SUMMARIES OF RECENT CASELAW

JULY 1, 2013 – SEPTEMBER 30, 2013

TABLE OF CONTENTS

UNITED STATES SUPREME COURT

None. The Supreme Court was in recess from July through September.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PUBLISHED OPINIONS

Burns v. Sec'y, Fla. Dep't. of Corr., No. 11-14148 (July 8, 2013) (the district court correctly denied habeas relief and held that the state court did not violate the Fifth Amendment by refusing to deliver a no-adverse-inference instruction in regard to the defendant-petitioner's decision not to testify at the penalty phase of his trial). **4**

Brown v. United States, No. 09-10142 (July 10, 2013) (an attorney does not render ineffective assisting by failing to introduce cumulative mitigating evidence at the sentencing phase of a capital trial if the evidence is cumulative and other strong aggravators exist). **5**

United States v. Scrushy, No. 12-10694 (July 15, 2013) (the district court did not abuse its discretion in denying the defendant's motions for recusal and for a new trial). **6**

Castillo v. State of Fla., No. 12-13053 (July 22, 2013) (under *United States v. Cronic*, prejudice is not presumed from the failure of the defendant's counsel to object to a juror's participation in juror deliberations despite her absence for a substantial amount of trial testimony). **7**

United States v. Charles, No. 12-14080 (July 25, 2013) (it was harmless error for the district court to admit into evidence a Customs and Border Protection officer's statements regarding the defendant's out-of-court statements, which had been translated from Creole into English by a translator). **8**

United States v. Vernon, No. 12-12767 (July 26, 2013) (the district court erred in granting the defendant's Fed. R. Crim. P. 29 motion on the ground that the defendant was not a doctor because the Anti-Kickback statute does not solely proscribe improper referrals by doctors). **8**

Burgess v. Comm'r, Ala. Dep't. of Corr., No. 12-10444 (July 30, 2013) (the district court clearly erred in crediting an Alabama state appellate court's finding that the petitioner was not mentally retarded because the state court's factual findings were either directly contradicted by the record or unsupported by the record).. . . . . **9**

Lee v. Ala. Dep't of Corr., No. 12-14421 (Aug. 1, 2013) (a state court's plain-error ruling constitutes an adjudication "on the merits" that may be afforded Antiterrorism and Effective Death Penalty Act of 1996 deference). **11**

United States v. Fries, No. 11-15724 (Aug. 6, 2013) (the district court erred in denying the defendant's motion for a new trial on the ground that the jury instructions shifted the burden of proof away from the Government). **12**

Bishop v. Warden, Ga. Dep't. of Corr., No. 10-15442 (Aug. 8, 2013) (the district court did not err in finding that the petitioner's trial counsel did not render ineffective assistance for declining to call reluctant law enforcement witnesses at trial, for not introducing additional evidence of the co-defendant's bad character, and for not requesting funds for a blood spatter expert in the hopes of further incriminating the co-defendant). **14**

United States v. Curbelo, No. 10-14665 (Aug. 9, 2013) (pursuant to Fed. R. Crim. P. 32.2(b)(5), money forfeiture allegations cannot be submitted to the jury).. . . . . **15**

Spencer v. United States, No. 10-10676 (Aug. 15, 2013) (a petitioner who unsuccessfully challenged the career offender enhancement at both sentencing and on direct appeal may use a timely-filed first motion under 28 U.S.C. § 2255 to pursue the same issue when an intervening case from the Supreme Court, with retroactive application, vindicates his argument). **19**

United States v. Madden, No. 11-14302 (Aug. 16, 2013) (the appropriate standard of review for an unobjected-to constructive amendment of a defendant's indictment is plain error). **20**

United States v. Yates, No. 11-16093 (Aug. 16, 2013) (a fish is a "tangible object" within the meaning of 18 U.S.C. § 1519). **21**

United States v. McQueen, No. 12-10840 (Aug. 22, 2013) (the district court's downward variance of more than 90% of the low end of the defendants' guideline ranges was substantively unreasonable). **22**

United States v. Bush, No. 12-12624 (Aug. 27, 2013) (the district court did not err in *sua sponte* delivering an *Allen* charge to the jury after just four hours of deliberations and no express notification of deadlock). **24**

McNabb v. Comm'r, Ala. Dep't. of Corr., No. 12-13535 (Aug. 28, 2013) (the district court did not abuse its discretion in dismissing the petitioner's habeas petition before the parties had filed additional briefs addressing the merits of his claims). **25**

