sign illustrated abrupt end to right lane, district court found that the sign did not resemble the actual roadway. Reliance on traffic sign in this situation was unreasonable. **No reasonable mistake of law** where government's argument depended upon the unreasonable mistake of fact.

08/21/23 United States v. Coplin-Benjamin, 79 F.4th 36 – **No procedural or substantive unreasonableness** in 262 month sentence for conspiracy to possess with intent to distribute and import cocaine. No clear error in determination that D was **organizer/leader rather than supervisor** under USSG 3B1.1 where D initiated conspiracy with idea to buy boat for buying drugs in St. Thomas to bring to Puerto Rico, directed coD to buy boats twice and gave him $30k to buy one; initiated and directed several trips; planned, met with co-conspirators, told them what to do, and gave them petty cash for food, gas and supplies; counted the money in his home with coD and paid codefendants. **Existence of another leader paying for everything and providing strategic overview of operation does not preclude finding that D also acted as leader.** Court **considered D's cooperation** even though it failed to explicitly mention it, where the court heard arguments about it and govt contended that D did not substantially assist and did not identify coconspirators by name until 3rd interview, and

court said it considered 3553(a) factors. **No unwarranted disparity** between D and coconspirators sentenced to 60 and 120 month sentences where D was organizer/leader, coDs were mere participants, and D was sentenced at low end of guideline range.

08/21/23 United States v. Andino-Rodriguez, 79 F.4th 7 – No violation of **Confrontation Clause** where D was given reasonable opportunity to impeach key cooperating witness despite not being permitted to **re-cross**. Nearly all of D's inquiries were permitted on cross-examination, many of which received responses tending to cast doubt on witness' credibility. No abuse of discretion in not permitting re-cross. Any abuse of discretion in allowing **motion to strike testimony regarding cooperating witness's gun possession** harmless beyond a reasonable doubt where D had much other impeachment material that she used in closing concerning, e.g., cooperation, favorable drug quantity stipulation, pattern of lying and minimizing role to agents. Moreover evidence against D was ample, including her presence on boat with 11 kilos of cocaine, cellphone text messages concerning that trip and earlier trip, cellphone photo of cocaine bricks and photo of D in apartment where drugs were packaged. No abuse of discretion in not permitting D to introduce showing of D's foot to contrast it with a foot shown in photo of cocaine bricks in order to contest D's knowledge of cocaine smuggling. No showing of relevance foundation where govt introduced the photo as evidence of D's participation on grounds it was on D's phone and bricks bore marks consistent with those on bricks that were on boat, and govt did not contend that D's foot was in photo. **No plain error in instructions that repeatedly grouped defendants together and did not include instruction to consider them separately** where court once referred to "a" defendant and named Ds separately, and another time referred to "each" defendant. Jury had indictment before them that laid out charges against each separately, and there were separate jury verdict forms that did not mention other defendant, and court told jury that there were two forms, one for each defendant. No controlling law obligates instruction to issue specific instruction to consider defendants separately. (Opinion says issue might have been closer call if it had been preserved.) No clear error in failing to grant D **mitigating role adjustment** (USSG 3B1.2) that had been supported by probation officer, where D stood somewhere in the middle of culpability of all CoDs in drug conspiracy, was at planning meeting, and received $7000 for drug smuggling trip. The fact that guidelines commentary directs court to consider adjustment for a defendant who is

merely paid to perform certain tasks, and that an adjustment is possible even for a defendant who performs an essential or indispensable role, does not mean that every such defendant is entitled to the adjustment.

08/16/23 United States v. Perez Soto, 80 F.4th 50 – Important. No plain error **improper closing remarks**. No **improper vouching** in saying police and DOJ had "done their duty" in investigating, solving, and bringing evidence proving D committed the crime. While **it was "serious" that prosecutor also told jury to do its duty and to find the defendant guilty**, D did not show that remark affected his substantial rights where evidence against D was strong, judge instructed jury that arguments were not evidence, and suggestion that jury should do its duty was only made in closing and was not a theme throughout trial. Even though prosecutor also made similar comments to jury that it was D's day of reckoning, it was time for justice and that members of jury were the ones in position to administer it, evidence was strong and D did not show statements led to or influenced conviction. **Warning to prosecutors not to adopt such rhetoric.** Where D in closing suggested that CI masterminded false accusation, prosecution response that it was absurd to think CI outsmarted all of the highly trained FBI agents, state troopers, and other law enforcement was **not improper vouching** that jury should believe them; rather, it was counterargument that their training would have made it implausible that CI could have fooled them. Nothing improper in saying to jury that government had presented far more than enough evidence to find beyond reasonable doubt that D committed the crimes. Prosecutor can suggest what jury should find from evidence. No impropriety in saying D was high volume seller of dangerous drugs in New Hampshire's biggest city, where fact that D was high-volume seller was inferable from amount of cash and heroin found, and Manchester is New Hampshire's largest city, the statement of which could not have prejudiced D. No error in denying **motion to suppress** drug evidence seized from home on grounds initial search predicated on warrant to search for evidence of identity theft was improper search for drug evidence. Police found container with drugs that could have contained documents for which they had proper warrant to search.

08/15/23 United States v. Sylvestre, 78 F.4th 28 – Warrant affidavit based on CI statements supported **probable cause** to search house where CI stated he had bought cocaine from D at house and CI made several controlled buys from D. **CI sufficiently reliable** where he made statement against penal interest; officers' knowledge corroborated that D was connected to house

because officer had seen him there; police had previously received complaint of drug activity there; and controlled buys corroborated statements. Though officers did not observe controlled buys in their entirety, sufficient support for probable cause that D was dealing out of house where they saw, variously, D himself meeting with the CI during 2 of the buys; D leaving house and meeting with CI at prearranged location, after which CI gave officers crack he said he received from D; D operating car and CI approaching it, after which CI gave officers crack he said he received from D; an individual leaving house and travelling to prearranged location for buy; CI entering house, then giving officers crack cocaine after exiting it. Evidence sufficient D **constructively possessed** gun found in cabinet drawer in house where there was evidence that house was D's home based on cable bill in his name at that address, statement by D that he lived there, police observations of D going in and out of address; there were prescription bottles in D's name in same cabinet drawer as gun, and D was moving toward the cabinet as he was apprehended by police. While there were 3 other people in house when D was apprehended, D was the only one directly connected by evidence to drawer in which gun was found. Moreover, constructive possession can be joint. **Upwardly variant** felon in possession sentence of 72 months **substantively reasonable** based on ground that guideline criminal history understated seriousness given recidivism and repeated firearms offenses.

08/14/23 United States v. McGlashan, 78 F.4th 1 – In Varsity Blues **wire fraud** case, obtaining college entrance ACT test, and not merely ACT score, was an **object of the fraud**, as opposed to an incidental byproduct or implementation cost. D spent $50k not only to have test scores increased, but to ensure that test would take place where proctor who would facilitate cheating would administer and access exam materials. D waived argument that test administrator was not in a fiduciary relationship for purposes of **honest services** fraud by conditional plea agreement that permitted appeal on grounds that insufficient facts supported fiduciary relationship. D on appeal argued by contrast largely as a matter of law that honest services fraud does not cover informal fiduciary relationships.

08/11/23 United States v. Diaz-Serrano, 77 F.4th 41 – Upwardly variant 240 month sentence (GSR=120; parties' agreed recommendation=210) **not procedurally or substantively unreasonable**. Court's reliance on judicially found facts not error where sentence was within statutory range for offense. No plain error reliance on mere arrests in sentencing where, though court mentioned arrests, it was not clear whether court relied on

them for sentence. No substantive unreasonableness based on **co-defendant disparity** where D, unlike co-D, was person in group who was called and given order to murder victim and participated in burning car in which victim was transported in an apparent attempt to destroy evidence that victim was in the car.

08/09/23 United States v. Gadson, 77 F.4th 16 – Important. In bank fraud, identity theft, and contempt case, no plain error in using **intended rather than actual loss** in calculating guidelines under 2B1.1 on grounds that commentary that advises using whichever loss is greater should not be followed under Kisor, since 2B1.1 is not ambiguous, and use of intended loss is not reasonable. Even if there was error, it was not clear where there was no post-Kisor precedent on issue; court outside First Circuit that found error did not suggest it was plain; and First Circuit previously had routinely applied intended loss. No clear error in **denial of three point acceptance of responsibility** where court found, and D did not contest on appeal, that D without merit had disputed his role in conspiracy and had not accepted that he was the top person. Parties agreed that **restitution should not have been ordered** for car loan on which D was current on payments at time of sentencing and which he obtained based on fraudulent income and employment documents.

