

# EIGHTH CIRCUIT CASE LAW UPDATE

(MAY 2025)



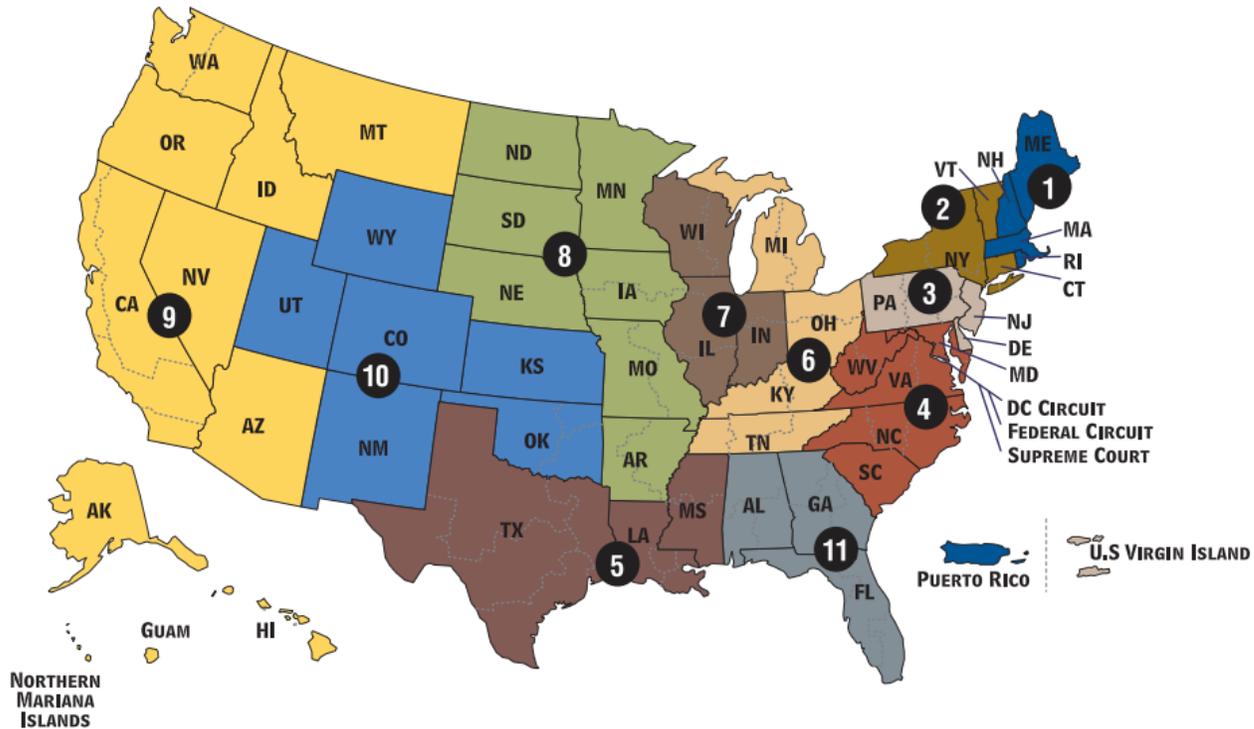
Nova D. Janssen

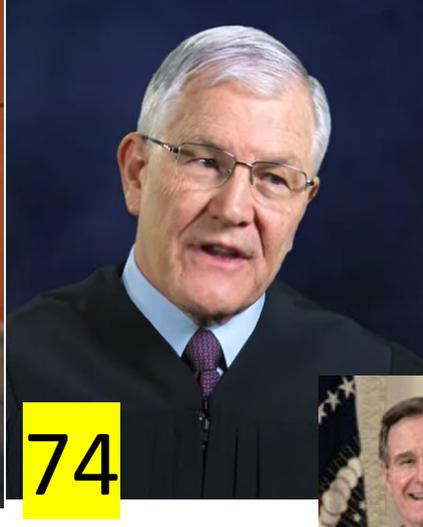
Assistant Federal Public Defender, Chief of Training and CJA Resource Counsel  
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# Federal Court

