SUMMARIES OF RECENT CASELAW
AUGUST 2012

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DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PUBLISHED OPINIONS

***United States v. Alcatel-Lucent France, SA et al.*, No. 11-12716 (Slip Opinion) (August 3, 2012)**
***United States v. Alcatel-Lucent, SA*, No. 11-12802 (Slip Opinion) (August 3, 2012)**

[consolidated cases]

Issues.

(1) May non-party crime victims challenge the final judgment in a criminal case?
(2) Does the Crime Victims' Rights Act create a substantive right for a crime victim to challenge a district court's denial of "victim status" within the meaning of the Act?

Held.

(1) No.
(2) No.

Background and procedural history. In December 2010, the Government filed criminal informations against, respectively, Alcatel-Lucent and three of its subsidiaries, charging them with various and sundry violations of the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-1. Alcatel-Lucent entered into a deferred prosecution agreement with the Government in February 2011, agreeing to make certain reforms and to pay a $92 million fine. The subsidiaries pleaded guilty to one count of conspiracy to violate the anti-bribery and accounting provisions of the FCPA and did not contest the facts in the criminal information.

The facts proffered in Alcatel-Lucent's deferred prosecution agreement revealed that it had hired and paid inordinately large fees to "consultants" who would then bribe the Instituto Costarricense de Electricidad (ICE), a state-owned Costa Rica telecommunications company, to give Alcatel-Lucent and its subsidiaries lucrative telecommunications contracts.

At a district court status conference in March 2011, ICE attempted to appeal the judgments in both cases by asserting victim status under the Crime Victims'

Rights Act (CVRA), 18 U.S.C. § 3771. The court declined to extend victim status, ruling on June 1, 2011, that the "pervasiveness of the illegal activity" among ICE officers and board members precluded such a finding. ICE appealed that ruling, and also initiated a separate petition for a writ of mandamus. A two-judge panel of the Eleventh Circuit denied relief on both grounds, and a separate two-judge panel denied reconsideration. ICE appealed the district court's denial of victim status in both the Alcatel-Lucent case and the subsidiaries' case to the Eleventh Circuit.

Analysis. In a *per curiam* decision of a panel consisting of Judges Wilson, Pryor and Martin, the Court granted the Government's motion to dismiss the case involving Alcatel-Lucent on grounds that the Court lacked jurisdiction under 28 U.S.C. § 1291 because, as Alcatel-Lucent was in a deferred prosecution agreement with the Government, there was no final judgment.

As to the subsidiaries' cases, the Court sided with three of its sister circuits in holding that the CVRA does not create a substantive right for a crime victim to appeal a judgment in a criminal case. The CVRA provides that in the appeal of a criminal case, the Government "may assert as error the district court's denial of any crime victim's right in the proceedings to which the appeal relates," 18 U.S.C. § 3771(d)(4), but has no provision creating an independent right for a crime victim to bring such a challenge. ICE therefore lacked standing, and the Eleventh Circuit therefore lacked jurisdiction.

***United States v. Broughton*, No. 10-15527 (Slip Opinion) (August 10, 2012)**
***United States v. Peterson*, No. 10-15536 (Slip Opinion) (August 10, 2012)**
[consolidated cases]

Issues. Did the district court err in holding that the Government did not fail to file charges within the relevant statute of limitations period and denying defendants' motion for judgment of acquittal due to purported insufficiency of the evidence?

Held. No.

Background and procedural history. Mr. Broughton and Mr. Peterson were indicted on conspiracy to commit mail, wire and insurance fraud and conspiracy to commit money-laundering. These charges apparently stemmed from defendants' involvement in a "far-reaching conspiracy intended to benefit the individual members from the fraudulent capitalization of purported insurance companies and related businesses." Slip Op. at 3-4.

Prior to trial, Mr. Broughton moved to dismiss the indictment, claiming that it was untimely filed because the statute of limitations had run prior to the January 17, 2006, indictment date because the district court improperly granted a motion to

suspend the statute of limitations pending resolution of the Government's efforts to acquire evidence from foreign jurisdictions. The district court denied this motion.

At the close of the Government's case at trial, Mr. Broughton and Mr. Peterson moved for judgment of acquittal on sufficiency of the evidence grounds. The district court denied those motions, and defendants' renewed motions after the trial. The jury found both defendants guilty, and each appealed to the Eleventh Circuit.

Analysis. In a panel decision authored by Judge Fay and joined by Judge Jordan and Judge Hood (of the Eastern District of Kentucky, by designation), the Court first addressed Mr. Broughton's contention that his January 17, 2006 indictment was barred by the statute of limitations. Mr. Broughton argued that the district court erred in suspending what he claimed to be the 5-year statute of limitations pursuant to 18 U.S.C. § 3292 and that, even if that finding was not erroneous, in any case the indictment should have been dismissed because the conspiracy terminated in 1999, more than five years prior January 17, 2006.

The Eleventh Circuit found that the "plain reading" of § 3292 requires that a district court "shall" suspend the statute of limitations if 1) an official request was made by the Government and 2) if that official request was made for evidence that reasonably appears to be in the country to which the request was made. Since both of these considerations were satisfied, the Court rejected Mr. Broughton's argument and opined that it was immaterial even if, as Mr. Broughton claimed, the Government knew of the conspiracy and the fact that it had ended before submitting its requests to the foreign governments, and despite the fact that the Government ultimately did not use the procured evidence at trial.

The Court next addressed Mr. Broughton's argument that a 5-year statute of limitations, rather than the 10 years argued for by the Government, should apply. It determined that the indictment was timely under either standard, since it found that the conspiracy continued through March 2001, within even the 5-year period championed by Mr. Broughton. Even assuming that the conspiracy terminated in 1999, as Mr. Broughton maintained, the Government would still have had 5 years in which to bring charges, and obtained the suspension of the statute of limitations in January 2003 – some 16 months before the original 5-year statute would have run. With that suspension ending in November 2005, the January 2006 indictment date was within the Government's remaining 16 months. "No matter how you cut it," the Eleventh Circuit concluded, "the January 17, 2006 indictment was timely under a correct application of § 3292." Slip Op. at 35.

Finally, the Eleventh Circuit considered both defendants' allegation that the district court erred in denying their respective motions for judgment of acquittal due to insufficient evidence. In rejecting their various and sundry arguments, the Court noted the "ample" evidence establishing each element of the two counts each

defendant faced, including, *inter alia*, documentary and testimonial evidence, and the details of the defendants' interactions with undercover agents.

***United States v. Mathurin*, No. 11-13211 (Slip Opinion) (August 15, 2012)**

Issue: Is the time during which plea negotiations are conducted **automatically** excludable from the Speedy Trial Act's 30-day window for filing and an information or indictment?

Held: No. Plea negotiations may be excludable, but are not automatically so.

Background and procedural history. Mr. Mathurin, then 17 years old, was arrested on December 12, 2007 following a 5-month crime spree in Miami. The Government filed a juvenile information in April 2009, and in August the district court ruled that Mr. Mathurin could be prosecuted as an adult.

The grand jury indicted Mr. Mathurin on December 29, 2009 on numerous armed robbery and weapons charges, and returned a superseding indictment on April 20, 2010. Mr. Mathurin moved on April 28, 2010 to dismiss all charges due to an alleged violation of the Speedy Trial Act's 30-day rule. The district court denied Mr. Mathurin's motion. A jury convicted Mr. Mathurin on all counts, and the district court sentenced him to a custodial term of 492 months. Mr. Mathurin appealed.

Analysis: Judge Martin authored the panel's decision, which Judges Wilson and Pryor joined.

Given the December 29, 2009 date of the initial indictment, the Court first set about to determine on when the statutory 30-day period commenced, determining that the clock began to run on the date the district court held that Mr. Mathurin could be tried as an adult: August 27, 2009. (This is also the date the Government originally agreed the 30-day period began before changing its position on appeal.)

The Court next considered the Government's argument that ongoing plea negotiations constituted "other proceedings concerning the defendant" within the meaning of 18 U.S.C. § 3161(h) (1) and thereby tolled the 30-day period. While there had previously been something of a circuit split on the question of whether plea negotiations automatically toll the Speedy Trial Act clock, the Eleventh Circuit noted that the U.S. Supreme Court's decision in *Bloate v. United States*, ___ U.S. ___, 130 S. Ct. 1345 (2010) limited the scope of § 3161(h)(1). *Bloate* provides that the governing subparagraphs of § 3161(h) (1) are the alpha and the omega in determining interpreting the section's ambit. Because subparagraph (G) automatically excludes only that "delay resulting from consideration by a court of a

proposed plea agreement to be entered into by the defendant and the attorney for the Government," Mr. Mathurin's 30-day period may only be automatically tolled if the facts of his plea negotiations comport with subparagraph (G). Since the district court was never asked to review a proposed plea agreement during the relevant time period, subparagraph (G) is inapposite and the Speedy Trial Act's thirty-day period was not tolled in this case.

The Eleventh Circuit clarified that delay resulting from plea negotiations cannot ***never*** toll the speedy-indictment clock, only that it does not **automatically** do so. It opined that this interpretation of § 3161 was in keeping with congressional intent in drafting the statute, and with the Supreme Court's statement that the Speedy Trial Act's purpose is "not only to protect defendants, but also to vindicate the public interest in the swift administration of justice." *Bloate*, ___ at ___; 130 S. Ct. at 1356.

The Court concluded by summarily rejecting the Government's argument that waiver and estoppel principles precluded Mr. Mathurin's Speedy Trial Act Claim.

SELECTED UNPUBLISHED OPINIONS

***United States v. Manuel Franciso de la Cruz-Ortiz*, No. 11-14862 (Slip Opinion) (August 2, 2012)**

Issue. Did the district court err in determining that a prior conviction of the South Carolina state crime of "assault and battery of a high and aggravated nature" constitutes a "crime of violence" within the meaning of USSG §2L1.2(b)(1)(A)(ii)?

Held. Yes, but the error is harmless because the sentencing judge stated on the record that she would have imposed the same sentence irrespective of the "crime of violence" sentencing enhancement.

Background and procedural history. The defendant, Mr. Manuel Francisco de la Cruz-Ortiz, a Mexican citizen, was deported from South Carolina in 2001 after being convicted under that state's "assault and battery of a high and aggravated nature" offense. After Mr. Cruz-Oritz illegally returned to the United States, he was apprehended, convicted of illegal re-entry and deported again in 2007. In 2011, he was arrested in Alabama and convicted once again of illegal re-entry. The district court accepted the probation officer's recommendation of a 16-level enhancement for the prior South Carolina offense, holding that the conviction was a "crime of violence" within the meaning of USSG §2L1.2(b)(1)(A)(ii). Mr. Cruz-Ortiz appealed.

Analysis. The Eleventh Circuit (*per curiam*, before Judges Hull, Pryor and Kravitch) affirmed Mr. Cruz-Ortiz's sentence. While the Government conceded on appeal that the sentencing judge improperly determined that Mr. Cruz-Ortiz's South Carolina conviction constituted a "crime of violence," the error was harmless because the lower court had stated that it would have imposed the same sentence regardless of its determination on the crime of violence question.

***United States v. Petronium Bailey, a.k.a. Petro Bailey*, No. 11-10187 (Slip Opinion) (August 6, 2012)**

Issue. Did the district court err in not sentencing the defendant under the Fair Sentencing Act of 2010 (FSA) given that the defendant's offense occurred prior to the FSA's August 3, 2010 effective date but whose sentencing hearing took place thereafter?

Held. Yes. The Eleventh Circuit vacated Mr. Bailey's sentence and remanded the case for resentencing under the FSA.

Background and procedural history. Mr. Bailey was convicted of possession with intent to distribute 5 grams or more of cocaine base. He was sentenced on January 6, 2011, months after the August 3, 2010 effective date of the FSA. The district court determined that Mr. Bailey nonetheless should not be sentenced under the FSA because, while his sentencing hearing was convened after its effective date, Mr. Bailey's offense occurred prior to the FSA's enactment. After the district court sentenced him under the pre-FSA version of 21 U.S.C. § 841, Mr. Bailey appealed.

Analysis. The Eleventh Circuit held, pursuant to the Supreme Court's decision in *Dorsey v. United States*, 567 U.S. ___, 132 S. Ct. 2321, 2330 (2012), that the FSA applies to a defendant whose offense occurred prior to the FSA's enactment but whose sentencing hearing is convened thereafter.

***United States v. Michael Edward Todd*, No. 11-15482 (Slip Opinion) (August 7, 2012)**

Issue. Did the Government breach a plea agreement by, contrary to the agreement's express terms, seeking denial of a sentencing reduction for defendant's acceptance of responsibility?

Held. Yes.

Background and procedural history. Mr. Todd pleaded guilty to conspiracy to violate the Arms Export Control Act, 22 U.S.C. § 2778, and some of its regulations. He appealed his 46-month custodial sentence.

Analysis. Mr. Todd argued that the Government reneged on its commitment, memorialized in his plea agreement, to recommend a 3-point decrease in his guideline range for acceptance of responsibility. The Government on appeal conceded its breach, but argued that Mr. Todd failed to object at sentencing. The Eleventh Circuit (*per curiam*, before Judges Barkett, Pryor and Martin) rejected the Government's argument in face of contrary evidence in the sentencing hearing transcript. It therefore vacated Mr. Todd's sentence and remanded the case for resentencing before a different district judge, with instructions to require specific performance of the Government's obligations under the plea agreement. The Court did not reach any of the other various issues that Mr. Todd raised on appeal.

***United States v. Craig Frazier, a.k.a. Chicken Man*, No. 12-10888 (Slip Opinion) (August 9, 2012)**

Issue: May a district court's denial of a defendant's 18 U.S.C. § 3582(c)(2) motion to reduce sentence pursuant to USSG Amendment 750 consist only of boilerplate language?

Held: No. A district court must demonstrate that it considered Amendment 750 and the § 3553(a) factors before denying a motion to reduce sentence.

Background and procedural history. Mr. Frazier filed a 18 U.S.C. § 3582(c)(2) motion to reduce his sentence. The district court denied the motion, but its order included only pre-written form language and did not evince the judge's consideration of the § 3553(a) factors or Amendment 750.

Analysis. The Eleventh Circuit (*per curiam*, before Judges Barkett, Wilson and Kravitch) vacated the district court's denial of defendant's 18 U.S.C. § 3582(c)(2) motion because the lower court's denial order consisted of only a pre-written form with boilerplate language, and failed to indicate that the court "actually conducted the required recalculation under the amended guidelines."

***United States v. Quang Van Nguyen*, No. 11-10407 (Slip Opinion) (August 16, 2012)**

Issue. Is the defendant entitled to an evidentiary hearing on his ineffective assistance of counsel claim when the trial counsel failed to object to methamphetamine being considered "ice" for purposes of USSG §2D1.1?

Held. Yes. The definition of "ice" is quite specific and trial counsel's failure to object may well have prejudiced Mr. Van Nguyen.

Background and procedural history. Mr. Van Nguyen's trial counsel failed to object at sentencing to methamphetamine being considered "ice" as defined in USSG §2D1.1(c), Note (C). Mr. Van Nguyen appealed.

Analysis. The Eleventh Circuit (*per curiam*, before Judges Jordan and Fay and U.S. District Judge Hood, Eastern District of Kentucky) vacated the district court's order, finding that Mr. Van Nguyen was entitled to an evidentiary hearing on his ineffective assistance of counsel claim.

***United States v. Federico Rosas, a.k.a. Felix*, No. 11-15388 (Slip Opinion) (August 23, 2012)**

Issues.

(1) Did the district court err in finding that the defendant was ineligible for safety-valve relief under USSG §5C1.2?

(2) Did the district court err in imposing a two-level enhancement for possession of a firearm under USSG §2D1.1(b)(1) based on defendant's mere possession of a firearm?

(3) Did the district court err in denying the defendant his requested two-level reduction based on his purportedly "minor role" in the offense, pursuant to USSG §3B1.2?

Held.

(1) No. Defendant did not meet the disclosure requirement of USSG §5C1.2(a)(2).

(2) No. Defendant did not demonstrate the "clear improbability" of any connection between the firearm and his underlying offense.

(3) No. Defendant did not present sufficient evidence to meet his burden of establishing "minor role" status.

Background and procedural history. Mr. Rosas pleaded guilty to conspiracy with intent to distribute and distribution of 5 or more grams of methamphetamine; aiding and abetting the aforementioned; and aiding and abetting the sale of a firearm to a convicted felon. The district court denied Mr. Rosas's request for safety-valve relief and for a two-level "minor role" reduction, and imposed a two-level enhancement for possession of a firearm. Mr. Rosas appealed.

Analysis. The Eleventh Circuit held that defendant was ineligible for safety-valve relief because he did not debrief the government and declined to testify regarding an affidavit that he filed the day before his sentencing hearing, therefore failing to meet the disclosure requirement of USSG §5C1.2(a)(2).