08/08/23 Miller v. United States, 77 F.4th 1 – In 2255 case, **no ineffective assistance of counsel** in not seeking dismissal on **statute of limitations** grounds where statute in effect at time of D's conduct would have barred prosecution at time of indictment, but statute enacted after conduct extended statute of limitations to life of victim. No deficient performance where there was out of circuit law holding that law that **extended statute of limitations** through life of victim was retrospectively applicable, and out of circuit law generally permitting application of an extended statute of limitations when, as here, statute extending SOL was enacted in period when case would still have fallen within original statute of limitations. Counsel made strategic decision to devote limited time and effort to making compelling case for modest sentence, even if he failed. **"Nothing ventured, nothing gained" theory of deficient performance inapplicable where counsel reasonably believed that time was better spent preparing for D's sentencing**.

08/07/23 Guardado v. United States, 76 F.4th 17– Important. No error in denying 2255 on **Rehaif** grounds. Although D never served nor was sentenced to a term exceeding one year, he did not contest in the district court or in

opening brief on appeal that he pleaded guilty on several occasions and was informed that an offense to which he was pleading guilty carried a possible sentence of greater than a year. Govt may supplement record on appeal with state court records susceptible to judicial notice. D gave no reason to believe state court judges did not comply with requirement to inform him of sentence maximums. D would have been advised in state district court that all of the crimes to which he had pleaded guilty carried a possible sentence of 2.5 years in a house of corrections. **No reasonable probability then that he would have proceeded to trial had he known that the govt would have to prove that he knew he had been convicted of an offense punishable by more than a year.** While D had an extensive and well-documented mental illness history that was relevant to mens rea issue, it did not suffice to cast reasonable doubt on his knowledge of possible sentence for all of his convictions because of the extensiveness of his record spanning periods during which there was no evidence of mental illness. One of his guilty pleas was only 6 months to 1.5 years before he committed underlying offense. He would have given up acceptance of responsibility had he chosen to go to trial.

07/27/23 United States v. Santiago-Lozada, 75 F.4th 285 – Sentence that was 24 months above mandatory minimum for a 924(c) count in carjacking case **not procedurally or substantively unreasonable.** On plain error review, court did not base **upward variance** on facts already taken into account in calculating the GSR, and district court's factual findings were based on findings adopted from PSR, to which D did not object, and so were supported by the record. No substantive unreasonableness in cumulative sentence that was high end of guidelines for carjackings and upward variance for consecutive 924(c) on grounds D's case was no different than run of the mill carjacking offense. Court noted D's violent use of firearm during both carjackings, and that D in one carjacking pointed gun at victim, kidnapped him, and forced him to debit all of his money from bank while pressing firearm against his waist.

07/20/23 United States v. Rivera-Rodriguez, 75 F.4th 1 – Important. **No error in granting compassionate release based on heightened COVID-related health risks at Butner, nor in denying reconsideration of grant on grounds inmate had been vaccinated before release where D served 11 years of 20-year sentence.** Court of appeals has **jurisdiction** to review compassionate release decisions under 28 USC 1291. District court had jurisdiction to reconsider compassionate release decision, and court of appeals has jurisdiction to review reconsideration denial. No abuse of

discretion where district court denied reconsideration motion made on grounds of D's vaccination status, and arguments about his health status and the relative safety of Butner conditions, where **with due diligence these grounds could have been presented earlier**. No abuse of discretion in granting compassionate release where government arguments on appeal that D overstated conditions at Butner, that D's health conditions of obesity, hypertension and pre-diabetes did not raise Covid risks to degree necessary for release, and that rehabilitation was overstated were **not raised in initial opposition to compassionate release, but only on reconsideration**. Where government failed to request plain error review in alternative, those arguments were waived. No abuse of discretion in weighing of rehabilitation as 3553 factor where court stated that even when considering seriousness of offense, rehabilitation record combined with fact that D had served slight majority of sentence justified functional variance. Reduction not unreasonable where court modified supervised release to include three years home confinement and electronic monitoring and noted D's rehabilitation.

07/13/23 United States v. Dennison, 73 F.4th 70 – Abuse of discretion standard is applied to court's **denial of motion to dismiss on double jeopardy grounds following declaration of mistrial**. Though mistrial declared due to unavailability of prosecution witness, government was not at fault; witness tested positive for COVID in the course of testifying at trial. **Manifest necessity for mistrial** where district court's General Order forbade witness to remain in courthouse once he had tested positive. Reasonable to forego asking jurors if they would consent to continue with trial despite risk of exposure where they had been assured protections would be in place to reduce risk of exposure. No abuse of discretion in failing to order **continuance** where no certainty of what length would be required, whether everyone would be available, and whether reduced number of courtrooms could accommodate future trial. Where D did not offer to waive right to confront adverse witnesses, no error in failure to allow witness to testify by video. No error in failure to strike testimony of witness where court supportably found he was essential.

07/12/23 United States v. Ford, 73 F.4th 57 – Important. No error under Fed.R.Crim.Pr. 32(i)(3)(B) in failing to make **explicit ruling on factual dispute** about whether cache of drugs found in D's boyfriend's home was attributable to D. Issue was implicitly resolved where judge stated he had read PSR, sentencing memos, listened to each side, said PSR needed no adjustment and checked box in statement of reasons saying he had

adopted PSR without change, which had to involve rejection of D's position. No error in court's reliance on evidence supplied by the government but not included in the PSR where D did not directly challenge it or ask for more time to defend against it. No clear error in attributing cache of drugs found in D's boyfriend's home to D where D participated in conspiracy to distribute drugs with him. **Dissent** would find error in failure to resolve factual dispute.

07/11/23 United States v. Andino-Morales, 73 F.4th 24 - In **RICO conspiracy case, evidence sufficient** that NETA organization was RICO **enterprise** even though some members did not engage in drug offenses where enterprise may have both legitimate and illegitimate purposes, and NETA had formalized membership practices, traditions and hierarchical structure. Evidence of **interstate commerce** element sufficient where there was testimony that heroin and cocaine are not produced in Puerto Rico. Murder for hire counts as racketeering activity despite fact that there is no Puerto Rico statute specifically prohibiting murder for hire where Puerto Rico's general murder statute applies. While there was lack of evidence of one type of offense identified in indictment as racketeering acts, other evidence in record sufficed to satisfy pattern of racketeering element. Evidence sufficient that D participated in at least two acts of drug trafficking; fact that jury acquitted him of drug conspiracy on another count and made no drug quantity finding irrelevant where D cannot attack conviction on basis of **inconsistent verdicts**. Evidence sufficient D participated in activities of enterprise where D participated in enterprise as decisionmaker as a NETA chapter leader, even if there were discussions about replacing him. Evidence sufficient for drug conspiracy where there was evidence D participated in and helped orchestrate NETA's drug trafficking operation in a prison. Evidence sufficient Ds aided and abetted **VICAR** murder where one D paid another member of NETA organization who leveraged his authority to have a NETA member kill victim. Another D seconded the order to carry out the murder in his capacity as NETA chapter leader. No **constructive amendment** of indictment on basis of jury instructions where instructions simply departed slightly from precise wording of Puerto Rico Penal Code murder offense. No requirement of **special verdict form** for question whether D committed murder as consideration for payment from enterprise or in hopes of gaining entrance to or maintaining or increasing position in enterprise. **No procedural unreasonableness at sentencing** in finding by preponderance that D participated in murder where there was testimony that witness confronted

D on the way to the murder, and D later expressed regret to witness for murder. Other minor issues.

