SUMMARIES OF RECENT CASELAW

MARCH 23, 2013 – June 30, 2013

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UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Florida v. Jardines, No. 11-564 (March 26, 2013)

Issue. Does use of a drug-sniffing dog on a homeowner's porch to investigate the contents of the home constitute an illegal search in violation of the Fourth Amendment?

Held. Yes.

Background and procedural history. Law enforcement obtained a warrant to search Mr. Jardines's home only after a drug-sniffing dog alerted for narcotics on his front porch. The police found marijuana plants inside the home. Mr. Jardines was charged in Florida state court with trafficking in cannabis. Mr. Jardines moved to suppress the evidence, alleging that it was discovered pursuant to an unreasonable search of his home. The trial court granted the motion, and the Florida Third District Court of Appeals reversed. On a petition for discretionary review, the Florida Supreme Court affirmed the trial court's decision. The Supreme Court granted *certiorari* review.

Analysis. The Supreme Court (Justice Scalia, for Justice Thomas, Justice Ginsburg, and Justice Kagan) held the Fourth Amendment prohibits the Government from physically intruding upon the curtilage of an individual's home.

The Court concluded that a home's surrounding area, the curtilage, is part of the home itself for Fourth Amendment purposes. There is no customary invitation for the officers to have drug-sniffing dogs inspect a constitutionally protected area. Therefore, the officers did not have the authority to approach the house and their actions were deemed a search.

Concurrence. Justice Kagan, for Justice Ginsburg and Justice Sotomayor, wrote that Mr. Jardines also had a privacy argument because the officers used equipment, a drug-sniffing dog, to gain information on things inside Mr. Jardines's residence that they would not have been able to gain without the aid of that equipment.

Dissent. Justice Alito, for Chief Justice Roberts, Justice Kennedy, and Justice Breyer, found that trespass law did not provide the majority with any support for its holding.

These justices based their opposition on the length of time the process took, the definition of license, the common use of dogs by officers, and the lack of expectation of privacy with respect to odors that can be smelled by human beings who are standing in lawful areas. The process of detecting the drugs took only a minute or two, and a law enforcement officer was able to smell the marijuana. The definition of "license" articulated by the majority is unfounded because the public has a license to walk to someone's front door. Law enforcement has used dogs for centuries. Homeowners

should not have a reasonable expectation to privacy in odors that originate from the home but reach the public.

Missouri v. McNeely, No. 11-1425 (April 17, 2013)

Issue. Does an involuntary blood test taken without a warrant violate the Fourth Amendment?

Held. Yes

Background and procedural history. Mr. McNeely refused to take a breath test or a blood test after being stopped by a Missouri police officer for speeding and crossing the centerline. The police officer instructed a lab technician to take a sample without having obtained a warrant. Tests showed that Mr. McNeely's blood alcohol concentration was above the legal limit, and he was arrested for driving while intoxicated (DWI). Mr. McNeely moved to suppress the results from the blood test. The trial court granted his motion, and the Missouri Supreme Court affirmed. The Supreme Court granted *certiorari* review.

Analysis. The Supreme Court (Justice Sotomayor, for Justice Scalia, Justice Kennedy, Justice Ginsburg, and Justice Kagan as to Parts I, II-A, II-B and IV) held drunk driving is not a per se emergency to justify conducting a nonconsensual blood test without a warrant.

The Court, after reviewing the totality of the circumstances, believed that this case involved a routine DWI; thus, conducting a nonconsensual warrantless blood test was a violation of Mr. McNeely's Fourth Amendment right to be free from unreasonable searches of his person. No emergency existed because the officer knew that a prosecuting attorney was on call and had no reason to believe that a magistrate judge would not have been available. The only factors that suggested that an emergency existed was the natural dissipation of blood-alcohol which the Court has previously held insufficient to support a warrantless blood draw in an alcohol-related case.

Justice Sotomayor, for Justice Scalia, Justice Ginsburg, and Justice Kagan as to Parts II-C and III, stated that the totality-of-the-circumstances rule should not be replaced by a window-of-time rule or a bright-line rule. A window-of-time rule would create odd consequences. Furthermore, a bright-line rule would weaken the warrant requirement in a context where substantial privacy interests are at stake.

Concurrence. Justice Kennedy indicated that the Court did not need to address the idea of a window-of-time rule and, although a bright-line rule may not be practical, there should be some guidelines to instruct law enforcement when a warrantless blood test would be appropriate.

Concurring in part and dissenting in part. Chief Justice Roberts, for Justice Breyer and Justice Alito, believed that the correct rule to follow in cases like this one is the window-of-time rule. The window-of-time rule would grant officers the right to conduct a warrantless blood test if the officers could not, or reasonably believe that they could not, obtain a warrant in the time it would take to transport the suspect to a medical facility. This would preserve the evidence of blood alcohol concentration that is diminishing as the officer waits for a warrant.

Dissent. Justice Thomas asserts since the body's natural metabolization of alcohol destroys evidence of the crime, it constitutes an exigent circumstance. Therefore, there should be a bright-line rule that drunk driving is a per se emergency.

Moncrieffe v. Holder, No. 11-702 (April 23, 2013)

Issue. Does a noncitizen's conviction for a state marijuana distribution offense that fails to establish that the offense involved either remuneration or more than a small amount of marijuana constitute an "aggravated felony" under the Immigration and Nationality Act (INA)?

Held. No.

Background and procedural history. Mr. Moncrieffe, a Jamaican citizen who was lawfully in the United States, pleaded guilty in a Georgia state court to possession of marijuana with intent to distribute. The Government argued that possession of marijuana with the intent to distribute was an aggravated felony punishable by up to five years' imprisonment under the Controlled Substances Act (CSA). An immigration judge ordered Mr. Moncrieffe to be deported and the Board of Immigration Appeals affirmed. The Fifth Circuit denied Mr. Moncrieffe's petition for review, and the Supreme Court granted *certiorari* review.

Analysis. The Supreme Court (Justice Sotomayor, for Chief Justice Roberts, Justice Scalia, Justice Kennedy, Justice Ginsburg, Justice Breyer, and Justice Kagan) held that the definition of "aggravated felonies" under the INA does not extend to state statutes that punish non-payment or the social sharing of a small amount of marijuana.

The INA concerns only what a noncitizen was convicted of, not the actual conduct. A conviction of possession with intent to distribute does not reveal whether either remuneration or more than a small amount of marijuana was involved. The state offense must meet the elements of the generic federal offense and be punished as a felony and not a misdemeanor.

Dissent. Justice Thomas argued that since Georgia punished Mr. Moncrieffe's offense as a felony and that felony was punishable under the CSA, then the offense counts as an aggravated felony under the INA.

Dissent. Justice Alito wrote that, contrary to the language of the INA, the majority opinion gives noncitizens in about half the states the ability to receive cancellation of removal. Depending on which state the suspect was convicted in, there would be a disparity of application.

Metrish v. Lancaster, No. 12-547 (May 20, 2013)

Issue. Did the Sixth Circuit err in granting the petitioner habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) due to the district court's retroactive application of a state court decision that rejected the "diminished capacity" defense he raised in the state court?

Held. Yes.

Background and procedural history. Mr. Lancaster, a former police officer with mental health problems, asserted the then-prevailing defense of diminished capacity at his first trial in a Michigan state court in 1994. He was convicted of first-degree murder and possession of a firearm in the commission of a felony; however, Mr. Lancaster was later granted habeas relief from these convictions. Before Mr. Lancaster's second trial, the Michigan Supreme Court rejected the diminished-capacity defense in *People v. Carpenter*, 627 N.W. 2d 276 (2001). At the second trial in 2005, the judge applied *Carpenter* and did not allow Mr. Lancaster to use diminished-capacity as a defense. Mr. Lancaster was convicted again. The Michigan Court of Appeals rejected Mr. Lancaster's due process claim based on the retroactive application of *Carpenter* and affirmed the lower court's decision. Mr. Lancaster reasserted his due process claim in a federal habeas petition that the district court denied, but the Sixth Circuit reversed and held that the Michigan Court of Appeals had "unreasonably applied clearly established federal law." The Supreme Court granted *certiorari* review.

Analysis. The Supreme Court (Justice Ginsburg, for a unanimous Court) held that Mr. Lancaster's petition did not meet the AEDPA's requirements and that the United States Court of Appeals for the Sixth Circuit erred in granting him habeas relief.

The Court determined that Mr. Lancaster's petition did not the requirements set forth in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Rogers v. Tennessee*, 532 U.S. 451 (2001). In *Bouie*, the petitioners were convicted of trespass under state law. The conviction was based on a prior decision in *Charleston v. Mitchell*, 123 S.E. 2d 512 (S.C. 1961), that expanded the trespass statute to include remaining on the premises after receiving notice to leave. The Supreme Court reasoned that the expansion of the statute created an alteration that lacked support from the state's precedent. The Court

further stated that due process does not allow unforeseeable retroactive application on law containing narrow and precise language. In *Rogers*, the victim died 15 months after the petitioner stabbed him. The petitioner contested the abolishment of the "year and a day rule" that prohibited a murder conviction unless the victim died within a year and a day after the act. There, the Court held that the abandonment of the year and a day rule did not violate due process because the rule was viewed as an "outdated relic" that had been abolished in the majority of jurisdictions.

