

SUPREME COURT & EIGHTH CIRCUIT CASE LAW UPDATE

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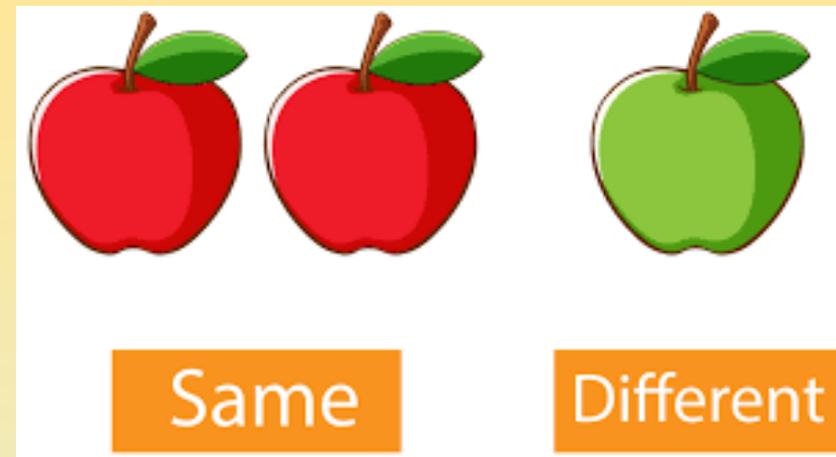
8TH CIRCUIT CASES



En banc

US v. Stowell,

40 F.4th 882 (8th Cir. July 25, 2022)



No error in district court’s fact-finding that ACCA predicates occurred on “different occasions.”

See also US v. Robinson, 43 F. 4th 892 (8th Cir. Aug. 9, 2022) (We note the Supreme Court recently decided [Wooden v. United States, — U.S. — \(2022\)](#), which Robinson suggests might change our analysis. It does not.)

VACATED NOVEMBER 15; EN BANC ARG HELD APRIL 11, 2023

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 ARG (set) APRIL 11, 2023

Guidelines

US v. Bailey,

37 F.4th 467 (8th Cir. June 14, 2022)



4B1.2(b) contains “no requirement that the particular substance underlying the state offense is also controlled under [the CSA]” . . . the “ordinary meaning of ... ‘controlled substance,’ is any type of drug whose manufacture, possession, and use is regulated by law.”

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.



ACCA

US v. Owen,

51 F.4th 292 (8th Cir. Oct. 19, 2022)



Minnesota sale of cocaine not a “serious drug offense” under the ACCA” (includes positional isomers, ecgonine, other).

“[T]he realistic probability test is about resolving ambiguities.”
Since all isomers included, realistic probability “is evident from the language of the statute itself” even if some isomers only exist in lab.

ACCA

United States v. Myers,

56 F.4th 595 (Dec. 29, 2022)

Missouri sale of cocaine (2000 statute)
NOT a “serious drug offense” under
ACCA (includes positional isomers).

Strong dissent by Loken on scope of
statute; also contends court is
misapplying realistic probability test.



ACCA



United States v. Heard,
62 F.4th 1109 (Mar. 16, 2023)

Minnesota MDMA (2011) conviction
not a qualifying ACCA predicate
because categorically overbroad when
compared to CSA (isomers).

CRIMES OF VIOLENCE

US v. Larry, 51 F.4th 290

(8th Cir. Oct. 17, 2022)

When the plurality and concurring opinions are read together, *Borden* holds only that the force clause categorically excludes offenses that can be committed recklessly.

Mo § 571.030.1, unlawful use of a weapon is COV: “knowingly . . . [e]xhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner.”



CROSS REFERENCES

US v. Sewalson,

36 F.4th 832 (8th Cir. June 13, 2022)



Section § 922(g) possession offenses can be subject to cross-reference where distribution quantities found in close proximity to a firearm. No requirement firearm be *used* in connection w/ the other offense.

§ 2K2.1(c)(1): “If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense . . .
apply

CROSS REFERENCES

United States v. Perkins,
52 F.4th 742 (Nov. 2, 2023)

Felon in possession case:
affirming cross-reference to
kidnapping



§ 2K2.1(c)(1)(A) (use of ammunition in connection w/ attempt to commit another offense).