06/26/23 United States v. Monson, 72 F.4th 1 – Important. **Evidence sufficient** for **child exploitation jurisdictional element** where D produced pornography on one iPhone, but it was discovered on a different, later model that had not been manufactured at the time of the initial creation of the image, and neither the earlier iPhone nor evidence concerning that earlier iPhone was introduced. Because less than a year after creation of image, D uploaded it to iCloud account, then linked account to later iPhone, populated image onto later phone and continued to store it, reasonable juror could conclude D had intended at time of image creation to create subsequent copies on devices linked to his iCloud account. Evidence sufficient that later iPhone travelled in interstate commerce where agent testified that iPhone with image he examined had same identity number as a black iPhone manufactured in China, even though agent also testified phone was dark grey. D not in **custody** where, although questioning took place in building that housed police department, it was not actually in police department, and was in conference room that was open space with table and chairs and door opened out into common area of building; only two agents present during questioning (though 8 or 9 had arrived at his home to execute search warrant before he was taken away for questioning); no physical restraints put on D (though they transported him to and from interrogation place, he went voluntarily); and interrogation was one hour and conversational in tone. In addition, agents told D he was not in custody or under arrest; D was never pat-frisked and maintained his cellphone throughout questioning; questioning happened in middle of afternoon; and agents' weapons were holstered throughout. Facts that agents made clear D was focus of investigation and never said he could leave cut against conclusion that he was not in custody, but are neither determinative nor outweigh other facts. **On plain error review, where court indicated its sentence was not tethered to guidelines range, any error in calculating the guidelines did not affect D's rights or result in higher sentence than would have otherwise been imposed.**

06/16/23 United States v. Balser, 70 F.4th 613 – Important. **Automobile exception** permits search or seizure of car without a warrant where there is probable cause to believe that contraband or evidence of a crime is inside. **Collective knowledge** doctrine includes "**vertical**" cases in which law enforcement officer with information sufficient for probable cause directs

another officer without that knowledge to make an arrest. "**Horizontal**" collective knowledge cases involve pooling or aggregating information of all officers involved in investigation. Where one officer personally reviewed wiretaps showing D had placed drug order, was heading to address for transaction, had arrived and entered building, and other DEA agents told officer in real time that they observed D exit his car with backpack, then re-enter car and drive off toward northbound highway, officer possessed these facts, even if indirectly, and had probable cause to believe D had drugs in his car. Officer then directed another officer, to whom he said on basis of wire that D ordered drugs, had purchased them, and was headed north with drugs in his car, to stop D's car. **Directive to stop D was sufficient to attribute first officer's probable cause to second as vertical collective knowledge.** Additional issues re: no clear error in factual findings.

06/15/23 United States v. Fagan, 71 F.4th 12 – Important. **Reasonable suspicion** for traffic stop where, based on video, police testimony, and estimates of speed differences and distances, a reasonable officer (with a blocked view behind truck) would have believed that D, after changing lanes and passing tractor-trailer, unsafely cut it off and moved back into lane too closely in front of it. **No error in judging officer credible about his reasons for stop despite evidence of bias** where district court found and parties agreed that officer mistakenly believed that changing lanes always required signaling, and that D did not signal before he changed lanes. Independently of any prolonged detention or questioning, heroin found on D would have been **inevitably discovered,** where officer did criminal history search after stop, learned that D had been involved with illegal drugs, was driving with suspended license, and was violating bail conditions. **Denial of discovery motion into other stops performed by officer waived by conditional plea that only reserved right to challenge suppression and not discovery motion.** Vigorous **dissent** argues no reasonable suspicion where, inter alia, officer's view of D's switch back into truck's lane was blocked so he could not see how close D was to truck at the time, and truck did not react by using brakes or swerving.

06/15/23 United States v. Garcia-Nunez, 71 F.4th 1 – No error in denying **motion to withdraw guilty plea. No abuse of discretion in accepting guilty plea on grounds of lack of factual basis.** There was factual basis that D committed underlying drug offense for 924(c) charge based on box with $91 in cash, a small amount of marijuana, a scale, blue pills, ammunition, and drug ledger with names and quantities, $1778 in cash, a loaded

firearm, and two loaded cartridges found in D's bedroom closet. Possibility that the small amount of marijuana could have been for personal use not sufficient without more to demonstrate lack of factual basis for plea. Sufficient factual basis that gun was possessed in furtherance of drug crime where gun was in close proximity to large sum of money and drug ledger with names and quantities. Plea was knowing, intelligent and voluntary despite fact D did not know counsel had not obtained lab results on "leafy green substance" where counsel was informed that 924(c) charge was based on firearm being used to protect money that came from drug trafficking. District court not required to ask D to state in own words what crime he committed to show that plea was knowing and intelligent. Ineffective assistance of counsel claim not entertained on appeal where record was insufficiently developed.

06/08/23 United States v. Sheehan, 70 F.4th 36 – Important. Partial reversal of denial of motion to **suppress in child porn case.** Where search warrant authorized police to search D's home and person to seize handheld devices or cell phones for non-child porn offenses, police did not exceed scope of warrant in seizing phone held by D's wife and thereby searching her. **Prying phone from hand was not a search**, but rather a seizure that was authorized by the warrant. **No probable cause for second warrant to search devices for child porn** based on trooper description of pictures he believed to be child pornography described as consisting of "images of prepubescent penises that lacked pubic hair." Description did little more than indicate child nudity, with no detail as to focus of images, how children were positioned, or whether they were sexually provocative in any other way so as to be sufficiently "lewd". Additional facts in affidavit that D was arrested for indecent A&B on a child, and police found electronic devices in his home pursuant to search warrant, did not add evidence to establish probable cause. No evidentiary context provided to link child sexual assault to possession of child porn. "**Cursory description of images of child nudity, coupled with unconnected fact that that the defendant was charged with indecent assault and battery of a child, does not, without further elaboration and factual support, suffice to show probable cause of possession of child pornography."** Facts supporting the first warrant could not be considered in support of the second where there was **no express incorporation** of the affidavit supporting the first into the second, nor was it attached. **Good faith exception inapplicable** where second affidavit was so lacking in indicia of probable cause that reliance upon it was unreasonable – it consisted of

little more than cursory description of images on D's phone and the bare fact that D had been arrested. Officer not entitled to rely on magistrate's assurances of defective warrant's legality where she herself was responsible for warrant's defects. **No reasonable belief that first affidavit had been incorporated into second.**

06/07/23 United States v. Munera-Gomez, 70 F.4th 22 – No error in court refusing to order govt to provide **use immunity** to defense witness where govt asserted that its reason for not granting use immunity was to avoid potential obstacles to witness's prosecution on pending federal charges. First Circuit, unlike Ninth Circuit, rejects **"effective defense"** theory requiring balancing D's interest in exculpatory testimony against govt interest in withholding immunity. Case did not rise to extreme level where prosecutor only had trivial need for withholding immunity and D had overwhelming need for testimony so as to avoid a complete miscarriage of justice. Witness was already under indictment for serious charges, and D did not have overwhelming need for witness to testify that D lacked predisposition to sell drugs where D himself testified that he never sold drugs to witness. Moreover, govt had other evidence of predisposition. No error in **limiting testimony** of D's girlfriend, in support of **entrapment** defense, about things that D told her the confidential source who arranged drug deal with D told D about his living conditions, about how source's struggles had effect on D, and about D's emotional state when discussing source's struggles. Girlfriend was permitted to testify about D's demeanor, but not D's internal emotional state, of which she had **no personal knowledge**. She was not permitted to testify about what D told her he was feeling because that was **hearsay**. While girlfriend was not permitted to testify as to things of which she had no personal knowledge, she was permitted to testify as to things D told her that source said about his financial and living conditions for its effect on D's mind, as opposed to for truth of the matter. No error in denying D **safety valve** relief where court found after trial at which D testified that D did not provide completely truthful evidence nor give all of the background information about his participation in offense, and court credited govt's opposing brief, which pointed out contradictions, implausibilities, and incompleteness in testimony. No plain error improper bias in denying safety valve relief where **judge commented on D's illegal alien status and said D deserved long sentence in order to, inter alia, "deter anyone else who thinks that he can abuse our immigration laws and spread poison in our midst without serious**

consequences. It won't happen on my watch." D made no attempt to bear burden to show reasonable probability that absent error court would have imposed more favorable result.

