SUMMARIES OF RECENT CASELAW
DECEMBER 20, 2012 – JANUARY 25, 2013

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Issue. Do death row inmates with pending *habeas* petitions have the right to a stay of proceedings when adjudged incompetent?

Held. No.

Background and procedural history. Mr. Gonzales, an Arizona death row inmate seeking *habeas* relief, moved to stay those proceedings because (due to his mental incompetence) he was no longer capable of rationally communicating with or assisting his counsel. Mr. Gonzales cited Ninth Circuit precedent holding that a prisoner's right to counsel in *habeas* proceedings could not be faithfully enforced unless courts could ensure that a petitioner is competent. *See Rohan v. Woodford*, 334 F. 3d 803 (9th Cir. 2003); *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009) (lack of competency grounds for a stay even when the claims are solely record-based). The district court denied Mr. Gonzales's motion, concluding that since the claims before it were record-based or resolvable as a matter of law, counsel could proceed without the client's input. Mr. Gonzales then filed an emergency petition for a writ of mandamus in the Ninth Circuit. The court granted the writ of mandamus, and concluded that although Mr. Gonzales' claims were record-based or legal in nature, he was entitled to a stay, under 18 U.S.C. § 3599, pending a competency determination.

Mr. Carter, a death row inmate in Ohio, also moved to stay his *habeas* relief proceeding pending a competency determination. The district court granted the

motion and, following several psychiatric evaluations and a competency determination, adjudged respondent incompetent to assist counsel. Applying the Ninth Circuit's *Rohan* decision, the court determined that Mr. Carter's assistance was required to develop his exhausted claims. Consequently, the court dismissed Mr. Carter's *habeas* petition without prejudice and prospectively tolled the statute of limitations. The State of Ohio appealed to the Sixth Circuit, which ultimately held that although *habeas* petitioners facing the death penalty do not have a constitutional right to competence, such persons do have a statutory right to competence pursuant to 18 U.S.C. § 4241. The Sixth Circuit ordered that Mr. Carter's petition be stayed indefinitely with respect to any claims that required his assistance.

The Supreme Court granted *certiorari* in both cases and consolidated them for decision.

Analysis. The Supreme Court (Justice Thomas, writing for a unanimous Court) held that neither § 3599 nor § 4241 provides death row inmates pursuing federal habeas with a right to suspension of proceedings when they are found to be incompetent.

The Court determined that there is no provision within the statutory text of § 3599 directing district courts to stay proceedings when *habeas* petitioners are found incompetent, and therefore held that the statute does not provide *habeas* petitioners with a statutory right to competence. The Court also rejected the assertion that the Sixth Amendment right to counsel at trial implies a right to competence, noting that the Court's precedent that "the criminal trial of an incompetent defendant violates *due process*," not the Sixth Amendment. In that same vein, the Court clarified that just because there is a *connection* between the right to counsel at trial, where competence is crucial to a defendant's ability to assist in his or her defense, it does not automatically follow that the right to competence *derives from* the right to counsel – a proposition not supported by precedent.

Accordingly, the Court rejected the Ninth Circuit's assertion in *Rohan* that a *habeas* petitioner's mental incompetency could "eviscerate the statutory right to counsel" in federal habeas proceedings, reasoning that counsel can generally provide effective representation to a *habeas* petitioner regardless of the petitioner's competence given the "backward-looking, record-based nature of most federal habeas proceedings." Slip Op. at 9. The Court further rejected the Ninth Circuit's reliance on *Rees v. Peyton*, 384 U.S. 312 (1966) (per curiam) and *Rees v. Superintendent of Va. State Penitentiary*, 516 U.S. 802 (1995), as unavailing, clarifying that those cases did not, as the Ninth Circuit maintained in *Rohan* and *Nash*, stand for the proposition that *habeas* petitioners have the right to stay proceedings for lack of competency.

Next, the Court examined the Sixth Circuit's finding that § 4241 provides habeas petitioners with a statutory right to competence during habeas proceedings.

It found that § 4241 is only applicable to trial proceedings prior to sentencing and at any time after an individual's release from confinement. Given that *habeas* proceedings commence after sentencing, and that petitioners are, by definition, incarcerated, § 4241 does not apply to *habeas* petitioners. To further highlight the inapplicability of § 4241, the Court noted that the provision authorizes the grant of a competency determination when a court has a reasonable belief that a defendant is "unable to understand the consequences of the proceedings against him, or to assist properly in his defense." In contrast, a *habeas* proceeding is a proceeding against the warden of a state prison rather than against the defendant. Also, a federal habeas petitioner does not mount a "defense" in a *habeas* proceeding, but instead attacks his conviction at an earlier state trial. The Court therefore held that § 4241 does not provide a statutory right of competency to a federal *habeas* petitioner.

Finally, the Court did not categorically reject the petitioners' final argument: that a district court can stay the proceeding of an incompetent petitioner under its equitable powers. While cautioning that "[a]t some point, the State must be allowed to defend its judgment of conviction," the Court did seem to allow for some degree of such a stay grounded in equity, so long as the district court "concludes that the petitioner's claim could substantially benefit from the petitioner's assistance" and "takes into account the likelihood that the petitioner will regain competence in the foreseeable future." But when "there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State's attempts to defend its presumptively valid judgment." Slip op. at 18.

Calvin Smith v. United States, No. 11-8976 (January 9, 2013)

Issue. When a defendant produces evidence that he or she withdrew from a criminal conspiracy outside the relevant statute-of-limitations period – a complete defense, if proven – must the Government prove beyond a reasonable doubt that the defendant did not withdraw outside the statute-of-limitations period?

Held. No.

Background and procedural history. Mr. Smith was indicted in the District of Columbia district court in a 158-count indictment that included several conspiracy charges. The district court rejected Mr. Smith's motion to dismiss the conspiracy counts as barred by the 5-year statute of limitations. It instructed the jury that if the Government had proven that Mr. Smith was the member of a criminal conspiracy, then Mr. Smith bore the burden of proving his withdrawal by a preponderance of the evidence. The jury found Mr. Smith guilty of the conspiracy counts, and the District of Columbia Circuit affirmed. Mr. Smith petitioned for

certiorari, arguing that the burden should be on the Government to prove beyond a reasonable doubt that he did not withdraw from the conspiracy.

Analysis. The Supreme Court (Justice Scalia, for a unanimous Court) held that neither the Constitution nor the conspiracy/limitations statutes supported Mr. Smith's argument that the Government bore the burden of disproving, beyond a reasonable doubt, his withdrawal from the conspiracy.

The Court supported its holding on the Constitutional question with citations to *In re Winship*, 397 U.S. 358, 364 (1970) ("[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required) and *Dixon v. United States*, 548 U.S. 1, 6 (2006) (the Government does not have the constitutional duty to overcome the defense beyond a reasonable doubt). Reasoning that since withdrawal from the conspiracy did not negate an element of the conspiracy crimes and that it "achieves more modest ends than exoneration," the "union of withdrawal with a statute-of-limitations defense can free the defendant of criminal liability, [but] it does not place upon the prosecution a constitutional responsibility to prove that he did not withdraw. As with other affirmative defenses, the burden is on" Mr. Smith. Slip op. at 5-6.

The Court likewise found no statutory support for Mr. Smith's argument. Writing that Congress, "[o]f course," may "choose to assign the Government the burden of proving the nonexistence of withdrawal," it "did not do so here." *Id.* at 6.

Quotable. "Having joined forces to achieve collectively more evil than he could accomplish alone, Smith tied his fate to that of the group. His individual change of heart (assuming it occurred) could not put the conspiracy genie back in the bottle. We punish him for the havoc wreaked by the unlawful scheme, whether or not he remained actively involved. It is his withdrawal that must be active, and it was his burden to show that." Slip Op. at 8.

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

PUBLISHED OPINIONS

United States v. Michael Petite, No. 11-14996 (January 3, 2013)

Issue. Is the defendant's prior Florida conviction for intentional vehicular flight a "violent felony" within the meaning of the Armed Career Criminal Act?

Held. Yes.

Background and procedural history. Mr. Petite was arrested as part of an undercover drug bust. The authorities found a loaded handgun and a bag of crack cocaine in the car Mr. Petite had arrived in, and he made a post-*Miranda* admission that the gun and drugs belonged to him. Mr. Petite was indicted in the Middle District of Florida on one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).

After Mr. Petite pleaded guilty, his Presentence Investigation Report (PSR) determined that he should be classified as an armed career criminal pursuant to 18 U.S.C. § 924(e) because he had 3 prior felony convictions in Florida state courts: 1) robbery; 2) sale of cocaine; and 3) feeling and attempting to elude a law enforcement officer. Mr. Petite objected to the third predicate conviction, but the district court overruled, citing the Supreme Court's decision in *Sykes v. United States*, 131 S. Ct. 2267 (2011), in which the Court held that a similar Indiana statute was an Armed Career Criminal Act (ACCA) predicate. The district court therefore sentenced Mr. Petite under the ACCA mandatory minimums, for a total sentence of 188 months in prison, followed by 36 months of supervised release. Mr. Petite appealed to the Eleventh Circuit.

Analysis. The Eleventh Circuit (Judge Marcus, for Associate Justice (ret.) O'Connor and Judge Pryor) applying the "categorical approach," concluded that the Florida offense in question was a "violent felony" within the meaning of the ACCA. The Court noted that the Supreme Court, in analyzing an Indiana statute very similar to the Florida law in the instant case, determined that the risk of injury presented by vehicular is just as inherent as that presented in the ACCA's enumerated offenses of arson and burglary. The Eleventh Circuit reached the same conclusion here, rejecting Mr. Petite's arguments that vehicular flight does not *per se* pose a serious potential risk of injury (for example, a person committing this offense could observe all traffic requirements and simply continue driving while disobeying police instructions to pull over). Mr. Petite attempted to distinguish *Sykes* on the grounds that the Florida statute, unlike its Indiana counterpart, contained a gradient of penalties for different levels of offense culpability. The Court rejected this argument, however, holding that this distinction was not a meaningful one.

The Court acknowledged that it reached the opposite result regarding this very Florida statute in a prior decision, *United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009), but ruled that *Sykes* had so undermined *Harrison* that its holding was abrogated.

United States v. Erick Garcia-Sandobal, No. 11-12196 (January 3, 2013)

Issue.

(1) Did the district court err in accepting the defendant's guilty plea and subsequently enhancing his sentence for illegally reentering the United States following a conviction for an aggravated felony?

(2) Did the district court err in applying the USSG §2L1.2(b)(1)(A)(ii) enhancement (removal from the United States upon conviction of a crime of violence)?

(3) Did the district court err by increasing the defendant's criminal history score by counting a prior conviction for disorderly intoxication?

Held.

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

Background and procedural history. Mr. Garcia-Sandobal, a citizen of Honduras, illegally entered the United States in 1993. Between 1993 and 1998, Mr. Garcia-Sandobal was convicted of several crimes in Florida, including two counts of battery on a law enforcement officer and one count of obstructing or opposing an officer with violence. Mr. Garcia-Sandobal was deported in 1998, but he soon reentered illegally and over the next 12 years committed many more crimes in Florida. He unlawfully reentered the United States, and between 2000 and 2010, Florida convicted Mr. Garcia-Sandobal of several crimes, including disorderly intoxication in 2009.

In October 2010, a federal grand jury indicted Mr. Garcia-Sandobal for illegal reentry. Mr. Garcia-Sandobal pleaded guilty before a magistrate judge, and during the plea colloquy stated on the record his understanding that he was pleading guilty to the offense with the enhanced penalty under 8 U.S.C. § 1326(b)(2).

The presentence investigation report called for a 16-level USSG § 2L1.2(b)(1)(A)(ii) enhancement for a prior deportation upon conviction of a crime of violence – Mr. Garcia-Sandobal's 1996 conviction for obstructing or opposing an officer with violence. The district court overruled Mr. Garcia-Sandobal's objection to the enhancement on the ground that his conviction was not a crime of violence.

The calculation of Mr. Garcia-Sandobal's criminal history score included a 2-point increase for his 2009 conviction for disorderly intoxication, pursuant to USSG §4A1.2(c). These 2 points increased Mr. Garcia-Sandobal's criminal history category from V to VI, with a corresponding increase in his advisory guideline range. Mr. Garcia-Sandobal objected on the ground that the offense of disorderly intoxication is similar to the offense of "public intoxication," which is not counted toward the criminal history score. The district court overruled this objection on the

ground that the offense of disorderly intoxication is more similar to the offense of "disorderly conduct or disturbing the peace," which may be counted toward a defendant's criminal history score. This appeal followed.

Analysis. The Eleventh Circuit (per curiam, before retired Associate Justice O'Connor and Judges Marcus and Pryor), affirmed the district court.

The Court rejected Mr. Garcia-Sandobal's argument that the district court erred by accepting his guilty plea and sentencing him under section 1326(b)(2) because Mr. Garcia-Sandobal waived this argument when he pleaded guilty to violating that section and admitted to the prior aggravated felony. *See United States v. Covington*, 565 F.3d 1336, 1345 (11th Cir. 2009). The Court also rejected Mr. Garcia-Sandobal's argument that he could and did preserve the right to later challenge the classification of his prior conviction at sentencing, noting its contrary holding in *United States v. Bennett*, 472 F.3d 825, 832-33 (11th Cir. 2006).

The Court also affirmed the district court's application of the USSG §2L1.2(b)(1)(A)(ii) enhancement based on its recent opinion in *United States v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012), which held that a conviction under the Florida statute in question constituted a "crime of violence" within the meaning of the guidelines.

The Eleventh Circuit further held that the district court did not err when it assessed 2 criminal history points for Mr. Garcia-Sandobal's conviction for disorderly intoxication. Applying the 5-part test set forth in USSG §4A1.2 cmt. 12(A), the Court concluded that Mr. Garcia-Sandobal's prior conviction was more akin to a conviction for disorderly conduct or disturbing the peace than to a conviction for public intoxication.

United States v. James Leray McIntosh, No. 11-12196 (January 7, 2013)

Issues.

