SUMMARIES OF RECENT CASELAW

APRIL 1, 2014 – JUNE 30, 2014

TABLE OF CONTENTS

UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PUBLISHED OPINIONS

SELECTED UNPUBLISHED OPINIONS

DECISIONS OF THE UNITED STATES SUPREME COURT

Navarette v. California, No. 12-9490 (Apr. 22, 2014)

Issue. Did an anonymous 911 call from a woman alleging a driver ran her off the road contain an "indicia of reliability" sufficient to support reasonable suspicion for a traffic stop?

Held. Yes.

Background and procedural history. 911 dispatch received an anonymous call that a vehicle had just run the caller off the road. Though she did not provide her name, the caller did provide the make, model, color, and tag number of the truck, as well as the direction of travel and location. Based on this description, highway patrol officers stopped Mr. Navarette near that location. Upon approaching the vehicle, the officers smelled marijuana in the truck bed. A search of the truck bed reveled 30 pounds of marijuana. At trial, Mr. Navarette moved to suppress the marijuana, arguing that the stop violated the Fourth Amendment because the officers lacked reasonable suspicion. The magistrate judge denied the motion and that ruling was affirmed by a California Superior Court and the state's Court of Appeals. The Supreme Court of California declined review.

Analysis. The Supreme Court (Justice Thomas for Chief Justice Roberts and Justices Kennedy, Breyer, and Alito) affirmed. The 911 call was reliable because the caller claimed eyewitness knowledge of the event and provided detailed information about the vehicle. That the officers located the truck a reasonable distance from where the call was made also shows some corroboration of the claim by law enforcement. It also shows that the tipster made the call very quickly after the event, lending the call the reliability associated with a "present sense impression" or "excited utterance." Further, while making a 911 call is not a *per se* indicator of reliability, the facts that calls to 911 are generally traceable and that false reports can have significant legal consequences do indicate reliability. This tip also provided for reasonable suspicion because the behavior noted was not simply a conclusory allegation based on one small factor that could point to drunk driving, but a very strong indicator of recklessness that shows a high probability of drunk driving. Although the officer observed no other suspicious behavior in the five minutes he followed the truck, this does not matter because reasonable suspicion had already attached.

Justice Scalia, joined by Justices Ginsburg, Sotomayor, and Kagan dissented.

Paroline v. United States, No. 12-8561 (April 23, 2014)

Issue. Is restitution under 18 U.S.C. § 2259 limited to losses proximately caused by the defendant's offense conduct?

Held. Yes.

Background and procedural history. Mr. Paroline pleaded guilty to possessing images of child pornography in violation of 18 U.S.C. § 2252. Two of those images were of a victim ("Amy") whose

sexual abuse as a young child had been widely distributed as child pornography. Amy sought nearly $3.5 million in restitution from Mr. Paroline under 18 U.S.C. § 2259, a component of the Violence Against Women Act of 1994. The district court found that the Government had not met its burden of proving losses that were proximately caused by Mr. Paroline's conduct and declined to award restitution. Amy sought a writ of mandamus from the Fifth Circuit to compel the district court to order Mr. Paroline to pay restitution. The Fifth Circuit initially denied relief, but later granted Amy's petition for writ of mandamus upon a rehearing en banc. The Fifth Circuit held that § 2259 did not limit restitution to losses the defendant proximately caused and that defendants like Mr. Paroline could be ordered to pay the entire loss sustained by the victim regardless of whether other offenders contributed to that loss. The Court granted certiorari to determine the proper causation standard for restitution determinations under § 2259.

Analysis. The Supreme Court (Justice Kennedy, for Justices Ginsburg, Breyer, Alito, and Kagan) reversed. The Court began by recognizing the broad restitutionary purpose of § 2259, noting specifically § 2259(b)(3)(F), which serves as a catchall category for "any other losses suffered by the victim as a proximate result of the offense." Slip. op. at 10. The Court reasoned that this subsection imposed a requirement of proximate cause on the whole of § 2259 because § 2259(b)(3)(F) "is most naturally understood as a summary of the type of losses covered–*i.e.*, losses suffered as a proximate result of the offense." Slip. op. at 10. The Court noted that to say that one event is the proximate cause of another is to say that the former event is the actual cause or cause-in-fact of the latter and also that the former event has a "sufficient connection to the result." Slip. op. at 6. The Court rejected Amy's suggested approach of holding individual possessors of her images liable for the combined effect of offenses committed by virtually thousands of others by suggesting that such a directive could be so disproportionate as to potentially implicate the Excessive Fines Clause of the Eighth Amendment. However, the Court noted that failing to award any restitution to victims like Amy would go against both Congress's intent and the spirit of impressing upon offenders the gravity of their conduct. In applying this proximate cause standard, district courts should begin by attempting to assess the defendant's role in the context of the overall process that caused the victim's losses. There is no exact formula for a district court's determination, but the Court provided some "guideposts" that could guide the district court's inquiry. Because district courts often exercise discretion in both sentencing and in restitution matters, the Court viewed imposition of a rigid test for determining restitution under § 2259 as unnecessary.

Chief Justice Roberts (joined by Justices Scalia and Thomas) and Justice Sotomayor each filed dissenting opinions.

White v. Woodall, No. 12-794 (Apr. 23, 2014)

Issue. Did the Sixth Circuit err in affirming the district court's grant of Mr. White's petition for a writ of habeas corpus, given the Kentucky Supreme Court's contrary holding on the matter?

Holding. Yes.

Background and procedural history. Mr. White pleaded guilty to capital murder, capital kidnaping, and first-degree rape. He chose not to testify at the sentencing phase of his trial. The trial court denied his request for a no-adverse-inference instruction, and he was sentenced to death. The Kentucky Supreme Court affirmed, recognizing that while *Carter v. Kentucky*, 450 U.S. 288 (1981), required the instruction at the guilt phase of a trial, it did not require one at the sentencing phase. Mr. White then filed a petition for a writ of habeas corpus in federal court. The district court granted the writ, finding that the refusal to issue a no-adverse-inference instruction violated the Fifth Amendment. The Sixth Circuit affirmed.

Analysis. The Supreme Court (Justice Scalia, for Chief Justice Roberts and Justices Kennedy, Thomas, Alito, and Kagan) reversed, concluding that the Kentucky Supreme Court's ruling was not contrary to clearly established federal law. Section 2254(d) only permits a court to grant federal habeas relief on a claim that has already been adjudicated on the merits in a state court if the adjudication involved was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court. The Kentucky Supreme Court's ruling does not meet this standard. That court relied on Supreme Court cases that do not create an error that is beyond "any possibility for fairminded agreement" and on *Mitchell v. United States*, 526 U.S. 314 (1999). The *Mitchell* Court did not decide whether silence could appropriately affect a determination of lack of remorse or acceptance of responsibility. *Mitchell* directly holds that silence cannot be used at sentencing with regard to determining the facts; however, Mr. White pleaded guilty, removing the State's burden with regard to the facts.

Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented.

Robers v. United States, No. 12-9012 (May 5, 2014)

Issue. Under the Mandatory Victims Restitution Act (MVRA), is "any part of the property. . . returned" when the victim takes title to the collateral securing a loan the defendant fraudulently obtained from the victim?

Holding. No.

Background and procedural history. Mr. Robers submitted fraudulent loan applications to 2 banks for the purchase of 2 homes. The combined total for these loans was $470,000. The banks foreclosed on the homes after Mr. Robers failed to make payments and sold both homes for $280,000. Mr. Robers was convicted and ordered to pay restitution of $220,000— roughly the difference between the amount loaned and the amount gained from the sale of the homes. The homes were sold in a falling real estate market. Mr. Robers argued that this calculation was in error because, when the banks took the title to the homes, "part of the property" was returned. He argued that calculation should account for the higher value of the homes at that time rather than the amount they sold for in a falling real estate market. The Seventh Circuit rejected this argument.

Analysis. The Supreme Court (Justice Breyer, writing for a unanimous Court) affirmed. The phrase "any part of the property . . . returned" refers to the money the banks lent Mr. Robers, not the

collateral they received. This interpretation is consistent with a natural reading of the statute; the term "property" is used 7 times throughout the MVRA, therefore it is natural to read the term as having the same definition throughout. This interpretation is also easier to administer than Mr. Robers's because valuing the property from the sale price is much simpler and clearer than valuing the property at the time it was received.

Mr. Robers further argued that the proximate harm for the decrease in value was the real estate market and not him because the MVRA defines a victim as one who is "directly and proximately harmed." The Court rejected this argument, reasoning that the loss of value of the homes is a foreseeable consequence of obtaining property through fraud; therefore, proximate cause is still present. The Court also rejected Mr. Robers's remaining arguments.

Justice Sotomayor (joined by Justice Ginsburg) concurred, noting that she would limit this holding to reasonable delays in the sale of collateral and not apply it in cases where the victim chooses to hold the collateral instead. In that case, the defendant is no longer the proximate cause of declining value.

Martinez v. Illinois, No. 13-5967 (May 27, 2014)

Issue. After the jurors in petitioner's trial were sworn, the State was not ready to proceed and declined to go forward. The trial court granted petitioner's motion for a directed verdict. Did jeopardy attach and, if it had, does the resolution of the case bar the State's appeal and attempt to subject petitioner to a new trial?

Holding. Yes and yes.

Background and procedural history. Mr. Martinez was indicted on charges of battery and mob action against two individuals. The State had substantial difficulty in getting the two victims to appear, which resulted in multiple continuances. Nearly a year after the first trial date, the court was ready to proceed. On the morning of the trial, the two victims were not present. The court offered to wait to swear in the jurors until a complete jury was empaneled and to allow the State to choose whether to swear in the jury or dismiss the case. After further delay, the victim witnesses had still not arrived and the State moved for a continuance. The court denied the motion and the jury was sworn. The State then declared it was not participating in this case. The court granted Mr. Martinez a direct verdict.

The State appealed this verdict, arguing that the court should have granted a continuance. Mr. Martinez claimed that the appeal was improper because he had been acquitted. The Illinois appeals court held jeopardy had never attached. The Illinois Supreme Court affirmed, citing *Serfass v. United States*, 420 U.S. 337 (1975), to hold that Mr. Martinez had never been at risk of conviction and, therefore, jeopardy did not attach.

Analysis. The Supreme Court (per curiam) reversed. Jeopardy had attached here because "jeopardy attaches when a jury has been empaneled and sworn." Slip op. at 5. Nothing in *Serfass* should be read to detract from this clear, bright-line rule.

The Court further held that a directed verdict of "not guilty" is a sufficient end to bar retrial. An acquittal includes any ruling that is based on the insufficiency of the prosecution's proof, which was is clearly present here.

Bond v. United States, No. 12-158 (June 2, 2014)

Issue. Does the Chemical Weapons Convention Implementation Act of 1998 reach the purely local crime of assault when that assault resulted in only a minor injury to one individual?

Held. No.

Background and procedural history. Ms. Bond pleaded guilty to a violation of 18 U.S.C. § 229(a) of the Chemical Weapons Convention Implementation Act of 1998, which prohibits the knowing "possess [ion] or use…[of] any chemical weapon." Ms. Bond spread two toxic chemicals on her husband's lover's doorknob, mailbox, and car. As a result, the victim suffered a minor chemical burn to her finger. After being charged, Ms. Bond moved to dismiss the chemical weapons charges on the ground that the Act violates the Tenth Amendment. The district court denied her motion. After the denial of her motion, Ms. Bond pleaded guilty, but reserved the right to appeal. The Third Circuit initially held that Ms. Bond lacked standing to raise her Tenth Amendment challenge; however the Supreme Court reversed. On remand, the Third Circuit relied on *Missouri v. Holland*, 252 U.S. 416 (1920), in rejecting Ms. Bond's Tenth Amendment argument. In *Holland*, the Court held "that '[i]f the treaty is valid there can be no dispute about the validity of the statute' that implements it 'as a necessary and proper means to execute the powers of the Government.'" Slip op. at 8 (*quoting Holland*, 252 U.S. at 432). The Supreme Court granted certiorari.

