SUMMARIES OF RECENT CASE LAW
SEPTEMBER 1, 2016—DECEMBER 31, 2016

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Bosse v. Oklahoma, 137 S. Ct. 1 (2016).

Issue: Did the admission, at capital-sentencing hearing, of testimony from victims' relatives, including sentencing recommendations to the jury, violate the defendant's Eighth Amendment rights?

Held: Yes.

Background: Following Mr. Bosse's conviction of three counts of first-degree murder, three family members of victims testified at the sentencing hearing. 137 S. Ct. at 1-2. The trial court allowed the State, over Mr. Bosse's objection, to ask the family members to recommend a sentence; all three recommended death. *Id.* at 2. On appeal, the Oklahoma Court of Criminal Appeals affirmed, finding no error. *Id.* The Supreme Court summarily reversed.

Analysis: In *Booth v. Maryland,* 482 U.S. 496, 107 S. Ct. 2529 (1987), the Court "held that 'the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence' that does not 'relate directly to the circumstances of the crime.'" *Id.* at 1. In *Payne v. Tennessee,* 501 U.S. 808, 111 S. Ct. 2597 (1991), the Court overruled *Booth* to the extent that it held that the Eighth Amendment requires a per se "ban on "'victim impact" evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family.'" *Id.* at 1-2. The Oklahoma appellate court held previously, and again in Mr. Bosse's case, that *Payne* "*implicitly* overruled that portion of *Booth* regarding characterizations of the defendant and opinions of the sentence." *Id.* at 2 (emphasis added in *Bosse*). However, *Payne* did not overrule every aspect of *Booth*'s holding, and the Oklahoma courts "remain[] bound by *Booth*'s prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence unless this Court reconsiders that ban." *Id.* at 2.

Bravo-Fernandez v. United States, 137 S. Ct. 352 (2016).

Issue: Do judgments of acquittal on charges of conspiracy to commit bribery and interstate travel to commit bribery preclude, under the Double Jeopardy Clause, retrial for bribery where a bribery conviction obtained after trial with the other counts is overturned on appeal?

Held: No.

Background: Mr. Bravo-Fernandez, a businessman, and Mr. Martinez-Maldonado, a Puerto Rican legislator at the time of the alleged offenses, were tried jointly on counts of federal-program bribery under 18 U.S.C. § 666, conspiracy to violate § 666,

and interstate travel to promote a violation of § 666. The jury convicted both men of bribery but acquitted them of the other counts. On appeal, the First Circuit reversed the bribery convictions, holding that they could have been the results of an erroneous jury instruction. After remand, the defendants moved the district court for judgments of acquittal on the bribery charges, arguing that under the Double Jeopardy Clause the jury's judgments of acquittal on the other counts necessarily entailed acquittal of bribery and precluded their reprosecution. The district court denied that motion, and the First Circuit affirmed.

Analysis: The Supreme Court (Justice Ginsburg) unanimously affirmed the First Circuit's holding that double jeopardy did not bar reprosecution on the bribery charges. 137 S. Ct. at 366. The Court previously held in *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189 (1970), that where a judgment of acquittal in a prior trial necessarily entailed a finding adverse to the prosecution as to a fact essential to the proof of a charge in a subsequent case, the Double Jeopardy Clause barred prosecution of the subsequent charge. *Id.* at 358–59. However, in *United States v. Powell*, 469 U.S. 57, 105 S. Ct. 471 (1984), the Court held that where a trial resulted in verdicts of not guilty on one charge and guilty on another, the issue-preclusion component of double jeopardy on which *Ashe* rested did not bar the trial court from entering judgment on the guilty verdict even where those verdicts would necessarily have entailed "irreconcilably inconsistent" factual findings. *Id.* at 359–60.

Powell controls the outcome in the instant case. The Court noted "that issue preclusion is 'predicated on the assumption that the jury acted rationally,'" but "[w]hen a jury returns irreconcilably inconsistent verdicts . . . it is impossible to discern which verdict the jurors arrived at rationally . . . ." *Id.* at 360 (quoting *Powell*, 469 U.S. at 68, 105 S. Ct. at 478). To establish issue preclusion in their own cases, Mr. Bravo-Fernandez and Mr. Martinez-Maldonado bore the burden of showing that the jury necessarily found in their favor as to the bribery allegations. *Id.* at 363. They could not make that showing, though, because the jury's verdicts on the bribery counts were incompatible with the verdicts on the conspiracy and interstate-travel counts, and the incompatibility could not be explained by the erroneous jury instruction, which "applied equally to every § 666-related count." *Id.* at 364. Therefore, the not-guilty verdicts were not entitled to preclusive effect as to the bribery charges. *Id.* at 366.

Salman v. United States, 137 S. Ct. 420 (2016).

Issue: Where a corporate insider makes a trading tip to a relative based on inside information, is a jury permitted to infer that the insider has personally benefitted from the tip, in violation of Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b-5?

Held: Yes.

Background: Mr. Salman was convicted of insider trading, in violation of Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b–5. Trial evidence indicated that a corporate insider, Maher Kara, shared information with his brother Michael Kara. Michael, Mr. Salman's friend and relative-by-marriage, then shared the information with Mr. Salman, who knew it was from Maher. The Ninth Circuit affirmed.

Analysis: The Supreme Court (Alito, J.) unanimously rejected Mr. Salman's argument that a gift of confidential information to a trading relative or friend was not sufficient to establish securities fraud. Mr. Salman argued that because there was no evidence that the tipper, Maher, personally benefitted from the tip, Maher had not violated his duty of corporate trust and confidence. If Maher had not violated a duty, Mr. Salman could not be convicted of trading based on an improper tip. He also argued that the law establishing that the duty could be violated in the absence of a material benefit to the tipper was unconstitutionally vague as applied to defendants who did not receive the tip directly from the insider.

The Court affirmed the conviction and held that *Dirks v. SEC* controlled. 463 U.S. 646, 103 S. Ct. 3255 (1983). When an insider makes a gift of confidential information to a trading relative or friend, the tipper personally benefits because it is akin to the insider acting on the information themselves and then gifting to profits to the family or friend. *Id.* at 664, 3266. Therefore, in this case, Maher did violate his duty. When Mr. Salman knowingly received the improper tip, he acquired that duty, and when he traded on the information, he violated the duty.

Mr. Salman relied on *United States v. Newman*, 773 F.3d 438 (2nd Cir. 2014), by arguing that the Second Circuit required a showing of something more than a family or friend relationship in order for a jury to infer a benefit to the tipper. The Court rejected this argument and overruled *Newman*, to the extent it supported this position. "To the extent the Second Circuit held that the tipper must also receive something of a 'pecuniary or similarly valuable nature' in exchange for a gift to family or friends, *Newman*, 773 F.3d, at 452, we agree with the Ninth Circuit that this requirement is inconsistent with *Dirks*." *Salman*, 137 S. Ct. at 428.

Finally, the Court rejected Mr. Salman's argument that *Dirks*'s gift-giving standard is unconstitutionally vague as applied to his case. Rather, "this case involves precisely the gift of confidential information to a trading relative that *Dirks* envisioned." *Salman*, 137 S. Ct. at 429 (quotations omitted).

Shaw v. United States, 137 S. Ct. 462 (2016).

Issues:

1. Can a defendant who schemes to deprive a bank customer of deposited funds, but does not intend to deprive the bank of those funds, be convicted for bank fraud under 18 U.S.C. § 1344(1)?

2. Did the district court err by instructing the jury that a scheme to defraud is defined as a plan "by which someone intends to deceive, cheat or deprive a financial institution of something of value"?

Held:

1. Yes.

2. Vacated and remanded for determination by court of appeals.

Background: Mr. Shaw used bank account information of Mr. Hsu without consent to transfer funds into accounts at other institutions from which Mr. Shaw obtained Mr. Hsu's funds. Mr. Shaw was convicted of violating 18 U.S.C. § 1344(1), which makes it a crime to "knowingly execut[e] a scheme ... to defraud a financial institution." The Ninth Circuit affirmed.

Analysis: The Supreme Court (Breyer, J.) unanimously affirmed as to issue I, but vacated and remanded the conviction based on issue II.

Mr. Shaw argued that § 1344(1) does not apply to him because he intended to deprive funds only from a bank depositor, not a bank. The Supreme Court rejected each of his arguments supporting this theory. First, Mr. Shaw did deprive the bank of property because a bank has a property interest in the funds it holds for depositors. Second, the statute does not require a showing that the bank suffered an actual loss or that the defendant intended to cause such a loss. Third, Mr. Shaw's ignorance of aspects of bank related-property law did not negate that he had the required mens rea to be convicted of bank fraud. It was sufficient that he knowingly made false statements to the bank that he believed would lead the bank to wrongfully release funds to him. The statute requires only "knowledge" that the action would harm the bank's property interest, not the intent or purpose to do so. Finally, the Court rejected Mr. Shaw's argument that because his conduct may be covered by § 1344(2), § 1344(1) does not apply. The Court found that subsections (1) and (2) are not mutually exclusive because, despite some overlap, they included significantly different behavior.

Mr. Shaw also argued that his conviction should be reversed because the jury instruction erroneously defined the phrase "scheme to defraud." The instruction required only that a defendant "deceive, cheat or deprive a financial institution of something of value." Mr. Shaw argued that the instruction erroneously used the disjunctive "or," and that a conviction required both deception "and" depriving the institution of something of value. The Court remanded this issue to the Ninth Circuit for consideration of whether it was fairly presented to the court and, if so, whether the instruction was erroneous.

PUBLISHED OPINIONS

Bester v. Warden, 836 F.3d 1331 (11th Cir. 2016).

Issue: Did trial counsel's failure to request a no-adverse-inference jury instruction regarding the petitioner's right not to testify constitute ineffective assistance of counsel?

Holding: Issue not reached because any error was harmless.

Background: Appellant Bester appealed the district court's denial of his petition for post-conviction relief under 28 U.S.C. § 2254. He challenged his Alabama drug-convictions alleging, among other things, ineffective assistance of counsel. At trial, a police officer testified that Mr. Bester admitted that a bag containing cocaine belonged to him. Mr. Bester's mother also provided a written statement to police that Mr. Bester had given the bag to two men. Mr. Bester did not testify and his attorney did not request a no-adverse-inference jury instruction, nor did the court provide one.

Mr. Bester sought state post-conviction relief on several issues, including the no-adverse-inference instruction. On appeal from denial of his claim, the Alabama Court of Criminal Appeals refused to consider his pro se brief addressing this issue. He then filed a pro se § 2254 petition in federal district court. The district court denied the petition, but granted a certificate of appealability on the no-adverse-inference issue.

Analysis: The Eleventh Circuit (Chief Judge Ed Carnes, for Judge Jordan and D. D. C. Judge Lamberth) affirmed. The Court concluded that it need not reach the issue of whether the trial court erred because Mr. Bester was not prejudiced by any error.