Defendant also challenged his sentencing enhancement for the presence of a firearm, arguing that mere possession is insufficient to trigger the enhancement. The Eleventh Circuit rejected this argument because once the Government has demonstrated proximity of the firearm, the defendant bears the burden of showing "the clear improbability" of any connection between the firearm and his drug offense – a burden the defendant was unable to meet.

The Eleventh Circuit summarily rejected defendant's argument that he played a "minor role" in the offense, finding that he failed to present sufficient evidence to meet his burden.

***United States v. Brandon Allen*, No. 11-11640 (Slip Opinion) (August 24, 2012)**

Issue. Do felony drug offenses committed 3 calendar days apart constitute separate and distinct prior offenses under the Armed Career Criminal Act?

Held. Yes.

Background and procedural history. Mr. Allen pleaded guilty to possession with intent to distribute 5 grams or more of crack cocaine and less than 50 grams of marijuana, and of felon in possession of a firearm. Due to his having 3 prior felony drug convictions, the district court sentenced Mr. Allen pursuant to the Armed Career Criminal Act. Mr. Allen unsuccessfully objected, arguing that he was sentenced on 2 of the 3 prior felony drug convictions on the same day and that the Government lacked proof that the crimes occurred on different occasions. He alternatively argued that the Fair Sentencing Act of 2010 applied to his case, but the judge concluded otherwise. Mr. Allen appealed.

Analysis. The Eleventh Circuit affirmed the district court's determination that 2 of Mr. Allen's prior controlled substance distribution offenses, separated in time by 3

calendar days, constitute "different occasions" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).

Mr. Allen also alleged that the district court erred in not retroactively applying the Fair Sentencing Act of 2010. The Eleventh Circuit agreed that, in light of the U.S. Supreme Court's decision in *Dorsey v. United States*, 567 U.S. ___, 132 S. Ct. 2321, 2335 (2012), this was error, but nonetheless concluded that the error was harmless because Mr. Allen was not sentenced based on the amount of drugs involved, but instead under the ACCA. The FSA therefore did not affect Mr. Allen's offense level or guideline range.

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UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Williams v. Illinois, No. 10-8505 (Slip Opinion) (June 18, 2012)

Issue. Does an expert witness's testifying about the results of DNA testing performed by others violate the Confrontation Clause of the Sixth Amendment to the United States Constitution?

Held. Unclear, due to the Court's failure to coalesce around a majority opinion. Four dissenters say "no"; the four signers of the plurality opinion say "yes"; and Justice Thomas essentially says, "sometimes." The longstanding rule is that the narrowest opinion by a justice concurring in the outcome set forth in the plurality opinion controls, but commentators do not have consensus about whether the plurality opinion or Justice Thomas's opinion exhibits narrower contours. The plurality argued that this sort of expert testimony does not violate the Confrontation Clause so long as it is not offered to prove the truth of the matter asserted. Justice Thomas wrote that while such evidence can be testimonial, the DNA Report about which the expert witness in the instant case testified is not sufficiently formal or solemn (as opposed to, for example, a sworn affidavit) to qualify as testimonial.

Vote. 5-4 to affirm the judgment of the Supreme Court of Illinois. Justice Alito authored a plurality opinion, joined by Chief Justice Roberts and Justices Kennedy and Breyer. Justice Thomas concurred only in the judgment and wrote separately to articulate his own standard. Justice Breyer wrote separately, and Justice Kagan filed a dissent that was joined by Justices Scalia, Ginsburg, and Sotomayor.

Background and procedural history. Petitioner was convicted in Illinois state court for the robbery and rape of a young woman. At trial, the government called an expert witness in forensic biology and forensic DNA analysis to testify about the results of DNA testing—testing that she did not personally conduct—that purported to match Petitioner's DNA with a semen sample collected from the victim's vaginal swabs. The DNA test report itself, on which the expert witness based her testimony, was not offered into evidence.

The court permitted the witness to testify over the objections of Petitioner's trial counsel, with the judge sharing the government's position that Petitioner's Confrontation Clause rights were protected because he had the opportunity to cross-examine the expert. The prosecutor further argued that Illinois Rule of Evidence 703 (identical to its federal counterpart) permits an expert to state facts on which his or her opinion is based, even if the expert is not qualified to testify as to those

facts, so long as the testimony is not offered to prove the matter asserted. Any deficiency would go to the weight of the evidence rather than to admissibility.

The Illinois Court of Appeals affirmed the trial court, and the Supreme Court of Illinois denied review.

Analysis.

Plurality Opinion. Justice Alito's plurality opinion maintains that permitting expert testimony of this sort—so long as not offered to show the truth of the matter asserted—has long been permitted in the American and British legal systems. Historically, this had been facilitated by either 1) waiting to call the expert until after the pertinent facts had been established on the record, or 2) branding the elicited testimony as the answer to a "hypothetical question," a legal fiction where counsel asks the expert questions based on a so-called "hypothetical" that all but mirrored the facts of the case at hand. These two approaches were obviated by the advent of evidentiary rules—specifically, Rule 703, which memorialized the principle.

Justice Alito also found it significant that Petitioner had a bench, not jury trial, further lessening any risk that the expert witness's testimony would be received as tending to show the truth of the matter asserted.

Concurring Opinions.

- Justice Breyer wrote to restate views that he expressed in other recent Confrontation Clause cases, such as that requiring testimony from those who prepare such lab reports would be costly and administratively burdensome. He preferred holding the case over for further briefing and reargument.
- Justice Thomas wrote separately to excoriate Justice Alito's plurality opinion and to urge "a reading of the confrontation clause that respects its historically limited application to a narrow class of statements bearing indicia of solemnity." Slip Op. at 16 (Thomas, J., concurring). Applying this standard to the instant case, he opined that the DNA Report "lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact…[and]… although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation." *Id.* at 9.

Dissent. Justice Kagan filed a dissent that was joined by Justices Scalia, Ginsburg, and Sotomayor. Citing the Court's recent decisions in *Crawford v. Washington*, 541 U.S. 36 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); and *Bullcoming v. New Mexico*, 564 U.S. ___ (2011), she cast this matter as a simple, "open-and-shut case," demonstrating "the genius of an 18th-century device [the Confrontation Clause] as applied to 21st-century evidence." Slip Op. at 2 (Kagan, J.,

dissenting). Justice Kagan concluded by expressing her view that the Court's other recent Confrontation Clause precedents remained good law, and her hope that the lower courts would continue to follow these precedents.

***Dorsey v. United States*, No. 11-5683 (Slip Opinion) (June 21, 2012)**

Issue. Do the more lenient mandatory minimums instituted by the Fair Sentencing Act of 2010 ("FSA"), and the revised Federal Sentencing Guidelines consequently promulgated, apply to defendants whose offense occurred before the August 3, 2010 effective date of the FSA but whose sentence was imposed after August 3, 2010?

Held. Yes. The Court held that the FSA and the revised Guidelines do apply to such offenders, and reversed the Seventh Circuit.

Vote. 5-4 to reverse. Justice Breyer authored the Opinion of the Court, joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan. Justice Scalia filed a dissent, which was joined by Chief Justice Roberts and Justices Thomas and Alito.

Background and procedural history. In separate cases, Corey Hill and Edward Dorsey Sr. were each convicted of possession with the intent to distribute crack cocaine, and failed in his appeal to the Seventh Circuit. Hill's offense was committed prior to the FSA's enactment, but his sentencing took place after both the Act's enactment and the resulting release of the revised Sentencing Guidelines on November 1, 2010. The procedural posture of Dorsey's case was substantially identical to Hill's, save for the fact that his sentencing, while occurring after Congress passed the FSA, took place before the Sentencing Commission promulgated its revised Guidelines.

Note: once this matter reached the Court, the Obama Justice Department agreed with Hill and Dorsey that the FSA should apply to their cases.

Analysis. The Court found that "[s]ix considerations, taken together, convince us that Congress intended [the FSA's] more lenient penalties to apply to those offenders whose crimes preceded [its enactment on] August 3, 2010, but who are sentenced after that date." Slip Op. at 11.

1.) Despite 1 U.S.C. § 109, a statute originally enacted in 1871 that requires any new criminal statute enacted by Congress to "expressly provide" that its provisions apply to pre-enactment offenders, a line of Court decisions has set the standard at something lower than "expressly provide"; namely, phrases such as "plain import" and "fair implication." To find that Congress intended the FSA to apply in the instant circumstances, the courts must "assure

themselves that ordinary interpretative considerations point clearly in that direction." Slip Op. at 13.

2.) The Sentencing Reform Act of 1986 ("SRA") requires federal judges to apply the guidelines in effect at the time of sentencing regardless of when the offense was committed.
3.) Congress's inclusion in the FSA of a section entitled "Emergency Authority for United States Sentencing Commission" that directed the Commission to "as soon as practicable" (and no later than 90 days following enactment) to promulgate "confirming amendments" to ensure that the Guidelines comport with "applicable law" – that is, the law as amended by the FSA.
4.) Applying the old mandatory minimums would create the very sort of sentencing disparities that the SRA and the FSA were designed to prevent.
5.) Moreover, not applying the FSA to this class of defendants would create new sets of disproportionate sentences that do not currently exist.
6.) There is no "strong countervailing consideration" that Congress intended any different interpretation. Slip Op. at 18.

The Court further held that the FSA's lower minimums also apply to those who, like Dorsey, committed the offense pre-FSA and who were sentenced after its enactment but before the promulgation of the new Guidelines. Justice Breyer's opinion noted that the FSA directed the Sentencing Commission to disseminate revised guidelines "as soon as practicable" and in any event no later than 90 days from enactment, which the justice seemed to imply indicated a decision to immediately activate the FSA's new, more lenient penalties.

Dissent. The sole dissent focuses virtually exclusively on 1 U.S.C. § 109, which Justice Scalia reads as mandating that the FSA's more lenient mandatory minimums do not apply to offenders who committed their offenses prior to the FSA's enactment. Citing his own dissent in *Lockhart v. United* States, 546 U.S. 142, 147-150 (2005) (Scalia, J., dissenting), Justice Scalia opines that a court should only find that Congress has deviated from § 109 when "the plain import of a later statute directly conflicts" with it. Slip Op. at 3 (Scalia, J., dissenting). He dismisses the majority's concerns over the resultant sentencing disparities, noting that these will occur anytime Congress revises the penalties for a criminal offense.

***Miller v. Alabama*, No. 10-9646 (Slip Opinion) (June 25, 2012)**

Issue. Do mandatory "life without the possibility of parole" sentences for those under the age of 18 years at the time of their crimes violate the Eighth Amendment to the United States Constitution's prohibition on "cruel and unusual punishments"?

Held. Yes.

Vote. 5-4 to reverse. Justice Kagan authored the Opinion of the Court, joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor. Justice Breyer filed a concurring opinion, joined by Justice Sotomayor. Chief Justice Roberts filed a dissent, joined by Justices Scalia, Thomas, and Alito. Justices Thomas and Alito also filed separate dissents, each of which was joined by Justice Scalia.

Background and procedural history. Two 14 year old offenders, Kuntrell Jackson of Arkansas and Evan Miller of Alabama, were each convicted of murder and sentenced to life imprisonment without the possibility of parole – a mandatory sentence in each state. Jackson accompanied friends on a store robbery when one friend murdered a store employee, while Miller killed a neighbor after an evening of heavy drug and alcohol use. The respective state appellate courts affirmed each sentence.

Analysis. Justice Kagan wrote that the cases "implicate two strands of precedent reflecting [the Court's] concern with proportionate punishment" and the "confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." Slip Op. at 6-7.

The first such line of precedent imposes categorical bans on sentencing practices "based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* at 6. Cases such as *Graham v. Florida*, 560 U.S. ___ (2010) (life without parole for nonhomicide, juvenile offenders); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (persons convicted of nonhomicide offenses); *Roper v. Simmons*, 543 U.S. 551 (2005) (persons under 18 years of age); *Atkins v. Virginia*, 536 U.S. 304 (2002) (persons with mental retardation) are examples.

The second line of precedent requires individualized sentences when imposing the death penalty. Examples include *Woodson v. North Carolina*, 428 U.S. 280 (1976) (banning mandatory death penalty for first-degree murder); *Sumner v. Shuman*, 483 U.S. 66 (1987) (striking down Nevada's mandatory death penalty for murder committed by an offender serving a sentence of life without parole); *see also Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Johnson v. Texas*, 509 U.S. 530 (1993).

Taken together, these precedents led the Court to conclude that mandatory life-without-parole for a juvenile prevents consideration not just of the facts of the offense, but also the juvenile's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment…no matter how brutal or dysfunctional." Slip Op. at 14-15. Moreover, the mandatory life-without-parole sentence "ignores that [the juvenile] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth," such as negotiating a plea deal or effectively assisting his or her counsel. *Id*. at 15.

The Court stopped short at imposing a categorical ban on life without parole for juveniles, but noted that it expects that such sentences will be "uncommon" given "all we have said in *Roper*, *Graham*, and in this decision," particularly regarding the "great difficulty" of "distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id*. at 17 (internal citations omitted). Despite its refusal to categorically ban the practice, the Court concluded with the directive that sentencing courts "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*

Addressing dissents filed by Chief Justice Roberts and Justices Thomas and Alito that echoed arguments made by Alabama and Arkansas, the Court rejected the argument that its holding's reasoning is undermined by state rules requiring an individualized assessment of whether or not a juvenile should be tried as an adult. The Court noted that many states employ mandatory transfer systems that require a juvenile of a certain age who is accused of committing certain offenses to be tried as an adult as a matter of course, regardless of any individual circumstances, and that some states even vest the decision entirely in the prosecutor. Even in states where it is the judge's discretion, this is of "limited utility" and insufficient to satisfy the Eighth Amendment because the judge will have scant information at this early state of the case. Additionally, there is a built-in disincentive to keep a juvenile defendant out of adult court because in many states an offender must be released at a certain age or after a time certain. The Court also dismissed various and sundry accusations, articulated by the dissents, that its holding conflicts with the previous body of Eighth Amendment precedents.

Concurrence. Justice Breyer, joined by Justice Sotomayor, wrote separately to state his position that, if on remand, the State of Arkansas continued to seek life without the possibility of parole for Kuntrell Jackson, under *Graham v. Florida* there must be a determination as to whether he intended to kill the robbery victim. Otherwise, Justice Breyer believed that Eighth Amendment prevents such a sentence, be it mandatory or discretionary.

Dissents.

- Chief Justice Roberts wrote that mandatory life-without-parole sentences for juveniles have only relatively recently been authorized in some states, and that since the 1980s there has been a societal shift towards tougher mandatory sentencing, with "rehabilitation" less of an emphasis than in previous decades of the 20th century. Based on this and other, similar statistical data, his opinion closely compares *Graham* and *Roper* to the instant case, and finds no similar emerging societal consensus against mandatory life without parole sentences for juveniles. The Chief Justice also

opines that the majority's true goal was to lay the groundwork for future restrictions on the states' sentencing discretion. Justices Scalia, Thomas and Alito joined the opinion.

- Justice Thomas wrote that both the majority opinion and much of the precedent it cites is inconsistent with the original understanding of the Eighth Amendment's Cruel and Unusual Punishments Clause. In Justice Thomas's view, the Clause only applies to bar tortuous "methods" of punishment that were considered cruel and unusual at the time of the Eighth Amendment's adoption in the eighteenth century. Justice Scalia joined the opinion.
- Justice Alito's dissent was a critique not just of the majority opinion, but of the precedents on which it was based. He maintains that with each new and nebulous application of the Eighth Amendment, the Court backs farther away from any sort of objective standard or consistency. Justice Scalia joined the opinion.

United States v. Daniels, No. 10-14794 (Slip Opinion) (July 2, 2012)

Issue: in order to attain a conviction under 18 U.S.C. § 2422(b), which prohibits the use of interstate commerce to facilitate the prostitution or other unlawful sexual activity of anyone under age 18, is the government required to prove that the defendant had actual knowledge that the victim was a minor?

Held: No. In a *per curiam* opinion, Judges Tjoflat, Pryor and Fay held that there was no such knowledge requirement in § 2422(b).

Background and procedural history. Robert Daniels was convicted in the Southern District of Florida on two § 2422(b) counts based on his role in managing the prostitution of a 14 year old woman. The trial judge denied Daniels's proposed jury instruction that would have read a *mens rea* requirement (as to the victim's age) into the § 2422(b) count.

Analysis: Daniels argued that the U.S. Supreme Court's decision in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009) governs because the statute at issue there was "grammatically similar" to § 2422(b). The Eleventh Circuit looked instead to Justice Alito's concurring opinion, which cautioned against application of the majority opinion "as adopting an overly rigid rule of statutory construction." *Id.* at 659-61 (Alito, J., concurring). Rather, Justice Alito maintained, a contextual reading is the appropriate statutory interpretation lens. The Eleventh Circuit agreed, distinguishing the statute at issue in *Flores-Figueroa* (pertaining to aggravated identity theft) from § 2422(b). The latter statute was predicated on congressional intent to "protect the most vulnerable among us," a "special context." Slip Op. at 21.

