SUMMARIES OF RECENT CASELAW

JANUARY 1, 2014 – MARCH 31, 2014

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DECISIONS OF THE UNITED STATES SUPREME COURT

Burrage v. United States, No. 12-7515 (Jan. 27, 2014)

Issue. Does the 20-year mandatory minimum established by 21 U.S.C. § 841(b)(1)(C) for drug trafficking when "death or serious bodily injury results from the use" of the drug apply where the decedent's drug use contributes to his death, but is not a but-for cause of it?

Held. No.

Background and procedural history. Mr. Burrage sold heroin to a heavy drug user who died shortly after using the heroin and other drugs. The Government charged him under § 841(b)(1)(C), and Mr. Burrage proceeded to trial. The district court denied Mr. Burrage's motion for judgment of acquittal on the ground that the Government failed to prove that the decedent's use of Mr. Burrage's heroin was a but-for cause of death. The jury adjudged Mr. Burrage guilty, and the Eighth Circuit affirmed his conviction.

Analysis. The Supreme Court (Justice Scalia, for Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, Kagan and, in part, Alito) reversed. Because the statute does not define "results from," the Court ascribed to it its ordinary meaning: actual causality. Accordingly, Mr. Burrage was correct that he could not be subject to the 20-year mandatory minimum absent proof that, but for the decedent's use of the heroin, death would not have occurred. The Court rejected the Government's arguments that it should dispense with the usual but-for causation requirement, or that it should consider the decedent's drug use a cause-in-fact if the drugs were a "substantial" or "contributing" factor to his or her death, reasoning that Congress could have mandated such an alternative causation calculus in the statute but did not do so.

Justice Ginsburg (joined by Justice Sotomayor) concurred in the judgment and wrote separately because she would have ruled for Mr. Burrage based on the Rule of Lenity.

Fernandez v. California, No. 12-7822 (Feb. 25, 2014)

Issue. Does the rule that police officers may not search jointly occupied premises where one of the occupants objects apply when the objecting occupant is not physically present?

Held. No.

Background and procedural history. Mr. Fernandez assaulted and robbed a man before fleeing to an apartment he shared with his girlfriend. The police arrived and arrested Mr. Fernandez. Before his arrest, Mr. Fernandez clearly told the police that he did not consent to their entering his home. The police returned the next day, obtained Mr. Fernandez's girlfriend's consent to search, and executed a search. After unsuccessfully moving to suppress the fruits of this search, Mr. Fernandez was convicted on several charges in a California state court. The California Court of Appeals

affirmed and the California Supreme Court denied Mr. Fernandez's petition for review. The Supreme Court granted certiorari.

Analysis. The Supreme Court (Justice Alito, for Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Breyer) affirmed. Although the longstanding general rule is that police may search jointly occupied premises so long as one occupant consents, in *Georgia v. Randolph*, 547 U.S. 103 (2006), the Court carved out a narrow exception in cases where a co-occupant who is physically present objects to the search. Mr. Fernandez argued that (1) the *Randolph* exception was applicable to his case because his arrest prevented him from being physically present to object and (2) his pre-arrest objection to search was sufficient to satisfy the *Randolph* requirement that he object in person. The Court rejected both of these arguments. As to the first, the Court ruled that a lawful arrest was not a ground to circumvent the *Randolph* physical presence requirement. Regarding Mr. Fernandez's second argument, the Court determined that it was at odds with *Randolph*'s reasoning, and that it would create a host of practical complications; for example, the difficulty of setting an administrable rule for how to measure the duration of a previously-stated objection by a now-absent occupant, how to bind the police, and by what procedure the occupant would raise a continuing objection.

Justice Scalia and Thomas each filed concurring opinions, and Justice Ginsburg (joined by Justices Sotomayor and Kagan) dissented.

Kaley v. United States, No. 12-464 (Feb. 25, 2014)

Issues. Whether criminal defendants are constitutionally entitled at a hearing challenging a pre-trial restraint on their property to contest a grand jury's prior determination of probable cause to believe they committed the crimes charged?

Held. No.

Background and procedural history. Immediately after obtaining the indictment, the Government sought a restraining order under 21 U.S.C. § 853(e)(1) to prevent the defendants from transferring any assets traceable to or involved in the alleged offenses. A pre-trial asset restraint is constitutionally permissible whenever there is probable cause to believe that the property is forfeitable. That probable cause determination has two parts: (1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to that crime. After an interlocutory appeal, the district court concluded that it should hold a hearing on the defendants' motion to vacate the pre-trial asset restraint, but only as to whether the restrained assets are traceable to or involved in the alleged criminal conduct and not on whether the there was probable cause to believe that the defendant had committed an offense permitting forfeiture. The defendants appealed that issue, the Eleventh Circuit affirmed, and the Supreme Court granted certiorari review.

Analysis. The Supreme Court (Justice Kagan, joined by Justices Scalia, Kennedy, Thomas, Ginsburg, and Alito) affirmed the Eleventh Circuit and remanded.

The Court held that its analysis was "straightforward." Slip op. at 12. It noted that it previously held in *United States v. Monsanto*, 491 U. S. 600, 615 (1989), that "the probable cause standard governs the pre-trial seizure of forfeitable assets, even when they are needed to hire a lawyer," and that it has "repeatedly affirmed a corollary of that standard: A defendant has no right to judicial review of a grand jury's determination of probable cause to think a defendant committed a crime." Slip op. at 12. Accordingly, the Court held that settled precedent "signaled defeat" for the defendants because they sought only to relitigate the grand jury's finding.

Chief Justice Roberts, joined by Justices Breyer and Sotomayor, dissented, writing that by freezing assets a defendant may use for legal representation, the majority's decision impedes a defendant's ability to challenge the Government's decision to freeze those assets and interferes with his Sixth Amendment rights.

United States v. Appel, No. 12-1038 (Feb. 26, 2014)

Issue. Are designated protest areas and an easements for a public road within an Air Force base part of a "military installation" within the meaning of 18 U.S.C. § 1382, which prohibits an individual from reentering a military installation after having been ordered not to do so?

Held. Yes.

Background and procedural history. Mr. Appel is an antiwar activist who frequented the designated protest area at Vandenburg Air Force Base. After being banned from the base several times, he was convicted pursuant to § 1382 and ordered to pay a fine. Mr. Appel appealed to the district court, which rejected his defense that § 1382 does not apply to the designated protest area. The Ninth Circuit reversed on the basis of its own precedent that § 1382 does not apply unless the military proves that it has the "exclusive right of possession of the area on which the trespass allegedly occurred." Slip op. at 6 (internal citation omitted).

Analysis. The Supreme Court (Chief Justice Roberts for a unanimous court, with separate written concurrences) reversed. The Court categorically rejected Mr. Appel's argument that § 1382 was implicated only where the military demonstrates exclusive possession of the area, finding that it was not supported by the statutory text. Characterizing Mr. Appel's argument as a "use-it-or-lose-it rule," the Court wrote that it would "decline [Mr.] Appel's invitation to require civilian judges to examine U.S. military sites around the world, parcel by parcel, to determine which have roads, which have fences, and which have a sufficiently important, persistent military purpose." Slip op. at 12.

The Court did not reach Mr. Appel's alternative argument that banning him from the designated protest area violated the First Amendment because the Ninth Circuit did not rule on that issue. Justice Ginsburg concurred and wrote separately to express her view that the Court's opinion "properly reserved that issue for consideration on remand." Slip op., Ginsburg, J., concurring, at 2. Justice Alito concurred and wrote separately to memorialize his view that the Court's "failure to address [the First Amendment issue] should not be interpreted to signify either agreement or

disagreement with the arguments outlined in Justice Ginsburg's concurrence." Slip op., Alito, J., concurring, at 1.

Rosemond v. United States, No. 12-895 (Mar. 5, 2014)

Issues. What must the Government prove when it accuses a defendant of aiding and abetting a violation of 18 U.S.C. § 924(c)?

Held. The Government must prove beyond a reasonable doubt that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission.

Background and procedural history. Mr. Rosemond participated in a drug deal in which he or one of the fellow participants fired a gun. Because of the dispute about who fired the gun, the Government charged Mr. Rosemond with violating 18 U.S.C. § 924(c) or, in the alternative, aiding and abetting that offense under 18 U.S.C. § 2. Mr. Rosemond proceeded to trial on both charges and argued that "a defendant could be found guilty of aiding or abetting a § 924(c) violation only if he 'intentionally took some action to facilitate or encourage the use of the firearm,' as opposed to the predicate drug offense." Slip op. at 3. The district court disagreed and instructed the jury that it could convict if "(1) the defendant knew his cohort used a firearm in the drug trafficking crime, and (2) the defendant knowingly and actively participated in the drug trafficking crime." *Id*. The jury convicted Mr. Rosemond of violating § 924(c), but the verdict form did not specify whether the jury found him guilty of using the gun or aiding and abetting in the use of the gun.

Analysis. The Supreme Court (Justice Kagan for Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Sotomayor and in which Justice Scalia joined in all but footnotes 7 and 8) vacated Mr. Rosemond's conviction and remanded to the Tenth Circuit for further review. Justice Alito, with whom Justice Thomas joined, concurred in part and dissented in part.

The Court held that the Government proves a charge of aiding and abetting a § 924(c) charge by establishing that "the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." Slip op. at 1. Applying this holding, the Court then concluded that the district court's instructions were erroneous because they failed to require that Mr. Rosemond knew in advance that one of his cohorts would be armed. The advance knowledge requirement allows the accomplice a reasonable opportunity to walk away from the conduct. The Court remanded the case to the Tenth Circuit to determine the appropriate consequence, if any, of the district court's error.

United States v. Castleman, No. 12-1371 (Mar. 26, 2014)

Issue. Title 18 U.S.C. § 922(g)(9) prohibits anyone convicted of "a misdemeanor crime of domestic violence" from possessing a firearm. In order for a prior conviction to be a § 922(g)(9) predicate, it must have, as an element, "the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A). Does"physical force" mean any physical force, regardless of degree or must it be "violent force"?

Held. "Physical force" in this context need not be "violent force." Instead, the common law definition of "physical force," which is satisfied by even the "slightest offensive touching," is the standard.

Background and procedural history. In 2001, Mr. Castleman pleaded guilty in a Tennessee state court to causing bodily injury to the mother of his child, in violation of Tenn. Code Ann. § 39-13-111(b). In 2008, Mr. Castleman was indicted under § 922(g)(9), and he moved to dismiss on the ground that his 2001 conviction did not have the use of physical force as an element. The district court granted the motion to dismiss and the Sixth Circuit affirmed, relying on *Johnson v. United States*, 559 U.S. 133 (2010). *Johnson* held that the physical force element of a "violent felony" within the meaning of the Armed Career Criminal Act (ACCA) required "violent force." The Sixth Circuit determined that *Johnson* applied to § 922(g)(9) misdemeanor domestic violence convictions and concluded that Mr. Castleman's 2001 conviction could not be a § 922(g)(9) predicate because he could have caused bodily injury without necessarily resorting to violent force.

Analysis. The Supreme Court (Justice Sotomayor, for Chief Justice Roberts and Justices Kennedy, Ginsberg, Breyer, and Kagan) reversed. The Court determined that Congress incorporated the common-law meaning of "force," which is "offensive touching." Slip op. at 4. The Court wrote that *Johnson* was distinguishable because it was clear in the case of the ACCA that Congress intended to depart from the common-law definition of "force"; that is, in defining a "violent felony," Congress clearly intended that the phrase "physical force" must mean "violent force."

The Court concluded that Mr. Castleman's 2001 conviction was an appropriate § 922(g)(9) predicate. Because the parties conceded that the Tennessee statute was divisible, the Court applied the modified categorical approach. The *Shepard* documents established that Mr. Castleman pleaded guilty to having "intentionally or knowingly caus[ing] bodily injury" to the mother of his child. Slip Op. at 12. The Court accordingly concluded that "the knowing or intentional bodily injury necessarily involves the use of physical force" because "[i]t is impossible to cause bodily injury without applying force in the common law sense." *Id*. at 12-13.

Justice Scalia and Justice Alito (for himself and Justice Thomas) each concurred in the judgment and wrote separately.

PUBLISHED OPINIONS

United States v. Contreras, No. 13-10928 (Jan. 2, 2014)

Issue. Is second-degree sexual battery under Florida law a "crime of violence" within the meaning of USSG §2L1.2(b)(1)(A)?

Held. Yes.

Background and procedural history. Mr. Contreras pleaded guilty to illegally reentering the United States. His PSR recommended that the 16-level §2L1.2(b)(1)(A) increase be applied based on Mr. Contreras's previous conviction for second-degree sexual battery in Florida. Mr. Contreras objected to the enhancement, arguing that his prior conviction was not a "crime of violence" but instead an "aggravated felony," *see* USSG §2L1.2(b)(1)(C), which carried only an 8-level enhancement. The Government argued that Mr. Contreras's sexual battery conviction was properly characterized as a "crime of violence" because nonconsensual sexual contact is an element of the offense.

At sentencing, the district court agreed with Mr. Contreras, finding that a "crime of violence" must require "something more than a nonconsensual touching" and applied the 8-level "aggravated felony" enhancement. Slip op. at 3.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judges Martin and Fay) vacated and remanded. The binding guideline commentary defines a "crime of violence" to include "forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor[.]" USSG §2L1.2 cmt. n.1(B)(iii). Mr. Contreras argued that, since the Florida statute did not require any "force" other than that necessary to engage in sexual intercourse, it was not a "forcible" sex offense within the meaning of the guideline, and therefore not a crime of violence.

The Court rejected this argument, noting the Sentencing Commission's explanation that "forcible sex offenses . . . are always classified as 'crimes of violence,' regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another." USSG App. C., Amend. 722 (2011). The Court further noted that the commentary's inclusion of statutory rape in the definition of "crime of violence" also indicated that physical force need not be an element of the predicate conviction.

Arthur v. Thomas, No. 12-13952 (Jan. 6, 2014)
***appeal from the Northern District of Alabama

Issue. May a petitioner invoke the procedural default exception of *Martinez v. Ryan*, 566 U.S. __, 132 S. Ct. 1309 (2012), to toll the one-year statute of limitations mandated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)?

Held. No.

Background and procedural history. Mr. Arthur was convicted of murder in Alabama state court in 1977. While on a state work release program, Mr. Arthur committed a second murder. The State would ultimately try Mr. Arthur three times for this crime. After two convictions, vacaturs, and remands, Mr. Arthur was again convicted of murder and sentenced to death.

Mr. Arthur at first pursued both a motion for a new trial on the ground of ineffective assistance of counsel and a direct appeal, but later withdrew his motion for a new trial to concentrate on his direct appeal. The Alabama appellate courts affirmed Mr. Arthur's conviction and sentence, and he did not file a petition for certiorari in the U.S. Supreme Court. This established a federal habeas deadline of June 18, 1999, and Mr. Arthur did not file a federal habeas petition until January of 2001. The district court dismissed the petition as untimely, and the Eleventh Circuit affirmed. The Supreme Court denied Mr. Arthur's petition for certiorari in 2007.

In 2012, Mr. Arthur filed a Fed. R. Civ. P. 60(b)(6) motion in the district court, arguing that the order dismissing his habeas petition as untimely should be set aside in light of *Martinez*. The district court denied the motion, and the Eleventh Circuit granted a certificate of appealability.

Analysis. The Eleventh Circuit (Judge Hull, for Judges Marcus and Wilson) affirmed. Relief under Rule 60(b) requires the movant to show "extraordinary circumstances justifying the reopening of a final judgment." Slip op. at 39 (internal citation and quotation omitted). Even when such a showing is made, relief is granted only at the district court's discretion. The Court held that Mr. Arthur had not made such a showing here because the new rule announced in *Martinez* was unavailable as a ground for tolling the AEDPA statute of limitations.

In *Martinez*, the Supreme Court announced a new, narrow exception to the procedural default rule, available where:

> "(1) a state requires a prisoner to raise ineffective-trial-counsel claims at the initial-review stage of a state collateral proceeding and precludes those claims during direct appeal;
> (2) the prisoner did not comply with state rules and failed properly to raise ineffective-trial-counsel claims in his state initial-review collateral proceeding;
> (3) the prisoner did not have counsel (or his appointed counsel was ineffective by not raising ineffective-trial-counsel claims) in that initial-review collateral proceeding; and
> (4) failing to excuse the prisoner's procedural default would cause the prisoner to lose a 'substantial' ineffective-trial-counsel claim."

Slip op. at 43. The Eleventh Circuit read *Martinez* as excusing only the procedural default of ineffective-assistance claims arising from certain class of state proceedings and has no bearing here, where it was "wholly the operation of AEDPA's federal limitations period—independent of any state procedural rule—that barred [Mr.] Arthur's petition." *Id*. at 46 (emphasis in original).

The Court further held that Mr. Arthur would not have been entitled to relief even if *Martinez* were on-point because a change in decisional law is not an "extraordinary circumstance" sufficient to invoke Rule 60(b)(6).

Mackey v. Warden, No. 12-14729 (Jan. 6, 2014)

Issue. Pursuant to *Bryant v. Warden, FCC Coleman - Medium,* 738 F.3d 1253 (11th Cir. 2013), did the district court err in denying Mr. Mackey's 28 U.S.C. § 2241 habeas petition, brought pursuant to the 28 U.S.C. § 2255(e) savings clause?

Held. Yes.

Background and procedural history. Mr. Mackey pleaded guilty to possession of a firearm after having previously been convicted of a felony. His sentence was enhanced pursuant to the Armed Career Criminal Act (ACCA). Mr. Mackey's direct appeal concerned only his unsuccessful motion to suppress and the Eleventh Circuit denied relief. He then filed his first § 2255 petition on issues unrelated to his ACCA-enhanced sentence. The district court denied the petition, and both that court and the Eleventh Circuit refused to grant a Certificate of Appealability. Mr. Mackey then filed a 18 U.S.C. § 3582(c)(2) motion to reduce his sentence, arguing that under *Begay* his Florida concealed-firearm convictions were not "violent felonies" under the ACCA. The district court construed this motion as a second § 2255 petition and dismissed it. Mr. Mackey subsequently filed a § 2241 petition arguing that, under *Begay* and *Archer*, his Florida concealed-firearm convictions were not ACCA violent felonies. The Government admitted that Mr. Mackey's petition was meritorious and expressly waived "any affirmative defense of procedural default." Slip op. at 7. The district court nevertheless denied the petition, concluding that Mr. Mackey could not invoke the § 2255(e) savings clause because he did not claim "actual innocence of the underlying offense."

Analysis. The Eleventh Circuit (Judge Hull, for Southern District of Georgia Judge Bowen) reversed. Applying the five-part test established in *Bryant*, the Court concluded that Mr. Mackey could invoke the § 2255(e) savings clause because the Supreme Court did not decide *Begay*—and therefore open a retroactive avenue of relief for Mr. Mackey—until after his sentencing hearing, direct appeal, and first § 2255 petition. With the advent of *Begay*, the statutory maximum custodial sentence for Mr. Mackey's offense was reduced from fifteen years to ten years. The Eleventh Circuit vacated the district court's denial of the § 2241 petition with instructions that the court grant the petition and reduce Mr. Mackey's sentence to the ten-year statutory maximum.

Judge Martin concurred in the judgment and dissented in part for the same reasons set forth in her *Bryant* dissent.

United States v. Stanley, No. 12-11126 (Jan. 6, 2014)

Issues.

1. Did the district court fail to establish the defendant's valid and knowing waiver of his right to counsel by waiting until after opening statements and two hours of trial before colloquying the defendant?

2. Did the district court abuse its discretion by refusing to allowing the defendant's standby counsel to assume representation after the defendant absconded?

Held.

1. No.

2. No.

Background and procedural history. Mr. Stanley and Mr. Harris were indicted and tried together for multiple counts of securities fraud. Shortly before trial, Mr. Harris moved to represent himself. The district court agreed and, without engaging in a *Faretta* colloquy with Mr. Harris, permitted Mr. Harris to take over and deliver an opening statement. Later that same day, however, the court did colloquy Mr. Harris and reaffirmed its earlier decision to permit him to represent himself.

After the Government rested its case, Mr. Harris absconded, and the district court refused to allow Mr. Harris's standby counsel to represent him in absentia. The court also denied Mr. Stanley's motions to sever and for a mistrial. The jury found Mr. Harris guilty on all counts and Mr. Stanley guilty on five of seven counts. At sentencing, the district court noted both defendants' lack of remorse, but clarified that it was just one of many factors it considered in imposing sentence. Both defendants appealed, individually challenging various aspects of the trial and sentencing.

Analysis. The Eleventh Circuit (Judge Marcus, for Judge Tjoflat and Northern District of Florida Judge Vinson) affirmed both defendants' convictions and sentences based on the following rationales.

Mr. Harris's self-representation at trial. The Court rejected Mr. Harris's argument that the district court erred by permitting him to represent himself at trial. The argument was based on the fact that the court permitted Mr. Harris to deliver his opening statement without conducting a full *Faretta* inquiry. The Eleventh Circuit held that the delayed *Faretta* inquiry revealed that Mr. Harris was capable of self-representation and that his responses to the court's questions were unlikely to have been different if elicited a couple of hours earlier when he first announced his wish to proceed pro se.

The district court's refusal to permit Mr. Harris's standby counsel to take over after Mr. Harris absconded. The Eleventh Circuit rejected this argument because Mr. Harris's decision to flee did not constitute rescission of his earlier knowing and voluntary waiver of his right to counsel.

Mr. Stanley's motions to sever and for a mistrial. Mr. Stanley first moved to sever, and then for a mistrial, on the grounds that Mr. Harris's abscondment called his good faith into question and that Mr. Stanley suffered by association. The Eleventh Circuit held that the district court did not abuse its discretion. Mr. Stanley could not show "specific and compelling prejudice" resulting in "fundamental unfairness" due to the court's decision because the court issued a no-negative-inference curative instruction. Slip op. at 30-31.

The district court's consideration of Mr. Harris's lack of remorse at sentencing. Mr. Harris argued that the court's consideration of Mr. Harris's apparent lack of remorse was tantamount to penalizing Mr. Harris for exercising his Fifth Amendment right against self-incrimination. The Eleventh Circuit was unpersuaded due to precedent confirming that a district court may take lack of remorse into consideration when imposing sentence.

Mr. Stanley's sentencing arguments. The Eleventh Circuit rejected Mr. Stanley's arguments that he should have received a minor role departure and that his sentence was substantively unreasonable. His argument on the former was supported only by his protestations of innocence and by the fact that he was less culpable than Mr. Harris. The Court reiterated that a lesser degree of culpability does not automatically entitle a defendant to the departure and noted that the court nonetheless took Mr. Stanley's lower culpability into account by sentencing him to a shorter prison sentence than Mr. Harris received. The Court summarily rejected the substantive reasonableness challenge.

LeCroy v. United States, No. 12-15132 (Jan. 15, 2014)

Issue. Was the petitioner denied the effective assistance of counsel during the penalty phase of his trial?

Held. No.

Background and procedural history. In 2004, Mr. LeCroy was convicted in federal district court of taking a motor vehicle by force, resulting in a woman's death.

Mr. LeCroy's trial attorneys hired Dr. Michael Hilton, a forensic psychiatrist, to conduct a mental evaluation of Mr. LeCroy so that they could formulate a trial strategy. Dr. Hilton's report noted Mr. LeCroy's childhood sexual abuse but nonetheless concluded that Mr. LeCroy was competent, could not present an insanity defense, knew that killing the victim was wrong but did it anyway, and suffered from borderline and antisocial personality disorders. Mr. LeCroy's attorneys examined Dr. Hilton's reports but did not meet with him in person. They also chose not to call him as a witness in order to avoid revealing his reports to the Government and subjecting Mr. LeCroy to a Government evaluation pursuant to Fed. R. Crim. P. 12.2. Additionally, because Mr. LeCroy's attorneys decided to proceed with a botched-burglary defense–claiming that Mr. LeCroy had not premeditated murdering the victim–Dr. Hilton's conclusions, if presented to the jury, would undercut the defense theory and the defense attorneys' credibility. Mr. LeCroy's trial attorneys also hired Dr. David Lisak as an expert witness who could "teach" the jury about to the relationship between childhood sexual abuse and criminality in men. To avoid triggering Rule 12.2, Mr. LeCroy's attorneys had Dr. Lisak review records pertaining to Mr. LeCroy's criminal history and mental

evaluations but did not personally evaluate him. The district court nevertheless granted the Government's motion for an evaluation of Mr. LeCroy by its own expert. That expert's report flatly rejected Mr. LeCroy's position that his childhood sexual abuse was a mitigating factor to his crime. Mr. LeCroy's attorneys therefore declined to call Dr. Lisak as a witness because they did not want to open the door to testimony from the Government's expert.

During closing arguments of the sentencing phase, one of Mr. LeCroy's attorneys reminded the jury that Mr. LeCroy had been sexually abused as a child and explained how it affected him as an adult. At the conclusion of the sentencing phase, the district court's jury instructions allowed the jury to consider the factor of future dangerousness to the public if it found beyond a reasonable doubt that Mr. LeCroy posed a "risk" of escape. Mr. LeCroy's attorneys did not object, and they also did not request a jury instruction that the balancing of aggravating and mitigating factors be conducted according to a reasonable doubt standard.

Mr. LeCroy was sentenced to death and, after unsuccessfully pursuing other avenues for relief, appealed the denial of his petition to vacate his sentence pursuant to 28 U.S.C. § 2255. Mr. LeCroy claimed in his habeas petition that he was denied effective assistance of counsel during the sentencing phase of his trial based on (1) his attorneys' alleged failure to investigate and present mental health evidence during the sentencing phase, (2) his attorneys' failure to object to jury instructions regarding his future dangerousness, and (3) his attorneys' failure to request a jury instruction that the balancing of aggravating and mitigating factors be conducted according to the reasonable doubt standard. The district court denied relief.

Analysis. The Eleventh Circuit (Judge Tjoflat for Judges Hull and Marcus) affirmed, finding that Mr. LeCroy was not denied the effective assistance of counsel during the sentencing phase of his trial.

Mental health evidence. The Court found that the attorneys' performance was not deficient and did not prejudice his defense. *Strickland v. Washington*, 466 U.S. 668 (1984), does not require attorneys to meet in person with a report's author when the author's conclusions are plain from the report, and Mr. LeCroy's attorneys' decisions not to call Dr. Hilton or Dr. Lisak as expert witnesses were strategic ones deserving of *Strickland* deference. It was also not unreasonable that Dr. Lisak did not personally evaluate Mr. LeCroy, and the defense team's decisions to insulate their expert from cross examination and to protect Mr. LeCroy from a Government evaluation were reasonable, tactical, and competent. Finally, while Mr. LeCroy's counsel might have done more during closing arguments to stress the connection between Mr. LeCroy's abuse and his crime, her performance was competent, and *Strickland* does not require perfection, only competence.

As to prejudice, the Court found that the decisions not to call either mental health expert did not prejudice Mr. LeCroy because Dr. Hilton's and Dr. Lisak's testimonies would have likely been more aggravating than mitigating and would have opened the door to rebuttal testimony from the Government's mental health expert.

Failure to object to jury instructions. The Court held that Mr. LeCroy's attorneys did not perform deficiently because the jury instructions did not misstate the law, and, in any event, there was no prejudice because "the jury found every other aggravating factor alleged by the Government." Slip op. at 52-53.

Failure to request reasonable doubt jury instruction. The Eleventh Circuit rejected this argument because "[a]t the time of LeCroy's trial in 2004, no court had found that the jury had to be instructed that it conduct its balancing inquiry against a reasonable doubt standard." Slip op. at 53-54. A *Strickland* analysis involves predominating professional standards at the time of trial and not changes to the law that later occur.

United States v. Gutierrez, No. 12-13809 (Jan. 16, 2014)

Issue. Did the district court constructively amend the indictment by tracking the statutory language rather than the more stringent phrasing of the indictment?

Held. No.

Background and procedural history. As Mr. Gutierrez and his father passed through customs in West Palm Beach, Florida, Mr. Gutierrez's father whistled at a Customs and Border Protection Officer's dog. The officer felt this was suspicious and led Mr. Gutierrez's father to another room for questioning. Mr. Gutierrez told the officer to leave his father alone and eventually the two men engaged in a physical confrontation. Mr. Gutierrez was indicted for forcibly assaulting a federal officer in the performance of his duties, in violation of 18 U.S.C. § 111(a)(1). He was found guilty after a jury trial. Mr. Gutierrez appealed, alleging error in the district court's refusal to deliver several jury instructions and in delivering an instruction that resulted in the constructive amendment of the indictment.

Analysis. The Eleventh Circuit (Eastern District of Pennsylvania Judge Baylson for Judges Martin and Jordan) affirmed. The Court summarily rejected several of Mr. Gutierrez's issues and resolved the others as follows.

Constructive amendment of indictment. The indictment charged that Mr. Gutierrez "did forcibly assault, oppose, impede, and interfere" with the officer, while the court's instructions to the jury stated that he "forcibly assaulted, resisted, opposed, impeded, intimidated or interfered." The Eleventh Circuit held that the court's instruction did not constructively amend the indictment because the § 111(a)(1) is phrased in the disjunctive and binding circuit precedent provides that there is no constructive amendment where, as here, the Government charged more than it was required to by the statute.

Simple assault instruction. The Court held that, because it was undisputed that Mr. Gutierrez made physical contact with the officer, the district court did not abuse its discretion by "refusing to give an instruction relevant only to a scenario in which no physical contact had occurred." Slip op. at 13.

Forcible assault instruction. The Eleventh Circuit held that it was not plain error for the district court to decline to instruct the jury on the pattern definition of "forcible assault." This definition "almost entirely concerns attempts or threats," which would have been noninformative at best and confusing at worst for the jury since this case did not involve attempts or threats. Slip op. at 15 (emphasis in original).

Self defense instruction. The Court held that the district court did not plainly err in not delivering this instruction. Counsel must request such an instruction, and although counsel here did initially request it, he then expressed misgivings at the charge conference and stated that he may wish for it not to be delivered after all. The district court responded that counsel should raise the issue the following day. Counsel failed to do so, and, therefore, it was not plain error for the court to not give the instruction.

United States v. Mathauda, No. 11-13558 (Jan. 21, 2014)

Issue. Did the district court err by applying the two-level USSG §2B1.1(b)(9)(C)* enhancement for violation of a prior court order?

Held. Yes.

Background and procedural history. Mr. Mathauda was convicted on multiple counts of mail and wire fraud. At sentencing, he objected to the PSR's inclusion of the two-level §2B1.1(b)(9)(C) enhancement for violation of a prior court order. Mr. Mathauda argued that while he had been served with notice of that earlier action and retained counsel to represent him, he did not know that his attorney had failed to respond, that a default judgment was eventually entered against him, and that the court ordered him to cease and desist the same essential activity at issue in the instant case. The Government conceded all of these facts but maintained that Mr. Mathauda should still receive the enhancement because he was willfully blind to the court's order, which satisfies the guideline's "knowing" requirement. The district court agreed and overruled Mr. Mathauda's objection.

Analysis. The Eleventh Circuit (per curiam, before Chief Judge Carnes, Judge Wilson, and Middle District of Florida Judge Corrigan) vacated Mr. Mathauda's sentence and remanded for resentencing. The Court found that the district court erred in applying the §2B1.1(b)(9)(C) enhancement because the Government failed to show that Mr. Mathauda was willfully blind to the court order. The Court, adopting the reasoning of *United States v. Bisong*, 645 F.3d 384, 399-400 (D.C. Cir. 2011), determined that the Government's burden was to prove by a preponderance of the evidence that Mr. Mathauda "purposefully contrived to avoid learning all the facts," or was aware of "a high probability of the fact in dispute and consciously avoided confirming that fact." Slip op. at 10. Although Mr. Mathauda was aware of the pending action against him, he hired an attorney to represent him and that was all. That court's final order was never served on him, and he never heard anything more about that case until his sentencing in the instant case. The Eleventh Circuit accordingly found that the Government failed to meet its burden.

*At the time of Mr. Mathauda's sentencing, this guideline provision was set forth at §2B1.1(b)(8)(C).

United States v. Aguilar-Ibarra, No. 13-10307 (Jan. 22, 2014)

Issue. Did the district court err in holding that the defendant's objection to the PSR was untimely where the defendant waited until sentencing to raise the objection because both the defendant and the Government had previously agreed that a particular guidelines enhancement was inapplicable?

Held. No.

Background and procedural history. Mr. Aguilar-Ibarra pleaded guilty to conspiracy to commit a Hobbs Act robbery and to Hobbs Act robbery. At sentencing, Mr. Aguilar-Ibarra objected for the first time to the PSR's application of the two-level USSG §2B3.1(b)(3)(A) enhancement for bodily injury. The district court overruled the objection as untimely because it was not raised within the 14-day period established by Fed. R. Crim. P. 32(f)(1) and also noted that it was "without merit." Mr. Aguilar-Ibarra appealed, arguing that the 14-day time limit was inapplicable because he and the Government had agreed the enhancement was inapplicable and, alternatively, that the district court waived the timeliness requirement by ruling on the merits of his objection.

Analysis. The Eleventh Circuit (per curiam, before Chief Judge Carnes and Judges Hull and Fay) affirmed. The Court rejected Mr. Aguilar-Ibarra's argument that Rule 32(f)(1)'s 14-day requirement exists only to resolve disputes between the parties, rendering it unnecessary to file advance written objections to undisputed PSR errors. The Eleventh Circuit noted that the rule clearly requires all objections to be filed, in writing, in advance of the sentencing hearing. The Court wrote that "the manifest purpose of Rule 32 as a whole . . . is to ensure that the district court can meaningfully exercise its sentencing authority based on a complete and accurate account of all relevant information." Slip op. at 6. The Court also rejected Mr. Aguilar-Ibarra's argument that the district court waived the timeliness requirement with its offhand comment on the merits of the objection.

United States v. Yeary, No. 11-13427 (Jan. 22, 2014)

Issue. Did the district court err in denying the defendant's motion to suppress evidence seized during warrantless searches of the defendant's residences?

Held. No.

Background and procedural history. Mr. Yeary was indicted on multiple drug-trafficking and firearm possession counts. He moved to suppress the fruits of three warrantless searches of his various residences.

The first warrantless search occurred when officers came to Mr. Yeary's residence to arrest him. Mr. Yeary's girlfriend at the time, Ms. Kline, answered the door and, before entering the premises, they observed a firearm in plain view. The officers conducted a protective sweep for the purpose of locating two other individuals Ms. Kline said were present and, in so doing, the officers observed drugs and drug paraphernalia in plain view.

The second warrantless search occurred when Mr. Yeary was subject to the conditions of in-house arrest while awaiting trial on drug and violent crime charges. Under the terms of his in-house arrest, Mr. Yeary waived his right to refuse to consent to warrantless searches of his residence. Officers conducted a warrantless search that yielded drugs, a firearm, and ammunition.

The third warrantless search occurred when officers arrived at the residence of Mr. Yeary and his then-girlfriend, Ms. Sackmann. Ms. Sackmann informed the officers that she was the lessee of the residence and invited the officers inside. Once inside, officers observed in plain view a Ziploc bag that they suspected contained cocaine residue. Officers then asked permission to search the residence, and Ms. Sackmann consented both verbally and in writing. The search yielded drugs and ammunition.

The district court denied Mr. Yeary's motion to suppress. Mr. Yeary proceeded to trial and the jury adjudged him guilty on nearly all counts. Mr. Yeary appealed the denial of his motion to suppress.

Analysis: The Eleventh Circuit (Judge Tjoflat for Judge Fay and Judge Martin, in part) affirmed. The Court found that an exception to the Fourth Amendment's warrant requirement justified each search.

The first search. The Court found that the officers conducted a valid protective sweep. After seeing the firearm and being informed that two other unseen individuals were in the home, the officers had a reasonable suspicion of danger that justified the protective sweep. The protective sweep was limited in scope, and the officers observed the contraband in plain view during the sweep. *See United States v. Smith*, 459 F.3d 1276 (11th Cir. 2006).