Analysis. The Supreme Court (Chief Justice Roberts, for Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan) reversed the Third Circuit. The Court followed its decision in *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984), and declined to decide the case on constitutional grounds. Slip op. at 9. The Court found that the statute was ambiguous. *Id*. at 15. The Court reasoned that the ambiguity in the statute arose from the unduly broad definition of chemical weapon given by the statute, the serious consequences of interpreting the statute broadly, and the context in which the statute was developed. *Id*. at 14. The Court relied on the basic principles of federalism in resolving the ambiguity. *Id*. The Court held that, in this case, it "should insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States." *Id*. The Court found that Congress did not intend to reach Ms. Bond's assault. *Id*. at 15.

Justice Scalia, joined by Justices Alito and Thomas, concurred in the judgment. Justice Scalia did not believe the statute was ambiguous. Justice Thomas, joined by Justices Scalia and Alito, also filed a concurrence, writing that he would have reversed Ms. Bond's conviction on constitutional grounds.

Abramski v. United States, No. 12-1493 (June 16, 2014)

Issue. Does a person violate 18 U.S.C. § 922(a)(6) when he purchases a firearm on someone else's behalf, even if the true buyer could have legally purchased the gun without the "straw purchaser"?

Held. Yes.

Background and procedural history. Mr. Abramski was charged with violating 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A), after he purchased a firearm for his uncle, Mr. Alvarez, but indicated that he was the true purchaser of the gun on the ATF 4473 form. Mr. Alvarez did not have any firearms restrictions and could have legally purchased the firearm himself; he simply wanted to take advantage of a discount Mr. Abramski would receive as a former law enforcement officer.

After Mr. Abramski's motion to dismiss the charges was denied, he entered a conditional guilty plea, which reserved his right to challenge the ruling on his motion to dismiss. The Fourth Circuit affirmed, and the Supreme Court granted certiorari.

Analysis. The Supreme Court (Justice Kagan, for Justices Kennedy, Ginsburg, Breyer, and Sotomayor) affirmed. The Court rejected Mr. Abramski's argument that because Mr. Alvarez could legally purchase the firearm himself. Mr. Abramski's misrepresentation on Form 4473 was not a "material" misrepresentation. Mr. Abramski's misrepresentation was material because if Mr. Abramski had revealed that he was purchasing the firearm for Mr. Alvarez, then the purchase could not have continued. Upon realizing the true buyer was not present, the seller would be required to end the sale because selling to anyone other than the true buyer would violate § 922(c). The Court also rejected Mr. Abramski's broader argument that federal gun laws are wholly unconcerned with any person other than the person standing at the counter. In rejecting this broader argument, the Court stated, "All those tools of divining meaning-not to mention common sense []-demonstrate that § 922, in regulating licensed dealers' gun sales, looks through the straw to the actual buyer." Slip op. at 9.

Justice Scalia dissented, joined by Chief Justice Roberts and Justices Thomas and Alito.

Loughrin v. United States, No. 13-316 (June 23, 2014)

Issue. Does 18 U.S.C. § 1344(2) require the Government to prove that the defendant intended to defraud a financial institution?

Held. No.

Background and procedural history. Mr. Loughrin was convicted of six counts of violating the federal bank fraud statute, 18 U.S.C. §1344(2). Mr. Loughrin was caught forging stolen checks, using them to buy goods at Target, and then returning the goods for cash. Mr. Loughrin requested a jury instruction that required the Government to prove that he intended to defraud a financial institution. The district court denied Mr. Loughrin's request. The Tenth Circuit affirmed the district

court and reasoned that the specific intent to defraud a financial institution only applies to the first clause of the bank fraud statute. The Supreme Court granted certiorari.

Analysis. The Supreme Court (Justices Kagan, for Justices Kennedy, Ginsburg, Breyer, and Sotomayor and Chief Justice Roberts) affirmed the Tenth Circuit. The Court rejected Mr. Loughrin's argument that the Government was required to prove that he intended to defraud a financial institution. In rejecting this argument the Court wrote, "Loughrin's view [] runs afoul of the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" Slip. op. at 6 (*quoting Williams v. Taylor*, 529 U.S. 362, 404 (2000)). The Court reasoned that Mr. Loughrin's view would render § 1344(2) redundant. Slip op. at 6. Mr. Loughrin next relied on the construction of the mail fraud statute, and *McNally v. United States*, 483 U.S. 350 (1987), which holds that, despite containing the word "or," the mail fraud statute sets forth only one offense. Mr. Loughrin analogized the bank fraud statute to the mail fraud statute. The Court rejected this argument as well and reasoned that the statutes "have notable textual differences. The mail fraud law contains two phrases strung together in a single, unbroken sentence." Slip op. at 8. In contrast, the bank fraud statute's "clauses have separate numbers, line breaks before, between and after them, and equivalent indentation-thus placing the clauses visually on an equal footing and indicating that they have separate meanings." *Id*. The Court also rejected Mr. Loughrin's argument that the Court's reading of § 1344(2) would erode the principles of federalism by imposing federal regulation into areas of traditional state governance. *Id*. at 14.The Court reasoned that the "by means of" language in §1344(2) is a textual limitation on the reach of the statute. *Id*. at 12.

Justice Scalia, joined by Justice Thomas, concurred in part and concurred in the judgment. Justice Scalia doubted the Court's view on the textual limitations of § 1344(2). Justice Alito also concurred in part and concurred in the judgment. Justice Alito disagreed with the Court's characterization of purpose of executing a scheme as the required intent for bank fraud. Justice Alito believed that the Court read "knowingly" out of the statute.

Riley v. California, No. 13-132 (Jun. 25, 2014)

Issue. May police search the contents of a cell phone pursuant to the search-incident-to-arrest exception to the warrant requirement?

Holding. No.

Background and procedural history. Mr. Riley was stopped for an expired tag. Firearms were later found in his car and he was arrested on weapons charges. Officers began looking through the information on his smart phone and found information linking Mr. Riley to a gang and pictures that connected him to a shooting that occurred a few weeks prior to his arrest. Mr. Riley was charged in connection with the shooting and sought to have the evidence obtained from his phone suppressed. The trial court denied his motion and the California Court of Appeal affirmed.

In the consolidated case, Mr. Wurie was arrested on drug charges. When the officers took him to the station, he received several calls to his cell phone from a number identified as "my house." The officers opened the phone, where there was a picture of a woman and small child as the

background. They then looked through the call log and traced the number back to an apartment address. The officers secured a warrant to search that apartment. Once there, they noticed "Wurie" on a mailbox and could see the woman from the pictures inside. When officers searched the apartment they found drugs and firearms. Mr. Wurie was charged with distributing crack cocaine and being a felon in possession of a firearm. At trial, he moved to have the evidence found in his apartment suppressed, but the district court denied the motion. The First Circuit reversed.

Analysis. The Supreme Court (Chief Justice Roberts for Justices Scalia, Kennedy, Thomas, Ginsberg, Breyer, Sotomayor, and Kagan) reversed the California Court of Appeal and affirmed the First Circuit opinion. The Court looked to the reasoning in *Chimel v. California*, 395 U.S. 752 (1969), *United States v. Robinson*, 414 U.S. 218 (1973) and *Arizona v. Gant*, 556 U.S. 332 (2009), to determine that the search incident to arrest exception does not apply to data stored in cell phones.

The two main purposes behind the search incident to arrest exception are officer safety and the preservation of evidence. Neither rationale supports the warrantless search of cell phone data. Officers will still be able to seize the phone and carefully examine its physical characteristics to ensure that, for example, there is not a razor blade hidden within the case. The Government argued that the information in the phone could potentially alert the officers to the fact that the arrestee's confederates are approaching; however, this interpretation of the exception moves away from the rationale of protecting officers from *the arrestee*. Preservation of evidence provides a slightly stronger argument, but it still fails. Even after an officer has secured a phone, there is a risk that data can be remotely wiped or encrypted. There are measures that can be taken to secure against this though, such as disconnecting the phone from the network or placing it in a Farraday bag that secures the phone against radio waves. If there are circumstances where there truly is a risk of data being wiped, they are better dealt with through an exigent circumstances analysis than by a categorical rule.

The idea that searching the contents of an arrestee's pockets creates no significant intrusion to privacy rights beyond the arrest itself is unworkable in application to cell phone data because it is qualitatively and quantitatively different that physical items. Cell phones hold substantially more information than anything else that can be carried in a pocket, and this information provides great insight into a person's life. To carry around physical copies of all the information contained in a cell phone, a person would need a container more akin to the footlocker in *United States v. Chadwick*, 433 U.S. 1 (1977), which the Court held could not be searched, than the cigarette container in *Robinson*. Further, police officers can reach data that is stored not in the phone itself, but rather sent from another source to a cloud device the phone can access. This type of search would be like "finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house." Slip. op. at 21.

Justice Alito filed a concurring opinion

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

PUBLISHED OPINIONS

United States v. Feliciano, No. 12-15341 (April 3, 2014)

Issues. (1) Does a prosecutor act improperly when he or she proceeds with a charge that is clearly unsupported by evidence? (2) Does the denial of the most persuasive form of expert assistance render a trial fundamentally unfair?

Held. (1) Yes. (2) No.

Background and procedural history. Mr. Feliciano was charged with attempted bank robbery (Count One), using a firearm during the attempted bank robbery (Count Two), bank robbery (Count Three), using a firearm during the bank robbery (Count Four), and felon in possession of a firearm (Count Five). Prior to trial, the Government recognized that there was insufficient evidence as to Count Four, but did not dismiss the count. A jury convicted Mr. Feliciano on all five counts. Mr. Feliciano's sole defense to Count Three was that he suffered from a long-term back injury, and, therefore, would not be able to vault over the teller counter as the security footage indicated. Before trial, Mr. Feliciano twice moved ex parte pursuant to 18 U.S.C. § 3006A(e) for an order authorizing an MRI. The magistrate judge denied the motion because there were "other less costly means of establishing" the defense. Slip op. at 8. Mr. Feliciano twice moved for reconsideration of the denial, but the district court denied his motion both times.

Analysis. The Eleventh Circuit (Judge Martin, for Judges Pryor and Gold) vacated Mr. Feliciano's conviction for using a firearm during the bank robbery (Count Four). The Court held that the Government's evidence was "plainly insufficient" to sustain a conviction because witnesses specifically stated that Mr. Feliciano did not own a gun at that time and that they did not see Mr. Feliciano with a gun. Slip op. at 20. The Court noted the Government conceded that the evidence was insufficient prior to trial.

The Eleventh Circuit affirmed Mr. Feliciano's four other convictions. In challenging Count Three, Mr. Feliciano argued that the denial of expert assistance violated 18 U.S.C. 3006A(e). To successfully argue a violation of 3006A(e), "a defendant must demonstrate three elements: (1) he made a timely request for assistance; (2) the request was improperly denied; and (3) 'the denial rendered the defendant's trial fundamentally unfair.'" Slip op. at 10. The Court noted that Mr. Feliciano satisfied the first two elements. However, the Court held that Mr. Feliciano failed to satisfy the third element. Slip op. at 12. The Court reasoned that just because the expert assistance "was not in the most persuasive form does not render the trial fundamentally unfair." *Id*. Fundamental unfairness requires that the denial of the expert assistance has a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Id*. (internal quotation omitted). The Court also noted that Mr. Feliciano received expert assistance in the form of a physician's examination.

