Table of Contents

II. CRIMINAL PROCEEDINGS

A. Introduction

1. Findings of Fact and Conclusions of Law

The district court's findings of fact are reviewed for clear error. *See, e.g.*, *United States v. Olsen*, 21 F.4th 1036, 1040 (9th Cir. 2022) (per curiam) (Speedy Trial Act); *United States v. Rodgers*, 656 F.3d 1023, 1026 (9th Cir. 2011) (motion to suppress); *United States v. Stoterau*, 524 F.3d 988, 997 (9th Cir. 2008) (sentencing).[1] Findings of fact based on stipulations are entitled to the same deference as those based on in-court testimony. *See United States v. Bazuaye*, 240 F.3d 861, 864 (9th Cir. 2001).

The district court's legal conclusions are reviewed de novo. *See United States v. Fomichev*, 899 F.3d 766, 770 (9th Cir.), *opinion amended on denial of reh'g*, 909 F.3d 1078 (9th Cir. 2018) (marital communications privilege); *United States v. Laursen*, 847 F.3d 1026, 1031 (9th Cir. 2017) (conclusions of law following bench trial); *United States v. Forrester*, 512 F.3d 500, 506 (9th Cir. 2008) (motion to suppress).[2] Thus, the district court's construction or interpretation of a statute is reviewed de novo. *See, e.g.*, *United States v. Lopez*, 998 F.3d 431, 434 (9th Cir. 2021) (18 U.S.C. § 3553(f)(1)); *United States v. Perez*, 962 F.3d 420, 439 (9th Cir. 2020) (reviewing district court's determination of a statute's extraterritorial reach), *cert. denied sub nom. Iraheta v. United States*, 141 S. Ct. 1443 (2021); *United States v. Valdez*, 911 F.3d 960, 962 (9th Cir. 2018) (federal forfeiture statutes); *United States v. Rivera*, 527 F.3d 891, 908 (9th Cir. 2008) (interpreting the Sentencing Guidelines).[3] Likewise, the "district court's

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[1] *See, e.g.*, *United States v. Doe*, 136 F.3d 631, 636 (9th Cir. 1998) (bench trial); *United States v. Benboe*, 157 F.3d 1181, 1183 (9th Cir. 1998) (possession of firearm); *United States v. Hernandez*, 109 F.3d 1450, 1454 (9th Cir. 1997) (exculpatory evidence).

[2] *See, e.g.*, *United States v. Enas*, 255 F.3d 662, 665 (9th Cir. 2001) (en banc) (double jeopardy); *United States v. Olafson*, 213 F.3d 435, 439 (9th Cir. 2000) (reasonable suspicion); *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999) (joinder); *United States v. Lester*, 85 F.3d 1409, 1410 (9th Cir. 1996) (criminal forfeiture).

[3] *See United States v. Cabaccang*, 332 F.3d 622, 624–25 (9th Cir. 2003) (en banc) (definition of importation); *United States v. Taylor*, 322 F.3d 1209, 1211

interpretation of the sentencing guidelines" is reviewed de novo. *See United States v. McEnry*, 659 F.3d 893, 896 (9th Cir. 2011); *see also United States v. George*, 949 F.3d 1181, 1184 (9th Cir. 2020) ("We review the district court's interpretation of the Sentencing Guidelines de novo, its factual findings for clear error, and its application of the Guidelines to the facts for abuse of discretion."); *United States v. Lloyd*, 807 F.3d 1128, 1176 (9th Cir. 2015) (same).[4]

The district court's interpretation of the federal rules is reviewed de novo. *See, e.g.*, *United States v. Rodriguez*, 971 F.3d 1005, 1017 (9th Cir. 2020) (Federal Rules of Evidence); *United States v. Lindsay*, 931 F.3d 852, 859 (9th Cir. 2019) (same); *United States v. Haines*, 918 F.3d 694, 697 (9th Cir. 2019) (same); *United States v. Lo*, 839 F.3d 777, 783 (9th Cir. 2016); *United States v. Alvarez-Moreno*, 657 F.3d 896, 900 n.2 (9th Cir. 2011) (criminal procedure).

When a district court does not make specific findings of fact or conclusions of law, the court of appeals may nevertheless uphold the result if there is a reasonable view of the evidence to support it. *See United States v. Davis*, 332 F.3d 1163, 1167 (9th Cir. 2003) (motion to suppress); *United States v. Most*, 789 F.2d 1411, 1417 (9th Cir. 1986) (waiver). Failure to make the required findings of fact pursuant to Fed. R. Crim. P. 32(i)(3)(B), however, requires a remand. *See Stoterau*, 524 F.3d at 1011.

2. Harmless Error

An error by a district court may be harmless. *See Neder v. United States*, 527 U.S. 1, 8–9 (1999) (discussing when harmless error rule applies); *Gautt v. Lewis*, 489 F.3d 993, 1014–16 (2007). Constitutional error is harmless only when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 23–24 (1967). *See also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017)

(9th Cir. 2003) (accessory after the fact statute); *United States v. Carranza*, 289 F.3d 634, 642 (9th Cir. 2002) (importation statute); *United States v. Lincoln*, 277 F.3d 1112, 1113 (9th Cir. 2002) (MVRA).

[4] Note that "a district court's application of the Sentencing Guidelines to the facts of a given case should be reviewed for abuse of discretion." *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc) (overruling prior cases to the extent they stated otherwise, resolving previous intra-circuit conflict).

(discussing *Chapman*); *United States v. Walters*, 309 F.3d 589, 593 (9th Cir. 2002).

"A non-constitutional error requires reversal unless there is a fair assurance of harmlessness, or stated another way, unless it is more probable than not that the error did not materially affect the verdict." *United States v. Lopez*, 913 F.3d 807, 825 (9th Cir. 2019); *United States v. Job*, 871 F.3d 852, 865 (9th Cir. 2017) (explaining the court must be convinced the improperly admitted evidence did not contribute to the verdict) *United States v. Seschillie*, 310 F.3d 1208, 1214 (9th Cir. 2002); *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc).

"Evidentiary errors are not harmless unless it is more probable than not that the erroneous admission of the evidence did not affect the jury's verdict." *United States v. Charley*, 1 F.4th 637, 651 (9th Cir. 2021) (internal quotation marks and citation omitted).

"Review for harmless error requires not only an evaluation of the remaining incriminating evidence in the record, but also the most perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact." *United States v. Job*, 871 F.3d 852, 865 (9th Cir. 2017) (internal quotation marks and citation omitted). *See also United States v. Oaxaca*, 233 F.3d 1154, 1158 (9th Cir. 2000) (noting "the harmlessness of an error is distinct from evaluating whether there is substantial evidence to support a verdict").

In habeas review, the harmlessness standard is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 766 (1946)); *see also O'Neal v. McAninch*, 513 U.S. 432, 440–41 (1995) ("if the harmlessness of the error is in 'grave doubt,' relief must be granted"); *California v. Roy*, 519 U.S. 2, 4 (1996) (per curiam) (rejecting Ninth Circuit's "modification" of the *Brecht* standard); *Kirkpatrick v. Chappell*, 950 F.3d 1118, 1128 (9th Cir. 2020) (as amended) (applying *Brecht* to section 2254 habeas petition); *McKinney v. Ryan*, 813 F.3d 798, 822 (9th Cir. 2015) ("The harmless-error standard on habeas review provides that "relief must be granted" if the error "had substantial and injurious effect or influence in determining the jury's verdict." (internal quotation marks and citation omitted)); *Ybarra v. McDaniel*, 656 F.3d 984, 995 (9th Cir. 2011); *United States v. Montalvo*, 331 F.3d 1052, 1057–58 (9th Cir. 2003) (applying *Brecht* to section 2255 habeas petition).

3. Plain Error

When a defendant raises an issue on appeal that was not raised before the district court, the court of appeals may review only for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 730–36 (1993) (defining limitations on a reviewing court's authority to correct plain error); *United States v. Williams*, 5 F.4th 973, 978 (9th Cir. 2021) (reviewing for plain error where defendant did not object at sentencing); *United States v. Herrera-Rivera*, 832 F.3d 1166, 1172 (9th Cir. 2016); *United States v. Pelisamen*, 641 F.3d 399, 404 (9th Cir. 2011).

Under the plain error standard, relief is not warranted unless there has been: (1) error, (2) that was plain, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *See Williams*, 5 F.4th at 978 (sentencing); *United States v. Becerra*, 939 F.3d 995, 999 (9th Cir. 2019) (jury instructions); *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019) (en banc) (sentencing); *United States v. Walter-Eze*, 869 F.3d 891, 911 (9th Cir. 2017) (jury instructions);[5] *see also United States v. Perez*, 116 F.3d 840, 845–46 (9th Cir. 1997) (en banc) (discussing difference between forfeited rights, which are reviewable for plain error, and waived rights, which are not).

Plain error is invoked to prevent a miscarriage of justice or to preserve the integrity and the reputation of the judicial process. *See Olano*, 507 U.S. at 736; *see also United States v. Lopez*, 4 F.4th 706, 719 (9th Cir. 2021) (reviewing forfeited challenges to the sufficiency of the evidence for plain error and concluding there was no error).

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[5] *See, e.g.*, *United States v. Garcia*, 522 F.3d 855, 860 (9th Cir. 2008) (supervised release conditions); *United States v. Brooks*, 508 F.3d 1205, 1209 (9th Cir. 2007) (vouching); *United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003) (restitution order); *United States v. Luna-Orozco*, 321 F.3d 857, 860 (9th Cir. 2003) (plea deficiency); *United States v. Buckland*, 289 F.3d 558, 568–69 (9th Cir. 2002) (en banc) (*Apprendi* claim); *United States v. Godinez-Rabadan*, 289 F.3d 630, 632 (9th Cir. 2002) (sufficiency of indictment); *United States v. Romero-Avila*, 210 F.3d 1017, 1021–22 (9th Cir. 2000) (prosecutor's statements).

4. Structural Error

> Structural errors are errors that affect the "entire conduct of the [proceeding] from beginning to end." … The "highly exceptional" category of structural errors includes, for example, the "denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt."

Greer v. United States, 141 S. Ct. 2090, 2100 (2021) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) and *United States v. Davila*, 569 U.S. 597, 611, 133 S. Ct. 2139, 186 L.Ed.2d 139 (2013)).

> The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself.

Weaver v. Massachusetts, 137 S. Ct. 1899, 1907–08 (2017) (internal quotation marks, emphasis, and citations omitted).

A structural error "defies analysis by harmless error standards." *Id.* (quotation marks and citation omitted). A structural error requires automatic reversal on appeal. *See Greer*, 141 S. Ct. at 2099; *Glebe v. Frost*, 574 U.S. 21, 23 (2014) ("Only the rare type of error—in general, one that infect[s] the entire trial process and necessarily render[s] [it] fundamentally unfair—requires automatic reversal." (internal quotation marks and citation omitted)); *see also United States v. Recuenco*, 548 U.S. 212, 219 (2006); *Neder v. United States*, 527 U.S. 1, 7 (1999) (defining structural error); *Greenway v. Schriro*, 653 F.3d 790, 805 (9th Cir. 2011); *United States v. Montalvo*, 331 F.3d 1052, 1057 (9th Cir. 2003) (listing structural errors); *United States v. Walters*, 309 F.3d 589, 593 (9th Cir. 2002) (same). Structural errors "are relatively rare, and consist of serious violations that taint the entire trial process, thereby rendering appellate review of the magnitude of the harm suffered by the defendant virtually impossible." *Eslaminia v. White*, 136 F.3d 1234, 1237 n.1 (9th Cir. 1998) (giving examples); *see also United States v. Chavez-Cuevas*, 862 F.3d 729, 734 (9th Cir. 2017).

> "[A] constitutional error is either structural or it is not." [*Neder v. United States*, 527 U.S. 1, 14 (1999)]. "An error can count as structural even if the error does not lead to fundamental unfairness in

every case." [*Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017)].

United States v. Becerra, 939 F.3d 995, 1003 (9th Cir. 2019).

B. Pretrial Decisions in Criminal Cases

1. Appointment of Expert Witness

The district court's denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. *See United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996); *see also United States v. Reed*, 575 F.3d 900, 918 (9th Cir. 2009). A district court's decision whether to appoint an expert witness at court expense pursuant to Fed. R. Crim. P. 17(b) is reviewed for an abuse of discretion. *See United States v. Cruz*, 783 F.2d 1470, 1473–74 (9th Cir. 1986). A district court's failure to rule on a motion for appointment of an expert witness is deemed a denial of the motion that is reviewed for an abuse of discretion. *See United States v. Depew*, 210 F.3d 1061, 1065 (9th Cir. 2000).

The district court's decision whether to admit or exclude expert testimony is also reviewed for an abuse of discretion. *See United States v. Valencia-Lopez*, 971 F.3d 891, 897 (9th Cir. 2020) (reviewing decision to admit expert testimony); *United States v. Spangler*, 810 F.3d 702, 706 (9th Cir. 2016) (same).[6]

2. Bail

Factual findings underlying a district court's pretrial detention order are reviewed under a deferential, "clearly erroneous" standard. *See United States v. Santos-Flores*, 794 F.3d 1088, 1090 (9th Cir. 2015) (order); *United States v. Fidler*, 419 F.3d 1026, 1029 (9th Cir. 2005); *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991). The court's finding of potential danger to the community is entitled to deference. *See Fidler*, 419 F.3d at 1029; *Marino v. Vasquez*, 812 F.2d 499, 509 (9th Cir. 1987). The district court's interpretation of

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[6] *See United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011) (explaining that the district court has ample discretion to prevent designation of a new expert witness after trial has started); *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000) (noting admission of expert testimony is reviewed for an abuse of discretion "except where no objection is raised, in which case we review for plain error").

"community," as used in the Bail Reform Act is reviewed de novo. *See United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008). The question of whether the district court's factual findings justify pretrial detention is also reviewed de novo. *See Santos-Flores*, 794 F.3d at 1090; *Hir*, 517 F.3d at 1086–87.

The court's finding that a defendant is a flight risk is reviewed under the clearly erroneous standard. *See Fidler*, 419 F.3d at 1029; *United States v. Donaghe*, 924 F.2d 940, 945 (9th Cir. 1991). The ultimate "fleeing from justice" question, however, is reviewed de novo, because "legal concepts that require [the court] to exercise judgment dominate the mix of fact and law." *United States v. Fowlie*, 24 F.3d 1070, 1072 (9th Cir. 1994); *see also Man-Seok Choe v. Torres*, 525 F.3d 733, 741 (9th Cir. 2008). The conclusions based on factual findings in a bail hearing present a mixed question of fact and law. *See Santos-Flores*, 794 F.3d at 1090. The facts, findings, and record are reviewed de novo to determine whether the detention order is consistent with constitutional and statutory rights. *See Hir*, 517 F.3d at 1086–87; *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990).

A district court's decision to set aside or remit forfeiture of appearance bond is reviewed for an abuse of discretion. *See United States v. Nguyen*, 279 F.3d 1112, 1115 (9th Cir. 2002); *United States v. Amwest Sur. Ins. Co.*, 54 F.3d 601, 602 (9th Cir. 1995).

The district court's decision whether to exonerate bail bond sureties is reviewed de novo. *See United States v. Noriega-Sarabia*, 116 F.3d 417, 419 (9th Cir. 1997); *United States v. Toro*, 981 F.2d 1045, 1047 (9th Cir. 1992). The legal validity of the bond is also reviewed de novo. *Noriega-Sarabia*, 116 F.3d at 419.

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 44. Pretrial Detention and Release.

3. Bill of Particulars

The district court's decision to deny a motion for a bill of particulars is reviewed for an abuse of discretion. *See United States v. Robertson*, 15 F.3d 862, 874 (9th Cir. 1994), *rev'd on other grounds*, 514 U.S. 669 (1995); *United States v. Ayers*, 924 F.2d 1468, 1483 (9th Cir. 1991). The scope and specificity of a bill of particulars rest within the sound discretion of the trial court. *See United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983).

4. *Brady* Violations

The court reviews de novo whether a *Brady* violation has occurred. *See United States v. Moalin*, 973 F.3d 977, 1001–02 (9th Cir. 2020); *United States v. Cano*, 934 F.3d 1002, 1022 n.14 (9th Cir. 2019).

Challenges to convictions based on alleged *Brady* violations are reviewed de novo. *See United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017); *United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004); *United States v. Smith*, 282 F.3d 758, 770 (9th Cir. 2002).

A district court's denial of a motion for mistrial or new trial based on an alleged *Brady* violation is also reviewed de novo. *See United States v. Miller*, 953 F.3d 1095, 1107 (9th Cir. 2020) (noting the court would review the district court's denial of a motion for a new trial based on a *Brady* violation de novo, but would review the district court's denial of a motion for a new trial based on newly discovered evidence for abuse of discretion); *United States v. Antonakeas*, 255 F.3d 714, 725 (9th Cir. 2001); *United States v. Howell*, 231 F.3d 615, 624 (9th Cir. 2000).

The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is reviewed, however, for an abuse of discretion. *See United States v. Belden*, 957 F.2d 671, 674 (9th Cir. 1992).

A district court's ruling on the prosecutor's duty to produce evidence under *Brady* is reviewed de novo. *See United States v. Si*, 343 F.3d 1116, 1122 (9th Cir. 2003); *United States v. Monroe*, 943 F.2d 1007, 1012 (9th Cir. 1991). The court's decision to allow production of redacted documents is reviewed for clear error. *See Si*, 343 F.3d at 1122. Thus, the district court's ruling on whether a defendant should have access to particular information in a government document that has been produced pursuant to *Brady* is reviewed for clear error. *See Monroe*, 943 F.2d at 1012; *see also United States v. Stinson*, 647 F.3d 1196, 1208 (9th Cir. 2011).

Whether a defendant has waived *Brady* rights in a plea agreement is a question of law reviewed de novo. *See United States v. Ruiz*, 241 F.3d 1157, 1163 (9th Cir. 2001), *rev'd on other grounds*, 536 U.S. 622 (2002).

5. Competency to Stand Trial

A district court's determination that a defendant is competent to stand trial is reviewed for clear error. *See United States v. Turner*, 897 F.3d 1084, 1105 (9th

Cir. 2018); *United States v. Loughner*, 672 F.3d 731, 766 n.17 (9th Cir. 2012); *United States v. Johnson*, 610 F.3d 1138, 1145 (9th Cir. 2010); *United States v. Friedman*, 366 F.3d 975, 980 (9th Cir. 2004); *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1171 (9th Cir. 2002); *see also Blair v. Martel*, 645 F.3d 1151, 1154 n.1 (9th Cir. 2011) (habeas). The test for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding … and a rational as well as factual understanding of the proceedings against him." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). In a federal habeas proceeding, state court determinations of mental competency are given a presumption of correctness, and will be overturned only if they are not fairly supported by the record. *See King v. Brown*, 8 F.3d 1403, 1408 (9th Cir. 1993).

A court's decision to order a psychiatric or psychological examination is reviewed for an abuse of discretion. *See United States v. George*, 85 F.3d 1433, 1347 (9th Cir. 1996). The court's decision whether to release a copy of the competency report to the media is also reviewed for an abuse of discretion. *See United States v. Kaczynski*, 154 F.3d 930, 931 (9th Cir. 1998).

Whether a court is permitted under 18 U.S.C. § 4243(f) to order a psychiatric evaluation of an insanity acquittee is a question of statutory construction reviewed de novo. *See United States v. Phelps*, 955 F.2d 1258, 1264 (9th Cir. 1992).

The court of appeals reviews the district court's failure to sua sponte hold a competency hearing for plain error. *See Turner*, 897 F.3d at 1107.

6. Confessions

This court reviews de novo the voluntariness of a confession. *See United States v. Price*, 980 F.3d 1211, 1226 (9th Cir. 2019) (as amended Nov. 27, 2020), *cert. denied*, 142 S. Ct. 129 (2021); *United States v. Heller*, 551 F.3d 1108, 1112 (9th Cir. 2009).[7] The district court's factual findings underlying its determination of voluntariness are reviewed for clear error. *See Price*, 980 F.3d at 1226; *Heller*,

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[7] *See also United States v. Shi*, 525 F.3d 709, 730 (9th Cir. 2008); *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003) (reviewing de novo district court conclusion that statements were involuntary); *United States v. Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002) (due process test considers totality of circumstances); *Pollard v. Galaza*, 290 F.3d 1030, 1032 (9th Cir. 2002) (habeas).

551 F.3d at 1112; *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003); *United States v. Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002). Special deference is owed to the trial court's credibility determinations. *See United States v. Nelson*, 137 F.3d 1094, 1110 (9th Cir. 1998); *see also United States v. Ruehle*, 583 F.3d 600, 606–07 (9th Cir. 2009).

7. Confidential Informants

The decision whether to disclose the identity of a confidential informant is reviewed for an abuse of discretion. *See United States v. Rowland*, 464 F.3d 899, 903 (9th Cir. 2006); *United States v. Decoud*, 456 F.3d 996, 1009 (9th Cir. 2006); *United States v. Henderson*, 241 F.3d 638, 646 (9th Cir. 2000). The district court must balance the public interest in "protecting the flow of information" against the defendant's competing interest for "relevant and helpful testimony." *United States v. Ramirez-Rangel*, 103 F.3d 1501, 1505 (9th Cir. 1997), *overruled in part on other grounds by Watson v. United States*, 552 U.S. 74 (2007). Nondisclosure is an abuse of discretion only if "disclosure of an informer's identity … is relevant and helpful to the defense of the accused, or is essential to a fair determination of [the defendant's] cause." *Roviaro v. United States*, 353 U.S. 53, 62 (1957).

The appropriate standard of review for the district court's decision to allow a confidential informant to testify in disguise is abuse of discretion." *United States v. de Jesus-Casteneda*, 705 F.3d 1117, 1119 (9th Cir. 2013).

The decision whether to hold an *in camera* hearing regarding disclosure of the informant's identity is reviewed for an abuse of discretion. *See Henderson*, 241 F.3d at 646; *United States v. Amador-Galvan*, 9 F.3d 1414, 1417 (1993).

The district court's refusal to give an informant credibility jury instruction is also reviewed for an abuse of discretion. *See United States v. Holmes*, 229 F.3d 782, 786 (9th Cir. 2000).

8. Consolidation of Counts

The trial court's decision whether to consolidate counts is reviewed de novo. *See United States v. Douglass*, 780 F.2d 1472, 1477 (9th Cir. 1986) (rejecting abuse of discretion standard). The district court's order that two indictments be tried together is reviewed, however, for an abuse of discretion. *See United States v. Nguyen*, 88 F.3d 812, 815 (9th Cir. 1996).

9. Continuances

A district court's decision to grant or deny a motion for a continuance is reviewed for an abuse of discretion. *See United States v. Walter-Eze*, 869 F.3d 891, 907 (9th Cir. 2017) (noting that broad discretion must be given to trial courts on matters of continuances); *United States v. Wilkes*, 662 F.3d 524, 543 (9th Cir. 2011); *United States v. Kloehn*, 620 F.3d 1122, 1126–27 (9th Cir. 2010); *United States v. Nguyen*, 262 F.3d 998, 1002 (9th Cir. 2001) (listing factors for appellate court to consider); *United States v. Garrett*, 179 F.3d 1143, 1144–45 (9th Cir. 1999) (en banc) (reaffirming that abuse of discretion is proper standard of review to review "a district court's ruling granting or denying a motion for a continuance"). The court reviews the district court's failure to grant a continuance for abuse of discretion, even where, no motion for continuance was made. *See United States v. Audette*, 923 F.3d 1227, 1240 (9th Cir. 2019).

"A court does not abuse its discretion unless the denial of a continuance was 'arbitrary or unreasonable.'" *Audette*, 923 F.3d at 1240; *see also Wilkes*, 662 F.3d at 543; *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1138 (9th Cir. 2005) ("Reversal is required if 'after carefully evaluating all the relevant factors,' we conclude that "the denial was arbitrary or unreasonable." (quoting *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985))). "To reverse a trial court's denial of a continuance, an appellant must show that the denial prejudiced [the] defense." *United States v. Gonzalez-Rincon*, 36 F.3d 859, 865 (9th Cir. 1994); *see also Wilkes*, 662 F.3d at 543. The court considers four factors: the extent of the appellant's diligence in readying his or her defense prior to the set hearing date, the likelihood that the need for the continuance could have been met had the district court granted the continuance, the inconvenience potentially caused by granting the continuance, and the extent of the harm the appellant might have suffered as a result of the denial. *See Kloehn*, 620 F.3d at 1127 (citing *Flynt*, 756 F.2d at 1359–61); *Rivera-Guerrero*, 426 F.3d at 1138–39 (citing *Flynt*, 756 F.2d at 1359).

A trial court's refusal to grant a continuance of a sentencing hearing is also reviewed for an abuse of discretion. *See United States v. Lewis*, 991 F.2d 524, 528 (9th Cir. 1993); *United States v. Monaco*, 852 F.2d 1143, 1150 (9th Cir. 1988).

"An arbitrary denial of a continuance is subject to the harmless error test." *United States v. Kloehn*, 620 F.3d 1122, 1130 (9th Cir. 2010).

10. Defenses

The district court's decision to preclude a defendant's proffered defense is reviewed de novo. *See United States v. Lindsey*, 850 F.3d 1009, 1014 (9th Cir. 2017); *United States v. Ibarra-Pino*, 657 F.3d 1000, 1003 (9th Cir. 2011); *United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010); *United States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008) (duress); *United States v. Biggs*, 441 F.3d 1069, 1070 n.1 (9th Cir. 2006); *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004) (entrapment defense); *United States v. Ross*, 206 F.3d 896, 898 (9th Cir. 2000) (granting motion in limine to preclude presentation of a defense).[8]

The district court's failure to instruct on an appropriate defense theory is a question of law reviewed de novo. *See United States v. Crandall*, 525 F.3d 907, 911 (9th Cir. 2008); *United States v. Sayakhom*, 186 F.3d 928, 939–40 (9th Cir.), *amended by* 197 F.3d 959 (9th Cir. 1999); *United States v. McGeshick*, 41 F.3d 419, 421 (9th Cir. 1994). Whether jury instructions adequately cover the defendant's proffered defense is also reviewed de novo. *See United States v. Chi*, 936 F.3d 888, 893 (9th Cir.), *amended sub nom. United States v. Heon-Cheol Chi*, 942 F.3d 1159 (9th Cir. 2019); *United States v. Kaplan*, 836 F.3d 1199, 1214 (9th Cir. 2016); *United States v. Pierre*, 254 F.3d 872, 875 (9th Cir. 2001) (lesser-included-offense). Whether a defendant has made the required factual foundation to support a requested jury instruction is reviewed, however, for an abuse of discretion. *See United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011); *United States v. Bush*, 626 F.3d 527, 539 (9th Cir. 2010); *United States v. Daane*, 475 F.3d 1114, 1119 (9th Cir. 2007); *United States v. Bello-Bahena*, 411 F.3d 1083, 1090 (9th Cir. 2005); *see also United States v. Perdomo-Espana*, 522 F.3d 983, 986 (9th Cir. 2008) (explaining various standards of review depending on focus of inquiry). Whether a challenged jury instruction precludes an adequate presentation of the defense theory of the case is reviewed de novo. *See United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998).

A determination that a defendant has the burden of proving a defense is reviewed de novo. *See United States v. Beasley*, 346 F.3d 930, 933 (9th Cir.

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[8] *See United States v. Shryock*, 342 F.3d 948, 987 (9th Cir. 2003) (accomplice-corroboration/duress); *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001) (necessity); *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000) (entrapment by estoppel).

2003); *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998); *see also United States v. Sandoval-Gonzalez*, 642 F.3d 717, 721 (9th Cir. 2011).

The district court's violation of a defendant's Sixth Amendment right to choose his or her defense is a structural error, and the proper remedy is a new trial." *United States v. Read*, 918 F.3d 712, 721 (9th Cir. 2019) (reviewing de novo defendant's claim that the district court violated his Sixth Amendment right to present a defense of his own choosing by terminating self-representation and permitting counsel to make an insanity defense, and holding that a district court commits reversible error by permitting defense counsel to present a defense of insanity over a competent defendant's clear rejection of that defense.).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 42. Preclusion of Proffered Defense.

11. Discovery

A district court's discovery rulings are reviewed for an abuse of discretion. *See United States v. Cano*, 934 F.3d 1002, 1023 (9th Cir. 2019) (discovery rulings are generally reviewed for abuse of discretion); *United States v. Sellers*, 906 F.3d 848, 851–52 (9th Cir. 2018) (reviewing district court's determination that the defendant failed to make the necessary showing to be entitled to discovery on a claim of selective prosecution for abuse of discretion.); *United States v. Soto-Zuniga*, 837 F.3d 992, 998 (9th Cir. 2016); *United States v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007); *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1069 (9th Cir. 2003) (denying discovery on claim that prosecution violated equal protection). An order limiting the scope of discovery is reviewed for an abuse of discretion. *See United States v. Candia-Veleta*, 104 F.3d 243, 246 (9th Cir. 1996); *United States v. Gomez-Lopez*, 62 F.3d 304, 306–07 (9th Cir. 1995). The court necessarily abuses its discretion when it applies the wrong legal standard. *See Sellers*, 906 F.3d at 852.

The district court's interpretation of the discovery rules is reviewed de novo. *See Cano*, 934 F.3d at 1023 n.15. Whether the district court applied the correct discovery standard is a legal question that is also subject to de novo review. *See Sellers*, 906 F.3d at 851.

"To reverse a conviction for a discovery violation, [the court] must find not only that the district court abused its discretion, but that the error resulted in prejudice to substantial rights." *United States v. Amlani*, 111 F.3d 705, 712 (9th Cir. 1997) (internal quotations and citation omitted). "To justify reversal of a

sanction for a discovery violation, the defendant must show a likelihood that the verdict would have been different had the government complied with the discovery rules." *United States v. de Cruz*, 82 F.3d 856, 866 (9th Cir. 1996) (internal quotations and citation omitted).

The district court's discovery rulings under Fed. R. Crim. P. 16 are reviewed for an abuse of discretion. *See United States v. Soto–Zuniga*, 837 F.3d 992, 998 (9th Cir. 2016) ("We review discovery rulings for abuse of discretion."); *United States v. Danielson*, 325 F.3d 1054, 1074 (9th Cir. 2003); *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990). The district court's interpretation of Rule 16, however, is reviewed de novo. *See Mandel*, 914 F.2d at 1219; *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002). The scope of the district court's authority under Rule 16 is also reviewed de novo. *See United States v. Gonzalez-Rincon*, 36 F.3d 859, 864 (9th Cir. 1994); *but see United States v. Chon*, 210 F.3d 990, 994 (9th Cir. 2000) (discussing scope of Rule 16(a)(1)(c) but applying abuse of discretion standard). The court's conclusion on Rule 16 "materiality" is reviewed, however, for an abuse of discretion. *See United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995). The propriety of excluding evidence as a sanction under Rule 16 is reviewed for an abuse of discretion. *See Finley*, 301 F.3d at 1007.

Whether the government violated its discovery obligations is reviewed de novo. *See United States v. Obagi*, 965 F.3d 993, 997 (9th Cir. 2020); *United States v. Stinson*, 647 F.3d 1196, 1208 (9th Cir. 2011).

a. Depositions

Denial of a motion to depose a witness pursuant to Fed. R. Crim. P. 15 is reviewed for abuse of discretion. *See United States v. Moalin*, 973 F.3d 977, 1005 (9th Cir. 2020); *United States v. Matus-Zayas*, 655 F.3d 1092, 1098 (9th Cir. 2011); *United States v. Olafson*, 213 F.3d 435, 442–43 (9th Cir. 2000); *United States v. Omene*, 143 F.3d 1167, 1170 (9th Cir. 1998).

b. Jencks Act

A district court's denial of a discovery motion made pursuant to the Jencks Act is reviewed for an abuse of discretion. *See United States v. Robertson*, 895 F.3d 1206, 1216 (9th Cir. 2018); *United States v. Alvarez*, 358 F.3d 1194, 1210 (9th Cir. 2004); *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Guagliardo*, 278 F.3d 868, 871 (9th Cir. 2002).

The district court's decision regarding the imposition of sanctions for a Jencks Act violation is reviewed for an abuse of discretion. *See United States v. Cardenas-Mendoza*, 579 F.3d 1024, 1031 (9th Cir. 2009); *United States v. McKoy*, 78 F.3d 446, 449 (9th Cir. 1996). A conviction will be affirmed if the "Jencks error is more than likely harmless." *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1457 (9th Cir. 1992); *United States v. Span*, 970 F.2d 573, 582 (9th Cir. 1992); *see also Cardenas-Mendoza*, 579 F.3d at 1031("an erroneous decision not to impose sanctions under the Jencks Act [is reviewed] for harmless error"); *United States v. Alvarez*, 86 F.3d 901, 907 (9th Cir. 1996) (harmless error doctrine applies to Jencks Act violations).

c. Sanctions

Discovery sanctions are generally reviewed for an abuse of discretion. *See United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002); *United States v. Fernandez*, 231 F.3d 1240, 1245 (9th Cir. 2000); *United States v. Scholl*, 166 F.3d 964, 972 (9th Cir. 1999). Whether the district court had any legal basis for its discovery order is reviewed de novo, but if it did, then the court's imposition of sanctions is reviewed for an abuse of discretion. *See Fernandez*, 231 F.3d at 1245; *see also United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992). The trial court's decision to impose sanctions for a Jencks Act violation is reviewed for an abuse of discretion. *See United States v. Cardenas-Mendoza*, 579 F.3d 1024, 1031 (9th Cir. 2009); *United States v. McKoy*, 78 F.3d 446, 448 (9th Cir. 1996).

The district court's conclusion that specific attorney conduct violated local rules is reviewed de novo. *See United States v. Carona*, 660 F.3d 360, 364 (9th Cir. 2011); *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1993). The court's findings of fact in support of its imposition of sanctions are reviewed for clear error. *See Lopez*, 4 F.3d at 1458.

To reverse a conviction for a discovery violation, this court must determine not only that the district court abused its discretion, but also that the error resulted in prejudice to substantial rights. *See United States v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007); *United States v. Amlani*, 111 F.3d 705, 712 (9th Cir. 1997); *United States v. de Cruz*, 82 F.3d 856, 866 (9th Cir. 1996).

Where the district court has sanctioned the government for its discovery violations, the choice of sanctions is reviewed for abuse of discretion. *See United States v. Obagi*, 965 F.3d 993, 997 (9th Cir. 2020); *United States v. Garrison*, 888 F.3d 1057, 1064 (9th Cir. 2018).

12. Discriminatory (Selective) Prosecution

"To establish a claim of selective prosecution, a defendant must show both discriminatory effect and discriminatory purpose." *United States v. Sellers*, 906 F.3d 848, 851 (9th Cir. 2018). Absent a prima facie showing of discrimination based on suspect characteristics, *i.e.*, race, religion, or gender, a court may not review a prosecutor's decision to charge a particular defendant. *See United States v. Nelson*, 137 F.3d 1094, 1105 (9th Cir. 1998); *United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996). "These are essentially factual determinations which [are] review[ed] for clear error." *United States v. Estrada-Plata*, 57 F.3d 757, 760 (9th Cir. 1995); *Bauer*, 84 F.3d at 1560 (applying clear error); *United States v. Davis*, 36 F.3d 1424, 1432 (9th Cir. 1994) (same). However, this court noted that, "[i]n reviewing a selective prosecution claim, this circuit has employed both a de novo and a clear error standard." *United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007) (electing not to resolve conflict).

The district court decision to dismiss an indictment based on a claim of selective prosecution is reviewed for clear error. *See Bauer*, 84 F.3d at 1560.

The district court's determination that the defendant failed to make the necessary showing to be entitled to discovery on a claim of selective prosecution is reviewed for abuse of discretion. *See Sellers*, 906 F.3d at 851–52; *United States v. Turner*, 104 F.3d 1180, 1185 (9th Cir. 1997); *United States v. Candia-Veleta*, 104 F.3d 243, 246 (9th Cir. 1996). The court necessarily abuses its discretion when it applies the wrong legal standard. *See Sellers*, 906 F.3d at 852.

The court's ruling on the scope of discovery for a selective prosecution claim is also reviewed for an abuse of discretion. See *Candia-Veleta*, 104 F.3d at 246. Discovery should be permitted when the defendant is able to offer "some evidence tending to show the existence of the discriminatory effect element." *United States v. Armstrong*, 517 U.S. 456, 469 (1996) (reversing Ninth Circuit's en banc decision at 48 F.3d 1508, 1512 (9th Cir. 1995)).

13. Dismissals

Generally, dismissal of an indictment based on legal error is reviewed de novo; dismissal based on discretionary authority is reviewed for an abuse of discretion. *See United States v. Sineneng-Smith*, 982 F.3d 766, 773 (9th Cir. 2020) *cert. denied*, 142 S. Ct. 117 (2021); *United States v. Miller*, 953 F.3d 1095, 1105 (9th Cir. 2020) ("We review the district court's denial of Miller's motion to dismiss on Due Process grounds de novo, and we review for abuse of discretion the

district court's decision not to dismiss the indictment under its supervisory powers."), *cert. denied*, 141 S. Ct. 1085 (2021); *United States v. Brobst*, 558 F.3d 982, 994 (9th Cir. 2009) (supervisory powers); *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991); *but see United States v. Miller*, 4 F.3d 792, 794 (9th Cir. 1993) (electing not to decide appropriate standard to be applied to dismissal based on supervisory powers).

The denial of a motion to dismiss based on a violation of constitutional rights is reviewed de novo. *See United States v. Olsen*, 21 F.4th 1036, 1040 (9th Cir. 2022) (per curiam) (Speedy Trial Act); *Miller*, 953 F.3d at 1105 (due process); *United States v. Lindsay*, 931 F.3d 852, 859 (9th Cir. 2019); *Brobst*, 558 F.3d at 994 (due process); *United States v. Reveles-Espinoza*, 522 F.3d 1044, 1047 (9th Cir. 2008) (due process); *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1174 (9th Cir. 2002) (failure to retain a witness); *United States v. Ziskin*, 360 F.3d 934, 942–43 (9th Cir. 2003) (double jeopardy);*United States v. Hinojosa-Perez*, 206 F.3d 832, 835 (9th Cir. 2000) (motion to dismiss an information).[9]

The district court's decision whether to dismiss an indictment based on its interpretation of a federal statute is also reviewed de novo. *See, e.g.*, *Sineneng-Smith*, 982 F.3d 766, 773; *United States v. Olander*, 572 F.3d 764, 766 (9th Cir. 2009); *United States v. W.R. Grace*, 504 F.3d 745, 751 (9th Cir. 2007) (18 U.S.C. § 3288); *United States v. Gorman*, 314 F.3d 1105, 1110 (9th Cir. 2002) (Speedy Trial Act); *United States v. Boren*, 278 F.3d 911, 913 (9th Cir. 2002) (18 U.S.C. § 1014); *United States v. Gomez-Rodriguez*, 96 F.3d 1262, 1264 (9th Cir. 1996) (en banc).

The trial court's findings of fact with regard to a motion to dismiss are reviewed for clear error. *See Olsen*, 21 F.4th at 1040; *United States v. Camacho-Lopez*, 450 F.3d 928, 929 (9th Cir. 2006); *Hinojosa-Perez*, 206 F.3d at 835.

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[9] *See, e.g.*, *United States v. Price*, 314 F.3d 417, 420 (9th Cir. 2002) (double jeopardy); *United States v. Pitner*, 307 F.3d 1178, 1182 (9th Cir. 2002) (Sixth Amendment); *United States v. Hancock*, 231 F.3d 557, 561 (9th Cir. 2000) (due process and equal protection); *United States v. Munsterman*, 177 F.3d 1139, 1141 (9th Cir. 1999) (bills of attainder); *United States v. Romeo*, 114 F.3d 141, 142 (9th Cir. 1997) (collateral estoppel/double jeopardy); *United States v. Fulbright*, 105 F.3d 443, 452 (9th Cir. 1997), *overruled in part on other grounds by United States v. Heredia*, 483 F.3d 913, 920 (9th Cir. 2007) (Fifth Amendment).

Whether to dismiss an indictment to remedy a violation of recognized rights, to deter illegal conduct, or to preserve judicial integrity is an exercise of the district court's supervisory powers reviewed for an abuse of discretion. *See United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000); *United States v. Garza-Juarez*, 992 F.2d 896, 905 (9th Cir. 1993). Thus, the trial court's decision on a defendant's motion to dismiss for impermissible preindictment or pre-accusation delay is reviewed for an abuse of discretion. *See United States v. Gregory*, 322 F.3d 1157, 1161 (9th Cir. 2003); *United States v. Mills*, 280 F.3d 915, 920 (9th Cir. 2002); *United States v. Doe*, 149 F.3d 945, 947 (9th Cir. 1998); *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992).

The dismissal of an indictment without prejudice is reviewed for an abuse of discretion. *United States v. Adrian*, 978 F.2d 486, 493 (9th Cir. 1992), *overruled in part on other grounds by United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008) (en banc).

A district court's ruling on the government's motion for leave to dismiss filed pursuant to Fed. R. Crim. P. 48(a) is reviewed for abuse of discretion, although the court's discretion to deny leave is limited. *See United States v. Garcia-Valenzuela*, 232 F.3d 1003, 1007 (9th Cir. 2000); *United States v. Gonzalez*, 58 F.3d 459, 461 (9th Cir. 1995) ("there is a question as to whether a district court may ever deny an uncontested Rule 48(a) motion").

The court's decision to dismiss pursuant to Rule 48(b) for preindictment delay and pretrial delay is also limited and reviewed only for an abuse of discretion; however, dismissal "should be imposed only in extreme circumstances," especially when the dismissal is with prejudice. *See United States v. Jiang*, 214 F.3d 1099, 1101 (9th Cir. 2000); *United States v. Talbot*, 51 F.3d 183, 186 (9th Cir. 1995).

"The court reviews the denial of the motion to dismiss on Speedy Trial Act grounds *de novo* and reviews findings of fact for clear error." *United States v. Henry*, 984 F.3d 1343, 1349–50 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 376 (2021); *see also United States v. Olsen*, 21 F.4th 1036, 1040 (9th Cir. 2022) (per curiam); *United States v. King*, 483 F.3d 969, 972 n.3 (9th Cir. 2007); *United States v. Gorman*, 314 F.3d 1105, 1110 (9th Cir. 2002). The decision whether to dismiss with or without prejudice for a Speedy Trial Act violation is reviewed for an abuse of discretion; the district court abuses its discretion when it "fail[s] to set out relevant factual findings and to clearly articulate its application of statutory factors to the facts of the case." *United States v. White*, 864 F.2d 660, 661 (9th Cir. 1988) (citing *United States v. Taylor*, 487 U.S. 326, 344 (1988)). However, before

a district court can enter a dismissal *without* prejudice, an evidentiary hearing must be held; otherwise, the district court shall enter a dismissal *with* prejudice. *See United States v. Delgado-Miranda*, 951 F.2d 1063, 1065 (9th Cir. 1991) (per curiam).

The district court's decision whether to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. *See United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011); *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir. 2007); *United States v. Bridges*, 344 F.3d 1010, 1014 (9th Cir. 2003); *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003); *United States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996); *cf. United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004) (even where no due process violation exists, reviewing district court's refusal to dismiss under abuse of discretion of its supervisory powers). The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. *See Gurolla*, 333 F.3d at 950; *United States v. Cuellar*, 96 F.3d 1179, 1182 (9th Cir. 1996). The court's decision whether to dismiss based on allegations of prosecutorial misconduct before a grand jury is also reviewed de novo. *See United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000); *United States v. De Rosa*, 783 F.2d 1401, 1404 (9th Cir. 1986); *see also United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004) (abuse of the grand jury process).

The denial of a motion to dismiss an indictment for an alleged lack of jurisdiction is reviewed de novo. *See United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004); *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002).

The district court's refusal to dismiss for a violation of the Interstate Agreement on Detainers Act is reviewed de novo. *United States v. Lualemaga*, 280 F.3d 1260, 1263 (9th Cir. 2002).

14. Evidentiary Hearings

A district court's decision whether to conduct an evidentiary hearing is generally reviewed for an abuse of discretion. *See Staten v. Davis*, 962 F.3d 487, 494 (9th Cir. 2020) (habeas), *cert. denied*, 141 S. Ct. 1502 (2021); *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008) (habeas); *United States v. Saya*, 247

F.3d 929, 934 (9th Cir. 2001) (as amended) (jury misconduct); *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158–60 (9th Cir. 2000).[10]

Note that in some instances the denial of a motion for an evidentiary hearing is reviewed de novo. *See United States v. Meek*, 366 F.3d 705, 716 (9th Cir. 2004) (*Franks* hearing); *United States v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002) (*Franks* hearing); *United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (use immunity); *cf. United States v. Smith*, 155 F.3d 1051, 1063 n.18 (9th Cir. 1998) (refusing to extend *Young* to suppression hearing).

The district court's timing of an evidentiary hearing is reviewed for an abuse of discretion. *See United States v. Montilla*, 870 F.2d 549, 551 (9th Cir. 1989), *amended by* 907 F.2d 115 (9th Cir. 1990). The court's decision regarding the scope of an evidentiary hearing is also reviewed for an abuse of discretion. *See United States v. Hernandez*, 322 F.3d 592, 600 n.8 (9th Cir. 2003).

15. Ex Parte Hearings

A trial court's decision to conduct an ex parte hearing is reviewed for an abuse of discretion. *See United States v. Wills*, 88 F.3d 704, 711 (9th Cir. 1996) (court did not abuse its discretion); *United States v. Thompson*, 827 F.2d 1254, 1260–61 (9th Cir. 1987) (court abused its discretion).

In *United States v. Carpenter*, 923 F.3d 1172, 1178 (9th Cir. 2019), the court reviewed for abuse of discretion the district court's decision not to seal or proceed ex parte with the defendant's offer of proof, where the district court balanced the interests of the public and the party seeking to keep secret certain judicial records.

16. Ex Post Facto

Whether a sentence violates the prohibition in Article I of the United States Constitution against ex post facto laws is reviewed de novo. *See Hunter v. Ayers*, 336 F.3d 1007, 1011 (9th Cir. 2003) (habeas); *see also United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010); *United States v. Staten*, 466 F.3d 708, 713 (9th

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[10] *See, e.g.*, *United States v. Quoc Viet Hoang*, 486 F.3d 1156, 1162 (9th Cir. 2007) (motion to suppress); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (habeas); *United States v. Hayes*, 231 F.3d 1132, 1135 (9th Cir. 2000) (Rule 35 motion); *United States v. Houston*, 217 F.3d 1204, 1206–07 (9th Cir. 2000) (sentencing).

Cir. 2006); *United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997). A district court's ruling that the ex post facto clause was not violated is also reviewed de novo. *United States v. Canon*, 66 F.3d 1073, 1077 (9th Cir. 1995); *United States v. Walker*, 27 F.3d 417, 419 (9th Cir. 1994).

17. Extradition

Whether a valid extradition treaty exists is a question of law reviewed de novo. *See United States v. Merit*, 962 F.2d 917, 919 (9th Cir. 1992). Whether such an extradition treaty is in force is a legal question subject to de novo review. *See United States v. Tuttle*, 966 F.2d 1316, 1316 (9th Cir. 1992). Whether the district court had jurisdiction if the treaty was violated is reviewed de novo. *See United States v. Struckman*, 611 F.3d 560, 571 (9th Cir. 2010); *United States v. Anderson*, 472 F.3d 662, 666 (9th Cir. 2006). Likewise, interpretations of extradition treaties are reviewed de novo. *See United States v. Soto-Barraza*, 947 F.3d 1111, 1117 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 599 (2020); *Manta v. Chertoff*, 518 F.3d 1134, 1141 (9th Cir. 2008); *United States v. Lazarevich*, 147 F.3d 1061, 1063 (9th Cir. 1998); *Clarey v. Gregg*, 138 F.3d 764, 765 (9th Cir. 1998).

Whether an offense comes within an extradition treaty requires a determination of whether the offense is listed as an extraditable crime and whether the conduct is illegal in both countries. Both are questions of law reviewed de novo. *See Soto-Barraza*, 947 F.3d at 1117; *Anderson*, 472 F.3d at 666; *United States v. Van Cauwenberghe*, 827 F.2d 424, 428 (9th Cir. 1987); *Quinn v. Robinson*, 783 F.2d 776, 791–92 (9th Cir. 1986); *see also Santos v. Thomas*, 830 F.3d 987, 1001 (9th Cir. 2016) (en banc) (reviewing the extradition court's legal rulings de novo). The court also reviews de novo whether extradition of a defendant satisfies the doctrines of dual criminality and specialty. *See Soto-Barraza*, 947 F.3d at 1117; *Anderson*, 472 F.3d at 666; *United States v. Khan*, 993 F.2d 1368, 1372 (9th Cir. 1993). A district court's analysis of foreign law is reviewed de novo. *See United States v. Fowlie*, 24 F.3d 1059, 1064 (9th Cir. 1994).

Factual determinations made by the extradition tribunal will be reviewed under the clearly erroneous standard of review. *See Santos v. Thomas*, 830 F.3d 987, 1001 (9th Cir. 2016) (en banc) (reviewing the extradition court's findings of fact for clear error); *Vo v. Benov*, 447 F.3d 1235, 1240 (9th Cir. 2006); *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1405 (9th Cir. 1988); *Quinn*, 783 F.2d at 792. Denials of requests for discovery in extradition matters are reviewed for an abuse of discretion. *See Prasoprat v. Benov*, 421 F.3d 1009, 1014 (9th Cir. 2005).

The scope of habeas review of an extradition order is limited. *See United States v. Knotek*, 925 F.3d 1118, 1124 (9th Cir. 2019); *Prasoprat*, 421 F.3d at 1013.

Factual findings made by a magistrate judge in an extradition proceeding are reviewed for clear error. *See Sainez v. Venables*, 588 F.3d 713, 715 (9th Cir. 2009); *Vo*, 447 F.3d at 1240. A probable cause finding must be upheld if there is any competent evidence in the record to support it. *See Prasoprat*, 421 F.3d at 1013–15. *See also Santos v. Thomas*, 830 F.3d 987, 1001 (9th Cir. 2016) (en banc) (magistrate's probably cause finding must be upheld if there is any competent evidence to support it).

18. *Faretta* Requests (Waive Counsel)

Faretta v. California, 422 U.S. 806, 835 (1975), states that before a district court may grant a defendant's request to proceed pro se, there must be a showing that the defendant "knowingly and intelligently" waived the right to counsel. The validity of a *Faretta* waiver is a mixed question of law and fact reviewed de novo. *See United States v. Audette*, 923 F.3d 1227, 1234 (9th Cir. 2019); *United States v. French*, 748 F.3d 922, 929 (9th Cir. 2014); *United States v. Moreland*, 622 F.3d 1147, 1156 (9th Cir. 2010); *United States v. Erskine*, 355 F.3d 1161, 1166 (9th Cir. 2004); *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2000). This is so "even where the defendant failed to raise the issue of the validity of the *Faretta* waiver to the district court." *United States v. Neal*, 776 F.3d 645, 657 (9th Cir. 2015) ("We review whether a *Faretta* waiver satisfied these requirements de novo, even where the defendant failed to raise the issue of the validity of the *Faretta* waiver to the district court."). *See also United States v. Brugnara*, 856 F.3d 1198, 1212 (9th Cir. 2017) (discussing defendant's right to represent himself).

Factual findings supporting the district court's decision are reviewed for clear error. *See United States v. Telles*, 18 F.4th 290, 302 (9th Cir. 2021) (as amended); *Audette*, 923 F.3d at 1234 ("A district court's finding that a defendant's waiver was unequivocal is a finding of fact reviewed for clear error."); *Burton v. Davis*, 816 F.3d 1132, 1159 (9th Cir. 2016) (reviewing "a district court's determination that a *Faretta* motion was not a delay tactic for clear error."); *United States v. George*, 56 F.3d 1078, 1084 (9th Cir. 1995); *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994).

The court has " 'not yet clarified whether denial of a *Faretta* request is reviewed de novo or for abuse of discretion.' " *Telles*, 18 F.4th at 302 (quoting *United States v. Kaczynski*, 239 F.3d 1108, 1116 (9th Cir. 2001)) (holding that the

claim failed under either standard of review because the court agreed with the district court's conclusion that Telles exercised his right to represent himself as a tactic to delay trial proceedings).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 50. Representation, e. Pro Se Representation.

19. *Franks* Hearing

The district court's refusal to conduct a *Franks* hearing is reviewed de novo. *See United States v. Norris*, 942 F.3d 902, 907 (9th Cir. 2019); *United States v. Barragan*, 871 F.3d 689, 701 (9th Cir. 2017); *United States v. Flyer*, 633 F.3d 911, 916 (9th Cir. 2011); *United States v. Napier*, 436 F.3d 1133, 1136 (9th Cir. 2006); *United States v. Meek*, 366 F.3d 705, 716 (9th Cir. 2004); *United States v. Shryock*, 342 F.3d 948, 975 (9th Cir. 2003). The court's underlying factual findings are reviewed for clear error. *See Meek*, 366 F.3d at 716; *Shryock*, 342 F.3d at 975; *see also United States v. Christie*, 825 F.3d 1048, 1069 (9th Cir. 2016) (reviewing "for clear error the district court's underlying finding that the government did not intentionally or recklessly make false statements").

20. Fugitive Status

A district court's "ultimate" conclusion whether a defendant is a fugitive or is "fleeing from justice" is reviewed de novo. *See United States v. $671,160.00 in U.S. Currency*, 730 F.3d 1051, 1055 (9th Cir. 2013) (reviewing the legal applicability of the fugitive disentitlement doctine de novo); *Man-Seok Choe v. Torres*, 525 F.3d 733, 741 (9th Cir. 2008) (habeas); *United States v. Fowlie*, 24 F.3d 1070, 1072 (9th Cir. 1994). The court's factual findings underlying that determination are reviewed under the clearly erroneous standard. *See Man-Seok*, 525 F.3d at 741; *Fowlie*, 24 F.3d at 1072; *United States v. Gonsalves*, 675 F.2d 1050, 1052 (9th Cir. 1982). Whether an appeal should be dismissed under the fugitive disentitlement doctrine is a matter of discretion vested with the appellate court. *See $671,160.00 in U.S. Currency*, 730 F.3d at 1055 (reviewing district court's decision to order disentitlement for abuse of discretion); *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1064 (9th Cir. 2004), *amended on denial of rehearing by* 449 F.3d 1059 (9th Cir. 2006); *Parretti v. United States*, 143 F.3d 508, 510 (9th Cir. 1998) (en banc) (dismissing appeal).

21. Grand Juries

The district court's refusal to dismiss an indictment based on alleged instructional errors to the grand jury is reviewed de novo. *See United States v. Marcucci*, 299 F.3d 1156, 1158 (9th Cir. 2002) (per curiam); *see also United States v. Inzunza*, 638 F.3d 1006, 1016 (9th Cir. 2011). The court's decision whether to dismiss an indictment because of prosecutorial misconduct before a grand jury is reviewed de novo. *See United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000); *see also United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004) (reviewing alleged governmental abuse of grand jury proceedings). Note that errors in the grand jury indictment procedures are subject to harmless error review "unless the structural protections of the grand jury have been compromised." *See United States v. Du Bo*, 186 F.3d 1177, 1180 n.1 (9th Cir. 1999); *United States v. Oliver*, 60 F.3d 547, 549 (9th Cir. 1995); *see also United States v. Salazar-Lopez*, 506 F.3d 748, 752–56 (9th Cir. 2007).

The district court's denial of a defendant's motion to disclose grand jury testimony is reviewed for an abuse of discretion. *See United States v. Mincoff*, 574 F.3d 1186, 1192 (9th Cir. 2009); *United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997). The court's resolution of a petition for disclosure of grand jury materials pursuant to Fed. R. Crim. P. 6(e) is reviewed for an abuse of discretion. *See In re Grand Jury Proceedings*, 62 F.3d 1175, 1178 (9th Cir. 1995). The denial of a motion to quash a grand jury subpoena is reviewed for an abuse of discretion. *See In re Grand Jury Subpoena*, 357 F.3d 900, 906 (9th Cir. 2004).

A court's imposition of contempt sanctions related to grand jury proceedings is also reviewed for an abuse of discretion. *See In re Grand Jury Investigation*, 966 F.3d 991, 994 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 308 (2021); *In re Grand Jury Proceedings*, 40 F.3d 959, 961 (9th Cir. 1994) (refusal to sign disclosure directive); *In re Grand Jury Proceedings*, 33 F.3d 1060, 1061 (9th Cir. 1994) (per curiam) (refusal to produce records); *In re Grand Jury Proceedings*, 9 F.3d 1389, 1390 (9th Cir. 1993) (refusal to testify).

A district court's denial of a motion to quash a grand jury subpoena and its order of contempt sanctions is reviewed for an abuse of discretion. *See In re Grand Jury Investigation*, 966 F.3d at 994; *In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1183 (9th Cir. 2017). Underlying factual findings are reviewed for clear error. *See In re Grand Jury Investigation*, 966 F.3d at 994; *In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d at 1183.