The second search. The Eleventh Circuit held that Mr. Yeary knowingly and voluntarily consented to the warrantless search of his home. When analyzing consent searches, voluntariness is required, and knowledge is a factor to be considered. *See United States v. Bustamonte*, 412 U.S. 218 (1973). Mr. Yeary's consent was knowing and voluntary, as evidenced by his thorough review of the in-house arrest agreement and his signature thereon.

The third search. The Court determined that Ms. Sackmann voluntarily consented to the search of her and Mr. Yeary's home. The officers' search was not unreasonable because they reasonably believed at the time of the search that Ms. Sackmann possessed authority over the premises. *See United States v. Mercer*, 541 F.3d, 1070 (11th Cir. 2008).

Judge Martin concurred and wrote separately to express her view that the Court should apply a "totality of the circumstances" test to determine whether the second search was valid.

United States v. Harris, No. 12-14482 (Jan. 28, 2014)

Issues.

1. Whether the imposition of a mandatory sentence of life imprisonment under 18 U.S.C. § 3559(c), without a finding by the jury of the defendant's prior convictions, is consistent with *Alleyne v. United States*, 133 S. Ct. 2151 (2013)?

2. Whether imposition of a mandatory life sentence under 18 U.S.C. § 3559(c) and 21 U.S.C. § 851 is unconstitutional on separation of powers grounds?

Held.

1. Yes.

2. No.

Background and procedural history. After a jury trial, Mr. Harris was convicted of three counts of Hobbs Act robbery and four counts relating to his possession and use of firearms during those robberies. Because he had been previously convicted of two or more serious violent felonies or serious drug offenses, he was subject to a mandatory sentence of life imprisonment under 18 U.S.C. § 3559(c). The district court imposed the statutorily mandated life sentence to be served consecutive to 57 years of imprisonment for his other crimes.

Analysis. The Eleventh Circuit (Chief Judge Carnes for Judges Hull and Marcus) affirmed Mr. Harris's sentence.

The Court first noted that "*Alleyne* did not address the specific question at issue in this case, which is whether a sentence can be increased because of prior convictions without a jury finding the fact of those convictions." Slip op. at 8. The Court then stated that this question continues to be governed by *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27, 118 S. Ct. 1219, 1222 (1998), where "the Court determined that the fact of a prior conviction is not an 'element' that must be found by a jury." Slip op. at 8. The Eleventh Circuit noted that tension exists between *Almendarez-Torres* and *Alleyne* and *Apprendi*, but further notes that it lacks the authority to overrule *Almendarez-Torres* and, therefore, it cannot hold that the district court erred in imposing a mandatory life sentence under § 3559(c) without jury findings about the existence of Mr. Harris's prior convictions.

The Court also quickly disposed of Mr. Harris's constitutional claims, noting that it previously held in *United States v. Holmes*, 838 F.2d 1175 (11th Cir. 1988) that mandatory minimum sentences do not violate the separation-of-powers doctrine. Slip op. at 10. The Court further noted that several of its sister circuits have held that § 3559(c) does not violate separation-of-powers principles and that it finds these decisions persuasive.

United States v. Ransfer, No. 12-12956 (Jan. 28, 2014)

Issues.

1. Whether the district court erred in admitting evidence obtained from the installation and use of a GPS tracking device without a warrant?

2. Whether the district court erred in admitting hearsay testimony and denying a motion to suppress post-arrest statements to police?

3. Whether sufficient evidence existed to convict a defendant?

Held.

1. No, the officers exercised good-faith reliance on then-binding precedent.

2. No, the district court did not abuse its discretion in any evidentiary rulings.

3. Yes and no, a reasonable trier of fact could find the defendant guilty of conspiracy to commit Hobbs Act robbery and charges related to the three of the armed robberies, but not as to the fourth robbery.

Background and procedural history. Between April 2011 and June 2011, a series of armed robberies occurred in Florida. An informant led investigators to several suspects and a subsequent investigation established the use of a particular vehicle used in the robberies to which the police attached a GPS tracking device. Shortly thereafter, police received notice of another robbery matching the *modus operandi* of the prior robberies and activated the GPS tracking device. Ultimately, police located the vehicle and physical evidence of the robberies on the defendants and the vehicles they were driving. Upon speaking with police, Mr. Ransfer and Mr. Hanna admitted their participation in the four robberies charged, but Mr. Lowe admitted only his presence at three of the robberies. The appellants were charged with sixteen counts of Hobbs Act robbery, conspiracy, and use and carrying of firearms during the commission of a violent crime.

The appellants later moved to suppress the evidence flowing from the warrantless GPS search and their post-arrest statements. After a hearing, the district court denied the motions, and the appellants proceeded to trial. A jury convicted the three appellants on all counts.

Analysis. The Eleventh Circuit (E.D. PA Judge Michael Baylson for Judges Martin and Jordan) vacated some convictions against Mr. Lowe and affirmed all others against him and his co-defendants.

As to the evidence resulting from the warrantless installation of the GPS, the Court held that reasonable suspicion existed as to the involvement of the vehicle with the robberies and that the police reasonably relied on then-binding precedent that installation of a device permitting electronic surveillance of a vehicle did not violate the Fourth Amendment when police have reasonable suspicion. Slip op. at 19 *citing United States v. Michael*, 645 F.2d 252, 258 (5th Cir. 1981).

Next, the Court held that it need not decide whether the district court erred in admitting all of the investigator's testimony because, even if it was error, it was not reversible error because the evidence about which he testified was otherwise admissible on the record. The Court relied on prior precedent holding that "[t]o require a new trial . . . [a] significant possibility must exist that, considering the other evidence presented by both the prosecution and the defense, the . . . statement had a substantial impact upon the verdict of the jury." Slip op. at 24 *citing United States v. Arbolaez*, 450 F.3d 1283, 1290 (11th Cir. 2006) (citations omitted).

Third, viewing the evidence in the light most favorable to the government, the Court affirmed all of the convictions with exception to those against Mr. Lowe relating to the Kendall CVS. As to this robbery, the Court held that because "there was no evidence of Lowe's conduct at the Kendall CVS, and evidence of his presence in the vicinity alone is insufficient to convict for aiding and abetting the CVS Kendall robbery." Slip op. at 40. In so finding, the Court held that cell phone records indicating that Mr. Lowe was near the Kendall CVS were sufficient to find that "a reasonable trier of fact could find beyond a reasonable doubt that Lowe 'associated himself with' the Kendall CVS robbery," but not that he acted in furtherance of the robbery. Slip op. at 39.

Lastly, the Court held that the appellants failed to show that any of the magistrate judge's findings about the voluntariness of their statements to police were erroneous.

Cadet v. State of Fla. Dep't. of Corr., No. 12-14518 (Jan. 31, 2014)

Issue. Does an attorney's negligent and willfully ignorant advice as to the federal habeas filing deadline constitute abandonment of his client and, therefore, permit equitable tolling of the deadline?

Held. No.

Background and procedural history. Mr. Cadet was convicted of sexual battery in Florida state court. After his conviction was affirmed on direct appeal, Mr. Cadet sought state habeas relief. Once the Florida state courts issued a final ruling denying Mr. Cadet's state habeas petition, Mr. Cadet filed a motion for an alternate form of Florida-specific post-conviction relief in the state trial court. This tolled Mr. Cadet's one-year deadline for filing a federal habeas petition. *See* 28 U.S.C. § 2244(d)(1). However, at this point, only five days remained of the 1-year period, the first 360 having run before Mr. Cadet filed his earlier state habeas petition and between the denial of that petition and Mr. Cadet's filing of the post-conviction relief motion.

While the motion for post-conviction relief was pending, Mr. Cadet had numerous discussions with his counsel about filing a federal habeas petition if the state court denied relief. Counsel mistakenly believed that the one-year period did not begin to run until the state motion for post-conviction relief was denied. Mr. Cadet, on the advise of jailhouse lawyers, was convinced that his time was almost up, although he did not realize that only five days remained. Mr. Cadet repeatedly told counsel that he thought he was wrong about the time limit, and counsel, without doing any research, insisted that he was correct. Mr. Cadet ultimately relented.

The Florida state court denied the motion for post-conviction relief, and counsel filed a federal habeas petition more than one year after the one-year period had run. The district court dismissed the petition as untimely, and only then did counsel realize that he was wrong about the interpretation of § 2244(d). Counsel and his eventual successor argued for equitable tolling of the limitations period based on counsel's error. The district court denied relief, ruling that although counsel was negligent, his conduct was not "so egregious as to amount to an effective abandonment of the attorney-client relationship," the standard that Mr. Cadet had to satisfy to invoke equitable tolling. Slip op. at 7. The Eleventh Circuit granted Mr. Cadet a certificate of appealability.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judge Fay) affirmed. The majority noted that equitable tolling is an extraordinary remedy "limited to rare and exceptional circumstances and typically applied sparingly." Slip op. at 8, *quoting Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009). Binding Supreme Court authority commands that, based on well-settled principles of agency law, a federal habeas petitioner is generally bound by his attorney's errors, including misinterpretation of a filing deadline. The narrow exception, memorialized in *Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549 (2010), and *Maples v. Thomas*, ___ U.S. ___, 132 S. Ct. 912 (2012), is for situations where counsel abandons his client, thereby severing the principal-agent relationship. The Court was unpersuaded by Mr. Cadet's argument that his counsel's negligent representation was so egregious as to constitute abandonment and held that "attorney negligence, however gross or egregious, does not qualify as an 'extraordinary circumstance' for purposes of equitable tolling." Slip op. at 17-18. Counsel merely provided appallingly bad representation, rendering *Holland*/*Maples* inapposite to this case. The Court reasoned that to adopt Mr. Cadet's argument would mean that a principal would only be bound by an agent's conduct on his behalf where it was advantageous to him.

Judge Wilson concurred in the judgment and wrote a separate opinion. He noted that the Supreme Court in *Holland* rejected the Eleventh Circuit's previous precedent on this issue as too draconian and wrote that he believed that the Supreme Court left open "the possibility that attorney misconduct which does not rise to the level of abandonment *might* constitute extraordinary circumstances sufficient to warrant equitable tolling." Slip op. at 32 (Wilson, J., concurring) (emphasis in original).

United States v. Reeves, No. 12-13110 (Feb. 6, 2014)

Issues.

1. Was there sufficient evidence to support two defendants' convictions for conspiracy to distribute cocaine?

2. Did the district court abuse its discretion in admitting recorded telephone calls that the defendant argued were improperly authenticated by an agent whose testimony was impermissibly bolstered by Government counsel?

3. Did the district court abuse its discretion in admitting alleged hearsay in the form of a co-conspirator's statements against one of the defendants?

4. Did the district court abuse its discretion in denying one defendant's motion for a mistrial after a government agent, during direct examination, improperly revealed the defendant's invocation of her right to counsel?

5. Did the district court abuse its discretion in denying a defendant's motion for a mistrial based on a series of allegedly improper prosecutorial statements during closing arguments?

6. Did the district court abuse its discretion in determining the drug quantity attributable to one defendant during his sentencing hearing?

Held.

1. Yes.

2-6. No.

Background: Michael Reeves, Shawanna Reeves (Ms. Halcomb-Reeves), and Thornton Moss, among others, were convicted of conspiracy to distribute cocaine. The Government's evidence at trial included (1) testimony of law enforcement officers who had conducted the investigation that detailed the defendants' involvement in the conspiracy; (2) testimony of several co-conspirators who detailed the defendants' involvement in the conspiracy; (3) a variety of recorded, incriminating telephone calls among the coconspirators and with third parties.

The recorded calls were authenticated through law enforcement and co-conspirator testimony. Two days prior to the law enforcement officer's testimony, Government counsel referred to the officer as an expert and proffered information about her experience. During direct examination, the officer revealed that Ms. Halcomb-Reeves invoked her right to counsel when he was questioning her. Ms. Halcomb-Reeves objected and unsuccessfully moved for a mistrial.

During closing arguments, the prosecution: (1) misstated that jurors must consider Ms. Halcomb-Reeves's testimony in the same way they assess a cooperating co-conspirator's testimony; (2) incorrectly alleged that one defendant's counsel referenced facts not in evidence during his closing argument, and (3) inaccurately attributed two kilograms of cocaine to Mr. Moss. The Government quickly clarified the third statement.

At sentencing, the district court based the drug quantity attributable to Mr. Reeves on a co-conspirator's trial testimony.

Analysis: The Eleventh Circuit (Judge Marcus, for Judge Edmondson and Northern District of Florida Judge Vinson) affirmed.

Sufficiency of the evidence. The Court found that the evidence presented at trial was sufficient to convict Mr. Reeves and Ms. Halcomb-Reeves of conspiracy to distribute cocaine because the Government met its burden of proving that "1) an agreement existed between two or more people to distribute the drugs; 2) that the defendant at issue knew of the conspiratorial goal; and 3) that he knowingly joined or participated in the illegal venture." *See United States v. Brown*, 587 F.3d 1082, 1089 (11th Cir. 2009). The Court found that the recorded telephone calls and testimony of co-conspirators and law enforcement officers was sufficient evidence for the jury to find Mr. Reeves and Ms. Halcomb-Reeves guilty.

Recorded telephone calls. The Eleventh Circuit held that the district court did not err in admitting the recorded telephone calls between Mr. Reeves and Ms. Halcomb-Reeves. Objections as to the co-defendant's identification of Ms. Halcomb-Reeves's voice were pertinent to the weight of the evidence, not its admissibility. Further, the law enforcement officer's identification of Ms. Halcomb-Reeves's voice was permissible pursuant to Fed. R. Evid. 901(b)(5). And the Government

did not improperly bolster the voice identification testimony the officer by eliciting testimony at her experience as a foundation to qualifying her as an expert witness. *See United States v. Bernal-Benitez*, 594 F.3d 1303, 1313-14 (11th Cir. 2010).

Co-conspirator testimony. The Court held that the district court did not abuse its discretion by admitting inculpatory co-conspirator testimony. Such testimony is admissible pursuant to Fed. R. Evid. 801(d)(2)(E) if the Government proves by a preponderance of the evidence that: "(1) a conspiracy existed; (2) the conspiracy included the declarant and the defendant against whom the statement is offered; and (3) the statement was made during the course and in furtherance of the conspiracy." *United States v. Magluta*, 340 F.3d 1166, 1177-78 (11th Cir. 2005).

Motions for mistrial. The Eleventh Circuit held that the district court did not err in denying Ms. Halcomb-Reeves's motion for a mistrial based on the officer's revelation that she invoked her right to counsel because Ms. Halcomb-Reeves was not in custody when she made the statement and, even if she had been Mirandized, the district court was within its discretion in denying the motion for mistrial. "A single, inappropriate reference to a defendant's post-arrest silence that is not mentioned again is too brief to constitute a Fifth Amendment violation." *United States v. Baker*, 432 F.3d 1189, 1222 (11th Cir. 2005). Ms. Halcomb-Reeves also declined the district court's offer of a curative instruction.

The Court held that the district court did not abuse its discretion by refusing to grant Mr. Moss a mistrial based on the allegedly improper remarks from the prosecution during closing arguments. To find prosecutorial misconduct, "(1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant." *United States v. Gonzalez*, 122 F.3d 1383, 1389 (11th Cir.1997).

Attributable drug quantity. The Eleventh Circuit held that the district court properly determined the drug quantity attributable to Mr. Reeves by a preponderance of the evidence, based on its credibility assessment of the co-conspirator's testimony at trial.

Chavez v. Sec'y, Fla. Dept. of Corr., No. 14-10486 (Feb. 10, 2014)

Issue. Did the district court err in denying petitioner's pro se request for appointment of counsel for the purpose of investigating whether his present counsel rendered ineffective assistance within the meaning of *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012)?

Held. No.

Background and procedural history. Mr. Chavez was sentenced to death by a Florida state court in 1998. The Florida appellate courts affirmed his convictions and sentence on direct appeal, and the U.S. Supreme Court denied his petition for certiorari. Mr. Chavez's then-counsel neglected to file a federal habeas petition within the one-year limit set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) but did pursue state collateral relief. During the time Mr. Chavez's state collateral relief proceedings were pending, Mr. Chavez received new counsel. In 2009, the Florida Supreme Court affirmed the lower court's denial of collateral relief and the U.S. Supreme Court denied Mr. Chavez's petition for certiorari.

Mr. Chavez's new counsel then filed a federal habeas petition on Mr. Chavez's behalf in 2010, and the district court officially appointed him as habeas counsel. The court subsequently dismissed the petition, rejecting Mr. Chavez's claim that he was entitled to equitable tolling due to the ineffective assistance of his original counsel. The Eleventh Circuit affirmed. Counsel thereafter continued active representation of Mr. Chavez, filing two successive, unsuccessful petitions for collateral relief in Florida state court.

In January 2014, roughly one month before his scheduled execution, Mr. Chavez filed a pro se request for appointment of counsel in federal district court. Mr. Chavez requested "conflict-free" counsel to investigate his current counsel for ineffective assistance in his state collateral proceedings and identify a potential avenue for federal relief pursuant to the Supreme Court's decision in *Martinez*. The district court denied Mr. Chavez's request.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judges Wilson and Marcus) affirmed. The Court first noted that Mr. Chavez's request should have been construed as a motion for substitution of counsel rather than as a request for counsel since incumbent counsel was duly appointed as habeas counsel and was obliged to continue in that capacity until replaced by other counsel. As to the merits, the Court concluded that the district court correctly held that Mr. Chavez was not entitled to new counsel for the purpose of investigating and prosecuting a *Martinez* claim because that claim would be futile. *Martinez* did not, as Mr. Chavez appeared to argue, change the rule that a habeas petitioner is precluded from relying on the ineffectiveness of his postconviction attorney as a ground for relief; to the contrary, the case expressly reiterated that principle. The only change in the law wrought by *Martinez* was a narrow exception to the procedural default rule that was inapplicable to Mr. Chavez's case.

Judge Martin concurred in the judgment and filed a separate opinion. Although the judge agreed with the majority that the appointment of conflict-free counsel to investigate a *Martinez* claim would have been futile, she did believe that conflict-free counsel may have been able to assist Mr. Chavez in other ways. However, since the *Martinez* claim was the only one identified by Mr. Chavez, Judge Martin concurred with the majority's disposition.

United States v. Smith, No. 12-14842 (Feb. 11, 2014)

Issue. In light of *Descamps v. United States*, ___U.S. ___, 133 S. Ct. 2276 (2013), is fleeing and eluding a law enforcement officer, Fla. Stat. § 316.1935(2), categorically a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e)?

Held. No, but it qualifies as a violent felony under the residual clause, 18 U.S.C. § 924(e)(2)(B)(ii).

Background and procedural history. Mr. Smith pleaded guilty to knowingly possessing a firearm after having previously been convicted of a felony. At sentencing, the district court found that Mr. Smith's prior convictions for false imprisonment, burglary of an unoccupied dwelling, and fleeing and eluding a police officer were violent felonies under the ACCA and sentenced him to an enhanced sentence of 180 months under the ACCA.

Analysis. The Eleventh Circuit (Judge Pryor for Chief Judge Carnes and Judge Tjoflat) affirmed Mr. Smith's sentence.

In light of *Descamps*, the district courts should not apply the modified categorical approach to determine whether Florida's crime of fleeing and eluding a law enforcement officer is a violent felony because the crime has a single, indivisible set of elements. However, the Court concluded that "fleeing and eluding a law enforcement officer, whether in a vehicle or on foot, is a violent felony under the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii)." Slip op. at 10. In so concluding, the Court held that fleeing and eluding an officer presents a serious potential risk of physical injury to another. *See Sykes v. United States*, ___U.S. ___, 131 S. Ct. 2267, 2273 (2011).

United States v. Isnadin, No. 12-13474 (Feb. 14, 2014)

Issues.

1. Whether the district court abused its discretion when it instructed the jury to consider the defense of entrapment separately as to each count?

2. Whether sufficient evidence supported the convictions?

Held.

1. No.

2. Yes.

Background and procedural history. An undercover agent offered the defendants the opportunity to rob a stash house, and the defendants met the agent at a warehouse on the arranged day. In a nine-count indictment, the defendants were charged with conspiracy to commit a Hobbs Act robbery, conspiracy to possess with the intent to distribute cocaine, attempting to possess with the intent to distribute cocaine, conspiracy to carry a firearm during and in relation to crimes of violence, and being felons in possession of a firearm. Three of the four defendants proceeded to trial, where they argued that they were entrapped.

The district court gave the pattern jury instruction for entrapment, and the jury submitted a question about whether entrapment as to one count should affect its verdict as to the other counts. The district court instructed the jury to consider the defense of entrapment separately and individually as to each defendant and each count in the indictment. The defendants were found guilty of conspiracy to distribute cocaine and conspiracy to use and carry a firearm during the distribution of cocaine, but not guilty of the Hobbs Act charge and the felon in possession charges.

Analysis. The Eleventh Circuit (N.D. Alabama District Judge Proctor for Judges Tjoflat and Wilson) affirmed the defendants' convictions.

The Court held that the district court's supplemental instruction was a correct statement of the law regarding entrapment. As an issue of first impression, the Court found no merit to the defendants' position that the crimes charged in the indictment were a course of conduct such that if they were entrapped as to committing the first crime, they necessarily were entrapped as to committing the separate offenses charged in the remaining counts. The Court held that, because the defense of entrapment requires two distinct elements — (1) Government inducement to commit the crime and (2) lack of predisposition by the defendant — "even if [the defendants] were induced as to all counts, there is still the question of whether they were predisposed to commit each of the crimes at issue." Slip op. at 42. The Court then concluded that sufficient evidence existed of predisposition to support the convictions.

The Court also concluded that the district court did not err in failing to grant the motion for a judgment of acquittal because sufficient evidence existed for the convictions and none of the defendants were entrapped as a matter of law. Finally, the Court reiterated that the Eleventh Circuit does not recognize derivative entrapment. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008)

United States v. Howard, No. 12-15756 (Feb. 19, 2014)

Issues.

1. In light of *Descamps v. United States*, ___ U.S. ___, 133 S. Ct. 2276 (2013), does a conviction under Alabama's third-degree burglary statute qualify as a predicate under the Armed Career Criminal Act (ACCA)?

2. Whether sufficient evidence was presented at trial to support Mr. Howard's conviction for being a felon in possession of a firearm?

Held.

1. No.

2. Yes.

Background and procedural history. After a jury trial, Mr. Howard was convicted of being a felon in possession of a firearm. At sentencing, the district court found that his Alabama conviction for third-degree robbery and two of his Alabama convictions for third-degree burglary qualified as predicates for imposition of the ACCA. The court imposed a sentence of 235 months, which was at the bottom on the guidelines range as enhanced by the ACCA.

Analysis. The Eleventh Circuit (Chief Judge Carnes for Judge Dubina and S.D. Texas Judge Rosenthal) affirmed Mr. Howard's conviction, vacated his sentence, and remanded for resentencing without the ACCA enhancement.

First, the Court held that "[t]here was plenty of evidence to support the conviction." Slip op. at 11. The Court next moved to applying the *Descamps* principles to Alabama's third-degree burglary statute. The Court noted that it previously held that the burglary statue is non-generic because the statute includes unlawful or unprivileged entry into or remaining in structures beyond buildings such as vehicles and watercraft. *See United States v. Rainer*, 616 F.3d 1212, 1213 (11th Cir. 2010) Accordingly, the Court next moved to determining whether the statue is divisible in light of *Descamps*, which held that the key to determining divisibility is whether the "statute sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building or an automobile." 133 S. Ct. at 2281. The Eleventh Circuit held that Alabama's third-degree burglary statute is not divisible because the statute provides a definition of the term "building" and then includes a list of things that fall under that definition rather than suggesting within the statute the definition of "building" is drafted in the alternative. "In light of the *Descamps* decision, illustrative examples are not alternative elements," and, therefore, Alabama's third-degree burglary status is "non-generic and indivisible, which means that a conviction under Alabama Code § 13A–7–7 cannot qualify as generic burglary under the ACCA." Slip op. at 24.

United States v. Campbell, No. 12-13647 (Feb. 20, 2014)

Issue. Does the admission of the Secretary of State's certification to establish extraterritorial jurisdiction, pursuant to the Maritime Drug Law Enforcement Act (MDLEA), for the prosecution of drug trafficking on the high seas violate a defendant's Confrontation Clause right?

Held. No.

Background and procedural history. Mr. Campbell was aboard an unmarked ship observed by a U.S. Coast Guard patrol vessel off the coast of Jamaica. The Coast Guard gave chase and saw several individuals dumping bales what was later determined to be marijuana into the water. When the Coast Guard contacted the ship's captain, the captain advised that the ship was registered in Haiti. The Haitian government told the Coast Guard that it could neither confirm nor deny this.

Mr. Campbell and others were indicted under the MDLEA for conspiracy to possess and possession with intent to distribute 100 or more kilograms of marijuana. Mr. Campbell moved to dismiss for lack of jurisdiction on the ground that the district court's admission of the Secretary of State's certification of extraterritorial jurisdiction for a prosecution of drug trafficking on the high seas violated his Confrontation Clause right. The magistrate judge held a hearing on the motion, where Mr. Campbell objected to the Government's introduction of the certification. The magistrate judge overruled, holding that the certification was self-authenticating and duly established extraterritorial jurisdiction.

Analysis. The Eleventh Circuit (Judge Pryor, for Judges Jordan and Fay) affirmed. The certification only establishes jurisdiction, which is a question of law outside the province of a jury. Accordingly, it does not implicate the Confrontation Clause.

United States v. Joseph, No. 13-12369 (Feb. 21, 2014)

Issue. Does a district court's oral pronouncement at sentencing that a defendant's forfeiture obligation could be offset by the amount of restitution govern its later written pronouncements to the contrary?

Held. No.

Background and procedural history. Mr. Joseph pleaded guilty to numerous counts of fraud that resulted in the IRS disbursing $37,196.27 in false tax refunds. The Mandatory Victim Restitution Act of 1996 required that this amount be paid to the IRS as restitution. Prior to sentencing, the district court entered a preliminary order of forfeiture in the amount of $29,514.91. Mr. Joseph argued at sentencing that his restitution obligation should be offset by the forfeiture. The Government disagreed, arguing that restitution and forfeiture are both mandatory and serve two different purposes. The district court initially seemed to side with the Government and orally ordered Mr. Joseph to pay the full restitution amount. At the end of the hearing, however, the court stated that the restitution would be offset by the forfeiture. The Government objected on the record and in a post-hearing filing. Without addressing the Government's objections, the court in its written judgment did not order that the forfeiture amount be offset.

Mr. Joseph moved to clarify and amend the written judgment, noting that it did not conform to the court's oral pronouncement at sentencing. The district court denied Mr. Joseph's motion, writing that the forfeiture amount "shall not be applied" to his restitution obligation.

Analysis. The Eleventh Circuit (per curiam, before Chief Judge Carnes and Judges Hull and Marcus) affirmed. Although noting the general rule that an oral pronouncement trumps any discrepancy with a written judgment, the Eleventh Circuit determined that this case was governed by an exception to that rule prohibiting the oral pronouncement from being observed where it is contrary to law. Here, the MVRA did not grant the district court the authority to order the forfeiture to be offset by the restitution.

United States v. Ramirez-Flores, No. 12-15602 (Feb. 21, 2014)

Issue. Did the district court plainly err in determining that burglary of a dwelling under South Carolina law is a "crime of violence" under USSG §2L1.2(b)(1)(A)(ii)?

Held. No.

Background and procedural history. Mr. Ramirez-Flores was convicted of illegal reentry after deportation. The PSR applied the sixteen-level §2L1.2(b)(1)(A)(ii) enhancement based on its finding that Mr. Ramirez-Flores's prior burglary conviction in South Carolina qualified as a "crime of violence." This determination was premised on the uncontested facts of the PSR, which provided that Mr. Ramirez-Flores "forcibly entered the victim's residence with a co-defendant and removed property from the residence." During sentencing, Mr. Ramirez-Flores objected generally that his

conviction was non-violent, but he did not object to those specific facts set forth in his PSR or take the position that a conviction under the South Carolina statute was categorically not a "crime of violence."

On appeal, Mr. Ramirez-Flores argued that a conviction under the South Carolina statute can never qualify as a predicate "crime of violence" under the guideline because such a conviction does not necessarily involve conduct equating to generic burglary. He also claimed that his prior conviction does not qualify as a "crime of violence" because the *Shepard* documents do not prove that he burglarized a dwelling. At oral argument, Mr. Ramirez-Flores argued for the first time that the intervening decision in *Deschamps v. United States*, ___ U.S. ___, 133 S. Ct. 2276 (2013), confirmed that the South Carolina statute was indivisible and, therefore, could not be considered a "crime of violence" pursuant to the modified categorical approach.

Analysis. The Eleventh Circuit (Judge Anderson for Judge Martin and M.D. Alabama Judge Fuller) affirmed. The Court reviewed Mr. Ramirez-Flores's *Descamps* argument for plain error and concluded that it was not "plain" that the statute was indivisible. Although the Court stopped short of ruling on whether or not the South Carolina statute was divisible or not, it determined that the district court did not plainly err in finding the statute divisible and employing the modified categorical approach.

The Eleventh Circuit also rejected Mr. Ramirez-Flores's argument that his South Carolina conviction was not a "crime of violence" even under a pre-*Descamps* analysis. The Court found that Mr. Ramirez-Flores did not lodge a sufficiently specific objection to put the Government on notice that it should obtain further *Shepard* documents to resolve whether Mr. Ramirez-Flores burglarized a building or another structure.

United States v. Jones, No. 11-11273 (Feb. 25, 2014)

Issue. Did the district court plainly err in determining that Alabama third-degree burglary convictions were violent felonies under the Armed Career Criminal Act (ACCA)?

Held. Yes.

Background and procedural history. Mr. Jones pleaded guilty to being a felon in possession of a firearm and ammunition. His PSR concluded that his three prior Alabama convictions for third-degree burglary qualified him for a sentencing enhancement under the ACCA. Mr. Jones's attorney did not object to the ACCA enhancement because it accorded with then-binding Eleventh Circuit precedent. After Mr. Jones's sentencing, the Eleventh Circuit ruled in *United States v. Howard*, 742 F. 3d 1334 (11th Cir. 2014), that Alabama third-degree burglary was not a valid ACCA predicate.

Analysis. The Eleventh Circuit (Chief Judge Carnes for Judge Dubina and S.D. of Texas Judge Rosenthal) vacated and remanded. The Court held that the district court should resentence Mr. Jones on remand without the ACCA enhancement.

The Court held that Mr. Jones established the elements of plain error. First, Mr. Jones did not have three qualifying convictions necessary for ACCA enhancement because "a conviction under

Alabama Code § 13A-7-7 cannot qualify as generic burglary under the ACCA." *Howard*, 742 F. 3d at 1349. Second, because an intervening decision by "this Court or the Supreme Court squarely on point may make an error plain," *United States v. Pielago*, 135 F.3d 703, 711 (11th Cir. 1998), and because *Howard* is an intervening decision that is squarely on point with Mr. Jones's case, the error was plain. Third, because the maximum sentence Mr. Jones could receive without the ACCA enhancement would be shorter than his original sentence, the sentencing error affected his substantial rights. For this same reason, the Court concluded that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Terrell v. GDCP Warden, No. 11-13660 (Mar. 11, 2014)

Issues. Whether previous decisions by Georgia state courts constitute an unreasonable application of clearly established laws as to:

1. Whether counsel was ineffective for failing to obtain the services of a forensic pathologist?

2. Whether counsel was ineffective for not sufficiently challenging the armed robbery statutory aggravator for the death sentence?

Held.

1. No.

2. No.

Background and procedural history. In a Georgia state court, Mr. Terrell was convicted of malice murder and ten counts of first-degree forgery. The jury found the following aggravating circumstances to the malice murder conviction: (1) the murder was committed while Mr. Terrell was engaged in an aggravated battery and an armed robbery; and (2) the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind and an aggravated battery to the victim before death. He was sentenced to death and to ten consecutive ten-year sentences for the forgery convictions. Mr. Terrell unsuccessfully appealed his convictions and sentence and next filed a state habeas petition. The Georgia trial court denied relief as to his convictions, but granted relief as to his death sentence based on several claims of ineffective assistance of counsel. The Georgia Supreme Court reversed and reinstated the death sentence. Mr. Terrell then filed a federal habeas petition. The district court denied the petition, and the Eleventh Circuit granted certificates of appealability for two issues: (1) whether counsel was ineffective for failing to obtain the services of a forensic pathologist to challenge the State's expert, who opined that the victim was still alive when he suffered blows to his face and head; and (2) whether counsel was ineffective for not sufficiently challenging the armed robbery aggravator.

Analysis. The Eleventh Circuit (Judge Dubina for Judges Marcus and Martin) affirmed the district court's denial of the habeas petition.

On the issue of counsel's failure to engage the services of a forensic pathologist, the Court affirmed the district court's finding that the Georgia Supreme Court correctly found that Mr. Terrell was not prejudiced because the "likelihood of a different result [was not] substantial." Slip op. at 15. Because counsel used the theory of defense that Mr. Terrell was not present at the scene of the crime, the testimony of forensic pathologist would not have assisted his defense.

As to counsel's failure to challenge the armed robbery aggravator factor, the Court affirmed the district court's finding that the Georgia Supreme Court's ruling on the issue was not unreasonable. Mr. Terrell failed to demonstrate by clear and convincing evidence that the Georgia Supreme Court's factual findings were erroneous. The Court found that substantial circumstantial evidence supported the application of the armed robbery aggravator and that counsel continuously challenged the evidence. Further, regardless of a finding of armed robbery as an aggravator, the jury also found the statutory aggravators of battery and depravity of mind, and, therefore, no prejudice exists.

Hitchcock v. Sec'y, Fla. Dept. of Corr., No. 12-16158 (Mar. 12, 2014)

Issues.

1. Did the state trial court violate the petitioner's constitutional rights by refusing to admit and consider the State's pretrial plea offer as relevant and mitigating evidence?

2. Did petitioner's counsel at his resentencing hearing render ineffective assistance by failing to elicit testimony from the defense's mental health expert about the applicability of two statutory mitigating factors and for failing to seek a neuropsychological evaluation of the petitioner to check for the presence of possible brain damage?

Held.

1. No.

2. No.

Background and procedural history. Mr. Hitchcock was convicted of murder and sentenced to death by a state trial court. After a decades-long procedural history, Mr. Hitchcock was retried for the fourth time and again adjudged guilty and sentenced to death. Mr. Hitchcock petitioned for habeas corpus in federal district court, alleging that counsel at his fourth resentencing hearing rendered ineffective assistance.

Mr. Hitchcock's ineffective-assistance claim was based on the following facts. Before trial, Mr. Hitchcock rejected the prosecution's offer to recommend a life sentence in exchange for his plea of guilty to first-degree murder. At sentencing, the trial court excluded the prosecution's pretrial plea offer from evidence and refused to consider the offer as a mitigating factor. Also during that hearing, Dr. Jethro Toomer, a clinical and forensic psychologist, testified for the defense that Mr. Hitchcock had borderline personality disorder that caused lifelong "personality difficulties" that would have

affected him at the time of the murder. Mr. Hitchcock's attorney did not question Dr. Toomer about two statutory mitigating circumstances: 1) whether the crime was committed while Mr. Hitchcock was under the influence of extreme mental or emotional disturbance; and, 2) whether Mr. Hitchcock's capacity to appreciate the criminality of his conduct or conform his conduct to the law was substantially impaired. Mr. Hitchcock's attorney also never had Mr. Hitchcock examined by a neuropsychologist for indications of brain damage.

The district court rejected Mr. Hitchcock's ineffective-assistance claims and denied the petition.