The Eleventh Circuit also cited *United States v. X-Citement Video Inc.*, 513 U.S. 64 (1994), which held that the general presumption of scienter requirement for each element of an offense is rebutted in the context of statutes concerned with protecting minors. The panel also found persuasive *United States v. Cox*, 577 F.3d 833 (7th Cir. 2009), which reasoned that, since the conduct disallowed by § 2423 (transportation of juveniles for purposes of prostitution) was already prohibited by § 2421 (general prohibition on the transportation of persons for such purposes), a defendant is on notice that his conduct with a minor violates the law, because the conduct is illegal regardless of the victim's age. Section 2423, like § 2422, merely enhances the penalty where the victim has not attained 18 years of age. The Court concluded, "[w]e honor the congressional goal…and reach a holding that aims to

protect minors—not make conviction more difficult for crimes that affect them." Slip Op. at 25-26.

Daniels also appealed on five other grounds that the panel disposed of largely summarily.

***United States v. Ealy*, Nos. 10-15537, 10-15538 (Slip Opinion) (July 11, 2012)**

Issue. Did a district court judge abuse his/her discretion by imposing a sentence of 210 months imprisonment despite the government's recommendation, offered pursuant to a plea bargain, of a sentencing range of 78 to 97 months?

Held. No.

Background and procedural history. Among other charges, James Lee Ealy was indicted under 18 U.S.C. § 2113(a) and (d) for robbing two banks. The government agreed to drop all other charges, and to recommend sentencing under the low end of the applicable guideline range of 78 to 97 months for the § 2113 charges, in exchange for Ealy's guilty plea thereunder.

The trial judge accepted Ealy's guilty plea but, on application of the § 3553(a) factors, sentenced Ealy to 210 months imprisonment. Ealy appealed, alleging that his sentence was "substantively unreasonable."

Analysis. The panel, employing the abuse-of-discretion standard of review, affirmed the sentence. Judge Hill's opinion noted the Court's opinion in *United States v. Shaw*, 560 F.3d 1230, 1238 (11th Cir. 2009), which permits the vacating of a sentence only where the Eleventh Circuit is "left with the definite and firm conviction that the district court committed a clear error of judgment…by arriving at a sentence that lies outside the range of reasonable sentences." Since the district judge's upward variance was still below the maximum 900-month range carried by § 2113, and due to Ealy's extensive criminal history, the panel could not arrive at a "firm conviction" that the district court had erred.

Concurrence. Judge Martin acknowledged that the majority opinion comported with precedent, but noted that the Court "has declined to exercise similar deference toward a sentencing court's decision to grant *downward* variance." Slip Op. at 9-10 (emphasis added). The judge further wrote that "[a]bsent correction, I fear this Court's different approach for reviewing up and down sentence variances may erode public trust in our work." *Id.* at 13.

***United States v. Hudson*, No. 10-14428; *United States v. Rojas*, No. 10-14662 (*en banc*) (Slip Opinion) (July 2, 2012)**

In these appeals, the Court, sitting *en banc*, vacated the defendants' sentences and remanded their cases to the district court for resentencing in light of the Supreme Court's decision in *Dorsey*.

***United States v. Lawson*, No. 11-15912 (*per curiam*) (Slip Opinion) (July 13, 2012)**

Issue. Is United States Sentencing Guidelines Amendment 750 available to an offender who was sentenced under the career offender sentencing guidelines, affording a district court jurisdiction to consider a duly filed 18 U.S.C. § 3852(c)(2) motion?

Held. No.

Background and procedural history. Lawson was convicted of distribution of crack cocaine and, as a career offender, was sentenced to 262 months' imprisonment. He filed a *pro se* 18 U.S.C. § 3582(c)(2) motion based on Amendment 750, which the trial judge denied on the grounds that Lawson's guideline range, based on the career-offender guideline in U.S.S.G. § 4B1.1, had not been lowered by Amendment 750. Lawson appealed, alleging that the U.S. Supreme Court's decision in *Freeman v. United States*, 131 S.Ct. 2685 (2011), entitled him to the reduction.

Analysis. The Court, in a *per curiam* decision by Judges Carnes, Wilson and Fay, affirmed the district court. It noted its previous decision in *United States v. Moore*, 541 F.3d 1323 (11th Cir. 2008), which held that the offense level for a career offender is determined under § 4B1.1(b), not § 2D1.1, because for defendants sentenced as career offenders their "base offense levels under § 2D1.1 [play] no role in the calculation of [their guideline] ranges." The Court maintained that *Freeman* did not expressly overrule *Moore* and, in any event, *Freeman* was not on point because it did not address the instant situation, *i.e.*, where a defendant was assigned a base offense under one guideline section but ultimately was assigned a total offense level and guideline range under the career offender section. Finally, the Court held that Lawson was not entitled to a sentence reduction under Amendment 750 because as it did not apply to the career offender guidelines.

***United States v. Almedina*, No. 11-13846 (Slip Opinion) (July 13, 2012)**

Issue. Was it clear error for a district court to estimate the amount of heroin contained in an unseized package where the estimate is based on the contents and delivery method of a subsequent package that was intercepted by the government, and to take the estimated drugs of the unseized package into account when imposing a sentence on the offender?

Held. No.

Background and procedural history. Hector Almedina was arrested in February 2011 after being paid $1,000 to accept a package containing 485.68 grams of heroin at Miami International Airport, and ultimately admitted receiving $1,300 to accept a package in the same manner the previous month. Almedina was convicted of conspiracy to import 100 grams or more heroin from Colombia into the U.S.; conspiracy to possess with the intent to distribute; and possession with intent to distribute. At sentencing, the government and the probation office recommended holding Almedina accountable for both packages, and estimated that the prior, unseized package contained at least 215 grams of heroin, less than half the amount in the seized package. With this sum of 701 total grams, Almedina's total offense level rose to a base of 30 (700 to 999 grams), and a guideline range of 97 to 121 months' imprisonment. The trial judge sentenced Almedina to serve concurrent 97 month prison terms. Almedina appealed, alleging that the trial judge improperly speculated on the contents of the prior, unseized package in determining the drug quantity attributable to him.

Analysis. Almedina argued that it was entirely possible that the January package was empty and was simply sent as a "dry run." The government responded that since Almedina was paid $1,000 for receiving the February package and $1,300 for the January package, it was unlikely that Almedina would have received an increased payment for a "dry run" package. The Court, in an opinion written by Chief Judge Dubina and joined by Judges Jordan and Alcaron (of the United States Court of Appeals for the Ninth Circuit, sitting by designation), noted its decision in *United States v. Izquierdo*, 448 F.36 1269, 1278 (11th Cir. 2006), which held that when a fact pattern gives rise to two reasonable and different constructions, the factfinder's choice cannot be "clearly erroneous," the operative standard of review in Almedina's appeal. Based on this precedent, and a line of caselaw permitting a court to estimate drug quantities in this manner, the panel affirmed Almedina's sentence.

***United States v. Glover*, No. 12-10580 (Slip Opinion) (July 11, 2012)**

Issue. Are United States Sentencing Guidelines Amendments 750 or 759 available to an offender who was sentenced under a statutory mandatory minimum life sentence, affording a district court jurisdiction to consider a duly filed 18 U.S.C. § 3852(c)(2) motion?

Held. No.

Background and procedural history. Glover pleaded guilty to conspiracy to distribute and possess with intent to distribute crack cocaine, and one count of possession with intent to distribute 50 grams or more of crack. Under the guidelines, he would have had a range of 188 to 235 months imprisonment, but instead faced a mandatory minimum life sentence because he had at least two prior felony drug offense convictions. The district court ultimately departed downward and sentenced him to 204 months after the government filed a § 5K1.1 motion. Glover did not file a direct appeal, but filed a *pro se* motion under 18 U.S.C. § 3852(c)(2) to reduce his sentence after the United States Sentencing Commission promulgated Amendment 750 in the wake of the Fair Sentencing Act of 2010. The district court denied Glover's § 3852(c)(2) motion and his motion for rehearing.

Analysis. Judge Carnes's opinion for the Court, joined by Judges Hull and Marcus, affirmed the district court. In *United States v. Mills*, 613 F.3d 1070 (11th Cir. 2010), the Court held that a sentencing court cannot consider a § 3852(c)(2) motion when the defendant was sentenced with a mandatory minimum base. The Court opined that *Mills* is controlling and, because Glover's guidelines range was based on a mandatory minimum, Amendment 750 is inapposite to his case. The Court also rejected Glover's argument that Amendment 759 abrogated *Mills*. Amendment 759, Judge Carnes wrote, "did nothing more than limit a district court's authority to reduce a defendant's sentence below the amended guidelines range," and did not disturb the *Mills* precedent. Slip Op. at 10. As neither Amendment 750 nor 759 changed Glover's guideline range of mandatory minimum life imprisonment, neither was applicable to afford him any sentencing relief.

***United States v. Smith*, No. 15929 (Slip Opinion) (July 23, 2012)**

Issue. Is it clear error for a district court to deny a defendant's motion to suppress evidence seized from his computers following a warrantless home entry when the defendant some time later consents to a home entry and search and where the warrantless entry was at least colorably justified by concern for the defendant's safety?

Held. No.

Background and procedural history. Daniel Smith entered a conditional guilty plea to receipt and attempted distribution of child pornography and was sentenced to 180 months imprisonment. He reserved his right to appeal the district court's denial of his motion to suppress inculpatory physical and testimonial evidence based on law enforcement officers' warrantless, uninvited entry into his home.

The officers, acting on an anonymous tip that Smith had child pornography on a laptop computer, went to Smith's home to speak with him. When they arrived, Smith did not answer, there was a foul odor in the air, and Smith's neighbor was worried about him. These factors lead the officers to enter the home, brandishing their weapons. After finding and awakening Smith, the officers went outside to speak with him. The officers falsely told Smith that they had evidence of the transmission of child pornography from his residence. Smith ultimately, within a time period of uncertain duration, permitted the officers, both orally and in writing, to search his computer and his home. Child pornography was present on his laptop computer. After going voluntarily to the police station and being read his *Miranda* rights, Smith apparently confessed to downloading child pornography and making it available for download via Ares, a peer-to-peer file-sharing program. Law enforcement subsequently obtained a warrant to search Smith's two computers, and found at least one video of child pornography.

Smith claimed that the district judge's refusal to suppress this evidence seized from his computers violated the Fourth Amendment to the U.S. Constitution and the "fruit of the poisonous tree" doctrine.

Analysis. In an opinion by Judge Ripple (of the United States Court of Appeals for the Seventh Circuit, sitting by designation), joined by Judges Tjoflat and Pryor, the Court affirmed the district court's denial of Smith's motion to suppress the evidence seized from his computers. The Court found that the warrantless home entry was justified under the "emergency aid exception" and that, even if this were not the case, Smith's later consent was "both voluntary and sufficiently attenuated from the entry such that any potential taint would have fully dissipated." Slip Op. at 12-13. Smith conceded that his consent was voluntary. Regarding attenuation, the Court noted that the officers' immediate withdrawal from the home after ascertaining Smith's safety, Smith's numerous grants of permission orally and in writing to search his property, and other details, and concluded that there was "no indication in the record that [the officers] exploited in any way their initial presence in the home to identify the presence of evidence or to intimidate Mr. Smith into cooperating." *Id.* at 20.

***United States v. Liberse*, No. 12-10243 (Slip Opinion) (July 30, 2012)**

Issue. Does a district court have the authority, under U.S. Sentencing Guidelines Amendments 750 and 759, to lower a defendant's guideline range when, despite being subject to a 120 month mandatory minimum sentence, defendant was originally sentenced under a guideline range that exceeded the mandatory minimum?

Held. Yes. The Eleventh Circuit vacated the district court's denial of defendant's 18 U.S.C. § 3582(c)(2) motion to reduce pursuant to Amendment 750 and remanded the matter.

Background and procedural history. In 2006, Liberse was convicted of conspiracy with intent to distribute 50 or more grams of crack cocaine. The presentencing report set the amount attributable to Liberse to a minimum of 50 but less than 150 grams, which under the Sentencing Guidelines then in affect made Liberse subject to a 120 month mandatory minimum sentence. Because the mandatory minimum sentence was less than the bottom of his 121 to 151 month guideline range, the mandatory minimum did not affect Liberse's guideline range. The district court initially imposed a 121 month sentence before reducing it to 97 months following the government's FED. R. CRIM. P. 35(b) motion to reduce based on Liberse's substantial assistance to the government.

Following the Fair Sentencing Act of 2010's enactment, Liberse filed a *pro se* motion under 18 U.S.C. § 3582(c)(2) to further reduce his sentence, arguing that Sentencing Guideline Amendment 750 lowered his range to 70 to 87 months. The district court denied the motion, maintaining that since Liberse was sentenced prior to the Fair Sentencing Act's passage, he was subject to the 120 month mandatory minimum. Accordingly, wrote the district judge, Amendment 750 was inapposite given that the Sentencing Commission cannot alter a statutory mandatory minimum.

Analysis. Judge Carnes, joined by Judges Hull and Martin, authored the Eleventh Circuit's opinion vacating the district court's order denying Liberse's § 3582(c)(2) motion. The Court observed that it was unclear what Liberse's mandatory minimum sentence was in the wake of the Fair Sentencing Act because the Supreme Court's decision in *Dorsey* did not address the Act's applicability to offenders sentenced before the Act's August 3, 2010 effective date but whose § 3582(c)(2) motions were filed after that date. However, the Court wrote that it need not decide that question either, because Amendment 750 lowered Liberse's guideline range regardless of whether the Fair Sentencing Act applies to him. If it does apply, his range would be 70 to 87 months; if it did not, Liberse would be subject to the pre-Act 120 month mandatory minimum—in either case below

Liberse's original range of 121 to 151 months. The Court distinguished this case from its recent decisions in *United States v. Glover* and *United States v. Lawson* and expressly left it to "the district court in the first instance to decide whether, in light of *Dorsey*, the Fair Sentencing Act applies to this case." Slip Op. at 11.

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United States v. Richard M. Franklin, No. 11-10555 (September 7, 2012)

Issue. Did the district court err in denying the defendant's motion to suppress on grounds that the warrantless search of his home was justified by exigent circumstances and probable cause, particularly given that the Government failed to first assert this argument before the magistrate judge?

Held. No.

Background and procedural history. With less than one month remaining on his period of supervised release, Mr. Franklin stopped cooperating with his probation officer and began living elsewhere. He telephoned his probation officer to let him know that he was using marijuana and that the probation officer would not be able to find him. The probation officer learned of Mr. Franklin's whereabouts several months later – after Mr. Franklin's supervised release had terminated – and he and the police traveled to the home where Mr. Franklin resided. Before Mr. Franklin exited the home and surrendered, police viewed firearms through one of the windows. After Mr. Franklin surrendered, the probation officer entered the home and encountered several individuals and saw multiple firearms. The probation officer seized the firearms.

Mr. Franklin moved to suppress the seized firearms on grounds that the warrantless entry of the home violated the Fourth Amendment. The Government argued that the probation officer's entry and seizure were justified under the good-faith exception to the exclusionary rule. Specifically, the Government argued that because the probation officer did not realize that Mr. Franklin's supervised release had terminated and that he entered the home in good faith because a condition of Mr. Franklin's release was that his probation officer could search his residence. The magistrate judge rejected this argument, noting that the expiration date was clearly noted on the face of the Conditions of Supervision and finding that the probation officer's belief "was not grounded in good faith."

The probation officer also testified that he feared for the safety of himself and of the police officers. However, the magistrate judge did not credit this argument, noting that Mr. Franklin had already surrendered and was in custody at the time the probation officer entered the home. The magistrate therefore recommended that Mr. Franklin's motion to suppress be granted.

The district court declined to follow the magistrate judge's recommendation and denied Mr. Franklin's motion. The district court determined that the police had probable cause because they had seen the firearms through the window of the home. While the district court agreed that the probation officer's "safety concerns" rationale for the warrantless search lacked credibility, it held that it was justified under the "exigent circumstances" exception to the exclusionary rule – a rationale not argued by the Government before the magistrate judge. The district court concluded that the presence of other persons in the home, who had demonstrated their inclination to help Mr. Franklin by staying with him in the home after police surrounded it, could be expected to remove or destroy the firearms before the police could procure a warrant.

Analysis. The Eleventh Circuit (in an opinion by Ninth Circuit Judge Alarcon, joined by Chief Judge Dubina and Judge Jordan) held that the district court did not abuse its discretion in accepting the probable cause/exigent circumstances argument that the Government failed to raise before the magistrate judge. In reviewing the magistrate's report and recommendation, the district court does not perform a strictly appellate function and has the discretion to consider novel arguments.

Regarding the merits of Mr. Franklin's argument, the Court cited its prior ruling in *United States v. Rodgers*, 924 F.2d 219, 223 (11th Cir. 1991), which held that exigent circumstances existed where police knew at least one other person besides defendant was in the building, that the other person was aware of defendant's arrest, and the firearms in the building could easily be hidden or removed. Since all of those elements were present in the instant case, the Eleventh Circuit affirmed. The Court rejected Mr. Franklin's argument that *Rodgers* was distinguishable because it involved handguns, which due to their smaller size are more easily concealed or discarded than the rifles and sawed off shotguns at issue in his case. The probation officer acted reasonably under the circumstances, as he could reasonably believe that the firearms would be removed before law enforcement could return with a warrant. The Court rejected Mr. Franklin's pretext argument because while the probation officer's intent is subjective, the test for analyzing probable cause and exigent circumstances is objective.