The Court summarily rejected Mr. Feliciano's remaining arguments.

Judge Pryor specially concurred to opine that the prosecutor's actions did not violate any prosecutorial standards.

United States v. Travis, No. 13-10400 (April 4, 2014)

Issue. Is a conviction for vehicular flight under Florida law a crime of violence within the meaning of USSG §4B1.2, which defines a predicate crime of violence as any felony offense that "involves conduct that presents a serious potential risk of physical injury to another"?

Held. Yes.

Background and procedural history. Mr. Travis was convicted of being a felon in possession of a firearm. The district court found that Mr. Travis's prior convictions for vehicular flight and aggravated assault with a weapon were crimes of violence within the residual clause of §4B1.2 and, therefore, his base offense level was 24. Mr. Travis appealed the district court's finding that his prior conviction for vehicular flight was a crime of violence.

Analysis. The Eleventh Circuit (per curiam, Chief Judge Carnes, Judges Hull and Marcus) affirmed. The Court applied the categorical approach and considered whether the offense "'as it is ordinarily committed . . . poses a serious potential risk of physical injury that is similar in kind and in degree to the risks posed by the enumerated crimes' of burglary, extortion, arson, and those involving the use of explosives.'" Slip op. at 3 (*quoting United States v. Owens*, 672 F.3d 662, 968 (11th Cir. 2012)).

The Court relied on the Supreme Court's ruling in *Sykes v. United States*, __ U.S. __, 131 S. Ct. 2267 (2011), and its own decision in *United States v. Petite*, 703 F.3d 1290 (11th Cir. 2013), in deciding that vehicular flight does pose a risk similar in kind and degree to the enumerated crimes. The Court rejected Mr. Travis's argument that nonviolent pursuits are different than the flight situations present by *Sykes* and *Petite* and that refusing to stop a vehicle when asked by a police officer is different than fleeing from a patrol car that has its lights and sirens activated. The Court reasoned that the *Sykes* and *Petite* decisions made clear that the type of vehicular flight was immaterial.

United States v. Grzybowicz, No. 12-13749 (Apr. 4, 2014)

Issue. Does a defendant "distribute" child pornography within the meaning 18 U.S.C. § 2252A(a)(2) when he sends images from his cell phone to his own e-mail address?

Held. No.

Background and procedural history. A jury found Mr. Grzybowicz guilty of several child pornography offenses, including distribution of child pornography, in violation of § 2252A(a)(2). The evidence at trial showed that Mr. Grzybowicz took four pornographic pictures of a child with his cell phone's camera, e-mailed them to himself, and downloaded two of the four images to his

computer. The district court denied Mr. Grzybowicz's motion for judgment of acquittal and motion for a new trial, rejecting his argument that he did not "distribute" child pornography within the meaning of the statute because he sent the images only to himself.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judge Hull and Fifth Circuit Judge Garza) affirmed Mr. Grzybowicz's convictions on all counts save for the one pursuant to § 2252A(a)(2), vacated his sentence as to all counts, and remanded for resentencing.

Noting that § 2252A(a)(2) does not define "distribute," the Court employed its plain and ordinary meaning: "to deliver, give out, dispense, or disperse to others." Slip op. at 22 (emphasis added). Concluding that "[w]e do not ordinarily speak of delivering to ourselves things that we already have," the Court determined that Mr. Grzybowicz's conviction on this count was due to be vacated. Slip op. at 23. By sending himself the photos, Mr. Grzybowicz may have taken a step toward distribution, but the statute does not criminalize "getting ready to distribute." Slip op. at 27. The Eleventh Circuit noted, however, that the definition of "distribute" under USSG §2G2.1(b)(3), which permits a sentencing enhancement for child pornography distribution, is expressly defined more broadly, and cautioned that its vacatur of Mr. Grzybowicz's conviction on the § 2252A(a)(2) count did not preclude application of that enhancement on remand.

Brown v. United States, No. 11-15149 (Apr. 7, 2014)

Issue. Is a 28 U.S.C. § 2255 proceeding a "civil matter" within the meaning of 28 U.S.C. § 636(c), thereby permitting a Magistrate Judge to enter a final judgment on a petitioner's § 2255 motion?

Held. No.

Background and procedural history. Mr. Brown filed a § 2255 motion to vacate his sentence. With the consent of the parties, the district court referred the matter to a magistrate judge. The magistrate judge denied the motion without holding an evidentiary hearing and later denied Mr. Brown's motion for reconsideration. Mr. Brown appealed both rulings. While that appeal was pending, Mr. Brown moved the magistrate judge, pursuant to FRCP 60(b)(4), to vacate his order denying the § 2255 motion. In this motion, Mr. Brown argued that Article III of the Constitution did not permit a magistrate judge to render a final judgment on a § 2255 motion, and that to the extent § 636(c) permitted this, it was unconstitutional. The magistrate judge denied the motion, and Mr. Brown appealed that ruling as well.

Analysis. The Eleventh Circuit (Judge Tjoflat, for Judge Pryor and W.D. Washington Judge Rothstein), citing the canon of constitutional avoidance, did not reach the Article III issue, ruling instead that a § 2225 proceeding was not a "civil matter" within the meaning of § 636(c). The Court vacated the magistrate judge's denial of Mr. Brown's § 2255 motion and remanded.

The Court surveyed the historical development of magistrate judges, culminating in the creation of the current structure through legislation in 1968, 1976, and 1979. It was the 1979 Act that enacted subsection (c) to § 636, which permits magistrate judges to conduct all proceedings in a "civil matter." Despite the fact that considerable historical and precedential bases exist for

concluding that a § 2255 proceeding is civil in nature, to so hold would require the Eleventh Circuit to determine whether § 636(c) was unconstitutional. To avoid reaching this question (and noting that the legislative history of the 1979 Act lacked any indication that Congress intended § 636(c) to apply to proceedings brought by federal prisoners), the Court held that a § 2255 proceeding was not a "civil matter" as that term is employed in § 636(c). (The Eleventh Circuit pointedly noted, however, that § 636(c) was of dubious constitutionality on its face because it permitted non-Article III judges to exercise the judicial power of the United States.) The Court accordingly concluded that the magistrate judge lacked statutory authority to issue a final order on Mr. Brown's motion to vacate his sentence.

Rodriguez v. Fla. Dep't. of Corr., No. 12-10887 (Apr. 7, 2014)

Issue. Is the State required, in a 28 U.S.C. § 2254 proceeding, to serve the petitioner with the appendix of exhibits it filed in the district court, and does a district court abuse its discretion in refusing to order the state to do so?

Held. Yes and yes.

Background and procedural history. Mr. Rodriguez moved to vacate his sentence pursuant to § 2254. The district court referred the proceeding to a magistrate judge, who ordered the State of Florida to show cause as to why relief should not be granted and further ordered the State to file a comprehensive appendix with copies of various records from the state court proceedings. The State complied, but only served Mr. Rodriguez with a copy of its response, which heavily referenced the appendix. Mr. Rodriguez's motion to compel the State to serve him with a copy of the appendix was denied. The magistrate judge filed a Report and Recommendation–also heavily citing the appendix–that recommended the denial of Mr. Rodriguez's petition. The district court adopted the Report in its entirety and denied Mr. Rodriguez's motion for reconsideration.

Analysis. The Eleventh Circuit (Judge Martin, for Judge Jordan, with E.D. Pennsylvania Judge Baylson concurring in the judgment) reversed, holding that service of the appendix was required by the Advisory Committee Notes to the Rules Governing § 2254 Cases and the FRCP and that the district court abused its discretion in refusing to order service. The Court rejected the State's argument that the appendix (which was filed one week after the response itself) was entirely separate and independent from the response. The response cited twelve of the fourteen documents included in the appendix, demonstrating that the response depended on those documents.

Judge Baylson concurred in the judgment but wrote separately to criticize the majority opinion for being overly broad. He would not have categorically held that service of these documents was required, but agreed that service was warranted in Mr. Rodriguez's case.

Osley v. United States, No. 11-14989 (Apr. 11, 2014)

Issue. Did counsel render ineffective assistance by (1) failing to advise the defendant of the mandatory minimum sentence and the potential life term of supervised release and (2) failing to object to potential double counting?

Holding. No.

Background and procedural history. Mr. Osley was charged with various counts of commercial sex trafficking of a minor. The Government offered a plea agreement in which it would offer the low end of an estimated 70 to 87 month guidelines range. At a hearing regarding the plea status, the prosecutor informed the court that the maximum sentence was life in prison; that if Mr. Osley pleaded guilty, he would ask for 80 months; that there was no mandatory minimum sentence for these charges; and, that if Mr. Osley were found guilty at trial, the guidelines called for a range of 90-121 months in prison. Mr. Osley proceeded to trial, where he was convicted on all counts. The parties were unaware that Congress had amended the statute to add a 15-year mandatory minimum sentence. Mr. Osley first discovered this during his PSR interview. Mr. Osley's guideline range was 210-262 months; however, the court decided he should be subject to a sentence above this range based on various aggravating factors. Mr. Osley was ultimately sentenced to 365 months and a life term of supervised release.

Mr. Osley moved for a new trial, but the district court denied the motion. The Eleventh Circuit affirmed on appeal. Mr. Osley then filed a *pro se* motion to vacate, claiming that his attorney's failure to inform him of the mandatory minimum 15-year sentence, failure to challenge an obvious double-counting violation in the calculation of the guideline range, and failure to advise him that there was a potential life term of supervised release constituted ineffective assistance of counsel. A magistrate judge determined that counsel was not ineffective and, over Mr. Osley's objections, the district court adopted the report and recommendation.

Analysis. The Eleventh Circuit (Judge Marcus for Judge Dubina and Second Circuit Judge Walker) affirmed.

To show prejudice with regard to an unaccepted plea agreement, a defendant must show that but for counsel's ineffectiveness 1) the plea offer would have been accepted by the defendant and not withdrawn by the Government, 2) the court would have accepted it, and 3) the sentence or conviction would have been less under the terms of the offer than the judgment and sentence that were actually imposed. The Court determined that Mr. Osley could not meet any of these requirements in regard to counsel's failure to inform him of the mandatory minimum. The Court did express "serious doubts" that counsel's failure to discover the mandatory minimum and inform Mr. Osley of its existence was effective assistance, but found that he had not been prejudiced. Mr. Osley's failure to accept a plea that would have given him the possibility of serving less than 5 years with good behavior and insistence that he was innocent do not show that he would have accepted the plea with a 15-year mandatory sentence. Further, the court could not have accepted the 70-month offer, as the mandatory minimum required a sentence of at least 15 years. It also requires speculation

to show that the outcome here would have been any different had Mr. Osley pleaded because the court would have been required to throw out the plea agreement based on the mandatory minimum.

Counsel had informed him that the potential sentence for this violation was life and Mr. Osley still decided to go to trial rather than plead guilty.

The Court also rejected the double-counting argument. A court may use double counting in situations such as this one, where the court intentionally applies sections cumulatively based on a crime's aggravated nature. It is not unreasonable for an attorney not to object where court's action is not clearly in error. Further, given the court's application of an upward variance, Mr. Osley could not demonstrate prejudice.