Analysis. The Eleventh Circuit (Judge Carnes for Judges Hull) affirmed. The Court held that the Constitution does not mandate the admission of rejected plea offers as relevant mitigating evidence at sentencing. The Court also held that Mr. Hitchcock's attorney was not ineffective because Mr. Hitchcock could not show that he had been prejudiced.

The Court cited *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), which holds that the Constitution requires that the sentencing court "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that proffers as a basis for a sentence less than death." (Emphasis in original.) The Court also stated, however, that the rule in *Lockett* does not "limit[] the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." 438 U.S. at 604 n. 12. The Court then found that evidence of a rejected plea offer for a lesser sentence is not a mitigating circumstance because it is not relevant to Mr. Hitchcock's character, record, or a circumstance of the offense; Mr. Hitchcock, therefore, did not have a constitutional right to present such evidence at a sentencing hearing. *See Oregon v. Guzek*, 546 U.S. 517 (2006).

With respect to whether Mr. Hitchcock's counsel at this latest sentencing hearing was ineffective, the Court adopted the Florida Supreme Court's holding that even if Mr. Hitchcock's counsel was deficient in failing to specifically ask Dr. Toomer about the two statutory mental health mitigators, Mr. Hitchcock was not prejudiced because of the many other mitigating factors presented at resentencing as well as the proven existence of "extremely weighty aggravators." The Court did not reach the issue of deficient performance for counsel's failure to procure a neuropsychological examination of Mr. Hitchcock.

Judge Wilson concurred in the result, writing separately to emphasize that, contrary to the majority's implication, evidence of a pretrial plea offer is not per se irrelevant. The judge also wrote that the majority's review of the evidence in Mr. Hitchcock's case was unnecessary to its holding.

In re Moody, No. 13-12657 (Mar. 12, 2014)

***appeal from the Northern District of Alabama

Issue. Is the petitioner entitled, pursuant to 28 U.S.C. § 455(a), to a writ of mandamus ordering the recusal of Northern District of Alabama Judge L. Scott Coogler on the ground that his impartiality to fairly decide a case involving the murder of the late Eleventh Circuit Judge Robert S. Vance was in question?

Held. No.

Background and procedural history. In 1989, Mr. Moody mailed a bomb to U.S. Circuit Judge Robert S. Vance. The bomb detonated and killed Judge Vance. Mr. Moody also sent a mail bomb that killed a Georgia attorney. After Mr. Moody was indicted in the Northern District of Georgia for the attorney's death, all judges sitting on the Eleventh Circuit recused themselves due to Mr. Moody's responsibility for Judge Vance's death. Mr. Moody's motion for a change of venue was granted, and he ultimately was convicted in federal district court in Minnesota. The Eleventh Circuit, with a panel comprised of three judges form the Fourth Circuit, affirmed Mr. Moody's convictions and sentences.

The State of Alabama then charged Mr. Moody with the capital murder of Judge Vance. He was found guilty and sentenced to death. The Alabama appellate courts affirmed Mr. Moody's conviction and death sentence and later affirmed the trial court's denial of collateral relief. Mr. Moody filed a habeas petition in the Northern District of Alabama, where his case was randomly assigned to Judge L. Scott Coogler. Judge Coogler denied Mr. Moody's motion for recusal, and Mr. Moody petitioned the Eleventh Circuit for a writ of mandamus.

Analysis. The Eleventh Circuit (per curiam, before Judges Wilson, Martin, and Jordan) denied Mr. Moody's petition for the writ. Section 455(a) provides that a judge should recuse himself or herself where an "objective, disinterested, lay observer . . . would entertain a significant doubt about the judge's impartiality." The Court noted that Judge Coogler held no federal judicial position at the time of Judge Vance's death, had no close connection to the late judge or his family, and took no part of the State of Alabama's prosecution of Mr. Moody. Mr. Moody cited Judge Coogler's adjunct professorship at the University of Alabama School of Law, which maintains a professorship named in Judge Vance's honor, and the fact that one of the federal courthouses in Birmingham is named after the late judge, but the Eleventh Circuit ruled that these tangential connections would not indicate to a lay, disinterested observer that Judge Coogler's impartiality was in question.

The Court also denied Mr. Moody's motion for the recusal of all Eleventh Circuit judges. It noted that no member of the panel served with Judge Vance and that no member of the panel enjoyed a close relationship with the late judge or his family and that the only link between members of the panel and the late judge was that they sat on the same Court as had Judge Vance at the time of his death twenty-four years ago. The Court ruled that "such a tenuous connection would not, standing alone, raise significant doubt in the mind of an informed, objective, and disinterested lay observer" about the panel's ability to fairly decide a case involving Mr. Moody.

Bowers v. United States Parole Comm'n, No. 12-16560 (Mar. 14, 2014)

Issue. Did the district court abuse its discretion in denying, based solely on its narrow reading of the Eleventh Circuit's mandate on a previous remand, the petitioner's motions for discovery on his allegation that he was denied parole due to political pressure and for leave to amend his habeas petition?

Held. Yes.

Background and procedural history. Mr. Bowers, serving a life sentence for the 1976 murder of a U.S. Park Ranger, received a notice of mandatory parole in May 2005. At the urging of one parole commissioner, who also got the Attorney General involved, the parole commission reversed the grant of mandatory parole on the ground of a 1979 escape attempt and its finding that Mr. Bowers's crime was motivated by his hatred for the U.S. Government, its employees, and its law enforcement, and that he "still held those feelings." Slip op. at 3.

Mr. Bowers filed a habeas petition. The district court denied relief, but the Eleventh Circuit reversed, finding that the parole commissioner who advocated the reopening of Mr. Bowers's parole case was biased. The Court directed that, on remand, the district court must order the Parole Commission to consider Mr. Bowers's case as it was prior to the biased commissioner's actions. The district court did so, and the Parole Commission again denied Mr. Bowers mandatory parole. Mr. Bowers then moved for discovery on whether the Parole Commission's act was due to still more political pressure. He also sought leave to amend his habeas petition. The district court denied the motion, finding that the Eleventh Circuit's mandate did not authorize, instruct, or suggest that additional discovery was "necessary or prudent," and noted that the Eleventh Circuit had not granted Mr. Bowers any relief on his claims that the Commission acted due to political pressure. Mr. Bowers appealed, arguing that the district court abused its discretion in denying his motions for discovery and for leave to amend.

Analysis. The Eleventh Circuit (Judge Wilson, for Judge Dubina and S.D. Florida Judge Middlebrooks) reversed and remanded. The standard for granting discovery in habeas cases is whether the movant has demonstrated good cause. Here, the district court did not consider whether Mr. Bowers had demonstrated good cause and, instead, interpreted the Eleventh Circuit's earlier mandate's omission of an express directive to conduct discovery to mean that discovery would be inappropriate. The court also denied Mr. Bowers's motion for leave to amend because the Eleventh Circuit's mandate did not grant relief on the asserted ground. The Eleventh Circuit determined that this was an incorrect interpretation of its mandate because the absence of specific directives should not have been read as precluding discovery or leave to amend.

United States v. Salgado, No. 12-15691 (Mar. 14, 2014)

Issue. Whether the district court misapplied the guidelines by using the defendant's conduct in the underlying drug conspiracy to impose a role enhancement when calculating his adjusted offense level for money laundering under USSG §2S1.1(a)(1)?

Held. Yes.

Background and procedural history. Mr. Salgado was convicted of conspiracy to distribute drugs, conspiracy to launder money, and possession with intent to distribute at least one kilogram of heroin. The PSR grouped his three convictions and, without explanation, used USSG §2S1.1, the money-laundering guideline to determine the base offense level. Among several enhancements, the PSR added 2 levels under §3B1.1(c) because Mr. Salgado's role in brokering drug transactions qualified

him as a manager, leader, or supervisor. The district court sentenced Mr. Salgado within a range enhanced by this 2-level adjustment.

Analysis. The Eleventh Circuit (Judge Pryor for Chief Judge Carnes and Judge Tjoflat) affirmed Mr. Salgado's convictions, but vacated and remanded his sentence for further proceedings.

Quoting USSG §1B1.5(c), the Court noted that the adjustments in Chapter Three of the guidelines "are determined in respect to the referenced offense guideline, except as otherwise expressly provided." Slip op. at 7 (emphasis added). It then held that Application Note 2(C) of § 2S1.1 is one of the "otherwise expressly provided" situations because the Note provides that when setting an offense level under §2S1.1(a)(1), a court should make Chapter Three adjustments based on the defendant's conduct in the money laundering offense itself, not based on his conduct in the offense from which the money that was laundered was obtained. Therefore, the §3B1.1(c) enhancement to a base offense level calculated under §2S1.1 was incorrect.

For remand, the Court instructed that the district court "should calculate the offense levels for each of Salgado's three grouped offenses, see U.S.S.G. § 3D1.3(a) & cmt. n.2, which will include determining what role adjustment, if any, he should receive when calculating his offense level under § 2S1.1(a)(1)" and then use the guideline that yields the highest adjusted offense level. Slip op. at 11-12.

Jones v. GDCP Warden, No. 11-14774 (Mar. 20, 2014)

Issue. Did the district court err in finding that the petitioner was not prejudiced by his state trial counsel's failure to identify and introduce mitigating evidence?

Held. No.

Background and procedural history. Mr. Jones was convicted of murder and sentenced to death by a Georgia state court in 1979. His sentence was vacated in federal district court on unrelated grounds, and Mr. Jones was again sentenced to death after his second penalty-phase trial. Mr. Jones's death sentence was affirmed on direct appeal.

Mr. Jones petitioned for collateral relief in state court, arguing that his trial counsel was ineffective during the second penalty-phase trial for failing to investigate and introduce a variety of mitigating evidence, including Mr. Jones's childhood sexual abuse, his mental health challenges, and his military service record. The court denied collateral relief, and the Georgia appellate courts affirmed. The district court denied Mr. Jones's federal habeas petition, finding that the Georgia courts did not unreasonably apply the ineffective-assistance analysis under *Strickland v. Washington*, 466 U.S. 668 (1984).

Analysis. The Eleventh Circuit (Judge Marcus for Judges Wilson and Pryor) affirmed, concluding that even assuming Mr. Jones's trial counsel performed deficiently, Mr. Jones could not demonstrate prejudice. The Court reasoned that by introducing evidence of Mr. Jones's childhood sexual abuse and military service, trial counsel would have opened the door "a vast array of aggravating evidence that likely would have overwhelmed the balance of mitigating evidence." Slip op. at 30. The Court

also noted that the mitigating mental health evidence that trial counsel could have introduced was rejected by the state habeas court and "subject to serious attack and meaningful contradiction." *Id*. at 30, 41-42. The Eleventh Circuit noted that, in contrast to what transpired in cases cited by Mr. Jones, the state court in this case did not simply disregard the mitigating evidence presented by the petitioner. *Id*. at 42, *citing Porter v. McCallum*, 558 U.S. 30 (2009). Instead, the state court considered Mr. Jones's mental health evidence, concluded that it would not have changed the outcome of the trial, and, therefore, determined that Mr. Jones failed to demonstrate prejudice under *Strickland*. Slip op. at 49-50. Accordingly, the state court did not unreasonably apply clearly established Supreme Court precedent.

The Court summarily rejected Mr. Jones's remaining arguments.

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United States v. Wade, No. 13-12075 (Jan. 8, 2014)

The Eleventh Circuit (per curiam, before Judges Hull, Marcus, and Hill), held that a prior conviction imposed pursuant to an *Alford* plea qualifies as an Armed Career Criminal Act predicate offense.

United States v. Menter, No. 13-12434 (Feb. 20, 2014)

The Eleventh Circuit (per curiam, before Judges Hull, Marcus, and Black) held that although it was "possible" the district court committed procedural error by neglecting to consider whether any departures were applicable to Mr. Menter before pronouncing sentence, any error was harmless because the tenor of the sentencing hearing transcript gave the Eleventh Circuit "fair assurance" that the district court would have imposed the statutory maximum sentence even if it had considered an applicable departure.

United States v. Pacquette, No. 13-11736 (Mar. 4, 2014)

The Eleventh Circuit (per curiam, before Judges Tjoflat, Jordan, and Fay) vacated Mr. Pacquette's conviction and remanded for a new trial. The Court determined that the district court improperly excluded Mr. Pacquette's exculpatory statement to law enforcement officers based on its mistaken understanding that the "rule of completeness" did not apply to oral statements. *See* Fed. R. Evid. 106. The primary issue at trial was whether Mr. Pacquette knew his bag contained cocaine, and the district court permitted law enforcement officers to testify that Mr. Pacquette admitted knowledge of the cocaine but prohibited the defense from questioning the officers about Mr. Pacquette's earlier denial of the same. The Eleventh Circuit cited its previous precedent finding that the rule of completeness does apply to oral statements, pursuant to Fed. R. Evid. 611(a), which requires that the district court exercise "reasonable control" over witness interrogation and the presentation of evidence to make them effective vehicles for "the ascertainment of the truth." Slip

op. at 5, *quoting United States v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005), *quoting in turn* Rule 611(a).

United States v. Anaya-Medina, No. 12-12261 (Mar. 11, 2014)

The Eleventh Circuit (per curiam, before Judges Wilson, Jordan, and Anderson) rejected Mr. Anaya-Medina's requested relief on the merits, but also denied the Government's Motion to Dismiss pursuant to his plea agreement's appeal waiver. Mr. Anaya-Medina argued that the district court plainly erred in accepting his guilty plea because, at the Fed. R. Crim. P. 11 hearing, the Government misstated the elements of his money laundering offense and gave an insufficient factual basis for that offense, thereby rendering his guilty plea unknowing and involuntary. The Court agreed with the Fifth Circuit that "[e]ven valid appeal waivers do not bar a claim that the factual basis [proffered during the Rule 11 hearing] was insufficient to support the plea." Slip op. at 6, *quoting United States v. Hildenbrand*, 527 F.3d 466, 474 (5th Cir. 2008).

United States v. Smith, No. 13-13028 (Mar. 13, 2014)

The Eleventh Circuit (per curiam, before Judges Wilson, Martin, and Anderson) vacated and remanded Mr. Smith's sentence. The district court imposed a procedurally unreasonable sentence by varying upward based on its view that Mr. Smith received a "break" by being previously resentenced pursuant to the Fair Sentencing Act of 2010. Resentencing under the FSA is not a "break," and the district court's action penalized Mr. Smith for receiving a lawful sentence authorized by Congress.

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DECISIONS OF THE UNITED STATES SUPREME COURT

Navarette v. California, No. 12-9490 (Apr. 22, 2014)

Issue. Did an anonymous 911 call from a woman alleging a driver ran her off the road contain an "indicia of reliability" sufficient to support reasonable suspicion for a traffic stop?

Held. Yes.

Background and procedural history. 911 dispatch received an anonymous call that a vehicle had just run the caller off the road. Though she did not provide her name, the caller did provide the make, model, color, and tag number of the truck, as well as the direction of travel and location. Based on this description, highway patrol officers stopped Mr. Navarette near that location. Upon approaching the vehicle, the officers smelled marijuana in the truck bed. A search of the truck bed reveled 30 pounds of marijuana. At trial, Mr. Navarette moved to suppress the marijuana, arguing that the stop violated the Fourth Amendment because the officers lacked reasonable suspicion. The magistrate judge denied the motion and that ruling was affirmed by a California Superior Court and the state's Court of Appeals. The Supreme Court of California declined review.

Analysis. The Supreme Court (Justice Thomas for Chief Justice Roberts and Justices Kennedy, Breyer, and Alito) affirmed. The 911 call was reliable because the caller claimed eyewitness knowledge of the event and provided detailed information about the vehicle. That the officers located the truck a reasonable distance from where the call was made also shows some corroboration of the claim by law enforcement. It also shows that the tipster made the call very quickly after the event, lending the call the reliability associated with a "present sense impression" or "excited utterance." Further, while making a 911 call is not a *per se* indicator of reliability, the facts that calls to 911 are generally traceable and that false reports can have significant legal consequences do indicate reliability. This tip also provided for reasonable suspicion because the behavior noted was not simply a conclusory allegation based on one small factor that could point to drunk driving, but a very strong indicator of recklessness that shows a high probability of drunk driving. Although the officer observed no other suspicious behavior in the five minutes he followed the truck, this does not matter because reasonable suspicion had already attached.

Justice Scalia, joined by Justices Ginsburg, Sotomayor, and Kagan dissented.

Paroline v. United States, No. 12-8561 (April 23, 2014)

Issue. Is restitution under 18 U.S.C. § 2259 limited to losses proximately caused by the defendant's offense conduct?

Held. Yes.

Background and procedural history. Mr. Paroline pleaded guilty to possessing images of child pornography in violation of 18 U.S.C. § 2252. Two of those images were of a victim ("Amy") whose

sexual abuse as a young child had been widely distributed as child pornography. Amy sought nearly $3.5 million in restitution from Mr. Paroline under 18 U.S.C. § 2259, a component of the Violence Against Women Act of 1994. The district court found that the Government had not met its burden of proving losses that were proximately caused by Mr. Paroline's conduct and declined to award restitution. Amy sought a writ of mandamus from the Fifth Circuit to compel the district court to order Mr. Paroline to pay restitution. The Fifth Circuit initially denied relief, but later granted Amy's petition for writ of mandamus upon a rehearing en banc. The Fifth Circuit held that § 2259 did not limit restitution to losses the defendant proximately caused and that defendants like Mr. Paroline could be ordered to pay the entire loss sustained by the victim regardless of whether other offenders contributed to that loss. The Court granted certiorari to determine the proper causation standard for restitution determinations under § 2259.

Analysis. The Supreme Court (Justice Kennedy, for Justices Ginsburg, Breyer, Alito, and Kagan) reversed. The Court began by recognizing the broad restitutionary purpose of § 2259, noting specifically § 2259(b)(3)(F), which serves as a catchall category for "any other losses suffered by the victim as a proximate result of the offense." Slip. op. at 10. The Court reasoned that this subsection imposed a requirement of proximate cause on the whole of § 2259 because § 2259(b)(3)(F) "is most naturally understood as a summary of the type of losses covered–*i.e.*, losses suffered as a proximate result of the offense." Slip. op. at 10. The Court noted that to say that one event is the proximate cause of another is to say that the former event is the actual cause or cause-in-fact of the latter and also that the former event has a "sufficient connection to the result." Slip. op. at 6. The Court rejected Amy's suggested approach of holding individual possessors of her images liable for the combined effect of offenses committed by virtually thousands of others by suggesting that such a directive could be so disproportionate as to potentially implicate the Excessive Fines Clause of the Eighth Amendment. However, the Court noted that failing to award any restitution to victims like Amy would go against both Congress's intent and the spirit of impressing upon offenders the gravity of their conduct. In applying this proximate cause standard, district courts should begin by attempting to assess the defendant's role in the context of the overall process that caused the victim's losses. There is no exact formula for a district court's determination, but the Court provided some "guideposts" that could guide the district court's inquiry. Because district courts often exercise discretion in both sentencing and in restitution matters, the Court viewed imposition of a rigid test for determining restitution under § 2259 as unnecessary.

Chief Justice Roberts (joined by Justices Scalia and Thomas) and Justice Sotomayor each filed dissenting opinions.

White v. Woodall, No. 12-794 (Apr. 23, 2014)

Issue. Did the Sixth Circuit err in affirming the district court's grant of Mr. White's petition for a writ of habeas corpus, given the Kentucky Supreme Court's contrary holding on the matter?

Holding. Yes.

Background and procedural history. Mr. White pleaded guilty to capital murder, capital kidnaping, and first-degree rape. He chose not to testify at the sentencing phase of his trial. The trial court denied his request for a no-adverse-inference instruction, and he was sentenced to death. The Kentucky Supreme Court affirmed, recognizing that while *Carter v. Kentucky*, 450 U.S. 288 (1981), required the instruction at the guilt phase of a trial, it did not require one at the sentencing phase. Mr. White then filed a petition for a writ of habeas corpus in federal court. The district court granted the writ, finding that the refusal to issue a no-adverse-inference instruction violated the Fifth Amendment. The Sixth Circuit affirmed.

Analysis. The Supreme Court (Justice Scalia, for Chief Justice Roberts and Justices Kennedy, Thomas, Alito, and Kagan) reversed, concluding that the Kentucky Supreme Court's ruling was not contrary to clearly established federal law. Section 2254(d) only permits a court to grant federal habeas relief on a claim that has already been adjudicated on the merits in a state court if the adjudication involved was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court. The Kentucky Supreme Court's ruling does not meet this standard. That court relied on Supreme Court cases that do not create an error that is beyond "any possibility for fairminded agreement" and on *Mitchell v. United States*, 526 U.S. 314 (1999). The *Mitchell* Court did not decide whether silence could appropriately affect a determination of lack of remorse or acceptance of responsibility. *Mitchell* directly holds that silence cannot be used at sentencing with regard to determining the facts; however, Mr. White pleaded guilty, removing the State's burden with regard to the facts.

Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented.

Robers v. United States, No. 12-9012 (May 5, 2014)

Issue. Under the Mandatory Victims Restitution Act (MVRA), is "any part of the property. . . returned" when the victim takes title to the collateral securing a loan the defendant fraudulently obtained from the victim?

Holding. No.

Background and procedural history. Mr. Robers submitted fraudulent loan applications to 2 banks for the purchase of 2 homes. The combined total for these loans was $470,000. The banks foreclosed on the homes after Mr. Robers failed to make payments and sold both homes for $280,000. Mr. Robers was convicted and ordered to pay restitution of $220,000— roughly the difference between the amount loaned and the amount gained from the sale of the homes. The homes were sold in a falling real estate market. Mr. Robers argued that this calculation was in error because, when the banks took the title to the homes, "part of the property" was returned. He argued that calculation should account for the higher value of the homes at that time rather than the amount they sold for in a falling real estate market. The Seventh Circuit rejected this argument.

Analysis. The Supreme Court (Justice Breyer, writing for a unanimous Court) affirmed. The phrase "any part of the property . . . returned" refers to the money the banks lent Mr. Robers, not the

collateral they received. This interpretation is consistent with a natural reading of the statute; the term "property" is used 7 times throughout the MVRA, therefore it is natural to read the term as having the same definition throughout. This interpretation is also easier to administer than Mr. Robers's because valuing the property from the sale price is much simpler and clearer than valuing the property at the time it was received.

Mr. Robers further argued that the proximate harm for the decrease in value was the real estate market and not him because the MVRA defines a victim as one who is "directly and proximately harmed." The Court rejected this argument, reasoning that the loss of value of the homes is a foreseeable consequence of obtaining property through fraud; therefore, proximate cause is still present. The Court also rejected Mr. Robers's remaining arguments.

Justice Sotomayor (joined by Justice Ginsburg) concurred, noting that she would limit this holding to reasonable delays in the sale of collateral and not apply it in cases where the victim chooses to hold the collateral instead. In that case, the defendant is no longer the proximate cause of declining value.

Martinez v. Illinois, No. 13-5967 (May 27, 2014)

Issue. After the jurors in petitioner's trial were sworn, the State was not ready to proceed and declined to go forward. The trial court granted petitioner's motion for a directed verdict. Did jeopardy attach and, if it had, does the resolution of the case bar the State's appeal and attempt to subject petitioner to a new trial?

Holding. Yes and yes.

Background and procedural history. Mr. Martinez was indicted on charges of battery and mob action against two individuals. The State had substantial difficulty in getting the two victims to appear, which resulted in multiple continuances. Nearly a year after the first trial date, the court was ready to proceed. On the morning of the trial, the two victims were not present. The court offered to wait to swear in the jurors until a complete jury was empaneled and to allow the State to choose whether to swear in the jury or dismiss the case. After further delay, the victim witnesses had still not arrived and the State moved for a continuance. The court denied the motion and the jury was sworn. The State then declared it was not participating in this case. The court granted Mr. Martinez a direct verdict.

The State appealed this verdict, arguing that the court should have granted a continuance. Mr. Martinez claimed that the appeal was improper because he had been acquitted. The Illinois appeals court held jeopardy had never attached. The Illinois Supreme Court affirmed, citing *Serfass v. United States*, 420 U.S. 337 (1975), to hold that Mr. Martinez had never been at risk of conviction and, therefore, jeopardy did not attach.

Analysis. The Supreme Court (per curiam) reversed. Jeopardy had attached here because "jeopardy attaches when a jury has been empaneled and sworn." Slip op. at 5. Nothing in *Serfass* should be read to detract from this clear, bright-line rule.

The Court further held that a directed verdict of "not guilty" is a sufficient end to bar retrial. An acquittal includes any ruling that is based on the insufficiency of the prosecution's proof, which was is clearly present here.

Bond v. United States, No. 12-158 (June 2, 2014)

Issue. Does the Chemical Weapons Convention Implementation Act of 1998 reach the purely local crime of assault when that assault resulted in only a minor injury to one individual?

Held. No.

Background and procedural history. Ms. Bond pleaded guilty to a violation of 18 U.S.C. § 229(a) of the Chemical Weapons Convention Implementation Act of 1998, which prohibits the knowing "possess [ion] or use…[of] any chemical weapon." Ms. Bond spread two toxic chemicals on her husband's lover's doorknob, mailbox, and car. As a result, the victim suffered a minor chemical burn to her finger. After being charged, Ms. Bond moved to dismiss the chemical weapons charges on the ground that the Act violates the Tenth Amendment. The district court denied her motion. After the denial of her motion, Ms. Bond pleaded guilty, but reserved the right to appeal. The Third Circuit initially held that Ms. Bond lacked standing to raise her Tenth Amendment challenge; however the Supreme Court reversed. On remand, the Third Circuit relied on *Missouri v. Holland*, 252 U.S. 416 (1920), in rejecting Ms. Bond's Tenth Amendment argument. In *Holland*, the Court held "that '[i]f the treaty is valid there can be no dispute about the validity of the statute' that implements it 'as a necessary and proper means to execute the powers of the Government.'" Slip op. at 8 (*quoting Holland*, 252 U.S. at 432). The Supreme Court granted certiorari.

Analysis. The Supreme Court (Chief Justice Roberts, for Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan) reversed the Third Circuit. The Court followed its decision in *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984), and declined to decide the case on constitutional grounds. Slip op. at 9. The Court found that the statute was ambiguous. *Id*. at 15. The Court reasoned that the ambiguity in the statute arose from the unduly broad definition of chemical weapon given by the statute, the serious consequences of interpreting the statute broadly, and the context in which the statute was developed. *Id*. at 14. The Court relied on the basic principles of federalism in resolving the ambiguity. *Id*. The Court held that, in this case, it "should insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States." *Id*. The Court found that Congress did not intend to reach Ms. Bond's assault. *Id*. at 15.

Justice Scalia, joined by Justices Alito and Thomas, concurred in the judgment. Justice Scalia did not believe the statute was ambiguous. Justice Thomas, joined by Justices Scalia and Alito, also filed a concurrence, writing that he would have reversed Ms. Bond's conviction on constitutional grounds.

Abramski v. United States, No. 12-1493 (June 16, 2014)

Issue. Does a person violate 18 U.S.C. § 922(a)(6) when he purchases a firearm on someone else's behalf, even if the true buyer could have legally purchased the gun without the "straw purchaser"?

Held. Yes.

Background and procedural history. Mr. Abramski was charged with violating 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A), after he purchased a firearm for his uncle, Mr. Alvarez, but indicated that he was the true purchaser of the gun on the ATF 4473 form. Mr. Alvarez did not have any firearms restrictions and could have legally purchased the firearm himself; he simply wanted to take advantage of a discount Mr. Abramski would receive as a former law enforcement officer.

After Mr. Abramski's motion to dismiss the charges was denied, he entered a conditional guilty plea, which reserved his right to challenge the ruling on his motion to dismiss. The Fourth Circuit affirmed, and the Supreme Court granted certiorari.

Analysis. The Supreme Court (Justice Kagan, for Justices Kennedy, Ginsburg, Breyer, and Sotomayor) affirmed. The Court rejected Mr. Abramski's argument that because Mr. Alvarez could legally purchase the firearm himself. Mr. Abramski's misrepresentation on Form 4473 was not a "material" misrepresentation. Mr. Abramski's misrepresentation was material because if Mr. Abramski had revealed that he was purchasing the firearm for Mr. Alvarez, then the purchase could not have continued. Upon realizing the true buyer was not present, the seller would be required to end the sale because selling to anyone other than the true buyer would violate § 922(c). The Court also rejected Mr. Abramski's broader argument that federal gun laws are wholly unconcerned with any person other than the person standing at the counter. In rejecting this broader argument, the Court stated, "All those tools of divining meaning-not to mention common sense []-demonstrate that § 922, in regulating licensed dealers' gun sales, looks through the straw to the actual buyer." Slip op. at 9.

Justice Scalia dissented, joined by Chief Justice Roberts and Justices Thomas and Alito.

Loughrin v. United States, No. 13-316 (June 23, 2014)

Issue. Does 18 U.S.C. § 1344(2) require the Government to prove that the defendant intended to defraud a financial institution?

Held. No.

Background and procedural history. Mr. Loughrin was convicted of six counts of violating the federal bank fraud statute, 18 U.S.C. §1344(2). Mr. Loughrin was caught forging stolen checks, using them to buy goods at Target, and then returning the goods for cash. Mr. Loughrin requested a jury instruction that required the Government to prove that he intended to defraud a financial institution. The district court denied Mr. Loughrin's request. The Tenth Circuit affirmed the district

court and reasoned that the specific intent to defraud a financial institution only applies to the first clause of the bank fraud statute. The Supreme Court granted certiorari.

Analysis. The Supreme Court (Justices Kagan, for Justices Kennedy, Ginsburg, Breyer, and Sotomayor and Chief Justice Roberts) affirmed the Tenth Circuit. The Court rejected Mr. Loughrin's argument that the Government was required to prove that he intended to defraud a financial institution. In rejecting this argument the Court wrote, "Loughrin's view [] runs afoul of the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" Slip. op. at 6 (*quoting Williams v. Taylor*, 529 U.S. 362, 404 (2000)). The Court reasoned that Mr. Loughrin's view would render § 1344(2) redundant. Slip op. at 6. Mr. Loughrin next relied on the construction of the mail fraud statute, and *McNally v. United States*, 483 U.S. 350 (1987), which holds that, despite containing the word "or," the mail fraud statute sets forth only one offense. Mr. Loughrin analogized the bank fraud statute to the mail fraud statute. The Court rejected this argument as well and reasoned that the statutes "have notable textual differences. The mail fraud law contains two phrases strung together in a single, unbroken sentence." Slip op. at 8. In contrast, the bank fraud statute's "clauses have separate numbers, line breaks before, between and after them, and equivalent indentation-thus placing the clauses visually on an equal footing and indicating that they have separate meanings." *Id*. The Court also rejected Mr. Loughrin's argument that the Court's reading of § 1344(2) would erode the principles of federalism by imposing federal regulation into areas of traditional state governance. *Id*. at 14.The Court reasoned that the "by means of" language in §1344(2) is a textual limitation on the reach of the statute. *Id*. at 12.

Justice Scalia, joined by Justice Thomas, concurred in part and concurred in the judgment. Justice Scalia doubted the Court's view on the textual limitations of § 1344(2). Justice Alito also concurred in part and concurred in the judgment. Justice Alito disagreed with the Court's characterization of purpose of executing a scheme as the required intent for bank fraud. Justice Alito believed that the Court read "knowingly" out of the statute.

Riley v. California, No. 13-132 (Jun. 25, 2014)

Issue. May police search the contents of a cell phone pursuant to the search-incident-to-arrest exception to the warrant requirement?

Holding. No.

Background and procedural history. Mr. Riley was stopped for an expired tag. Firearms were later found in his car and he was arrested on weapons charges. Officers began looking through the information on his smart phone and found information linking Mr. Riley to a gang and pictures that connected him to a shooting that occurred a few weeks prior to his arrest. Mr. Riley was charged in connection with the shooting and sought to have the evidence obtained from his phone suppressed. The trial court denied his motion and the California Court of Appeal affirmed.

In the consolidated case, Mr. Wurie was arrested on drug charges. When the officers took him to the station, he received several calls to his cell phone from a number identified as "my house." The officers opened the phone, where there was a picture of a woman and small child as the

background. They then looked through the call log and traced the number back to an apartment address. The officers secured a warrant to search that apartment. Once there, they noticed "Wurie" on a mailbox and could see the woman from the pictures inside. When officers searched the apartment they found drugs and firearms. Mr. Wurie was charged with distributing crack cocaine and being a felon in possession of a firearm. At trial, he moved to have the evidence found in his apartment suppressed, but the district court denied the motion. The First Circuit reversed.

Analysis. The Supreme Court (Chief Justice Roberts for Justices Scalia, Kennedy, Thomas, Ginsberg, Breyer, Sotomayor, and Kagan) reversed the California Court of Appeal and affirmed the First Circuit opinion. The Court looked to the reasoning in *Chimel v. California*, 395 U.S. 752 (1969), *United States v. Robinson*, 414 U.S. 218 (1973) and *Arizona v. Gant*, 556 U.S. 332 (2009), to determine that the search incident to arrest exception does not apply to data stored in cell phones.

The two main purposes behind the search incident to arrest exception are officer safety and the preservation of evidence. Neither rationale supports the warrantless search of cell phone data. Officers will still be able to seize the phone and carefully examine its physical characteristics to ensure that, for example, there is not a razor blade hidden within the case. The Government argued that the information in the phone could potentially alert the officers to the fact that the arrestee's confederates are approaching; however, this interpretation of the exception moves away from the rationale of protecting officers from *the arrestee*. Preservation of evidence provides a slightly stronger argument, but it still fails. Even after an officer has secured a phone, there is a risk that data can be remotely wiped or encrypted. There are measures that can be taken to secure against this though, such as disconnecting the phone from the network or placing it in a Farraday bag that secures the phone against radio waves. If there are circumstances where there truly is a risk of data being wiped, they are better dealt with through an exigent circumstances analysis than by a categorical rule.

The idea that searching the contents of an arrestee's pockets creates no significant intrusion to privacy rights beyond the arrest itself is unworkable in application to cell phone data because it is qualitatively and quantitatively different that physical items. Cell phones hold substantially more information than anything else that can be carried in a pocket, and this information provides great insight into a person's life. To carry around physical copies of all the information contained in a cell phone, a person would need a container more akin to the footlocker in *United States v. Chadwick*, 433 U.S. 1 (1977), which the Court held could not be searched, than the cigarette container in *Robinson*. Further, police officers can reach data that is stored not in the phone itself, but rather sent from another source to a cloud device the phone can access. This type of search would be like "finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house." Slip. op. at 21.

Justice Alito filed a concurring opinion

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

PUBLISHED OPINIONS

United States v. Feliciano, No. 12-15341 (April 3, 2014)

Issues. (1) Does a prosecutor act improperly when he or she proceeds with a charge that is clearly unsupported by evidence? (2) Does the denial of the most persuasive form of expert assistance render a trial fundamentally unfair?

Held. (1) Yes. (2) No.

Background and procedural history. Mr. Feliciano was charged with attempted bank robbery (Count One), using a firearm during the attempted bank robbery (Count Two), bank robbery (Count Three), using a firearm during the bank robbery (Count Four), and felon in possession of a firearm (Count Five). Prior to trial, the Government recognized that there was insufficient evidence as to Count Four, but did not dismiss the count. A jury convicted Mr. Feliciano on all five counts. Mr. Feliciano's sole defense to Count Three was that he suffered from a long-term back injury, and, therefore, would not be able to vault over the teller counter as the security footage indicated. Before trial, Mr. Feliciano twice moved ex parte pursuant to 18 U.S.C. § 3006A(e) for an order authorizing an MRI. The magistrate judge denied the motion because there were "other less costly means of establishing" the defense. Slip op. at 8. Mr. Feliciano twice moved for reconsideration of the denial, but the district court denied his motion both times.