Here, the Court recognized that this case was not as weak as the one established in *Rogers* and noted that unlike the year and a day rule, the diminished capacity defense was not an "outdated relic" as evidenced by the fact that it is included within the Model Penal Code. *See* ALI, Model Penal Code § 4.02(1). Nevertheless, this case was not as unreasonable and unforeseeable as *Bouie*. The statute that the petitioners were convicted of in *Bouie* was well-established and precisely defined whereas the statute in *Carpenter* was reviewed by the state's Supreme Court for the first time. Therefore, the Michigan Supreme Court's rejection of the diminished capacity defense was far from an unreasonable application of clearly established federal law.

Lastly, the Court noted that it has never found a due process claim in situations where a state supreme court reviews and rejects a line of consistent lower court cases. Thus, the Sixth Circuit should not have reversed the district court's denial of habeas relief.

McQuiggin v. Perkins, No. 12-126 (May 28, 2013)

Issue. Does a proper showing of actual innocence overcome the one-year statute of limitations for the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)?

Held. Yes.

Background and procedural history. Mr. Perkins was convicted of first-degree murder. His conviction was final in 1997. More than 11 years later, Mr. Perkins filed a habeas petition based on the ineffective assistance of his trial counsel and on newly-discovered affidavit evidence of his actual innocence. The district court found that even if the affidavits were newly-discovered, Mr. Perkins's petition could not overcome ADEPA's statute of limitations. The Sixth Circuit reversed and held that Mr. Perkins's claim of actual-innocence permitted him to present his claim as if it had been timely filed. The Supreme Court granted *certiorari* review.

Analysis. The Supreme Court (Justice Ginsburg, for Justice Kennedy, Justice Breyer, Justice Sotomayor, and Justice Kagan) held that a proper showing of actual innocence is an equitable exception to the AEDPA statute of limitations.

The Court based its holding on the "miscarriage of justice" exception. This rule was founded on the belief that innocent people should not be incarcerated as a result of federal constitutional errors. The Court also found that the miscarriage of justice

exception does not render the statute-of-limitations provision superfluous because the concept of the rule was embedded in other sections. Even so, the Court did note that timing is a factor in determining the reliability of a petitioner's proof of actual innocence.

Dissent. Justice Scalia, for Chief Justice Roberts and Justice Thomas, with Justice Alito joining in part, wrote that the Court did not have the authority to create an exception to AEDPA's one-year statute of limitations.

The Justices listed three reasons supporting their position. First, actual innocence has only applied to judge-made procedural barriers to habeas relief not statutory barriers to habeas relief. Second, the majority has created an exception that the statute did not contain. Lastly, suspending the one-year limitation in the statute simply because the majority believes actual innocence should trump it is overruling the genuine intent of the statute.

Trevino v. Thaler, No. 11-10189 (May 28, 2013)

Issue. Does the rule in *Martinez v. Ryan*, 566 U.S. 1 (2012), that procedural default does not bar a habeas court from hearing a petitioner's ineffective-assistance claim apply to states that do not explicitly limit the petitioner's ability to raise the claim in initial state collateral review proceedings, thereby allowing them to raise claims on direct review?

Held. Yes.

Background and procedural history. Mr. Trevino was convicted of capital murder in a Texas state court and sentenced to death. Neither the counsel appointed for his direct appeal nor the counsel appointed for state collateral review raised the claim that Mr. Trevino's trial counsel provided ineffective assistance during the penalty phase. The claim was later raised in Mr. Trevino's federal habeas petition. As a result, the district court stayed the proceeding to allow the petitioner to raise his ineffective-assistance claim in state court. The state court barred the federal courts from considering his claim because he failed to raise it on direct appeal or in his initial state post-conviction proceedings. The Fifth Circuit affirmed. In a subsequent, unrelated case, the Fifth Circuit held that *Martinez*, which had been decided in the interim, did not apply in Texas because state law apparently allowed a petitioner to raise the claim on direct appeal.

Analysis. The Supreme Court (Justice Kennedy, for Justice Ginsburg, Justice Sotomayor, and Justice Kagan) held that if a state's structure and operations make it effectively impossible for a petitioner to claim the defense on direct appeal, then the *Martinez* rule applies.

The Court stated that the present case was proof that, in reality, Texas did not

permit direct review of ineffective assistance of trial counsel claims. The practical effect of this mandate is that a petitioner must bring the claim in a collateral proceeding. The Court determined that there is no difference between a state that denies petitioners the ability to raise the claim on direct review and a state that makes it virtually impossible to raise the claim on direct review.

Dissent. Chief Justice Roberts, for Justice Alito, believed the narrow language in *Martinez* limits its application to cases that involve a state explicitly barring the defendant from raising the claim of ineffective assistance of trial counsel on direct appeal. Therefore, the rule in *Coleman v. Thompson*, 501 U. S. 722, 732, 750 (1991), stating that a petitioner must bear the burden of the default from not raising ineffective assistance of counsel, should control.

Dissent. Justice Scalia, for Justice Thomas, dissented on the same grounds articulated in their *Martinez* dissent.

Maryland v. King, No. 12-207 (June 3, 2013)

Issue. Does the Fourth Amendment permit law enforcement to obtain involuntary DNA samples (saliva swabs) from a suspect under arrest based on probable cause?

Held. Yes.

Background and procedural history. In 2003, an armed, masked man committed a rape. No arrests were made at that time, but a sample of the rapist's DNA was recovered from the victim and maintained in a law enforcement database. In 2009, Mr. King was arrested for first and second-degree assault. While he was being booked, law enforcement took a saliva swab from Mr. King's cheek and sent it away for testing. The results showed that Mr. King's DNA matched that recovered from the 2003 rape. Law enforcement obtained a search warrant, and thereafter took a second DNA sample from Mr. King. This second sample also matched the 2003 rape, and Mr. King was subsequently indicted. After unsuccessfully moving to suppress the DNA match on Fourth Amendment grounds, Mr. King was convicted of rape. The Maryland Court of Appeals reversed, adjudging Maryland's DNA Collection Act unconstitutional. The Supreme Court granted Maryland's petition for certiorari review.

Analysis. The Supreme Court (Justice Kennedy, for Chief Justice Roberts and Justices Thomas, Breyer, and Alito) held that DNA sampling at booking is no more a violation of the Fourth Amendment than fingerprinting and photographing. All are routine police procedures that are reasonable under the Fourth Amendment. The Court primarily grounded its ruling on law enforcement's need to identify suspects, and opined that the Fourth Amendment does not stand for the principle that a criminal should evade punishment where the identification evidence of the crime is DNA

instead of a live witness. (The Court further noted that sometimes the most dangerous criminals are initially detained for minor offenses – *i.e.*, Timothy McVeigh – and such vital identification information that connects two crimes is important.) The Court maintained that the taking of the samples for the limited purpose of identification would prevent abuse, and protect the arrestees' privacy because they would not be identified by name in the DNA database. The Majority did write such DNA samples can only be taken from persons arrested on suspicion of a "serious" crime, but did not define what constituted a "serious" offense.

Dissent. Justice Scalia (for Justices Ginsburg, Sotomajor, and Kagan) wrote that despite the Court's emphasis on identification—which it characterized as "tax[ing] the credulity of the credulous"— what the Majority had actually done was to permit the use of warrantless evidence to solve cold cases. It pointed out that Maryland law actually forbade the collection of DNA evidence from a suspect before his or her arraignment (a procedure the state followed in Mr. King's case), that law enforcement did not promptly send off Mr. King's DNA sample (it actually sat around in the mail room for some weeks), and that Mr. King's sample was checked not against an arrestee/convict database but against the unsolved crimes database—all facts that belie the Majority's "identification" rationale. The dissent also noted that the Majority's analogies to photographing a suspect, for example, are inapposite because the Court has never held that taking a person's photograph implicates Fourth Amendment concerns.

Peugh v. United States, No. 12-62 (June 10, 2013)

Issue. Does the Ex Post Facto Clause bar application of 2009 version of the Federal Sentencing Guidelines where the defendant's crime predated the 2009 revisions?

Held. Yes.

Background and procedural history. Mr. Peugh and a co-defendant were accused of bank fraud. Mr. Peugh and the co-defendant were in the business of buying, storing, and selling grain to landowners and tenants. When the business began experiencing cash-flow problems they took out fraudulent loans from the bank and began to kite checks. The series of loans they took out were based on false representations of nonexistent future grain deliveries. These loans resulted in losses of more than $2,000,000. Mr. Peugh went to trial and was convicted of 5 counts.

Although Mr Peugh's trial predated the 2009 revisions, his sentencing occurred after their effective date. Under the 1998-era Sentencing Guidelines, his guideline range would have been 30 to 37 months. Under the 2009 version, his guideline range was 70 to 87 months. The district court rejected Mr. Peugh's ex post facto argument and sentenced him to 70 months in prison. The Seventh Circuit affirmed, and the Supreme Court granted Mr. Peugh's petition for certiorari review.