(1) After the Eleventh Circuit held that a second indictment against the defendant violated the Fifth Amendment's Double Jeopardy Clause and ordered the district court to dismiss it, did the district court's imposition of a sentence based on the defendant's guilty plea to the first indictment also violate the Double Jeopardy Clause?

(2) Did the district court err in retaining jurisdiction despite the dismissed indictment?

(3) Did the sentence violate the Constitution's Grand Jury Clause?

(4) Does the Fifth Amendment require a pending indictment at the time of sentencing?

(5) Did the defendant's sentence violate either Rules 7(a) or 12(b)(3)(B) of the Federal Rules of Criminal Procedure?

(6) Did the district court abuse its discretion in denying the defendant's motion to withdraw his guilty plea?
(7) Did the district court have the power to sentence the defendant?
(8) Did the district court err in not sentencing the defendant under the Fair Sentencing Act of 2010 even though sentencing occurred after the Act's effective date?

Held.

(1) No.
(2) No.
(3) No.
(4) No.
(5) No.
(6) No.
(7) Yes.
(8) Yes.

Background and procedural history. Mr. McIntosh was indicted in September of 2007 on one count of possessing five grams or more of crack cocaine with the intent to distribute the drug and one count of carrying a firearm during and in relation to a drug-trafficking offense. The September 2007 indictment arose from a November 2005 traffic stop that lead to a lawful arrest, but erroneously alleged that Mr. McIntosh committed the offenses in February 2007. The Government noticed the error after Mr. McIntosh had pleaded guilty, but before his sentencing, and sought to correct the mistake by obtaining a second indictment alleging the proper date of the offenses and moving to dismiss the original indictment. The district court granted the motion to dismiss. Mr. McIntosh entered a conditional guilty plea to the new indictment, but reserved his right to appeal his conviction on grounds of double jeopardy. The Eleventh Circuit reversed in *United States v. McIntosh*, 580 F.3d 1222, 1229 (11th Cir. 2009), finding that jeopardy attached when the district court accepted McIntosh's original guilty plea and that the acceptance of such a plea on each count was "itself a conviction." *Id.* at 1228 (internal quotation marks and citation omitted). Because the dismissal of the original indictment "did not vacate the convictions or set aside the guilty plea," the Court held that "the Double Jeopardy Clause prohibited a second prosecution of McIntosh for the same offenses." *Id.* at 1228-29. The Eleventh Circuit therefore vacated the judgment and remanded with instructions to dismiss the second indictment.

After the district court dismissed the second indictment, the Government moved to set a sentencing hearing based on Mr. McIntosh's guilty plea to the original indictment. The district court granted that motion, denied Mr. McIntosh's numerous objections, and set a new sentencing hearing based on the original indictment. Mr. McIntosh was sentenced in December 2012 to 120 months in

prison, pursuant to the term of imprisonment mandated before the Fair Sentencing Act of 2010. Mr. McIntosh appealed.

Analysis. For the reasons detailed below, the Eleventh Circuit (Sixth Circuit Judge Gilman, for Chief Judge Dubina and Judge Carnes) affirmed the district court's orders denying Mr. McIntosh's various motions to terminate the proceeding and withdrew his guilty plea, but vacated the sentence and remanded for resentencing.

Double Jeopardy. The Court rejected Mr. McIntosh's argument that the dismissal of the original indictment terminated the case, making any further proceedings in the original case a second prosecution for the same offense, and thus unconstitutional. Rather, the original prosecution never ended, and the eventual sentencing hearing was just a continuation of that original action. "That the government unconstitutionally placed [Mr.] McIntosh in double jeopardy through the prosecution of a second indictment does not transform the first and only sentencing on the original indictment into a double-jeopardy problem." Slip op. at 7.

Jurisdiction. The Court also rejected Mr. McIntosh's argument that the errors in the original indictment divested the district court of jurisdiction. The precedent on which Mr. McIntosh primarily relied on as support for this proposition had been previously overruled. *See United States v. Cotton*, 535 U.S. 625 (2002). Moreover, while there was no pending indictment at the time of Mr. McIntosh's sentencing, by originally pleading guilty Mr. McIntosh had conceded to the original indictment's validity. *See id.*

Grand Jury Clause. Mr. McIntosh next argued that his sentence violated the Fifth Amendment's Grand Jury Clause ("[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury") because, at the time of his sentencing, there was no outstanding indictment. The Court rejected this argument because it read the "to answer for" language as meaning "to speak in reply or opposition to a charge," rather than "to bear the consequences of" – the definition urged by Mr. McIntosh. As such, an extant indictment was not a prerequisite to an otherwise valid sentencing.

Federal Rules of Criminal Procedure 7(a) and 12(b)(3)(B). Since Fed. R. Crim. P. 7(a) "simply gives effect" to the Grand Jury Clause, the Court summarily rejected Mr. McIntosh's Rule 7(a) argument that he was sentenced without being "prosecuted by an indictment" for the same reasons it found his Grand Jury Clause argument unpersuasive. Slip op. at 18.

Mr. McIntosh also argued that his indictment neither invoke the district court's jurisdiction nor stated a federal offense, both of which are fatal to an indictment. Fed. R. Crim. P. 12(b)(3)(B). The Court did not accept this interpretation of the rule because it was "based on the faulty premise that Rule 12(b)(3)(B) requires that an indictment be in place at all times while the case is pending." Slip op. at 20. The Eleventh Circuit dismissed this argument,

characterizing it as an attempt to use a procedural rule to create a substantive right that does not exist.

Separation of powers. The Court rejected Mr. McIntosh's argument that the district court's proceeding to sentence him in the absence of a pending indictment violated the separation of powers doctrine. He maintained that in so doing, the district court effectively usurped the Executive Branch's power to decide whether to abandon a prosecution. But that sentencing hearing was convened on the Government's own motion, making it obvious that the Government had not abandoned the prosecution.

Motion to withdraw guilty plea. The Court summarily affirmed the district court's denial of Mr. McIntosh's motion to withdraw his guilty plea. In order to be permitted to withdraw his guilty plea, Mr. McIntosh had to articulate a "fair and just reason." While an indictment's failure to allege an offense would be a fair and just reason, that is not what occurred in Mr. McIntosh's case. He pleaded guilty to a *bona fide* indictment, and its post-conviction dismissal does not change that fact.

The district court's power to sentence Mr. McIntosh. Mr. McIntosh also argued that, to the extent the court below had any authority to impose sentence on him, that power was limited to the four corners of the indictment and, since there was no indictment at the time of sentencing, the district court had no authority to sentence him. The Eleventh Circuit dismissed this argument, finding it to be just a restatement of the jurisdictional argument it had already deemed unavailing.

Fair Sentencing Act. The Court agreed with both Mr. McIntosh and the Government that he should have been sentenced under the Fair Sentencing Act of 2010's lower mandatory minimums because he was sentenced after its effective date. The Court vacated Mr. McIntosh's sentence and remanded for that limited purpose.

United States v. Erica Hall, No. 11-14698 (January 16, 2013)

Issue. Did the district court err in applying USSG §2B1.1(b)(2)(B), which imposes a 4-level sentencing enhancement when the offense involves more than 50 but less than 250 victims, where the defendant disclosed the personal identifying information of 141 individuals to coconspirators but only 12 individuals' information was used for fraudulent purposes?

Held. Yes.

Background and procedural history. While working as an office assistant in a medical practice, Ms. Hall provided patients' personal identifying information to coconspirators, who used that information to fraudulently obtain credit cards. The coconspirators actually only used the information of 12 out of the 141 individuals'

information that Ms. Hall disclosed. For her participation, Ms. Hall was paid $200.00.

Ms. Hall pleaded guilty to conspiracy to commit bank fraud, conspiracy to commit identity theft and access device fraud, wrongfully obtaining and transferring individually identifiable health information for personal gain. The probation office recommended a 4-level USSG §2B1.1(b)(2)(B) enhancement, because it found that Mr. Hall's offense involved more than 50 but less than 250 victims. Ms. Hall objected, arguing that because just 12 individuals' information out of the 141 that was used in the scheme, the 2-level USSG §2B1.1(b)(2)(A) enhancement for offenses involved more than 10 but less than 50 victims was the applicable enhancement. The district court overruled Ms. Hall's objection, applied the 4-level enhancement, and sentenced her to a below-guideline 14 months in prison. Ms. Hall appealed, arguing that the court erred in applying the 4-level enhancement.

Analysis. The Eleventh Circuit (Chief Judge Dubina, writing for Judges Pryor and Hill) held that the enhancement was improper, vacated Ms. Hall's sentence, and remanded for resentencing. The Court cited Application Note 4(E) of §2B1.1, which defines "victim" as used in the subsection at issue as "(i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was *used* unlawfully or without authority." (Emphasis added.) The 129 individuals in question were not "victims" as defined in Application Note 1, and the Eleventh Circuit further held that they also did not fall under Note 4(E)(ii) because their information was not *used* unlawfully or without authority. Accordingly, the 4-level enhancement should not have been applied to Ms. Hall, and since the district court did not clearly state that it would have applied the 14-month sentence regardless, the Court remanded for resentencing.

United States v. Michael Jiminez, No. 11-15039 (January 25, 2013)

Issue. Did the Government present sufficient evidence at trial to prove that defendant "intentionally misappl[ied]" funds within the meaning of 18 U.S.C. § 666?

Held. No.

Background and procedural history. Mr. Jiminez was the Deputy Director of Fiscal and Administrative Services for Hillsborough County's Head Start Program. In the Spring of 2010, Mr. Jiminez's wife asked him if Head Start might have interest in purchasing copies of a children's book that she had written. Mr. Jiminez recommended the book to colleagues as a resource to help teach children about "germs and their relationship to disease." Slip op. at 3. Specifically, Mr. Jiminez referred his wife's request to the Deputy Director of Program Services. This official

ultimately decided to order copies of Mr. Jiminez's wife's book at a total cost of $9,000.

During this time period, Head Start required employees to submit "conflict of interest" disclosure forms every 45 days. Mr. Jiminez did not disclose his wife's transaction with Head Start on that form.

The grand jury indicted Mr. Jiminez, his wife, and the other head start official in April 2011 for intentionally misapplying funds concerning programs receiving federal funds, 18 U.S.C. § 666, and on honest services mail fraud. Mr. Jiminez was also charged with conspiring to commit offenses against the United States. The jury acquitted Mr. Jiminez of conspiracy to commit offenses against the United States, found him guilty of honest services fraud and intentionally misapplying funds, and acquitted his co-defendants on all charges. The district court granted Mr. Jiminez's motion for judgment of acquittal on the honest services fraud charge, but denied it as to intentionally misapplying funds. Mr. Jiminez was sentenced to 36 months of probation and ordered to pay $9,000 in restitution. He appealed the § 666 conviction.

Analysis. The Court (Judge Wilson, writing for Judge Cox and Northern District of Florida Judge Vinson) reversed Mr. Jiminez's conviction and remanded with instructions that the district court enter a judgment of acquittal because it found that the evidence was insufficient to demonstrate that Mr. Jiminez "applied" or directed any of the funds. Noting that "one cannot 'misapply' funds without having 'applied' them in the first place," the Eleventh Circuit applied the ordinary meaning of "misapply," which in the current context is "a verb connoting an actor who exercises some degree of power over his agency's purse." Slip op. at 10-11.

Here, the Government pointed to 3 "supposedly incriminating actions" by Mr. Jiminez: (1) forwarding the initial e-mail from his wife; (2) being with his colleague when she discussed the books with others; and (3) approving a report acknowledging Head Start's receipt of the books. The Court was not persuaded that this evidence showed that Mr. Jiminez directed any funds, and in fact it was his colleague who authorized the expenditure, a fact that the Eleventh Circuit believed "[n]o reasonable jury could have found otherwise." Slip op. at 12. The Court noted Mr. Jiminez's failure to note the book purchase on his disclosure form, but said "we are reluctant to metamorphose every municipal misstep into a federal crime." *Id*. at 13.

United States v. Thomas Grove, Jr., No. 12-10907 (January 2, 2013)

Issues.

(1) Did the district court err in denying the defendant's request for a mistrial or a new trial in light of the prosecutor's improper statements during closing argument?

(2) Did the district court err in applying a 2-level USSG §2D1.1(b)(1) sentencing enhancement for possession of a dangerous weapon during a drug offense?

Held.

(1) No.

(2) The Court did not reach this question.

Background and procedural history. Mr. Grove was convicted of possession with intent to distribute crack and powder cocaine and sentenced to 97 months in prison. During his trial, the prosecutor made several improper comments during closing argument. For example, the prosecutor encouraged the jury to "help out the community" and "automatically make it safer" by convicting Mr. Grove. Slip op. at 2. Mr. Grove's counsel's objection was overruled by the district court, which later regretted that ruling and instructed the jury that the prosecutor's statements were improper and should be disregarded. The court denied counsel's motion for a mistrial or for a new trial based on the prosecutor's inappropriate comments.

At sentencing, the district court applied a 2-level enhancement pursuant to USSG §2D1.1(b)(1) for possession of a dangerous weapon during the underlying drug offense. Mr. Grove objected to the enhancement, arguing that the firearms discovered in his home did not belong to him and were not reasonably foreseeable because they were not found in his bedroom. The court overruled Mr. Grove's objection.

Mr. Grove appealed the denial of the motion for mistrial or a new trial and the sentencing enhancement.

Analysis. The Eleventh Circuit (per curiam, before Judges Burkett, Martin, and Kravitch) held that the prosecutor's improper statements during closing argument were insufficient to mandate reversal of Mr. Grove's conviction because the district court gave a curative instruction, and because there was ample evidence of Mr. Grove's guilt. The Court affirmed Mr. Grove's sentence irrespective of the propriety of the enhancement because the district court expressly stated that it would have imposed the same sentence pursuant to 18 U.S.C. § 3553(a) even if the enhancement had been inapplicable.

United States v. Henry James Jackson, No. 12-11510 (January 3, 2013)

Issue. Can the defendant collaterally attack a state court conviction that qualified as a career offender predicate, on the grounds that the state conviction is unconstitutional?

Held. No.

Background and procedural history. Mr. Jackson pleaded guilty to numerous drug offenses. The district court applied the USSG §4B1.1 career offender enhancement and sentenced Mr. Jackson to 188 months in prison. Mr. Jackson did not object to the career offender enhancement below, but challenged it on appeal.