Analysis. The Eleventh Circuit (Judge Martin, for Judges Pryor and Gold) vacated Mr. Feliciano's conviction for using a firearm during the bank robbery (Count Four). The Court held that the Government's evidence was "plainly insufficient" to sustain a conviction because witnesses specifically stated that Mr. Feliciano did not own a gun at that time and that they did not see Mr. Feliciano with a gun. Slip op. at 20. The Court noted the Government conceded that the evidence was insufficient prior to trial.

The Eleventh Circuit affirmed Mr. Feliciano's four other convictions. In challenging Count Three, Mr. Feliciano argued that the denial of expert assistance violated 18 U.S.C. 3006A(e). To successfully argue a violation of 3006A(e), "a defendant must demonstrate three elements: (1) he made a timely request for assistance; (2) the request was improperly denied; and (3) 'the denial rendered the defendant's trial fundamentally unfair.'" Slip op. at 10. The Court noted that Mr. Feliciano satisfied the first two elements. However, the Court held that Mr. Feliciano failed to satisfy the third element. Slip op. at 12. The Court reasoned that just because the expert assistance "was not in the most persuasive form does not render the trial fundamentally unfair." *Id*. Fundamental unfairness requires that the denial of the expert assistance has a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Id*. (internal quotation omitted). The Court also noted that Mr. Feliciano received expert assistance in the form of a physician's examination.

The Court summarily rejected Mr. Feliciano's remaining arguments.

Judge Pryor specially concurred to opine that the prosecutor's actions did not violate any prosecutorial standards.

United States v. Travis, No. 13-10400 (April 4, 2014)

Issue. Is a conviction for vehicular flight under Florida law a crime of violence within the meaning of USSG §4B1.2, which defines a predicate crime of violence as any felony offense that "involves conduct that presents a serious potential risk of physical injury to another"?

Held. Yes.

Background and procedural history. Mr. Travis was convicted of being a felon in possession of a firearm. The district court found that Mr. Travis's prior convictions for vehicular flight and aggravated assault with a weapon were crimes of violence within the residual clause of §4B1.2 and, therefore, his base offense level was 24. Mr. Travis appealed the district court's finding that his prior conviction for vehicular flight was a crime of violence.

Analysis. The Eleventh Circuit (per curiam, Chief Judge Carnes, Judges Hull and Marcus) affirmed. The Court applied the categorical approach and considered whether the offense "'as it is ordinarily committed . . . poses a serious potential risk of physical injury that is similar in kind and in degree to the risks posed by the enumerated crimes' of burglary, extortion, arson, and those involving the use of explosives.'" Slip op. at 3 (*quoting United States v. Owens*, 672 F.3d 662, 968 (11th Cir. 2012)).

The Court relied on the Supreme Court's ruling in *Sykes v. United States*, __ U.S. __, 131 S. Ct. 2267 (2011), and its own decision in *United States v. Petite*, 703 F.3d 1290 (11th Cir. 2013), in deciding that vehicular flight does pose a risk similar in kind and degree to the enumerated crimes. The Court rejected Mr. Travis's argument that nonviolent pursuits are different than the flight situations present by *Sykes* and *Petite* and that refusing to stop a vehicle when asked by a police officer is different than fleeing from a patrol car that has its lights and sirens activated. The Court reasoned that the *Sykes* and *Petite* decisions made clear that the type of vehicular flight was immaterial.

United States v. Grzybowicz, No. 12-13749 (Apr. 4, 2014)

Issue. Does a defendant "distribute" child pornography within the meaning 18 U.S.C. § 2252A(a)(2) when he sends images from his cell phone to his own e-mail address?

Held. No.

Background and procedural history. A jury found Mr. Grzybowicz guilty of several child pornography offenses, including distribution of child pornography, in violation of § 2252A(a)(2). The evidence at trial showed that Mr. Grzybowicz took four pornographic pictures of a child with his cell phone's camera, e-mailed them to himself, and downloaded two of the four images to his

computer. The district court denied Mr. Grzybowicz's motion for judgment of acquittal and motion for a new trial, rejecting his argument that he did not "distribute" child pornography within the meaning of the statute because he sent the images only to himself.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judge Hull and Fifth Circuit Judge Garza) affirmed Mr. Grzybowicz's convictions on all counts save for the one pursuant to § 2252A(a)(2), vacated his sentence as to all counts, and remanded for resentencing.

Noting that § 2252A(a)(2) does not define "distribute," the Court employed its plain and ordinary meaning: "to deliver, give out, dispense, or disperse to others." Slip op. at 22 (emphasis added). Concluding that "[w]e do not ordinarily speak of delivering to ourselves things that we already have," the Court determined that Mr. Grzybowicz's conviction on this count was due to be vacated. Slip op. at 23. By sending himself the photos, Mr. Grzybowicz may have taken a step toward distribution, but the statute does not criminalize "getting ready to distribute." Slip op. at 27. The Eleventh Circuit noted, however, that the definition of "distribute" under USSG §2G2.1(b)(3), which permits a sentencing enhancement for child pornography distribution, is expressly defined more broadly, and cautioned that its vacatur of Mr. Grzybowicz's conviction on the § 2252A(a)(2) count did not preclude application of that enhancement on remand.

Brown v. United States, No. 11-15149 (Apr. 7, 2014)

Issue. Is a 28 U.S.C. § 2255 proceeding a "civil matter" within the meaning of 28 U.S.C. § 636(c), thereby permitting a Magistrate Judge to enter a final judgment on a petitioner's § 2255 motion?

Held. No.

Background and procedural history. Mr. Brown filed a § 2255 motion to vacate his sentence. With the consent of the parties, the district court referred the matter to a magistrate judge. The magistrate judge denied the motion without holding an evidentiary hearing and later denied Mr. Brown's motion for reconsideration. Mr. Brown appealed both rulings. While that appeal was pending, Mr. Brown moved the magistrate judge, pursuant to FRCP 60(b)(4), to vacate his order denying the § 2255 motion. In this motion, Mr. Brown argued that Article III of the Constitution did not permit a magistrate judge to render a final judgment on a § 2255 motion, and that to the extent § 636(c) permitted this, it was unconstitutional. The magistrate judge denied the motion, and Mr. Brown appealed that ruling as well.

Analysis. The Eleventh Circuit (Judge Tjoflat, for Judge Pryor and W.D. Washington Judge Rothstein), citing the canon of constitutional avoidance, did not reach the Article III issue, ruling instead that a § 2225 proceeding was not a "civil matter" within the meaning of § 636(c). The Court vacated the magistrate judge's denial of Mr. Brown's § 2255 motion and remanded.

The Court surveyed the historical development of magistrate judges, culminating in the creation of the current structure through legislation in 1968, 1976, and 1979. It was the 1979 Act that enacted subsection (c) to § 636, which permits magistrate judges to conduct all proceedings in a "civil matter." Despite the fact that considerable historical and precedential bases exist for

concluding that a § 2255 proceeding is civil in nature, to so hold would require the Eleventh Circuit to determine whether § 636(c) was unconstitutional. To avoid reaching this question (and noting that the legislative history of the 1979 Act lacked any indication that Congress intended § 636(c) to apply to proceedings brought by federal prisoners), the Court held that a § 2255 proceeding was not a "civil matter" as that term is employed in § 636(c). (The Eleventh Circuit pointedly noted, however, that § 636(c) was of dubious constitutionality on its face because it permitted non-Article III judges to exercise the judicial power of the United States.) The Court accordingly concluded that the magistrate judge lacked statutory authority to issue a final order on Mr. Brown's motion to vacate his sentence.

Rodriguez v. Fla. Dep't. of Corr., No. 12-10887 (Apr. 7, 2014)

Issue. Is the State required, in a 28 U.S.C. § 2254 proceeding, to serve the petitioner with the appendix of exhibits it filed in the district court, and does a district court abuse its discretion in refusing to order the state to do so?

Held. Yes and yes.

Background and procedural history. Mr. Rodriguez moved to vacate his sentence pursuant to § 2254. The district court referred the proceeding to a magistrate judge, who ordered the State of Florida to show cause as to why relief should not be granted and further ordered the State to file a comprehensive appendix with copies of various records from the state court proceedings. The State complied, but only served Mr. Rodriguez with a copy of its response, which heavily referenced the appendix. Mr. Rodriguez's motion to compel the State to serve him with a copy of the appendix was denied. The magistrate judge filed a Report and Recommendation–also heavily citing the appendix–that recommended the denial of Mr. Rodriguez's petition. The district court adopted the Report in its entirety and denied Mr. Rodriguez's motion for reconsideration.

Analysis. The Eleventh Circuit (Judge Martin, for Judge Jordan, with E.D. Pennsylvania Judge Baylson concurring in the judgment) reversed, holding that service of the appendix was required by the Advisory Committee Notes to the Rules Governing § 2254 Cases and the FRCP and that the district court abused its discretion in refusing to order service. The Court rejected the State's argument that the appendix (which was filed one week after the response itself) was entirely separate and independent from the response. The response cited twelve of the fourteen documents included in the appendix, demonstrating that the response depended on those documents.

Judge Baylson concurred in the judgment but wrote separately to criticize the majority opinion for being overly broad. He would not have categorically held that service of these documents was required, but agreed that service was warranted in Mr. Rodriguez's case.

Osley v. United States, No. 11-14989 (Apr. 11, 2014)

Issue. Did counsel render ineffective assistance by (1) failing to advise the defendant of the mandatory minimum sentence and the potential life term of supervised release and (2) failing to object to potential double counting?

Holding. No.

Background and procedural history. Mr. Osley was charged with various counts of commercial sex trafficking of a minor. The Government offered a plea agreement in which it would offer the low end of an estimated 70 to 87 month guidelines range. At a hearing regarding the plea status, the prosecutor informed the court that the maximum sentence was life in prison; that if Mr. Osley pleaded guilty, he would ask for 80 months; that there was no mandatory minimum sentence for these charges; and, that if Mr. Osley were found guilty at trial, the guidelines called for a range of 90-121 months in prison. Mr. Osley proceeded to trial, where he was convicted on all counts. The parties were unaware that Congress had amended the statute to add a 15-year mandatory minimum sentence. Mr. Osley first discovered this during his PSR interview. Mr. Osley's guideline range was 210-262 months; however, the court decided he should be subject to a sentence above this range based on various aggravating factors. Mr. Osley was ultimately sentenced to 365 months and a life term of supervised release.

Mr. Osley moved for a new trial, but the district court denied the motion. The Eleventh Circuit affirmed on appeal. Mr. Osley then filed a *pro se* motion to vacate, claiming that his attorney's failure to inform him of the mandatory minimum 15-year sentence, failure to challenge an obvious double-counting violation in the calculation of the guideline range, and failure to advise him that there was a potential life term of supervised release constituted ineffective assistance of counsel. A magistrate judge determined that counsel was not ineffective and, over Mr. Osley's objections, the district court adopted the report and recommendation.

Analysis. The Eleventh Circuit (Judge Marcus for Judge Dubina and Second Circuit Judge Walker) affirmed.

To show prejudice with regard to an unaccepted plea agreement, a defendant must show that but for counsel's ineffectiveness 1) the plea offer would have been accepted by the defendant and not withdrawn by the Government, 2) the court would have accepted it, and 3) the sentence or conviction would have been less under the terms of the offer than the judgment and sentence that were actually imposed. The Court determined that Mr. Osley could not meet any of these requirements in regard to counsel's failure to inform him of the mandatory minimum. The Court did express "serious doubts" that counsel's failure to discover the mandatory minimum and inform Mr. Osley of its existence was effective assistance, but found that he had not been prejudiced. Mr. Osley's failure to accept a plea that would have given him the possibility of serving less than 5 years with good behavior and insistence that he was innocent do not show that he would have accepted the plea with a 15-year mandatory sentence. Further, the court could not have accepted the 70-month offer, as the mandatory minimum required a sentence of at least 15 years. It also requires speculation

to show that the outcome here would have been any different had Mr. Osley pleaded because the court would have been required to throw out the plea agreement based on the mandatory minimum.

Counsel had informed him that the potential sentence for this violation was life and Mr. Osley still decided to go to trial rather than plead guilty.

The Court also rejected the double-counting argument. A court may use double counting in situations such as this one, where the court intentionally applies sections cumulatively based on a crime's aggravated nature. It is not unreasonable for an attorney not to object where court's action is not clearly in error. Further, given the court's application of an upward variance, Mr. Osley could not demonstrate prejudice.

United States v. Davila, No. 10-15310 (Apr. 15, 2014)

Issue. Does a magistrate judge's impermissible participation in plea negotiations justify vacatur of the defendant's conviction where the defendant cannot show that, but-for the error, he would not have pleaded guilty?

Held. No.

Background and procedural history. Mr. Davila moved to replace his counsel because he was dissatisfied with counsel's advice that he plead guilty. At a hearing, the magistrate judge strongly encouraged Mr. Davila to plead guilty. For example, the magistrate judge told Mr. Davila that pleading guilty is often the best advice a lawyer can give his client, and that if he would plead guilty and not waste the Government's time and "come to the cross" and give substantial assistance, he could get significantly less time in prison. Several months later, Mr. Davila pleaded guilty. He subsequently waived his right to counsel, and the district court denied his pro se efforts to withdraw his guilty plea. He appealed, arguing for the first time that the magistrate judge's comments constituted improper judicial participation in plea discussions, in violation of FRCP 11(c)(1). The Eleventh Circuit, in accordance with then-binding precedent mandating automatic vacatur in such situations, vacated Mr. Davila's conviction. The Supreme Court granted certiorari and held that the Eleventh Circuit's automatic vacatur rule was incompatible with Rule 11(h)'s requirement that a variance from the rule is harmless error if it does not affect the defendant's substantial rights. The Supreme Court remanded for a determination of whether Mr. Davila was prejudiced by the magistrate judge's comments and whether harmless error or plain error review should apply.

Analysis. On remand, the Eleventh Circuit (per curiam, before Judges Tjoflat, Pryor, and Kravitch) affirmed Mr. Davila's conviction. The Court applied plain-error review because Mr. Davila not only failed to contemporaneously object through his then-counsel, but he also did not object during the several months he represented himself. The panel concluded that although the magistrate judge's "highly improper" comments were plain error, Mr. Davila failed to show that his substantial rights were affected. To make that showing, Mr. Davila would have to establish that, but for the magistrate judge's comments, he would not have pleaded guilty. Here, Mr. Davila swore under oath at his change-of-plea hearing that his plea was not coerced, did not mention the improper comments in moving to withdraw his guilty plea, did not plead guilty until three months after the magistrate

judge's comments, had his guilty plea accepted by a different judge than the one who committed the Rule 11 error, and signed a plea agreement significantly more favorable than the Government's original offer. In light of these facts, the Eleventh Circuit determined that Mr. Davila could not show that the magistrate judge's Rule 11 error was the reason he pleaded guilty.

United States v. Tellis, No. 12-12594 (Apr. 18, 2014)

Issue. May a district court deny a defendant's motion to modify his sentence under USSG App C. Amend. 750 based on his status as a career offender where the career offender guideline was not applied at his original sentencing?

Held. Yes.

Background and procedural history. Mr. Tellis pleaded guilty to conspiracy to sell crack cocaine in 2001. In Mr. Tellis's PSR, he was determined to be a career offender as defined in USSG §4B1.1, which carries a base offense level of 37. However, based on the quantity of crack involved, Mr. Tellis's base offense level under USSG §2D1.1 was a 38. Because the base offense level under §2D1.1 was higher, the PSR noted that the career offender status did not affect the total offense level. Mr. Tellis received reductions that brought his offense level down to a 32 and he was sentenced to 210 months.

In 2007, the USSG App. C. Amend. 706 provided a 2-level reduction in base offense levels for crack cocaine. Under this amendment, Mr. Tellis's base offense level was lowered from a 38 to a 36. In 2008, the district court ordered a supplemental PSR to determine whether Mr. Tellis's sentence should be reduced. The probation office found that career offender status raised the base offense level of 36 to 37. The district court reduced the sentence, based on the career offender status, to 188 months.

In 2011, USSG App C. Amend. 750 again reduced sentencing guidelines for certain quantities of crack cocaine, so that Mr. Tellis's base offense level was now at 34 instead of 36. Mr. Tellis moved to reduce his sentence; however, the probation office stated that he was not eligible for a reduced sentence because he was considered a career offender. Mr. Tellis argued that the career offender guideline had not been applied in the initial sentencing and therefore should not apply here. The district court rejected this reasoning and denied the motion.

Analysis. The Eleventh Circuit (Judge Martin, for Judge Hill and Middle District of Alabama Judge Fuller) affirmed. To obtain a sentence reduction, a defendant must show that a retroactive amendment has actually lowered the guideline range. The district court properly denied Mr. Tellis's motion to reduce his sentence because Amendment 750 did not lower his offense level after the Amendment 706 modification, and therefore did not change his guideline range.

The Eleventh Circuit rejected Mr. Tellis's argument that the record did not establish that he was a career offender. The Court further rejected Mr. Tellis's argument that relying on the career offender guidelines now would constitute resentencing rather than a modification, noting that when the district court considered the 2008 motion, it also revisited the initial determination of Mr. Tellis's career offender status.

United States v. Fowler, No. 12-15818 (Apr. 21, 2014)

Issue. When a sentence as to one count of conviction is vacated on appeal, may the district court resentence the defendant on the counts not disturbed on appeal?

Held. Yes.

Background and procedural history. Mr. Fowler was convicted of witness tampering and for use of a firearm during the commission of a federal crime of violence (murder of a police officer). The district court sentenced Mr. Fowler to life in prison on the witness tampering count and to the ten-year statutory minimum on the firearm count, to be served consecutively to the life sentence. Mr. Fowler's witness tampering conviction was ultimately vacated by the Supreme Court and, at resentencing, the district court sentenced Mr. Fowler to life in prison on the firearm count alone. The court explained that the original sentence "was obviously a package" and that it would never have given Mr. Fowler just ten years on a firearm charge stemming from a murder. Slip op. at 2. Mr. Fowler argued on appeal that the district court had no authority to resentence him on the firearm count and, alternatively, that the enhanced sentence on that count violated his due process rights.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judges Hull and Cox) affirmed. The district court had authority to resentence Mr. Fowler because long-standing precedent confirms that a district court has jurisdiction to resentence where, as here, its sentence package has been "unpackaged" on direct appeal. The Court reiterated that "[t]he sentence package that has been unpackaged by a reversal is to be repackaged at resentencing using the guidelines and the § 3553(a) factors." Slip op. at 11-12. *See, e.g., United States v. Mixon*, 115 F.3d 900, 903 (11th Cir. 1997). Repackaging was particularly appropriate in this case because the district court made it clear that the original sentence was a packaged one, and because the original ten-year sentence on the firearm was consecutive to the since-vacated life sentence on the witness tampering count; without the witness tampering count, there was nothing to which the ten-year sentence could run consecutive.

The Eleventh Circuit also rejected Mr. Fowler's due process challenge. *United States v. Monaco*, 702 F.2d 860 (11th Cir. 1983) held that a sentencing court, on remand, could not increase the total sentence on the remaining counts. The Court held that *Monaco*, a pre-sentencing guidelines case, was inapposite to packaged sentences calculated pursuant to the guidelines. Moreover, Mr. Fowler's total sentence was not increased because the original sentence was life, and the sentence imposed on remand was life. The Court was also unpersuaded by Mr. Fowler's argument that the new sentence was based on the district court's vindictiveness, noting the court's statement that it would not have originally imposed the mandatory minimum on the firearm count if Mr. Fowler were not already subject to a life sentence.

Jeffries v. United States, No. 13-10730 (April 23, 2014)

Issue. May the Government use evidence other than prison logs or other records to refute the prison mailbox rule?

Held. Yes.

Background and procedural history. Mr. Jeffries was convicted of multiple offenses and sentenced to 360 months in prison. The Eleventh Circuit affirmed his convictions and sentence on May 11, 2010. One year later, Mr. Jeffries filed a *pro se* 28 U.S.C. § 2255 petition to vacate, which he and a notary signed May 9, 2011. The Government responded to the petition on July 22, 2011.

A magistrate judge issued a report and recommendation, recommending Mr. Jeffries's petition be denied and his case be dismissed. The district court adopted the recommendation and on November 21, 2011, denied Mr. Jeffries's petition, and dismissed his case. That same day, the court received another petition from Mr. Jeffries dated November 4, 2011. Mr. Jeffries explained in that petition that he had filed three additional claims to his § 2255 petition on June 1, 2011, which he attached in the form of a supplemental motion dated June 1, 2011. A signed certificate of service was also attached stating that Mr. Jeffries had deposited the supplemental brief in the prison legal mailbox on June 1, 2011.

The district court had no record of the June 1, 2011, filing. An evidentiary hearing on the issue of the timeliness of Mr. Jeffries's supplemental claims was ordered, after which the court concluded that the claims in Mr. Jeffries's supplemental motion did not relate back to his original § 2255 petition. The court further concluded that the earliest Mr. Jeffries gave the supplemental motion to prison authorities was November 4, 2011. His supplemental claims were thereby untimely. Mr. Jeffries filed a motion for reconsideration, which the court denied. Mr. Jeffries appealed, and the Eleventh Circuit granted a COA regarding whether Mr. Jeffries's *pro se* supplement to his § 2255 petition was untimely.

Analysis. The Eleventh Circuit (per curiam, Judges Hull, Marcus, and Black) affirmed. The prison mailbox rule dictates that a *pro se* prisoner's court filing is treated as filed on the date the filing is delivered to prison authorities for mailing. Because it is assumed that a prisoner delivered the filing to prison authorities on the date he or she signs it, the burden rests on the Government to prove that the filing was delivered to prison authorities on a date other than the date of signing. This burden is usually satisfied by the Government furnishing of prison logs or other prison mailroom records. However, in Mr. Jeffries's case, a mailroom supervisor testified that the prison mailroom only logged or tracked legal mail sent with a certified return receipt. Because Mr. Jeffries did not mail his supplemental motion with a certified return receipt, the mailroom records could not dispose of the issue one way or another. The Eleventh Circuit concluded that the evidence presented by the Government, "including [the mailroom supervisor's] testimony of normal mailroom practices, Jeffries' lack of diligence in following up on the supplemental motion until it was recommended the original motion be denied, and Jeffries' incredible testimony" was nevertheless sufficient to "convince[] us the district court did not clearly err in finding the supplemental § 2255 motion was untimely." (Slip op. at 12).

Lugo v. Sec'y, Fla. Dep't. of Corr., Nos. 11-13439 and 12-13737 (Apr. 24, 2014)

Issue. Does unethical conduct by a petitioner's state habeas counsel justify equitable tolling of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) deadline for filing a habeas petition where counsel's unethical conduct occurred after the deadline had elapsed?

Held. No.

Background and procedural history. Mr. Lugo was sentenced to death by a Florida trial court. His conviction was affirmed by the Florida Supreme Court and the U.S. Supreme Court denied certiorari, triggering Mr. Lugo's one-year deadline, pursuant to the AEDPA, to file a federal habeas petition. The Florida Supreme Court appointed a series of attorneys to represent Mr. Lugo in state post-conviction proceedings, the first several of whom withdrew due to various conflicts. Mr. Lugo's eventual counsel did not file the (ultimately unsuccessful) state petition for post-conviction relief until after Mr. Lugo's one-year deadline to file a habeas petition had expired.

After the state court's denial of post-conviction relief was affirmed on appeal, Mr. Lugo filed a pro se 28 U.S.C. § 2254 petition. He asserted that it was timely due to "impediments" in filing earlier, and argued that his state-appointed counsel had retaliated against Mr. Lugo for his refusal to pay him large sums of money by failing to meet certain filing deadlines, but did not provide specifics. The district court appointed counsel, but the amended petition this counsel filed was no more specific. The district court denied the petition, and Mr. Lugo appealed. The court appointed new counsel for appeal. Counsel filed a FRCP 60(b) motion to vacate the earlier denial and, for the first time, presented specific information and evidence as to state post-conviction counsel's misconduct. Counsel argued that state counsel's misconduct warranted equitable tolling of the AEDPA filing deadline. The district court denied the Rule 60(b) motion, finding that while state post-conviction counsel's conduct was appalling and unethical, it could not justify equitable tolling because it occurred after the AEDPA deadline had passed.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judges Martin and Dubina) affirmed. The district court properly dismissed Mr. Lugo's § 2254 motion because he failed to make a specific showing as to why equitable tolling should apply, and the court rightly denied the Rule 60(b) motion because state post-conviction counsel's reprehensible conduct occurred after the AEPDA statute of limitations had already run.

Judge Martin concurred in the judgment but wrote separately to express her concern at the fact that Florida death row inmates routinely miss the AEDPA filing deadline, a problem apparently unique to the State of Florida among the states comprising the Eleventh Circuit. The majority wrote that it shared Judge Martin's concern, and the entire panel called for the creation of a Capital Habeas Unit in one or more of Florida's three federal districts to redress this recurring problem. Judge Martin called for more prompt appointment of federal habeas counsel, while the majority cautioned against federal courts appointing counsel to assist petitioners in state challenges to their death sentences.

United States v. Parton, No. 13-12612 (Apr. 30, 2014)

Issue. Did the Supreme Court's decision in *Nat'l Fed'n of Ind. Bus. v. Sebelius*, 567 U.S. ___ (2012), overrule the holding in *United States v. Smith*, 459 F.3d 1276 (11th Cir. 2006), that 18 U.S.C. § 2251(a) was a constitutional exercise of Congress's Commerce Clause authority?

Held. No.

Background and procedural history. Mr. Parton was indicted under 18 U.S.C. § 2251(a) for enticing a minor to engage in sexually explicit conduct for purpose of producing a visual depiction of that conduct. He moved to dismiss the indictment, arguing that the mere use of an electronic device that has traveled through interstate commerce in the production of child pornography is not a strong enough connection to interstate commerce to support federal prosecution. The district court denied this motion and Mr. Parton pleaded guilty.

Analysis. The Eleventh Circuit (Judge Anderson, for Tenth Circuit Judge Ebel and Southern District of Florida Judge Ungaro) affirmed. The Eleventh Circuit had previously rejected this argument in *Smith*; however, Mr. Parton argued that the Supreme Court overruled *Smith* in *Sebelius*. The Court reasoned that *Smith* is distinguishable from *Sebelius*, in which the Supreme Court refused to accept the Congressional requirement of individuals to become engaged in commerce as an extension of the Commerce Clause. Here, because the production of child pornography is what is being regulated, as opposed to inactivity, *Sebelius* did not abrogate *Smith*.

United States v. Massam, No. 12-15924 (May 6, 2014)

Issue. May a defendant receive a "credit" from the loss amount based on the amount of monies returned to a victim where the loss amount is calculated based on "intended loss" rather than "actual loss"?

Held. No.

Background and Procedural History. Mr. Massam set up a supersedeas bond through which he paid asset distribution to his ex-wife as ordered by the court in his divorce proceedings. Mr. Massam also made investments on behalf of the two pension plans associated with the business. One investment turned out to be a Ponzi scheme and all money invested in this particular company was lost.

After several years of taking monies from his employees' pension funds, Mr. Massam pleaded guilty to theft and embezzlement of employee benefit funds, 18 U.S.C. § 664. At sentencing, he argued that the total loss amount should be offset by the amount of money that was lost in the Ponzi scheme and by the money paid to his ex-wife from the supersedeas bond. The district court allowed Mr. Massam credit against the total loss amount of money from the pension funds that resulted in a loss due to the Ponzi scheme that Mr. Massam was unaware of at the time of investment, but the court did not credit the amount paid to his ex-wife from the supersedeas bond.

Consequently, the total loss amount was still more than $400,000, implicating a sentencing enhancement.

Analysis: The Eleventh Circuit (Chief Judge Carnes, for Judge Wilson and Middle District of Florida Judge Dalton) affirmed. The loss amount cannot be reduced by any amount of funds returned to the victim because the loss amount is based on "intended loss" and not "actual loss." Credit can only be given when there is a loss against a victim, therefore resulting in an actual loss, which does not exist when calculating the intended loss.

United States v. Harrell, No. 11-15680 (May 14, 2014)

Issues.
1. Did the district court's participation in Mr. Harrell's plea agreement constitute reversible error?
2. Did the district court err in admitting expert testimony regarding the location of Mr. Dantzle's cell phone based on information from cell towers?

Holdings.
1. Yes.
2. Yes, but it was not reversible error.

Background and procedural history. Mr. Harrell and Mr. Dantzle were each indicted on four counts of Hobbs Act Robbery and conspiracy to commit the same. On the day of the trial, the district court initiated discussions with the defense attorneys and the prosecution regarding a plea deal. With both Mr. Harrell and Mr. Dantzle present, the district court discussed the high sentences each would likely get if convicted, in contrast with the break they could get with a plea. Prior to trial, the government had refused to offer Mr. Harrell any deal below the mandatory minimum sentence of 32 years, and Mr. Harrell had refused this agreement. The court then suggested options for the prosecution that would allow for a sentence of 20 or 25 years, pending the outcome of certain state cases. The government ultimately offered Mr. Harrell a 25-year deal that he initially rejected before accepting a few hours later.

At Mr. Dantzle's trial, the government presented testimony regarding the location of Mr. Dantzle's cell phone based on cell tower data. Mr. Dantzle objected, asserting there was no foundation for the agent's testimony. The agent then explained that he had previously testified about cell location data and had personally observed cell tower locations. The district court certified the agent as an expert. Mr. Dantzle was convicted on all four counts.

Analysis. The Eleventh Circuit (Judge Jordan for Judges Pryor and Fay) reversed Mr. Harrell's conviction and affirmed Mr. Dantzle's conviction. The district court impermissibly interfered with plea negotiations between Mr. Harrell and the government. Fed. R. Crim. P. 11(c)(1) creates a bright line rule prohibiting judicial interference with plea agreements because it threatens a judge's impartiality and appearance of impartiality. The district court erred in discussing a plea agreement and this error affected Mr. Harrell's substantial rights, requiring the vacatur of Mr. Harrell's conviction.

While the district court erred in Mr. Dantzle's case, the error was harmless. The government failed to establish that the agent was qualified as an expert, and, therefore, the district court's certification of him as an expert was in error. The error did not have a substantial effect on the jury's verdict because the government presented other, substantial evidence linking Mr. Dantzle to the robberies.

United States v. Rodriguez, No. 10-12065 (May 15, 2014)

Issue. Is the level of competence required for a defendant to enter a guilty plea the same level of competence required for a defendant to stand trial?

Held. Yes.

Background and procedural history. Ms. Rodriguez pleaded guilty to conspiracy to commit mail and wire fraud, mail fraud, and wire fraud. Ms. Rodriguez had been undergoing treatment for mental illness the year prior to entering her guilty plea. She was taking three different types of medication. On the day of the guilty plea, Ms. Rodriguez had taken her medication. The district court accepted Ms. Rodriguez's guilty plea and eventually sentenced her to 70 months in prison. The district court found that mandatory restitution was appropriate; however, the district court noted that the victims' losses were not yet clear. The district court entered its judgment and deferred determination of restitution. Ms. Rodriguez appealed her sentence of 70 months.

Analysis. The Eleventh Circuit (Judge Marcus, for Northern District of Alabama Judge Coogler, and Southern District of Georgia Judge Bowen) affirmed. Ms. Rodriguez argued that her guilty plea violated her constitutional rights because she was not competent to plead guilty due to mental illness. The Court rejected Ms. Rodriguez's argument and began its analysis by defining the standard of review for issues of competency that were not objected to in the district court. The Court stated that, like when a defendant fails to object in the district court to a claimed Rule 11 violation, the Court reviews for plain error a defendant's failure to object to the district court's determination that she is competent to plead guilty. Slip op. at 12. The Court stated that the defendant is competent to plead guilty if the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *Id*. at 13 (internal quotation omitted). The Court noted that "an allegation of mental illness or other mental disability does not invalidate a guilty plea if the defendant was still competent to enter that plea." *Id*. The Court held that the district court did not commit plain error in finding that Ms. Rodriguez was competent to plead guilty. *Id.* at 17. The Court reasoned that the district court repeatedly questioned Ms. Rodriguez and her attorney about Ms. Rodriguez's ability to understand the questions posed by the district court, and Ms. Rodriguez and her attorney repeatedly acknowledged that Ms. Rodriguez did understand the questions and that she was able to assist counsel. *Id*. at 16.

The Court summarily rejected Ms. Rodriguez's remaining arguments.

United States v. Chahla, No. 13-12717 (May 21, 2014)

Issue. May a conviction under 18 U.S.C. § 1425(a) (unlawful procurement of citizenship) be based on fraudulent statements made when seeking Lawful Permanent Resident status?

Held. Yes.

Background and procedural history. The three Chahla brothers were each charged and convicted of one count of conspiracy to commit offenses against the laws of the United States or defraud the United States, under 18 U.S.C. § 371 and § 1001, and 8 U.S.C. § 1325(c). The Chahla brothers were also charged with two counts each of unlawful procurement of naturalization under 18 U.S.C. § 1425(a). Two of the brothers were convicted of both § 1425(a) charges, while a third brother was only convicted of one §1425(a) charge because the Government dismissed his second charge. The Government alleged that the Chahla brothers had entered into fraudulent marriages to obtain a more favorable immigration status. During trial, the Chahlas moved for a judgment of acquittal on all counts at the close of the Government's case and again at the close of all evidence. The district court denied both motions. After the verdict, the Chahlas renewed their motions for judgment of acquittal or, alternatively, for a new trial. The district court denied the renewed motions.

Analysis. The Eleventh Circuit (Judge Martin, for Judge Dubina and District of South Carolina Judge Duffy) affirmed. The Court rejected the Chahlas' argument that three of their convictions under 18 U.S.C. § 1425(a) were invalid. The Chahlas claimed that § 1425(a) criminalizes fraudulent procurement of naturalization, but not false statements made in applications to become a Lawful Permanent Resident. In rejecting this argument, the Court relied on *Fedorenko v. United States*, 449 U.S. 490 (1988). The Court recognized that the statute in *Fedorenko* is different than the one at issue in this case; however, the Court adopted the principle announced in *Fedorenko* that "'there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship' and '[f]ailure to comply with any of these conditions renders the certificate of citizenship illegally procured.'" Slip op. at 12 (*quoting Fedorenko*, 449 U.S. at 506). The Court noted that becoming a Lawful Permanent Resident was a statutory prerequisite to becoming a naturalized citizen. Slip op. at 13. The Court therefore held that "the Chahlas' attempt to become naturalized citizens was 'contrary to law' to the extent it was based on their fraudulently obtained status as Lawful Permanent Residents." *Id*. The Court summarily rejected the Chahlas' remaining arguments.

United States v. Mozie, No. 12-12538 (May 22, 2014)

Issue. Did the district court constructively amend Mr. Mozie's indictment through the jury instructions?

Held. No.

Background and procedural history. Mr. Mozie was convicted of eight counts of child sex trafficking, one count of conspiracy to commit child sex trafficking, and one count of producing

child pornography. Mr. Mozie posed as a businessman working for a modeling agency to recruit teenage girls into his prostitution ring (PPP). He provided the girls, many of whom were runaways, with a place to stay, drugs, and alcohol in exchange for their services. He was sentenced to the Guidelines-recommended life imprisonment.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judges Wilson and Fay) affirmed. Mr. Mozie challenged both his conviction and sentence, but the Court rejected each of his arguments.

Mr. Mozie argued that the district court constructively amended his indictment. The indictment charged that Mr. Mozie knew *and* recklessly disregarded the age of his victims, but the district court charged the jury to convict if he knew *or* recklessly disregarded the age of his victims. There can be a constructive amendment when the language of the jury instructions differs from the indictment; however, when an indictment charges multiple means of violating a statute conjunctively, a conviction can arise from proof of only one means. Here, the district court properly changed the language from conjunctive to disjunctive; therefore there was no constructive amendment. This case is distinguishable on two main grounds from *United States v. Cancellierre*, where the Eleventh Circuit held a constructive amendment occurred when the district court allowed "willfulness" to be removed from an indictment at the close of evidence. 69 F.3d 1116 (11th Cir. 1995). There, "willfulness" was not a statutory element of the offense charged, and the entire defense rested on disproving "willfulness."

