

# 8<sup>TH</sup> CIRCUIT CASE LAW UPDATE



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# Categorical Approach

*United States v. Box,*

960 F.3d 1025 (8<sup>th</sup> Cir. 2020)

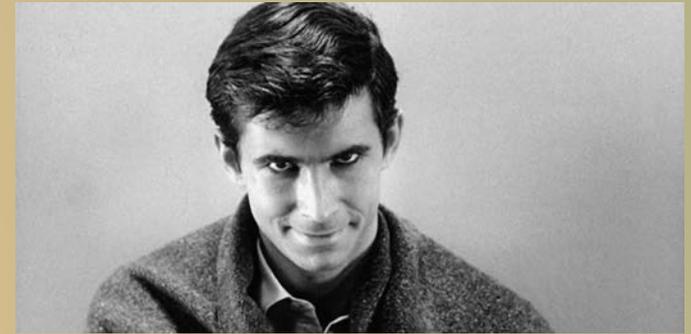


18 USC § 2251(e), 2252(b)(2), 2252A(b)(2) provide for increased penalties where the defendant:

“has one prior conviction . . . under the laws of any State relating to . . . the possession, production, . . . or transportation of child pornography. “

18 USC § 2257(8)(A): “Child pornography” is “any visual depiction . . . of sexually explicit conduct, where . . . such visual depiction involves the use of a minor engaging in sexually explicit conduct.”

# Statutes



*United States v. Perkins,*

948 F.3d 936 (8<sup>th</sup> Cir. 2020)

§ 2241(c) intent-in-travel element met when the illicit sexual activity at issue “was one of the purposes motivating the defendant to cross state lines, even if the sexual activity is not the sole or dominant purpose for the trip.”

The illicit “sexual activity,” however, “must be more than merely incidental to the trip across state lines.”

**WITH CHILDREN.**—Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years. . . .

# Fourth Amendment

*United States v. Davis,*

943 F.3d 1129 (8<sup>th</sup> Cir. 2019)



Passenger in rental vehicle, being operated on long-distance trip by someone other than the renter, did not have reasonable expectation of privacy in vehicle, and thus lacked standing to challenge search on basis that he had property or possessory interest in vehicle

# Fourth Amendment



*United States v. Sanders,*

956 F.3d 534 (8<sup>th</sup> Cir. 2019)

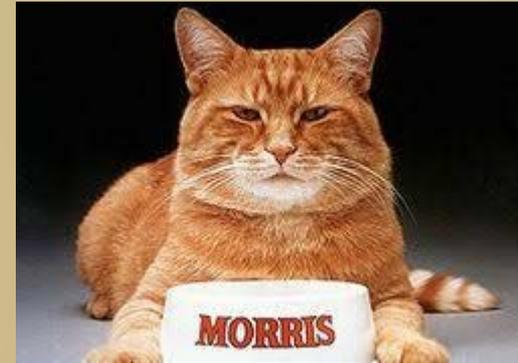
## Community Caretaker Exception

- Police may enter a residence w/o warrant based on a reasonable belief that an **emergency exists requiring his or her attention.**
- Compelling need that outweighs privacy interest in home.
- Specific and articulable facts
- Totality of circumstances
- Objective test

# Guidelines

*United States v. Morris,*

955 F.3d 722 (8<sup>th</sup> Cir. 2020)



USSG § 4A1.1(c) is not ambiguous. A district court may select whichever four of the prior offenses it wishes to count, including for purposes of career offender status.

# Bail Reform Act/ICE

*United States v. Pacheco-Poo*,  
952 F.3d 950 (8<sup>th</sup> Cir. 2020)



An order of release under the Bail Reform Act does not preclude removal under the Immigration and Nationality Act (INA)