As a threshold matter, the Court rejected the government's argument that the Antiterrorism and Effective Death Penalty Act of 1996 barred review of Mr. Bester's claim because it had already been adjudicated by the state. No state court, in either the direct appeal or the collateral state proceeding, had ever ruled on the merits of Bester's no-adverse-inference argument. Therefore the Court found that Mr. Bester had rebutted the presumption that this federal claim had been previously adjudicated on the merits.

The Court declined to decide whether trial counsel had performed deficiently by not requesting a no-adverse-inference instruction. It found that it need not reach the issue because Mr. Bester had not established a reasonable probability that such an instruction would have changed the result of the proceeding. To establish prejudice, Mr. Bester relied on cases on direct appeal in which a defendant had requested a no-adverse-inference instruction, but the court declined to give one. The Court distinguished such cases, stating that they are governed by "different burdens of persuasion and different prejudice standards" than Mr. Bester's case. *Bester*, 836 F.3d at 1338. Where a court refuses to give a requested no-adverse-inference instruction, it is a constitutional violation and the government bears the burden of proving the

outcome survives "constitutional harmless error review." *Id.* (quotation omitted). In contrast, because Mr. Bester raised his ineffective assistance claim in a habeas proceeding, he bears the burden of establishing prejudice under the *Strickland* standard. Based on the testimony of the officer regarding his observations and Mr. Bester's mother's written statement, the Court found overwhelming evidence of guilt existed and that Bester was not prejudiced by any error.

Ray v. Spirit Airlines, Inc., 836 F.3d 1340 (11th Cir. 2016).

Issue: Did the district court err by dismissing plaintiff's Racketeer Influenced and Corrupt Organizations Act (RICO) claim on the ground that a RICO enterprise cannot consist of a common purpose between a corporation and its officers or employees acting within the scope of their employment?

Held: No.

Background: Plaintiffs sought to represent customers of Spirit Airlines in a class action against Spirit claiming misrepresentations about ticket fees. Plaintiffs argued that Spirit engaged in this fraudulent activity as part of a RICO enterprise consisting of Spirit, two corporate officers and several Spirit employees and contractors.

Analysis: The Eleventh Circuit (Judge Marcus, for Judge Fay and D. D.C. Judge Friedman) affirmed the dismissal on two grounds. First, the Court stated that the RICO claim failed because the plaintiffs had not adequately pleaded an actual injury proximately caused by the alleged fraud.

The claim also failed for a second and independent reason: it relied on a RICO enterprise consisting of a corporation and its officer and employees. The Court found that there was no evidence that several of entities identified by the complaint shared a common purpose with Spirit. Those that arguably did share a common purpose with Spirit could not form a RICO enterprise with Spirit because they were corporate officers or employees acting within the scope of their duties. A corporation can only act through its officers, agents and employees. Therefore, these parties cannot form a RICO enterprise because there would be "no distinction between the corporate person and the alleged enterprise." The Court stated that Congress had not intended a RICO enterprise to be as broad as the plaintiffs' interpretation, which would "turn every claim of corporate fraud into a RICO violation."

Dean-Mitchell v. Warden, 837 F.3d 1107 (11th Cir. 2016).

Issue: Did the district court err by granting summary judgement in favor of the Warden regarding Mr. Dean-Mitchell's 28 U.S.C. § 2241 habeas petition based on the presence of only "some evidence" that the Warden comported with due process?

Held: Yes.

Background: Mr. Dean-Mitchell filed a habeas petition under 28 U.S.C. § 2241 seeking to restore good-time credits that were revoked based on disciplinary actions. Mr. Dean-Mitchell specifically argued that he did not receive adequate notice of one of the disciplinary actions in the form of the relevant incident reports. Because he has a due process-protected liberty interest in the good-time credits, he was entitled to such notice.

The district court initially ordered an evidentiary hearing to determine if Mr. Dean-Mitchell had received proper notice. However, the Warden submitted a declaration stating that in order to file his earlier administrative appeal, Mr. Dean-Mitchell would have been required to attach the incident report. Based on this declaration, the district court found there was "some evidence" in the record of the required notice and granted summary judgment to the Warden.

Analysis: The Eleventh Circuit (Robreno, E.D. Pa. Judge, for Judge Jordan and Judge Julie Carnes) reversed the decision of the district court and remanded. The Court found that the record reflected a genuine dispute of a material fact and therefore the motion for summary judgment should have been denied.

As a threshold matter, the Court rejected the Warden's argument that it lacked subject matter jurisdiction because of the absence of a certificate of appealability (COA). It stated that it can "construe [Mr.] Dean-Mitchell's notice of appeal as a request for a COA." *Dean-Mitchell*, 837 F.3d at 1112.

On the merits, the Court concluded that a genuine issue existed as to whether Mr. Dean-Mitchell received the incident reports. The Warden argued that the prison's records indicated that Mr. Dean-Mitchell received it, but Mr. Dean-Mitchell asserted that he had not and pointed to emails in which prison officials noted that the report was missing from his files. The Court noted that the district court relied on the existence of "some evidence," which is the standard for an inmate challenging the sufficiency of evidence supporting a disciplinary action and not relevant to Mr. Dean-Mitchell's challenge based on compliance with due process.

Cox v. Sec'y Fla. Dep't of Corr., 837 F.3d 1114 (11th Cir. 2016).

Issue: When a conviction for which no sentence was imposed is dismissed, but two other convictions remain, does the dismissal constitute a "new judgment" for the purpose of avoiding the bar on second or successive habeas petitions.

Held: No.

Background: Mr. Cox was convicted on three counts in Florida state court, receiving prison sentences on only counts one and two and a suspended sentence on count three. After filing several unsuccessful habeas petitions, in 2013 he successfully moved a

Florida state court to dismiss count three because conviction on both counts one and three violated his rights against double jeopardy.

Mr. Cox then filed this habeas petition under 28 U.S.C. § 2254. The district court denied this petition as successive, based on the several previous habeas petitions previously dismissed on the merits.

Analysis: The Eleventh Circuit (6th Cir. Judge Rodgers for Judge Tjoflat and Judge Marcus) affirmed.

Mr. Cox argued that the 2013 state ruling was a new judgment that permits him to file a collateral attack against his convictions that would otherwise be successive. Under *Magwood v. Patterson*, a federal habeas petition is not second or successive if it challenges a "new judgment" that was issued after an earlier habeas petition. 561 U.S. 320, 130 S. Ct. 2788 (2010).

However, the Eleventh Circuit held that the 2013 judgment did not qualify as a "new judgment" under *Magwood*. By statute, "a habeas petition may challenge only the state-court judgment 'pursuant to' which the petitioner is being held 'in custody.'" *Cox*, 837 F.3d at 1117 (quoting 28 U.S.C. § 2254(a)). The Court held that "[w]hen a conviction is not attached to any type of sentence—such as the case here with Count 3—it is not a judgment within the meaning of the federal habeas statute." *Id.* at 1118. The Court noted that it need not address a circuit split on the issue of whether dismissal of a conviction for which a petitioner was serving a sentence concurrent with other remaining convictions qualified as a "new judgement," because Mr. Cox's dismissed conviction never carried a sentence. For this reason, the Court affirmed the district court's dismissal of the habeas petition as second or successive.

United States v. Cruickshank, 837 F.3d 1182 (11th Cir. 2016), *petition for cert. filed*, No. 16-7337 (U.S. Dec. 29, 2016).

Issues:

1. Did the district court err by denying Mr. Cruickshank's motion for judgment of acquittal for insufficient evidence of mens rea, in prosecution for conspiracy to possess drugs with intent to distribute and aiding and abetting possession of drugs with intent to distribute?

2. Did the district court clearly err at sentencing by denying Mr. Cruickshank a two-point downward adjustment of his base offense level, under U.S.S.G § 3B1.2(b), for being a minor participant in his offenses?

Held:

1. No.

2. Yes.

Background: The Coast Guard stopped a vessel with Mr. Cruickshank and another man aboard and found 171 kilograms of cocaine. After a trial, Mr. Cruickshank was convicted of one count of conspiracy to possess with intent to distribute five kilograms or more of cocaine while aboard a vessel, 21 U.S.C. § 960(b)(1)(B)(ii); 46 U.S.C. §§ 70503(a), 70506(a) and (b), and one count of and aiding and abetting possession with intent to distribute five kilograms or more of cocaine while aboard a vessel, 18 U.S.C. § 2; 21 U.S.C. § 960(b)(1)(B)(ii); 46 U.S.C. §§ 70503(a), 70506(a). The district court denied Mr. Cruickshank a U.S.S.G. § 3B1.2(b) reduction for being a minor participant in the offense and sentenced him to 324 months' imprisonment.

Analysis: The Eleventh Circuit (Judge Marcus for Judge William Pryor and M.D. Fla. Judge Davis) affirmed Mr. Cruickshank's convictions, but vacated his sentence and remanded for resentencing.

The Court held that the district court erred in relying on the large quantity of drugs as "the *only* factor to be considered" in deciding whether Mr. Cruickshank was eligible was a minor-participant adjustment under U.S.S.G § 3B1.2(b). *Id.* at 1195. In support of that characterization of the district court's rationale, the Court cited the sentencing judge's statements "that the quantity of drugs was 'so large that any participant in [the case] can't be said to be engaged in minor activity'" and that a crime involving such a large amount "is *not even available for a minor role*" adjustment. *Id.* at 1194–95 (emphasis added in opinion).

The Sentencing Commission has stated that a minor-participant adjustment is "not automatically preclude[d] . . . solely for the amount of drugs the defendant personally handled." *Id.* at 1193. A November 2015 amendment to the application notes for § 3B1.2 includes a non-exhaustive list of factors to consider in evaluating the appropriateness of a minor-participant adjustment, such as the extent of the defendant's understanding, planning, organizing, and decision-making with regard to the criminal activity; "the nature and extent of the defendant's participation . . . , including the acts the defendant performed and the responsibility and discretion the defendant had"; and "the degree to which the defendant stood to benefit . . . ." *Id.* Although the amendment took effect after Mr. Cruickshank was sentenced, the Court considered it retroactively on appeal because it clarified the guideline rather than substantively changing it. *Id.* at 1194. The Court vacated Mr. Cruickshank's sentence and remanded for the district court to "perform an inquiry based on the totality of circumstances, taking into account the variety of factors laid out in [*United States v.*] *De Varon*[, 175 F.3d 930 (11th Cir. 1999) (en banc)] and [the November 2015 amendment to § 3B1.2's commentary]."

Sullivan v. Sec'y Fla. Dep't of Corr., 837 F.3d 1195 (11th Cir. 2016).

Issue: Did the district court err by granting 28 U.S.C. § 2254 habeas corpus relief based on ineffective assistance of post-conviction counsel, who failed to investigate the existence of a pretrial plea offer?

Held: No.

Background: Mr. Sullivan was convicted at trial of fleeing from police officers and several other charges stemming from the same event. At trial, defense counsel argued a voluntary intoxication defense even though Florida law specifically stated that voluntary intoxication could not serve as a defense to the crime. The jury was so instructed and convicted on all counts. The trial court sentenced Mr. Sullivan to 30 years in prison on the fleeing charge.