## Geographic Boundaries

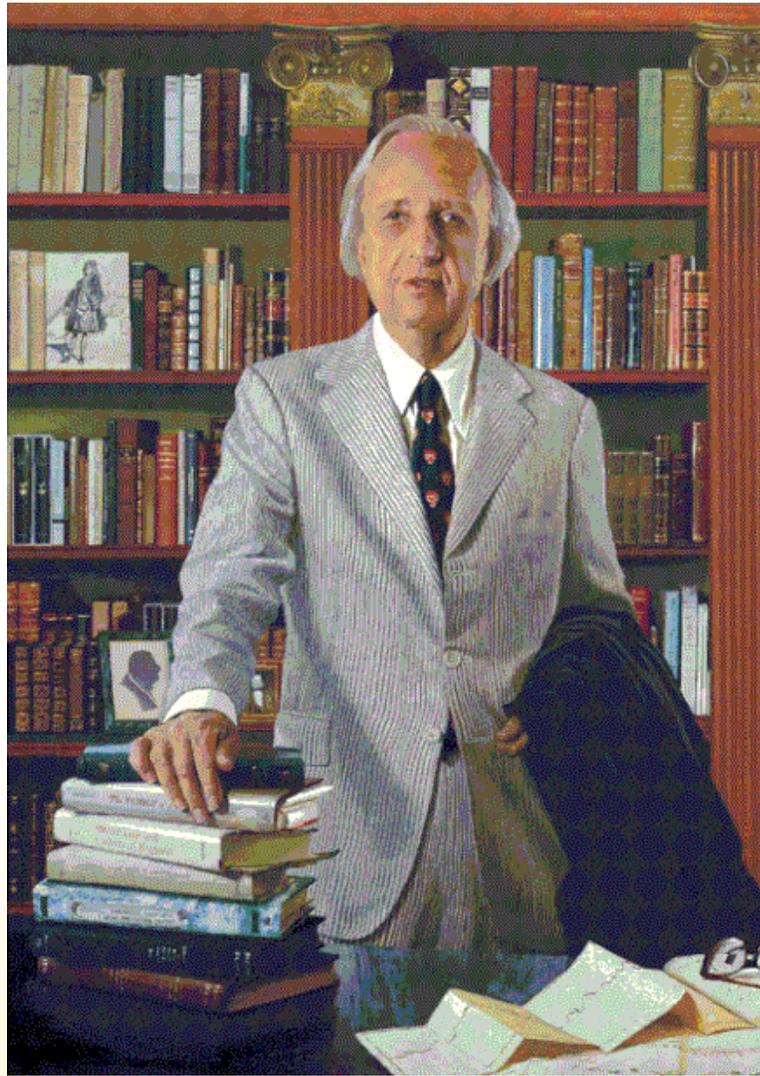
of United States Courts of Appeals and United States District Courts





# Active 8<sup>th</sup> Circuit Judges





83

Senior 8<sup>th</sup> Circuit Judge





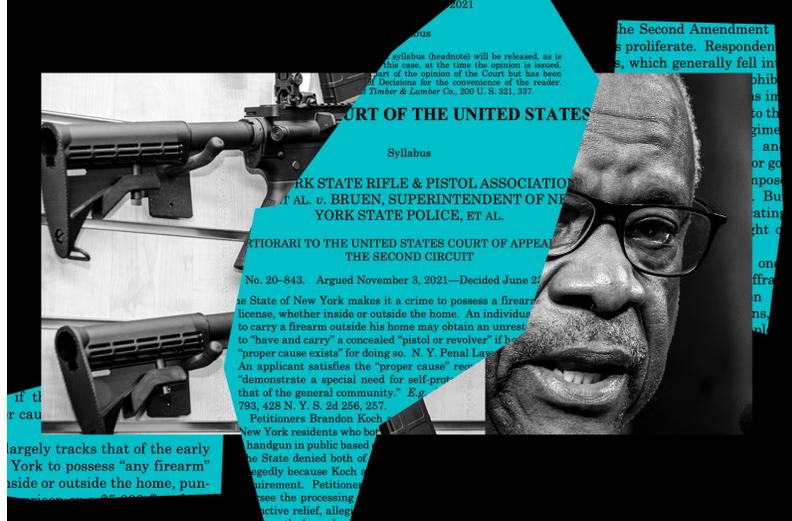
# 2d Amend

*New York State Rifle Ass'n Inc. v. Bruen*,  
142 S.Ct. 2111 (June 23, 2022)

2<sup>nd</sup> & 14<sup>th</sup> Amendments protect right to keep and bear firearms outside the home for ordinary purposes of self-defense.

Test :

- 1) Does 2A's plain text cover the person's conduct?
- 2) If yes, gov't must show regulation is consistent w/ historical understanding of the 2d Amend.



# § 922 (g)(1)

## *US v. Jackson (Jackson I)*

69 F.4<sup>th</sup> 495 (8<sup>th</sup> Cir. June 2, 2023)

SC in *Heller* said nothing in its recognition of an individual right to keep and bear arms “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.” In *Bruen*, SC reaffirmed the right is “subject to certain reasonable, well-defined restrictions.”

“Given these assurances . . . and the history that supports them, we conclude that there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1).”



"I swear, I didn't know it was a felony to squeeze the fresh fruit in a grocery store."

# § 922(g)(1)

*US v. Cunningham,*

70 F.4<sup>th</sup> 502 (8<sup>th</sup> Cir. June 13, 2023)



§ 922(g)(1) conviction is constitutional and consistent w/  
longstanding law

- priors: Illinois DUI & a subsequent federal § 922(g)(1)

*Judge Stras:*

“I dissent. More to come.” *See U.S. v. Jackson.*

# Reh'g Denied



*US v. Jackson (Jackson I)*,  
85 F.4<sup>th</sup> 468 (8<sup>th</sup> Cir. Aug. 30, 2023)

Colloton concurs: “The dissent misconstrues a trailing footnote. . . the panel opinion faithfully applied the *Bruen* framework . . . .”

Stras dissents, (w/ Erickson, Grasz, Kobes): “By cutting off as-applied challenges to the federal statute, *Jackson & Cunningham* give “second-class” treatment to the second amendment. Even worse, they create a group of second-class citizens: felons who, for the rest of their lives, cannot touch a firearm, no matter the crime they committed or how long ago it happened. I dissent from the decision to deny reh’g en banc.”



