SUMMARIES OF CASE LAW
JULY 1, 2019–SEPTEMBER 30, 2019

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

PUBLISHED OPINIONS

United States v. Smith, 928 F.3d 1215 (11th Cir. 2019) (the district court did not violate the defendants' Confrontation Clause rights in their trial for alien smuggling by admitting the videotaped deposition testimony of a smuggled passenger who did not appear at trial, because the government had made a good-faith effort to locate her and secure her presence but had failed; Rosenbaum, J., dissented from the holding, noting that her "former attorney had informed the government that [the witness] was with her boyfriend in Delaware," and although agents called the boyfriend once and texted him once in unsuccessful attempts to contact him, they never tried to learn his address and contact him in person).

Khan v. United States, 928 F.3d 1264 (11th Cir. 2019) (*Strickland v. Washington*'s standard for ineffective assistance of counsel precludes "*per se* rules of deficien[t performance]," and a 28 U.S.C. § 2255 movant failed to show deficient performance from his counsel's failure to comply with the district court's instruction to get the Pakistani government's permission to depose defense witnesses on Pakistani soil, because counsel tried and failed to get formal permission and proposed an alternative arrangement that could be considered sound trial strategy).

Arias Leiva v. Warden, 928 F.3d 1281 (11th Cir. 2019) (the district court did not err by denying habeas relief from a certification of extradition to Colombia, because although the Colombian Supreme Court had held that country's extradition treaty with the United States to be unconstitutional in 1986, the State Department represented that the treaty remained in force and both countries follow it, and the judiciary should defer to the Executive Branch's determination).

United States v. Whyte, 928 F.3d 1317 (11th Cir. 2019) (in a prosecution for sex trafficking of a minor, evidence "that the defendant had a reasonable opportunity to observe the minor victim" is sufficient to carry the government's burden that the defendant knew or recklessly disregarded the fact that the person was a minor).

Tribue v. United States, 929 F.3d 1326 (11th Cir. 2019) (the district court properly denied Mr. Tribue's § 2255 motion challenging his ACCA sentence, even though it did so by relying on a predicate conviction that the original sentence did not).

Weeks v. United States, 930 F.3d 1263 (11th Cir. 2019) (in evaluating whether a § 2255 movant's ACCA-enhanced sentence depended on the Act's now-void residual clause, "the relevant time frame to consider when determining whether the residual clause solely caused the enhancement . . . extends through direct appeal" if "a claimant challenged his ACCA enhancement on direct appeal"; because the Eleventh Circuit had relied exclusively on the residual clause to hold that an indispensable predicate was an ACCA violent felony, Mr. Weeks carried his burden of showing that his enhancement depended on the residual clause).

In re Hammoud, 931 F.3d 1032 (11h Cir. 2019) (the Supreme Court's voiding of 18 U.S.C. § 924(c)(3)(B)'s residual clause in *United States v. Davis*, 139 S. Ct. 2319 (2019), was "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. § 2255(h)(2), and Mr. Hammoud made a *prima facie* showing that his challenge to his § 924(c) conviction for possessing a firearm during a solicitation to commit murder was based on *Davis*'s new rule).

In re Cannon, 931 F.3d 1236 (11th Cir. 2019) (*Davis*'s voiding of § 924(c)'s residual clause did not affect the lawfulness of a § 924(c) conviction involving carjacking under 18 U.S.C. § 2119, but Mr. Cannon made a *prima facie* showing that his conviction under § 924(o)—conspiracy to violate § 924(c)—"may . . . implicate § 924(c)(3)(B)'s residual clause and *Davis*").

United States v. Feldman, 931 F.3d 1245 (11th Cir. 2019) (at retrial after wire-fraud and money-laundering convictions were vacated on appeal in *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), *modified on denial of reh'g*, 838 F.3d 1168 (11th Cir. 2016), the district court did not subject the defendant to double jeopardy by allowing the government to pursue two different money-laundering theories, one of which—a "concealment" theory—had not been a basis for the verdict at the first trial, because the first verdict "found [the defendant] guilty of conspiracy to commit money laundering by international transactions" and "expressed no finding at all about" the concealment theory; William Pryor, J., concurred to "express some concerns about our puzzling opinion in *United States v. Takhalov*" and to caution that "the bench and bar should exercise due care in interpreting our opinion in *Takhalov* and determining its precedential value.").

In re Navarro, 931 F.3d 1298 (11th Cir. 2019) (Mr. Navarro was not entitled to file a second or successive § 2255 motion based on *Davis*, because his § 924(c) conviction was for carrying a firearm "during and in relation to a crime of violence *and a drug trafficking crime*," and *Davis* had no effect on the definition of a drug-trafficking crime under § 924(c)).