The Court did not reach the Government's alternate argument that the probation officer was justified in entering the home because the conditions of supervised release were tolled due to Mr. Franklin's disappearance.

United States v. Carrell Johnson, No. 11-13621 (September 10, 2012)

Issue. Did the district court commit plain error in imposing a 2-level USSG §3C1.2 enhancement for reckless endangerment during a car chase even though the defendant was a passenger in the getaway vehicle and the district failed to make a specific finding that he actively encouraged a dangerous situation?

Held. Yes.

Background and procedural history. Mr. Johnson was convicted of interfering with commerce by threats or violence; brandishing a firearm during a crime of violence; and being a felon in possession of a firearm.

These convictions resulted from Mr. Johnson's robbery of a CVS Pharmacy in Atlanta. After committing the robbery, Mr. Johnson and his co-defendant evaded the police by car, forcing their way out of the CVS parking lot by crashing into a police vehicle that blocked their exit. Taking to the open road, they drove recklessly before eventually crashing into a telephone poll. Mr. Johnson, who was not the driver of the car, attempted to flee on foot before being apprehended by the police.

In calculating Mr. Johnson's Guidelines range, the probation officer recommended a USSG §3C1.2 2-level enhancement for reckless endangerment. Mr. Johnson's objected to the enhancement on grounds that he was merely a passenger of the vehicle, but the district court overruled his objection and applied the enhancement. While the district court acknowledged that the probation officer's rationale – that it was "reasonably foreseeable" that the defendants might have to flee by car and therefore recklessly endanger law enforcement and other motorists – was not the correct standard, it nevertheless held that the circumstantial evidence (Mr. Johnson's participation in the robbery, his decision to get into the vehicle when the police were already on the scene, and his attempt to flee on foot after the car crashed) was sufficient to justify the enhancement.

Analysis. Mr. Johnson argued on appeal that his sentence was procedurally unreasonable because the district court failed to specifically find that it applied the reckless endangerment enhancement, as required by *United States v. Cook*, 181 F.3d 1232 (11th Cir. 1999). Because Mr. Johnson raised this issue for the first time on appeal, the Court (opinion by Fifth Circuit Judge Higginbotham and joined by Judge Anderson) reviewed for plain error.

Under *Cook*, the §3C1.2 enhancement could not be applied to Mr. Johnson unless the district court made a specific finding that there was a preponderance of the evidence to indicate that he "directly engaged in, or actively 'aided or abetted, counseled, commanded, induced, procured, or willfully caused'" his codefendant to commit the reckless endangerment.

The Eleventh Circuit held that the district court did not make such a finding and, therefore, committed plain error in applying the sentencing enhancement. It rejected the Government's cited circumstantial evidence. First, the Court agreed with the Third and Ninth Circuits that a defendant's planning of a robbery is not sufficient to make him or her accountable for subsequent reckless endangerment. Second, the Court determined that while the district court could have properly determined that Mr. Johnson's knowledge that the police were on the scene when he entered the car *could* rise to the level of "actively causing or procuring the reckless behavior at issue," the district court failed to expressly make such a finding here. Third, the Eleventh Circuit held that Mr. Johnson's attempt to flee on foot following the car crash failed to meet the *Cook* standard because this evidence does not clarify whether Mr. Johnson played any role in the reckless car chase.

The Court vacated the sentence and remanded. It directed the district court to reopen the record and consider any additional relevant evidence on whether Mr. Johnson knew that the police were on the scene at the time he entered the car. The Eleventh Circuit elaborated that the district court should "turn its eye to the robbery scene when [Mr.] Johnson exited the CVS store, considering where the police and their cars were situated and what was more likely than not visible to [Mr.] Johnson as he exited the store and entered the getaway car." Slip Op. at 13. If after considering such evidence the district court could make the *Cook*-required specific finding that Mr. Johnson "aided and abetted, counseled, commanded, induced, procured or willfully caused" the endangering conduct, then the enhancement could be appropriately imposed.

United States v. Claude Louis Duboc, No. 11-15133 (September 11, 2012)

Issues.

(1) Did the district court err in granting the Government's motion to amend an order of forfeiture filed 12 years earlier?
(2) Was the amended forfeiture order barred by the statute of limitations or the doctrine of laches?
(3) Did the amended forfeiture order violate the defendant's due process rights?
(4) Does the Mutual Legal Assistance Treaty between Thailand and the United States prevent the amendment of the forfeiture order?

Held.

(1) No.
(2) No.
(3) No.

(4) No.

Background and procedural history. In 1994, Mr. Duboc was convicted of several drug trafficking and money laundering charges and sentenced to one term of life imprisonment and one term of 240 months in prison. At his sentencing hearing, the district court found that Mr. Duboc had no legitimate source of income and that he acquired his assets either directly or indirectly from drug trafficking. The district court ordered Mr. Duboc to forfeit $100 million dollars and virtually all of his assets but retained jurisdiction to allow the Government to later move to amend the forfeiture order to include newly discovered assets or to substitute assets.

In 2000, Thailand "restrained" two condominiums owned by Mr. Duboc at the request of the U.S. Government pursuant to the nations' Mutual Legal Assistance Treaty (MLAT). In 2011, the Government moved to amend the 1999 forfeiture order to include the 2 Thailand condominiums, alleging that they were obtained with funds procured through Mr. Duboc's drug trafficking. The district court denied Mr. Duboc's *pro se* objection and granted the Government's motion. It noted that 21 U.S.C. § 853(d) establishes a rebuttable presumption that the property of a person convicted of certain crimes is subject to forfeiture if the property was acquired during the period the crime occurred and there is no likely legitimate source for the property. The district court held that this presumption applied to the forfeiture of the Thailand condos because (1) they were acquired during the period at issue in Mr. Duboc's indictment; (2) the court had previously found no other income to explain Mr. Duboc's formerly considerable wealth; (3) Mr. Duboc had not identified a persuasive legitimate source for the condos' acquisition; (4) the district court had previously found that Mr. Duboc profited more than $100 million from his crimes.

Mr. Duboc filed a timely *pro se* appeal, alleging (1) that the Thailand condos were not purchased with proceeds from drug shipments into the United States, and collateral estoppel did not bar him from litigating issues decided in his earlier criminal case; (2) the 2011 amendment to the forfeiture order was barred by either the statute of limitations or the doctrine of laches; (3) the 11-year delay between Thailand's restraint of the condos and the Government's motion violated his due process rights; and (4) the treaty voids the district court's amended order.

Analysis.

(1) Forfeiture order amendment. The Eleventh Circuit (*per curiam*, before Judges Hull, Marcus and Fay) noted that pursuant to Fed. R. Crim. P. 32.2(b)(1)(A) the district court may amend a forfeiture order at any time, and reiterated the rebuttable presumption established by 21 U.S.C. § 853(d). It held that Mr. Duboc was collaterally estopped from arguing that he had a legitimate funding source for the condos' acquisition. Even if this were not the case, the Court found Mr. Duboc's argument – that since only 2.4% of his

$100 million was attributable to drugs imported into the United States, it was not certain that the condos were paid for out of this small percentage – insufficient to rebut the presumption because even assuming Mr. Duboc's numbers were accurate, that fact alone did not establish that he did not use part of this percentage to purchase the Thailand condos.

(2) Statute of limitations and laches. Mr. Duboc cited the 5-year statute of limitations in 19 U.S.C. § 1621, but the Eleventh Circuit found this statute inapposite because it applies only to civil *in rem* forfeiture proceedings and not to *in personam* criminal judgments. The Court pointed out that even if the statute did apply, it would have been tolled for 5 years because the Thailand condos are located outside of the United States. Regarding the laches defense, the Eleventh Circuit applied the general rule that the United States is not subject to it.

(3) Due process. The Eleventh Circuit noted that all of the cases Mr. Duboc cited to support his due process argument concerned civil and not criminal forfeiture, and that regardless the district court properly afforded Mr. Duboc notice and hearing before issuing its forfeiture order. The Court also found that, to the extent Mr. Duboc argued that he was entitled to a hearing sooner than 11 years after the Government requested the Thailand government "restrain" his condos, this argument failed because he made no showing that he was prejudiced by the delay.

(4) MLAT. The Eleventh Circuit stated that this argument "lacks merit," as the treaty's express terms state that it cannot be asserted as a defense by a private party.

United States v. Cecil Anthony Dortch, No. 10-14772 (September 11, 2012)

Issues.

(1) Did the district court abuse its discretion in denying the defendant's motion for a new trial based on the district court's submission to the jury an unredacted indictment containing references to several of the defendant's previous convictions?
(2) Did the district court commit plain error by constructively amending the indictment that charged possession of two specific types of firearms with a jury instruction that the defendant could be found guilty if the Government proved he possessed ***any*** firearm?

(3) Did the district court abuse its discretion in refusing to admit evidence of a judgment of acquittal on related state charges?

Held.

(1) No.
(2) No.
(3) No.

Background and procedural history. A jury convicted Mr. Dortch on charges of being a felon in possession of a firearm; possession of marijuana with intent to distribute; and possession of a firearm in connection with a drug trafficking offense.

Mr. Dortch's appeal concerns 3 incidents that occurred during his trial. First, the district court mistakenly allowed the jury to see an unredacted copy of Mr. Dortch's indictment, which contained information on 5 prior convictions that the district court had earlier ruled were inadmissible. Second, while instructing the jury, the district court gave an instruction (to which Mr. Dortch did not object) that the jury could convict Mr. Dortch if the Government proved that he possessed ***any*** firearm even though the indictment had alleged that Mr. Dortch possessed specific types of firearms. Third, the district court ruled that Mr. Dortch could not introduce evidence of his acquittal on related state charges.

Analysis.

(1) Motion for a new trial. The Eleventh Circuit (opinion by Judge Pryor and joined by Judge Tjoflat and Southern District of Florida Judge Huck) held that to the extent this was error, it was harmless error because there was overwhelming evidence of Mr. Dortch's guilt and because the district court instructed the jury both orally and in writing that the indictment was not evidence of guilt.
(2) Constructive amendment of the indictment. The Court determined that even if it assumed the district court erred, it was not plain error because Mr. Dortch failed to object at trial.
(3) Admissibility of judgment of acquittal. In rejecting this argument, the Eleventh Circuit relied on its previous ruling that "[j]udgments of acquittal are hearsay" and thus inadmissible. *United States v. Irvin*, 787 F.2d 1506, 1516 (11th Cir. 1986).

SELECTED UNPUBLISHED OPINIONS

United States v. Willard Green Porter, No. 11-15546 (September 4, 2012)

Issue. Did the district court's filing of a second written order increasing defendant's custodial sentence from 92 to 120 months constitute a "correction" within the meaning of Fed. R. Crim. P. 35(a)?

Held. No.

Background and procedural history. Mr. Porter was convicted in 2004 of possession with intent to distribute crack cocaine and sentenced to 151 months. After the Fair Sentencing Act of 2010 (FSA) was enacted, the district court granted defendant's 18 U.S.C. § 3582(c)(2) motion to reduce his sentence pursuant to USSG Amendment 750 and resentenced him to 92 months in prison. Within 14 days of so ordering, the district court, citing its authority pursuant to Fed. R. Crim. P. 35(a), issued another written order "correcting" the defendant's sentence to 120 months. Rule 35(a) permits a court to correct a sentence within 14 days for "arithmetical, technical, or other clear error."

The defendant appealed, arguing that a 120-month sentence would violate the FSA, which set a 60-month mandatory minimum for his underlying offense. The Government claimed that, because defendant's original sentencing predated the FSA, the Act's more lenient mandatory minimums were not the appropriate standard for defendant's resentencing but, rather, the 120-month mandatory minimum in effect at the defendant's 2004 sentencing must be imposed.

Analysis. The Eleventh Circuit (*per curiam*, before Judges Tjoflat, Carnes and Jordan) vacated the 120-month sentence and ordered on remand that the original 92-month sentence be reinstated. The Court expressly declined to rule that the FSA *per se* applied to defendants who were first sentenced before the FSA's effective date. Its narrow holding was that, while the district court's 92-month sentence may have been error, it was not "clear error" within the meaning of Fed. R. Crim. P. 35(a). The Eleventh Circuit noted, however, that the Government was free to appeal the 92-month sentence if it so chose.

United States v. Gus Dasher, No. 12-10318 (September 12, 2012)

Issue. Did the district court commit plain error in failing to "state the reasons for the revocation of supervised release and evidence" it relied upon in revoking the defendant's supervised release and sentencing him to 10 months in prison?

Held. No.

Background and procedural history. The district court, finding that Mr. Dasher violated 6 supervised release conditions, revoked his supervised release and sentenced him to 10 months in prison.

Analysis. Mr. Dasher argued for the first time on appeal that the district court failed to make explicit findings about the evidence and the reasons it relied upon in revoking his supervised release. The Eleventh Circuit (*per curiam*, before Chief Judge Dubina and Judges Jordan and Anderson) agreed that the district court erred by failing to state "the reasons for the revocation of supervised release and evidence" it relied upon, but that since the defendant did not object below, the lower court's action could only be reviewed for plain error. The Court concluded that it was not plainly erroneous because Mr. Dasher could not show that the error affected his substantive rights, having conceded several violations below. Consequently, the Eleventh Circuit affirmed the district court's judgment.

United States v. Misty Dew, No. 12-11047 (September 20, 2012)

Issue. Can the defendant's conviction on a compound offense stand despite her acquittal on the predicate offense?

Held. Yes.

Background and procedural history. Ms. Dew was charged with conspiracy to commit mail fraud, mail fraud, and aggravated identity theft. A jury acquitted her of the conspiracy and mail fraud charges but convicted her on aggravated identity theft. Ms. Dew appealed, arguing that a conviction on a predicate felony is a required element of aggravated identity theft pursuant to 18 U.S.C. § 1028A(a)(1).

Analysis. The Eleventh Circuit's 2-page opinion (*per curiam*, before Judges Tjoflat, Wilson and Fay) relied exclusively on *United States v. Powell*, 469 U.S. 57, 64 (1984), in affirming Ms. Dew's conviction on a compound offense despite her jury acquittal on a predicate offense. The Court stated that "[t]he inconsistency in the jury verdict is not problematic" and, quoting from *Powell*, held that it is possible that the jury, either through mistake, compromise or lenity, arrived at the "wrong verdict as to the charge of mail fraud and not the charge of aggravated identify theft."

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United States v. Lawrence S. Duran, No. 12-12227 (November 29, 2012)

Issue. Does the Fair Debt Collection Practices Act give the district court the authority to determine the state law ownership interests in property against which the United States has obtained a writ of execution to collect a restitution judgment in a criminal action?

Held. Yes.

Background and procedural history. Mr. Duran pleaded guilty to 38 crimes related to his part in a Medicare fraud conspiracy and was sentenced to 50 years in prison, 3 years of supervised release, and ordered to pay $87,533,863.46 in restitution.

The Government subsequently proceeded under the Fair Debt Collection Practices Act (Act) for a writ of execution against a New York City apartment to collect against the restitution judgment. The Government did not serve Carmen Duran, Mr. Duran's former wife, with a copy of the application, which the Clerk of the district court granted on the same day and issued a writ of execution. The writ of execution ordered the United States Marshal to sell the apartment to satisfy the restitution judgment.

Mrs. Duran moved to dissolve or stay the writ of execution on the ground that she was an "innocent owner" of the apartment. She claimed that she was granted full sole ownership of the apartment as part of her divorce from Mr. Duran almost 2 years earlier. Mrs. Duran's divorce attorney had neglected to record the deed confirming her sole ownership of the apartment. The Government opposed Mrs. Duran's motion, arguing that she was entitled only to one-half of the net proceeds from the sale of the apartment since she was only a half-owner at the time the Government recorded its lien due to Mrs. Duran's failure to record her post-divorce deed of sole ownership.

Finding that it lacked jurisdiction to adjudicate a property dispute arising out of a divorce proceeding, the district court denied Mrs. Duran's motion, and this appeal followed.

Analysis. The Eleventh Circuit (per curiam, before Judges Pryor, Fay, and Anderson) vacated the district court's denial of Mrs. Duran's motion. The Act required the district court to determine what, if any, "substantial nonexempt interest" Mr. Duran had in the apartment at the time the Government levied against the property. The Court remanded the matter for this determination.

United States v. David Bishop Laist, No. 11-15531 (December 11, 2012)

Issues.

(1) Did the FBI violate the Fourth Amendment by taking 25 days to prepare its search warrant application and affidavit while holding the defendant's computer and external hard drives based on probable cause?

(2) Was the magistrate judge's 1-week delay in signing the search warrant attributable to the Government?

Held.

(1) No.

(2) No.