Analysis. The Supreme Court (Justice Sotomayor, for Justices Ginsberg, Breyer, Kagan, and for Justice Kennedy in part) reversed. Mr. Peugh argued that the 2009 amendments, as applied to his case, constituted an impermissible ex post facto law because they made his ultimate punishment more severe than it would have been at the time he committed his crime. The Government responded that, since *Booker* was in place at the time of Mr. Peugh's sentencing, the guidelines were only advisory, and were therefore not a "law" of the sort implicated by the Ex Post Facto Clause. The Supreme Court disagreed and reversed, holding that the Ex Post Facto Clause does not permit a defendant to be sentenced based on guidelines promulgated after he or she committed his or her crimes when the newly-promulgated guidelines yielded a heightened sentencing range. The Court cited *Miller v. Florida*, 482 U.S. 423 (1987), a case in which it had found that the new Florida sentencing guidelines violated the Ex Post Facto Clause because they created a higher hurdle to clear for a discretionary departure. The Court found that the post-*Booker* federal sentencing structure was analogous since appellate courts presume sentences within guideline range are reasonable, but in its review for reasonableness may consider the extent of the deviation outside the range. Accordingly, the Court determined that application of the 2009 amendments constituted an ex post facto violation.

Justice Thomas filed a dissenting opinion that Chief Justice Roberts and Justices Scalia and Alito joined in part. Justice Alito filed a separate dissent that Justice Scalia joined.

Alleyne v. United States, No. 11-9335 (June 17, 2013)

Issue. Must facts that increase a defendant's mandatory minimum sentence be proven to a jury beyond a reasonable doubt?

Held. Yes. Allowing the sentencing judge to make such factual findings violates the Sixth Amendment.

Background and procedural history. Mr. Alleyne and an accomplice committed armed robbery. Along with other federal crimes, Mr. Alleyne was charged with using or carrying a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A), which carried a 5-year minimum sentence. The statute also provided for sentence enhancements if the firearm was "brandished" or "discharged." The minimum sentence if the firearm was brandished was 7 years, while the minimum sentence if the firearm was discharged was 10 years. The jury convicted Mr. Alleyne and indicated on the verdict form that Mr. Alleyne had "used or carried a firearm during and in relation to a crime of violence" but did not expressly find that the firearm was "brandished."

The presentence report recommended the 7-year mandatory minimum sentence on the § 924(c) count." Mr. Alleyne objected to this enhancement and argued that the

verdict form clearly indicated that the jury did not find "brandishing" beyond a reasonable doubt. Further, Mr. Alleyne argued that raising his sentence based on a sentencing judge's finding of brandishing would violate his Sixth Amendment right to a jury trial.

The district court overruled Mr. Alleyne's objection, relying on *Harris v. United States*, 536 U.S. 545 (2002). In *Harris*, the Supreme Court held that judicial fact finding that increases the mandatory minimum sentence did not violate the Sixth Amendment. The United States Court of Appeals for the Fourth Circuit affirmed.

Analysis. The Supreme Court (Justice Thomas, for a fractured Court) reversed. The Sixth Amendment is violated when a judge makes a factual finding that increases the mandatory minimum because the fact that the judge decided, impacted the eventual sentence and was thus an element of the offense charged. Slip op. at 12 ("the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury").

The Court determined that *Harris* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), conflicted and overruled *Harris*. In *Harris*, the Supreme Court held that judicial fact-finding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. *Harris* drew a distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum. In *Harris*, the Supreme Court held that the factual basis for increasing the minimum sentence was not "essential" to the defendant's punishment.

Here, the Supreme Court changed course, holding that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Slip op. at 6. The Court noted that raising Mr. Alleyne's minimum sentence based on a sentencing judge's finding that he brandished a firearm would violate his Sixth Amendment right to a jury trial because brandishing became an element of the offense and all determinations of crime's elements must be determined by a jury. "In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment about what is otherwise legally prescribed." *Id*. at 6.

The Supreme Court did caution that its ruling did not mean that any fact that influences a judge's decision must be found by a jury. *Id*. at 15. The Court reaffirmed the district courts' broad sentencing discretion, but cautioned against judicial intrusions into the jury's purview.

Justice Sotomayor, for Justices Ginbsburg and Kagan, filed a concurring opinion. Chief Justice Roberts, for Justices Scalia and Kennedy, filed a dissenting opinion. Justice Alito dissented separately.

United States v. Davila, No. 12-167 (June 13, 2013)

Issue. Does a Rule 11 error require automatic vacatur of a plea regardless of whether the record shows any prejudice?

Held. No.

Background and procedural history. After being indicted for 34 counts related to falsifying tax returns, Mr. Davila requested a new court-appointed attorney, claiming that his attorney never offered a defense and, instead, simply told him to plead guilty. During an *in camera* hearing before a magistrate judge, the magistrate told Mr. Davila that he would not receive another attorney and urged him to cooperate and plead guilty because of the strength of the Government's case. Mr. Davila pleaded guilty before the district court, during which time he stated that he had not been forced or pressured to plead. Mr. Davila did not mention the *in camera* hearing.

Prior to sentencing, Mr. Davila moved to vacate the plea and dismiss the indictment, but again failed to mention the *in camera* hearing. The district court denied the motion because Mr. Davila had stated under oath that he was not forced or pressured to enter the plea and was fully aware of his rights at his change-of-plea hearing. Mr. Davila was sentenced to 115 months in prison and appealed. His attorney asked to withdraw because there were no issues of merit to be raised, but the Eleventh Circuit denied the motion based on the court's finding that the record indicated an issue with the magistrate judge's statements. The Eleventh Circuit, following its bright-line rule, held that a Rule 11(c)(1) violation required automatic vacatur of Mr. Davila's guilty plea regardless of whether the violation had an actual adverse effect on Mr. Davila's rights. The Court granted the Government's petition for certiorari to resolve a circuit split over the consequences of a Rule 11(c)(1) violation.

Analysis. The Supreme Court (Justice Ginsburg, joined by Chief Justice Roberts and Justices Kennedy, Breyer, Alito, Sotomayor, and Kagan) rejected the Eleventh Circuit's rule requiring automatic vacatur for any Rule 11(c)(1) error. The Court held that the pertinent question for the Eleventh Circuit to explore, upon review of the full record, was whether, but for the magistrate judge's comments, Mr. Davila would have exercised his right to go to trial. Slip op. at 14.

The Court reasoned that neither the plain language of Rule 11 nor the advisory comments make an error grounds for automatic vacatur. Rule 11(h) simply states that a "variance from the requirements of [Rule 11] is harmless error if it does not affect substantial rights," making clear that Rule 52(a)'s "harmless-error" rule may apply to Rule 11 errors. Rule 52(b) states a "plain-error" rule that applies if the defendant fails to object to error in trial court. Slip op. at 7-8. *See United States v. Vonn*, 535 U.S. 55 (2004); *United States v. Dominguez Benitez,* 542 U.S. 74 (2004) (holding that defendant who does not raise error before appeal has burden of satisfying 52(b) plain-error rule).

The Court rejected Mr. Davila's attempt to distinguish his case from *Vonn* and *Dominguez Benitez* as so extraordinary that Rule 52(a) applies instead of 52(b). Rule 11(c)(1) violations are not more exceptional than other Rule 11 violations in a way that would call for automatic vacatur. Slip op. at 12. Rule 11(h) controls, calling for Rule 52(a)'s harmless-error rule to apply to all Rule 11 violations, unless prompt objection is lacking, when the 52(b) plain-error rule applies, as is the case here. This requires consideration of the full record to determine if the error was harmless.

Concurrence. Justice Scalia (joined by Justice Thomas) concurred in part and in the judgement. Justice Scalia argued that the case could be decided simply on the text of the harmless error rule, which states that a harmless error is one that "does not affect substantial rights." He concluded that the majority's analysis of legislative history to determine the scope of the rule was unnecessary.

Salinas v. Texas, No. 12-246 (June 17, 2013)

Issue. Does the Government's reference at trial to a defendant's silence in response to a *pre-Miranda* question, and argument that this silence evidences guilt, violate the Fifth Amendment?

Held. No.

Background and procedural history. During a murder investigation, Mr. Salinas voluntarily answered police officers' questions without being placed in custody or receiving *Miranda* warnings. When asked about whether his shotgun would match shell casings at the crime scene, Mr. Salinas chose to remain silent and not answer. The Government, over Mr. Salinas's objection, cited his silence as evidence of guilt in the subsequent murder trial where he was convicted and sentenced to 20 years in prison. The Texas Court of Appeals affirmed, holding that there was no Fifth Amendment violation because Mr. Salinas's silence was not "compelled," and the Texas Court of Criminal Appeals affirmed on the same grounds. The Supreme Court granted certiorari to resolve a lower court division on a separate issue, but it was never reached because it ultimately ruled that Mr. Salinas did not invoke his Fifth Amendment privilege.

Analysis. The Supreme Court (Justice Alito, joined by Chief Justice Roberts and Justice Kennedy) held that because Mr. Salinas did not expressly invoke his Fifth Amendment privilege in response to the officer's question, his silence could be used as evidence in trial. The Court cited the long-standing general rule that a person's Fifth Amendment privilege "generally is not self-executing" and must be claimed. *See Minnesota v. Murphy*, 465 U.S. 420, 427 (1984). This is to ensure that the Government has access to all the information to which it is entitled. Slip op. at 4. While there are two exceptions to this requirement–privilege does not have to be invoked at trial and

silence will be excused if Government coercion occurs–neither applies here. Slip op. at 4-5.

