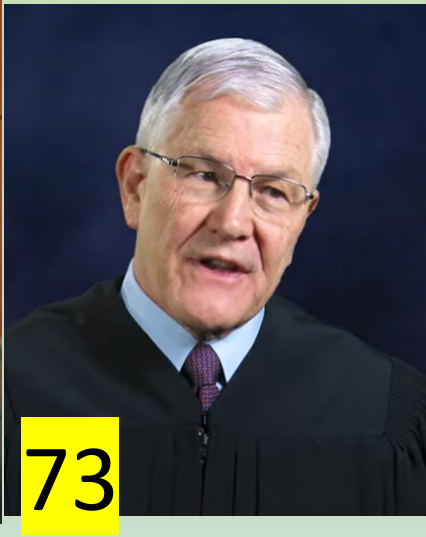


EIGHTH CIRCUIT CASE LAW UPDATE

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8TH CIRCUIT CASES



SCOTUS WATCH



Jackson v. US (11th Cir.)

Brown v. US (3d Cir.), 22-6389

Argument set Nov. 27, 2023

Issue: Whether the classification of a prior state conviction as a “serious drug offense” under the ACCA depends on the federal controlled-substance schedules in effect at the time of the defendant’s prior state crime (3d & 11th), the time of the federal offense conduct (8th & 10th), or the time of his federal sentencing (4th).

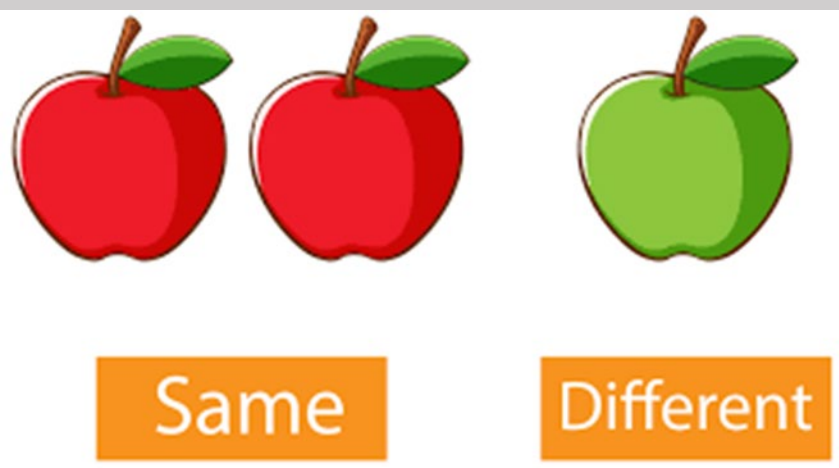
ACCA

US v. Perez,
46 F.4th 691 (8th Cir. Aug. 18, 2022)



“[T]he categorical approach requires comparison of the state drug schedule at the time of the prior state offense to the federal schedule at the time of the federal offense.”

Iowa cocaine (2013) categorically overbroad (includes ioflupane) as ACCA predicate.



SCOTUS WATCH

Erlinger (7th), Valencia (5th), Thomas (6th)

No. 22-721 (Ga.)

Argument heard March 27, 2024

Issue: Whether the Constitution requires a jury trial and proof beyond a reasonable doubt to find that a defendant's prior convictions were "committed on occasions different from one another," as is necessary to impose an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

En banc

US v. Stowell,

82 F.4th 607 (8th Cir. Sept. 22, 2023)

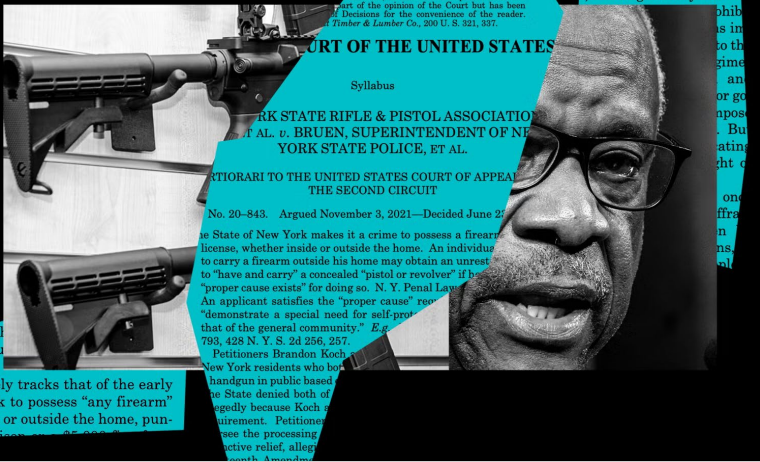


Wooden does not change our conclusion that the “different occasions” analysis for ACCA purposes is a legal question, rather than an element/fact question for the jury.