## § 922(g)(1)

*US v. Cameron,*

99 F.4<sup>th</sup> 432 (8<sup>th</sup> Cir. Apr. 18, 2024)

18 U.S.C. § 922(g)(1) conviction based on *ammunition* not unconstitutional as applied.

The right to possess a firearm implies a corresponding right to possess ammunition & *Bruen* does not distinguish between the two.

*Jackson* controls.

# § 922(g)(3)

*US v. Veasley,*

98 F.4<sup>th</sup> 906 (8<sup>th</sup> Cir. Apr. 17, 2024)



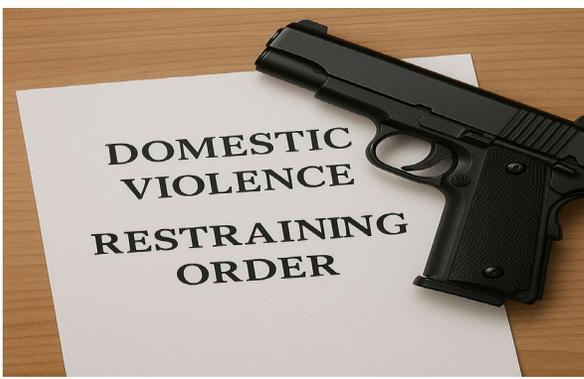
*Seay*, 620 F.3d 919 (8<sup>th</sup> 2010) establishes § 922(g)(3) facially con'l.

“But we add to its analysis by doing the historical work and ‘analogical reasoning’ that *Bruen* requires. What it tells us is that, for *some* drug users, § 922(g)(3) is ‘analogous enough to pass constitutional muster.’ Whether it is for others is a question for another day.”

*Compare: US v. Daniel*, 77 F.4<sup>th</sup> 337 (5<sup>th</sup> Cir. 2023) (§(g)(3) uncon'l as applied)



**SECOND  
AMENDMENT:  
AN EXCITING NEW SEASON**



# § 922(g)(8)

*US v. Rahimi*

602 U.S. 680 (June 21, 2024)

*Bruen* Test :

- 1) Does 2A's plain text cover the person's conduct?
- 2) If yes, is regulation is consistent w/ historical understanding of the 2d Amend.

Consistent w/ historical understanding *means* **“‘relevantly similar’ to laws that our tradition is understood to permit.”**

- “appl[y] faithfully the balance struck by the founding generation to modern circumstances”
- focus on “purpose of the regulation and the burden that it places on the 2d Amend right to bear arms.”

# 2d Amend

## *Worth v. Jacobson*

108 F.4th 677 (8th Cir. July 16, 2024)

Gov't failed to carry burden to show that restricting the right of 18–20 year olds to bear handguns in public is consistent with the nation's historical tradition of firearms regulation.



# § 922(g)(1)

## *US v. Jackson (Jackson II)*

110 F.4th 1120 (8th Cir. August 8, 2024)

(vacating *Jackson I*)



“We conclude that legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms. Whether those actions are best characterized as restrictions on persons who deviated from legal norms or persons who presented an unacceptable risk of dangerousness, Congress acted within the historical tradition when it enacted § 922(g)(1) and the prohibition on possession of firearms by felons.”

# § 922(g)(1)

*US v. Jackson (rehearing denial)*

121 F.4th 656 (8th Cir. Nov. 5, 2024)

“I have no special affection for felons either, but the Second Amendment does not care. It says what it says, and so do the Supreme Court decisions interpreting it.”

*Judge Stras*, dissenting from denial of reh’g  
(joined by Erickson, Grasz, and Kobes)



# § 922(g)(3)

*US v. Cooper*, 127 F.4<sup>th</sup> 1092 (8th Cir. Feb. 5, 2025)



*Veasley*: Can keeping firearms from drug users violate the 2d Amend?

YES

- ✓ Individualized assessment
- ✓ Historic analogues: confine mentally ill; take up arms to terrify people
- ✓ Relevant questions:
  - 1) Did using MJ cause D to act like someone who is both mentally ill & dangerous;
  - 2) Did D induce terror or pose a credible threat to the safety of others

“Unless one answer is yes—or the government identifies a new analogue we missed—[the] prosecut[ion] is . . . [in]consistent with this Nation’s historical tradition of firearm regulation.”

“Individual self-defense is ‘the central component’ of the 2d Amend right,’ not an exception to it.”

# § 922(g)(3)

*US v. Deng*

104 F.4th 1052 (8th Cir. June 20, 2024)

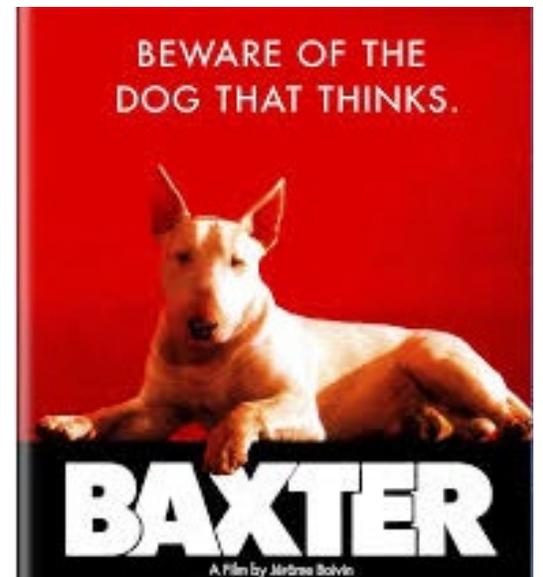
Unconditional guilty plea waives vagueness and as-applied Second Amendment constitutional challenges.