22. Guilty Pleas

a. Rule 11

The adequacy of a Rule 11 plea hearing is reviewed de novo. *See United States v. Peterson*, 995 F.3d 1061, 1064 (9th Cir. 2021) (reviewing de novo the sufficiency of a Rule 11 plea colloquy); *United States v. Alvarez*, 835 F.3d 1180, 1188 (9th Cir. 2016); *United States v. Pacheco-Navarette*, 432 F.3d 967, 969 (9th Cir. 2005); *United States v. Villalobos*, 333 F.3d 1070, 1073 (9th Cir. 2003); *United States v. Pena*, 314 F.3d 1152, 1155 (9th Cir. 2003). Whether the trial court's colloquy with the defendant satisfies the requirements of Rule 11 is also reviewed de novo. *See United States v. Ross*, 511 F.3d 1233, 1235 (9th Cir. 2008); *United States v. Barragan-Espinoza*, 350 F.3d 978, 981 (9th Cir. 2003); *United States v. King*, 257 F.3d 1013, 1021 (9th Cir. 2001); *see also United States v. Barrios-Gutierrez*, 255 F.3d 1024, 1027–28 (9th Cir. 2001) (en banc) (discussing Rule 11's requirements).

When a defendant fails to object, the court's review is limited to plain error. *See United States v. Ferguson*, 8 F.4th 1143, 1145 (9th Cir. 2021); *United States v. Carter*, 795 F.3d 947, 950 (9th Cir. 2015) (applying "only plain error review when a defendant appeals based on an unobjected-to Rule 11 procedural violation); *United States v. Benitez*, 542 U.S. 74, 83 (2004) (noting defendant's burden); *Ross*, 511 F.3d at 1235; *United States v. Monzon*, 429 F.3d 1268, 1271 (9th Cir. 2005). The appellate court may review, however, "the entire record, from the defendant's first appearance to his plea colloquy." *United States v. Vonn*, 294 F.3d 1093, 1093–94 (9th Cir. 2002) (on remand).

b. Voluntariness

The voluntariness of a guilty plea is subject to de novo review. *See United States v. Seng Chen Yong*, 926 F.3d 582, 589 (9th Cir. 2019) (reviewing de novo a district court's finding as to whether a plea is knowing and voluntary); *United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010); *United States v. Gaither*, 245 F.3d 1064, 1068 (9th Cir. 2001); *United States v. Kaczynski*, 239 F.3d 1108, 1114 (9th Cir. 2001); *United States v. Kikuyama*, 109 F.3d 536, 537 (9th Cir. 1997); *see also Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995) (habeas). Although the court reviews de novo whether a defendant entered a plea knowingly and voluntarily, the court applies "only plain error review when a defendant appeals based on an unobjected-to Rule 11 procedural violation." *United States v. Carter*, 795 F.3d 947, 950 (9th Cir. 2015) (citation omitted).

c. Withdrawal

A district court's decision whether to grant a motion for withdrawal of a guilty plea is reviewed for an abuse of discretion. *See United States v. Peterson*, 995 F.3d 1061, 1064 (9th Cir. 2021); *United States v. Yamashiro*, 788 F.3d 1231, 1236 (9th Cir. 2015) (reviewing district court's denial of a motion to withdraw a guilty plea for abuse of discretion); *United States v. Briggs*, 623 F.3d 724, 727 (9th Cir. 2010); *United States v. Showalter*, 569 F.3d 1150, 1154 (9th Cir. 2009); *United States v. Ross*, 511 F.3d 1233, 1235 (9th Cir. 2008); *United States v. Jones*, 472 F.3d 1136, 1140–41 (9th Cir. 2007); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1117 (9th Cir. 2003) (en banc) (applying "fair and just" standard); *United States v. Nostratis*, 321 F.3d 1206, 1208 (9th Cir. 2003); *United States v. Ruiz*, 257 F.3d 1030, 1032–33 (9th Cir. 2001) (en banc) (clarifying that "fair and just" rather than "manifest injustice" standard should be applied by district court).

23. Immunity Agreements

"[T]he decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch." *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984). Informal immunity agreements are reviewed under ordinary contract law principles: factual determinations are reviewed for clear error; whether the government has breached the agreement is a question of law reviewed de novo. *See United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995); *United States v. Gamez-Orduno*, 235 F.3d 453, 465 (9th Cir. 2000) (reviewing immunity agreement de novo).

The denial of a *Kastigar* hearing is reviewed for an abuse of discretion. *See Dudden*, 65 F.3d at 1468; *but see United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (district court's denial of a defense motion for an evidentiary hearing on use immunity raises mixed questions of fact and law reviewed de novo).

The district court's finding that the government's evidence was not tainted by a grant of use immunity is reviewed under the clearly erroneous standard. *See United States v. Montoya*, 45 F.3d 1286, 1291 (9th Cir. 1995). Whether the government has violated its obligation to disclose immunity agreements with a prosecution witness is a question of law reviewed de novo. *See United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999). Whether a district court erred by refusing to compel the government to grant immunity to a defense witness is a mixed question of law and fact reviewed de novo. *See United States v. Wilkes*, 744 F.3d 1101, 1104 (9th Cir. 2014); *United States v. Alvarez*, 358 F.3d 1194, 1216

(9th Cir. 2004). Underlying factual findings are reviewed for clear error. *See Wilkes*, 744 F.3d at 1104; *Alvarez*, 358 F.3d at 1216.

24. In Camera Proceedings

The trial court's decision whether to conduct an in camera proceeding is reviewed for an abuse of discretion. *See United States v. Alvarez*, 358 F.3d 1194, 1208 (9th Cir. 2004); *United States v. Henderson*, 241 F.3d 638, 646 (9th Cir. 2000); *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) (crime fraud exception). When there is no objection to in camera proceedings, review is for plain error. *See United States v. Cazares*, 788 F.3d 956, 966 (9th Cir. 2015).

The decision to seal documents is reviewed for an abuse of discretion. *See United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Mann*, 829 F.2d 849, 853 (9th Cir. 1987). The denial of a motion to unseal is also reviewed for abuse of discretion. *See United States v. Perez*, 962 F.3d 420, 434 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1443 (2021).

Whether the court erred by not allowing defense counsel to participate in an in camera proceeding is reviewed for an abuse of discretion. *See United States v. Fowlie*, 24 F.3d 1059, 1066 (9th Cir. 1994). The court's decision regarding the scope of in camera review of privileged documents, however, is a mixed question of law and fact and is reviewed de novo. *See In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 829 (9th Cir. 1994).

25. Indictments and Informations

a. Constructive Amendments

Whether an indictment was constructively amended is reviewed de novo. *See United States v. Tuan Ngoc Luong*, 965 F.3d 973, 984 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 336 (2021); *United States v. Davis*, 854 F.3d 601, 603 (9th Cir. 2017); *United States v. Lazarenko*, 564 F.3d 1026, 1034 (9th Cir. 2009); *United States v. Pang*, 362 F.3d 1187, 1193 (9th Cir. 2004) (information); *United States v. Shryock*, 342 F.3d 948, 988 (9th Cir. 2003); *United States v. Adamson*, 291 F.3d 606, 612 (9th Cir. 2002). When the defendant fails to object, review is limited to plain error. *See United States v. Shipsey*, 190 F.3d 1081, 1085 (9th Cir. 1999).

b. Dismissals

See II. Criminal Proceedings, B. Pretrial Decisions, 13. Dismissals.

c. Duplicitous/Multiplicitous

Whether an indictment is multiplicitous – charging a single offense in more than one count – is reviewed de novo. *See United States v. Wahchumwah*, 710 F.3d 862, 866 (9th Cir. 2013); *United States v. Brooks*, 610 F.3d 1186, 1194 (9th Cir. 2010); *United States v. Vargas-Castillo*, 329 F.3d 715, 718–19 (9th Cir. 2003); *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998). Whether an indictment is duplicitous – charging more than one violation in each count – is reviewed de novo. *See United States v. Mancuso*, 718 F.3d 780, 790 (9th Cir. 2013); *United States v. Martin*, 4 F.3d 757, 759 (9th Cir. 1993) (duplicitous); *United States v. Yarborough*, 852 F.2d 1522, 1530 (9th Cir 1988). The court's decision not to dismiss an allegedly duplicitous indictment is reviewed de novo. *See United States v. Ramirez-Martinez*, 273 F.3d 903, 913 (9th Cir. 2001), *overruled in part on other grounds by United States v. Lopez*, 484 F.3d 1186, 1191 (9th Cir. 2007) (en banc).

d. Misjoinder

Misjoinder of charges under Fed. R. Crim. P. 8(a) is an issue of law reviewed de novo. *See United States v. Prigge*, 830 F.3d 1094, 1098 (9th Cir. 2016); *United States v. Jawara*, 474 F.3d 565, 572 (9th Cir. 2007); *United States v. VonWillie*, 59 F.3d 922, 929 (9th Cir. 1995); *United States v. Sanchez-Lopez*, 879 F.2d 541 (9th Cir. 1989) (distinguishing between Rule 8(a) and 8(b)). Misjoinder of defendants under Fed. R. Crim. P. 8(b) is also a question of law reviewed de novo. *See United States v. Sarkisian*, 197 F.3d 966, 975 (9th Cir. 1999); *United States v. Golb*, 69 F.3d 1417, 1425 (9th Cir. 1995); *United States v. Vasquez-Velasco*, 15 F.3d 833, 843 (9th Cir. 1994). Improper joinder is subject to harmless error review – reversal is required only if misjoinder results in actual prejudice because it had a "substantial and injurious effect or influence in determining the jury's verdict." *United States v. Lane*, 474 U.S. 438, 449 (1986). *See also Prigge*, 830 F.3d at 1098 ("Reversal for improper joinder under Rule 8(a) is appropriate only if the defendant can show actual prejudice.").

The district court's order that two indictments be tried together under Fed. R. Crim. P. 13 is reviewed for an abuse of discretion. *See United States v. Nguyen*, 88 F.3d 812, 815 (9th Cir. 1996).

e. Prosecutorial Misconduct

The district court's decision whether to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. *See United States v. Pedrin*, 797 F.3d 792, 795 (9th Cir. 2015); *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011); *United States v. Struckman*, 611 F.3d 560, 573 (9th Cir. 2010); *United States v. Bridges*, 344 F.3d 1010, 1014 (9th Cir. 2003); *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003); *United States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996); *cf. United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004) (even where no due process violation exists, reviewing district court's refusal to dismiss under abuse of discretion of its supervisory powers). The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. *See United States v. Bundy*, 968 F.3d 1019, 1030 (9th Cir. 2020); *Struckman*, 611 F.3d at 573; *Gurolla*, 333 F.3d at 950; *United States v. Cuellar*, 96 F.3d 1179, 1182 (9th Cir. 1996).

The district court's dismissal of an indictment for government misconduct under its supervisory powers is reviewed for an abuse of discretion. *Bundy*, 968 F.3d at 1030. However, any legal issues predicating the district court's dismissal receive de novo review. *Id*.

Allegations of prosecutorial misconduct before a grand jury are also reviewed de novo. *See United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000); *United States v. De Rosa*, 783 F.2d 1401, 1404 (9th Cir. 1986); *see also United States v. Harmon*, 833 F.3d 1199, 1203 (9th Cir. 2016); *United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004) (abuse of the grand jury process).

A district court's refusal to disqualify the prosecutor is reviewed for an abuse of discretion. *See United States v. Kahre*, 737 F.3d 554, 565 (9th Cir. 2013); *United States v. Davis*, 932 F.2d 752, 763 (9th Cir. 1991); *United States v. Plesinski*, 912 F.2d 1033, 1035 (9th Cir. 1990).

f. Sufficiency

The sufficiency of an indictment is subject to de novo review. *See United States v. Chi*, 936 F.3d 888, 893 (9th Cir.), *amended sub nom. United States v. Heon-Cheol Chi*, 942 F.3d 1159 (9th Cir. 2019); *United States v. Kaplan*, 836 F.3d 1199, 1216 (9th Cir. 2016); *United States v. Holden*, 806 F.3d 1227, 1231 (9th Cir. 2015); *United States v. Inzunza*, 638 F.3d 1006, 1016 (9th Cir. 2011); *United States v. O'Donnell*, 608 F.3d 546, 555 (9th Cir. 2010); *United States v. Rodriguez*,

360 F.3d 949, 958 (9th Cir. 2004). When defendant fails to object to the sufficiency of the indictment in the district court, review is for plain error. *See Rodriguez*, 360 F.3d at 958; *United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002); *but see United States v. Lo*, 231 F.3d 471, 481 (9th Cir. 2000) (reviewing de novo when issue raised for the first time on appeal).

Whether a criminal information complies with constitutional requirements is examined de novo. *See Givens v. Housewright*, 786 F.2d 1378, 1380 (9th Cir. 1986). Whether an information is sufficient to charge a defendant in a particular situation is a question of law reviewed de novo. *See United States v. Hamilton*, 208 F.3d 1165, 1168 (9th Cir. 2000); *United States v. Linares*, 921 F.2d 841, 843 (9th Cir. 1990).

"In this circuit an indictment missing an essential element that is properly challenged before trial *must* be dismissed." *United States v. Qazi*, 975 F.3d 989, 991 (9th Cir. 2020) (*United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999), and explaining the *Du Bo* rule). "Whether an indictment challenge triggers *Du Bo*'s de novo review depends, in large part, on timing." *Qazi*, 975 F.3d at 992. "Pre-trial indictment challenges are reviewed de novo and post-trial challenges are reviewed for plain error." *Id.*

g. Validity

The validity of an indictment is reviewed de novo. *See United States v. San Juan-Cruz*, 314 F.3d 384, 387 (9th Cir. 2002); *United States v. Matsumaru*, 244 F.3d 1092, 1099 (9th Cir. 2001); *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir. 1994). A claim that an indictment is defective may be raised at any time, *see United States v. Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002); however, "review of an untimely objection to the sufficiency of the indictment is limited to the plain error test." *Id*; *United States v. Cotton*, 535 U.S. 625, 631–34 (2002). A "terminally defective" indictment constitutes a deficiency that is not subject to harmless error analysis. *See United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999). Technical deficiencies, however, are subject to harmless error review. *See United States v. Fleming*, 215 F.3d 930, 935–36 (9th Cir. 2000).

26. In Limine Orders

This court generally reviews the district court's ruling on a motion in limine for an abuse of discretion. *See United States v. Alvirez*, 831 F.3d 1115, 1120 (9th Cir. 2016) ("Generally, we review the ruling on a motion in limine for abuse of discretion."); *United States v. Sutcliffe*, 505 F.3d 944, 958 (9th Cir. 2007); *United*

States v. Geston, 299 F.3d 1130, 1138 (9th Cir. 2002); *United States v. Ross*, 206 F.3d 896, 898 (9th Cir. 2000). The trial court's decision to change an in limine ruling is also reviewed for an abuse of discretion. *See United States v. Bensimon*, 172 F.3d 1121, 1127 (9th Cir. 1999).

A district court's order precluding certain testimony is an evidentiary ruling subject to review for an abuse of discretion. *See United States v. Lynch*, 437 F.3d 902, 913 (9th Cir. 2006); *United States v. Ravel*, 930 F.2d 721, 726 (9th Cir. 1991). If the order precludes the presentation of a defense, however, review is de novo. *See Ross*, 206 F.3d at 898–99.

27. Interpreters

"[T]he use of interpreters in the courtroom is a matter within the trial court's discretion, and … a trial court's ruling on such a matter will be reversed only for clear error." *United States v. Mayans*, 17 F.3d 1174, 1179 (9th Cir. 1994); *see also United States v. Jayavarman*, 871 F.3d 1050, 1065 (9th Cir. 2017) ("When a defendant challenges a district court's factual finding that he does not need an interpreter, the decision is reviewed for clear error." (internal quotation marks omitted)). The trial court's determination that a defendant needs an interpreter is also reviewed for an abuse of discretion. *See United States v. Petrosian*, 126 F.3d 1232, 1234 n.3 (9th Cir. 1997) (per curiam). The district court's decision not to declare a mistrial based on alleged interpreter's mistake is reviewed for an abuse of discretion. *See United States v. Long*, 301 F.3d 1095, 1105 (9th Cir. 2002).

28. Investigators

A district court's decision to deny funds for an investigator is reviewed for an abuse of discretion. *See United States v. Croft*, 124 F.3d 1109, 1125 n.7 (9th Cir. 1997).

29. Judicial Estoppel

The trial court's decision to invoke judicial estoppel in criminal proceedings is reviewed for an abuse of discretion. *See United States v. Ruiz*, 73 F.3d 949, 953 (9th Cir. 1996). *See also In re Jacobson*, 676 F.3d 1193, 1198 (9th Cir. 2012) (bankruptcy) ("The decision whether to invoke judicial estoppel is reviewed for abuse of discretion.").

30. Judicial Notice

A district court's decision to take judicial notice is reviewed for an abuse of discretion. *See United States v. Daychild*, 357 F.3d 1082, 1099 n.26 (9th Cir. 2004); *United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir. 1994).

31. Jurisdiction

Jurisdictional issues are reviewed de novo. *See United States v. Struckman*, 611 F.3d 560, 571 (9th Cir. 2010); *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004); *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002); *United States v. Errol D. Jr.*, 292 F.3d 1159, 1161 (9th Cir. 2002). Whether a district court has jurisdiction is reviewed de novo. *See United States v. Robertson*, 980 F.3d 672, 675 (9th Cir. 2020) (subject matter jurisdiction); *United States v. Obaid*, 971 F.3d 1095, 1098 (9th Cir. 2020) (personal jurisdiction); *United States v. Aguilar-Reyes*, 653 F.3d 1053, 1055 (9th Cir. 2011); *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003); *United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002). The assumption of jurisdiction by a district court is reviewed de novo. *See United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014); *United States v. Juvenile Female*, 566 F.3d 943, 945 (9th Cir. 2009); *United States v. Ross*, 372 F.3d 1097, 1105 (9th Cir. 2004); *United States v. Bennett*, 147 F.3d 912, 913 (9th Cir. 1998); *United States v. Juvenile Male*, 118 F.3d 1344, 1346 (9th Cir. 1997). Note, however, that in instances where jurisdiction is intertwined with the merits and must be resolved by a jury, the appropriate standard of review is unsettled. *See Juvenile Male*, 118 F.3d at 1346; *United States v. Gomez*, 87 F.3d 1093, 1097 n.3 (9th Cir. 1996). *See also United States v. Cruz*, 554 F.3d 840, 843–44 (9th Cir. 2009) ("Although jurisdictional questions are ordinarily reviewed *de novo*, when a defendant brings a motion for acquittal in order to challenge the sufficiency of the *evidence* underlying a jurisdictional element, we owe deference to the jury's ultimate factual finding." (emphasis in original)).

A magistrate judge's assertion of jurisdiction is reviewed de novo. *See United States v. Real Property*, 135 F.3d 1312, 1314 (9th Cir. 1998) (civil forfeiture).

32. Jury Demand

A defendant's entitlement to a jury trial is a question of law reviewed de novo. *See United States v. Charette*, 893 F.3d 1169, 1172 (9th Cir. 2018); *United States v. Kimsey*, 668 F.3d 691, 697 (9th Cir. 2012); *United States v. Male Juvenile*, 280 F.3d 1008, 1021 (9th Cir. 2002); *United States v. Clavette*, 135 F.3d 1308, 1309 (9th Cir. 1998). *See also U.S. Sec. & Exch. Comm'n v. Jensen*, 835 F.3d 1100, 1106 (9th Cir. 2016) (SEC civil enforcement action).

33. Jury Trial Waiver

The adequacy of a defendant's jury trial waiver presents a mixed question of law and fact reviewed de novo. *See United States v. Laney*, 881 F.3d 1100, 1106 (9th Cir. 2018) (adequacy of jury trial waiver); *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997) (listing requirements for valid waiver); *United States v. Christensen*, 18 F.3d 822, 824 (9th Cir. 1994). Whether a district court should have allowed a defendant to waive trial by jury over the objection of the government is a question of law subject to de novo review. *See United States v. Reyes*, 8 F.3d 1379, 1382 (9th Cir. 1993).

34. Juveniles

To prosecute a juvenile in federal court, the government must follow the certification procedures required by 18 U.S.C. § 5032. *See United States v. Juvenile Male*, 492 F.3d 1046, 1048 (9th Cir. 2007); *United States v. Doe*, 170 F.3d 1162, 1165 (9th Cir. 1999). Jurisdictional issues are reviewed de novo. *See United States v. Errol D., Jr.*, 292 F.3d 1159, 1161 (9th Cir. 2002); *Doe*, 170 F.3d at 1165. Compliance with § 5032 is a question of statutory interpretation reviewed de novo. *See United States v. JDT*, 762 F.3d 984, 992 (9th Cir. 2014); *United States v. James*, 556 F.3d 1062, 1065 (9th Cir. 2009); *United States v. C.M.*, 485 F.3d 492, 498 (9th Cir. 2007); *United States v. Jose D.L.*, 453 F.3d 1115, 1120 (9th Cir. 2006); *see also United States v. Camez*, 839 F.3d 871, 872 (9th Cir. 2016). Questions regarding the constitutionality of § 5032 are also reviewed de novo. *See United States v. Juvenile*, 228 F.3d 987, 990 (9th Cir. 2000). Note that compliance with § 5032 is subject to harmless error review if defendant objects and plain error review if no objection is made. *See United States v. Doe*, 366 F.3d 1069, 1077 & n.10 (9th Cir. 2004) (en banc).

The district court's decision to transfer a juvenile to adult court is reviewed for an abuse of discretion. *See Juvenile Male*, 492 F.3d at 1048; *United States v. Gerald N.*, 900 F.2d 189, 191 (9th Cir. 1990). Review of a juvenile delinquency

sentence that falls within the sentencing guidelines is also abuse of discretion. *See JDT*, 762 F.3d at 1006; *United States v. Juvenile*, 347 F.3d 778, 784 (9th Cir. 2003).

Section 5033 requires that federal law enforcement agents notify parents of a juvenile's rights "immediately" after the juvenile is taken into custody. *See Jose D.L.*, 453 F.3d at 1119. The district court's ultimate determination that notification was "immediate" is reviewed de novo. *See United States v. C.M.*, 485 F.3d 492, 498 (9th Cir. 2007); *Jose D.L.*, 453 F.3d at 1120. Whether a juvenile's parents have been notified pursuant to § 5033 is a predominantly factual question that is reviewed for clear error. *See C.M.*, 485 F.3d at 498 (9th Cir. 2007); *Jose D.L.*, 453 F.3d at 1119; *United States v. Juvenile (RRA-A)*, 229 F.3d 737, 742 (9th Cir. 2000); *United States v. Doe*, 219 F.3d 1009, 1014 (9th Cir. 2000).

Whether a juvenile has been arraigned without unreasonable delay is a mixed question of law and fact reviewed de novo. *See C.M.*, 485 F.3d at 498; *Jose D.L.*, 453 F.3d at 1120. Whether a juvenile is "in custody" is also a mixed question of law and fact reviewed de novo. *See United States v. Female Juvenile (Wendy G.)*, 255 F.3d 761, 765 (9th Cir. 2001). The court also reviews de novo whether a juvenile's speedy trial rights were violated. *See Juvenile RRA-A*, 229 F.3d at 742 (applying Juvenile Delinquency Act).

34. Lack of Prosecution

A district court's denial of a motion to dismiss under Fed. R. Crim. P. 48(b) is reviewed for abuse of discretion. *See United States v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007); *United States v. Barken*, 412 F.3d 1131, 1136 (9th Cir. 2005); *United States v. Sears, Roebuck & Co.*, 877 F.2d 734, 737–38 (9th Cir. 1989) (frequently cited and fullest discussion of standard). A Rule 48(b) dismissal should only be granted "in extreme circumstances." *Barken*, 412 F.3d at 1136.

35. Law of the Case

A district court's decision whether to apply the law-of-the-case doctrine is reviewed for an abuse of discretion. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (listing five different conditions allowing a court to stray from the law of the case). "Failure to apply the … law of the case absent one of the requisite conditions constitutes an abuse of discretion." *Id.*

In *United States v. Lummi Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014), the court explained that "[a]buse of discretion, … , is the standard when it is clear that the law of the case doctrine applies." If "the parties dispute whether the doctrine

applies at all, *i.e.* whether the issue has already 'been decided explicitly or by necessary implication[,]'" review is de novo because it is a question of law. *Id*. at 1185 (internal citation omitted).

36. Lineups

The court reviews de novo the constitutionality of pretrial identification procedures. *See United States v. Bruce*, 984 F.3d 884, 890 (9th Cir. 2021). As such, whether a pretrial lineup was impermissibly suggestive, and violates due process, is reviewed de novo. *See United States v. Carr*, 761 F.3d 1068, 1073 (9th Cir. 2014); *United States v. Bowman*, 215 F.3d 951, 966 n.9 (9th Cir. 2000); *United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1998). In making this determination, the court reviews the totality of the circumstances. *See Bruce*, 984 F.3d at 891 (stating the court examines "the totality of the circumstances to determine whether an identification procedure was unduly suggestive"); *United States v. Jones*, 84 F.3d 1206, 1209 (9th Cir. 1996).

When a defendant fails to object to the lineup identification by way of a pretrial suppression motion, he waives his right to challenge it absent a showing of prejudice. *See United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996).

The district court's decision to admit or deny in-court identification testimony is reviewed for abuse of discretion. *See United States v. Dixon*, 201 F.3d 1223, 1229 (9th Cir. 2000). The court's ruling regarding the admissibility of expert testimony on the reliability of eyewitness identification is reviewed for abuse of discretion. *See United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994).

37. Magistrate Judges

The delegation of authority and the scope of powers of a magistrate judge are questions of law reviewed de novo. *See United States v. Gamba*, 541 F.3d 895, 898 (9th Cir. 2008); *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1067 (9th Cir. 2004); *United States v. Colacurcio*, 84 F.3d 326, 328 (9th Cir. 1996). Whether a magistrate judge has jurisdiction is also a question of law reviewed de novo. *See Branch v. Umphenour*, 936 F.3d 994, 1000 (9th Cir. 2019); *United States v. Carr*, 18 F.3d 738, 740 (9th Cir. 1994). Whether a magistrate judge's "precise formulation" of a jury instruction is sufficient is reviewed for an abuse of discretion. *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998).

Factual findings made by a magistrate judge are reviewed for clear error. *See United States v. Ruiz-Gaxiola*, 623 F.3d 684, 693 n. 4 (9th Cir. 2010); *Wildman v. Johnson*, 261 F.3d 832, 836 (9th Cir. 2001) (habeas). A magistrate

judge's decision whether to conduct an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. *See United States v. Howell*, 231 F.3d 615, 620–21 (9th Cir. 2000).

A district court's decision regarding the scope of review of a magistrate judge's decision is reviewed for an abuse of discretion. *See Brown v. Roe*, 279 F.3d 742, 744 (9th Cir. 2002) (habeas). The district court's denial of a motion to reconsider a magistrate's pretrial order will be reversed only if "'clearly erroneous or contrary to law.'" *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (quoting Fed. R. Civ. P. 72(a)); *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002) (habeas).

The issuance of a search warrant by a magistrate judge is reviewed for clear error. *See United States v. Fernandez*, 388 F.3d 1199, 1252 (9th Cir. 2004). More specifically, "a magistrate judge's finding of probable cause to issue a search warrant is reviewed for clear error … ." *United States v. Nielsen*, 371 F.3d 574, 579 (9th Cir. 2004); *see also United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011). Thus, the magistrate judge's original determination of probable cause is accorded significant deference. *See United States v. Crews*, 502 F.3d 1130, 1135 (9th Cir. 2007); *United States v. Battershell*, 457 F.3d 1048, 1050 (9th Cir. 2006); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003). "This standard of review is less probing than de novo review and shows deference to the issuing magistrate's determination." *Fernandez*, 388 F.3d at 1252 (internal quotation marks omitted).

38. *Miranda* Rights

Whether a defendant was constitutionally entitled to *Miranda* warnings is an issue of law reviewed de novo. *See United States v. Zapien*, 861 F.3d 971, 974 (9th Cir. 2017) (per curiam); *United States v. Cazares*, 788 F.3d 956, 981 (9th Cir. 2015); *United States v. Craighead*, 539 F.3d 1073, 1082 (9th Cir. 2008); *United States v. Washington*, 462 F.3d 1124, 1132 (9th Cir. 2006); *United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc). The trial court's decision to admit or suppress a statement that may have been obtained in violation of *Miranda* is also reviewed de novo. *See United States v. Brobst*, 558 F.3d 982, 995 (9th Cir. 2009); *Craighead*, 539 F.3d at 1082. Admission of statements made in violation of *Miranda* are subject to harmless error review. *See United States v. Williams*, 435 F.3d 1148, 1151 (9th Cir. 2006).

The adequacy of a *Miranda* warning is a legal issue reviewed de novo. *See United States v. Loucious*, 847 F.3d 1146, 1148 (9th Cir. 2017); *United States v. Williams*, 435 F.3d 1148, 1151 (9th Cir. 2006); *United States v. San Juan-Cruz*, 314 F.3d 384, 387 (9th Cir. 2002) (explaining why de novo review is appropriate). Factual findings underlying the adequacy challenge are reviewed for clear error. *See Craighead*, 539 F.3d at 1082; *United States v. Lares-Valdez*, 939 F.2d 688, 689 (9th Cir. 1991) (per curiam).

Whether a *Miranda* waiver was voluntary is a mixed question of fact and law reviewed de novo. *See United States v. Price*, 980 F.3d 1211, 1226 (9th Cir. 2019) (as amended Nov. 27, 2020), *cert. denied*, 142 S. Ct. 129 (2021); *United States v. Jennings*, 515 F.3d 980, 986 (9th Cir. 2008) ("Our review of the voluntariness of a *Miranda* waiver is de novo, but we will not disturb the district court's underlying factual findings unless they are clearly erroneous."); *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1127 (9th Cir.), *amended by* 416 F.3d 939 (9th Cir. 2005). Whether the waiver was knowing and intelligent is a question of fact, which the court reviews for clear error, considering the totality of the circumstances. *See Price*, 980 F.3d at 1226; *United States v. Shi*, 525 F.3d 709, 728 (9th Cir. 2008); *Rodriguez-Preciado*, 399 F.3d at 1127.

Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact reviewed de novo. *See United States v. IMM*, 747 F.3d 754, 766 (9th Cir. 2014); *United States v. Reyes-Bosque*, 596 F.3d 1017, 1031 (9th Cir. 2010); *United States v. Bassignani*, 575 F.3d 879, 883 (9th Cir. 2009); *United States v. Kim*, 292 F.3d 969, 973 (9th Cir. 2002) (key case noting prior conflict and reaffirming de novo review). The district court's factual findings underlying that decision, such as what a defendant was told, are reviewed for clear error. *See IMM*, 747 F.3d at 766; *Bassignani*, 575 F.3d at 883; *Kim*, 292 F.3d at 973. The court also reviews de novo whether a defendant was subject to "interrogation" within the meaning of *Miranda*. *See Zapien*, 861 F.3d at 974.

The district court's factual findings concerning the words a defendant used to invoke the right to counsel are reviewed for clear error. *See United States v. Rodriguez*, 518 F.3d 1072, 1076 (9th Cir. 2008); *United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005); *United States v. Ogbuehi*, 18 F.3d 807, 812 (9th Cir. 1994). Whether those words actually invoked the right to counsel is reviewed de novo. *See Rodriguez*, 518 F.3d at 1076.

Whether the public safety exception applies to the failure to give a *Miranda* warning is a mixed question of fact and law reviewed de novo. *See United States v. Reilly*, 224 F.3d 986, 992 (9th Cir. 2000); *United States v. Brady*, 819 F.2d 884,

886 (9th Cir. 1987). *See also United States v. Williams*, 842 F.3d 1143, 1150 (9th Cir. 2016) (concluding public safety exception to *Miranda* requirement did not apply).

Whether the prosecution's references to a defendant's retention of counsel and silence after a *Miranda* warning violates the Fifth Amendment is reviewed de novo. *See United States v. Ross*, 123 F.3d 1181, 1187 (9th Cir. 1997).

On habeas corpus review, the district court's decision that a defendant knowingly and voluntarily waived *Miranda* rights is a mixed question of law and fact reviewed de novo. *See Pollard v. Galaza*, 290 F.3d 1030, 1032 (9th Cir. 2002); *Collazo v. Estelle*, 940 F.2d 411, 415 (9th Cir. 1991) (en banc). Whether a defendant's *Miranda* waiver was knowing and intelligent is a factual issue reviewed for clear error. *See Collazo*, 940 F.2d at 416. Whether a defendant was "in custody" for purposes of *Miranda* is a mixed question of law and fact reviewed de novo. *See Bains v. Cambra*, 204 F.3d 964, 972 (9th Cir. 2000).

39. Motion to Quash

The abuse of discretion standard applies to review of a trial court's decision to grant the government's motion to quash a subpoena under Fed. R. Crim. P. 17(c). *See United States v. George*, 883 F.2d 1407, 1418 (9th Cir. 1989). The district court's decision whether to quash a grand jury subpoena is reviewed for an abuse of discretion. *See In re Grand Jury Investigation*, 966 F.3d 991, 994 (9th Cir. 2020) ("We review a district court's denial of a motion to quash a grand jury subpoena and its order of contempt sanctions for an abuse of discretion. … Underlying factual findings are reviewed for clear error."), *cert. denied*, 142 S. Ct. 308 (2021); *In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1183 (9th Cir. 2017) (reviewing denial of motion to quash a grand jury subpoena); *In re Grand Jury Subpoena*, 357 F.3d 900, 906 (9th Cir. 2004); *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995) (denial of motion to quash reviewed for abuse of discretion).

Whether a district court may conditionally enforce an IRS summons is a question of statutory interpretation reviewed de novo. *See United States v. Jose*, 131 F.3d 1325, 1327 (9th Cir. 1997) (en banc). A district court's decision to quash an IRS summons is reviewed, however, for clear error. *See David H. Tedder & Assocs. v. United States*, 77 F.3d 1166, 1169 (9th Cir. 1996). The court's decision to enforce a summons is also reviewed for clear error. *See United States v. Blackman*, 72 F.3d 1418, 1422 (9th Cir. 1995); *Fortney v. United States*, 59 F.3d 117, 119 (9th Cir. 1995) (applying clear error review to district court's denial of

petition to quash); *but see Crystal v. United States*, 172 F.3d 1141, 1145 n.5 (9th Cir. 1999) (reviewing de novo when appeal is from grant of summary judgment denying petition to squash IRS subpoena).

40. Out-of-Court Identification

Whether a pretrial lineup was impermissibly suggestive is reviewed de novo. *See United States v. Bowman*, 215 F.3d 951, 966 n.9 (9th Cir. 2000). To determine whether such a procedure violated the defendant's due process rights, this court examines the totality of the surrounding circumstances. *See United States v. Jones*, 84 F.3d 1206, 1209 (9th Cir. 1996); *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995), *amended by* 98 F.3d 1100 (9th Cir. 1996).

The constitutionality of a pretrial identification procedure is also reviewed de novo. *See United States v. Bruce*, 984 F.3d 884, 890 (9th Cir. 2021); *United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1998). But when a defendant fails to object to the admission of the identification by way of a pretrial suppression motion, he waives his right to challenge the identification absent a showing of prejudice. *See United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996).

The district court's decision regarding the admissibility of expert testimony on the reliability of eyewitness identification is reviewed for an abuse of discretion. *See United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994).

41. Plea Agreements

a. Breaches/Enforcement

Alleged violations of plea agreements are reviewed de novo. *See United States v. Gonzalez-Aguilar*, 718 F.3d 1185, 1187 (9th Cir. 2013); *United States v. Whitney*, 673 F.3d 965, 970 (9th Cir. 2012); *United States v. Camarillo-Tello*, 236 F.3d 1024, 1026 (9th Cir. 2001). Whether the district court must enforce a plea agreement is a question of law reviewed de novo. *See United States v. Flores*, 559 F.3d 1016, 1019 (9th Cir. 2009); *United States v. Kuchinski*, 469 F.3d 853, 857 (9th Cir. 2006). Whether a district court is bound by the sentencing range in a plea agreement is also reviewed de novo. *See United States v. Perez-Corona*, 295 F.3d 996, 1000 (9th Cir. 2002).

The district court's grant or denial of a defendant's motion to compel specific performance of a plea agreement is reviewed for abuse of discretion. *See United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006) (reviewing

grant of motion); *United States v. Anthony*, 93 F.3d 614, 616 (9th Cir. 1996) (reviewing denial of motion). Whether a district court has jurisdiction to enforce a plea agreement is reviewed de novo. *See United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002).

A defendant's failure to argue breach of the plea agreement before the district court limits appellate review to plain error. *See Gonzalez-Aguilar*, 718 F.3d at 1187; *Whitney*, 673 F.3d at 970; *United States v. Cannel*, 517 F.3d 1172, 1176 (9th Cir. 2008); *United States v. Maldonado*, 215 F.3d 1046, 1051 (9th Cir. 2000).

Whether the government violated the terms of the agreement is reviewed de novo. *See United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir. 2000). However, factual issues underlying an alleged breach of a plea agreement are reviewed for clear error. *United States v. Martinez*, 143 F.3d 1266, 1271 (9th Cir. 1998); *but see United States v. Franco-Lopez*, 312 F.3d 984, 988 (9th Cir. 2002) (noting inconsistency with de novo review established in *United States v. Schuman*, 127 F.3d 815, 817 (9th Cir. 1997)).

A district court has broad discretion in fashioning a remedy for breach of a plea agreement. *See United States v. Chiu*, 109 F.3d 624, 626 (9th Cir. 1997).

b. Interpretation

There is conflicting case law concerning the proper standard for reviewing a district court's interpretation of a plea agreement. *See United States v. Plascencia-Orozco*, 852 F.3d 910, 916 (9th Cir. 2017) (explaining conflicting case law, and choosing not resolve the conflict); *United States v. Ellis*, 641 F.3d 411, 417 (9th Cir. 2011); *United States v. Transfiguracion*, 442 F.3d 1222, 1227 (9th Cir. 2006); *compare United States v. Franklin*, 603 F.3d 652 (9th Cir. 2010); *United States v. Reyes*, 313 F.3d 1152, 1156 (9th Cir. 2002) ("A district court's interpretations of law are reviewed *de novo* and a district court's construction of a plea agreement is reviewed for clear error."); *United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir. 2000) ("The district court's interpretation and construction of a plea agreement is reviewed for clear error."); *United States v. Floyd*, 1 F.3d 867, 869–70 (9th Cir. 1993) ("The district court's interpretation of a plea agreement is a finding of fact and is reviewed for clear error, but its application of the legal principles is a question of law reviewed de novo.") (citations omitted); *with United States v. Quach*, 302 F.3d 1096, 1100 (9th Cir. 2002) ("We review de novo a district court's interpretation of a plea agreement."); *United States v. Salemo*, 81 F.3d 1453, 1460 (9th Cir. 1996) ("We review a district court's interpretation of the terms of a plea

agreement de novo."). Underlying factual findings are reviewed for clear error. *See Reyes*, 313 F.3d at 1156 ("[A] district court's construction of a plea agreement is reviewed for clear error."); *Clark*, 218 F.3d at 1095. Whether language in a plea agreement is ambiguous is reviewed de novo. *See Clark*, 218 F.3d at 1095.

c. Negotiations

Whether a district judge improperly participated in plea negotiations is a question of law reviewed de novo. *See United States v. Collins*, 684 F.3d 873, 882 (9th Cir. 2012). *See also United States v. Davila*, 569 U.S. 597 (2013) (addressing improper participation by court in plea discussions); *United States v. Velazquez*, 855 F.3d 1021, 1038 (9th Cir. 2017) ("Federal Rule of Criminal Procedure 11(c)(1) prohibits any participation by a judge in plea negotiations. *See United States v. Bruce*, 976 F.2d 552, 555–56 (9th Cir. 1992), *abrogated on other grounds by Davila*, 133 S. Ct. 2139. This includes magistrate judges even when they are neither 'the sentencing judge nor the judge presiding over the defendant's criminal case.' *United States v. Myers*, 804 F.3d 1246, 1253 (9th Cir. 2015).").

d. Waiver

Whether a defendant has waived his statutory right to appeal by plea agreement is reviewed de novo. *See United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017); *United States v. Lo*, 839 F.3d 777, 783 (9th Cir. 2016); *United States v. Lightfoot*, 626 F.3d 1092, 1094 (9th Cir. 2010); *United States v. Speelman*, 431 F.3d 1226, 1229 (9th Cir. 2005); *United States v. Bynum*, 362 F.3d 574, 583 (9th Cir. 2004). The validity of a waiver in a plea agreement is reviewed de novo. *See United States v. Medina-Carrasco*, 815 F.3d 457, 461 (9th Cir. 2016); *United States v. Charles*, 581 F.3d 927, 931 (9th Cir. 2009); *United States v. Littlejohn*, 224 F.3d 960, 964 (9th Cir. 2000). Whether a defendant may waive the prohibition against the introduction of plea negotiation statements is a question of law reviewed de novo. *See United States v. Rebbe*, 314 F.3d 402, 405 (9th Cir. 2002). Plain error review applies to arguments on appeal not made before the district court. *United States v. Minasyan*, 4 F.4th 770, 778 (9th Cir. 2021).

e. Withdrawal of Plea

"A defendant may withdraw a plea of guilty before sentencing if 'the defendant can show a fair and just reason for requesting the withdrawal.' Fed. R. Crim. P. 11(d)(2)(B)." *United States v. Yamashiro*, 788 F.3d 1231, 1236–37 (9th Cir. 2015). The court reviews "a district court's denial of a motion to withdraw a guilty plea for abuse of discretion. *United States v. Ensminger*, 567 F.3d 587, 590

(9th Cir. 2009). Under this standard, [the court reviews] the district court's findings of fact for clear error. *United States v. McTiernan*, 546 F.3d 1160, 1166 (9th Cir. 2008)." *Yamashiro*, 788 F.3d at 1236. The court reviews de novo whether the district court had jurisdiction to allow the defendant to withdraw his plea. *See United States v. Shehadeh*, 962 F.3d 1096, 1100 (9th Cir. 2020).

42. Preclusion of Proffered Defense

The district court's decision to preclude a defendant's proffered defense is reviewed de novo. *See United States v. Lindsey*, 850 F.3d 1009, 1014 (9th Cir. 2017); *United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010); *United States v. Biggs*, 441 F.3d 1069, 1070 n.1 (9th Cir. 2006); *United States v. Gurolla*, 333 F.3d 944, 952 n.8 (9th Cir. 2003); *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000).[11] Whether the court's instructions adequately cover the defendant's proffered defense is also reviewed de novo. *See United States v. Kleinman*, 880 F.3d 1020, 1039 (9th Cir. 2017) (as amended January 22, 2018); *United States v. Bello-Bahena*, 411 F.3d 1083, 1089 (9th Cir. 2005). However, whether a defendant has made the required factual foundation to support a requested jury instruction is reviewed for abuse of discretion. *See Bello-Bahena*, 411 F.3d at 1089; *see also United States v. Wiggan*, 700 F.3d 1204, 1210 (9th Cir. 2012); *United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011); *United States v. Perdomo-Espana*, 522 F.3d 983, 986 (9th Cir. 2008) (explaining various standards of review depending on focus of inquiry).

Whether a challenged jury instruction precludes an adequate presentation of the defense theory of the case is reviewed de novo. *See United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998); *United States v. Amlani*, 111 F.3d 705, 716 n.5 (9th Cir. 1997). Additionally, whether the ruling on a motion in limine precludes the presentation of a defense is reviewed de novo. *See United States v. Alvirez*, 831 F.3d 1115, 1120 (9th Cir. 2016). Finally, a determination that a

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[11] For specific defenses, *see United States v. Ibarra-Pino*, 657 F.3d 1000, 1003 (9th Cir. 2011) (duress); *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004) (entrapment); *United States v. Shryock*, 342 F.3d 948, 987 (9th Cir. 2003) (accomplice-corroboration & duress); *United States v. Pierre*, 254 F.3d 872, 875 (9th Cir. 2001) (lesser-included-offense); *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001) (necessity); *United States v. Ross*, 206 F.3d 896, 898 (9th Cir. 2000) (motion in limine); *United States v. de Cruz*, 82 F.3d 856, 867 (9th Cir. 1996) (mistake of law).

defendant has the burden of proving a defense is reviewed de novo. *See United States v. Leal-Cruz*, 431 F.3d 667, 670 (9th Cir. 2005); *United States v. Beasley*, 346 F.3d 930, 933 (9th Cir. 2003); *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998); *United States v. Dominguez-Mestas*, 929 F.2d 1379, 1381 (9th Cir. 1991) (duress).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 10. Defenses.

43. Pre-indictment Delay

The district court's decision on a defendant's motion to dismiss for pre-indictment delay is reviewed for abuse of discretion. *See United States v. Gregory*, 322 F.3d 1157, 1160–61 (9th Cir. 2003); *United States v. Mills*, 280 F.3d 915, 920 (9th Cir. 2002).

A district court's decision whether to dismiss an indictment for violation of the constitutional right to a speedy trial is reviewed de novo. *See United States v. De Jesus Corona-Verbera*, 509 F.3d 1105, 1114 (9th Cir. 2007); *Gregory*, 322 F.3d at 1160–61. A finding of prejudice is reviewed under the clearly erroneous standard. *See De Jesus Corona-Verbera*, 509 F.3d at 1114; *Gregory*, 322 F.3d at 1161.

44. Pretrial Detention and Release

Factual findings underlying a district court's detention order are reviewed under a deferential, clearly erroneous standard. *See United States v. Santos-Flores*, 794 F.3d 1088, 1090 (9th Cir. 2015) (order); *United States v. Fidler*, 419 F.3d 1026, 1029 (9th Cir. 2005). "The conclusions based on such factual findings, however, present a mixed question of fact and law. Thus, 'the question of whether the district court's factual determinations justify the pretrial detention order is reviewed de novo.'" *Santos-Flores*, 794 F.3d at 1090 (quoting *United States v. Hir*, 517 F.3d 1086–87 (9th Cir. 2008)). The court's finding of potential danger to the community is entitled to deference. *See Fidler*, 419 F.3d at 1029; *Marino v. Vasquez*, 812 F.2d 499, 509 (9th Cir. 1987). The district court's interpretation of "community," as used in the Bail Reform Act, is reviewed de novo. *See Hir*, 517 F.3d at 1086. Also, whether the district court's factual findings justify pretrial detention is reviewed de novo. *See id.* at 1086–87. The court's finding that a defendant is a flight risk is also reviewed under the clearly erroneous standard. *See Fidler*, 419 F.3d at 1029; *United States v. Donaghe*, 924 F.2d 940, 945 (9th Cir. 1991). The ultimate "fleeing from justice" question, however, is reviewed de

novo, because "legal concepts that require us to exercise judgment dominate the mix of fact and law." *United States v. Fowlie*, 24 F.3d 1070, 1072 (9th Cir. 1994).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 2. Bail.

45. Pretrial Hearings

A trial court's decision whether to hold a hearing on pretrial motions is reviewed for an abuse of discretion. *See United States v. Schafer*, 625 F.3d 629, 635 (9th Cir. 2010) (evidentiary hearing); *United States v Marks*, 530 F.3d 799, 810 (9th Cir. 2008); *United States v. Hagege*, 437 F.3d 943, 951 (9th Cir. 2006); *United States v. Hernandez*, 424 F.3d 1056, 1058 (9th Cir. 2005) (suppression motion); *United States v. Alatorre*, 222 F.3d 1098, 1099 (9th Cir. 2000) (evidentiary ruling). *But see United States v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002) (denial of *Franks* hearing is reviewed de novo); *United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (denial of evidentiary hearing on use immunity is reviewed de novo).

46. Pretrial Identifications

Whether a pretrial lineup was impermissibly suggestive is reviewed de novo. *See United States v. Bowman*, 215 F.3d 951, 966 n.9 (9th Cir. 2000). To determine whether such a procedure violated the defendant's due process rights, this court examines the totality of the surrounding circumstances. *See United States v. Jones*, 84 F.3d 1206, 1209 (9th Cir. 1996); *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995), *amended by* 98 F.3d 1100 (9th Cir. 1996).

The constitutionality of a pretrial identification procedure is also reviewed de novo. *See United States v. Bruce*, 984 F.3d 884, 890 (9th Cir. 2021); *United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1998).

Where the defendant fails to object to the admission of the identification by way of a pretrial suppression motion, however, he waives his right to challenge the identifications absent a showing of prejudice. *See United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996).

The district court's decision to admit in-court identification testimony is reviewed for an abuse of discretion. *United States v. Dixon*, 201 F.3d 1223, 1229 (9th Cir. 2000). The district court's decision regarding the admissibility of expert testimony on the reliability of eyewitness identification is reviewed for an abuse of discretion. *See United States v. Hicks*, 103 F.3d 837, 847 (9th Cir. 1996),

overruled in part on other grounds by United States v. W.R. Grace, 526 F.3d 499, 502 (9th Cir. 2008) (en banc); *United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994).

47. Probable Cause

The determination of probable cause is a mixed question of law and fact reviewed de novo. *See United States v. Price*, 980 F.3d 1211, 1224 (9th Cir. 2019) (as amended Nov. 27, 2020) (probable cause to arrest a suspect), *cert. denied*, 142 S. Ct. 129 (2021); *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (warrantless search of vehicle); *United States v. Faagai*, 869 F.3d 1145, 1149 (9th Cir. 2017); *United States v. Lopez*, 482 F.3d 1067, 1071 (9th Cir. 2007). *See also United States v. Borowy*, 595 F.3d 1045, 1047 (9th Cir. 2010) (per curiam); *Lopez*, 482 F.3d at 1071; *United States v. Williamson*, 439 F.3d 1125, 1135 n.8 (9th Cir. 2006).[12] However, underlying historical facts are reviewed for clear error. *See Williamson*, 439 F.3d at 1135 n.8; *United States v. Ortiz-Hernandez*, 427 F.3d 567, 573 (9th Cir. 2005).

The issuance of a search warrant by a magistrate judge is reviewed for clear error. *See United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011); *United States v. Hill*, 459 F.3d 966, 970 (9th Cir. 2006) (according "great deference" to the magistrate judge's finding); *United States v. Fernandez*, 388 F.3d 1199, 1252 (9th Cir. 2004).[13] Thus, the magistrate judge's determination of probable cause is accorded deference by the reviewing court. *See Krupa*, 658 F.3d at 1177; *Hill*, 459 F.3d at 970 ("great deference"); *United States v. Meek*, 366 F.3d 705, 712 (9th Cir. 2004) (same); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) ("significant deference").

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[12] For specific examples *see, e.g.*, *United States v. Sandoval-Venegas*, 292 F.3d 1101, 1104 (9th Cir. 2002) (warrantless arrest); *United States v. Parks*, 285 F.3d 1133, 1141 (9th Cir. 2002) (vehicle search); *United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 868 (9th Cir. 2001) (civil forfeiture); *Picray v. Sealock*, 138 F.3d 767, 770–71 (9th Cir. 1998) (warrantless arrest in § 1983 action).

[13] *See also Dawson v. City of Seattle*, 435 F.3d 1054, 1062 (9th Cir. 2006) (noting magistrate judge's finding of probable cause is reviewed for clear error); *United States v. Nielsen*, 371 F.3d 574, 579 (9th Cir. 2004) (same); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) (same).

A district court's determination of probable cause in a case with a redacted affidavit is reviewed de novo. *See United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992); *United States v. Grandstaff*, 813 F.2d 1353, 1355 (9th Cir. 1987) (search warrant); *see also United States v. Barajas-Avalos*, 377 F.3d 1040, 1058 (9th Cir. 2004) (reviewing de novo whether probable cause exists after tainted information has been redacted from an affidavit); *United States v. Castillo*, 866 F.2d 1071, 1076 (9th Cir. 1988) (totality of circumstances used to determine if magistrate had probable cause to issue arrest warrant, reversible only upon finding of clear error, similar to review of search warrants).

Whether probable cause is lacking because of alleged misstatements and omissions in the affidavit is reviewed de novo. *See United States v. Perkins*, 850 F.3d 1109, 1115 (9th Cir. 2017); *United States v. Ruiz*, 758 F.3d 1144, 1148 (9th Cir. 2014); *United States v. Elliott*, 322 F.3d 710, 714 (9th Cir. 2003); *United States v. Bowman*, 215 F.3d 951, 963 n.6 (9th Cir. 2000). The district court's factual findings whether any statements were false and omitted, and whether such statements were intentionally or recklessly made, are reviewed for clear error. *Perkins*, 850 F.3d at 1115; *Elliott*, 322 F.3d at 714. *See also Ruiz*, 758 F.3d at 1148 (reviewing for clear error the district court's finding that a fact was not recklessly omitted from an affidavit supporting probable cause).

48. Recusal

"Rulings on motions for recusal are reviewed under the abuse-of-discretion standard." *United States v. Carey*, 929 F.3d 1092, 1096 (9th Cir. 2019) (quotation marks and citation omitted); *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012); *United States v. Johnson*, 610 F.3d 1138, 1147 (9th Cir. 2010); *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002); *United States v. Silver*, 245 F.3d 1075, 1078 (9th Cir. 2001); *United States v. Scholl*, 166 F.3d 964, 977 (9th Cir. 1999).

When recusal is not raised below, the allegation of judicial bias is reviewed for plain error. *See United States v. Spangle*, 626 F.3d 488, 495 (9th Cir. 2010); *United States v. Holland*, 519 F.3d 909, 911 (9th Cir. 2008); *United States v. Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991).

49. Regulations

A district court's interpretation of a federal regulation is reviewed de novo. *See United States v. Obendorf*, 894 F.3d 1094, 1098 (9th Cir. 2018); *United States v. Bohn*, 622 F.3d 1129, 1135 (9th Cir. 2010); *United States v. Bucher*, 375 F.3d 929, 931 (9th Cir. 2004); *United States v. Willfong*, 274 F.3d 1297, 1300 (9th Cir. 2001). An agency's interpretation of regulations, however, is entitled to deference. *United States v. Bowen*, 172 F.3d 682, 685 (9th Cir. 1999); *United States v. McKittrick*, 142 F.3d 1170, 1173 (9th Cir. 1998). Whether a regulation is unconstitutionally vague is a question of law reviewed de novo. *See United States v. Agront*, 773 F.3d 192, 195 (9th Cir. 2014); *United States v. Elias*, 269 F.3d 1003, 1014 (9th Cir. 2001); *United States v. Coutchavlis*, 260 F.3d 1149, 1155 (9th Cir. 2001).

50. Representation

a. Conflict-Free Representation

This court reviews de novo whether a defendant was denied the right to conflict-free representation. *See United States v. Baker*, 256 F.3d 855, 859 (9th Cir. 2001) (habeas); *United States v. Moore*, 159 F.3d 1154, 1157 (9th Cir. 1998); *United States v. Cruz*, 127 F.3d 791, 801 (9th Cir. 1997) (direct appeal), *overruled in part on other grounds in United States v. Jimenez Recio*, 537 U.S. 270, 276–77 (2003).

b. Disqualification of Counsel

District judges have "substantial latitude" in deciding whether counsel must be disqualified; review is for an abuse of discretion. *See United States v. Frega*, 179 F.3d 793, 799 (9th Cir. 1999); *United States v. Stites*, 56 F.3d 1020, 1024 (9th Cir. 1995). *See also Radcliffe v. Hernandez*, 818 F.3d 537, 541 (9th Cir. 2016).

c. Hybrid Representation

The decision whether to allow a pro se litigant to proceed with either form of hybrid representation (co-counsel or advisory counsel) is reviewed for abuse of discretion. *See United States v. George*, 85 F.3d 1433, 1439 (9th Cir. 1996); *United States v. Bergman*, 813 F.2d 1027, 1030 (9th Cir. 1987). The court's denial of a request for hybrid representation is reviewed for an abuse of discretion. *See United States v. Olano*, 62 F.3d 1180, 1193 (9th Cir. 1995); *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994).

d. Ineffective Representation

Whether a defendant received ineffective assistance of counsel is reviewed de novo both in direct appeals and on habeas.

Direct appeals: *See United States v. Liu*, 731 F.3d 982, 995 (9th Cir. 2013); *United States v. Nickerson*, 556 F.3d 1014, 1018 (9th Cir. 2009); *United States v. Labrada-Bustamante*, 428 F.3d 1252, 1260 (9th Cir. 2005); *United States v. Mack*, 164 F.3d 467, 471 (9th Cir. 1999).

Habeas: *See Dickinson v. Shinn*, 2 F.4th 851, 857 (9th Cir. 2021) (§ 2254); *Frierson v. Woodford*, 463 F.3d 982, 988 (9th Cir. 2006) (§ 2254); *Allen v. Woodford*, 395 F.3d 979, 992 (9th Cir. 2005) (§ 2254); *Stankewitz v. Woodford*, 365 F.3d 706, 714 (9th Cir. 2004) (§ 2254); *United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003) (§ 2255); *United States v. Alaimalo*, 313 F.3d 1188, 1191 (9th Cir. 2002) (§ 2255).

Ineffective assistance of counsel claims are mixed questions of fact and law to be reviewed de novo. *See Dickinson*, 2 F.4th at 847; *Earp v. Ornoski*, 431 F.3d 1158, 1182 (9th Cir. 2005); *Labrada-Bustamante*, 428 F.3d at 1260; *Dubria v. Smith*, 224 F.3d 995, 1000 (9th Cir. 2000) (en banc).