CROSS REFERENCES

United States v. Greer,
57 F.4th 626 (Jan. 13, 2023)

Felon in possession of ammunition
case: affirming cross-reference to
attempted murder

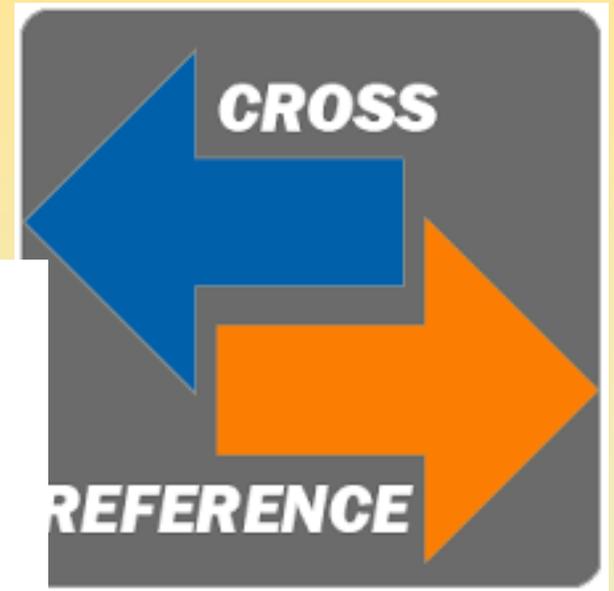


§ 2K2.1(c)(1)(A) (use of ammunition in connection w/ attempt to commit another offense).

CROSS REFERENCES

United States v. K...
1204 (April 4, 20...

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§ 2C1.1(c)(1): “[i]f the offense was committed for the purpose of facilitating the commission of another criminal offense.”

Plea Agreements

*United States v. Hahn,
58 F.4th 1009 (Jan. 26, 2023)*



District court may use portions of signed plea agreement with R. 410 waiver, even though never accepted.

1st Amendment



US v. Sryniawski,
48 F.4th 583 (8th Cir.
Sept 25, 2022)

“The cyberstalking statute cannot be applied constitutionally to a defendant who directs speech on a matter of public concern to a political candidate with intent to merely trouble or annoy the candidate.”

Requires “course of conduct” of 2 events—Each act must be considered separately and have intent to reasonably expect to cause emotional distress (not basic acts like logging on computer).

Costs

United States v. Kock,
2023 WL 2923039
(Apr. 13, 2023)



A fraud victim's negligence is not a defense to criminal charges under federal fraud statutes.

District court is required to impose costs of prosecution when conviction is for failure to file a tax return, 26 U.S.C. § 7203