Harmless error for D given multi-day gap between battery convictions.

Second Amendment

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



2nd & 14th 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 Second Amendment.

SCOTUS WATCH: Second Amendment



US v. Rahimi (5th Cir.)

Argued Nov. 7, 2023

Issue: Whether 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.

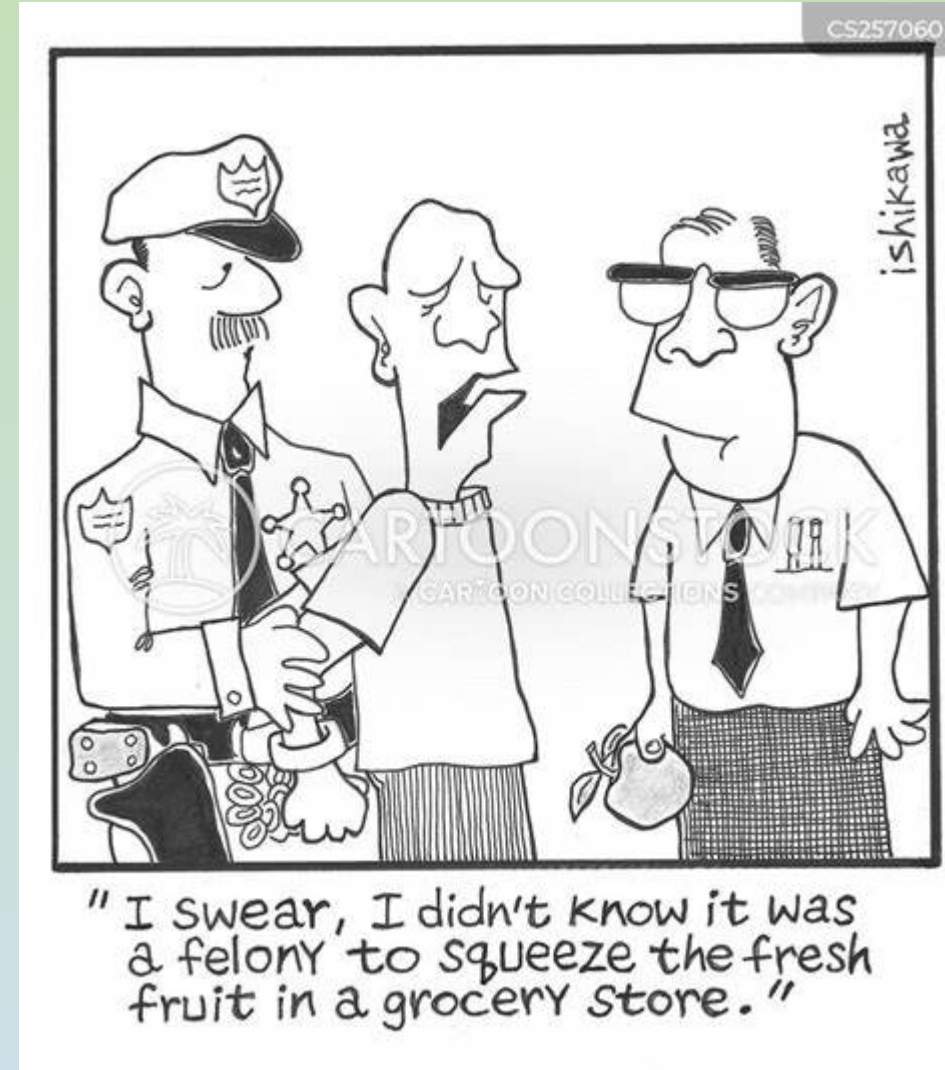
Second Amendment

US v. Jackson,

69 F.4th 495 (8th Cir. June 2, 2023)

SC in *Heller* said 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).”



Second Amendment

US v. Cunningham,

70 F.4th 502 (8th 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.*

Second Amendment: Reh'g Denied

US v. Jackson,

85 F.4th 468 (8th Cir. Aug. 30, 2023)



Colloton concurs: “The dissent misconstrues a trailing footnote whose only purpose was to note that it was unnecessary to address [the D’s] particular conduct. . . 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.”