06/05/23 United States v. Saemisch, 70 F.4th 1 – Under "turnover" **restitution** statute (18 USC 3664(n)) inmates who acquire **substantial resources** are required to apply them toward unpaid restitution obligations. Ordering D to turn over funds from unanticipated lawsuit settlement **immediately as lump-sum payment** did not impermissibly supersede provisions in restitution order that D begin restitution payments immediately in accordance with Inmate Financial Responsibility Program, which allocated 50% of D's monthly earnings from prison wages to restitution obligation. Under 18 USC 3664(m), govt may use all available and reasonable means to ensure satisfaction of restitution, in addition to enforcement of a restitution order. Court below referenced 3664(m) in its restitution order. Immediate lump sum turnover reasonable where D had prison job and 50% of his earnings could cover needs in prison, and order was in keeping with intent behind statute to ensure that windfalls received by prisoners will go to victims and that they receive prompt and full restitution. Court did not need to make findings regarding D's financial condition to order payment. Where funds from substantial resources windfall are commingled with other funds in prison account, and it is impracticable to segregate which money comes from windfall, court may order turnover of any sum of money up to the amount of substantial resources deposited into the account, so long as it is reasonable.

05/30/23 United States v. Iwuanyanwu, 69 F.4th 17 – Fraud case involving business email compromise conspiracy that operated by spoofing legitimate business email accounts and inducing employees or customers of the businesses to transfer funds to bank accounts controlled by conspirators, and in addition a romance scam conspiracy. No error in applying enhancement for **unauthorized use of a means of identification** (USSG 2B1.1(b)(11)(C)(i)) where a member of conspiracy used identity of a real person without authority to open bank account. Despite fact that common practice was to use co-conspirator real names to open bank accounts, it was **reasonably foreseeable** to D that a non-participant's name would be used in the scheme without authority because D's role in conspiracy was not a limited, middleman role, and he himself used fraudulent corporate documents. No error in applying **substantial financial hardship to victim** enhancement. (USSG 2B1.1(b)(2)(A)(iii). Victim was disabled, unable to

work, lived on fixed income of $1000/month, and scheme obtained $6000 from her in a month. She had to take out personal loans shortly thereafter to pay medical bills because she had sent conspirators all the money she had at the time.

05/26/23 United States v. Cardozo, 68 F.4th 725 – **Restitution** issues in **cyberstalking** case. On plain error review, no prejudice from any error in failure to order probation to prepare a restitution report, and failure of PSI to include substantive information about restitution, where government gave court detailed restitution accounting that probation omitted. No plain error unreliability of lawyer billing statements as evidence of loss amount where statements included dates, hourly rate, time spent, and description of work performed, which dovetailed with PSI account of victim's attempts to thwart D's harassment and threats. No requirement that statements be sworn. Any **loss awarded under 28 USC 3664** must have been **proximately caused by offense conduct**, **within reasonably foreseeable risks of harm created by D's conduct.** Attorneys' fees included in restitution order not excessive and thus unreasonable. Reasonableness of fees could not be determined by comparing fees in one unrelated cyberstalking case with another. Fees not unreasonable where D had received considerable legal assistance over two years in connection with D's ongoing harassments and threats of violence. No plain error unreasonableness in victim hiring two New York lawyers where she lived in New York before criminal proceedings were instituted in Boston; travel time expenses therefore also reasonable. No plain error unreasonableness in costs for hiring and travel for Florida attorney who lived in different city from where Florida proceedings against D for protection order would take place. **Plain error satisfied where total loss amount had accounting error amounting to over $4000 in excess of evidence for amount of attorneys' fees.**

05/25/23 United States v. Gonzalez, 68 F.4th 699 – In **compassionate release** denial, no clear error in district court's analysis of COVID risks based on D's presentation which included statements that evidence of risk of re-infection was not yet solid but that evidence at time speculatively suggested real concerns of re-infection. Court said it would be willing to reconsider its assumption that re-infection is relatively rare if D presented better evidence. Reference to BOP mitigation efforts and vaccination in footnote did not suggest court found that these were adequate to protect him from harm, but rather cumulatively reinforced conclusion that covid concerns did not rise to extraordinary and compelling circumstances.

Court was not obligated to consider covid circumstances again under 3553(a) for re-sentencing based on sentencing disparity issue. No remand for district court to consider latest developments concerning re-infection rates where there was no error in the analysis. **Where D presented his arguments to the court as two alternative arguments with two different forms of relief– one for immediate release based on COVID concerns, and another for a reduced sentence based on sentencing disparity, no error for court to consider two factors separately rather than holistically.**

05/17/23 United States v. Fitzpatrick, 67 F.4th 497 – In determining that D was **ineligible for safety valve relief** from mandatory minimum, no clear error in finding that D possessed firearm when he sold drugs to CI on a specific date. CI nearly contemporaneously and with specificity reported seeing a handgun in the door pocket of D's truck during one transaction; a later search of same color truck as in CI report turned up firearm in exact same location. Court's decision to credit CI account over D's contrary account is peculiarly in province of district court. Given that record as a whole did not undermine CI's account, no clear error in finding. No error in finding D **possessed firearm in connection with offense** where CI said that when he arrived at a garage for an arranged drug purchase from D, D was in truck, a handgun was inside the truck, and CI could see the firearm while engaged in the drug deal. Close proximity shows gun was readily available to protect D and the drugs. **Even though gun was most closely tied to drug count that did not carry mandatory minimum, where there was no dispute that the count was relevant conduct in relation to mandatory minimum drug count, D was ineligible for safety valve relief from sentence on latter count**.

05/10/23 United States v. Abdelaziz, 68 F.4th 1 – Important. Convictions vacated in college admissions bribe and fraud case. **Federal funds program bribery/theft** (18 USC 666) applies to **giving a thing of value to an organizational principal**. Parents' payments to universities to secure admissions for their children **did not constitute bribes** for purposes of **honest services fraud where payments made were to the purportedly betrayed party. Court erred in instructing that, for purposes of the mail and wire fraud statutes, admissions slots are the property of the universities.** While property may be intangible, Supreme Court guideposts for when a purported property interest is at issue are whether it falls within a dictionary definition, if it has been recognized as such in caselaw or other legal source, and if it exhibits traditional attributes of property. Given the wide range of types of admission slots, it is too broad

to say that all admissions slots are property. Admission slots cannot categorically count as property simply on the grounds that they are exclusive and have economic value; a right to accurate information before entering into a transaction would have economic value for and belong exclusively to the party engaging in the transaction, but the right to accurate information has not been held to be property. Admissions slots might be property under certain conditions, e.g., certain contractual relationships developed between the applicant and the school, but the record was undeveloped in fact and argument on this point. **Evidence insufficient to convict parent Ds of broad hub and spoke conspiracy between college admissions consultant, university officials, and numerous parents attempting to gain admission for their children into universities.** Evidence was sufficient to convict defendants of smaller conspiracy between college admissions consultant, university officials, and each defendant to gain admission for his children alone. **Insufficient evidence of agreement to common goal** among parents **or understanding of interdependence with other parents to attain goal**. Any belief about interdependence had to be a belief of the defendant's himself; other coconspirators' beliefs about interdependence were irrelevant. That defendant referred friends to admissions consultant does not show that D believed that consultant's work with friends would be beneficial to the success of D's goal to get his children admitted. **Variance prejudicial because of evidentiary spillover** where Ds' defense was that they acted in good faith, believing that the admissions consultant's services were legitimate; there was evidence that the consultant had provided some legitimate services, even possibly to one of the Ds; but there was powerful evidence of culpable intent on the part of other parents that presented a pervasive risk of prejudicing the jury's assessment of each defendant's own guilt. For example, unlike the evidence against the Ds, there was evidence that one parent knew that money he gave to the consultant went into the consultant's own pocket rather than to the universities, and that the parent tried to shield that fact from the IRS. Also, there was evidence that other parents had participated in clearly fraudulent conduct that Ds did not, including having other people take entrance tests for their children, and arranging to fake a child's learning disability. **Sheer number of alleged coconspirators (at least 15) and breadth of overarching conspiracy further substantiates evidentiary spillover. Limiting instruction insufficient to mitigate risk of spillover prejudice. The more sweeping the charged conspiracy, the higher the bar for showing error was harmless.** Federal funds bribery conviction also vacated **on**

retroactive misjoinder grounds where there was same spillover prejudice as for variance. Guilty verdict following trial did not undermine claim of prejudice where there was no discriminating verdict – i.e., jury found D guilty on all counts. **Evidence sufficient for filing false tax return** where D designated payments made to secure son's admission to college as business expenses and charitable contributions. No evidence jury convicted D of tax fraud based on charges of bribery or property fraud. **No retroactive misjoinder** on this count where strong govt evidence on count largely relied on D's own emails, and was distinct from evidence related to other parents, reducing danger of spillover prejudice. Evidence on intent strong based on emails from D asking whether admissions consultant could designate payment to him for consulting from consultant's business so D could pay from his corporate account. Any error in excluding variety of evidence meant to show D believed admissions consultant services were legitimate, or involved charitable donations, was harmless in light of jury hearing similar other evidence, low probative value, and strength of other evidence.