The Court rejected Mr. Salinas's argument for a third exception when a witness remains silent, declining to give an answer that officials suspect would be incriminating. Slip op. at 6. Typically, the silence of the defendant does not invoke the privilege. *See Roberts v. United States*, 445 U.S. 552, 560 (1980) (rejecting defendant's Fifth Amendment claim when he remained silent during a police investigation without indicating that he believed his silence was privileged). Slip op. at 7. Additionally, the general rule applies even if the official suspects an answer will be incriminating. Slip op. at 8. The Court found that both a witness' silence and official suspicions together are insufficient to exempt the obligation to expressly invoke the privilege. Slip op. at 8. *See Berghuis v. Thompkins*, 560 U.S. 370 (2010) (rejecting Fifth Amendment claim when defendant was silent for 2 hours and 45 minutes during police questioning without invoking). The Court also rejected Mr. Salinas's remaining arguments.

Concurrence. Justice Thomas (joined by Justice Scalia) concurred in the opinion, based on the theory that the claim would fail even if Mr. Salinas had invoked the privilege because "the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony." This is based on the concurrence's disagreement with the Court's ruling in *Griffin v. California*, 380 U.S. 609 (1965), prohibiting a prosecutor from commenting on a defendant's failure to testify, which Mr. Salinas sought to extend to include silence in a precustodial interview.

Dissent. Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan) dissented, based on the theory that the Fifth Amendment prohibits the prosecution from commenting on the petitioner's silence in response to police questioning. The dissent believed the critical question was whether the circumstances gave rise to a fair inference that the silence rests on the Fifth Amendment. The dissent argues that to allow comment on silence can "compel an individual to act as a witness against himself," directly contrary to the Fifth Amendment. The dissent would have ruled that the courts should examine all of the specific circumstances of an individual's encounter with police to decide whether, in fact, that person's silence was an attempt to claim the Fifth Amendment right. The dissent believed it was clear that Mr. Salinas was invoking his Fifth Amendment right based on the circumstances at hand, and as such, Mr. Salinas's silence was sufficient to put the Government on notice and bar the evidence of silence from being admitted against Mr. Salinas.

***Descamps v. United States*, No. 11-9540 (June 20, 2013)**

Issue. The "modified categorical approach" is a means of determining whether a prior state court conviction is an Armed Career Criminal Act "violent felony" predicate. May sentencing courts employ the "modified categorical approach" to state statutes that have only one set of indivisible elements?

Held. No.

Background and procedural history. Mr. Descamps was convicted of being a felon in possession of a firearm, and the Government sought an enhanced sentence under ACCA based on prior California state convictions for felony harassment, robbery, and burglary. Mr. Descamps argued that his burglary conviction was not an ACCA predicate because, although the California statute criminalized entering certain locations with the intent to commit larceny or any felony, it did not require such entry to be unlawful, as does a "generic" burglary statute. This had the effect of criminalizing conduct such as shoplifting as a burglary. This state law therefore was more broad than the generic definition of burglary, which requires an unlawful entry.

The district court employed the modified categorical approach, which permitted it to consider other evidence, such as the record of Mr. Descamps's California plea colloquy, to determine whether he had admitted to the elements of a generic burglary when he pleaded guilty. Because the state prosecutor had alleged that Mr. Descamps committed breaking and entering, and Mr. Descamps failed to object, the district court determined that Mr. Descamps's prior burglary conviction met the elements of generic burglary and therefore was a predicate conviction for ACCA purposes. The Ninth Circuit affirmed, and the Supreme Court granted Mr. Descamps's petition for certiorari review to resolve a circuit split as to whether the modified categorical approach applies to statutes that contain a single indivisible set of elements but are broader than the corresponding generic offense.

Analysis. The Supreme Court (Justice Kagan, for an 8-1 Court with Justices Kennedy and Thomas concurring and Justice Alito dissenting) held that the modified categorical approach could not be used when the defendant was convicted under an indivisible statute.

In *Taylor v. United States*, 495 U.S. 575 (1990), the Court established the "formal categorical approach" for determining when a prior conviction counts as one of ACCA's predicate offenses, such as burglary. Under this approach, "[s]entencing courts may 'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and not 'to the particular facts underlying those convictions.'" Slip. Op. at 5 (quoting *Taylor*, 495 U.S. at 600). If the underlying statute has the same elements as the generic ACCA offense, or defines the crime more narrowly, then the prior conviction may serve as an ACCA predicate; if the statute is broader than the generic offense the conviction cannot serve as an ACCA predicate, even if as a factual matter the defendant committed the offense in its generic form. "The key . . . is elements, not facts." Slip. Op. at 5.

Taylor also recognized a "narrow range of cases" where sentencing courts could apply a "modified categorical approach" and look beyond the statutory elements to other documents. Slip. Op. at 6. However, this approach was only to be used when a statute has a list of alternative elements, some of which would work as an ACCA predicate while others would not. Therefore, the modified categorical approach would

allow sentencing courts to examine a limited set of documents to determine which of the alternative elements actually formed the basis of the defendant's prior conviction.

Here, the Supreme Court held that the modified categorical approach preserves the focus on elements rather than facts of the formal categorical approach, and is simply "a mechanism for making that comparison when a statute lists multiple, alternative elements" and thus essentially establishes several different crimes. Slip. Op. at 8. The Court therefore determined that the modified categorical approach has no role to play in a case like that of Mr. Descamps, where the underlying statute contains only one set of elements. No uncertainty exists as to what statutory elements formed the basis of Mr. Descamp's conviction, so "[u]nder [the Court's] prior decisions, the inquiry is over." Slip. Op. at 10. Because the California burglary statute sweeps more broadly than the generic offense of burglary by failing to require an unlawful entry, a conviction under that statute cannot serve as a predicate offense for ACCA purposes.

The Court next reaffirmed three grounds it had cited in *Taylor* as the basis for the "elements-centric" categorical approach to ACCA predicates, and determined that the Ninth Circuit's method of applying the modified categorical approach to an indivisible statute ran afoul of *Taylor*. First, ACCA increases a defendant's sentence if they have three prior convictions, not if they have committed certain crimes three times. This demonstrates a congressional choice to look only to whether a defendant had been convicted of certain crimes rather than the underlying facts and circumstances of those convictions. The Court determined that the result of the Ninth Circuit's approach—where some convictions for a crime could serve as ACCA predicates while others could not—would be "exactly the differential treatment we thought Congress, in enacting ACCA, took care to prevent." Slip. Op. at 13. Second, the Court recognized potential Sixth Amendment issues under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), if a sentencing court was allowed to determine which facts formed the basis of a conviction. The only facts a sentencing court is certain a jury found (or that the defendant waived his right to have a jury find, in the case of a guilty plea) are those which constitute elements of the offense. The Court therefore concluded that when a sentencing court finds any other facts, it engages in judicial fact-finding for the purpose of increasing a sentence in violation of *Apprendi*. Third, the Ninth Circuit's approach created the same practical difficulties which initially led to the creation of the categorical approach: sentencing courts could base decisions on facts that defendants failed to contest simply because they were unrelated to the elements of the offense, or deprive defendants of the benefit of the bargain in a plea deal when a sentencing court can turn a lesser, non-ACCA predicate offense into an ACCA predicate. The fact-centric approach of the Ninth Circuit essentially "explore[s] whether a person convicted of one crime could also have been convicted of another, more serious offense"—and the Court says this is exactly the kind of review the categorical approach established in *Taylor* precludes. Slip. Op. at 22.

United States v. Kebodeaux, **No. 12-418 (June 24, 2013)**

Issue. Did Congress exceed its authority in enacting the Sex Offender Registration and Notification Act (SORNA) registration requirements and apply them to federal offenders who had already completed their sentence at the time of its enactment?

Held. No.

Background and procedural history. In 1999, while serving in the United States Air Force, Mr. Kebodeaux was convicted by court-martial of a sex offense, sentenced to three months in prison, and given a bad conduct discharge. Several years later, after Mr. Kebodeaux had completed his sentence and was discharged, Congress enacted SORNA, requiring people convicted of federal sex offenses to register in the states where they live. Regulations enacted pursuant to SORNA established that the law was intended to apply to sex offenders who had already completed their sentences at the time of its enactment.

After Mr. Kebodeaux served his sentence and was discharged, he moved to Texas and registered as a sex offender with state authorities. Congress enacted SORNA in 2006, and in 2007 Mr. Kebodeaux moved from San Antonio to El Paso, updating his sex offender registration at that time. However, later that year he moved back to San Antonio and failed to update his sex offender registration. The Federal Government then prosecuted Mr. Kebodeaux for this SORNA violation.

Mr. Kebodeaux was convicted in district court, and appealed his conviction to the Fifth Circuit. The Fifth Circuit initially upheld the conviction, but reheard the appeal en banc and reversed by a vote of 10 to 6, holding that Mr. Kebodeaux had been unconditionally set free by Government at the time of SORNA's enactment because he was not imprisoned or serving a term of supervised release at the time. Because Mr. Kebodeaux had been unconditionally set free, the Government lacked the power to regulate his subsequent interstate movements. The Supreme Court granted the Government's petition for certiorari review because the Fifth Circuit had adjudged a federal statute unconstitutional.

Analysis. The Court (Justice Breyer, for a 7-2 Court with Chief Justice Roberts and Justice Alito concurring) disagreed with the Fifth Circuit's reasoning because it determined that Mr. Kebodeaux had not been released unconditionally–rather, he was subject to the federal Wetterling Act, which imposed similar registration requirements to SORNA. The Wetterling Act, like SORNA, imposed criminal penalties for failing to register on people who had committed certain sex offense. The fact that the Wetterling Act involved compliance with state-law registration requirements did not make it any less of a requirement imposed on Mr. Kebodeaux by federal law.