# § 922(g)(3)

## *US v. Baxter*

127 F.4<sup>th</sup> 1087 (8th Cir. Feb. 5, 2025)



Fed. R. Crim P. 12 may allow pretrial resolution of § 922(g)(3) as-applied challenges if:

- 1) relevant factual evidence agreed to by the parties; or
- 2) court finds it can decide the legal issues w/o making any factual findings.

Conditional plea preserves *denied* motions.

Can consider evidence beyond pleadings to make record factual findings.

# § 922(g)(3)

*US v. Grubb*

--- F.4th ---- 2025 WL 1154495 (8th Cir. Apr. 21, 2025)



Gov't might have to establish additional facts beyond the elements to defeat an as-applied constitutional challenge.

If evidence inadmissible at trial, court can use mechanisms to hear such needed evidence outside the jury or separate from the charge.

R.12 only appropriate if “trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.”

# § 922(g)(3)

*US v. Loftin*

--- F.4th ---- 2025 WL 1154493

(8th Cir. Apr. 21, 2025)



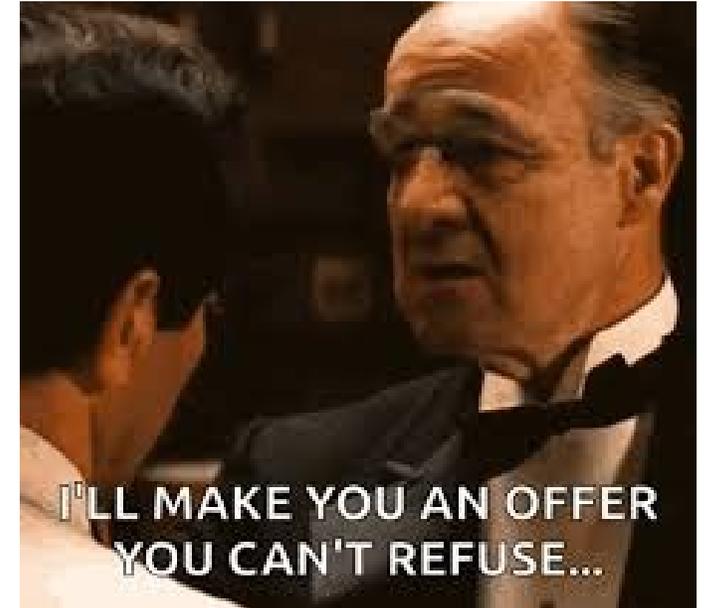
Conditional plea does not preserve *delayed* Fed. R. Crim. P. 12 decisions.

A defendant who pleads guilty conditionally “is not allowed to take an appeal on a matter which can only be fully developed by proceeding to trial.”

# Related concept

## *US v. Whitworth*

107 F.4th 817 (8th Cir. July 11, 2024)



A defendant who declines a court’s invitation to strike objectionable testimony or otherwise provide a limiting instruction effectively “waives his right to appeal the denial of his motion for a mistrial as to any prejudice that would have been cured by such an instruction.”

# § 922(g)(3)

*US v. Madden*

--- F.4th ---- 2025 WL 1199346

(8th Cir. Apr. 25, 2025)



“Because the term ‘unlawful user’ ‘runs the risk of being unconstitutionally vague,’ we interpret it to ‘*require a temporal nexus*’ between the gun possession and regular drug use.”

5<sup>th</sup> Amend. void-for-vagueness challenge fails but leaves door open for as-applied challenges.

# § 922 Collateral Attack

*US v. Williams*

131 F.4th 652 (8th Cir. Mar. 18, 2025)



Challenge to a felony predicate for a § 922(g)(1) conviction must be raised “through an appropriate pleading in a court possessing jurisdiction over the parties and the case.”

Cannot raise “invalidity” claim for first time in federal criminal prosecution.

**UPDATED**

*US v. McCoy,*

**55 F.4th 658 (8<sup>th</sup> Cir. Dec. 15, 2022)**

It was  
Good  
while it  
Lasted

“Sexually explicit conduct” for purposes of § 2251(a) requires  
“lascivious exhibition of the genitals, anus, or public area of any  
person.”

“Lascivious exhibition” = more than mere nudity.

Images must be designed to elicit sexual response in objective viewer.

**VACATED MARCH 10, 2023; EN BANC argued Sept. 19, 2023**

# En banc

*US v. McCoy,*

108 F.4<sup>th</sup> 639 (8<sup>th</sup> Cir. July 15, 2024)



Issue not whether images intended to appeal to D’s sexual interests, but whether they appear to be of a sexual character on their face.