05/09/23 McCants v. Alves, 67 F.4th 47 – In **2254** case, no showing of **actual innocence** to avoid time bar. Petitioner went to trial on two rape charges, two unnatural and lascivious acts charges, and two unarmed robbery charges, all stemming from prolonged incident involving two roommates. He was acquitted of the rape charges, but convicted of the lascivious acts and robbery offenses. Petitioner argued that available description of evidence at 1973 trial suggested that the only issue at trial was consent; acquittals on rape charges suggested that jury found victims had consented to intercourse; jurors had incorrectly not been instructed that lack of consent was element of lascivious charges, but had they been, acquittals would have resulted on those as well. Conclusion too speculative to meet demanding standard of actual innocence claim. Petitioner bore responsibility for lengthy delay that made record of trial unavailable. Though MA statute prohibiting unnatural and lascivious acts had been found unconstitutionally vague, subsequent decisions before petitioner's conduct narrowed the statute sufficiently to survive constitutional challenge as to conviction for nonconsensual fellatio.

05/08/23 United States v. Rivera-Nazario, 68 F.4th 653 – Where court held **in absentia sentencing hearing**, no clear error in finding that D was voluntarily absent without granting a continuance and requiring additional information. D failed to comply with release conditions, developed pattern of evading legal supervision and arrest and failed to

report to probation officer dozens of times. Probation requested escalating release condition modifications – location monitoring and an arrest warrant – but these produced no results. He later absconded from 3rd party custodian home, remained at large for ten months following arrest warrant to date of sentencing, and then well after sentencing hearing. Counsel raised no explanation for D's absence. No error in applying **obstruction of justice enhancement**. No advance notice of enhancement required where D was well aware of release condition violations facts relevant to enhancement and counsel had advance warning that D would be sentenced in absentia should he fail to appear. **Willfulness** established by pattern of conduct supporting inference of voluntary absence.

05/04/23 United States v. Ruiz-Valle, 68 F.4th 741 – Important. In **supervised release revocation** case, D waived argument that imprisonment terms for separate supervised release revocations **accumulate to the statutory cap** in 18 USC 3583(e)(3). (And dicta from 1st Cir and all other circuits to decide issue hold to the contrary). D conceded below that he could be sentenced to 2 year cap. Later statements about lack of accumulation did not preserve objection because they came after concession, there was no argument developed, and could be interpreted as referring to imposition of supervised release after imprisonment. **On plain error review**, **court violated 3583(h) by imposing term of supervised release after D had accumulated terms of imprisonment on a series of revocations that together exceeded term of supervised release authorized by statute for original offense underlying all of the terms of imprisonment.**

05/02/23 United States v. Winczuk, 67 F.4th 11 – Important. **Mandatory minimum** 35-year sentence for **sexual exploitation of minor** under 18 USC 2251(e) where D has 2 prior convictions **relating to sexual exploitation of children** applies where prior convictions involve **any criminal sexual conduct involving children**. Court rejects argument that exploitation in statute only refers to child pornography because section 2251 is entitled "sexual exploitation of children" and only criminalizes conduct that involves production of child pornography.

04/19/23 United States v. Howard, 66 F.4th 33 – Important. **No traffic stop occurred** when police pulled over to the side of the road to investigate car that had crashed on highway. Trooper's arrival on scene and initial accident response, speaking with car occupants and running ID checks, was **not Terry stop** – D was not restricted by police but rather was passenger in a crashed car. D was free to not interact with police and in fact chose not to,

walking a short distance away from the scene. Police were free to ask questions and to ask for identification so long as they did not demand it. Police activation of emergency lights and arrival of 2d officer did not constitute seizure where emergency lights were for safety reasons. **Reasonable suspicion of drug activity** arose under totality of circumstances where occupants of car appeared not to know one another – one passenger provided incorrect name for another and was unable to identify 3rd beyond saying he was boyfriend of the other; all provided vague or inconsistent answers to questions about their itinerary; driver did not have valid registration and insurance; one passenger gave fake name and had outstanding warrants; D distanced herself from trooper when he arrived on scene and walked away in the snow despite 8 degree weather. Any racial bias revealed by trooper's description of D as "the Black girl who won't come next to me" did not affect credibility where D did not dispute the accuracy of anything trooper reported observing. **Presence of improper motive plays no role in suppression motion**. D **not in custody** where she initially walked around crash site freely and was invited rather than ordered to sit in trooper's car because of weather. She sat in front passenger seat and could have gotten out at any time and was unrestrained. She was patted down, but that did not give impression of formal arrest rather than to ensure officer safety. Although there were five officers present, encounter had respectful tone and was in public setting. Though D may have felt obliged to **consent to bag search** while she was seated in car, nothing about request to search bag indicated sitting in car was conditioned on it. **Facts about D's youth, below average intelligence, disability, inexperience with criminal justice system, and the fact that she was not told about right to refuse consent to search bag were not raised below and did not in any event render consent involuntary in the circumstances**.

04/14/23 United States v. Lilly, 65 F.4th 38 – **No procedural unreasonableness** at sentencing in relying on grand jury testimony that D had pointed gun at testifying witness who offered detailed testimony about the incident and the gun and identified gun from photograph. Contention that witness had lied about his relationship with D's daughter insufficient to show error in crediting witness' other statements. Court had reason to discredit D's statement that he wielded a bat, not a gun, where D had lied about his access to guns in the house.

04/14/23 United States v. Morales-Cortijo, 65 F.4th 30 – **No plain error procedural unreasonableness** in **above-guidelines sentence** or **delegation to**

probation of decision as to when D could stop mandated therapy. Court's factfinding in support of relevant conduct on which upward variance was based was well-supported by PSR, and D could not demonstrate fact-finding to the contrary. Clear or obvious error must be shown by showing that desired factual finding is the only one rationally supported by the record. Under 18 USC 3563(b)(9), court only needs to specify which treatment it is ordering, not the number or duration of treatment sessions.

04/11/23 Thompson v. United States, 64 F.4th 412 – In 2255 case, **no ineffective assistance of counsel** in failure to argue that **Maine drug trafficking conviction** was not **career offender predicate.** Conviction was 4 years before circuit caselaw holding that Maine heroin trafficking is not a career offender predicate; counsel is not ineffective for having failed to anticipate new rule of law; the existence of law on the categorical and modified categorical approach did not mean that the ruling on Maine drug law was a straightforward application; caselaw from other circuits on similar statutes was mixed. Thus, there is no argument that challenge would have been standard practice among defense counsel. Also, there were strategic risks in making speculative challenge that government might have offered more documentation on specific drugs involved, drawing focus away from mitigating factors. Counsel is not required to raise every conceivable claim. Had counsel made challenge, government would have had opportunity to submit additional documents to show conviction was not for simple heroin possession, and thus qualified as career offender. D did not argue that his conviction was for simple heroin possession. D had multiple attorneys, none of whom made argument that conviction was not a career offender predicate, which buttresses conclusion that defense counsel was not ineffective.

04/05/23 United States v. Cantwell, 64 F.4th 396 – Extortion and threats case. **Improper closing** where prosecutor used **hearsay** comments by D's girlfriend about threats **for the truth of the matter** that messages were threats when they had been admitted at trial as context for D's statements during telephone conversation with her. Under plain error review, however, no demonstration that error likely affected outcome of trial. There was other strong evidence that D intended to threaten the target of messages and that the target of D's messages reasonably perceived that D intended to threaten him, including content of D's messages to target, D's testimony regarding past conduct against target, and testimony of others that content of messages "crossed a line" in hate group community. **Instruction that provocation was not a defense to threats** was not

improperly confusing on grounds D did not present provocation as a defense but rather presented evidence as context that his messages expressed frustration rather than threat. D presented evidence that target trolled D and tried to make D angry and provoke a response, thus implying provocation. Court also provided instruction that jury could consider violent, racist, misogynistic words commonplace in hate group community to decide whether messages were mere idle and careless talk. No abuse of discretion in failing to grant **downward departure for victim provocation** where court found that much of the provocation was not attributable to the victim, rather than group to which he belonged; victim's conduct on one occasion was not provocative and victim attempted to de-escalate; and court did not require that provocative conduct be immediately before threat, as opposed to taking immediacy into consideration.