Note that claims of ineffective assistance of counsel are generally inappropriate on direct appeal. *See Liu*, 731 F.3d at 995; *United States v. McGowan*, 668 F.3d 601, 605 (9th Cir. 2012); *United States v. Moreland*, 622 F.3d 1147, 1157 (9th Cir. 2010); *United States v. Alferahin*, 433 F.3d 1148, 1160 n.6 (9th Cir. 2006) (noting when direct review is permissible and accepting review); *United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) (declining review).

The district court's findings of fact are reviewed under the clearly erroneous standard. *See Jones v. Shinn*, 943 F.3d 1211, 1220 (9th Cir. 2019); *Gollehon v. Mahoney*, 626 F.3d 1019, 1023 (9th Cir. 2010); *Summerlin v. Schriro*, 427 F.3d 623, 629 (9th Cir. 2005) (en banc); *Allen*, 395 F.3d at 992; *United States v. Alvarez-Tautimez*, 160 F.3d 573, 575 (9th Cir. 1998).

The district court's decision not to conduct an evidentiary hearing on an ineffective assistance of counsel claim is reviewed for an abuse of discretion. *See Hurles v. Ryan*, 752 F.3d 768, 777 (9th Cir. 2014) (§ 2254); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (§ 2255); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 50. Representation, f. Right to Counsel.

e. Pro Se Representation

Factual findings supporting the district court's decision whether to allow a defendant to proceed pro se are reviewed for clear error. *See United States v. Audette*, 923 F.3d 1227, 1234 (9th Cir. 2019) ("A district court's finding that a defendant's waiver was unequivocal is a finding of fact reviewed for clear error."); *United States v. Marks*, 530 F.3d 799, 816 (9th Cir. 2008); *United States v. George*, 56 F.3d 1078, 1084 (9th Cir. 1995); *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994). The validity of a *Faretta* waiver is a mixed question of law and fact reviewed de novo. *See Audette*, 923 F.3d at 1234; *United States v. Moreland*, 622 F.3d 1147, 1156 (9th Cir. 2010); *United States v. Erskine*, 355 F.3d 1161, 1166 (9th Cir. 2004). *See also United States v. Brugnara*, 856 F.3d 1198, 1212 (9th Cir. 2017) (discussing defendant's right to represent himself).

Although the court reviews "the district court's factual findings for clear error, [the court has] not yet clarified whether denial of a *Faretta* request is reviewed de novo or for abuse of discretion." *United States v. Telles*, 18 F.4th 290, 302 (9th Cir. 2021) (as amended) (holding that claim failed under either standard of review).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 18. *Faretta* Requests.

f. Right to Counsel

Whether a defendant was denied his Sixth Amendment right to counsel is a question of law reviewed de novo. *See United States v. Hantzis*, 625 F.3d 575, 582 (9th Cir. 2010) (direct appeal); *United States v. Danielson*, 325 F.3d 1054, 1066 (9th Cir. 2003) (direct appeal); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255); *United States v. Ortega*, 203 F.3d 675, 679 (9th Cir. 2000) (direct appeal); *United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995) (coram nobis).

The district court's factual findings concerning the words a defendant used to invoke the right to counsel are reviewed for clear error. See *United States v. Rodriguez*, 518 F.3d 1072, 1076 (9th Cir. 2008); *United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005). Whether those words actually invoked the right to counsel is reviewed de novo. See *Younger*, 398 F.3d at 1185; *United States v. Doe*, 170 F.3d 1162, 1166 (9th Cir. 1999).

g. Substitution of Counsel

Denial of a motion for substitution of counsel is reviewed for an abuse of discretion. *See United States v. Velazquez*, 855 F.3d 1021, 1033 (9th Cir. 2017); *United States v. Lindsey*, 634 F.3d 541, 554 (9th Cir. 2011); *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010); *United States v. Mendez-Sanchez*, 563 F.3d 935, 942 (9th Cir. 2009); *United States v. Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005); *United States v. McKenna*, 327 F.3d 830, 843 (9th Cir. 2003); *United States v. Smith*, 282 F.3d 758, 763 (9th Cir. 2002); *United States v. Corona-Garcia*, 210 F.3d 973, 976 (9th Cir. 2000); *United States v. Moore*, 159 F.3d 1154, 1159 n.3 (9th Cir. 1998).

In reviewing the district court's exercise of discretion, the court of appeals considers three factors: (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the extent of conflict between the defendant and counsel; and (3) the timeliness of the motion and the extent of resulting inconvenience and delay. *See Lindsey*, 634 F.3d at 554; *Rivera-Corona*, 618 F.3d at 978; *Prime*, 431 F.3d at 1154; *McKenna*, 327 F.3d at 843; *Smith*, 282 F.3d at 763.

Note that this court clarified that, in habeas review of a state court's denial of a motion to substitute counsel, review is not for an abuse of discretion, but whether the error violated the defendant's constitutional rights. *See Gonzales v. Knowles*, 515 F.3d 1006, 1012 (9th Cir. 2008); *Schell v. Witek*, 218 F.3d 1017, 1024–25 (9th Cir. 2000) (en banc) (overruling *Crandell v. Bunnell*, 144 F.3d 1213, 1215 (9th Cir. 1998)).

h. Waiver of Representation

Whether a defendant has knowingly and voluntarily waived the right to counsel and elected self-representation is a mixed question of law and fact reviewed de novo. *See United States v. Schaefer*, 13 F.4th 875, 885 (9th Cir. 2021); *United States v. French*, 748 F.3d 922, 929 (9th Cir. 2014); *United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007) (implicit waiver, direct appeal); *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001) (direct appeal); *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2001) (direct appeal); *Lopez v. Thompson*, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc) (habeas). This court reviews de novo whether a defendant's waiver of the right to counsel was made knowingly, intelligently, and voluntarily. *See French*, 748 F.3d at 929; *United States v. Springer*, 51 F.3d 861, 864 (9th Cir. 1995); *see also Sutcliffe*, 505 F.3d at 954, 956.

i. Withdrawal of Counsel

The trial court's decision to grant or deny an attorney's motion to withdraw as counsel is reviewed for an abuse of discretion. *See United States v. Carter*, 560 F.3d 1107, 1113 (9th Cir. 2009); *LaGrand v. Stewart*, 133 F.3d 1253, 1269 (9th Cir. 1998); *United States v. Roston*, 986 F.2d 1287, 1292 (9th Cir. 1993) (substitution of new counsel).

51. Sealed Materials

The district court's decision whether to seal documents is reviewed for an abuse of discretion. *See United States v. Doe*, 870 F.3d 991, 996 (9th Cir. 2017) ("When a district court 'conscientiously balances' the interests of the public and the party seeking to keep secret certain judicial records, we review a decision whether or not to seal the judicial records for abuse of discretion."); *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Mann*, 829 F.2d 849, 853 (9th Cir. 1987).

> A district court's denial of a motion to unseal is reviewed for abuse of discretion. *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir 2016). As part of that review, this court must first determine under de novo review whether the district court applied the correct legal rule. *United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc). If the district court applied the wrong rule, the district court abused its discretion. *Id.* The application of the correct legal standard may nonetheless constitute an abuse of discretion if the application "was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* at 1262 (quotations, citation, and footnote omitted).

United States v. Sleugh, 896 F.3d 1007, 1012 (9th Cir. 2018).

52. Search and Seizure

The lawfulness of a search and seizure is reviewed de novo. *See United States v. Scott*, 705 F.3d 410, 414–15 (9th Cir. 2012) (stating it is a mixed question of law and fact); *United States v. Kriesel*, 508 F.3d 941, 946 n.6 (9th Cir. 2007); *United States v. Stafford*, 416 F.3d 1068, 1073 (9th Cir. 2005); *United States v. Deemer*, 354 F.3d 1130, 1132 (9th Cir. 2004); *United States v. Nerber*, 222 F.3d 597, 599 (9th Cir. 2000).

The trial court's underlying factual findings are reviewed for clear error. *See Scott*, 705 F.3d at 415; *Stafford*, 416 F.3d at 1073; *Deemer*, 354 F.3d at 1132. "Where no findings of fact were made or requested, this court will uphold a trial court's denial of a motion to suppress if there was a reasonable view to support it." *United States v. Gooch*, 506 F.3d 1156, 1158 (9th Cir. 2007) (quoting *United States v. Becker*, 23 F.3d 1537, 1539 (9th Cir. 1994)).

This court reviews de novo a district court's ultimate legal conclusion whether a defendant has standing to challenge a search and seizure. *See United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1116 (9th Cir. 2005); *United States v. Silva*, 247 F.3d 1051, 1054 (9th Cir. 2001); *United States v. Sarkisian*, 197 F.3d 966, 986 (9th Cir. 1999); *United States v. Armenta*, 69 F.3d 304, 306–07 (9th Cir. 1995). The district court's factual findings underlying its decision on standing are reviewed for clear error. *See Gonzales*, 412 F.3d at 1116; *Armenta*, 69 F.3d at 307.

Whether an encounter between a defendant and officers constitutes a seizure is a mixed question of law and fact to be reviewed de novo. *See United States v. Smith*, 633 F.3d 889, 892 (9th Cir. 2011); *United States v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007); *United States v. Becerra-Garcia*, 397 F.3d 1167, 1170 (9th Cir. 2005); *United States v. Enslin*, 327 F.3d 788, 792–93 (9th Cir. 2003); *United States v. Cormier*, 220 F.3d 1103, 1110 (9th Cir. 2000). However, the district court's underlying findings of fact are reviewed for clear error. *See Becerra-Garcia*, 397 F.3d at 1172; *Cormier*, 220 F.3d at 1110.

Whether an otherwise valid search or seizure was carried out in an unreasonable manner is determined under an objective test, on the basis of the facts and circumstances confronting the officers. *See Franklin v. Foxworth*, 31 F.3d 873, 875 (9th Cir. 1994) (civil rights action). The court's determination of "reasonableness" is reviewed de novo. *See id.*

a. Abandonment

Whether property has been abandoned within the meaning of the Fourth Amendment is an issue of fact reviewed for clear error. *See United States v. Stephens*, 206 F.3d 914, 916–17 (9th Cir. 2000); *United States v. Gonzales*, 979 F.2d 711, 712 (9th Cir. 1992).

b. Border Searches

The legality of a border search is reviewed de novo. *See United States v. Seljan*, 547 F.3d 993, 999 n.6 (9th Cir. 2008) (en banc) (packages); *United States v. Cortez-Rocha*, 394 F.3d 1115, 1118 (9th Cir. 2005) (car tire).[14] Note that reasonable suspicion is not required for every border search. *See United States v. Arnold*, 533 F.3d 1003, 1008 (9th Cir. 2008) ("[R]easonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border"). *See also United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013) (discussing border searches). Whether a border detention was based on reasonable suspicion is reviewed de novo. *See United States v. Nava*, 363 F.3d 942, 944 (9th Cir. 2004); *United States v. Gonzalez-Rincon*, 36 F.3d 859, 863 (9th Cir. 1994). The district court's findings of fact are reviewed under the clearly erroneous standard. *See United States v. Chen*, 439 F.3d 1037, 1040 (9th Cir. 2006); *United States v. Camacho*, 368 F.3d 1182, 1183 (9th Cir. 2004); *Gonzalez-Rincon*, 36 F.3d at 863. The appellate court reviews de novo the district court's determination that a warrantless search was a valid border search. *See United States v. Cano*, 934 F.3d 1002, 1010 n.3 (9th Cir. 2019).

c. Coast Guard Searches

The lawfulness of a search and seizure by the Coast Guard, a mixed question of law and fact, is reviewed de novo. *See United States v. Dobson*, 781 F.2d 1374, 1376 (9th Cir. 1986). Whether the continued detention of a vessel after completion of a safety inspection by the Coast Guard is permissible based on reasonable suspicion is a question of law reviewed de novo. *See United States v. Thompson*, 282 F.3d 673, 676 (9th Cir. 2002).

d. Consent to Search

A district court's determination whether a defendant voluntarily consented to a search depends on the totality of circumstances and is a question of fact reviewed for clear error. *See United States v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007)

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[14] *See, e.g.*, *United States v. Abbouchi*, 502 F.3d 850, 854 n.1 (9th Cir. 2007) (package shipment); *United States v. Bennett*, 363 F.3d 947, 950 (9th Cir. 2004) (boat); *United States v. Vargas-Castillo*, 329 F.3d 715, 722 (9th Cir. 2003) (vehicle); *United States v. Okafor*, 285 F.3d 842, 845 (9th Cir. 2002) (plane); *United States v. Ani*, 138 F.3d 390, 391 (9th Cir. 1998) (mail); *United States v. Nates*, 831 F.2d 860, 862 (9th Cir. 1987).

(discussing five factors to consider); *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1125–26 (9th Cir.), *amended by* 416 F.3d 939 (9th Cir. 2005). The question whether as a general rule certain types of action give rise to an inference of consent to search is a question of law reviewed de novo. *See United States v. Albrektsen*, 151 F.3d 951, 953 (9th Cir. 1998); *United States v. Garcia*, 997 F.2d 1273, 1281 (9th Cir. 1993).

A trial court's findings on whether the scope of consent to a search has been exceeded will be upheld unless they are clearly erroneous. *See United States v. Lopez-Cruz*, 730 F.3d 803, 809 (9th Cir. 2013); *United States v. Russell*, 664 F.3d 1279, 1280 n.1 (9th Cir. 2012); *United States v. McWeeney*, 454 F.3d 1030, 1033–34 (9th Cir. 2006); *Rodriguez-Preciado*, 399 F.3d at 1131.

A district court's determination regarding authority to consent to a search is a mixed question of fact and law reviewed de novo. *See United States v. Arreguin*, 735 F.3d 1168, 1174 (9th Cir. 2013); *United States v. Ruiz*, 428 F.3d 877, 880 (9th Cir. 2005); *United States v. Kim*, 105 F.3d 1579, 1581 (9th Cir. 1997) (resolving previously undecided standard of review). A determination of apparent authority to consent is a mixed question of law and fact reviewed de novo. *See Ruiz*, 428 F.3d at 880; *United States v. Enslin*, 327 F.3d 788, 792 (9th Cir. 2003); *United States v. Reid*, 226 F.3d 1020, 1025 (9th Cir. 2000); *United States v. Fiorillo*, 186 F.3d 1136, 1144 (9th Cir. 1999) (describing three-part analysis).

e. Exclusionary Rule

Whether the exclusionary rule is applicable to a given case is reviewed de novo while underlying factual findings are reviewed for clear error. *See United States v. Lundin*, 817 F.3d 1151, 1157 (9th Cir. 2016); *United States v. Perea-Rey*, 680 F.3d 1179, 1183 (9th Cir. 2012); *United States v. Jefferson*, 566 F.3d 928, 933 (9th Cir. 2009); *United States v. Quoc Viet Hoang*, 486 F.3d 1156, 1159 (9th Cir. 2007); *United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc). Whether the rule applies to revocation hearings is reviewed de novo. *See United States v. Hebert*, 201 F.3d 1103, 1104 (9th Cir. 2000) (per curiam); *see also Grimes v. Commissioner*, 82 F.3d 286, 288 (9th Cir. 1996) (reviewing de novo whether rule applies to civil tax proceedings). Whether the good faith exception to the exclusionary rule applies in any given case is subject to de novo review. *See United States v. Krupa*, 658 F.3d 1174, 1179 (9th Cir. 2011); *United States v. Thai Tung Luong*, 470 F.3d 898, 902 (9th Cir. 2006); *United States v. Kurt*, 986 F.2d 309, 311 (9th Cir. 1993). Whether an officer's conduct was sufficiently egregious to require application of the exclusionary rule is reviewed de novo. *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994). Whether the exclusionary rule

was properly applied is reviewed de novo. *See United States v. Jobe*, 933 F.3d 1074, 1077 (9th Cir. 2019).

f. Exigent Circumstances

Exigent circumstances present a mixed question of law and fact reviewed de novo. *See United States v. Iwai*, 930 F.3d 1141, 1144 (9th Cir. 2019) (reviewing de novo whether exigent circumstances justify a warrantless entry and/or search); *United States v. Mancinas-Flores*, 588 F.3d 677, 687 (9th Cir. 2009); *United States v. Russell*, 436 F.3d 1086, 1089 n.2 (9th Cir. 2006); *United States v. VonWillie*, 59 F.3d 922, 925 (9th Cir. 1995). Findings of fact underlying the district court's determination are reviewed for clear error. *See Iwai*, 930 F.3d at 1144; *Mancinas-Flores*, 588 F.3d at 687; *Russell*, 436 F.3d at 1089 n.4; *VonWillie*, 59 F.3d at 925.

g. Expectation of Privacy

Whether an individual had a reasonable expectation of privacy in property is a question of law reviewed de novo. *See United States v. Yang*, 958 F.3d 851, 858 (9th Cir. 2020); *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007); *United States v. Gust*, 405 F.3d 797, 799 (9th Cir. 2005). A finding that an individual had a subjective expectation of privacy is reviewed for clear error. *See United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993).

h. Governmental Conduct

"This court reviews the district court's determination that a particular search involves governmental conduct de novo." *United States v. Ross*, 32 F.3d 1411, 1413 (9th Cir. 1994) (per curiam).

i. Inevitable Discovery

Rulings regarding inevitable discovery present mixed questions of fact and law that are reviewed for clear error. *See United States v. Peterson*, 902 F.3d 1016, 1019 (9th Cir. 2018); *United States v. Lundin*, 817 F.3d 1151, 1157 (9th Cir. 2016) (noting that it is essentially a factual inquiry); *United States v. Ruckes*, 586 F.3d 713, 716 (9th Cir. 2009); *United States v. Lang*, 149 F.3d 1044, 1048 (9th Cir. 1998) (resolving prior unsettled standard).

j. Investigatory Stops

Whether an encounter between an individual and law enforcement authorities constitutes an investigatory stop is a mixed question of law and fact subject to de novo review. *See United States v. Michael R.*, 90 F.3d 340, 345 (9th Cir. 1996); *United States v. Kim*, 25 F.3d 1426, 1430 (9th Cir. 1994). Factual determinations underlying this inquiry are reviewed for clear error. *See United States v. Garcia-Acuna*, 175 F.3d 1143, 1145 (9th Cir. 1999); *Michael R.*, 90 F.3d at 345; *Kim*, 25 F.3d at 1430.

The specific question of whether reasonable suspicion existed under given facts is also subject to de novo review. *See United States v. Williams*, 846 F.3d 303, 306 (9th Cir. 2016); *United States v. Burkett*, 612 F.3d 1103, 1106 (9th Cir. 2010) ("A determination whether there was reasonable suspicion to support an investigatory 'stop and frisk' is a mixed question of law and fact, also reviewed de novo."); *United States v. Arvizu*, 534 U.S. 266, 275 (2002) (reaffirming de novo standard); *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Burkett*, 612 F.3d 1103, 1106 (9th Cir. 2010); *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007); *United States v. Crapser*, 472 F.3d 1141, 1145 (9th Cir. 2007); *United States v. Colin*, 314 F.3d 439, 442 (9th Cir. 2002); *United States v. Fuentes*, 105 F.3d 487, 490 (9th Cir. 1997) (propriety of a *Terry* stop is reviewed de novo). Underlying factual findings are reviewed for clear error. *See Williams*, 846 F.3d at 306; *Ornelas*, 517 U.S. at 699; *United States v. Drake*, 543 F.3d 1080, 1087 (9th Cir. 2008); *Berber-Tinoco*, 510 F.3d at 1087; *United States v. Choudhry*, 461 F.3d 1097, 1100 (9th Cir. 2006); *Colin*, 314 F.3d at 442; *United States v. Lopez-Soto*, 205 F.3d 1101, 1103 (9th Cir. 2000).

Whether a seizure exceeds the bounds of a valid investigatory stop and becomes a de facto arrest is reviewed de novo. *See United States v. Edwards*, 761 F.3d 977, 981 (9th Cir. 2014); *United States v. Thompson*, 282 F.3d 673, 676 (9th Cir. 2002); *United States v. Torres-Sanchez*, 83 F.3d 1123, 1127 (9th Cir. 1996). Whether the scope of a vehicle stop exceeded the permissible scope of a traffic stop is reviewed de novo. *See United States v. Garcia-Rivera*, 353 F.3d 788, 791 (9th Cir. 2003). Whether an encounter between a defendant and officers constitutes a seizure is a mixed question of law and fact reviewed by this court de novo. *See United States v. Smith*, 633 F.3d 889, 892 (9th Cir. 2011); *United States v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007); *United States v. Becerra-Garcia*, 397 F.3d 1167, 1170 (9th Cir. 2005); *United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000). A district court's determination that a police officer lawfully crossed the threshold of a dwelling to effect an arrest is reviewed de novo. *See United States v. Albrektsen*, 151 F.3d 951, 953 (9th Cir. 1998).

k. Issuance of a Search Warrant

The issuance of a search warrant by a magistrate judge is reviewed for clear error. *See United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011); *United States v. Hill*, 459 F.3d 966, 970 (9th Cir. 2006) (noting finding of probable cause is reviewed for clear error); *United States v. Fernandez*, 388 F.3d 1199, 1252 (9th Cir. 2004).[15] Thus, the magistrate judge's determination of probable cause is accorded deference by the reviewing court. *See United States v. Garay*, 938 F.3d 1108, 1114 (9th Cir. 2019) ("We owe 'great deference' to magistrate judges' probable-cause findings."); *Krupa*, 658 F.3d at 1177; *Hill*, 459 F.3d at 970; *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) ("significant deference").

A district court's determination of probable cause in a case with a redacted affidavit is reviewed de novo. *See United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992); *United States v. Grandstaff*, 813 F.2d 1353, 1355 (9th Cir. 1987) (search warrant); *see also United States v. Barajas-Avalos*, 377 F.3d 1040, 1058 (9th Cir. 2004) (reviewing de novo whether probable cause exists after tainted information has been redacted from an affidavit); *United States v. Castillo*, 866 F.2d 1071, 1076 (9th Cir. 1988) (totality of circumstances used to determine if magistrate had probable cause to issue arrest warrant, reversible only upon finding of clear error, similar to review of search warrants).

Whether probable cause is lacking because of alleged misstatements and omissions in the affidavit is reviewed de novo. *See United States v. Perkins*, 850 F.3d 1109, 1115 (9th Cir. 2017); *United States v. Elliott*, 322 F.3d 710, 714 (9th Cir. 2003); *United States v. Bowman*, 215 F.3d 951, 963 n.6 (9th Cir. 2000). The district court's factual findings whether any statements were false and omitted, and whether such statements were intentionally or recklessly made, are reviewed for clear error. *See United States v. Ruiz*, 758 F.3d 1144, 1148 (9th Cir. 2014); *Elliott*, 322 F.3d at 714.

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[15] *United States v. Nielsen*, 371 F.3d 574, 579 (9th Cir. 2004) (noting finding of probable cause is reviewed for clear error); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) (same).

l. Knock and Announce

Compliance with "knock and announce" standards established by statute is reviewed de novo. *See United States v. Chavez-Miranda*, 306 F.3d 973, 980 (9th Cir. 2002); *United States v. Granville*, 222 F.3d 1214, 1217 (9th Cir. 2000); *United States v. Hudson*, 100 F.3d 1409, 1417 (9th Cir. 1996) (reviewing de novo the validity of a protective sweep, including compliance with knock and announce requirements). Underlying factual findings are reviewed for clear error. *See Chavez-Miranda*, 306 F.3d at 980; *Granville*, 222 F.3d at 1217. Whether exigent circumstances existed to excuse an officer's noncompliance with the knock and announce rule is a mixed question of law and fact reviewed de novo. *See United States v. Bynum*, 362 F.3d 574, 578–79 (9th Cir. 2004); *United States v. Peterson*, 353 F.3d 1045, 1048 (9th Cir. 2004); *United States v. Reilly*, 224 F.3d 986, 991 (9th Cir. 2000); *Hudson*, 100 F.3d at 1417.

m. Private Searches

A district court's conclusion that a search did not violate the Fourth Amendment because it was a private search is reviewed de novo as a question of law. *See United States v. Reed*, 15 F.3d 928, 930 (9th Cir. 1994). *See also United States v. Wilson*, 13 F.4th 961, 967–68 (9th Cir. 2021) (discussing private search exception).

n. Probable Cause

The determination of probable cause is a mixed question of law and fact in which the legal issues predominate, and it is therefore subject to de novo review. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996) (warrantless search of vehicle); *United States v. Faagai*, 869 F.3d 1145, 1149 (9th Cir. 2017) (warrantless search of vehicle); *United States v. Borowy*, 595 F.3d 1045, 1047 (9th Cir. 2010) (per curiam); *United States v. $493,850.00 in United States Currency*, 518 F.3d 1159, 1164 (9th Cir. 2008) (currency forfeiture).[16] However, underlying historical

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[16] *See United States v. Williamson*, 439 F.3d 1125, 1135 n.8 (9th Cir. 2006) (search warrant); *United States v. Sandoval-Venegas*, 292 F.3d 1101, 1104 (9th Cir. 2002) (warrantless arrest); *United States v. Parks*, 285 F.3d 1133, 1141 (9th Cir. 2002) (vehicle search); *United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 868 (9th Cir. 2001) (civil forfeiture); *Picray v. Sealock*, 138 F.3d 767, 770–71 (9th Cir. 1998) (warrantless arrest in § 1983

facts are reviewed for clear error. *See Borowy*, 595 F.3d at 1048; *Williamson*, 439 F.3d at 1135 n.8; *Sandoval-Venegas*, 292 F.3d at 1104; *Parks*, 285 F.3d at 1141.

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 52. Search and Seizure, k. Issuance of a Search Warrant.

o. Probation/Parole Searches

The denial of a motion to suppress the fruits of a warrantless parole search is reviewed de novo. *See United States v. Peterson*, 995 F.3d 1061, 1064 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 472 (2021); *United States v. Korte*, 918 F.3d 750, 753 (9th Cir. 2019); *United States v. Grandberry*, 730 F.3d 968, 970–71 (9th Cir. 2013); *United States v. Hebert*, 201 F.3d 1103, 1104 (9th Cir. 2000). The district court's factual determination that a probation search was not impermissible is reviewed for clear error. *See Grandberry*, 730 F.3d at 971; *United States v. Watts*, 67 F.3d 790, 794 (9th Cir. 1995), *rev'd on other grounds*, 519 U.S. 148 (1997). The district court's determination of the reasonable scope of a probation search is a mixed question of fact and law reviewed de novo. *See United States v. Davis*, 932 F.2d 752, 756 (9th Cir. 1991). Whether a probation search was a subterfuge for a criminal investigation is a factual determination that is reviewed for clear error. *See United States v. Knights*, 219 F.3d 1138, 1141 (9th Cir. 2000), *rev'd on other grounds*, 534 U.S. 112 (2001). *See also United States v. Lara*, 815 F.3d 605, 608 (9th Cir. 2016) (reviewing de novo a district court's denial of a motion to suppress, and reviewing for clear error the district court's underlying factual findings, in case concerning warrantless probation search of cellular telephone).

p. Protective Sweeps

De novo review applies to a trial court's determination of the validity of a protective sweep, including compliance with statutory "knock and announce" requirement. *See United States v. Hudson*, 100 F.3d 1409, 1417 (9th Cir. 1996);[17]

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action); *United States v. Jones*, 84 F.3d 1206, 1210 (9th Cir. 1996) (probable cause to arrest).

[17] *See also United States v. Chavez-Miranda*, 306 F.3d 973, 980 (9th Cir. 2002) (noting compliance with "knock and announce" standards is reviewed de novo); *United States v. Granville*, 222 F.3d 1214, 1217 (9th Cir. 2000) (noting de novo review applies to legal conclusion that "knock and announce" statute was

see also United States v. Job, 871 F.3d 852, 862 (9th Cir. 2017) (discussing protective sweeps). Whether exigent circumstances existed to excuse an officer's noncompliance with the knock and announce rule is a mixed question of law and fact reviewed de novo. *See United States v. Bynum*, 362 F.3d 574, 578–79 (9th Cir. 2004); *United States v. Peterson*, 353 F.3d 1045, 1048 (9th Cir. 2004); *United States v. Reilly*, 224 F.3d 986, 991 (9th Cir. 2000).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 52. Search and Seizure, l. Knock and Announce.

q. Reasonable Suspicion

The specific question of whether reasonable suspicion existed under given facts is subject to de novo review. *See United States v. Arvizu*, 534 U.S. 266, 275 (2002) (reaffirming de novo standard); *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Bontemps*, 977 F.3d 909, 913 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2874 (2021); *United States v. Raygoza-Garcia*, 902 F.3d 994, 999 (9th Cir. 2018); *United States v. Job*, 871 F.3d 852, 861 (9th Cir. 2017); (*Terry* stop); *United States v. Williams*, 846 F.3d 303, 306 (9th Cir. 2016) (investigatory stop and frisk); *United States v. Evans*, 786 F.3d 779, 788 (9th Cir. 2015); *United States v. Valdes-Vega*, 738 F.3d 1074, 1077 (9th Cir. 2013); *United States v. Burkett*, 612 F.3d 1103, 1106 (9th Cir. 2010); *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007); *United States v. Crapser*, 472 F.3d 1141, 1145 (9th Cir. 2007); *United States v. Colin*, 314 F.3d 439, 442 (9th Cir. 2002); *United States v. Fuentes*, 105 F.3d 487, 490 (9th Cir. 1997) (propriety of a *Terry* stop is reviewed de novo). Underlying factual findings are reviewed for clear error. *See Ornelas*, 517 U.S. at 699; *Bontemps*, 977 F.3d at 913; *Raygoza-Garcia*, 902 F.3d at 999 *Evans*, 786 F.3d at 788; *United States v. Drake*, 543 F.3d 1080, 1087 (9th Cir. 2008); *Berber-Tinoco*, 510 F.3d at 1087; *United States v. Choudhry*, 461 F.3d 1097, 1100 (9th Cir. 2006); *Colin*, 314 F.3d at 442; *United States v. Lopez-Soto*, 205 F.3d 1101, 1103 (9th Cir. 2000).

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violated while clear error review applies to findings of historical facts underlying conclusion).

r. Rule 41(g) Motions

Note that "Rule 41(e) was changed to Rule 41(g) in 2002 and amended for stylistic purposes only." *United States v. Kaczynski*, 416 F.3d 971, 973 n.3 (9th Cir. 2005).

A district court's interpretation of Fed. R. Crim. P. 41(g) is reviewed de novo. *See Kaczynski*, 416 F.3d at 974; *J.B. Manning Corp. v. United States*, 86 F.3d 926, 927 (9th Cir. 1996). The denial of a motion for return of property pursuant to Rule 41(g) is reviewed de novo. *See United States v. Gladding*, 775 F.3d 1149, 1151 (9th Cir. 2014); *United States v. Harrell*, 530 F.3d 1051, 1057 (9th Cir. 2008); *Kaczynski*, 416 F.3d at 974; *United States v. Ritchie*, 342 F.3d 903, 906 (9th Cir. 2003); *In re Grand Jury Investigation Concerning Solid State Devices, Inc.*, 130 F.3d 853, 855 (9th Cir. 1997); *but see United States v. Comprehensive Drug Testing, Inc*., 621 F.3d 1162, 1172 (9th Cir. 2010) (en banc) (per curiam) (explaining that when Rule 41(g) motion "is made by a party against whom no criminal charges have been brought, such a motion is in fact a petition that the district court invoke its civil equitable jurisdiction" which is reviewed for abuse of discretion); *Ramsden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993) (district court's decision to exercise its equitable jurisdiction under Rule 41(e) is reviewed for an abuse of discretion). The district court's underlying factual findings are reviewed for clear error. *See Gladding*, 775 F.3d at 1152. The trial court's decision not to hold an evidentiary hearing on a Rule 41(g) motion is reviewed for an abuse of discretion. *See Ctr. Art Galleries-Haw., Inc. v. United States*, 875 F.2d 747, 753 (9th Cir. 1989), *superseded by statute as stated in J.B. Manning Corp. v. United States*, 86 F.3d 926 (9th Cir. 1996).

s. Suppression Motions

Motions to suppress are reviewed de novo. *See United States v. Yang*, 958 F.3d 851, 857 (9th Cir. 2020); *United States v. Iwai*, 930 F.3d 1141, 1144 (9th Cir. 2019); *United States v. Zapien*, 861 F.3d 971, 974 (9th Cir. 2017); *United States v. Rodgers*, 656 F.3d 1023, 1026 (9th Cir. 2011); *United States v. Smith*, 633 F.3d 889, 892 (9th Cir. 2011); *United States v. Giberson*, 527 F.3d 882, 886 (9th Cir. 2008); *United States v. Forrester*, 512 F.3d 500, 506 (9th Cir. 2008) ("Conclusions of law underlying the denial of a motion to suppress evidence are also reviewed de novo"); *United States v. Crawford*, 372 F.3d 1048, 1053 (9th Cir. 2004) (en banc).

The trial court's factual findings are reviewed for clear error. *See Yang*, 958 F.3d at 857; *Zapien*, 861 F.3d at 974; *Rodgers*, 656 F.3d at 1026; *United States v. McCarty*, 648 F.3d 820, 824 (9th Cir. 2011); *Giberson*, 527 F.3d at 886; *United*

States v. Gooch, 506 F.3d 1156, 1158 (9th Cir. 2007); *United States v. Aukai*, 497 F.3d 955, 958 (9th Cir. 2007).

Whether to hold an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. *See United States v. Herrera–Rivera*, 832 F.3d 1166, 1172 (9th Cir. 2016); *United States v. Quoc Viet Hoang*, 486 F.3d 1156, 1163 (9th Cir. 2007); *United States v. Hernandez*, 424 F.3d 1056, 1058 (9th Cir. 2005); *see also United States v. Schafer*, 625 F.3d 629, 635–36 (9th Cir. 2010). Whether to grant or deny a motion to continue a suppression hearing is reviewed for an abuse of discretion. *See United States v. Mejia*, 69 F.3d 309, 314 (9th Cir. 1995) (setting forth five factors for considering whether district court abused its discretion).

Whether to reconsider a suppression order at trial is reviewed for abuse of discretion. *See United States v. Buffington*, 815 F.2d 1292, 1298 (9th Cir. 1987). Failure to apply the doctrine of law of the case to the motion for reconsideration absent one of the requisite conditions of that doctrine constitutes an abuse of discretion. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997); *see also United States v. Renteria*, 557 F.3d 1003, 1006 (9th Cir. 2009). The district court's denial of a motion to reconsider and to reopen a suppression hearing is reviewed for an abuse of discretion. *See United States v. Hobbs*, 31 F.3d 918, 923 (9th Cir. 1994) (court abused its discretion).

t. *Terry* Stops

The propriety of a *Terry* stop is reviewed de novo. *See United States v. Job*, 871 F.3d 852, 861 (9th Cir. 2017); *United States v. Burkett*, 612 F.3d 1103, 1106–07 (9th Cir. 2010); *United States v. Grigg*, 498 F.3d 1070, 1074 (9th Cir. 2007); *United States v. Thompson*, 282 F.3d 673, 678 (9th Cir. 2002); *United States v. King*, 244 F.3d 736, 738 (9th Cir. 2001). The determination whether an investigatory stop is a warrantless arrest or a *Terry* stop, is a mixed question of law and fact, reviewed de novo. *See United States v. Charley*, 396 F.3d 1074, 1079 (9th Cir. 2005); *United States v. Harrington*, 923 F.2d 1371, 1373 (9th Cir. 1991). *United States v. Hall*, 974 F.2d 1201, 1204 (9th Cir. 1992); *United States v. Carrillo*, 902 F.2d 1405, 1410–11 (9th Cir. 1990).

u. Warrantless Searches and Seizures

The validity of a warrantless search is reviewed de novo. *See United States v. Cano*, 934 F.3d 1002, 1010 (9th Cir. 2019) (border search); *United States v. Faagai*, 869 F.3d 1145, 1149 (9th Cir. 2017) (warrantless search of vehicle); *United States v. Franklin*, 603 F.3d 652, 655 (9th Cir. 2010); *United States v.*

Johnson, 256 F.3d 895, 905 (9th Cir. 2001) (en banc); *United States v. Hinton*, 222 F.3d 664, 673 (9th Cir. 2000). Underlying factual findings are reviewed for clear error. *See Franklin*, 603 F.3d at 655.

The validity of a warrantless entry into a residence is reviewed de novo. *See United States v. Iwai*, 930 F.3d 1141, 1144 (9th Cir. 2019); *United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992). Whether an area is within the protected curtilage of a home is also reviewed de novo. *See United States v. Barajas-Avalos*, 377 F.3d 1040, 1054 (9th Cir. 2004); *United States v. Cannon*, 264 F.3d 875, 879 (9th Cir. 2001); *United States v. Johnson*, 256 F.3d 895, 909 n.1 (9th Cir. 2001) (en banc) (overruling prior cases that applied clear error standard); *but see United States v. Romero-Bustamente*, 337 F.3d 1104, 1107–08 n.2 (9th Cir. 2003) (questioning *Johnson*).

The validity of a warrantless seizure is reviewed de novo. *See United States v. Hernandez*, 313 F.3d 1206, 1208 (9th Cir. 2002) (package); *United States v. Gill*, 280 F.3d 923, 928 (9th Cir. 2002) (mail); *United States v. Sarkissian*, 841 F.2d 959, 962 (9th Cir. 1988) (exigent circumstances); *United States v. Vasey*, 834 F.2d 782, 785 (9th Cir. 1987) (incident to arrest); *United States v. Howard*, 828 F.2d 552, 554 (9th Cir. 1987) (exigent circumstances and consent).

In *United States v. Rosi*, 27 F.3d 409, 411 (9th Cir. 1994), this court applied the clearly erroneous standard to "the validity of the warrantless entry and warrantless search." *Id.* The court reasoned that unlike other cases applying a de novo standard to "the formulation of a general rule … applicable to a wide class of cases," this case involved "an unusual set of factual circumstances that required the district court to weigh and evaluate various live testimony given at the suppression hearing." *Id.* at 411 n.1. *See also United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1125 (9th Cir.), *amended by* 416 F.3d 939 (9th Cir. 2005); *United States v. Patayan Soriano*, 361 F.3d 494, 501 (9th Cir. 2004).

Whether exigent circumstances justify a warrantless search or seizure is a mixed question of law and fact reviewed de novo. *See United States v. Iwai*, 930 F.3d 1141, 1144 (9th Cir. 2019); *United States v. Mancinas-Flores*, 588 F.3d 677, 687 (9th Cir. 2009); *United States v. Russell*, 436 F.3d 1086, 1089 n.2 (9th Cir. 2006); *United States v. Gooch*, 6 F.3d 673, 679 (9th Cir. 1993). The district court's findings of fact are reviewed for clear error. *See Iwai*, 930 F.3d at 1144.

Whether probable cause supports a warrantless search of an automobile is a question of law reviewed de novo. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Ibarra*, 345 F.3d 711, 715 (9th Cir. 2003).

Whether probable cause supports a warrantless arrest is also reviewed de novo, while underlying facts reviewed for clear error. *See United States v. Sandoval-Venegas*, 292 F.3d 1101, 1104 (9th Cir. 2002).

53. Selective Prosecution

This court noted that it "has employed both a de novo standard and a clearly erroneous standard when reviewing a selective prosecution claim." *See United States v. Culliton*, 328 F.3d 1074, 1080–81 (9th Cir. 2003) (electing not to resolve conflict); *see also United States v. Sutcliffe*, 505 F.3d 944, 954 (9th Cir. 2007); *United States v. Moody*, 778 F.2d 1380, 1385 (9th Cir. 1985) (noting but not resolving conflict between clear error and abuse of discretion standards). Before, however, this court reviewed for clear error. *See United States v. Estrada-Plata*, 57 F.3d 757, 760 (9th Cir. 1995); *United States v. Davis*, 36 F.3d 1424, 1432 (9th Cir. 1994); *United States v. Leidendeker*, 779 F.2d 1417, 1418 (9th Cir. 1986); *United States v. Wilson*, 639 F.2d 500, 503 n.2 (9th Cir. 1981) (explaining that clear error standard was chosen because "selective prosecution, more than vindictive prosecution, lends itself to the factfinding standard").

The district court decision to dismiss an indictment based on a claim of selective prosecution is reviewed for clear error. *See United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996). The court's ruling on a motion for discovery relating to a claim of discriminatory prosecution is reviewed for an abuse of discretion. *See United States v. Turner*, 104 F.3d 1180, 1185 (9th Cir. 1997); *United States v. Candia-Veleta*, 104 F.3d 243, 246 (9th Cir. 1996).

The court's ruling on the scope of discovery for a selective prosecution claim is also reviewed for an abuse of discretion. *See Candia-Veleta*, 104 F.3d at 246. Discovery should be permitted when the defendant can offer "some evidence tending to show the existence of the discriminatory effect element." *United States v. Armstrong*, 517 U.S. 456, 469 (1996) (reversing Ninth Circuit's en banc decision at 48 F.3d 1508, 1512 (9th Cir. 1995)). *See also United States v. Sellers*, 906 F.3d 848, 851–52 (9th Cir. 2018) (discussing *Armstrong* and selective prosecution).

54. Severance

A district court's decision on a motion for severance is reviewed for an abuse of discretion. *See United States v. Barragan*, 871 F.3d 689, 701 (9th Cir. 2017); *United States v. Stinson*, 647 F.3d 1196, 1205 (9th Cir. 2011); *United States v. Sullivan*, 522 F.3d 967, 981 (9th Cir. 2008); *United States v. Decoud*, 456 F.3d 996, 1008 (9th Cir. 2006) (defendants); *United States v. Vargas-Castillo*, 329 F.3d

715, 722 (9th Cir. 2003) (counts); *United States v. Sarkisian*, 197 F.3d 966, 978 (9th Cir. 1999); *United States v. Gillam*, 167 F.3d 1273, 1276 (9th Cir. 1999).

The test for abuse of discretion is whether a joint trial was so manifestly prejudicial as to require the trial court to exercise its discretion in but one way, by ordering a separate trial. *See Barragan*, 871 F.3d at 701; *United States v. Jenkins*, 633 F.3d 788, 807 (9th Cir. 2011); *Sullivan*, 522 F.3d at 981; *Decoud*, 456 F.3d at 1008; *United States v. Johnson*, 297 F.3d 845, 855 (9th Cir. 2002); *United States v. Nelson*, 137 F.3d 1094, 1108 (9th Cir. 1998); *Gillam*, 167 F.3d at 1276. Defendants must meet a heavy burden to show such an abuse, and the trial judge's decision will seldom be disturbed. *See United States v. Ponce*, 51 F.3d 820, 831 (9th Cir. 1995). The defendant must prove that prejudice from the joint trial was so "clear, manifest or undue" that he or she was denied a fair trial. *See United States v. Throckmorton*, 87 F.3d 1069, 1071–72 (9th Cir. 1996); *see also Alvarez*, 358 F.3d at 1206 (defendant has burden of proving "clear, manifest, or undue prejudice" from joint trial).

55. Sixth Amendment Rights

Whether a defendant was denied his Sixth Amendment right to counsel is a question of law reviewed de novo. *See United States v. Martinez*, 850 F.3d 1097, 1100 (9th Cir. 2017); *United States v. Danielson*, 325 F.3d 1054, 1066 (9th Cir. 2003) (direct appeal); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001) (§ 2255).[18] Whether a defendant has knowingly, voluntarily, and intelligently waived his Sixth Amendment right to counsel is a mixed question of law and fact reviewed de novo. *See United States v. Schaefer*, 13 F.4th 875, 886 (9th Cir. 2021); *United States v. Kowalczyk*, 805 F.3d 847, 856 (9th Cir. 2015); *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001); *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2001).

The district court's factual findings concerning the words a defendant used to invoke the right to counsel are reviewed for clear error. *See United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005); *United States v. Ogbuehi*, 18 F.3d 807, 812 (9th Cir. 1994). Whether those words actually invoked the right to

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[18] *See, e.g.*, *United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995) (coram nobis); *United States v. Benlian*, 63 F.3d 824, 826 (9th Cir. 1995) (ineffective assistance of counsel claim).

counsel is reviewed de novo. *See Younger*, 398 F.3d at 1185; *Ogbuehi*, 18 F.3d at 812.

Whether the district court violated defendant's Sixth Amendment right to counsel by failing to notify and consult with defense counsel before responding to a jury note is reviewed de novo. *See United States v. Martinez*, 850 F.3d 1097, 1100–02 (9th Cir. 2017) (concluding the "district court violated Federal Rule of Criminal Procedure 43(a) and Martinez's Sixth Amendment right to counsel by failing to notify and consult with his counsel before responding to the jury's question").

Denial of a motion for substitution of counsel is reviewed for an abuse of discretion. *See United States v. Velazquez*, 855 F.3d 1021, 1033 (9th Cir. 2017); *United States v. Lindsey*, 634 F.3d 541, 554 (9th Cir. 2011); *United States v. Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005); *United States v. McKenna*, 327 F.3d 830, 843 (9th Cir. 2003). A district court's decision at a revocation hearing to deny defendant's request for substitute counsel is reviewed for an abuse of discretion. *See United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000).

Whether a defendant has a Sixth Amendment right to counsel in a civil forfeiture proceeding is reviewed de novo. *See United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564, 566 (9th Cir. 1995).

Whether a defendant was deprived of his constitutional right to testify is reviewed de novo. *See United States v. Kowalczyk*, 805 F.3d 847, 859 (9th Cir. 2015); *United States v. Orozco*, 764 F.3d 997, 1001 (9th Cir. 2014) (reviewing de novo defendant's claim that he was deprived of his constitutional right to testify, however, reviewing for an abuse of discretion the district court's decision not to reopen evidence to permit a defendant to testify). Whether a trial court's suppression of a defendant's testimony violates the Sixth Amendment right to testify is reviewed de novo. *See United States v. Moreno*, 102 F.3d 994, 998 (9th Cir. 1996).

Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. *See United States v. Singh*, 995 F.3d 1069, 1080 (9th Cir. 2021) (limitations on cross-examination); *United States v. Benamor*, 937 F.3d 1182, 1190 (9th Cir. 2019); *United States v. Matus-Zayas*, 655 F.3d 1092, 1098 (9th Cir.

2011); *United States v. Norwood*, 603 F.3d 1063, 1067 (9th Cir. 2010); *United States v. Ballesteros-Selinger*, 454 F.3d 973, 974 n.2 (9th Cir. 2006).[19]

Prior to *United States v. Larson*, 495 F.3d 1094, 1100 (9th Cir. 2007), there was "an intra-circuit conflict regarding the standard of review for Confrontation Clause challenges to a trial court's limitations on cross-examination." One line of cases applied de novo review, a second line applied abuse of discretion, and a third line of cases combined the two approaches. *See id*. at 1100–01.[20] *Larson* resolved the conflict, holding that "[i]f the defendant raises a Confrontation Clause challenge based on the exclusion of an area of inquiry, [the court] reviews de novo. … A challenge to a trial court's restrictions on the manner or scope of cross-examination on nonconstitutional grounds is [] reviewed for abuse of discretion." *Id*. at 1101. *See also Singh*, 995 F.3d at 1080 (citing *Larson*).

Confrontation Clause violations are subject, however, to harmless error analysis. *See United States v. Nguyen*, 565 F.3d 668, 673 (9th Cir. 2009); *Shryock*, 342 F.3d at 979; *United States v. Comito*, 177 F.3d 1166, 1170 (9th Cir. 1999).[21]

The court reviews de novo whether there has been a violation of the Sixth Amendment right to make a defense. *See United States v. Brown*, 859 F.3d 730, 733 (9th Cir. 2017); *United States v. Stever*, 603 F.3d 747, 752 (9th Cir. 2010). *See also United States v. Read*, 918 F.3d 712, 719 (9th Cir. 2019) (reviewing de

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[19] *See also Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 951 (9th Cir. 1998) (tribal court); *Paradis v. Arave*, 20 F.3d 950, 956 (9th Cir. 1994) (habeas).

[20] *Compare United States v. Adamson*, 291 F.3d 606, 612 (9th Cir. 2002) (applying de novo review); *United States v. James*, 139 F.3d 709, 713 (9th Cir. 1998) (same); *with United States v. Lo*, 231 F.3d 471, 482 (9th Cir. 2000) (applying abuse of discretion standard); *with United States v. Shryock*, 342 F.3d 948, 979 (9th Cir. 2003); *United States v. Bensimon*, 172 F.3d 1121, 1128 (9th Cir. 1999) (noting that de novo review applies to determination of whether limitations on cross-examination violated right to confrontation but that "[t]he district court, however, has considerable discretion in restricting cross-examination, and this court will find error only when that discretion has been abused.").

[21] *See also Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir. 2002) (habeas); *Whelchel v. Washington*, 232 F.3d 1197, 1205 (9th Cir. 2000) (habeas).

novo and holding the district court violated defendant's Sixth Amendment right to present a defense of his own choosing).

Whether a defendant has been denied the right to a public trial is reviewed de novo. *See United States v. Yazzie*, 743 F.3d 1278, 1288 (9th Cir. 2014); *United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003).

56. Speedy Trial

A district court's decision to dismiss on Speedy Trial Act grounds is reviewed de novo. *See United States v. Olsen*, 21 F.4th 1036, 1040 (9th Cir. 2022) (per curiam); *United States v. Henry*, 984 F.3d 1343, 1349–50 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 376 (2021); *United States v. Myers*, 930 F.3d 1113, 1118 (9th Cir. 2019); *United States v. Alexander*, 817 F.3d 1178, 1181 (9th Cir. 2016) (per curiam); *United States v. King*, 483 F.3d 969, 972 n.3 (9th Cir. 2007) *United States v. Gregory*, 322 F.3d 1157, 1160–61 (9th Cir. 2003); *United States v. Lam*, 251 F.3d 852, 855 (9th Cir.), *amended by* 262 F.3d 1033 (9th Cir. 2001).

The factual determinations underlying the district court's decision are reviewed for clear error. *See Olsen*, 21 F.4th at 1040; *Henry*, 984 F.3d at 1349–50; *Myers*, 930 F.3d at 1118; *Alexander*, 817 F.3d at 1181. A finding of prejudice is reviewed under the clearly erroneous standard. *See Gregory*, 322 F.3d at 1161; *United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998).

The district court's application of the Speedy Trial Act is reviewed de novo. *See United States v. Torres*, 995 F.3d 695, 701 (9th Cir. 2021); *United States v. Medina*, 524 F.3d 974, 982 (9th Cir. 2008); *United States v. King*, 483 F.3d 969, 972 n.3 (9th Cir. 2007); *United States v. Vo*, 413 F.3d 1010, 1014 n.1 (9th Cir. 2005); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1084 (9th Cir. 2004); *United States v. Pitner*, 307 F.3d 1178, 1182 (9th Cir. 2002); *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000); *United States v. Hall*, 181 F.3d 1057, 1061 (9th Cir. 1999) (noting that questions of law under the Speedy Trial Act reviewed de novo). The court's interpretation of the Speedy Trial Act is also reviewed de novo. *See Torres*, 995 F.3d at 701; *Medina*, 524 F.3d at 982; *United States v. Boyd*, 214 F.3d 1052, 1054 (9th Cir. 2000); *United States v. Ortiz-Lopez*, 24 F.3d 53, 54 (9th Cir. 1994).

"A district court's ends of justice determination will be reversed only if it is clearly erroneous." *Olsen*, 21 F.4th at 1040. *See also Torres*, 995 F.3d at 701 ("[W]e review factual findings supporting an "ends of justice" exclusion of time for clear error … ."); *Ramirez-Cortez*, 213 F.3d at 1153; *United States v. Paschall*,

988 F.2d 972, 974 (9th Cir. 1993); *United States v. Murray*, 771 F.2d 1324, 1327 (9th Cir. 1985). A judge may revoke a time extension made in the same case by another judge. The revocation will be upheld only if the second judge specifically determines that the fact findings of the judge granting the continuance were clearly in error. *See Murray*, 771 F.2d at 1327.

To dismiss *without* prejudice for a Speedy Trial Act violation, the district court shall make factual findings and apply them to the relevant statutory factors; otherwise, dismissal shall be entered *with* prejudice. *See United States v. Delgado-Miranda*, 951 F.2d 1063, 1064–65 (9th Cir. 1991) (per curiam); *but see United States v. Clymer*, 25 F.3d 824, 831 (9th Cir. 1994) (reviewing court has discretion on appeal to decide whether to dismiss indictment with or without prejudice if all relevant facts have been presented).

Whether a juvenile's speedy trial rights were violated is reviewed de novo. *See United States v. C.M.*, 485 F.3d 492, 498 (9th Cir. 2007); *United States v. Juvenile (RRA-A)*, 229 F.3d 737, 742 (9th Cir. 2000) (applying Juvenile Delinquency Act); *United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998); *United States v. Eric B.*, 86 F.3d 869, 872 (9th Cir. 1996).

Whether a defendant was brought to trial within the speedy trial period of the Interstate Agreement on Detainers Act is a question of law reviewed de novo. *See United States v. Collins*, 90 F.3d 1420, 1425 (9th Cir. 1996).

Note that a trial court's decision on a defendant's motion to dismiss charges for *preindictment delay* is reviewed for an abuse of discretion. *See United States v. DeGeorge*, 380 F.3d 1203, 1210 (9th Cir. 2004); *United States v. Gregory*, 322 F.3d 1157, 1161 (9th Cir. 2003); *United States v. Doe*, 149 F.3d 945, 947 (9th Cir. 1998). The denial of a motion to dismiss based on *preaccusation delay* is reviewed for an abuse of discretion. *See Doe*, 149 F.3d at 947.

57. Statutes

The construction or interpretation of a statute is reviewed de novo. *See United States v. Pacheco*, 977 F.3d 764, 767 (9th Cir. 2020); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 495 (9th Cir. 2007); *United States v. Norbury*, 492 F.3d 1012, 1014 (9th Cir. 2007); *United States v. Cabaccang*, 332 F.3d 622, 624–25 (9th Cir. 2003) (en banc).

The applicability of a statute to a particular case is a question of law reviewed de novo. *See United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000) (per curiam) (AEDPA).

The constitutionality of a statute is a question of law reviewed de novo. *See United States v. Garcia*, 768 F.3d 822, 827 (9th Cir. 2014); *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007); *United States v. Lujan*, 504 F.3d 1003, 1006 (9th Cir. 2007); *United States v. Strong*, 489 F.3d 1055, 1060 (9th Cir. 2007); *United States v. Jensen*, 425 F.3d 698, 706–07 (9th Cir. 2005); *see also United States v. $129,727.00 U.S. Currency*, 129 F.3d 486, 491 (9th Cir. 1997) (civil forfeiture). The court reviews de novo whether a criminal statute is an unconstitutional overreach of congressional authority. *See United States v. Mujahid*, 799 F.3d 1228, 1232 (9th Cir. 2015).

Whether a statute is void for vagueness is a question of law reviewed de novo. *See United States v. Agront*, 773 F.3d 192, 195 (9th Cir. 2014) (regulation); *United States v. Chhun*, 744 F.3d 1110, 1116 (9th Cir. 2014); *United States v. Shetler*, 665 F.3d 1150, 1164 (9th Cir. 2011); *United States v. Hungerford*, 465 F.3d 1113, 1116 (9th Cir. 2006); *United States v. Rodriguez*, 360 F.3d 949, 953 (9th Cir. 2004); *United States v. Naghani*, 361 F.3d 1255, 1259 (9th Cir. 2004); *United States v. Cooper*, 173 F.3d 1192, 1202 (9th Cir. 1999).

Whether a statute violates a defendant's right to due process is reviewed de novo. *See United States v. Hill*, 279 F.3d 731, 736 (9th Cir. 2002); *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999). A district court's decision whether to dismiss an indictment based on its interpretation of a federal statute is reviewed de novo. *See United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017); *United States v. Wanland*, 830 F.3d 947, 952 (9th Cir. 2016).

Examples are below.

Sentencing (statutes & guidelines). *See, e.g.*, *United States v. Madrid-Becerra*, 14 F.4th 1096, 1099 (9th Cir. 2021) (interpretation of the Sentencing Guidelines, including the calculation of the criminal history score); *United States v. Furaha*, 992 F.3d 871, 874 (9th Cir. 2021); *United States v. Valle*, 940 F.3d 473, 478 (9th Cir. 2019); *United States v. Lizarraga-Carrizales*, 757 F.3d 995, 997 (9th Cir. 2014); *Gamboa-Cardenas*, 508 F.3d at 495; *United States v. Leon H.*, 365 F.3d 750, 752 (9th Cir. 2004); *United States v. Auld*, 321 F.3d 861, 863 (9th Cir. 2003); *United States v. Kakatin*, 214 F.3d 1049, 1051 (9th Cir. 2000); *United States v. Hunter*, 101 F.3d 82, 84 (9th Cir. 1996).

State law. *See, e.g.*, *United States v. Pisarski*, 965 F.3d 738, 742 (9th Cir. 2020) (California); *United States v. Davidson*, 246 F.3d 1240, 1246 (9th Cir. 2001) (California); *United States v. Ramos*, 39 F.3d 219, 220 (9th Cir. 1994) (Arizona).