Background and procedural history. An FBI investigation traced some child pornography images to Mr. Laist. FBI agents visited Mr. Laist's apartment to conduct a "knock and talk." Mr. Laist invited the agents into his home, admitted that he possessed child pornography on his computer and 5 external hard drives, signed 2 consent forms, gave the agents his usernames and passwords, and showed them one child pornography image. The agents then indicated that they would need to seize the computer and hard drives as evidence, and allowed Mr. Laist to copy his school documents onto another external hard drive before departing with the evidence. The following day, Mr. Laist called the FBI to provide them with additional passwords to access the external hard drives.

Mr. Laist subsequently retained counsel, who within days informed the FBI that Mr. Laist was revoking his consent. The FBI then coordinated with an Assistant U.S. Attorney to prepare the search warrant affidavit and application, but did not actually file them for 25 days after receiving notice that Mr. Laist had rescinded his consent. Once the affidavit and application were filed, the magistrate judge did not sign and issue the search warrant for 1 week because he was holding a habeas proceeding.

After Mr. Laist was formally indicted for possession and receipt of child pornography, he moved to suppress all evidence obtained from his computer and the 5 external hard drives on the ground that the 25-day delay in obtaining a search warrant constituted an unreasonable seizure of his property in violation of the Fourth Amendment. Mr. Laist also argued that the delay between his withdrawal of consent and the ultimate issuance of the search warrant should actually be recognized as 31 days rather than just 25 because the magistrate judge's 1-week delay was attributable to the Government.

The district court denied the motion in full, and Mr. Laist thereafter entered a conditional guilty plea, reserving the right to appeal the court's denial of his motion to suppress. Mr. Laist was sentenced to concurrent 120-month sentences for each offense.

Analysis. The Eleventh Circuit (Judge Marcus, writing for Judge Pryor and District of Columbia District Judge Friedman) affirmed the district court.

The Court rejected Mr. Laist's assertion that the magistrate judge's delay in issuing the search warrant was attributable to the Government, finding it at odds with the purposes for which the exclusionary rule exists. The exclusionary rule is a prudential doctrine that exists only to deter future Fourth Amendment violations. Here, attributing the magistrate's delay to the Government would not serve as a deterrent because neither the FBI nor the U.S. Attorney is in control of a federal magistrate judge's docket or schedule. The Eleventh Circuit therefore concluded that 25 days was the accurate tenure of the delay.

The Court next considered the underlying issue. Mr. Laist relied primarily on *United States v. Mitchell*, 565 F.3d 1347 (11th Cir. 2009), in which the Court held that a 21-day delay in seeking the warrant affidavit and application was unreasonable and violated the Fourth Amendment. Here, the Court clarified that *Mitchell* did not establish a bright-line rule, but instead was another in a series of cases applying the fact-intensive "totality of the circumstances" analysis commanded by the Supreme Court's ruling in *Illinois v. McArthur*, 531 U.S. 326, 334, 121 S. Ct. 946 (2001). Under this analysis, the Court considers 1) the significance of the Government's interference with the defendant's possessory interest; 2) the duration of the delay; 3) whether or not the defendant consented; and 4) the Government's legitimate interest in holding the property as evidence. Slip Op. at 10-11. The Court further considers how diligently the Government pursued its investigation.

The Eleventh Circuit found that, while Mr. Laist had a significant possessory interest in his computer and hard drives, that interest was diminished because he was permitted to remove files before the FBI agents seized his property, and because Mr. Laist both admitted and demonstrated that his computer contained child pornography. The latter fact also went to the Government's legitimate interest in holding the property. Turning to the question of the Government's

diligence, the Court found that the FBI began drafting the warrant application and affidavit on the same day it learned that Mr. Laist was withdrawing his consent, that it continued to exchange drafts with the U.S. Attorney's office over the next 25 days, that the application and affidavit were case-specific and not boilerplate, and that the agent in charge was 1 of 2 agents in a field office overseeing 10 counties, resulting in a heavy workload. These facts were distinct from those of *Mitchell*, where the FBI agent was not diligent, attending a 2-week seminar before beginning work on the affidavit and application, which in final form contained substantial boilerplate language. The Court further noted that in *Mitchell*, unlike in the instant case, the agent did not know for certain that the seized evidence contained illegal material.

United States v. Rodney Edward Thompson, No. 11-15122 (December 11, 2012)

Issue.

(1) Does the restoration of the defendant's voting rights satisfy 18 U.S.C. § 921(a)(20), which exempts former felons from 18 U.S.C. § 922(g)(1) when their "civil rights" are restored?

(2) Was the defendant's bottom-guideline, 12-month sentence substantively unreasonable?

Held.

(1) No.

(2) No.

Background and procedural history. In 1994, Mr. Thompson was convicted of 1st-degree assault in an Alabama state court. Consequently, he lost the rights to possess a firearm, hold office, serve on juries, and vote. In 2006, Mr. Thompson received notice from the Alabama Board of Pardons and Paroles that his voter registration rights had been restored. The notice expressly stated that it was only Mr. Thompson's voting rights, and no other rights, that had been restored.

In 2011, Mr. Thompson pleaded guilty in federal district court to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He subsequently moved to dismiss the indictment on the ground that the restoration of his voting rights triggered 18 U.S.C. § 921(a)(20), making him no longer a felon within the meaning of the felon-in-possession statute. The district court denied the motion to dismiss, finding that § 921(a)(20) does not apply when only voting rights are restored. After the district court sentenced him to 12 months in prison, Mr. Thompson appealed.

Analysis. The Eleventh Circuit (Chief Judge Dubina, for Judges Carnes and Anderson) affirmed the district court's interpretation of § 921(a)(20). Noting the "plain language" of the statute, which refers to "civil rights" in the plural, the Court determined that more than one civil right must be restored before a former felon can shed that status for purposes of § 922(g)(1). The Court rejected Mr. Thompson's argument that the restoration of his voting rights fell within the § 921(a)(20) exception because "voting rights" includes multiple attendant rights, including the right to vote in federal elections, state elections, and political party primaries. The Eleventh Circuit instead characterized these as "subsidiary rights" associated with voting rights. Slip Op. at 7.

The Court summarily affirmed Mr. Thompson's 12-month sentence as substantively reasonable, noting that it was at the bottom end of his guideline range.

SELECTED UNPUBLISHED OPINIONS

United States v. Taresa Jarriel, No. 11-10928 (November 27, 2012)

Issue. Did the district court violate Fed. R. Evid. 404(b) in admitting evidence of the defendant's prior conviction for possession of cocaine when offered to show intent?

Held. No.

Background and procedural history. A jury found Ms. Jarriel guilty of possession with intent to distribute cocaine and conspiracy to possess with intent to distribute cocaine. She had pleaded not guilty and denied involvement in any conspiracy. At trial, the district court admitted, over Ms. Jarriel's Fed. R. Evid. 404(b) objection, evidence of her prior conviction for cocaine possession. The court below reasoned that the fact of her prior conviction was more probative (of the fact that she was familiar with cocaine) than prejudicial.

Analysis. The Eleventh Circuit (per curiam, before Judges Hull, Edmondson, and Black) affirmed the district court. It rejected Ms. Jarriel's argument that this violated Fed. R. Evid. 404(b), reasoning that since the instant charges alleged conspiracy to possess/distribute cocaine, and Ms. Jarriel presented a "mere presence" defense, the prior conviction was admissible to show Ms. Jarriel's intent. This is so despite the fact that the prior conviction involved possession and the instant charges involved conspiracy because both involved cocaine, demonstrating that Ms. Jarriel was "familiar with the look and smell of cocaine and was aware generally of how cocaine purchases are negotiated and conducted." Slip. Op. at 3.

The Court also summarily rejected Ms. Jarriel's sufficiency of the evidence argument.

United States v. James Anthony Campbell, No. 11-15392 (November 28, 2012)

Issue. Did the district court abuse its discretion by admitting hearsay evidence in the form of an alleged sexual assault victim's testimony as relayed through the police officer who interviewed her?

Held. No.

Background and procedural history. Mr. Campbell appealed the revocation of his supervised release based on his arrest for second-degree rape, sexual abuse, and sodomy of a minor. The alleged victim did not testify, but her account of the

incident was relayed through testimony of a police officer. Mr. Campbell argued that the district court erred in admitting hearsay evidence at his revocation hearing because it failed to balance his confrontation rights against the Government's reasoning for not producing the alleged victim, as required by *United States v. Frazier*, 26 F.3d 968, 1005 (11th Cir. 2001).

Analysis. The Eleventh Circuit (per curiam, before Judges Marcus, Edmondson and Black) affirmed. In order to prevail on his argument that admission of the hearsay evidence violated due process, Mr. Campbell had to show 1) the evidence was materially false or unreliable and 2) it actually served as the basis of his sentence. *United States v. Taylor*, 931 F.2d 842, 847 (11th Cir. 1991). The Court determined that Mr. Campbell could not satisfy either prong here. The *Frazier* balancing test was not implicated because the district court did not make any reliability finds thereunder, and there was other evidence of Mr. Campbell's guilt (for example, his admission to his probation officer). The Court further noted that to the extent there actually was error, it was harmless.

United States v. J. Harris Morgan Jr., No. 11-10026 (November 28, 2012)

Issues.

(1) Was sufficient evidence presented at trial to support the defendant's conviction of 69 health care fraud counts?
(2) Did the district court abuse its discretion and violate Fed. R. Evid. 404(b) by admitting evidence of uncharged health care fraud claims?
(3) Did the district court abuse its discretion by refusing to give the defendant's requested "good faith" theory of defense jury instruction?

Held.

(1) Yes.
(2) No.
(3) No.

Background and procedural history. Mr. Morgan, a pharmacist, was convicted of 69 health care fraud counts related to overbilling Medicaid for certain prescription drugs. On appeal, he argued 1) there was insufficient evidence to support his convictions; 2) the district court abused its discretion and violated Fed. R.Evid. 404(b) by admitting evidence of uncharged false health care claims; and 3) the district court abused its discretion by refusing to give a "good faith" theory of defense jury instruction.

Analysis. The Eleventh Circuit (per curiam, before Judges Marcus, Martin and Fay) affirmed all of defendant's convictions in a November 2011 unpublished opinion. In January 2012, the Court granted defendant's petition for rehearing, vacated the 2011 panel opinion, and set the case for oral argument. The 2nd panel (per curiam, before Judges Jordan, Hill, and Southern District of Georgia District Judge Edenfield) thereafter reinstated the prior panel opinion in full.

The Court found that sufficient evidence existed to support the jury's verdict of guilty on all counts. While Mr. Morgan argued that the evidence did not show his knowing and willful intent to defraud, the Eleventh Circuit noted the evidence that Mr. Morgan directed his subordinates to submit false claims, actively managed them in doing so, told them to adhere to a billing schedule that did not allow for methodical verification of the claims. The Court concluded that the jury could reasonably disbelieve Mr. Morgan's asserted explanation (that he pushed billing through expeditiously to ensure his patients would not experience a lapse in medication).

On the 404(b) issue, the Court held that the district court did clearly abuse its discretion because the uncharged claims were not similar to the charged claims, not necessary to explain the charged crimes and, therefore, were not "inextricably intertwined," *United States v. Veltmann*, 6 F.3d 1483, 1498 (11th Cir. 1993), with the overall scheme to defraud Medicaid by submitting false claims. However, this was harmless error because there was sufficient evidence to otherwise establish Mr. Morgan's guilt, and because Mr. Morgan had the opportunity to present rebuttal evidence.

The Eleventh Circuit affirmed the district court's decision not to deliver Mr. Morgan's requested "good faith" theory of defense jury instruction. There was insufficient evidence of good faith presented at trial and, even if there were, the district court "adequately covered the subject matter of good faith" by instructing the jury that Mr. Morgan had to act "knowingly, willfully, and with the specific intent to defraud to be found guilty," and not because of "mistake or accident." Slip Op. at 16.

Judge Jordan concurred in part (as to the sufficiency of the evidence determination) and dissented in part. He believed that the combined effect of the 2 errors warranted a new trial for Mr. Morgan. Judge Jordan disagreed with the majority's ruling that the 404(b) error was harmless and thought that the district court's instructions were an insufficient substitute for Mr. Morgan's requested "good faith" jury instruction.

United States v. Mark Goss, No. 12-11481 (November 30, 2012)

Issue. Is the defendant entitled to notice where the district court intends to vary from the advisory guideline range?

Held. No.

Background and procedural history. Mr. Goss pleaded guilty to mail fraud and was sentenced to 144 months in prison.

Analysis. Mr. Goss argued for the first time on appeal that he was entitled to notice that the court was considering varying upward or, alternatively, to a continuance to prepare a response to the victim impact statements used to fashion his sentence. He also argued that his sentence was unreasonable.

The Eleventh Circuit affirmed (per curiam, before Judges Marcus, Pryor, and Kravitch). A defendant is not entitled to notice that the district court intends to vary from the advisory guideline range, *see Irizarry v. United States*, 553 U.S. 708, 713-14, 128 S. Ct. 2198, 2202-03 (2008), and the district court had no duty to *sua sponte* continue Mr. Goss's sentencing hearing. The Court also rejected Mr. Goss's argument that his sentence was substantively unreasonable, finding that it was well below the statutory maximum and justified by the district court's § 3553(a) analysis.

United States v. Tavoris Hall, No. 12-11915 (December 6, 2012)

Issue. Did the district court err in denying the defendant's motion to suppress evidence found in a warrantless search of his home where police officers covered the peephole before knocking on the defendant's front door, leading to a confrontation in which they tackled the defendant and learned that he was armed, a discovery that the Government claims implicated the exigent circumstances exception?

Held. No.

Background and procedural history. Mr. Hall appealed his conviction for felon in possession of a firearm, arguing on appeal that the district court erred in denying his motion to suppress evidence found after officers conducted a warrantless search of his home.

Analysis. The Eleventh Circuit affirmed the district court based on initial consent and on exigent circumstances. The officers covered the peephole of defendant's door, preventing him from seeing who was knocking. Mr. Hall opened the door

regardless, and the Court determined that this deception did not render Mr. Hall's consent in opening the door involuntary. When Mr. Hall saw that it was the police, he apparently put his hand into his left pocket, refused an order to show his hands, was tackled by a police officer, and during the scuffle the butt of a handgun became visible. The Court emphasized that the officers' conduct prior to the exigent circumstances arising did not violate the Fourth Amendment.

United States v. Charles Tomlin, No. 12-11305 (December 12, 2012)

Issue. Did the district court err in including a prorated portion of federal investigators' salaries into the restitution/loss amount calculations levied against the defendant, whose false statements to federal officials necessitated the investigation?

Held. No.

Background and procedural history. Mr. Tomlin refused to pay rent for the property on which he operated his business, falsely telling his landlord that the Environmental Protection Agency (EPA) had identified multiple cleanup needs there. Mr. Tomlin contacted Georgia's state environmental agency to request an assessment and told the Georgia environmental agent who made the site visit that 3 EPA agents had already inspected the property and informed him that he faced a fine of more than $80,000. The Georgia agent informed the EPA, which knew nothing about this situation an opened an internal investigation into potential intra-agency misconduct. The EPA investigators at first coordinated with Mr. Tomlin, but ultimately concluded that he had contrived the entire scenario.

Mr. Tomlin was found guilty by a jury of one 18 U.S.C. § 1001(a)(2) count of making a false statement to a federal official and sentenced to 20 months in prison, along with a $5,000 fine and a $43,331.69 restitution judgment. This appeal followed.

Analysis. Mr. Tomlin argued on appeal that the district court should have granted the Fed. R. Crim. P. 29 motion for judgment of acquittal that he made at trial, and that the court incorrectly included the salaries of EPA agents (who undertook more than 320 hours of investigations as a result of his false statement) in its loss amount and restitution calculations.

The Court (per curiam, before Judges Carnes, Barkett, and Pryor) reviewed the Rule 29 issue for a "manifest miscarriage of justice" because Mr. Tomlin did not preserve the issue by renewing the Rule 29 motion at the close of all evidence. To prevail under this standard, Mr. Tomlin had to show that the evidence on a key element of the offense was so tenuous that a conviction would be shocking. Mr.

Tomlin argued that the evidence of his specific intent was appropriately tenuous, but the Eleventh Circuit disagreed, citing the Government's evidence that Mr. Tomlin made the false statements directly to government officials, continued to make them after he was under investigation, and that he did so to avoid paying rent on the property.

The Eleventh Circuit also affirmed the district court on the loss amount/restitution matters. It rejected Mr. Tomlin's argument that the calculations were improper since the agents would have been paid their salaries regardless of whether they were investigating him, as the agents could have spent that time on other matters.

United States v. Robert Russell, No. 11-15794 (December 12, 2012) (appeal from the Northern District of Alabama)

Issue. Was there sufficient evidence produced at trial to support the defendant's mail fraud and mail fraud conspiracy convictions?

Held. Yes.

Background and procedural history. A jury found Mr. Russell guilty of mail fraud and mail fraud conspiracy.