Mr. Sullivan retained Mr. Harper to represent him on appeal and in the state post-conviction proceedings. In the post-conviction proceeding, Mr. Harper declined to raise an ineffective assistance of counsel (IAC) claim based on trial counsel's reliance on a non-existent defense, contrary to Mr. Sullivan's repeated suggestions.

Mr. Sullivan then filed a federal habeas petition under 28 U.S.C. § 2254. A magistrate judge held an evidentiary hearing to determine whether Mr. Harper's counsel had been constitutionally deficient for failing to raise an IAC claim regarding trial counsel's representation. The hearing revealed that the government had made a pretrial plea offer of 12 years in prison. The magistrate recommended a finding that Mr. Sullivan had a meritorious IAC claim based on trial counsel's deficiency and that Mr. Harper's counsel was constitutionally deficient for failing to raise the IAC claim. The district court adopted the magistrate judge's findings and ordered the state to reoffer the plea agreement for a 12-year sentence.

Analysis: The Eleventh Circuit (Judge Marcus for Judge William Pryor and M.D. Fla. Judge Davis) affirmed.

The Court found that Mr. Harper's failure to investigate the plea offer was objectively unreasonable. Mr. Harper stated that he had not raised an IAC claim because he did not believe a plea offer existed and therefore did not believe he could demonstrate prejudice resulting from the trial counsel's errors. However, Mr. Harper did not contact the trial counsel or prosecutor and because Mr. Sullivan did not mention a plea agreement, Mr. Harper assumed that the government had never offered one.

The Court stated that "any reasonable attorney would have made at least some minimal exploration of the IAC-trial claim, such as asking Mr. Sullivan directly whether he had received a plea offer, requesting the state attorney's file or contacting the prosecutor to see whether a plea offer had been made, or, most importantly, speaking with trial counsel to ask why he had attempted to present a non-existent defense when his client was facing thirty years in prison." *Sullivan*, 837 F. 3d at 1205. Because any of these steps would have produced evidence of the plea agreement establishing prejudice under the IAC claim, Mr. Harper's investigation of the case fell below an objective standard of reasonableness. The court emphasized that "it is counsel's duty, not the defendant's, to develop the relevant facts and to draw the defendant's focus to the information that might be potentially relevant, as defendants who are not versed in the law will often not know what facts are relevant to a given legal claim."

United States v. DiFalco, 837 F.3d 1207 (11th Cir. 2016).

Issues:

1. Does a valid appeal waiver require dismissal of a defendant's appeal challenging a sentence enhancement under 21 U.S.C. § 851?

2. Did the district court plainly err by enhancing defendant's sentence under 21 U.S.C. § 851?

Held:

1. Yes.

2. No, but the Court need not reach this issue.

Background: Mr. DiFalco pleaded guilty to one count of conspiracy to distribute and possess with the intent to distribute 50 grams or more of methamphetamine. Pursuant to a plea agreement, the government filed only one of several possible 21 U.S.C. § 851 enhancements, thereby reducing Mr. DiFalco's mandatory minimum exposure from life in prison to 20 years. The § 851 information described a prior felony drug conviction but had inaccurate information. The plea agreement contained an appeal waiver whereby Mr. DiFalco waived his appellate rights unless his sentence exceeded the guideline range, the statutory maximum, or violated the Eighth Amendment prohibition against cruel and unusual punishment. The district court imposed a sentence of 240 months, the mandatory minimum.

Analysis: The Eleventh Circuit (Judge Marcus for Judge William Pryor and M.D. Ga. Judge Lawson) dismissed the appeal.

Mr. DiFalco argued that his sentence was unlawful because the government did not properly file the information under 21 U.S.C. § 851. The Court found that the appeal waiver was valid and covered all of the issues raised on appeal. However, the parties may not waive a subject matter jurisdiction defect and therefore the Court addressed whether a district court lacks jurisdiction to impose an enhanced § 851 sentence if the government does not file an §851 information in accordance with the statute.

The Court reversed Eleventh Circuit precedent holding that § 851 is a jurisdictional requirement. *See Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998). "We hold today that our decisions that § 851 imposes a jurisdictional limit on a district court's authority have been undermined to the point of abrogation by subsequent decisions of the Supreme Court." *DiFalco*, 837 F. 3d at 1216 (discussing the implications of *Kontrick v. Ryan*, 540 U.S. 443, 124 S. Ct. 906 (2004), and *Eberhart v. United States*, 546 U.S. 12, 126 S. Ct. 403 (2005)). The Court reasoned that § 851 is not a jurisdictional requirement because the sentencing court "had the statutory authority to impose the very same 240-month sentence even

without the filing of any § 851 information." 837 F.3d at 1218. However, the Court stated that "our holding today that § 851 is not a jurisdictional provision does not in any way affect our holdings that § 851 imposes mandatory requirements on the government before a court may enhance a sentence under § 841." 837 F.3d at 1219. Because the § 851 requirement is not jurisdictional, the plea waiver barred each of Mr. DiFalco's claims on appeal and the appeal was dismissed.

The Court also concluded that "as an independent basis for our ruling," Mr. DiFalco's claims failed on the merits under plain error review.

United States v. White, 837 F.3d 1225 (11th Cir. 2016).

Issue: Did the district court err by classifying Mr. White's prior convictions for Alabama first-degree possession of marijuana and Alabama trafficking in cocaine as serious drug offenses under the ACCA?

Held: No.

Background: Mr. White pleaded guilty to possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). After finding Mr. White had one violent felony and two serious drug offenses, the court applied the ACCA enhancement and sentenced him to 180 months in prison.

Analysis: The Eleventh Circuit (per curiam, Judge Marcus, Judge William Pryor, Judge Julie Carnes) affirmed.

Mr. White was convicted of first-degree possession of marijuana "for other than personal use." Ala. Code § 13A–12–213(a)(1). He argued that this conviction did not qualify as a serious drug offense under the ACCA because it does not require "manufacturing, distributing, or possessing with intent" to do either. 18 U.S.C. § 924(e)(2)(A)(ii). Mr. White acknowledged that this argument was rejected in *United States v. Robinson*, 583 F.3d 1292, 1296–97 (11th Cir. 2009), but argued that *Robinson* no longer controlled in light of *Descamps v. United States*, 133 S. Ct. 2276 (2013). *Robinson*, and the cases it relies on, held that where a statute does not contain each element of the generic offense, a sentencing court may infer such elements based on considerations such as the title of the statute or the structure of the laws governing that crime. *See United States v. Madera-Madera*, 333 F.3d 1228, 1231-33 (11th Cir. 2003). Mr. White argued that the *Descamps* categorical approach does not permit courts to find an ACCA predicate offense based on the infer-the-elements approach applied in *Robinson*.

The Court found that *Robinson* still controlled. To overrule Eleventh Circuit precedent, the "intervening Supreme Court decision must actually abrogate or directly conflict with, as opposed to merely weaken, the prior panel's holding." *White*, 837 F. 3d at 1230-31. The Court held that *Descamps* "has no bearing on our decision in *Robinson* that the possession of marijuana 'for other than personal use' necessarily involves an intent to distribute, such that a conviction under § 13A–12–213(a)(1) is

encompassed by the ACCA's definition of a serious drug offense." *Id.* at 1231. The Court seemed to find that the Alabama statute was narrower than the generic offense and thus that the decision in *Robinson* did not conflict with *Descamps*. "[W]e follow *Robinson* unless and until it is overruled by this Court en banc or by the Supreme Court, [and] *Robinson* clearly governs—and forecloses—this ground of Defendant's appeal." *Id.*

The Court also found that binding precedent foreclosed Mr. White's argument that the trafficking in cocaine conviction was not a serious drug offense. Mr. White had argued that because the statute could be satisfied by possession of 28 grams or more of cocaine, it did not necessarily involve manufacturing, distributing or possessing with intent to do either.

The Court again rejected defendant's argument that *Descamps* had displaced Eleventh Circuit precedent. *See United States v. James*, 430 F.3d 1150 (11th Cir. 2005), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). "The Supreme Court had no occasion in *Descamps* to decide whether it is appropriate to infer intent to distribute based on the quantity of drugs that must be possessed in order to violate a state trafficking statute, or even to consider more generally the proper interpretation or application of the ACCA's serious drug offense provision." *Id.* at 1235. The Court noted that no other circuit has "held that a conviction for trafficking based on the possession of a certain quantity of drugs is a serious drug offense under the ACCA." *Id.* at 1234. However, it also stated that no other circuit had adopted Mr. White's argument that "an offense cannot qualify [as an ACCA predicate offense] unless it expressly requires actual distribution or manufacture, or a specific intent to distribute or manufacture." *Id.* The Court stated that the state statute need not exactly match the specific acts listed in ACCA and that this reasoning in earlier decisions is not disturbed by decisions holding "(1) that the guidelines definition of a drug trafficking and a controlled substance offense does require an exact match and (2) that there is no match when the state statutes of conviction require nothing more than possession of a certain quantity of drugs." *Id.* at 1235.

United States v. Vail-Bailon, 838 F.3d 1091 (11th Cir. 2016) (vacated and rehearing en banc granted).

Issue: Is the Florida offense of felony battery under Fla. Stat. § 784.041(1) categorically a "crime of violence" under the force clause of the definition of that term in the application notes for U.S.S.G. § 2L1.2?

Held: No.

Background: Mr. Vail-Bailon was convicted of illegal reentry under 8 U.S.C. § 1326. The district court found that his prior Florida conviction for felony battery was a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A).

Analysis: The Eleventh Circuit (Judge Rosenbaum for Judge Jordan and Sixth Circuit Judge Siler) vacated the sentence and remanded for resentencing. However, the Court subsequently vacated the panel opinion and ordered rehearing en banc.

Florida law defines felony battery as "(a) [a]ctually and intentionally touch[ing] or strik[ing] another person against the will of the other; and (b) [c]aus[ing] great bodily harm, permanent disability, or permanent disfigurement." 838 F.3d at 1094 (quoting Fla. Stat. § 784.041(1)). Because no documentary evidence showed whether Mr. Vail-Bailon was convicted of striking or merely touching, the Court's categorical analysis of the conviction "evaluate[d] the least of the ways in which a given crime may be committed . . . ." *Id.* The panel concluded that although Fla. Stat. § 784.041(1) requires "great bodily harm, permanent disability, or permanent disfigurement," that requirement does not affect the offense's classification, because § 784.041 does not require that the injury be caused "intentionally or knowingly . . . ." *Id.* at 1095-96 (citing *T.S. v. State*, 965 So. 2d 1288, 1290 (Fla. 2007)). Unintended "results of a specific incident of mere touching do not alter . . . the nature of mere touching . . . ." *Id.* at 1096. Therefore, Mr. Vail-Bailon's conviction was not categorically a crime of violence under the force clause of § 2L1.2's definition of crime of violence. *Id.* at 1098.

Fish v. Brown, 838 F.3d 1153 (11th Cir. 2016).

Issues:

1. Did clearly established law prohibit sheriff's deputies' warrantless entry into a sunroom on the back side of Mr. Fish's house, from which a wood door led into the interior of the house?