# Guidelines

*United States v. Roberts,*

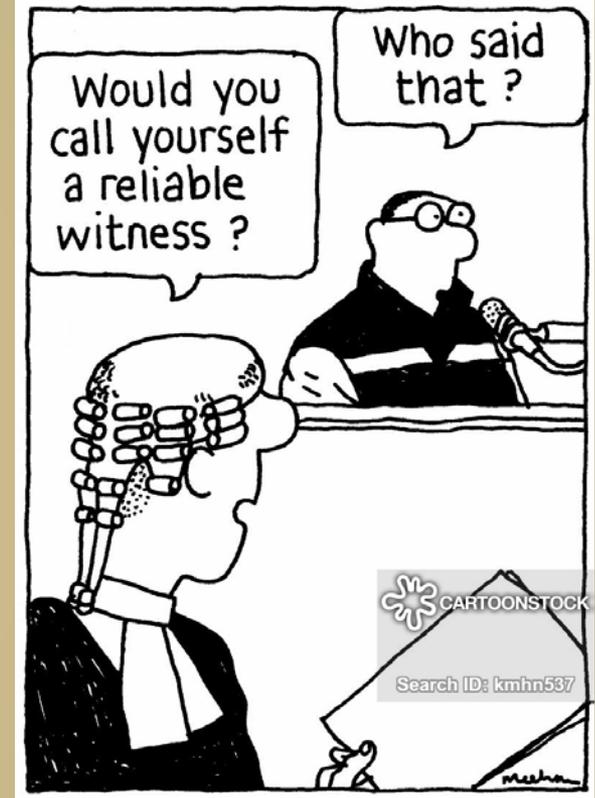
958 F.3d 675 (8<sup>th</sup> Cir. 2020)



USSG § 3B1.4 enhancement for “using” a minor to commit a crime enhancement requires that the defendant act affirmatively to involve a minor in the crime – beyond mere joint participation in the crime.

# Sentencing

*United States v. Sterling*,  
942 F.3d 439 (8<sup>th</sup> Cir. 2019)



“Without quantity information having ‘sufficient indicia of reliability to support its probable accuracy,’ USSG § 6A1.3(a), reliance on the Probation Officer's unsupported opinion results in a clearly erroneous quantity finding.”

# Due Process

*United States v. Burrage,*

951 F.3d 913 (8<sup>th</sup> Cir. 2020)



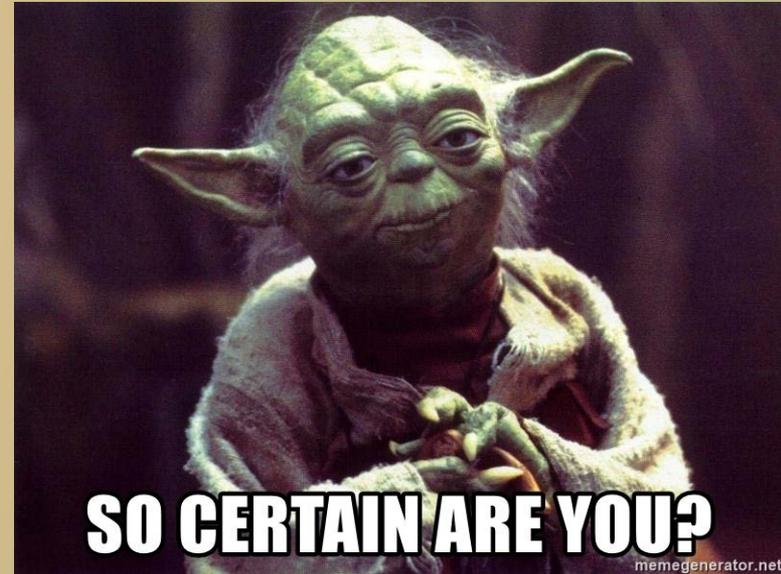
Objection on chain of custody grounds does not equate to a due process challenge for denial of right to confrontation.

No plain error where district court failed to require lab personnel to testify at SR revocation hearing where no objection was raised, testimony wasn't requested, and district court had no reason or opportunity to even address the absence of live testimony.

# Categorical Approach

*United States v. Silva,*

944 F.3d 993 (8<sup>th</sup> Cir. 2019)



When determining whether a prior state conviction comports with the generic offense, *Taylor's* “demand for certainty” applies only to the *modified* categorical approach, not the categorical approach.

# *United States v. Timmons,*

950 F.3d 1047 (8<sup>th</sup> Cir. 2020)

## Due Process

Due process requires opportunity to confront and cross-examine witnesses unless court finds that the interests of justice do not require it.

Government must provide a “reasonably satisfactory explanation for not producing [a] witness” in a revocation proceeding.



# Restitution

*United States v. Clausen,*

949 F.3d 1077 (8<sup>th</sup> Cir. 2020)



18 USC § 3664(d)(5), which allows the court to hold a restitution hearing open for 90 days “[i]f the victim’s losses are not ascertainable by the date that is 10 days prior to sentencing” does not apply where the losses are known, determined, and disclosed prior to sentencing.