The Court held that it was proper for Congress to have enacted the Wetterling Act, and applied it to military personnel, under the Military Regulation Clause, U.S. Const., Art. I., § 8, cl. 14, and the Necessary and Proper Clause. These same powers

also authorized Congress to enact the requirements of SORNA, and the Court determined that Congress's decision to impose a civil registration requirement on sex offenders was reasonable. Because Mr. Kebodeaux was already subject to similar registration requirements and had not been unconditionally released, Congress had the power under the Necessary and Proper Clause to modify his registration requirements in order to make more uniform what had been a patchwork system of federal law and individual state registration systems.

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

PUBLISHED OPINIONS

United States v. Cruz, No. 11-12568 (March 26, 2013)
United States v. Cruz, No. 11-12441 (March 26, 2013) [consolidated cases]

Issues.

(1) Did the district court plainly err in applying the 2-level USSG §2B1.1(b)(10) enhancement in addition to a mandatory sentence under 18 U.S.C. § 1028A?
(2) Did the district court plainly err in applying the 2-level USSG §3B1.3 abuse-of-trust enhancement based on the defendant's position as a store cashier?

Held.

(1) No.
(2) No.

Background and procedural history. Lisandra Cruz, sister of Jose Cruz, worked as a cashier at Target. She allowed Jose to use false credit cards for purchases at her register. Jose and Lisandra were convicted under 18 U.S.C. § 1029(a)(2) for unauthorized access device fraud. Additionally, they were convicted of two counts of aggravated identity theft under 18 USC § 1028A, mandating an additional consecutive two-year term of imprisonment for a defendant convicted of certain predicate crimes if the offender "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 19 U.S.C. § 1029A(a)(1). They each received a 2-level enhancement under USSG §2B1.1(b)(10) for the possession of device-making equipment. Lisandra also received a 2-level abuse-of-trust enhancement because of her status as a Target store cashier.

Analysis. Jose and Lisandra contended that the 2-level enhancement for possession of device-making equipment was in error, arguing that comment two of USSG §2B1.6 precludes a cumulative enhancement for the use of device-making equipment. Their

position was that the use of device-making equipment was part of the relevant conduct underlying their predicate 18 U.S.C. § 1029(a)(2) convictions for unauthorized access device fraud, rendering the sentencing enhancement inappropriate. Thus, an enhancement for the use of device-making equipment is prohibited.

The Eleventh Circuit (Judge Black, for Judge Carnes and International Trade Judge Restanti) noted that the Court had not yet addressed this issue but looked to the First and Eighth Circuits for guidance, both of which had held that there is no prohibition on applying §2B1.1(b)(10) enhancements to defendants convicted under § 1028A. *See United States v. Jenkins-Watts*, 574 F.3d 950, 962 (8th Cir. 2009); *United States v. Sharapka*, 526 F.3d 58, 62 (1st Cir. 2008). The Court ruled that Jose's and Lisandra's enhancements were not based on the "transfer, possession, or use of a means of identification" but on relevant conduct related to device-making equipment; therefore, the district court was not precluded from applying a §2B1.1(b)(10)(A)(i) enhancement based on the use of device-making equipment.

Lisandra contended further that her status as a Target store cashier did not support an enhancement under USSG §3B1.3. She asserts she was merely a cashier who exercised no discretion, but instead processed transactions the credit card company's computer systems accepted or declined electronically. She also contended that she did not create a relationship of trust between herself and the credit card companies or the owners of the cards and that she did not exploit her position because there was no evidence of her stealing. The Court affirmed the enhancement, finding that Lisandra's actions fell within USSG §2B1.3 Application Note 1 which states if the defendant "exceeds or abuses the authority of his or her position in order to obtain, transfer, or issue unlawfully, or use without authority, any means of identification," an abuse-of-trust enhancement is applicable. USSG §2B1.3, cmt. 2(B).

United States v. Overstreet, No. 11-16031 (March 28, 2011)

Issues.

(1) Must a defendant admit to prior felonies in his guilty plea in order to be designated as a career criminal under the Armed Career Criminal Act (ACCA)?
(2) Did the district court err in concluding that the defendant's crimes occurred on different occasions, as required by ACCA?
(3) Did the district court abuse its discretion sentencing the defendant above the guidelines?

Held.

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

Background and procedural history. In 1986, Mr. Overstreet was sentenced to 22 years in the Texas prison system for a spree of crimes including burglary, two

attempted murders, and aggravated sexual assault. Mr. Overstreet was paroled in 2008, moved in with his wife Taffy in Houston, TX, and placed on electronic monitoring. In November 2010, Mr. Overstreet cut his ankle monitor and fled Texas. Taffy was reported missing shortly after Mr. Overstreet's flight. Mr. Overstreet was caught and arrested in December 2010. The police found duct-tape with blood residue and a loaded firearm in Mr. Overstreet's trunk and arrested him. Mr. Overstreet was the prime suspect in Taffy's disappearance, but her body was never found and Mr. Overstreed was not charged with her murder. Instead, Mr. Overstreet was indicted and later pleaded guilty to felon-in-possession of a firearm under 18 U.S.C. § 922(g).

At sentencing, the district court found that Mr. Overstreet was subject to the ACCA and a 180-month mandatory minimum sentence. This made the guideline range 180-188 months, and the district court sentenced Mr. Overstreet to 420 months in prison.

Analysis. The Eleventh Circuit (Judge Hull for Judge Carnes and Judge Fay) affirmed the district court. Mr. Overstreet contended that the district court erred in applying the ACCA enhancement because he did not admit to the prior convictions in his guilty plea and because there was no indication in the indictment or proof beyond a reasonable doubt that the prior offenses were committed on separate occasions.

The Court rejected these arguments. It held that Mr. Overstreet's prior conviction argument was foreclosed by the Supreme Court's decision in *Almendarex-Torres v. United States*, 523 U.S. 22 (1998), which held that, for sentence enhancement purposes, the fact of a defendant's prior conviction did not need to be alleged in the indictment or proven beyond a reasonable doubt where the fact of a prior conviction was not an element of the present offense. Additionally, the Court dispelled Mr. Overstreet's separate occasion argument based on the district court's authority to determine the factual nature of prior convictions for ACCA purposes. See *United States v. Weeks*, 711 F.3d 1225 (11th Cir. 2013).

Mr. Overstreet further contended that his above-guideline sentence was unreasonable and argued that he was sentenced as if he had been found guilty for Taffy's murder even though he was only convicted of being a felon in possession of a firearm. The Court held that the district court did not place an undue weight on the evidence of the murder but applied the lengthy sentence based upon a demonstrated need to protect the public from Mr. Overstreet based on his blatant disregard for the law and for human life; therefore there was no abuse of discretion by the district court.

United States of America v. Diaz-Calderone, No. 12-12013 (May 23, 2013)

Issue. Did the district court err in applying the modified categorical approach and in determining that the defendant had committed a "crime of violence" under USSG §2L1.2?

Held. No.

Background and procedural history. Mr. Diaz-Calderone was convicted and sentenced on a charge of illegal entry following deportation. He received a 16-level enhancement for a prior conviction deemed a "crime of violence." Mr. Diaz-Calderone's prior convictions were for a State of Florida crime, "aggravated battery," consisting of battery upon a pregnant victim whom the perpetrator knew or should have known was pregnant. Under Florida law, aggravated battery upon a pregnant woman can be accomplished by 1) intentional touching, including slight contact; 2) striking; or 3) intentionally causing bodily harm. Therefore, a conviction for aggravated battery alone does not constitute a crime of violence.

The Government submitted sworn affidavits from police officers describing the events as violent and not merely "unwanted touching." The district court applied the modified categorical approach and relied on statements made in Mr. Diaz-Calderone's change-of-plea proceeding in state court for two separate allegations of aggravated battery on the same pregnant woman cases. The Government submitted an audio recording of this plea as an exhibit, and the district court stated that it had "listened very carefully to the recording." The district court found that in the colloquy, "the defendant assented to the facts which would make this a violent offense."

Analysis. The Eleventh Circuit (Ninth Circuit Judge Kleinfeld, for Chief Judge Dubina and Judge Barkett) affirmed. Mr. Diaz-Calderone argued that the district court should have determined that Florida aggravated battery was not categorically a crime of violence, and stopped there. The Court rejected this argument and concluded that the statute is ambiguous because the word "battery" in Florida's aggravated battery upon a pregnant woman statute encompasses a mix of forceful and non-forceful conduct. The district court was correct to use the modified categorical approach. The Court noted that the district court's ruling was based upon a recording of the change-of-plea proceeding and not the affidavits of the police officers. Mr. Diaz-Calderone admitted at the state plea proceedings that he was guilty of aggravated battery based on his striking of the pregnant victim and, therefore, the district court properly imposed the 16-level sentencing enhancement.

United States v. Hinds, No. 11-16048 (April 9, 2013)

Issue. Does the Fair Sentencing Act (FSA) apply to a post-FSA resentencing following an initial pre-FSA sentencing?

Held. Yes.