United States v. Davila, No. 10-15310 (Apr. 15, 2014)

Issue. Does a magistrate judge's impermissible participation in plea negotiations justify vacatur of the defendant's conviction where the defendant cannot show that, but-for the error, he would not have pleaded guilty?

Held. No.

Background and procedural history. Mr. Davila moved to replace his counsel because he was dissatisfied with counsel's advice that he plead guilty. At a hearing, the magistrate judge strongly encouraged Mr. Davila to plead guilty. For example, the magistrate judge told Mr. Davila that pleading guilty is often the best advice a lawyer can give his client, and that if he would plead guilty and not waste the Government's time and "come to the cross" and give substantial assistance, he could get significantly less time in prison. Several months later, Mr. Davila pleaded guilty. He subsequently waived his right to counsel, and the district court denied his pro se efforts to withdraw his guilty plea. He appealed, arguing for the first time that the magistrate judge's comments constituted improper judicial participation in plea discussions, in violation of FRCP 11(c)(1). The Eleventh Circuit, in accordance with then-binding precedent mandating automatic vacatur in such situations, vacated Mr. Davila's conviction. The Supreme Court granted certiorari and held that the Eleventh Circuit's automatic vacatur rule was incompatible with Rule 11(h)'s requirement that a variance from the rule is harmless error if it does not affect the defendant's substantial rights. The Supreme Court remanded for a determination of whether Mr. Davila was prejudiced by the magistrate judge's comments and whether harmless error or plain error review should apply.

Analysis. On remand, the Eleventh Circuit (per curiam, before Judges Tjoflat, Pryor, and Kravitch) affirmed Mr. Davila's conviction. The Court applied plain-error review because Mr. Davila not only failed to contemporaneously object through his then-counsel, but he also did not object during the several months he represented himself. The panel concluded that although the magistrate judge's "highly improper" comments were plain error, Mr. Davila failed to show that his substantial rights were affected. To make that showing, Mr. Davila would have to establish that, but for the magistrate judge's comments, he would not have pleaded guilty. Here, Mr. Davila swore under oath at his change-of-plea hearing that his plea was not coerced, did not mention the improper comments in moving to withdraw his guilty plea, did not plead guilty until three months after the magistrate

judge's comments, had his guilty plea accepted by a different judge than the one who committed the Rule 11 error, and signed a plea agreement significantly more favorable than the Government's original offer. In light of these facts, the Eleventh Circuit determined that Mr. Davila could not show that the magistrate judge's Rule 11 error was the reason he pleaded guilty.

United States v. Tellis, No. 12-12594 (Apr. 18, 2014)

Issue. May a district court deny a defendant's motion to modify his sentence under USSG App C. Amend. 750 based on his status as a career offender where the career offender guideline was not applied at his original sentencing?

Held. Yes.

Background and procedural history. Mr. Tellis pleaded guilty to conspiracy to sell crack cocaine in 2001. In Mr. Tellis's PSR, he was determined to be a career offender as defined in USSG §4B1.1, which carries a base offense level of 37. However, based on the quantity of crack involved, Mr. Tellis's base offense level under USSG §2D1.1 was a 38. Because the base offense level under §2D1.1 was higher, the PSR noted that the career offender status did not affect the total offense level. Mr. Tellis received reductions that brought his offense level down to a 32 and he was sentenced to 210 months.

In 2007, the USSG App. C. Amend. 706 provided a 2-level reduction in base offense levels for crack cocaine. Under this amendment, Mr. Tellis's base offense level was lowered from a 38 to a 36. In 2008, the district court ordered a supplemental PSR to determine whether Mr. Tellis's sentence should be reduced. The probation office found that career offender status raised the base offense level of 36 to 37. The district court reduced the sentence, based on the career offender status, to 188 months.

In 2011, USSG App C. Amend. 750 again reduced sentencing guidelines for certain quantities of crack cocaine, so that Mr. Tellis's base offense level was now at 34 instead of 36. Mr. Tellis moved to reduce his sentence; however, the probation office stated that he was not eligible for a reduced sentence because he was considered a career offender. Mr. Tellis argued that the career offender guideline had not been applied in the initial sentencing and therefore should not apply here. The district court rejected this reasoning and denied the motion.

Analysis. The Eleventh Circuit (Judge Martin, for Judge Hill and Middle District of Alabama Judge Fuller) affirmed. To obtain a sentence reduction, a defendant must show that a retroactive amendment has actually lowered the guideline range. The district court properly denied Mr. Tellis's motion to reduce his sentence because Amendment 750 did not lower his offense level after the Amendment 706 modification, and therefore did not change his guideline range.

The Eleventh Circuit rejected Mr. Tellis's argument that the record did not establish that he was a career offender. The Court further rejected Mr. Tellis's argument that relying on the career offender guidelines now would constitute resentencing rather than a modification, noting that when the district court considered the 2008 motion, it also revisited the initial determination of Mr. Tellis's career offender status.

United States v. Fowler, No. 12-15818 (Apr. 21, 2014)

Issue. When a sentence as to one count of conviction is vacated on appeal, may the district court resentence the defendant on the counts not disturbed on appeal?

Held. Yes.

Background and procedural history. Mr. Fowler was convicted of witness tampering and for use of a firearm during the commission of a federal crime of violence (murder of a police officer). The district court sentenced Mr. Fowler to life in prison on the witness tampering count and to the ten-year statutory minimum on the firearm count, to be served consecutively to the life sentence. Mr. Fowler's witness tampering conviction was ultimately vacated by the Supreme Court and, at resentencing, the district court sentenced Mr. Fowler to life in prison on the firearm count alone. The court explained that the original sentence "was obviously a package" and that it would never have given Mr. Fowler just ten years on a firearm charge stemming from a murder. Slip op. at 2. Mr. Fowler argued on appeal that the district court had no authority to resentence him on the firearm count and, alternatively, that the enhanced sentence on that count violated his due process rights.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judges Hull and Cox) affirmed. The district court had authority to resentence Mr. Fowler because long-standing precedent confirms that a district court has jurisdiction to resentence where, as here, its sentence package has been "unpackaged" on direct appeal. The Court reiterated that "[t]he sentence package that has been unpackaged by a reversal is to be repackaged at resentencing using the guidelines and the § 3553(a) factors." Slip op. at 11-12. *See, e.g., United States v. Mixon*, 115 F.3d 900, 903 (11th Cir. 1997). Repackaging was particularly appropriate in this case because the district court made it clear that the original sentence was a packaged one, and because the original ten-year sentence on the firearm was consecutive to the since-vacated life sentence on the witness tampering count; without the witness tampering count, there was nothing to which the ten-year sentence could run consecutive.

The Eleventh Circuit also rejected Mr. Fowler's due process challenge. *United States v. Monaco*, 702 F.2d 860 (11th Cir. 1983) held that a sentencing court, on remand, could not increase the total sentence on the remaining counts. The Court held that *Monaco*, a pre-sentencing guidelines case, was inapposite to packaged sentences calculated pursuant to the guidelines. Moreover, Mr. Fowler's total sentence was not increased because the original sentence was life, and the sentence imposed on remand was life. The Court was also unpersuaded by Mr. Fowler's argument that the new sentence was based on the district court's vindictiveness, noting the court's statement that it would not have originally imposed the mandatory minimum on the firearm count if Mr. Fowler were not already subject to a life sentence.

Jeffries v. United States, No. 13-10730 (April 23, 2014)

Issue. May the Government use evidence other than prison logs or other records to refute the prison mailbox rule?

Held. Yes.

Background and procedural history. Mr. Jeffries was convicted of multiple offenses and sentenced to 360 months in prison. The Eleventh Circuit affirmed his convictions and sentence on May 11, 2010. One year later, Mr. Jeffries filed a *pro se* 28 U.S.C. § 2255 petition to vacate, which he and a notary signed May 9, 2011. The Government responded to the petition on July 22, 2011.

A magistrate judge issued a report and recommendation, recommending Mr. Jeffries's petition be denied and his case be dismissed. The district court adopted the recommendation and on November 21, 2011, denied Mr. Jeffries's petition, and dismissed his case. That same day, the court received another petition from Mr. Jeffries dated November 4, 2011. Mr. Jeffries explained in that petition that he had filed three additional claims to his § 2255 petition on June 1, 2011, which he attached in the form of a supplemental motion dated June 1, 2011. A signed certificate of service was also attached stating that Mr. Jeffries had deposited the supplemental brief in the prison legal mailbox on June 1, 2011.

The district court had no record of the June 1, 2011, filing. An evidentiary hearing on the issue of the timeliness of Mr. Jeffries's supplemental claims was ordered, after which the court concluded that the claims in Mr. Jeffries's supplemental motion did not relate back to his original § 2255 petition. The court further concluded that the earliest Mr. Jeffries gave the supplemental motion to prison authorities was November 4, 2011. His supplemental claims were thereby untimely. Mr. Jeffries filed a motion for reconsideration, which the court denied. Mr. Jeffries appealed, and the Eleventh Circuit granted a COA regarding whether Mr. Jeffries's *pro se* supplement to his § 2255 petition was untimely.

Analysis. The Eleventh Circuit (per curiam, Judges Hull, Marcus, and Black) affirmed. The prison mailbox rule dictates that a *pro se* prisoner's court filing is treated as filed on the date the filing is delivered to prison authorities for mailing. Because it is assumed that a prisoner delivered the filing to prison authorities on the date he or she signs it, the burden rests on the Government to prove that the filing was delivered to prison authorities on a date other than the date of signing. This burden is usually satisfied by the Government furnishing of prison logs or other prison mailroom records. However, in Mr. Jeffries's case, a mailroom supervisor testified that the prison mailroom only logged or tracked legal mail sent with a certified return receipt. Because Mr. Jeffries did not mail his supplemental motion with a certified return receipt, the mailroom records could not dispose of the issue one way or another. The Eleventh Circuit concluded that the evidence presented by the Government, "including [the mailroom supervisor's] testimony of normal mailroom practices, Jeffries' lack of diligence in following up on the supplemental motion until it was recommended the original motion be denied, and Jeffries' incredible testimony" was nevertheless sufficient to "convince[] us the district court did not clearly err in finding the supplemental § 2255 motion was untimely." (Slip op. at 12).

Lugo v. Sec'y, Fla. Dep't. of Corr., Nos. 11-13439 and 12-13737 (Apr. 24, 2014)

Issue. Does unethical conduct by a petitioner's state habeas counsel justify equitable tolling of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) deadline for filing a habeas petition where counsel's unethical conduct occurred after the deadline had elapsed?

Held. No.

Background and procedural history. Mr. Lugo was sentenced to death by a Florida trial court. His conviction was affirmed by the Florida Supreme Court and the U.S. Supreme Court denied certiorari, triggering Mr. Lugo's one-year deadline, pursuant to the AEDPA, to file a federal habeas petition. The Florida Supreme Court appointed a series of attorneys to represent Mr. Lugo in state post-conviction proceedings, the first several of whom withdrew due to various conflicts. Mr. Lugo's eventual counsel did not file the (ultimately unsuccessful) state petition for post-conviction relief until after Mr. Lugo's one-year deadline to file a habeas petition had expired.