Specific statutes & phrases. *See, e.g.*, *United States v. Swenson*, 971 F.3d 977, 980 (9th Cir. 2020) (Mandatory Victims Restitution Act); *United States v. Prasad*, 18 F.4th 313, 317–18 (9th Cir. 2021) (federal forfeiture statutes); *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011) (SDWA); *United States v. One Sentinel Arms Striker-12 Shotgun Serial No. 001725*, 416 F.3d 977, 979 (9th Cir. 2005) ("destructive device"); *United States v. 144,774 pounds of Blue King Crab*, 410 F.3d 1131, 1133 (9th Cir. 2005) (contraband); *United States v. Kranovich*, 401 F.3d 1107, 1111 (9th Cir. 2005) (theft involving federal funds/programs); *Cabaccang*, 332 F.3d at 624–25 (importation); *United States v. Migi*, 329 F.3d 1085, 1087 (9th Cir. 2003) (playground); *United States v. Lincoln*, 277 F.3d 1112, 1113 (9th Cir. 2002) (MVRA); *United States v. Kaluna*, 192 F.3d 1188, 1193 (9th Cir. 1999) (en banc) (three-strikes law); *United States v. Frega*, 179 F.3d 793, 802 n.6 (9th Cir. 1999) (mail fraud); *United States v. Doe*, 136 F.3d 631, 634 (9th Cir. 1998) (arson); *United States v. DeLaCorte*, 113 F.3d 154, 155 (9th Cir. 1997) (carjacking); *United States v. Salemo*, 81 F.3d 1453, 1457 (9th Cir. 1996) (Criminal Justice Act); *United States v. Van Poyck*, 77 F.3d 285, 291 (9th Cir. 1996) (Omnibus Crime Control and Safe Streets Act); *United States v. Bailey*, 41 F.3d 413, 416 (9th Cir. 1994) ("access device").

58. Statutes of Limitation

The district court's conclusion that a particular statute of limitation applies is reviewed de novo. *See United States v. Nishiie*, 996 F.3d 1013, 1018 (9th Cir. 2021); *United States v. Wanland*, 830 F.3d 947, 952 (9th Cir. 2016); *United States v. Leo Sure Chief*, 438 F.3d 920, 922 (9th Cir. 2006). When a statute of limitation began to run is also a question of law reviewed de novo. *See United States v. Hickey*, 580 F.3d 922, 929 (9th Cir. 2009); *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 780 (9th Cir. 2002) (as amended). *See also Oja v. U.S. Army Corps of Engineers*, 440 F.3d 1122, 1127 (9th Cir. 2006) ("We review de novo the question of when a cause of action accrues and whether a claim is barred by the statute of limitations.").

59. Suppression

Motions to suppress are reviewed de novo and the trial court's factual findings are reviewed for clear error. *See United States v. Malik*, 963 F.3d 1014, 1015 (9th Cir. 2020) (per curiam) (reviewing grant to motion to suppress), *cert. denied*, 141 S. Ct. 1434 (2021), *and cert. denied*, 141 S. Ct. 1721 (2021); *United States v. Dixon*, 984 F.3d 814, 818 (9th Cir. 2020); *United States v. Zapien*, 861 F.3d 971, 974 (9th Cir. 2017) (per curiam); *United States v. Gorman*, 859 F.3d

706, 714 (9th Cir.), *order corrected*, 870 F.3d 963 (9th Cir. 2017); *United States v. Aukai*, 497 F.3d 955, 958 (9th Cir. 2007).

Whether to hold an evidentiary hearing on a motion to suppress is reviewed for abuse of discretion. *See United States v. Quoc Viet Hoang*, 486 F.3d 1156, 1162 (9th Cir. 2007); *United States v. Hernandez*, 424 F.3d 1056, 1058 (9th Cir. 2005).[22] Whether to grant or deny a motion to continue a suppression hearing is reviewed for an abuse of discretion. *See United States v. Mejia*, 69 F.3d 309, 314 (9th Cir. 1995) (listing factors).

Whether to reconsider a suppression order at trial is reviewed for abuse of discretion. *See United States v. Buffington*, 815 F.2d 1292, 1298 (9th Cir. 1987). The district court's denial of a motion to reconsider and to reopen a suppression hearing is reviewed for an abuse of discretion. *See United States v. Hobbs*, 31 F.3d 918, 923 (9th Cir. 1994) (court abused its discretion).

The district court's decision whether to use its supervisory power to decide whether to suppress evidence as a sanction for the government's late supplemental FISA notice is reviewed for an abuse of discretion. *See United States v. Mohamud*, 843 F.3d 420, 432 (9th Cir. 2016).

60. Transfer of Trial

The district court's denial of a motion to transfer trial pursuant to Fed. R. Crim. P. 18 is reviewed for an abuse of discretion. *See United States v. Scholl*, 166 F.3d 964, 969 (9th Cir. 1999) (as amended).

61. Venue

In criminal cases, venue is a question of law reviewed de novo. *See United States v. Lozoya*, 982 F.3d 648, 650 (9th Cir. 2020); *United States v. Obaid*, 971 F.3d 1095, 1098 (9th Cir. 2020); *United States v. Stinson*, 647 F.3d 1196, 1204 (9th Cir. 2011); *United States v. Valdez-Santos*, 457 F.3d 1044, 1046 (9th Cir. 2006) (reversing district court); *see also United States v. Sullivan*, 797 F.3d 623, 631 (9th Cir. 2015). The trial court's denial of a motion for change of venue,

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[22] *See also United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000) ("An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist.").

however, is reviewed for an abuse of discretion. *See Stinson*, 647 F.3d at 1204; *Valdez-Santos*, 457 F.3d at 1046; *United States v. Croft*, 124 F.3d 1109, 1115 n.2 (9th Cir. 1997); *United States v. Collins*, 109 F.3d 1413, 1416 (9th Cir. 1997).

62. Vindictive Prosecution

"To the extent the 'vindictive prosecution inquiry turns upon a district court's proper application of the law, our review is de novo.' *United States* v. *Kent*, 649 F.3d 906, 912 (9th Cir. 2011). To the extent a determination of vindictive prosecution turns upon factual findings, we review for clear error. *Id.*" *United States v. Brown*, 875 F.3d 1235, 1240 (9th Cir. 2017); *see also United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir. 2007) (the district court's decision whether to dismiss an indictment for vindictive prosecution is a mixed question of law and fact reviewed de novo).

63. Voluntariness of a Confession

See II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 6. Confessions.

64. Waiver of Rights

Issues of waiver generally are reviewed de novo. *See United States v. Laney*, 881 F.3d 1100, 1106 (9th Cir. 2018) (adequacy of jury trial waiver); *United States v. Lo*, 839 F.3d 777, 783 (9th Cir. 2016) (appeal waiver). "Whether [a] waiver was knowing and intelligent is a question of fact that [the court] review[s] for clear error." *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1127 (9th Cir.), *amended by* 416 F.3d 939 (9th Cir. 2005); (*Miranda* waiver); *see also United States v. Shi*, 525 F.3d 709, 728 (9th Cir. 2008) (*Miranda* waiver); *but see United States v. Anglin*, 215 F.3d 1064, 1066 (9th Cir. 2000) ("Whether a particular waiver was made 'knowing and voluntarily' is a determination we make de novo."), *superseded by rule on other grounds as stated in Lo*, 839 F.3d at 784 n.1. "Whether the waiver was voluntary is a mixed question of fact and law, which [the court] review[s] de novo." *United States v. Amano*, 229 F.3d 801, 803 (9th Cir. 2000) (*Miranda* waiver); *see also United States v. Audette*, 923 F.3d 1227, 1234 (9th Cir. 2019) (validity of *Faretta* waiver); *United States v. Pollard*, 850 F.3d 1038, 1041 (9th Cir. 2017) (appeal waiver).[23]

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[23] *See, e.g.*, *United States v. Younger*, 398 F.3d 1179, 1185 (9th Cir. 2005) (*Miranda* waiver); *United States v. Amlani*, 169 F.3d 1189, 1194 (9th Cir. 1999)

65. Warrants

The issuance of a search warrant by a magistrate judge is reviewed for clear error. *See United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011); *United States v. Hill*, 459 F.3d 966, 970 (9th Cir. 2006).[24] The magistrate judge's determination of probable cause is accorded deference by the reviewing court. *See United States v. Garay*, 938 F.3d 1108, 1114 (9th Cir. 2019); *United States v. Job*, 871 F.3d 852, 863 (9th Cir. 2017); *Hill*, 459 F.3d at 970 ("great deference"); *United States v. Meek*, 366 F.3d 705, 712 (9th Cir. 2004) ("great deference"); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) ("significant deference).

Whether a warrant is sufficiently specific is reviewed de novo. *See United States v. Adjani*, 452 F.3d 1140, 1143 (9th Cir. 2006).[25] The scope of a warrant is a question of law reviewed de novo. *See United States v. Hurd*, 499 F.3d 963, 965 (9th Cir. 2007).[26] Whether an area is within the protected curtilage of a home is

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(waiver of attorney-client privilege); *United States v. Aguilar-Muniz*, 156 F.3d 974, 976 (9th Cir. 1998) (right to appeal); *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997) (waiver of jury trial); *United States v. Anderson*, 79 F.3d 1522, 1525 (9th Cir. 1996) (privilege against self-incrimination); *United States v. Reyes*, 8 F.3d 1379, 1383 (9th Cir. 1993) (waiver of jury trial by jury over government objection); *but see United States v. Lumitap*, 111 F.3d 81, 83 (9th Cir. 1997) (district court's denial of a defendant's motion to waive presence at trial reviewed for abuse of discretion).

[24] *See also United States v. Reeves*, 210 F.3d 1041, 1046 (9th Cir. 2000); *United States v. Wong*, 334 F.3d 831, 835–36 (9th Cir. 2003); *United States v. Celestine*, 324 F.3d 1095, 1000 (9th Cir. 2003); *United States v. Bowman*, 215 F.3d 951, 963 n.6 (9th Cir. 2000); *United States v. Hernandez*, 937 F.2d 1490, 1494 (9th Cir. 1991) (the standard of review is "less probing than de novo review and shows deference to the issuing magistrate's determination.").

[25] *See also United States v. Barajas-Avalos*, 377 F.3d 1040, 1058 (9th Cir. 2004) (legal sufficiency of a redacted affidavit); *United States v. Noushfar*, 78 F.3d 1442, 1447 (9th Cir. 1996), *amended by* 140 F.3d 1244 (9th Cir. 1998).

[26] *See also United States v. Hitchcock*, 286 F.3d 1064, 1071 (9th Cir. 2002), *amended and superseded by* 298 F.3d 1021 (9th Cir. 2002); *United States v.*

reviewed de novo. *See United States v. Davis*, 530 F.3d 1069, 1077 (9th Cir. 2008); *United States v. Barajas-Avalos*, 377 F.3d 1040, 1054 (9th Cir. 2004).[27]

Whether the good faith exception to the exclusionary rule applies in any given case is subject to de novo review. *United States v. Kurt*, 986 F.2d 309, 311 (9th Cir. 1993); *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1282 (9th Cir. 1992); *see also United States v. Fowlie*, 24 F.3d 1059, 1066 (9th Cir. 1994) (good faith reliance on a warrant not supported by probable cause).

66. Wiretaps

A district court's authorization of a wiretap is reviewed for an abuse of discretion. *See United States v. Barragan*, 871 F.3d 689, 700 (9th Cir. 2017); *United States v. Rodriguez*, 851 F.3d 931, 937 (9th Cir. 2017); *United States v. Canales Gomez*, 358 F.3d 1221, 1225 (9th Cir. 2004).[28] However, the court reviews de novo whether the requisite full and complete statement of facts was submitted in compliance with 18 U.S.C. § 2518(1)(c). *See Rodriguez*, 851 F.3d at 937; *Canales Gomez*, 358 F.3d at 1224; *United States v. Shryock*, 342 F.3d 948, 975 (9th Cir. 2003).[29] Whether other investigative procedures have been exhausted or why they reasonably appear not likely to succeed is also reviewed de novo. *See United States v. Lynch*, 437 F.3d 902, 912 (9th Cir. 2006) (but noting that ultimate conclusion that a wiretap is necessary is reviewed for an abuse of discretion).

Cannon, 264 F.3d 875, 878 (9th Cir. 2001); *United States v. Gorman*, 104 F.3d 272, 274 (9th Cir. 1996).

[27] *See also United States v. Johnson*, 256 F.3d 895, 909 n.1 (9th Cir. 2001) (en banc) (overruling prior cases that applied clear error standard); *but see United States v. Romero-Bustamente*, 337 F.3d 1104, 1107–08 n.2 (9th Cir. 2003) (questioning *Johnson*'s precedential value on the standard of review).

[28] *See also United States v. McGuire*, 307 F.3d 1192, 1197 (9th Cir. 2002); *United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001); *United States v. Echavarria-Olarte*, 904 F.2d 1391, 1395 (9th Cir. 1990); *United States v. Carneiro*, 861 F.2d 1171, 1177 (9th Cir. 1988).

[29] *See also McGuire*, 307 F.3d at 1197; *Blackmon*, 273 F.3d at 1207; *United States v. Khan*, 993 F.2d 1368, 1375 (9th Cir. 1993); *Carneiro*, 861 F.2d at 1176.

The court's decision to deny a motion to suppress wiretap evidence is reviewed de novo. *See Rodriguez*, 851 F.3d at 937; *Lynch*, 437 F.3d at 913 (reviewing denial of suppression motion); *United States v. Reyna*, 218 F.3d 1108, 1110 (9th Cir. 2000) (same). The ultimate question whether a false statement or omission is necessary to a finding of probable cause is a mixed question of law and fact reviewed de novo. *See United States v. Tham*, 960 F.2d 1391, 1395 (9th Cir. 1992). This court reviews de novo a district court's denial of a *Franks* hearing challenging the veracity of an affidavit supporting a wiretap application. *See Shryock*, 342 F.3d at 975; *United States v. Meling*, 47 F.3d 1546, 1553 (9th Cir. 1995). The district court's underlying factual determinations are reviewed for clear error. *See Shryock*, 342 F.3d at 975; *Tham*, 960 F.2d at 1395.

A trial court's decision to allow use of wiretap transcripts during trial and to permit such exhibits in the jury room is reviewed for an abuse of discretion. *See United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999); *United States v. Fuentes-Montijo*, 68 F.3d 352, 354 (9th Cir. 1995).

C. Trial Decisions in Criminal Cases

1. Acquittals

A trial court's ruling on a motion for acquittal is reviewed de novo. *See United States v. Sineneng-Smith*, 982 F.3d 766, 776 (9th Cir. 2020) (motion for acquittal based on insufficiency of the evidence), *cert. denied*, 142 S. Ct. 117 (2021); *United States v. Gagarin*, 950 F.3d 596, 602 (9th Cir. 2020) (Rule 29 motion for judgment of acquittal), *cert. denied*, 141 S. Ct. 2729 (2021); *United States v. Wanland*, 830 F.3d 947, 952 (9th Cir. 2016); *United States v. Suarez*, 682 F.3d 1214, 1218 (9th Cir. 2012); *United States v. Sutcliffe*, 505 F.3d 944, 959 (9th Cir. 2007).[30] This court reviews evidence presented against the defendant in a light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[31] *See Sineneng-Smith*, 982 F.3d at 776; *Gagarin*, 950 F.3d at 602; *United States v.*

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[30] *See also United States v. Dearing*, 504 F.3d 897, 900 (9th Cir. 2007); *United States v. Atalig*, 502 F.3d 1063, 1066 (9th Cir. 2007); *United States v. Johnson*, 357 F.3d 980, 983 (9th Cir. 2004); *United States v. Somsamouth*, 352 F.3d 1271, 1274 (9th Cir. 2003).

[31] *See United States v. Sutcliffe*, 505 F.3d 944, 959 (9th Cir. 2007); *Dearing*, 504 F.3d at 900; *Atalig*, 502 F.3d at 1066; *Somsamouth*, 352 F.3d at 1274–75.

Mincoff, 574 F.3d 1186, 1191–92 (9th Cir. 2009); *see also United States v. Yoshida*, 303 F.3d 1145, 1149 (9th Cir. 2002) (noting standard and explaining deference owed to jury); *United States v. Magallon-Jimenez*, 219 F.3d 1109, 1112 (9th Cir. 2000) (noting standard applies also to bench trials).

The denial of a motion for judgment of acquittal based on the untimeliness of the motion involves factual findings reviewed under the clearly erroneous standard. *See United States v. Mullins*, 992 F.2d 1472, 1478 (9th Cir. 1993); *United States v. Stauffer*, 922 F.2d 508, 516 (9th Cir. 1990).

When a defendant fails to move for acquittal during trial, review is limited to plain error. *See United States v. Ross*, 338 F.3d 1054, 1057 (9th Cir. 2003) (per curiam). Similarly, when a defendant fails to renew a motion for judgment of acquittal at the close of all evidence in a jury trial, this court reviews only for plain error to prevent a miscarriage of justice. *See United States v. Pelisamen*, 641 F.3d 399, 408–09 n.6 (9th Cir. 2011); *United States v. Lowry*, 512 F.3d 1194, 1198 n.3 (9th Cir. 2008); *United States v. Yossunthorn*, 167 F.3d 1267, 1270 n.4 (9th Cir. 1999) (explaining how defendant may preserve de novo review). No such motion is required, however, in a bench trial to preserve for appeal a challenge to the sufficiency of the evidence. *See United States v. Atkinson*, 990 F.2d 501, 503 (9th Cir. 1993) (en banc). When a claim of sufficiency of the evidence is preserved by a motion for acquittal at the close of the evidence, the appellate court reviews the district court's denial of the motion de novo. *See United States v. Dann*, 652 F.3d 1160, 1168 (9th Cir. 2006); *United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002).

2. Admission of Evidence

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *See United States v. Cox*, 963 F.3d 915, 924 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1281 (2021); *United States v. Alvirez*, 831 F.3d 1115, 1120 (9th Cir. 2016) (reviewing decision to admit evidence); *United States v. Torres*, 794 F.3d 1053, 1059 (9th Cir. 2015) (reviewing decision to exclude evidence); *United States v. Santini*, 656 F.3d 1075, 1077 (9th Cir. 2011) (per curiam); *United States v. Cherer*, 513 F.3d 1150, 1157 (9th Cir. 2007).[32] Such rulings will be

[32] *See United States v. Cohen*, 510 F.3d 1114, 1123 (9th Cir. 2007) (Rule 702 and 704(b)); *United States v. Salcido*, 506 F.3d 729, 732 (9th Cir. 2007) (per curiam) (Rule 901); *United States v. Moran*, 493 F.3d 1002, 1012 (9th Cir. 2007)

reversed for an abuse of discretion only if such nonconstitutional error more likely than not affected the verdict. *See United States v. Edwards*, 235 F.3d 1173, 1178 (9th Cir. 2000); *United States v. Ramirez*, 176 F.3d 1179, 1182 (9th Cir. 1999); *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc); *see also United States v. Berber-Tinoco*, 510 F.3d 1083, 1092 (9th Cir. 2007) ("We need not reverse a district court's decision so long as we have a fair assurance that the verdict was not substantially swayed by error.") (quotation marks omitted). The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is also reviewed for an abuse of discretion. *See United States v. Belden*, 957 F.2d 671, 674 (9th Cir. 1992).

The district court's construction or interpretation of the Federal Rules of Evidence is a question of law subject to de novo review. *See United States v. Lindsay*, 931 F.3d 852, 859 (9th Cir. 2019); *Torres*, 794 F.3d at 1059; *United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011); *United States v. W.R. Grace*, 504 F.3d 745, 758–59 (9th Cir. 2007).[33] Whether particular evidence falls within the scope of a rule of evidence is also reviewed de novo. *See United States v. Duenas*, 691 F.3d 1070, 1079 (9th Cir. 2012); *United States v. Garrido*, 596 F.3d 613, 616 (9th Cir. 2010); *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006).

Questions of the admissibility of evidence that involve factual determinations, rather than questions of law, are reviewed for an abuse of discretion. *See United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000).[34] When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate. If an "essentially factual" inquiry is present, or if the exercise of the district court's discretion is determinative, then deference is given to the decision of the district court; otherwise, review is de novo. *See United States v. Fryberg*, 854 F.3d 1126,

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(Rule 403); *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1062 (9th Cir. 2004) (Rule 404(b)).

[33] *See also United States v. Yida*, 498 F.3d 945, 949 (9th Cir. 2007); *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006).

[34] *See also United States v. Murphy*, 65 F.3d 758, 761 (9th Cir. 1995); *United States v. Wood*, 943 F.2d 1048, 1055 n.9 (9th Cir. 1991).

1130 (9th Cir. 2017); *Mateo-Mendez*, 215 F.3d at 1042; *United States v. Marbella*, 73 F.3d 1508, 1515 (9th Cir. 1996).

3. *Allen* Charges

See II. Criminal Proceedings, C. Trial Decisions in Criminal Cases, 41. Jury Instructions, b. Adequacy of Instructions, i. *Allen* Charges.

4. Authenticity

A trial court's decision regarding the authenticity of evidence is reviewed for an abuse of discretion. *See United States v. Alvirez*, 831 F.3d 1115, 1120 (9th Cir. 2016); *United States v. Weiland*, 420 F.3d 1062, 1072 n.6 (9th Cir. 2005); *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996). Authentication of evidence is satisfied by evidence "sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a).[35] The trial court's conclusion that evidence is supported by a proper foundation is also reviewed for an abuse of discretion. *See United States v. Mageno*, 786 F.3d 768, 778 (9th Cir. 2015) (order); *United States v. Pang*, 362 F.3d 1187, 1191 (9th Cir. 2004); *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000).

5. *Batson* Claims

Ordinarily, the court reviews the district court's ruling on a *Batson* challenge for clear error. *See United States v. Mikhel*, 889 F.3d 1003, 1028 (9th Cir. 2018). However, the court reviews de novo whether the district court properly applied *Batson*. *See Mikhel*, 889 F.3d at 1028; *United States v. Herrera-Rivera*, 832 F.3d 1166, 1172 (9th Cir. 2016); *United States v. Alvarez-Ulloa*, 784 F.3d 558, 565 (9th Cir. 2015).

Whether a district court is obligated to apply the *Batson* analysis to a defendant's claim of purposeful discrimination is a question of law reviewed de novo. *See United States v. Alanis*, 335 F.3d 965, 967 & n.1 (9th Cir. 2003). Whether a particular jury satisfies the "representative jury" required by *Batson* is reviewed de novo. *See United States v. Bishop*, 959 F.2d 820, 827 (9th Cir. 1992), *overruled on other grounds by United States v. Nevils*, 598 F.3d 1158 (9th Cir.

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[35] *See also United States v. Panaro*, 266 F.3d 939, 951 (9th Cir. 2001) (reciting standard); *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996) (same).

2010).[36] Whether a prosecutor's proclaimed reason for exercising a peremptory challenge is an adequate race-neutral explanation is an issue of law reviewed de novo. *See United States v. Mitchell*, 502 F.3d 931, 957 (9th Cir. 2007).[37] When defense counsel fails to preserve a *Batson* claim, review is limited to plain error. *See United States v. Contreras-Contreras*, 83 F.3d 1103, 1105 (9th Cir. 1996). Note that the court has implied "that an objection must be made in order to preserve a *Batson* claim in a habeas case." *Haney v. Adams*, 641 F.3d 1168, 1171 n.5 (9th Cir. 2011).

Where the district court erroneously denies a peremptory challenge, the court applies "the standard of review that is appropriate under the circumstances of the district court's error." *United States v. Lindsey*, 634 F.3d 541, 550 (9th Cir. 2011) (reviewing for plain error where defendant failed to object to district judge's miscounting of peremptory challenges).

The district court's findings of fact as to the racially discriminatory use of peremptory challenges are reviewed for clear error. *See Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) ("[A] trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous."); *Mitchell*, 502 F.3d at 956.[38]

The trial court's remedy for a *Batson* violation is reviewed for an abuse of discretion. *See United States v. Ramirez-Martinez*, 273 F.3d 903, 910 (9th Cir. 2001), *overruled in part on other grounds by United States v. Lopez*, 484 F.3d 1186, 1191 (9th Cir. 2007) (en banc).

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[36] *See also Cooperwood v. Cambra*, 245 F.3d 1042, 1047 (9th Cir. 2001) (habeas) (reviewing de novo the state court's ruling on the *Batson* prima facie issue).

[37] *See also Williams v. Rhoades*, 354 F.3d 1101, 1107 (9th Cir. 2004) (habeas) (reviewing de novo the facial validity of prosecutor's proffered reasons).

[38] *See also United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002) (noting whether defendant has made a prima facie showing of racial discrimination is reviewed for clear error); *United States v. Hernandez-Herrera*, 273 F.3d 1213, 1218 (9th Cir. 2001) (same); *United States v. Gillam*, 167 F.3d 1273, 1278 (9th Cir. 1999) ("The district court's determination on intent to discriminate is reviewed under a deferential standard.").

6. Best Evidence Rule

The best evidence rule provides that the original of a "writing, recording, or photograph" is required to prove the contents thereof. Fed. R. Evid. 1002. A district court's ruling on the best evidence rule is reviewed for an abuse of discretion. *See United States v. Bennett*, 363 F.3d 947, 952 (9th Cir. 2004).

7. *Bruton* Violations

An alleged *Bruton* violation is reviewed de novo. *See United States v. Mitchell*, 502 F.3d 931, 956 (9th Cir. 2007). When there is no objection at trial, review is limited to plain error. *See United States v. Arias-Villanueva*, 998 F.2d 1491, 1507 (9th Cir. 1993), *overruled in part on other grounds as stated in United States v. Jimenez-Ortega*, 472 F.3d 1102, 1103 (9th Cir. 2007) (per curiam).

8. Burden of Proof

Whether a district court properly applied the correct burden of proof is a question of law reviewed de novo. *See Washington Mut., Inc. v. United States*, 856 F.3d 711, 721 (9th Cir. 2017); *United States v. Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006). Whether the court improperly shifted the burden of proof is reviewed de novo. *See United States v. Brobst*, 558 F.3d 982, 998 (9th Cir. 2009); *United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Cir. 2001). The trial court's determination that a defendant has the burden of proving a defense is reviewed de novo. *See United States v. Beasley*, 346 F.3d 930, 933 (9th Cir. 2003); *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998). The trial court's allocation of the burden of proof is also reviewed de novo. *See United States v. Pisello*, 877 F.2d 762, 764 (9th Cir. 1989); *see also United States v. Phelps*, 955 F.2d 1258, 1266 (9th Cir. 1992) (denial of release). Whether a jury instruction misstates the burden of proof is similarly subject to de novo review. *United States v. Woodberry*, 987 F.3d 1231, 1234 (9th Cir. 2021) (citing *United States v. Doe*, 705 F.3d 1134, 1143 (9th Cir. 2013)), *cert. denied*, 142 S. Ct. 371 (2021).

9. Chain of Custody

The trial court's ruling on a chain-of-custody challenge to evidence is reviewed for an abuse of discretion. *See United States v. Matta-Ballesteros*, 71 F.3d 754, 768 (9th Cir. 1995), *amended by* 98 F.3d 1100 (9th Cir. 1996).

10. Character Evidence

The trial court's decision to admit character evidence is reviewed for an abuse of discretion. *See United States v. Geston*, 299 F.3d 1130, 1137–38 (9th Cir. 2002).[39] If no objection was raised, the court's decision to admit the evidence is reviewed for plain error. *See United States v. Smith*, 282 F.3d 758, 768 (9th Cir. 2002); *United States v. Bracy*, 67 F.3d 1421, 1432 (9th Cir. 1995). Whether particular evidence falls within the scope of Rule 404 is reviewed de novo. *See United States v. Wells*, 879 F.3d 900, 924 (9th Cir. 2018); *United States v. Rizk*, 660 F.3d 1125, 1131 (9th Cir. 2011); *United States v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006); *United States v. Lillard*, 354 F.3d 850, 853 (9th Cir. 2003).

11. Closing Arguments

The district court's decision to allow a jury to consider comments made in closing argument is reviewed for an abuse of discretion. *See United States v. Tucker*, 641 F.3d 1110, 1121 (9th Cir. 2011); *United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001).[40] Any improper comments are subject to harmless error review. *See United States v. Brown*, 327 F.3d 867, 871 (9th Cir. 2003).[41] The plain error standard applies when there is no objection. *See Tucker*, 641 F.3d at 1120–21; *Brown*, 327 F.3d at 871; *Tam*, 240 F.3d at 802.[42]

Prosecutors are forbidden from commenting on a defendant's silence. *See Griffin v. California*, 380 U.S. 609, 615 (1985); *United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996). Claimed violations are reviewed de novo. *See United States v. Norwood*, 603 F.3d 1063, 1068 (9th Cir. 2010); *United States v. Lopez*,

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[39] *See also United States v. Smith*, 282 F.3d 758, 768 (9th Cir. 2002); *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999); *United States v. Bracy*, 67 F.3d 1421, 1432 (9th Cir. 1995).

[40] *See also United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999); *United States v. Etsitty*, 130 F.3d 420, 424 (9th Cir. 1997) (per curiam), *amended by* 140 F.3d 1274 (9th Cir. 1998).

[41] *See also United States v. Marcucci*, 299 F.3d 1156, 1158 (9th Cir. 2002) (per curiam); *United States v. Senchenko*, 133 F.3d 1153, 1156 (9th Cir. 1998).

[42] *See also United States v. Leon-Reyes*, 177 F.3d 816, 821 (9th Cir. 1999); *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999).

500 F.3d 840, 844 (9th Cir. 2007); *United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001) (applying harmless error standard). When there is no objection, review is limited to plain error. *See United States v. Sanchez*, 659 F.3d 1252, 1256 (9th Cir. 2011); *United States v. Amlani*, 111 F.3d 705, 714 (9th Cir. 1997).

The district court's decision to allow supplemental closing arguments is reviewed for abuse of discretion. *See United States v. Della Porta*, 653 F.3d 1043, 1047 (9th Cir. 2011). "Under this standard, the district judge's discretion should be preserved unless its exercise could deprive the defendant of a constitutional right or otherwise prejudice defendant's case." *Id*. (citations and internal quotation marks omitted) (relying on *United States v. Evanston*, 651 F.3d 1080, 1083–84 (9th Cir. 2011)).

> A prosecutor' s misstatements of law during closing argument provide grounds for reversal. … [The court] will not reverse a conviction, however, unless the prosecutor's statements during closing argument are so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge. … To show prejudice, the defendant must show that it is more probable than not that the misconduct materially affected the verdict.

United States v. Velazquez, 1 F.4th 1132, 1136 (9th Cir. 2021) (internal citations and quotation marks omitted).

In *Velazquez*, the court acknowledged a potential intra-circuit conflict on the standard of review for challenges to prosecutorial comments. *Id.* at 1137. The court explained:

> On multiple occasions, we have reviewed de novo whether a challenged prosecutorial comment infringes on a defendant's Fifth Amendment rights. *United States v. Mikhel*, 889 F.3d 1003, 1060 (9th Cir. 2018) (reviewing de novo prosecutor's comment on defendant's failure to testify); *United States v. Inzunza*, 638 F.3d 1006, 1023 (9th Cir. 2011) (reviewing de novo prosecutor's comment on failure to call witness); *United States v. Reyes*, 660 F.3d 454, 461 (9th Cir. 2011); *United States v. Perlaza*, 439 F.3d 1149, 1169 n.22 (9th Cir. 2006). We recently acknowledged, however, potential intra-circuit conflict on the standard of review for challenges to prosecutorial comments, suggesting that we might instead review the court's overruling of an objection to such comments "for abuse of discretion." *United States*

v. Wijegoonaratna, 922 F.3d 983, 989 (9th Cir. 2019) (quoting *United States v. Santiago*, 46 F.3d 885, 892 (9th Cir. 1995)).

Velazquez, 1 F.4th at 1136–37 (declining to revisit the issue because the same conclusion was reached under either standard of review, and concluding that the prosecutor engaged in misconduct by trivializing the reasonable doubt standard that resulted in substantial prejudice, which the district court failed to neutralize).

12. Coconspirator Statements

A trial court's decision to admit coconspirator statements is reviewed for an abuse of discretion, while its underlying factual determinations that a conspiracy existed and that the statements were made in furtherance of that conspiracy are reviewed for clear error. *See United States v. Moran*, 493 F.3d 1002, 1010 (9th Cir. 2007).[43] In *United States v. Pena-Espinoza*, 47 F.3d 356, 360–61 (9th Cir. 1995), however, this court stated that "[w]e review de novo the legal question of whether the government established a prima facie showing of conspiracy but apply a clearly erroneous standard in reviewing whether a challenged statement was made in the course and furtherance of the conspiracy." The court noted that "[t]he standard for reviewing the prima facie showing is … unsettled in this circuit." *Id.* at 361 n.3.

Prior to *Bourjaily v. United States*, 483 U.S. 171 (1987), this circuit reviewed de novo the district court's legal conclusion that a conspiracy existed. *See United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988) (reviewing development of standard of review). In *Bourjaily*, the Supreme Court noted that the district court's factfinding regarding the existence of a conspiracy and the defendant's involvement in it was not clearly erroneous. *Bourjaily*, 483 U.S. at 181. After *Bourjaily*, this court has generally stated that it reviews for clear error the district court's findings that there was a conspiracy and that the statements were made in furtherance of the conspiracy. *See Moran*, 493 F.3d at 1010. Notwithstanding, some cases state that the circuit's standard of review is "unclear." *See Pena-Espinoza*, 47 F.3d at 361 n.3; *United States v. Castaneda*, 16 F.3d 1504, 1507 (9th Cir. 1994).

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[43] *See also United States v. Shryock*, 342 F.3d 948, 981 (9th Cir. 2003); *United States v. Bowman*, 215 F.3d 951, 960 (9th Cir. 2000); *United States v. Gil*, 58 F.3d 1414, 1419 (9th Cir. 1995).

In some instances, this court has simply stated that "[w]e review for abuse of discretion the district court's decision to admit evidence of a co-conspirator's statement." *United States v. Garza*, 980 F.2d 546, 553 (9th Cir. 1992). This is the correct standard if review is limited to the trial court's discretionary decision to admit evidence. In *United States v. Peralta*, 941 F.2d 1003, 1006 (9th Cir. 1991), the court noted that the abuse of discretion standard applied to the trial court's decision to admit the statements but the trial court's underlying findings that there was a conspiracy and that the statements were made in furtherance of the conspiracy are reviewed for clear error. As stated in *United States v. Moran*, 493 F.3d 1002, 1010 (9th Cir. 2007), the court reviews "for an abuse of discretion the district court's decision to admit coconspirators' statements, and review[s] for clear error the district court's underlying factual determinations that a conspiracy existed and that the statements were made in furtherance of that conspiracy." *See also United States v. Shryock*, 342 F.3d 948, 981 (9th Cir. 2003) (stating standard); *United States v. Segura-Gallegos*, 41 F.3d 1266, 1271 (9th Cir. 1994); *United States v. Arambula-Ruiz*, 987 F.2d 599, 607 (9th Cir. 1993). There remain some instances, however, where this court reviews de novo the trial court's conclusion regarding the existence of a conspiracy. *See Pena-Espinoza*, 47 F.3d at 360–61; *United States v. Vowiell*, 869 F.2d 1264, 1267 (9th Cir. 1989).

13. Comments on the Evidence

A trial court has discretion to comment on the evidence, as long as it makes clear that the jury must ultimately decide all questions of fact. *See United States v. Sager*, 227 F.3d 1138, 1145 (9th Cir. 2000); *People of Guam v. McGravey*, 14 F.3d 1344, 1348 (9th Cir. 1994). Whether a judge's comment on a defendant's decision not to testify violates the right against self-incrimination is reviewed de novo. *See United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Cir. 2001).

A prosecutor's improper comments at closing argument are reviewed for harmless error. *See United States v. Brown*, 327 F.3d 867, 871 (9th Cir. 2003); *United States v. Marcucci*, 299 F.3d 1156, 1158 (9th Cir. 2002) (per curiam); *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002) (vouching). The plain error standard applies when there is no objection. *See Brown*, 327 F.3d at 871. *See also United States v. Velazquez*, 1 F.4th 1132, 1136–37 (9th Cir. 2021) (acknowledging potential intra-circuit conflict intra-circuit conflict on the standard of review for challenges to prosecutorial comments).

14. Confrontation Clause

Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. *See United States v. Singh*, 995 F.3d 1069, 1080 (9th Cir. 2021) (challenge to a district court's limitations on cross-examination); *United States v. Benamor*, 937 F.3d 1182, 1190 (9th Cir. 2019) (as amended); *United States v. Johnson*, 875 F.3d 1265, 1278 (9th Cir. 2017); *United States v. Matus-Zayas*, 655 F.3d 1092, 1098 (9th Cir. 2011); *United States v. Norwood*, 603 F.3d 1063, 1067 (9th Cir. 2010); *United States v. Larson*, 495 F.3d 1094, 1101 (9th Cir. 2007) (en banc); *Lilly v. Virginia*, 527 U.S. 116, 136–37 (1999).[44] However, where defendant fails "to object to the admission of evidence under the Confrontation Clause, [review is] for plain error." *See Matus-Zayas*, 655 F.3d at 1098 (internal quotation marks and citation omitted); *see also Johnson*, 875 F.3d at 1278.

Confrontation Clause violations are subject to harmless error analysis. *See United States v. Shayota*, 934 F.3d 1049, 1052 (9th Cir. 2019); *Johnson*, 875 F.3d at 1279; *United States v. Orozco-Acosta*, 607 F.3d 1156, 1161 (9th Cir. 2010); *Larson*, 495 F.3d at 1107–08; *United States v. Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004).[45] "Whether a violation of the Confrontation Clause is harmless depends on a variety of factors including: (1) the importance of the evidence to the prosecution's case; (2) whether the evidence was cumulative; (3) the presence of corroborating evidence; (4) the overall strength of the prosecution's case." *Shayota*, 934 F.3d at 1052 (internal quotation marks and citation omitted).

A challenge to a trial court's restrictions on the manner or scope of cross-examination on non-constitutional grounds is reviewed for abuse of discretion. *See Singh*, 995 F.3d at 1080; *Larson*, 495 F.3d at 1101. The district court retains wide latitude to impose reasonable limits on the scope of questioning within a given area. *See Larson*, 495 F.3d at 1101. The caselaw regarding the standard of review for challenges to a trial court's limitations on cross-examination was inconsistent

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[44] *See also Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 951 (9th Cir. 1998) (tribal court); *Paradis v. Arave*, 20 F.3d 950, 956 (9th Cir. 1994) (habeas).

[45] *See also Gibbs v. Covello*, 996 F.3d 596, 602 (9th Cir. 2021) (habeas), *cert. denied*, 142 S. Ct. 285 (2021), *and cert. denied*, 142 S. Ct. 453 (2021); *Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir. 2002) (habeas); *Whelchel v. Washington*, 232 F.3d 1197, 1205 (9th Cir. 2000) (habeas).

prior to *Larson*. *See United States v. Rodriguez-Rodriguez*, 393 F.3d 849, 856 (9th Cir. 2005) (noting but not resolving conflict).

See also II. Criminal Proceedings, B. Pretrial Decisions in Criminal Cases, 55. Sixth Amendment Rights.

15. Constitutionality of Regulations

Whether a regulation is unconstitutional is a question of law reviewed de novo. *See United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017); *United States v. Bohn*, 622 F.3d 1129, 1133 (9th Cir. 2010) (challenged as exceeding congressional authority); *United States v. Elias*, 269 F.3d 1003, 1014 (9th Cir. 2001) (vagueness). The district court's interpretation of a regulation is reviewed de novo. *See United States v. Bibbins*, 637 F.3d 1087, 1090 (9th Cir. 2011); *Bohn*, 622 F.3d at 1135; *United States v. Willfong*, 274 F.3d 1297, 1300 (9th Cir. 2001).[46] However, "an agency's interpretation of its own regulation is entitled to deference when, among other things, the regulation is 'genuinely ambiguous.'" *Goffney v. Becerra*, 995 F.3d 737, 741–42 (9th Cir. 2021) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)), *cert. denied*, 142 S. Ct. 589 (2021).

16. Constitutionality of Statutes

The constitutionality of a statute is a question of law reviewed de novo. *See United States v. Bartley*, 9 F.4th 1128, 1131 (9th Cir. 2021); *United States v. Hudson*, 986 F.3d 1206, 1210 (9th Cir. 2021); *United States v. Laursen*, 847 F.3d 1026, 1031 (9th Cir. 2017); *United States v. Xiaoying Tang Dowai*, 839 F.3d 877, 879 (9th Cir. 2016). The construction or interpretation of a statute is reviewed de novo. *See United States v. Carey*, 929 F.3d 1092, 1096 (9th Cir. 2019); *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011) (Safe Drinking Water Act); *United States v. Li*, 643 F.3d 1183, 1185 (9th Cir. 2011).[47] The applicability of a

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[46] *See also United States v. Albers*, 226 F.3d 989, 994 (9th Cir. 2000); *United States v. Ani*, 138 F.3d 390, 391 (9th Cir. 1998).

[47] *See also United States v. Tapia-Romero*, 523 F.3d 1125, 1126 (9th Cir. 2008) (sentencing); *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008) (Bail Reform Act); *United States v. Macias-Valencia*, 510 F.3d 1012, 1013 (9th Cir. 2007) (DEA); *United States v. Atalig*, 502 F.3d 1063, 1066 (9th Cir. 2007) (false claims); *United States v. Cabaccang*, 332 F.3d 622, 624–25 (9th Cir. 2003) (en banc).

statute to a particular case is a question of law reviewed de novo. *See United States v. $671,160.00 in U.S. Currency*, 730 F.3d 1051, 1055 (9th Cir. 2013) (Fugitive Disentitlement Statute); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000) (per curiam) (AEDPA).

17. Contempt

"The district court's decision to invoke summary contempt procedures, including its consideration of the need for immediate action, is reviewed for an abuse of discretion." *See United States v. Rrapi*, 175 F.3d 742, 753 (9th Cir. 1999); *see also In re Grand Jury Subpoena*, 875 F.3d 1179, 1183 (9th Cir. 2017) (imposition of contempt sanctions reviewed for abuse of discretion); *United States v. Cohen*, 510 F.3d 1114, 1119 (9th Cir. 2007); *but see United States v. Glass*, 361 F.3d 580, 587 (9th Cir. 2004) (noting court "must independently evaluate the need for summary procedures"). The court's refusal to grant a mistrial after holding a defendant in criminal contempt is reviewed for an abuse of discretion. *See United States v. McCormac*, 309 F.3d 623, 626 (9th Cir. 2002).

A district court's findings of fact in support of a disciplinary order are reviewed for clear error. *See United States Dist. Court v. Sandlin*, 12 F.3d 861, 864–65 (9th Cir. 1993). The terms and conditions of a disciplinary order are reviewed for abuse of discretion. *See Engstrom*, 16 F.3d at 1011.

The legality of a sentence imposed for criminal contempt is reviewed de novo. *See United States v. Carpenter*, 91 F.3d 1282, 1283 (9th Cir. 1996) (per curiam), *implied overruling on other grounds recognized by United States v. Broussard*, 611 F.3d 1069 (9th Cir. 2010). Whether a magistrate judge has jurisdiction to impose criminal contempt sanctions is a question of law reviewed de novo. *See Bingman v. Ward*, 100 F.3d 653, 656 (9th Cir. 1996).

Civil contempt orders are reviewed for an abuse of discretion. *See Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016); *SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir.), *amended by* 335 F.3d 834 (9th Cir. 2003); *United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999).

A district court's order of contempt sanctions is reviewed for an abuse of discretion. *See In re Grand Jury Investigation*, 966 F.3d 991, 994 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 308 (2021); *In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1183 (9th Cir. 2017).

18. Continuances

A trial court's ruling on a request for a continuance of trial is reviewed for an abuse of discretion. *See United States v. Turner*, 897 F.3d 1084, 1101 (9th Cir. 2018); *United States v. Wilkes*, 662 F.3d 524, 543 (9th Cir. 2011); *United States v. Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005).[48] The court's decision to grant or deny a motion for continuance made during trial is also reviewed for an abuse of discretion. *See United States v. Nguyen*, 88 F.3d 812, 819 (9th Cir. 1996); *United States v. Gonzalez-Rincon*, 36 F.3d 859, 865 (9th Cir. 1994). The decision to deny a motion for continuance made on the first day of trial is also reviewed for an abuse of discretion. *See United States v. Walter-Eze*, 869 F.3d 891, 907 (9th Cir. 2017) (morning-of-trial request for continuance); *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1383 (9th Cir. 1991), *abrogated on other grounds by Bailey v. United States*, 516 U.S. 137 (1995), *superseded by statute as recognized by Welch v. United States*, 136 S. Ct. 1257 (2016). A trial court's refusal to grant a continuance of a sentencing hearing is reviewed for an abuse of discretion. *See United States v. Lewis*, 991 F.2d 524, 528 (9th Cir. 1993).

A trial court abuses its discretion only if its denial of a continuance was arbitrary or unreasonable. *See Turner*, 897 F.3d at 1101; *Wilkes*, 662 F.3d at 543; *United States v. Wills*, 88 F.3d 704, 711 (9th Cir. 1996). "To reverse a trial court's denial of a continuance, an appellant must show that the denial prejudiced [her] defense." *Gonzalez-Rincon*, 36 F.3d at 865 (internal quotation omitted); *see also Wilkes*, 662 F.3d at 543. "'Where the denial of a continuance prevents the introduction of specific evidence, the prejudice inquiry focuses on the significance of that evidence.'" *Id*. (quoting *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1142 (9th Cir. 2011)).

19. Credibility Determinations

A trial court's ruling on the credibility of a witness is entitled to deference and is reviewed for clear error. *See Kirola v. City & Cty. of San Francisco*, 860 F.3d 1164, 1179–82 (9th Cir. 2017); *United States v. Ubaldo*, 859 F.3d 690, 703 (9th Cir. 2017); *United States v. Santos*, 527 F.3d 1003, 1009 (9th Cir. 2008). Harmless error review applies when defendant objects at trial to alleged improper

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[48] *See also United States v. Nguyen*, 262 F.3d 998, 1002 (9th Cir. 2001); *United States v. Zamora-Hernandez*, 222 F.3d 1046, 1049 (9th Cir. 2000); *United States v. Garrett*, 179 F.3d 1143, 1144–45 (9th Cir. 1999) (en banc).

vouching. *See United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002). Plain error review applies when defendant makes no objection to alleged improper vouching. *See United States v. Doss*, 630 F.3d 1181, 1193 (9th Cir. 2011); *United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001).[49] A district court commits plain error by allowing a prosecutor to persist in asking witnesses to comment upon the veracity of other witnesses. *See United States v. Geston*, 299 F.3d 1130, 1138 (9th Cir. 2002); *cf. United States v. Greer*, 640 F.3d 1011, 1023–24 (9th Cir. 2011) (distinguishing between asking whether another witness was "lying" or simply "mistaken").

20. Cross-Examination

A trial court's decisions regarding the scope of cross-examination on non-constitutional grounds is reviewed for abuse of discretion. *See United States v. Singh*, 995 F.3d 1069, 1080 (9th Cir. 2021); *United States v. Cazares*, 788 F.3d 956, 983 (9th Cir. 2015); *United States v. Larson*, 495 F.3d 1094, 1101 (9th Cir. 2007) (en banc); *United States v. Shryock*, 342 F.3d 948, 980 (9th Cir. 2003) (limiting cross-examination);*United States v. Senchenko*, 133 F.3d 1153, 1158–59 (9th Cir. 1998) (permitting cross-examination).[50] "The trial court does not abuse its discretion as long as the jury receives sufficient information to appraise the biases and motivations of the witnesses." *United States v. Manning*, 56 F.3d 1188, 1197 (9th Cir. 1995) (internal quotation omitted). The failure to object to questions posed during cross-examination limits review to plain error. *See United States v. Shwayder*, 312 F.3d 1109, 1120 (9th Cir. 2002), *amended by* 320 F.3d 889 (9th Cir. 2003); *United States v. Geston*, 299 F.3d 1130, 1135 (9th Cir. 2002).

Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. *See Singh*, 995 F.3d at 1080 (9th Cir. 2021) (challenge to a district court's limitations on cross-examination); *United States v. Benamor*, 937 F.3d 1182, 1190 (9th Cir. 2019) (as amended); *United States v. Johnson*, 875 F.3d 1265, 1278 (9th Cir. 2017); *United States v. Matus-Zayas*, 655 F.3d 1092, 1098

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[49] *See also United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999); *United States v. Leon-Reyes*, 177 F.3d 816, 821 (9th Cir. 1999); *United States v. Garcia-Guizar*, 160 F.3d 511, 521 (9th Cir. 1998); *United States v. Rudberg*, 122 F.3d 1199, 1206 (9th Cir. 1997).

[50] *See also United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002); *United States v. Bensimon*, 172 F.3d 1121, 1128 (9th Cir. 1999).

(9th Cir. 2011); *United States v. Norwood*, 603 F.3d 1063, 1067 (9th Cir. 2010); *United States v. Larson*, 495 F.3d 1094, 1101 (9th Cir. 2007) (en banc); *Lilly v. Virginia*, 527 U.S. 116, 136–37 (1999).[51] However, where defendant fails "to object to the admission of evidence under the Confrontation Clause, [review is] for plain error." *See Matus-Zayas*, 655 F.3d at 1098 (internal quotation marks and citation omitted); *see also Johnson*, 875 F.3d at 1278.

Whether a court's limitation on recross-examination constitutes a violation of the Confrontation Clause is also reviewed de novo. *See United States v. Baker*, 10 F.3d 1374, 1405 (9th Cir. 1993), *overruled in part on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), *overruled in part by United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002); *United States v. Vargas*, 933 F.2d 701, 704 (9th Cir. 1991). Within the bounds of constitutionality, review of the court's limitations on recross is for an abuse of discretion. *See Baker*, 10 F.3d at 1405.

In habeas review, a state trial court has "considerable discretion to limit cross-examination … ." *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (internal quotation omitted).

21. Documentary Evidence

A district court's ruling on the admission of documentary evidence is reviewed for abuse of discretion. *See United States v. Lloyd*, 807 F.3d 1128, 1151, 1161–62 (9th Cir. 2015) (email evidence); *United States v. Laurienti*, 611 F.3d 530, 550 (9th Cir. 2010) (charts and summaries); *United States v. Blitz*, 151 F.3d 1002, 1007 (9th Cir. 1998) (bank records).[52] The decision to seal documents is reviewed for an abuse of discretion. *See Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 n.3 (9th Cir. 2006) ("We review for abuse of

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[51] *See also Selam v. Warm Springs Tribal Corr. Facility*, 134 F.3d 948, 951 (9th Cir. 1998) (tribal court); *Paradis v. Arave*, 20 F.3d 950, 956 (9th Cir. 1994) (habeas).

[52] *See also United States v. Bachsian*, 4 F.3d 796, 799 (9th Cir. 1993) (shipping documents); *United States v. Hernandez*, 876 F.2d 774, 778 (9th Cir. 1989) (police reports); *United States v. Miller*, 874 F.2d 1255, 1275 (9th Cir. 1989) (classified documents); *United States v. Black*, 767 F.2d 1334, 1342 (9th Cir. 1985) (confirmation sale slips).

discretion … the decision to unseal the judicial record."); *United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003).

22. Double Jeopardy

Double jeopardy claims are reviewed de novo. *See United States v. Chilaca*, 909 F.3d 289, 291 (9th Cir. 2018); *United States v. Castillo-Basa*, 483 F.3d 890, 895 (9th Cir. 2007); *United States v. Male Juvenile (Pierre Y.)*, 280 F.3d 1008, 1019 (9th Cir. 2002) (noting review applies to both statutory and constitutional claims).[53]

The district court's denial of a motion to dismiss on double jeopardy grounds is reviewed de novo. *See Chilaca*, 909 F.3d at 291; *United States v. Lopez-Avila*, 678 F.3d 955, 961 (9th Cir. 2012) (as amended); *Castillo-Basa*, 483 F.3d at 895; *United States v. Hickey*, 367 F.3d 888, 891 n.3 (9th Cir. 2004), *amended by* 400 F.3d 658 (9th Cir. 2005); *United States v. Ziskin*, 360 F.3d 934, 942–43 (9th Cir. 2003) (clarifying law). Factual findings, including those on which denial may be based, are reviewed for clear error. *See Lopez-Avila*, 678 F.3d at 961; *Ziskin*, 360 F.3d at 943. Note, however, that the district court's determination that the initial dismissal was required by "manifest necessity" is reviewed for an abuse of discretion. *See United States v. Bonas*, 344 F.3d 945, 948 (9th Cir. 2003) (explaining in n.3 that review is for an abuse of discretion even though "manifest necessity" is referred to as a finding). Also, a denial of a motion for a hearing on the issue of double jeopardy is reviewed for an abuse of discretion. *See United States v. Hernandez*, 80 F.3d 1253, 1261 (9th Cir. 1996), *overruled in part on other grounds as recognized by United States v. Foster*, 165 F.3d 689, 692 n.5 (9th Cir. 1999) (en banc).

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[53] *See also United States v. Kuchinski*, 469 F.3d 853, 857 (9th Cir. 2006) (sentencing); *United States v. Patterson*, 381 F.3d 859, 863 (9th Cir. 2004) (plea agreement); *United States v. Radmall*, 340 F.3d 798, 800 n. 4 (9th Cir. 2003) (resentencing); *United States v. McClain*, 133 F.3d 1191, 1193 (9th Cir. 1998) (habeas); *United States v. Stoddard*, 111 F.3d 1450, 1454 (9th Cir. 1997) (conspiracy); *United States v. Seley*, 957 F.2d 717, 720 (9th Cir. 1992) (relationship of collateral estoppel to double jeopardy reviewed de novo); *United States v. Stauffer*, 922 F.2d 508, 513 (9th Cir. 1990) (whether trial court's correction of verdict form violates double jeopardy reviewed de novo).

"[T]he district court's dismissal of the indictment on the basis of double jeopardy" is reviewed de novo." *United States v. Carothers*, 630 F.3d 959, 963 (9th Cir. 2011).

Note there is a distinction between "objections to multiplicity in the indictment, which can be waived, and objections to multiplicitous sentences and convictions, which cannot be waived." *United States v. Zalapa*, 509 F.3d 1060, 1063 (9th Cir. 2007). Where the defendant fails to "'raise the issue of multiplicity of convictions and sentences before the district court, … review [of] the district court's decision [is] for plain error.'" *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1148 (9th Cir. 2012) (quoting *Zalapa*, 509 F.3d at 1064).

23. Entrapment

A defendant's entrapment argument is reviewed de novo. *See United States v. Temkin*, 797 F.3d 682, 691 (9th Cir. 2015); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 648 (9th Cir. 2006).[54] A trial court's decision to exclude evidence of an entrapment defense is also reviewed de novo. *See United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004).[55] Whether a jury instruction properly states the law of entrapment is a question of law subject to de novo review. *See United States v. LaRizza*, 72 F.3d 775, 778 (9th Cir. 1995).[56] Findings underlying a district court's decision not to depart based on sentencing entrapment are reviewed for clear error. *See United States v. Ross*, 372 F.3d 1097, 1113–14 (9th Cir. 2004).

24. Evidentiary Rulings

In reviewing a district court's evidentiary rulings, "the selection of the applicable standard of review is contextual: The de novo standard applies when issues of law predominate in the district court's evidentiary analysis, and the abuse-of-discretion standard applies when the inquiry is essentially factual."

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[54] *See also United States v. Si*, 343 F.3d 1116, 1125 (9th Cir. 2003); *United States v. Mendoza-Prado*, 314 F.3d 1099, 1102 (9th Cir. 2002); *United States v. Tucker*, 133 F.3d 1208, 1214 (9th Cir. 1998).

[55] *See also United States v. Hancock*, 231 F.3d 557, 561 (9th Cir. 2000); *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000).

[56] *See also United States v. Reese*, 60 F.3d 660, 661 (9th Cir. 1995); *United States v. Lorenzo*, 43 F.3d 1303, 1306 (9th Cir. 1995).

United States v. Mateo-Mendez, 215 F.3d 1039, 1042 (9th Cir. 2000) (internal quotation marks omitted); *see also United States v. Fryberg*, 854 F.3d 1126, 1130 (9th Cir. 2017). In reviewing an "essentially factual" ruling for abuse of discretion, the court reviews any underlying factual determinations for clear error. *See Fryberg*, 854 F.3d at 1130; *United States v. Whittemore*, 776 F.3d 1074, 1077 (9th Cir. 2015). *See also United States v. Lopez*, 4 F.4th 706, 714 (9th Cir. 2021) (reviewing challenged evidentiary rulings for abuse of discretion); *United States v. Perez*, 962 F.3d 420, 434 (9th Cir. 2020) (explaining district court's evidentiary rulings are reviewed for abuse of discretion and should be upheld unless illogical, implausible, or without support in inferences that may be drawn from the facts in the record), *cert. denied*, 141 S. Ct. 1443 (2021); *United States v. Thornhill*, 940 F.3d 1114, 1117 (9th Cir. 2019) (evidentiary rulings reviewed for abuse of discretion); *United States v. Haines*, 918 F.3d 694, 697 (9th Cir. 2019) (reviewing evidentiary rulings for abuse of discretion, though reviewing de novo interpretation of Federal Rules of Evidence and whether rulings violated defendant's constitutional rights).