Background and procedural history. Mr. Hinds was convicted of conspiring to possess with intent to distribute 50 grams or more of cocaine base. His original 120-month sentence, imposed prior to the FSA's effective date, was vacated due to the speculative nature of the amount of drugs involved. The district court convened Mr.

Hinds's re-sentencing after the effective date of the FSA, but did not apply the FSA's lower mandatory minimums and imposed the same 120-month sentence.

Analysis. The Eleventh Circuit (per curiam, before Judges Dubina, Barkett, and Ninth Circuit Judge Kleinfeld) vacated and remanded to the district court for resentencing pursuant to the FSA. The Court noted the Supreme Court's holding in *Dorsey v. United States* that "Congress intended the Fair Sentencing Act's new, lower mandatory minimums to apply to the post-Act sentencing of Pre-Act offenders." 132 S. Ct. 2321, 2335 (2012). The Eleventh Circuit held there is no meaningful difference between an initial sentencing and a resentencing post-Act and that the FSA applies in both instances.

United States v. Hall, No. 12-11343 (April 16, 2013)

Issue. Is the possession of a sawed-off shotgun a "crime of violence" within the meaning of the career offender guideline?

Held. Yes.

Background and procedural history. Mr. Hall pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court enhanced Mr. Hall's sentence under USSG §2K2.1(a)(4)(A) after determining that a prior 2006 felony conviction for possession of an unregistered sawed-off shotgun, in violation of 26 U.S.C. § 5861(d), qualified as a "crime of violence" under the Sentencing Guidelines. Mr. Hall appealed.

Analysis. The Eleventh Circuit (Judge Wilson for Judge Cox and North Carolina District Judge Voorhees) affirmed the district court. Mr. Hall argued that possession of a sawed-off shotgun is not closely enough related to the enumerated offenses to constitute a "crime of violence" under the guideline's residual clause. The Court rejected this argument, citing the commentary under USSG §4B1.2 which explicitly provides that unlawful possession of a sawed-off shotgun as a crime of violence. The Court reiterated that guideline commentary is generally authoritative and that Mr. Hall did not demonstrate the applicability of any exception.

United States of America v. Hamilton, No. 12-10899 (April 23, 2012)

Issue. Given that the probation office incorrectly advised the district court of the drug quantity it relied on at the original sentencing, did the court err in denying Mr. Hamilton's 18 U.S.C. § 3582(c)(2) motion for resentencing based on USSG Amendment 750?

Held. Yes.

Background and procedural history. Mr. Hamilton pleaded guilty to possession with intent to distribute 5 grams or more of crack cocaine, a quantity of powder cocaine, and a quantity of marijuana. The Government dismissed three charges, but noted that as part of the plea Mr. Hamilton admitted he was part of a drug trafficking group. The district court adopted the calculations of the Presentence Report Addendum stating the defendants received 2 kilograms of cocaine base per week for "at least two months," and that two weeks of such activity established "at least 1.5 kilograms of crack cocaine, which established a base offense level of 38." This resulted in a guideline range of 360 months to life, and the district court sentenced Mr. Hamilton to 262 months in prison after granting the Government's USSG §5K1.1 motion.

Mr. Hamilton filed a § 3582(c)(2) motion to modify his sentence under Amendment 706 to the guidelines, which stated an offense must involve 4.5 kilograms of crack cocaine to result in a base level offense of 38. The district court denied this motion, agreeing with probation and the Government that, based on the PSI Addendum's calculation, Mr. Hamilton was responsible for more than 4.5 kilograms of crack cocaine.

Mr. Hamilton filed a second § 3582(c)(2) motion to modify his sentence under USSG Amendment 750, which raised the minimum amount of crack cocaine necessary to establish a base level of 38 to 8.4 kilograms. Mr. Hamilton pointed out the initial PSI did not allege how much crack cocaine the kilograms of powder cocaine produced in excess of 1.5 kilograms. The court again denied the motion based on the probation and Government's arguments that, according to the PSI, the district court had found him responsible for approximately 12 kilograms of crack cocaine.

Analysis. The Eleventh Circuit (Judge Hull for Judge Carnes and Judge Anderson) vacated the order of the district court and remanded for further proceedings. The Court examined the governing principles for § 3582(c)(2) motions to establish that Mr. Hamilton bore the burden of establishing that a retroactive amendment has actually lowered his guidelines range in his case. Additionally, the Court noted the district court's discretion in electing to impose the newly-calculated sentence or to retain the original sentence and the use of this discretion does not create a reversible error unless the record demonstrates that the district court failed to evaluate the motion in light of the factors listed in 18 U.S.C. § 3553(a).

The Court pointed to the error in both probation's and the Government's memos about the drug quantity findings at the original sentencing. Both memos used the original PSI and did not mention the Addendum; therefore, when the district court denied the motion based on the persuasiveness of the arguments from probation and the government, it also failed to use the Addendum. The Court remanded the case due to case law indicating the need for the district court to accurately determine the original drug quantity before it can analyze whether Mr. Hamilton had shown that Amendment 750 actually lowered his base offense level.

United States of America v. Washington, No. 11-14177 (April 26, 2013)

Issue. Did the Government present sufficient evidence that 250 or more persons or entities were victimized in order to apply the 6-level USSG §2B1.1(b)(2)(C) enhancement?

Held. No.

Background and procedural history. Mr. Washington pleaded guilty to four counts pertaining to the unauthorized possession and use of credit card numbers. The Presentence Investigation Report assessed a 6-level enhancement under USSG § 2B1.1(b)(2)(C), explaining the involvement of "hundreds of individuals" and "approximately 30 credit card companies." Mr. Washington objected to the enhancement, leaving the Government with the burden of establishing the factual basis at the hearing. At sentencing, the Government presented evidence of Mr. Washington purchasing the card numbers online and then selling them or using them for retail purchases. The Government offered no evidence of more than 250 victims. The district court applied the 6-level enhancement and sentenced Mr. Washington to 105 months in prison and 3 years of supervised release.

Analysis. The Eleventh Circuit (Judge Jordan for Judge Pryor and District of Nevada Judge Pro) vacated and remanded to the district court for resentencing. The Court looked to *United States v. Perez-Oliveros*, 479 F.3d 779, 783 (11th Cir. 2007), to establish that when the Government seeks to apply an enhancement under the Sentencing Guidelines over a defendant's factual objection, it has the burden of introducing "sufficient and reliable" evidence to prove the necessary facts by a preponderance of the evidence. Here, the evidence that the enhancement was applied to co-conspirators is not sufficient evidence for application to Mr. Washington because those transcripts were not provided and because Mr. Washington was not a member for the complete length of the conspiracy. The Government did not meet its burden of establishing that the fraud scheme involved 250 or more victims during Mr. Washington's involvement.

United States v. Philidor, No. 12-13679 (May 29, 2013);
United States v. Philidor, No. 12-13724 [consolidated cases]

Issue. Did the district court err in imposing the 6-level USSG §2B1.1(b)(2)(C) enhancement for more than 250 living victims where the government had only positively identified 26 victims?

Held. No.

Background and procedural history. Alland Philidor and his brother Willman Philidor each pleaded guilty to one count of conspiracy to steal government funds and one count of theft of government property. Their Presentence Investigation Reports (PSI) found that the offense involved 250 or more victims and suggested a six-level enhancement. The Philidors objected. The district court overruled the objection and imposed the 6-level enhancement. The Philidors appealed.

Analysis. The Eleventh Circuit (per curiam, before Judges Tjoflat, Wilson, and Anderson) affirmed the district court.

The Court found that the district court did not clearly err because it logically inferred from the undisputed facts of the PSI that, if over 250 Social Security numbers were used and those numbers corresponded to tax refunds issued, then the numbers likely belonged to living victims. The word "actual" in USSG §2B1.1 comment (n.1) does not distinguish between living and deceased people. Therefore, there was no error in failing to determine whether the victims were alive before imposing the enhancement.

United States v. Whately, 11-14151 (June 3, 2013)

Issue. Did the district court properly apply the 4-level USSG §2B3.1(b)(4)(A) sentencing enhancement for "abduction" when the defendant did not force anyone to accompany him to a different location?

Held. No.

Background and procedural history. Mr. Whately was charged with four counts of robbing banks (18 U.S.C. § 2113(a), (d)) and four counts of brandishing a firearm in the commission of those robberies (18 U.S.C. § 924(c)(1)(A)). Mr. Whately robbed four banks by going into the banks right before closing time and acting like a potential customer. Once the bank was closed or empty of customers, Mr. Whately would pull out a gun and round up the employees who would be locked in the vault or other inescapable room after he emptied the teller tills and the vault.

Mr. Whately was adjudged guilty after a jury trial. At sentencing, he received the 4-level USSG §2B3.1(b)(4)(A) sentencing enhancement for abduction.

Analysis. The Eleventh Circuit (Judge Pryor, for Judge Jordan and District of Nevada Judge Pro) rejected Mr. Whately's various challenges to his conviction, but vacated the §2B3.1(b)(4)(A) enhancement and remanded for resentencing. The Court noted that the guideline commentary provides that an offender commits an "abduction" when a person is "forced to accompany the offender to a different location." Here, Mr. Whately did not remove any bank employees from the bank itself, instead permitting them to move about the inside of the bank as he directed. Accordingly, the Eleventh Circuit

remanded with instructions that the district court instead impose the 2-level enhancement for "physical restraint."