United States v. Edwards, No. 11-15953 (Sept. 6, 2013) (the district court lacked sufficient evidence to order restitution to a subset of victims, upon the Government's proposal to change the restitution order to replace the initial victim (who allegedly was a co-conspirator with the defendant) with a

subset of victims, because the Government failed to comport with the 18 U.S.C. § 3664 procedures to substantiate restitution). **28**

United States v. Diveroli, No. 13-10248 (Sept. 10, 2013) (the district court does not have jurisdiction to rule on a Fed. R. Crim. P. 12(b)(3)(B) motion to dismiss the charging document while the defendant's direct appeal is pending).. . . . . **30**

Muhammad v. Sec'y, Fla. Dep't. of Corr., No. 12-16243 (Sept. 23, 2013) (the district court erred in granting the petitioner's 28 U.S.C. § 2254 petition on the basis that his Confrontation Clause rights were violated at his Florida state court resentencing hearing). **30**

United States v. Castro, No. 12-12927 (Sept. 26, 2013) (in light of *United States v. Davila*, the district court's comments to the defendant regarding the potential peneological consequences of not going forward with his stated intent to plead guilty were not a Fed. R. Crim. P. 11(c)(1) violation requiring automatic vacatur). **32**

Selected Unpublished Opinions

United States v. Seecharan, No. 12-15231 (July 18, 2013) (the district court imposed a procedurally unreasonable sentence by finding, based only on a Bureau of Prisons official's unsubstantiated statement, that the defendant's extensive medical conditions could be addressed by the BOP). . **32**

United States v. Cooper, No. 12-12033 (Sept. 4, 2013) (the district court plainly erred by not allowing the defendant an opportunity for allocution at sentencing). **33**

United States v. Valdes, No. 11-15517 (Sept. 4, 2013) (the district court's failure to comply with 21 U.S.C. § 851(b) by not asking the defendant at sentencing whether he admitted the existence of his prior convictions, which were in turn used to enhance his sentence for the instant drug offenses, was not reversible error). **34**

United States v. Cedillo, No. 13-10933 (Sept. 5, 2013) (the Government did not breach its plea agreement by recommending a 30-year term of supervised release where the plea agreement erroneously listed the statutory maximum term of supervised release as three years, but also provided that the Government made no commitment as to what sentence it would ultimately recommend)
. . . . **35**

United States v. Griffin, No. 12-15847 (Sept. 6, 2013) (a district court is not required to consider the 18 U.S.C. § 3553(a) sentencing factors when imposing a mandatory revocation of supervised release under 18 U.S.C. § 3583(g)). **36**

United States v. Sanders, No. 12-16092 (Sept. 6, 2013) (state court "youthful offender" convictions can constitute predicate offenses for the USSG §4B1.2 career offender enhancement). **36**

United States v. Morgan, No. 12-12497 (Sept. 23, 2013) (the district court erroneously applied the two-level USSG §3B1.3 enhancement for abuse of a position of trust where the defendant engaged in only an arms-length, commercial relationship with the victims of her investment fraud). . . . **37**

Farina v. Sec'y, Fla. Dep't of Corr., No. 12-13260 (Sept. 30, 2013) (the petitioner's counsel rendered ineffective assistance by failing to challenge, on direct appeal, the state court prosecutor's use of religious authority in a capital sentencing proceeding). **37**

DECISIONS OF THE UNITED STATES SUPREME COURT

None. The Supreme Court was in recess from July through September.

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

PUBLISHED OPINIONS

Burns v. Sec'y, Fla. Dep't. of Corr., No. 11-14148 (July 8, 2013)

Issue. Does a state court's refusal to deliver a no-adverse-inference instruction in regard to a defendant's decision to not testify constitute per se reversible error?

Held. No.

Background and procedural history. Mr. Burns did not testify in his Florida state court capital murder case where he was convicted and sentenced to death. At the sentencing phase, the court refused to instruct the jury to draw no adverse inference from Mr. Burns's decision to not testify at trial. The Florida Supreme Court held that the court's refusal violated his Fifth Amendment privilege, but applied harmless-error review and found that the error did not warrant reversal. Mr. Burns filed a federal habeas petition and then appealed the district court's denial of his petition.