2. Would deputies reasonably have believed they had consent to enter into the interior of Mr. Fish's house?

3. Was the seizure of firearms justified by the plain view doctrine where deputies saw the firearms while in an area pursuant to Mr. Fish's consent?

Held:

1. No.

2. Yes.

3. Yes.

Background: Mr. Fish had maintained a relationship with a married woman for about three years. After she refused his request to leave her husband, the woman ended her relationship with Mr. Fish. A few months later, she called Mr. Fish and told him that she was going to his house to collect some of her belongings. At her request, two deputies accompanied her, one in uniform, and the other in street clothes with badge and service pistol visible.

When they arrived, the woman, followed by the deputies, opened a lockable, but unlocked, glass exterior door that led into a sunroom on the back of the house. Both deputies kept their guns holstered. She knocked on a wood door leading from the sunroom into the interior of the house. Mr. Fish opened the door and saw her and the deputies behind her. The woman said, "I brought them to watch so I don't steal nothing of yours, okay?" Mr. Fish replied, "All right." She and the deputies entered. Through an open bedroom door one deputy saw a pistol hanging from a bedpost, an urn containing ammunition, and other guns partially visible under a bed. The deputy was aware of a domestic-violence restraining order against Mr. Fish and asked him, "[Y]ou still got that injunction against you for the firearms?" Mr. Fish did not directly answer the question but said that the guns weren't his and that he and his son each stayed in the room at times. The deputies arrested Mr. Fish and seized the guns.

Criminal charges were filed but ultimately dismissed. Mr. Fish brought suit, claiming that the deputies' entry, search of the home, and arrest of him violated the Fourth Amendment. The district court dismissed the suit on motion for summary judgment, finding that the deputies were entitled to qualified immunity.

Analysis: The Eleventh Circuit held that the officers were entitled to qualified immunity with regard to the entry because it did not violate any clearly established authority. Although the Court "assume[d] . . . that 'the sunroom was not a place where the public would be expected to go" and, therefore, was entitled to the same level of Fourth Amendment protection as the home itself," it held that the officers could have relied upon either of two different legal theories, neither clearly contrary to a settled rule of law. Slip op. at 20-21. The first, "the 'consent-once-removed' doctrine, . . . 'permits a warrantless entry by police officers into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view.'" *Id.* at 21. That doctrine has not been conclusively addressed by either the Supreme Court or the Eleventh Circuit, but of the "few federal Circuits" that had addressed it at the time of the events involved in this suit, "all . . . had adopted it." *Id.* at 21-22. The deputies also "reasonably could have believed that the sunroom was 'impliedly open to use by the public' for the purpose of gaining access to the principal, interior areas of the house." *Id.* at 22.

The Court also affirmed the district court's finding of qualified immunity as to the entry from the sunroom into the interior of the house, although its discussion of that holding seemed to decide that there was no Fourth Amendment violation. The Court agreed with the district court's conclusion that "'any reasonable person would have considered [Mr. Fish's response to be] explicit verbal consent for the officers to enter his home.'" Slip op. at 24. Moreover, his consent was not coerced or "prompted by any showing of official authority," because neither deputy "brandished his weapon, and neither demanded entry." *Id.* at 24-25.

The Court explicitly held that the seizure of guns was not a Fourth Amendment violation, not limiting its holding to qualified immunity. When deputies saw the firearms, their incriminating character was immediately apparent, because one of the deputies knew that Mr. Fish had been subject to a civil restraining order. Mr. Fish's

reply of "Those aren't mine" in response to the deputy's question whether he "still" was subject to the injunction was not a denial, and "could have led a reasonable officer to conclude that Fish was acknowledging the existence of the injunction . . . ." *Id.* at 26.

United States v. Wilchcombe, 838 F.3d 1179 (11th Cir. 2016).

Issues:

1. Did the district court err by exercising of jurisdiction under the Maritime Drug Law Enforcement Act (MDLEA)?

2. Did the district court err by entering a conviction for Mr. Wilchcombe based on insufficient evidence?

3. Did the government's presentation of evidence that the defendants remained silent while in custody but before being given *Miranda* warnings violate the Fifth Amendment?

4. Did the district court err by denying a motion to dismiss on the basis of government destruction of evidence favorable to the defense?

5. Did the district court abuse its discretion by admitting evidence of a defendant's prior drug crimes?

Held:

1. No

2. No.

3. No.

4. No.

5. No.

Background: Mr. Wilchcombe, Mr. Rolle, and Mr. Beauplant were convicted for conspiring to distribute cocaine and marijuana on board a vessel in U.S. jurisdiction, in violation of 46 U.S.C. §§ 70503 and 70506. While aboard Mr. Rolle's Bahamian-licensed boat, the men threw packages into the water as the U.S. Coast Guard pursued them. The Coast Guard contacted Bahamian officials and received a verbal statement of no objection (SNO) to the Coast Guard boarding the boat for law enforcement purposes. The Coast Guard took the men into custody and, after determining it was not feasible to tow the boat, sank it. The discarded packages were recovered and found to contain 35 kg of cocaine and 860 kg of marijuana. One of the men was repatriated to Haiti. The remaining men were placed in leg irons and held

aboard the Coast Guard boat for five days. They were not interrogated or read their *Miranda* rights.

Analysis: The Eleventh Circuit (2nd Cir. Judge Walker for Judge Marcus and Judge Jordan) affirmed.

The Court first rejected three different arguments that the district court did not have jurisdiction over the case. First, the Court stated that binding Eleventh Circuit precedent precluded the appellants' argument that the MDLEA violates the due process clause because it does not require proof of a nexus between the United States and a defendant. Second, the Court addressed an issue the Eleventh Circuit had not addressed in a published opinion and held that the "SNOs need not exactly track the language contained" in the MDLEA, but rather simply must inform U.S. officials that the foreign government consented to U.S. jurisdiction over the vessel. That requirement was satisfied here. Third, the Court rejected the appellants' argument that the Coast Guard provided Bahamian authorities with inaccurate information about the boat's registration before obtaining the SNO. The Court found that the evidence did not clearly indicate Coast Guard misconduct and moreover, the Coast Guard would not have obtained an advantage from any misinformation.

Next, the Court found that the government provided sufficient evidence to rebut Mr. Wilchcombe's claim that he was merely present and did not participate in the conspiracy. The Court stated that in maritime cases involving a large quantity of drugs, the government need only prove one of the factors indicating knowledge and several had been proven.

Next, the Court held that the district court did not abuse its discretion by denying the appellants' motion for a mistrial based on the government's presentation of evidence in its case-in-chief regarding defendants' in-custody silence. The Court affirmed the denial, relying on *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991), in which the Eleventh Circuit stated, "the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given." The Court noted a circuit split on this issue and that only the Fourth and Eighth Circuits join the Eleventh in permitting such evidence. The Court also noted that, in addition, any error on this issue was harmless.

The Court also rejected Mr. Beauplant's argument that the government's repatriation one of the men on the boat to Haiti and sinking the boat without photographing it violated is due process rights. The Court held Mr. Beauplant had not met his burden on this issue to demonstrate that the Coast Guard acted in bad faith in either of these decisions.

Finally, the Court rejected Mr. Beauplant's argument that the district court abused its discretion under FRE 404(b) by admitting testimony related to his prior involvement in drug smuggling. The Court affirmed the district court's decision that the evidence was relevant to the permissible purpose of proving absence of mistake and its probative value was not substantially outweighed by the prejudice.

Judge Jordan (for Judge Walker) wrote a separate concurring opinion addressing issue III, arguing that although the Court is bound by *Rivera*, "its reading of the Fifth Amendment is misguided and should be reconsidered en banc in an appropriate case." *Id.* at 1193. Judge Jordan argued that *Rivera*'s reliance on *Fletcher v. Weir* was misguided for two reasons. First, *Fletcher* was decided under the due process clause of the Fourteenth Amendment, which provides different protection, based on different rationales, than the self-incrimination clause. Second, *Fletcher* addressed the use of a defendant's silence to impeach during cross-examination, not its use during the government's case-in-chief. Judge Jordan argued that custody, not the recitation of *Miranda* warnings, should trigger the constitutional protection of silence. Judge Jordan concluded:

> In this case the Coast Guard officers chose not to give *Miranda* warnings to Mr. Wilchcombe and Mr. Beauplant while they were kept in shackles for five days at sea, and after they were told that the officers were not interested in having a conversation. In my view, the Fifth Amendment's privilege against self-incrimination did not permit the government to use the post-arrest silence of Mr. Wilchcombe and Mr. Beauplant—neither of whom testified at trial—as substantive evidence of their guilt in its case-in-chief.

838 F.3d at 1196-97.

United States v. Plate, 839 F.3d 950 (11th Cir. 2016).

Issue: Did the district court abuse its discretion by giving improper weight to the defendant's inability to pay restitution?

Held: Yes.

Background: Ms. Plate worked as a long-time financial advisor to an elderly couple and defrauded the couple of $176,079.70. She pleaded guilty to embezzlement by a bank officer or employee and based on an offense level of 18 and a criminal history category of I, her guideline range was 27 to 33 months in custody. She asked for a sentence of probation and supported the request with numerous letters and forensic evaluation. Her net worth at the time of sentencing was $47,500 and she brought $45,000 in cashier's checks to the sentencing hearing. In imposing a sentence of 27 months in custody, the district court stated that it "would be glad under this case to give you probation if you had paid back the restitution; but with all this restitution still outstanding, the Court just can't do it." 839 F.3d at 954. The court also stated that "if you, your friends and supporters step up and pay your restitution, I will immediately convert your prison term to probation." *Id.* at 954–55.

Analysis: The Eleventh Circuit (N.D. Fla. Judge Vinson for Judges Martin and Jordan) vacated and remanded for resentencing. The Court held that the district court abused its discretion by giving significant and dispositive weight to Ms. Plate's inability to pay restitution. The Court held that Ms. Plate's "inability to pay restitution in full was an impermissible factor insofar as it is not among the factors listed in § 3553(a)." Slip op. at 957. Previous precedent establishes that "[a] sentence that is based entirely upon an impermissible factor is unreasonable because such a sentence does not achieve the purposes of § 3553(a)." *United States v. Velasquez*, 524 F.3d 1248, 1252 (11th Cir. 2008) (per curiam) (quotation omitted).

United States v. Seabrooks, 839 F.3d 1326 (11th Cir. 2016).

Issues:

1. Was there sufficient evidence to support Mr. Seabrooks's convictions under 18 U.S.C. § 922(g)(1) and (j) where he was in a car with another man who parked next to a truck, broke into the truck, and removed and handed Mr. Seabrooks several items, including three firearms, while Mr. Seabrooks remained in the car?

2. Was the trial court's jury instruction on aiding and abetting so confusing or misleading as to constitute reversible error?

3. Were Mr. Seabrooks's Florida convictions for armed robberies committed in 1995 "violent felonies" under the Armed Career Criminal Act's ("ACCA's") force clause, 18 U.S.C. § 924(e)(2)(B)(i)?