United States v. Rothstein, 11-10676 (June 12, 2013)

Issue. Is the money in a law firm's bank account at the time of a named partner's RICO indictment, which included both the partner's lucre and the firm's legitimate monies, subject to forfeiture?

Held. No.

Background and procedural history. Mr. Rothstein's law firm petitioned for Chapter 11 bankruptcy. Less than a month later, he was charged with conspiring to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO") for operating a "Ponzi" scheme. The Government then moved to freeze all accounts and other assets. The district court denied the bankruptcy trustee's motion to have the bank accounts and their funds unfrozen because they were part of the bankruptcy estate. Mr. Rothstein pleaded guilty and forfeited his right to all of the funds to the Government. The Government attempted to seize the funds in the accounts, but one of the banks rejected the attempt due to the dispute between the Government and the trustee.

The district court ordered that all but a portion of those accounts must go to the Government. The funds and other assets were therefore transferred to the Government, and the trustee moved for the monies to be returned, arguing that the rights to the accounts and the assets purchased with funds from those accounts vested with the law firm, not Mr. Rothstein or the Government, so legal title passed to the trustee. The district court, after a hearing, determined that some of the funds were proven beyond a preponderance of the evidence to be legitimate monies of the firm and ordered that just those monies returned to the bankruptcy estate. The trustee appealed, arguing that all funds should be returned to the estate.

Analysis. The Eleventh Circuit (Judge Tjoflat, for Judge Martin and Middle District of Florida Judge Bucklew) agreed with the trustee and reversed the district court. It found that the Government did not show the requisite nexus between Mr. Rothstein's offense and the monies in the firm's account. The Court looked to the Third Circuit's decision in *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996), for direction on the question of when assets and property become so commingled that it may not be forfeited directly and substitute property must be forfeited instead. The Third Circuit ruled that when assets are purchased with improper funds and commingled with proper funds, which after "numerous intervening deposits and withdrawals," cannot be traced as a matter of law, "the government must [then] satisfy its forfeiture judgement through the substitute asset provision." *Voight*, 89 F.3d at 1087-1088. Accordingly, where commingled funds cannot be accurately divided, the Government

must utilize the statutes' substitute property provisions, 21 U.S.C. § 853(p) and 18 U.S.C. § 1963(m), in order to seek a forfeiture.

The Eleventh Circuit also determined that the use of bank funds to purchase other assets is a question of fact, and vacated the district court's decision as to the funds and other assets and remanded for a determination on whether the Government is entitled to either the funds or the assets.

United States v. Pacchioli et al., No. 12-12913 (June 19, 2013)

Issue. Is an indictment alleging bribery time-barred where the bribery agreement was consummated outside the limitations period, but the actual act of bribery occurred within the period?

Held. No.

Background and Procedural History. This case was a direct appeal by three co-defendants who sought to overturn their convictions for bribery of programs receiving federal funds. *See* 18 U.S.C. § 666(a)(2). The three were involved in a scheme whereby hospital facility managers awarded maintenance contracts to those individuals willing to pay. Because it was unclear when Mr. Pacchioli actually completed payment of his bribe, the district court decided to treat the statute-of-limitations issue as a factual issue for the jury. All three were found guilty.

Analysis. The Eleventh Circuit (Judge Marcus, for Judge Barkett and Middle District of Florida Judge Conway) affirmed the lower court's decision. Mr. Pacchioli argued that the limitations period for his crime should have begun from the moment he agreed to the bribe, in which case the statute of limitations would bar his prosecution. The Eleventh Circuit concluded that the limitations period in this case began to run from when the offender actually paid the bribe, and therefore the conviction did not run afoul of the statute.

Statutes of limitation normally begin to run when the crime is complete. *See Toussie v. United States*, 397 U.S. 112, 115 (1970). Ordinarily, an offense is "complete" when all the elements of the crime have been satisfied. *See United States v. Irvine*, 98 U.S. 450, 452 (1879). The Eleventh Circuit found that § 666(a)(2) is phrased in the disjunctive and a violation can be proven in three distinct ways: 1. either by giving, offering, or agreeing to give a thing of value to any person; 2. with the corrupt intent to influence or reward an agent of an organization that receives more than $10,000 in federal funding in any one-year period; 3. in connection with any business transaction or series of transactions of that organization involving more than $5,000. The Government needed to only prove one of the three charged acts. If the Government had charged only the agreement or proven only the date of the agreement, then the first element would not have been met, and the limitations period would have run from the date of the agreement. But the Government charged and proved all three acts, so

if one of the three acts occurred within the five-year limitation, then the limitations period had not run. The Eleventh Circuit found Mr. Pacchioli's statute-of-limitations claim to have no merit because the jury found that Mr. Pacchioli paid the bribe less than five years before the date of his indictment and summarily rejected Mr. Pacchioli's remaining arguments.

United States v. Rojas, No. 12-15364 (June 20, 2013)

Issue. Does the five-year statute of limitations for marriage fraud begin from the date of the marriage?

Held. Yes. The plain meaning of 8 U.S.C. § 1325(c) dictates that the crime of marriage fraud is complete on the date of marriage and, as a result, the Government's indictment was time-barred.

Background and Procedural History. Mr. Rojas was convicted of marriage fraud in violation of 8 U.S.C. § 1325(c). Mr. Rojas moved to dismiss the case, alleging that the indictment was time-barred, but the district court denied the motion. Mr. Rojas appealed.

Analysis. The Eleventh Circuit (Judge Wilson, for Judge Martin and Judge Kravitch) found that the five-year statute of limitations began to run on April 23, 2007, and the Government did not indict Mr. Rojas within the five-year statute of limitations. Therefore, the district court abused its discretion in denying Mr. Rojas's motion to dismiss, and the Eleventh Circuit reversed. The Court looked at the plain meaning of the statute and found that Congress did not intend marriage fraud to be a continuing offense. Instead, it contemplated that the crime was completed on the day of the marriage.

United States v. Valerio, No. 12-12235 (June 20, 2013)

Issue. Does *Terry v. Ohio*, 392 U.S. 1 (1968), authorize law enforcement officers to effectuate a full-body pat-down search nearly one week after last observing suspicious behavior?

Held. No.

Background and Procedural History. Police observed Mr. Valerio behaving suspiciously. One week later, the police conducted a full-body pat-down search of Mr. Valerio's person in his driveway, where he admitted to growing marijuana. After being convicted in a bench trial, Mr. Valerio appealed the district court's denial of his motion to suppress evidence from the pat-down search.

Analysis. The Eleventh Circuit (Judge Barkett for Judge Marcus and Middle District of Florida Judge Conway) held that Mr. Valerio was subjected to an unconstitutional search and reversed and vacated. The authority to make a *Terry* stop is dependent upon the exigencies associated with "on-the-spot observations of the officer on the beat." *Terry*, 392 U.S. at 20. *Terry* carved out a minor exception to the Fourth Amendment, but whenever practicable, police must obtain advance judicial approval of searches and seizures through the warrant procedure. In most instances, failure to comply with the warrant requirement can only be excused by exigent circumstances. The timing and circumstances surrounding the officers' full-body pat-down in this case place it well outside of the *Terry* exception to the probable cause requirement.

United States v. Victor, No. 12-12809 (June 27, 2013)

Issue. Does the lack of physical contact preclude a USSG §2B3.1(a) physical-restraint enhancement?

Held. No.

Background and Procedural History. On September 22, 2011, Mr. Victor entered a credit union in Florida. He walked up to an employee with his hand in his pocket as if he had a gun. Mr. Victor yelled that he had a gun and would kill anyone who did not do what he said. With the bank employee beside him, he then demanded money from the tellers' drawers. As he was robbing the credit union, an employee contacted the local police. The police arrived, and Mr. Victor fled in a car driven by a friend. Mr. Victor was arrested and eventually pleaded guilty to bank robbery and to brandishing an assault rifle. His Presentence Investigation Report included the U.S.S.G. § 2B3.1(a) enhancement for physical restraint of a person. Mr. Victor objected to the physical-restraint enhancement, arguing that he did not physically touch the bank employee. The district court overruled Mr. Victor's objections and sentenced him to _____ months in prison.

Analysis. The Eleventh Circuit (Judge Kravitch for Judge Tjoflat and Judge Pryor) rejected both arguments, writing that its prior precedent is clear that the physical-restraint enhancement is not limited to instances "where a victim was physically restrained by being tied, bound, or locked up." *See* the commentary and background to USSG § 2B3.1. The Eleventh Circuit reiterated that the enhancement applies when the defendant's conduct "ensured the victims' compliance and effectively prevented them from leaving" a location. *United States v. Jones*, 32 F.3d 1512, 1518-1519(11th Circuit 1994). Here, Mr. Victor, by threatening violence and feigning the use of a gun, did ensure the victim's compliance.

SELECTED UNPUBLISHED OPINIONS

United States v. Jardines, No. 12-14461 (April 23, 2013)

Issue. Can the district court compel the Government to file a Fed.R.Crim.P. 35(b) motion to reduce a defendant's sentence?

Held. No, unless the Government's refusal is based on an unconstitutional motive.

Background and procedural history. Mr. Jardines pleaded not guilty to five counts related to identity theft in 2009 but advised the district court of his intent to change his plea. He did not appear at his change-of-plea hearing, and instead fled to Mexico for two years. Mr. Jardines pleaded guilty in 2011, but his attorney stated there was no plea agreement with the Government. He was sentenced to 48 months in prison and did not appeal his convictions or sentence.