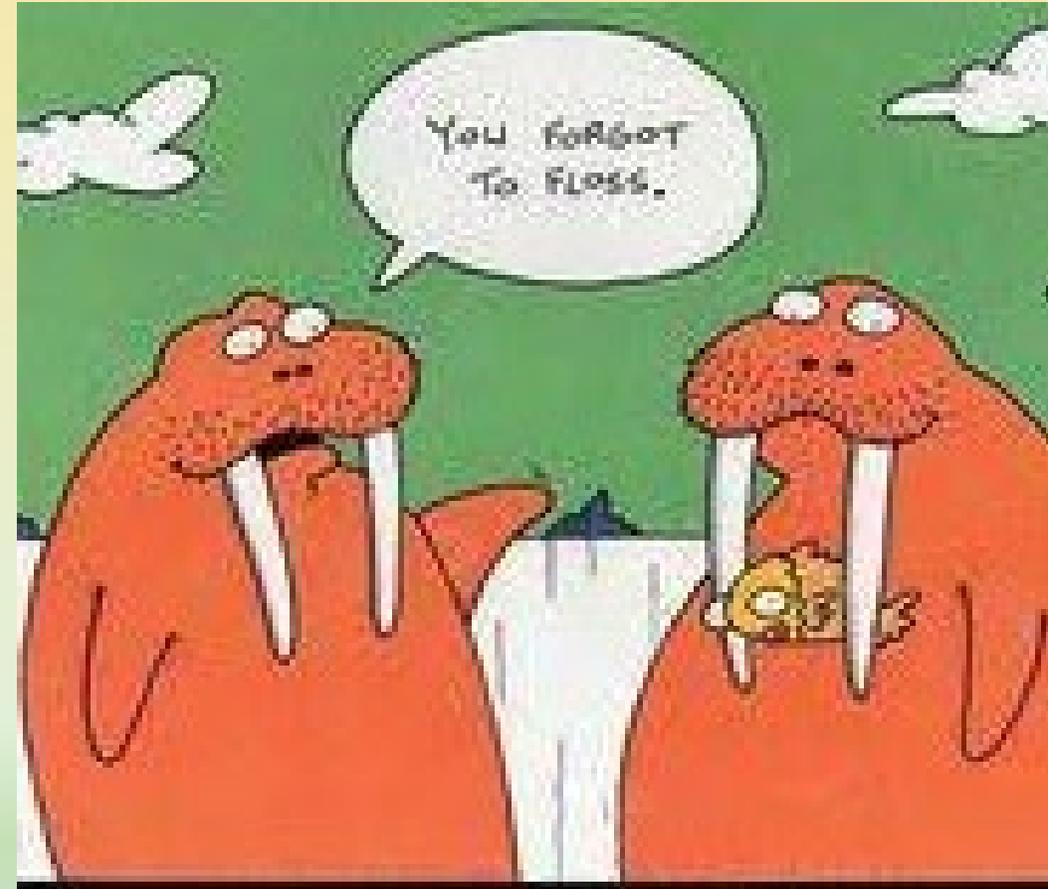
Supervised Release terms

US v. Floss,

42 F.4th 854 (8th Cir. July 29, 2022)

Failure to register under SORNA is not a sex offense, so the advisory GL range of SR is just five years, not five years to life.

*not harmless error—Grasz dissent



Bruen

United States v. Sitladeen,
64 F.4th 978 (Apr. 4, 2023)



18 U.S.C. § 922(g)(5)(A), possession of firearm by alien unlawfully present in the U.S., not a 2d Amendment or Equal Protection violation.

Restitution

US v. Evans,

48 F.4th 888 (8th Cir. Sept. 9, 2022)



Prison wages aren't "substantial resources," that must be applied to restitution under MVRA

Remand for hearing on whether seized \$ is prison earnings or windfall because it includes part of a COVID-19 stimulus payment.

*Has CP series victim been fully compensated?

Plea breach

US v. Beston,

43 F.4th 867 (8th Cir. Aug. 8, 2022)



Here, the government's inexcusable breach of the plea agreement undermined judicial fairness. We therefore decline to enforce the plea agreement's appeal waiver.



INTEPRETATION

United States v. Moreira-Bravo,
56 F.4th 568 (Dec. 27, 2022)

18 U.S.C. § 2423(a) does not require knowledge of the victim's underage status. (Grasz dissents).

Gov't needs not prove D specifically intended victim to engage in sexual activity that was unlawful as such.

Section 2323(a): “knowingly transports an individual who has not attained the age of 18 years . . . with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense .

Dismissal of Charges

US v. Bernard

42 F.4th 905 (8th Cir. Aug. 2, 2022)



Courts should interfere w/ gov't charging/dismissal decisions “only the rarest of cases,” such as when there has been “prosecutorial harassment,” including a pattern of “charging, dismissing, and recharging” or when dismissal of the charges “would be clearly contrary to manifest public interest,” i.e., when “the prosecutor . . . had an illegitimate motive rising to the level of bad faith.”

Fourth Amendment

US v. Armstrong,

39 F.4th 1053 (8th Cir. July 13, 2022)



We are not convinced that the question about employment violated the *Miranda* rule. Employment is a standard element of a booking inquiry because a judicial officer is required by statute to consider “employment” in deciding whether to release or detain a defendant pending trial

Forfeiture v. waiver

US v. Combs,

44 F.4th 815 (8th Cir. Aug. 12, 2022)



Failure to renew objection to facts in PSR not proved by gov't is classic forfeiture (not waiver) that can still receive plain error appellate review.

Spousal Privilege



US v. White Owl,

39 F.4th 527 (8th Cir. July 5, 2022)

When one spouse is charged with committing a crime against a third person while committing a crime against the other spouse, marital peace, unity, and stability have already been undermined: “there is probably little in the way of marital harmony for the [spousal] privilege to preserve.”