Relevant factor: if images are “intended to elicit a sexual response in the viewer,” or if “their purpose appears to be to elicit a sexual response from the viewer.”

“[E]ven images of children acting innocently can be considered lascivious if they are intended to be sexual.” A minor need not subjectively intend to elicit a sexual response or express sexual desire: “The ‘lascivious exhibition’ is not the work of the child, whose innocence is not in question, but of the producer or editor of the video.” Whether the materials depict a lascivious exhibition is a question of fact for the jury.



**SUPPRESSIONS**

# Detention/Terry Stop

*US v. McMillion*

101 F.4th 573 (8th Cir. May, 13, 2024)



Even if all of a defendant’s conduct is “itself lawful,” reasonable suspicion may still exist when the conduct is ambiguous and susceptible to both an innocent explanation and a criminal one.

“[O]fficers [can] detain the individuals to resolve the ambiguity.”

# Of note: *Curtilage*

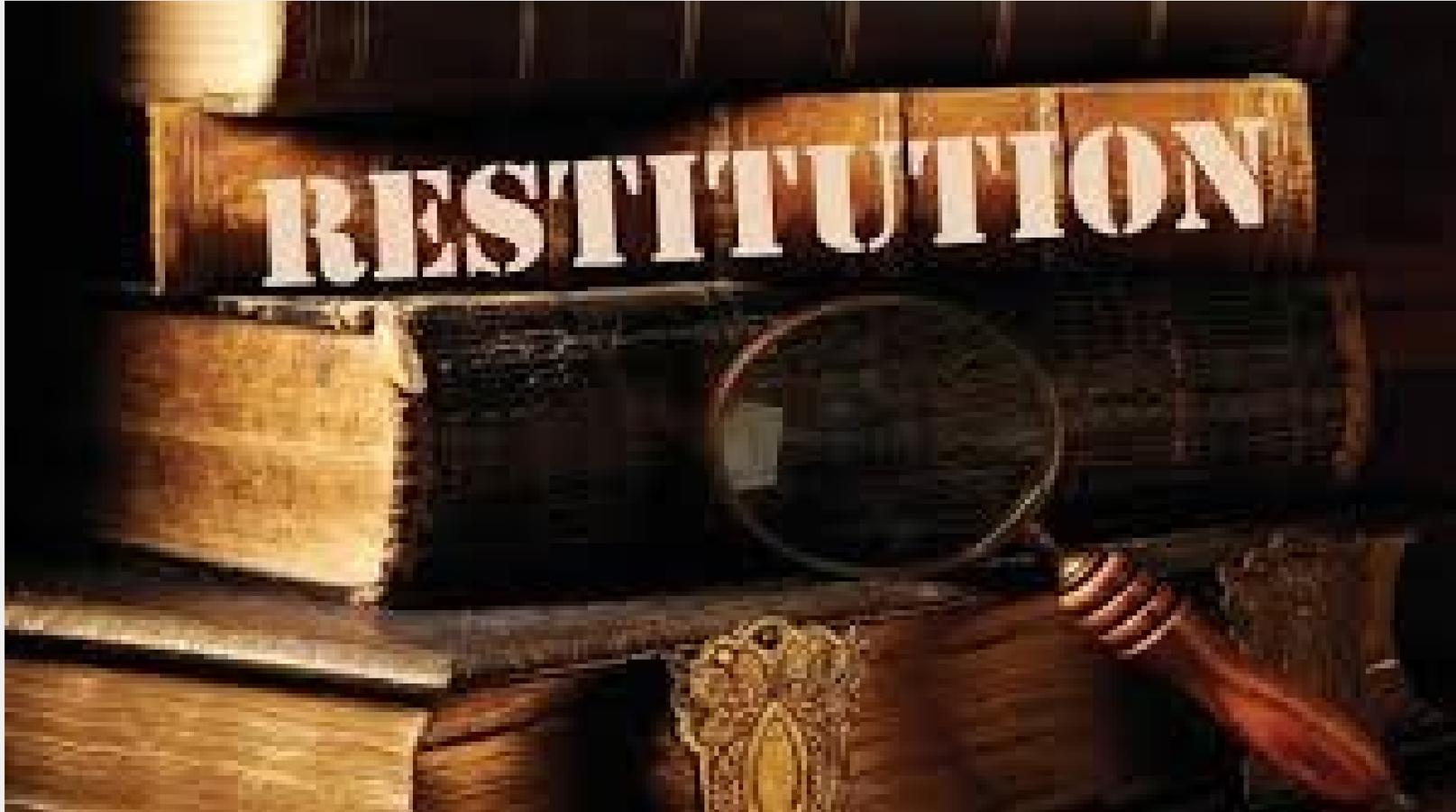
*US v. Peck*

131 F.4th 629 (8th Cir. Mar, 12, 2025)

KELLY, Circuit Judge, concurring.

I agree that the district court properly denied both motions to suppress under the good-faith exception. However, I would further address the Fourth Amendment issue and conclude, as I have written elsewhere, that the area immediately surrounding Peck's [apartment] front door [in a communal hallway] was curtilage.