03/31/23 United States v. De Jesus-Torres, 64 F.4th 33 – Though **objections to PSI** were untimely (24 rather than 14 days after PSI issued), where neither govt not court questioned timeliness, preservation of objections was assumed. Where sentencing court disavowed any reliance on a disputed fact, even though court mentioned it, no ruling on fact was necessary. **No substantive unreasonableness** in 78 month low end guideline sentence (parties recommended 51 months). **Enhancement for dangerous weapon** applicable where co-ds used weapon during **carjackings**, and D aided and abetted use. Though court has discretion to vary downwardly in response to policy arguments, it is not required to do so. Even though court used a lot of **boilerplate language**, where it considered mitigating factors of youth, mental health condition, mental disability, first-time offender status and allocution, and it weighed them against violent nature of six carjacking crimes in which victims were led to believe their lives were threatened by a firearm, and it struck a balance contrary to parties' recommendation, result was not error for failure to appropriately consider mitigating factors. Court mentioned case-specific aggravating factor, and sentence was within GSR. **Restitution order directed to be reduced to omit payment for transmission repairs where there was no evidence of causal connection between carjacking and damage.**

03/24/23 United States v. Abraham, 63 F.4th 102 – In **sex trafficking** case, no plain error in asking jury to determine whether D was subject to **leadership role enhancement** and instructing them that they could not find that certain people were allied with D as grounds for the enhancement because of evidence that they were **coerced**, which was an element of the sex

trafficking crime. No prejudice where evidence of coercion overwhelming. Four witnesses testified to D causing drug addiction, then withholding drugs, physically attacking witnesses, threatening them and their families with death, and forcing them to look at women he had raped or beaten. Court also repeatedly said it was making no finding and jury was factfinder. Appeals Court nevertheless criticized practice of having jury find both elements of charged crimes and evidence on sentencing enhancements concurrently.

03/24/23 United States v. Minor, 63 F.4th 112 – Important. En banc opinion again vacates **924(a)(2) and 922(g)(9)** conviction for **instructional error regarding knowledge that D's assault conviction put him in category of persons convicted of misdemeanor crime of domestic violence.** Under **Rehaif**, government must prove that D knew he had been convicted of a misdemeanor crime of domestic violence. **D need not know that prior was classified as a misdemeanor crime of domestic violence;** D only has to know everything necessary to satisfy definition of "misdemeanor crime of domestic violence" under 921(a)(33)(A). Instruction given in this case failed to include requirement that prior have as an element the use or attempted use of physical force, or the threatened use of a deadly weapon. Rather, it said that D knew the conviction was for causing bodily injury or offensive physical contact to another person, eliminating the requirements of "element" and "use of force". For future guidance at retrial, **govt need not prove that D knew that his knowing possession of a gun was a crime.** It only has to prove that D knew he possessed a firearm and, at the time he possessed it, he knew he belonged to the category of persons convicted of a crime of violence. To prove that D knew he belonged to that category, govt does not need to prove that D knew his prior was labelled under federal law as a "misdemeanor crime of domestic violence." Rather, court can instruct that govt must prove that D knew at time he possessed gun that (i) he had been previously convicted of an offense that is a misdemeanor under Federal, State, or Tribal law; (ii) in order for him to have been convicted of the prior offense at a trial, the government would have had to prove beyond a reasonable doubt that he "used or attempted to use . . . physical force"; and (iii) the victim of that offense was, at the time of the offense, his "current or former spouse." If either party requests, court should explain use of physical force as intentionally, knowingly or recklessly causing bodily injury or offensive physical contact with another person. Conviction vacated and remanded rather

than acquittal entered where evidence was sufficient that D had requisite knowledge of requirement that govt prove use of force.

03/23/23 United States v. Spinks, 63 F.4th 95 – Procedural reasonableness of 115-month sentence was within scope of **appeal waiver in plea agreement** that waived right to appeal sentence that did not exceed 125 months. Waiver was not limited to substantive reasonableness. Waiver applicable even though at the time D signed plea agreement he did not know the GSR (calculation of which was basis of procedural unreasonableness claim). Knowledge of GSR was not condition of waiver, and D was told at plea that it had not been calculated and he could not withdraw plea if his sentence was more severe than that called for by GSR. No **miscarriage of justice** in enforcing waiver on grounds D did not enter plea knowingly because he did not realize he would be unable to appeal guidelines calculations. District court need not lay out what types of claims appeal waiver would bar, and court could rely on D's representations of satisfaction with counsel, review of terms of plea agreement with counsel, and understanding of those terms.

03/20/23 United States v. Santiago, 62 F.4th 639 – **Evidence sufficient for drug distribution or PWID** where there was testimony from undercover that D visited UC's home, showed him a package of fentanyl, said that he put it there, and invited UC to take it. Witness credibility is resolved against D, and there was corroboration through text messages and controlled payments. No error in failure to give **unanimity instruction** requiring finding either that D was guilty of distribution, or possession with intent to distribute. Under facts of case the offenses merged because jurors could not have found that D was guilty of possession with intent to distribute without finding him guilty of distribution. **No error in denying mistrial** on grounds government agent testified to matter defense had been told was not part of prosecution case concerning D's connection with another drug organization. Statement was isolated, it was elicited by defense, district court gave curative instructions immediately and at end of trial and struck testimony from record, and evidence against D was strong. No error in permitting UC to testify as **lay witness** where text message conversations included ambiguities due to code and other words used whose referents were unclear. D waived **Rule 16 failure to disclose expert testimony** objection by not raising it below and not addressing plain error standard on appeal. In any event, no prejudice where minimum drug weight for charge was 400 grams, prosecutor disclosed that chemist who weighed drugs initially gave net weight of 499 grams, then one chemist

who testified estimated net weight of approximately half kilogram on basis of gross weight and subtracting estimated weight of packaging, and a second chemist testified that net weight was 480 grams.

03/20/23 United States v. Flores-Nater, 62 F.4th 652 – Important. **Thirty year upwardly variant sentence substantively unreasonable.** D plead guilty to discharging firearm in furtherance of a crime of violence after having been originally charged in addition with kidnapping resulting in death, and using, carrying or discharging firearm in furtherance of a crime of violence causing murder. Guideline sentence was 120 months, and parties agreed to 25 year sentence. Defendant in his sentencing memorandum stated that 25 years was fair and just given unique case and circumstances despite being far above statutory minimum and guideline sentence. Court accepted guideline calculation, said it considered 3553(a) factors and sentencing memorandum, discussed D's background and facts of case, noted agreed recommendations, and merely said that the recommendation does not reflect the seriousness of offense, does not promote respect for the law, does not protect public from D, and does not address deterrence and punishment. Court imposed sentence that was 20 years above guidelines, yet offered no case-specific rationale. Court failed to make clear which specific facts of case motivated its decision and why those facts led to that decision.

03/10/23 United States v. Concepcion-Guliam, 62 F.4th 26 – Where D withdrew his suppression motion before trial, he waived his 4th Amendment claim. No state of mind testimony by detective who testified only to actions of D in approaching 2d floor storage unit whose door had not been previously left open by detectives and had been under continuous surveillance. **Evidence sufficient that D intended to possess fentanyl found in storage unit and took substantial step toward it** where police seized fentanyl and paraphernalia from unit, left copy of search warrant on top of storage bin where anyone entering it would see it immediately, closed unit and began surveillance. Three hours later, D entered storage facility, parked car next to entrance leading to where unit was located, went through door and less than 20 seconds later ran back to his car. After his arrest, police found door to storage unit open. Evidence sufficient that D intended to distribute based on testimony that D was courier, and quantity and packaging of fentanyl was consistent with distribution. Inferences strengthened by D's attempt to flee, crashing into police cruiser. **No plain procedural unreasonableness in D's sentence** on grounds of faulty explanation for sentence where court gave grounds for downwardly

variant sentence by saying that conduct was not a mistake and D had been selling vast quantity of drugs for over a year, and noting mitigating factors that D was good family man whose separation from daughter would be terrible. No unwarranted disparity where prosecutor without objection told court that co-D had not been charged with same conduct, but rather conduct involving different drugs at different times. Downwardly variant sentence of 108 months for attempted PWID 400 grams of fentanyl **not substantively unreasonable** given danger of fentanyl and evidence D had been selling it for over a year in vast quantities.