The Court rejected his remaining claims.

United States v. Isaacson, Nos. 11-14287, 12-14703 (May 22, 2014)

Issue. Does the striking of prospective jurors based on their answers to written questionnaires, prior to any appearance by those jurors in court, constitute "voir dire" for purposes of the Speedy Trial Act?

Held. Yes.

Background and procedural history. Mr. Issacson was convicted after a jury trial under 18 U.S.C. § 371 for his participation in a conspiracy to commit securities fraud. The district court sentenced him to 36 months in prison and ordered that he pay $8 million in restitution. On appeal, Mr. Issacson argued that the district court should have granted his motion to dismiss for Speedy Trial Act violations. The Government responded that Mr. Isaacson's Speedy Trial Act motion was untimely because it was submitted after voir dire and, therefore, after trial had commenced.

Analysis. The Eleventh Circuit (Judge Martin for Judge Fay and D.C. Circuit Judge Sentelle) affirmed Mr. Issacson's conviction. Mr. Isaacson argued that his motion to dismiss for a violation Speedy Trial Act was raised prior to trial and therefore timely. The Court disagreed, finding that Mr. Isaacson raised the issue after the commencement of trial because voir dire had already begun. In so doing, it rejected Mr. Isaacson's argument that voir dire did not commence until in-court jury selection began and that the striking of jurors based on written questionnaires was not part of voir dire. The Court, referencing the broad discretion district courts have in developing procedures for

jury selection, rejected this argument "[b]ecause written questionnaires facilitate jury selection in ways not unlike traditional oral examination[.] Where, as here, the District Court relies on written questionnaires to aid in jury selection, voir dire and thus the trial begins when the Court starts to rule on opposed juror challenges based on those written questionnaires." Slip op. at 18.

The Court vacated and remanded for resentencing, finding that the Government did not introduce sufficient evidence to justify the district court's restitution judgment.

United States v. Flanders, No. 12-10995 (May 27, 2014)

Issues.

1. Does charging a defendant with violations of both 18 U.S.C. §1591(a) and §1591(b) constitute double jeopardy?

2. Were the consecutive life sentences for each defendant reasonable in this case, given the charges of the men involved?

Holding.

1. No.

2. Yes.

Background and procedural history. Mr. Flanders and Mr. Callum were charged in a 20-count indictment with conspiracy to commit sex trafficking by fraud, sex trafficking by fraud, benefitting by participating in a venture that commits sex trafficking by fraud, attempted sex trafficking by fraud, and attempted benefitting by participating in a venture that commits sex trafficking by fraud. The two men perpetrated a scheme in which they convinced women to travel to Miami to audition for a potential modeling job. Once there, the women were given drinks spiked with Benzodiazepines and presented with release forms to sign. Once the drugs had fully taken effect, Mr. Flanders would film Mr. Callum having sex with the women. Mr. Callum would then edit the videos to remove portions where the women were obviously asleep, and distribute the videos.

Mr. Flanders and Mr. Callum were found guilty on all but two counts (these were dismissed by the district court because they involved a victim who did not testify). The district court then entered a preliminary order of forfeiture against both men. At sentencing, the district court granted the Government's request for an upward variance and sentenced both men to a term of life.

Analysis. The Eleventh Circuit (District of South Carolina Judge Duffy, for Judges Martin and Fay) affirmed.

Mr. Flanders and Mr. Callum asserted that each pair of § 1591(a) and § 1591(b) violations constituted double jeopardy. Under the *Blockburger* test, there is no double jeopardy so long as one provision requires proof of a fact that the other does not. Here, § 1591(a)(2) does not require a showing that the defendant fraudulently induced someone to engage in a commercial sex act, only that the defendant was part of a venture that recruited a person for these purposes. Further,

§ 1591(a)(1) requires no proof that the defendant received a benefit from his participation. Because the two charges do not require proof of the exact same elements, there is no double jeopardy.

Mr. Flanders and Mr. Callum also challenged the reasonableness of their life sentences. The district court applied USSG §2G1.1(c)'s cross reference to §2A3.1 in determining the sentences. Under the cross-reference, if the charged offense "involved" conduct prohibited under 18 U.S.C. § 2241(a) or (b), then §2A3.1 applies a four-level enhancement. Mr. Callum argued that he was not convicted of a sex act itself, but fraudulent inducement; therefore §2A3.1 does not apply. This reasoning fails because the language of §2A3.1 does not require a conviction or charge under § 2241, merely that the offense "involved" conduct within § 2241. Mr. Flanders argued that the application of §2A3.1 constituted impermissible double counting because the conduct described in § 2241 was used for his base offense and enhancements. The language of the Guidelines shows that the Sentencing Commission intended for both sections to apply, and the enhancement only applies when the offense involved the subset of aggravated sexual abuse offenses.

Mr. Flanders further argued that the district court erred in applying §2G1.3(d) in grouping his offenses because this provision involves the trafficking of minors. The Court held that while the district court did err, this was not plain error because the correct Guidelines section would have grouped the offenses the same way. The district court did not abuse its discretion in applying an upward variance to the sentence, as the defendants' conduct can be classified as "unusually heinous, cruel, brutal, or degrading to the victim," especially because the videos of the assaults will prolong the victims' pain and humiliation. Neither defendant was able to provide any persuasive argument to show that the consecutive life sentences were substantively unreasonable.

The Eleventh Circuit rejected the defendants' remaining arguments.

United States v. Brown, No. 13-10023 (May 28, 2014)

Issue. Does the failure to allege the mens rea in an indictment render it jurisdictionally defective?

Holding. No.

Background and procedural history. Ms. Brown pleaded guilty to receipt of counterfeit money orders under a plea agreement that included an appeal waiver. The indictment did not explicitly allege that Ms. Brown knew that the money orders were counterfeit at the time she received them, an element of the charging statute. The factual basis for the guilty plea likewise lacked any allegation of knowledge.

The district court accepted the guilty plea and sentenced Ms. Brown to 63 months in prison. She appealed, claiming for the first time that the indictment was defective because it did not set forth the mens rea. Ms. Brown accordingly argued that the indictment did not charge her with a federal crime and the district court therefore lacked the jurisdiction to sentence her.

Analysis. The Eleventh Circuit (Judge Hull, writing for Chief Judge Carnes and Fifth Circuit Judge Garza) affirmed. The court looked to four previously decided cases to show that, even if an indictment fails to allege an element of the crime charged, it does not strip away a district court's

subject matter jurisdiction. *See Alikhani v. United States*, 200 F.3d 732 (11th Cir. 2000); *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) (en banc); *United States v. Cromartie*, 267 F.3d 1293 (11th Cir. 2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001). The holdings of these cases were reinforced by the Supreme Court. *See United States v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781 (2002) (comparing subject matter jurisdiction, which cannot be waived, to the right to a grand jury, which can, to show that defects in an indictment do not deprive a district court of jurisdiction). Some defects in an indictment divest the district court of subject-matter jurisdiction, but these involve positive allegations of actions that do not constitute violations of federal law rather than omissions of elements of the charged offenses. *See United States v. Peter*, 310 F.3d 709 (11th Cir. 2002). As long as the indictment charges a defendant with a violation of federal law, it is sufficient to invoke the district court's jurisdiction.

Because the alleged defect in the indictment was not jurisdictional, Ms. Brown waived her ability to challenge her sentence both by entering an unconditional guilty plea and by signing an appeal waiver.

United States v. Rodriguez, No. 12-14629 (Jun. 5, 2014)

Issue. Does the prolonged vacancy of four seats on the Eleventh Circuit constitutes an "emergency" within the meaning of 28 U.S.C. §46(b)?

Holding. Yes.

Background and procedural history. 28 U.S.C. § 46(b) allows each Circuit to create panels to hear cases, but requires that each of these panels have a majority of judges from that Circuit unless there is an emergency, such as the illness of a judge. In 2013, the Chief Judge of the Eleventh Circuit issued General Order No. 41, which declared that the Eleventh Circuit was experiencing an "emergency" contemplated within the meaning of § 46(b) based on the prolonged vacancy of four of the twelve seats on the Court.

Analysis. The Eleventh Circuit (per curiam) affirmed. The statute provides the prolonged illness of one judge as a potential emergency; therefore, this reasoning clearly extends to a prolonged vacancy of four seats in a Circuit that already has a high caseload. There is very little precedent on this issue, but what exists supports this holding.

United States v. King, No. 12-16268 (Jun. 9, 2014)

Issues.

1. Does the failure to submit a gun into evidence preclude a conviction of using a firearm in furtherance of a crime?
2. Did the district court err in refusing to use the defendant's proposed jury instruction on cross-race identifications?
3. Did the district court commit reversible error in light of *Alleyne v. United States* by imposing mandatory minimum sentences based on assertions that the defendant "brandished" a firearm

and that multiple counts constituted "second or subsequent" offenses under 18 U.S.C. § 924(c), when neither assertion was found by a jury beyond a reasonable doubt?

Held.

1. No.
2. No.
3. No.

Background and procedural history. Mr. King was indicted on nine counts pertaining to a string of armed robberies, including four counts of carrying a firearm in furtherance of a crime of violence in violation of § 924(c). Law enforcement officers showed victims from several of the locations a photo line-up, and each identified Mr. King as a robber. Mr. King sought to suppress these identifications, but the district court refused. Because the Government was unable to find the gun used, Mr. King moved for a judgement of acquittal, arguing that there was insufficient evidence to show that the gun met the statutory definition of a firearm. The district court denied this motion and Mr. King was convicted on all counts. Mr. King's guidelines range included a mandatory minimum, consecutive seven-year sentence for the first § 924(c) conviction and consecutive 25-year terms for each of his other three § 924(c) convictions. Mr. King challenged this sentence, arguing that both brandishing and the other firearms convictions were "second or subsequent" had to be proved beyond a reasonable doubt under *Apprendi v. New Jersey* and *Alleyne v. United States*.

Analysis. The Eleventh Circuit (per curiam, before Judges Hull and Black, and Ninth Circuit Judge Ferris) affirmed. The Court held there is no requirement for the firearm in a § 924(c) case to be entered as evidence or for expert testimony that the firearm met the statutory definition. Rather, there must only be sufficient testimony, including lay testimony, to show beyond a reasonable doubt that the defendant used a firearm. The Court also rejected Mr. King's argument that the district court erred in refusing to use his proposed jury instruction on cross-race identifications because Mr. King failed to establish a sufficient evidentiary basis for the charge to be given. Even if he had done so, the district court did instruct the jury on cross-race identifications, and the instruction was sufficiently comprehensive.

In light of *Alleyne*, which held that "any fact that increases a mandatory minimum is an 'element' that must be submitted to the jury" 133 S. Ct. 2155, 2163 (2012), Mr. King argued that his first conviction under § 924(c) must be reversed. He further claimed that this prevents the mandatory consecutive 25-year sentences imposed because the jury did not find that the other three counts were "second or subsequent." The Government conceded that the district court erred in sentencing Mr. King to seven years under § 924(c). This does not require a reversal of the sentence, however, because harmless error applies and there was more than enough testimonial and video evidence for a reasonable jury to find that Mr. King brandished a firearm. Furthermore, finding that other counts are "second or subsequent" is a determination of a prior conviction. *Apprendi* and *Alleyne* do not require the government to prove prior convictions beyond a reasonable doubt. The district court did not err in its determination of mandatory sentences under § 924(c).

The Court rejected the remainder of Mr. King's arguments.

United States v. Davis, No. 12-12928 (June 11, 2014)

Issue. Is cell phone location information within the cell phone subscriber's reasonable expectation of privacy for Fourth Amendment purposes?

Held. Yes.

Background and procedural history. Mr. Davis was convicted by a jury on several counts of Hobbs Act robbery, conspiracy to violate the Hobbs Act, and knowing possession of a firearm in furtherance of a crime of violence. The district court sentenced Mr. Davis to 1,941 months imprisonment. During trial, the government introduced evidence of Mr. Davis's location through cell phone location evidence. After conviction and sentencing, Mr. Davis appealed.

Analysis. The Eleventh Circuit (Judge Martin, for Judge Dubina and D.C. Circuit Judge Sentelle) affirmed the judgment in part, but vacated a sentencing enhancement the district court applied. Mr. Davis argued that the obtaining of the cell location evidence violated his constitutional rights under the Fourth Amendment. The Court stated, "Fourth Amendment jurisprudence has dual underpinnings with respect to the rights protected: the trespass theory and the privacy theory." Slip op. at 16. In *United States v. Jones*, __U.S.__, 132 S. Ct. 945 (2012), the Supreme Court addressed a similar issue involving location data generated by a GPS tracking system physically attached to a car, and held that the electronic transmission of GPS location data, in that situation, violated the Fourth Amendment. The Court noted that since there was no trespass against Mr. Davis, *Jones* was not binding authority. The Court nevertheless held that cellular location information is protected by the Fourth Amendment. *Id*. at 23. The Court rejected the Government's argument that "Davis did not have a reasonable expectation of privacy because he had theretofore surrendered that expectation by exposing his cell site location to his service provider when he placed the call" based on *Smith v. Maryland*, 425 U.S. 435 (1976). *Id*. at 21. The Court noted that the *Smith* decision involved phone numbers voluntarily dialed by the cell phone user, in contrast to the instant case, where "Mr. Davis has not voluntarily disclosed his cell site location information to the provider in such a fashion to lose his reasonable expectation of privacy." *Id*. at 22-23. However, the Court deemed that error harmless under the good faith exception. *Id*. at 25, *citing United States v. Leon*, 468 U.S. 897 (1984).

The Court vacated a sentencing enhancement for brandishing a firearm that was improperly applied to Mr. Davis. The Court found that there was not sufficient evidence to apply that sentencing enhancement. *Id*. at 32. Additionally, the Court found that any prosecutorial misconduct did not result in prejudice. *Id*. at 27. The Court summarily rejected Mr. Davis's remaining arguments.

In re Henry, No. 14-12623 (June 17, 2014)

Issue. Is the Supreme Court's recent decision in *Hall v. Florida*,___ U.S. ___, 134 S. Ct. 1986 (2014) retroactive?

Held. No.

Background and procedural history. Mr. Henry committed two murders in Florida and was sentenced to death. With Mr. Henry's execution scheduled for June 18, 2014, the Supreme Court held in *Hall* on May 24, 2014, that it was unconstitutional for the State of Florida to define "mental retardation" as an IQ score of 70 or below and that a petitioner who scores between 70 and 75 on an IQ test may introduce additional evidence of difficulties in adaptive functioning in support of a claim of mental retardation. Mr. Henry moved in the Eleventh Circuit for leave to file a second or successive petition for a writ of habeas corpus in the district court, pursuant to 28 U.S.C. § 2244.

Analysis. The Eleventh Circuit (Judge Marcus, for Judge Pryor) denied Mr. Henry's motion for leave to file a second or successive habeas petition. In this context, § 2244(b)(2) permits such petitions upon a showing that the petitioner's claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" and that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole" would establish by "clear and convincing evidence" that "but for constitutional error, no reasonable factfinder would have found the [petitioner] guilty of the underlying offense." The Court recognized that *Hall* was a "new rule of constitutional law," but found that it was not retroactive because the Supreme Court did not specifically direct as such and because a finding of retroactivity was not "logically dictate[d]" through "multiple holdings." Slip op. at 16, *citing Tyler v. Cain*, 553 U.S. 656, 668 (2001) (O'Connor, J., concurring). The Court further held that even if Mr. Henry could demonstrate that *Hall* was retroactively applicable, he could not satisfy the second prong of the § 2244(b)(2) test. Mr. Henry's claim of mental retardation rested on a score of 78 on a mid-1980s IQ test, which would not implicate the *Hall* ruling that a score of 70 to 75 would permit a petitioner to demonstrate mental retardation by "additional evidence regarding difficulties in adaptive functioning." Slip op. at 22.

Judge Martin dissented, arguing that *Hall* was retroactively applicable.

United States v. Serrapio, No. 12-14897 (June 18, 2014)

Issue. After Mr. Serrapio made certain comments to his university's newspaper, the district court modified the conditions of his probation. Does this modification violate the Double Jeopardy Clause, the Due Process Clause, or the First Amendment?

Holding. No.

Background and procedural history. Mr. Serrapio pleaded guilty to a violation of 18 U.S.C. § 871 for threatening to shoot President Obama when he visited the University of Miami. Mr. Serrapio was sentenced to three years of probation with the special conditions of four months of home confinement, with electronic monitoring, and 250 hours of community service. After Mr. Serrapio began serving his sentence, a college newspaper printed an interview with Mr. Serrapio in which he stated that he viewed his prosecution as "pretty funny" and noted that the publicity benefitted his rock band. This piece was published alongside an article penned by Mr. Serrapio in which he states that the threat was "the biggest mistake of his life." The day after the article ran, the district court set a status conference relating to the conditions of Mr. Serrapio's probation. At this hearing, the

district court expressed concern over the interview. Though it did not revoke his probation, the court modified its conditions, requiring Mr. Serrapio to spend 45 days in a halfway house and lengthened his home confinement to one year.

Analysis. The Eleventh Circuit (Judge Jordan for Judge Martin and Eastern District of Pennsylvania Judge Baylson) affirmed. Mr. Serrapio's challenge came before the court after the completion of his halfway-house stay and home confinement. Although the home confinement issue is moot, Mr. Serrapio was required to pay for his electronic monitoring, and, therefore, was still suffering from collateral consequences.

The modification of the conditions of probation did not violate the Double Jeopardy Clause. Although Mr. Serrapio did not violate the terms of his probation, under § 3563(c) probation can be modified where, as here, the defendant's conduct shows that the initial conditions are insufficient to accomplish the purposes of probation. Mr. Serrapio cited *United States v. Jones* to argue that this case violates Double Jeopardy because it affects his "legitimate expectations" regarding the length of his sentence. 722 F.2d 632, 637 (11th Cir. 1983). However, Mr. Serrapio did not have a legitimate expectation that the terms of his probation would remain the same if his conduct warranted a modification. Mr. Serrapio further alleged that, as applied, § 3563(c) defeats finality of probationary sentences, but the Eleventh Circuit rejected that argument because the discretion of the district court to modify sentences is not unlimited.

United States v. Vandergrift, No. 12-13154 (June 18, 2014)

Issue. Does *Tapia v. United States*, __ U.S. __, 131 S. Ct. 2382 (2011), which prohibits the consideration of a defendant's rehabilitative needs in imposing or lengthening a custodial sentence, apply in the context of a supervised release revocation proceeding?

Held. Yes.

Background and procedural history. The district court determined that Mr. Vandergrift violated several conditions of his supervised release. In imposing sentence, the court stated its view that a custodial sentence was appropriate, in part, because of Mr. Vandergrift's rehabilitative needs. Specifically, the court noted that the structure of the prison environment would be beneficial to Mr. Vandergrift's physical well-being and that Mr. Vandergrift would benefit from the vocational training programs offered by the Bureau of Prisons.

Analysis. The Eleventh Circuit (Judge Wilson, for Judge Tjoflat and Middle District of Florida Judge Bucklew) affirmed. The Court decided for the first time that *Tapia* applied in the context of a supervised release revocation proceeding, abrogating its prior, contrary holding in *United States v. Brown* that "a court may consider a defendant's rehabilitative needs when imposing a specific incarcerative term following revocation of supervised release." 224 F.3d 1237, 1240 (11th Cir. 2000). In so doing, the Eleventh Circuit refused to limit its holding to situations where rehabilitation was a district court's "dominant" consideration; instead, the Court held that reversible *Tapia* error exists where the district court "considers" rehabilitation at all. Slip op. at 12.

However, because Mr. Vandergrift did not raise the issue below, plain-error review applied. Although Mr. Vandergrift did demonstrate error, even if that error were "plain" he could not show that it affected his substantial rights because Mr. Vandergrift could not demonstrate that the outcome would have been different but-for the error.

Boyd v. United States, No. 11-15643 (June 18, 2014)

Issue. Is a fourth-in-time 28 U.S.C. § 2255 motion challenging the enhancement of the movant's sentence, based on the vacatur of his state court predicate convictions, "successive" where the movant's first § 2255 motion predated the state court vacatur and where the second-and third-in-time § 2255 motions were not adjudicated on the merits?

Held. No.

Background and procedural history. In 1998, Mr. Boyd was convicted of several drug offenses and, pursuant to 21 U.S.C. § 851, was sentenced to life in prison due to his two prior felony drug convictions.

Following an unsuccessful direct appeal, Mr. Boyd filed his first § 2255 motion in 2001. This motion did not challenge the validity of Mr. Boyd's state court convictions. The district court denied the motion, and the Eleventh Circuit affirmed. In 2003, the Georgia court vacated Mr. Boyd's state convictions, and Mr. Boyd filed a second-in-time § 2255 motion in 2004. The district court denied that motion as successive, and Mr. Boyd did not appeal. In 2005, Mr. Boyd filed a third-in-time § 2255 motion on the same grounds that was also denied, and the Eleventh Circuit refused to grant Mr. Boyd's request for a certificate of appealability. Mr. Boyd filed his fourth-in-time § 2255 motion in 2011, which was also dismissed as successive. The Eleventh Circuit granted Mr. Boyd a certificate of appealability on whether the district court erred and, if so, whether Mr. Boyd's failure to appeal the second-in-time § 2255 motion or the Eleventh Circuit's denial of a certificate of appealability on the denial of the third-in-time motion had "any effect on the propriety of a federal court now considering the merits of [Mr.] Boyd's claim." Slip op. at 4.

Analysis. The Eleventh Circuit (Southern District of Florida Judge Moore for Judge Tjoflat and Middle District of Florida Judge Schlesinger) reversed and remanded. Although a movant must obtain certification from the court of appeals before the district court may consider the merits of a successive § 2255, "the phrase second or successive is not self-defining and does not refer to all habeas petitions filed second or successively in time." Slip op. at 6. The certification requirement is implicated where the petitioner "could have raised his or her claim for relief in an earlier filed motion, but without a legitimate excuse, failed to do so." *Id*. For this reason, Mr. Boyd's second-in-time § 2255 motion was not successive because its basis–the vacatur of his state court predicate convictions–did not exist at the time of his first § 2255 in 2001. And his subsequent § 2255 filings were also not successive because they were dismissed as successive and not on the merits. *See Humphrey v. United States*, 766 F.2d 1522, 1524-25 (11th Cir. 1985) (per curiam) (a § 2255 motion dismissed as second or successive is not resolved on the merits). Accordingly, Mr. Boyd's requested

relief, based on the vacatur or his state court convictions, has never been reviewed on the merits, and his fourth-in-time § 2255 motion is not "successive."

The Court remanded for a determination as to whether the fourth-in-time § 2255 motion was untimely due to the fact that it was not filed within one year of the state court vacatur. *See* § 2255(f).

United States v. Stanley, No. 13-10066 (June 20, 2014)

Issue. Does the six-level sentencing enhancement for assault during immediate flight, USSG §3A1.2(c)(1), apply to conduct that occurs eight days after the charged offense occurred?

Held. No.

Background and procedural history. Siblings Mr. Stanley, Ryan Dougherty, and Lee Dougherty pleaded guilty to participating in an armed bank robbery. Each received a sentence of 428 months in prison. Eight days after the robbery, the siblings were involved in a high speed car chase during which Ryan Dougherty drove, Mr. Stanley fired shots at the pursuing officers, and Lee Dougherty brandished a machine pistol. The district court applied several sentencing enhancements to each sibling, including the six-level enhancement for assaulting a law enforcement officer and creating a substantial risk of death or serious bodily harm during immediate flight. Mr. Stanley and Lee Dougherty's guidelines range was 207-228 months. Ryan Dougherty's guidelines range was 220-245 months. The district court varied above each sibling's guidelines range and imposed 428-month sentences. On appeal, Mr. Stanley and Lee Dougherty challenged both the procedural and substantive reasonableness of the sentence. Ryan Dougherty only challenged the substantive reasonableness of his sentence.

Analysis. The Eleventh Circuit (Southern District of Florida Judge Scola for Judges Tjoflat and Pryor) vacated Mr. Stanley and Lee Dougherty's sentences, but affirmed Ryan Dougherty's sentence. In vacating Mr. Stanley and Lee Dougherty's sentences, the Court rejected the district court's reasoning that continuous flight is synonymous to immediate flight. Slip op. at 10-11. The Court stated that "immediate flight" is not defined by the Guidelines. *Id*. at 10. Therefore, the Court gave the term its ordinary meaning. *Id*. To determine the ordinary meaning of immediate, the Court cited several dictionary definitions. The Court reasoned, "Under each definition, the Defendants' assaults against the police officers in this case, occurring eight days after, and thousands of miles and several states away from the Georgia robbery [] do not meet the ordinary meaning of the term 'immediate.'" Slip op. at 12. The Court summarily rejected Mr. Stanley and Lee Dougherty's remaining arguments.

The Court affirmed Ryan Dougherty's sentence because he only challenged the substantive reasonable of his sentence, and the Court found his sentence to be reasonable. *Id*. at 22.

Rodriguez v. Sec'y, Fla. Dep't of Corr., No. 11-13273 (June 30, 2014)

Issue. Must the fact that the State's key cooperating witness was permitted conjugal visits be disclosed to the defense as *Brady* or *Giglio* material?

Held. No.

Background and procedural history. Mr. Rodriguez was convicted of three counts of capital murder and one count of armed burglary in Florida state court, and he was subsequently sentenced to death. The State relied on testimony from a cooperating witness who also participated in the murders and burglary. Between Mr. Rodriguez's arrest and his trial, the state's cooperating witness was allowed to visit his family on three occasions. On one of those occasions, the witness and his wife had sex in a police interrogation room. After being sentenced to death, Mr. Rodriguez appealed his convictions for murder and armed burglary and his death sentences. The Florida Supreme Court affirmed Mr. Rodriguez's convictions and death sentences. The United States Supreme Court denied certiorari review. Then, Mr. Rodriguez moved the Dade County Circuit Court to vacate his convictions and sentences. The Circuit Court denied Mr. Rodriguez's motion after an evidentiary hearing, and the Florida Supreme Court affirmed the denial.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judges Tjoflat and Wilson) affirmed Mr. Rodriguez's convictions and death sentences. Mr. Rodriguez claimed both *Giglio* and *Brady* violations based on the argument that the detectives provided the key State witness with family visits and an opportunity to have sex with his wife in order to secure his cooperation and favorable testimony. To succeed on Mr. Rodriguez's *Giglio* claim, he must have shown that (1) "the Florida Supreme Court's adjudication was contrary to, or an unreasonable application of, *Giglio*, or was based on an unreasonable determination of the facts," and that (2) "the *Giglio* error was not harmless under *Brecht*[*v. Abrahamson*, 507 U.S. 619 (1993)]." Slip op. at 54-55. *Brecht* requires Mr. Rodriguez to demonstrate "that the constitutional error-here the *Giglio* violation-'had substantial and injurious effect or influence in determining the jury's verdict.'" Slip op. at 54 (quoting *Brecht,* 507 U.S. 619). The Court held that Mr. Rodriguez failed to "overcome his *Brecht* hurdle." Slip op. at 63. The Court reasoned that the key witness testified to avoid the death penalty in his case, and everyone in the courtroom, including the jury, knew his motivation. Slip op. at 62-63. Therefore, the Court concluded the evidence would not have affected the jury's determination. *Id*.

To successfully assert a *Brady* violation in federal habeas court, the defendant must show that "the state high court's adjudication was contrary to or an unreasonable application of *Brady* or was based on an unreasonable determination of the facts" and "that the prosecution violated *Brady*." Slip op. at 57. A *Brady* violation requires: "(1) the evidence at issue must be favorable to the accused, which means it is either exculpatory or impeaching, (2) the evidence must have been wilfully or inadvertently suppressed by the prosecution, and (3) the accused must have been prejudiced as a result." *Id*. at 55. The Court noted that "[e]vidence is material, *i.e.*, prejudicial, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Slip op. at 55 (quoting *United States v. Bagley*, 473 U.S. 667 (1985)). The Court deferred to the Florida Supreme Court's factual findings, which precluded Mr. Rodriguez's *Brady* claim. Slip op. at 63.However, the Court noted that even if the claim was not foreclosed, Mr. Rodriguez did not prove any prejudicial effect for the same reasons as above. *Id*. at 65.

The Court summarily rejected Mr. Rodriguez's remaining arguments.

SELECTED UNPUBLISHED OPINIONS

United States v. Hooper, No. 13-11584 (May 13, 2014)*

The Eleventh Circuit (per curiam, before Judges Pryor, Martin, and Anderson) vacated Mr. Hooper's sentence of 60 months' probation, a downward variance from the low-end guidelines sentence of 70 months in prison. Mr. Hooper, a Birmingham, Alabama police officer, assaulted a handcuffed, non-resisting arrestee and was convicted under 18 U.S.C. § 242. The Court agreed with the Government's position that this sentence was substantively unreasonable. Although the district court did find that Mr. Hooper would be specifically deterred from committing further crimes, the court expressly declined to consider general deterrence, a statutory sentencing factor that is one of the "key purposes" of sentencing. Slip op. at 6. The Eleventh Circuit further held that the sentence imposed did not adequately account for the seriousness of the offense, which included an abuse of police power to assault a vulnerable, restrained arrestee, and that the district court "failed to cite a sufficiently significant justification for granting a 100%, 70-month downward variance." *Id*.

United States v. Falsey, No. 12-15817 (May 20, 2014)

The Eleventh Circuit (per curiam, before Chief Judge Carnes, Judge Dubina, and Sixth Circuit Judge Siler) reversed the district court's grant of Mr. Falsey's motion to suppress drugs that the police found during an inventory search of the car he had been driving. Because Mr. Falsey abandoned the car by exiting (leaving it unlocked and with the key inside) and running into the woods to evade the police, he lacked standing to challenge the constitutionality of the search.

Fondren v. Comm'r, Ala. Dep't. of Corr., No. 12-14759 (June 4, 2014)*

The Eleventh Circuit (per curiam, before Judges Hull, Black, and Western District of Louisiana Judge Walter) reversed the district court's grant of 28 U.S.C. § 2254 habeas relief to Mr. Fondren. The district court held that Mr. Fondren's state counsel was ineffective at capital murder trial because he failed to request a negative heat of passion jury instruction. This instruction would have informed the jury that the state had the burden to prove beyond a reasonable doubt that Mr. Fondren had not been moved to kill the victim by a sudden heat of passion caused by a provocation that is recognized under Alabama law. The Eleventh Circuit held that the state court's rejection of Mr. Fondren's argument was not contrary to clearly established federal law.

United States v. Chaney, No. 13-12187 (June 4, 2014)*

The Eleventh Circuit (per curiam, before Judges Tjoflat, Martin, and Jordan) denied the Government's motion to dismiss Mr. Chaney's appeal of his conviction. The Court found that the district court failed to specifically discuss the appeal waiver with Mr. Chaney during his change-of-plea hearing. Although the district court did explain that Mr. Chaney "may have waived or given up some or all of [his] right to appeal any sentences imposed," the court failed to confirm that Mr.

Chaney understood that the appeal waiver prevented an appeal of his conviction as well as his sentence. Slip op. at 3 (emphasis added). Because of this, and the fact that the record did not otherwise indicate Mr. Chaney's understanding that the appeal waiver applied to his conviction, the Eleventh Circuit refused to enforce it as to Mr. Chaney's challenges to his conviction. The Court did dismiss Mr. Chaney's sentencing arguments and did deny Mr. Chaney's conviction arguments on the merits.

United States v. Moody, No. 13-15224 (June 17, 2014)

The Eleventh Circuit (per curiam, before Judges Tjoflat, Hull, and Jordan) vacated Mr. Moody's sentence and remanded because the district court failed to state the specific reason or reasons for its *sua sponte* upward variance. The district court did not explain the upward variance and 20-month total sentence and its reasoning was not otherwise clear from the record (the Government did not request any specific sentence and Mr. Moody requested a low-end, 4-month guidelines sentence). The Eleventh Circuit wrote that the district court erred "[u]nder these particular circumstances, and in light of the degree of the variance." Slip op. at 4.

United States v. Seecharan, No. 13-15024 (June 20, 2014)

The Eleventh Circuit (per curiam, before Judges Tjoflat, Jordan, and Kravitch) affirmed Mr. Seecharan's 60-month sentence. The district court reimposed this sentence after the Eleventh Circuit vacated and remanded Mr. Seecharan's original sentence. The Court found that the original sentence, which was also 60 months, was procedurally unreasonable because the district court's finding that the Bureau of Prisons (BOP) was capable of treating Mr. Seecharan's many medical problems was not supported by any evidence in the record. After remand, the Government presented evidence–a declaration from The BOP's Southeast region medical director–that Mr. Seecharan's medical needs could be met during a sustained period of incarceration. The Eleventh Circuit determined that this was sufficient to justify the district court's reimposition of the original, 60-month sentence.

*appeal from the Northern District of Alabama

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United States v. Charles, No. 13-11863 (July 7, 2014)

Issue. Did the district court err by applying a two-level increase to the defendant's guideline sentencing range for trafficking in unauthorized access devices under U.S.S.G. § 2B1.1(b)(11)(B), where the defendant was also subject to a two-year, consecutive term of imprisonment for aggravated identity theft?

Holding. Yes.

Background and procedural history. Mr. Charles pleaded guilty to one count of aggravated identity theft and one count of conspiring to use unauthorized access devices. Aggravated identity theft carries a mandatory, consecutive two-year prison term. In calculating the guideline range for the conspiracy charge, the district court applied U.S.S.G. § 2B1.1(b)(11)(B), which increases the offense level by two levels for trafficking of unauthorized devices.

Analysis. The Eleventh Circuit (Judge Hull, for Judge Cox and Ninth Circuit Judge Farris) vacated the sentence and remanded for resentencing. Application note 2 to § 2B1.6 (aggravated identity theft) explains that if a sentence is imposed for aggravated identity theft in conjunction with a sentence for an underlying offense, the court must not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. Mr. Charles was sentenced for aggravated identity theft and for the underlying offense of conspiring to use unauthorized access devices. Because the § 2B1.1(b)(11)(B) specific offense characteristic was based on the trafficking, or transfer, of an access device, the district court's application of that section, in calculating the guideline range for the underlying offense, ran afoul of § 2B1.6 note 2.

United States v. Muzio, No. 10-13325 (July 8, 2014)

Issues. Does the Court of Appeals have jurisdiction to hear an appeal from a judgment that imposes a term of imprisonment and that indicates that restitution will later be ordered, but defers determination of the specific amount?

Held. Yes.

Background and procedural history. Mr. Muzio was convicted of one count of conspiring to commit wire fraud, two counts of wire fraud, six counts of securities fraud, and two counts of making false statements to federal agents. The district court entered a judgment on July 1, 2010, sentencing Mr. Muzio to 163 months in prison. The judgment indicated that restitution would be ordered, but deferred determination of the amount for 90 days. The district court referred the matter to a magistrate judge, who recommended that Mr. Muzio pay $631,976.06 in restitution. On November 3, 2010—127 days after the sentencing hearing—the district court adopted the magistrate's recommendation and directed the government to prepare a proposed final judgment.

The government never prepared a proposed final judgment and, consequently, no amended final judgment was ever entered.

Analysis. The Eleventh Circuit (Judge Wilson, with N.D. Ala. Judge Coogler concurring in judgment) held that a judgment imposing a term of imprisonment is sufficiently final to support an appeal. Prior to the Supreme Court's decision in *Dolan v. United States*, 560 U.S. 605, 130 S. Ct. 2533 (2010), the law of the circuit was that a criminal judgment was not final until the district court ordered restitution or 90 days passed and the district court lost the power to order restitution. In *Dolan*, the Supreme Court held that a district court retains the power to order restitution even if it misses the 90-day statutory deadline. Thus, after *Dolan*, the prior circuit rule creates the possibility, in circumstances where the court does not enter a restitution amount, that defendants may be denied their right to appeal indefinitely because the court never loses the power to enter restitution. The Court, relying on dicta from *Dolan* and *Corey v. United States*, 375 U.S. 169, 84 S. Ct. 298 (1963), held that a judgment that imposes a term of imprisonment, regardless of whether it reflects a restitution amount, is "freighted with sufficiently substantial indicia of finality to support an appeal."