Held:

1. Yes.

2. No.

3. Yes.

Background: Mr. Seabrooks was a passenger in a car driven by a Mr. Butler. Mr. Butler stopped the car next to a pickup truck in a parking lot. While Mr. Seabrooks remained in the car, Mr. Butler broke into the truck and removed several items, including three firearms. He handed the items to Mr. Seabrooks, got back in the car, and drove away. Police later stopped their car, removed both men, and handcuffed them. Mr. Seabrooks told the police that he had taken all three of the guns when Mr. Butler handed them to him. He said that he immediately placed them in the car's center console because "he '[didn't] want no guns around [him] . . . .'" 839 F.3d at1330.

Both men were charged with violations of 18 U.S.C. § 922(g)(1) (possession of a firearm by a convicted felon) and § 922(j) (possession of a stolen firearm). Mr. Butler pleaded guilty; Mr. Seabrooks went to trial. Over his objection, the judge gave a jury

instruction on accomplice liability by aiding and abetting. Mr. Seabrooks was convicted on both counts. The district court found that Mr. Seabrooks's six prior Florida armed robbery convictions were "violent felonies" under the ACCA and sentenced him to concurrent terms of 188 months for the § 922(g)(1) conviction and 120 months for the § 922(j) conviction.

Analysis: The Eleventh Circuit (Judge Hull, with Judge Martin and Tenth Circuit Judge Baldock concurring in the judgment) affirmed. The Court held that Mr. Seabrooks's convictions were supported by sufficient evidence that he aided and abetted Mr. Butler. *Id.* at 1333-34, 1336. The jury heard evidence that Mr. Seabrooks watched Mr. Butler break into the truck and remove items; that he took the stolen items, some of which he recognized as guns, from Mr. Butler; that he placed the guns in the center console; and that he chose to remain in the car with Mr. Butler throughout. *Id.*

That evidence also supported the jury instruction on aiding and abetting. *Id.* at 1333-34. The Court found no plain error in giving the instruction even though there was no evidence that "Seabrooks was . . . aware that Butler would possess stolen firearms before he began breaking into [the] truck . . . ." *Id.* at 1334-37 (distinguishing § 922(g)(1) and (j) offenses from the offense involved in *Rosemond v. United States*, 134 S. Ct. 1240 (2014), in which the Supreme Court held that a trial court erred in giving an aiding and abetting instruction in trial for using a firearm during a drug trafficking crime absent of evidence that the defendant had "advance knowledge of a firearm's presence," 134 S. Ct. at 1251). Unlike in Mr. Rosemond's offense—a "'combination crime' that 'punishes the temporal and relational conjunction of two separate acts'"—in Mr. Seabrooks's offenses "the scienter inquiry is limited to whether the aider and abettor intended to assist in the confederate's possession of a stolen firearm." 839 F.3d at 1334-35 (quoting *Rosemond*, 134 S. Ct. at 1248). Moreover, the Court held, the instruction was not made unduly misleading or confusing by the fact that Mr. Butler's name was redacted from the indictment that the trial court read during voir dire and omitted from the instruction. *Id.* at 1331, 1337. The Court rejected Mr. Seabrooks's argument that the instruction "suggest[ed] that [the jury] could find him guilty of aiding and abetting himself," noting that Mr. Butler was mentioned in testimony and arguments throughout the trial. *Id.* at 1337.

All three members of the panel joined in the holding that Mr. Seabrooks's armed robbery convictions were properly classified as violent felonies under the ACCA's force clause, and all agreed that *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), is dispositive of that question. 839 F.3d at 1338, 1340, 1346. However, both Judge Hull and Judge Martin wrote at length about their divergent views of Eleventh Circuit precedent concerning classification of robbery offenses under the ACCA.

Judge Hull authored the opinion for the Court, but was joined as to her ACCA analysis only with regard to its reliance on *Lockley* and its conclusion that Florida robbery is a violent felony under the elements clause. *Id.* at 1340, 1346. Writing for herself, she also offered a defense of the continuing precedential weight of the Court's decision in *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), in which

Judge Hull wrote for the panel. *Dowd*, she noted, was "the first panel to address the ACCA–Florida armed robbery issue . . . ." 839 F.3d at 1341. (*Dowd* "held that a 1974 Florida conviction for armed robbery 'is undeniably a conviction for a violent felony' under the ACCA's elements clause." *Id.* at 1339.) Judge Hull asserted that *Dowd* remains valid precedent, "binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court." *Id.* at 1341 (quoting *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001)). She rejected arguments by both Mr. Seabrooks and Judge Martin that *Dowd*'s validity had been undermined by *Curtis Johnson v. United States*, 559 U.S. 133, 130 S. Ct. 1265 (2010), *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012), *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), *Descamps v. United States*, 133 S. Ct. 2276 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). 839 F.3d at 1341-45.

Judge Martin concurred in the judgment, but wrote specially to "set out my contrary view" in response to Judge Hull's "broad[]" writing on the ACCA-classification issue. *Id.* at 1346 (Martin, J., concurring in the judgment). Her opinion focused on *Dowd*'s analytical methodology rather than its holding, contending that "in light of the clarifications given to us by the Supreme Court about what steps we must take when applying the categorical approach, *Dowd* is no longer good law." *Id.* at 1348 (Martin, J., concurring). Noting that "[t]he entirety of *Dowd*'s reasoning occupies one sentence," Judge Martin wrote, "even if *Dowd*'s reasoning was adequate under the categorical approach at the time it was published in 2006, the Supreme Court has since made it clear that we must do more"—a "rigorous step-by-step analysis" summarized in Part I of her concurrence. *Id.* (Martin, J., concurring). "The Supreme Court's jurisprudence since *Dowd* clarifying how we must apply the categorical approach," she wrote, "'has undermined' *Dowd*'s conclusory mode of analysis 'to the point of abrogation.'" *Id.* at 1349 (Martin, J., concurring) (quoting *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008)). In light of the Supreme Court's intervening decisions elucidating the categorical approach, Judge Martin stated, "reliance on *Dowd* . . . elevates the one-sentence rationale in *Dowd* over recent Supreme Court precedent." *Id.* (Martin, J., concurring). She also took exception with Judge Hull's claim "that several of our recent 'cases' have also followed *Dowd*." *Id.* (Martin, J., concurring). "[T]hese 'cases' were orders issued on applications to file second or successive § 2255 motions"—"limited ruling[s], resulting from . . . a confined process" that "makes it possible for a three-judge ruling (or even a two-judge ruling) on one of these applications to say things rejected by every other member of the court." *Id.* at 1349-50 (Martin, J., concurring). Accordingly, Judge Martin asserted, the Court's analysis of Mr. Seabrooks's sentencing argument should have been confined to "*Lockley* alone" and should have "le[ft] for another day the question of the continuing viability of *Dowd*." *Id.* at 1346 (Martin, J., concurring).

United States v. Campo, 840 F.3d 1249 (11th Cir. 2016).

Issues:

1. Did the district court err by finding that sufficient evidence supported the convictions?

2. Did the district court plainly err by permitting a lay witness to testify to an opinion?

3. Did the district court plainly err by imposing a consecutive sentence for a lesser included offense, in violation of the Double Jeopardy Clause of the Fifth Amendment?

Held:

1. No.

2. No.

3. No.

Background: Mr. Campo was convicted of four counts related to a murder, six counts related to trafficking firearms, and two counts related to possession of firearms and ammunition as a fugitive. He argued on appeal that insufficient evidence supported his convictions for the following offenses: conspiracy to commit murder with intent to prevent that person from communicating with a law enforcement officer regarding a federal offense, 18 U.S.C. § 1512(a)(1)(C); murder with intent to prevent that person from communicating with a law enforcement officer regarding a federal offense, 18 U.S.C. § 1512(a)(1)(C); discharge of a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c)(1)(A)(iii); use of a firearm during and in relation to a crime of violence resulting in death, 18 U.S.C. § 924(c)(1)(A)(iii); and smuggling goods, 18 U.S.C. § 554.

Analysis: The Eleventh Circuit (10th Cir. Judge Baldock for Judge Hull and Judge Martin) affirmed.

The Court found "ample" evidence that Mr. Campo conspired to and participated in the killing of the victim. Testimony and physical evidence, including DNA evidence, indicated that Mr. Campo was present at the scene, with his co-conspirator, around the time of the murder. The Court also found overwhelming evidence that Mr. Campo intended to kill the victim to prevent him from talking with law enforcement based on testimony indicating Mr. Campo threatened the victim directly and indirectly over his cooperation with law enforcement. The Court found that attempts to undermine this evidence constituted challenges to credibility that were reasonably resolved by the jury. The Court also found the testimonial and physical evidence sufficient to support the firearm convictions.

Next, the Court held that the district court did not plainly err by admitting the purported opinion testimony. First, it accepted the government's contention that, had Mr. Campo objected at trial, the government could have laid foundation for why the testimony was rationally based on her perception and therefore admissible. Second,

the testimony was not objectionable for addressing an ultimate issue in the case, because it was based on reasonable inferences from the personal observations of the witness. And third, any error was harmless because of the overwhelming evidence of guilt.

Finally, the Court rejected the Double Jeopardy argument. The district court could not have plainly erred because *United States v. Julian*, 633 F.3d 1250 (11th Cir. 2011), suggested that § 924 specifically permitted the consecutive sentences and therefore did not violate Double Jeopardy.

United States v. Hughes, 840 F.3d 1368 (11th Cir. 2016).

Issues:

1. Where a court grants a continuance for a pretrial motion without stating its reasons on the record, is that time excludable from the 70-day Speedy Trial Act clock?

2. Did the district court commit clear error by denying appellant's *Batson* challenge?

3. Did the district court err by admitting physical evidence with alleged gaps in the chain of custody or by admitting records of 911 calls?

4. Did the district court erroneously permit the jury to consider the defendant's pre-trial, false-exculpatory statements as substantive evidence of his guilt?

5. Is 18 U.S.C. § 922(g) unconstitutional because it exceeds Congress's power under the commerce clause?

Held:

1. Yes.

2. No.

3. No.

4. No.

5. No.

Background: Mr. Hughes was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), and was arraigned on April 4, 2014. On April 21, the government and pretrial services filed a petition alleging Mr. Hughes had violated conditions of pretrial release. He was arrested and had an initial detention hearing on April 24. Mr. Hughes' attorney requested and was granted a continuance, and the detention hearing occurred April 29. The court did not record any findings or reasons for granting the continuance.

On June 19, 2014, Mr. Hughes file a motion to dismiss under the Speedy Trial Act arguing that the 70-day clock had expired on June 13. The district court denied the motion, stating that the clock would expire on June 23, the scheduled first day of trial. The district court stated that the six days between April 24 and April 29, were excludable from the 70 day clock as pretrial-motion delay.

Analysis: The Eleventh Circuit (Judge Rosenbaum for Judge Tjoflat and Judge Anderson) affirmed.