After the state court's denial of post-conviction relief was affirmed on appeal, Mr. Lugo filed a pro se 28 U.S.C. § 2254 petition. He asserted that it was timely due to "impediments" in filing earlier, and argued that his state-appointed counsel had retaliated against Mr. Lugo for his refusal to pay him large sums of money by failing to meet certain filing deadlines, but did not provide specifics. The district court appointed counsel, but the amended petition this counsel filed was no more specific. The district court denied the petition, and Mr. Lugo appealed. The court appointed new counsel for appeal. Counsel filed a FRCP 60(b) motion to vacate the earlier denial and, for the first time, presented specific information and evidence as to state post-conviction counsel's misconduct. Counsel argued that state counsel's misconduct warranted equitable tolling of the AEDPA filing deadline. The district court denied the Rule 60(b) motion, finding that while state post-conviction counsel's conduct was appalling and unethical, it could not justify equitable tolling because it occurred after the AEDPA deadline had passed.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judges Martin and Dubina) affirmed. The district court properly dismissed Mr. Lugo's § 2254 motion because he failed to make a specific showing as to why equitable tolling should apply, and the court rightly denied the Rule 60(b) motion because state post-conviction counsel's reprehensible conduct occurred after the AEPDA statute of limitations had already run.

Judge Martin concurred in the judgment but wrote separately to express her concern at the fact that Florida death row inmates routinely miss the AEDPA filing deadline, a problem apparently unique to the State of Florida among the states comprising the Eleventh Circuit. The majority wrote that it shared Judge Martin's concern, and the entire panel called for the creation of a Capital Habeas Unit in one or more of Florida's three federal districts to redress this recurring problem. Judge Martin called for more prompt appointment of federal habeas counsel, while the majority cautioned against federal courts appointing counsel to assist petitioners in state challenges to their death sentences.

United States v. Parton, No. 13-12612 (Apr. 30, 2014)

Issue. Did the Supreme Court's decision in *Nat'l Fed'n of Ind. Bus. v. Sebelius*, 567 U.S. ___ (2012), overrule the holding in *United States v. Smith*, 459 F.3d 1276 (11th Cir. 2006), that 18 U.S.C. § 2251(a) was a constitutional exercise of Congress's Commerce Clause authority?

Held. No.

Background and procedural history. Mr. Parton was indicted under 18 U.S.C. § 2251(a) for enticing a minor to engage in sexually explicit conduct for purpose of producing a visual depiction of that conduct. He moved to dismiss the indictment, arguing that the mere use of an electronic device that has traveled through interstate commerce in the production of child pornography is not a strong enough connection to interstate commerce to support federal prosecution. The district court denied this motion and Mr. Parton pleaded guilty.

Analysis. The Eleventh Circuit (Judge Anderson, for Tenth Circuit Judge Ebel and Southern District of Florida Judge Ungaro) affirmed. The Eleventh Circuit had previously rejected this argument in *Smith*; however, Mr. Parton argued that the Supreme Court overruled *Smith* in *Sebelius*. The Court reasoned that *Smith* is distinguishable from *Sebelius*, in which the Supreme Court refused to accept the Congressional requirement of individuals to become engaged in commerce as an extension of the Commerce Clause. Here, because the production of child pornography is what is being regulated, as opposed to inactivity, *Sebelius* did not abrogate *Smith*.

United States v. Massam, No. 12-15924 (May 6, 2014)

Issue. May a defendant receive a "credit" from the loss amount based on the amount of monies returned to a victim where the loss amount is calculated based on "intended loss" rather than "actual loss"?

Held. No.

Background and Procedural History. Mr. Massam set up a supersedeas bond through which he paid asset distribution to his ex-wife as ordered by the court in his divorce proceedings. Mr. Massam also made investments on behalf of the two pension plans associated with the business. One investment turned out to be a Ponzi scheme and all money invested in this particular company was lost.

After several years of taking monies from his employees' pension funds, Mr. Massam pleaded guilty to theft and embezzlement of employee benefit funds, 18 U.S.C. § 664. At sentencing, he argued that the total loss amount should be offset by the amount of money that was lost in the Ponzi scheme and by the money paid to his ex-wife from the supersedeas bond. The district court allowed Mr. Massam credit against the total loss amount of money from the pension funds that resulted in a loss due to the Ponzi scheme that Mr. Massam was unaware of at the time of investment, but the court did not credit the amount paid to his ex-wife from the supersedeas bond.

Consequently, the total loss amount was still more than $400,000, implicating a sentencing enhancement.

Analysis: The Eleventh Circuit (Chief Judge Carnes, for Judge Wilson and Middle District of Florida Judge Dalton) affirmed. The loss amount cannot be reduced by any amount of funds returned to the victim because the loss amount is based on "intended loss" and not "actual loss." Credit can only be given when there is a loss against a victim, therefore resulting in an actual loss, which does not exist when calculating the intended loss.

United States v. Harrell, No. 11-15680 (May 14, 2014)

Issues.
1. Did the district court's participation in Mr. Harrell's plea agreement constitute reversible error?
2. Did the district court err in admitting expert testimony regarding the location of Mr. Dantzle's cell phone based on information from cell towers?

Holdings.
1. Yes.
2. Yes, but it was not reversible error.

Background and procedural history. Mr. Harrell and Mr. Dantzle were each indicted on four counts of Hobbs Act Robbery and conspiracy to commit the same. On the day of the trial, the district court initiated discussions with the defense attorneys and the prosecution regarding a plea deal. With both Mr. Harrell and Mr. Dantzle present, the district court discussed the high sentences each would likely get if convicted, in contrast with the break they could get with a plea. Prior to trial, the government had refused to offer Mr. Harrell any deal below the mandatory minimum sentence of 32 years, and Mr. Harrell had refused this agreement. The court then suggested options for the prosecution that would allow for a sentence of 20 or 25 years, pending the outcome of certain state cases. The government ultimately offered Mr. Harrell a 25-year deal that he initially rejected before accepting a few hours later.

At Mr. Dantzle's trial, the government presented testimony regarding the location of Mr. Dantzle's cell phone based on cell tower data. Mr. Dantzle objected, asserting there was no foundation for the agent's testimony. The agent then explained that he had previously testified about cell location data and had personally observed cell tower locations. The district court certified the agent as an expert. Mr. Dantzle was convicted on all four counts.

Analysis. The Eleventh Circuit (Judge Jordan for Judges Pryor and Fay) reversed Mr. Harrell's conviction and affirmed Mr. Dantzle's conviction. The district court impermissibly interfered with plea negotiations between Mr. Harrell and the government. Fed. R. Crim. P. 11(c)(1) creates a bright line rule prohibiting judicial interference with plea agreements because it threatens a judge's impartiality and appearance of impartiality. The district court erred in discussing a plea agreement and this error affected Mr. Harrell's substantial rights, requiring the vacatur of Mr. Harrell's conviction.

While the district court erred in Mr. Dantzle's case, the error was harmless. The government failed to establish that the agent was qualified as an expert, and, therefore, the district court's certification of him as an expert was in error. The error did not have a substantial effect on the jury's verdict because the government presented other, substantial evidence linking Mr. Dantzle to the robberies.

United States v. Rodriguez, No. 10-12065 (May 15, 2014)

Issue. Is the level of competence required for a defendant to enter a guilty plea the same level of competence required for a defendant to stand trial?

Held. Yes.

Background and procedural history. Ms. Rodriguez pleaded guilty to conspiracy to commit mail and wire fraud, mail fraud, and wire fraud. Ms. Rodriguez had been undergoing treatment for mental illness the year prior to entering her guilty plea. She was taking three different types of medication. On the day of the guilty plea, Ms. Rodriguez had taken her medication. The district court accepted Ms. Rodriguez's guilty plea and eventually sentenced her to 70 months in prison. The district court found that mandatory restitution was appropriate; however, the district court noted that the victims' losses were not yet clear. The district court entered its judgment and deferred determination of restitution. Ms. Rodriguez appealed her sentence of 70 months.

Analysis. The Eleventh Circuit (Judge Marcus, for Northern District of Alabama Judge Coogler, and Southern District of Georgia Judge Bowen) affirmed. Ms. Rodriguez argued that her guilty plea violated her constitutional rights because she was not competent to plead guilty due to mental illness. The Court rejected Ms. Rodriguez's argument and began its analysis by defining the standard of review for issues of competency that were not objected to in the district court. The Court stated that, like when a defendant fails to object in the district court to a claimed Rule 11 violation, the Court reviews for plain error a defendant's failure to object to the district court's determination that she is competent to plead guilty. Slip op. at 12. The Court stated that the defendant is competent to plead guilty if the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *Id*. at 13 (internal quotation omitted). The Court noted that "an allegation of mental illness or other mental disability does not invalidate a guilty plea if the defendant was still competent to enter that plea." *Id*. The Court held that the district court did not commit plain error in finding that Ms. Rodriguez was competent to plead guilty. *Id.* at 17. The Court reasoned that the district court repeatedly questioned Ms. Rodriguez and her attorney about Ms. Rodriguez's ability to understand the questions posed by the district court, and Ms. Rodriguez and her attorney repeatedly acknowledged that Ms. Rodriguez did understand the questions and that she was able to assist counsel. *Id*. at 16.

The Court summarily rejected Ms. Rodriguez's remaining arguments.

United States v. Chahla, No. 13-12717 (May 21, 2014)

Issue. May a conviction under 18 U.S.C. § 1425(a) (unlawful procurement of citizenship) be based on fraudulent statements made when seeking Lawful Permanent Resident status?

Held. Yes.

Background and procedural history. The three Chahla brothers were each charged and convicted of one count of conspiracy to commit offenses against the laws of the United States or defraud the United States, under 18 U.S.C. § 371 and § 1001, and 8 U.S.C. § 1325(c). The Chahla brothers were also charged with two counts each of unlawful procurement of naturalization under 18 U.S.C. § 1425(a). Two of the brothers were convicted of both § 1425(a) charges, while a third brother was only convicted of one §1425(a) charge because the Government dismissed his second charge. The Government alleged that the Chahla brothers had entered into fraudulent marriages to obtain a more favorable immigration status. During trial, the Chahlas moved for a judgment of acquittal on all counts at the close of the Government's case and again at the close of all evidence. The district court denied both motions. After the verdict, the Chahlas renewed their motions for judgment of acquittal or, alternatively, for a new trial. The district court denied the renewed motions.

Analysis. The Eleventh Circuit (Judge Martin, for Judge Dubina and District of South Carolina Judge Duffy) affirmed. The Court rejected the Chahlas' argument that three of their convictions under 18 U.S.C. § 1425(a) were invalid. The Chahlas claimed that § 1425(a) criminalizes fraudulent procurement of naturalization, but not false statements made in applications to become a Lawful Permanent Resident. In rejecting this argument, the Court relied on *Fedorenko v. United States*, 449 U.S. 490 (1988). The Court recognized that the statute in *Fedorenko* is different than the one at issue in this case; however, the Court adopted the principle announced in *Fedorenko* that "'there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship' and '[f]ailure to comply with any of these conditions renders the certificate of citizenship illegally procured.'" Slip op. at 12 (*quoting Fedorenko*, 449 U.S. at 506). The Court noted that becoming a Lawful Permanent Resident was a statutory prerequisite to becoming a naturalized citizen. Slip op. at 13. The Court therefore held that "the Chahlas' attempt to become naturalized citizens was 'contrary to law' to the extent it was based on their fraudulently obtained status as Lawful Permanent Residents." *Id*. The Court summarily rejected the Chahlas' remaining arguments.

United States v. Mozie, No. 12-12538 (May 22, 2014)

Issue. Did the district court constructively amend Mr. Mozie's indictment through the jury instructions?

Held. No.

