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JANUARY 1, 2014 – MARCH 31, 2014

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DECISIONS OF THE UNITED STATES SUPREME COURT

[*Burrage v. United States*](#), No. 12-7515 (Jan. 27, 2014)

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

Held. No.

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

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

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

[*Fernandez v. California*](#), No. 12-7822 (Feb. 25, 2014)

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

Held. No.

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

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

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

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

[*Kaley v. United States*](#), No. 12-464 (Feb. 25, 2014)

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

Held. No.

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

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

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

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

[*United States v. Appel*](#), No. 12-1038 (Feb. 26, 2014)

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

Held. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**DECISIONS OF THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
PUBLISHED OPINIONS**

[*United States v. Contreras*](#), No. 13-10928 (Jan. 2, 2014)

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

Held. Yes.

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

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

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

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

Arthur v. Thomas, No. 12-13952 (Jan. 6, 2014)

***appeal from the Northern District of Alabama

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

Held. No.

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

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

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

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

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

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

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

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

[*Mackey v. Warden*](#), No. 12-14729 (Jan. 6, 2014)

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

Held. Yes.

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

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

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

Issues.

1. Did the district court fail to establish the defendant's valid and knowing waiver of his right to counsel by waiting until after opening statements and two hours of trial before colloquying the defendant?
2. Did the district court abuse its discretion by refusing to allow the defendant's standby counsel to assume representation after the defendant absconded?

Held.

1. No.
2. No.

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

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

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

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

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

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

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

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

[*LeCroy v. United States*](#), No. 12-15132 (Jan. 15, 2014)

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

Held. No.

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

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

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

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

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

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

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

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

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

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

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

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

Held. No.

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

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

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

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

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

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

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

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

Held. Yes.

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

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

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

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

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

Held. No.

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

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

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

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

Held. No.

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

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

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

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

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

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

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

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

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

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

[*United States v. Harris*](#), No. 12-14482 (Jan. 28, 2014)

Issues.

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

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

Held.

1. Yes.
2. No.

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

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

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

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

[*United States v. Ransfer*](#), No. 12-12956 (Jan. 28, 2014)

Issues.

1. Whether the district court erred in admitting evidence obtained from the installation and use of a GPS tracking device without a warrant?
2. Whether the district court erred in admitting hearsay testimony and denying a motion to suppress post-arrest statements to police?

3. Whether sufficient evidence existed to convict a defendant?

Held.

1. No, the officers exercised good-faith reliance on then-binding precedent.
2. No, the district court did not abuse its discretion in any evidentiary rulings.
3. Yes and no, a reasonable trier of fact could find the defendant guilty of conspiracy to commit Hobbs Act robbery and charges related to the three of the armed robberies, but not as to the fourth robbery.

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

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

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

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

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

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

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

[*Cadet v. State of Fla. Dep’t. of Corr.*](#), No. 12-14518 (Jan. 31, 2014)

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

Held. No.

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

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

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

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

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

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

Issues.

1. Was there sufficient evidence to support two defendants’ convictions for conspiracy to distribute cocaine?
2. Did the district court abuse its discretion in admitting recorded telephone calls that the defendant argued were improperly authenticated by an agent whose testimony was impermissibly bolstered by Government counsel?
3. Did the district court abuse its discretion in admitting alleged hearsay in the form of a co-conspirator’s statements against one of the defendants?
4. Did the district court abuse its discretion in denying one defendant’s motion for a mistrial after a government agent, during direct examination, improperly revealed the defendant’s invocation of her right to counsel?
5. Did the district court abuse its discretion in denying a defendant’s motion for a mistrial based on a series of allegedly improper prosecutorial statements during closing arguments?

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

Held.

1. Yes.
- 2-6. No.

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

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

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

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

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

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

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

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

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

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

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

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

[*Chavez v. Sec’y, Fla. Dept. of Corr.*](#), No. 14-10486 (Feb. 10, 2014)

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

Held. No.

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

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

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

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

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

[*United States v. Smith*](#), No. 12-14842 (Feb. 11, 2014)

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

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

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

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

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

[*United States v. Isnadin*](#), No. 12-13474 (Feb. 14, 2014)

Issues.

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

Held.

1. No.
2. Yes.

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

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

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

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

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

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

Issues.

1. In light of *Descamps v. United States*, ___ U.S. ___, 133 S. Ct. 2276 (2013), does a conviction under Alabama’s third-degree burglary statute qualify as a predicate under the Armed Career Criminal Act (ACCA)?
2. Whether sufficient evidence was presented at trial to support Mr. Howard’s conviction for being a felon in possession of a firearm?

Held.

1. No.
2. Yes.

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

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

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

[*United States v. Campbell*](#), No. 12-13647 (Feb. 20, 2014)

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

Held. No.

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

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

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

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

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

Held. No.

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

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

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

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

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

Held. No.

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

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

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

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

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

[*United States v. Jones*](#), No. 11-11273 (Feb. 25, 2014)

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

Held. Yes.

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

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

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

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

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

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

1. Whether counsel was ineffective for failing to obtain the services of a forensic pathologist?
2. Whether counsel was ineffective for not sufficiently challenging the armed robbery statutory aggravator for the death sentence?

Held.

1. No.
2. No.

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

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

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

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

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

Issues.

1. Did the state trial court violate the petitioner's constitutional rights by refusing to admit and consider the State's pretrial plea offer as relevant and mitigating evidence?
2. Did petitioner's counsel at his resentencing hearing render ineffective assistance by failing to elicit testimony from the defense's mental health expert about the applicability of two statutory mitigating factors and for failing to seek a neuropsychological evaluation of the petitioner to check for the presence of possible brain damage?

Held.

1. No.
2. No.

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

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

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

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

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

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

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

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

[*In re Moody*](#), No. 13-12657 (Mar. 12, 2014)

***appeal from the Northern District of Alabama

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

Held. No.

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

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

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

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

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

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

Held. Yes.

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

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

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

[*United States v. Salgado*](#), No. 12-15691 (Mar. 14, 2014)

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

Held. Yes.

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

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

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

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

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

[*Jones v. GDCP Warden*](#), No. 11-14774 (Mar. 20, 2014)

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

Held. No.

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

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

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

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

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

SELECTED UNPUBLISHED OPINIONS

[*United States v. Wade*](#), No. 13-12075 (Jan. 8, 2014)

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

[*United States v. Menter*](#), No. 13-12434 (Feb. 20, 2014)

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

[*United States v. Pacquette*](#), No. 13-11736 (Mar. 4, 2014)

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

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

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

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

[*United States v. Smith*](#), No. 13-13028 (Mar. 13, 2014)

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