03/10/23 United States v. Teixeira, 62 F.4th 10 – Important. **Plain error did not apply** where, in revocation proceeding, unanticipated issue arose during court's pronouncement of bench decision on revocation, and court immediately went on to sentence to be imposed. **D did not have fair opportunity to object**. **Court did not assume role of witness or advocate in using its own knowledge of firearms to assess testimony of ATF agent** that videos of D appeared to contain firearms that were different from prop guns that D contended were in the videos. **No 6th Amend. right to confront witnesses in revocation proceedings. Third-party statement falling within hearsay exception need not be subjected to balancing under Rule 32.1 before its admission in a revocation hearing.** Text messages between D and alleged co-conspirator were not hearsay where they were either statements of party opponent or admitted for context rather than for truth of matter. Assuming that court did not perform required 32.1 balancing for other third-party hearsay statements, any error was harmless where statements had compelling indicia of reliability as statements against interest because they implicated speaker in illegal arms trafficking and were made to federal agent, and they were consistent with other evidence. Moreover, reason for not calling declarant as live witness obvious where witness was in Ohio and was cooperating with government in an arms-trafficking investigation. Nevertheless, court of appeals urges district courts to undertake the required 32.1 balancing. No clear error in court finding that weapons in videos were real firearms based on ATF testimony that their characteristics were those of real guns. Government's failure to introduce firearms depicted in videos did not render district court's decision erroneous.

03/10/23 United States v. Thompson, 62 F.4th 37 – Important. Appeal dismissed where **waiver of appeal rights** in plea agreement was found valid. No requirement that district court read appeal waiver to D or that D have plea

agreement in front of him during plea hearing for its validity. Court's mistaken assertion that D could appeal denial of motion to suppress was quickly corrected. Court's statement that D had "waived any right to appeal anything in most circumstances" was **not so confusing as to render waiver invalid**, where it was correct because "miscarriage of justice" exception applies to appellate waivers, and it did not mislead D into thinking he could appeal sentencing enhancements. There was colloquy with court in which court explicitly told D he could only challenge enhancements before the district court. Court also explicitly told D that sentence imposed was below guidelines and therefore he waived his right to appeal, and counsel when asked had no further objections. **No miscarriage of justice in enforcing waiver on grounds gun serial number obliteration enhancement (USSG 2K2.1(b)(4)(B)) violates Second Amendment.** Any potential error is not egregious where law of constitutionality of gun enhancements under **Bruen** is unclear: law is rapidly developing; there are no decisions as of yet on this sentencing enhancement guideline; and district court cases on similar statute prohibiting possession of firearm with obliterated serial number are split on constitutionality of statute after **Bruen.**

02/28/23 United States v. Munoz-Fontanez, 61 F.4th 212 – Important. On plain error review, court's **failure to explain reason for upwardly variant sentence was error.** Sentence was almost 2 and ½ times the GSR, and 2 years longer than top end of recommended sentence range in plea agreement. Court merely recounted facts of arrest, noted D's age, education level, employment history, and prior drug use, the parties' sentencing recommendations, and then said it found that the agreed sentencing recommendations "do not reflect seriousness of the offense, do not promote respect for the law, do not protect the public from further crimes [by D], and do not address the issues of deterrence and punishment. Even though government focused in its argument on destructive nature of weapon D possessed in connection with drug crime, and number of firearms and amount of ammunition, Court of Appeals would not infer explanation from what parties argued where district court did not emphasize any particular fact in its mere recounting of facts of the offense.

02/23/23 United States v. Tucker, 61 F.4th 194 – No error in denying motion for mistrial on grounds of **jury taint.** Though court said there was no "**manifest necessity**" for mistrial, and that standard does not apply when defense is requesting mistrial, defendant himself below proposed that standard, so he waived issue. Moreover, trial court did not rely solely on

standard. It found that there was no misconduct by jurors who had made comments, applied corrective measures of dismissing two jurors who had made comments "out of an abundance of caution", and determined that remaining jurors were not influenced by comments of the dismissed jurors. Reported juror misconduct - comments about lawyers or pace of trial -was minimal. No error in denying motion for new trial for **failure to disclose impeachment evidence** that witness had pretrial arrest on state charge and was possibly going to be prosecuted federally. While evidence was not merely collateral, it was not particularly strong where jury heard testimony that witness had a pending felony charge and D had opportunity to explore that during cross (but failed to do so); evidence of motive to please government by testifying was cumulative where D knew that witness had immunity agreement with government; and witness testimony was sufficiently corroborated by other witnesses' testimony, even if not as detailed. Thus no reasonable probability of a different outcome had govt produced impeachment information before or during trial.

02/23/23 United States v. Akoto, 61 F.4th 36 - **Aggravated ID theft** and **wire fraud** case. Court of Appeals would not take up **ineffective assistance of counsel** claim for failure to pursue **statute of limitations** defense for aggravated ID theft count where factual development was required to assess viability of defense. No plain error **constructive amendment** of substantive wire fraud counts where D was charged with both conspiracy and substantive counts, court instructions on elements of wire fraud included as examples of interstate wire communications both the electronic filing of tax returns and email transmissions, but only email transmissions were the basis of substantive wire fraud counts. Court instructed that substantive counts were based on certain writings and described the specific emails charged in the indictment on those counts, then provided more general definition applicable to conspiracy. No error in calculating **loss** amount by matching personal identification information found in co-conspirators' email accounts with fraudulent tax returns requesting refunds sent to IRS, even though PII may also have been sold to people outside the conspiracy who also may have filed fraudulent returns. Strong evidence of D's culpability in simple fact that conspiracy possessed the PII, the PII possessed by the conspiracy was a small fraction of the inventory kept by person who sold it, confined to specific years for which false returns were filed, and D specifically requested new information that would work for scheme to fraudulently

get tax refunds. Lesser loss amount for co-d reflected narrower universe of emails associated with him, and D's deeper involvement in conspiracy.

02/10/23 United States v. Portell-Marquez, 59 F.4th 533 – **No procedural or substantive unreasonableness** in supervised release revocation sentence imposed on remand identical to that originally imposed. D appealed initial sentence on grounds court erroneously classified violation as Grade A where it should have been Grade B. Court of Appeals vacated, and District Court upwardly varied to same sentence as originally imposed. D admitted to domestic violence allegations in a probation officer's motion identifying violations of supervised release conditions. District court may take such admissions as demonstrating reliably that conduct occurred. Any improper reliance on untranslated complaint written in Spanish harmless where it would be cumulative of probation officer report of allegations.

02/03/23 United States v. John, 59 F.4th 44 – **No objectively reasonable expectation of privacy** in case left in apartment in which D did not have permission to be and did not have permission to store case. No reasonable expectation that apartment owner would not open unlocked case, especially where she feared it might pose danger, and D was trespasser.

01/30/23 United States v. Pina-Nieves, 59 F.4th 9 – Important. **Evidence insufficient for possession of machinegun** (18 USC 922(o)) where, while evidence was sufficient to show that D constructively possessed gun that had been modified to have characteristics of machinegun in a home that he owned, evidence insufficient that he knew it had characteristics of machinegun because he did not live at that house, others lived there, there was no evidence concerning when the gun was modified, nor that he had been in the home at any point after its purchase, or that he had been told it had been modified. On **felon in possession** conviction, it was **hearsay error** to admit at trial defense counsel sentence from a motion to dismiss for government misconduct that "Just the fact that the government learned that the defendant was resigned to the fact that he would have to spend time in prison is a tremendous advantage to have in plea negotiation." In context, sentence was **not a statement** under Rule 801(d)(2)(c) and 801(d)(2)(D), but rather a legal argument about prejudice that would follow if the government had learned a fact about D's state of mind through misconduct, without actually asserting a fact that government had learned of any fact about his state of mind. **Error under R 401** to exclude testimony of D's realtor pertaining to the distance D lived

from the house where guns were located and that he had residences outside of Puerto Rico, bolstering contention that he lacked intention to exercise dominion and control over weapons. Despite stress prosecution placed on erroneously admitted hearsay, it was highly probable that errors singly or cumulatively did not affect verdict where evidence was overwhelming in light of telephone conversations D had concerning what to do with "my guns".