Background and procedural history. Mr. Mozie was convicted of eight counts of child sex trafficking, one count of conspiracy to commit child sex trafficking, and one count of producing

child pornography. Mr. Mozie posed as a businessman working for a modeling agency to recruit teenage girls into his prostitution ring (PPP). He provided the girls, many of whom were runaways, with a place to stay, drugs, and alcohol in exchange for their services. He was sentenced to the Guidelines-recommended life imprisonment.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judges Wilson and Fay) affirmed. Mr. Mozie challenged both his conviction and sentence, but the Court rejected each of his arguments.

Mr. Mozie argued that the district court constructively amended his indictment. The indictment charged that Mr. Mozie knew *and* recklessly disregarded the age of his victims, but the district court charged the jury to convict if he knew *or* recklessly disregarded the age of his victims. There can be a constructive amendment when the language of the jury instructions differs from the indictment; however, when an indictment charges multiple means of violating a statute conjunctively, a conviction can arise from proof of only one means. Here, the district court properly changed the language from conjunctive to disjunctive; therefore there was no constructive amendment. This case is distinguishable on two main grounds from *United States v. Cancellierre*, where the Eleventh Circuit held a constructive amendment occurred when the district court allowed "willfulness" to be removed from an indictment at the close of evidence. 69 F.3d 1116 (11th Cir. 1995). There, "willfulness" was not a statutory element of the offense charged, and the entire defense rested on disproving "willfulness."

The Court rejected his remaining claims.

United States v. Isaacson, Nos. 11-14287, 12-14703 (May 22, 2014)

Issue. Does the striking of prospective jurors based on their answers to written questionnaires, prior to any appearance by those jurors in court, constitute "voir dire" for purposes of the Speedy Trial Act?

Held. Yes.

Background and procedural history. Mr. Issacson was convicted after a jury trial under 18 U.S.C. § 371 for his participation in a conspiracy to commit securities fraud. The district court sentenced him to 36 months in prison and ordered that he pay $8 million in restitution. On appeal, Mr. Issacson argued that the district court should have granted his motion to dismiss for Speedy Trial Act violations. The Government responded that Mr. Isaacson's Speedy Trial Act motion was untimely because it was submitted after voir dire and, therefore, after trial had commenced.

Analysis. The Eleventh Circuit (Judge Martin for Judge Fay and D.C. Circuit Judge Sentelle) affirmed Mr. Issacson's conviction. Mr. Isaacson argued that his motion to dismiss for a violation Speedy Trial Act was raised prior to trial and therefore timely. The Court disagreed, finding that Mr. Isaacson raised the issue after the commencement of trial because voir dire had already begun. In so doing, it rejected Mr. Isaacson's argument that voir dire did not commence until in-court jury selection began and that the striking of jurors based on written questionnaires was not part of voir dire. The Court, referencing the broad discretion district courts have in developing procedures for

jury selection, rejected this argument "[b]ecause written questionnaires facilitate jury selection in ways not unlike traditional oral examination[.] Where, as here, the District Court relies on written questionnaires to aid in jury selection, voir dire and thus the trial begins when the Court starts to rule on opposed juror challenges based on those written questionnaires." Slip op. at 18.

The Court vacated and remanded for resentencing, finding that the Government did not introduce sufficient evidence to justify the district court's restitution judgment.

United States v. Flanders, No. 12-10995 (May 27, 2014)

Issues.

1. Does charging a defendant with violations of both 18 U.S.C. §1591(a) and §1591(b) constitute double jeopardy?

2. Were the consecutive life sentences for each defendant reasonable in this case, given the charges of the men involved?

Holding.

1. No.

2. Yes.

Background and procedural history. Mr. Flanders and Mr. Callum were charged in a 20-count indictment with conspiracy to commit sex trafficking by fraud, sex trafficking by fraud, benefitting by participating in a venture that commits sex trafficking by fraud, attempted sex trafficking by fraud, and attempted benefitting by participating in a venture that commits sex trafficking by fraud. The two men perpetrated a scheme in which they convinced women to travel to Miami to audition for a potential modeling job. Once there, the women were given drinks spiked with Benzodiazepines and presented with release forms to sign. Once the drugs had fully taken effect, Mr. Flanders would film Mr. Callum having sex with the women. Mr. Callum would then edit the videos to remove portions where the women were obviously asleep, and distribute the videos.

Mr. Flanders and Mr. Callum were found guilty on all but two counts (these were dismissed by the district court because they involved a victim who did not testify). The district court then entered a preliminary order of forfeiture against both men. At sentencing, the district court granted the Government's request for an upward variance and sentenced both men to a term of life.

Analysis. The Eleventh Circuit (District of South Carolina Judge Duffy, for Judges Martin and Fay) affirmed.

Mr. Flanders and Mr. Callum asserted that each pair of § 1591(a) and § 1591(b) violations constituted double jeopardy. Under the *Blockburger* test, there is no double jeopardy so long as one provision requires proof of a fact that the other does not. Here, § 1591(a)(2) does not require a showing that the defendant fraudulently induced someone to engage in a commercial sex act, only that the defendant was part of a venture that recruited a person for these purposes. Further,

§ 1591(a)(1) requires no proof that the defendant received a benefit from his participation. Because the two charges do not require proof of the exact same elements, there is no double jeopardy.

Mr. Flanders and Mr. Callum also challenged the reasonableness of their life sentences. The district court applied USSG §2G1.1(c)'s cross reference to §2A3.1 in determining the sentences. Under the cross-reference, if the charged offense "involved" conduct prohibited under 18 U.S.C. § 2241(a) or (b), then §2A3.1 applies a four-level enhancement. Mr. Callum argued that he was not convicted of a sex act itself, but fraudulent inducement; therefore §2A3.1 does not apply. This reasoning fails because the language of §2A3.1 does not require a conviction or charge under § 2241, merely that the offense "involved" conduct within § 2241. Mr. Flanders argued that the application of §2A3.1 constituted impermissible double counting because the conduct described in § 2241 was used for his base offense and enhancements. The language of the Guidelines shows that the Sentencing Commission intended for both sections to apply, and the enhancement only applies when the offense involved the subset of aggravated sexual abuse offenses.

Mr. Flanders further argued that the district court erred in applying §2G1.3(d) in grouping his offenses because this provision involves the trafficking of minors. The Court held that while the district court did err, this was not plain error because the correct Guidelines section would have grouped the offenses the same way. The district court did not abuse its discretion in applying an upward variance to the sentence, as the defendants' conduct can be classified as "unusually heinous, cruel, brutal, or degrading to the victim," especially because the videos of the assaults will prolong the victims' pain and humiliation. Neither defendant was able to provide any persuasive argument to show that the consecutive life sentences were substantively unreasonable.

The Eleventh Circuit rejected the defendants' remaining arguments.

United States v. Brown, No. 13-10023 (May 28, 2014)

Issue. Does the failure to allege the mens rea in an indictment render it jurisdictionally defective?

Holding. No.

Background and procedural history. Ms. Brown pleaded guilty to receipt of counterfeit money orders under a plea agreement that included an appeal waiver. The indictment did not explicitly allege that Ms. Brown knew that the money orders were counterfeit at the time she received them, an element of the charging statute. The factual basis for the guilty plea likewise lacked any allegation of knowledge.

The district court accepted the guilty plea and sentenced Ms. Brown to 63 months in prison. She appealed, claiming for the first time that the indictment was defective because it did not set forth the mens rea. Ms. Brown accordingly argued that the indictment did not charge her with a federal crime and the district court therefore lacked the jurisdiction to sentence her.

Analysis. The Eleventh Circuit (Judge Hull, writing for Chief Judge Carnes and Fifth Circuit Judge Garza) affirmed. The court looked to four previously decided cases to show that, even if an indictment fails to allege an element of the crime charged, it does not strip away a district court's

subject matter jurisdiction. *See Alikhani v. United States*, 200 F.3d 732 (11th Cir. 2000); *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) (en banc); *United States v. Cromartie*, 267 F.3d 1293 (11th Cir. 2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001). The holdings of these cases were reinforced by the Supreme Court. *See United States v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781 (2002) (comparing subject matter jurisdiction, which cannot be waived, to the right to a grand jury, which can, to show that defects in an indictment do not deprive a district court of jurisdiction). Some defects in an indictment divest the district court of subject-matter jurisdiction, but these involve positive allegations of actions that do not constitute violations of federal law rather than omissions of elements of the charged offenses. *See United States v. Peter*, 310 F.3d 709 (11th Cir. 2002). As long as the indictment charges a defendant with a violation of federal law, it is sufficient to invoke the district court's jurisdiction.

Because the alleged defect in the indictment was not jurisdictional, Ms. Brown waived her ability to challenge her sentence both by entering an unconditional guilty plea and by signing an appeal waiver.

United States v. Rodriguez, No. 12-14629 (Jun. 5, 2014)

Issue. Does the prolonged vacancy of four seats on the Eleventh Circuit constitutes an "emergency" within the meaning of 28 U.S.C. §46(b)?

Holding. Yes.

Background and procedural history. 28 U.S.C. § 46(b) allows each Circuit to create panels to hear cases, but requires that each of these panels have a majority of judges from that Circuit unless there is an emergency, such as the illness of a judge. In 2013, the Chief Judge of the Eleventh Circuit issued General Order No. 41, which declared that the Eleventh Circuit was experiencing an "emergency" contemplated within the meaning of § 46(b) based on the prolonged vacancy of four of the twelve seats on the Court.

Analysis. The Eleventh Circuit (per curiam) affirmed. The statute provides the prolonged illness of one judge as a potential emergency; therefore, this reasoning clearly extends to a prolonged vacancy of four seats in a Circuit that already has a high caseload. There is very little precedent on this issue, but what exists supports this holding.

United States v. King, No. 12-16268 (Jun. 9, 2014)

Issues.

1. Does the failure to submit a gun into evidence preclude a conviction of using a firearm in furtherance of a crime?
2. Did the district court err in refusing to use the defendant's proposed jury instruction on cross-race identifications?
3. Did the district court commit reversible error in light of *Alleyne v. United States* by imposing mandatory minimum sentences based on assertions that the defendant "brandished" a firearm

and that multiple counts constituted "second or subsequent" offenses under 18 U.S.C. § 924(c), when neither assertion was found by a jury beyond a reasonable doubt?

Held.

1. No.
2. No.
3. No.

Background and procedural history. Mr. King was indicted on nine counts pertaining to a string of armed robberies, including four counts of carrying a firearm in furtherance of a crime of violence in violation of § 924(c). Law enforcement officers showed victims from several of the locations a photo line-up, and each identified Mr. King as a robber. Mr. King sought to suppress these identifications, but the district court refused. Because the Government was unable to find the gun used, Mr. King moved for a judgement of acquittal, arguing that there was insufficient evidence to show that the gun met the statutory definition of a firearm. The district court denied this motion and Mr. King was convicted on all counts. Mr. King's guidelines range included a mandatory minimum, consecutive seven-year sentence for the first § 924(c) conviction and consecutive 25-year terms for each of his other three § 924(c) convictions. Mr. King challenged this sentence, arguing that both brandishing and the other firearms convictions were "second or subsequent" had to be proved beyond a reasonable doubt under *Apprendi v. New Jersey* and *Alleyne v. United States*.

Analysis. The Eleventh Circuit (per curiam, before Judges Hull and Black, and Ninth Circuit Judge Ferris) affirmed. The Court held there is no requirement for the firearm in a § 924(c) case to be entered as evidence or for expert testimony that the firearm met the statutory definition. Rather, there must only be sufficient testimony, including lay testimony, to show beyond a reasonable doubt that the defendant used a firearm. The Court also rejected Mr. King's argument that the district court erred in refusing to use his proposed jury instruction on cross-race identifications because Mr. King failed to establish a sufficient evidentiary basis for the charge to be given. Even if he had done so, the district court did instruct the jury on cross-race identifications, and the instruction was sufficiently comprehensive.