Analysis. Mr. Russell argued on appeal that insufficient evidence was presented at trial to support his conviction. Specifically, he maintained that the evidence below did not prove that he showed his alleged co-conspirators how to fraudulently order drugs over the internet, that there was any agreement to defraud, that Mr. Russell intended online pharmacies to suffer losses, and that he sent false or misleading information to pharmacies to obtain drugs.

The Eleventh Circuit (per curiam, before Judges Carnes, Barkett and Marcus) affirmed. Mr. Russell's alleged co-conspirators testified that he involved them in the scheme and taught them methods they used in their own, similar schemes. They also testified that they observed Mr. Russell ordering pills using the names of third parties, using their identifications to do so, and ultimately posing as those individuals in order to pick up the orders. The evidence, both physical and testimonial, also showed the parties' agreement to defraud and that they shared information in working together to do so.

United States v. Cesar Sierra, No. 11-14746 (December 17, 2012)

Issues.

(1) Did the defendant establish that the police officer's traffic stop, ostensibly for traffic violations, was a pretext for ethnic animus?

(2) Was the police officer's question to the defendant about whether his truck contained contraband, posed after the traffic stop was essentially complete, and the ensuing search of the truck, grounded in sufficient "reasonable suspicion" to pass Fourth Amendment muster?

(3) Did the defendant voluntarily consent to the search of his truck?

Held.

(1) No.

(2) Reasonable suspicion notwithstanding, the question and search did not violate the Fourth Amendment because at that point the original traffic stop had concluded and the encounter had devolved into a voluntary one.

(3) Yes.

Background and procedural history. A police officer pulled over Mr. Sierra after seeing his eighteen wheeler cross the fog line several times. Mr. Sierra apparently exhibited "signs of nervousness" while the officer questioned him. The officer told Mr. Sierra that he was only going to write him a warning, but asked if he could ask Mr. Sierra another question. Mr. Sierra agreed, and the officer asked if he was carrying any illegal contraband. Mr. Sierra said no, and agreed to let the officer search his truck. The officer found cocaine in the truck.

After the district court denied his motion to suppress the cocaine evidence, Mr. Sierra pleaded guilty to possession with the intent to distribute cocaine and was sentenced to 108 months in prison. Mr. Sierra's plea agreement preserved his right to appeal the district court's denial of the motion to suppress.

Analysis. Mr. Sierra argued on appeal that the officer pulled him over because of his ethnicity, in violation of the Equal Protection Clause; that he was detained longer than necessary during the stop; and that he did not voluntarily consent to the search of his truck. The Eleventh Circuit (per curiam, before Judges Barkett, Pryor, and Jordan) affirmed.

Equal protection. Mr. Sierra conceded he had no evidence of racial profiling aside from his counsel's "good faith belief" that the traffic stop was pretextual. The Eleventh Circuit rejected this argument because, even if there were evidence, such ulterior motives do not invalidate police conduct otherwise justified on probable cause. *Whren v. United States*, 517 U.S. 806, 811-12 (1996). Here, the officer has probable cause because he observed Mr. Sierra committing a traffic violation.

Reasonable suspicion to conduct questioning beyond the scope of the original traffic stop. The Court held that the officer's further questioning was permissible because, at the time it was posed, the initial detention had become a consensual encounter. Here, Mr. Sierra was free to leave and voluntarily chose to answer the officer's question about contraband.

Voluntary consent. The Eleventh Circuit summarily affirmed the district court's determination that Mr. Sierra had voluntarily consented to the search of his truck, finding no error and no evidence to support his assertion that he misunderstood the consequences of allowing the search.

United States v. Lee Thornton Smith Jr. (December 17, 2012) (appeal from the Northern District of Alabama)

Issue. Did the district court clearly err by considering the defendant's previous sentence reduction pursuant to USSG Amendment 706 in denying his motion for an addition reduction under Amendment 750?

Held. Yes.

Background and procedural history. The district court denied Mr. Smith's 18 U.S.C. § 3582(c)(2) motion to reduce sentence pursuant to USSG Amendment 750, citing Mr. Smith's criminal history, a post-conviction prison disciplinary infraction, and the fact that he had previously already received a prison reduction pursuant to USSG Amendment 706. Mr. Smith appealed.

Analysis. Mr. Smith argued that the district court's denial was based on improper considerations, and that, in calculating his amended guideline range in light of Amendment 750, the court failed to take into account the downward departure he previously received for providing substantial assistance.

The Eleventh Circuit (per curiam, before Judges Martin, Jordan, and Anderson) summarily rejected all of Mr. Smith's arguments save one: that the district court's consideration of his previous sentence reduction under Amendment 706 was improper. The Court concluded that the district court committed a "clear error of judgment" when it "took a position that is contrary to that of the Sentencing Commission and of Congress when it indicated that a reduction under Amendment 706 renders a reduction under Amendment 750 unnecessary or otherwise inappropriate." Slip Op. at 13-14. The Eleventh Circuit vacated and remanded, expressing no view on whether or not the district court on remand should grant or deny Mr. Smith's § 3582(c)(2) motion.

United States v. Karl Bernard Bell, No. 12-11807 (December 18, 2012)

Issue. Does the district court to have jurisdiction to dismiss the defendant's motion after the Eleventh Circuit has remanded the case but before the mandate has been issued?

Held. No.

Background and procedural history. Mr. Bell filed a "Motion for Clarification" in the district court. The court construed it as a § 2255 motion and denied it because Mr. Bell had already filed such a motion and had not sought leave to file a second.

On appeal, the Eleventh Circuit (per curiam, before Judges Carnes, Marcus, and Pryor) vacated the district court's denial of the motion, and remanded with instructions to instead *dismiss* the motion for lack of subject matter jurisdiction. The district court did so, but without waiting for the Eleventh Circuit's mandate to issue and be docketed. The district court ultimately dismissed the motion twice, once before the appellate mandate issued and once after. Mr. Bell appealed both orders of dismissal.

Analysis. The Court, in an earlier in 2012 opinion, vacated the pre-mandate dismissal because the district court lacked jurisdiction at the time it entered that dismissal. The instant appeal concerned the post-mandate dismissal, when jurisdiction had returned to the district court, and the Court affirmed.

United States v. Liky Desire, No. 12-11914 (December 19, 2012)

Issue. Is an interpreter's testimony of what the defendant told him hearsay?

Held. No.

Background and procedural history. Mr. Desire flew from Haiti to Fort Lauderdale, Florida. On his customs form and in statements made to Customs and Border Protections officials, Mr. Desire denied carrying more than $10,000 U.S. dollars into the country. The customs official checked Mr. Desire's "crossing records" and noted that on at least 3 occasions, Mr. Desire had unlawfully brought more than $10,000 into the United States. Mr. Desire, a native Creole speaker, initially continued to deny through 2 interpreters that he was carrying an illegal amount of cash. After customs officials searched his luggage and found large amounts of cash, Mr. Desire told one of the interpreters that he had concealed

additional monies on his person and in total customs officials found that Mr. Desire was carrying approximately $49,240.

A jury found Mr. Desire guilty of one count of intent to evade currency reporting and one 18 U.S.C. § 1001(a)(2) count for making a false statement to a federal officer. The district sentenced Mr. Desire to 18 months in prison.

Analysis. Mr. Desire argued on appeal that the district court erred at trial in admitting testimony from the two Creole-to-English interpreters because the interpreters' testimony was hearsay and violated his Confrontation Clause rights.

The Eleventh Circuit affirmed (per curiam, before Judges Carnes, Barkett, and Fay), citing Circuit precedent that interpreter testimony is not hearsay because interpreters act as a defendant's authorized agent. Under Fed. R. Evid. 801(d)(2)(A), statements made by a party's authorized evidence are not hearsay. As such, an interpreter's testimony is not hearsay where, as here, there is no indication that the interpreter's testimony was inaccurate. The Court further held that, to the extent there was error, it was harmless because there was other sufficient evidence of Mr. Desire's guilt.

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United States v. Yimmi Bellaizac-Hurtado, Nos. 11-14049, 11-14227, 11-14310, 11-14311 (November 6, 2012)

Issue: Did Congress exceed its powers under the Constitution's Offences Clause, Art. I, §8, cl. 10, in enacting the Maritime Drug Law Enforcement Act, which proscribes drug trafficking in the territorial waters of foreign nations?

Held: Yes.

Background and procedural history: In 2010, United States Coast Guard officers were on a routine patrol of Panamanian waters when they observed wooden fishing boat operating without lights or a flag. The Coast Guard informed Panamanian authorities, who pursued the boat and eventually arrested its occupants, the four defendants in this case. Panamanians authorities seized 760 kilograms of cocaine from the boat and consented to prosecution of the defendants in the United States.

After being indicted, the defendants moved to dismiss on several grounds, including that the Maritime Drug Law Enforcement Act was unconstitutional as applied because it exceeded Congress's powers under the Offences Clause. The district court denied the motion. The defendants conditionally pleaded guilty to conspiracy with intent to distribute 5 kilograms or more of cocaine and were each sentenced to prison terms of varying length. This appeal followed.

Analysis: The Government argued that the Offences Clause vested Congress with the power, exercised through the Maritime Drug Law Enforcement Act, to proscribe drug trafficking in the territorial waters of another sovereign nation. The Clause provides: "The Congress shall have Power… To define and punish Piracies and

Felonies committed on the high Seas, and Offences against the Law of Nations[.]" U.S. Const. Art. I, §8, cl.10.

The Eleventh Circuit (Judge Pryor, writing for himself, Judge Barkett and Northern District of Georgia Judge Batten) held that Congress's power to "define" offenses against the "law of nations" does not include "the authority to punish conduct that is not a violation of the law of nations." Slip Op. at 6. Rather, "define," at the time of America's Founding, was understood to "explain a thing by its qualities." As such, the Offences Clause does not give Congress the power to adjudge and decree what constitutes "offences against the law of nations," but instead to "codify and explain offenses that had already been understood as offenses against the law of nations." Slip. Op. at 7. The Court noted that this reading of the Clause is consistent with the overall structure of the Constitution that creates a federal government of limited and enumerated powers. *Id*. at 9.

A line of precedent from the Eleventh Circuit and its sister circuits establishes that the 18th Century phrase "the law of nations" means, in contemporary terms, "customary international law." Accordingly, the Court determined that it must look to customary international law to ascertain the scope of Congress's power under the Clause. This was an issue of first impression in the Eleventh Circuit, and the Court agreed with its sister circuits that customary international law is determined by examining 1) "the general and consistent practice of states" that has "wide acceptance among the states particularly involved in the relevant activity," and 2) whether states have a sense of legal obligation – that is, states "must follow the practice because they believe it is required by international law, not merely because they think it is a good idea, or politically useful, or otherwise desirable." Slip Op. at 12, quoting *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001).

Private criminal activity is "rarely considered a violation of customary international law" because it is unlikely to be a matter of mutual legal concern *between* states. *Id*. at 13 (emphasis added). Applying the aforementioned 2-prong analysis to drug trafficking, the Court found that it was not a matter of "customary international law," either at the Founding or in the modern era. The Eleventh Circuit accordingly held that Congress lacked the authority to proscribe drug trafficking in foreign territory, ruled that the Maritime Drug Law Enforcement Act as applied here is unconstitutional, and vacated the defendants' convictions and sentences.

United States v. Gregory Randolph Berry, No. 12-11150 (November 14, 2012)

Issues:

(1) Does USSG Amendment 750 lower the guideline range of the defendant, who upon his 2002 conviction was subject the career offender guideline and a statutory, mandatory minimum life sentence?

(2) Is the defendant eligible for resentencing under the lowered mandatory minimums implemented by the Fair Sentencing Act of 2010?

Held:

(1) No.

(2) No.

Background and procedural history: Mr. Berry, who was convicted of a crack cocaine offense in 2002, filed an 18 U.S.C. § 3582(c)(2) motion to reduce his sentence pursuant to USSG Amendment 750. The district court denied Mr. Berry's motion and this appeal followed.

Analysis: The Eleventh Circuit (*per curiam*, before Judges Tjoflat, Hull, and Pryor) affirmed the district court's denial of Mr. Berry's § 3582(c)(2) motion. Mr. Berry was originally subject to sentencing under the career offender guideline and was ultimately sentenced under a statutory, mandatory minimum life sentence. Amendment 750 did not lower the guidelines for persons sentenced as career offenders or pursuant to a statutory mandatory minimum.

The Court also rejected Mr. Berry's alternative argument that he is eligible for a § 3582(c)(2) reduction based on the Fair Sentencing Act of 2010 (FSA). Because the FSA is a congressional enactment and not a guidelines amendment by the sentencing commission, it cannot serve as the basis for a § 3582(c)(2) motion. Even if Mr. Berry could have brought an FSA claim in a § 3582(c)(2) motion, the Court determined that it would still fail because the FSA would not apply retroactively to his 2002 sentence. Under *Dorsey v. United States*, 567 U.S. ___, 132 S. Ct. 2321 (2012), the FSA is retroactive only as to persons who committed crimes prior to the FSA's August 3, 2010 effective date but were sentenced thereafter.

United States v. Herbert Rozier, No. 11-13557 (November 21, 2012)

Issue: Does the holding in *Johnson v. United States*, ___ U.S. ___, 130 S. Ct. 1265 (2010), that Florida's "battery on a law enforcement officer statute" is not a "crime of violence" under USSG §4B1.1 constitute a change in the controlling law such that the defendant, who received a career offender sentencing enhancement based in

part on a conviction under that Florida statute, can collaterally challenge the district court's contrary interpretation?

Held: No.

Background and procedural history: Mr. Rozier was convicted in 2001 of distributing crack cocaine. At his sentencing hearing, the district court applied the USSG §4B1.1 career offender enhancement. One of Mr. Rozier's two prior felony convictions that the district court deemed a qualifying predicate offense was a Florida felony conviction for battery on a law enforcement officer. Mr. Rozier objected to the enhancement, but the district court overruled and imposed a 151-month prison sentence. The Eleventh Circuit affirmed Mr. Rozier's sentence on direct appeal in 2002. In so ruling, the Court determined that although Mr. Rozier correctly argued that the Florida battery statute could be violated by mere touching without actual violence, meaning that it could not constitute a "crime of violence" under the elements clause of §4B1.1(a)(1), it could constitute a "crime of violence" under the residual clause of §4B1.1(a)(2).

Nearly a decade later, the Supreme Court held in *Johnson* that the Florida battery statute was not a "violent felony" under the Armed Career Criminal Act's elements clause. In 2011, Mr. Rozier filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence, arguing that the district court had erred in finding his Florida battery conviction was a "crime of violence" within the meaning of §4B1.1. The district court dismissed Mr. Rozier's motion, but granted a certificate of appealability on the question of whether or not *Johnson* should be given retroactive application so that Mr. Rozier should be re-sentenced without the career offender enhancement. Mr. Rozier then appealed to the Eleventh Circuit.

Analysis: The Eleventh Circuit (Judge Carnes, writing for himself and Judge Barkett) recognized that *Johnson* was retroactively applicable but, given the instant procedural posture, determined that Mr. Rozier would only be entitled to resentencing if there had been an intervening change in controlling law to justify a collateral challenge to an issue decided against him in the original district court proceedings and on direct appeal. The Court answered this question in the negative, characterizing the *Johnson* decision as being in agreement with its own ruling in Mr. Rozier's direct appeal, which had affirmed Mr. Rozier's sentence under §4B1.1's residual clause. The *Johnson* Court did not reach the residual clause issue.

Dissent: Judge Hill filed an impassioned dissent expressing his stupefied reaction to the majority's view that the Florida battery statute, although not a "crime of violence" under the elements subsection of the career offender guideline because it could be violated by non-violent touching, could nonetheless constitute a "crime of

violence" under the residual clause, which requires a "serious potential risk of physical injury to another."

Judge Hill also decried the majority's use of this distinction to deny Mr. Rozier collateral relief even though the Government had waived the argument by raising it. The judge observed, "I feel certain that, if the petitioner [Mr. Rozier] had failed to make an argument to us, we would not now be making it for him." Slip Op. at 16.

The judge went on reveal that he was "bewildered" by the Government's and the Eleventh Circuit's elevation of procedural rules above fundamental justice, *id.* at 21, and that "I reluctantly conclude that our court is determined to deny relief to every confined habeas petitioner whose sentence has been unlawfully enhanced under either the career offender guideline or the armed career criminal statute." *Id.* at 19. Judge Hill concluded by declaring that he was "weary of our court's relentless effort to put more and more procedural angles on the head of the habeas pin." *Id.* at 23.

SELECTED UNPUBLISHED OPINIONS

United States v. Scott Allan Bennett, No. 11-15931 (November 1, 2012)

Issue. Did the district court err in applying the USSG §2B1.1(b)(14)(B) ("possession of a weapon in connection with the offense") sentencing enhancement to a defendant who kept weapons in his military apartment and whose underlying offense was making false statements on his military housing application?

Held. No.