The opinion focused primarily on the Speedy Trial Act issue. The Court explained that it started from the premise that "excludable pretrial-motion delay encompasses 'all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is reasonably necessary.'" *Hughes*, 840 F.3d at 1378 (quoting *Henderson v. United States*, 476 U.S. 321, 330, 106 S. Ct. 1871, 1877 (1986)). Mr. Hughes argued that under § 3161(h)(7)(A) of the Speedy Trial Act, "delay resulting from a continuance granted by any judge" is excludable delay only if the court makes findings on the record that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." *Hughes*, 840 F.3d at 1379. Therefore, he argued, the period from April 24 to April 29 could not be excluded because the judge made no findings on the record supporting the continuance.

The Court explained that the delay from April 24 to April 29 was directly caused by an event that would make it nonexcludable (the grant of the continuance), but also indirectly caused by an event that would make the time excludable (the government's pretrial motion). The Court stated that in *United States v. Tinklenberg*, the Supreme Court had provided a solution to such a conflict: "[T]he filing of a pretrial motion automatically stops the Speedy Trial clock until its resolution, regardless of whether it 'actually causes' any delay." *Hughes*, 840 F.3d at 1381 (quoting *United States v. Tinklenberg*, 563 U.S. 647, 650, 131 S. Ct. 2007, 2011 (2011). Therefore, the period from the government's April 21 motion seeking detention and the April 29 ruling on that motion was properly excluded and the district court did not err by denying the motion to dismiss.

Next, the Court rejected Mr. Hughes's argument that the government had failed to identify a nondiscriminatory ground for striking Juror Number 3 and that it could not rely on the jurors' prior conviction because other jurors also had convictions. The Court stated that courts should "not view a party's failure to strike similarly situated jurors as pretextual when relevant differences exist between the juror who was stricken and jurors who were not." *Hughes*, 840 F.3d at 1382 (quotation omitted). The Court found no clear error in the district court's decision that Juror Number 3's probation violation was a relevant difference that provided a nondiscriminatory grounds for distinguishing him from other jurors with prior contact with law enforcement.

The Court summarily affirmed on the remaining issues.

United States v. Fritts, 841 F.3d 937 (11th Cir. 2016).

Issue: Is the Florida offense of robbery with a firearm, as it was defined in 1988, a "violent felony" under the Armed Career Criminal Act's ("ACCA's") force clause, 18 U.S.C. § 924(e)(2)(B)(i)?

Held: Yes.

Background: Mr. Fritts was convicted of possession of a firearm by a felon and sentenced to 15 years' imprisonment under the ACCA, 18 U.S.C. § 924(e), based on a determination that he had two prior convictions of "violent felonies" and one prior conviction of a "serious drug offense." On appeal, he argued that his ACCA-enhanced sentence was unlawful because his prior conviction for Florida robbery with a firearm committed in 1988 did not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another" as required by the force clause.

Analysis: The Florida statute under which Mr. Fritts was convicted proscribed "the taking of money or other property which may be the subject of a larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear" while "carr[ying] a firearm or other deadly weapon," 841 F.3d at 939 (quoting Fla. Stat. § 812.13(1), (2)(a) (1987)). The Eleventh Circuit previously held that the least culpable conduct encompassed by the statute was "putting in fear," which, "per Florida law, involves an act causing the victim to fear death or great bodily harm . . . ." *Id.* at 941 (quoting *United States v. Lockley*, 632 F.3d 1238, 1244 (11th Cir. 2011)). Stating, "[w]e can conceive of no means by which a defendant could cause such fear absent a threat to the victim's person," *Lockley* held that Florida attempted robbery was a "crime of violence" under the force clause of that term's definition in the Sentencing Guidelines. *Id.* (quoting *Lockley*, 632 F.3d at 1244-45).

Relying on *Lockley* and *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006), and finding that "nothing in *Curtis Johnson* [*v. United States*, 559 U.S. 133, 130 S. Ct. 1265 (2010),] . . . undermines our binding precedent in *Dowd* or *Lockley*," the Court held that Mr. Fritts's Florida robbery conviction was a violent felony under the ACCA's force clause. *Id.* at 942.

United States v. Leon, 841 F.3d 1187 (11th Cir. 2016).

Issues:

1. Did the district court commit plain error by concluding that the conviction for attempting to cause a financial institution to not file a required report, in violation of 31 U.S.C. § 5324(a)(1), was supported by sufficient evidence?

2. Did the district court commit plain error by permitting the government to constructively amend the indictment?

Held:

1. No.

2. No.

Background: Appellant Leon was convicted of three counts of attempting to cause a financial institution to not file a required currency transaction report (CTR), in violation of 31 U.S.C. § 5324(a)(1). These reports are required for certain transactions of $10,000 or more. A person can violate the statute by attempting to cause a financial instruction to fail to file a report, under § 5324(a)(1), or by "structuring" transactions in a way that results in evading the reporting requirement, under § 5324(a)(3). The evidence indicated that Ms. Leon arranged transactions below $10,000 to avoid the reporting requirements and asked tellers to reverse certain transactions to avoid exceeding $10,000. The indictment charged her only under § 5324(a)(1) and Ms. Leon argued for the first time on appeal that the trial evidence was insufficient to convict her and that government constructively amended the indictment by submitting evidence and jury instructions permitting a conviction for structuring.

Analysis: The Eleventh Circuit (Judge Jordan for Judge Rosenbaum and 6th Cir. Judge Siler) affirmed. Because it was not raised in the district court, the Eleventh Circuit reviewed the sufficiency challenge for plain error and found the evidence was sufficient to support the conviction.

Ms. Leon's argument that the government constructively amended the indictment was also reviewed for plain error. An impermissible constructive amendment occurs "when the theory or evidence presented by the government, or the jury instructions, alter the 'essential elements' of the offense contained in the indictment to broaden the possible bases for conviction beyond what is charged." *Leon*, 841 F.3d 1187, 1192 (11th Cir. 2016) (citations omitted).

Ms. Leon argued that § 5324(a)(1) exclusively governs an offense for intentionally preventing filing and § 5324(a)(3) exclusively governs a structuring offense. Therefore, she argued that the government constructively amended the indictment by charging her with a violation of § 5324(a)(1), but presenting a case at trial and submitting jury instructions permitting a conviction for structuring.

The Court concluded that that the indictment was not constructively amended. The Court stated that attempts to structure transactions could be understood as evidence of intent to evade the reporting requirements under § 5324(a)(1). The jury instructions, although imprecise in their use of the "structuring" language, did require a jury to find the essential elements of the § 5324(a)(1) beyond a reasonable doubt.

United States v. Esprit, 841 F.3d 1235 (11th Cir. 2016).

Issue: Are Mr. Esprit's prior Florida convictions for burglary categorically convictions of generic burglary, encompassed by the enumerated clause of the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B)(ii)?

Held: No.

Background: Mr. Esprit was convicted of possession of a firearm by a felon under 18 U.S.C. § 922(g)(1). The district court found that he had four prior convictions for offenses that qualified as ACCA predicates, including two burglary Florida convictions, and sentenced him to 188 months' imprisonment.

Analysis: The Eleventh Circuit (Judge Jill Pryor for Judge Jordan and N.D. Ala. Judge Proctor) vacated Mr. Esprit's sentence and remanded for resentencing. Florida burglary "is defined as '[e]ntering a dwelling, a structure, or a conveyance with the intent to commit an offense therein.'" 841 F.3d at 1237 (quoting Fla. Stat. § 810.02(1)(b)(1)). The statutory definitions of "dwelling" and "structure" include not only buildings but also their curtilage. *Id.* (citing Fla. Stat. § 810.011(1), (2)). Because generic burglary "requires an unlawful entry into, or remaining in, 'a *building or other structure*,'" the Supreme Court previously held that Florida burglary is broader than generic burglary because of its "inclusion of curtilage . . . ." *Id.* at 1238-39 (quoting *James v. United States*, 550 U.S. 192, 212, 127 S. Ct. 1586, 1599 (2007), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015)) (emphasis in *James*).

Even after *James*, the Eleventh Circuit used the modified categorical approach to conclude that a Florida burglary conviction was generic and qualified as a violent felony. *Id.* at 1239 (citing *United States v. Weeks*, 711 F.3d 1255, 1262-63 (11th Cir. 2013)). *Descamps v. United States*, 133 S. Ct. 2276 (2013), subsequently made clear that courts may use the modified categorical approach to classify divisible statutes only. Holding that Florida burglary is not divisible, the Eleventh Circuit concluded that the offense is categorically non-generic and does not qualify as a "violent felony" under the ACCA.

United States v. Davis, 841 F.3d 1253 (11th Cir. 2016).

Issue: Were the district court's post-sentencing changes to the verdict forms and judgments permissible under Fed. R. Crim. Pro. 36 as a correction to a clerical error?

Held: Yes.

Background: Appellants Davis and Coffee were charged with six counts of robbery in violation of 18 U.S.C. § 1951(a) and two counts of using a firearm during and in relation to two of the robberies in violation of 18 U.S.C. § 924(c)(1)(A) (Counts three and seven). The case was repeatedly described to the jury as containing two groups

of offenses: robbery counts, and two counts for using a firearm during and in relation to those robberies. Attorneys for both the government and one of the appellants referred to counts three and seven as the "firearm offenses." *Davis*, 841 F.3d at 1257-58. Count three of the verdict form correctly stated the offense as "using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)." *Id.* at 1258. Count seven cited the same statute, but incorrectly stated the offense as "robbery." The jury convicted on all counts.

Appellants' sentences for the violations of § 924(c)(1)(A) were consecutive to the sentences for the robbery convictions, as required by statute. In the judgments, the court listed the nature of the offense for count seven as "robbery," but, like the verdict form, it cited § 924(c)(1)(A). No party objected to this issue. After the judgment was entered, the court sua sponte amended the judgment, over the objection of the appellants, to correct what it called a "scrivener's" error in count seven. *Id.* at 1260.

Analysis: The Eleventh Circuit (N.D. Fla. Judge Vinson for Judge Martin and Judge Jordan) affirmed. Fed. R. Crim. Pro. 36 may be used to correct a clerical error in a judgment, but may not be used to make a substantive alteration. Appellants argued that the court's action was a substantive change because a robbery conviction would not carry the required consecutive sentences appellants were given on count seven. The Court concluded that it was proper to amend the judgment under Rule 36 because the incorrect verdict form "(a) was not objected to, (b) did not in any way confuse the jury, or, even if it did, (c) could not have possibly prejudiced the defendants." *Davis*, 841 F.3d at 1265.

The Court explained that because the evidence was inarguable that the perpetrators of the robbery had used a firearm, even if the jury believed they were convicting only for robbery, the guilty verdict on this count necessarily implies that the jury found the appellants had used a firearm in furtherance of that robbery. Thus, the appellants "were not exposed to a longer prison term *because of the Rule 36 amendment* but, rather, *because the jury inescapably found that they had used a gun for the [relevant] robbery." Davis*, 841 F.3d at 1263. Finally, the Court stated that its decision was supported by the reasoning in *United States v. Diaz*, 190 F.3d 1247, 1252 (11th Cir. 1999).

United States v. Gundy, 842 F.3d 1156 (11th Cir. 2016).