We reach the same conclusion where a spouse is charged with a crime against a third person that is committed in the course of victimizing the other spouse. Crime needs not be formally charged.

Due Process

US v. Ivers,

44 F.4th 753 (8th Cir. Aug. 10, 2022)



Due process violation where defendant forced to proceed through revocation of supervised release hearing with either an unprepared attorney or no attorney at all in violation of his statutory right to counsel.

PLEAS



US v. Schneider,

40 F.4th 849 (8th Cir. July 20, 2022)

Rule 11(c)(1) errors do not trigger automatic reversal.

District court's plain error of "participation" in the plea agreement did not affect Defendant's substantial rights.

US v. Streb,

36 F.4th 782 (8th Cir. July 1, 2022)

Discovery

Even assuming the government's late disclosure of benefits (meals, clothing, personal hygiene items, gift cards) it provided to minor victims of defendant's sex trafficking amounted to a discovery violation, the district court did not abuse its discretion by offering a continuance, jury instruction, and "wide open cross-examination" as remedies instead of the remedies suggested by defendant





US v. Taylor,

44 F.4th 779 (8th Cir. Aug. 10, 2022)

Statutes

We, like other courts, decline Taylor's invitation to restrict “sex act” as used in [18 U.S.C. § 1591](#) (Chapter 77) by incorporating a definition set forth in [18 U.S.C. § 2246\(2\)](#), which expressly limits its application to offenses in Chapter 109A.

Mandatory Minimum

US v. Rivas,

39 F.4th 974 (8th Cir. July 8, 2022)

Joining the Tenth, Seventh, and Sixth Circuits in reaching the conclusion that the § 2422(b) (knowingly attempt to persuade minor to engage in sexual activity) mandatory minimum does not violate the Eighth Amendment.

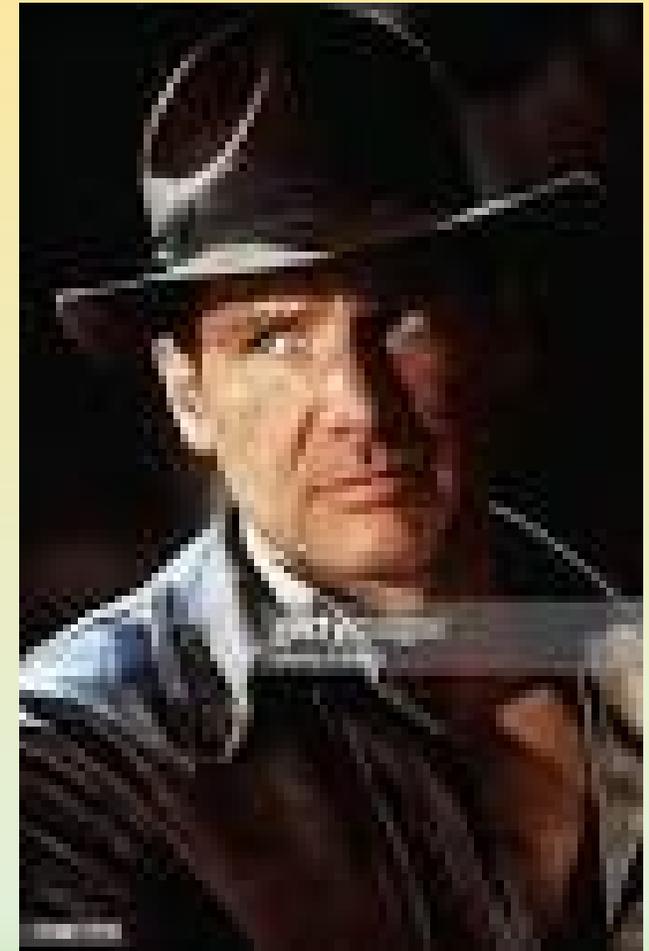


Guidelines

US v. Jones,

38 F.4th 727 (8th Cir. July 5, 2022)

That the district court may have disagreed with the sentencing guideline as construed by the appellate courts does not amount to an abuse of discretion where the court nonetheless correctly calculates the advisory range. Court are not bound to adhere to the policies of the advisory guidelines.





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