*Open question:* Whether the strict limits on a district court’s authority to modify a sentence it has imposed mean that “any order of restitution must be imposed at sentencing, if it is to be imposed at all.” See *Dolan v. US*, 570 US 605 (2010).

# Prosecutorial Misconduct

*United States v. Keleta,*

949 F.3d 1082 (8<sup>th</sup> Cir. 2020)



"Sustained. Prosecution will refrain from going 'dun dun *dunnnnnnn*...' during the witness' testimony."

Prosecutorial misconduct requires the court to consider “whether the conduct, viewed in the context of the entire trial, was so offensive that it deprived the defendant of a fair trial,” considering: (1) the cumulative effect the misconduct; (2) the strength of the properly admitted evidence of guilt; and (3) curative actions taken by the trial court. To affirm, government’s misconduct must be “harmless beyond a reasonable doubt.”

# Retesting Drug Quantity

*United States v. Escalante,*

944 F.3d 410 (8<sup>th</sup> Cir. 2019)

District court does not abuse its discretion by denying CJA re-testing funds where the sole basis for the request is defendant's subjective belief the drugs were of a lower potency than that suggested in the gov't reports.



# Statutes

*United States v. Buie*,  
946 F.3d 443 (8<sup>th</sup> Cir. 2019)



I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it...

-Justice Potter Stewart  
*Jacobellis v. Ohio*

Federal statute prohibiting possession of “obscene” depictions of minors engaging in sexually explicit conduct [18 USC 1466A(b)(1)] is not overbroad and provides adequate notice of proscribed conduct to comply with due process, even though juries in different communities may have different opinions as to what qualifies as obscene.

# Plea Agreements

*United States v. Zurheide,*

959 F.3d 919 (8<sup>th</sup> Cir. 2020)

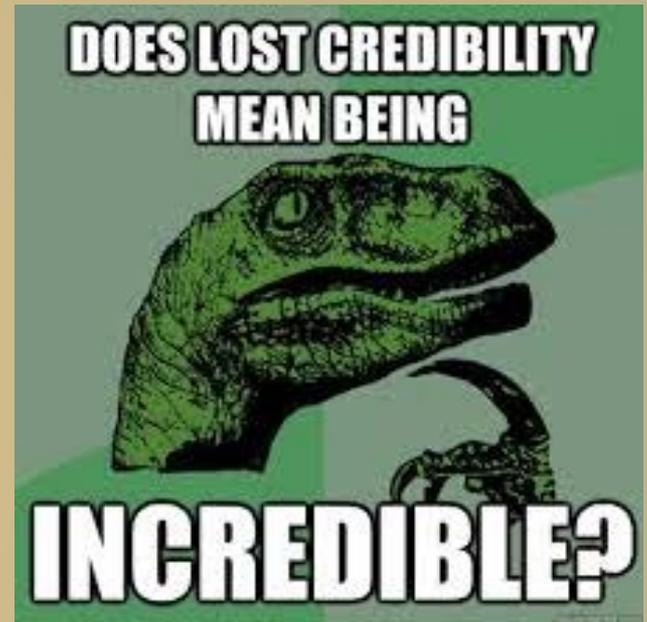
Government does not breach plea agreement's joint sentencing recommendation by failing to zealously defend the suggested sentence in the face of the court's hostility to it.



# Revocations

*United States v. Lillybridge,*

944 F.3d 990 (8<sup>th</sup> Cir. 2019)



District court was entitled to credit statements made by defendant's girlfriend to police for purposes of determining whether he violated supervised release, even though the girlfriend later recanted.

It is "almost impossible" for a reviewing court to find clear error in credibility determinations.

# Identifications

*United States v. Heard*,  
951 F.3d 920 (8<sup>th</sup> Cir. 2020)

Full *Faretta*  
colloquy not  
required in  
hybrid  
representation.



# Intent

*United States v. Juhic,*

954 F.3d 1084 (8<sup>th</sup> Cir. 2020)

Child pornography statutes require knowledge, not intent, such that “innocent intent” instruction was inapplicable.