Issue: Are Mr. Gundy's prior Georgia convictions for generic burglary, encompassed by the enumerated clause of the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B)(ii)?

Held: Yes. (Mr. Gundy's petition for rehearing en banc is pending.)

Background: Mr. Gundy was convicted of possession of a firearm by a felon under 18 U.S.C. § 922(g)(1). The district court found that his seven prior Georgia convictions for burglary qualified as violent felonies under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), and sentenced him to 288 months' imprisonment.

Analysis: The Eleventh Circuit (Judge Hull for M.D. Fla. Judge Conway) affirmed. The Court examined the burglary statute in force at the time of Mr. Gundy's convictions, Ga. Code Ann. § 16-7-1. Although § 16-7-1(a) was amended in 2012, at the time of each of Mr. Gundy's prior offenses it provided, "A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof . . . ." 842 F.3d at 1164 n.3. The Court identified the elements of generic burglary as "(1) an unlawful or unprivileged entry into, or remaining in, (2) a building or other structure, (3) with intent to commit a crime therein." *Id.* at 1164 (citing *United States v. Howard*, 742 F.3d 1334, 1342 (11th Cir. 2014); *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016)). Because Georgia burglary "encompassed not only unlawful entry into buildings or other structures, but also into vehicles, railroad cars, watercraft, or aircraft," it "criminalized conduct broader than the ACCA's generic definition of burglary." *Id.*

The Court then considered whether the statute was divisible into alternative versions of the offense, some of which would be limited to generic burglary. In that analysis, the Court focused on the portion of the burglary statute that extended beyond the bounds of generic burglary: the list of premises. *Id.* at 1166-67. Reviewing Georgia case law, the Court found, "[U]nder Georgia law a prosecutor must select, identify, and charge the specific place or location that was burgled. . . . [A] burglary indictment must charge the particular place or premises burgled and the specific location of that place or premises." *Id.* or 1167. Consequently, the Court concluded that the statute was divisible because the list identified alternative elements, constituting separate crimes, and not alternative means of satisfying the same element of a single crime. *Id.* at 1167–68. The Court then examined the indictments upon which Mr. Gundy's prior convictions were based. Finding that "all of the burgled locations were either dwelling houses or buildings housing a business" and "none were vehicles, railroad cars, watercrafts [sic], or aircrafts [sic]," the Court held that all of the convictions were for generic burglary and affirmed the ACCA-enhanced sentence. *Id.* at 1168–69.

Judge Jill Pryor dissented, arguing that the list of premises set forth alternative means rather than elements and that the statute therefore was not divisible. *Id.* at 1172 (Pryor, J., dissenting). She noted that Georgia case law has established that "there are two essential elements [of the crime of burglary] which must be established by the State: 1) lack of authority to enter the *dwelling or building*; 2) intent to commit a felony or theft," *Id.* (Pryor, J., dissenting) (quoting *Lloyd v. State*, 168 Ga. App. 5, 5, 308 S.E.2d 25, 25 (1983) (emphasis added)). Judge Pryor further cited Georgia

decisions that "upheld jury instructions listing 'building or dwelling' as part of a single element," which the state's pattern jury instructions also do. *Id.* at 1173 (Pryor, J., dissenting).

United States v. Ammar, 842 F.3d 1203 (11th Cir. 2016).

Issue: Did the district court violate the Speedy Trial Act by granting a one-year continuance based solely on the parties' agreement?

Held: Yes.

Background: On September 1, 2011, Mr. Ammar was indicted on several counts stemming from alleged involvement in an armed robbery and killing of an armored truck driver. At a scheduling conference, the court entered a scheduling order setting trial to begin October 9, 2012. The district court denied Mr. Ammar's objection to the trial date. On October 3, 2012, Mr. Ammar moved to dismiss the indictment under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174. The district court stated at an October 4, 2012, proceeding that the parties had agreed to the trial date at the September 2011 scheduling conference and "everybody knew they were waiving the Speedy Trial Act." *Ammar*, 842 F.3d at 1209. Because the parties had agreed to the trial date, the district court denied the motion. Mr. Ammar was convicted on three counts and sentenced to life imprisonment.

Analysis: The Eleventh Circuit (Judge Wilson for Judge Julie Carnes and 10th Cir. Judge Ebel) reversed and remanded. The Speedy Trial Act requires a trial within 70 days unless the court puts on the record its reasons for finding that the delay serves the ends of justice in a way that outweighs the public's and defendant's interest in a speedy trial. *Zedner v. United States* requires that the reasons be stated on the record. 547 U.S. 489, 507, 126 S. Ct. 1976, 1989 (2006). Additionally, the Court stated that *Zedner* held a continuance "justified solely because the parties agreed to the continuance is not a proper ends-of-justice finding." *Ammar*, 842 F.3d at 1210. Because the parties' agreement was the sole reason cited by the court on the record, the continuance did not comply with the requirements of the Speedy Trial Act. The Court held that the indictment must be dismissed and reversed Mr. Ammar's convictions, but remanded to the district court to determine if the dismissal should be with or without prejudice.

United States v. Green, 842 F.3d 1299 (11th Cir. 2016).

Issues:

1. Did the district court err by denying appellant's motion for a judgment of acquittal based on sufficiency of the evidence?

2. Did the district court err by refusing to change the word "crimes" to "crime" in the indictment's reference to appellant's prior convictions?

3. Did the district court err by admitting evidence of a nolo contendere plea to prove a prior bad act under F.R.E. 404(b)?

4. Did the district court err by concluding that defendant's conviction for Florida Battery constituted a violent felony under the Armed Career Criminal Act (ACCA)?

Held:

1. No.

2. Yes, but the error was harmless.

3. Yes, but the error was harmless.

4. No.

Background: Mr. Green was convicted of being a felon in possession of a firearm or ammunition under 18 U.S.C. § 922(g)(1). Officers discovered Mr. Green in the closet of a bedroom and methamphetamine, drug paraphernalia, a .22 caliber gun, and .22 caliber ammunition in the bedroom. Incident to his arrest, Mr. Green stated that he had traded methamphetamine for the gun.

Before trial, Mr. Green motioned for a change to the indictment. Because he stipulated to his felon status, he asked that the reference to "crimes" be removed or changed to the singular, but the motion was denied. The Court also denied a motion to excluded evidence of a prior felon in possession conviction under F.R.E. 404(b). Mr. Green argued that it should be excluded because it resulted from a plea of nolo contendere.

Analysis: The Eleventh Circuit (Judge Julie Carnes for Judge Jordan and E. D. Pa. Judge Robreño) affirmed.

Mr. Green argued that evidence supporting his constructive possession of the firearm improperly relied on his uncorroborated admission that the gun belonged to him. However, the Court found that because "[d]rug paraphernalia, methamphetamine, and .22 caliber ammunition were also in close proximity to Defendant," the admission was sufficiently corroborated and could properly be considered. *Green*, 842 F.3d at 1306. The evidence was sufficient for a reasonable jury to find guilt beyond a reasonable doubt.

Mr. Green also argued that the court erred by denying his motion to change the description of his prior felonies in the indictment from "crimes" to "crime." The Court explored a circuit split on this issue. The Eighth Circuit held that it is not error to allow the government to introduce evidence of more than one conviction where only one is necessary. *United States v. Garner*, 32 F.3d 1305, 1311 (8th Cir. 1994). The Seventh and Fifth Circuits, however, held that it is error to permit indictments or evidence that provide evidence of any more prior convictions than is necessary to prove the offense. *United States v. King*, 897 F.2d 911, 913 (7th Cir. 1990); *United*

States v. Quintero, 872 F.2d 107, 111 (5th Cir. 1989). The Eleventh Circuit adopted the latter approach, stating that the district court erred because "unnecessarily communicating to a jury that a defendant has multiple convictions . . . increases the risk of unfair prejudice." *Green*, 842 F.3d at 1309. However, because of the other evidence of guilt, the Court concluded that the error was harmless.

Addressing an issue of first impression, the Court ruled that Mr. Green's prior conviction based on a nolo contendere plea could not be used to prove the bad acts underlying the conviction. The Court's analysis relied on F.R.E. 803(22), which provides that "a prior judgment of conviction based on a nolo plea is not included in the list of judgments that are exempt from the hearsay rule." *Green*, 842 F.3d at 1318. "[F]or purposes of Rule 404(b), Rule 803(22) precludes use of the 2006 nolo conviction here to prove that Defendant actually possessed ammunition in 2006. Instead, the Government should have introduced evidence proving that Defendant so possessed ammunition on the date in question." *Id.* at 1319. However, because the Court found there was ample such evidence that the government could have relied on, again the error was harmless.

Finally, the Court concluded that Mr. Green was properly sentenced under ACCA because his conviction for Florida Battery constituted a violent felony. Although it is not categorically a violent felony, the Court found the Florida Battery statute was divisible and, based on *Shepard* documents, that Mr. Green was convicted under the "intentionally striking" element. Although Mr. Green pleaded nolo contendere to the offense, he checked a box incorporating the arrest report as the factual basis for the plea. Because the report stated that he struck the victim, the Court concluded that the *Shepard* documents could support the conviction's status as a violent felony.

May v. City of Nahunta, --- F.3d ---, 2017 WL 218838 (11th Cir. Jan. 19, 2017).

Issues:

1. Was a police officer's seizure of Ms. May to transport her to the hospital for mental health evaluation unreasonable in light of emergency medical technicians' ("EMTs"') reports about her behavior and his own observations?

2. Even if the seizure was justified at its inception, was the manner in which it was conducted extraordinary and unreasonable, where the officer detained Ms. May in a locked room for 15 to 20 minutes, during which he made her remove her nightgown and put on clothes, and patted his gun and said "Yes, you will" when she initially refused to take off her shorts and put on underwear?

Held:

1. No.

2. Yes.

Background: Exhausted from attending to her mother, Ms. May called her brother to relieve her, then fell asleep. Two or three hours later, her brother still had not arrived, and her mother went to the brother's nearby home and brought him to her house. He could not awaken Ms. May, so he called 911, and four EMTs (three men and one woman) came to the house. A 911 dispatcher also called for a police officer to go to the house. When the officer arrived, an EMT told him that Ms. May "had 'been a little combative to herself' and was upset." Slip op. at 4. Another said that she "had been clasping her fists and 'scruffing and hitting herself in the head.'" *Id.* When the officer saw Ms. May in her bedroom, "her hair was 'all over her head in disarray.'" *Id.* He decided to take her to the hospital for evaluation. He asked the EMTs to leave the bedroom, then closed and locked the door. He told her to change out of her nightgown into "more suitable clothing," refusing to leave the room while she did so. *Id.* at 5. She began to cry. *Id.* He handed clothes to her and "touched her shoulder roughly in an effort to pull off her nightgown." *Id.* She put on shorts but not underwear. The officer told her to take off the shorts and put on underwear. She refused, and he "replied, 'Yes, you will,' and patted his gun." *Id.* Ms. May and the officer were in the locked room for 15 to 20 minutes. He then took her to the hospital.

Ms. May filed civil suit under 42 U.S.C. § 1983. The district court rendered summary judgment for the defendants.