Second Amendment

US v. Cameron,

99 F.4th 432 (8th 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.

Second Amendment

US v. Veasley,

98 F.4th 906 (8th Cir. Apr. 17, 2024)



Seay, 620 F.3d 919 (8th 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.4th 337 (5th Cir. 2023) (§(g)(3) uncon'l as applied)

Pending: En banc

US v. McCoy,

55 F.4th 658 (8th Cir. Dec. 15, 2022)



“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.

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

CATEGORICAL APPROACH

US v. Coulson,

86 F.4th 1189 (8th Cir. Nov. 20, 2023)

Holding, “for the first time, in line with a consensus of authority from other circuits, that the categorical approach applies to SORNA’s tier analysis.”



Loss

US v. Harris,

83 F.4th 1093 (8th Cir. Oct. 11, 2023)

Loss under § 2B1.1(b)(1) requires “a reasonable estimate of the fair market value at the time of the [fraudulent] transfer, either by using a measure that reflects the value at that point or by accounting for . . . post-fraud improvements and market changes during the intervening period.”



Hearsay

US v. Campos,

79 F.4th 903 (8th Cir. Aug. 15, 2023)



When factual allegations in a PSR are contested, “the government must present evidence at the sentencing hearing to prove the existence of the disputed facts” by a preponderance. It fails this burden when it asks court to credit without any testimony, over defendant’s objection, an informant’s hearsay statement to a police officer, which is corroborated only by the officer’s hearsay report.

USSG § 3C1.1 by its terms does not apply to “mere attempts” to obstruct.

Rule 404(b)

US v. Harrison,

70 F.4th 1094 (8th Cir. June 14, 2023)



404(b) evidence must be:

- 1) relevant to a material issue raised at trial,
- 2) similar in kind and close in time to the crime charged,
- 3) supported by sufficient evidence that defendant committed the other act, and
- 4) its probative value was not substantially outweighed by its prejudicial value

Judge Stras, concurring: “The truth is that a prior conviction is irrelevant in most actual possession cases, unless, of course, the whole point is to allow the jury to make a propensity inference. Although I believe that we should revisit our precedent at some point, this is not the right case.”

SUPERVISED RELEASE

US v. Lester,

92 F.4th 740 (8th Cir. Feb. 8, 2024)

The plain language of 18 U.S.C. § 3583(e)(1) allows district courts discretion to grant early termination of supervised release anytime after one year, in the interests of justice, even in cases where a mandatory minimum term of SR applies.



Waiver

US v. Johnson,

70 F.4th 1115 (8th Cir. June 16, 2023)



Defendant waived his right to appeal the use of a categorically overbroad § 851 predicate by only challenging it as a “mere offer to sell” under *Hinkle*, and failing to raise an “isomer overbreadth” argument under *Oliver*.

21 U.S.C. § 851(c)(1): If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information.

§ 851(c)(2): Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

Sentencing

US v. McKenzie,

79 F.4th 924 (8th Cir. Aug. 17, 2023)



USSG § 5G1.3(b) & cmt. 2(C) require an adjustment of sentence in certain situations.

- (1) determine whether any time spent in custody resulted from . . . relevant conduct to the instant offense of conviction;
- (2) adjust the sentence downward for time already spent in custody for solely relevant conduct . . . unless the Bureau of Prisons will otherwise credit it
- (3) determine what to do with time spent in custody for solely non-relevant conduct or a mixture of relevant and non-relevant conduct. (only these provide a choice about whether to give credit)
- (4) decide whether to grant a discretionary variance

Hearsay

US v. Dunn,

76 F.4th 1062 (8th Cir. Aug. 9, 2023)

Codefendant's plea statements are not excepted from the hearsay exclusion rule as former testimony under 804(b)(1) or statements against interest under Rule 804(b)(3).



SENTENCING

US v. Grabau,

89 F.4th 691 (8th Cir. Jan. 3, 2024)

USSG § 2G2.2(b)(3)(F): amended 2016 to 2-level enhancement only when a defendant “knowingly” distributes child pornography.

Gov’t may need direct evidence beyond the fact files were transferred using a file-sharing program & may abrogate *US v. Dodd*, 598 F.3d 449 (8th 2010), holding: “a fact-finder may reasonably infer [Def] knowingly employed a file sharing program for its intended purpose” absent “concrete evidence of ignorance.”