Judge Tjoflat dissented, finding the majority's conclusion at odds with the general rule that federal courts of appeal have jurisdiction to review only final decisions of the lower courts. The sentencing process was not concluded in this case because the district court never entered a final judgment that included the restitution amount. No final judgment was ever entered and thus there was no jurisdiction to hear the appeal.

Stoufflet v. United States, No. 13-10874 (July 8, 2014)

Issue. May a federal prisoner collaterally attack the voluntariness of his guilty plea in a § 2255 motion after he presented the same issue on direct appeal by objecting to his appointed counsel's *Anders* brief?

Held. No.

Background and procedural history. On direct appeal, Mr. Stoufflet's attorney moved to withdraw and filed an *Anders* brief. Mr. Stoufflet filed an objection to his attorney's motion, attacking the voluntariness of his guilty plea. His appeal was dismissed. Mr. Stoufflet then filed a motion to vacate his conviction under 28 U.S.C. § 2255, arguing again that his guilty plea was not voluntary.

Analysis. The Eleventh Circuit (Judge Pryor for S.D. Ga. Judge Wood and S.D. Ga. Judge Edenfield) held that the prisoner was procedurally barred from relitigating the voluntariness of his plea and affirmed the denial of his § 2255 motion. The Court relied on the long-standing rule that a prisoner is procedurally barred from raising arguments in a § 2255 motion that he has already raised and that have been rejected on direct appeal.

Hittson v. GDCP Warden, No. 12-16103 (July 9, 2014)

Issue. Was Mr. Hittson prejudiced by evidence erroneously admitted by the trial court in violation of his Fifth and Sixth Amendment rights, which consisted of a psychologist's testimony about statements Mr. Hittson made during a court-ordered mental-health examination?

Held. No.

Background and procedural history. Mr. Hittson is a Georgia state prisoner on death row. The district court found that Mr. Hittson was entitled to habeas relief from his death sentence because the trial court erroneously allowed the State's psychologist to testify to statements made by Mr. Hittson during a court-ordered mental-health examination, in violation of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to effective assistance of counsel. The district court found that the Georgia Supreme Court unreasonably applied *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866 (1981), in finding that the trial court's admission of the psychologist's testimony did not deny Mr. Hittson his Fifth and Sixth Amendment rights. On appeal, the state conceded that the testimony violated Mr. Hittson's constitutional rights, but argued that the admission of the testimony was harmless error under *Brecht v. Abrahamson*, 507 U.S. 617, 638, 113 S. Ct. 1710, 1722 (1993).

Analysis. The Eleventh Circuit (JudgeTjoflat, for Chief Judge Carnes) reversed. To obtain relief under AEDPA's deferential standard, Mr. Hittson must show that there was no reasonable basis for the state court to deny relief. Under *Brecht*, habeas petitioners must establish that constitutional errors resulted in actual prejudice, meaning the error had a substantial and injurious effect or influence in determining the jury's verdict. Because the constitutional error here resulted in improper admission of evidence, the court measured the impact of the improperly-admitted evidence (the psychologist's testimony) on the jury in light of the body of evidence before them at the time. The Court concluded that the psychologist's testimony did not meaningfully influence the jury in light of the overwhelming evidence that supported the jury's finding of an aggravated factor, which permitted them to impose the death penalty. The Court therefore reversed the district court's grant of habeas relief. The Court also affirmed the district court's denial of relief on the ground of ineffective assistance of counsel.

Judge Wilson dissented and would have affirmed the district court's grant of habeas relief on the basis that the violation of Mr. Hittson's constitutional rights had a substantial and injurious effect of influence on the jury's determination to sentence him to death. Judge Wilson noted that the state court, on collateral review, erred by applying the *Brecht* standard for harmless error. The *Brecht* standard applies only to federal courts on collateral review, whereas state courts should apply the more petitioner-friendly standard of harmless error set out in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824 (1967). Mr. Hittson, therefore, was entitled to have his claim considered by the State of Georgia under the *Chapman* analysis.

Bowers v. United States Parole Commission, No. 12-16560 (July 9, 2014)

Issues. Whether, on remand from the Eleventh Circuit, the district court interpreted the mandate too narrowly and abused its discretion by denying Mr. Bowers's motion for discovery and leave to amend his 28 U.S.C. § 2241 petition?

Held. Yes.

Background and procedural history. Mr. Bowers is serving a life sentence for the 1973 murder of a United States Park Ranger. On May 17, 2005, the Parole Commission told Mr. Bowers that he had been granted mandatory parole. However, a Parole Commissioner, acting on her own, wrote to the Attorney General and requested that the Attorney General ask the Parole Commission

to review its decision. The Attorney General made the request, the Parole Commission reopened the case, and the Commission reversed its decision and voted to deny Mr. Bowers's parole.

Mr. Bowers filed a 28 U.S.C. § 2241 petition, challenging the Parole Commission's decisions to reopen his parole determination. He claimed that the Parole Commissioner's actions were improper and that the decision was affected by political pressure from the Attorney General. The district court denied the petition, but in *Bowers v. Keller*, 651 F.3d 1277 (11th Cir. 2011), the Eleventh Circuit reversed, holding that the Parole Commission had failed to act independently and without bias and returned the case to its May 17, 2005 posture. While on remand, the district court denied Mr. Bowers's motions for discovery and for leave to amend his petition. He appealed those denials.

Analysis. The Eleventh Circuit (Judge Wilson, for Judge Dubina and S.D. Fla. Judge Middlebrooks) reversed the district court's denials of the motions for discovery and for leave to amend and affirmed all other grounds.

The Court held the district court abused its discretion by reading the mandate so narrowly as to preclude discovery into whether the Parole Commission acted independently and without bias in reaching its 2011 decision denying parole. The absence of an express instruction in the mandate to the district court to determine whether discovery would be necessary should not be read to preclude discovery or to disallow amendment to the petition. The Court also noted that, although its previous opinion stated that the Court affirmed the denial of habeas relief as to Mr. Bowers's remaining claims, the law of the case doctrine does not apply when the issue in question was outside the scope of the prior appeal.

United States v. Estrella, No. 12-15815 (July 10, 2014)

Issue. Is a conviction under Fla. Stat. § 790.19 for wantonly or maliciously throwing, hurling, or projecting a missile, stone, or other hard substance at an occupied vehicle a crime of violence under U.S.S.G. § 2L1.2?

Held. No.

Background and procedural history. Mr. Estrella pleaded guilty to illegally re-entering the United States after being deported. At sentencing, the district court found that Mr. Estrella's prior conviction under Fla. Stat. § 790.19 qualified as a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii), and imposed a 16-level enhancement to Mr. Estrella's offense level.

Analysis. The Eleventh Circuit (Judge Martin, for Judge Hill and M.D. Ala. Judge Fuller) vacated and remanded for resentencing. The Court applied the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143 (1990), to determine whether Mr. Estrella's prior conviction was a crime of violence. Under the categorical approach, the Court asks whether the conviction has as an element the use, attempted use, or threatened use of physical force against the person of another. The Court first concluded that Fla. Stat. § 790.19 is divisible because it criminalizes targeting different types of structures—buildings, boats, trains, railways cars, etc. The Court thus invoked the modified categorical approach, and asked whether Mr. Estrella's specific conviction for targeting an occupied vehicle satisfies the crime-of-violence element that requires using force against a person. The Court concluded that directing physical force against an occupied vehicle, without more, does not permit application of the U.S.S.G. § 2L1.2 crime-of-violence

enhancement. Where an element would permit conviction whenever the defendant targets property that happens to be occupied, that element covers conduct broader that the crimes against persons to which the U.S.S.G. § 2L1.2 crime-of-violence enhancement is supposed to apply.

DeBruce v. Comm'r, Ala. Dep't of Corr., No. 11-11535 (July 15, 2015)

Issues.

1. Was Mr. DeBurce denied effective assistance of counsel during the guilt phase of his trial because his attorney failed to cross-examine state witness LuJuan McCants, a co-participant in the robbery who identified Mr. DeBruce as the shooter at trial?
2. Was Mr. DeBruce denied effective assistance of counsel during the penalty phase of his trial because his attorney failed to investigate and present evidence about Mr. DeBruce's mental capacity and background?

Held.

1. No.
2. Yes.

Background and procedural history. Mr. DeBruce, a state prisoner, was convicted of fatally shooting a customer during the robbery of an AutoZone store. Mr. DeBruce's attorney, Mr. Mathis, took on the case within three to four weeks of trial. He did not hire an investigator because he did not have funds to pay for one. During the guilt phase, Mr. Mathis did not cross-examine a key state witness, Mr. McCants, with the discrepancies between his interrogation statements and his trial testimony. But he did impeach McCants with his plea agreement and advanced, via the testimony of Mr. DeBruce's sister, the defense theory that Mr. McCants was actually the shooter.

To prepare for the penalty phase, Mr. Mathis spoke to two people, Mr. DeBruce and his mother. He presented one witness, Mr. DeBruce's mother, who made a passing reference to her son's treatment for a mental disorder and explained that he had an impoverished but unremarkable childhood. At a state collateral hearing, Mr. DeBruce presented evidence that he argued the jury would have heard had Mathis conducted a reasonably adequate mitigation investigation: two psychologists testified that Mr. DeBruce suffers from brain damage, has a borderline intelligence, suffers lingering emotional damage and social impairment as a result of being raised in a violent community, and suffers from blackout episodes and seizures. Mr. DeBruce argued that his attorney should have been alerted to the need for additional mitigation investigation because a pretrial report created by a social worker at his attorney's request noted that Mr. DeBruce had attempted suicide on four occasions, dropped out of school at age 16, had low-average intelligence, and had a history of substance abuse problems.

Analysis. The Eleventh Circuit (Judge Wilson, with Judge Martin concurring in judgment) affirmed in part and reversed in part. The Court reviewed the record under AEDPA's deferential standard. The Court found adequate evidence in the record to conclude that counsel's guilt phase performance was strategic and reasonable, and therefore found that the state court did not unreasonably apply *Strickland* in denying Mr. DeBruce's claim that his attorney was ineffective for failing to cross-examine McCants.

The Court found, however, that the Alabama court unreasonably applied *Strickland* by finding

that Attorney Mathis acted strategically in failing to conduct a mitigation investigation. No lawyer reasonably could have made a strategic decision to forego pursuit of mitigation evidence based on the results of the social worker's pre-trial report. The Court also held that it was an unreasonable application of *Strickland* to find that Mr. DeBruce was not prejudiced by his counsel's performance. Because of trial counsel's deficient performance, the jury was given almost no reason to spare his life. The omitted mitigating evidence, when compared to what little was introduced at trial, undermines confidence in the outcome of Mr. DeBruce's sentencing. He therefore suffered prejudice.

Judge Tjoflat dissented in part and would have denied habeas relief based upon Mr. DeBruce's failure to develop the record regarding what investigation his attorney did conduct into mitigation.

Jeanty v. Warden, FCI Miami, No. 13-14931 (July 22, 2014)

Issue. May a federal prisoner challenge the validity of his sentence using 28 U.S.C. § 2241, where he asserts that the trial court violated *Alleyne v. United States*, 133 S. Ct. 2151 (2013), by failing to submit to the jury the question of whether he had a prior conviction that qualified him for a ten-year mandatory minimum sentence?

Held. No.

Background and procedural history. Mr. Jeanty is a federal prisoner. Following his conviction, he brought an unsuccessful challenge to his conviction and sentence under 28 U.S.C. § 2255. He then filed a petition under 28 U.S.C. § 2241, arguing that the trial court violated *Alleyne v. United States*, 133 S. Ct. 2151 (2013), by failing to submit to the jury the question of whether he had a prior conviction that qualified him for a ten-year mandatory minimum sentence. The district court dismissed the petition, finding that the *Alleyne* challenge did not qualify for review under 28 U.S.C § 2255(e)'s savings clause.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judges Wilson and Kravitch) affirmed. Though federal prisoners bringing a collateral attack on their convictions or sentences must typically proceed under 28 U.S.C. § 2255, that statute contains a "savings clause" permitting federal prisoners to bring collateral attack under 28 U.S.C. § 2241 if § 2255 is inadequate or ineffective to test the legality of the prisoner's detention. To proceed under § 2255(e)'s savings clause and bring a § 2241 petition, a petitioner must satisfy five requirements: (1) throughout the petitioner's sentencing, direct appeal, and first § 2255 proceeding, this Court's precedent had specifically and squarely foreclosed the claim raised in the § 2241 petition; (2) after the petitioner's first § 2255 proceeding, the Supreme Court overturned that binding precedent; (3) that Supreme Court decision applies retroactively on collateral review; (4) as a result of that Supreme Court decision, the petitioner's current sentence exceeds the statutory maximum; and (5) the savings clause of § 2255(e) reaches his claim. Mr. Jeanty's petition did not meet the third requirement because *Alleyne* does not apply retroactively on collateral review. Additionally, mandatory minimum notwithstanding, Mr. Jeanty's current sentence of 10 years does not exceed the statutory maximum of 40 years, and therefore he does not meet the fourth requirement.

United States v. Watkins, No. 12-12549 (July 28, 2014)

Issues.

1. In *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515 (2006), the Supreme Court held that a warrantless search of a shared dwelling, conducted over the express refusal of consent by a physically present resident, cannot be found reasonable as to that resident on the basis of consent given by another resident. Did the district court err in concluding that the search of defendant's computer was valid under *Randolph*, when subsequent to the defendant's consent to a limited search of the computer, the defendant's wife gave consent to a full search of the computer, while in the presence of and without objection from the defendant?
2. In reviewing the magistrate judge's denial of the motion to suppress, did the district court abuse its discretion in adopting the magistrate judge's findings without reopening the suppression hearing to make its own credibility determinations?

Held.

1. No.
2. No.

Background and procedural history. Mr. Watkins was convicted of receiving child pornography in violation of 18 U.S.C. § 2252. Prior to trial, he moved to suppress the child pornography found on his computers. At a suppression hearing, a magistrate judge found that Mr. Watkins and his wife both had authority to consent to a search of the computers. Mr. Watkins initially consented to an unlimited search of the computers, but because police misled Mr. Watkins about the purpose and scope of the search, the magistrate judge found that his initial consent justified only a limited search of the computers that did not encompass the search for child pornography. Subsequently, Mrs. Watkins, in the presence of Mr. Watkins, gave full consent for an unlimited search of the same computers. Mr. Watkins did not register any objection or reservation while the police sought and obtained Mrs. Watkins's consent. Based on Mrs. Watkins's consent, the magistrate judge recommended that the motion to suppress be denied.

Mr. Watkins moved the district court for reconsideration of the magistrate judge's recommendation and to reopen the suppression hearing. The district court held oral argument to consider the magistrate judge's determination about the scope of Mrs. Watkins's consent, but did not reopen the hearing or make its own credibility determinations. The district court ultimately adopted the finding in the Report and Recommendation that she had consented to a full search of the computers.

Analysis. The Eleventh Circuit (Seventh Circuit Judge Ripple, for Judges Tjoflat and Wilson) affirmed. *Randolph* creates a narrow exception to the general rule that the consent of a person who possesses common authority over premises or effects is valid against an absent, non-consenting person with whom that authority is shared. To obtain *Randolph's* protections, a defendant must object to the search while present with the co-possessor. Because Mr. Watkins did not object at any time while police obtained Mrs. Watkins's full, independent consent, *Randolph* does not apply.

The district court did not abuse its discretion by denying Mr. Watkins's motion to re-open the suppression hearing. The district court conducted an independent review of the entire record, including the complete transcript of the evidentiary hearing, before it adopted the magistrate

judge's report. Having conducted a thorough *de novo* review, the district court was entitled to adopt the magistrate judge's credibility determinations and credit the magistrate judge's findings.

Taylor v. Sec'y, Fla. Dep't of Corr., No. 12-12112 (July 28, 2014)

Issues.

1. Did the trial court err in excluding defense evidence in violation of Mr. Taylor's due process right to present evidence in his defense?
2. Did trial counsel provide ineffective assistance at the guilt phase of trial by calling Mr. Taylor to testify and having him reenact the murder without preparation?

Held.

1. No.
2. No.

Background and procedural history. Mr. Taylor, a state prisoner, was convicted of first-degree murder and sexual battery of a woman and sentenced to death. In this federal habeas proceeding, under 28 U.S.C. § 2254, Mr. Taylor asserted that the trial court erred by excluding testimony that the victim occasionally used and purchased crack cocaine. According to Taylor, that evidence would have corroborated his defense that the victim consented to have sex with him in exchange for cash or crack. Mr. Taylor also claimed that his trial counsel provided ineffective assistance by calling him to testify without preparation, and then directing him to physically reenact the murder in front of the jury.

Analysis. The Eleventh Circuit (Judge Marcus, for Judges Pryor and Jordan) affirmed the denial of Mr. Taylor's petition. The Court reviewed Mr. Taylor's claims through AEDPA's deferential lens. As to Mr. Taylor's first claim, the Court held that the proffered evidence was not relevant enough to "fatally infect" the trial and justify habeas relief. As to the second claim, the Court held that the state court reasonably determined that counsel did not render deficient performance. The attorney's decision to call Mr. Taylor to the stand, even without rehearsing the testimony, falls squarely within the wide range of performance that is constitutionally acceptable under *Strickland*. The attorney's options were circumscribed by the fact that Mr. Taylor had twice confessed in detail to the murder. Furthermore, the only way to establish that the victim consented to the sexual encounter was through Mr. Taylor's testimony.

Mendoza v. Sec'y, Fla. Dep't of Corr., No. 13-14968 (July 31, 2014)

Issue. Did Mr. Mendoza's trial counsel render ineffective assistance of counsel in the investigation and presentation of mitigation evidence during the penalty phase of trial?

Held. No.

Background and procedural history. Mr. Mendoza is a Florida inmate on death row. During the penalty phase of his trial, counsel's strategy was to establish that one of Mr. Mendoza's co-defendants was the gunman who actually shot the victim and to persuade the jury, based on proportionality, that Mr. Mendoza should not be punished more than his co-defendants, who

received life sentences. Counsel called Mr. Mendoza's mother, who testified at length about Mr. Mendoza's tumultuous and tragic childhood as a Cuban refugee. Counsel also presented Mr. Mendoza's medical records from Cuba, which were consistent with his mother's testimony and documented his childhood mental health problems. Counsel also called a psychologist, Dr. Toomer, to testify about Mr. Mendoza's numerous mental health problems.

Mr. Mendoza filed a motion for postconviction relief in state court, alleging that he was denied effective assistance of counsel because his attorney failed to investigate and present mitigating evidence during the penalty phase of trial. At a hearing on the matter, numerous doctors and experts explained and expanded upon Mr. Mendoza's mental health problems. The state court found that Mr. Mendoza's post-conviction evidence was cumulative and that he had failed to show that his attorney's performance was deficient.

Analysis. The Eleventh Circuit (Judge Hull, for Judges Tjoflat and Jordan) affirmed the denial of Mr. Mendoza's § 2254 petition. Applying AEDPA's deferential standard, the Court held that the state court's decision was not an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts.

Wright v. Sec'y, Fla. Dep't of Corr., No. 13-11832 (August 4, 2014)

Issues.

1. Did the prosecution violate *Brady v. Maryland*, 373 U.S. 83, 83, S. Ct. 1194 (1963), by failing to turn over certain items to the defense prior to trial?
2. Was trial counsel constitutionally ineffective by failing to call a witness to testify that the vase the prosecution alleged was stolen from the murdered victim was actually a family heirloom that belonged to the defendant?
3. Were Mr. Wright's due process rights violated when the Florida Supreme Court reversed the trial court's findings as to one of the four statutory aggravating circumstances, but affirmed Mr. Wright's death sentence without undertaking a harmless error analysis?

Held.

1. No.
2. No.
3. No.

Background and procedural history. In 1983, a jury convicted Mr. Wright of first-degree murder, sexual battery with force likely to cause serious personal injury, burglary of a dwelling, and grand theft of the second degree. The evidence showed that Mr. Wright entered the home of his 75-year-old neighbor, stole her money, raped her brutally, and then stabbed her in the face and neck twelve times. During the penalty phase of the trial, the jury returned an advisory 9-3 verdict in favor of the death penalty. The state trial court found no statutory mitigating circumstances and four statutory aggravating circumstances: (1) the murder was committed during the commission of a rape and burglary; (2) the murder was committed for the avowed purpose of preventing Mr. Wright's arrest; (3) the murder was especially heinous; and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justifications. The court sentenced Mr. Wright to death for the murder. On direct appeal, the Florida Supreme

Court reversed the trial court as to one of the four aggravating circumstances, but did not remand for resentencing or state that the error was harmless beyond reasonable doubt.

In state post-conviction proceedings, Mr. Wright raised two *Brady* claims related to a state witness, Charles Westberry. Mr. Westberry testified at trial that Mr. Wright had confessed the murder to him. Mr. Wright, by post-conviction motion, asserted that the prosecution had failed to reveal to the defense that, in exchange for Mr. Westberry's testimony, it had verbally agreed not to prosecute several scrap metal thefts. In addition, the prosecution failed to turn over notes that the prosecutor had given to Mr. Westberry in preparation for his testimony. Mr. Wright also asserted that the prosecution failed to turn over three statements from witnesses that tended to inculpate another suspect for the same murder. Mr. Wright also asserted in post-conviction proceedings that he was denied effective assistance of counsel because his attorney failed to call a witness to testify that the vase that the prosecution alleged was stolen from the murdered victim was actually a family heirloom that belonged to the defendant. Finally, he argued that the Florida Supreme Court violated *Sochor v. Florida*, 305 U.S. 527, 112 S. Ct. 2114 (1992) by failing to conduct a harmless error analysis after it reversed one of the trial court's aggravating factors.

Analysis. The Eleventh Circuit (Judge Hull, for Chief Judge Carnes and Judge Wilson) affirmed. The Court applied AEDPA's deferential standard, under which a federal court can only grant habeas relief if the state court's adjudication was contrary to or involved an unreasonable application of clearly established federal law, or was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. The Court held that ample evidence supported the state court's factual finding that no immunity agreement existed between the prosecution and Mr. Westberry regarding the scrap metal thefts. It held that the prosecutor's notes, provided to Mr. Westberry, contained only a summary of his prior statements and were not *Brady* material. The Court held that the state court reasonably concluded that the additional witness statements were not exculpatory and that it was merely speculative that they could have led to exculpatory information. The Court held that the state court reasonably concluded that Mr. Wright did not suffer prejudice from his attorney's performance at trial. Finally, the Court held that because the Florida Supreme Court affirmed Mr. Wright's death sentence in 1985, it did not misapply clearly established federal law by not conducting a harmless error analysis because *Sochor* had not yet been decided.

Madison v. Comm'r, Ala. Dep't of Corr., No. 13-12348 (August 4, 2014)

Issue. Applying *Batson's* third prong, did the district court clearly err by finding that petitioner had not proved purposeful racial discrimination?

Held. No.

Background and procedural history. Mr. Madison is an Alabama prisoner on death row. In this federal habeas petition, brought under 28 U.S.C. § 2254, Mr. Madison asserted that the prosecutor engaged in racially discriminatory jury selection in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). The Eleventh Circuit previously considered Mr. Madison's claim, and held that the Alabama Court of Criminal Appeals had reached a decision contrary to clearly established federal law on this issue because that court increased Mr. Madison's burden of proof beyond what *Batson* requires. The Eleventh Circuit, applying *de novo* review, found that Mr. Madison had established a *prima facie* case of discrimination and remanded to the district court to complete the

Batson analysis. On remand, the district court held an evidentiary hearing and found that the prosecution had provided adequate race-neutral explanations for each strike and that Mr. Madison had failed to prove purposeful discrimination or pretext on the part of the prosecution. Mr. Madison appealed.

Analysis. The Eleventh Circuit (Judge Martin, for Judges Wilson and Jordan) affirmed. The Court reviewed the district court's findings for clear error and concluded that there are two plausible views of the evidence, both of which have some support. The district court's choice between them, therefore, could not be clearly erroneous.

Troy v. Sec'y, Fla. Dept. of Corr. et al., No. 13-10516 (Aug. 15, 2014)

Issue. Did the district court err in ruling that the Florida Supreme Court properly rejected the movant's argument that the Eighth and Fourteenth Amendments required the state trial court to permit him to offer certain mitigation evidence?

Holding. No.

Background and procedural history. Mr. Troy was convicted of first degree murder and multiple other violent offenses and sentenced to death in Florida state court. During the penalty phase of trial, the court excluded one of Mr. Troy's witnesses, Florida Corrections Officer Michael Galemore, who would have testified as to the nature of custody and the availability of illegal drugs for persons serving life sentences in Florida. The court reasoned that because Mr. Galemore had never met Mr. Troy and did not know where Mr. Troy would be incarcerated, his testimony was not appropriate mitigation evidence.

Mr. Troy argued on direct appeal to the Florida Supreme Court that the exclusion of Mr. Galemore's testimony violated his Eighth and Fourteenth Amendment Rights to present mitigation evidence relating to his potential for rehabilitation during a sentence of life in prison and to rebut the Government's implication on cross-examination that he would continue to use drugs while in prison. The Florida Supreme Court rejected this argument, as did the federal district court in denying Mr. Troy's 28 U.S.C. § 2254 petition. The Eleventh Circuit granted Mr. Troy a Certificate of Appealability.

Analysis. The Eleventh Circuit (Judge Marcus for Judge Pryor) affirmed. The Court held that the Florida Supreme Court's rejection of Mr. Troy's claim that the exclusion of Mr. Galemore's testimony violated the Eighth and Fourteenth Amendment was neither "contrary to" nor an "unreasonable application" of "clearly established Federal law, as determined by the Supreme Court of the United States." *See* § 2254(d). The Court wrote that no Supreme Court authority required the consideration of the sort of evidence that Mr. Galemore's testimony would have conveyed. It acknowledged the line of authority holding that the Eighth and Fourteenth Amendments require that the sentencing judge be allowed to consider the defendant's proffer of "any aspect of a defendant's character or record and any of the circumstances of the offense" but noted that the Supreme Court also cautioned that this holding did not "limit the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense." *Lockett v. Ohio*, 438 U.S. 586, 604 n.12 (1978); *see also Skipper v. South Carolina*, 476 U.S. 1 (1986). The Court determined that Mr. Galemore's testimony was of this character because he had never met Mr. Troy, had no knowledge of his

character or conduct, and did not know which Florida correctional facility Mr. Troy would be sent to in the event he received a life sentence. And any testimony that Mr. Galemore could have offered about Mr. Troy's access to drugs would have been purely speculative.

The Court further held that even if there was any constitutional error, it was harmless because Mr. Troy was allowed to and did present substantial mitigating evidence that the jury evidently accorded less weight than the aggravating evidence.

Judge Martin concurred in the judgment only and filed a separate opinion.

United States v. Barsoum, No. 13-10710 (August 15, 2014)

Issues.

1. Did the district court abuse its discretion by denying a *Franks* hearing, under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978)?
2. Was there a material variance between the indictment and the evidence at trial because the indictment charged a single conspiracy yet multiple conspiracies were proved at trial?
3. Did the district court err by estimating the amount of pills for which Mr. Barsoum was responsible?
4. Did the district court abuse its discretion by not declaring a mistrial after the prosecutor stated, in the presence of the jury, that the government had proven the existence of a conspiracy?
5. Did the district court err in denying a motion for new trial based upon newly discovered evidence?

Held.

1. No.
2. No.
3. No.
4. No.
5. No.

Background and procedural history. A jury convicted Mr. Barsoum of one count of conspiring to dispense Oxycodone not for a legitimate medical purpose and five counts of distributing Oxycodone outside the course of professional practice. The evidence showed that Mr. Barsoum began working at St. George's pharmacy in 2006, where his cousin Mr. Wahba had already established a pill racket. Mr. Barsoum started accepting and filling falsified prescriptions from an associate, Pat Stevens. In 2007, Mr. Barsoum opened his own pharmacy, Trinity Pharmacy, where he began accepting and filling falsified prescriptions from an Oxycodone addict and dealer named Christopher Scott, while continuing to fill prescriptions for Mr. Stevens. Mr. Barsoum then opened another pharmacy, Platinum Pharmacy, where he continued distributing to Mr. Stevens, who by then had begun cooperating with the DEA in a series of undercover, controlled buys. In a search of Platinum Pharmacy, the DEA seized over sixty prescriptions that were signed by a Dr. Belsole and accounted for over 11,000 Oxycodone pills.

Before trial, Mr. Barsoum requested a hearing under *Franks v. Deleware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), alleging that the special agent who swore out the probable cause affidavit supporting the search warrant application recklessly omitted information. The district court denied the request. During trial, the prosecutor, in response to an objection and in the presence of the jury,

stated, "Your Honor, at this—at this time I think we pretty squarely established a conspiracy, an agreement between these individuals." Mr. Barsoum moved for a mistrial on the basis of this statement. The court denied the motion but did give a lengthy curative instruction.

At the close of evidence, Mr. Barsoum moved for an acquittal, arguing that the government had charged one conspiracy in the indictment, but proved at least four separate conspiracies at trial. The district court denied the motion. At sentencing, the district court found Mr. Barsoum responsible for 56,000 Oxycodone pills—16,000 pills from the scheme with Scott; 11,000 pills from the Belsole prescriptions; 24,000 pills from the scheme with Stevens; and 5,000 pills from DEA controlled buys using Stevens. Mr. Barsoum argued that the finding was based upon various estimates and not supported by a preponderance of the evidence. Following his conviction, Mr. Barsoum moved for a new trial on the basis of newly discovered evidence, which consisted of conversations Scott and Stevens had in prison that tended to show that Mr. Barsoum's participation in the conspiracy was involuntary. The district court denied the motion.

Analysis. The Eleventh Circuit (S.D. Fla. Chief Judge Moore, for Judge Tjoflat and M.D. Fla. Judge Schlesinger) affirmed. The Court reviewed the denial of a *Franks* hearing for abuse of discretion and held that the district court did not abuse its discretion because Mr. Barsoum failed to make a substantial preliminary showing of deliberate falsity and omission. Regarding the material variance argument, the Court held that there was sufficient evidence to infer the existence of single conspiracy—all of the coconspirators shared the common goal of filling unauthorized prescriptions for large amounts of Oxycodone at Mr. Barsoum's pharmacies, each sub-scheme was part and parcel of Mr. Barsoum's overarching conspiracy, Mr. Barsoum was the gatekeeper and hub of each scheme, and there was an overlap of participants and schemes.

The Court reviewed the district court's drug-quantity findings only for clear error. The Court held that a sentencing court may estimate drug quantities, including by basing its calculation on evidence showing the average frequency and amount of a defendant's drug sales over a given time period. Even where a witness gives two inconsistent accounts regarding the drug quantity, the district court may credit the account it finds to be credible. The Court therefore affirmed the district court's calculation of drug quantity.

The Court further held that the district court did not abuse its discretion by not declaring a mistrial based upon the prosecutor's improper statements about the existence of a conspiracy. The court gave a lengthy curative instruction, and the prosecutor's statements were not so highly prejudicial that it could not be cured by instruction. Finally, the court held that the district court did not abuse its discretion by denying the motion for new trial. The Court reasoned that the district court was in the best position to assess the new testimony offered and had acted within its discretion in determining that the new evidence was either impeachment evidence or cumulative of other evidence presented at trial.

United States v. Payne, No. 13-15699 (August 15, 2014)

Issue. Did the district court err under *Alleyne v. United States*, 133 S. Ct. 2151 (2013), by sentencing Mr. Payne to a mandatory minimum sentence based on its own finding that a firearm had been brandished during the robbery, instead of Mr. Payne's admission or a jury's finding of that fact?

Held. Yes, but the error was harmless.

Background and procedural history. Mr. Payne pleaded guilty to one count of bank robbery, 18 U.S.C. § 2113(a), (d), and one count of possession of a firearm during a crime of violence, 18 U.S.C. § 924(c)(1)(A). During the plea hearing, Mr. Payne admitted that he was the getaway driver in an armed robbery of the People's Bank and Trust. His accomplices entered the bank carrying a shotgun, revolver, pistol, and duct tape. Mr. Payne admitted that he knowingly participated in the armed robbery, but that he could not admit to what happened inside because he was the getaway driver. Mr. Payne's PSR concluded that he was subject to an 84-month mandatory minimum sentence because one of Mr. Payne's accomplices brandished a firearm by pointing it at a teller in the bank. Mr. Payne objected under *Alleyne*, 133 S. Ct. 2151 (2013), which held that any fact that increases a mandatory minimum sentence for a crime must be admitted by the defendant or submitted to a jury and found beyond a reasonable doubt. The district court, in light of Mr. Payne's objection, heard evidence to determine whether a firearm had been brandished during the robbery. Based on its own finding that a firearm was brandished, the district court applied the mandatory minimum sentence.

Analysis. The Eleventh Circuit (per curiam, before Chief Judge Carnes and Judges Hull and Fay) affirmed. The Court held that the district court erred under *Alleyne* because it sentenced Mr. Payne to a mandatory minimum sentence based on its own conclusion about brandishing, instead of Mr. Payne's admission or a jury's finding concerning that fact. Nevertheless, the district court's error was harmless beyond a reasonable doubt because there was uncontroverted evidence supporting the finding. A teller testified that one of Mr. Payne's codefendants pointed a pistol at her during the robbery and that testimony was unrefuted. It is therefore clear beyond a reasonable doubt that a rational jury would have found that a firearm was brandished.

United States v. Therve, No. 13-11879 (August 20, 2014)

Issue. Did the district court abuse its discretion in declaring a mistrial where, after receiving an *Allen* charge, the jury sent the district court a note disclosing that they had been 11 to 1 in favor of not guilty from the beginning and that they could not reach a unanimous decision?

Held. No.

Background and procedural history. Mr. Therve was tried twice on an indictment charging bribery of a public official, in violation of 18 U.S.C. §§ 2 & 201(b)(1)(C). At the first trial, the district court declared a mistrial after the jury was unable to agree on a unanimous verdict, with all but one juror in favor of finding Mr. Therve not guilty. Before declaring a mistrial, the district court disclosed to the parties that the jury had sent out a note stating that they had been 11 to 1 in favor of not guilty from the beginning. At the second trial, Mr. Therve was convicted. Mr. Therve appealed, arguing that the district court abused its discretion in declaring a mistrial at his first trial.

Analysis. The Eleventh Circuit (per curiam, before Judges Jordan, Rosenbaum, and Anderson) affirmed. Though the better practice is for the district court to disclose to the parties only that the jury considers itself deadlocked, not the specific numerical division, the district court exercised appropriate discretion in declaring a mistrial. Under the doctrine of "manifest necessity," district courts are permitted to declare a mistrial where, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. A decision to declare a mistrial based on the trial court's belief that the jury is unable to reach a

verdict is the classic basis for a proper mistrial and generally is accorded great deference. Here, the trial judge reasonably concluded that continued deliberations would not be helpful, and possibly would have been coercive, where (1) the jury had deliberated to deadlock twice, including once after receiving an *Allen* charge; (2) despite two periods of deliberation, the jury said it has been split the same way since the beginning; (3) the judge believed the jury to be truthful in its assessment that it was hung; (4) the trial was short and straightforward; and (5) requiring the jury to deliberate after the second note following the *Allen* charge was coercive.