01/26/23 United States v. Nieves-Melendez, 58 F.4th 569 – No error in **denying motion to withdraw guilty plea** where motion was made 6 months after guilty plea, after unfavorable PSR was issued; while D made claims of innocence, they were not sufficiently credible where contradicted by his statements at plea hearing, and corroboration not credible. D fully advised through plea agreement and at plea hearing that he could receive higher sentence than that contemplated by the plea agreement and its guideline calculations. No requirement that D be advised specifically that drug quantity calculations at sentencing may differ from those given in agreement or at plea. D **forfeited argument** that drugs found in apartment where he was staying but not in his room could not be attributed to him as **relevant conduct** by stating in sentencing memorandum and formal objection to PSR only that the court was not obligated to factor in apartment-wide quantity. Even though D argued orally at hearing that drug quantity was incorrect, he did not argue on appeal that this preserved a relevant conduct objection. No clear error in attributing apartment-wide drugs to D, where, though he consistently stated he was only temporary visitor to apartment, there was ammunition, plastic bags, vials and weight scales both in his room and throughout apartment, and while D's contention that he was a mere visitor would contradict finding him responsible for any amount of drugs, D nevertheless did not challenge factual basis for amount to which he pleaded guilty.

01/26/23 United States v. Ochoa, 58 F.4th 556 – No error in holding D **jointly and severally liable for full amount of restitution in fraud conspiracy.** Even though D received smaller share of proceeds of scheme**,** D had instrumental role in conspiracy, taking advantage of his position as lawyer to entice victims to entrust him with his money, drafted agreements to facilitate scheme, took in the funds, falsely promised to hold them in escrow, and disbursed funds to self and co-conspirators. **Where D is convicted as member of wire-fraud conspiracy, district court may order him to reimburse victims of scheme, jointly and severally with his co-**

conspirators, for all reasonably foreseeable losses engendered by the scheme.

01/26/23 United States v. Ramos-Carreras, 59 F.4th 1 – Important. **Plain error** in imposing upwardly variant sentence in supervised release revocation where court, immediately before imposition, recited **allegations not in record before district court**. Record consisted of documents from probation or allegations admitted to in court, none of which indicated D admitted to misconduct as egregious as that in allegations. While court may consult with probation officer, if officer discloses new facts, they must be disclosed to defense. D did not preserve issue merely by stating that sentence was procedurally and substantively unreasonable.

01/26/23 United States v. Gonzalez-Andino, 58 F.4th 563 – No **plain error procedural unreasonableness** in failure to explicitly tie D's conduct to amount of various drugs in PSR or relying on PSR drug quantity. D failed to object to PSR findings, and objection lodged that D only pled to marijuana did not sufficiently alert court to objections. D waived argument on appeal by not attempting to meet plain error standard. In any event, no clear error in district court where court found D responsible for drugs other than marijuana as relevant conduct as common scheme or plan where D stated at sentencing he was an addict and was at apartment stash house because it would allow him to consume drugs in exchange for being lookout, and where police found drugs, paraphernalia, cash guns and ammunition in same apartment, suggesting larger drug trafficking enterprise. While it is better practice for court to **explicitly state drug quantity attribution**, no error where court stated D was arrested with three others just before describing items found in D's vicinity, showing court factored in everything in the context of his vicinity and arrest.

01/24/23 United States v. Boudreau, 58 F.4th 26 – **Waiver of appeal in plea agreement valid** even though court failed to tell D that he did not have right to withdraw plea, in violation of Rule 11(c)(3)(B), since any such error has no bearing on whether D was adequately informed of right to appeal conviction and sentence. Where D was represented by counsel, said he was satisfied with representation, and was given opportunity to consult during plea hearing, he did not carry burden to establish he did not enter into plea knowingly and intelligently. **No plain error miscarriage of justice in enforcement of waiver of appeal** on grounds that D, in his lifetime supervised release, was subject to conditions that his home could be searched without reasonable suspicion, that he be

restricted from accessing devices capable of connecting to the internet, and that he was restricted from contact with children under the age of 18. No precedent gives basis for concluding any error was clear or obvious, where various courts have upheld these conditions.

01/23/23 United States v. Jackson, 58 F.4th 541 – **Evidence sufficient for felon in possession convictions** where **D was identified in court** as the perpetrator of the charged offenses both when witness answered question about whether D was heavier or thinner than at time witness saw D, and witness replied he was thinner today, and testified that D was depicted in surveillance footage; moreover, both prosecution and defense referred to "defendant at trial" as person involved in alleged events, with no objection from defense to reference to person in courtroom at trial as "defendant". No error in admitting **interstate commerce expert** testimony on grounds expert did not specify which reference materials he consulted as to each gun in order to determine whether they travelled in interstate commerce. District court supportably found expert testimony was based entirely on facts or data reasonably relied on by experts in field. **No error in failure to dismiss indictment for government misconduct** in permitting false testimony concerning status of one alleged prior conviction **during grand jury proceedings** where D could not show prejudice. Witness testified that D had multiple felony convictions that could serve as predicate offense. Record did not support government intentionally sought to have grand jury draw negative inference from D's invocation of rights by saying that he stopped cooperating.

01/19/23 United States v. Bishoff, 58 F.4th 18 – No error in **firearm trafficking enhancement** (USSG 2K2.1(b)(5)), which requires transfer of two or more guns while having reason to believe at least one would be possessed, used or disposed of unlawfully where evidence was D and undercover discussed lack of serial numbers on guns several times, sales were conducted in clandestine locations and D and UC briefly discussed drugs. No error in **possession of firearm in connection with another felony enhancement** (USSG 2K2.1(b)(6)(B)) where there was testimony that D gave drugs in exchange for assembling the guns. **No unwarranted disparity** between D and co-D where co-D charged with different offenses, court could not have explained differences because co-D was sentenced 5 months before D, and co-D cooperated immediately and negotiated a plea agreement whereas D entered straight plea without cooperation.

01/09/23 United States v. Qin, 57 F.4th 343 – No 4th Amendment violation in **warrantless, non-routine border search** of D's computers where agents had reasonable suspicion that they contained evidence of violation of export laws. From prior investigation, agents had evidence including that D expressed interest in using a front company to purchase items without export license, had asked undercover not to disclose items were to be sold in China, that D's company included clients to whom US restricted exports, that he expressed interest in exporting products that required export licenses and products that could not be exported, that he filed documents misrepresenting who end users of products were, and asked U.S. seller not to disclose end user of a product. When questioned at airport, agents reasonably believed that D misrepresented scope of what kind of products he exported. Search of computers constituted a border search even though **duration** was 60 days where court found length justified by amount of data, language barriers and encrypted files. Scope of search not too broad in using keywords for general business records, financial documents, etc., given nature of suspected criminal activities.

01/09/23 United States v. Melendez-Rosado, 57 F.4th 32 – Important. **Stash house enhancement** (USSG 2D1.1(b)(12)) applicable **even where dwelling is both residence of D and family and place where drug-distribution regularly occurs**. A premises that principally serves as a family residence may also principally serve as a site for manufacturing or distribution of a controlled substance. No clear error in finding that drug distribution was one principal use where there was large variety and quantity of drugs, drug paraphernalia, cash, tools of trade, defendant admission that he owned full inventory in apartment, possessed firearm in furtherance, and ran drug point; and there was surveillance of 3 sales over 2 days from apartment. Claim of criminal history error not resolved because harmless where it played no role in criminal history category or guideline sentencing range, and record showed it was harmless where court did not allude to subject disposition in explicating sentence (though it did mention it to explain criminal history category). Bottom of guideline range sentence, above recommendation of both parties, **not substantively unreasonable** where court stated recommendation did not reflect seriousness where drugs and loaded firearm were in child's bedroom.