Background and procedural history. Following his conviction under 18 U.S.C. § 1001 for making a false statement on a military housing application, Mr. Bennett challenged the USSG §2B1.1(b)(14)(B) ("possession of a dangerous weapon (including a firearm) in connection with the offense") sentencing enhancement. Mr. Bennett argued that the enhancement should not have been applied because there was no evidence establishing that he had possessed a weapon at the time he made the false statements on his military housing application. (The weapons were found in Mr. Bennett's military apartment after the false statements on his application were discovered.) The district court rejected this argument, applied the sentencing enhancement, and sentenced Mr. Bennett to 36 months in prison.

Analysis. The Eleventh Circuit (*per curiam*, before Judges Marcus, Martin, and Fay) affirmed, noting that while it had not yet defined the phrase "in connection with" as used in this particular guideline, the Court had expansively defined this phrase when interpreting other guidelines and had held generally that the ordinary meaning of "in connection with" does not require that the weapon was used to facilitate the underlying offense. Under this reading of the guideline, the enhancement was properly applied to Mr. Bennett because he violated the military base's security regulations by having weapons at his on-base apartment that Mr. Bennett procured by making the false statements on his housing application.

The Court further held that, to the extent there was error, it was harmless because the district court noted at sentencing that it had "come down with" the 36-month sentence, indicating that the district court had considered a higher sentence but ultimately imposed a lower one. The Eleventh Circuit found that this "statement, by itself and in context, supports the view that the [district] court would have sentenced [Mr.] Bennett to 36 months even without" the enhancement. Slip Op. at 7.

The Eleventh Circuit also held that Mr. Bennett's 36-month sentence was substantively reasonable in light of the large security breach his "cache" of weapons represented and his "pattern of falsehoods." Slip Op. at 7-8.

United States v. Anthony Jerome Terry, No. 12-10291 (November 6, 2012***)***

Issue: Did the defendant's prior Florida conviction for lewd and lascivious battery on a minor constitute a "crime of violence" under the career offender guideline, USSG §4B1.1?

Held: Yes.

Background and procedural history: Mr. Terry pleaded guilty to possession with intent to distribute cocaine and possession of a firearm in furtherance of a drug trafficking crime. At sentencing, the district court adopted finding in the Presentence Investigation Report that Mr. Terry's prior Florida convictions qualified him as a career offender under to USSG §4B1.1 and imposed a 198-month prison sentence. Mr. Terry appealed.

Analysis: Mr. Terry argued that his conviction for lewd and lascivious battery on a minor should not qualify as a predicate offense under the career-offender guideline because it was a strict liability offense. He cited *United States v. Harris*, 608 F.3d 1222 (11th Cir. 2010), which held that a Florida conviction for sexual battery of a child under age 16 does not fall within the residual clause of the Armed Career Criminal Act because it imposes strict liability. Mr. Terry accordingly argued that his prior conviction was also a strict liability offense that should not qualify as a predicate offense under the career-offender guideline. Mr. Terry therefore urged the Court to apply the categorical approach and not inquire into the facts of the predicate offense, but argued that even under the modified categorical approach, his predicate still should not be considered a crime of violence because the Government relied on non-*Shepard* documents.

The Eleventh Circuit (*per curiam*, before Judges Barkett, Pryor, and Fay) rejected all of Mr. Terry's arguments and affirmed the district court. The *Harris* decision dealt with an earlier version of the same Florida statute under which Mr. Terry was convicted. The revised version at issue in Mr. Terry's case was more expansive and could be violated in multiple ways, permitting the district court to apply the modified categorical approach and inquire into the specifics of defendant's prior conviction. The Court also distinguished *Harris* by noting that there the district court lacked access to "specifics" regarding that defendant's prior conviction, which was not the case here. It further found Mr. Terry's *Shepard* argument unavailing because, when the prosecutor in the Florida case read the basis for Mr. Terry's plea, Mr. Terry did not object to the factual basis, mooting the issue of *Shepard*-approved documents.

Turning the facts of the predicate offense in question, the Eleventh Circuit found that the victim's report that she was raped and the corroborating medical

evidence was sufficient to establish that Mr. Terry's conduct was "purposeful, violent, and aggressive" within the meaning of the career-offender guideline as opposed to passive, strict liability conduct.

United States v. Wayne Evans, No. 11-15973 (November 13, 2012)

Issues:

(1) Did the district court violate the defendant's constitutional right to counsel when it denied his request for substitute counsel and his counsel's request to withdraw?
(2) Did the district court violate the defendant's right to present a full defense by denying his motion to continue his trial?
(3) Did the district court violate the defendant's rights of due process, compulsory process, and a fair trial by refusing to conduct a plea colloquy and accept his guilty plea?

Held:

(1) No.
(2) No.
(3) No.

Background and procedural history: Mr. Evans was indicted on numerous firearms offenses. On the day before trial, Mr. Evans moved for substitute counsel, and his counsel moved to withdraw. The magistrate judge denied both motions, and Mr. Evans did not appeal that decision within the 14-day deadline imposed by Fed. R. Crim. P. 59.

Mr. Evans later moved for a continuance of his trial because the Government had only recently turned over new discovery and because his counsel, proceeding under the belief that Mr. Evans planned to plead guilty, had not subpoenaed witnesses necessary to Mr. Evans's defense. After the district court denied the motion to continue, Mr. Evans requested that he be permitted to plead guilty and that the court conduct a plea colloquy. The district court refused, the case proceeded to trial, and a jury found Mr. Evans guilty.

Analysis: The Eleventh Circuit (*per curiam*, before Judges Marcus, Wilson, and Fay) held that it lacked jurisdiction to consider Mr. Evans's claim that the magistrate judge erred in denying his pre-trial motions for substitute counsel and his counsel's motion to withdraw because defendant failed to appeal those rulings within the 14-day deadline imposed by Fed. R. Crim. P. 59.

The Court rejected Mr. Evans's argument that the district court erred in denying defendant's motion for a continuance. Mr. Evans sought the continuance in

part because his counsel thought that Mr. Evans would be pleading guilty and therefore did not subpoena certain witnesses for trial. Applying the 9-part test set forth in *United States v. Uptain*, 531 F.2d 1281, 1287 (5th Cir. 1976), the Court held that the district court did not abuse its discretion in denying the continuance because the so-called "new" discovery was not new at all because its substance was conveyed in prior discovery disclosures, and because Mr. Evans (by changing his mind about pleading) was the source of counsel's failure to subpoena witnesses. Moreover, the district court had already gone to some effort to empanel a jury during the busy summer months.

The Eleventh Circuit also found that the district court did not abuse its discretion in refusing to conduct a Rule 11 plea colloquy after Mr. Evans sought to plead guilty following the district court's denial of his motion to continue. The Court wrote that Rule 11 does not cover the district court's consideration of whether or not to accept a plea. Moreover, the district court had broad discretion over acceptance of pleas, and here the questionable voluntariness and sincerity of Mr. Evans's request to plead and the interests of judicial expediency justified the district court's ruling.

United States v. Ernest Mallety, No. 11-12804 (November 14, 2012)

Issues:

(1) Did the expert witness testify as to the ultimate issue of the defendant's participation in a drug conspiracy?

(2) Was the evidence offered at trial insufficient to support the defendant's convictions?

Held:

(1) No.

(2) No.

Background and procedural history: A jury found Mr. Mallety guilty of (1) conspiracy to distribute and possess with intent to distribute 5 kilograms or more of cocaine; (2) conspiracy to use a cellular telephone to facilitate a drug offense; and (3) possession of a firearm in furtherance of a trafficking crime. Mr. Mallety appealed his convictions on Counts 1 and 3.

Analysis: Mr. Mallety first argued that the Government's law enforcement expert witness went too far in her testimony interpreting drug jargon and code words, and in the end testified as to the ultimate issue of Mr. Mallety's participation in a drug conspiracy. Applying plain error review, the Eleventh Circuit (*per curiam*, before Judges Hull, Jordan, and Anderson) rejected Mr. Mallety's argument, holding that

while the witness testified that Mr. Mallety was used to transport drugs across state lines, the witness did not comment on the "ultimate issue" of whether Mr. Mallety knowingly joined a particular drug conspiracy. Rather, the witness testified as to her "informed, factual observation" that Mr. Mallety was being used to transport the drugs. Slip Op. at 11. Mr. Mallety also noted the witness's interpretation of the meanings of the recorded conversations between Mr. Mallety and alleged co-conspirators, but the Court ruled that permitting this testimony was not plain error because it did not affect Mr. Mallety's substantial rights given the overwhelming evidence of his guilt, and because the district court gave a curative jury instruction.

The Eleventh Circuit summarily rejected Mr. Mallety's other argument, that there was insufficient evidence to support his conviction of possessing a firearm in furtherance of a drug trafficking crime. The Court found "ample" evidence in the record.

Judge Jordan wrote a concurring opinion to "emphasize the dangers that can surface when a case agent, who testifies as both a code-interpreting expert and a fact witness, expresses an opinion that the defendant was engaged in wrongdoing." Slip Op. at 16. The judge believed that the witness's testimony in this case was improper, but given the other evidence against Mr. Mallety he agreed with the majority that there was no plain error.

United States v. Lomax Lamar Jenkins, No. 12-11948 (November 19, 2012)

Issue: Did the district court err in applying a USSG §2B1.1(b)(10)(C) "sophisticated means" enhancement based on the defendant's use of a cellular telephone's text messaging feature to coordinate with his associates in a credit card fraud scheme, and his use of a laptop computer to activate counterfeit credit and debit cards?

Held: No.

Background and procedural history: Mr. Jenkins and others used fraudulent credit and debit cards to purchase gift cards from various stores and then sell the gift cards on the Internet. When Mr. Jenkins and his associates went to the same store, they would send text messages to let each other know which check-out lane each person had used so as to avoid raising suspicion. If any of the fraudulent cards did not work, Mr. Jenkins or one of his associates would take it to the parking lot to another associate who was standing by with a laptop that would re-encode the card.

Mr. Jenkins was convicted of conspiracy to commit fraud with counterfeit credit and debit cards and of aiding and abetting the same. The district court applied a 2-level "sophisticated means" enhancement pursuant to USSG §2B1.1(b)(10)(C) and sentenced Mr. Jenkins to 37 months in prison.

Analysis: Mr. Jenkins argued that the district court erred in applying a USSG §2B1.1(b)(10)(C) "sophisticated means" enhancement. Mr. Jenkins argued that the use of cellular phones and a laptop computer was "nothing special." Slip Op. at 3.

The Eleventh Circuit (*per curiam*, before Judges Carnes, Hull, and Martin) affirmed the district court's application of the enhancement, stating that special equipment need not be used in a crime to justify a "sophisticated means" enhancement and noting the commentary's definition of the phrase as "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." Slip Op. at 4. The Court determined that the totality of the circumstances in the instant case justified the enhancement.

United States v. Jane M. McDonald, No. 12-11879 (November 19, 2012)

Issue: Did the district court err denying the defendant a "minor" or "minimal" role reduction pursuant to USSG §3B1.2 where her co-defendant was identified as having a "major" role in a mail fraud scheme?

Held: No.

Background and procedural history: Ms. McDonald pleaded guilty to conspiracy to commit wire or mail fraud and actual mail fraud. The scheme, which was led by Ms. McDonald's co-defendant and then-boyfriend, involved the financing and purchase of a $2 million condominium. The district court denied Ms. McDonald's request for a "minor" or "minimal" role reduction pursuant to USSG §3B1.2, but did vary downward from Ms. McDonald's 27 to 33-month guideline range and sentenced her to 15 months in prison. Ms. McDonald appealed.

Analysis: Ms. McDonald argued that the district court erred in not granting her a "minor role" reduction where her co-defendant received a "major role" enhancement and was identified in her Presentence Investigation Report as the "most culpable defendant."

The Eleventh Circuit (*per curiam*, before Judges Tjoflat, Pryor, and Martin) held that the district court did not err in denying the minor role reduction and that just because a co-defendant played a major role does not necessarily mean that a defendant played a minor one. Here, the Court found that the mail fraud scheme could not have occurred without Ms. McDonald's actions. The Court further noted that the district court did consider Ms. McDonald's lack of criminal history and her having been manipulated by her "con artist" co-defendant/ex-boyfriend, which led it to vary downward from the 27-month low end of the guideline range to 15 months.

United States v. Devorious Montez Wooden Jones, No. 12-10895 (November 20, 2012)

Issues:

(1) Did the district court err in denying the defendant an acceptance of responsibility reduction when he pleaded guilty to conspiracy to commit bank robbery but denied using a firearm during the crime, requiring the Government to prove that offense at a bench trial?
(2) Was the defendant's 130-month sentence reasonable?
(3) Did the district court clearly err in finding that the defendant brandished a firearm during a robbery?

Held:

(1) No.
(2) Yes.
(3) No.

Background and procedural history: Mr. Jones was indicted for conspiracy to commit a Hobbs Act robbery and for using and carrying a firearm during and in relation to that robbery. Mr. Jones pleaded guilty to the conspiracy charge but not the firearm charge. He was subsequently convicted of that charge at a bench trial. The district court sentenced Mr. Jones to 130 months in prison. Mr. Jones appealed.

Analysis: Mr. Jones argued that the district court erred in denying him an acceptance of responsibility reduction, that his sentence was unreasonable, and that the district court's erred in finding that he brandished a firearm during a robbery.

The Court (*per curiam*, before Judges Hull, Marcus, and Pryor) held that Mr. Jones was not entitled to the acceptance of responsibility reduction because, although he pleaded guilty for conspiring to commit bank robbery, he falsely denied using a firearm during the crime and required the Government to prove that charge during a bench trial. The Court further held that the sentence was reasonable because it was at the low end of Mr. Jones's guideline range and was below the statutory maximum. Regarding Mr. Jones's final argument, the Eleventh Circuit determined that the district court did not plainly err in finding that Mr. Jones brandished a firearm during the robbery, based on eyewitness testimony adjudged credible below.

United States v. Eric Holmes, No. 12-11332 (November 21, 2012)

Issues:

(1) Did the district court abuse its discretion in admitting hearsay evidence – specifically, recordings of two 911 telephone calls?

(2) Did the district court plainly err in deviating from the written jury instructions during its oral jury charge?

(3) Was the defendant's 120-month prison sentence substantively unreasonable?

Held:

(1) No.

(2) No.

(3) No.

Background and procedural history: A jury found Mr. Holmes guilty of being a felon in possession of a firearm, and the district court sentenced Mr. Holmes to 120 months in prison. Mr. Holmes appealed.

Analysis: Mr. Holmes argued that the district court (1) abused its discretion by admitting hearsay evidence in the form of two recorded 911 calls placed by an employee of the convenience store where Mr. Holmes was arrested, (2) plainly erred in its oral jury charge by varying from the written final jury instructions, and (3) imposed a substantively unreasonable sentence.

The Eleventh Circuit (*per curiam*, before Chief Judge Dubina and Judges Marcus and Kravitch) held that the evidentiary ruling was not an abuse of discretion because, if hearsay, the 911 tapes were admissible as present sense impressions and excited utterances. The Court further held that even if admitting the tapes had been error, it would be harmless because the content of the calls was introduced through other means, and because there was sufficient, independent evidence of Mr. Holmes's guilt. The Court rejected the jury charge argument because Mr. Holmes could not show that the district court's deviation from the written instructions affected the outcome of the proceedings, and summarily held (without meaningful analysis) that the sentence was substantively reasonable.

United States v. Charles Edward Leach, No. 12-11349 (November 21, 2012)

Issue: Did the district court err in denying the defendant's motion to suppress evidence acquired through a search of his residence based on a search warrant that the defendant claimed included false information and omitted other, material information?

Held: No.

Background and procedural history: Mr. Leach was convicted of manufacturing marijuana and conspiracy to manufacture marijuana.

Analysis: Mr. Leach argued that the district court erred in denying his motion to suppress evidence acquired through a search of his residence because the agents "included deliberate falsehoods and omitted material information in applying for the search warrant." Slip Op. at 2. The Eleventh Circuit (*per curiam*, before Judges Carnes, Barkett, and Marcus) affirmed, finding that the affidavit would have been sufficient to establish probable cause even with the incorrect information omitted and the correct information added and, consequently, there was no need to engage in a *Franks v. Delaware*, 438 U.S. 154, 171 (1978), analysis.

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***United States v. Kareen Rasul Griffin*,** No. 11-15558 (October 2, 2012)

Issue: Did the district court err in suppressing an individual's statements to a police officer and evidence found in the individual's pockets when the officer asked brief questions unrelated to the reason for an otherwise constitutional stop and frisk?

Held: Yes. The Eleventh Circuit reversed and remanded.

Background and procedural history. In February 2011, Officer Edwards responded to a police call from a children's clothing store in Jacksonville, Florida. Upon his arrival, a security guard pointed toward a man walking away from the store and said the man had attempted to rob the store. Mr. Griffin was the man indicated by the security guard. Officer Edwards followed Mr. Griffin, noting his evasive and nervous behavior. Officer Edwards then told Mr. Griffin to stop. Mr. Griffin ignored Officer Edward's request and continued walking.