Evidentiary rulings will be reversed for abuse of discretion only if such error more likely than not affected the verdict. *See United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004); *United States v. Alvarez*, 358 F.3d 1194, 1205 (9th Cir. 2004); *United States v. Workinger*, 90 F.3d 1409, 1412 (9th Cir. 1996). When no objection is made, the court may review for plain error, but may reverse only if the defendant persuades this court that the error was prejudicial in that it "affected the outcome of the district court proceeding." *United States v. Sine*, 493 F.3d 1021, 1038 (9th Cir. 2007).[57]

Although review of evidentiary rulings is generally for abuse of discretion, the court has recognized that such issues may present issues of law which are reviewed de novo. *See Haines*, 918 F.3d at 697 (reviewing evidentiary rulings for abuse of discretion, though reviewing de novo interpretation of Federal Rules of Evidence and whether rulings violated defendant's constitutional rights); *Fryberg*, 854 F.3d at 1130; *United States v. Lynch*, 437 F.3d 902, 913 (9th Cir. 2006)

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[57] *See also United States v. Tisor*, 96 F.3d 370, 376 (9th Cir. 1996); *United States v. Flores*, 172 F.3d 695, 698 (9th Cir. 1999); *United States v. Serang*, 156 F.3d 910, 915 (9th Cir. 1998).

(reviewing evidentiary ruling that precluded defendant's proffered defense).[58] For example, the district court's interpretations of the Federal Rules of Evidence are reviewed de novo. *See Haines*, 918 F.3d at 697; *United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011); *United States v. W.R. Grace*, 504 F.3d 745, 758–59 (9th Cir. 2007).[59]

A district court has broad discretion whether to admit extrinsic evidence in a criminal case. *See United States v. Higa*, 55 F.3d 448, 452 (9th Cir. 1995). Note, however, that when the issue is framed as a potential violation of the Sixth Amendment's Confrontation Clause, review is de novo. *See United States v. Saya*, 247 F.3d 929, 937 (9th Cir. 2001) (as amended). The district court's decision to admit or reject impeachment evidence is reviewed for an abuse of discretion. *See United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002) (prior bad acts).[60]

25. Expert Testimony

A district court's decision to admit expert opinion testimony is reviewed for abuse of discretion. *See United States v. Johnson*, 875 F.3d 1265, 1280 (9th Cir. 2017); *United States v. Cazares*, 788 F.3d 956, 975–76 (9th Cir. 2015); *United States v. Gadson*, 763 F.3d 1189, 1202 (9th Cir. 2014); *United States v. Gonzales*, 307 F.3d 906, 909 (9th Cir. 2002) (noting such decisions will not be reversed unless "manifestly erroneous").[61] The district court's decision to exclude expert

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[58] *See United States v. Hardy*, 289 F.3d 608, 612 (9th Cir. 2002) (relevance); *United States v. James*, 169 F.3d 1210, 1214 (9th Cir. 1999) (en banc); *United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999).

[59] *See also United States v. Yida*, 498 F.3d 945, 949 (9th Cir. 2007); *United States v. Sioux*, 362 F.3d 1241, 1244 n.5 (9th Cir. 2004); *United States v. Bensimon*, 172 F.3d 1121, 1125 (9th Cir. 1999).

[60] *See, e.g.*, *United States v. Beckman*, 298 F.3d 788, 792 (9th Cir. 2002) (harmless error); *United States v. Bensimon*, 172 F.3d 1121, 1125 (9th Cir. 1999) (prior criminal conviction); *United States v. Beltran*, 165 F.3d 1266, 1269 (9th Cir. 1999) (prior inconsistent statements); *United States v. Rowe*, 92 F.3d 928, 933 (9th Cir. 1996) (prior crime).

[61] *See also United States v. McCaleb*, 552 F.3d 1053, 1060 (9th Cir. 2009) (whether testimony was sufficiently reliable); *United States v. Moran*, 493 F.3d 1002, 1008 (9th Cir. 2007) (on expert witnesses and impermissible legal conclusions); *United States v. Freeman*, 498 F.3d 893, 900 (9th Cir. 2007)

testimony is also reviewed for an abuse of discretion. *See United States v. Laurienti*, 611 F.3d 530, 547 (9th Cir. 2010); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 652 (9th Cir. 2006). Note that there are cases that refer to both "abuse of discretion" and "manifest error" in discussing the standard of review for decisions on expert testimony.[62]

Admission of expert estimony to which there is no objection at trial is reviewed for plain error. *See United States v. Halamek*, 5 F.4th 1081, 1087 (9th Cir. 2021); *United States v. Perez*, 962 F.3d 420, 434 (9th Cir. 2020) (the plain-error standard governs a witness's opinion not objected to at trial), *cert. denied*, 141 S. Ct. 1443 (2021); *United States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007); *United States v. Sherwood*, 98 F.3d 402, 408 (9th Cir. 1996); *see also United States v. Varela-Rivera*, 279 F.3d 1174, 1177–78 (9th Cir. 2002) (noting circumstances that preserve defendant's right of review under abuse of discretion standard rather than plain error); *United States v. Seschillie*, 310 F.3d 1208, 1212 (9th Cir. 2002), (applying harmless error review).

"The trial court has wide discretion in determining whether particular scientific tests are reliable enough to permit expert testimony based upon their results." *United States v. Gillespie*, 852 F.2d 475, 480 (9th Cir. 1988) (citations

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(admitting a single person as both lay and expert witness); *United States v. Hanna*, 293 F.3d 1080, 1085 (9th Cir. 2002); *United States v. Abonce-Barrera*, 257 F.3d 959, 964 (9th Cir. 2001) (whether an expert witness has sufficient qualifications to testify); *United States v. Marsh*, 26 F.3d 1496, 1502 (9th Cir. 1994) (refusal to allow an expert to testify regarding a witness's psychiatric condition).

[62] In 1997, the Ninth Circuit sitting en banc noted that "although there appears to be no practical difference" between abuse of discretion and manifest error review, earlier cases had used the two standards inconsistently. The court explicitly adopted abuse of discretion as the proper standard, "to the extent [the two standards were] … different." *United States v. Morales*, 108 F.3d 1031, 1034 & n.1 (9th Cir. 1997) (en banc). Later that same year, the Supreme Court conflated the two terms by stating that abuse of discretion is the proper standard in reviewing decisions on expert testimony, and describing that standard as requiring reversal only where the decision was "manifestly erroneous." *General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997). Subsequent cases have again used the terms in parallel. *See United States v. Gonzales*, 307 F.3d 906, 909 (9th Cir. 2002).

omitted); *see also United States v. McCaleb*, 552 F.3d 1053, 1060 (9th Cir. 2009) (noting district court has broad discretion when discharging gatekeeping function).

The district court's denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. *See United States v. Nelson*, 137 F.3d 1094, 1101 n.2 (9th Cir. 1998); *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996). A district court's failure to rule on a motion for appointment of an expert witness is deemed a denial of the motion and is reviewed for an abuse of discretion. *See United States v. Depew*, 210 F.3d 1061, 1065 (9th Cir. 2000).

When expert testimony has been erroneously excluded, the court applies the harmless error standard for non-constitutional error. *See United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997).

26. Extrinsic Evidence

A district court has broad discretion to decide whether to admit extrinsic evidence in a criminal case. *See United States v. Higa*, 55 F.3d 448, 452 (9th Cir. 1995). The court's decision to admit evidence of extrinsic acts is reviewed for an abuse of discretion. *See United States v. Blackstone*, 56 F.3d 1143, 1145 (9th Cir. 1995). Note, however, that when the issue is framed as a potential violation of the Sixth Amendment's Confrontation Clause, review is de novo. *See United States v. Saya*, 247 F.3d 929, 937 (9th Cir. 2001) (as amended). Review is also de novo of the denial of a motion for mistrial based on a contention that the jury improperly reviewed extrinsic evidence. *See United States v. Prime*, 431 F.3d 1147, 1157 (9th Cir. 2005) (noting "independent review"); *see also United States v. McChesney*, 871 F.3d 801, 805 (9th Cir. 2017) (improper juror contact).

27. Federal Rules

The district court's interpretation of the federal rules is reviewed de novo. *See United States v. Rodriguez*, 971 F.3d 1005, 1017 (9th Cir. 2020) (evidence); *United States v. Seminole*, 865 F.3d 1150, 1152 (9th Cir. 2017) (evidence); *United States v. Lo*, 839 F.3d 777, 783 (9th Cir. 2016) (criminal procedure); *United States v. W.R. Grace*, 504 F.3d 745, 758–59 (9th Cir. 2007) (evidence); *United States v. Fort*, 472 F.3d 1106, 1109 (9th Cir. 2007) (criminal procedure).

28. Fifth Amendment Rights

Whether there has been a violation of a defendant's Fifth Amendment right is reviewed de novo. *See United States v. Oriho*, 969 F.3d 917, 923 (9th Cir. 2020); *United States v. Lopez*, 500 F.3d 840, 844 (9th Cir. 2007) (references to

defendant's silence).[63] A witness's claim of Fifth Amendment privilege is reviewed de novo. *See Earp v. Cullen*, 623 F.3d 1065, 1070 (9th Cir. 2010) (challenge to invocation of Fifth Amendment); *United States v. Rubio-Topete*, 999 F.2d 1334, 1338 (9th Cir. 1993). Fifth Amendment violations are subject to harmless error review. *See Lopez*, 500 F.3d at 844; *United States v. Velarde-Gomez*, 269 F.3d 1023, 1034–35 (9th Cir. 2001) (en banc).

A trial court's decision to exclude a witness's testimony based on an anticipated invocation of the Fifth Amendment privilege against self-incrimination is reviewed for an abuse of discretion. *See United States v. Klinger*, 128 F.3d 705, 709 (9th Cir. 1997). The court's denial of an evidentiary hearing on the issue is also reviewed for an abuse of discretion. *See id.*

The district court's refusal to hold a *Kastigar* hearing is reviewed for an abuse of discretion. *See United States v. Anderson*, 79 F.3d 1522, 1525 (9th Cir. 1996); *United States v. Dudden*, 65 F.3d 1461, 1468 (9th Cir. 1995). If a hearing is held, the district court's findings of fact are reviewed for clear error. *See Anderson*, 79 F.3d at 1525 n.4. Whether a defendant's testimony is immunized is a question of law reviewed de novo. *See id.* at 1525.

In *United States v. Velazquez*, 1 F.4th 1132, 1136 (9th Cir. 2021), the court acknowledged a potential intra-circuit conflict on the standard of review for challenges to prosecutorial comments. *Id.* at 1137. The court explained:

> On multiple occasions, we have reviewed de novo whether a challenged prosecutorial comment infringes on a defendant's Fifth Amendment rights. *United States v. Mikhel*, 889 F.3d 1003, 1060 (9th Cir. 2018) (reviewing de novo prosecutor's comment on defendant's failure to testify); *United States v. Inzunza*, 638 F.3d 1006, 1023 (9th Cir. 2011) (reviewing de novo prosecutor's comment on failure to call witness); *United States v. Reyes*, 660 F.3d 454, 461 (9th Cir. 2011); *United States v. Perlaza*, 439 F.3d 1149, 1169 n.22 (9th Cir. 2006).

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[63] *See also United States v. Gregory*, 322 F.3d 1157, 1161 (9th Cir. 2003) (due process); *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002) (references to defendant's silence); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028 (9th Cir. 2001) (en banc) (evidence of defendant's physical or emotional reaction); *United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Cir. 2001) (judge's reference to defendant's decision not to testify).

> We recently acknowledged, however, potential intra-circuit conflict on the standard of review for challenges to prosecutorial comments, suggesting that we might instead review the court's overruling of an objection to such comments "for abuse of discretion." *United States v. Wijegoonaratna*, 922 F.3d 983, 989 (9th Cir. 2019) (quoting *United States v. Santiago*, 46 F.3d 885, 892 (9th Cir. 1995)).

Velazquez, 1 F.4th at 1136–37 (declining to revisit the issue because the same conclusion was reached under either standard of review, and concluding that the prosecutor engaged in misconduct by trivializing the reasonable doubt standard that resulted in substantial prejudice that the district court failed to neutralize).

29. *Griffin* Violations

Prosecutors are forbidden from commenting on a defendant's decision not to testify. *See Griffin v. California*, 380 U.S. 609, 615 (1985). *Griffin* violations are reviewed de novo. *See United States v. Mikhel*, 889 F.3d 1003, 1060 (9th Cir. 2018); *United States v. Inzunza*, 638 F.3d 1006, 1022 (9th Cir. 2011); *United States v. Smith*, 282 F.3d 758, 769 (9th Cir. 2002). When there is no objection to the prosecutor's comments, review is for plain error. *See United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011); *United States v. Tam*, 240 F.3d 797, 801 (9th Cir. 2001); *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999). When the defendant does object, harmless error applies. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1034–35 (9th Cir. 2001) (en banc); *cf. Tucker*, 641 F.3d at 1120 (in non-*Griffin* case, explaining where an objection to prosecutorial misconduct is raised in the trial court and overruled, review is for abuse of discretion).

30. Hearsay

Whether the district court correctly construed the hearsay rule is a question of law reviewable de novo. *See United States v. Johnson*, 875 F.3d 1265, 1278 (9th Cir. 2017); *United States v. Barragan*, 871 F.3d 689, 705 (9th Cir. 2017); *United States v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007).[64] However, a district court's decision to admit evidence under an exception to the hearsay rule is

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[64] *See also United States v. Yida*, 498 F.3d 945, 949 (9th Cir. 2007); *United States v. Weiland*, 420 F.3d 1062, 1074 n.9 (9th Cir. 2005); *United States v. Alvarez*, 358 F.3d 1194, 1214 (9th Cir. 2004); *United States v. Orellana-Blanco*, 294 F.3d 1143, 1148 (9th Cir. 2002).

reviewed for an abuse of discretion. *See Johnson*, 875 F.3d at 1278; *United States v. Molina*, 596 F.3d 1166, 1168 (9th Cir. 2010).[65] The court's decision to exclude evidence under the hearsay rule is reviewed for an abuse of discretion. *See Mitchell*, 502 F.3d at 964.[66] The court's decision to consider hearsay at sentencing is also reviewed for an abuse of discretion. *See United States v. Berry*, 258 F.3d 971, 976 (9th Cir. 2001); *United States v. Chee*, 110 F.3d 1489, 1492 (9th Cir. 1997).

The district court's determination that a witness is unavailable is reviewed for an abuse of discretion. *See United States v. Yida*, 498 F.3d 945, 952 (9th Cir. 2007); *United States v. McGuire*, 307 F.3d 1192, 1205 (9th Cir. 2002); *United States v. Magana-Olvera*, 917 F.2d 401, 407 (9th Cir. 1990). If a witness is deemed unavailable, the court's decision to admit that witness's statement is reviewed for an abuse of discretion. *See Magana-Olvera*, 917 F.2d at 407. The denial of a continuance based upon the absence of a witness is reviewed for an abuse of discretion. *See United States v. Foster*, 985 F.2d 466, 469 (9th Cir.), *amended by* 995 F.2d 882 (9th Cir. 1993), *and* 17 F.3d 1256 (9th Cir. 1994).

However, the refusal to dismiss based on the prosecutor's failure to retain a witness is reviewed de novo. *See United States v. Gastelum-Almeida*, 298 F.3d 1167, 1174 (9th Cir. 2002); *Arizona v. Johnson*, 351 F.3d 988, 993 (9th Cir. 2003) (direct appeal from trial conducted pursuant to 28 U.S.C. § 1442(a)(1)).

In collateral proceedings, "[a] state trial court's decision that a witness is constitutionally 'unavailable' is an evidentiary question we review de novo, rather than for an abuse of discretion." *Acosta-Huerta v. Estelle*, 7 F.3d 139, 143 (9th Cir. 1992); *see also Jackson v. Brown*, 513 F.3d 1057, 1082–83 (9th Cir. 2008); *Windham v. Merkle*, 163 F.3d 1092, 1102 (9th Cir. 1998) (explaining that de novo review applies to determining whether the Supreme Court's standards for unavailability have been met).

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[65] *See also Weiland*, 420 F.3d at 1074 n.9; *Alvarez*, 358 F.3d at 1214 (noting error may be harmless); *United States v. Scholl*, 166 F.3d 964, 978 (9th Cir. 1999).

[66] *See also Yida*, 498 F.3d at 949; *United States v. Shryock*, 342 F.3d 948, 981 (9th Cir. 2003); *United States v. Alarcon-Simi*, 300 F.3d 1172, 1175 (9th Cir. 2002).

31. Immunity from Prosecution

"[T]he decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch." *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984). Informal immunity agreements are reviewed under ordinary contract law principles: factual determinations are reviewed for clear error; whether the government has breached the agreement is a question of law reviewed de novo. *See McKnight v. Torres*, 563 F.3d 890, 892 (9th Cir. 2009); *United States v. Wilson*, 392 F.3d 1055, 1059 (9th Cir. 2005) (as amended); *United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995). The denial of a *Kastigar* hearing is reviewed for an abuse of discretion. *See Dudden*, 65 F.3d at 1468; *but see United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (district court's denial of a defense motion for an evidentiary hearing on use immunity raises mixed questions of fact and law reviewed de novo).

The district court's finding that the government's evidence was not tainted by a grant of use immunity is reviewed under the clearly erroneous standard. *See United States v. Montoya*, 45 F.3d 1286, 1291 (9th Cir. 1995); *United States v. Baker*, 10 F.3d 1374, 1415 (9th Cir. 1993), *overruled in part on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), *overruled in part by United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (en banc). Whether the government has violated its obligation to disclose immunity agreements with a prosecution witness is a question of law reviewed de novo. *See United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999). Whether a district court erred by refusing to compel the government to grant immunity to a defense witness is a mixed question of law and fact reviewed de novo. *See United States v. Wilkes*, 662 F.3d 524, 532 (9th Cir. 2011); *United States v. Straub*, 538 F.3d 1147, 1156 (9th Cir. 2008); *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004). Underlying factual findings are reviewed for clear error. *See Wilkes*, 662 F.3d at 532; *Straub*, 538 F.3d at 1156 *Alvarez*, 358 F.3d at 1216.

32. Impeachment Evidence

The district court's decision to admit impeachment evidence is reviewed for an abuse of discretion. *See United States v. Navarrette-Aguilar*, 813 F.3d 785, 793–94 (9th Cir. 2015); *United States v. Osazuwa*, 564 F.3d 1169, 1173 (9th Cir. 2009) (prior conviction); *United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir.

2002) (prior bad acts).[67] The trial court's refusal to allow impeachment evidence is also reviewed for an abuse of discretion. *See United States v. Rowe*, 92 F.3d 928, 933 (9th Cir. 1996) (prior crime).

33. In Absentia Proceedings

"Whether a judge has the power to try a defendant in absentia is an issue of law, which [the court] consider[s] de novo." *United States v. Houtchens*, 926 F.2d 824, 826 (9th Cir. 1991). "The judge's factual finding that a defendant has knowingly and voluntarily failed to appear at trial is reviewable for clear error." *Id.*

The court reviews a district court's sentencing decision following a sentencing hearing conducted in the defendant's absence for abuse of discretion. *United States v. Ornelas*, 828 F.3d 1018, 1021 (9th Cir. 2016). "[T]he district court's factual determination that the defendant was 'voluntarily absent' from the proceedings is reviewed for clear error." *Id*.

34. In-Court Identification

Decisions involving in-court identification are reviewed for an abuse of discretion. *See United States v. Lumitap*, 111 F.3d 81, 83–84 (9th Cir. 1997); *United States v. Duran*, 4 F.3d 800, 803 (9th Cir. 1993). The trial court's decision to conduct an in-court identification process is reviewed for an abuse of discretion. *See United States v. Burdeau*, 168 F.3d 352, 358 (9th Cir. 1999).[68] The admission of in-court identification testimony is reviewed for an abuse of discretion. *See United States v. Dixon*, 201 F.3d 1223, 1229 (9th Cir. 2000); *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989). The denial of a request for an in-court lineup is also reviewed for an abuse of discretion. *See Dixon*, 201 F.3d at 1229; *Lumitap*, 111 F.3d at 83.

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[67] *See also United States v. Beckman*, 298 F.3d 788, 792 (9th Cir. 2002) (harmless error); *United States v. Beltran*, 165 F.3d 1266, 1269 (9th Cir. 1999) (prior inconsistent statements).

[68] *See also United States v. Carbajal*, 956 F.2d 924, 929 (9th Cir. 1992); *United States v. Walitwarangkul*, 808 F.2d 1352, 1353 (9th Cir. 1987).

35. Ineffective Assistance of Counsel

Whether a defendant received ineffective assistance of counsel is reviewed de novo. *See United States v. Juliano*, 12 F.4th 937, 940 (9th Cir. 2021) (§ 2255); *Heishman v. Ayers*, 621 F.3d 1030, 1036 (9th Cir. 2010) (per curiam); *Womack v. Del Papa*, 497 F.3d 998, 1002 (9th Cir. 2007) (§ 2254); *United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003) (§ 2255); *United States v. Mack*, 164 F.3d 467, 471 (9th Cir. 1999) (direct appeal).[69]

Note that claims of ineffective assistance of counsel are generally inappropriate on direct appeal. *See United States v. Liu*, 731 F.3d 982, 995 (9th Cir. 2013); *United States v. Rahman*, 642 F.3d 1257, 1259–60 (9th Cir. 2011) (declining to review ineffective assistance of counsel claim on direct appeal); *United States v. Dewey*, 599 F.3d 1010, 1014 (9th Cir. 2010) (same); *United States v. Lillard*, 354 F.3d 850, 853 (9th Cir. 2003) (explaining rationale); *United States v. McKenna*, 327 F.3d 830, 845 (9th Cir. 2003) (noting exceptions);[70] *see also United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) (electing to review claim on direct appeal); *United States v. Mack*, 164 F.3d 467, 471 (9th Cir. 1999) (same). "The only exceptions are when the record on appeal is sufficiently developed to permit determination of the issue, or the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel." *Liu*, 731 F.3d at 995 (internal quotation marks and citation omitted). "Review, when warranted, is de novo." *Id.*

A defendant claiming ineffective assistance of counsel must demonstrate (1) that counsel's actions were outside the wide range of professionally competent assistance, and (2) that defendant was prejudiced by reason of counsel's actions. *Strickland v. Washington*, 466 U.S. 668, 687–90 (1984); *Juliano*, 12 F.4th at 940; *United States v. Walter-Eze*, 869 F.3d 891, 900 (9th Cir. 2017); *see also Leavitt v.*

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[69] *See also United States v. Alaimalo*, 313 F.3d 1188, 1191 (9th Cir. 2002) (§ 2255); *Mancuso v. Olivarez*, 292 F.3d 939, 949 (9th Cir. 2002) (§ 2254), *overruled on other grounds by Slack v. McDaniel*, 529 U.S. 47 (2000); *LaGrand v. Stewart*, 133 F.3d 1253, 1269–70 (9th Cir. 1998) (noting claim presents a mixed question of law and fact reviewed de novo).

[70] *See also United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) (declining review); *United States v. Ross*, 206 F.3d 896, 899 (9th Cir. 2000) (noting when direct review is permissible).

Arave, 646 F.3d 605, 608 (9th Cir. 2011) (habeas). "An exception to this general rule applies where 'counsel is burdened by an actual conflict of interest.' In such cases, where it is often 'difficult to measure the precise effect on the defense of representation corrupted by conflicting interests,' the Supreme Court has held that prejudice is presumed. *Walter-Eze*, 869 F.3d at 900 (quoting *Strickland*, 466 U.S. at 692).

The district court's findings of fact are reviewed for clear error. *See Hernandez v. Chappell*, 923 F.3d 544, 549 (9th Cir. 2019) (as amended); *Leavitt*, 646 F.3d at 608; *United States v. Alvarez-Tautimez*, 160 F.3d 573, 575 (9th Cir. 1998).

The district court's decision not to conduct an evidentiary hearing on an ineffective assistance of counsel claim is reviewed for an abuse of discretion. *See Noguera v. Davis*, 5 F.4th 1020, 1056 (9th Cir. 2021) (§ 2254) (concluding the district court's grant of habeas relief without an evidentiary hearing on ineffective assistance of counsel claim was not an abuse of its discretion); *Djerf v. Ryan*, 931 F.3d 870, 887 (9th Cir. 2019) (holding the state court reasonably concluded that sentencing counsel was not ineffective, and the district court did not abuse its discretion by denying defendant's request for an evidentiary hearing on that claim); *Stankewitz v. Woodford*, 365 F.3d 706, 714 (9th Cir. 2004);[71] *see also Hovey v. Ayers*, 458 F.3d 892, 910 (9th Cir. 2006) (refusing expert witnesses during evidentiary hearing).

36. *Jewell* Instruction

The court "review[s] the [district court's] decision to give a deliberate ignorance instruction—also known as *Jewell* instruction, after *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc)—for abuse of discretion." *United States v. Walter-Eze*, 869 F.3d 891, 908 (9th Cir. 2017) (citing *United States v. Heredia*, 483 F.3d 913, 922 (9th Cir. 2007)).

See II. Criminal Proceedings, C. Trial Decisions in Criminal Cases, 41. Jury Instructions, b. Adequacy of Instructions & j. *Jewell* Instruction.

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[71] *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (§ 2255); *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158–59 (9th Cir. 2000) (habeas).

37. Judge Conduct

"A federal judge has broad discretion in supervising trials, and his or her behavior during trial justifies reversal only if [he or she] abuses that discretion." *United States v. Laurins*, 857 F.2d 529, 537 (9th Cir. 1988) (citations omitted).[72] Allegations of judicial misconduct are reviewed for plain error when a defendant fails to object at trial. *See United States v. Morgan*, 376 F.3d 1002, 1007 (9th Cir. 2004); *United States v. Springer*, 51 F.3d 861, 864 n.1 (9th Cir. 1995).

A district court's decision whether to grant a motion for recusal is reviewed for an abuse of discretion. *See United States v. McChesney*, 871 F.3d 801, 807–08 (9th Cir. 2017) (no abuse of discretion by denying recusal motion); *United States v. Sutcliffe*, 505 F.3d 944, 957–58 (9th Cir. 2007); *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002).[73] When recusal is not raised below, the allegation of judicial bias is reviewed for plain error. *See United States v. Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991).

38. Juror Misconduct

The standard of review of a trial court's decisions regarding jury incidents is abuse of discretion. *See United States v. Simtob*, 485 F.3d 1058, 1064 (9th Cir. 2007); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1081–82 (9th Cir. 2004) (noting "extremely deferential standard").[74] The district court has considerable discretion in determining whether to hold an investigative hearing on allegations of jury misconduct or bias and in defining its nature and extent. *See United States v. Olano*, 62 F.3d 1180, 1192 (9th Cir. 1995). "[R]eview ultimately

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[72] *See also United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) (whether to impose security measures during trial); *United States v. Morgan*, 376 F.3d 1002, 1006–07 (9th Cir. 2004) (questioning of witness).

[73] *See also United States v. Silver*, 245 F.3d 1075, 1078 (9th Cir. 2001); *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000); *United States v. Eshkol*, 108 F.3d 1025, 1030 (9th Cir. 1997); *see also United States v. Rogers*, 119 F.3d 1377, 1380 (9th Cir. 1997) (motion to disqualify).

[74] *See also United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007); *United States v. Shryock*, 342 F.3d 948, 973 (9th Cir. 2003); *United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002); *United States v. Beard*, 161 F.3d 1190, 1194 (9th Cir. 1998).

is limited to determining whether the district court, in view of all the circumstances, so abused its discretion that [the defendant] must be deemed to have been deprived of his Fifth Amendment due-process or Sixth Amendment impartial-jury guarantees." *Id.* (internal quotation omitted). The presence of a biased juror cannot be harmless; the error requires a new trial without the showing of prejudice. *See Simtob*, 485 F.3d at 1064; *United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002); *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998) (en banc). Note in *United States v. Mitchell*, 568 F.3d 1147, 1150 (9th Cir. 2009), the court recognized there was an ambiguity and/or conflict with regard to whether plain error review is appropriate for unpreserved claims of juror bias, but declined to resolve the issue.

A district court's decision to replace a juror with an alternate is reviewed for an abuse of discretion. *See United States v. Alexander*, 48 F.3d 1477, 1485 (9th Cir. 1995). The trial court's decision to excuse a juror after deliberations have commenced is also reviewed for abuse of discretion. *See Smith v. City & Cty. of Honolulu*, 887 F.3d 944, 953 (9th Cir. 2018); *United States v. Christensen*, 828 F.3d 763, 806 (9th Cir. 2015); *United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007).[75] Deference is paid to the trial judge, since the trial judge is uniquely qualified to appraise the probable effect of misconduct upon the jury, such as the materiality of extraneous material and its prejudicial nature. *See United States v. Madrid*, 842 F.2d 1090, 1092 (9th Cir. 1988);[76] *but see United States v. Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999) (noting district court's discretion is not unbounded).

A district court's decision to excuse a juror for just cause is reviewed for an abuse of discretion. *See United States v. Lindsey*, 634 F.3d 541, 553 (9th Cir. 2011); *United States v. Mitchell*, 502 F.3d 931, 955 (9th Cir. 2007); *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000) (noting also that implied bias presents a mixed issue of law and fact reviewed de novo). The court's decision not

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[75] *See also United States v. Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999); *United States v. Mullins*, 992 F.2d 1472, 1478 (9th Cir. 1993); *United States v. Egbuniwe*, 969 F.2d 757, 760 (9th Cir. 1992).

[76] *See also United States v. LaFleur*, 971 F.2d 200, 206 (9th Cir. 1991) (same standard); *United States v. Hernandez*, 952 F.2d 1110, 1117 (9th Cir. 1991) (review is independent but reviewing court must "remain mindful of the trial court's conclusions").

to excuse a juror is also reviewed for an abuse of discretion. *See Long*, 301 F.3d at 1101;[77] *see also United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000) (reversing Ninth Circuit's ruling that the erroneous refusal to excuse a juror for cause that forces defendant to use peremptory challenge to exclude juror violates defendant's Fifth Amendment due process rights and requires automatic reversal).

A district court's order granting a new trial based on juror misconduct is reviewed for an abuse of discretion. *See United States v. Edmond*, 43 F.3d 472, 473 (9th Cir. 1994); *but see United States v. Keating*, 147 F.3d 895, 899 (9th Cir. 1998) (grant of motion for new trial based on jurors' improper exposure to extrinsic evidence is subject to "independent" review). The court's denial of a motion for a new trial based on allegations of juror misconduct is also reviewed for an abuse of discretion. *See Smith*, 887 F.3d at 953; *Christensen*, 828 F.3d at 806.[78] The district court's findings of fact relating to the issue of juror misconduct are reviewed for clear error. *See Christensen*, 828 F.3d at 806; *Long*, 301 F.3d at 1101.[79]

In habeas, whether an instance of juror misconduct was prejudicial to the defendant presents a mixed question of law and fact reviewed de novo. *See Hamilton v. Ayers*, 583 F.3d 1100, 1106–07 (9th Cir. 2009); *see also Caliendo v. Warden*, 365 F.3d 691, 694 (9th Cir. 2004) (noting issues of juror misconduct are reviewed de novo).

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[77] *United States v. Miguel*, 111 F.3d 666, 673 (9th Cir. 1997); *United States v. Alexander*, 48 F.3d 1477, 1484–85 (9th Cir. 1995).

[78] *See also United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002); *United States v. Saya*, 247 F.3d 929, 935 (9th Cir. 2001) (as amended); *but see United States v. Lopez-Martinez*, 543 F.3d 509 n.4 (9th Cir. 2008) (stating, "the denial of a motion for a new trial is typically reviewed for abuse of discretion, [however] where the motion is based on juror misconduct … review is *de novo*."); *United States v. Keating*, 147 F.3d 895, 899 (9th Cir. 1998) (acknowledging abuse of discretion review, but noting that "where jurors are exposed to extrinsic evidence, however, our review 'is an independent one'" when considering a new trial motion).

[79] *See also United States v. Elias*, 269 F.3d 1003, 1020 (9th Cir. 2001) (as amended); *but see United States v. Martinez-Martinez*, 369 F.3d 1076, 1082 (9th Cir. 2004) (reviewing findings for manifest error or abuse of discretion).

39. Jury Examination of Evidence

The trial court's decision to allow a jury to have exhibits or transcripts during deliberations is reviewed for an abuse of discretion. *See United States v. Chadwell*, 798 F.3d 910, 914 (9th Cir. 2015) (noting that the decision to send properly admitted exhibits to the jury room during deliberations is within the discretion of the trial court); *United States v. Richard*, 504 F.3d 1109, 1113–16 (9th Cir. 2007) (noting that court's discretion is not boundless and listing factors).[80] The court's decision to replay tape-recorded conversation evidence to the jury is reviewed for an abuse of discretion. *See United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999). The trial court's decision to reread testimony to the jury or permit the jury to have excerpts of the testimony is also reviewed for an abuse of discretion. *See United States v. Stinson*, 647 F.3d 1196, 1217 (9th Cir. 2011); *Richard*, 504 F.3d at 1113.[81]

A trial court's finding that transcripts are accurate and complete cannot be disturbed unless clearly erroneous. *See United States v. Carrillo*, 902 F.2d 1405, 1410 (9th Cir. 1990). A court's decision to allow a jury to have English translations is reviewed for an abuse of discretion. *See United States v. Abonce-Barrera*, 257 F.3d 959, 963 (9th Cir. 2001).[82]

The erroneous inclusion of audio tapes allowed in the jury room that were not admitted into evidence is constitutional error subject to the harmless error standard. *See Eslaminia v. White*, 136 F.3d 1234, 1237 & n.1 (9th Cir. 1998) (habeas).[83]

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[80] *See also United States v. Montgomery*, 150 F.3d 983, 999 (9th Cir. 1998); *United States v. Tisor*, 96 F.3d 370, 377 (9th Cir. 1996) (during trial); *United States v. Fuentes-Montijo*, 68 F.3d 352, 354 (9th Cir. 1995).

[81] *See also Montgomery*, 150 F.3d at 999; *United States v. Hernandez*, 27 F.3d 1403, 1408 (9th Cir. 1994); *United States v. Guess*, 745 F.2d 1286, 1288 (9th Cir. 1984) ("[I]t is within the trial court's discretion to replay tapes or have the court reporter reread portions of testimony at the jury's request during deliberations.").

[82] *See also United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999).

[83] *But see United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996), *amended by* 140 F.3d 1244 (9th Cir. 1998) (allowing unplayed audio tapes into the

The trial court decision whether to allow jurors to take notes during trial is reviewed for an abuse of discretion. *See United States v. Baker*, 10 F.3d 1374, 1403 (9th Cir. 1993), *overruled in part on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), *overruled in part by United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (en banc).

The denial of a motion for mistrial based on a contention that the jury was improperly exposed to extrinsic evidence is reviewed de novo. *See United States v. Prime*, 431 F.3d 1147, 1157 (9th Cir. 2005) (noting "independent review").

40. Jury Inquiries

a. District Court's Response

A district court's response to a jury's inquiry is reviewed for an abuse of discretion. *See United States v. Humphries*, 728 F.3d 1028, 1031 (9th Cir. 2013); *United States v. Verduzco*, 373 F.3d 1022, 1030 n.3 (9th Cir. 2004); *United States v. Romero-Avila*, 210 F.3d 1017, 1024 (9th Cir. 2000) (explaining abuse of discretion standard). Whether the district court's response correctly states the law or violates due process is reviewed de novo. *Verduzco*, 373 F.3d at 1031. Where there is no objection to the district court's response to the jury question, the issue is reviewed for plain error. *See United States v. Anekwu*, 695 F.3d 967, 986 (9th Cir. 2012). "When a trial court responds to jury questions every effort must be undertaken to avoid influencing or coercing a jury to reach one verdict over another." *United States v. Alvarez-Ulloa*, 784 F.3d 558, 569 (9th Cir. 2015) (internal quotation marks and citation omitted).

b. Supplemental Instructions

The court's decision whether to give supplemental instructions is reviewed for an abuse of discretion. *See United States v. Alvarez-Ulloa*, 784 F.3d 558, 567–68 (9th Cir. 2015); *Avila v. Los Angeles Police Dep't*, 758 F.3d 1096, 1104 (9th Cir. 2014) (no abuse of discretion in declining request for supplemental instructions); *United States v. McIver*, 186 F.3d 1119, 1130 (9th Cir. 1999), *overruled on other grounds as recognized by United States v. Pineda-Moreno*, 688 F.3d 1087, 1091 (9th Cir. 2012); *United States v. Solomon*, 825 F.2d 1292, 1295

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jury room is structural error); *see also United States v. Keating*, 147 F.3d 895, 899 (9th Cir. 1998) (grant of motion for new trial based on jurors' improper exposure to extrinsic evidence is subject to "independent" review).

(9th Cir. 1987) ("[N]ecessity, extent and character of supplemental instructions lies within the discretion of the trial court."). When defendant does not challenge the supplemental instruction or fails to state distinctly the grounds for the objection, review is limited to plain error. *See United States v. Banks*, 514 F.3d 959, 974 (9th Cir. 2008).

Whether supplemental jury instructions correctly state the elements of an offense is a question of law reviewed de novo. *See United States v. Verduzco*, 373 F.3d 1022, 1030 n.3 (9th Cir. 2004); *United States v. Si*, 343 F.3d 1116, 1126 (9th Cir. 2003).

Whether the district court's supplemental instruction impermissibly coerced the jury's verdict is also reviewed de novo. *See Alvarez-Ulloa*, 784 F.3d at 567.

41. Jury Instructions

a. Formulation of Instructions

A district court's formulation of jury instructions is reviewed for an abuse of discretion. *See United States v. Rodriguez*, 971 F.3d 1005, 1017 (9th Cir. 2020); *United States v. Chi*, 936 F.3d 888, 893 (9th Cir.), *amended sub nom. United States v. Heon-Cheol Chi*, 942 F.3d 1159 (9th Cir. 2019); *United States v. Kleinman*, 880 F.3d 1020, 1031 (9th Cir. 2017) (as amended January 22, 2018); *United States v. Liew*, 856 F.3d 585, 595–96 (9th Cir. 2017); *United States v. Kaplan*, 836 F.3d 1199, 1214 (9th Cir. 2016) (wording of jury instructions); *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010); *United States v. Dearing*, 504 F.3d 897, 900 (9th Cir. 2007); *United States v. Garcia-Rivera*, 353 F.3d 788, 791–92 (9th Cir. 2003); *United States v. Franklin*, 321 F.3d 1231, 1240–41 (9th Cir. 2003) (considering "'the instructions as a whole, and in context'"); *United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir. 2000) ("The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented." (internal quotation marks and citation omitted)).[84] "The 'relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation.' " *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010)

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[84] *See also United States v. Tatoyan*, 474 F.3d 1174, 1179 (9th Cir. 2007); *United States v. Si*, 343 F.3d 1116, 1126 (9th Cir. 2003) (supplemental instructions); *United States v. Stapleton*, 293 F.3d 1111, 1114 (9th Cir. 2002); *United States v. Amlani*, 111 F.3d 705, 716 (9th Cir. 1997).

(quoting *United States v. Frega*, 179 F.3d 793, 806 n.16 (9th Cir. 1999)). *See also Liew*, 856 F.3d at 596.

b. Adequacy of Instructions

The court reviews de novo whether jury instructions omit or misstate elements of a statutory crime. *See United States v. Collazo*, 984 F.3d 1308, 1318 (9th Cir. 2021) (as amended); *United States v. Miller*, 953 F.3d 1095, 1101 (9th Cir. 2020) (concluding instruction was erroneous), *cert. denied*, 141 S. Ct. 1085 (2021); *United States v. Chi*, 936 F.3d 888, 893 (9th Cir.), *amended sub nom. United States v. Heon-Cheol Chi*, 942 F.3d 1159 (9th Cir. 2019); *United States v. Benamor*, 937 F.3d 1182, 1186 (9th Cir. 2019); *United States v. Kaplan*, 836 F.3d 1199, 1214 (9th Cir. 2016); *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010).[85]

Whether jury instructions adequately cover a defendant's proffered defense or theory of the case is also reviewed de novo. *See United States v. Chi*, 936 F.3d 888, 893 (9th Cir.), *amended sub nom. United States v. Heon-Cheol Chi*, 942 F.3d 1159 (9th Cir. 2019); *United States v. Kleinman*, 880 F.3d 1020, 1039 (9th Cir. 2017) (as amended January 22, 2018); *United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017); *United States v. Morsette*, 622 F.3d 1200, 1201 (9th Cir. 2010) (per curiam).[86] "The relevant inquiry is whether the instructions as a whole are

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[85] *See also United States v. Cherer*, 513 F.3d 1150, 1155 (9th Cir. 2008) ("[T]he relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation."); *Stapleton*, 293 F.3d at 1114; *United States v. Henderson*, 243 F.3d 1168, 1170 (9th Cir. 2001) (If the instructions misstate the offense, "we reverse a defendant's conviction unless the misstatement was harmless beyond a reasonable doubt."); *United States v. Romo-Romo*, 246 F.3d 1272, 1274 (9th Cir. 2001) ("Whether a jury instruction misstates elements of a statutory crime is a question of law reviewed de novo."); *United States v. Knapp*, 120 F.3d 928, 930 (9th Cir. 1997); *see also United States v. Vallejo*, 237 F.3d 1008, 1024 (9th Cir. 2001), *amended by* 246 F.3d 1150 (9th Cir. 2001) (If "the instructions 'fairly and adequately covered the elements of the offense,' we review the instruction's precise formulation for abuse of discretion.'"); *United States v. Gergen*, 172 F.3d 719, 724 (9th Cir. 1999) (supplemental jury instruction).

[86] *See also United States v. Solorzano-Rivera*, 368 F.3d 1073, 1076 (9th Cir. 2004); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1083 (9th Cir. 2004); *United States v. Leyva*, 282 F.3d 623, 625 (9th Cir. 2002) (reviewing rejected

misleading or inadequate to guide the jury's deliberation." *Liew*, 856 F.3d at 596 (internal quotation marks and citation omitted).

c. Denial of Requested Instruction

> When reviewing a district court's denial of a defendant's requested jury instruction, the standard of review we use depends on the specific issue we are reviewing, and "reflect[s] the relative competencies and functions of the appellate and district courts." *See United States v. Heredia*, 483 F.3d 913, 921 (9th Cir. 2007) (en banc). When the parties dispute the sufficiency of a proposed jury instruction's factual foundation, we review for abuse of discretion. *See United States v. Daane*, 475 F.3d 1114, 1119 (9th Cir. 2007); *United States v. Hairston*, 64 F.3d 491, 493 (9th Cir. 1995). However, when the parties dispute a legal determination by the trial court, we review de novo. *See United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004); *United States v. Wiseman*, 274 F.3d 1235, 1240 (9th Cir. 2001); *Hairston*, 64 F.3d at 493.

United States v. Perdomo-Espana, 522 F.3d 983, 986 (9th Cir. 2008) (reviewing "de novo the legal question whether the necessity defense requires an objective inquiry."). *See also United States v. Somsamouth*, 352 F.3d 1271, 1274 (9th Cir. 2003); *United States v. Hairston*, 64 F.3d 491, 493–94 (9th Cir. 1995) (citing *United States v. Duran*, 59 F.3d 938, 941 (9th Cir. 1995)).

The district court's denial of a requested jury instruction due to insufficient evidence to support the instruction is reviewed for abuse of discretion. *United States v. Ocampo-Estrada*, 873 F.3d 661, 665 (9th Cir. 2017); *Perdomo-Espana*, 522 F.3d at 986 (reviewing for abuse of discretion whether there was a sufficient factual basis for proffered jury instruction). The denial of a defendant's jury instruction due to an inadequate factual basis is reviewed for an abuse of discretion. *See United States v. Daane*, 475 F.3d 1114, 1119 (9th Cir. 2007); *United States v. Wills*, 88 F.3d 704, 715 (9th Cir. 1996) (noting clarification of standard); *see also United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir.

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instruction); *see also United States v. Iverson*, 162 F.3d 1015, 1022 & n.5 (9th Cir. 1998) (discussing preservation of issue); *United States v. Amlani*, 111 F.3d 705, 716 n.5 (9th Cir. 1997) (distinguishing allegation that instructions were potentially misleading).

2011). Denial of a jury instruction based on a question of law is reviewed de novo. *See United States v. Castagana*, 604 F.3d 1160, 1163 n.2 (9th Cir. 2010); *United States v. Wiseman*, 274 F.3d 1235, 1240 (9th Cir. 2001); *United States v. Eshkol*, 108 F.3d1025, 1028 (9th Cir. 1997).

A district court's refusal to give a lesser-included offense involves two questions. The first question – whether the offense for which instruction is sought is a lesser-included offense of the charged offense – is a legal question subject to de novo review. Second, the district court considers whether the record contains evidence that would support conviction of the lesser offense – an inquiry reviewed for abuse of discretion. *See United States v. Rivera-Alonzo*, 584 F.3d 829, 832 (9th Cir. 2009); *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007) (clarifying that there is no split in Ninth Circuit authority).[87] If the defendant did not request the lesser included offense instruction or does not object to its omission, review is only for plain error. *See United States v. Anderson*, 201 F.3d 1145, 1148 (9th Cir. 2000).

d. Special Verdict Forms

The district court's decision to use a special verdict form over a defendant's objection is reviewed for an abuse of discretion. *See United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998). The formulation of a special verdict form is reviewed for an abuse of discretion. *See United States v. Stinson*, 647 F.3d 1196, 1218 (9th Cir. 2011). Any error is subject to harmless error review. *See United States v. Perez*, 129 F.3d 1340, 1342 (9th Cir. 1997). When a defendant does not object, review is for plain error. *See United States v. Vasquez-Velasco*, 15 F.3d 833, 847 (9th Cir. 1994). In some instances, however, when the information sought in a special verdict is relevant to the sentence imposed, the government has a duty to request a special verdict, and review of the sentence imposed is reviewed de novo. *See United States v. Garcia*, 37 F.3d 1359, 1370 (9th Cir. 1994), *abrogated on other grounds by United States v. Jackson*, 167 F.3d 1280 (9th Cir.

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[87] *See also United States v. Naghani*, 361 F.3d 1255, 1262 (9th Cir. 2004) ("A lesser included offense instruction is proper where (1) the offense on which the instruction is sought is a lesser included offense in the offense charged and (2) the jury could rationally conclude that the defendant was guilty of the lesser but not of the greater offense. We review the first step de novo, and the second for abuse of discretion.").

1999). "Reconciliation of the special verdict form" is reviewed de novo. *Flores v. City of Westminster*, 873 F.3d 739, 756 (9th Cir. 2017).

e. Due Process Challenges

Whether a jury instruction violated due process is reviewed de novo. *See United States v. Mikhel*, 889 F.3d 1003, 1056 (9th Cir. 2018); *United States v. Lopez*, 500 F.3d 840, 847 (9th Cir. 2007); *United States v. Trevino*, 419 F.3d 896, 902 (9th Cir. 2005). For example, whether an instruction violates due process by creating an unconstitutional presumption or inference is reviewed de novo. *See Tapia v. Roe*, 189 F.3d 1052, 1056 (9th Cir. 1999) (habeas); *United States v. Warren*, 25 F.3d 890, 897 (9th Cir. 1994). Whether a constitutionally deficient jury instruction is harmless error is reviewed de novo. *See Tapia*, 189 F.3d at 1055–56.

f. Procedure for Reviewing Instructions

In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation. *See United States v. Tuan Ngoc Luong*, 965 F.3d 973, 986 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 336 (2021); *United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017); *United States v. Houston*, 648 F.3d 806, 818 (9th Cir. 2011); *United States v. Reed*, 575 F.3d 900, 926 (9th Cir. 2009); *United States v. Cherer*, 513 F.3d 1150, 1154 (9th Cir. 2008); *United States v. Tatoyan*, 474 F.3d 1174, 1179–80 (9th Cir. 2007); *United States v. Garcia-Rivera*, 353 F.3d 788, 792 (9th Cir. 2003); *United States v. Dixon*, 201 F.3d 1223, 1230 (9th Cir. 2000); *United States v. Knapp*, 120 F.3d 928, 930 (9th Cir. 1997). The district court has substantial latitude so long as its instructions fairly and adequately cover the issues presented. *See Tuan Ngoc Luong*, 965 F.3d at 986; *Houston*, 648 F.3d at 818; *Cherer*, 513 F.3d at 1154.[88] A single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *See Houston*, 648 F.3d at 818; *Reed*, 575 F.3d at 926; *Ho v. Carey*, 332 F.3d 587, 593 (9th Cir. 2003) (granting habeas writ based on jury instruction error); *Dixon*, 201 F.3d at 1230.

Jury instructions, even if imperfect, are not a basis for overturning a conviction absent a showing that they prejudiced the defendant. *See United States*

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[88] *See also United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir. 2000); *United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998).

v. Christensen, 828 F.3d 763, 786 (9th Cir. 2015); *United States v. de Cruz*, 82 F.3d 856, 864 (9th Cir. 1996). *See also Tuan Ngoc Luong*, 965 F.3d at 986 ("Jury instructions only require reversal where they prejudiced the defendant.").

g. Harmless Error and Plain Error

A district court's failure to instruct the jury on an element of a crime may be harmless if the appellate court concludes that it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *United States v. Cherer*, 513 F.3d 1150, 1155 (9th Cir. 2008); *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1197 (9th Cir. 2000) (en banc); *see also United States v. Bachmeier*, 8 F.4th 1059, 1065 (9th Cir. 2021) (holding that although the district court erred in instructing the jury, that error was harmless beyond a reasonable doubt).

When there is no objection to the jury instructions at the time of trial, the court of appeals will review only for plain error. *See United States v. Conti*, 804 F.3d 977, 981 (9th Cir. 2015); *Jones v. United States*, 527 U.S. 373, 388 (1999); *United States v. Bhagat*, 436 F.3d 1140, 1147 (9th Cir. 2006); *United States v. Recio*, 371 F.3d 1093, 1099–1102 (9th Cir. 2004) (explaining when review is for plain error or harmless error); *United States v. Franklin*, 321 F.3d 1231, 1240 (9th Cir. 2003). "Under plain error review, [the appellate court] may reverse a district court's ruling only if (1) there was error, (2) the error was plain, (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Becerra*, 939 F.3d 995, 999 (9th Cir. 2019) (reviewing the failure to provide an oral jury charge for plain error where defendant did not object in the district court). *See also Conti*, 804 F.3d at 981; *United States v Houston*, 648 F.3d 806, 818 (9th Cir. 2011); *Franklin*, 321 F.3d at 1240.[89]

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[89] *United States v. Garcia-Guizar*, 160 F.3d 511, 516, 522–23 (9th Cir. 1998) (noting plain error is a highly prejudicial error affecting substantial rights); *United States v. Klinger*, 128 F.3d 705, 712 (9th Cir. 1997) (noting plain error is "'error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection'"); *United States v. Lacy*, 119 F.3d 742, 749 (9th Cir. 1997) (noting plain error does not require reversal unless the error seriously affected the fairness, integrity, or public reputation of the judicial proceeding).

h. Invited Error

"The doctrine of invited error prevents a defendant from complaining of an error that was his own fault. … Under the doctrine, an error is waived and therefore unreviewable when the defendant has both [1] invited the error, and [2] relinquished a known right." *United States v. Myers*, 804 F.3d 1246, 1254 (9th Cir. 2015) (as amended).

If the district court gives jury instructions requested by the defendant, those instructions are nonreviewable under the invited error doctrine. *See United States v. Hui Hsiung*, 778 F.3d 738, 747 (9th Cir. 2015) (as amended); *United States v. Burt*, 143 F.3d 1215, 1217 (9th Cir. 1998); *United States v. Perez*, 116 F.3d 840, 844 (9th Cir. 1997) (en banc). In *Perez*, however, this court limited that rule to situations where the defendant has "waived" his rights in contrast to "forfeited." *See Burt*, 143 F.3d at 1217; *Perez*, 116 F.3d at 845, 846. Thus, where a defendant submits flawed instructions, but neither defendant, government, nor the court is aware of the mistake, the error is not waived, but merely forfeited, and may be reviewed under the plain error standard. *See United States v. Kuzma*, 967 F.3d 959, 972 (9th Cir. 2020) (stating that "an error induced or caused by the defendant remains subject to plain error review unless, in inviting the error, the defendant intentionally relinquished or abandoned a known right." (citation omitted), *cert. denied*, 141 S. Ct. 939 (2020); *Burt*, 143 F.3d at 1217–18; *Perez*, 116 F.3d at 846; *see also United States v. Johnson*, 132 F.3d 1279, 1284–85 (9th Cir. 1997) (applying plain error in same circumstances). When defendant rejects an instruction suggested by judge at trial, invited error does not preclude review of that omitted instruction. *See United States v. Alferahin*, 433 F.3d 1148, 1154 n.2 (9th Cir. 2006).

i. *Allen* Charges

The trial court's decision to instruct the jury with an *Allen* charge is reviewed for an abuse of discretion. *See United States v. Berger*, 473 F.3d 1080, 1089 (9th Cir. 2007).[90] The court's delivery of an *Allen* charge must be upheld unless it is clear from the record that the charge had an impermissibly coercive effect on the jury. *See Berger*, 473 F.3d 1089; *United States v. Steele*, 298 F.3d

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[90] *See also United States v. Steele*, 298F.3d 906, 909 (9th Cir. 2002); *United States v. Daas*, 198 F.3d 1167, 1179 (9th Cir. 1999) (modified charge); *United States v. Nelson*, 137 F.3d 1094, 1109 (9th Cir. 1998).

906, 909–10 (9th Cir. 2002); *United States v. Daas*, 198 F.3d 1167, 1179 (9th Cir. 1999) (modified charge); *United States v. Nelson*, 137 F.3d 1094, 1109 (9th Cir. 1998). Note, however, that whether a judge has improperly coerced a jury's verdict is a mixed question of law and fact reviewed de novo. *See Berger*, 473 F.3d at 1089; *see also United States v. Della Porta*, 653 F.3d 1043, 1047 (9th Cir. 2011).

j. *Jewell* Instruction

The court "review[s] the [district court's] decision to give a deliberate ignorance instruction—also known as *Jewell* instruction, after *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc)—for abuse of discretion." *United States v. Walter-Eze*, 869 F.3d 891, 908 (9th Cir. 2017) (citing *United States v. Heredia*, 483 F.3d 913, 922 (9th Cir. 2007)).

42. Jury Selection

a. Challenges for Cause

i. Voir Dire/Peremptory Challenges

A district court's voir dire procedures are reviewed for an abuse of discretion, and its findings regarding juror impartiality is for manifest error. *See United States v. Padilla-Mendoza*, 157 F.3d 730, 733 (9th Cir. 1998); *United States v. Warren*, 25 F.3d 890, 894 (9th Cir. 1994) ("The district court's selection of procedures for the exercise of peremptory challenges is reviewed for an abuse of discretion.").[91] "Although [the court] review[s] the district court's conduct of voir dire for abuse of discretion, … , questions of law that arise during the course of voir dire are reviewed de novo." *United States v. Reyes*, 764 F.3d 1184, 1188 (9th Cir. 2014) (citations omitted). For example, whether a defendant was deprived of a fair trial by the nature of the voir dire is a legal question reviewed de novo. *See United States v. Milner*, 962 F.2d 908, 911 (9th Cir. 1992).

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[91] *See also United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002); *United States v. Howell*, 231 F.3d 615, 627 (9th Cir. 2000); *United States v. Sarkisian*, 197 F.3d 966, 978 (9th Cir. 1999) (reviewing for an abuse of discretion the court's refusal to ask requested voir dire questions); *see also United States v. Sherwood*, 98F.3d 402, 407 (9th Cir. 1996) (defendant has a right to be present at voir dire sidebars, but waives the right if not expressed).

The district court has considerable control over the administration of peremptory challenges and the scope of questioning permitted during voir dire. *See United States v Toomey*, 764 F.2d 678 (9th Cir. 1985). The sufficiency of voir dire questions asked by the district court is also reviewed for an abuse of discretion, *see United States v. Payne*, 944 F.2d 1458, 1474 (9th Cir. 1991), as is the court's refusal to ask defendant's requested voir dire questions, *see United States v. Sarkisian*, 197 F.3d 966, 978 (9th Cir. 1999).

Where the district court erroneously denies a peremptory challenge, the court applies "the standard of review that is appropriate under the circumstances of the district court's error." *United States v. Lindsey*, 634 F.3d 541, 550 (9th Cir. 2011) (reviewing for plain error where defendant failed to object to district judge's miscounting of peremptory challenges).[92] The court may also abuse its discretion by failing to ask questions reasonably sufficient to test jurors for bias or partiality. *See United States v. Payne*, 944 F.2d 1458, 1474 (9th Cir. 1991).