# Restitution

## *US v. Barrera*

112 F.4th 614 (8th Cir. Aug. 14, 2024)



No error in requiring restitution to private health & disability insurers where they were billed for unnecessary medical treatments as part of D's conspiracy to defraud the Social Security Administration.

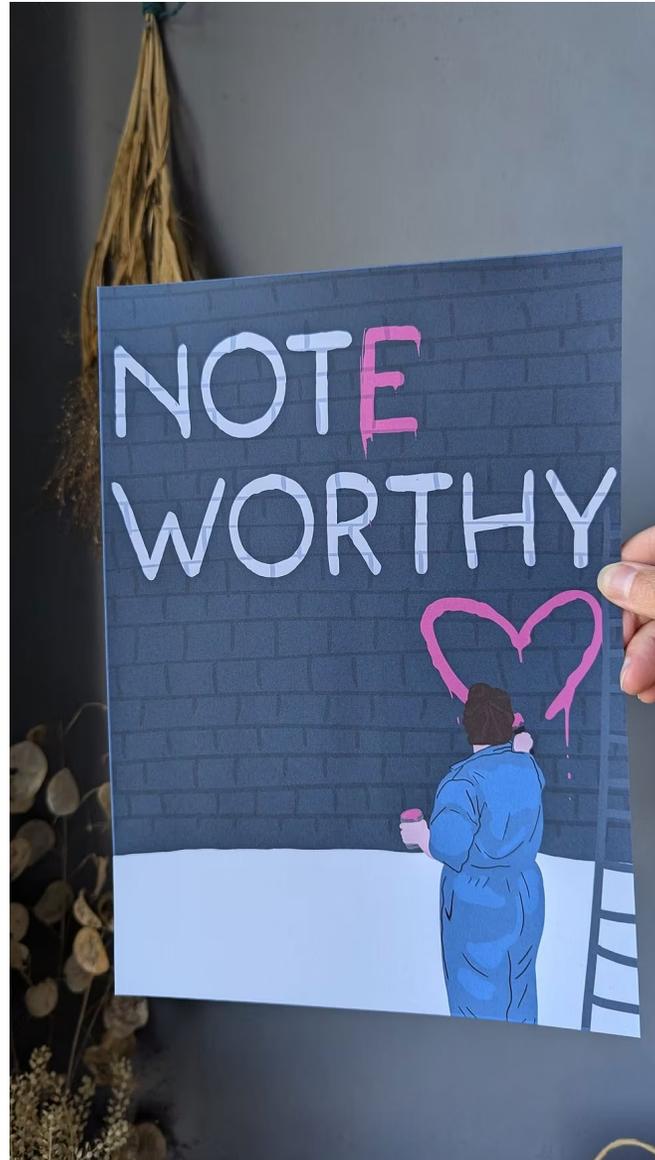
# Restitution

*US v. Ellingburg*

113 F.4th 839 (8th Cir. Aug. 23, 2024)



Retroactive application of the MVRA to a restitution order does not constitute an Ex Post Facto violation because restitution is a *civil* remedy, not a *criminal* penalty.



# Issue of note

## *US v. Collier*

116 F.4th 756 (8th Cir. Sept. 6, 2024)



“Whether the officer who handles a drug-detection dog is an expert witness, for whom expert disclosures are required, or a lay witness, for whom expert disclosures are not required, appears to be an issue of first impression in our court. The Supreme Court has not spoken clearly on this issue. And among our sister circuits, only the First Circuit seems to have addressed the issue. See *United States v. Naranjo-Rosario*, 871 F.3d 86, 96–97 (1st Cir. 2017) (holding that officers who handle drug-detection dogs are expert witnesses).

# Crime of Violence? Maybe not.

*US v. Aguilar*

2024 WL 4866868 (8th Cir. Nov. 22, 2024) (unpub'd)



California carjacking as a COV may no longer be on solid legal footing. Later-issued Eighth Circuit opinions cast doubt on its earlier review of the statute. The Ninth Circuit has also now held that California’s carjacking statute is overbroad and therefore not a crime of violence.

Cal Penal Code § 215(a) prohibits: “the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, ... against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.

# A footnote of note.

*US v. Driscoll*

122 F.4th 106 (8<sup>th</sup> Cir. Dec. 17, 2024).



This court reiterates its Sixth Amendment concerns about the District of South Dakota's standard discovery order.

*See United States v. Ladeaux*, 61 F.4th 582, 586 n. 4 (8th Cir. 2023) (“A criminal defendant has a constitutional right to conduct his own defense. ... Conducting a defense necessitates adequate time and resources to prepare for trial. ... Denying a self-represented criminal defendant the ability to prepare for trial can effectively abrogate his constitutional right to self-representation.” (internal citations and quotation marks omitted)).

# CP

## *US v. Schram*

128 F.4th 922 (8th Cir. Feb. 12, 2025)



Advertising CP conviction requires imagery be of “real” children. 8<sup>th</sup> Cir. precedent allows juries to review images & decide if they depict real children or not. Established principle states government needs not produce evidence to negate speculative assertion child in image is virtual.

“With improvements in image-generation technology, we may someday have to revisit our precedent . . . [w]e will suppose, for present purposes, that we could disregard our court's prior decisions if changes in technology undermined their assumption that jurors can reliably distinguish images of real children from images of virtual children.”