United States v. Hayes, No. 11-13678 (August 12, 2014)

Issue. Did the district court abuse its discretion by imposing a sentence of three years of probation on a business owner who doled out over $600,000 in bribes to a state official in exchange for government contracts, and whose company reaped over $5 million in profits as a result of the corrupt payments?

Held. Yes.

Background and procedural history. Mr. Hayes pleaded guilty to bribing an agency receiving federal funds, 18 U.S.C. § 666(a)(2), and conspiring to launder money, 18 U.S.C. § 1956(h). His undisputed guideline sentencing range was 135 to 168 months' imprisonment. Because Mr. Hayes provided substantial assistance to the government during their investigation of the bribery scheme, the government moved the court to depart downward under U.S.S.G. § 5K1.1, recommending that the court depart to a guideline range of 57-71 months' imprisonment and sentence Mr. Hayes to 60 months' imprisonment. The district court first granted the government's § 5K1.1 motion and departed beyond the government's recommendation to a guideline range of 41 to 51 months. The district court then sentenced Mr. Hayes to three years' probation, with six to twelve months' home confinement. The government appealed the substantive reasonableness of the sentence.

Analysis. The Eleventh Circuit (Judge Jordan for Judge Carnes) reversed. The Court characterized Mr. Hayes's crime as "bribery writ large." Because of the magnitude of the crime, a sentence of probation failed to promote respect for the law and failed to provide for general deterrence. A probationary sentence sends the message that would-be white-collar criminals stand to lose little more than a portion of their ill-gotten gains and practically none of their liberty.

Judge Tjoflat dissented. He fully agreed that Mr. Hayes's sentence was shockingly low and should not have been imposed. He dissented, however, because the court's error was invited by the government, which induced the court into procedural error by moving the court to lower Mr. Hayes's offense level and guideline range under U.S.S.G. § 5K1.1 and use that range, instead of Mr. Hayes's true guideline range, as the starting point for determining the defendant's sentence. Judge Tjofalt would have applied the invited error doctrine and allowed the sentence to stand.

United States v. Haynes, No. 12-12689 & 12-13244 (August 22, 2014)

Issue. On a direct appeal of resentencing, may the defendant raise new arguments unrelated to the errors corrected at the resentencing?

Held. No.

Background and procedural history. Mr. Haynes was prosecuted in two separate cases before the same district judge. In one hearing, he pleaded guilty to all of the counts charged in both cases. The first case charged possession with intent to distribute crack cocaine, possession of a firearm as a convicted felon, and possession of a firearm in furtherance of a drug-trafficking offense. The second case charged two counts of possession with intent to distribute crack cocaine. The district court sentenced Mr. Haynes as a career offender under the U.S. Sentencing Guidelines and also applied a statutory enhancement under the Armed Career Criminal Act (ACCA). On his first direct appeal, Mr. Haynes appealed only the application of the ACCA. The Eleventh Circuit affirmed. Mr. Haynes then filed a motion to vacate his sentence under 28 U.S.C. § 2255, arguing that he did not qualify for the ACCA enhancement and that he also did not qualify as a career offender under the Sentencing Guidelines. The district court granted the first claim, but found the second to be procedurally defaulted. The district court then resentenced Mr. Haynes, modifying only the counts related to the ACCA enhancement. Mr. Haynes appealed, arguing that the district court erred by resentencing him as a career offender.

Analysis. The Eleventh Circuit (Judge Pryor, for Judges Wilson and Rosenbaum) affirmed. The Court found that Mr. Haynes invited the resentencing error, assuming there was error, because at the resentencing he took the position that the resentencing court would only modify the sentences in his first case, and not the second. Mr. Haynes thereby invited the court to limit the resentencing proceedings to the first case and to the sentences affected by the partially-vacated sentence. The Court also noted that, even if Mr. Haynes had not invited the district court to limit its review, a resentencing court has discretion to limit resentencing to "appropriate" relief.

Fults v. GDCP Warden, No. 12-13563 (August 26, 2014)

Issues.

1. Was Mr. Fults's claim of juror bias procedurally defaulted because Mr. Fults did not raise the claim on direct appeal?
2. Was it is a misapplication of clearly established federal law to find that Mr. Fults was not mentally retarded and therefore eligible for the death penalty?

Held.

1. Yes.
2. No.

Background and procedural history. Mr. Fults is an inmate on Georgia's death row. In this federal habeas proceeding, brought under 28 U.S.C. § 2254, Mr. Fults first claims that one of the jurors at his trial was racially biased. The state court denied this claim as procedurally defaulted because it was not raised on direct appeal. Mr. Fults also argued that he is mentally retarded and ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002).

Analysis. The Eleventh Circuit (Judge Jordan, for Judges Marcus and Dubina) affirmed the denial of the § 2254 petition. Because Mr. Fults failed to allege any facts showing that the evidence of juror bias was unknown to him at the time of trial and could not have been discovered through ordinary diligence, it was not an error to conclude that his claim was procedurally barred under Georgia law. Regarding Mr. Fults's claim that he is mentally retarded and cannot be executed

under *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that Mr. Fults had not rebutted, by clear and convincing evidence, the presumption of correctness given to the state court's factual finding that he is not mentally retarded. Even though all of Mr. Fults's IQ tests were within the range of mental retardation, it was not an unreasonable application of *Atkins* for the state court to find that this evidence is not credible where one doctor testified that Mr. Fults was street smart, could make decisions and choices, and did not have to rely on another to support him, and where defense attorneys and investigators were able to communicate well with Mr. Fults, considered him to be bright, and did not have any concerns about his intelligence.

United States v. Godwin, No. 13-10184 (September 3, 2014)

Issues.

1. Did the district court abuse its discretion by excusing a member of the jury for cause before trial commenced on the basis that the juror would be too distracted by concern for her 14-month old son to focus on the trial?
2. Did the district court abuse its discretion by excusing a member of the jury during deliberations on the basis that the juror refused to apply the law as instructed?
3. Was the evidence sufficient to convict a defendant of racketeering and conspiracy to commit racketeering where he was not a "card carrying" member of the corrupt enterprise?

Holdings.

1. No.
2. No.
3. Yes.

Background and procedural history. Two defendants—Maynard Godwin and Eric Ellis—were tried jointly before two separate juries. Each was convicted under the Racketeer Influenced and Corrupt Organizations Act ("RICO") for racketeering, in violation of 18 U.S.C. § 1962(c) and conspiracy to commit racketeering, in violation of 18 U.S.C. § 1962(d). The evidence showed that Mr. Godwin had formed a gang called "The Guardians." The Guardians stockpiled guns, dealt drugs, peddled stolen goods, and committed a slew of violent crimes. Mr. Ellis was not a member of the Guardians, but he knew they were a gang, knew Mr. Godwin was their leader, and personally participated in several crimes committed by Guardian members.

Before the trial commenced, the district court struck one of Mr. Godwin's jurors for cause, finding that she was too distraught over the prospect of leaving her 14-month old child in someone elses's care for the duration of the trial, which was expected to last four and a half weeks. After the jurors began deliberating, the district court removed a second juror, this time on the basis that the juror was refusing to follow the court's legal instructions.

Analysis. The Eleventh Circuit (Chief Judge Carnes for Judge Tjoflat and Sixth Circuit Judge Siler) affirmed.

Removal of jurors: The district court was well within its discretion to remove a distraught juror for cause on the basis that a distraught juror is unlikely to be an attentive juror. The court justifiably found that the juror would be affected by being away from her 14-month old child, and would be unable or unwilling to focus on the trial. The district court was also within its discretion to excuse

a deliberating juror for failure to follow the court's instructions on the law. Because the court explicitly applied the appropriate standard—whether there was a substantial possibility that the removed juror was merely espousing a view that there was insufficient evidence to convict rather than refusal to follow the court's instructions—the only question is whether the court clearly erred in finding that the juror was refusing to follow the instructions. There was no clear error here. Mr. Godwin's jury submitted two notes to the judge within an hour explaining that Juror 10 disagreed with the court's instructions on the law and upon questioning, eleven jurors (all except Juror 10) explained that Juror 10 refused to follow the court's instructions.

Sufficiency of evidence: To establish a substantive RICO crime, the government must prove, among other elements, that the defendant was associated with an enterprise and participated in the enterprise's affairs through a pattern of racketeering activity. To establish a RICO conspiracy, the government must prove an agreement to participate in the affairs of the enterprise through a pattern of racketeering activity. The Court held that it was not necessary to prove that the defendant was a bona-fide member of the enterprise in order to prove that the defendant was associated with it. RICO applies to insiders as well as outsiders who are merely associated with the enterprise by their conduct. *United States v. Watchmaker*, 761 F.2d 1459, 1476 (11th Cir. 1985). Mr. Ellis was associated with the Guardians because he knew that the Guardians were a gang and he helped Guardian members and associates commit various crimes. Furthermore, Mr. Ellis was a member of conspiracy because he agreed to participate in a pattern of racketeering activity through the Guardians, even though other members of the conspiracy committed other, unrelated acts.

United States v. Campbell, No. 12-11952 (September 3, 2014)

Issue. Did the district court err in calculating "loss amount" by using the total amount of money the defendant's nonprofit received, in the absence of evidence that each of the nonprofit's expenditures was illegitimate?

Held. No.

Background and procedural history. Mr. Campbell and several co-conspirators created a scheme to defraud the State of Alabama. Mr. Campbell secured over $7.3 million from the state, purportedly for his nonprofit organization. He and his co-conspirators did not use the money for legitimate purposes r, but instead treated the money as their own—paying for meals, clothing, cars, jewelry, and vacations. Based on this scheme, Mr. Campbell was convicted of multiple fraud offenses including wire fraud, mail fraud, and money laundering. At sentencing, the district court used U.S.S.G. § 2B1.1 to calculate Mr. Campbell's guideline sentencing range, which enhances a defendant's offense level according to the amount of loss attributable to the defendant's fraud. The court calculated the loss amount using the total amount of state money received by the nonprofit, $7.3 million, and subtracting the $1.4 million that was distributed to legitimate organizations. This resulted in a total loss of $5.9 million.

Analysis. The Eleventh Circuit (Judge Tjoflat, for Judge Carnes and Southern District of Florida Judge Marra) affirmed. The Court rejected the argument that the government had to prove the illegitimacy of each of the nonprofit's expenditures, item by item. The government proved that the nonprofit was a sham organization that served no legitimate purpose. Where a defendant's conduct was permeated with fraud, a district court does not err by treating the amount that was transferred

from the victim to the fraudulent enterprise as the starting point for calculating the victim's pecuniary harm.

United States v. Green, No. 12-12952 (September 4, 2014)

Issues. Whether, on a motion for a reduced sentence, 18 U.S.C. § 3582(c)(2), a district court may clarify the quantity of drugs for which it held a defendant accountable at an earlier sentencing hearing?

Held. Yes.

Background and procedural history. A jury convicted Mr. Green with one count of conspiracy to distribute crack and two counts of distribution of crack. At sentencing, the district court found that Mr. Green was responsible for "certainly well in excess of 10 kilograms" and "far above" 1.5 kilograms of crack, which was the minimum amount required for a base-offense level of 38. After Mr. Green's second motion for a sentence reduction, the district court denied the motion by clarifying that it actually held Mr. Green responsible for 32.1 kilograms of crack, which, even after the sentencing amendments, results in a base-offense level of 38.

On appeal, Mr. Green argued that the district court's findings of fact violate the Sixth Amendment as interpreted by *Apprendi* and conflict with its earlier finding of drug quantity.

Analysis. The Eleventh Circuit (Judge Pryor for S.D. Ga. Judges Wood and Edenfield) affirmed the district court's denial of the § 3582 motion. The Court held that the district court's factual finding in the context of a § 3582 motion does not implicate *Apprendi* because the finding cannot increase Mr. Green's sentence. The Court also noted that it has encouraged courts to make similar fact findings when considering eligibility for sentence reductions due to guidelines amendments. *See e.g.*, *United States v. Hamilton*, 715 F.3d 328, 337 (11th Cir. 2013).

Bates v. Sec'y, Fla. Dep't of Corr., No. 13-11882 (September 5, 2014)

Issues.

1. Was it an unreasonable application of federal law to find that counsel was not constitutionally ineffective for failing to object to an opening prayer at trial, delivered by the victim's minister?
2. Was it an unreasonable application of federal law to find that the defendant's due process rights were not violated when the trial court refused to instruct the jury, at sentencing, that the defendant had agreed to waive his eligibility for parole and that he had already been sentenced to two life terms plus fifteen years on his other counts of conviction?

Held.

1. No.
2. No.

Background and procedural history. Mr. Bates is a Florida inmate on death row who petitioned the court for federal habeas relief under 28 U.S.C. § 2254. Before jury selection at his trial, the judge asked all present, including the jury venire, to stand while the victim's minister opened the proceedings with prayer. Mr. Bates's trial counsel did not object to the prayer. The jury convicted

Mr. Bates of first-degree murder, kidnapping, armed robbery, and attempted sexual battery. At sentencing, the jury submitted a note to the judge asking, "Are we limited to the two recommendations of life with minimum 25 years or death penalty. Yes. No. Or can we recommend life without a possibility of parole. Yes. No." The trial court responded only by referring the jury to its prior written instructions, denying Mr. Bates's requests to inform the jury that he would waive parole and that he had already been sentenced to consecutive life terms plus fifteen years on his non-capital convictions.

Analysis. The Eleventh Circuit (Chief Judge Carnes and Judge Tjoflat) affirmed the denial of the § 2254 petition. As to the first issue, the Court asked whether the religious features of the trial substantially impaired the fairness of the proceeding—not whether, in the abstract, the religious events violated the Establishment Clause. The Court held that Mr. Bates's lawyer could not be held ineffective for failing to raise an Establishment Clause claim, because he could not show that the opening prayer made his trial unfair. As to the second issue, the Court held that because parole was a legal possibility for Mr. Bates under Florida law, however remote, it was not a violation of clearly established federal law to deny Mr. Bates's requested jury instructions. His circumstances fell outside of the narrow confines of *Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187 (1994), which holds that where the defendant's future dangerousness is at issue and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.

Judge Wilson concurred, finding that trial counsel was ineffective for failing to object to the opening prayer, but that it was not an unreasonable application of federal law to find otherwise.

Samak v. Warden, FCC Coleman, No. 13-12161 (September 10, 2014)

Issue. Did the district court err by dismissing Mr. Samak's habeas petition, brought under 28 U.S.C. § 2241, on the basis that Mr. Samak did not meet the requirements of 28 U.S.C. § 2255(e)?

Held. No.

Background and procedural history. Mr. Samak, having already brought one unsuccessful challenge to his conviction and sentence under 28 U.S.C. § 2255, brought a second attack under 28 U.S.C. § 2241. Mr. Samak argued that the district court erred in sentencing him to life imprisonment and that his counsel was ineffective for failing to advise him to enter into a plea agreement. The district court dismissed the petition because it concluded that Mr. Samak had failed to establish the necessary conditions for his claims to satisfy the savings clause of 28 U.S.C. § 2255(e) such that they might be considered in a § 2241 petition.

Analysis. The Eleventh Circuit (per curium, Judges Pryor, Martin, and Anderson) affirmed. To proceed under § 2255(e)'s savings clause and bring a § 2241 habeas petition, a federal prisoner must satisfy five requirements: (1) throughout the petitioner's sentencing, direct appeal, and first § 2255 proceeding, this Court's precedent had specifically and squarely foreclosed the claim raised in the § 2241 petition; (2) after the petitioner's first § 2255 proceeding, the Supreme Court overturned that binding precedent; (3) that Supreme Court decision applies retroactively on collateral review; (4) as a result of that Supreme Court decision, the petitioner's current sentence exceeds the statutory maximum; and (5) the savings clause of § 2255(e) reaches his claim. Mr. Samak failed to show that binding precedent foreclosed his claims at the time he was sentenced.

The district court properly dismissed the petition.

Judge Pryor concurred, but wrote separately to explain that the Court's rule, contrived in *Bryant v. Warden, FCC Coleman*, No. 12-11212 (May 5, 2014), is contrary to the text of the § 2255(e) savings clause. Judge Pryor would only permit prisoners to bring § 2241 claims that challenge the execution of the prisoner's sentence because only those claims cannot be adequately remedied under § 2255.

United States v. Kirk, No. 13-15103 (September 16, 2014)

Issues.

1. Does a prior conviction for burglary under Fla. Stat. 810.02(1)(b) qualify as a violent felony for purposes of the Armed Career Criminal Act?
2. Are prior offenses committed on different occasions from one another, where the charging documents show that the offenses were committed on three separate dates?
3. Is 18 U.S.C. § 922(g) a facially unconstitutional exercise of Congress's Commerce Clause power?

Held.

1. Yes.
2. Yes.
3. No.

Background and procedural history. Mr. Kirk was convicted of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g). The sentencing court found that he had three prior convictions for violent felonies or serious drug offenses and therefore sentenced him under the ACCA. Mr. Kirk, on appeal, argued that his prior burglary offenses did not qualify as violent felonies because he was convicted under Fla. Stat. § 810.02(1)(b), which prohibits entering or remaining in a dwelling with intent to commit an offense therein. Mr. Kirk argued that remaining in a dwelling poses less of a risk of physical injury than entering a dwelling, and therefore should not qualify as a violent felony. Mr. Kirk also argued that the Government failed to prove that his prior burglary convictions were for offenses that were committed on different occasions from one another. Finally, Mr. Kirk argued that 18 U.S.C. § 922(g) is an unconstitutional exercise of Congress's Commerce Clause power as applied to purely intrastate conduct, such as mere possession of a firearm.

Analysis. The Eleventh Circuit (per curiam, Judges Hull, Marcus, and Anderson) affirmed. First, remaining in a dwelling to commit an offense qualifies as generic burglary under the ACCA's definition of violent felony. Second, the Government presented charging documents to show that Mr. Kirk's prior offenses occurred on three separate dates. This is sufficient proof because the Government used *Shepard*-approved documents to prove that the offenses arose from separate and temporally distinct criminal episodes. Finally, 18 U.S.C. § 922(g)'s jurisdictional element, requiring the minimum nexus that the firearm have been in interstate commerce at some time, is sufficient to bring the statute within the commerce powers of Congress.

Winthrop-Redin v. United States, No. 13-10107 (Sept. 23, 2014)

Issue. Did the district court err in denying the movant an evidentiary hearing on the issue of whether his counsel rendered ineffective assistance?

Holding. No.

Background and procedural history. Mr. Winthrop-Redin, a boat crew member in a drug-smuggling operation, pleaded guilty to conspiracy with intent to distribute five kilograms of cocaine. Two years after sentencing, Mr. Winthrop-Redin filed a *pro se* 28 U.S.C. § 2255 petition claiming that his plea was coerced by the ship's captain (later revealed to be a Government informant) and that his lawyer rendered ineffective assistance by instructing him to not report that threat to the district court. Mr. Winthrop-Redin supported his motion only with his own affidavit and did not list the specifics of the alleged threat. The district court denied habeas relief without an evidentiary hearing. The Eleventh Circuit granted a Certificate of Appealability.

Analysis. The Eleventh Circuit (Judge Marcus for Judges Hull and Black) affirmed, finding that because Mr. Winthrop-Redin "put forward only implausible and conclusory allegations," no evidentiary hearing was required. Slip op. at 2, *citing* § 2255(b) and *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002). Although Mr. Winthrop-Redin's motion described a threat allegedly rendered prior to his indictment, he did not give specifics as to the purported post-indictment threat by the ship captain. It was therefore not error to deny Mr. Winthrop-Redin an evidentiary hearing because his pleadings failed to "put forward specific and detailed factual assertions" that, if true, would entitle him to relief. Slip op. at 14 (internal citation omitted). The Court further noted that Mr. Winthrop-Redin waited two years before alerting the district court of the alleged threats, and highlighted Mr. Winthrop-Redin's sworn statements during his change-of-plea hearing that he was pleading guilty voluntarily, had not been threatened, and was satisfied with counsel. Mr. Winthrop-Redin also failed to specifically allege that he told his attorney he had been threatened with death unless he pleaded guilty.

United States v. Mathis, No. 13-13109 (September 24, 2014)

Issues. Whether a defendant's use of a cell phone to call and send text messages constitutes the use of a computer, as that term is defined in 18 U.S.C. § 1030(e)(1), and warrants imposition of an enhancement under U.S.S.G. § 2G2.1(b)(6)?

Held. Yes.

Background and procedural history. A jury convicted Mr. Mathis of several child exploitation offenses and the district court sentenced him to 480 months in prison. The evidence at trial showed that Mr. Mathis communicated with minors via text messages on his cell phone.

On appeal, Mr. Mathis raised numerous grounds, including whether the district court erred in applying a 2-level enhancement under USSG §2G2.1(b)(6). This section applies if the defendant, for the purpose of producing sexually explicit material, used "a computer or an interactive computer service to . . . persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct." The guidelines commentary instructs that the word "computer" has "the meaning given that term in 18 U.S.C. § 1030(e)(1)." §2G2.1 cmt. (n.1).

Analysis. The Eleventh Circuit (Judges Hull, Marcus, and Black, per curiam) affirmed Mr. Mathis's convictions and sentence and remanded only for a scrivener's error in the judgment.

As a matter of first impression, the Court held that a cell phone is a "computer" within the meaning of 18 U.S.C. § 1030(e)(1). The Court agreed with the Eighth Circuit's decision in *United States v. Kramer*, 631 F.3d 900 (8th Cir. 2011), that the language of § 1030(e)(1) is broad and encompasses any device that uses a data processor. The Court specifically agreed with the Eighth Circuit's observation that "each time an electronic processor performs any task—from powering on, to receiving keypad input, to displaying information—it performs logical, arithmetic, or storage functions. These functions are the essence of its operation." Slip op at 37 (quoting *Kramer*, 631 F.3d at 903). The Court's rejection of Mr. Mathis's remaining arguments was not notable.

Reed v. Sec'y, Fla. Dep't of Corr., No. 13-10900 (September 24, 2014)

Issue. Was it an unreasonable application of Supreme Court law for the state court to deny Mr. Reed's claim that his trial counsel rendered ineffective assistance by failing to investigate and call a witness at trial?

Held. No.

Background and procedural history. Mr. Reed is a state prisoner serving a 35-year term of imprisonment as a result of his convictions for two counts of vehicular homicide and two counts of leaving the scene of an accident that resulted in death. He filed a motion for post-conviction relief in state court, arguing that his trial counsel's failure to locate, interview, and call Jarvis Coleman as a witness amounted to ineffective assistance. Mr. Coleman would have testified, had he been called, that he didn't meet Mr. Reed the night of the incident. This would have impeached the testimony of the state's witness, Willie Richards, who testified at trial that Mr. Reed drove both him and Mr. Coleman around the night of the incident. The state court denied post-conviction relief and Mr. Reed filed a § 2254 petition for a writ of habeas corpus in federal court. The federal district court granted Mr. Reed's petition, finding that no reasonable lawyer would have failed to contact Mr. Coleman to find out what he knew and that Mr. Coleman's testimony established prejudice. The State appealed.

Analysis. The Eleventh Circuit (Judge Marcus for Judge Hull) reversed. Applying AEDPA's deferential standard of review, the Court held that it was not an unreasonable application of Supreme Court law for the state court to find that Mr. Reed had not been prejudiced by his attorney's failure to find and interview Mr. Coleman. First, there was reasonable basis in the record to find that Mr. Coleman was unavailable around the time of trial. Second, there was a reasonable basis to find that Mr. Coleman's testimony was not credible. Third, Mr. Coleman's testimony, even if credited, would not have directly exculpated Mr. Reed. Fourth, there was substantial remaining evidence implicating Mr. Reed.

Judge Hill dissented for the reasons stated by the district court.

United States v. Gonzalez-Flores, No. 13-15430 (July 18, 2014)

Issue. Did the district court plainly err during Mr. Gonzalez-Flores's guilty plea hearing by failing to record or have transcribed (1) the English-to-Spanish and Spanish to English communications between him and the court interpreter, or (2) the interpreter's identification, qualifications, or oath?

Held. No.

Background and procedural history. Mr. Gonzalez-Flores pleaded guilty to one count of conspiring to distribute and possess with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. § 846. During his guilty plea hearing, the district court did not record or transcribe the Spanish-to-English and English-to Spanish exchanges between him and the court interpreter. Nor did the court record or transcribe the interpreter's identification, qualifications, or oath. Mr. Gonzalez-Flores argued that the absence of such record prevented new counsel on appeal from reviewing the record to determine the voluntariness of his plea.

Analysis. The Eleventh Circuit (per curiam, before Judges Tjoflat, Wilson, and Anderson) affirmed. Although following a trial a defendant has the right to a complete transcript, neither the Supreme Court nor the Eleventh Circuit has interpreted the Court Reporter Act, 28 U.S.C. § 753(b) to require a compete transcript in the context of plea hearings. Furthermore, the regulations promulgated under that Act provide that in the case of testimony made through an interpreter, it will be assumed that answers are made in a foreign language and interpreted, with only the English translations being recorded. In addition, no binding authority requires the district court to record the court interpreter's identification, qualifications, or oath, and the plain language of the Court Interpreters Act, 28 U.S.C. § 1827, likewise does not compel the inclusion of that information in the transcript.

United States v. Means, No. 13-14266 (July 18, 2014)

Issue. Does a sentencing court have jurisdiction to rescind a prisoner's obligation to make financial payments on the fine and special assessment imposed upon the prisoner, on the basis that the BOP has set a payment schedule that the prisoner cannot meet or that the BOP lacks authority to set such payment schedule?

Held. No.

Background and procedural history. A federal prisoner, proceeding *pro se*, moved the district court to rescind his obligation to make further financial payments on his criminal fine and special assessment. He argued that the BOP had set a payment schedule for the fine that he was unable to meet and that the BOP lacked authority to set such a payment schedule. The district court dismissed the petition.

Analysis. The Eleventh Circuit (per curiam, Judges Marcus, Wilson, and Rosenbaum) affirmed. A sentence imposing a fine is a final judgment. It may be modified or remitted upon the motion of the government under 18 U.S.C. § 3573, but the government made no such motion here. Mr. Means's motion could be construed as a collateral attack on the execution of his judgment, but

such an attack must be brought as a petition for habeas corpus under 28 U.S.C. § 2241. Such a petition must be brought in the district where the inmate is incarcerated. The district court would have been correct to dismiss Mr. Means's construed § 2241 petition, therefore, because he failed to file it in the district where he is currently incarcerated.

United States v. Douglas, No. 14-10439 (July 23, 2014)

Issue. Did the district court plainly err at trial by delivering an *Allen* charge?

Held. No.

Background and procedural history. On direct appeal, Ms. Douglas challenged the district court's decision to deliver an *Allen* charge to the jury. Ms. Douglas argued that the charge was coercive because it inducted the jury to deliver a split verdict, finding her guilty of only of one of the two counts.

Analysis. The Eleventh Circuit (per curiam, before Judges Marcus, Wilson, and Rosenbaum) affirmed. The Court, looking to the totality of the circumstances, held that the charge was not coercive. A split verdict does not necessarily indicate coercion. In this case, the district court gave the pattern *Allen* charge, which has been approved by the Eleventh Circuit, and did not make any additional comments that were partial or one-sided.

United States v. Lockett, No. 14-10144 (August 13, 2014)

Issue. On direct appeal, was the record sufficiently developed to hear Mr. Lockett's claim that he was denied effective assistance of counsel below?

Held. No.

Background and procedural history. Mr. Lockett pleaded guilty, pursuant to a written plea agreement, of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). On appeal, Mr. Lockett argued that his court-appointed trial counsel rendered ineffective assistance by advising him to sign a plea agreement that unnecessarily admitted that he used the firearm during an armed robbery. That fact (1) was not necessary for conviction under § 922(g)(1), (2) was used to enhance his sentence under USSG §§ 2K2.1(c), 2X1.1, and 2B3.1, and (3) all but assured his conviction for robbery in his still-pending state proceeding.

Analysis. The Eleventh Circuit (per curiam, Judges Tjoflat, Martin, and Jordan) affirmed. Although the case presented a close call, the Court applied its general rule favoring resolution of ineffectiveness claims in habeas proceedings. The record is not sufficiently developed at this stage to decide whether Mr. Lockett's counsel's performance was deficient or whether Mr. Lockett was prejudiced by deficient performance.

United States v. Baxter, No. 13-14104 (Aug. 21, 2014)

Issues.

1. Did the district court abuse its discretion in denying the defendant's motion to dismiss the two counts of his indictment charging him with being a felon in possession of a firearm, in light of the defendant's argument that his prior Alabama forgery convictions were void *ab initio*?
2. Did the district court err in denying the defendant's motion to dismiss in light of the defendant's argument that the district court incorrectly determined that his claim failed because he could not properly challenge the validity of his predicate convictions?

Held.

1. No.
2. No.

Background and procedural history. Mr. Baxter was indicted for one count of being an unlicensed firearm dealer in violation of 18 U.S.C. § 922(a)(1)(A), and two counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The indictment alleged that Mr. Baxter had three prior Alabama convictions of forgery. Prior to trial, Mr. Baxter moved to dismiss the felon-in-possession counts, arguing that his prior forgery convictions were void *ab initio* under Alabama state law. The district court denied his motion, finding that (1) Mr. Baxter was not asserting a facial defect in the indictment or the manner in which it was commenced, but rather challenging the sufficiency of the evidence; (2) even if Mr. Baxter could use a pretrial motion to test the sufficiency of the government's evidence, he could not raise a collateral attack on the validity of his prior felony convictions under *Lewis v. United States*, 445 U.S. 55, 100 (1980); and (3) under Alabama law, at least two of the forgery convictions did not appear to be invalid, and a state court had not yet set them aside. Mr. Baxter pled guilty to all three counts in the indictment, reserving the right to appeal the denial of the motion.

On appeal, Mr. Baxter argues that a motion to dismiss was the appropriate mechanism for the district court to resolve his challenge to the felon-in-possession counts, by relying on the Eleventh Circuit's decision in *United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982). He further argues that the district court incorrectly determined that his claim failed because he could not properly challenge the validity of his predicate convictions.

Analysis. The Eleventh Circuit (per curiam, Judges Pryor, Martin, and Jordan) affirmed Mr. Baxter's conviction. The Court held that the indictment sufficiently charged Mr. Baxter with being a felon in possession. The Court reasoned that the indictment presented the essential elements of the charged offense. Specifically, the indictment notified Mr. Baxter of the charges to be defended against, and also enabled him to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense. The Court held that its prior decision in *Zayas-Morales* is distinguishable because the stipulated facts in *Zayas-Morales* supported the procedural dismissal there, and no such stipulated facts existed in Mr. Baxter's case.

The Court also explained that a court ruling on a motion to dismiss may not look beyond the four corners of the indictment, nor may it properly dismiss an indictment for insufficient evidence. Furthermore, a district court may not dismiss an indictment on a determination of facts that should have been developed at trial. The Court reasoned Mr. Baxter's motion to dismiss the indictment

impermissibly asked the district court to both look beyond the indictment (by calling into question the validity of his prior convictions) and to dismiss for insufficient evidence (by arguing that the government could not prove beyond a reasonable doubt that Mr. Baxter was a convicted felon under Alabama law).

United States v. Mickens, No. 12-13265 (August 29, 2014)

Issue. Does the simultaneous arrival of 6-10 police cars in a parking lot where Mr. Mickens and others were standing amount to a seizure under the Fourth Amendment?

Held. No.

Background and procedural history. Mr. Mickens was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), after a police officer saw him remove a firearm from his waistband and throw it beneath a vehicle. Before the district court, Mr. Mickens moved to suppress the officer's testimony about him having the pistol on the basis that he had been seized without probable cause. At the time, Mr. Mickens was standing in a parking lot at the rear of a strip mall with between 15 and 30 other people. Between 6 and 10 police cars, responding to a civilian complaint, pulled into the lot. Within 10 to 20 seconds of driving into the lot, the officer saw Mr. Mickens pull a handgun and toss it underneath a nearby car.

Analysis. The Eleventh Circuit (per curiam, Chief Judge Carnes, Judges Jordan, Rosenbaum) affirmed. The Court considered the factors set out in *United States v. Perez*, 443 F.3d 772 (11th Cir. 2006), to determine whether Mr. Mickens had been seized. Those factors include whether the citizen's path is blocked or impeded; whether identification is retained; the suspect's age, education, and intelligence; the length of the suspect's detention and questioning; the number of police officer's present; the display of weapons; any physical touching of the suspect; and the language and tone of voice of the police. The Court held that only one factor favored Mr. Micken's position, the number of officers present. But all of the other factors weighed against him—there were multiple entrances to the parking lot, and therefore his path was not impeded; his identification had not been requested or retained; he had not been questioned for any period of time; and none of the officers had displayed their weapons. Accordingly, under the totality of the circumstances, the Court held that Mr. Mickens had not been seized.

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Warger v. Shauers, No. 13-517 (December 9, 2014)

Issue. Does Fed. R. Evid. 606(b), known as the anti-impeachment rule, bar a party from introducing evidence of statements made by jurors during deliberations for the purpose of proving that a juror lied on voir dire and in support of the party's motion for new trial?

Held. Yes.

Background and procedural history. Gregory Warger sued Randy Shauers in federal court for negligence for injuries suffered in a motor vehicle accident. After the jury returned a verdict for Shauers, one of the jurors contacted Warger's attorney, claiming that Regina Whipple, the jury foreperson, had revealed during deliberations that her daughter had been at fault in a fatal motor vehicle accident, and that a lawsuit would have ruined her daughter's life. Armed with an affidavit from the juror, Warger moved for a new trial, arguing that Whipple had deliberately lied during voir dire about her impartiality and ability to award damages. The district court denied Warger's motion, holding that Fed. R. Evid. 606(b), which bars evidence "about any statement made . . . during the jury's deliberations," barred the affidavit, and that none of the Rule's three exceptions were applicable. The Eighth Circuit affirmed. The Supreme Court granted certiorari.

Analysis. The Supreme Court (Justice Sotomayor) unanimously affirmed. The Court held that Rule 606(b) applies to juror testimony during a proceeding in which a party seeks a new trial on the ground that a juror lied during voir dire. This reading accords with the plain meaning of the rule, which applies to an inquiry into the validity of the verdict. The Court also held that Rule 606(b)(2)(a)'s exception for evidence of extraneous prejudicial information improperly brought to the jury's attention did not apply. Information is only extraneous if it derives from a source external to the jury. It does not include internal matters or the general body of experiences that jurors are understood to bring with them to the jury room. Finally, the Court saw no need for constitutional avoidance. Though the Constitution guarantees both criminal and civil litigants a right to an impartial jury, that right is sufficiently protected even if jurors lie in voir dire in a way that conceals bias because the parties can bring evidence of bias to the court's attention before the verdict is rendered and employ nonjuror evidence even after the verdict is rendered. The Court noted that there may be cases of juror bias so extreme that they rise to the level of denying an individual the right to a jury trial, but the Court did not consider that question here.

Heien v. North Carolina, No. 13-604 (December 15, 2014)

Issue. Can a police officer's reasonable mistake of law give rise to the reasonable suspicion necessary to uphold a seizure under the Fourth Amendment?

Held. Yes.

Background. Sergeant Matt Darisse pulled over Mr. Heien's Ford Escort after noticing that the right brake light was broken. With Mr. Heien's consent, Sergeant Darisse searched the car and found a sandwich bag that contained cocaine. The State charged Mr. Heien with attempted trafficking in cocaine. Mr. Heien moved to suppress the evidence seized from the car, contending that the stop and search had violated the Fourth Amendment. The trial court denied the motion, finding that the faulty brake light had given Sergeant Darisse reasonable suspicion to initiate the stop. The North Carolina Court of Appeals reversed, concluding that the initial stop was not valid because driving with only one working brake light was not actually a violation of North Carolina law. The North Carolina Supreme Court reversed, finding that the stop was valid because Sergeant Darisse could reasonably, even if mistakenly, read the vehicle code to require that both brake lights be in good working order. The Supreme Court granted certiorari.