In re Palacios, 931 F.3d 1314 (11th Cir. 2019) (Mr. Palacios was not entitled to file a second or successive § 2255 motion based on *Rehaif v. United States*, 139 S. Ct. 2191 (2019), because *Rehaif* was a statutory-construction decision, not "a new rule of constitutional law," § 2255(h)(2)).

In re Pollard, 931 F.3d 1318 (11th Cir. 2019) (Mr. Pollard was not entitled to file a second or successive § 2255 motion based on *Davis* because his § 924(c) conviction involved a substantive offense, armed bank robbery under 18 U.S.C. § 2113(a) and (d), which remains a crime of violence under the § 924(c)(3)(A) elements clause).

Al-Amin v. Warden, 932 F.3d 1291 (11th Cir. 2019) (a state prosecutor's use, during closing argument, of a visual aid titled "QUESTIONS FOR THE DEFENDANT" and repeated rhetorical questions directed to the non-testifying defendant violated his Fifth Amendment privilege against self-incrimination, but the state post-conviction court's determination

that the error was harmless was not an unreasonable application of Fifth Amendment law, because the trial record as a whole did not establish "'grave doubt' that the constitutional error 'had substantial and injurious effect or influence in determining the jury's verdict'").

United States v. Stahlman, 934 F.3d 1199 (11th Cir. 2019) (affirming Mr. Stahlman's conviction and sentence for attempted enticement of a minor to engage in sexual activity, holding that (1) the district court did not err in excluding the expert testimony of a psychologist who would have testified that Mr. Stahlman intended to engage in a role-play fantasy with an adult posing as a minor, not to have sex with a minor, because Fed. R. Evid. 704(b) bars an expert opinion as to whether a defendant had the required *mens rea*; (2) in admitting an FBI agent's testimony about his communication with Mr. Stahlman as lay opinion testimony because the court found some of it included "specialized knowledge," the court misunderstood distinctions between the rules governing lay and expert opinion testimony, since only the latter may address matters of specialized knowledge, but any error was harmless; (3) the court did not clearly err by applying an obstruction-of-justice adjustment under U.S.S.G. § 3C1.1, because at trial Mr. Stahlman denied ever having sexual thoughts about children, which other testimony of his contradicted; and (4) any error, under Fed. R. Crim. P. 16 or *Brady v. Maryland*, in the government's failure to disclose that the lead FBI agent was previously disciplined for "conducting undercover child exploitation investigations using his home computer" was not sufficiently prejudicial to warrant reversal).

United States v. Hawkins, 934 F.3d 1251 (11th Cir. 2019) (vacating defendants' convictions for conspiracy to distribute cocaine and related offenses and remanded for a new trial, holding that the district court plainly erred under Fed. R. Evid. 702 in allowing a DEA case agent, who testified as a drug-distribution expert, to interpret unambiguous communications between co-conspirators, mix expert opinion with fact testimony, and synthesize the trial evidence for the jury, which "strayed into speculation and unfettered, wholesale interpretation of the evidence").

United States v. Brown, 934 F.3d 1278 (11th Cir. 2019) (for purposes of sentencing a defendant convicted of deprivation of rights under color of law (1) as a matter of first impression, a determination that the offense is subject to an increased offense level under U.S.S.G. § 2H1.1(a) because it "involved . . . the use or threat of force against a person" is reviewed for clear error, and the district court's determination was not clearly erroneous; but (2) in the government's cross-appeal, the Eleventh Circuit vacated Mr. Brown's sentence and remanded the case for resentencing because in concluding that a cross-reference to the aggravated assault guideline, U.S.S.G. § 2A2.2, was unwarranted, the district court may have relied on a legally erroneous belief that because the police officer-defendant's use of force was intended to gain control of a suspect, the offense could not have involved intent to cause bodily injury, U.S.S.G. § 2A2.2 cmt. n.1).

United States v. Taylor, 935 F.3d 1279 (11th Cir. 2019) (N.D. Ala. Nos. 4:16-cr-312-VEH-JHE-1 & 2:16-cr-203-KOB-JEO-1) ((1) a Virginia magistrate judge's search warrant exceeded her territorial authority, under Fed. R. Crim. P. 41(b) as it existed at the time, by authorizing the FBI to mine identifying information from computers accessing an FBI-controlled child pornography website from any location, and (2) conducting such a search without a valid warrant violated the Fourth Amendment, but (3) the majority held that the good-faith exception to the exclusionary rule barred suppression; Tjoflat, J., agreed that the search violated the Fourth Amendment but dissented from the holding that the good-faith exception applied, because by claiming in their warrant application "that the property to be searched would be 'located in the Eastern District of Virginia,'" "the officials deliberately or recklessly misled the magistrate").