In July 2012, Mr. Jardines moved to compel the Government to file a Rule 35(b) motion for a sentence reduction. Mr. Jardines claimed a deal was made with the Government to have information he allegedly provided taken into account at sentencing or to file a Rule 35(b) motion after sentencing. The district court denied the motion, ruling that it could not force the Government to file a Rule 35(b) motion, and Mr. Jardines appealed.

Analysis. The Eleventh Circuit (per curiam, before Judges Tjoflat, Pryor and Kravitch) affirmed the denial of Mr. Jardines's motion. A district court can only compel the Government to file a Rule 35(b) motion when the refusal is based on an unconstitutional motive. *See* slip op. at 4, *citing Wade v. United States*, 504 U.S. 181, 185-86 (1992). Mr. Jardines's argument that the Government refused to file the motion because he fled to Mexico was inadequate to prove an unconstitutional motive. There was no evidence of a plea agreement at the plea hearing or sentencing. Without a plea agreement promise, the Government is not *required* to file a motion to reduce a sentence; rather, it only has the authority to do so at its discretion. Slip op. at 4, *citing Wade* at 185. A mere claim by a defendant that he or she provided substantial assistance is not enough for the court to compel the Government to file a Rule 35(b) motion.

United States v. Perez, No. 12-10372 (May 22, 2013)

Issue. Is the USSG §2B3.1(b)(2)(E) dangerous weapon enhancement proper for pepper spray when the only evidence of its dangerous nature is the defendant's intended use

and the product's label and name?

Held. No.

Background and procedural history. On the way to rob a check-cashing store, Mr. Perez and co-conspirators bought pepper spray. The plan was to use the pepper spray to blind a man carrying money out of the store, but the robbery did not occur due to nearby police presence. Later, a detective filmed two individuals (presumably Mr. Perez's co-conspirators, although the Court's opinion is unclear) acting like they were spraying pepper spray in a person's eyes. Five days after the filming, Mr. Perez and his co-conspirators were arrested on their way to rob a fake cocaine house. During the arrest, a can of pepper spray was recovered from a co-conspirator.

Mr. Perez was convicted of three robbery-related charges and one count of possessing a firearm during a violent drug-related crime. The Government requested and received a 3-level dangerous weapon enhancement under USSG §2B3.1(b)(2)(E) for one count, based on the co-conspirator's possession of the pepper spray during the first aborted robbery. Mr. Perez was sentenced to 140 months in prison. He appealed, arguing, *inter alia*, that the application of the enhancement was improper.

Analysis. The Eleventh Circuit (Judge Tjoflat, for Judge Pryor and Western District of Washington Judge Rothstein) vacated the sentence and remanded for re-sentencing, concluding that the district court erred in applying the dangerous weapon enhancement. The pertinent Sentencing Guideline instructs that a defendant's offense level shall be increased by three levels "if a dangerous weapon was brandished or possessed" during the crime. Slip op. at 6, *citing* U.S.S.G. § 2B3.1 (b)(2)(E). A weapon is dangerous if it is "an instrument capable of inflicting death or serious bodily injury." *Id*. at §1B1.1, comment. (n. 1(D)).

The Court held that the Government did not present sufficient evidence to establish that the pepper spray was a dangerous weapon within the meaning of the guideline. Slip op. at 7. The brand name, "Red Saber," and the "dangerous" note on the pepper spray's warning label were insufficient to establish a "dangerous weapon," as the label's description did not imply that its contents rose to the necessary level to inflict a serious bodily injury under USSG §1B1.1, comment. (n. 1(L)). Additionally, Mr. Perez's intended use of the pepper spray (based on the investigator's video or otherwise) does not qualify it as a dangerous weapon, since it is not telling of whether the pepper spray is *actually capable* of inflicting serious bodily injury. Slip op. at 8-9. The imposition of a sentence enhancement without sufficient factual support is legal error. The Court remanded to the district court for re-sentencing without the enhancement.

United States v. Rodger, No. 11-10170 (June 6, 2013)

Issue. Did the district court err in denying the defendant's motion to suppress evidence seized after he was stopped at a police roadblock and his motion to suppress out-of-court witness identifications?

Held. No.

Background and procedural history. Mr. Rodger robbed a bank. When the bank robbery occurred, the teller gave the robber bait money, and provided law enforcement with a description of the robber. An officer stopped Mr. Rodger because he matched the description and asked to search his trunk. He opened the trunk, but refused to allow further search. An FBI agent arrived and identified Mr. Rodger based on the bank's surveillance video. After he was arrested, officers searched Mr. Rodger's car and found a jacket and handgun matching the descriptions given, as well as the bait money. Three bank employees who witnessed the robbery were also asked to identify Mr. Rodger outside the bank after his arrest. Two of the three positively identified him. Mr. Rodger filed a pretrial motion to suppress evidence seized from his car, as well as the identifications of the bank employees. The district court adopted the magistrate judge's recommendations to deny the motions. After being found guilty in a jury trial, Mr. Rodger appealed.

Analysis. The Eleventh Circuit (per curiam, Judge Carnes, Judge Wilson and Southern District of Florida Judge Huck) affirmed the denial of Mr. Rodger's motions to suppress the evidence from the roadblock and the out-of-court identifications. The roadblock in question was set up to find a dangerous robbery suspect who was armed and was tailored accordingly. Roadblocks are justifiable if the primary purpose is some emergency situation. Slip op. at 8 *citing City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). The law enforcement officer also had reasonable suspicion to stop Mr. Rodger based on the description given to her. The bank employees' out-of-court identifications were reviewed under a two-part test from *United States v. Diaz*, 248 F.3d 1065, 1102 (11th Cir. 2001). First, the court must determine if the "original identification procedure was unduly suggestive." Then, if so, the court must consider whether "under the totality of the circumstances, the identification was nonetheless reliable." Slip op. at 11 *citing id.* The identifications here were reliable regardless of whether they were unduly suggestive because the eyewitnesses had significant time to view the robber during the crime, and one even had a conversation with him. They were also both able to give a full, detailed description of the robber to police before the identifications. Slip op. at 12-13.

The Court summarily rejected Mr. Rodger's additional arguments, including his assertion that he was entitled to a new trial because of an omission from the transcript. This only warrants a new trial if the court could not satisfactorily reconstruct the missing portions of the transcript, which the district court was able to do here. Slip op. at 19-20.

United States v. Wiggins, No. 12-16362 (June 4, 2013)

Issue. Did the district court plainly err by denying the defendant the opportunity to repeat his allocution at a revocation hearing where, due to the defendant's accent, the district court did not understand everything the defendant said?

Held. No.

Background and procedural history. At Mr. Wiggins's supervised release hearing, he was given the opportunity to make a statement before sentencing. Mr. Wiggins made a short allocution. Afterwards, the district court noted that Mr. Wiggins's accent and the speed at which he spoke made him difficult to understand, but denied Mr. Wiggins's offer to repeat the statement and instead asked the defense counsel to elaborate. The defense counsel asked for 12 months of imprisonment, and the court imposed an 18-month sentence. There were no objections at that time to the sentence or manner in which it was imposed. Mr. Wiggins appealed the revocation of his supervised released on the grounds that his right to allocution was denied when the district court claimed to not understand his accent but denied him the chance to repeat himself.

Analysis. Applying plain error review, the Eleventh Circuit affirmed (per curiam, Judge, Barkett, Judge Marcus and Judge Martin). The district court is only required to provide the defendant at a revocation hearing "an opportunity to make a statement and present any information in mitigation." Fed. R. Crim. P. 32.1 (b)(2)(E). Because Mr. Wiggins's specific allocution did not present any mitigating factors and his attorney repeated his opinion regarding sentence length, there is no evidence that his allocution was not fairly considered. Slip op. at 3-4.

Rosin v. United States, No. 11-14391 (June 19, 2013)

Issue. Did the district court err in placing a "clear and convincing evidence" burden of proof on a defendant's motion to vacate his conviction on the grounds that counsel rendered ineffective assistance?

Held. Yes.

Background and procedural history. Mr. Rosin filed a 28 U.S.C. § 2255 motion to vacate his conviction and sentence. The district court denied the motion without an evidentiary hearing, reasoning that Mr. Rosin had failed to establish the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), by "clear and convincing" evidence. Slip op. at 2.

Analysis. The Eleventh Circuit (per curiam, Judge Dubina, Judge Jordan and Judge Cox) vacated the district court's order denying relief and remanded with instructions.

The "clear and convincing" evidence test applied by the district court placed an undue burden on Mr. Rosin. Slip op. at 2. Instead, Mr. Rosin only had to show that there was a "reasonable probability" that, "absent counsel's alleged ineffective assistance, he would have [pleaded guilty]." Slip op. at 2 *citing United States v. Diaz*, 930 F.2d 832, 835 (11th Cir. 1991). "Reasonable probability" is a lower standard than "clear and convincing" evidence, which "entails proof that a claim is 'highly probable'..." Slip op. at 3. Because the district court used the wrong legal standard, the Court remanded the case for the motion to be considered under the "reasonable probability" standard set forth in *Strickland* to determine whether an evidentiary hearing should be granted. Slip op. at 3.