Analysis. The Eleventh Circuit (per curiam, before Judges Carnes, Hull, and Jordan) held that the court below did not plainly err in applying the enhancement, rejecting Mr. Jackson's argument that the Florida statute under which he was convicted of the career offender predicate offense was unconstitutional. The Court cited its precedent that a defendant cannot collaterally attack a state court conviction used to apply a career offender enhancement except when that conviction was obtained in violation of the defendant's right to counsel.

United States v. Rogelio Torres, No. 11-14199 (January 3, 2013)

Issue. Did the district court's failure to explain at the defendant's change of plea hearing that an essential element of his 18 U.S.C. § 1915(a) charge was that his criminal conduct affect *interstate* commerce render his guilty plea unknowing and involuntary?

Held. No.

Background and procedural history. Mr. Torres pleaded guilty to multiple § 1915(a) counts. At his change of plea hearing, the district court did not explain to Mr. Torres that, in order for him to be adjudged guilty on those counts, the Government would have to prove that his criminal conduct affected interstate commerce. Mr. Torres appealed, alleging that the district court's failure to explain the interstate commerce element rendered his guilty plea unknowing and involuntary.

Analysis. The Eleventh Circuit (Judges Barkett, Pryor, and Anderson) rejected Mr. Torres's argument. The district court's failure to use the word "interstate" in accepting defendant's plea was not fatal to the plea's soundness because the "necessary jurisdictional elements" of § 1915(a) are "robbery" and "an effect on

commerce," and the district court referenced both elements. Moreover, Mr. Torres's indictment, plea agreement, and change-of-plea hearing all contained these elements and Mr. Torres told the court that his counsel had explained the required elements of the offenses charged. The Court also summarily rejected Mr. Torres's challenge to the sufficiency of the indictment.

The Court affirmed in part, but did remand the case to correct a scrivener's error in the judgment.

United States v. Daniel Edwin Warwick, No. 12-10792 (January 8, 2013)

Issue. Did the district court err in refusing to instruct the jury on an "innocent transitory possession" defense to the defendant's felon-in-possession charge?

Held. No.

Background and procedural history. Mr. Warwick was convicted by a jury of being a felon in possession of a firearm. He appealed, arguing that the district court erred in refusing to instruct the jury on his "innocent transitory possession" defense.

Analysis. The Eleventh Circuit (per curiam, before Judges Barkett, Wilson, and Anderson) affirmed because it has never recognized such a defense and, even if it had, Mr. Warwick had not alleged specific facts to establish that he would be entitled to the defense even if it existed. If there were to be such a defense, it would have to be "narrow and highly fact specific." Slip op. at 3.

United States v. Alfredo Julian Hassun, No. 11-14800 (January 11, 2013)

Issue. Did the defendant's former counsel render ineffective assistance by failing to advise the defendant of the immigration consequences of pleading guilty in 1985, a quarter century before the Supreme Court established this rule in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)?

Held. No.

Background and procedural history. Mr. Hassun, a Cuban national, pleaded guilty to a cocaine defense in 1985 and was deported after serving his sentence. After the Supreme Court ruled in *Padilla*, he moved for a writ of error *coram nobis*, arguing that his trial counsel had rendered ineffective assistance by failing to advise him of the deportation consequences of his 1985 guilty plea.

Analysis. The Eleventh Circuit (per curiam, before Judges Carnes, Barkett, and Black), affirmed the district court's denial of Mr. Hassun's motion for a writ of error

coram nobis, noting that prior to *Padilla* it did not follow the rule adopted therein, and that even if *Padilla* applied retroactively (an open question that it chose not to resolve in this case), Mr. Hassun failed to show that his trial counsel violated the 1985, pre-*Padilla* professional standards. Moreover, even if Mr. Hassan had made such a showing, he had not demonstrated that he suffered prejudice as a consequence – the standard required to establish ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

United States v. Ivan Antonio Flores, No. 12-11587 (January 11, 2013)

Issue. Did the district court lack evidence to find that the defendant's instant offense of illegal reentry occurred within 15 years of his prior crime of violence because the Government failed to present evidence of the date he was released from his prior incarceration or illegally reentered the United States?

Held. No.

Background and procedural history. Mr. Flores pleaded guilty illegal reentry. At sentencing, the district court assessed a 16-level USSG §2L1.2(b)(1)(A)(ii) enhancement (for a previous deportation based on conviction of a crime of violence) because Mr. Flores's prior deportation was precipitated by a California conviction for assault with a deadly weapon. Mr. Flores appealed, arguing that the district court lacked evidence to find that his instant offense of illegal reentry occurred within 15 years of his prior crime of violence because the Government failed to present evidence of the date he was released from his prior incarceration or illegally reentered the United States.

Analysis. The Eleventh Circuit (per curiam, before Judges Carnes, Barkett, and Anderson) affirmed because Mr. Flores admitted at his change of plea hearing that he reentered the country in 1996, just 3 years after his 1993 assault conviction and well within the pertinent 15-year period.

United States v. Joseph Tyrell Duhon, No. 12-12195 (January 15, 2013)

Issue.

(1) Did exigent circumstances justify the police's entry into the defendant's home where the police were there to investigate reports of child abuse and of battery on an adult woman, and where the defendant was seen trying to escape the house?

(2) Was the police's post-arrest protective sweep of the defendant's home reasonable under the circumstances, and did the evidence found constitute probable cause for the issuance of a search warrant?

Held.

(1) Yes.

(2) Yes.

Background and procedural history. The police came to Mr. Duhon's home to investigate reports that he had severely abused a toddler and committed battery on an adult woman. When the police arrived at the home, no one answered the door even though it was obvious that there were people inside, and Mr. Duhon unsuccessfully tried to flee out of a back window. Mr. Duhon went back inside the window after seeing the police, who then went back to the front of the home, where a co-habitant told them that Mr. Duhon was inside the house. The police took a step in, saw Mr. Duhon, and arrested him. As Mr. Duhon was being taken away, the police conducted a protective sweep of the property and found marijuana sitting on a bed and a rifle in a bedroom closet. The house was subsequently searched pursuant to a warrant, and more contraband was found.

Mr. Duhon pleaded guilty after the district court denied his motion to suppress evidence seized from the protective sweep and subsequent search of his home. He argued on appeal that the police lacked probable cause to arrest him, that there were no exigent circumstances to warrant their entry into his home, and that their "protective sweep" of the home did not constitute probable cause to obtain a search warrant.

Analysis. The Eleventh Circuit (per curiam, before Judges Carnes, Barkett, and Martin) affirmed the district court's denial of Mr. Duhon's motion to suppress. The Court held that the police had probable cause to arrest Mr. Duhon and that, taken as a whole, there were exigent circumstances to justify the officers' entry into the home, given the following factors: the report of the abused child and the battery charge against Mr. Duhon; it was late at night; there were a number of people inside the house who refused to answer the door; the lights were off; and Mr. Duhon's escape attempt. (The Eleventh Circuit did emphasize that the absence of any one of these factors could have precluded a finding of exigent circumstances.)

The Court also held that the protective sweep was conducted in conjunction with a lawful arrest, and was appropriate in light of the circumstances at the time. And, since the officers found marijuana and a firearm during the protective sweep, there was probable cause for the subsequent search warrant.

United States v. Terrance Jarome Johnson, No. 12-12471 (January 16, 2013)

Issue. Did the district court breach its duty of impartiality by, after the Government said it had no other witnesses, suggesting to the Government that it

call an additional witness, and that witness's testimony supported a higher advisory guideline range for the defendant?

Held. No.

Background and procedural history. At Mr. Johnson's sentencing hearing, the Government called a witness who it expected to testify that Mr. Johnson asked him to illegally purchase firearms, which would establish several instances of relevant conduct set forth in Mr. Johnson's Presentence Investigation Report and trigger a higher advisory guideline range. But when that witness took the stand, he flatly refused to testify. The Government then said it had no other witnesses, and the district court asked the Government if it would not like to call one of its agents who had interviewed the then-uncooperative witness. The Government elected to do so over defense counsel's objection, and based on that agent's testimony the district court held that the Government had proven the relevant conduct, raising Mr. Johnson's guideline range.

Mr. Johnson appealed, arguing that the district court breached its duty of impartiality during his sentencing hearing, denying him the due process of law.

Analysis. The Eleventh Circuit (per curiam, before Judges Tjoflat, Hull, and Pryor) affirmed, holding that the district court did not abuse its discretion or cross into improper advocacy by inviting the Government to call an agent in light of the formerly cooperating witness's last-minute refusal to testify. The Court cited Fed. R. Crim. P. 32 (trial judge's obligation to make a factual finding is triggered by defendant's objection to the Presentence Investigation Report) and circuit precedent (for example, a district court did not err in prompting the Government to elicit a statement from a witness that was necessary for the prosecution's case) as grounds for its ruling.

United States v. Charles Dennis Britton, Jr., No. 12-10738 (January 23, 2013)

Issue. Did the district court err by failing to elicit objections after imposing sentence and by failing to correctly calculate, or even reference, the defendant's advisory guideline range?

Held. Yes.

Background and procedural history. Mr. Britton appealed his 36-month sentence, imposed upon revocation of his supervised release. He argued that the district court erred by failing to elicit objections after imposing sentence, and by failing to correctly calculate, or even reference, his advisory guideline range.

Analysis. The Eleventh Circuit vacated Mr. Britton's sentence and remanded for resentencing because the district court failed to elicit objections after imposing sentence in violation of *United States v. Jones*, 899 F.2d 1097 (11th Cir. 1990), *overruled on other grounds by United States v. Morrill*, 984 F.2d 1136 (11th Cir. 1993) (en banc), and furthermore failed to correctly calculate, or even reference, defendant's guideline range.

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United States v. Darrin Joseph Hoffman, No. 12-11529 (February 26, 2013)

Issue. Does the use of the defendant's juvenile convictions as predicates for the statutory sentencing enhancement of life in prison violate the Eighth Amendment's Cruel and Unusual Punishment Clause?

Held. No.

Background and procedural history. Mr. Hoffman was indicted for, *inter alia*, conspiracy to distribute 500 or more grams of methamphetamine mixture. Prior to trial, the Government filed a 21 U.S.C. § 851 notice of its intent to seek an enhanced sentence based on Mr. Hoffman's juvenile drug convictions, which it argued constituted "prior convictions for a felony drug offense" under 21 U.S.C. § 841(b)(1)(A). Mr. Hoffman did not object to the notice and proceeded to trial, and the jury found him guilty of all charges.

At sentencing, the district court applied the § 851 enhancement and sentenced Mr. Hoffman to concurrent terms of life in prison. Mr. Hoffman did not object, but later appealed to the Eleventh Circuit, arguing that using his juvenile offenses as triggers for a statutorily mandated sentence of imprisonment for life constituted cruel and unusual punishment.

Analysis. The Eleventh Circuit (per curiam, before Judges Carnes, Hull, and Anderson) rejected Mr. Hoffman's Eighth Amendment argument. The Court dismissed Mr. Hoffman's citation to *Roper v. Simmons*, 542 U.S. 551, 125 S. Ct. 1183 (2005), as

inapposite, noting that *Roper* stood for the proposition that the juvenile death penalty violated the Eighth Amendment, not that juvenile offenses cannot serve as predicate offenses for statutory sentencing enhancements. *See United States v. Wilks*, 464 F.3d 1240, 1242-43 (11th Cir. 2006) (rejecting *Roper* challenge to the use of youthful offender convictions as predicate offenses under the career offender guideline and the Armed Career Criminal Act). The Eleventh Circuit likewise distinguished *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 2460 (2012), noting that "[n]othing in *Miller* suggests that an adult offender who has committed prior crimes as a juvenile should not receive a mandatory life sentence *as an adult* after committing a further crime as an adult." Slip op. at 9 (emphasis in original).

The Court summarily rejected Mr. Hoffman's remaining argument, a challenge to the reasonableness of his sentence.

United States v. Dedrick D. Gandy, No. 11-15407 (February 27, 2013)

Issue. Is the residual clause of the Armed Career Criminal Act (ACCA) void for vagueness?

Held. No.

Background and procedural history. Mr. Gandy was convicted of being a felon in possession of a firearm and ammunition. Finding that he had at least 3 prior, violent felonies, the district court imposed the 15-year mandatory minimum sentence required by the ACCA. Mr. Gandy appealed, raising various challenges to the court's finding that he qualified for sentencing under the ACCA—including an argument that his prior conviction for "simple vehicle flight" in Florida could not be an ACCA predicate offense because the ACCA's residual clause was unconstitutionally vague.

Analysis. Mr. Gandy emphasized Justice Scalia's dissenting opinion in *Sykes v. United States*, ___ U.S. ___, 131 S. Ct. 2267 (2011), in which the justice argued that the residual clause was void for vagueness. The Eleventh Circuit (per curiam, before Judges Carnes, Hull, and Anderson) rejected this argument, noting that a majority of the Supreme Court had rejected Justice Scalia's view in both *Sykes* and *James v. United States*, 550 U.S. 192, 127 S. Ct. 1586 (2007). The Court further noted that 4 of its sister circuits—the, First, Fifth, Sixth, and Eighth Circuits—had also declined to adopt Justice Scalia's view of the residual clause. Slip. Op. at 9-10.

The Eleventh Circuit was also unpersuaded by Mr. Gandy's challenge to his prior conviction for aggravated assault as an ACCA predicate and deemed any error by the district court during the Rule 11 colloquy to be harmless.

Edward Dell v. United States, No. 11-12904 (February 27, 2013)

Issue. Did the district court err in rejecting the defendant's claim that his former counsel rendered ineffective assistance at sentencing and on appeal by failing to argue, prior to the enactment of the Fair Sentencing Act of 2010, for a downward variance based on the crack/powder cocaine disparity?

Held. No.

Background and procedural history. In 2007, a jury found Mr. Dell and 3 of his co-defendants guilty of various crack cocaine offenses.