Sentencing

US v. Watkins,

91 F.4th 955 (8th Cir. Jan. 30, 2024)



Court *MUST* consider the 18 U.S.C. § 3553(a) factors in arriving at a final sentence.

Objections

US v. Moore,

71 F.4th 678 (8th Cir. June 27, 2023)



Chain-of-custody objections are generally limited to real or physical evidence—things like drugs, weapons, clothing, even cellphones.

The framework likely does not apply to text messages, which are more akin to writings.

US v. Ralston,

88 F.4th 776 (8th Cir. Dec. 14, 2023)

Leon can't save warrant "so lacking in indicia of PC as to render official belief in its existence entirely unreasonable."

- Mere proximity insufficient for PC;
- past convictions need nexus to contraband sought/ place to be searched;
- "mere association w/ a known or suspected criminal in a location known to be involved in criminal activity does not establish PC and no reasonably well-trained officer would think otherwise"

Good Faith



Consent authority

US v. Bermel,

88 F.4th 741 (8th Cir. Dec. 12, 2023)



A warrantless search is permissible w/ consent of a 3d party – w/ common or apparent authority over the object at issue.

A minor with common or apparent authority can give consent to search a parent's property.

Notice of upward variance

US v. Dickson,

70 F.4th 1099 (8th Cir. June 15, 2023)

Where district court relies on information contrary to PSR, it must allow the defense an opportunity to be heard.

USSG § 6A1.3(a): When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor.



Categorical Approach

US v. Lung'aho,

72 F.4th 845 (8th Cir. July 6, 2023)



The issue before us is whether arson is a “crime of violence” under 18 U.S.C. § 924(c)(1)(A).

“We agree with the district court that it is not” because maliciousness is insufficient under *Borden*.

18 U.S.C. § 844(f)(1): “maliciously damag[ing] or destroy[ing],” by “fire or an explosive,” a “vehicle ... owned or possessed by ... an[] institution or organization receiving” federal funding.

Categorical approach

US v. Brewer,

89 F.4th 1091 (8th Cir. Jan. 10, 2024)



Under *Borden*, 18 USC § 1112, voluntary manslaughter, qualifies as a COV because it requires more than ordinary recklessness, specifically “a general intent to kill, intent to do serious bodily injury, or w/ depraved heart recklessness.”

Categorical Approach

US v. Conrad,

74 F.4th 957 (8th Cir. July 26, 2023)



An offense under Iowa Code § 708.2A(2)(c) is a crime of violence regardless whether defendant “uses” or “displays” a firearm. There is no distinction between the two alternative means: both involve at least a threat of physical force.

Court must correctly recount findings and resolution of PSR objections in the Statement of Reasons to comply w/ Fed. R. Criminal P. 32(i)(3), requiring a sentencing court to rule on any disputed portions of a PSR or determine ruling is unnecessary, and append those determinations on a copy of PSR made available to the BOP.

Categorical approach

US v. Daye,

90 F.4th 941 (8th Cir. Jan. 16, 2024)



Gov't waived argument statute is divisible.

Iowa's domestic abuse assault enhanced statute does not qualify as a crime of violence under the Guidelines.

Iowa Code § 708.2A(3)(b).

4th Amendment

US v Vittetoe

86 F.4th 1200 (8th Cir. Nov. 23, 2023)

PC to search a vehicle under the auto exception can exist even when there is not enough PC to make an arrest. Question is whether objectively reasonable PC existed at time of search.