At this point, Officer Edwards grabbed Mr. Griffin by the wrist and said he was investigating a petit theft. Mr. Griffin denied involvement with the theft. Officer Edwards frisked Mr. Griffin and felt what he believed to be batteries in Mr. Griffin's pocket. Officer Edwards asked Mr. Griffin, "Hey, what's in your pocket? Why do you have batteries?" Mr. Griffin told Officer Edwards that the items were actually shotgun shells. Officer Edwards asked Mr. Griffin if he had ever been in prison, and Mr. Griffin answered affirmatively. After Officer Edwards explained that it was illegal for a felon to possess ammunition, Mr. Griffin began to flee. Officer Edwards pursued and arrested Mr. Griffin, who was subsequently charged with being a felon in possession of ammunition.

On Mr. Griffin's motion to suppress the ammunition and statements made to Officer Edwards, the district court determined that although the initial stop was constitutional, Officer Edwards's questioning of Mr. Griffin was unrelated to the initial stop and improperly extended beyond the scope necessary to ensure his own safety. The district court wrote that Officer Edwards's questions became an

"unreasonable search" when he continued to "probe and investigate" about the items he felt in Mr. Griffin's pocket. Slip Op. at 4. The court concluded that the questioning violated the Fourth Amendment's guarantee against unreasonable searches and seizures and suppressed the ammunition and statements.

Analysis: Judge Jordan authored the panel's decision, which Chief Judge Dubina and Ninth Circuit Judge Alarcon joined.

The Eleventh Circuit employs a two-step process for determining the legality of an investigatory stop under the Fourth Amendment: (1) determine whether the stop was justified at its inception; and (2) determine whether the officer's actions were reasonably related in scope to the circumstances that justified the stop in the first place. The Court noted that this test considers the "totality of the circumstances" rather than individual events. The parties did not dispute whether the stop was justified.

Constitutionality of the initial pat-down. The Court first considered the district court's assumption that the pat-down was permissible. On appeal, Mr. Griffin asserted that the pat-down was unconstitutional because Officer Edwards lacked the requisite reasonable suspicion that the defendant was dangerous. The Court disagreed, holding that, under *Terry v. Ohio*, 392 U.S. 1 (1968), reasonable suspicion does not require hard evidence and that the totality of facts were such that a reasonable person may feel his safety was in danger due to the high crime rate in the area, Mr. Griffin's evasive behavior, and the dangerous nature of a robbery investigation. The Court concluded that "the suspected offense, together with the attendant circumstances, provided a sufficient basis for Officer Edwards to frisk Mr. Griffin." Slip Op. at 9.

Unrelated questioning. Next, the Eleventh Circuit analyzed whether questions unrelated to the initial stop were unconstitutional under *Terry*'s "reasonably related" test, such that the "scope of the search" was too broad. The Court held that the rule cited by the district court that a *Terry* stop must be reasonably related to the reasons justifying the detention does not apply in this case because questions are not categorized as a "seizure" as long as they don't unnecessarily prolong an otherwise lawful stop. Here, because Edwards's brief questioning did not unnecessarily prolong the initial lawful stop for suspicion of attempted robbery, the questioning was permissible. The Court therefore held that unrelated questions posed during a valid *Terry* stop do not create a Fourth Amendment problem unless they "measurably extend the duration of the stop." In support of this conclusion, the Eleventh Circuit noted that each of its sister circuits to analyze this issue agree, and referenced the Supreme Court's decisions in *Muehler v. Mena*, 544 U.S. 93 (2005), and *Arizona v. Johnson*, 555 U.S. 323 (2009). The Eleventh Circuit stopped short of adopting a "no prolongation" rule, however, and held that in this case, because of the brevity of Officer Edwards's questioning

(which the Court characterized as no more than 30 seconds), the stop was not an unconstitutionally prolonged seizure.

The Court also considered whether the frisk went beyond what is permitted in *Terry*. It concluded that because Officer Edwards did not intensively examine the object in the Mr. Griffin's pocket to find out its contents, and because Officer Edwards did not physically reach into the Mr. Griffin's pocket, the scope of the search was not too invasive. The Court found that the caselaw cited by Mr. Griffin was both distinguishable and unpersuasive in large part because officers in those cases actually reached into the defendant's pocket or clothing, as opposed to simply asking questions.

In sum, because the initial pat-down was warranted, because the unrelated questions did not unnecessarily prolong the stop, and because the frisk was not invasive, the Eleventh Circuit reversed the district court's order granting the Mr. Griffin's motion to suppress and remanded the case.

United States v. Rhonda Michelle Fee, No. 11-15356 (October 4, 2012)

Issues.

(1) Do 8 obscene photographs of a minor child taken during a single photography session constitute 8 distinct crimes of producing child pornography? If so, does the Rule of Lenity apply?
(2) Does the failure to object when a lower court denies a motion to sever result in the waiver of the issue on appeal?
(3) Did the district court err in allowing the victim, Ms. Fee's daughter, to testify by closed-circuit television in violation of Ms. Fee's rights under the Confrontation Clause of the Sixth Amendment?
(4) Did the district court abuse its discretion in denying Ms. Fee's motion for a new trial?

Held.

(1) Yes, and the Rule of Lenity is inapplicable.
(2) No.
(3) No.
(4) No.

Background and procedural history. Ms. Fee was indicted on 8 counts of producing child pornography, 18 U.S.C. § 2251(a), and one count of possessing child pornography, 18 U.S.C. § 2252A(a)(5)(B), over a 5-year period where Ms. Fee and her husband produced sexually explicit images of Ms. Fee's daughter. Ms. Fee's defense was that the photographs were produced to serve as a visual aid in teaching her daughter personal hygiene.

After a jury found Ms. Fee guilty on all counts, the district court sentenced her to 8 concurrent terms of 180 months in prison for each of the 8 production counts and to a concurrent 120-month custodial term for the possession count. Ms. Fee appealed.

Analysis. The Eleventh Circuit (*per curiam*, before Judges Marcus, Pryor and Jordan) rejected all of Ms. Fee's issues on appeal and affirmed the district court.
The indictment was not multiplicous and the Rule of Lenity does not apply. Ms. Fee argued that charging each individual image as a separate crime was multiplicitous because the 8 photographs involved a single crime. She contended that § 2251(a) was intended to proscribe the *act* of producing child pornography rather than proscribing the number of images produced. The Eleventh Circuit disagreed, citing the "plain text" of the statute. Slip Op. at 14. Section 2251(a) refers to "any visual

description" of "sexually explicit conduct" involving a minor, and the Court held that the word "any" in this context has an "expansive meaning, that is, one or some indiscriminately of whatever kind." *See United States v. Gonzales*, 520 U.S. 1, 117 S. Ct. 1032, 1035 (1997); *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 726 (11th Cir. 2008). The Court concluded that it is "clear that Congress proscribed each discreet visual depiction of a minor as a separate offense."

The Eleventh Circuit also rejected Ms. Fee's argument that the Rule of Lenity should be applied. Since the Rule of Lenity is only invoked where the textual language of the statute is ambiguous, it is inapplicable where, as here, the plain language of the statute indicates congressional intent to punish offenders for each separate use.

Ms. Fee did not preserve the right to appeal the denial of her motion to sever. The Eleventh Circuit determined that Ms. Fee waived any challenge to the denial of her motion to sever her trial from her husband's trial by failing to object below.

Permitting Ms. Fee's daughter to testify by closed-circuit television did not violate Ms. Fee's Confrontation Clause right. Ms. Fee argued the district court violated her Sixth Amendment confrontation right when it allowed the victim to testify by closed-circuit television. Citing Supreme Court authority and the Child Victims' and Child Witnesses' Rights Act, the Eleventh Circuit held that the district court did not err in allowing the testimony via closed-circuit television because the Government presented considerable evidence to demonstrate that testifying in open court would have been traumatic for the child.

The district court did not err in denying Ms. Fee's motion for a new trial due to her diminished mental capacity. The Court determined that post-trial evidence of Ms. Fee's diminished mental capacity was known prior to trial and was unnecessarily cumulative, and was likely inadmissible. Even if the evidence were inadmissible, the fact of Ms. Fee's matriculation at a junior college and her professional degree in accounting would have contradicted Ms. Fee's argument that she lacked the mental capacity to educate her daughter about personal hygiene by any means other than the sexually explicit photographs. The Eleventh Circuit therefore affirmed the district court's denial of Ms. Fee's motion for a new trial.

United States v. John Patrick Russo, No. 11-15408 (October 10, 2012)

Issues.

(1) Does an "actual individual" within the meaning of USSG §2B1.1(b)(10)(C)(i) include a deceased person?

(2) Does the use of a fictitious social security number along with the name and date of birth of an actual person render the USSG §2B1.1(b)(10)(C)(i) enhancement inapplicable?

Held.

(1) Yes.

(2) No.

Background and procedural history. Mr. Russo pleaded guilty to theft of government property, disability benefits fraud, and false representation of a social security number. The district court applied a 2-level identity theft enhancement pursuant to USSG §2B1.1(b)(10)(C)(i) and sentenced Mr. Russo to 37 months in prison. Mr. Russo appealed, arguing that the USSG §2B1.1(b)(10)(C)(i) identify theft enhancement should not apply because the victim was deceased and because he used a fictitious social security number.

Analysis. The Eleventh Circuit (*per curiam*, before Judges Marcus, Martin and Fay) affirmed the district court's application of the enhancement, finding that an "actual individual" within the meaning of the guideline includes a deceased person. The Court noted that it had recently reached the same conclusion in interpreting a similar provision. *See United States v. Zuniga-Arteaga*, 681 F.3d 1220, 1223 (11th Cir. 2012) (the federal identity theft statute proscribes identity theft of any actual person "regardless of whether that person is still alive").

Mr. Rosso also argued that his use of a fictitious social security number in conjunction with the decedent's actual name and date of birth placed his conduct outside the reach of the USSG §2B1.1(b)(10)(C)(i) enhancement. The Eleventh Circuit rejected this argument, noting that the guideline commentary defined "means of identification" to include "any name **or** number that may be used." USSG §2B1.1 cmt. n.1 (emphasis added). Mr. Rosso's admitted use of the decedent's name and date of birth was sufficient to justify the enhancement, and the Court therefore did not reach the question of whether Mr. Rosso's use of the fictitious social security number, in and of itself, would trigger the enhancement.

United States v. Rony Orlando Urquia Lagos, No. 12-10839 (October 22, 2012)

Issues.

(1) Did the district court err in imposing a 16-level USSG §2L1.2(b)(1)(A)(ii) enhancement?

(2) Was Mr. Lagos's sentence substantively or procedurally unreasonable?

Held.

(1) No, pursuant to binding, on-point precedent.

(2) No.

Background and procedural history. Mr. Lagos pleaded guilty to one count of illegal re-entry of a previously deported alien in violation of 8 U.S.C. § 1326(a). The Presentence Investigation Report recommended a 16-level USSG §2L1.2(b)(1)(A)(ii) enhancement for Mr. Lagos's previous deportation following a crime of violence. The district court applied the enhancement and sentenced Mr. Lagos to 46 months in prison. Mr. Lagos challenged the enhancement on appeal, arguing that his prior Florida state conviction for resisting arrest did not constitute a "crime of violence" within the meaning of the sentencing guidelines.

Analysis. The Eleventh Circuit (*per curiam*, before Judges Barkett, Pryor and Martin), citing its previous decision in *United States v. Romo-Villalobos*, 674 F.3d 1246, 1247 (11th Cir. 2012), reiterated that Florida's resisting an officer with violence statute is a crime of violence for purposes of USSG §2L1.2(b)(1)(A)(ii).

Regarding Mr. Lagos's challenge to the reasonableness of his sentence, the Court summarily held that his 46-month sentence was procedurally reasonable because the district court correctly calculated Mr. Lagos's guideline range and appropriately weighed the §3553(a) factors. The Court also held that the sentence was substantively reasonable, emphasizing that it was at the low end of the guideline range.

United States v. William Lee Hunt, No. 12-10231 (October 25, 2012)

Issues.

(1) Is the Government's motion to dismiss Mr. Hunt's appeal pursuant to his plea agreement's appeal waiver due to be granted?

(2) Should Mr. Hunt's conviction be reversed based on his attorney's failure to argue for a 7-year sentence rather than the 10-year statutory mandatory minimum?

Held.

(1) Yes.

(2) No.

Background and procedural history. The district court imposed a 10-year mandatory minimum sentence following Mr. Hunt's guilty plea. Mr. Hunt appealed, arguing that he understood his attorney would argue for a 7-year mandatory minimum and that, had he known the mandatory minimum was actually 10 years, Mr. Hunt would not have pleaded guilty. The Government moved to dismiss the appeal pursuant to the appeal waiver contained in Mr. Hunt's plea agreement.

Analysis. The Eleventh Circuit (*per curiam*, before Judges Carnes, Barkett and Wilson) denied the Government's motion to dismiss Mr. Hunt's appeal pursuant to the plea agreement's appeal waiver. The record was not clear that Mr. Hunt understood that he was waiving his right to appeal his conviction as well as his sentence, and the district court failed to expressly ask Mr. Hunt if he understood the scope of the appeal waiver.

The Court nevertheless affirmed Mr. Hunt's conviction because he could not show that he would not have pleaded guilty but for his attorney's failure to argue for a 7-year mandatory minimum sentence rather than the actual 10-year mandatory minimum. The record confirmed that the district court informed Mr. Hunt at his change of plea hearing that the mandatory minimum was 10 years, and Mr. Hunt testified that he understood this fact. Mr. Hunt also did not object to the 10-year sentence at his sentencing hearing, attempt to withdraw his guilty plea, or to inform the court that he had understood the mandatory to be 7 years instead of 10.

OTHER NOTEWORTHY FEDERAL APPELLATE DECISIONS

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States v. Jesus Rodriguez-Escareno, No. 11-41063 (October 23, 2012), *also available at* 2012 WL 5200190.

Issue. Does a conspiracy conviction under § 846 satisfy the requirements for the 16-level enhancement of USSG §2L1.2(b)(1)(A)(i)?

Held. No. The Fifth Circuit vacated Mr. Rodriguez-Escareno's sentence and remanded for resentencing.

Background and procedural history. Texas law enforcement officers performed a traffic stop after observing a vehicle exceeding the speed limit. During the stop, officers discovered that the one of the passengers, Mr. Rodriguez-Escareno, had previously been deported in 2006. Mr. Rodriguez-Escareno was detained and later convicted of illegal reentry pursuant to 8 U.S.C. § 1326. His Presentence Investigation Report calculated Mr. Rodriguez-Escareno's base offense level at eight and stated that his criminal history included a 2001 conviction for conspiring to distribute methamphetamines in violation of 21 U.S.C. § 846. The PSR characterized this conviction as a "drug trafficking offense," which made Mr. Rodriguez-Escareno subject to the 16-level enhancement under USSG §2L1.2(b)(1)(A)(i) and resulted in a guideline range of 41-51 months. Mr.

Rodriguez-Escareno did not object to these findings, and the lower court sentenced him to 48 months in prison.

Mr. Rodriguez-Escareno challenged his sentence on appeal, arguing that a conspiracy conviction under § 846 does not require the Government to prove an overt act in furtherance of the conspiracy, unlike Application Note 5 to USSG §2L1.2(b)(1)(A)(i), which does require such an overt act.

Analysis. The Fifth Circuit (Judge Southwick, writing also for Judges Wiener and Elrod) employed the plain error standard of review because Mr. Rodriguez-Escareno did not object at sentencing. For plain error to exist, it must have been a clear and obvious error which affected the defendant's substantial rights. Upon a finding of plain error, the Fifth Circuit has discretion to remedy the error if the error seriously affected fairness, integrity, or public reputation of the judicial proceeding.

Was there an error? Since the Sentencing Guidelines do not define "conspiracy," the Fifth Circuit assessed the term's "generic, contemporary meaning." Slip. Op. at 3. The Court noted that many jurisdictions, including the Fifth Circuit, and a leading legal treatise (Walter R. LaFave, SUBSTANTIVE CRIMINAL LAW § 12.2) follow the BLACK'S LAW DICTIONARY definition of conspiracy, which requires "action or conduct that furthers the agreement." Slip Op. at 3. The Fifth Circuit emphasized that "[i]t has been settled since 1994" that § 846 does not require an overt act. *See United States v. Shabani*, 513 U.S. 10, 13-14 (1994). The Fifth Circuit concluded that the term "conspiring" in Application Note 5 of USSG §2L1.2(b)(1)(A)(i) is not applicable to conspiracy convictions under § 846.

Was the error obvious? The Fifth Circuit analyzed whether this error was obvious by exploring whether its existence was subject to reasonable dispute. The Court ruled that this error in this case was obvious when a legal dictionary, a leading treatise, and the weight of court precedent demonstrated that an overt act was necessary.

Did the obvious error affect the defendant's substantial rights? The Fifth Circuit held that the error did affect the defendant's substantial rights. A proper calculation of the guideline would result in a sentence ranging from 15-21 months. Because the defendant was sentenced to 48 months, his rights were substantially affected.