In light of *Alleyne*, which held that "any fact that increases a mandatory minimum is an 'element' that must be submitted to the jury" 133 S. Ct. 2155, 2163 (2012), Mr. King argued that his first conviction under § 924(c) must be reversed. He further claimed that this prevents the mandatory consecutive 25-year sentences imposed because the jury did not find that the other three counts were "second or subsequent." The Government conceded that the district court erred in sentencing Mr. King to seven years under § 924(c). This does not require a reversal of the sentence, however, because harmless error applies and there was more than enough testimonial and video evidence for a reasonable jury to find that Mr. King brandished a firearm. Furthermore, finding that other counts are "second or subsequent" is a determination of a prior conviction. *Apprendi* and *Alleyne* do not require the government to prove prior convictions beyond a reasonable doubt. The district court did not err in its determination of mandatory sentences under § 924(c).

The Court rejected the remainder of Mr. King's arguments.

United States v. Davis, No. 12-12928 (June 11, 2014)

Issue. Is cell phone location information within the cell phone subscriber's reasonable expectation of privacy for Fourth Amendment purposes?

Held. Yes.

Background and procedural history. Mr. Davis was convicted by a jury on several counts of Hobbs Act robbery, conspiracy to violate the Hobbs Act, and knowing possession of a firearm in furtherance of a crime of violence. The district court sentenced Mr. Davis to 1,941 months imprisonment. During trial, the government introduced evidence of Mr. Davis's location through cell phone location evidence. After conviction and sentencing, Mr. Davis appealed.

Analysis. The Eleventh Circuit (Judge Martin, for Judge Dubina and D.C. Circuit Judge Sentelle) affirmed the judgment in part, but vacated a sentencing enhancement the district court applied. Mr. Davis argued that the obtaining of the cell location evidence violated his constitutional rights under the Fourth Amendment. The Court stated, "Fourth Amendment jurisprudence has dual underpinnings with respect to the rights protected: the trespass theory and the privacy theory." Slip op. at 16. In *United States v. Jones*, __U.S.__, 132 S. Ct. 945 (2012), the Supreme Court addressed a similar issue involving location data generated by a GPS tracking system physically attached to a car, and held that the electronic transmission of GPS location data, in that situation, violated the Fourth Amendment. The Court noted that since there was no trespass against Mr. Davis, *Jones* was not binding authority. The Court nevertheless held that cellular location information is protected by the Fourth Amendment. *Id*. at 23. The Court rejected the Government's argument that "Davis did not have a reasonable expectation of privacy because he had theretofore surrendered that expectation by exposing his cell site location to his service provider when he placed the call" based on *Smith v. Maryland*, 425 U.S. 435 (1976). *Id*. at 21. The Court noted that the *Smith* decision involved phone numbers voluntarily dialed by the cell phone user, in contrast to the instant case, where "Mr. Davis has not voluntarily disclosed his cell site location information to the provider in such a fashion to lose his reasonable expectation of privacy." *Id*. at 22-23. However, the Court deemed that error harmless under the good faith exception. *Id*. at 25, *citing United States v. Leon*, 468 U.S. 897 (1984).

The Court vacated a sentencing enhancement for brandishing a firearm that was improperly applied to Mr. Davis. The Court found that there was not sufficient evidence to apply that sentencing enhancement. *Id*. at 32. Additionally, the Court found that any prosecutorial misconduct did not result in prejudice. *Id*. at 27. The Court summarily rejected Mr. Davis's remaining arguments.

In re Henry, No. 14-12623 (June 17, 2014)

Issue. Is the Supreme Court's recent decision in *Hall v. Florida*,___ U.S. ___, 134 S. Ct. 1986 (2014) retroactive?

Held. No.

Background and procedural history. Mr. Henry committed two murders in Florida and was sentenced to death. With Mr. Henry's execution scheduled for June 18, 2014, the Supreme Court held in *Hall* on May 24, 2014, that it was unconstitutional for the State of Florida to define "mental retardation" as an IQ score of 70 or below and that a petitioner who scores between 70 and 75 on an IQ test may introduce additional evidence of difficulties in adaptive functioning in support of a claim of mental retardation. Mr. Henry moved in the Eleventh Circuit for leave to file a second or successive petition for a writ of habeas corpus in the district court, pursuant to 28 U.S.C. § 2244.

Analysis. The Eleventh Circuit (Judge Marcus, for Judge Pryor) denied Mr. Henry's motion for leave to file a second or successive habeas petition. In this context, § 2244(b)(2) permits such petitions upon a showing that the petitioner's claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" and that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole" would establish by "clear and convincing evidence" that "but for constitutional error, no reasonable factfinder would have found the [petitioner] guilty of the underlying offense." The Court recognized that *Hall* was a "new rule of constitutional law," but found that it was not retroactive because the Supreme Court did not specifically direct as such and because a finding of retroactivity was not "logically dictate[d]" through "multiple holdings." Slip op. at 16, *citing Tyler v. Cain*, 553 U.S. 656, 668 (2001) (O'Connor, J., concurring). The Court further held that even if Mr. Henry could demonstrate that *Hall* was retroactively applicable, he could not satisfy the second prong of the § 2244(b)(2) test. Mr. Henry's claim of mental retardation rested on a score of 78 on a mid-1980s IQ test, which would not implicate the *Hall* ruling that a score of 70 to 75 would permit a petitioner to demonstrate mental retardation by "additional evidence regarding difficulties in adaptive functioning." Slip op. at 22.

Judge Martin dissented, arguing that *Hall* was retroactively applicable.

United States v. Serrapio, No. 12-14897 (June 18, 2014)

Issue. After Mr. Serrapio made certain comments to his university's newspaper, the district court modified the conditions of his probation. Does this modification violate the Double Jeopardy Clause, the Due Process Clause, or the First Amendment?

Holding. No.

Background and procedural history. Mr. Serrapio pleaded guilty to a violation of 18 U.S.C. § 871 for threatening to shoot President Obama when he visited the University of Miami. Mr. Serrapio was sentenced to three years of probation with the special conditions of four months of home confinement, with electronic monitoring, and 250 hours of community service. After Mr. Serrapio began serving his sentence, a college newspaper printed an interview with Mr. Serrapio in which he stated that he viewed his prosecution as "pretty funny" and noted that the publicity benefitted his rock band. This piece was published alongside an article penned by Mr. Serrapio in which he states that the threat was "the biggest mistake of his life." The day after the article ran, the district court set a status conference relating to the conditions of Mr. Serrapio's probation. At this hearing, the

district court expressed concern over the interview. Though it did not revoke his probation, the court modified its conditions, requiring Mr. Serrapio to spend 45 days in a halfway house and lengthened his home confinement to one year.

Analysis. The Eleventh Circuit (Judge Jordan for Judge Martin and Eastern District of Pennsylvania Judge Baylson) affirmed. Mr. Serrapio's challenge came before the court after the completion of his halfway-house stay and home confinement. Although the home confinement issue is moot, Mr. Serrapio was required to pay for his electronic monitoring, and, therefore, was still suffering from collateral consequences.

The modification of the conditions of probation did not violate the Double Jeopardy Clause. Although Mr. Serrapio did not violate the terms of his probation, under § 3563(c) probation can be modified where, as here, the defendant's conduct shows that the initial conditions are insufficient to accomplish the purposes of probation. Mr. Serrapio cited *United States v. Jones* to argue that this case violates Double Jeopardy because it affects his "legitimate expectations" regarding the length of his sentence. 722 F.2d 632, 637 (11th Cir. 1983). However, Mr. Serrapio did not have a legitimate expectation that the terms of his probation would remain the same if his conduct warranted a modification. Mr. Serrapio further alleged that, as applied, § 3563(c) defeats finality of probationary sentences, but the Eleventh Circuit rejected that argument because the discretion of the district court to modify sentences is not unlimited.

United States v. Vandergrift, No. 12-13154 (June 18, 2014)

Issue. Does *Tapia v. United States*, __ U.S. __, 131 S. Ct. 2382 (2011), which prohibits the consideration of a defendant's rehabilitative needs in imposing or lengthening a custodial sentence, apply in the context of a supervised release revocation proceeding?

Held. Yes.

Background and procedural history. The district court determined that Mr. Vandergrift violated several conditions of his supervised release. In imposing sentence, the court stated its view that a custodial sentence was appropriate, in part, because of Mr. Vandergrift's rehabilitative needs. Specifically, the court noted that the structure of the prison environment would be beneficial to Mr. Vandergrift's physical well-being and that Mr. Vandergrift would benefit from the vocational training programs offered by the Bureau of Prisons.

Analysis. The Eleventh Circuit (Judge Wilson, for Judge Tjoflat and Middle District of Florida Judge Bucklew) affirmed. The Court decided for the first time that *Tapia* applied in the context of a supervised release revocation proceeding, abrogating its prior, contrary holding in *United States v. Brown* that "a court may consider a defendant's rehabilitative needs when imposing a specific incarcerative term following revocation of supervised release." 224 F.3d 1237, 1240 (11th Cir. 2000). In so doing, the Eleventh Circuit refused to limit its holding to situations where rehabilitation was a district court's "dominant" consideration; instead, the Court held that reversible *Tapia* error exists where the district court "considers" rehabilitation at all. Slip op. at 12.

However, because Mr. Vandergrift did not raise the issue below, plain-error review applied. Although Mr. Vandergrift did demonstrate error, even if that error were "plain" he could not show that it affected his substantial rights because Mr. Vandergrift could not demonstrate that the outcome would have been different but-for the error.

Boyd v. United States, No. 11-15643 (June 18, 2014)

Issue. Is a fourth-in-time 28 U.S.C. § 2255 motion challenging the enhancement of the movant's sentence, based on the vacatur of his state court predicate convictions, "successive" where the movant's first § 2255 motion predated the state court vacatur and where the second-and third-in-time § 2255 motions were not adjudicated on the merits?

Held. No.

Background and procedural history. In 1998, Mr. Boyd was convicted of several drug offenses and, pursuant to 21 U.S.C. § 851, was sentenced to life in prison due to his two prior felony drug convictions.

Following an unsuccessful direct appeal, Mr. Boyd filed his first § 2255 motion in 2001. This motion did not challenge the validity of Mr. Boyd's state court convictions. The district court denied the motion, and the Eleventh Circuit affirmed. In 2003, the Georgia court vacated Mr. Boyd's state convictions, and Mr. Boyd filed a second-in-time § 2255 motion in 2004. The district court denied that motion as successive, and Mr. Boyd did not appeal. In 2005, Mr. Boyd filed a third-in-time § 2255 motion on the same grounds that was also denied, and the Eleventh Circuit refused to grant Mr. Boyd's request for a certificate of appealability. Mr. Boyd filed his fourth-in-time § 2255 motion in 2011, which was also dismissed as successive. The Eleventh Circuit granted Mr. Boyd a certificate of appealability on whether the district court erred and, if so, whether Mr. Boyd's failure to appeal the second-in-time § 2255 motion or the Eleventh Circuit's denial of a certificate of appealability on the denial of the third-in-time motion had "any effect on the propriety of a federal court now considering the merits of [Mr.] Boyd's claim." Slip op. at 4.