Acceptance of Responsibility

US v. Chappell,

69 F.4th 492 (8th Cir. June 2, 2023)

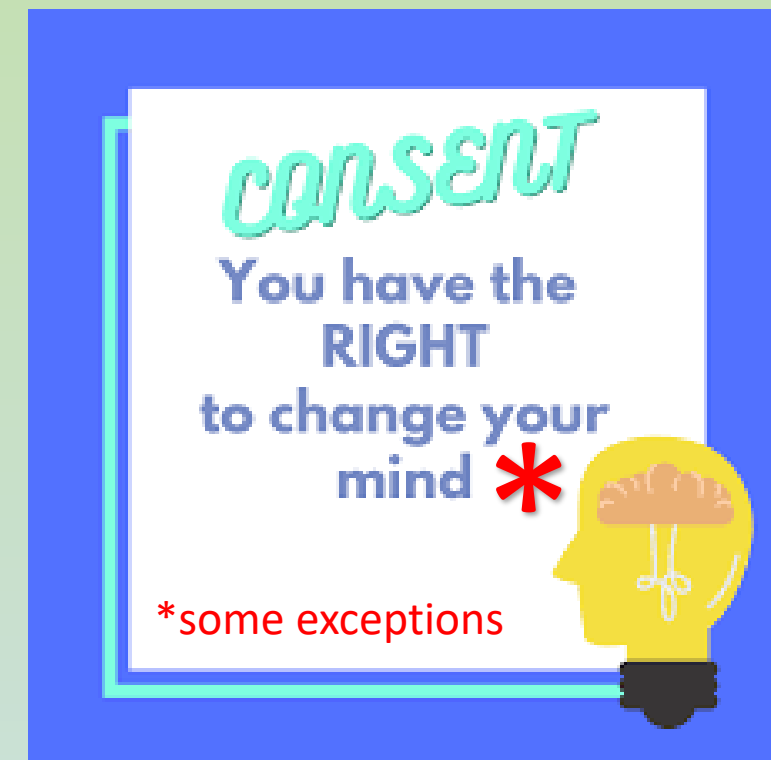
No error in district court's decision to deny acceptance of responsibility credit based on defendant's pre-plea assault of corrections officer and post-plea possession of a shank, even though the jail conduct occurred more than a year after his charged crime.



Double jeopardy

US v. White Owl,

93 F.4th 1089 (8th Cir. Feb. 23, 2024)



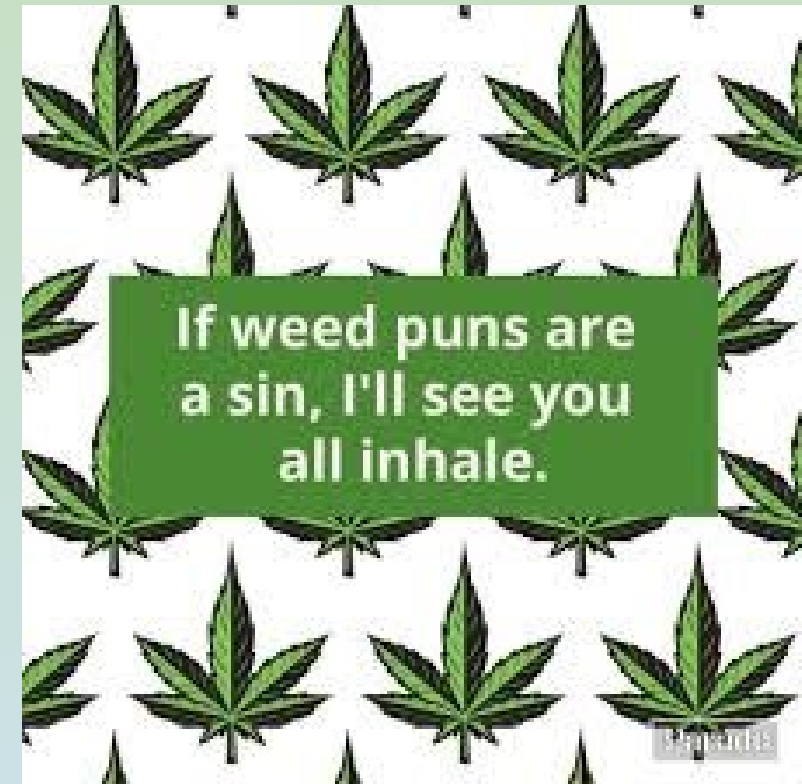
The Double Jeopardy Clause prevents multiple prosecutions for the same offense; however, this provision is not implicated when the defendant consents—expressly or impliedly—to a mistrial.

Supervised Release

US v. Doolin,

93 F.4th 1094 (8th Cir. Feb. 26, 2024)

Prohibition of marijuana use while on supervised release in “legal” states is *likely* permissible.



Remedies

US v. Jones,

70 F.4th 1109 (8th Cir. June 15, 2023)

37-day delay in defendant's Initial Appearance due to "inexcusable neglect" not sufficiently "outrageous" or "conscience shocking" to warrant dismissal of the indictment for a substantive due process violation.



Evidence

US v. Duggar,

76 F.4th 788 (8th Cir. Aug. 7, 2023)



No error in district court’s refusal to admit evidence of possible alternative suspect’s prior sex offense based on risk of confusing the jury.

“The right to a complete defense . . . does not trump a district court’s discretion to keep out confusing or misleading evidence, even if it would be helpful to the defense.”



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