Analysis. The Supreme Court (Chief Justice Roberts, for Justices Scalia, Kennedy, Thomas, Ginsberg, Breyer, Alito, and Kagan) affirmed. The Court noted that it has repeatedly affirmed that the ultimate touchstone of the Fourth Amendment is reasonableness. The Court, in prior cases, has recognized that mistakes of fact can be reasonable. The Court concluded that mistakes of law are no less compatible with the concept of reasonable suspicion than are mistakes of fact. In this case, the Court had little difficulty concluding that the officer's error of law was reasonable. Although the statute at issue refers to "a stop lamp," suggesting the need for only one working brake light, another provision requires that all vehicles "have all originally equipped rear lamps or the equivalent in good working order," arguably indicating that if a vehicle has multiple originally equipped rear stop lamps, all must be functional.

Justice Kagan filed a concurring opinion, in which Justice Ginsburg joined, emphasizing that the Fourth Amendment will tolerate only objectively reasonable mistakes of law. Justice Kagan also explained that the inquiry the Court permits today is more demanding than the one courts undertake before awarding qualified immunity. The law at issue must be so doubtful in construction that a reasonable judge could agree with the officer's view.

Justice Sotomayor dissented and would have held that determining whether a search or seizure is reasonable requires evaluating an officer's understanding of the facts against the actual state of the law.

Cole v. Warden, Ga. State Prison, No. 13-12635 (October 6, 2014)

Issue. Did Mr. Cole's one-year limitations period under 28 U.S.C. § 2254(d) begin to run in September 2007, which he represents to be the date on which he discovered the alleged *Boykin* violations at his plea proceeding?

Held. No.

Background. In 1990, Mr. Cole, then 16 years' old, shot and killed Benjamin West during a robbery. He pleaded guilty to malice murder and armed robbery and was sentenced to two, concurrent life sentences. More than seventeen years later, on July 1, 2008, Mr. Cole filed a state habeas petition asserting that the judge who accepted his plea did so without first ensuring that Mr. Cole was knowingly, intelligently, and voluntarily waiving his constitutional rights, as required by *Boykin v. Alabama*, 395 U.S. 238 (1969). The state court dismissed the petition as untimely. On January 18, 2013, Mr. Cole filed a federal habeas petition under 28 U.S.C. § 2254 on the same basis. He asserted that he did not discover the violation of his *Boykin* rights until September 2007, when he overhead an inmate librarian discussing them. He also asserted that he was entitled to equitable tolling of the statute of limitations because he was only 16 years-old when he pleaded guilty and he has been incarcerated since that time. The district court dismissed Mr. Cole's petition as untimely.

Analysis. The Eleventh Circuit (Judge Fay, for M.D. Fla. Judge Hodges and S.D. Fla. Judge Huck) affirmed. While 28 U.S.C. § 2254(d)(1)(D) provides that the one-year limitations period may run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," that clock starts ticking when a person knows or should know the underlying vital facts of the claim, regardless of when their legal significance is actually discovered. The Court held that inquiry-notice analysis applied to Mr. Cole's contention that he was deprived of being informed of his *Boykin* rights at his plea proceeding. The Court noted that the record on appeal contained the written plea form that Mr. Cole signed, which states the *Boykin* rights. The Court reasoned that if Mr. Cole had any question about the rights he was relinquishing by pleading guilty, he could have consulted with is attorney at the time of his plea or before he signed the form. Consequently, Mr. Cole knew or should have known of his *Boykin* rights at the time of his plea. The statute of limitations began to run when his conviction became final, not when he learned the legal significance of the underlying facts of his *Boykin* claim. The Court further held that Mr. Cole failed to show that any extraordinary circumstance warranted equitable tolling of the statute of limitations.

Spencer v. United States, No. 10-10676 (en banc) (November 14, 2014)

Issue. Can a federal prisoner move to vacate his sentence in a collateral attack under 28 U.S.C. § 2255 on the basis that the sentencing court erroneously classified him as a career offender under the U.S. Sentencing Guidelines?

Held. No.

Background. Mr. Spencer pleaded guilty to distributing crack cocaine. Based on his prior convictions for selling cocaine and felony child abuse, the district court concluded that Mr. Spencer was a career offender under USSG § 4B1.1 and sentenced him to 151 months of imprisonment. At sentencing, Mr. Spencer argued that his prior conviction for felony child abuse is not a "crime of violence" and therefore not a predicate offense under § 4B1.1. The facts underlying that offense are that when he was 18, Mr. Spencer had sex with a 14-year-old victim. On direct appeal, the Eleventh Circuit rejected Mr. Spencer's argument that felony child abuse was not a crime of violence.

Two weeks after the Court affirmed Mr. Spencer's sentence, the Supreme Court decided *Begay v. United States*, 553 U.S. 137 (2008), which held that "violent felonies" under the Armed Career Criminal Act must involve purposeful, violent, or aggressive conduct similar to burglary, arson, or extortion. Because the definitions of "violent felony" under the ACCA and "crime of violence" under the Sentencing Guidelines are identical, *Begay* also limited the meaning of crime of violence for purposes of the career-offender enhancement.

Mr. Spencer moved to vacate his sentence under 28 U.S.C. § 2255, arguing that *Begay* applies retroactively to his sentence and makes clear that felony child abuse is not a crime of violence. The district court denied Mr. Spencer's motion, but granted a certificate of appealability on two issues: (1) whether Mr. Spencer's freestanding challenge to a career offender sentence is cognizable on collateral review; and (2) whether the district court, in light of *Begay*, erroneously sentenced Mr. Spencer as a career offender?

Analysis. The Eleventh Circuit (Judge William H. Pryor, for Chief Judge Ed Carnes and Judges Tjoflat, Hull, and Marcus) affirmed. As a preliminary matter, the Court held that the certificate of appealability was defective because, in violation of 28 U.S.C. § 2253(c), it did not specify what issues raised by the prisoner made a substantial showing of the denial of a constitutional right. The Court declined to vacate the certificate at this case, but noted that going forward a certificate of appealability must specify what constitutional issue jurists of reason would find debatable.

The Court next held that § 2255 does not provide a remedy for every alleged error in conviction and sentencing, but only for fundamental defects that inherently resulted in a complete miscarriage of justice. The Court held that a prisoner may challenge a sentencing error as a fundamental defect on collateral review only when he can prove that he is either actually innocent of his crime or that a prior conviction

used to enhance his sentence has been vacated.

Judge Wilson dissented, joined by Judges Martin, Jordan, and Rosenbaum. Judge Wilson would have reached the merits of Mr. Spencer's claim because an erroneous guideline determination that is likely to result in a person spending a considerable amount of additional time in prison constitutes a fundamental error resulting in a complete miscarriage of justice.

Judge Martin dissented, joined by Judges Wilson and Jordan, and wrote separately to draw attention to Mr. Spencer's particular case. With the career offender enhancement, Mr. Spencer's guideline range was 151-188 months. Mr. Spencer was sentenced to 151 months of imprisonment. Today, without the career offender enhancement and with the benefit of the retroactive amendments to the drug quantity tables, Mr. Spencer's guideline range would be 24-30 months.

Judge Jordan dissented, joined by Judges Wilson, Martin, and Rosenbaum. Judge Jordan notes that there are strong reasons to believe that a career-offender error under the advisory Sentencing Guidelines results in a sentence that is contrary to "the laws of the United States," under § 2255: (1) it results in a procedurally unreasonable sentence that is reversible on direct appeal; and (2) incorrect application results in a violation of the Ex Post Facto Clause under *Peugh v. United States*, 133 S. Ct. 2072 (2013), because the Sentencing Guidelines have sufficient legal affect to attain the status of "law" under the Ex Post Facto Clause.

Judge Rosenbaum dissented, joined by Judges Wilson, Martin, and Jordan. Judge Rosenbaum believed that the Supreme Court decision in *Johnson v. United States*, 544 U.S. 295, 125 S. Ct. 1571 (2005), controlled and required the granting of Mr. Spencer's petition.

United States v. Anderson, No. 13-12945 (November 19, 2014)

Issue. Does the district court have jurisdiction to consider a defendant's second or successive motion for reduction of sentence under 18 U.S.C. § 3582(c)(2) that is based on the same Amendment to the Sentencing Guidelines as the first motion?

Held. Yes.

Background. Mr. Anderson was convicted of various federal drug offenses in 1990. At sentencing, the district court found that the offenses involved at least 15 kilograms of crack cocaine and, using the relevant drug quantity table, determined that Mr. Anderson's base offense level was 42 and his total offense level was 46. In 2006, Mr. Anderson moved for a sentence reduction based upon Amendment 505 of the Sentencing Guidelines. The district court found that Amendment 505 lowered Mr. Anderson's base offense level to 38 and his total offense level to 42, but denied the motion for reduction under the 18 U.S.C. § 3553(a) factors. In 2008, Mr. Anderson moved for a sentence reduction under Amendment 706. The district court determined that Amendment 706 did not affect Mr. Anderson's offense level and therefore denied the motion. In 2011, Mr. Anderson moved for a sentence reduction under Amendment 750. The district court denied the motion, finding that Amendment 750 did not reduce

Mr. Anderson's guideline range. Mr. Anderson appealed that denial and the Eleventh Circuit affirmed. In May 2013, Mr. Anderson filed a renewed motion for reduction of sentence based on Amendment 750. The district court denied the motion. On appeal, the government argued that the district court lacked jurisdiction to hear a second or successive motion based upon the same amendment.

Analysis. The Eleventh Circuit (M.D. Fla. Judge Schlesinger, for Judges Wilson and Rosenbaum) affirmed. The Court held that the district court had jurisdiction to hear Mr. Anderson's second motion. Relying on *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), the Court explained that courts should treat limitations on a statute's scope as nonjurisdictional unless Congress clearly articulates its intention to create a jurisdictional limitation. Because 18 U.S.C. § 3582(c)(1) does not contain a clearly expressed jurisdictional limitation on a district court's ability to hear successive motions based upon the same amendment, the Court did not read such a limitation into the statute. The Court nevertheless affirmed the denial of Mr. Anderson's motion because the alleged error—the district court's failure to use the marijuana equivalency table to calculate the base offense level—did not affect Mr. Anderson's based offense level.

Tanzi v. Sec'y, Fla. Dep't of Corr., No. 13-12421 (November 19, 2014)

Issue. Was Mr. Tanzi entitled to federal habeas relief on his claim that he was denied effective assistance of counsel during the penalty phase of his capital trial because his attorney failed to offer evidence that Mr. Tanzi suffers from a genetic abnormality in that he has an XYY genotype?

Held. No.

Background. Mr. Tanzi is a Florida state prisoner on death row. He was sentenced to death based on a unanimous jury recommendation for the murder of Janet Acosta. The facts of the murder are that Mr. Tanzi kidnapped Ms. Acosta while she was reading a book in her car. He punched her in the face until he could get into her car, forced her to accompany him from Miami to the Florida Keys, and forced her to perform oral sex on him. Once in the Keys, Mr. Tanzi strangled Ms. Acosta with rope until she died and disposed of her body in a wooded, secluded area. Mr. Tanzi pleaded guilty to first-degree murder, carjacking, kidnapping, and armed robbery.

During the penalty phase, Mr. Tanzi presented a substantial case for mitigation. Mr. Tanzi had a long history of mental health problems and was sexually abused as a child. Mr. Tanzi did not present evidence of his XXY genotype, a genetic abnormality. The jury unanimously recommended the death penalty and the trial judge adopted that recommendation. Mr. Tanzi sought postconviction relief in state court, arguing that he was denied effective assistance of counsel because his attorney failed to investigate and failed to introduce evidence of Mr. Tanzi's genetic abnormality in mitigation. The state trial court denied his ineffective-assistance-of-counsel claim on the merits following an evidentiary hearing. The Florida Supreme

Court affirmed. Mr. Tanzi then filed this federal habeas claim. The district court denied habeas relief and Mr. Tanzi appealed.

Analysis. The Eleventh Circuit (Judge Martin, for Judges Marcus and William H. Pryor) affirmed. The Court reviewed Mr. Tanzi's claim under AEDPA's highly deferential standard. Because the Florida Supreme Court adjudicated the merits of Mr. Tanzi's claims in a reasoned opinion, the Court applied a two-step analysis. First, the Court determined what arguments or theories support the state court's decision. Second, the Court asked whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the Supreme Court. The Court found that the Florida Supreme Court's decision was a reasonable application of federal law. Notably, the Court explained that an outcome that is only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support. The Court thus agreed with the Florida Supreme Court that Mr. Tanzi failed to show prejudice, given that none of his postconviction evidence cast any doubt on the existence or strength of the aggravating circumstances that were found to exist by the sentencing judge and that supported the judge's decision to impose the death penalty.

The Court also denied Mr. Tanzi's claim that the prosecutor's late disclosure to defense counsel of Mr. Tanzi genetic abnormality was a *Brady* violation. The prosecution disclosed the abnormality three days before the penalty phase trial. The Court concluded that Mr. Tanzi could not show prejudice as a result of the late disclosure.

United States v. McIlwain, No. 14-10735 (November 25, 2014)

Issue. Does a formal involuntary commitment to a mental institution, under Ala. Code § 22-52-10.1, qualify as commitment to a mental institution for purposes of 18 U.S.C. § 922(g)(4), which criminalizes possession of a firearm by a person who has been committed to a mental institution?

Held. Yes.

Background. Mr. McIlwain was involuntarily committed to the custody of the Alabama State Department of Mental Health by a state probate court. He was afforded formal process, as required by Ala. Code § 22-52-1, and his commitment was a formal commitment under Ala. Code. § 22-52-7. After being released from the commitment, Mr. McIlwain was charged and convicted of possessing a firearm after having been committed to a mental institution, in violation of 18 U.S.C. § 922(g)(4). The district court denied Mr. McIlwain's motion to dismiss the indictment, which he brought on the basis that the prior commitment did not constitute a formal involuntary commitment because it occurred in a single day, did not provide adequate notice, and was only an emergency hospitalization.

Analysis. The Eleventh Circuit (Judge Hull, for Judges Marcus and Dubina) affirmed. The Court explained that the commitment was a formal involuntary commitment under Alabama law and therefore qualified as a commitment under 18 U.S.C. § 922(g)(4). The Court held that Mr. McIlwain could not collaterally attack the validity of the commitment order in a subsequent federal criminal proceeding.

United States v. Brown, No. 13-13670 (November 25, 2014)

Issue. Did the district court abuse its discretion by imposing a sentence of 240 months of imprisonment, an upward variance from the guideline range of 78 to 97 months?

Held. No.

Background. Mr. Brown pleaded guilty to eight counts of possession and receipt of child pornography. The district court found the guideline sentencing range to be 78 to 97 months of imprisonment. The government filed a motion for upward variance, which the district court granted. The court noted Mr. Brown has had an unhealthy obsession with young boys for most of his adult life, which seems to have become much more active in recent years. In addition to child pornography, Mr. Brown had an interest in dead children, murder, and cannibalism. While Mr. Brown had never crossed the line between fantasy and action, Mr. Brown had photographed a boy who attended his church and fantasized about eating him. The district court sentenced Mr. Brown to 240 months in prison. Mr. Brown appealed the sentence, arguing that it was substantively unreasonable because it was based on the unfounded assumption that Mr. Brown would physically harm a child in the future and placed undue weight on the need to protect the public.

Analysis. The Eleventh Circuit (per curiam; Judges Tjoflat, Jill A. Pryor, and Fay) affirmed. The Court reviewed the reasonableness of the sentence under a deferential abuse-of-discretion standard in accordance with *Gall v. United States*, 552 U.S. 38 (2007). The Court noted that the 240-month sentence was above the applicable guideline range, but well below the statutory maximum. The district court discussed four 18 U.S.C. § 3553(a) factors, including (1) Mr. Brown's long history of obsession with young boys; (2) the seriousness of child-pornography crimes; (3) the futility of deterrence; and (4) the self-evident danger to society posed by Mr. Brown, as demonstrated by his depraved online chats and interest in the abduction, sexual molestation, murder, and cannibalization of children. Although the district court commented that the need to protect the public was the most important factor in the case, the court also discussed other factors and it is within the court's discretion to afford one factor greater weight.

Lebron v. Sec'y, Fla. Dep't of Children & Families, No. 14-10322 (December 3, 2014)

Issue. Does a Florida Statute that mandates suspicionless drug testing of all applicants seeking Temporary Assistance for Needy Families ("TANF") benefits violate the Fourth Amendment's prohibition against unreasonable searches?

Held. Yes.

Background. Fla. Stat. § 414.00652 mandates suspicionless drug testing of all applicants seeking TANF benefits. Mr. Lebron sued the Secretary of the Florida Department of Children and Families ("State"), which administers TANF benefits, claiming that the statute violates the Fourth Amendment's prohibition against unreasonable searches, applied against the states through the Fourteenth Amendment. The district court granted summary judgment in favor of Mr. Lebron, declared § 414.0652 unconstitutional, and permanently enjoined its enforcement. The State appealed, arguing that it had three special needs that justified suspicionless searches of TANF applicants: (1) ensuring TANF applicants' job readiness; (2) promoting child-welfare and family stability; and (3) ensuring that public funds were used for their intended purposes.

Analysis. The Eleventh Circuit (Judge Marcus, for Judge Hull and N.D. Ga. Judge Totenberg) affirmed. The Court held that drug testing by urinalysis is undisputedly a Fourth Amendment search under *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602 (1989). The Fourth Amendment generally prohibits such searches without individualized suspicion, except in certain well-defined circumstances where the government has a special need that goes beyond the normal need for law enforcement. The Court held that the State had a legitimate public interest in encouraging employability, protecting children, and conserving public funds. But those general concerns, proffered only at a high level of abstraction and without empirical evidence, do not justify an exception to the Fourth Amendment. The Court noted that the State failed to establish a peculiar drug-use problem among TANF applicants and that, if anything, the State's evidence showed that rates of drug use in the TANF population are no greater than for those who receive other government benefits, or even for the general public.

United States v. Cruanes, No. 13-15057 (December 5, 2014)

The Eleventh Circuit (per curiam, Judges Tjoflat, Jill A. Pryor, and Fay) issued a writ of mandamus compelling the district court to issue a certificate stating that Mr. Cruanes's conviction was automatically set aside on December 1, 1983, under the now-repealed Youth Corrections Act, 18 U.S.C. § 5021(b). Mr. Cruanes had petitioned the district court for a writ of error coram nobis. The government conceded in oral argument that Mr. Cruanes was entitled to relief because the district court discharged Mr. Cruanes from custody effective December 1, 1983, but did not issue the requisite certificate stating that the conviction had been set aside.

Wilson v. Warden, Ga. Diagnostic Prison, No. 14-10681 (December 15, 2014)

Issue. Was it a reasonable application of federal law for the Georgia Supreme Court to deny Mr. Wilson's claim that his trial counsel was ineffective for failing to discover and introduce mitigating evidence at the sentencing phase of his capital trial?

Held. Yes.

Background. Mr. Wilson is a state prisoner on death row for the murder of Donavan Parks. At trial, he argued that he was merely present during the crime, but a jury found him guilty. During the penalty phase, defense counsel argued that the jury should not sentence Mr. Wilson to death because there was residual doubt about his guilt. Counsel also introduced mitigating testimony from Mr. Wilson's mother and Dr. Renee Kohanski, a forensic psychiatrist, who both testified that Mr. Wilson had a difficult childhood. The prosecution presented evidence of Mr. Wilson's extensive criminal history, violence, and gang activity, which included the fact that he had shot people on two prior occasions.

After being sentenced to death, Mr. Wilson filed a petition for a writ of habeas corpus is state court, arguing that his trial counsel was ineffective for failing to thoroughly investigate his background and present adequate mitigation evidence. At an evidentiary hearing, Mr. Wilson introduced lay testimony from former teachers, family members, friends, and social workers. He also introduced expert testimony from neuropsychologist Dr. Herrera and Dr. Kohanski. Mr. Wilson argued that the testimony would have explained his disruptive childhood behavior and portrayed him as someone who never stood a chance. The state trial court denied Mr. Wilson's petition, and the Supreme Court of Georgia summarily affirmed. Mr. Wilson then petitioned the federal district court for habeas relief.

Analysis. The Eleventh Circuit (Judge William H. Pryor, for Chief Judge Ed Carnes and Judge Jordan) affirmed. The Court held that the Supreme Court of Georgia could have reasonably concluded that Mr. Wilson's new mitigation evidence would not have changed the overall mix of evidence at his trial and that the new evidence was largely cumulative of the evidence that trial counsel did present to the jury. It therefore reasonably could have determined that Mr. Wilson failed to show prejudice. The Court could not say that the decision of the Supreme Court of Georgia was an unreasonable application of clearly established federal law.

Velazco v. Dep't of Corr., No. 13-12525 (December 16, 2014)

Issue. Did the district court err by denying Mr. Velazco's petition for a writ of habeas corpus without holding an evidentiary hearing?

Held. No.

Background. Mr. Velazco, a Florida state prisoner, petitioned the federal district court for a writ of habeas corpus. The Florida state court, in a postconviction

proceeding, had previously denied his claim that his trial counsel had been ineffective. In the federal petition, Mr. Velazco argued that the Florida state court had unreasonably applied clearly established federal law when it denied his claim of ineffective assistance of counsel. The federal district court refused to hold an evidentiary hearing and denied the petition. On appeal, Mr. Velazco argued that he was entitled to an evidentiary hearing on his claim.

Analysis. The Eleventh Circuit (Judge William H. Pryor, for Judge Jordan and W.D. La. Judge Walter) affirmed. The Court followed 28 U.S.C. § 2254's clear, emphatic rule that if a state court has adjudicated the claim on the merits, then a petitioner must satisfy § 2254(d)(1) based only on the record before that state court. The district court correctly examined only the state record.

United States v. Baldwin, No. 13-12973, *United States v. Belizaire*, No. 12-20763 (December 17, 2014)

Issues.

1. Did the district court constructively amend the indictment by instructing the jury to disregard discrepancies between the debit card numbers listed in Counts 11 and 16 of the indictment and those that were presented at trial?
2. Did the district court err by calculating the intended loss to include the total amount of fraudulent refunds requested from the IRS during the fraud conspiracy, and attributing that loss amount to all three defendants?

Held.

1. No.
2. No.

Background. Earnest Baldwin, Earl Baldwin, and Lineten Belizaire were convicted of various crimes arising out of a scheme to use personal identifying information to claim fraudulent tax refunds. They appealed various aspects of their convictions and sentences. Earl Baldwin argued that the district court constructively amended the indictment by instructing the jury to disregard discrepancies between the debit card numbers listed in Counts 11 and 16 and those that were presented at trial. Counts 11 and 16 charged Mr. Baldwin with using debit cards with the last four digits of 9000" and "9440," respectively, but the evidence offered at trial listed the accounts as ending in "9005" and "9449."

All three defendants challenged the district court's calculation of the intended loss amount. The court calculated the amount of intended loss to be $1,803,826, the total amount of fraudulent refunds requested from the IRS during the conspiracy.

Analysis. The Eleventh Circuit (Ct. Int'l Trade Judge Restani, for Chief Judge Ed Carnes and E.D. Pa. Judge Robreno) affirmed. The Court agreed with the district court that the discrepancies between the account numbers in the indictment and

those presented at trial were scrivener's errors that the jury could disregard. The indictment alleged that on May 22, 2012, Earl Baldwin used an account number ending in "9000" issued to "R.E.," and that on June 27, 2012, he used an account number ending in "9440," issued to "S.T." The only discrepancy between the indictment and the evidence was in the very last digit of the card numbers. The district court did not allow a shift in theory regarding the essential elements of the crime, such as allowing a conviction based on the use of a different means of identification or the use of a different individual's identity.

The Court affirmed the district court's calculation of intended loss and the attribution of that loss amount to all three defendants. A defendant may be held responsible for the reasonably foreseeable acts of his co-conspirators in furtherance of the conspiracy. In determining the scope of the criminal activity a particular defendant agreed to undertake, the district court may consider any explicit or implicit agreement fairly inferred from the conduct of the defendant and others. The evidence sufficiently established that all three defendants participated fully in the conspiracy, therefore the district court did not err in holding all three accountable for the total amount of the tax returns fraudulently filed in connection with the conspiracy.

United States v. Smith, No. 13-15227, consolidated with *United States v. Nunez*, Nos. 13-15133; 14-10075 (December 22, 2014)

Issue. Must a state drug offense include an element of *mens rea* regarding the illicit nature of the controlled substance in order to qualify as a serious drug offense under the Armed Career Criminal Act ("ACCA") or as a controlled substance offense under the Sentencing Guidelines' career offender enhancement?

Held. No.

Background. Both Mr. Smith and Mr. Nunez pleaded guilty to possession of a firearm by a convicted felon. Mr. Smith was sentenced under the ACCA and Mr. Nunez was sentenced as a career offender under the Sentencing Guidelines. In both cases, the sentencing court used a conviction under Fla. Stat. § 893.13(1) (prohibiting sale, manufacture, delivery, or possession with intent to sell, manufacture, or deliver, a controlled substance) as a predicate offense for the sentencing enhancement. Mr. Smith and Mr. Nunez argued that a conviction under Fla. Stat. § 893.13(1) could not qualify as a predicate offense under the ACCA or the career offender guidelines, respectively, because it did include an element of *mens rea* with respect to the illicit nature of the controlled substance.

Analysis. The Eleventh Circuit (Judge William H. Pryor, for Judge Jordan and W.D. La. Judge Walter) affirmed. The Court held that the definitions of "serious drug offense" and "controlled substance offense" did not contain an element of *mens rea* with respect to the illicit nature of the controlled substance. The Court distinguished these definitions from those considered in *Donawa v. United States Attorney General*, 735 F.3d 1275 (11th Cir. 2013), where the Court was asked to decide whether Fla.

Stat. 893.13(1)(a)(2) was a "drug trafficking aggravated felony" under the Immigration and Nationality Act. In *Donawa*, the Court held that the Florida statute was not a "drug trafficking aggravated felony," because the federal analogue included an element of *mens rea* with resepect to the illicit nature of the controlled substance and the Florida statute did not. The generic federal definitions of "serious drug offense" and "controlled substance offense," however, contain no such requirement.

Holland v. Florida, No. 12-12404 (December 29, 2014)

Issue. Did the Florida Supreme Court unreasonably apply *Faretta v. California*, 422 U.S. 806 (1975), by determining that Mr. Holland could not knowingly and voluntarily waive his right to counsel because of his serious mental illness?

Held. No.

Background. Mr. Holland is a state prisoner on death row. Before his trial, Mr. Holland repeatedly requested to represent himself because he did not trust his court-appointed attorneys. The trial court denied the request, in part because Mr. Holland suffered from a serious brain injury for which he had previously been hospitalized, he demonstrated an inability to follow court orders and decorum required to be in a courtroom, and because he failed to demonstrate the legal knowledge and skill required to present his own case. The Florida Supreme Court affirmed the trial court. Mr. Holland then petitioned the federal district court for relief. The district court issued a writ of habeas corpus on the ground that the State of Florida violated Mr. Holland's right to represent himself, in violation of the Sixth Amendment and *Faretta*.

Analysis. The Eleventh Circuit (Judge Marcus, for Chief Judge Ed Carnes and Judge William H. Pryor) reversed. The Court held that the Florida Supreme Court's decision was consistent with the Supreme Court's instructions in *Faretta*, which explained that a court should inquire in to a defendant's age, mental status, and lack of knowledge and experience in criminal proceedings to determine whether their waiver of the assistance of counsel is knowing and voluntary. The Court noted that the Supreme Court itself concluded, in *Indiana v. Edwards*, 554 U.S. 164 (2008), that a state may deny a defendant the right to represent himself when he is not mentally competent to conduct a trial himself, even if he is competent to stand trial.

The Court also denied Mr. Holland's three other claims for relief, including his assertions that the Florida Supreme Court: (1) unreasonably applied the harmless error analysis of *Chapman v. California*, 386 U.S. 18 (1967), to certain evidentiary errors; (2) unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), in rejecting his claim that trial counsel was ineffective for failing to object to the prosecutor's improper comments; and (3) unreasonably applied *Edwards v. Arizona*, 451 U.S. 477 (1981) in finding his incriminating statements admissible.

SELECTED UNPUBLISHED OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

United States v. Hunter, No. 13-15354 (October 16, 2014)*

The Eleventh Circuit (per curiam, before Judges Hull, Rosenbaum, and Anderson) held that the district court did not abuse its discretion by refusing to permit Mr. Hunter to withdraw his guilty plea. Under Fed. R. Crim. P. 11(d)(2)(B), a defendant seeking to withdraw a guilty plea prior to sentencing must show a fair and just reason for requesting the withdrawal. In light of the statements that Mr. Hunter made under oath at the plea hearing that his attorney had done a good job and spent sufficient time talking with him about the case, the Court did not find convincing Mr. Hunter's contentions that he did not have a working relationship with his attorney. Furthermore, the Court rejected Mr. Hunter's allegations that he was under duress to plead guilty because his mother and attorney had advised him to do so and because he had heard rumors that the judge was a tough sentencer. These allegations are indicative of the kinds of pressures and tradeoffs inherent in the difficult decision of whether to plead guilty, not improper pressure or coercion.

United States v. Mooney, No. 13-15016 (October 30, 2013)

The Eleventh Circuit (per curiam, before Judges Tjoflat, Hull, and Jordan) affirmed the district court's denial of Mr. Mooney's post-judgment motion for return of property—a laptop computer. Under Fed. R. Crim. P. 41(g), a person aggrieved by an unlawful search and seizure of property may move for the property's return. When invoked at the close of criminal proceedings, the court treats the motion as a civil action in equity. To establish the court's equitable jurisdiction, the property owner must show that he has clean hands with respect to the property. The Court held that Mr. Mooney was not entitled to relief because he could not show that he had clean hands with respect to the seized computer, which, even if unlawfully seized, undisputably contained evidence of his offenses, including contraband child pornography.

United States v. Garcia, No. 12-16572 (November 4, 2014)

The Eleventh Circuit (per curiam, Judges Tjoflat, Julie E. Carnes, and S.D. Ala. Judge Dubose) held that the district court erred at sentencing by collapsing two separate issues into one analysis: first, whether Mr. Garcia should receive a two-level enhancement for possessing a firearm under USSG § 2D1.1(b)(1), and second, whether Mr. Garcia was entitled to safety valve relief under 18 U.S.C. § 3553(f) and USSG § 5C1.2. In cases in which the defendant possessed a gun, the former requires the defendant show that it was clearly improbable that the gun was used in connection with the offense to avoid enhancement. The latter requires that the defendant show by a preponderance of the evidence that the firearm was not possessed in connection with the offense. Under the Eleventh Circuit's decision in

United States v. Carillo-Ayala, 713 F.3d 82 (11th Cir. 2013), these are two discrete inquiries that the sentencing court must analyze separately.

United States v. Murphy, No. 14-11467 (November 13, 2014)

The Eleventh Circuit (per curiam, before Judges Hull, Marcus, and Rosenbaum) held that the district court did not abuse its discretion by accepting Ms. Murphy's guilty plea and later, at sentencing, deciding to reject the plea agreement. The district court informed Ms. Murphy at sentencing that it was rejecting her plea agreement because it found the negotiated sentencing inadequate to meet the purposes of statutory punishment or the Guidelines. The district court also gave Ms. Murphy the option of withdrawing her guilty plea or to go forward with sentencing without the benefit of the plea agreement, and Ms. Murphy opted for the latter. On this record, the Court found no abuse of discretion.

United States v. Duhaney, No. 14-10654 (December 8, 2014)

The Eleventh Circuit (per curiam, before Judges Hull, Julie E. Carnes, and Anderson) held that Mr. Duhaney's California conviction under Cal. Health & Safety Code § 11352(a) constituted a drug trafficking offense under USSG § 2L1.2(b)(1)(B). The Court concluded that by pleading guilty to an indictment that charged him conjunctively with the sale, import, and transport of cocaine base, Mr. Duhaney, under California law, admitted all the elements alleged conjunctively in the indictment. The Court rejected Mr. Duhaney's argument that multiple elements charged conjunctively is insufficient to carry the government's burden because prosecutors routinely charge offenses in the conjunctive, but are required only to prove one of the alleged statutory bases to obtain a conviction at trial. The Court held that by pleading to a charge alleged in the conjunctive, Mr. Duhaney admitted guilt as to each of the listed offenses.

United States v. Antone-Herron, No. 14-10915 (December 10, 2014)*

The Eleventh Circuit (per curiam, before Judges William H. Pryor, Rosenbaum, and Julie E. Carnes) held that it was not clear error to find that Mr. Antone-Herron's roommate had given consent to the police to search Mr. Antone-Herron's home. The roommate did not merely fail to object to the officer's entry into the home, but explicitly told the officers to "do what you gotta do," and then allowed the officers to enter the home without objection.

United States v. Kellogg, No. 14-11522 (December 15, 2014)

The Eleventh Circuit (per curiam, before Judges Marcus, William H. Pryor, and Rosenbaum) reversed the district court's imposition of a $40,000 fine on Mr. Kellogg. The Court found the record insufficient to conclude that the district court had a reasoned basis for imposing the fine, where the district court did not explain its reasoning and where the Presentence Investigation Report showed that Mr.

Kellogg has at least three dependent children; his family's monthly cash flow was negative; his net worth was negative; he was appointed counsel in the criminal case; and the probation officer did not recommend imposing a fine.

United States v. Porter, No. 13-15643 (December 17, 2014)*

The Eleventh Circuit (per curiam, before Judges William H. Pryor, Martin, and Jordan) held that it was plain error for the district court to fail to properly distinguish between armed bank robbery and the lesser included offense of bank robbery on the verdict form, but that the error did not affect Mr. Porter's substantial rights or seriously affect the integrity of the proceedings. The verdict form asked the jury to find Mr. Porter guilty or not guilty of "bank robbery, accompanied by force, violence and intimidation" or in the alternative of "the lesser included offense of bank robbery." This is an error because force is an element of both armed bank robbery and bank robbery, the relevant distinction is whether the offense involves the use of a dangerous weapon. The Court held that the error did not affect Mr. Porter's substantial rights because the verdict form and the jury instructions, taken as a whole, adequately instructed the jury of the difference between armed bank robbery and bank robbery and there was ample evidence presented at trial to support the jury's finding that Mr. Porter committed bank robbery.

United States v. Gibson, No. 14-12069 (December 18, 2014)

The Eleventh Circuit (per curiam, before Judges Marcus, Julie E. Carnes, and Fay) held that the district court erred by applying a six-level enhancement under USSG § 3A1.2(c)(1) for assaulting a law enforcement officer during the course of the offense or the immediate flight therefrom. The Court agreed with Mr. Gibson that the enhancement should not have applied to his case because his altercation with a police officer occurred the day after the offense, not during the course of the offense or the immediate flight therefrom. Immediate flight means flight that occurs instantly, without delay, or without loss of time. The Court held the error harmless, however, because the district court indicated that it would have imposed the same sentence without the six-level enhancement and, even without the enhancement, the ultimate sentence was substantively reasonable.

United States v. Norris, No. 14-11674 (December 31, 2014)*

The Eleventh Circuit (per curiam, before Judges Tjoflat, Jill A. Pryor, and Black) held that its holding in *United States v. Robinson*, 583 F.3d 1292 (11th Cir. 2009), that Ala. Code § 13A-12-213 (possession of marijuana for other than personal use) is a serious drug offense for purposes of the ACCA remains good law. The Court rejected Mr. Norris's argument that *Descamps v. United States*, 133 S. Ct. 2276 (2013), abrogated *Robinson*. The Court noted that viewing § 13A-12-213(a)(1) as a whole in light of Alabama courts' interpretation of the statute, § 13A-12-213(a)(1) is the only section under which possession with intent to distribute or manufacture

marijuana can be charged and that the section does not apply to any other form or non-personal use of marijuana.