The month before Mr. Dell's trial, the Supreme Court granted *certiorari* in *Kimbrough v. United States*, 552 U.S. 85, 128 S. Ct. 558 (2007), in which it was to consider whether a district judge's "sentence...outside the guidelines range is per se unreasonable when it is based on a disagreement with the [Sentencing Guidelines] disparity for crack and powder cocaine offenses." The Supreme Court heard oral argument in *Kimbrough* in October 2007, and in November 2007 the district court sentenced Mr. Dell to 235 months in prison. His court-appointed counsel did not file a sentencing memorandum and, during the hearing, did not argue for a variance based on the crack/powder cocaine disparity. Some of Mr. Dell's co-defendants raised the crack/powder disparity, however, and received lower sentences. Mr. Dell's trial counsel also represented him on direct appeal, and did not raise the crack/powder disparity in the appeal even though, by that time, the Supreme Court had issued its opinion in *Kimbrough*, ruling that district courts had the discretion to vary downward if they believed that the crack/powder disparity resulted in greater-than-necessary sentences.

Instead, Mr. Dell's counsel filed only a 5-page argument attacking the district court's factual findings. The Eleventh Circuit affirmed Mr. Dell's sentence, but remanded his co-defendants' cases for resentencing in light of *Kimbrough*. In 2010, Mr. Dell filed a *pro se* 28 U.S.C. § 2255 motion to vacate his sentence, based in part on the argument that his former counsel rendered ineffective assistance by failing to raise the crack/powder disparity at sentencing or on appeal. The district court denied the § 2255 motion, reasoning that the failure to raise an argument on direct appeal when it had not been raised below was not ineffective assistance and that it was also not ineffective assistance to fail to anticipate the change in the law wrought by *Kimbrough*. Mr. Dell filed a *pro se* appeal to the Eleventh Circuit, which appointed counsel to represent him.

Analysis. The Eleventh Circuit (Judge Marcus, for Judges Martin and Southern District of Florida Judge Gold) affirmed the district court's denial of Mr. Dell's § 2255 motion. It did so despite its "serious doubts" about whether Mr. Dell's "counsel's appellate performance met the minimum objective standard of reasonableness." Slip op. at 13. Even so, the Court held that Mr. Dell could not satisfy the "prejudice" prong of *Strickland v. Washington*, 466 U.S. 468, 104 S. Ct. 2052 (1984). At the time of Mr. Dell's direct appeal, binding Eleventh Circuit precedent foreclosed downward variances

based on a district court's disagreement with the crack/powder cocaine disparity. Consequently, although Mr. Dell could demonstrate that [with the advent of *Kimbrough*] there was error, and that the error was plain, he could not satisfy the third prong of the Eleventh Circuit's plain error analysis: a showing that the ensuing prejudice affected his substantial rights. The Court found that Mr. Dell could not make this showing because it could locate nothing in the record—such as an on-the-record comment from the court during Mr. Dell's original sentencing hearing—to indicate that the district court would have imposed a lesser sentence if his counsel had emulated Mr. Dell's co-defendants' counsels and raised the crack/powder disparity.

The Court also held that Mr. Dell's counsel did not render ineffective assistance by failing to raise the argument at sentencing, writing that to do so would be to adjudge Mr. Dell's counsel ineffective for failing to argue against binding precedent based on the speculative outcome of a then-pending Supreme Court case, *Kimbrough*.

Concurrence. Judge Martin concurred in the result, agreeing that it was mandated under the Court's plain error precedents. She wrote separately to express her view that the Court's application of the plain error rule went beyond what the Supreme Court requires for a showing of plain error. Judge Martin would instead prefer that the rule be interpreted to mean that a defendant meets his or her burden of showing a "reasonable probability" that the outcome would have been different if he or she can show that, but for the error, it was just as likely than not that the court below would have ruled in his or her favor. It is unreasonable to expect district judges to use every sentencing hearing as a forum to air a list of grievances about existing law, and to specifically state which sentence he or she would impose but-for binding precedent he or she finds disagreeable.

Judge Martin noted that here, the district court's comments at Mr. Dell's post-Fair Sentencing Act resentencing indicated that it would have given Mr. Dell an even lesser sentence had his counsel raised the crack/powder disparity, but since those comments were not part of the direct appeal record, they could not be considered.

Judge Martin concluded with the observation that, although the Court did not reach the fourth prong of the plain error test—whether the error "seriously affect[ed] the fairness, integrity of public reputation of judicial proceedings"—she felt it worth a mention. Slip op. at 44 (Martin, J., concurring). From the standpoint of the taxpaying public that funds the court system, and from the perspective of the family members of criminal defendants who "sadly find themselves before us," Judge Martin wrote that she was "simply not able to articulate any explanation of why Mr. Dell is being treated differently from his co-defendants that would strike me as fair if he were a family member of mine." The judge concluded, "I am sorry for this, because we have been entrusted with the responsibility to maintain the integrity and public reputation of this institution. When the public we serve cannot make sense of how or why we do what we do, we put those things at risk." *Id*. at 44-45.

Ricky D. Adkins v. Warden, Holman Corr. Facility, No. 11-12380 (February 27, 2013)

Issue. Did the district court err in denying the defendant's 28 U.S.C. § 2254 petition and finding that the Alabama state court considered "all relevant circumstances" in concluding that the exclusion of black potential jurors through the State's peremptory strikes did not result from "purposeful discrimination"?

Held. Yes.

Background and procedural history. In 1988, Mr. Adkins stood trial for capital murder in the St. Clair County, Alabama Circuit Court. At jury selection, the prosecutor used peremptory strikes to eliminate 9 of the 11 black potential jurors. Mr. Adkins struck one of the remaining black potential jurors, leaving just one to serve on the jury. At the time of Mr. Adkins's trial, a state rule prohibited a white defendant, such as Mr. Adkins, from challenging the state's use of peremptory strikes to remove black citizens from the jury pool. Consequently, Mr. Adkins did not object to the strikes on racial grounds, and the prosecutor did not proffer reasons for the strikes. The jury found Mr. Adkins guilty of capital murder and imposed a death sentence.

Before Mr. Adkins's direct appeal was complete, the Supreme Court ruled in *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364 (1991), that a state cannot prevent a criminal defendant from objecting to race-based exclusions of jurors on the ground that the defendant and the excluded juror shared the same race. Mr. Adkins subsequently raised a *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), claim in his petition for writ of *certiorari* to the Supreme Court of Alabama. Ultimately, Mr. Adkins's case was remanded back to the trial court for a *Batson* hearing.

During the *Batson* hearing, the prosecutor proffered reasons for striking each of the 9 black jurors. The reason for one particular strike, of a Billy Morris, was that he was single but, in reality, Mr. Morris was married, and had said so at voir dire. The state judge ordered the prosecutor to explain the discrepancy, and the prosecutor responded by *ex parte* affidavit that he and his staff were simply mistaken. The following day, without argument or an opportunity for Mr. Adkins to cross-examine the prosecutor about his affidavit, the judge entered an order rejecting Mr. Adkins's *Batson* claim and finding that there was no purposeful racial discrimination in the prosecutor's peremptory strikes. As to the strike of Billy Morris, the judge found that he was struck because of the prosecutor's "mistaken" belief that he was single, an assertion the judge deemed credible based on his personal experience with the prosecutor in other cases. The judge's ruling was affirmed on direct appeal and on collateral review. Mr. Adkins then filed a 28 U.S.C. § 2254 petition in the district court, which ultimately denied relief. Mr. Adkins then appealed to the Eleventh Circuit.

Analysis. The Eleventh Circuit (Judge Martin, for Judge Barkett) held that the Alabama state court did not consider "all relevant circumstances in assessing whether Mr. Adkins had proven the *Batson* prong of "purposeful discrimination." The fact that

the prosecutor noted the race of all black potential jurors, but not the race of other potential jurors and that the prosecutor's stated reasons for striking the black jurors did not lead him to strike non-black jurors, indicated that the strikes were racially based. The strike of Billy Morris in particular was contradicted by the record, the trial judge improperly attempted to mollify it by soliciting an *ex parte* affidavit, and the Alabama Court of Criminal Appeals, which summarily affirmed, did not engage in meaningful review.

Dissent. Judge Tjoflat dissented, arguing that procedural default should apply to Mr. Adkins's *Batson* claim because he did not raise a contemporaneous objection to the prosecutor's peremptory strikes.

United States v. Rick A. Kuhlman, No. 11-15959 (March 8, 2013)

Issue. Was the white collar defendant's downwardly variant sentence of "time served" on presentencing supervised release substantively reasonable where the guideline range was 57 to 71 months?

Held. No.

Background and Procedural history. Over a 5-year period, Mr. Kuhlman oversaw a scheme in which health insurance companies were fraudulently billed for services that he knew were not rendered. Before stopping these practices, Mr. Kuhlman collected $2,944,883 in fraudulent billings.

Mr. Kuhlman pleaded guilty to one count of health care fraud. Before the sentencing hearing, Mr. Kuhlman paid $2,944,883 in full restitution. The district court judge was impressed and proceeded to discuss the rising costs of incarceration and alternatives to incarceration. The court then *sua sponte* continued the sentencing hearing for 6 months. During that time, Mr. Kuhlman logged hundreds of hours of community service, visiting various medical, nursing, and chiropractic schools and giving presentations on health care insurance fraud. Mr. Kuhlman also provided 18 days of free chiropractic services at homeless shelters across the Atlanta, Georgia area.

When the district court reconvened Mr. Kuhlman's sentencing hearing, the court imposed a sentence of "time served" on presentencing supervised release, citing Mr. Kuhlman's full restitution payment, his community service, and the rising costs of incarceration. The Government appealed, arguing that this sentence was substantively unreasonable.

Analysis. The Eleventh Circuit (Judge Wilson, for Judges Hull and Anderson) adjudged Mr. Kuhlman's sentence substantively unreasonable and reversed and remanded for resentencing. While noting that it was not holding that probation can *never* be a reasonable sentence in a white collar case, the Court opined that a 57-month downward variance from the low end of the guideline range fails to achieve a critical

consideration in a white collar crime case: deterrence. The Court reasoned that other would-be white collar defendants would look to Mr. Kuhlman's case and not be discouraged from committing criminal acts, believing that, at worst, they will have to perform community service and give the money back. *See United States v. Livesay*, 587 F.3d 1274 (11th Cir. 2009), *United States v. Martin*, 455 F.3d 1227 (11th Cir. 2006), and *United States v. Crisp*, 454 F.3d 1287 (2006). The Eleventh Circuit concluded with the admonition that the Sentencing Guidelines "authorize no special sentencing discounts on account of economic and social status," and cautioned its "district court colleagues" to refrain from sympathizing more with criminal defendants of their same social class because their advantages make them more—not less—culpable than their "desperately poor and deprived brethren in crime." Slip op. at 16 (internal citation omitted).

United States v. Tony Devaughn Nelson, No. 12-11066 (March 13, 2013)

Issue. Is the honest-services mail fraud statute (18 U.S.C. §§ 1341, 1346, 666(a)(1)(B)), as applied to the defendant's conduct, void for vagueness?

Held. No.

Background and procedural history. Mr. Nelson was a former member of the Jacksonville, Florida Port Authority's Board of Directors. While serving on the Board, Mr. Nelson agreed to work for Mr. Young, an influential local businessman, and his company, SSI, which had a number of dealings with the Port Authority. This arrangement included monthly payments from SSI to Mr. Nelson.

Mr. Nelson was indicted following a federal investigation, and a jury found him guilty of honest-services mail fraud and several other mail fraud and bribery offenses. Mr. Nelson appealed, arguing, *inter alia*, that the honest-services mail fraud statute was unconstitutionally vague because it does not describe the "character and scope of the fiduciary relationship from which the honest-services obligation arises." As such, Mr. Nelson maintained that the jury could not determine whether his relationship with Mr. Young and SSI was prohibited by the statute, or if it was simply a matter of him being compensated for perfectly legal lobbying work.

Analysis. The Eleventh Circuit (Senior Southern District of Florida Judge Huck, for Judges Wilson and Hill) rejected Mr. Nelson's argument and held that the honest-services mail fraud statute was not void for vagueness. The Court found that although Mr. Nelson was not paid for his work on the Jacksonville Port Authority, he was nevertheless a "public official" within the meaning of the statute. His arrangement with SSI, through a third-party "middle man," to represent its interests in exchange for monthly payments was a "classic bribery and kickback scenario," and Mr. Nelson had no justifiable argument that the honest-services mail fraud statute did not put him on notice as to the criminality of his actions. Slip op. at 21. As to Mr. Nelson's point

about the lack of statutory language defining the scope of the honest-services obligation, the Eleventh Circuit noted that this concern was acknowledged by the Supreme Court in *Skilling v. United States*, ___ U.S. ___, 130 S. Ct. 2896 (2010), in which the Court upheld the statute against a vagueness challenge.

The Eleventh Circuit also rejected Mr. Nelson's challenge to certain jury instructions and to one of the district court's evidentiary rulings.

United States v. Louis Jean Hippolyte, No. 11-15933 (March 14, 2013)

Issue. Is the defendant, who was convicted of crack cocaine offenses in 1996 and sentenced under the mandatory minimum then in effect, eligible for a 18 U.S.C. § 3582(c)(2) sentence reduction based on Amendments 750 and 759?

Held. No.

Background and procedural history. After being convicted of crack cocaine offenses in 1996, Mr. Hippolyte moved in 2011 for an 18 U.S.C. § 3582(c)(2) reduction pursuant to USSG Amendment 750. Mr. Hippolyte argued that despite being sentenced pursuant to a mandatory minimum, the Guidelines' new definition of "applicable guideline range," which was put into place by Amendment 759, rendered him eligible for a § 3582(c)(2) reduction. The district court rejected this argument, and Mr. Hippolyte appealed.

Analysis. One of the changes wrought by Amendment 759 was the first-ever definition of "applicable guideline range," as used in USSG §1B1.10. The definition is "the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance." USSG §1B1.10 cmt. n.1(A) (2011). Prior to Amendment 759, the Eleventh Circuit had defined "applicable guideline range" as "the scope of sentences available to the district court, which could be limited by a statutorily imposed mandatory minimum 'guideline sentence.'"