United States v. Baptiste, 935 F.3d 1304 (11th Cir. 2019) (in a trial for a money-laundering conspiracy, even if a defense witness's brother's testimony that the witness said the defendant promised her a Mercedes in exchange for favorable testimony was inadmissible hearsay, (1) admitting it would have been harmless error because there was ample other evidence of guilt, and (2) the district court could rely on it to apply

an obstruction-of-justice adjustment under U.S.S.G. § 3C1.1, because Sentencing Guidelines calculations may be based on "reliable hearsay . . . provided that there are sufficient indicia of reliability to support its probable accuracy" (emphasis omitted)).

United States v. Feldman, 936 F.3d 1288 (11th Cir. 2019) ((1) under *Burrage v. United States*, 571 U.S. 204 (2014), the jury's special verdict that a victim would not have died "but for" drugs the defendants distributed was a sufficient finding of causation to support a 21 U.S.C. § 841(b)(1)(C) enhancement for a distribution offense from which "death or serious bodily injury results," but (2) the enhancement *was not* proper for counts where jury found that "Schedule II and Schedule IV drugs *in the aggregate* caused the deaths," because the death-results enhancement is limited to Schedule I or II drugs).

United States v. Waters, 937 F.3d 1344 (11th Cir. 2019) ((1) the district court in a trial for wire fraud did not abuse its discretion in declining to give a proposed jury instruction drawn from *United States v. Takhalov*, because the instruction did not explain the difference between a scheme to deceive and a scheme to defraud, so it "was an incomplete statement of the law and would have confused the jury"; (2) Mr. Waters's challenge to the sufficiency of the evidence was reviewable only for "a manifest miscarriage of justice" because he did not renew his motion for judgment of acquittal at the close of the evidence; and (3) Mr. Waters's conviction was not a manifest miscarriage of justice).

United States v. Gillis, 938 F.3d 1181 (11th Cir. 2019) (in a prosecution for solicitation to commit a crime of violence under 18 U.S.C. § 373, the definition of a crime of violence requires a categorical approach, and federal kidnapping is not categorically a crime of violence because it can be accomplished by inveigling or decoying without physical force; Hull, J., dissented, interpreting § 373 to establish a conduct-based approach to identifying a crime of violence because it twice refers to engaging in conduct, and Mr. Gillis actually solicited an FBI agent to engage in a kidnapping that would involve force).

United States v. Kirby, 938 F.3d 1254 (11th Cir. 2019) (the 1,440-month sentence for child pornography offenses did not abuse the district court's discretion, where the court imposed consecutive statutory maximum terms for all counts to achieve the Guidelines range of life; the Eleventh Circuit rejected Mr. Kirby's argument that a 470-month sentence was equal to a life sentence because the Sentencing Commissions Sourcebook of Federal Sentencing Statistics defined a life sentence that way based on average inmate life expectancy).

United States v. Annamalai, 939 F.3d 1216 (11th Cir. 2019) (affirming Mr. Annamalai's convictions for bank fraud, conspiracy to commit bank fraud, filing a false income tax return, obstruction of justice, and making false statements in writing and in a bankruptcy, but reversed his convictions for bankruptcy fraud, conspiracy to commit bankruptcy fraud, money laundering in the course of bankruptcy fraud, and conspiracy to harbor a fugitive, holding that (1) a bankruptcy trustee's testimony—that money Mr. Annamalai received and deposited into the account of a new Hindu temple he opened after his first temple filed for bankruptcy properly belonged to the first temple—was "an incorrect and unsupported legal conclusion" because the money was not the first temple's property at the time it filed for bankruptcy; (2) although "[t]he conduct here could have supported a state theft or embezzlement charge," the government presented insufficient evidence of bankruptcy fraud; (3) the bankruptcy-fraud conspiracy and money-laundering convictions depended on the allegations of bankruptcy fraud and could not stand on their own; (4) harboring a fugitive "requires some affirmative physical act to help harbor or conceal" a fugitive, so Mr. Annamalai's instruction to his wife to tell a fugitive co-defendant to use cash while traveling could not constitute the substantive offense for such a conspiracy; and (5) the district court clearly erred in calculating a bank-fraud loss amount based on all the temple's credit card transactions that cardholders disputed, because the government provided documentation of the basis for only 85 of 467 disputed transactions)

Boston v. United States, 939 F.3d 1266 (11th Cir. 2019) (a Florida conviction for principal to armed robbery qualified as an ACCA predicate under the elements clause, because under Florida law, an aidor and abettor faces the same punishment as a principal, and so he necessarily commits all of the elements of principal Florida armed robbery; Judge Jill Pryor concurred, noting that this was correct under the Court's prior opinions, but criticizing the former opinion as relying on a legal fiction that an aidor and abettor is deemed to have committed the crime itself, and to hold that the aidor and abettor committed a crime involving an element of force).