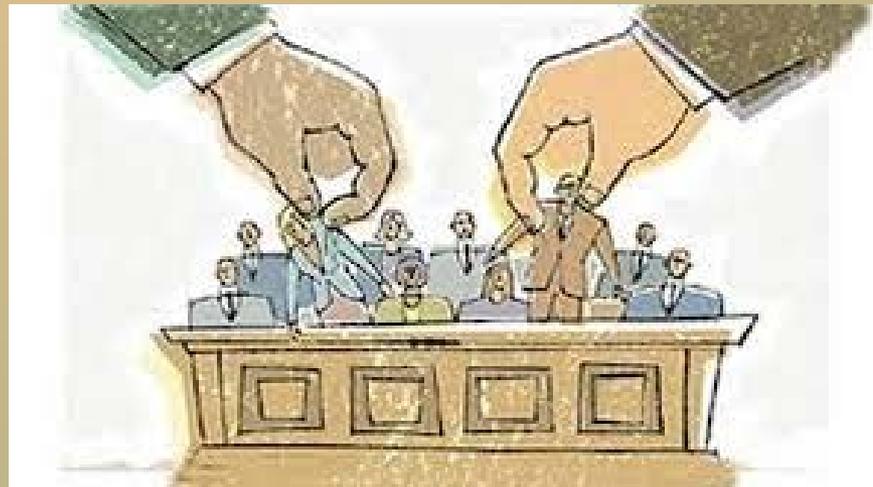


# Batson

*United States v. Johnson,*

954 F.3d 1106 (8<sup>th</sup> Cir. 2020)

No *Batson* errors even though gov't used three of its six peremptory strikes against the only minorities in the venire.



# Guidelines

*United States v. Jones,*

951 F.3d 918 (8<sup>th</sup> Cir. 2020)



Sentence imposed for possession with intent to distribute cocaine base did not result in impermissible double-counting, even though the guidelines calculation included both the drugs seized and a consideration of defendant's supervised release status

# Self-Representation

*United States v. Luscombe,*

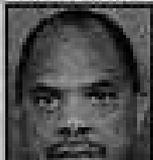
950 F.3d 1021 (8<sup>th</sup> Cir. 2020)

A defendant who knowingly and voluntarily waives his right to counsel cannot not complain that the quality of his own defense amounted to denial of effective assistance of counsel.

## Man accused of pretending to be a lawyer will represent himself

By Lynn LaRowe  
Texarkana Gazette

A man accused of falsely holding himself out to be a lawyer and collecting thousands in fees from a Texarkana woman appeared for a pretrial hearing Monday in Bowie County.



Zakre Kabeem Abdullah, 37, is rep-

resenting himself at court. Abdullah told Pesek he wants a personal recognizance bond.

Pesek scheduled a special hearing for Wednesday to address Abdullah's desire for a lower bond and a bevy of other motions he has filed on his own behalf.

Bail is currently set at \$60,000. Abdullah is facing charges of falsely holding himself out to be a lawyer and theft. If convicted of theft, Abdullah could receive six months in prison, according to court records.

standards," Abdullah said.

Pesek told Abdullah the clerk's office typically doesn't file or provide copies of motions when the required fees have not been paid.

"I told them you're indigent," Pesek said.

Abdullah is accused of taking more than \$3,000 from a woman who allegedly thought she was dealing with a licensed attorney named Robert White, according to court records.

# *Rehaif*

*United States v. Welch,*

951 F.3d 901 (8<sup>th</sup> Cir. 2020)

No plain error under *Rehaif* where record shows defendant actually served more than a year in custody on his prior felony conviction.



# *Rehaif*

*United States v. Coleman,*

961 F.3d 1024 (8<sup>th</sup> Cir. 2020)

A plea that is constitutionally invalid because of a *Rehaif* error does not qualify as structural error.



# Rehaif

*United States v. Davies*,  
942 F.3d 871 (8<sup>th</sup> Cir. 2019)



Plain error not to instruct on “knowledge of status element” where a reasonable person in defendant’s position might believe he could possess firearms because he had not yet been sentenced.

# Rehaif

*United States v. Jawher*,  
950 F.3d 576 (8<sup>th</sup> Cir. 2020)

Plea cannot be knowing and voluntary under Fed. R. Crim. P. 11 if defendant lacks full knowledge of elements of crime he is pleading guilty to. Plain error *Rehaif* reversal.



*"I thought it was legal—I wrote it on a legal pad."*