Mr. Hippolyte argued that since the new, Amendment 759 definition does not mention mandatory minimums, they are excluded from consideration and, therefore, the fact that he was sentenced under the 1996-era mandatory minimums does not preclude his eligibility for a § 3582(c)(2) reduction. The Eleventh Circuit (Judge Tjoflat, for Judge Hill and Senior Southern District of Florida Judge Huck) rejected this "creative" argument. Even notwithstanding the definition of "applicable guideline range," §1B1.1(a) directs use of Chapter 5 as part of the process for determining the applicable guideline range, and §5G1.1(b) specifically provides that, where a statutory mandatory minimum is greater than the high end of the applicable guideline range, the mandatory minimum becomes the guideline sentence. The Eleventh Circuit further noted that the actual purpose of the Amendment 759 definition was to resolve a circuit split over which, if any, departures should be deemed part of the applicable

guideline range, and that it did so by clarifying that no departures should be included in that calculation.

The Court disposed of Mr. Hippolyte's assertion that the Fair Sentencing Act applies retroactively, noting that this argument is foreclosed by precedent. *See United States v. Berry*, 701 F.3d 374 (11th Cir. 2012).

United States v. Arturo Carillo-Ayala, No. 11-14473 (March 22, 2013)

Issue. Is a defendant who sells both firearms and drugs per se disqualified from receiving safety-valve relief?

Held. No.

Background and procedural history. Mr. Carillo-Ayala sold a number of drugs and firearms, in separate but sometimes overlapping transactions, to an undercover law enforcement officer. After being indicted, he entered a blind guilty plea to possession with intent to distribute at least 5 grams of methamphetamine and of being an illegal alien in possession of a firearm. The meth count carried a 5-year mandatory minimum sentence, but Mr. Carillo-Ayala sought safety-valve relief because it was his first qualifying drug offense, and he argued that his possession of the firearms did not preclude safety valve because there was no "connection" (within the meaning of USSG §5C1.2(a)(2)) with the two types of sales. The district court rejected Mr. Carillo-Ayala request for safety-valve relief, and he appealed to the Eleventh Circuit.

Analysis. The Eleventh Circuit (District of Montana Judge Molloy, for Judges Tjoflat and Cox) rejected the Government's argument that a "connection" between drugs and firearms always exists where, as here, the firearms were part of the "relevant conduct" for a drug offense. Accordingly, it is possible for a defendant who possesses guns to receive safety-valve relief. Even so, the Court concluded that a "connection" within the meaning of §5C1.2(a)(2) means that a defendant possesses the firearm "in close proximity" to the drugs, "facilitates" the drug offense by "emboldening" the defendant, or by helping the defendant's drug activities avoid detection.

Here, the Court held that Mr. Carillo-Ayala did possess the firearms in "connection" with his drug trafficking because the proceeds from the firearm sales may have been subsequently used to fund the drug activities. The Court also noted that, by selling firearms to an individual he thought to be a drug dealer, Mr. Carillo-Ayala was providing the dealer a means to facilitate his continuation in the drug trafficking scheme.

SELECTED UNPUBLISHED OPINIONS

United States v. David Hayden, No. 12-11346 (March 4, 2013)

Issue. In a possession of child pornography case where the defendant's defense was that any downloads of were inadvertent, did the district court err in admitting the testimony of medical doctors and law enforcement officers regarding the ages of the persons in the images and the victim impact?

Held. No.

Background and procedural history. A jury found Mr. Hayden guilty of receipt of child pornography. Throughout his trial, at sentencing, and on appeal, Mr. Hayden did not dispute that his computer contained child pornography images, basing his defense on the argument that he did not intentionally download the images. On appeal, Mr. Hayden argued, *inter alia*, that the district court erred in admitting the testimony of medical doctors and law enforcement officers on the ages of the persons in the images and the victim impact.

Analysis. The Eleventh Circuit (per curiam, before Judges Wilson, Anderson, and Edmondson) rejected Mr. Hayden's argument. The Court held that since Mr. Hayden argued that he received the child pornography images by mistake, it was not plain error for the district court to allow the evidence to rebut Mr. Hayden's argument that his receipt of child pornography was inadvertent.

The Court further noted that even if there was error, it was harmless in light of the overwhelming evidence of the Mr. Hayden's guilt and summarily rejected his remaining arguments.

United States v. Randy Wilcher, No. 11-14140 (March 13, 2013)

Issue. Did the district court plainly err by admitting the defendant's prior statement where the defendant did not object until after the next court recess?

Held. No.

Background and procedural history. Mr. Wilcher stood trial for various drug and firearm charges. During the jury trial, the Government used one of Mr. Wilcher's prior statements. Although the Government had not filed a pretrial Fed. R. Crim. P. 16(a)(1)(A) disclosure of its intent to use the statement, Mr. Wilcher's counsel did not object until after the court's next recess. After being found guilty and sentenced, Mr. Wilcher appealed.

Analysis. Mr. Wilcher's primary argument on appeal was that the district court erred

in admitting his prior statement because the Government violated Fed. R. Crim. P. 16(a)(1)(A). The Government conceded that it violated Rule 16, but argued that the district court's admission of the statement was not plain error, which was the appropriate standard of review because Mr. Wilcher did not lodge a contemporaneous objection, and instead only objected after the next court recess. The Eleventh Circuit agreed, adjudging an objection after the next court recess insufficient to preserve the issue for appeal under the more lenient abuse-of-discretion standard of review. The Court also rejected Mr. Wilcher's other arguments.

Dissent. Judge Martin dissented from the majority's (Chief Judge Dubina and Ninth Circuit Judge Alcaron) per curiam opinion because she felt reversal was warranted under the doctrine of cumulative error. She noted the aforementioned Rule 16 violation, giving it more context, as well as others, and commented that by extending leniency to federal prosecutors, "we invite them to relax from being the careful lawyers they are capable of being." Slip op. at 18.

United States v. Leighton Martin Curtis, No. 12-10864 (March 19, 2013)

Issue. Did the defendant have a reasonable expectation that his cell phone call would be private when he conducted the conversation in the presence of another, with the other telephone party on speaker phone?

Held. No.

Background and procedural history. Following his conviction for sex trafficking of a minor, Mr. Curtis appealed the denial of his motion to suppress a webcam video (recorded by the alleged victim) that showed Mr. Curtis speaking on his cell phone's speaker phone to an unknown female while Mr. Curtis and the victim were in the same room.

Analysis. The Eleventh Circuit affirmed, holding that Mr. Curtis did not have a reasonable expectation of privacy because he was in the same room with another individual (the victim) at the time, and conducted the conversation on speaker phone. The Court also rejected Mr. Curtis's remaining arguments.

United States v. Valarian Jaymonn Brown, No. 12-11744 (March 19, 2013)

Issue. Was the Government's otherwise correct pre-trial 21 U.S.C. § 851 notice of enhanced sentence deficient because it misidentified the defendant's prior drug convictions as being for possession with intent to distribute, rather than for simple possession?

Held. No.

Background and procedural history. A jury found Mr. Brown guilty of conspiracy to possess with intent to distribute cocaine and marijuana, and of possession with intent to distribute cocaine. Prior to trial, the Government had filed a 21 U.S.C. § 851 notice of enhanced sentence, claiming that Mr. Brown had prior Washington state convictions for possession of a controlled substance with intent to distribute and possession of a controlled substance without a prescription. At sentencing, Mr. Brown objected to the § 851 notice on the ground that it misidentified the nature of his prior offenses, which were actually for simple possession of cocaine. The district court overruled, concluding that the notice was sufficient, as evidenced by the fact that Mr. Brown was able to identify, without confusion, the prior convictions upon which the Government was relying. The district court then applied the § 841(b)(1)(A) enhancement, based on the § 851 notice, and sentenced Mr. Brown to a mandatory term of life imprisonment.

Analysis. The Eleventh Circuit (per curiam, before Chief Judge Dubina and Judges Marcus and Kravitch) affirmed, finding that despite the inaccurate identification of Mr. Brown's prior convictions, the Government's § 851 notice was sufficient to effectuate the purposes of such notice. Those purposes are to allow a defendant to (1) "contest the accuracy of the information," and (2) "have ample time to determine whether to enter a plea or go to trial and plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." Slip op. at 6, *citing United States v. Ramirez*, 501 F.3d 1237, 1239 (11th Cir. 2009). Even though the prior convictions were misidentified, the notice gave Mr. Brown sufficient accurate details to research, identify, and potentially contest the accuracy of the information, and also signaled the Government's intent to seek a sentencing enhancement.

United States v. Scott Michael Patrick, No. 11-14466 (March 20, 2013)

Issue. Did the district court conduct an improper Fed. R. Evid. 403 analysis and abuse its discretion in partially granting the defendant's motion in limine to exclude surveillance video recordings of the prison brawl that led to the instant prosecution against him?

Held. Yes.

Background and procedural history. The Government appealed the district court's partial grant of Mr. Patrick's motion in limine, which excluded 2 surveillance video recordings of the prison brawl that led to the instant prosecution against Mr. Patrick. The videos showed one inmate being fatally stabbed by another, although not by Mr. Patrick, who was charged only with aiding and abetting an assault. The district court agreed with Mr. Patrick that, pursuant to Fed. R. Evid. 403, the prejudicial nature of the videos outweighed their probative value.

Analysis. The Eleventh Circuit (per curiam, before Judges Carnes, Hull, and Fay) reversed, finding that the district court abused its discretion by excluding the surveillance videos, which it found offered "highly probative and irreplaceable evidence of [defendant's] role in the charged assault." Slip op. at 6. It rejected Mr. Patrick's argument that his concession that he participated in the brawl, and the availability of live testimony from other witnesses and brawl participants, detracted from the probative value of the videos, citing the "standard rule" that, absent exceptional circumstances, "the prosecution is entitled to prove its case by evidence of its own choice," and a "criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." Slip op. at 11, *citing Old Chief v. United States*, 519 U.S. 172, 186-87, 117 S. Ct. 644, 653 (1997).

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Chunon L. Bailey v. United States, No. 11-770 (February 19, 2013)

Issue. Does the seizure of a person stopped and detained one mile away from the premises for which the police officer had a valid search warrant violate the Fourth Amendment?

Held. Yes.

Background and procedural history. Local police obtained a search warrant for Mr. Bailey's basement apartment based on a tip that he was selling drugs and was in possession of a handgun. While surveilling the property, the police saw Mr. Bailey leave the apartment, enter his car, and drive away. The police followed Mr. Bailey for about one mile before pulling him over. The police detained Mr. Bailey, drove him back to his apartment, and then arrested him after finding drugs and a firearm in the apartment.

Mr. Bailey moved to suppress the evidence seized from his apartment. The district court denied the motion, citing *Michigan v. Summers*, 452 U.S. 692 (1981), in support of its conclusion that the police's seizure of Mr. Bailey was justified as a detention incident to the execution of a search warrant. Mr. Bailey proceeded to trial and was found guilty. The United States Court of Appeals for the Second Circuit affirmed, and the Supreme Court granted *certiorari*.

Analysis. The Court (by Justice Kennedy, for a 6-3 majority) began by revisiting *Summers*. In that case, the Court held that the police did not violate the Fourth Amendment by detaining the occupant of home for which they had a search warrant when they encountered the occupant going down the front steps outside of the home. The Court stated that officer safety, orderly completion of the search, and preventing a home occupant's flight all rationalized the *Summers* decision. But none of those rationales justified broadening the scope of the *Summers* rule to fit the facts of Mr. Bailey's case. Mr. Bailey was no longer on the premises and posed no threat to officer safety. His absence also precluded Mr. Bailey from interfering with the orderly completion of the search, and his flight was not at issue because, of course, Mr. Bailey was not at the home.

***Florida v. Clayton Harris*,** No. 11-817 (February 19, 2013)

Issue. In every case, must the State present an exhaustive set of records, including a log of the drug-detection dog's performance in the field, to establish the dog's reliability in order for the court to find that the dog's "alert" during a traffic stop provided probable cause to search a vehicle?

Held. No. "[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert." Slip. Op. at 8.

Background and procedural history. Liberty County, Florida Sheriff's Officer Wheetley pulled over Mr. Harris for an expired license plate. Observing that Mr. Harris was nervous and had an open beer can in his truck, Officer Wheetley asked Mr. Harris for consent to search his truck. Mr. Harris refused. Officer Wheetley then retrieved his drug-detection dog, Aldo, from his patrol car and executed a sniff test around Mr. Harris's truck. Aldo alerted to the driver's side door handle, and Officer Wheetley proceeded to search Mr. Harris's truck. Although the search did not produce the drugs Aldo was trained to detect, Officer Wheetley did find pseudoephedrine and other ingredients used to manufacture methamphetamine. Mr. Harris admitted to routinely cooking methamphetamine at his house, and the State charged him with possessing pseudoephedrine for use in manufacturing methamphetamine.

In a subsequent stop while Mr. Harris was out on bail, Officer Wheetley pulled over Mr. Harris for a broken brake light. Officer Wheetley again executed a sniff test with Aldo, and Aldo again alerted to the driver's side door handle. However, when Officer Wheetley searched the truck, nothing of interest was found. Mr. Harris moved to suppress the evidence found in his truck on the ground that Aldo's alert had not given Officer Wheetley probable cause to search. At the suppression hearing, Officer Wheetley offered extensive evidence of Aldo's training and certification in drug-detection. Mr. Harris's attorney did not contest Aldo's quality of training, but did question Aldo's certification and performance in the field.

The trial court denied Mr. Harris's motion to suppress and found that Officer Wheetley had probable cause to search Mr. Harris's truck. The Florida Supreme Court reversed, holding that the "State needed to produce a wider array of evidence: . . . 'evidence of the dog's performance history,' including records showing 'how often the dog has alerted in the field without illegal contraband having been found.' " Slip Op. at 4 (*quoting* 71 So. 3d 756, 775, 769 (2011)). The Florida Supreme Court found that Officer Wheetley could only establish his faith in Aldo, as a reliable indicator of dugs, with field performance records, in addition to completed training programs. Mr. Harris successfully petitioned for *certiorari.*

Analysis. The Supreme Court (Justice Kagan, for a unanimous Court) held that Aldo's completed training programs, certification, continued weekly training with Officer Wheetley, and Aldo's success within each of those exercises, was sufficient to establish Aldo's reliability, and thus give Officer Wheetley probable cause to search Mr. Harris's truck.