Where there is no objection to voir dire, review is limited to plain error. *See United States v. Mitchell*, 502 F.3d 931, 955 (9th Cir. 2007); *United States v. Mendoza-Reyes*, 331 F.3d 1119, 1121 (9th Cir. 2003) (per curiam). The district court's failure to sua sponte conduct supplemental voir dire is reviewed for plain error. *See United States v. Gay*, 967 F.2d 322, 325 (9th Cir. 1992).

The number of peremptory challenges permitted by the Federal Rules of Criminal Procedure presents a question of law reviewed de novo. *See United States v. Machado*, 195 F.3d 454, 456 (9th Cir. 1999).

ii. Jury Misconduct

The district court's decisions regarding incidents of jury misconduct are reviewed for an abuse of discretion. *See United States v. Simtob*, 485 F.3d 1058, 1064 (9th Cir. 2007); *United States v. Shryock*, 342 F.3d 948, 973 (9th Cir. 2003).

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[92] *See also United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000) (reversing Ninth Circuit's ruling that the erroneous refusal to excuse a juror for cause that forces defendant to use peremptory challenge to exclude juror violates defendant's Fifth Amendment due process rights and requires automatic reversal).

Thus, the district court's decision to excuse[93] or to not excuse[94] a juror for just cause is reviewed for an abuse of discretion. The court generally defers to the district court's good cause determinations because the district court is in the best position to evaluate the jury's ability to deliberate. *See United States v. Litwin*, 972 F.3d 1155, 1170 (9th Cir. 2020) ("In deference to the district court's superior vantage point, we review the district court's dismissal of a juror during deliberations for abuse of discretion."). Factual findings are reviewed for clear error. *See id.*; *United States v. Christensen*, 828 F.3d 763, 806 (9th Cir. 2015) ("[F]actual findings relating to the issue of juror misconduct are reviewed for clear error.")

"When the defendant has made a timely objection to an error, the harmless error standard generally applies, and the government bears the burden of proving that the error was not prejudicial." *United States v. Beard*, 161 F.3d 1190, 1193 (9th Cir. 1998).

A district court's decision to replace a juror with an alternate is reviewed for an abuse of discretion. *See United States v. Alexander*, 48 F.3d1477, 1485 (9th Cir. 1995); *Beard*, 161 F.3d at 1194–95 (discussing application of harmless error review); *United States v. Gay*, 967 F.2d 322, 325 (9th Cir. 1992).

b. Jury Composition/*Batson* Claims

A challenge to the composition of a jury is reviewed de novo. *See United States v. Torres-Hernandez*, 447 F.3d 699, 703 (9th Cir. 2006); *Thomas v. Borg*, 159 F.3d 1147, 1149 (9th Cir. 1998) (habeas).

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[93] *See United States v. Vartanian*, 476 F.3d 1095, 1098 (9th Cir. 2007); *United States v. Beard*, 161 F.3d 1190, 1193 (9th Cir. 1998); *United States v. McFarland*, 34 F.3d 1508, 1511 (9th Cir. 1994); *see also United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000) (noting also that implied bias presents a mixed issue of law and fact reviewed de novo).

[94] *See United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002) (noting presence of biased jury can never be harmless error); *United States v. Miguel*, 111 F.3d 666, 673 (9th Cir. 1997); *United States v. Alexander*, 48 F.3d 1477, 1484–85 (9th Cir. 1995); *see also United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000) (no constitutional right violated if the defendant uses a peremptory challenge to cure an erroneous refusal by the court to remove the juror for cause).

"The standards of review for rulings on certain aspects of the *Batson* analysis are settled in this circuit." *Tolbert v. Page*, 182 F.3d 677, 680 n.5 (9th Cir. 1999) (explaining standards of review for *Batson* challenges) (en banc). Whether the district court properly applied *Batson* is reviewed de novo. *See United States v. Mikhel*, 889 F.3d 1003, 1028 (9th Cir. 2018) (reviewing de novo where the court improperly applied the three-step framework); *United States v. Herrera-Rivera*, 832 F.3d 1166, 1172 (9th Cir. 2016). "When considering a *Batson* challenge, [the court] review[s] de novo whether a prosecutor's proclaimed reason for exercising a peremptory challenge was an adequate explanation." *United States v. You*, 382 F.3d 958, 967 (9th Cir. 2004) (citation omitted); *see also United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002).

"'A trial court's determination on discriminatory intent is a finding of fact entitled to deference and is reviewed for clear error.'" *You*, 382 F.3d at 967–68; *see also Mikhel*, 889 F.3d 1003, 1028; Tolbert, 182 F.3d at 680 n.5. For example, the determination whether a defendant established a prima facie showing of racial discrimination under *Batson* is reviewed for clear error. *See Steele*, 298 F.3d at 910; *United States v. Hernandez-Herrera*, 273 F.3d 1213, 1218 (9th Cir. 2001). Clear error review also applies to the question whether the defendant has satisfied the ultimate burden of proving purposeful discrimination. *See Paulino v. Harrison*, 542 F.3d 692, 699 (9th Cir. 2008); *Tolbert*, 182 F.3d at 680 n.5.[95]

"[W]hether the challenged juror is a member of a protected class for *Batson* purposes is a question of law reviewed de novo." *Tolbert*, 182 F.3d at 680 n.5.

"Whether the district court was obliged to proceed to step three of the *Batson* process is a legal question we review de novo." *United States v. Alanis*, 335 F.3d 965, 967 n.1 (9th Cir. 2003).

Whether a particular jury satisfies the "representative jury" standard under *Batson* is a question of law reviewed de novo. *See United States v. Bishop*, 959 F.2d 820, 827 (9th Cir. 1992), *overruled on other grounds by United States v. Nevils*, 598 F.3d 1158 (9th Cir. 2010).

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[95] *See also Hernandez v. New York*, 500 U.S. 352, 364–65 (1991); *United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir. 2002) ("The trial court's findings regarding purposeful discrimination in jury selection are entitled to 'great deference' and will not be set aside unless clearly erroneous.") (internal quotation marks omitted).

When defense counsel fails to preserve a *Batson* claim, review is limited to plain error. *See United States v. Contreras-Contreras*, 83 F.3d 1103, 1105 (9th Cir. 1996).

The district court's "remedy" for a *Batson* violation is reviewed for an abuse of discretion. *See United States v. Ramirez-Martinez*, 273 F.3d 903, 910 (9th Cir. 2001), *overruled in part on other grounds*, *United States v. Lopez*, 484 F.3d 1186, 1200 (9th Cir. 2007) (en banc).

See also II. Criminal Proceedings, C. Trial Decisions in Criminal Cases, 5. *Batson* Claims.

c. Anonymous Jury

The district court's decision to empanel an anonymous jury is reviewed for an abuse of discretion. *See United States v. Shryock*, 342 F.3d 948, 970 (9th Cir. 2003) (deciding first impression question). When there is no objection to empaneling an anonymous jury below, the court reviews for plain error. *See United States v. Mikhel*, 889 F.3d 1003, 1031 (9th Cir. 2018).

43. Materiality of a False Statement

In prosecutions under 18 U.S.C. § 1001 (false statements),[96] 26 U.S.C. § 7206 (filing false tax returns),[97] and 18 U.S.C. § 1623 (perjury),[98] and other statutes having the element of materiality, the question of materiality is a mixed question of law and fact to be submitted to the jury. *See United States v. Uchimura*, 125 F.3d 1282, 1284 (9th Cir. 1997) (discussing the leading Supreme Court case on the topic of materiality, *United States v. Gaudin*, 515 U.S. 506, 512 (1995) (stating that "the Supreme Court's reasoning applies with equal potency to every crime of which materiality is an element").[99]

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[96] *See United States v. Gaudin*, 515 U.S. 506, 512, 522–23 (1995); *United States v. King*, 735 F.3d 1098, 1107 (9th Cir. 2013).

[97] *See United States v. Scholl*, 166 F.3d 964, 980 (9th Cir. 1999).

[98] *See Johnson v. United States*, 520 U.S. 461, 465 (1997) (materiality is an element of perjury).

[99] *See also United States v. Alferahin*, 433 F.3d 1148, 1154–56 (9th Cir. 2006) (discussing materiality specific to denaturalization); *United States v. Service*

If materiality is not an element of the crime, however, it need not be submitted to the jury. *See Uchimura*, 125 F.3d at 1284.[100] Whether materiality is an element of a crime is a question of law reviewed de novo. *See United States v. Watkins*, 278 F.3d 961, 964 (9th Cir. 2002).

A district court's error in not charging a jury on the element of materiality is subject to harmless error review. *See Neder v. United States*, 527 U.S. 1, 8–15 (1999) (discussing framework to decide if harmless error review applies); *United States v. Du Bo*, 186 F.3d 1177, 1180 n.2 (9th Cir. 1999) (limiting *Neder* to petite juries, and not grand juries).

Plain error applies when defendant fails to object to a materiality instruction. *See United States v. Johnson*, 297 F.3d 845, 866 (9th Cir. 2002).[101]

44. Opening Statements

A district court's decision to order parties to deliver opening statements before voir dire is reviewed for an abuse of discretion. *See United States v. Goode*, 814 F.2d 1353, 1354–55 (9th Cir. 1987). The court's "broad discretion is to be limited only when a party's rights are somehow prejudiced." *Id*. at 1354. *See also United States v. Marks*, 530 F.3d 799, 807 (9th Cir. 2008) (holding district court acted within its discretion in cutting short defendant's opening statement).

Deli, Inc., 151 F.3d 938, 941 (9th Cir. 1998) (discussing various formulations of materiality).

[100] *See also United States v. Taylor*, 66 F.3d 254, 255 (9th Cir. 1995) (per curiam) (false claims against the United States); *see also United States v. Wells*, 519 U.S. 482, 489–95 (1997) (false statements to federally insured bank).

[101] *See also United States v. Scholl*, 166 F.3d 964, 980–81 (9th Cir. 1999) ("[W]here the defendant failed to object to the materiality error, '[t]o warrant reversal in a case where a *Gaudin*-type error is made, the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.'" (second alternation in original, internal quotation marks omitted)); *United States v. Knapp*, 120 F.3d 928, 932 (9th Cir. 1997); *United States v. Nash*, 115 F.3d 1431, 1437 (9th Cir. 1997).

45. Opinion Evidence

a. Expert Opinion Evidence

i. Admission or Exclusion of Evidence

A district court's decision to admit[102] or exclude[103] evidence is reviewed for an abuse of discretion and will be reversed only if manifestly erroneous. *See United States v. Wells*, 879 F.3d 900, 914 (9th Cir. 2018); *United States v. Gonzales*, 307 F.3d 906, 909 (9th Cir. 2002); *United States v. Finley*, 301 F.3d 1000, 1008 (9th Cir. 2002); *see also United States v. Von Willie*, 59 F.3d 922, 928 (9th Cir. 1995) (noting court has characterized the standard of review in different ways). Pursuant to this standard, the district court's refusal to allow an expert to testify regarding a witness's psychiatric condition, *see United States v. Marsh*, 26 F.3d 1496, 1502 (9th Cir. 1994), and decisions regarding experts on eyewitness

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[102] *See United States v. Valencia-Lopez*, 971 F.3d 891, 897 (9th Cir. 2020) (district court abused its discretion by qualifying Immigration and Customs Enforcement agent as expert, without explicitly finding reliability of expert's proposed testimony); *United States v. Freeman*, 498 F.3d 893, 901 (9th Cir. 2007) (combination lay and expert witness); *United States v. Salcido*, 506 F.3d 729, 732 (9th Cir. 2007); *United States v. Sutcliffe*, 505 F.3d 944, 958–59 (9th Cir. 2007) (not limiting purpose of evidence); *United States v. Hanna*, 293 F.3d1080, 1085 (9th Cir. 2002) (officers as experts); *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000) (customs officer as expert, discussing *Daubert*, *Joiner*, and *Kumho Tire*); *United States v. Gillespie*, 852 F.2d 475, 480 (9th Cir. 1988) (reversing district court's admission of criminal profiler testimony).

[103] *See United States v. Spangler*, 810 F.3d 702, 706 (9th Cir. 2016) (holding district court did not abuse its discretion in excluding forensic accountant's proffered expert testimony); *United States v. Seschillie*, 310 F.3d 1208, 1211–12 (9th Cir. 2002) (shooting expert); *United States v. Johnson*, 297 F.3d 845, 862 (9th Cir. 2002) (sentencing guideline expert); *United States v. Campos*, 217 F.3d 707, 710 (9th Cir. 2000) (polygraph); *United States v. Benavidez-Benavidez*, 217 F.3d 720, 723 (9th Cir. 2000) (polygraph); *United States v. Scholl*, 166 F.3d 964, 971–72 (9th Cir. 1999) (accounting expert); *United States v. Morales*, 108 F.3d 1031, 1034 & n.1 (9th Cir. 1997) (en banc) (reversing court's exclusion of bookkeeping expert, noting review is for an abuse of discretion, not "manifest error").

identification reliability, *see United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994), are both reviewed for an abuse of discretion.

When no objection is made, review is limited to plain error analysis; reversal is mandated only if the district court committed a clear or obvious error that affected substantial rights or was prejudicial. *See United States v. Hayat*, 710 F.3d 875, 900 (9th Cir. 2013); *United States v. Banks*, 514 F.3d 959, 975–76 (9th Cir. 2008) (holding that argument must be same as that presented to the court below); *United States v. Sherwood*, 98 F.3d 402, 408 (9th Cir. 1996); *see also United States v. Varela-Rivera*, 279 F.3d 1174, 1177–78 (9th Cir. 2002) (noting circumstances that preserve defendant's right of review under abuse of discretion standard rather than plain error).

ii. Reliability

"[B]efore admitting expert testimony, the district court must perform a gatekeeping role to ensure that the testimony is both relevant and reliable." *United States v. Valencia-Lopez*, 971 F.3d 891, 897–98 (9th Cir. 2020) (holding that district court abused its discretion by qualifying Immigration and Customs Enforcement Supervisory Special Agent as an expert without explicitly finding reliability of expert's proposed testimony).

The district court has broad discretion in determining whether particular scientific tests are reliable enough to permit expert testimony based upon their results. *See United States v. W.R. Grace*, 504 F.3d 745, 759 (9th Cir. 2007); *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002); *United States v. Gillespie*, 852 F.2d 475, 480 (9th Cir. 1988).

iii. Qualifications

The determination of whether an expert witness has sufficient qualifications to testify is reviewed for an abuse of discretion. *See United States v. Wells*, 879 F.3d 900, 934 (9th Cir. 2018) (as amended) (finding no abuse of discretion in permitting expert to opine and testify where magistrate judge conducted pretrial *Daubert* hearing and determined expert's 20 years' experience as engineer at automobile manufacturer qualified him as an expert); *United States v. Redlightning*, 624 F.3d 1090, 1115 (9th Cir. 2010); *United States v. Abonce-Barrera*, 257 F.3d 959, 964 (9th Cir. 2001); *United States v. Benavidez-Benavidez*, 217 F.3d 720, 723 (9th Cir. 2000); *United States v. Garcia*, 7 F.3d 885, 889 (9th Cir. 1993).

iv. Funds/Expert Appointment Request

> The Criminal Justice Act provides that a person "who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application" and the court, "[u]pon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary," may authorize funding for such expert services. 18 U.S.C. § 3006A(e)(1).

United States v. Turner, 897 F.3d 1084, 1106 (9th Cir. 2018). Deciding whether expert services are "necessary" under the CJA falls within the district court's discretion. *Id.* at 1106–07. "[I]t is an abuse of discretion to deny a request for an expert where (1) reasonably competent counsel would have required the assistance of the requested expert for a paying client, and (2) the defendant 'was prejudiced by lack of expert assistance." *Id*. (holding the district court did not abuse its discretion in denying Turner's request for an expert to perform a mental evaluation in support of a motion for a new trial).

The district court's denial of a request for public funds to hire an expert is reviewed for an abuse of discretion. *See United States v. Pete*, 819 F.3d 1121, 1130 (9th Cir. 2016).[104]

A district court's failure to rule on a motion for appointment of an expert witness is deemed a denial of the motion that is reviewed for an abuse of discretion. *See United States v. Depew*, 210 F.3d 1061, 1065 (9th Cir. 2000).

b. Lay Opinion Testimony

This court reviews for abuse of discretion a district court's admission of lay opinion testimony. *See United States v. Rodriguez*, 971 F.3d 1005, 1016 (9th Cir. 2020); *United States v. Beck*, 418 F.3d 1008, 1013–15 & n.3 (9th Cir. 2005) (holding that "a lay witness's testimony is rationally based within the meaning of Rule 701 where it is 'based upon personal observation and recollection of concrete facts.'").[105]

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[104] *See also United States v. Nelson*, 137 F.3d 1094, 1101 n.2 (9th Cir. 1998); *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996).

[105] *See also United States v. Martinez*, 657 F.3d 811, 818–19 (9th Cir. 2011); *United States v. Matsumaru*, 244 F.3d 1092, 1101 (9th Cir. 2001) (allowing lay

"A defendant who fails to object to lay-opinion testimony … may nevertheless preserve his objection—and trigger abuse-of-discretion review on appeal—if he objects to hearsay, speculation, and lack of foundation, which serves to raise the essence of these concerns." *United States v. Perez*, 962 F.3d 420, 435 n.3 (9th Cir. 2020) (internal quotation marks and citation omitted), *cert. denied sub nom. Iraheta v. United States*, 141 S. Ct. 1443 (2021).

46. Photographs

A district court's ruling on the admission of photographs into evidence is reviewed for an abuse of discretion. *See United States v. Espinoza*, 880 F.3d 506, 511 (9th Cir. 2018); *United States v. Wahchumwah*, 710 F.3d 862, 866 (9th Cir. 2013); *United States v. Pineda-Doval*, 614 F.3d 1019, 1034 (9th Cir. 2010); *United States v. Campbell*, 42 F.3d 1199, 1204 (9th Cir. 1994); *United States v. Chambers*, 918 F.2d 1455, 1462 (9th Cir. 1990).

Permitting lay witness testimony regarding the identity of an individual depicted in a photograph is also reviewed for an abuse of discretion. *See United States v. Henderson*, 241 F.3d 638, 650–51 (9th Cir. 2000).

47. Presence of Defendant

A district court's denial of a defendant's motion to waive his or her presence at trial is reviewed for abuse of discretion. *See United States v. Lumitap*, 111 F.3d 81, 83 (9th Cir. 1997). A district court's decision to conduct a criminal trial in the defendant's absence is reviewed for abuse of discretion. *See United States v. Telles*, 18 F.4th 290, 301 (9th Cir. 2021) (as amended); *United States v. Ornelas*, 828 F.3d 1018, 1021 (9th Cir. 2016).

The district court's factual determination that the defendant was "voluntarily absent" from the proceedings is reviewed for clear error. *Ornelas*, 828 F.3d at 1021; *United States v. Houtchens*, 926 F.2d 824, 826 (9th Cir. 1991).

A defendant's absence from a "critical stage" of the trial is subject to harmless error review. *See United States v. Berger*, 473 F.3d 1080, 1094 (9th Cir. 2007) (noting government's burden to show harmlessness). Plain error applies

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testimony); *United States v. Holmes*, 229 F.3d 782, 788 (9th Cir. 2000) (same); *United States v. Von Willie*, 59 F.3d 922, 929 (9th Cir. 1995) (noting this court has characterized the standard of review in different ways).

when there is no objection. *See United States v. Romero*, 282 F.3d 683, 689 (9th Cir. 2002).

48. Prior Crimes, Wrongs or Acts

The court reviews for abuse of discretion a district court's decision to admit evidence of prior bad acts. *See United States v. Lague*, 971 F.3d 1032, 1037 (9th Cir. 2020) ("other act" evidence), *cert. denied*, 141 S. Ct. 1695 (2021); *United States v. Cox*, 963 F.3d 915, 924 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1281 (2021); *United States v. Ubaldo*, 859 F.3d 690, 704–05 (9th Cir. 2017); *United States v. Mendoza-Prado*, 314 F.3d 1099, 1103 (9th Cir. 2002).

a. Fed. R. Evid. 404(b)

The court reviews de novo whether evidence is other act evidence within the meaning of Fed. R. Evid. 404(b), but the admission of this evidence for abuse of discretion. *See United States v. Carpenter*, 923 F.3d 1172, 1180–81 (9th Cir. 2019); *United States v. Hill*, 953 F.2d 452, 455 (9th Cir. 1991). "Where a district court errs in admitting other act evidence, … review [is] for harmless error." *Carpenter*, 923 F.3d at 1181.

> Under our case law, "[w]hen the [G]overnment offers evidence of prior crimes or bad acts as part of its case in chief, 'it has the burden of first establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of Rule 404(b)[.]' " *United States v. Sims*, 617 F.2d 1371, 1378 (9th Cir. 1980) (quoting *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1108 (9th Cir. 1979)). Second, the Government must show "that the proper relevant evidence is more probative than it is prejudicial to the defendant." *Id*. (quoting *Hernandez-Miranda*, 601 F.2d at 1108). The required probative versus prejudicial balancing is reviewed for abuse of discretion.

United States v. Holiday, 998 F.3d 888, 895 (9th Cir. 2021).

The district court's decision to admit evidence of prior crimes or bad acts pursuant to Fed. R. Evid. 404(b) is reviewed for an abuse of discretion under a four-part test. *See United States v. Lague*, 971 F.3d 1032, 1038 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1695 (2021); *United States v. Cox*, 963 F.3d 915, 924 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1281 (2021); *United States v. Major*, 676 F.3d 803, 807–09 (9th Cir. 2012).

> A district court may admit other act evidence if: (1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged. *See United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012) (citation omitted). The government "has the burden of proving that the evidence meets all of the above requirements."

Lague, 971 F.3d at 1038. *See also Cox*, 963 F.3d at 924; *United States v. Lloyd*, 807 F.3d 1128, 1157 (9th Cir. 2015); *United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012); *United States v. Flores-Blanco*, 623 F.3d 912, 919 (9th Cir. 2010).[106]

Whether specific evidence falls within the scope of Federal Rule of Evidence 404(b) is a question of law reviewed de novo. *See Lague*, 971 F.3d at 1037; *United States v. Smith*, 282 F.3d 758, 768 (9th Cir. 2002). For example, de novo review applies to whether such evidence is directly relevant to the crime charged or relevant only to "other crimes." *See United States v. Rodriguez*, 880 F.3d 1151, 1167 (9th Cir. 2018); *United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999); *United States v. Rrapi*, 175 F.3d 742, 748 (9th Cir. 1999); *United States v. Jackson*, 84 F.3d 1154, 1158–59 (9th Cir. 1996).

De novo review also applies to whether certain conduct constitutes "other crimes." *See United States v. Carpenter*, 923 F.3d 1172, 1180–81 (9th Cir. 2019); *United States v. Serang*, 156 F.3d 910, 915 (9th Cir. 1998); *United States v. Andaverde*, 64 F.3d 1305, 1314 (9th Cir. 1995); *United States v. Kearns*, 61 F.3d 1422, 1427 (9th Cir. 1995); *United States v. Warren*, 25 F.3d 890, 895 (9th Cir. 1994).

In allowing Rule 404(b) evidence, a district court is not required to recite the corresponding Rule 403 balancing analysis; it is enough if the reviewing court can

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[106] *United States v. Rendon-Duarte*, 490 F.3d 1142, 1145 (9th Cir. 2007); *United States v. Plancarte-Alvarez*, 366 F.3d 1058, 1062 (9thCir. 2004); *United States v. Smith*, 282 F.3d 758, 768 (9th Cir. 2002); *United States v. Romero*, 282 F.3d 683, 688 (9th Cir. 2002); *United States v. Carrasco*, 257 F.3d1045, 1048 (9th Cir. 2001); *United States v. Chea*, 231 F.3d 531, 534 (9th Cir. 2000); *United States v. Howell*, 231 F.3d 615, 628 (9th Cir. 2000); *United States v. Hicks*, 217 F.3d 1038, 1046 (9th Cir. 2000).

conclude, based on a review of the record, that the district court considered Rule 403's requirements. *See United States v. Cherer*, 513F.3d 1150, 1159 (9th Cir. 2008).

Where a district court errs in admitting other act evidence, the court reviews for harmless error. *See Carpenter*, 923 F.3d at 1181.

b. Fed. R. Evid. 414

The court reviews the admission of prior acts of child molestation pursuant to Rule 414 for abuse of discretion. *See United States v. Halamek*, 5 F.4th 1081, 1087 (9th Cir. 2021) (citing *United States v. LeMay*, 260 F.3d 1018, 1022 (9th Cir. 2001)).

c. Fed. R. Evid. 608

"Under Rule 608(b), specific instances of a witness's prior conduct *may* be admissible in the discretion of the court for purposes of impeachment in order to show a witness's character for truthfulness or untruthfulness." *United States v. Price*, 566 F.3d 900, 912 (9th Cir. 2009) (internal quotation marks and citation omitted). "Evidentiary rulings admitting evidence of prior criminal activity under Rule 608 are reviewed for an abuse of discretion." *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999).

d. Fed. R. Evid. 609

Admission of prior criminal activity pursuant to Fed. R. Evid. 609 (impeachment) is reviewed for an abuse of discretion under five-factor test. *See United States v. Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir. 2004). This court reviews the district court's interpretation of Rule 609 de novo. *See United States v. Foster*, 227 F.3d 1096, 1099 (9th Cir. 2000).

The court reviews de novo the district court's conclusion that a prior conviction may be used as a sentencing enhancement, *see United v. Gallaher*, 275 F.3d 784, 790 (9th Cir. 2001),[107] and its determination that a defendant is a career offender, *see United States v. Kovac*, 367 F.3d 1116, 1118 (9th Cir. 2004).

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[107] *See also United States v. Walker*, 953 F.3d 577, 578 n.1 (9th Cir. 2020) (reviewing de novo whether prior conviction qualifies as a "violent felony" under the Armed Career Criminal Act), *cert. denied*, 141 S. Ct. 1084 (2021); *United*

49. Privileges

a. Attorney-Client, Doctor-Patient, Marital

> Whether the attorney-client privilege applies to specific documents represents "a mixed question of law and fact which this court reviews independently and without deference to the district court." *United States v. Richey*, 632 F.3d 559, 563 (9th Cir. 2011) (cleaned up). The district court's legal rulings about the scope of the privilege are reviewed de novo. *Id*. So is the district court's choice of the applicable legal standard. *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir. 1985). We review the district court's factual findings for clear error. *Richey*, 632 F.3d at 563.

In re Grand Jury, No. 21-55085, 2021 WL 6750904, at *2 (9th Cir. Jan. 27, 2022) (as amended). *See also United States v. Christensen*, 828 F.3d 763, 798 (9th Cir. 2015) ("[R]ulings on the scope of the privilege, including the crime-fraud exception, involve mixed questions of law and fact and are reviewable de novo, unless the scope of the privilege is clear and the decision made by the district court is essentially factual; in that case only clear error justifies reversal."); *United States v. Gonzalez*, 669 F.3d 974, 977 (9th Cir. 2012) ("A district court's conclusions whether information is protected by attorney-client privilege is a mixed question of law and fact which this court).

An abuse of discretion standard applies to factual findings regarding the applicability of the marital privilege. *See United States v. Murphy*, 65 F.3d 758, 761 (9th Cir. 1995). Legal conclusions regarding the marital communications privilege are reviewed de novo. *See United States v. Fomichev*, 899 F.3d 766, 770 (9th Cir.), *opinion amended on denial of reh'g*, 909 F.3d 1078 (9th Cir. 2018); *United States v. Griffin*, 440 F.3d 1138, 1143–44 (9th Cir. 2006) (discussing marital communications privilege).

De novo review also exists for the scope of the doctor-patient privilege. *See United States v. Romo*, 413 F.3d 1044, 1046 (9th Cir. 2005) (psychotherapist-patient privilege); *United States v. Chase*, 340 F.3d 978, 981 (9th Cir. 2003) (en banc) (patient-doctor privilege).

States v. Phillips, 149 F.3d 1026, 1031 (9th Cir. 1998) (Armed Career Criminal Act); *United States v. Young*, 988 F.2d 1002, 1003 (9th Cir. 1993) (same).

An otherwise applicable privilege may be waived through voluntary disclosure; whether such waiver occurred is a mixed question of fact and law. *See Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 665, 667–68 (9th Cir. 2003) (marital privilege); *United States v. Amlani*, 169 F.3d 1189, 1194 (9th Cir. 1999) (attorney-client).[108]

Courts have discretion to fashion appropriate remedies whenever prosecutors subvert the attorney-client relationship. *See United States v. Chen*, 99 F.3d 1495, 1504 (9th Cir. 1996).

The attorney-client privilege does not extend to "'communications which solicit or offer advice for the commission of a crime or fraud.'" *In re Grand Jury Subpoena 92 1(SJ)*, 31 F.3d 826, 829 (9th Cir. 1994). *See also In re Grand Jury Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016) ("Under the crime-fraud exception, communications are not privileged when the client consults an attorney for advice that will serve him in the commission of a fraud or crime." (internal quotation marks and citation omitted)). The court has "held that rulings on the scope of the privilege, including the crime-fraud exception, involve mixed questions of law and fact and are reviewable de novo, unless the scope of the privilege is clear and the decision made by the district court is essentially factual; in that case only clear error justifies reversal." *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1089 (9th Cir. 2007), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009). *But see United States v. Bauer*, 132 F.3d 504, 509 n.3 (9th Cir. 1997) ("The standard of review for deciding whether the Government has made a prima facie showing that the crime-fraud exception applies is unclear in this circuit."); *In re Grand Jury Proceedings*, 87 F.3d 377, 380 (9th Cir. 1996).

b. Fifth Amendment/Defendant's Silence

Potential violations of the Fifth Amendment are reviewed de novo. *See United States v. Oriho*, 969 F.3d 917, 923 (9th Cir. 2020). De novo review applies to the district court's determinations regarding the scope of the Fifth Amendment privilege, *see United States v. Rubio-Topete*, 999 F.2d 1334, 1338 (9th Cir. 1993) (witness), whether a defendant's waiver of Fifth Amendment privilege was compelled, *see United States v. Anderson*, 79 F.3d 1522, 1525 (9th Cir. 1996),

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[108] *See also United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997); *United States v. Plache*, 913 F.2d 1375, 1379 (9th Cir. 1990).

whether suppression of a defendant's testimony violates the constitutional right to testify, *see United States v. Moreno*, 102 F.3d 994, 998 (9th Cir. 1996), and whether there has been a violation of a defendant's Fifth Amendment right via references to the defendant's silence, *see United States v. Bohn*, 622 F.3d 1129, 1135 (9th Cir. 2010); *United States v. Lopez*, 500 F.3d 840, 844 (9th Cir. 2007); *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002).[109]

Prosecutors are forbidden from commenting on a defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 615 (1985); *United States v. Mikhel*, 889 F.3d 1003, 1059–60 (9th Cir. 2018).[110] *Griffin* claims are reviewed de novo. *See Mikhel*, 889 F.3d at 1060 (reviewing de novo prosecutor's comment on defendant's failure to testify); *United States v. Smith*, 282 F.3d 758, 769 (9th Cir. 2002); *United States v. Mende*, 43 F.3d 1298, 1301 (9th Cir. 1995). *See also United States v. Gomez*, 725 F.3d 1121, 1125 (9th Cir. 2013) (the court reviews de novo whether the prosecutor's use of a defendant's silence violated the Constitution).

When a defendant fails to object to the admission of testimony or comments that may violate his Fifth Amendment privilege (or that may violate *Griffin*), review is limited to plain error. *See United States v. Thompson*, 82 F.3d 849, 854–55 (9th Cir. 1996).

When the defendant does object, harmless error applies. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1034–35 (9th Cir. 2001) (en banc) (*Griffin* case); *cf. United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011) (explaining where an objection to prosecutorial misconduct is raised in the trial court and overruled, review is for abuse of discretion).

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[109] *See also United States v. Hernandez*, 476 F.3d 791, 795–96 (9th Cir. 2007); *United States v. Beckman*, 298 F.3d788, 795 (9th Cir. 2002); *United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028 (9th Cir. 2001) (en banc) (defendant's lack of a physical or emotional reaction).

[110] *See also United States v. Garcia-Guizar*, 160 F.3d 511, 522 (9th Cir. 1998); *United States v. Atcheson*, 94 F.3d 1237, 1246 (9th Cir. 1996); *see also Cook v. Schriro*, 538 F.3d 1000, 1019 (9th Cir. 2008) (habeas).

50. Fed. R. Evid. 403 – Probative Value vs. Prejudicial Harm

> Under our case law, "[w]hen the [G]overnment offers evidence of prior crimes or bad acts as part of its case in chief, 'it has the burden of first establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of Rule 404(b)[.]' " *United States v. Sims*, 617 F.2d 1371, 1378 (9th Cir. 1980) (quoting *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1108 (9th Cir. 1979)). Second, the Government must show "that the proper relevant evidence is more probative than it is prejudicial to the defendant." *Id*. (quoting *Hernandez-Miranda*, 601 F.2d at 1108). The required probative versus prejudicial balancing is reviewed for abuse of discretion.

United States v. Holiday, 998 F.3d 888, 895 (9th Cir. 2021). *See also United States v. Carpenter*, 923 F.3d 1172, 1182 (9th Cir. 2019) (concluding that the district court abused its discretion in admitting the evidence because it should have been excluded under Rule 403's balancing); *United States v. Jayavarman*, 871 F.3d 1050, 1063 (9th Cir. 2017) ("Typically a district court's admission of evidence, including its Rule 403 balancing, is reviewed for abuse of discretion.").[111] The district court is not required to recite the Rule 403 test when deciding whether to admit evidence. *See United States v. Gomez*, 725 F.3d 1121, 1128 (9th Cir. 2013) ("The district court is not required to mechanically recite Rule 403's requirements before admitting evidence.").

When the district court does not engage in explicit balancing of the probative value of the evidence against its prejudicial effect, its determination is reviewed de novo. *See United States v. Wells*, 879 F.3d 900, 914 (9th Cir. 2018); *United States v. Moran*, 493 F.3d 1002, 1012 (9th Cir. 2007) (per curiam).

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[111] *United States v. Allen*, 341 F.3d 870, 886 (9th Cir. 2003); *United States v. LeMay*, 260 F.3d 1018, 1024 (9th Cir. 2001) (discussing constitutional import of Rule 403); *United States v. Leon-Reyes*, 177 F.3d 816, 821 (9th Cir. 1999); *United States v. Neill*, 166 F.3d 943, 946 (9th Cir. 1999) (finding harmless error); *see also Old Chief v. United States*, 519 U.S. 172, 183 n.7 (1997) ("On appellate review of a Rule 403 decision, a defendant must establish abuse of discretion, a standard not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely on.").

A district court abuses its discretion by not examining and evaluating all the evidence it must weigh. *See United States v. Curtin*, 489 F.3d 935, 958 (9th Cir. 2007) (en banc). *See also Jayavarman*, 871 F.3d at 1063–64.

51. Prosecutorial Misconduct

a. Generally

The district court's rulings on alleged prosecutorial misconduct are reviewed for an abuse of discretion, *see United States v. Flores*, 802 F.3d 1028, 1034 (9th Cir. 2015); *United States v. Reyes*, 660 F.3d 454, 461 (9th Cir. 2011); *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002),[112] including the denial of a motion for new trial based on prosecutorial misconduct, *see United States v. Murillo*, 288 F.3d 1126, 1140 (9th Cir. 2002).[113] *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002)). "'Analysis of a claim of prosecutorial misconduct focuses on its asserted impropriety and substantial prejudicial effect.' *United States v. Weatherspoon*, 410 F.3d 1142, 1145 (9th Cir. 2005)." *United States v. Barragan*, 871 F.3d 689, 707 (9th Cir. 2017).

Harmless error applies when defendant objects to prosecutorial misconduct, *see Flores*, 802 F.3d at 1034; *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1150 (9th Cir. 2012); *United States v. Blueford*, 312 F.3d 962, 973–74 (9th Cir. 2002), and plain error review applies when defendant fails to object, *see Flores*, 802 F.3d at 1034; *United States v. Geston*, 299 F.3d 1130, 1134 (9th Cir. 2002). *See also United States v. Garcia-Morales*, 942 F.3d 474, 475 (9th Cir. 2019) (prosecutorial misconduct claim reviewed for plain error where defendant did not object to prosecutor's statements at trial); *United States v. Preston*, 873 F.3d 829, 835 (9th Cir. 2017).

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[112] *See also United States v. Murillo*, 288 F.3d1126, 1140 (9th Cir. 2002).

[113] *See also United States v. Sarkisian*, 197 F.3d 966, 988 (9th Cir. 1999) (misconduct to be viewed in entirety of the trial); *United States v. Scholl*, 166 F.3d 964, 974 (9th Cir. 1999); *United States v. Peterson*, 140 F.3d 819, 821 (9th Cir. 1998); *United States v. Nelson*, 137 F.3d 1094, 1106 (9th Cir. 1998) (reciting defendant's burden as "showing that it is 'more probable than not that the misconduct materially affected the verdict'"); *United States v. Sayetsitty*, 107 F.3d 1405, 1408 (9th Cir. 1997).

Trial courts have discretion to fashion an appropriate remedy when a prosecutor subverts the attorney-client relationship. *See United States v. Chen*, 99 F.3d 1495, 1504 (9th Cir. 1996).

b. Bolstering/Vouching

Whether a prosecutor's comments constitute improper "bolstering" is a mixed question of law and fact reviewed de novo. *See United States v. Santiago*, 46 F.3d 885, 891 (9th Cir. 1995).

The court reviews for abuse of discretion a district court's rulings on alleged prosecutorial misconduct, including vouching. *See United States v. Stinson*, 647 F.3d 1196, 1211 (9th Cir. 2011). Where the defendant has objected to alleged prosecutorial misconduct at trial, the court reviews for harmless error. *See United States v. Alcantara-Castillo*, 788 F.3d 1186, 1190 (9th Cir. 2015); *Stinson*, 647 F.3d at 1211 ("We review alleged vouching for harmless error when, as here, the defendant objected at trial.").

If there is no timely objection, vouching claims are reviewed for plain error. *See Alcantara-Castillo*, 788 F.3d at 1190; *United States v. Doss*, 630 F.3d 1181, 1193 (9th Cir. 2011) (as amended); *United States v. Brooks*, 508 F.3d 1205, 1209 (9th Cir. 2007).[114] A district court commits plain error by allowing a prosecutor to persist in asking witnesses to comment upon the veracity of other witnesses. *See United States v. Geston*, 299 F.3d 1130, 1138 (9th Cir. 2002); *cf. United States v. Greer*, 640 F.3d 1011, 1023–24 (9th Cir. 2011) (distinguishing between asking whether another witness was "lying" or simply "mistaken").

c. Dismissal

The district court's decision whether to dismiss an indictment based on improper or outrageous government conduct is reviewed de novo. *See United States v. Pedrin*, 797 F.3d 792, 795 (9th Cir. 2015); *United States v. Black*, 733 F.3d 294, 301 (9th Cir. 2013); *United States v. Stinson*, 647 F.3d 1196, 1209 (9th

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[114] *See also United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001); *United States v. Leon-Reyes*, 177 F.3d 816, 821 (9thCir. 1999); *United States v. Garcia-Guizar*, 160 F.3d 511, 516, 521 (9th Cir. 1998); *United States v. Rudberg*, 122 F.3d 1199, 1206 (9th Cir. 1997).

Cir. 2011); *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003).[115] The evidence is viewed, however, in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. *See United States v. Black*, 733 F.3d 294, 301 (9th Cir. 2013); *United States v. Struckman*, 611 F.3d 560, 573 (9th Cir. 2010); *Gurolla*, 333 F.3d at 950; *United States v. Cuellar*, 96 F.3d 1179, 1182 (9th Cir. 1996).

d. Grand Jury Misconduct

Allegations of prosecutorial misconduct before a grand jury are reviewed de novo. *See United States v. Harmon*, 833 F.3d 1199, 1203 (9th Cir. 2016) (not correcting false testimony); *United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004); *United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000).[116]

e. Disqualification of Prosecutor

A district court's refusal to disqualify the prosecutor is reviewed for an abuse of discretion. *See United States v. Kahre*, 737 F.3d 554, 565 (9th Cir. 2013) (per curiam); *United States v. Davis*, 932 F.2d 752, 763 (9th Cir. 1991); *United States v. Plesinski*, 912 F.2d 1033, 1035 (9th Cir. 1990).

f. Suppression of Exculpatory Evidence

Whether the prosecutor has improperly suppressed exculpatory evidence is a question of law reviewed de novo. *See United States v. Moalin*, 973 F.3d 977, 1001 (9th Cir. 2020); *United States v. Cano*, 934 F.3d 1002, 1022 n.14 (9th Cir. 2019); *United States v. Inzunza*, 638 F.3d 1006, 1021 (9th Cir. 2011); *United States v. Hernandez*, 109 F.3d 1450, 1454 (9th Cir. 1997); *see also United States v. Flyer*, 633 F.3d 911, 915–16 (9th Cir. 2011); *United States v. Estrada*, 453 F.3d 1208, 1212 (9th Cir. 2006). The district court's underlying factual findings are reviewed for clear error. *See Hernandez*, 109 F.3d at 1454. The court's decision to exclude evidence as a sanction for destroying or failing to preserve evidence is

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[115] *See also United States v. Bridges*, 344 F.3d 1010, 1014 (9th Cir. 2003); *United States v. Lazarevich*, 147 F.3d 1061, 1065 (9th Cir. 1998); *United States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996); *United States v. Wills*, 88 F.3d 704, 711 (9th Cir. 1996); *United States v. Dudden*, 65 F.3d 1461, 1466 (9th Cir. 1995).

[116] *See also United States v. De Rosa*, 783F.2d 1401, 1404 (9th Cir. 1986); *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1392 n.9 (9th Cir. 1983).

reviewed for an abuse of discretion. *See United States v. Belden*, 957 F.2d 671, 674 (9th Cir. 1992).

Where the claim is not presented to the district court, review is for plain error. *See United States v Houston*, 648 F.3d 806, 813 (9th Cir. 2011).

52. Rebuttal and Surrebuttal Evidence

Abuse of discretion review applies to a district court's decision regarding admission of rebuttal evidence,[117] order of proof,[118] proper scope of rebuttal,[119] and admission or exclusion of surrebuttal evidence.[120] *See United States v. Beck*, 418 F.3d 1008, 1016 n.6 (9th Cir. 2005) (admission of rebuttal evidence); *United States v. Goland*, 959 F.2d 1449, 1454 (9th Cir. 1992) (scope); *United States v. Blackstone*, 56 F.3d 1143, 1146 (9th Cir. 1995) (surrebuttal).

53. Recess

A trial court's decision to recess during trial is reviewed for an abuse of discretion. *See United States v. Hay*, 122 F.3d 1233, 1235 (9th Cir. 1997) (holding that forty-eight-day recess between close of evidence and closing arguments is an abuse of discretion).

54. Recusal and Disqualification of Judge

A district court's decision whether to grant a motion for recusal, or to disqualify herself,[121] is reviewed for an abuse of discretion. *See United States v. Mikhel*, 889 F.3d 1003, 1025 (9th Cir. 2018) (reviewing denial of recusal motion for abuse of discretion); *United States v. Holland*, 519 F.3d 909, 912–13 (9th Cir.

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[117] *See United States v. Antonakeas*, 255 F.3d 714, 724 (9th Cir. 2001).

[118] *See* Fed. R. Evid. 611(a); *Geders v. United States*, 425 U.S. 80, 86 (1976); *United States v. Arbelaez*, 719 F.2d 1453, 1460 (9th Cir. 1993).

[119] *See Rent-A-Center v. Canyon Television & Appliance*, 944 F.2d 597, 601 (9th Cir. 1991).

[120] *See United States v. Butcher*, 926 F.2d 811, 817 (9th Cir. 1991).

[121] *See also United States v. Rogers*, 119 F.3d 1377, 1380 (9th Cir. 1997).

2008) (noting that courts generally do not review a judge's decision to recuse himself or herself).[122]

When recusal is not raised below, or the defendant fails to object at trial, the allegation of judicial bias is reviewed for plain error. *See United States v. Morgan*, 376 F.3d 1002, 1007 (9th Cir. 2004).[123]

55. Relevancy of Evidence

The district court's decisions regarding the relevancy of evidence are reviewed for abuse of discretion. *See United States v. Lynch*, 903 F.3d 1061, 1071 (9th Cir. 2018) (concluding district court did not abuse its discretion in excluding certain evidence that was repetitive of evidence already received, and not otherwise relevant to the defense); *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004).[124] Note, however, that legal issues regarding whether evidence is relevant to other acts or to the crime charged is reviewed de novo. *See United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999).[125]

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[122] *See also United States v. Sutcliffe*, 505 F.3d 944, 957–58 (9thCir. 2007); *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002); *United States v. Silver*, 245 F.3d 1075, 1078 (9th Cir. 2001); *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000); *United States v. Scholl*, 166 F.3d 964, 977 (9th Cir. 1999); *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997); *United States v. Eshkol*, 108 F.3d 1025, 1030 (9th Cir. 1997); *see also United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564, 566 (9th Cir. 1995) (civil forfeiture action).

[123] *See also United States v. Springer*, 51 F.3d 861, 864 n.1 (9th Cir. 1995); *United States v. Bosch*, 951 F.2d 1546, 1548 (9th Cir. 1991).

[124] *See also United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) (expert testimony); *United States v. Easter*, 66 F.3d 1018, 1020 (9th Cir. 1995); *United States v. Kallin*, 50 F.3d 689, 693 (9th Cir. 1995) (Rule 402); *United States v. Vaandering*, 50 F.3d 696, 704 (9th Cir. 1995).

[125] *See also United States v. Hardy*, 289 F.3d 608, 612 (9th Cir. 2002); *United States v. Rrapi*, 175 F.3d 742, 748 (9th Cir. 1999) (Rule 404(b)); *United States v. Keiser*, 57 F.3d 847, 852 n.6 (9th Cir. 1995).

56. Reopening

Abuse of discretion standard applies to the district court's decision whether to reopen a case,[126] the time for appeal,[127] the evidence,[128] or a suppression hearing.[129] *See United States v. Pino-Noriega*, 189 F.3d 1089, 1094 (9th Cir. 1999).

57. Rule of Completeness

The trial judge's decision to admit evidence pursuant to the rule of completeness is reviewed for an abuse of discretion. *See United States v. Lopez*, 4 F.4th 706, 717 (9th Cir. 2021) (recognizing application of the rule of completeness is a matter for the trial judge's discretion); *United States v. Vallejos*, 742 F.3d 902, 905 (9th Cir. 2014); *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996); *United States v. Dorrell*, 758 F.2d 427, 434 (9th Cir. 1985).

58. Sanctions

Discovery sanctions are generally reviewed for an abuse of discretion. *See United States v. Obagi*, 965 F.3d 993, 997 (9th Cir. 2020); *United States v. Garrison*, 888 F.3d 1057, 1064 (9th Cir. 2018) (reviewing choice of sanctions for abuse of discretion); *United States v. Fernandez*, 231 F.3d 1240, 1245 (9th Cir. 2000). *See also In re Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1183 (9th Cir. 2017) (reviewing for abuse of discretion district court's impositions of contempt sanctions); *United States v. Rivera-Relle*, 333 F.3d 914, 922 (9th Cir. 2003) (reviewing for abuse of discretion the decision to exclude evidence as a sanction for destroying or failing to preserve evidence).

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[126] *See, e.g.*, *United States v. Simtob*, 901 F.2d 799, 804 (9th Cir. 1990).

[127] *See United States v. Winkles*, 795 F.3d 1134, 1144 (9th Cir. 2015) (The district court did not abuse its discretion by refusing to reopen the time for appeal.)

[128] *See United States v. Orozco*, 764 F.3d 997, 1001 (9th Cir. 2014) (reviewing for abuse of discretion district court's decision not to reopen evidence to permit defendant to testify).

[129] *See, e.g.*, *United States v. Jordan*, 291 F.3d 1091, 1100 (9th Cir. 2002) (no abuse of discretion); *United States v. Hobbs*, 31 F.3d 918, 923 (9th Cir. 1994) (court abused its discretion).

The applicability of Federal Rules and local rules,[130] however, is reviewed de novo. *See United States v. Cano*, 934 F.3d 1002, 1023 n.15 (9th Cir. 2019) (reviewing district court's interpretation of discovery rules de novo).[131] Once sanctions are imposed, their propriety is reviewed for an abuse of discretion. *See United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002).[132]

The district court's findings of fact in support of its imposition of sanctions are reviewed for clear error. *See United States v. Mohamud*, 843 F.3d 420, 432 (9th Cir. 2016); *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1993).

To reverse a conviction for a discovery violation, this court must determine not only that the district court abused its discretion, but that the error resulted in prejudice to substantial rights. *See United States v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007).[133]

The trial court's decision to impose sanctions for a Jencks Act violation is reviewed for an abuse of discretion. *See United States v. McKoy*, 78 F.3d 446, 449 (9th Cir. 1996).

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[130] *See United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996) (noting apparent unresolved question of what standard of review applies to sanctions for violation of local rules); *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1993) ("We review de novo the district court's conclusion that specific conduct violated court rules.").

[131] *See United States v. Cedano-Arellano*, 332 F.3d 568, 571 (9th Cir. 2003) (de novo review of interpretation of discovery rule); *United States v. Fernandez*, 231 F.3d 1240, 1245 (9th Cir. 2000).

[132] *See also United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992) ("We review de novo the question whether the district court had any legal basis for its discovery order. If it did, we review for an abuse of discretion the court's choice of a sanction for a violation of its order."); *United States v. Mandel*, 914 F.2d 1215, 1218 (9th Cir. 1990); *United States v. Iglesias*, 881 F.2d 1519, 1523 (9th Cir. 1989).

[133] *See also United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003); *United States v. Amlani*, 111 F.3d 705, 712 (9th Cir. 1997); *United States v. de Cruz*, 82 F.3d 856, 866 (9th Cir. 1996).

59. Shackling

The district court's decision to shackle a defendant, or to impose other security measures,[134] is reviewed for an abuse of discretion. *See United States v. Cazares*, 788 F.3d 956, 963 (9th Cir. 2015); *United States v. Fernandez*, 388 F.3d 1199, 1245 (9th Cir. 2004), *modified*, 425 F.3d 1248 (9th Cir. 2005) ("A decision to shackle defendants is reviewed for an abuse of discretion."); *United States v. Collins*, 109 F.3d 1413, 1417 (9th Cir. 1997).[135] The underlying factual findings are reviewed for clear error. *See Spain v. Rushen*, 883 F.2d 712, 717 (9th Cir. 1989).

60. Side-Bar Conferences

The judge's decision whether to conduct a side-bar conference is reviewed for an abuse of discretion. *See United States v. Bennett*, 363 F.3d 947, 952 (9th Cir. 2004).[136] *See also United States v. Reyes*, 764 F.3d 1184, 1190–91 (9th Cir. 2014) (holding that meetings between counsel and the court at which the participants discuss whether jurors should be excused for cause, exercise peremptory challenges, or decide whether to proceed in the absence of prospective jurors are all examples of "a conference or hearing on a question of law" from which the defendant may be excluded at the district court's discretion").

61. Witnesses

a. District Court Decisions

The trial court's decisions regarding witnesses are generally reviewed for an abuse of discretion. For example:

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[134] *See United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) (holding that a district court's decision to impose security measures is reviewed for abuse of discretion).

[135] *See also Morgan v. Bunnell*, 24 F.3d 49, 51 (9th Cir. 1994) (per curiam); *Jones v. Meyer*, 899 F.2d 883, 884 (9th Cir. 1990).

[136] *See also United States v. Laurins*, 857 F.2d 529, 538 (9th Cir. 1988); *United States v. Wellington*, 754 F.2d 1457, 1469 (9th Cir. 1985).

- Issues regarding the court's control over the questioning of witnesses at trial. *See United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002) (limiting cross-examination).[137]

- Decision to exclude witnesses from the courtroom. *See United States v. Seschillie*, 310 F.3d 1208, 1213 (9th Cir. 2002).

- Imposition of a sanction for a violation of a witness sequestration order. *See United States v. English*, 92 F.3d 909, 913 (9th Cir. 1996). If there is no contemporaneous objection, however, plain error review applies. *See United States v. Hobbs*, 31 F.3d 918, 921 (9th Cir. 1994).

- Whether a witness is "unavailable" to testify. *See United States v. McGuire*, 307 F.3d 1192, 1205 (9th Cir. 2002).

- Refusal to allow witness testimony on remand. *See United States v. Ross*, 372 F.3d1097, 1112 (9th Cir. 2004).

- Grant of an exception to the witness disclosure requirements of Fed. R. Crim. P. 12.1(e). *See United States v. Wills*, 88 F.3d 704, 708 (9th Cir. 1996).

- Refusal to grant a writ of habeas corpus ad testificandum to allow an individual to testify. *See United States v. Smith*, 924 F.2d 889, 896 (9th Cir. 1991).

- Denying jury's request to readback witness's testimony. *See United States v. Price*, 980 F.3d 1211, 1227 (9th Cir. 2019) (as amended Nov. 27, 2020) (noting the district court's great latitude to address requests for readbacks of witness testimony).

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[137] *See, e.g.*, *United States v. Geston*, 299 F.3d 1130, 1137 (9th Cir. 2002) (limiting cross-examination); *United States v. Pearson*, 274 F.3d 1225, 1233 (9th Cir. 2001) (disallowing leading questions); *United States v. Archdale*, 229 F.3d 861, 865 (9th Cir. 2000) (permitting leading questions); *United States v. Hay*, 122 F.3d 1233, 1235 (9th Cir. 1997) (limiting defendant's testimony); *United States v. Rutgard*, 116 F.3d 1270, 1279 (9th Cir. 1997) (imposing time restraints on examination of witnesses).

- Denying a motion to produce a witness' statement pursuant to the Jencks Act. *See United States v. Robertson*, 895 F.3d 1206, 1216 (9th Cir. 2018); *United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997).

- Denying motion to depose prospective witness. *See United States v. Moalin*, 973 F.3d 977, 1005 (9th Cir. 2020).

A defendant's failure to object limits review to plain error. *See United States v. Shwayder*, 312 F.3d 1109, 1120 (9th Cir. 2002) (prosecutor's use of guilt-assuming hypotheticals during cross-examination), *amended by* 320 F.3d 889 (9th Cir. 2003). A trial judge has broad discretion in supervising the trial and may participate in the examination of witnesses to clarify issues and call the jury's attention to important evidence. *See United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997); *United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994); *see also United States v. Moorehead*, 57 F.3d 875, 878 (9th Cir. 1995) ("[Defendant] does not dispute the broad authority of the district court to examine witnesses.").

Other witness determinations are reviewed de novo, such as the denial of a motion to dismiss an indictment for the government's failure to retain witnesses. *See United States v. Gastelum-Almeida*, 298 F.3d 1167, 1174 (9th Cir. 2002). The district court's interpretation of the witness tampering provisions of 18 U.S.C. § 1512(b) is also reviewed de novo. *See United States v. Khatami*, 280 F.3d 907, 910 (9th Cir. 2002).

The district court's underlying factual determinations are reviewed for clear error. *See Gastelum-Almeida*, 298 F.3d at, 1174.

b. Witness Immunity

The decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch. *See United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984).

Informal immunity agreements are reviewed under ordinary contract law principles: factual determinations are reviewed for clear error; whether the government has breached the agreement is a question of law reviewed de novo. *See United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995).

Whether the government has violated its obligation to disclose immunity agreements with a prosecution witness is a question of law reviewed de novo. *See United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999).

Whether a district court erred by refusing to compel the government to grant immunity to a defense witness is a mixed question of law and fact reviewed de novo. *See United States v. Moalin*, 973 F.3d 977, 1004 n.20 (9th Cir. 2020); *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004). Underlying factual findings are reviewed for clear error. *See Alvarez*, 358 F.3d at 1216.

D. Post-Trial Decisions in Criminal Cases

1. Allocution

The court's failure to allow a defendant his or her right of allocution is reviewed to determine if the error is harmless. *See United States v. Marks*, 530 F.3d 799, 813 (9th Cir. 2008); *United States v. Mack*, 200 F.3d 653, 657 (9th Cir. 2000).[138] The denial of allocution is not harmless when the district court has the discretion to sentence the defendant to a shorter sentence than given. *See Mack*, 200 F.3d at 657.[139]

In *United States v. Yamashiro*, 788 F.3d 1231, 1235–36 (9th Cir. 2015), the court held that the denial of counsel during a portion of the allocution phase of the sentencing proceeding was the type of "structural defect" to which no harmless error analysis can be applied.

2. Appeals

De novo review applies to whether a defendant has waived the statutory right to appeal by entering into a plea agreement. *See United States v. Kelly*, 874

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[138] *See also United States v. Leasure*, 122 F.3d 837, 840 (9th Cir. 1997); *United States v. Carper*, 24 F.3d 1157, 1162 (9th Cir. 1994) (finding error not harmless), *superseded by rule as stated in United States v. Reyes-Solosa*, 761 F.3d 972, 975 n.2 (9th Cir. 2014).

[139] *See also United States v. Sarno*, 73 F.3d 1470, 1503–04 (9th Cir. 1995) (reversing sentence).