Analysis. The Eleventh Circuit (Southern District of Florida Judge Moore for Judge Tjoflat and Middle District of Florida Judge Schlesinger) reversed and remanded. Although a movant must obtain certification from the court of appeals before the district court may consider the merits of a successive § 2255, "the phrase second or successive is not self-defining and does not refer to all habeas petitions filed second or successively in time." Slip op. at 6. The certification requirement is implicated where the petitioner "could have raised his or her claim for relief in an earlier filed motion, but without a legitimate excuse, failed to do so." *Id*. For this reason, Mr. Boyd's second-in-time § 2255 motion was not successive because its basis–the vacatur of his state court predicate convictions–did not exist at the time of his first § 2255 in 2001. And his subsequent § 2255 filings were also not successive because they were dismissed as successive and not on the merits. *See Humphrey v. United States*, 766 F.2d 1522, 1524-25 (11th Cir. 1985) (per curiam) (a § 2255 motion dismissed as second or successive is not resolved on the merits). Accordingly, Mr. Boyd's requested

relief, based on the vacatur or his state court convictions, has never been reviewed on the merits, and his fourth-in-time § 2255 motion is not "successive."

The Court remanded for a determination as to whether the fourth-in-time § 2255 motion was untimely due to the fact that it was not filed within one year of the state court vacatur. *See* § 2255(f).

United States v. Stanley, No. 13-10066 (June 20, 2014)

Issue. Does the six-level sentencing enhancement for assault during immediate flight, USSG §3A1.2(c)(1), apply to conduct that occurs eight days after the charged offense occurred?

Held. No.

Background and procedural history. Siblings Mr. Stanley, Ryan Dougherty, and Lee Dougherty pleaded guilty to participating in an armed bank robbery. Each received a sentence of 428 months in prison. Eight days after the robbery, the siblings were involved in a high speed car chase during which Ryan Dougherty drove, Mr. Stanley fired shots at the pursuing officers, and Lee Dougherty brandished a machine pistol. The district court applied several sentencing enhancements to each sibling, including the six-level enhancement for assaulting a law enforcement officer and creating a substantial risk of death or serious bodily harm during immediate flight. Mr. Stanley and Lee Dougherty's guidelines range was 207-228 months. Ryan Dougherty's guidelines range was 220-245 months. The district court varied above each sibling's guidelines range and imposed 428-month sentences. On appeal, Mr. Stanley and Lee Dougherty challenged both the procedural and substantive reasonableness of the sentence. Ryan Dougherty only challenged the substantive reasonableness of his sentence.

Analysis. The Eleventh Circuit (Southern District of Florida Judge Scola for Judges Tjoflat and Pryor) vacated Mr. Stanley and Lee Dougherty's sentences, but affirmed Ryan Dougherty's sentence. In vacating Mr. Stanley and Lee Dougherty's sentences, the Court rejected the district court's reasoning that continuous flight is synonymous to immediate flight. Slip op. at 10-11. The Court stated that "immediate flight" is not defined by the Guidelines. *Id*. at 10. Therefore, the Court gave the term its ordinary meaning. *Id*. To determine the ordinary meaning of immediate, the Court cited several dictionary definitions. The Court reasoned, "Under each definition, the Defendants' assaults against the police officers in this case, occurring eight days after, and thousands of miles and several states away from the Georgia robbery [] do not meet the ordinary meaning of the term 'immediate.'" Slip op. at 12. The Court summarily rejected Mr. Stanley and Lee Dougherty's remaining arguments.

The Court affirmed Ryan Dougherty's sentence because he only challenged the substantive reasonable of his sentence, and the Court found his sentence to be reasonable. *Id*. at 22.

Rodriguez v. Sec'y, Fla. Dep't of Corr., No. 11-13273 (June 30, 2014)

Issue. Must the fact that the State's key cooperating witness was permitted conjugal visits be disclosed to the defense as *Brady* or *Giglio* material?

Held. No.

Background and procedural history. Mr. Rodriguez was convicted of three counts of capital murder and one count of armed burglary in Florida state court, and he was subsequently sentenced to death. The State relied on testimony from a cooperating witness who also participated in the murders and burglary. Between Mr. Rodriguez's arrest and his trial, the state's cooperating witness was allowed to visit his family on three occasions. On one of those occasions, the witness and his wife had sex in a police interrogation room. After being sentenced to death, Mr. Rodriguez appealed his convictions for murder and armed burglary and his death sentences. The Florida Supreme Court affirmed Mr. Rodriguez's convictions and death sentences. The United States Supreme Court denied certiorari review. Then, Mr. Rodriguez moved the Dade County Circuit Court to vacate his convictions and sentences. The Circuit Court denied Mr. Rodriguez's motion after an evidentiary hearing, and the Florida Supreme Court affirmed the denial.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judges Tjoflat and Wilson) affirmed Mr. Rodriguez's convictions and death sentences. Mr. Rodriguez claimed both *Giglio* and *Brady* violations based on the argument that the detectives provided the key State witness with family visits and an opportunity to have sex with his wife in order to secure his cooperation and favorable testimony. To succeed on Mr. Rodriguez's *Giglio* claim, he must have shown that (1) "the Florida Supreme Court's adjudication was contrary to, or an unreasonable application of, *Giglio*, or was based on an unreasonable determination of the facts," and that (2) "the *Giglio* error was not harmless under *Brecht*[*v. Abrahamson*, 507 U.S. 619 (1993)]." Slip op. at 54-55. *Brecht* requires Mr. Rodriguez to demonstrate "that the constitutional error-here the *Giglio* violation-'had substantial and injurious effect or influence in determining the jury's verdict.'" Slip op. at 54 (quoting *Brecht,* 507 U.S. 619). The Court held that Mr. Rodriguez failed to "overcome his *Brecht* hurdle." Slip op. at 63. The Court reasoned that the key witness testified to avoid the death penalty in his case, and everyone in the courtroom, including the jury, knew his motivation. Slip op. at 62-63. Therefore, the Court concluded the evidence would not have affected the jury's determination. *Id*.

To successfully assert a *Brady* violation in federal habeas court, the defendant must show that "the state high court's adjudication was contrary to or an unreasonable application of *Brady* or was based on an unreasonable determination of the facts" and "that the prosecution violated *Brady*." Slip op. at 57. A *Brady* violation requires: "(1) the evidence at issue must be favorable to the accused, which means it is either exculpatory or impeaching, (2) the evidence must have been wilfully or inadvertently suppressed by the prosecution, and (3) the accused must have been prejudiced as a result." *Id*. at 55. The Court noted that "[e]vidence is material, *i.e.*, prejudicial, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Slip op. at 55 (quoting *United States v. Bagley*, 473 U.S. 667 (1985)). The Court deferred to the Florida Supreme Court's factual findings, which precluded Mr. Rodriguez's *Brady* claim. Slip op. at 63.However, the Court noted that even if the claim was not foreclosed, Mr. Rodriguez did not prove any prejudicial effect for the same reasons as above. *Id*. at 65.

The Court summarily rejected Mr. Rodriguez's remaining arguments.

SELECTED UNPUBLISHED OPINIONS

United States v. Hooper, No. 13-11584 (May 13, 2014)*

The Eleventh Circuit (per curiam, before Judges Pryor, Martin, and Anderson) vacated Mr. Hooper's sentence of 60 months' probation, a downward variance from the low-end guidelines sentence of 70 months in prison. Mr. Hooper, a Birmingham, Alabama police officer, assaulted a handcuffed, non-resisting arrestee and was convicted under 18 U.S.C. § 242. The Court agreed with the Government's position that this sentence was substantively unreasonable. Although the district court did find that Mr. Hooper would be specifically deterred from committing further crimes, the court expressly declined to consider general deterrence, a statutory sentencing factor that is one of the "key purposes" of sentencing. Slip op. at 6. The Eleventh Circuit further held that the sentence imposed did not adequately account for the seriousness of the offense, which included an abuse of police power to assault a vulnerable, restrained arrestee, and that the district court "failed to cite a sufficiently significant justification for granting a 100%, 70-month downward variance." *Id*.

United States v. Falsey, No. 12-15817 (May 20, 2014)

The Eleventh Circuit (per curiam, before Chief Judge Carnes, Judge Dubina, and Sixth Circuit Judge Siler) reversed the district court's grant of Mr. Falsey's motion to suppress drugs that the police found during an inventory search of the car he had been driving. Because Mr. Falsey abandoned the car by exiting (leaving it unlocked and with the key inside) and running into the woods to evade the police, he lacked standing to challenge the constitutionality of the search.

Fondren v. Comm'r, Ala. Dep't. of Corr., No. 12-14759 (June 4, 2014)*

The Eleventh Circuit (per curiam, before Judges Hull, Black, and Western District of Louisiana Judge Walter) reversed the district court's grant of 28 U.S.C. § 2254 habeas relief to Mr. Fondren. The district court held that Mr. Fondren's state counsel was ineffective at capital murder trial because he failed to request a negative heat of passion jury instruction. This instruction would have informed the jury that the state had the burden to prove beyond a reasonable doubt that Mr. Fondren had not been moved to kill the victim by a sudden heat of passion caused by a provocation that is recognized under Alabama law. The Eleventh Circuit held that the state court's rejection of Mr. Fondren's argument was not contrary to clearly established federal law.

United States v. Chaney, No. 13-12187 (June 4, 2014)*

The Eleventh Circuit (per curiam, before Judges Tjoflat, Martin, and Jordan) denied the Government's motion to dismiss Mr. Chaney's appeal of his conviction. The Court found that the district court failed to specifically discuss the appeal waiver with Mr. Chaney during his change-of-plea hearing. Although the district court did explain that Mr. Chaney "may have waived or given up some or all of [his] right to appeal any sentences imposed," the court failed to confirm that Mr.

Chaney understood that the appeal waiver prevented an appeal of his conviction as well as his sentence. Slip op. at 3 (emphasis added). Because of this, and the fact that the record did not otherwise indicate Mr. Chaney's understanding that the appeal waiver applied to his conviction, the Eleventh Circuit refused to enforce it as to Mr. Chaney's challenges to his conviction. The Court did dismiss Mr. Chaney's sentencing arguments and did deny Mr. Chaney's conviction arguments on the merits.

United States v. Moody, No. 13-15224 (June 17, 2014)

The Eleventh Circuit (per curiam, before Judges Tjoflat, Hull, and Jordan) vacated Mr. Moody's sentence and remanded because the district court failed to state the specific reason or reasons for its *sua sponte* upward variance. The district court did not explain the upward variance and 20-month total sentence and its reasoning was not otherwise clear from the record (the Government did not request any specific sentence and Mr. Moody requested a low-end, 4-month guidelines sentence). The Eleventh Circuit wrote that the district court erred "[u]nder these particular circumstances, and in light of the degree of the variance." Slip op. at 4.

United States v. Seecharan, No. 13-15024 (June 20, 2014)

The Eleventh Circuit (per curiam, before Judges Tjoflat, Jordan, and Kravitch) affirmed Mr. Seecharan's 60-month sentence. The district court reimposed this sentence after the Eleventh Circuit vacated and remanded Mr. Seecharan's original sentence. The Court found that the original sentence, which was also 60 months, was procedurally unreasonable because the district court's finding that the Bureau of Prisons (BOP) was capable of treating Mr. Seecharan's many medical problems was not supported by any evidence in the record. After remand, the Government presented evidence–a declaration from The BOP's Southeast region medical director–that Mr. Seecharan's medical needs could be met during a sustained period of incarceration. The Eleventh Circuit determined that this was sufficient to justify the district court's reimposition of the original, 60-month sentence.

*appeal from the Northern District of Alabama