"The question . . . is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test." Slip Op. at 9. This test is rooted in the Court's prior holdings, as it reiterated, "[a] police officer has probable cause to conduct a search when 'the facts available to [him] would 'warrant a [person] of reasonable caution in the belief' ' that contraband or evidence of a crime is present." Slip Op. at 5 (*quoting Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion) (*quoting Carroll v. United States*, 267 U.S. 132, 162 (1925)). The Court has held probable cause as a "fluid concept" and that it should not be "reduced to a neat set of legal rules." *Id.* (*quoting Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

The Court denounced the Florida Supreme Court's creation of "a strict evidentiary checklist." *Id.* at 6. The Florida Supreme Court's use of bright line rules, as to whether probable cause should be extended, went against the mandated totality-of-the-circumstances analysis. Rather, the Court held that the best indicia of reliability for a dog's skill in detecting drugs is observed in "controlled testing environments" and, where a dog has been certified by a bona fide organization in such an environment,

> a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs.

Id. at 8.

Roselva Chaidez v. United States, No. 11-820 (February 20, 2013)

Issue. Does *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010), apply retroactively to cases already final on direct review?

Held. No.

Background and procedural history. Ms. Chaidez, who became a lawful permanent resident in 1977, pleaded guilty in 2004 to two counts of mail fraud and

was sentenced to four years of probation and ordered to pay restitution. At the time of her plea, Ms. Chaidez's attorney did not advise her that, because those offenses were "aggravated felonies," they subjected Ms. Chaidez to mandatory removal from the United States.

In 2009, Ms. Chaidez applied for citizenship, which alerted the immigration authorities of her 2004 conviction. Immigration officials then initiated removal proceedings. Ms. Chaidez petitioned for a writ of *coram nobis* to overturn her 2004 conviction on the ground that her former counsel's failure to advise her of the immigration consequences of pleading guilty constituted ineffective assistance of counsel.

While Ms. Chaidez's petition was pending, the Supreme Court decided *Padilla*, which held that failure to inform a client of the immigration consequences of a guilty plea did indeed constitute ineffective assistance of counsel. The district court denied Ms. Chaidez's motion anyway, however, holding that *Padilla* did not apply retroactively. The Seventh Circuit affirmed, and the Supreme Court granted *certiorari* to resolve a circuit split on the question of *Padilla*'s retroactivity.

Analysis. The Court (Justice Kagan, for a 7-2 Court with Justice Thomas concurring) held that *Padilla* did not have retroactive effect and affirmed the Seventh Circuit. *Teague v. Lane*, 489 U.S. 288 (1989) established that the retroactivity of criminal procedure decisions depends on whether or not those decisions constitute a "new" rule, as opposed to the application of an extant one. When it is a new rule, a person whose conviction is already final cannot avail himself or herself of the new rule.

In *Padilla*, before deciding if the failure to inform a client of immigration consequences constituted ineffective assistance, the Court first considered whether or not advice about deportation was "categorically removed" from the scope of the Sixth Amendment right to counsel because it involved a "collateral consequence" of a conviction and not a component of a criminal sentence. This indicates that the *Padilla* rule was a "new rule," and therefore did not have retroactive effect.

Lamar Evans v. Michigan, No. 11-1327 (February 20, 2013)

Issue. Is an erroneous acquittal in a criminal case an "acquittal" for double jeopardy purposes?

Held. Yes.

Background and procedural history. Mr. Evans was tried by the State of Michigan on a single count of arson. At the close of the State's case, Mr. Evans moved for a directed verdict of acquittal on the ground that the State had failed to prove an element (that the burned building was not a "dwelling") of the offense. The trial court agreed and granted Mr. Evans's motion.

The State appealed, arguing that the "element" Mr. Evans claimed was unproven at trial was not actually an element of the Michigan arson statute at all. The Michigan Court of Appeals agreed, and its reversal was affirmed by the Supreme Court of Michigan.

Analysis. The Court (Justice Sotomayor for an 8-1 Court, with Justice Alito in dissent) held that its prior decisions in *Fong Foo v. United States*, 369 U.S. 141 (1962), *United States v. Ball*, 163 U.S. 662 (1886), and *Smith v. Massachusetts*, 543 U.S. 462 (2005) controlled this case, and reiterated that the Double Jeopardy Clause "bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation.'" Slip op. at 4, *citing Fong Foo*, 369 U.S. at 143. The Court also declared that a "mistaken acquittal is an acquittal nonetheless." Slip op. at 4.

Deborah K. Johnson, Acting Warden, v. Tara Sheneva Williams, No. 11-465 (February 20, 2013)

Issue. Is there a rebuttable presumption that a federal claim has been "adjudicated on the merits in State court" within the meaning of 28 U.S.C. § 2254(d) when the state court rules against the defendant and issues an opinion that addresses some issues but does not expressly address the federal claim in question?

Held. Yes.

Background and procedural history. Ms. Williams was convicted of first-degree murder in California. On direct appeal, she challenged the propriety of a juror's discharge on state law grounds and under the Sixth Amendment to the federal Constitution. In rejecting any challenge to the juror discharge, the California Court of Appeal did not expressly state that it was rejecting Ms. Williams's Sixth Amendment argument. The California Supreme Court remanded Ms. Williams's case to the Court of Appeal for reconsideration in light of intervening authority, but the Court of Appeal again rejected Ms. Williams's juror discharge arguments, again without expressly deciding the issue on Sixth Amendment grounds.

After unsuccessfully seeking state collateral relief, Ms. Williams petitioned for habeas corpus in federal district court. That court denied relief, based on § 2254(d)'s deferential standard of review. The Ninth Circuit reversed, finding it "obvious" that the California Court of Appeal had "overlooked or disregarded" Ms. Williams's Sixth Amendment claim and, applying its own precedent, held that the juror discharge violated the Sixth Amendment. The Supreme Court granted *certiorari.*

Analysis. The Court (Justice Alito for a unanimous Court, with Justice Scalia concurring in the judgment) reversed the Ninth Circuit, finding this case controlled by *Harrington v. Richter*, 562 U.S. ___ (2011). In *Richter*, the Court held that when a state court did not give *any* reasons for rejecting any of the claims raised by a defendant, including a federal claim that the defendant later seeks to raise in a federal habeas proceeding, the federal court must nevertheless proceed under a rebuttable presumption that the federal claim was adjudicated on the merits. The Court determined that there was no reason for a different result where, as in Ms. Williams's case, the state court addressed *some* claims, but not expressly the federal claim later asserted in a federal habeas petition. As in *Richter*, this "strong" presumption is still rebuttable. Slip op. at 10. For example, if a state standard is less protective than a federal standard, a petitioner could potentially rebut the presumption.

The Court further justified its holding by pointing out that state courts do not uniformly address every claim raised by a defendant. For example, some may view a line of state precedent as having fully incorporated a corresponding federal constitutional right and see no need for a separate discussion and written determination on a passing citation to a federal case or constitutional provision.

Applying this reasoning to Ms. Williams's case, the Court held that the Ninth Circuit erred.

Armarcion D. Henderson v. United States, No. 11-9307 (February 20, 2013)

Issue. Is an error "plain" within the meaning of Fed. R. Crim. P. 52(b) when it concerns a substantive legal question that was unsettled at the time the trial court acted, but was resolved in the defendant's favor at the time of direct appellate review?

Held. Yes.

Background and procedural history. Mr. Henderson pleaded guilty to being a felon in possession of a firearm. The district court varied upward to sentence Mr. Henderson to an above-guidelines prison term of 60 months. The court stated that it was doing

so in order to "try to help" Mr. Henderson by having a sentence that would qualify him for an in-prison drug rehabilitation program. Mr. Henderson did not object.

After Mr. Henderson's sentencing but before his direct appeal was heard, the Supreme Court decided in *Tapia v. United States*, 564 U.S. ___ (2011) that it was error for a district court to "impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." 564 U.S. at ___ (slip op. at 15). The Fifth Circuit declined to vacate Mr. Henderson's sentence under *Tapia* because Mr. Henderson did not object below and because, prior to *Tapia*, there was a circuit split on this issue. It determined that an error "is plain only if it was clear under current law *at the time of trial*." *United States v. Henderson*, 646 F.3d 223, 225 (5th Cir. 2011) (emphasis in original). The Court granted *certiorari* to resolve a circuit split.

Analysis. The Court (Justice Breyer for a 6-3 Court with Justice Scalia in a dissent and joined by Justices Thomas and Alito) held that an error was "plain" if the erroneous nature of the ruling below was plain at the time of appellate review. This holding answers the question expressly left open by the Court in its previously seminal case on plain error, *United States v. Olano*, 507 U.S. 725, 732 (1993). This principle has support in the law as far back as Chief Justice Marshall's opinion in *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801), and Rule 52 by its own terms demonstrates that the plain error rule is not absolute. The Court also observed that, if the plain error rule covers trial court decisions clearly correct at the time they were made, and those clearly incorrect when made, then the rule should also cover those cases in the middle – where, as in Mr. Henderson's case, the decision was neither correct nor incorrect at the time, but was unsettled.

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

PUBLISHED OPINIONS

United States v. Jason Dennis McGuire, No. 11-12052 (January 30, 2013)

Issue. Is the defendant's 18 U.S.C. § 32(a)(1) conviction for attempt to damage, destroy, disable, or wreck an aircraft "in the special aircraft jurisdiction of the United States" a "crime of violence" within the meaning of 18 U.S.C. § 924(c)?

Held. Yes.

Background and procedural history. Mr. McGuire, inebriated and contemplating suicide, stepped outside his home and began firing a loaded handgun down the street and toward a tree. Neighbors called the police, and officers responded on the ground and in a helicopter. Mr. McGuire, who had stepped back into his home, went outside again and fired one round into the sky as the police helicopter circled overhead. Mr. McGuire was indicted under 18 U.S.C. § 32(a)(1) for attempting to "set[] fire to, damage[], destroy[], disable[], or wreck[] an[] aircraft in the special jurisdiction of the United States." The district court determined that this was a crime of violence within the meaning of 19 U.S.C. § 924(c)(1)(A) and, accordingly, imposed the mandatory consecutive sentence required under that statute. Mr. McGuire appealed.

Analysis. The Eleventh Circuit (Retired Associate Justice O'Connor writing for Judges Marcus and Pryor) applied the "categorical" approach to determine whether Mr. McGuire's offense was a crime of violence. In so doing, it had to assess whether the offense, in general, could plausibly proscribe any non-violent conduct. The Court noted that § 32(a)(1) requires a finding that a defendant attempted to damage or disable an aircraft in the "special aircraft jurisdiction of the United States" which, pursuant to 49 U.S.C. §§ 46501(1)(A),(2), is defined as an "aircraft in flight."

The Eleventh Circuit accordingly found that the "set fire to," "damage," "destroy," or "wreck" versions of the offenses "can be readily recognized as crimes of violence" because they necessarily endanger both property and human life. Slip op. at 7-8. The Court rejected Mr. McGuire's argument that because § 32(a)(1) can also be violated by attempting to "disable an aircraft," this precludes the offense from being a § 924(c) "crime of violence." The Court found that attempting to disable an aircraft while people are on board is itself a very serious act of force that, similar to burglary, at a minimum carries a serious risk of a face-to-face confrontation between a perpetrator and a third party, particularly in this era of heightened aircraft security.

John Duncan Fordham et al. v. United States, Nos. 12-10299, 12-10948 (January 31, 2013) [consolidated cases]

Issue. Did the district court err in denying the defendants' 28 U.S.C. § 2255 motions on procedural default grounds?

Held. No.

Background and procedural history. The district court denied both co-defendants' 28 U.S.C. § 2255 motions, holding that their claims were procedurally defaulted because they failed to raise them on direct appeal. The defendants had argued on direct appeal that both the "cause and prejudice" and "actual innocence" exceptions to the procedural default rule applied. After the Eleventh Circuit affirmed, the Supreme Court decided *Skilling v. United States*, ___ U.S. ___, 130 S. Ct. 2896 (2010), which limited the scope of 18 U.S.C. § 1346, the honest-services fraud statute, under which both defendants here were convicted.

Analysis. The Eleventh Circuit (Judge Marcus, for Judge Martin and Southern District of Florida Judge Gold) affirmed the district court because, despite several mentions of "honest-services fraud" during the defendants' trial and in a jury instruction, the only theory of honest-services fraud that could have been a basis for the defendants' convictions was bribery. Bribery convictions were not at issue in *Skilling*, and the defendants therefore could not show prejudice or establish actual innocence.

United States v. Christina Elizabeth Colon, No. 12-12794 (February 6, 2013)

Issue. Did the district court err in applying the post-Amendment 759 version of USSG §1B1.10(b)(2), restricting the scope of the court's authority to further reduce the defendant's sentence below the amended guidelines range in a 18 U.S.C. § 3582(c)(2) proceeding?

Held. No.

Background and procedural history. In 2006, Ms. Colon pleaded guilty to distribution of crack cocaine and possession of a firearm in furtherance of a drug trafficking crime. Her post-acceptance of responsibility guideline range for the drug offense was 46-57 months, and the firearm count carried a 5-year mandatory minimum. The district court sentenced Ms. Colon to 96 months in prison.

In 2008, Ms. Colon filed an 18 U.S.C. § 3582(c)(2) motion to reduce her sentence pursuant to USSG Amendment 706. The district court granted the motion and, based on an amended guideline range of 37-46 months and a downward variance comparable to the one she originally received, sentenced Ms. Colon to 87 months in prison.

When Ms. Colon filed a second § 3582(c)(2) motion based on Amendment 750, the district court denied it because her original variance was not based on substantial

assistance and because Ms. Colon's current sentence was below the amended guideline range of 30-37 months. Ms. Colon appealed to the Eleventh Circuit.