F.3d 1037, 1046 (9th Cir. 2017).[140] Whether the waiver is valid is also reviewed de novo. *See United States v. Littlejohn*, 224 F.3d 960, 964 (9th Cir. 2000).[141]

A district court's determination whether a defendant has shown excusable neglect in failing to file a timely notice of appeal is reviewed for an abuse of discretion. *See United States v. Green*, 89 F.3d 657, 660 (9th Cir. 1996); *United States v. Smith*, 60 F.3d 595, 596–97 (9th Cir. 1995).

A district court's decision to grant or deny a motion for an extension of time to file a notice of appeal is reviewed for an abuse of discretion. *See United States v. Navarro*, 800 F.3d 1104, 1109 (9th Cir. 2015); *United States v. Garcia*, 997 F.2d 1273, 1276 n.1 (9th Cir. 1993).

3. *Apprendi* Violations

De novo review applies to a claim that a defendant's sentence violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *see United States v. Martinez-Rodriguez*, 472 F.3d 1087, 1092 (9th Cir. 2007),[142] whether the district court

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[140] *See also United States v. Lightfoot*, 626 F.3d 1092, 1094 (9th Cir. 2010); *United States v. Cope*, 527 F.3d 944, 949 (9th Cir. 2008);*United States v. Speelman*, 431 F.3d 1226, 1229 (9th Cir. 2005); *United States v. Bynum*, 362 F.3d 574, 583 (9th Cir. 2004); *United States v. Joyce*, 357 F.3d 921, 922 (9th Cir. 2004); *United States v. Shimoda*, 334 F.3d 846, 848 (9th Cir. 2003); *United States v. Nunez*, 223 F.3d 956, 958 (9th Cir. 2000) ("'Generally, courts will enforce a defendant's waiver of his right to appeal if (1) the language of the waiver encompasses the defendant's right to appeal on the grounds claimed on appeal, and (2) the waiver is knowingly and voluntarily made.'"); *United States v. Phillips*, 174 F.3d 1074, 1075 (9th Cir. 1999) (holding that no waiver existed due to ambiguous plea agreement); *United States v. Buchanan*, 59 F.3d 914, 918 (9th Cir. 1995) (plea agreement waiver not controlling in light of court's oral assurances of appeal).

[141] *See also United States v. Garza-Sanchez*, 217 F.3d 806, 808 (9th Cir. 2000) (deportation order); *United States v. Portillo-Cano*, 192 F.3d 1246, 1249 (9th Cir. 1999) (finding no waiver, vacating conviction); *United States v. Aguilar-Muniz*, 156 F.3d 974, 976 (9th Cir. 1998); *United States v. Zink*, 107 F.3d 716, 717 (9th Cir. 1997) (finding no waiver).

[142] *See also United States v. Valle-Montalbo*, 474 F.3d 1197, 1199 (9th Cir. 2007); *United States v. Covian-Sandoval*, 462 F.3d 1090, 1093 (9th Cir. 2006) (applying plain error); *United States v. Pina-Jaime*, 332 F.3d 609, 611 (9th Cir.

correctly applied *Apprendi* at sentencing, *United States v. Gill*, 280 F.3d 923, 928 (9th Cir. 2002), and the district court's interpretation of the constitutional rule in *Apprendi*. *See United States v. Maria-Gonzalez*, 268 F.3d 664, 667 (9th Cir. 2001).

Apprendi violations are subject to harmless error review. *See United States v. Hunt*, 656 F.3d 906, 913–14 (9th Cir. 2011); *United States v. Valle-Montalbo*, 474 F.3d 1197, 1201–02 (9th Cir. 2006).

A defendant's failure, however, to raise an *Apprendi* claim before the district court limits appellate review to plain error. *See United States v. Covian-Sandoval*, 462 F.3d 1090, 1093 (9th Cir. 2006).[143]

Note that *Apprendi* is not structural, nor is it to be applied retroactively. *See United States v. Sanchez-Cervantes*, 282 F.3d 664, 670–71 (9th Cir. 2002).

4. Arrest of Judgment

The district court's denial of a motion for arrest of judgment is reviewed for an abuse of discretion. *See United States v. Rodriguez*, 360 F.3d 949, 955 (9th Cir. 2004); *United States v. Baker*, 63 F.3d 1478, 1499 (9th Cir. 1995).

5. Attorneys' Fees

The award[144] or denial[145] of attorneys' fees pursuant to 18 U.S.C. § 3006A (Hyde Amendment) are reviewed for an abuse of discretion. *See United States v.*

2003); *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002) (*Apprendi* does not apply to criminal history).

[143] *See also United States v. Sua*, 307 F.3d 1150, 1154 (9th Cir. 2002); *United States v. Buckland*, 289 F.3d 558, 563 (9th Cir. 2002) (en banc) (finding any error harmless); *United States v. Rodriguez*, 285 F.3d 759, 763 (9th Cir. 2002) (vacating sentence); *United States v. Johansson*, 249 F.3d 848, 861 (9th Cir. 2001) (no error if fact used to increase sentence within statutory maximum).

[144] *See United States v. Sherburne*, 506 F.3d 1187, 1190 (9th Cir. 2007) (reversing reward); *United States v. Braunstein*, 281 F.3d 982, 992 (9th Cir. 2002).

[145] *See United States v. Chapman*, 524 F.3d 1073, 1089–90 (9th Cir. 2008) (construing "prevailing party"); *United States v. Danielson*, 325 F.3d 1054, 1076 (9th Cir. 2003); *United States v. Campbell*, 291 F.3d 1169, 1170 (9th Cir. 2002);

Danielson, 325 F.3d 1054, 1076 (9th Cir. 2003). *See also United States v. Mixon*, 930 F.3d 1107, 1110 (9th Cir. 2019) (reviewing district court's ruling on a motion for attorneys' fees under the Hyde Amendment for an abuse of discretion; the court cannot reverse unless it has a definite and firm conviction that the district court committed a clear error of judgment).

6. Bail Pending Sentence and Appeal

Post-trial release is governed by the standards set forth in 18 U.S.C. § 3143, Fed. R. Crim. P. 46, and Fed. R. App. P. 9. "In reviewing a district court's denial of release pending appeal [the court consider's] the district court's legal determinations de novo." *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003). The court has laid out the requirements for bail pending appeal. *See United States v. Handy*, 761 F.2d 1279, 1283–84 (9th Cir. 1985); *United States v. Montoya*, 908 F.2d 450, 450 (9th Cir. 1990). Findings by the trial court whether a defendant is likely to flee or pose a danger to the safety of the community are likely reviewed for clear error. *See Handy*, 761 F.2d at 1283; *United States v. Reynolds*, 956 F.2d 192, 192 (9th Cir. 1992) (order). Other circuits are split.[146]

When a district court refuses release pending appeal or imposes conditions of release, the court must state in writing the reasons for the action taken. Fed. R. App. P. 9(a)(1). The district court satisfies this requirement by issuing written findings or by stating the reasons for the decision orally and providing a transcript. *See United States v. Cordero*, 992 F.2d 985, 986 n.1 (9th Cir. 1993) (order). Absent written findings or a transcript of the bail hearing, remand is required. *See id.*

United States v. Tucor Int'l, Inc., 238 F.3d 1171, 1175 (9th Cir. 2001) ("The district court abuses its discretion when it makes an error of law, or bases its conclusion on a clearly erroneous finding of fact.") (citation omitted); *United States v. Lindberg*, 220 F.3d 1120, 1124 (9th Cir. 2000) (comparing EAJA standard).

[146] *See United States v. Barnes*, 324 F.3d 135, 140 (3d Cir. 2003) ("plenary"); *United States v. Chilingirian*, 280 F.3d 704, 709 (6th Cir. 2001) (abuse of discretion); *United States v. Mercedes*, 254 F.3d 433, 435 (2d Cir. 2001) (per curiam) (clear error); *United States v. Eaken*, 995 F.2d 740, 741 (7th Cir. 1993) (de novo); *United States v. Bayko*, 774 F.2d 516, 519 (1st Cir. 1985) ("independent").

The district court's denial of a motion for relief from bond forfeiture is reviewed for an abuse of discretion. *See United States v. Nguyen*, 279 F.3d 1112, 1115 (9th Cir. 2002); *United States v. Amwest Sur. Ins. Co.*, 54 F.3d 601, 602 (9th Cir. 1995).

7. Correcting/Amending/Reducing Sentences

> Subject to certain requirements, Rule 35 of the Federal Rules of Criminal Procedure authorizes a court to correct an error in sentencing that "resulted from arithmetical, technical, or other clear error," Fed. R. Crim. P. 35(a), and to reduce a sentence when the defendant has provided substantial assistance to the government, Fed. R. Crim. P. 35(b).

United States v. Kelley, 962 F.3d 470, 476 n.8 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

Fed. R. Crim. P. 35 permits corrections of sentences that are clearly erroneous under the Sentencing Guidelines. *See United States v. Aguirre*, 214 F.3d 1122, 1126 (9th Cir. 2000).

De novo review applies to issues of law raised in a Rule 35 motion,[147] and whether a court has jurisdiction under Rule 35 to resentence.[148] *See United States v. JDT*, 762 F.3d 984, 1005 (9th Cir. 2014); *United States v. Aguilar-Reyes*, 653 F.3d 1053, 1055 (9th Cir. 2011); *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003).

Note that Fed. R. Crim. P. 35 was modified to conform with the Sentencing Guidelines. Review of a trial court's decision under the former rule may arise, however, if the criminal conduct occurred prior to November 1, 1987. A district court's decision under Rule 35 involving pre-November 1, 1987 conduct is "reviewed for illegality or gross abuse of discretion." *United States v. Hovsepian*,

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[147] *See United States v. Zakhor*, 58 F.3d 464, 465 (9th Cir. 1995) (challenging application and constitutionality of Sentencing Reform Act).

[148] *See United States v. Aguirre*, 214 F.3d 1122, 1124 (9th Cir. 2000) (vacating resentence); *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1027 (9th Cir. 1999) (vacating resentence).

359 F.3d 1144, 1153 (9th Cir. 2004) (en banc); *United States v. Hayes*, 231 F.3d 1132, 1135 (9th Cir. 2000) (addressing pre-November 1, 1987 conduct).

Abuse of discretion review applies to a trial court's decision whether to reduce a Guideline sentence pursuant to 18 U.S.C. § 3582(c)(2) (change in Guideline range). *See United States v. Sainz*, 933 F.3d 1080, 1083 (9th Cir. 2019); *United States v. Dunn*, 728 F.3d 1151, 1155 (9th Cir. 2013); *United States v. Chaney*, 581 F.3d 1123, 1125 (9th Cir. 2009); *United States v. Hurt*, 345 F.3d 1033, 1035 (9th Cir. 2003).[149] "A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Sainz*, 933 F.3d at 1083 (quoting *Dunn*, 728 F.3d at 1155.

Whether a district court may sua sponte raise a defendant's waiver of the right to seek relief under 18 U.S.C. § 3582(c)(2) is a legal question reviewed de novo. *See Sainz*, 933 F.3d at 1083.

The court also reviews § 3582(c)(1) sentence reduction decisions for abuse of discretion. *See United States v. Aruda*, 993 F.3d 797, 799 (9th Cir. 2021) (per curiam).

8. Disciplinary Orders

Terms and conditions of a disciplinary order are reviewed for abuse of discretion. *See United States v. Engstrom*, 16 F.3d 1006, 1011 (9th Cir. 1994).

9. Expungement

This court reviews de novo whether a district court has the authority to order expungement of a record of conviction. *See United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004); *United States v. Sumner*, 226 F.3d 1005, 1009 (9th Cir. 2000).

10. Fed. R. Crim. P. 32

The sentencing court's compliance with Fed. R. Crim. P. 32 is generally reviewed de novo. *See United States v. Wijegoonaratna*, 922 F.3d 983, 989 (9th Cir. 2019); *United States v. Gray*, 905 F.3d 1145, 1148 (9th Cir. 2018) (per curiam); *United States v. Job*, 871 F.3d 852, 868 (9th Cir. 2017) (as amended);

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[149] *See also United States v. Sprague*, 135 F.3d 1301, 1304 (9th Cir. 1998); *United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996) (per curiam).

United States v. Burkholder, 590 F.3d 1071, 1076 (9th Cir. 2010); *United States v. Stoterau*, 524 F.3d 988, 1011 (9th Cir. 2008).[150] Where a defendant does not object at sentencing to a district court's compliance with the Rule, the court reviews for plain error. *See Wijegoonaratna*, 922 F.3d at 989; *United States v. Kaplan*, 839 F.3d 795, 803 (9th Cir. 2016).

The court's decision whether to hold an evidentiary hearing on a Rule 32 motion is reviewed for an abuse of discretion. *See United States v. Pearson*, 274 F.3d 1225, 1234 (9th Cir. 2001).[151] If the defendant failed to request a Rule 32 evidentiary hearing in district court, this court reviews for plain error. *See United States v. Berry*, 258 F.3d 971, 976 (9th Cir. 2001).

11. Fines

The district court's determination that a defendant has the ability to pay a fine is a finding of fact reviewed for clear error. *See United States v. Rearden*, 349 F.3d 608, 617 (9th Cir. 2003).[152]

De novo review applies to the legality, *see United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002), and constitutionality of a fine, *see United States v. Bajakajian*, 524 U.S. 321, 336 & n.10 (1998). The court also reviews de novo whether a district court has the authority to modify a fine. *See United States v. Miller*, 205 F.3d 1098, 1100 (9th Cir. 2000).

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[150] *See also United States v. Saeteurn*, 504 F.3d 1175, 1178 (9th Cir. 2007); *United States v. Baldrich*, 471 F.3d 1110, 1112 (9th Cir. 2006); *United States v. Herrera-Rojas*, 243 F.3d 1139, 1142 (9th Cir. 2001) (vacating sentence); *United States v. Havier*, 155 F.3d 1090, 1092 (9th Cir. 1998) (examining requirements of Rule 32.1 and vacating sentence); *see also United States v. Ruiz*, 257 F.3d 1030, 1031 & 1033 (9th Cir. 2001) (en banc) (clarifying that "fair and just" standard applies to Rule 32(e) rather than "manifest injustice" test).

[151] *See also United States v. Houston*, 217 F.3d 1204, 1206–07 (9th Cir. 2000); *United States v. Stein*, 127 F.3d 777, 780 (9th Cir. 1997).

[152] *United States v. Sager*, 227 F.3d 1138, 1147 (9th Cir. 2000); *United States v. Scrivener*, 189 F.3d 944, 953 (9th Cir. 1999); *see also United States v. Ganoe*, 538 F.3d 1117, 1128 (9th Cir. 2008).

12. Forfeiture

De novo review applies to the following:

- District court's interpretation of the federal forfeiture laws. *See United States v. Pollard*, 850 F.3d 1038, 1041 (9th Cir. 2017); *United States v. Casey*, 444 F.3d 1071, 1073 (9th Cir. 2006).[153]

- Whether there is standing to contest a forfeiture action. *See United States v. Real Property Located at 475 Martin Lane*, 545 F.3d 1134, 1140 (9th Cir. 2008).

- Whether a delay in the initiation of civil forfeiture proceedings is unconstitutional. *See United States v. Approximately $1.67 Million in U.S. Currency, Stock, & Other Valuable Assets*, 513 F.3d 991, 1001 (9th Cir. 2008); *United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564, 566 (9th Cir. 1995) (no probable cause).

- Determinations of probable cause in civil forfeiture proceedings. *See United States v. $186,416.00 in U.S. Currency*, 590 F.3d 942, 949 (9th Cir. 2010) (as amended); *$493,850.00*, 518 F.3d at 1164.[154]

- Whether a civil forfeiture is "grossly disproportional" to the gravity of the defendant's crime. *See United States v. $100,348 in U.S. Currency*, 354 F.3d 1110, 1121 (9th Cir. 2004).

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[153] *See also United States v. $46,588.00 in U.S. Currency and $20.00 in Canadian Currency*, 103 F.3d 902, 903 (9th Cir. 1996); *United States v. Kim*, 94 F.3d 1247, 1249 (9th Cir. 1996); *United States v. 1980 Lear Jet*, 38 F.3d 398, 400 (9th Cir. 1994) (reversing).

[154] *See, e.g.*, *United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 868 (9th Cir. 2001); *United States v. $129,727.00 U.S. Currency*, 129 F.3d 486, 489 (9th Cir. 1997); *United States v. $405,089.23 U.S. Currency*, 122 F.3d 1285, 1289 (9th Cir. 1997) (reversing probable cause); *United States v. One 1986 Ford Pickup*, 56 F.3d 1181, 1186 (9th Cir. 1995) (reviewing certificate of reasonable cause); *United States v. U.S. Currency*, $30,060, 39 F.3d 1039, 1041 (9th Cir. 1994).

"However, [the appellate court] must accept the district court's findings of fact in conducting the excessiveness inquiry unless they are clearly erroneous." *$100,348 in U.S. Currency*, 354 F.3d at 1121.

13. Mistrial

The district court's denial of a motion for mistrial is reviewed for an abuse of discretion. *See United States v. Ubaldo*, 859 F.3d 690, 700 (9th Cir. 2017); *United States v. Chapman*, 524 F.3d 1073, 1081–82 (9th Cir. 2008) (manifest discretion, noting a varying deference depending upon the circumstances).[155] However, the district court's denial of a mistrial based on *Brady* violations is reviewed do novo. *See United States v. Antonakeas*, 255 F.3d 714, 725 (9th Cir. 2001); *United States v. Howell*, 231 F.3d 615, 624 (9th Cir. 2000). A district court's failure to declare mistrial sua sponte after the defendant withdraws a motion for a mistrial is reviewed for plain error. *See United States v. Banks*, 514 F.3d 959, 973–74 (9th Cir. 2008).

14. New Trial

The denial of a defendant's motion for a new trial is reviewed for an abuse of discretion. *See United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011);

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[155] *See also, e.g.*, *United States v. Washington*, 462 F.3d 1124, 1136 (9th Cir. 2006) (prosecutorial misconduct); *United States v. Hagege*, 437 F.3d 943, 959–60 (9th Cir. 2006); *United States v. Allen*, 341 F.3d 870, 891 (9th Cir. 2003) (prejudicial testimony); *United States v. McCormac*, 309 F.3d 623, 626 (9th Cir. 2002) (contempt); *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002) (prosecutorial misconduct); *United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002) (juror misconduct); *United States v. Sarkisian*, 197 F.3d 966, 981 (9th Cir. 1999) (extraneous information to jury); *United States v. Ramirez*, 176 F.3d 1179, 1183 (9th Cir. 1999) (misstatements at closing); *United States v. Randall*, 162 F.3d 557, 559 (9th Cir. 1998) (cautionary instruction); *United States v. Nelson*, 137 F.3d 1094, 1106 (9th Cir. 1998) (improper questions); *United States v. English*, 92 F.3d 909, 912 (9th Cir. 1996) (emotional testimony); *United States v. Wills*, 88 F.3d 704, 712 (9th Cir. 1996) (statement about polygraph); *United States v. Frederick*, 78 F.3d 1370, 1375 (9th Cir. 1996) (prejudicial testimony); *United States v. George*, 56 F.3d 1078, 1082 (9th Cir. 1995) (inadmissible hearsay).

United States v. Moses, 496 F.3d 984, 992–93 (9th Cir. 2007).[156] This includes the following:

- Motions based on newly discovered evidence. *See United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc) (Rule 33 motion); *United States v. Brugnara*, 856 F.3d 1198, 1206 (9th Cir. 2017).[157]

- Motions based on alleged prosecutorial misconduct. *See United States v. Washington*, 462 F.3d 1124, 1135 (9th Cir. 2006) (finding error harmless).[158]

- Motions based on alleged juror misconduct. *See United States v. Murphy*, 483 F.3d 639, 642 (9th Cir. 2007); *United States v. Bussell*, 414 F.3d 1048, 1054 (9th Cir. 2005).[159]

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[156] *See, e.g.*, *United States v. Mack*, 362 F.3d 597, 600 (9th Cir. 2004) (reversing for a new trial); *United States v. Hursh*, 217 F.3d 761, 769 (9th Cir. 2000); *United States v. Jackson*, 209 F.3d 1103, 1106 (9th Cir. 2000) (28 U.S.C. § 2255 "motion"); *United States v. Endicott*, 869 F.2d 452, 454 (9th Cir. 1989) ("[T]he defendant carries a 'significant burden' to show that the district court abused its discretion in denying a new trial.").

[157] *See also United States v. Waggoner*, 339 F.3d 915, 919 (9th Cir. 2003); *United States v. Sarno*, 73 F.3d 1470, 1507 (9th Cir. 1995); *United States v. Bischel*, 61 F.3d 1429, 1436 (9th Cir. 1995); *United States v. Reyes Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992).

[158] *See also United States v. Murillo*, 288 F.3d 1126, 1140 (9th Cir. 2002) (finding error harmless beyond reasonable doubt); *United States v. Peterson*, 140 F.3d 819, 821 (9th Cir. 1998) (prosecutorial misconduct, reversing for new trial); *United States v. Sayetsitty*, 107 F.3d 1405, 1408 (9th Cir. 1997).

[159] *See also United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002); *United States v. Saya*, 247 F.3d 929, 935 (9th Cir. 2001); *United States v. George*, 56 F.3d 1078, 1083 (9th Cir. 1995).

- District court's decision not to hold an evidentiary hearing. *See Bussell*, 414 F.3d at 1054; *see also United States v. Del Muro*, 87 F.3d 1078, 1080 n.3 (9th Cir. 1996).

The decision to grant a new trial based on a claim that jurors were improperly exposed to extrinsic evidence is subject, however, to "independent" review. *See United States v. Prime*, 431 F.3d 1147, 1157 (9th Cir. 2005); *United States v. Keating*, 147 F.3d 895, 899 (9th Cir. 1998). Note that the presence of a biased juror cannot be harmless and requires a new trial without a showing of prejudice. *See United States v. Long*, 301 F.3d 1095, 1101 (9th Cir. 2002).

The court has also stated that de novo review applies to the denial of motions for a new trial based on a *Brady* violation, *see United States v. Bruce*, 984 F.3d 884, 890 (9th Cir. 2021); *United States v. Liew*, 856 F.3d 585, 595–96 (9th Cir. 2017); *United States v. Pelisamen*, 641 F.3d 399, 408 (9th Cir. 2011); *United States v. Antonakeas*, 255 F.3d 714, 725 (9th Cir. 2001); *United States v. Howell*, 231 F.3d 615, 624 (9th Cir. 2000), or one based on a theory of entrapment, *see United States v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997).

15. Parole

The legality of a sentence and its impact on parole are issues reviewed de novo. *See United States v. Carpenter*, 91 F.3d 1282, 1283 (9th Cir. 1996) (per curiam), *implied overruling on other grounds recognized by United States v. Broussard*, 611 F.3d 1069 (9th Cir. 2010); *United States v. Manning*, 56 F.3d 1188, 1200 (9th Cir. 1995).

Whether a parole or probation officer is acting as a "stalking horse" is a question of fact reviewed for clear error. *See United States v. Vought*, 69 F.3d 1498, 1501 (9th Cir. 1995).

The Parole Commission's interpretations of law are subject to de novo review and its factual findings are reviewed for clear error. *See Kleeman v. United States Parole Comm'n*, 125 F.3d 725, 730 (9th Cir. 1997). The Commissioner's discretionary decisions to grant or deny parole are not reviewable by this court except for the claim that "the Commission acted beyond the scope of discretion

granted by Congress." *DeLancy v. Crabtree*, 131 F.3d 780, 787 (9th Cir. 1997) (internal quotation omitted).[160]

16. Probation

A district court may lack discretion to impose probation as a sentence. *See United States v. Green*, 105 F.3d 1321, 1323 (9th Cir. 1997); *United States v. Roth*, 32 F.3d 437, 440 (9th Cir. 1994). If probation is available, the "task of line drawing in probation matters is best left to the discretion of the sentencing judge." *United States v. Juvenile #1*, 38 F.3d 470, 473 (9th Cir. 1994) (internal quotation omitted).

Abuse of discretion review applies to the following:

- Decision to revoke probation or supervised release. *See United States v. Green*, 12 F.4th 970, 973 (9th Cir. 2021); *United States v. Cate*, 971 F.3d 1054, 1057 (9th Cir. 2020); *United States v. Harvey*, 659 F.3d 1272, 1274 (9th Cir. 2011); *United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008); *United States v. Shampang*, 987 F.2d 1439, 1441 (9th Cir. 1993).

- Imposition or modification of probation or supervised release conditions. *See United States v. Gibson*, 998 F.3d 415, 418 (9th Cir. 2021) ("We generally review conditions of supervised release for abuse of discretion."); *United States v. Dailey*, 941 F.3d 1183, 1188 (9th Cir. 2019) ("A district court's imposition of probation conditions is reviewed for abuse of discretion."); *United States v. Hohag*, 893 F.3d 1190, 1192 (9th Cir. 2018) ("District courts have wide discretion to impose conditions of supervised release."); *United States v. Evans*, 883 F.3d 1154, 1159 (9th Cir. 2018); *United States v. Sims*, 849 F.3d 1259, 1262 (9th Cir. 2017) (the appellate court owes substantial deference to the district court's judgment about which conditions are needed to ensure successful supervision of the defendant); *United States v. Nixon*, 839 F.3d 885, 887 (9th Cir. 2016) (modification of probation conditions); *United States v. Johnson*, 697 F.3d 1249, 1251 (9th Cir. 2012) ("We

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[160] *See also Benny v. United States Parole Comm'n*, 295 F.3d 977, 981 (9th Cir. 2002) (noting review is limited to "whether the Commission exceeded its authority or acted so arbitrarily as to violate due process").

review the district court's decision to impose a condition of supervised release for an abuse of discretion.").

- The decision not to conduct an in camera inspection of probation files pursuant to defendant's discovery request. *See United States v. Alvarez*, 358 F.3d 1194, 1208 (9th Cir. 2004).

De novo review applies to the following:

- Challenges to the district court's authority to impose or modify specific probation or supervised release conditions. *See United States v. Many White Horses*, 964 F.3d 825, 828 (9th Cir. 2020) (reviewing de novo the legal authority of the district court to impose the condition); *United States v. Bainbridge*, 746 F.3d 943, 946 (9th Cir. 2014) ("Whether a district court has authority to modify supervised release conditions is a question of law reviewed de novo."); *United States v. Parrott*, 992 F.2d 914, 920 (9th Cir. 1993).

- Claims that conditions of supervised release violate the Constitution are reviewed de novo. *See United States v. Gibson*, 998 F.3d 415 (9th Cir. 2021); *Dailey*, 941 F.3d at 1188; *United States v. Ochoa*, 932 F.3d 866, 868–69 (9th Cir. 2019).

- Whether a supervised release condition illegally exceeds the permissible statutory penalty. *See Dailey*, 941 F.3d at 1188; *Ochoa*, 932 F.3d 866, 868–69.

- Whether a district court can properly delegate authority to a magistrate judge to conduct a probation revocation hearing. *See United States v. Colacurcio*, 84 F.3d 326, 328 (9th Cir. 1996). *See also United States v. Gray*, 905 F.3d 1145, 1148 (9th Cir. 2018) ("The magistrate judge, therefore, was authorized to hold a revocation hearing in this matter and recommend a sentence to the district court.").

- Whether a probation officer exceeds her statutory authority by submitting a petition on supervised release to the district court. *See United States v. Mejia-Sanchez*, 172 F.3d 1172, 1174 (9th Cir. 1999).

- Whether a district court may reinstate an original term of supervised release. *See United States v. Trenter*, 201 F.3d 1262, 1263 (9th Cir. 2000).

- The district court's interpretation and application of the supervised release statute. *See United States v. Harvey*, 659 F.3d 1272, 1274 (9th Cir. 2011); *United States v. Anderson*, 519 F.3d 1021, 1022 (9th Cir. 2008); *United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002); *United States v. Cade*, 236 F.3d 463, 465 (9th Cir. 2000).

17. Resentencing

De novo review applies to whether a court has jurisdiction to resentence a defendant,[161] whether double jeopardy bars resentencing,[162] and whether resentencing violates a defendant's due process rights.[163] *See United States v. Ornelas*, 825 F.3d 548, 549 (9th Cir. 2016) (jurisdiction); *United States v. Aguilar-Reyes*, 653 F.3d 1053, 1055 (9th Cir. 2011) (jurisdiction); *United States v. Dowd*, 417 F.3d 1080, 1086 (9th Cir. 2005) (due process rights); *United States v. Radmall*, 340 F.3d 798, 800 n.4 (9th Cir. 2003) (double jeopardy). Note that generally a district court's discretion on remand to resentence a defendant is not limited to the prior record. *See United States v. Matthews*, 278 F.3d 880, 885 (9th Cir. 2002) (en banc); *United States v. Luong*, 627 F.3d 1306, 1309 (9th Cir. 2010).[164]

"Whether a district court's imposition of a higher sentence at resentencing was vindictive is reviewed under a de novo standard." *United States v. Horob*, 735 F.3d 866, 869 (9th Cir. 2013).

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[161] *See United States v. Cabaccang*, 481 F.3d 1176, 1182 (9th Cir. 2007); *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003); *United States v. Aguirre*, 214 F.3d 1122, 1124 (9th Cir. 2000) (vacating sentence); *United States v. Ruiz-Alvarez*, 211 F.3d 1181, 1184 (9th Cir. 2000); *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1027 (9th Cir. 1999) (vacating sentence).

[162] *See United States v. Ruiz-Alvarez*, 211 F.3d 1181, 1185 (9th Cir. 2000); *United States v. McClain*, 133 F.3d 1191, 1193 (9th Cir. 1998) (habeas).

[163] *See United States v. Garcia-Guizar*, 234 F.3d 483, 489 n.2 (9th Cir. 2000).

[164] *See also United States v. Culps*, 300 F.3d 1069, 1082 (9th Cir. 2002) (discussing certain cases where we may limit the discretion of the district court to consider new evidence).

18. Restitution

The legality of a restitution order is reviewed de novo. *See United States v. Gagarin*, 950 F.3d 596, 607 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2729 (2021); *United States v. Anieze-Smith*, 923 F.3d 565, 570 (9th Cir. 2019) (reviewing de novo the legality of a restitution order, including the district court's valuation method). The court's "valuation methodology" is also reviewed de novo. *See Anieze-Smith*, 923 F.3d at 570; *United States v. Berger*, 473 F.3d 1080, 104 (9th Cir. 2007).

If the order is within statutory bounds, then the restitution calculation is reviewed for abuse of discretion, with any underlying factual findings reviewed for clear error. *See Gagarin*, 950 F.3d at 607; *Anieze-Smith*, 923 F.3d at 570; *United States v. Galan*, 804 F.3d 1287, 1289 (9th Cir. 2015) ("We review de novo the legality of a restitution order and, if the order is within the statutory bounds, we review the amount of restitution for abuse of discretion. We review for clear error factual findings supporting an order of restitution."); *United States v. Brock-Davis*, 504 F.3d 991, 996 (9th Cir. 2007).[165] The amount of restitution ordered is reviewed for an abuse of discretion. *See United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004).[166]

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[165] *See also United States v. Doe*, 488 F.3d 1154, 1160–61 (9th Cir. 2007); *United States v. Berger*, 473 F.3d 1080, 1104 (9th. Cir. 2007); *United States v. Cienfuegos*, 462 F.3d 1160, 1162 (9th Cir. 2006); *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004); *United States v. De La Fuente*, 353 F.3d 766, 772 (9th Cir. 2003); *United States v. Riley*, 335 F.3d 919, 931 (9th Cir. 2003); *United States v. Grice*, 319 F.3d 1174, 1176 (9th Cir. 2003) (per curiam); *United States v. Pizzichiello*, 272 F.3d 1232, 1240 (9th Cir. 2001).

[166] *See also United States v. Najjor*, 255 F.3d 979, 984 (9th Cir. 2001) (remand for recalculation of restitution); *United States v. Matsumaru*, 244 F.3d 1092, 1108 (9th Cir. 2001) (same); *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999); *United States v. Johnson*, 132 F.3d 1279, 1286 (9th Cir. 1997); *United States v. Sablan*, 92 F.3d 865, 870 (9th Cir. 1996) (reversing for recalculation of restitution).

A court has broad discretion in ordering restitution. *See United States v. Batson*, 608 F.3d 630, 632 (9th Cir. 2010).[167]

When the restitution order is not challenged before the district court, review is limited to plain error. *See United States v. Yijun Zhou*, 838 F.3d 1007, 1010–11 (9th Cir. 2016); *United States v. Beecroft*, 825 F.3d 991, 995 (9th Cir. 2016); *United States v. Bright*, 353 F.3d 1114, 1120 (9th Cir. 2004).[168]

The court reviews de novo decisions involving the interpretation of federal statutes like the Mandatory Victims Restitution Act, and questions of law regarding the application of restitution statutes. *See United States v. Swenson*, 971 F.3d 977, 980 (9th Cir. 2020); *United States v. Berger*, 574 F.3d 1202, 1204 (9th Cir. 2009) ("We review de novo questions of law regarding the application of restitution statutes.").

19. Sentencing

a. Applicability of the Sentencing Guidelines and pre-Guidelines Standards of Review

The Sentencing Guidelines apply to defendants who committed offenses on or after November 1, 1987. The district court's interpretation of the Sentencing Guidelines is reviewed de novo. *See United States v. Campbell*, 937 F.3d 1254, 1256 (9th Cir. 2019); *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc); *United States v. Lynn*, 636 F.3d 1127, 1138 (9th Cir. 2011) (as amended); *United States v. Rising Sun*, 522 F.3d 989, 993 (9th Cir. 2008); *United States v. Alcarez-Camacho*, 340 F.3d 794, 796 (9th Cir. 2003); *United States v. Merino*, 44 F.3d 749, 753 (9th Cir. 1994).

Prior to the Guidelines, a district court had "virtually unfettered discretion in imposing sentence." *United States v. Baker*, 10 F.3d 1374, 1420 (9th Cir. 1993)

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[167] *See United States v. Berger*, 473 F.3d 1080, 1104 (9th Cir. 2007); *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999); *United States v. Miguel*, 49 F.3d 505, 511 (9th Cir. 1995).

[168] *See also United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003); *United States v. Zink*, 107 F.3d 716, 718 (9th Cir. 1997); *see also United States v. Fu Sheng Ko*, 620 F.3d 1158, 1162 (9th Cir. 2010) (reviewing valuation method for plain error where not challenged in district court).

(internal quotation omitted), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). The legality of a pre-Guidelines sentence is reviewed de novo. *See United States v. Pomazi*, 851 F.2d 244, 247 (9th Cir. 1988), *overruled on other grounds by Hughey v. United States*, 495 U.S. 411 (1990). Pre-Guidelines sentences that fall within statutory limits are left to the sound discretion of the district court and are reviewed only for abuse of discretion. *See Pomazi*, 851 F.2d at 247. If the sentence raises constitutional issues, however, review is more searching. *See id.*; *see also United States v. Tucker*, 404 U.S. 443, 447 (1972) (sentence within statutory limits generally not reviewable absent constitutional concerns). The district court's decision to impose pre-Guidelines and Guidelines sentences consecutively is reviewed for an abuse of discretion. *See United States v. Scarano*, 76 F.3d 1471, 1474 (9th Cir. 1996).

b. Application of the Guidelines to Specific Facts

> In the sentencing context, "[w]e review the district court's factual findings for clear error, its construction of the United States Sentencing Guidelines de novo, and its application of the Guidelines to the facts for abuse of discretion." *United States v. Harris*, 999 F.3d 1233, 1235 (9th Cir. 2021). "Objections to a sentence not presented to the district court generally cannot be raised for the first time on appeal. However, imposition of an erroneous sentence may be reviewed for plain error." *United States v. Vieke*, 348 F.3d 811, 813 (9th Cir. 2003) (internal citation omitted).

United States v. Halamek, 5 F.4th 1081, 1087 (9th Cir. 2021).

The court in *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc) clarified the standard of review, stating that "as a general rule, a district court's application of the Sentencing Guidelines to the facts of a given case should be reviewed for abuse of discretion." *Id*. at 1170. The court explained:

> Guideline-application decisions, in the sense we refer to them here, arise only after the district court has identified the correct legal standard and properly found the relevant historical facts. At that point, there is often room for judgment in deciding whether the specific constellation of facts at issue meets the governing legal standard. As is true in other contexts, the more general the standard set by the Guidelines, "the more leeway courts have in reaching outcomes in case-by-case determinations." … . Under the standard of review we adopt today, this last component of the district court's

> decision—deciding whether a specific set of facts satisfies the correctly identified legal standard—will generally be subject to review for abuse of discretion.

Id. at 1171. To the extent prior cases held otherwise, *Gasca-Ruiz* overruled them.[169] 852 F.3d at 1170.

Note, while "Guideline-application decisions should almost always be reviewed deferentially for abuse of discretion, [] there is at least one situation in which *de novo* review is appropriate: determining whether a defendant's prior conviction is for a 'crime of violence,' as required under some provisions of the Guidelines." *Gasca-Ruiz*, 852 F.3d at 1174. *See also United States v. Prigan*, 8 F.4th 1115, 1118 (9th Cir. 2021); *United States v. Robinson*, 869 F.3d 933, 936 (9th Cir. 2017) (reviewing de novo whether a state-law crime constitutes a crime of violence under the Guidelines).

District courts' sentencing decisions are entitled to deference. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1043 (9th Cir. 2017) (en banc). Sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *See Gall v. United States*, 552 U.S. 38, 46 (2007); *Rita v. United States*, 551 U.S. 338, 351 (2007); *United States v. Door*, 996 F.3d 606, 622–23 (9th Cir. 2021); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008); *United States v. Cruz-Mendez*, 811 F.3d 1172, 1175 (9th Cir. 2016).

Procedural error includes failing to calculate (or calculating incorrectly) the proper Guidelines range, treating the Guidelines as mandatory, failing to consider the factors from 18 U.S.C. § 3553(a), choosing a sentence based on clearly

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[169] Examples of cases noting the intracircuit conflict that existed prior to *Gasca-Ruiz* include: *United States v. McEnry*, 659 F.3d 893, 896 n.5 (9th Cir. 2011) ("[t]here is 'an intracircuit conflict as to whether the standard of review for *application* of the Guidelines to the facts is de novo or only for abuse of discretion,'") (quoting *United States v. Laurienti*, 611 F.3d 530, 552 (9th Cir. 2010) (emphasis added)); *United States v. Bernardo*, 818 F.3d 983, 985 (9th Cir. 2016) (not resolving the conflict because the court would reach the same conclusion under either standard); *United States v. Sullivan*, 797 F.3d 623, 641 n.13 (9th Cir. 2015) (noting intracircuit conflict regarding standard of review for the application of the Guidelines to the facts).

erroneous facts, or failing to explain a selected sentence, including any deviation from the Guidelines range. *See Carty*, 520 F.3d at 993. *See also Door*, 996 F.3d at 622.

In considering the substantive reasonableness of a sentence, the totality of the circumstances is considered. *See Carty*, 520 F.3d at 993. A court of appeals may not presume a non-Guidelines sentence unreasonable. *See id.* Once a sentence is selected, the district court must sufficiently explain the sentence to permit meaningful appellate review. *See id.* at 992. *See also Door*, 996 F.3d at 622–23.

> [T]his court should only vacate a sentence if the district court's decision not to impose a lesser sentence was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Laurienti*, 731 F.3d 967, 976 (9th Cir. 2013) (cleaned up). "Although we do not automatically presume reasonableness for a within-Guidelines sentence, in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Id*. (cleaned up).

United States v. Wilson, 8 F.4th 970, 977–78 (9th Cir. 2021) (per curiam).

c. Constitutionality

The constitutionality of the Sentencing Guidelines is a question of law reviewed de novo. [170] *See United States v. Padilla-Diaz*, 862 F.3d 856, 860 (9th Cir. 2017). The constitutionality of a sentence imposed under the Guidelines is reviewed de novo.[171] *See United States v. Henderson*, 998 F.3d 1071, 1073 (9th

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[170] *See United States v. Ellsworth*, 456 F.3d 1146, 1149 (9th Cir. 2006); *United States v. Leasure*, 319 F.3d 1092, 1096 (9th Cir. 2003); *United States v. Mezas de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000); *United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997); *see also United States v. Booker*, 543 U.S. 220 (2005) (holding portions of the Guidelines unconstitutional).

[171] *See United States v. Raygosa-Esparza*, 566 F.3d 852, 854 (9th Cir. 2009); *United States v. McCaleb*, 552 F.3d 1053, 1061 (9th Cir. 2009); *United States v. Leon H.*, 365 F.3d 750, 752 (9th Cir. 2004); *United States v. Barajas-Avalos*, 377 F.3d 1040, 1060 (9th Cir. 2004).

Cir. 2021); *United States v. Hunt*, 656 F.3d 906, 911 (9th Cir. 2011) *United States v. Guillen-Cervantes*, 748 F.3d 870, 872 (9th Cir. 2014). A claim that a defendant's sentence violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is also reviewed de novo. *See United States v. Dare*, 425 F.3d 634, 638 (9th Cir. 2005); *United States v. Smith*, 282 F.3d 758, 771 (9th Cir. 2002); *but see United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir. 2002) (holding that "*Apprendi* does not apply retroactively to cases on initial collateral review"). *Apprendi* errors are reviewed under the harmless error standard. *See Henderson*, 998 F.3d at 1073–74; *Hunt*, 656 F.3d at 911.

d. Continuances

A trial court's refusal to grant a continuance of a sentencing hearing is reviewed for an abuse of discretion. *See Williams v. Stewart*, 441 F.3d 1030, 1056 (9th Cir. 2006) (as amended); *United States v. Lopez-Patino*, 391 F.3d 1034, 1036 (9th Cir. 2004); *United States v. Lewis*, 991 F.2d 524, 528 (9th Cir. 1993); *United States v. Monaco*, 852 F.2d 1143, 1150 (9th Cir. 1988).

e. Correcting/Amending/Reducing Sentences and Rule 35

> Subject to certain requirements, Rule 35 of the Federal Rules of Criminal Procedure authorizes a court to correct an error in sentencing that "resulted from arithmetical, technical, or other clear error," Fed. R. Crim. P. 35(a), and to reduce a sentence when the defendant has provided substantial assistance to the government, Fed. R. Crim. P. 35(b).

United States v. Kelley, 962 F.3d 470, 476 n.8 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

Fed. R. Crim. P. 35 permits corrections of sentences that are clearly erroneous under the Sentencing Guidelines. *See United States v. Aguirre*, 214 F.3d 1122, 1126 (9th Cir. 2000).

De novo review applies to issues of law raised in a Rule 35 motion,[172] and whether a court has jurisdiction under Rule 35 to resentence.[173] *See United States v. JDT*, 762 F.3d 984, 1005 (9th Cir. 2014); *United States v. Aguilar-Reyes*, 653 F.3d 1053, 1055 (9th Cir. 2011); *United States v. Penna*, 319 F.3d 509, 511 (9th Cir. 2003).

Note that Fed. R. Crim. P. 35 was modified to conform with the Sentencing Guidelines. Review of a trial court's decision under the former rule may arise, however, if the criminal conduct occurred prior to November 1, 1987. A district court's decision under Rule 35 involving pre-November 1, 1987 conduct is "reviewed for illegality or gross abuse of discretion." *United States v. Hovsepian*, 359 F.3d 1144, 1153 (9th Cir. 2004) (en banc); *United States v. Hayes*, 231 F.3d 1132, 1135 (9th Cir. 2000) (addressing pre-November 1, 1987 conduct).

Abuse of discretion review applies to a trial court's decision whether to reduce a Guideline sentence pursuant to 18 U.S.C. § 3582(c)(2) (change in Guideline range). *See United States v. Sainz*, 933 F.3d 1080, 1083 (9th Cir. 2019); *United States v. Dunn*, 728 F.3d 1151, 1155 (9th Cir. 2013); *United States v. Chaney*, 581 F.3d 1123, 1125 (9th Cir. 2009); *United States v. Hurt*, 345 F.3d 1033, 1035 (9th Cir. 2003).[174] "A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Sainz*, 933 F.3d at 1083 (quoting *Dunn*, 728 F.3d at 1155.

Whether a district court may sua sponte raise a defendant's waiver of the right to seek relief under 18 U.S.C. § 3582(c)(2) is a legal question reviewed de novo. *See Sainz*, 933 F.3d at 1083.

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[172] *See United States v. Zakhor*, 58 F.3d 464, 465 (9th Cir. 1995) (challenging application and constitutionality of Sentencing Reform Act).

[173] *See United States v. Aguirre*, 214 F.3d 1122, 1124 (9th Cir. 2000) (vacating resentence); *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1027 (9th Cir. 1999) (vacating resentence).

[174] *See also United States v. Sprague*, 135 F.3d 1301, 1304 (9th Cir. 1998); *United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996) (per curiam).

The court also reviews § 3582(c)(1) sentence reduction decisions for abuse of discretion. *See United States v. Aruda*, 993 F.3d 797, 799 (9th Cir. 2021) (per curiam).

f. Departures

A district court's sentencing decisions are reviewed for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Door*, 996 F.3d 606, 622 (9th Cir. 2021); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). The sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 351 (2007); *Carty*, 520 F.3d at 993. Procedural error includes failing to calculate (or calculating incorrectly) the proper Guidelines range, treating the Guidelines as mandatory, failing to consider the factors from 18 U.S.C. § 3553(a), choosing a sentence based on clearly erroneous facts, or failing to explain a selected sentence, including any deviation from the Guidelines range. *See Carty*, 520 F.3d at 993. *See also Door*, 996 F.3d at 622.

In considering the substantive reasonableness of a sentence, the totality of the circumstances is considered. *See Carty*, 520 F.3d at 993. A court of appeals may not presume a non-Guidelines sentence unreasonable. *See id.* Once a sentence is selected, the district court must sufficiently explain the sentence to permit meaningful appellate review. *See id.* at 992. *See also Door*, 996 F.3d at 622–23.

If a district court finds a non-Guidelines sentence appropriate, it must consider the extent of the deviation "and ensure that the justification is sufficiently compelling to support the degree of the variance." *Carty*, 520 F.3d at 991 (quoting *Gall*, 552 U.S. at 50). The degree of variance is just one consideration. Once a sentence is selected, the district court must sufficiently explain the sentence to permit meaningful appellate review. *Id.* at 992. For any departure from the Guidelines, due deference is given "to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* at 993 (quoting *Gall*, 552 U.S. at 51); s*ee also United States v. Shi*, 525 F.3d 709, 732–33 (9th Cir. 2008).

Prior to *United States v. Booker*, 543 U.S. 220 (2005), district court decisions to depart from the Guidelines were reviewed de novo in accordance with

18 U.S.C. § 3742(e).[175] *Booker* excised this and other provisions as unconstitutional and stated that the modified statute sets forth an implicit reasonableness standard for appellate review. *Booker*, 543 U.S. at 260–65. *Booker* applies to all cases pending on direct review at the time it was decided. *Id*. at 268. Also, prior to *Booker*, the extent of a district court's downward departure was reviewed for abuse of discretion.[176]

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[175] The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT) (April 30, 2003) amended 18 U.S.C. § 3742(e) and provided for de novo review of the district court's decision to depart from the applicable sentencing guideline. *See United States v. Barragan-Espinoza*, 350 F.3d 978, 981 (9th Cir. 2003). PROTECT thus overruled in part the holding of *Koon v. United States*, 518 U.S. 81, 99 (1996) (holding district court's decision to depart is reviewed for an abuse of discretion), and applied to all pending cases. *See United States v. Philips*, 367 F.3d 846, 860 (9th Cir. 2004) (holding PROTECT "applies to cases pending on appeal at the time of its enactment"); *United States v. Daychild*, 357 F.3d 1082, 1105–06 (9th Cir. 2004); *see also United States v. Leon*, 341 F.3d 928, 931 (9th Cir. 2003) (noting change in standard of review but declining to decide whether PROTECT applied to cases pending on appeal). Prior to PROTECT, a district court's decision to depart was reviewed under an abuse of discretion standard. *See, e.g.*, *Barragan-Espinoza*, 350 F.3d at 981; *Leon*, 341 F.3d at 931; *United States v. Thompson*, 315 F.3d 1071, 1074 (9th Cir. 2002). PROTECT applied only to review of departures and not to a district court's refusal to depart downward. *See United States v. Linn*, 362 F.3d 1261, 1262 (9th Cir. 2004) (per curiam) (holding appellate court lacks jurisdiction to review district court's discretionary refusal to depart downward).

[175] *See Barragan-Espinoza*, 350 F.3d at 981 (explaining that PROTECT did not alter this standard of review); *United States v. Working*, 287 F.3d 801, 806 (9th Cir. 2002) (noting extent of departure must be "reasonable"); *United States v. Rodriguez-Cruz*, 255 F.3d 1054, 1060 (9th Cir. 2001) (noting extent of departure cannot be "grossly disproportionate to objective criteria").

[176] *See Barragan-Espinoza*, 350 F.3d at 981 (explaining that PROTECT did not alter this standard of review); *United States v. Working*, 287 F.3d 801, 806 (9th Cir. 2002) (noting extent of departure must be "reasonable"); *United States v. Rodriguez-Cruz*, 255 F.3d 1054, 1060 (9th Cir. 2001) (noting extent of departure cannot be "grossly disproportionate to objective criteria").

Booker requires the review of a sentence for reasonableness pursuant to the factors in 18 U.S.C. § 3553(a), and this includes the review of a denied downward departure. *See United States v. Dallman*, 533 F.3d 755, 760 (9th Cir. 2008).

Pre-*Booker*, the adequacy of the district court's notice to defendant of its intent to depart upward pursuant Fed. R. Crim. P. 32(h) was reviewed de novo. *United States v. Evans-Martinez*, 530 F.3d 1164, 1167 (9th Cir. 2008); *United States v. Garcia*, 323 F.3d 1161, 1165 (9th Cir. 2003) (articulating pre-Booker standard). Where the defendant fails to object to lack of notice, however, review for plain error applies, both pre- and post-*Booker*. *See Evans-Martinez*, 530 F.3d at 1167. The requirement, imposed by Rule 32(h), that a district court provide notice of its intent to depart from the Guidelines, survives *Booker*. *See id.* at 1168. However, the Supreme Court has clarified that Rule 32(h) no longer applies to a variance — as opposed to a departure — from a recommended Guidelines range. *See Irizarry v. United States*, 553 U.S. 708, 715 (2008). Pre-*Booker*, the district court's consideration of Chapter 7's non-binding policy statements was reviewed for an abuse of discretion. *See Garcia*, 323 F.3d at 1164.

g. Disparate Sentences

Before *United States v. Booker*, 543 U.S. 220 (2005), a claim of disparate sentencing was reviewed under the abuse of discretion standard. *See United States v. Bischel*, 61 F.3d 1429, 1437 (9th Cir. 1996) ("Generally, the imposition of disparate sentences alone is not an abuse of discretion, and a judge isn't required to give reasons for a disparate sentence in the absence of any evidence that a defendant is being punished for exercising his right to stand trial."). This standard has not been rearticulated since *Booker*.

Both before and after *Booker*, the Ninth Circuit "has applied the rational basis standard of review to equal protection challenges to the Sentencing Guidelines based on a comparison of allegedly disparate sentences." *United States v. Ellsworth*, 456 F.3d 1146, 1149 (9th Cir. 2006); *see also United States v. Johnson*, 626 F.3d 1085, 1088 (9th Cir. 2010).

h. Factual Findings

Post-*Booker* a district court's sentencing decisions are reviewed for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Campbell*, 937 F.3d 1254, 1256 (9th Cir. 2019) (reviewing sentence imposed on revocation of supervised release under the *Booker* reasonableness standard); *United States v. Montes-Ruiz*, 745 F.3d 1286, 1289 (9th Cir. 2014) (same); *United*

States v. Carty, 520 F.3d 984, 993 (9thCir. 2008) (en banc). The sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *See Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 351 (2007); *Carty*, 520 F.3d at 993. Procedural error includes, among other things, choosing a sentence based on clearly erroneous facts. *See Carty*, 520 F.3d at 993; *see also United States v. Stoterau*, 524 F.3d 988, 997 (9th Cir. 2008) (reviewing factual findings for clear error). The district court's factual findings are reviewed for clear error. *See Campbell*, 937 F.3d at 1256; *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc).

The Ninth Circuit has clarified the plain error standard to be applied when a *Booker* Sixth Amendment sentencing claim was not raised in pre-*Booker* proceedings at the district court. *See United States v. Ameline*, 409 F.3d 1073, 1078-85 (9th Cir. 2005) (en banc). When faced with an unpreserved *Booker* error, the court applies the "limited remand" procedure described in *Ameline*. *See Ameline*, 409 F.3d at 1078–85.

Before *United States v. Booker*, 543 U.S. 220 (2005), the district court's factual findings in the sentencing phase were reviewed for clear error.[177]

i. Fines

The legality of a fine imposed is a question of law reviewed de novo. *See United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002); *United States v. Portin*, 20 F.3d 1028, 1029–30 (9th Cir. 1994). Whether a fine is constitutionally excessive is reviewed de novo. *See United States v. Bajakajian*, 524 U.S. 321, 336 & n.10 (1998). Whether a district court has the authority to modify a fine is a question of law reviewed de novo. *See United States v. Miller*, 205 F.3d 1098, 1100 (9th Cir. 2000). The district court's determination that a defendant has the

[177] *See United States v. Nielsen*, 371 F.3d 574, 582 (9th Cir. 2004) (acceptance of responsibility); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1088–89 (9th Cir. 2004) (acceptance of responsibility); *United States v. Cordova Barajas*, 360 F.3d 1037, 1042 (9th Cir. 2004) (minor participant); *United States v. Smith*, 282 F.3d 758, 772 (9th Cir. 2002) (minor or minimal role).

ability to pay a fine is a finding of fact reviewed for clear error. *See United States v. Rearden*, 349 F.3d 608, 617 (9th Cir. 2003).[178]

j. In Absentia

A district court's decision following a sentencing hearing conducted in the defendant's absence is reviewed for abuse of discretion. *United States v. Ornelas*, 828 F.3d 1018, 1021 (9th Cir. 2016). "In addition, the district court's factual determination that the defendant was 'voluntarily absent' from the proceedings is reviewed for clear error. *Id.*

k. Interpretation and Application of Sentencing Guidelines

The district court's construction of the United States Sentencing Guidelines is reviewed de novo, and its application of the Guidelines to the facts is reviewed for abuse of discretion. *See United States v. Halamek*, 5 F.4th 1081, 1087 (9th Cir. 2021); *United States v. Harris*, 999 F.3d 1233, 1235 (9th Cir. 2021). The district court's factual findings are reviewed for clear error. *See Halamek*, 5 F.4th at 1087; *Harris*, 999 F.3d at 1235.

" 'Objections to a sentence not presented to the district court generally cannot be raised for the first time on appeal. However, imposition of an erroneous sentence may be reviewed for plain error.' " *Halamek*, 5 F.4th at 1087 (quoting *United States v. Vieke*, 348 F.3d 811, 813 (9th Cir. 2003)).

Before *United States v. Booker*, 543 U.S. 220 (2005), the district court's interpretation of the Sentencing Guidelines was reviewed de novo. *See United States v. Nielsen*, 371 F.3d 574, 582 (9th Cir. 2004) ("interpretation" reviewed de novo); *United States v. Phillips*, 367 F.3d 846, 854 (9th Cir. 2004) ("interpretation" reviewed de novo); *United States v. Mitchell*, 354 F.3d 1013, 1014 (9th Cir. 2004) ("application" reviewed de novo); *United States v. Garcia*, 323 F.3d 1161, 1164 (9th Cir. 2003) ("application" reviewed de novo); *United States v. Lopez-Garcia*, 316 F.3d 967, 970 (9th Cir. 2003) ("interpretation and application" reviewed de novo). Opinions since *Booker* have continued to apply this standard. *See United States v. Rivera*, 527 F.3d 891, 908 (9th Cir. 2008).

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[178] *See United States v. Sager*, 227 F.3d 1138, 1147 (9th Cir. 2000); *United States v. Scrivener*, 189 F.3d 944, 953 (9th Cir. 1999); *United States v. Ladum*, 141 F.3d 1328, 1344 (9th Cir. 1998).

The following subsections address specific issues related to interpretation and application of the guidelines.

i. Abuse-of-Trust Enhancement

> "We review a district court's application of an abuse-of-trust enhancement under a two-step analysis." *United States v. Aubrey*, 800 F.3d 1115, 1134 (9th Cir. 2015). First, we review the legal question whether a defendant occupied a position of trust as defined by the Guidelines de novo. *Id*. "Then, if we decide that the defendant held a position of trust, we review for clear error the district court's decision whether the defendant's abuse of his position significantly facilitated the offense." *Id*. (internal quotation marks and alterations omitted).