**SELF  
REPRESENTATION**

# Self-Representation

*US v. Willis,*

101 F.4th 577 (8th Cir. May, 13, 2024)



Under *Faretta v. California*, a defendant’s right to self-representation can be overcome only by “serious and obstructionist misconduct.”

“Repeated assertion of judicially-rejected sovereign citizen theories and defenses” are insufficient basis to deny right.

# Self-Representation

## *US v. Lemicy*

122 F.4<sup>th</sup> 298 (8th Cir. Nov. 26, 2024)



Valid waiver of 6A right to counsel requires D be “aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.”

Court must inform the defendant of the dangers and disadvantages of self-representation, or evidence in the record—including a defendant's background, experiences, and conduct—must establish the defendant knew and understood the disadvantages of self-representation.



# Supervised Release



# Revocations

*US v. Dailey*

113 F.4th 850 (8th Cir. Aug. 27, 2024)

At a revocation hearing, the court may admit a probation officer's report when she is available for cross-examination.



# Supervised Release Conditions

## *US v. Hinkeldey*

124 F.4th 1093 (8th Cir. Dec. 24, 2024)



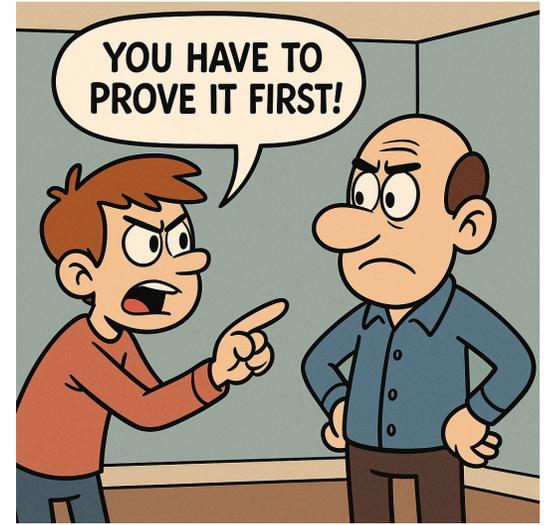
"I'd be more impressed with your hundreds of hours of community service if it weren't court ordered."

Where GL commentary suggests no more than 400 hours community service, court commits a plain error abuse of discretion by requiring as much as 10x more w/o justification.

# Supervised Release

*US v. Sutton*

105 F.4<sup>th</sup> 1083 (8th Cir. June 26, 2024)



Government must prove by a preponderance that conditions of supervision are reasonably related to the offender and his offense or history & characteristics.

Cannot shift burden to defense to disprove claim to avoid suggested condition of supervision.



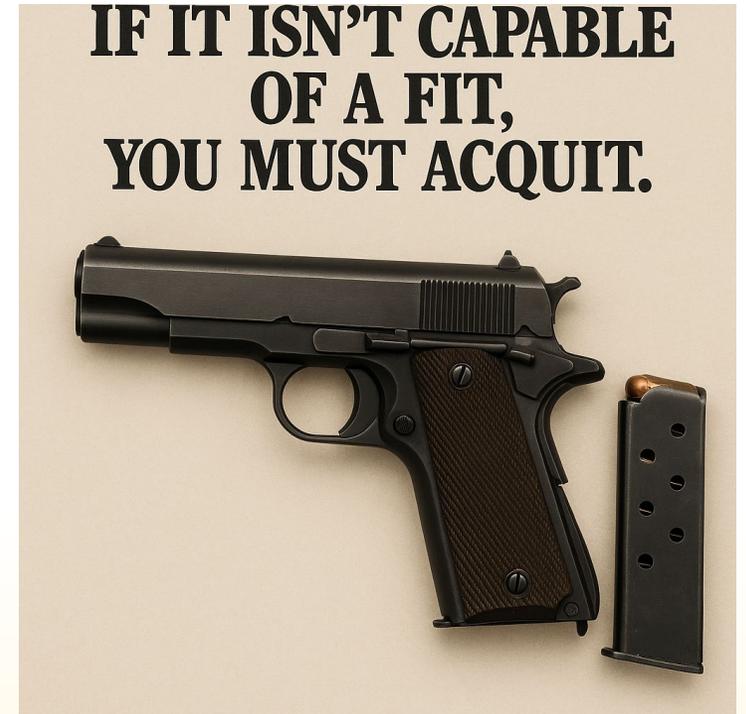
# Guidelines: high capacity magazine

*US v. Thomas*

2025 WL 464984

(8th Cir. Feb. 11, 2025) (unpub'd)

Enhancement under USSG § 2K2.1(a)(3) requires some evidence firearm is capable of accepting the magazine.



# Correctly Calculate GL Range

*US v. Shaw,*

104 F.4<sup>th</sup> 691 (8<sup>th</sup> Cir. June 17, 2024)



District court plainly erred by imposing a revocation sentence without first calculating the applicable Guideline sentencing range.