Analysis. The Eleventh Circuit (Judge Carnes, writing for Judges Pryor and Tjoflat) held that the district court was within its scope of authority and discretion to deny Ms. Colon's second § 3582(c)(2) motion to further reduce her sentence, based on the restrictions prescribed in Amendment 759. The Court found no merit in Ms. Colon's four arguments against the application of Amendment 759. First, the Court did not find that Amendment 759 violated the Ex Post Facto Clause because the "net effect of Amendments 750 and 759 was not to increase her range of punishment above what it was at the time she committed her crimes." Slip op. at 5-6.

Second, Ms. Colon argued that the Sentencing Commission exceeded its authority and violated the Sentencing Reform Act, 28 U.S.C. § 994. Following the Third and Eighth circuits, the Court held that the Commission acted properly, under the Sentencing Reform Act, in restricting sentence reductions under § 3582(c)(2). The Court noted specific provisions of the Sentencing Reform Act which expressly requires and authorizes the Commission (1) "to specify the circumstances in which and the amounts by which sentences may be reduced based on retroactive amendments;" and (2) "that it do so in a policy statement." *Id.* at 8. 28 U.S.C. §§ 994(u), 994(a)(2)(C).

In responding to Ms. Colon's third argument, the Court rejected the argument that the Commission violated the separation of powers doctrine and again followed the Third and Eighth circuits. The Court stated that §1B1.10(b)(2) does not override a court's original sentence, and that the Commission is authorized by Congress to impose limitations on reducing an "otherwise final sentence." Slip op. at 10. The Court also held that 28 U.S.C. § 994(p)'s report-and-wait procedure for issuing legislative rules "applies only to guidelines and not to policy statements. Section 1B1.10(b)(2) is not a guideline but a policy statement." *Id. See* 28 U.S.C. § 994(p).

Finally, the Court rejected Ms. Colon's fourth argument that the Commission did not comply with the notice and comment requirements of the Administrative Procedure Act ("APA"). Agreeing with the Third, Eighth, and Ninth circuits, the Court held "the Commission's policy statements, specifically including §1B1.10, are not subject to the APA's notice and comment provisions." Slip op. at 12; (citing *Berberena*, 694 F.3d at 526-27; *United States v. Anderson*, 686 F.3d 585, 590 (8th Cir. 2012); *United States v. Fox*, 631 F.3d 1128, 1131 (9th Cir. 2011)). Ms. Colon contended that the Commission's policy statement was binding and thus should be subject to the APA's notice and comment provisions. However, the Court held that "it was Congress . . . that made §1B1.10 binding on the courts" by requiring sentence reductions in a § 3582(c)(2) proceeding to be "consistent with the Commission's policy statements." *Id.* at 13.

United States v. Chester Ray Slaughter, No. 11-15262 (February 11, 2013)

Issues.

(1) Did the district court err in denying the defendant's motion to suppress a statement given after a warrantless entry into his hotel room that violated the Fourth Amendment?

(2) Did the district court err in refusing to order 2 separate trials for each of the 2 counts for which the defendant was charged?

(3) Does an "actual minor" have to be involved in the defendant's offense in order for him to be convicted under 18 U.S.C. § 2260A?

Held.

(1) No.

(2) No.

(3) No.

Background and procedural history. Mr. Slaughter, a registered sex offender, engaged in an Internet relationship with a law enforcement officer who was posing as a 14-year old girl. They agreed to meet at a hotel room. Law enforcement agents kept that appointment, and when Mr. Slaughter answered the door they tackled and handcuffed him, and told him that they were going to search his hotel room. Mr. Slaughter signed a consent form approximately 8 minutes later.

After searching his hotel room, the agents took Mr. Slaughter to the sheriff's office, where he signed a *Miranda* waiver and confessed to attempting to entice a minor to engage in sexual activity. Before trial, Mr. Slaughter moved to suppress his statement to the law enforcement agents. The district court denied the motion, finding that the statement was admissible pursuant to *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640 (1990). The court also denied Mr. Slaughter's motion for 2 separate trials on the 2 counts presented in the indictment.

Mr. Slaughter appealed after being found guilty in a jury trial.

Analysis. The Eleventh Circuit (Judge Martin, for Judges Marcus and Southern

District of Florida Judge Gold) affirmed. In *Harris*, the Supreme Court held that the exclusionary rule does not bar a statement duly obtained after a *Miranda* waiver where the police had probable cause for an arrest, even if the statement was given following an arrest that was illegal under the Fourth Amendment. The Court held that *Harris* controlled this case.

Regarding the motion for separate trials: Mr. Slaughter had argued that his presumption of innocence as to Count 1 would be prejudiced because Count 2 required the Government to prove that he was required to register as a sex offender. The Court held that the district court did not abuse its discretion by denying this motion since court gave a limiting instruction that Mr. Slaughter drafted, and also in light of the other, overwhelming evidence of Mr. Slaughter's guilt.

The Court rejected Mr. Slaughter's argument that an "actual minor" had to be involved in order to sustain a conviction under § 2260A, noting its own precedent that a defendant's mere "belief" that an actual minor was involved is sufficient. *See United States v. Root*, 296 F.3d 1222, 1227 (11th Cir. 2002).

United States v. Robert Davis, No. 12-10938 (February 12, 2013)

Issue. Did double jeopardy attach when the district court declared a mistrial after 2 jurors were dismissed following the Government's opening statement?

Held. No.

Background and procedural history. Mr. Davis was indicted for his participation in 7 armed robberies. On the day of his trial, two of the prospective jurors who were ultimately selected had indicated during *voir dire* that there were circumstances impacting their ability to serve: one for financial reasons, the other because she had difficulty comprehending the English language. The court refused to strike the former for cause, and no party challenged the latter juror. The remainder of the jury pool was distinguished by peremptory strikes and for cause, and trial commenced with exactly 12 jurors and no alternates.

After the Government's opening statement, Mr. Davis announced his wish to proceed *pro se*. The district court granted that request after a *Faretta* hearing and appointed Mr. Davis's now-former counsel as standby counsel. Mr. Davis then asked to be sent to his cell for the remainder of his trial, and the district court took an early lunch to sort though the implications of this. During the break, the two jurors approached the judge and renewed their concerns about continuing their service. The court ultimately dismissed the jurors and, since there were no alternates, declared a

mistrial after Mr. Davis refused to consent to proceeding with just 10 jurors. Mr. Davis then filed a motion to dismiss the indictment on double jeopardy grounds. The district court denied the motion, and Mr. Davis sought interlocutory review in the Eleventh Circuit.

Analysis. Mr. Davis argued that because the district court's decision to declare a mistrial was not based on "manifest necessity," *see United States v. Butler*, 41 F.3d 1435, 1441-42 (11th Cir. 1995), its denial of his motion to dismiss the indictment on double jeopardy grounds was an abuse of discretion. The Eleventh Circuit (Judge Carnes, for Judge Cox and International Trade Judge Restani) rejected that argument on the ground that, once the 2 jurors were excused, there *was* "manifest necessity" for a mistrial. In fact, a mistrial was the only possible result, since Fed. R. Crim. P. 23(b) does not permit a trial to proceed with less than 12 jurors, and Mr. Davis did not consent to proceed with just 10 jurors, a mistral was "the only possible result." Slip op. at 11.

The Court also rejected Mr. Davis's argument that the district court actually created the supposed "manifest necessity" by choosing to dismiss the 2 jurors. Because it found that the dismissal of the juror with the language barrier was "manifestly necessary" and therefore not an abuse of discretion, the Eleventh Circuit did not consider the propriety of dismissing the other juror.

United States v. Bishop Capers et al., Nos. 10-14332; 10-14521; 10-15074 (February 14, 2013) [consolidated cases]

Issues.

(1) Were the defendants properly convicted of conspiracy to possess and distribute cocaine and crack cocaine in violation of 21 U.S.C. §§ 846 and 841(a)(1), possession with intent to distribute cocaine and crack cocaine in violation of 21 U.S.C. § 841(a)(1), and other counts?

(2) Were the defendants properly sentenced?

Held.

(1) Yes.

(2) No as to two of the defendants.

Background and Procedural History. The defendants (Mr. Frederick, Mr. Capers, and Mr. Little) were arrested for their participation in a cocaine trafficking operation

and they went to trial on a 43-count indictment. Evidence against the defendants included testimony of co-conspirators, evidence collected from wiretaps, and evidence from a confidential government informant. The defendants appealed after being found guilty of almost all charges in a jury trial.

Mr. Frederick was sentenced to concurrent terms of life imprisonment, 360 months imprisonment, 120 months imprisonment, and a consecutive term of 60 months based on application of the career offender enhancement, USSG §§4B1.1(c)(2)(A) and 5G1.2(e). Mr. Capers and Mr. Little were sentenced to concurrent terms of 225 months, and 327 months imprisonment, respectively. However, the district court did not apply the Fair Sentencing Act (FSA) to the calculation of Mr. Capers's and Mr. Little's guideline range, determining that the FSA was not retroactive to offenses committed before it was enacted.

Analysis. The Eleventh Circuit (Judge Martin, writing for Judges Tjoflat and Fay) affirmed the convictions against each defendant and the sentence against Mr. Frederick, but vacated the sentences against Mr. Capers and Mr. Little and remanded their cases for resentencing under the FSA.

Mr. Frederick

Mr. Frederick argued that because three paragraphs of the 40-page warrant affidavit contained "misleading statements" then the wiretap evidence should have been suppressed. The Court found that Mr. Frederick did not satisfy *Franks v. Delaware*, 438 U.S. 154 (1978), which required him to prove that the misleading statements in the warrant affidavit were necessary to the finding of probable cause in order to successfully argue that the evidence must be suppressed.

The Court rejected Mr. Frederick's argument that the district court erred in denying his Rule 29 motion for judgement of acquittal, finding that there was sufficient evidence presented at trial to justify the jury's guilty verdict. It also dismissed Mr. Frederick's various evidentiary arguments, concluding that any errors were rendered harmless by the substantial independent evidence of Mr. Frederick's guilt. The Court further rejected Mr. Frederick's cumulative error argument, finding that Mr. Frederick failed to demonstrate how the aggregate effect of the claimed errors substantially influenced the outcome of his trial.

Mr. Capers

The Eleventh Circuit rejected Mr. Capers's sufficiency of the evidence argument, reasoning that even if Mr. Capers purchased the drugs entirely for personal use, the evidence demonstrated that he was aware of the drug ring headed by Mr. Frederick, and he was a knowing and voluntary participant in the objectives of that ring.

The Court also rejected Mr. Capers's challenge to his conviction for possession with intent to distribute, finding that the Government offered sufficient circumstantial

evidence at trial for a reasonable jury to conclude that he possessed the drugs at issue. The Court summarily found that the evidence was sufficient to sustain Mr. Capers's conspiracy conviction.

Mr. Little

The Court held that it was not erroneous for the district court to quash Mr. Little's subpoena seeking production of a video recording of his interview with police because the recording was not "highly relevant" to this case, as he was being interviewed about a separate murder case. Also, Mr. Little failed to establish that the materials were unavailable from another source, as he served his subpoena for the materials on the producers of "The First 48," a reality television show, and there was no evidence he tried to acquire the recording from the agency that conducted it–the Miami Police Department.

Mr. Little also argued that the Government failed to prove his actual or constructive possession of the drugs that served as the basis of one count of his possession with intent to distribute conviction because he waited outside the house on the particular occasion that the drugs were purchased. The Court agreed that the Government had failed to prove possession, but ruled that there was sufficient evidence to prove that Mr. Little aided and abetted the distribution of the drugs because he was aware of the conspiracy, and he knocked on the door to initiate the particular transaction. Mr. Little additionally argued that the district court erred in admitting an audio recording relating to a another drug transaction, but ruled that the error was harmless in light of the overwhelming evidence of his guilt. The Court summarily dismissed Mr. Little's remaining arguments.

Mr. Capers's and Mr. Little's Sentencing

The Government conceded that the district court erred when it determined that the FSA did not apply to Mr. Capers's and Mr. Little's respective sentencing guidelines because their crimes were committed prior to the act being passed. *See United States v. Hudson*, 685 F.3d 1260, 1260-61 (11th Cir. 2012). The Court therefore vacated the sentences, and remanded the cause for proper sentencing in accordance with the FSA.

United States v. James L. Gibson, No. 10-15728 (February 14, 2013)

Issues.

(1) Does the defendant have standing to challenge the use of a GPS to locate a vehicle the defendant possessed when the tracking device was installed, but not when the tracking device was later used to seize incriminating evidence?

(2) Did the district court violate the Double Jeopardy Clause by instructing the jury that it could convict a defendant for his renewed participation in a drug conspiracy

after his earlier conviction for participating in the same conspiracy?

(3) Did the district court abuse its discretion in admitting evidence of a defendant's participation in illegal dog fighting?

Held.

(1) No.

(2) No.

(3) No.

Background and procedural history. James Gibson, Sidney Gibson, Leondray Gibson, and Kevin Burton were all indicted for their involvement in a drug conspiracy to possess and distribute cocaine and cocaine base. The trials were consolidated. Mr. Burton pleaded guilty and testified against the Gibson brothers at trial. *Id.* at 20.

In January 2009, a Florida Department of Law Enforcement agent installed a tracking device to a Chevy Avalanche parked in James Gibson's driveway, with the rear end of the car extending over the sidewalk. James Gibson paid for the Avalanche and its insurance, but the vehicle was registered in Mr. Burton's name. Several weeks later, Mr. Burton was pulled over by a police officer and consented to a search of the vehicle. The officer found two packages of cocaine, on which Sidney Gibson's fingerprints were later identified. The district court denied both James Gibson's and Mr. Burton's motions to suppress evidence of the installation and use of the tracking device.

At trial, Leondray Gibson moved to exclude any testimony regarding his participation in dog fighting. The Government argued that the testimony would provide context for the drug trafficking operation and prove a link between Leondray's dog fighting and drug dealing. The district court allowed the testimony, but issued a limiting instruction to the jury as to the scope of the dog fighting and its irrelevancy to the current charge.

After the jury found the defendants guilty, James Gibson and Sidney Gibson each appealed their convictions for conspiracy to possess with intent to distribute cocaine and cocaine base, and possession with intent to distribute cocaine. Leondray Gibson appealed his conviction and sentence for conspiracy to possess with intent to distribute cocaine base.