Analysis: The Eleventh Circuit (M.D. Fla. Judge Dalton, for Judges Jordan and Anderson) affirmed in part and reversed in part. The Court held that by confining Ms. May in the bedroom and compelling her to go to the hospital, the officer effected a seizure of her. *Id.* at 10. To be reasonable under the Fourth Amendment, a seizure of a person must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 1879 (1968)). A seizure for psychiatric evaluation is justified where an officer "could have reasonably believed that [the person seized] posed a danger to herself." *Id.* at 12 (citing *Roberts v. Spielman*, 643 F.3d 899, 906 (11th Cir. 2011)). The Court held that based on the information given to him by the EMTs and his own observations consistent with that information, the officer's seizure of Ms. May was justified at its inception. *Id.*

However, the Court concluded that Ms. May's factual allegations, if proved, would be sufficient to support a determination that the seizure as conducted was unreasonable. *Id.* at 17–18. Ordinarily, whether a Fourth Amendment intrusion is reasonable in scope is "judged 'by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate, governmental interests.'" *Id.* at 14. Where the intrusion was justified at its inception, though, it is unreasonable only if "'conducted in an extraordinary manner'—that is, . . . in a manner 'unusually harmful to an individual's privacy or even physical interests.'" *Id.* at 15 (quoting *Whren v. United States*, 517 U.S. 806, 818, 116 S. Ct. 1769, 1776 (1996)). The Court determined that the measures that the officer used to make Mr. May get dressed and to ensure that she could not harm herself were unreasonably intrusive: "one could

certainly conclude that it was unreasonable for Officer Allen *not* to ask the female EMT to remain with May while she disrobed," and "[e]ven more troubling is the testimony that Officer Allen attempted to pull May's nightgown from her shoulder and used the threat of deadly force to compel her to remove her shorts . . . ." *Id.* at 17. The length of the time he confined her in the locked bedroom also contributed to the unreasonableness of the manner in which the officer conducted the seizure. *Id.* at 18.

The Court affirmed the district court's holding that the officer was entitled to qualified immunity as to "his *decision* to seize and transport her to the hospital," but reversed the summary judgment insofar as it conferred qualified immunity on the officer for the manner in which he conducted the seizure. *Id.* at 21–22.

Doe v. Miami-Dade County, --- F.3d ---, 2017 WL 360510 (11th Cir. Jan. 25, 2016).

Issue: Did plaintiffs allege facts sufficient to state a claim that a Miami-Dade County ordinance's residency restriction for sex offenders is punitive for purposes of the Ex Post Facto Clause?

Held: Yes.

Background: A Miami-Dade County ordinance imposes a residency restriction on persons designated "'sexual offenders' and 'sexual predators'" based on prior criminal convictions involving children less than 16 years old. Slip op. at 2–3. The restriction prohibits such sex offenders from "resid[ing] within 2,500 feet of any school" unless he or she established residence at that address before the ordinance took effect or before the school opened, or the offense was committed when the offender was a minor and did not result in conviction as an adult. *Id.* at 3. Plaintiffs challenged the restriction, claiming that it is impermissibly vague, violates substantive due process, and imposes ex post facto punishment. The district court dismissed the suit under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

Analysis: Plaintiffs appealed the dismissal of the ex post facto claim, and the Eleventh Circuit (Judge Wilson for Judges Tjoflat and Jill Pryor) reversed. A law violates the Ex Post Facto Clause if it "'appl[ies] to events occurring before its enactment' and . . . 'disadvantage[s] the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime.'" *Id.* at 4–5 (quoting *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S. Ct. 891, 896 (1997)). The Court analyzed the ex post facto challenge under a framework set forth in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140 (2003), in which the Supreme Court held that an Alaska sex offender registration and notification law did not violate the Ex Post Facto Clause because it was not punitive. *Id.* at 5–6 (citing *Smith*, 538 U.S. at 105–06, 123 S. Ct. at 1154). *Smith* framed the inquiry as follows:

> We must ascertain whether the legislature meant the statute to establish civil proceedings. If the intention of the legislature was to

> impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil.

Id. at 5 (quoting *Smith*, 538 U.S. at 92, 123 S. Ct. at 1149).

The plaintiffs conceded "that the County intended the Ordinance to be civil and non-punitive." *Id.* at 7. Nevertheless, they asserted that the effect of the law is so punitive that it implicates the Ex Post Facto Clause. *Id.* In the complaint, the plaintiffs had alleged that the residency restriction limits housing options, increases transience and homelessness without considering an individual's risk of recidivism, applies even after offenders are no longer subject to state registration and residency requirements, and "undermines the goal of public safety" by failing to "'effectively manag[e] reentry and recidivism . . . .'" *Id.* at 8–10. The Court concluded that the plaintiffs' allegations were "sufficient . . . to raise plausible claims that the County's residency restriction is so punitive in effect that it violates the ex post facto clauses of the federal and Florida Constitutions." *Id.* at 10–11.

SELECTED UNPUBLISHED OPINIONS

Coon v. United States, --- Fed. App'x ---, 2016 WL 4544437 (11th Cir. Sept. 1, 2016).

Issue: Did the district court err in denying the claim in his 28 U.S.C. § 2255 motion to vacate that he was erroneously sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) in excess of the statutory maximum?

Held: Yes.

Background: Appellant Coon is serving a 180-month sentence for possession of a firearm by a convicted felon. Mr. Coon's pro se motion to vacate set, aside or correct his sentence under 28 U.S.C. § 2255 was denied by the district court. The motion raised several issues, including whether his sentence was incorrectly enhanced under ACCA. The Eleventh Circuit affirmed the denial, but the Supreme Court remanded the case to the Eleventh Circuit in light of its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Analysis: The Eleventh Circuit (per curiam) vacated the sentence and remanded to the district court. After *Johnson*, two of the four convictions the sentencing court classified as violent felonies under the ACCA no longer qualify: Alabama third-degree escape and Alabama third-degree robbery. For that reason, Mr. Coon does not qualify for an enhanced sentence under ACCA and the 15-year sentence exceeds the statutory maximum.

United States v. Rogers, --- Fed. App'x ---, 2016 WL 6134816 (11th Cir. Oct. 21, 2016).

Issues:

1. Did the district court err by concluding that sufficient evidence supported the conviction for failure to update sex offender registration, in violation of 18 U.S.C. § 2250(a)?

2. Did the district court abuse its discretion by imposing a total sentence of 84 months?

Held:

1. No.

2. No.

Background: Appellant Rogers is a convicted sex offender required to register under the Sex Offender and Registration Notification Act (SORNA), 18 U.S.C. § 2250(a). In October 2011, he registered employment with CLP Resources, and testimony indicated he worked there for five to six months. In November 2011, Mr. Rogers moved out of his registered address without notifying the government and ended employment at CLP Resources sometime thereafter. Mr. Rogers was arrested in 2015

attempting to cross the United States border from Mexico. He was convicted and sentenced to 60 months for his SORNA-related offense and to 24 consecutive months for his supervised release violation.

Analysis: The Eleventh Circuit (per curiam, Judge Hull, Judge Marcus, and Judge Edmondson) affirmed.

The parties stipulated that Mr. Rogers was required to register under SORNA. Mr. Rogers argued that there was insufficient evidence to demonstrate that he violated the SORNA requirements by remaining in Alabama after failing to update his housing or employment registration. The Court found that even under Mr. Rogers's interpretation of the facts, he violated his SORNA registration requirements. Either he failed to report that his employment with CLP started well before October 2011, or he remained employed in Alabama beyond the date when he moved out of his registered address. Either interpretation could permit a rational trier of fact to conclude beyond a reasonable doubt that Mr. Rogers violated § 2250(a).

Mr. Rogers also argued that the district court's upward variances of 10 and 19 months on the two convictions were substantively unreasonable. In support of the 24 month sentence, the district court cited the "nature and circumstances of the offense, Rogers's history and characteristics, and the need to protect the public from Rogers's future offenses." Rogers, 2016 WL 6134816, at *4. In support of the 60 month sentence, the district court recounted Mr. Rogers's criminal history as evidence that he was "an absolute predator and sex offender" and cited the "continued violation of the terms of his supervised release, his complete lack of remorse, and his lack of respect for the law." *Id*. The Court found these reasons were supported by the record and the district court did not abuse its discretion in imposing the 84-month sentence.

United States v. Means, --- Fed. App'x ---, 2016 WL 6211821 (11th Cir. Oct. 25, 2016).

Issue: Did the district court err by denying appellant's motion under 18 U.S.C. § 3582(c)(2) to reduce his sentence?

Held: No.

Background: In 2011, Mr. Means filed a pro se motion under § 3582(c)(2) seeking a sentence reduction under Amendment 750 to the Sentencing Guidelines. The district court denied the motion, finding that because he was serving a mandatory minimum life sentence, he was not entitled to a reduction. He filed for appeal, but voluntarily dismissed it. He later filed the instant pro se motion under § 3582(c)(2) arguing that he was entitled to a sentence reduction under Amendments 750 and 782 to the Sentencing Guidelines. The district court denied the motion.

Analysis: The Eleventh Circuit (per curiam, Judge Marcus, Judge Martin and Judge Anderson) affirmed. The Court held that Mr. Mean's claim under Amendment 750 is barred by the law-of-the-case doctrine because his earlier motion on these grounds was denied and he voluntarily dismissed the appeal. Moreover, the Court found even

if he could raise a claim under Amendments 750 or 782, the motion should be denied on the merits. Mr. Means is ineligible for a sentence reduction because he was sentenced to a mandatory minimum life sentence and, therefore, application of the Amendments would not alter his guideline range.

Wilborn v. United States, --- Fed. App'x ---, 2016 WL 6804892 (11th Cir. Nov. 17, 2016).

Issues:

1. Did the district court err by construing petitioner's Rule 60(b) motion as a new motion to vacate under 28 U.S.C. § 2255?

2. Did the district court err in determining that it lacked jurisdiction over the § 2255 petition and dismissing it.

Held:

1. No.

2. No.

Background: In his habeas case, Mr. Wilborn filed a motion under Rule 60(b) arguing that, due to ineffective assistance of postconviction counsel, valid claims were not raised before the district court in his first postconviction proceeding. The district court interpreted the Rule 60(b) motion as a new motion to vacate under § 2255, and dismissed the motion as a second or successive habeas motion improperly filed in the district court without Eleventh Circuit authorization.

Analysis: The Eleventh Circuit (per curium, Judge Tjoflat, Judge Hull, and Judge Wilson) affirmed. The Court found that the district court properly interpreted the 60(b) motion as a § 2255 motion. The Rule 60(b) motion should be interpreted as a § 2255 motion because it sought to raise new claims for relief and did not assert that the previous ruling precluding a merits determination was erroneous or attack the integrity of the earlier proceeding. This made the motion successive to Mr. Wilborn's earlier § 2255 motion, and he was therefore required to receive authorization from the Eleventh Circuit before filing in the district court. Without such authorization, the district court correctly concluded that it lacked jurisdiction over the motion.