# Criminal history scoring

*US v. Jackson*

106 F.4th 772 (8th Cir. July 2, 2024)

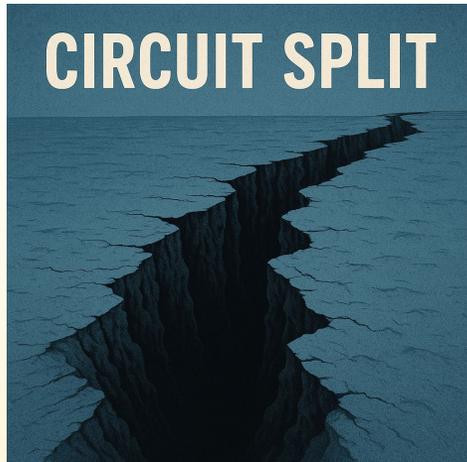
Date of conviction for purposes of USSG § 2K2.1(a)(3) is the date guilt is established (often plea date).



# Criminal history scoring

*US v. Syphax*

127 F.4<sup>th</sup> 746 (8th Cir. Feb. 5, 2025)



Follows 10<sup>th</sup> Circuit.

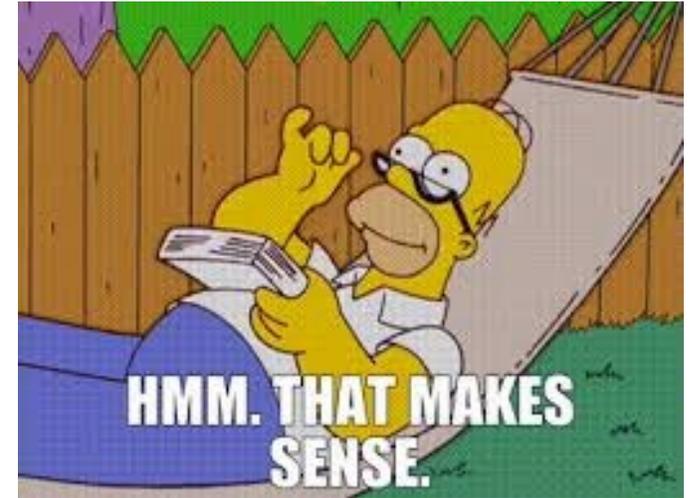
Rejects contrary holdings of 6<sup>th</sup> & 9<sup>th</sup> Circuits.

USSG § 4A1.2 cmt. N. 11’s plain and unambiguous language applies to a single revocation, not cases where, as here, there are multiple revocations. Although the revocations occurred on the same day based on the same conduct, they were separate, each applying to a different case.”

# Third Acceptance Point

## *US v. Simpson*

109 F.4th 1018 (8th Cir. July 25, 2024)



GL Amendment 820 clarified the government may refuse to move for the third-level reduction *only* if the defendant's conduct did not help it avoid preparing for trial.

This only “narrows the government’s discretion to move for a three-level decrease; it does not affect the government's decision against requesting the third acceptance point.



# General Principles

*US v. Ahmed,*

103 F.4<sup>th</sup> 1318 (8<sup>th</sup> Cir. June 4, 2024)

## **A FEW THINGS...**

- “A sentencing court may accept the facts in a PSR as true unless the defendant objects to specific factual allegations.”
- “[I]n sentencing matters a district court’s assessment of witness credibility is quintessentially a judgment call and virtually unassailable on appeal.”
- Rules of evidence *generally* inapplicable.
- Hearsay admissible if sufficient indicia of reliability for court to rely on it (*e.g.*, corroboration) USSG § 6A1.3
- “When explaining a sentence, a court need only set forth enough to satisfy us that it considered the parties’ arguments and had a reasoned basis for exercising its legal decision-making authority.”

# Mistaken Statement of Fact

*US v. Tumea,*

103 F.4<sup>th</sup> 1349 (8<sup>th</sup> Cir. June 6, 2024)

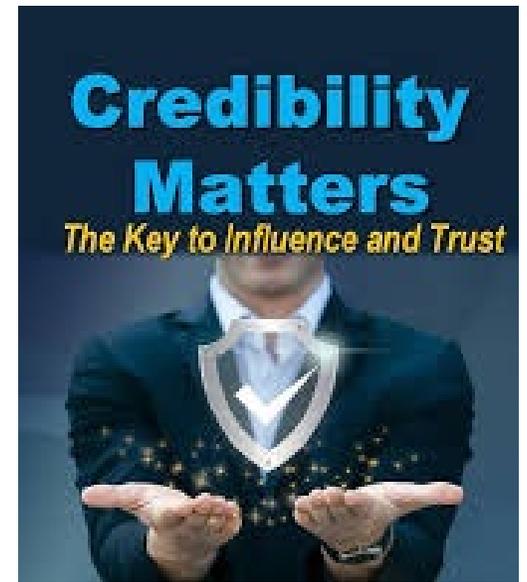


No plain error in relying on an incorrect fact to impose sentence, because Defendant failed to prove it “affected the district court’s sentencing conclusion.”

# Jury instructions/verdicts

*US v. Osorio*

110 F.4th 1089 (8th Cir. August 5, 2024)



To establish that a limitation on cross-examination has violated the Sixth Amendment, the defendant must “show that a reasonable jury might have received a significantly different impression of the witness’s credibility had defense counsel been permitted to pursue his proposed line of cross-examination.”

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