Analysis. The Eleventh Circuit (Judge Pryor, writing for Judges Tjoflat and Kravitch) held that the district court did not err when it denied James Gibson's and Kevin Burton's motion to suppress evidence; that the court did not abuse its discretion when

it admitted evidence of the installation and use of the tracking device, admitted evidence of Sidney Gibson's prior conviction and previous participation in the drug conspiracy, admitted evidence of Leondray's participation in dog fighting, nor when it sentenced Leondray; that the court did not plainly err when it instructed the jury; and that the court properly protected Sidney's risk of double jeopardy.

James Gibson's standing.

The Court held that James Gibson was not the legal owner of the Avalanche and therefore could only have standing to challenge a warrantless search if he was in lawful possession of the vehicle at the time it was searched. Because James "was neither the driver nor a passenger" in the Avalanche at the time it was stopped and searched, he had no expectation of privacy in the vehicle and thus cannot have standing to challenge the instant search. *Id.* at 44.

Sidney Gibson and Double Jeopardy.

In response to Sidney Gibson's argument that he was not free from double jeopardy, the Court recounted the number of times Sidney's counsel failed to object or move on the issue of double jeopardy, and found that the jury instructions ensured that he was not subject to multiple prosecutions for the same crime. Also, in finding that the district court did not abuse its discretion when it admitted evidence of Sidney's prior conviction, the Court reiterated that his imprisonment was "intrinsic evidence relevant to prove his acquaintance with [a cocaine supplier,] to explain [his] absence for several years of the conspiracy. . . . and to prove James Gibson's participation in the cocaine trafficking activities." Slip Op. at 53. The Court found that the district court properly limited the prejudicial effect of the evidence, as argued by Sidney under Federal Rule of Evidence 404(b), "by providing contemporaneous limiting instructions and by repeating those limiting instructions during the jury charge." *Id.*

Leondray Gibson's involvement in dog fighting.

The Court lastly held that the district court did not abuse its discretion when it admitted evidence of Leondray Gibson's involvement in dog fighting because it disallowed any testimony about the dog fight or how the dogs were handled or trained, and became the court delivered contemporaneous limiting instructions. The Court also held that Leondray's sentence was reasonable.

United States v. Jack Kelly Joseph et al., No. 09-11984 (February 21, 2013)

Issue. Did the district court plainly err by instructing the jury to evaluate the defendants' conduct against a national standard of professional practice, in violation of *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904 (2006)?

Held. No.

Background and procedural history. The defendants were a doctor, the doctor's assistant, and a local pharmacist. The grand jury returned an 89-count indictment against all 3 defendants, charging them with numerous violations of the Controlled Substances Act. A jury found all 3 defendants guilty of these offenses, which stemmed from a "pill mill" scheme where the doctor and his assistant would write prescriptions for drug addicts and dealers that were not medically necessary and send them to the pharmacist, who would fill those prescriptions, with no questions asked. The doctor was sentenced to 30 years in prison, his assistant was sentenced to 41 months in prison, and the pharmacist received an 84-month sentence.

The defendants appealed on several grounds, including the propriety of the district court's jury instruction, which instructed the jury that a controlled substance prescription is lawful if the physician prescribes it "in good faith as a part of his medical treatment for the patient in accordance with a standard of medical practice *generally recognized and accepted in the United States*." Slip op. at 14 (emphasis added). The defendants argued for the first time on appeal that this instruction violated *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904 (2006), a case that has been interpreted to stand for the proposition that Congress intended to "leave it to the states to define the applicable standards of professional practice." *United States v. Tobin*, 676 F.3d 1264, 1275 (11th Cir. 2012).

Analysis. The Eleventh Circuit (Judge Pryor, for Judge Marcus and District of Columbia Judge Friedman) affirmed the district court. The Court held that the district court's instruction did not, as the defendants claimed, evaluate the defendants' conduct against a *single* national standard of practice, but instead required the Government to prove that the defendants' actions were inconsistent with *any* standard of professional practice.

United States v. Yuri Izurieta et al., No. 11-13585 (February 22, 2013)

Issue. Are defendants' sentences due to be vacated because the indictment failed to sufficiently charge a crime?

Held. Yes.

Background and procedural history. The grand jury returned an 8-count

indictment against the defendants, alleging a conspiracy to unlawfully import goods into the United States. After the jury returned a guilty verdict, the defendants appealed.

Analysis. The Eleventh Circuit (International Trade Judge Restani, for Judges Carnes and Cox) *sua sponte* raised the question of whether the indictment sufficiently charged a crime. The Court applied the Rule of Lenity and held that Counts 2-7 of the indictment were premised on a violation of a "law" – specifically, 19 C.F.R. § 141.113(c) – that was civil in nature, regarding contractual agreements, and therefore failed to qualify as a "law" pursuant to 18 U.S.C. § 545. The Court also vacated Count 1 of the indictment because it alleged a conspiracy of Counts 2-7. The Court did note that Count 1 contained "passing mention of unlawful acts" in paragraphs 3 and 9, but determined that this was "obscured by the vast majority of the indictment, which focuses on acts that are not criminal in nature." Slip op. at 18.

SELECTED UNPUBLISHED OPINIONS

United States v. Steven Richard Kocis, No. 12-11838 (January 28, 2013)

Issue. Did the district court err in applying the USSG §5G1.1(b) enhancement to the defendant's sentence even though the jury verdict form did not specifically ask the jury to find that the defendant committed his offenses "for the purpose of commercial advantage or private financial gain," which is the standard required to trigger the sentencing enhancement?

Held. No.

Background and procedural history. A jury found Mr. Kocis guilty of several immigration offenses, including two 8 U.S.C. § 1324(a)(2)(B)(iii) counts of alien smuggling for the purpose of commercial advantage or private financial gain. At sentencing, the district court found that Mr. Kocis had committed his offenses "for the purpose of commercial advantage or private financial gain," implicating the 36-month mandatory minimum sentence set forth at USSG §5G1.1(b). The court sentenced Mr. Kocis to that 36-month minimum, and Mr. Kocis appealed.

Analysis. The Eleventh Circuit (per curiam, before Judges Carnes, Marcus, and Kravitch) affirmed the district court. Mr. Kocis, citing *United States v. O'Brien*, ___ U.S. ___, 130 S. Ct. 2169 (2010), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), had argued on appeal that the enhancement was in error because the jury verdict form did not specifically ask the jury to find that he committed the crime for commercial advantage or private financial gain. The Court held that neither *O'Brien* nor *Apprendi* required any particular format for the jury verdict form, and that all that is required is that the jury make the factual finding that is used to enhance a defendant's sentence. Here, that is what happened, as evidenced by the district court's instruction that the jury find beyond a reasonable doubt that Mr. Kocis's motive was commercial advantage or private financial gain.

United States v. Francisco Solano-Ramirez, No. 12-12769 (February 4, 2013)

Issue. Did the district court commit reversible procedural error by failing to acknowledge the defendant's mitigation arguments or to mention the 18 U.S.C. § 3553(a) sentencing factors?

Held. Yes.

Background and procedural history. At Mr. Solano-Ramirez's sentencing hearing, the district court imposed a 46-month sentence without acknowledging Mr. Solano-Ramirez's mitigation arguments or mentioning the statutory sentencing factors. Mr. Solano-Ramirez appealed.

Analysis. The Eleventh Circuit (per curiam, before Judges Marcus, Jordan and Kravitch) vacated and remanded because the district court failed to acknowledge that it considered Mr. Solano-Ramirez's mitigation arguments and did not even mention the 18 U.S.C. § 3553(a) factors. Since the district court "said absolutely nothing about why he thought 46 months was the appropriate prison term," the Court concluded that it "simply [did] not know why" the court below imposed that sentence. Slip op. at 8.

United States v. Valeriano Cruz-Mendoza, No. 12-13029 (February 8, 2013)

Issues.

(1) Did the district court plainly err in applying the 16-level USSG §2L1.2(b)(1)(A)(ii) enhancement in the absence of empirical evidence?

(2) Does the fact that prior convictions raise both the offense level and criminal history score *and* trigger the §2L1.2(b)(1)(A)(ii) enhancement constitute impermissible double-counting" of the defendant's criminal history?

Held.

(1) No.

(2) No.

Background and procedural history. At Mr. Cruz-Mendoza's sentencing, the district court applied the 16-level USSG §2L1.2(b)(1)(A)(ii) enhancement for illegal reentry following conviction of an aggravated felony. The court sentenced Mr. Cruz-Mendoza to 32 months in prison.

Analysis. The Eleventh Circuit (per curiam, before Judges Barkett, Wilson and Anderson) affirmed the district court's application of the 16-level USSG §2L1.2(b)(1)(A)(ii), rejecting Mr. Cruz-Mendoza's argument that the enhancement should not be applied without empirical evidence. The Court clarified that, while the district is *permitted* to consider any lack of empirical evidence, it is not *required* to do so.

The Court also rejected Mr. Cruz-Mendoza's argument that the enhancement double-counted his criminal history, finding that double-counting is permitted where the Sentencing Commission intended that result and the 2 guideline provisions serve different purposes—here, 1) the criminal history categories punish recidivists and 2) §2L1.2(b)(1)(A)(ii) deters illegal reentry. *See United States v. Adeleke*, 968 F.2d 1159, 1160-61 (11th Cir. 1992).

Further, the Eleventh Circuit summarily rejected Mr. Cruz-Mendoza's argument that his sentence was substantively unreasonable.

United States v. Tabitha Dixon, No. 12-12765 (February 11, 2013)

Issue. Did the district court err in denying the defendant's 18 U.S.C. § 3582(c)(2) motion to reduce sentence pursuant to USSG Amendment 750, based on its finding that the amendment did not lower the defendant's guideline range below the 120-month sentence that the district court originally imposed after granting the Government's USSG §5K1.1 substantial assistance motion?

Held. Yes.

Background and procedural history. Ms. Dixon pleaded guilty in 2006 to conspiracy with intent to distribute 500 grams or more of cocaine and 5 grams or more of cocaine base, and to carrying and using a firearm during and in relation to a drug trafficking crime. Her original advisory guideline range was 168 to 210 months, but the district court imposed a 120-month sentence after granting the Government's USSG §5K1.1 substantial assistance motion.

In 2011, Ms. Dixon filed a *pro se* § 3582(c)(2) motion to reduce sentence based on USSG Amendment 750, arguing that the amendment reduced her advisory guideline range to 135 to 168 months in prison. The district court denied her motion, finding that Amendment 750 did not have the effect of reducing the guideline range since her original 120-month sentence was even lower. Ms. Dixon appealed.

Analysis. The Eleventh Circuit (per curiam, before Judges Carnes, Barkett, and Fay) held that the district court clearly erred in finding that Amendment 750 did not lower Ms. Dixon's guideline range. While Ms. Dixon's original 120-month sentence was still lower than the lowered guideline range, this was because she originally received a 67% reduction pursuant to the USSG §5K1.1 substantial assistance motion. Accordingly, the Court vacated and remanded for a determination on whether Ms. Dixon should receive an equivalent reduction from her newly lowered guideline range.

United States v. Antranik Keshishian, No. 12-10680 (February 12, 2013)

Issue. Did the district court err by denying the defendant's 18 U.S.C. § 3583(e)(1) motion for early termination of his supervised release through a form order that lacked any indication that the court considered the statutory sentencing factors?

Held. Yes.

Background and procedural history. Mr. Keshishian filed an 18 U.S.C. § 3583(e)(1) motion for early termination of his supervised release, which the district court denied in a form order without conducting a hearing. Mr. Keshishian appealed.

Analysis. The Eleventh Circuit (per curiam, before Judges Pryor, Martin and Kravitch) vacated and remanded the district court's denial of Mr. Keshishian's 18 U.S.C. § 3583(e)(1) motion for early termination of supervised release because the

record did not show that the district court considered the 18 U.S.C. § 3553(a) factors. The district court's failure to indicate that it considered the statutory sentencing factors renders meaningful appellate review impossible. *See United States v. Douglas*, 576 F.3d 1216, 1219 (11th Cir. 2009).

United States v. Dwain D. Williams, No. 11-10658 (February 15, 2013)

Issues.

(1) Is the Military Extraterritorial Jurisdiction Act of 2000 unconstitutional because it subjects defendants to prosecution in the United States for conduct that was committed outside the United States's territorial, special maritime, or admiralty jurisdiction?

(2) Did the district court err by imposing a "general verdict"?

Held.

(1) No.

(2) Yes.

Background and procedural history. Mr. Williams, while living with his wife in Japan during her United States Air Force deployment there, engaged in sexual conduct with his step-daughter, a minor child. After Mr. Williams's wife was eventually transferred to a domestic Air Force base in Georgia, the step-daughter told her mother what had happened, and Mr. Williams was arrested and prosecuted in Georgia under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA).

Analysis. The Eleventh Circuit (per curiam, before Judges Tjoflat, Cox, and District of Maryland Senior Judge Motz) rejected Mr. Williams's argument that MEJA was unconstitutional because it subjects American citizens to domestic prosecution for conduct that was committed outside American jurisdiction. The Court noted that a defendant indicted under the MEJA enjoys all constitutional rights. As to Mr. Williams's specific argument that the MEJA violates the venue and compulsory process provisions of the Sixth Amendment, the Eleventh Circuit found that there was no venue issue because Article III, § 2 of the Constitution specifically states that trials for offenses against the United States committed elsewhere "shall be at such Place or Places as the Congress may by Law have directed." The Court further held that there was no compulsory process violation because Mr. Williams failed to identify any foreign

witnesses who would be material and favorable to his defense, let alone to make the required showing that any foreign witness's testimony would be both "favorable and material to his defense." *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

The Court nevertheless remanded the case anyway because the court below imposed an impermissible "general sentence." General sentences are *per se* illegal in the Eleventh Circuit and require a remand. *See United States v. Moriarty*, 429 F.3d 1012, 1025 (11th Cir. 2005). The district court sentenced Mr. Williams to a lifetime sentence, followed by a lifetime sentence of supervised release, despite the fact that the maximum permissible sentence for one of the counts under which Mr. Williams was convicted was 30 years. The Government conceded that a remand for clarification was warranted.