United States v. Rothstein, 939 F.3d 1286 (11th Cir. 2019) (the district court did not err in permitting the government to withdraw a placeholder Rule 35(b) motion, because withdraw of such a motion is within the government's exercise of discretion).

UNPUBLISHED OPINIONS FROM THE NORTHERN DISTRICT OF ALABAMA

United States v. Balcazar, 775 F. App'x 657 (11th Cir. 2019) (N.D. Ala. No. 4:15-cr-133-KOB-JHE-1) (the district court did not clearly err by enhancing Mr. Balcazar's offense level by two under U.S.S.G. § 2D1.1(b)(15)(D) where a co-defendant testified that Mr. Balcazar "tried to persuade [her] not to testify against him because he knew where her family was").

United States v. Hopper, 772 F. App'x 877 (11th Cir. 2019) (N.D. Ala. No. 5:18-cr-172-AKK-TMP-1) (binding precedent foreclosed Ms. Hopper's argument that the court erred by assigning a criminal history point to a prior uncounseled conviction).

United States v. McKleroy, 783 F. App'x 878 (11th Cir. 2019) (N.D. Ala. No. 6:17-cr-144-LSC-SGC-1) (affirming a 121-month sentence for possession of child pornography and attempted transfer of obscene material to a minor as within the district court's discretion, because the court was reasonably "concern[ed by] the nature of the offense and McKleroy's characteristics, including his 'unusual' desire to engage in a relationship with a minor based on his communications with an officer

he thought was a 14-year-old girl and his very active solicitation of child pornography").

Childs v. United States, 783 F. App'x 893 (11th Cir. 2019) (N.D. Ala. Nos. 1:16-cv-8064-LSC; 1:10-cr-226-LSC-TMP-1) (affirming the denial of Mr. Child's *Johnson*-based § 2255 motion, because his Alabama robbery conviction qualified as a violent felony under the ACCA).

United States v. Romans, 786 F. App'x, 891 (11th Cir. 2019) (N.D. Ala. No. 5:17-cr-546-AKK-JHE-1) (affirming Mr. Romans's ACCA-enhanced sentence, because his conviction for conspiracy to possess with intent to distribute cocaine and two substantive distribution offenses that occurred within its span, occurred on different occasions, and thus, qualified as three separate predicates).

United States v. Means, 787 F. App'x 999 (11th Cir. 2019) (N.D. Ala. No. 2:95-cr-129-LSC-TMP-1) (affirming the denial of Mr. Means's motion for a reduced sentence under § 404 of the First Step Act, because a drug quantity of five kilograms was attributed to him at his 1996 sentencing, and the Act's changes to predicates for enhancements under 21 U.S.C. § 841(b) were not retroactive, so he still was subject to mandatory imprisonment for life).

United States v. Oden, 786 F. App'x 961 (11th Cir. 2019) (N.D. Ala. No. 1:17-cr-549-RDP-JHE-1) (affirming the denial of a motion to suppress evidence of a warrantless search—Mr. Oden's encounter with law enforcement was consensual and did not implicate the Fourth Amendment, because his path was not blocked, his identification was not taken, the encounter was brief, and the officers did not display their weapons or use coercive language).

United States v. Walker, 777 F. App'x 478 (11th Cir. 2019) (N.D. Ala. No. 7:18-cr-190-LSC-TMP-1) (affirming a 120-month sentence for possessing a firearm after a felony conviction as substantively reasonable where officers discovered a loaded gun in a vehicle Mr. Walker had abandoned when trying to evade police, and where he had clipped two officers and sideswiped a patrol car when avoiding questioning about a reported gunfight; Judge Jordan dissented, noting that the sentencing transcript

revealed that the district court, when varying upward, mistakenly stated that Mr. Walker had previously shot three people when he had only shot two, and reasoning that it was not clear from the record whether the district court would have varied upward if it had known the correct information).

United States v. Carmichael, 777 F. App'x 977 (11th Cir. 2019) (N.D. Ala. No. 1:98-cr-24-SLB-MHH-1) (affirming a 36-month sentence for revocation of supervised release because: (1) the revocation was mandatory, and thus the district court was not required to weigh the § 3553(a) factors, such that any argument that the court improperly weighed the factors was irrelevant, and (2) even if the court were required to weigh the factors, it did not do so improperly here).

United States v. Varner, 789 F. App'x 144 (11th Cir. 2019) (N.D. Ala. No. 2:18-cr-251-LSC-JHE-1) (the district court did not clearly err in enhancing Mr. Varner's offense level under U.S.S.G. § 2K2.1(b)(1)(A) by finding he possessed additional guns found on or near the front passenger seat from which he fled; and (2) any error in enhancing his offense level under § 2K2.1(b)(6)(B) by finding that his firearm possession was in connection with another felony offense—possession of a "rock-like substance" found in the driver's door—was harmless because the district court stated that it would have imposed the same sentence even absent that finding).