United States v. Adebimpe, 819 F.3d 1212, 1217 (9th Cir. 2016).

ii. Prior Conviction

The court's conclusion that a prior conviction may be used for purposes of sentencing enhancement is also reviewed de novo. *See United States v. Reinhart*, 893 F.3d 606, 610 (9th Cir. 2018) ("We review de novo whether prior convictions support statutory mandatory-minimum enhancements."); *United States v. Chavez-Cuevas*, 862 F.3d 729, 734 (9th Cir. 2017); *United States v. Sullivan*, 797 F.3d 623, 635 (9th Cir. 2015).[179] Whether a district court's determination that a prior conviction qualifies as a crime of violence is reviewed de novo. *See Chavez-Cuevas*, 862 F.3d at 734; *United States v. Rodriguez-Guzman*, 506 F.3d 738, 740–41 (9th Cir. 2007). Whether a defendant is a career offender is reviewed de novo. *See United States v. Mitchell*, 624 F.3d 1023, 1025 (9th Cir. 2010); *United States v. Piccolo*, 441 F.3d 1084, 1086 (9th Cir. 2006). "The same reasons for applying de novo review to determinations of whether a prior conviction is a 'crime of violence' also apply to whether a prior conviction is a 'controlled substance offense.'" *United States v. Brown*, 879 F.3d 1043, 1047 (9th Cir. 2018).

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[179] *See also United States v. Hernandez-Valdovinos*, 352 F.3d 1243, 1246 (9th Cir. 2003) (§ 2L1.2); *United States v. Ramirez*, 347 F.3d 792, 797 (9th Cir. 2003) (§ 4A1.1(c)); *United States v. Gallaher*, 275 F.3d 784, 790 (9th Cir. 2001) (Armed Career Criminal Act).

iii. Prison Credit Time

Whether the district court can grant prison credit time is a question of law reviewed de novo. *See United States v. Brito*, 868 F.3d 875, 879 (9th Cir. 2017); *United States v. Peters*, 470 F.3d 907, 908–09 (9th Cir. 2006) (per curiam); *United States v. Lualemaga*, 280 F.3d 1260, 1265 (9th Cir. 2002); *United States v. Checchini*, 967 F.2d 348, 349 (9th Cir. 1992).

iv. Aggravated Felonies

Whether the aggravated felony provisions of the guidelines apply to a conviction is reviewed de novo. *See United States v. Arriaga-Pinon*, 852 F.3d 1195, 1198 (9th Cir. 2017); *United States v. Figueroa-Ocampo*, 494 F.3d 1211, 1213 (9th Cir. 2007).[180]

v. Approximation of Drug Quantities

Whether a district court's method of approximating the relevant drug quantity conforms to the guidelines is reviewed de novo. *See United States v. Mancuso*, 718 F.3d 780, 796 (9th Cir. 2013); *United States v. Flores*, 725 F.3d 1028, 1035 (9th Cir. 2013); *United States v. Chase*, 499 F.3d 1061, 1068 (9th Cir. 2007); *United States v. Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006); *United States v. Rosacker*, 314 F.3d 422, 425 (9th Cir. 2002).

vi. Grouping of Offenses

The trial court's "grouping of offenses" for purposes of applying the Sentencing Guidelines is also reviewed de novo. *See United States v. Williams*, 693 F.3d 1067, 1072 (9th Cir. 2012); *United States v. Melchor-Zaragoza*, 351 F.3d 925, 927 (9th Cir. 2003).[181] Note, however, that whether prior convictions are "related" for purposes of sentencing enhancement is a factual inquiry reviewed for

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[180] *See United States v. Espinoza-Cano*, 456 F.3d 1126, 1130 (9th Cir. 2006), *superseded by regulation on other grounds*; *United States v. Sanchez-Sanchez*, 333 F.3d 1065, 1067 (9th Cir. 2003); *United States v. Hernandez-Castellanos*, 287 F.3d 876, 878 (9th Cir. 2002).

[181] *See United States v. Gastelum-Almeida*, 298 F.3d 1167, 1174 (9th Cir. 2002); *United States v. Seesing*, 234 F.3d 456, 458 (9th Cir. 2001); *United States v. Boos*, 127 F.3d 1207, 1209 (9th Cir. 1997).

clear error. *See United States v. Woodard*, 172 F.3d 717, 719 (9th Cir. 1999); *see also Buford v. United States*, 532 U.S. 59, 60 (2001) (clarifying that standard is a deferential search for clear error).

vii. Reductions for Change in Guideline Range (§ 3582(c)(2))

A trial court's denial of a motion to reduce a Guideline sentence pursuant to 18 U.S.C. § 3582(c)(2) (change in Guideline range) is reviewed for an abuse of discretion. *See United States v. Lizarraras-Chacon*, 14 F.4th 961, 964 (9th Cir. 2021); *United States v. Chaney*, 581 F.3d 1123, 1125 (9th Cir. 2009); *United States v. Sprague*, 135 F.3d 1301, 1304 (9th Cir. 1998); *United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996). The district court abuses its discretion if it does not apply the correct law or predicates its decision on a clearly erroneous factual finding. *See Lizarraras-Chacon*, 14 F.4th at 964; *United States v. Trujillo*, 713 F.3d 1003, 1008 n.3 (9th Cir. 2013).

l. Legality

The legality of a Guidelines sentence is reviewed de novo. *See United States v. Hammond*, 742 F.3d 880, 882 (9th Cir. 2014); *United States v. Garcia-Guerrero*, 635 F.3d 435, 438 (9th Cir. 2011); *United States v. Napier*, 463 F.3d 1040, 1042 (9th Cir. 2006).[182]

20. Sufficiency of the Evidence

Claims of insufficient evidence are reviewed de novo. *See United States v. Tuan Ngoc Luong*, 965 F.3d 973, 980–81 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 336 (2021); *United States v. Benamor*, 937 F.3d 1182, 1186 (9th Cir. 2019); *United States v. Sandoval-Gonzalez*, 642 F.3d 717, 727 (9th Cir. 2011) (reviewing de novo the denial of a motion to acquit under Fed. R. Crim. P. 29, based on insufficiency of the evidence); *United States v. Bennett*, 621 F.3d 1131, 1135 (9th Cir. 2010); *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008).

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[182] *See United States v. Smith*, 330 F.3d 1209, 1212 (9th Cir. 2003); *United States v. Tighe*, 266 F.3d 1187, 1190 (9th Cir. 2001); *United States v. Reyes-Pacheco*, 248 F.3d 942, 945 (9th Cir. 2001); *United States v. Tam*, 240 F.3d 797, 803 (9th Cir. 2001); *United States v. Carter*, 219 F.3d 863, 866 (9th Cir. 2000).

There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Tuan Ngoc Luong*, 965 F.3d 973, 980–81; *United States v. Chi*, 936 F.3d 888, 893 (9th Cir.), *amended sub nom. United States v. Heon-Cheol Chi*, 942 F.3d 1159 (9th Cir. 2019); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Liew*, 856 F.3d 585, 596 (9th Cir. 2017).

In habeas review, the state court's application of *Jackson v. Virginia*, 443 U.S. 307 (1979) must be "objectively unreasonable," the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") notwithstanding. *See Juan H. v. Allen*, 408 F.3d 1262, 1275 n.13 (9th Cir. 2005) (as amended) ("We note that this Circuit has not yet decided what standard applies to sufficiency of the evidence challenges under AEDPA. We conclude that the Supreme Court's analysis of AEDPA in *Williams* compels the conclusion that the state court's application of the *Jackson* standard must be 'objectively unreasonable.'") (citations omitted). The same test applies to both jury and bench trials. *See United States v. Magallon-Jimenez*, 219 F.3d 1109, 1112 (9th Cir. 2000).[183]

When a claim of sufficiency of the evidence is preserved by making a motion for acquittal at the close of the evidence, this court reviews the district court's denial of the motion de novo. *See United States v. Door*, 996 F.3d 606, 616 (9th Cir. 2021); *United States v. Maggi*, 598 F.3d 1073, 1080 (9th Cir. 2010), *overruled on other grounds by United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015); *United States v. Stewart*, 420 F.3d 1007, 1014 (2005); *see also United States v. Sandoval-Gonazlez*, 642 F.3d 717, 727 (9th Cir. 2011).[184]

The defendant's failure to move for acquittal at the close of all the evidence limits appellate review to plain error or manifest injustice. *See United States v.*

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[183] *See United States v. Doe*, 136 F.3d 631, 636 (9th Cir. 1998); *United States v. Mayberry*, 913 F.2d 719, 721 (9th Cir. 1990).

[184] *See United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002); *United States v. Tucker*, 133 F.3d 1208, 1214 (9th Cir. 1998); *United States v. Hernandez*, 105 F.3d 1330, 1332 (9th Cir. 1997); *United States v. Bahena-Cardenas*, 70 F.3d 1071, 1072 (9th Cir. 1995).

Gadson, 763 F.3d 1189, 1218 (9th Cir. 2014); *United States v. Pelisamen*, 641 F.3d 399, 408–09 & n.6 (9th Cir. 2011).[185]

Where a sufficiency challenge is actually a claim of trial error, and the claim is not preserved, review is for plain error. *See Door*, 996 F.3d at 618; *United States v. Johnson*, 979 F.3d 632, 636 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2823 (2021) (concluding that although defendant framed his argument as a challenge to the sufficiency of the evidence, it was better understood as a claim that district court applied the wrong legal standard to which defendant failed to object, subject to review for plain error).

21. Supervised Release

District courts have wide discretion in fashioning a defendant's obligations during terms of supervised release. *See United States v. Napulou*, 593 F.3d 1041 (9th Cir. 2010).[186] A district court's decision to impose a condition of supervised release is typically reviewed for an abuse of discretion. *See United States v. Green*, 12 F.4th 970, 973 (9th Cir. 2021); *United States v. Rudd*, 662 F.3d 1257, 1260 (9th Cir. 2011); *United States v. Apodaca*, 641 F.3d 1077, 1079 (9th Cir. 2011).[187] The district court's decision whether to grant a motion to terminate

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[185] *United States v. Lowry*, 512 F.3d 1194, 1198 n.3 (9th Cir. 2008); *United States v. Gonzales*, 528 F.3d 1207, 1210 (9th Cir. 2008); *United States v. Ross*, 338 F.3d 1054, 1057 (9th Cir. 2003); *United States v. Franklin*, 321 F.3d 1231, 1239 (9th Cir. 2003); *United States v. Weber*, 320 F.3d 1047, 1050–51 (9th Cir. 2003); *United States v. Alarcon-Simi*, 300 F.3d 1172, 1176 (9th Cir. 2002); *see also United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1010 (9th Cir. 1995) (noting reluctance to affirm conviction when there is insufficient evidence to sustain the conviction regardless of standard of review to be applied).

[186] *See United States v. Weber*, 451 F.3d 552, 557 (9th Cir. 2006); *United States v. Williams*, 356 F.3d 1045, 1052 (9th Cir. 2004) ("wide latitude"); *United States v. Rearden*, 349 F.3d 608, 618 (9th Cir. 2003); *United States v. Lopez*, 258 F.3d 1053, 1056 (9th Cir. 2001); *United States v. Bee*, 162 F.3d 1232, 1234 (9th Cir. 1998).

[187] *See United States v. Stoterau*, 524 F.3d 988, 1002 (9th Cir. 2008); *United States v. Cope*, 527 F.3d 944, 949 (9th Cir. 2008); *United States v. Betts*, 511 F.3d 872, 874 (9th Cir. 2007); *United States v. Jeremiah*, 493 F.3d 1042, 1046 (9th Cir. 2007); *Weber*, 451 F.3d at 557 (9th Cir. 2006); *Williams*, 356 F.3d at 1052; *United*

supervised release is also reviewed for abuse of discretion. *See United States v. Cate*, 971 F.3d 1054, 1057 (9th Cir. 2020); *United States v. Emmett*, 749 F.3d 817, 819 (9th Cir. 2014). A district court's decision to revoke a term of supervised release is reviewed for an abuse of discretion. *See United States v. Harvey*, 659 F.3d 1272, 1274 (9th Cir. 2011).[188]

This court reviews de novo the district court's application of the supervised release statute.[189] Jurisdictional issues are also reviewed de novo. *See United States v. Ignacio Juarez*, 601 F.3d 885, 888 (9th Cir. 2010) (per curiam).[190] Similarly, whether a district court has the authority to reinstate an original term of supervised release is a question of law reviewed de novo. *See United States v. Trenter*, 201 F.3d 1262, 1263 (9th Cir. 2000). Whether a district court has the authority to modify a fine when it is an express condition of supervised release is also a question of law reviewed de novo. *See United States v. Miller*, 205 F.3d 1098, 1100 (9th Cir. 2000).

This court reviews de novo whether a supervised release condition violates the Constitution or exceeds the permissible statutory penalty. *See United States v. Ochoa*, 932 F.3d 866, 868–69 (9th Cir. 2019). Whether a defendant has received sufficient due process at a revocation proceeding is a mixed question of law and

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States v. Britt, 332 F.3d 1229, 1231 (9th Cir. 2003); *United States v. T.M.*, 330 F.3d 1235, 1239–40 (9th Cir. 2003) (noting discretion is not unfettered); *United States v. Gallaher*, 275 F.3d 784, 793 (9th Cir. 2001).

[188] *See United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008); *United States v. Verduzco*, 330 F.3d 1182, 1184 (9th Cir. 2003); *United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002); *United States v. Musa*, 220 F.3d 1096, 1100 (9th Cir. 2000); *United States v. Daniel*, 209 F.3d 1091, 1094 (9th Cir.), *amended by* 216 F.3d 1201 (9th Cir. 2000).

[189] *See United States v. Anderson*, 519 F.3d 1021, 1022 (9th Cir. 2008); *United States v. Tinoso*, 327 F.3d 864, 865 (9th Cir. 2003); *United States v. Cade*, 236 F.3d 463, 465 (9th Cir. 2000); *United States v. Lomayoama*, 86 F.3d 142, 146 (9th Cir. 1996).

[190] *See United States v. Sullivan*, 504 F.3d 969, 971 (9th Cir. 2007); *United States v. Vargas-Amaya*, 389 F.3d 901, 903 (9th Cir. 2004) (reviewing de novo jurisdiction to revoke supervised release under 18 U.S.C. § 3583(i)); *United States v. Malandrini*, 177 F.3d 771, 772 (9th Cir. 1999).

fact that is reviewed de novo. *See United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008); *United States v. Havier*, 155 F.3d 1090, 1092 (9th Cir. 1998). Any such due process violation is subject to harmless error analysis. *See Perez*, 526 F.3d at 547; *United States v. Verduzco*, 330 F.3d 1182, 1184 (9th Cir. 2003); *United States v. Daniel*, 209 F.3d 1091, 1094 (9th Cir.), *amended by* 216 F.3d 1201 (9th Cir. 2000); *Havier*, 155 F.3d at 1090.

It is plain error to sentence a defendant to a term of supervised release that exceeds the statutory maximum. *See United States v. Guzman-Bruno*, 27 F.3d 420, 423 (9th Cir. 1994).

A court's decision at a revocation hearing to deny defendant's request for substitute counsel is reviewed for an abuse of discretion. *See United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000). A district court's grant or denial of equitable vacatur is reviewed for abuse of discretion. *See United States v. Arpaio*, 951 F.3d 1001, 1005 (9th Cir. 2020); *United States v. Tapia-Marquez*, 361 F.3d 535, 537 (9th Cir. 2004).

A sentence imposed on revocation of supervised release is reviewed under the *Booker* reasonableness standard. *See United States v. Campbell*, 937 F.3d 1254, 1256 (9th Cir. 2019); *United States v. Montes-Ruiz*, 745 F.3d 1286, 1289 (9th Cir. 2014).

Abuse of discretion review applies to the following:

- Decision to revoke probation or supervised release. *See United States v. Green*, 12 F.4th 970, 973 (9th Cir. 2021); *United States v. Cate*, 971 F.3d 1054, 1057 (9th Cir. 2020); *United States v. Harvey*, 659 F.3d 1272, 1274 (9th Cir. 2011); *United States v. Perez*, 526 F.3d 543, 547 (9th Cir. 2008); *United States v. Shampang*, 987 F.2d 1439, 1441 (9th Cir. 1993).

- Imposition or modification of probation or supervised release conditions. *See United States v. Gibson*, 998 F.3d 415, 418 (9th Cir. 2021) ("We generally review conditions of supervised release for abuse of discretion."); *United States v. Dailey*, 941 F.3d 1183, 1188 (9th Cir. 2019) ("A district court's imposition of probation conditions is reviewed for abuse of discretion."); *United States v. Hohag*, 893 F.3d 1190, 1192 (9th Cir. 2018) ("District courts have wide discretion to impose conditions of supervised release."); *United States v. Evans*, 883 F.3d 1154, 1159 (9th Cir. 2018); *United States v. Sims*, 849 F.3d 1259, 1262 (9th Cir. 2017) (the appellate court owes substantial deference to the

district court's judgment about which conditions are needed to ensure successful supervision of the defendant); *United States v. Nixon*, 839 F.3d 885, 887 (9th Cir. 2016) (modification of probation conditions); *United States v. Juvenile #1*, 38 F.3d 470, 473 (9th Cir. 1994).

De novo review applies to the following:

- Challenges to the district court's authority to impose or modify specific probation or supervised release conditions. *See United States v. Many White Horses*, 964 F.3d 825, 828 (9th Cir. 2020); *United States v. Bainbridge*, 746 F.3d 943, 946 (9th Cir. 2014) ("Whether a district court has authority to modify supervised release conditions is a question of law reviewed de novo."); *United States v. Johnson*, 697 F.3d 1249, 1251 (9th Cir. 2012) ("We review the district court's decision to impose a condition of supervised release for an abuse of discretion."); *United States v. Parrott*, 992 F.2d 914, 920 (9th Cir. 1993).

- Claims that conditions of supervised release violate the Constitution are reviewed de novo. *See United States v. Gibson*, 998 F.3d 415 (9th Cir. 2021); *Dailey*, 941 F.3d at 1188; *United States v. Ochoa*, 932 F.3d 866, 868–69 (9th Cir. 2019).

- Whether a supervised release condition illegally exceeds the permissible statutory penalty. *See Dailey*, 941 F.3d at 1188; *Ochoa*, 932 F.3d 866, 868–69.

- Whether a district court may reinstate an original term of supervised release. *See United States v. Trenter*, 201 F.3d 1262, 1263 (9th Cir. 2000).

- The district court's interpretation and application of the supervised release statute. *See United States v. Harvey*, 659 F.3d 1272, 1274 (9th Cir. 2011); *United States v. Anderson*, 519 F.3d 1021, 1022 (9th Cir. 2008); *United States v. Turner*, 312 F.3d 1137, 1142 (9th Cir. 2002); *United States v. Cade*, 236 F.3d 463, 465 (9th Cir. 2000).

22. Transcripts

A criminal defendant has a right to a record on appeal that includes a complete transcript of the proceedings at trial. *See United States v. Wilson*, 16 F.3d 1027, 1031 (9th Cir. 1994); *United States v. Carrillo*, 902 F.2d 1405, 1409

(9th Cir. 1990). A trial court's finding that transcripts are accurate and complete cannot be disturbed unless clearly erroneous. *See United States v. Horob*, 735 F.3d 866, 872 (9th Cir. 2013) (per curiam); *Carrillo*, 902 F.2d at 1410. "[A]ssuming there were omissions in the transcripts, appellant cannot prevail without a showing of specific prejudice." *Horob*, 735 F.3d at 872 (alternation in original) (internal quotation marks and citation omitted).

The denial of a jury's request to read back a witness's testimony is reviewed for abuse of discretion. *United States v. Price*, 980 F.3d 1211, 1227 (9th Cir. 2019) (as amended Nov. 27, 2020), *cert. denied*, 142 S. Ct. 129 (2021). The court has noted the "the district court's great latitude to address requests for readbacks." *Id.* (citation omitted).

A court's decision to allow a jury to have English translations of Spanish wiretap tape recordings is reviewed for an abuse of discretion. *See United States v. Fuentes-Montijo*, 68 F.3d 352, 353 (9th Cir. 1995).[191]

A claim that the district court violated a defendant's constitutional right to prepare an adequate defense by refusing to provide free transcripts of a prior proceeding is reviewed de novo. *See United States v. Devlin*, 13 F.3d 1361, 1363 (9th Cir. 1994).

The district court's decision to use transcripts as an aid in listening to tape recordings is reviewed for an abuse of discretion. *See United States v. Delgado*, 357 F.3d 1061, 1068 (9th Cir. 2004), *overruled on other grounds as noted in United States v. Katakis*, 800 F.3d 1017 (9th Cir. 2015).[192] Where there is no dispute as to accuracy, this court reviews for an abuse of discretion the trial court's decision to allow the use of transcripts during trial and to allow them into the jury room. *See United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999).[193] A district

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[191] *See also United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999) (English translation of Albanian wiretap tape recordings).

[192] *See United States v. Abonce-Barrera*, 257 F.3d 959, 963 (9th Cir. 2001); *Rrapi*, 175 F.3d at 746; *United States v. Tisor*, 96 F.3d 370, 377 (9th Cir. 1996); *United States v. Armijo*, 5 F.3d 1229, 1234 (9th Cir. 1993).

[193] *See United States v. Montgomery*, 150 F.3d 983, 999 (9th Cir. 1998); *Tisor*, 96 F.3d at 377; *United States v. Fuentes-Montijo*, 68 F.3d 352, 354 (9th Cir. 1995); *United States v. Pena-Espinoza*, 47 F.3d 356, 359 (9th Cir. 1995); *United*

court is not, however, required as a matter of law to determine whether a transcript is accurate before permitting a jury to look at it. *See United States v. Tisor*, 96 F.3d 370, 377 (9th Cir. 1996).

The erroneous inclusion of audio tapes allowed in the jury room that were not admitted into evidence is constitutional error subject to the harmless error standard. *See Eslaminia v. White*, 136 F.3d 1234, 1237 & n.1 (9th Cir. 1998) (habeas); *but see United States v. Noushfar*, 78 F.3d 1442, 1445 (9th Cir. 1996), *amended by* 140 F.3d 1244 (9th Cir. 1998) (allowing unplayed audio tapes into the jury room is structural error).

The trial court's decision whether to release grand jury transcripts is reviewed for an abuse of discretion. *See United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997).

23. Writ Ad Testificandum

The trial court's refusal to grant a writ of habeas corpus ad testificandum to allow an individual to testify is reviewed for an abuse of discretion. *See United States v. Smith*, 924 F.2d 889, 896 (9th Cir. 1991). *See also Barnett v. Norman*, 782 F.3d 417 (9th Cir. 2015) (trial judge abused discretion by permitting prisoner-witnesses to refuse to answer questions and did nothing to encourage testimony). The court's allocation of costs under a writ of habeas corpus ad testificandum is also reviewed for an abuse of discretion. *See Wiggins v. County of Alameda*, 717 F.2d 466, 468 (9th Cir. 1983).

24. Writ of Audita Querela

This court reviews de novo the question whether a federal prisoner challenging a conviction and sentence may properly file a petition for a writ of audita querela. *See United States v. Valdez-Pacheco*, 237 F.3d 1077, 1079 (9th Cir. 2000); *United States v. Fonseca-Martinez*, 36 F.3d 62, 63 (9th Cir. 1994) (per curiam). The effectiveness of such a writ for purposes of immigration is also a pure legal issue reviewed de novo. *See Beltran-Leon v. INS*, 134 F.3d 1379, 1380 (9th Cir. 1998). The district court's decision to grant a writ of audita querela is

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States v. Hernandez, 27 F.3d 1403, 1408 (9th Cir. 1994) ("We review a decision to allow the jury to reread transcripts in the jury room for an abuse of discretion.").

reviewed de novo. *See United States v. Gamboa*, 608 F.3d 492, 494 (9th Cir. 2010); *United States v. Hovsepian*, 359 F.3d 1144, 1153 (9th Cir. 2004) (en banc).

25. Writ of Coram Nobis

"A writ of error coram nobis affords a remedy to attack a conviction when the petitioner has served his sentence and is no longer in custody." *United States v. Kroytor*, 977 F.3d 957, 961 (9th Cir. 2020). The denial of a writ of error coram nobis is reviewed de novo. *See Kroytor*, 977 F.3d at 961; *United States v. Chan*, 792 F.3d 1151, 1153 (9th Cir. 2015); *United States v. Riedl*, 496 F.3d 1003, 1005 (9th Cir. 2007); *Matus-Leva v. United States*, 287 F.3d 758, 760 (9th Cir. 2002); *United States v. Walgren*, 885 F.2d 1417, 1420 (9th Cir. 1989).

E. Habeas Corpus Petitions

1. 28 U.S.C. § 2241

The district court's decision to grant or deny a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 is reviewed de novo. *See Bello-Reyes v. Gaynor*, 985 F.3d 696, 699 (9th Cir. 2021) (reviewing district court's decision to deny petition for a writ of habeas corpus de novo, and findings of fact for clear error); *Davies v. Benov*, 856 F.3d 1243, 1246 (9th Cir. 2017); *Zavala v. Ives*, 785 F.3d 367, 370 (9th Cir. 2015) ("We review the district court's denial of a habeas petition de novo, while we review any underlying factual findings for clear error."); *Harrison v. Gillespie*, 640 F.3d 888, 896-97 (9th Cir. 2011) (en banc) (adopting original panel's majority discussion of standard of review).[194] The court's dismissal of a § 2241 petition is also reviewed de novo. *See Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012); *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011) (as amended); *Zegarra-Gomez v. INS*, 314 F.3d 1124, 1126 (9th Cir. 2003).[195] Whether a district court has jurisdiction over a § 2241 petition is reviewed de novo. *See Iasu v. Smith*, 511 F.3d 881, 884 (9th Cir.

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[194] *See also Parle v. Runnels*, 505 F.3d 922, 926 (9th Cir. 2007); *Hunter v. Ayers*, 336 F.3d 1007, 1011 (9th Cir. 2003); *Benny v. United States Parole Comm.*, 295 F.3d 977, 981 (9th Cir. 2002).

[195] *See also Miranda v. Reno*, 238 F.3d 1156, 1158 (9th Cir. 2001); *Nakaranurack v. United States*, 231 F.3d 568, 570 (9th Cir. 2000).

2008).[196] A district court's decision whether to stay habeas proceedings is reviewed for an abuse of discretion. *See Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000) (noting review is "somewhat less deferential" than usual abuse of discretion).

For information regarding how the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") Pub. L. No. 104-208, 110 Stat. 3009, and the subsequent passage of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), affected habeas review of final orders of exclusion, removal, or deportation *see* III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, v. Immigration.

2. 28 U.S.C. § 2255

The district court's decision to grant or deny a federal prisoner's 28 U.S.C. § 2255 motion is reviewed de novo. *See United States v. Pollard*, 20 F.4th 1252, 1255 (9th Cir. 2021); *United States v. Seng Chen Yong*, 926 F.3d 582, 589 (9th Cir. 2019) *United States v. Swisher*, 811 F.3d 299, 306 (9th Cir. 2016) (en banc) (denial); *United States v. Navarro*, 160 F.3d 1254, 1255 (9th Cir. 1998) (grant). Whether a district court has jurisdiction over a § 2255 motion is reviewed de novo. *See United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002) (construing action as a § 2255 motion).[197] The dismissal of a § 2255 motion based on statute of limitations is reviewed de novo. *See United States v. Battles*, 362 F.3d 1195, 1196 (9th Cir. 2004).

Findings underlying the court's decision on a § 2255 motion are reviewed for clear error. *See Seng Chen Yong*, 926 F.3d at 589.[198] The district court's

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[196] *See also Puri v. Gonzales*, 464 F.3d 1038, 1040 (9th Cir. 2006); *Johnson v. Reilly*, 349 F.3d 1149, 1153 (9th Cir. 2003); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1044 (9th Cir. 2000); *Barapind v. Reno*, 225 F.3d 1100, 1109–10 (9th Cir. 2000).

[197] *See United States v. Martin*, 226 F.3d 1042, 1045 (9th Cir. 2000) (reconsideration); *see also United States v. Thiele*, 314 F.3d 399, 401–02 (9th Cir. 2002) (noting limitations of § 2255).

[198] *See also United States v. Battles*, 362 F.3d 1195, 1196 (9th Cir. 2004); *United States v. Alaimalo*, 313 F.3d 1188, 1191 (9th Cir. 2002); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001); *United States v. Guess*, 203 F.3d

decision whether to conduct an evidentiary hearing is reviewed for an abuse of discretion. *See Mendoza*, 449 F.3d at 1068.[199]

Note that for purposes of § 2255, constitutional errors may be deemed harmless unless the defendant demonstrates that the error had a "substantial and injurious effect or influence" on the jury's verdict. *See United States v. Montalvo*, 331 F.3d 1052, 1057 (9th Cir. 2003) (per curiam) (applying *Brecht* standard).

The district court's determination of the appropriate remedy in a successful or partially successful § 2255 motion is reviewed for abuse of discretion. *Troiano v. United States*, 918 F.3d 1082 (9th Cir. 2019).

3. 28 U.S.C. § 2254

The district court's decision to grant or deny a 28 U.S.C.§ 2254 habeas petition is reviewed de novo. *See Avena v. Chappell*, 932 F.3d 1237, 1247 (9th Cir. 2019); *Spreitz v. Ryan*, 916 F.3d 1262, 1272 (9th Cir. 2019) (denial); *Poyson v. Ryan*, 879 F.3d 875, 887 (9th Cir. 2018) (denial) (as amended); *Sanders v. Cullen*, 873 F.3d 778, 793 (9th Cir. 2017); *Crittenden v. Chappell*, 804 F.3d 998, 1006 (9th Cir. 2015) (grant); *Leavitt v. Arave*, 646 F.3d 605, 608 (9th Cir. 2011) (grant). This court may affirm on any ground supported by the record even if it differs from the rationale of the district court. *See Varghese v. Uribe*, 736 F.3d 817, 823 (9th Cir. 2013) (as amended) (denial); *Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006) (en banc) (grant); *Washington v. Lampert*, 422 F.3d 864, 869 (9th Cir. 2005); *Ramirez v. Castro*, 365 F.3d 755, 762 (9th Cir. 2004).

A dismissal of a habeas petition for mootness is reviewed de novo. *See Dominguez v. Kernan*, 906 F.3d 1127, 1132 (9th Cir. 2018); *Abdala v. INS*, 488 F.3d 1061, 1063 n.1 (9th Cir. 2007); *Zegarra-Gomez v. INS*, 314 F.3d 1124, 1126 (9th Cir. 2003). Dismissals based on jurisdiction are also reviewed de novo. *See Lucky v. Calderon*, 86 F.3d 923, 925 (9th Cir. 1996); *Cook v. Maleng*, 847 F.2d 616, 617 (9th Cir. 1988) (per curiam).

1143, 1145 (9th Cir. 2000); *Sanchez v. United States*, 50 F.3d 1448, 1452 (9th Cir. 1995).

[199] *See also Sandoval-Lopez*, 409 F.3d at 1195 & n.4; *Rodrigues*, 347 F.3d at 823; *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003); *Christakis*, 238 F.3d at 1168; *Chacon-Palomares*, 208 F.3d at 1158–59.

The rejection of a sufficiency of the evidence challenge in a habeas petition is also reviewed de novo. *See United States v. Wright*, 625 F.3d 583, 590 (9th Cir. 2010), *superseded by statute on other grounds as recognized by United States v. Brown*, 785 F.3d 1337, 1351 (9th Cir. 2015); *Chein v. Shumsky*, 373 F.3d 978, 982 (9th Cir. 2004) (en banc). *See also Maquiz v. Hedgpeth*, 907 F.3d 1212, 1222 (9th Cir. 2018) (concluding insufficient evidence to support sentencing enhancement and granting that claim in habeas petition).

Dismissals based on state procedural default are reviewed de novo. *See Poyson v. Ryan*, 879 F.3d 875, 887 (9th Cir. 2018); *Robinson v. Schriro*, 595 F.3d 1086, 1099 (9th Cir. 2010); *Griffin v. Johnson*, 350 F.3d 956, 960 (9th Cir. 2003); *Cockett v. Ray*, 333 F.3d 938, 941 (9th Cir. 2003). *See also Hooper v. Shinn*, 985 F.3d 594, 615 (9th Cir. 2021) ("We … review de novo a district court's procedural default determinations.") (citing *Runningeagle v. Ryan*, 825 F.3d 970, 978 (9th Cir. 2016)).

Dismissals based on a prisoner's failure to exhaust remedies are reviewed de novo. *See Dixon v. Baker*, 847 F.3d 714, 718 (9th Cir. 2017) (reviewing de novo an order an order dismissing a petition for a writ of habeas corpus based on a failure to exhaust state-court remedies); *Rhoades v. Henry*, 638 F.3d 1027, 1034 (9th Cir. 2011) (as amended); *Fields v. Waddington*, 401 F.3d 1018, 1020 (9th Cir. 2005); *Peterson v. Lampert*, 319 F.3d 1153, 1155 (9th Cir. 2003) (en banc). Whether a state prisoner must exhaust state remedies before pursuing a federal constitutional claim is a question of law to be reviewed de novo. *See Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997).

Dismissals of "mixed petitions" are reviewed de novo. *See Dixon v. Baker*, 847 F.3d 714, 718 (9th Cir. 2017) (reviewed de novo order dismissing petition based on failure to exhaust state-court remedies); *Wooten v. Kirkland*, 540 F.3d 1019, 1023 (9th Cir. 2008); *Robbins v. Carey*, 481 F.3d 1143, 1146 (9th Cir. 2007); *Cassett v. Stewart*, 406 F.3d 614, 620–21 (9th Cir. 2005).

The denial of a stay and abeyance pending resolution of unexhausted claim in the state court is reviewed under the abuse-of-discretion standard. *See Bolin v. Baker*, 994 F.3d 1154, 1156 (9th Cir. 2021); *Dixon*, 847 F.3d at 718; *Blake v. Baker*, 745 F.3d 977, 980 (9th Cir. 2014); *Olvera v. Giurbino*, 371 F.3d 569, 572 (9th Cir. 2004) (noting district court's decision whether to grant petitioner's request for "withdrawal and abeyance" is reviewed for abuse of discretion).

A dismissal for failure to comply with an order requiring submission of pleadings within a designated time is reviewed for an abuse of discretion. *See Pagtalunan v. Galaza*, 291 F.3d 639, 640 (9th Cir. 2002).

"When a district court denies leave to amend based on a determination that the proposed claim would be futile, [the court] review[s] the determination of futility de novo." *Hooper v. Shinn*, 985 F.3d 594, 615 (9th Cir. 2021) (citing *Murray v. Schriro*, 745 F.3d 984, 1015 (9th Cir. 2014)).

Findings of fact made by the district court are reviewed for clear error. *See Djerf v. Ryan*, 931 F.3d 870, 878 (9th Cir. 2019) (applying AEDPA standards); *Hernandez v. Chappell*, 923 F.3d 544, 549 (9th Cir. 2019) (as amended) (pre-AEDPA standards); *Leavitt v. Arave*, 646 F.3d 605, 608 (9th Cir. 2011); *Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006); *Washington v. Lampert*, 422 F.3d 864, 869 (9th Cir. 2005); *Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir. 2003); *McClure v. Thompson*, 323 F.3d 1233, 1240 (9th Cir. 2003) (noting standard is "significantly deferential"); *cf. Juan H. v. Allen*, 408 F.3d 1262, 1269 (9th Cir. 2005) ("Although we normally review for clear error any factual findings of the district court, … in this case the district court made no independent factual findings, and so we review the state court findings under the deferential standards of AEDPA … .").

Note that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") altered habeas review of state convictions brought under § 2254. *See Bell v. Cone*, 535 U.S. 685, 693 (2002); *Bartlett v. Alameida*, 366 F.3d 1020, 1023 (9th Cir. 2004) (noting AEDPA limits appellate review); *Riley*, 352 F.3d at 1317 (noting "constrained standards of review"). "AEDPA, … , applies only to those cases that were filed after its effective date of April 24, 1996." *Clark v. Chappell*, 936 F.3d 944, 966 (9th Cir. 2019) (per curiam) (applying pre-AEDPA standards where original petition filed before AEDPA's effective date). The AEDPA does not apply to the merits of petitions filed before the effective date of the Act. *See, e.g.*, *Clark*, 936 F.3d at 966 (per curiam) (applying pre-AEDPA standards where original petition filed before AEDPA's effective date, even though amended petition was filed after AEDPA's effective date); *Hernandez*, 923 F.3d at 549 (applying pre-AEDPA standards of review where federal habeas petition before the enactment of AEDPA); *Brown v. Sanders*, 546 U.S. 212, 215 n.1 (2006) (citing *Lindh v. Murphy*, 521 U.S. 320, 327 (1997)); *Hernandez*, 923 F.3d at 549 (governed by pre-AEDPA standards); *Doe v. Ayers*, 782 F.3d 425, 428 (9th Cir. 2015); *Duncan v. Ornoski*, 528 F.3d 1222, 1232–33 (9th Cir. 2008); *Lambright v. Schriro*, 490 F.3d 1103, 1113–14 (9th Cir. 2007). "Where a petitioner files an

amended petition, the filing date of the original petition is the controlling date for purposes of determining whether AEDPA applies." *Clark*, 936 F.3d at 966.

Although this court applies pre-AEDPA law to petitions filed before the Act's effective date, the COA requirement imposed by AEDPA applies to appellate proceedings initiated post-AEDPA. *See Slack v. McDaniel*, 529 U.S. 473, 482 (2000) (holding that AEDPA's requirements regarding certificates of appealability apply to petition filed prior to effective date of act); *Clark*, 936 F.3d at 983 ("When a habeas petitioner seeks to initiate an appeal, the petitioner must obtain a COA under 28 U.S.C. § 2253(c), regardless of whether the petition was filed pre- or post-AEDPA."); *Smith v. Mahoney*, 611 F.3d 978, 993 (9th Cir. 2010) (as amended); *Beardslee v. Woodford*, 358 F.3d 560, 568 (9th Cir. 2004) (applying *Slack*); *Nevius v. McDaniel*, 218 F.3d 940, 942 (9th Cir. 2000) (order) (noting § 2253(c) provides that petitioner cannot appeal unless a circuit justice or judge issues a certificate of appealability).

Under the AEDPA, a petitioner must demonstrate that the state court's decision on the merits was contrary to, or involved an unreasonable application of, clearly established federal law under United States Supreme Court precedent, or that the decision was based on an unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 70–73 (2003) (explaining standard); *Hooper v. Shinn*, 985 F.3d 594, 614 (9th Cir. 2021); *Pizzuto v. Yordy*, 947 F.3d 510, 522 (9th Cir. 2019) (per curiam) (as amended); *Carter v. Davis*, 946 F.3d 489, 501 (9th Cir. 2019) (per curiam).[200] "These standards are intentionally difficult to meet." *Carter*, 946 F.3d at 501 (quoting *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam)).

"A state-court decision is contrary to clearly established Supreme Court precedent if it applies a rule that contradicts the governing law set forth in the Supreme Court's cases or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at

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[200] *See also Doe v. Busby*, 661 F.3d 1001, 1010 (9th Cir. 2010); *Parle v. Runnels*, 505 F.3d 922, 926 (9th Cir. 2007); *Arnold v. Runnels*, 421 F.3d 859, 862 (9th Cir. 2005); *Ramirez v. Castro*, 365 F.3d 755, 762 (9th Cir. 2004) (reciting and applying standard); *Chia v. Cambra*, 360 F.3d 997, 1002 (9th Cir. 2004) (explaining "unreasonable application" prong); *Vlasak v. Superior Court*, 329 F.3d 683, 687 (9th Cir. 2003) (explaining "contrary to" prong); *Lewis v. Lewis*, 321 F.3d 824, 829 (9th Cir. 2003) (noting "highly deferential standard").

a different result." *Carter*, 946 F.3d at 501 (internal quotation marks and citations omitted); *see also Price v. Vincent*, 538 U.S. 634, 640 (2003); *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000); *Hooper*, 985 F.3d at 614; *Pizzuto*, 947 F.3d at 522.

"A state court decision is an unreasonable application of clearly established federal law if the state court identified the correct governing legal rule but unreasonably applied it to the facts at hand." *Christian v. Frank*, 595 F.3d 1076, 1081 (9th Cir. 2010) (internal quotation marks and citation omitted); *see also Hooper*, 985 F.3d at 614; *Carter*, 946 F.3d at 501; *Pizzuto*, 947 F.3d at 523; *Andrews v. Davis*, 944 F.3d 1092, 1107 (9th Cir. 2019). "The unreasonable application clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Hooper*, 985 F.3d at 614 (internal quotation marks omitted) (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)).

A state-court decision is based on an unreasonable determination of the facts if the appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record. *See Carter*, 946 F.3d at 501; *Pizzuto*, 947 F.3d at 523; *Murray v. Schriro*, 745 F.3d 984, 999 (9th Cir. 2014). "Under § 2254(d)(2), 'a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'" *Hooper*, 985 F.3d at 615 (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)).

Under the AEDPA, state court findings of fact are to be presumed correct unless petitioner rebuts the presumption with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Davis v. Ayala*, 576 U.S. 257, 271 (2015); *Sifuentes v. Brazelton*, 825 F.3d 506, 517 (9th Cir. 2016); *Ybarra v. McDaniel*, 656 F.3d 984, 989 (9th Cir. 2011); *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008).[201] This presumption applies even if the finding was made by a state court of appeals rather than by the state trial court. *See Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.) *amended by* 253 F.3d 1150 (9th Cir. 2001). Where the state court fails to articulate its reasoning, however, the reviewing court grants less deference to the state court's decision. *See Brown v. Palmateer*, 379 F.3d 1089, 1092–93 (9th Cir. 2004) ("Because the [state] courts have provided no *ratio decidendi* to review, or

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[201] *See also Plumlee v. Masto*, 512 F.3d 1204, 1209 (9th Cir. 2008); *Bockting v. Bayer*, 505 F.3d 973, 978 (9th Cir. 2007); *Stenson v. Lambert*, 504 F.3d 873, 881 (9th Cir. 2007).

to which we can give deference, we employ the 'objectively reasonable' test. In this situation, federal habeas courts accord the state court decisions less deference than in standard habeas cases.") (citing *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000)).[202]

In § 2254 cases, an error may be harmless unless it "'had substantial and injurious effect or influence in determining the jury's verdict.'" *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Davis v. Ayala*, 576 U.S. 257, 268 (2015); *Smith v. Baker*, 983 F.3d 383, 405 (9th Cir. 2020); *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011).[203]

The AEDPA limits a district court's decision to conduct evidentiary hearings in § 2254 proceedings. *See* 28 U.S.C. § 2254(e)(2); *see also Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1171 n.4 (9th Cir. 2003) (reviewing limitations).[204] If the

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[202] *See also Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999) (noting trial judge made no factual determinations entitled to deference under 28 U.S.C. § 2254(e)(1) and that other factual findings were reviewed for clear error).

[203] *See also Calderon v. Coleman*, 525 U.S. 141, 147 (1998) (noting not all constitutional errors entitle petitioner to relief; rather the "court must find that the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict."); *California v. Roy*, 519 U.S. 2, 5–6 (1996) (per curiam) (rejecting Ninth Circuit's "modification" of the *Brecht* standard); *Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9th Cir. 2005) (holding that the *Brecht* standard survived the AEDPA and *Mitchell v. Esparza*, 540 U.S. 12 (2003), despite contrary views in other circuits); *Kennedy v. Lockyer*, 379 F.3d 1041, 1053–54 (9th Cir. 2004) (noting that *Brecht* standard applies to both post-AEDPA and pre-AEDPA cases); *Gill v. Ayers*, 342 F.3d 911, 921 (9th Cir. 2003) (reciting and explaining *Brecht* standard); *Evanchyk v. Stewart*, 340 F.3d 933, 941 n. 3 (9th Cir. 2003) (noting circuit has "not used always used the same language in describing the harmless error standard in habeas cases").

[204] *Bragg v. Galaza*, 242 F.3d 1082, 1089–90 (9th Cir.) (noting AEDPA precludes remand for an evidentiary hearing), *amended by* 253 F.3d 1150 (9th Cir. 2001); *Downs v. Hoyt*, 232 F.3d 1031, 1041 (9th Cir. 2000) (noting AEDPA limits district court's discretion); *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999)

petitioner failed in state court to develop the factual basis for a claim, no hearing may be held unless the claim relies on (1) a new rule of constitutional law or facts previously undiscoverable and (2) it is clear by "clear and convincing evidence" that but for the claimed error, "no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2). The district court's interpretation of these standards in determining whether to conduct an evidentiary hearing is reviewed de novo. *See Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir. 2005); *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999). The court's decision to deny an evidentiary hearing based on these standards is reviewed for an abuse of discretion. *See Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004) (as amended). *See also Smith v. Baker*, 983 F.3d 383, 395–96 (9th Cir. 2020) (as amended) (concluding that Smith had not shown that he was prejudiced by the lack of an evidentiary hearing, and the district court did not abuse its discretion by dismissing the ineffective assistance of counsel claim without holding one).

In cases not under AEDPA, a state habeas petitioner is entitled to an evidentiary hearing if petitioner alleged facts that, if proven, would entitle petitioner to relief and petitioner did not receive a full and fair evidentiary hearing in a state court. *See Stankewitz v. Woodford*, 365 F.3d 706, 714 (9th Cir. 2004); *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004).[205] The court's decision to deny an evidentiary hearing is reviewed for abuse of discretion. *See Stankewitz*, 365 F.3d at 714; *Beardslee v. Woodford*, 358 F.3d 560, 573 (9th Cir. 2004); *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003).

The decision to conduct an evidentiary hearing is also reviewed for an abuse of discretion. *See Lawson v. Borg*, 60 F.3d 608, 611 (9th Cir. 1995). The district court's decision to conduct an evidentiary hearing without petitioner's presence is reviewed for an abuse of discretion. *See Wade v. Calderon*, 29 F.3d 1312, 1325–26 (9th Cir. 1994), *overruled on other grounds as recognized by Rohan ex. Rel. Gates v. Woodford*, 334 F.3d 803, 815 (9th Cir. 2003), *abrogated by Ryan v. Gonzales*, 568 U.S. 57 (2013). The scope of an evidentiary hearing is reviewed for

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(noting AEDPA "substantially restricts the district court's discretion to grant an evidentiary hearing").

[205] *See also Beaty v. Stewart*, 303 F.3d 975, 993 (9th Cir. 2002); *Karis v. Calderon*, 283 F.3d 1117, 1126–27 & n.1 (9th Cir. 2002); *Laboa v. Calderon*, 224 F.3d 972, 981 n.7 (9th Cir. 2000).

an abuse of discretion. *See LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998).

The "district court's determination of the appropriate remedy for a constitutional violation on a habeas petition [is reviewed] for abuse of discretion." *Loher v. Thomas*, 825 F.3d 1103, 1111 (9th Cir. 2016) (§ 2254 habeas petition).

4. Certificates of Appealability

"State prisoners seeking postconviction relief under 28 U.S.C. § 2254 [have] no automatic right to appeal a district court's denial or dismissal of the petition. … Rather, habeas petitioners must first seek and obtain a COA." *Payton v. Davis*, 906 F.3d 812, 817 (9th Cir. 2018) (internal citations and quotation marks omitted). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") limits the scope of review in a habeas case to those issues specified in the certificate of appealability ("COA"). *See Olvera v. Giurbino*, 371 F.3d 569, 572 (9th Cir. 2004); *Hiivala v. Wood*, 195 F.3d 1098, 1102–03 (9th Cir. 1999); *see also Williams v. Rhoades*, 354 F.3d 1101, 1106 (9th Cir. 2004) (reviewing related issue not excluded by the COA). "The COA requirement serves a gatekeeping function." *Payton*, 906 F.3d at 818. A request to broaden the scope of the COA may be granted if petitioner makes a substantial showing of the denial of a constitutional right. *See Robertson v. Pichon*, 849 F.3d 1173, 1187 (9th Cir. 2017); *Pham v. Terhune*, 400 F.3d 740, 742 (9th Cir. 2005); *see also Silva v. Woodford*, 279 F.3d 825, 832 (9th Cir. 2002) (distinguishing standard of review for purposes of granting COA and for granting writ of habeas corpus). Uncertified issues included in a brief are treated as a request to expand the scope of the COA. *See Robertson*, 849 F.3d at 1187; *Delgadillo v. Woodford*, 527 F.3d 919, 930 (9th Cir. 2008).

5. Discovery

The court's decision to permit discovery in habeas proceedings is reviewed for an abuse of discretion. *See Earp v. Davis*, 881 F.3d 1135, 1142 (9th Cir. 2018) ("The district court's decision to deny discovery is reviewed for abuse of discretion."); *Bemore v. Chappell*, 788 F.3d 1151, 1176 (9th Cir. 2015) (the "district court's ruling on the discovery motions is reviewed for abuse of discretion"); *Cooper v. Brown*, 510 F.3d 870, 877 (9th Cir. 2007); *Bittaker v. Woodford*, 331 F.3d 715, 728 (9th Cir. 2002) (en banc) (noting habeas discovery is limited to court's discretion); *Rich v. Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999) (noting discovery is available only in the discretion of the court).

6. Evidentiary Hearings

The district court's decision whether to conduct an evidentiary hearing for a § 2255 motion is reviewed for an abuse of discretion. *See United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003) (§ 2255); *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003); *United States v. Christakis*, 238 F.3d 1164, 1168 (9th Cir. 2001); *United States v. Chacon-Palomares*, 208 F.3d 1157, 1158–59 (9th Cir. 2000).

In pre-AEDPA § 2254 proceedings, a state habeas petitioner is entitled to an evidentiary hearing if petitioner alleged facts that, if proven, would entitle petitioner to relief, and petitioner did not receive a full and fair evidentiary hearing in a state court. *See Clark v. Chappell*, 936 F.3d 944, 967 (9th Cir. 2019); *Stankewitz v. Woodford*, 365 F.3d 706, 714 (9th Cir. 2004); *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004); *Beaty v. Stewart*, 303 F.3d 975, 993 (9th Cir. 2002); *Laboa v. Calderon*, 224 F.3d 972, 981 n.7 (9th Cir. 2000).

The court's decision to deny an evidentiary hearing is reviewed for abuse of discretion. *See United States v. Olsen*, 704 F.3d 1172, 1178 (9th Cir. 2013); *Fairbanks v. Ayers*, 650 F.3d 1243, 1251 (9th Cir. 2011); *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008); *Cooper v. Brown*, 510 F.3d 870, 877 (9th Cir. 2007); *Beardslee v. Woodford*, 358 F.3d 560, 573 (9th Cir. 2004). The decision to conduct an evidentiary hearing is also reviewed for an abuse of discretion. *See Lawson v. Borg*, 60 F.3d 608, 611 (9th Cir. 1995). The district court's decision to conduct an evidentiary hearing without petitioner's presence is reviewed for an abuse of discretion. *See Wade v. Calderon*, 29 F.3d 1312, 1325–26 (9th Cir. 1994), *overruled on other grounds as recognized by Rohan ex. Rel. Gates v. Woodford*, 334 F.3d 803, 815 (9th Cir. 2003), *abrogated by Ryan v. Gonzales*, 568 U.S. 57 (2013). The scope of an evidentiary hearing is reviewed for an abuse of discretion. *See Cooper*, 510 F.3d at 877; *Williams*, 384 F.3d at 586; *LaGrand v. Stewart*, 133 F.3d 1253, 1270 (9th Cir. 1998). *See also Phillips v. Ornoski*, 673 F.3d 1168, 1179 (9th Cir. 2012) (pre-AEDPA) (the district court's decision to limit evidentiary hearing to written evidence is reviewed for abuse of discretion).

Note that the AEDPA limits the district court's authority to conduct evidentiary hearings in § 2254 proceedings. *See* 28 U.S.C. § 2254(e)(2); *see also Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1171 n.4 (9th Cir. 2003) (reviewing

limitations).[206] If the petitioner failed in state court to develop the factual basis for a claim, no hearing may be held unless the claim relies on (1) a new rule of constitutional law or facts previously undiscoverable and (2) it is clear by "clear and convincing evidence" that but for the claimed error, "no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2). The district court's interpretation of these standards in determining whether to conduct an evidentiary hearing is reviewed de novo. *See Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir. 2005); *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999). The court's decision to deny an evidentiary hearing based on these standards is reviewed for an abuse of discretion. *See Davis v. Woodford*, 384 F.3d 624, 638 (9th Cir. 2004) (as amended).

7. Interstate Agreement on Detainers Act

A petition for habeas relief based on an alleged violation of the Interstate Agreement on Detainers Act ("IAD") is reviewed de novo. *See King v. Brown*, 8 F.3d 1403, 1409 (9th Cir. 1993); *Snyder v. Sumner*, 960 F.2d 1448, 1452 (9th Cir. 1992). A district court's refusal to dismiss an indictment based on its interpretation of the IAD is reviewed de novo. *See United States v. Lualemaga*, 280 F.3d 1260, 1263 (9th Cir. 2002).

8. Juror Misconduct

Allegations of juror misconduct in habeas cases are reviewed de novo. *See Caliendo v. Warden*, 365 F.3d 691, 694 (9th Cir. 2004); *Mancuso v. Olivarez*, 292 F.3d 939, 949 (9th Cir. 2002), *overruled on other grounds by Slack v. McDaniel*, 529 U.S. 473 (2000); *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir. 2000) ("Juror misconduct is a mixed question of law and fact, reviewed de novo."). The court's decision not to hold a hearing on alleged juror misconduct is reviewed for an abuse of discretion. *See Davis v. Woodford*, 384 F.3d 628, 653 (9th Cir. 2004) (as amended).

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[206] *Bragg v. Galaza*, 242 F.3d 1082, 1089–90 (9th Cir.) (noting AEDPA precludes remand for an evidentiary hearing), *amended by* 253 F.3d 1150 (9th Cir. 2001); *Downs v. Hoyt*, 232 F.3d 1031, 1041 (9th Cir. 2000) (noting AEDPA limits district court's discretion); *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999) (noting AEDPA "substantially restricts the district court's discretion to grant an evidentiary hearing").

9. Reconsideration

The district court's denial of a motion to reconsider is reviewed for an abuse of discretion. *See Wood v. Ryan*, 759 F.3d 1117, 1119 (9th Cir. 2014) (per curiam); *Phelps v. Alameida*, 569 F.3d 1120, 1131 (9th Cir. 2009); *Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001); *McDowell v. Calderon*, 197 F.3d 1253, 1256 (9th Cir. 1999) (en banc); *see also Ybarra v. McDaniel*, 656 F.3d 984, 998 (9th Cir. 2011).

10. Statutes of Limitations

Dismissals based on statutes of limitations are reviewed de novo. *See Smith v. Davis*, 953 F.3d 582, 587 (9th Cir. 2020) ("We review de novo the dismissal of a federal habeas petition as untimely, including whether the statute of limitations should be equitably tolled."), *cert. denied*, 141 S. Ct. 878 (2020); *Fue v. Biter*, 842 F.3d 650, 653 (9th Cir. 2016) (en banc); *Bryant v. Ariz. A.G.*, 499 F.3d 1056, 1059 (9th Cir. 2007); *Shannon v. Newland*, 410 F.3d 1083, 1087 n.3 (9th Cir. 2005).[207] Legal determinations regarding equitable tolling are also reviewed de novo. *See Davis*, 953 F.3d at 587; *Bryant*, 499 F.3d at 1060; *Shannon*, 410 F.3d at 1087 n.3; *Malcom v. Payne*, 281 F.3d 951, 956 (9th Cir. 2002) (§ 2254); *Corjasso v. Ayers*, 278 F.3d 874, 877 (9th Cir. 2002). Note that the district court has the discretion to stay habeas proceedings pending state action to avoid the limitations period in § 2244(d). *See Valerio v. Crawford*, 306 F.3d 742, 771 (9th Cir. 2002) (en banc).

11. Successive Petitions

The AEDPA made significant changes to 28 U.S.C. § 2244, setting requirements for filing a second or successive habeas petition. *See Gonzalez v. Sherman*, 873 F.3d 763, 767 (9th Cir. 2017); *Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (en banc) (noting limitations); *Barapind v. Reno*, 225 F.3d 1100, 1111 (9th Cir. 2000) (noting provision does not apply to § 2241 petitions). "AEDPA generally bars second or successive habeas petitions. Section 2244(b)(1) states that '[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.' 28 U.S.C. § 2244(b)(1). No exceptions exist to this statutory bar." *Balbuena v.*

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[207] *See, e.g.*, *Guillory v. Roe*, 329 F.3d 1015, 1017 (9th Cir. 2003) (§ 2254); *Ferguson v. Palmateer*, 321 F.3d 820, 822 (9th Cir. 2003) (§ 2254); *Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002) (§ 2254); *Hasan v. Galaza*, 254 F.3d 1150, 1153 (9th Cir. 2001) (§ 2254).

Sullivan, 980 F.3d 619, 634 (9th Cir. 2020) (as amended), *cert. denied*, 141 S. Ct. 2755 (2021)

A district court's determination that petitioner failed to establish eligibility under § 2244 to file a successive petition is reviewed de novo. *See Brown v. Muniz*, 889 F.3d 661, 666 (9th Cir. 2018) (reviewing de novo a district court's dismissal of a habeas petition as second or successive); *Clayton v. Biter*, 868 F.3d 840, 843 (9th Cir. 2017) (same); *Gonzalez v. Sherman*, 873 F.3d 763, 767 (9th Cir. 2017); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000) (per curiam); *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (en banc). A district court's dismissal of a petition under abuse of the writ doctrine is reviewed for an abuse of discretion. *See Barapind*, 225 F.3d at 1110.[208]

[208] *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Paradis v. Arave*, 130 F.3d 385, 390 (9th Cir. 1997); *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996).