Analysis. The Eleventh Circuit (Judge Marcus, for Judges Carnes and Hull) affirmed the district court's denial of Mr. Burn's habeas petition. Federal courts may only grant habeas relief if a state court's decision on the merits contradicts or unreasonably applies "clearly established Federal law." Slip op. at 11, *citing* 28 U.S.C. § 2254(d)(1)-(2). This only includes the holdings of Supreme Court decisions.

The Eleventh Circuit upheld a harmless-error standard for a no-adverse-inference instruction error. Constitutional errors are either structural errors, requiring automatic reversal, or trial errors, more common errors that do not effect the entire trial. Slip op. at 13, *citing Arizona v. Fulminante*, 499 U.S. 279, 307-11 (1991). Since the United States Supreme Court has never addressed the issue of whether no-adverse-inference instruction is a structural or trial issue, the Florida Supreme Court decision was not contrary to clearly established law. Additionally, the Court found that the failure to give the instruction did not have a "substantial and injurious effect" on the jury in question. The state never mentioned Mr. Burns's failure to testify and the failure to give the instruction would only have affected one of five mitigators in question (remorse). Slip op. at 20.

Brown v. United States, No. 09-10142 (July 10, 2013)

Issue. Does a failure to bring certain cumulative mitigating evidence render the counsel ineffective for purposes of vacating a sentence?

Held. No. If the mitigating evidence is cumulative and other strong aggravators exist, counsel's failure to introduce the evidence does not satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

Background and procedural history. Mr. Brown was found guilty of murdering a federal employee during a bank robbery and sentenced to death. After his conviction and sentence were affirmed, Mr. Brown filed a 28 U.S.C. § 2255 petition alleging that his former counsel rendered ineffective assistance of counsel by failing to adequately investigate his background to engender remorse and sympathy during the penalty phase of his trial. Mr. Brown appealed the district court's denial of the petition.

Analysis. The Eleventh Circuit (Judge Marcus, for Chief Judge Dubina and Judge Barkett) affirmed the district court's denial of Mr. Brown's motion to vacate on all grounds. The Court concluded that Mr. Brown's ineffective-assistance claim failed the prejudice prong of *Strickland*. Slip op. at 14. Seven strong aggravating factors existed regardless, and the omitted evidence would have been cumulative to the testimony of fourteen witnesses who testified on his behalf. Slip op. at 16, 19. Mr. Brown also argued that one juror was not properly voir dired about death penalty views. The juror completed a written questionnaire in advance, which included ten questions about her death penalty opinions, and Mr. Brown did not object during voir dire to the failure to further voir dire the juror. The Court held that this argument was procedurally defaulted because it was not sufficiently raised on direct appeal, and Mr. Brown could not show both "cause" and "prejudice" as the juror's questionnaire responses were favorable to him. Slip op. at 29-31. Finally, the Eleventh Circuit affirmed the district court's denial of new representation for Mr. Brown based on his attorney's conflict of interest.

United States v. Scrushy, No. 12-10694 (July 15, 2013)

Issues.

1. Did the district court abuse its discretion in denying the defendant's motion for recusal?

2. Did the district court abuse its discretion in denying the defendant's motion for a new trial?

Held.

1. No.

2. No.

Background and Procedural History. Mr. Scrushy was tried with former Alabama Governor Don Siegelman, primarily for charges of bribery. The jury adjudged the pair guilty on some bribery and honest services mail fraud counts while acquitting them of others. Although the Eleventh Circuit affirmed Mr. Scrushy's convictions and sentence on direct appeal, the Supreme Court granted Mr. Scrushy's petition for certiorari and remanded his case to the Eleventh Circuit for reconsideration in light of *Skilling v. United States*, 561 U.S. ___, 130 S. Ct. 2896 (2010). The Eleventh Circuit then reversed two of Mr. Scrushy's convictions and remanded to the district court for resentencing.

After being resentenced, Mr. Scrushy appealed the denial of his motions for recusal and for a new trial. He argued that the district judge, Judge Fuller, should have recused himself pursuant to 28 U.S.C. § 455(a), (b) from consideration of the motion for a new trial because he met ex parte with the U.S. Marshals about a factual issue (the authenticity of e-mails purporting to show improper juror conduct) in the motion and because, at that meeting, Judge Fuller acquired personal knowledge of a disputed evidentiary fact pertinent to that ground (an outside entity had concluded that the e-mails were not authentic). Regarding the motion for a new trial, Mr. Scrushy argued that he was entitled to relief on several grounds, alleging that some jurors had improperly deliberated and also improperly researched and shared their research with each other; that he was selectively prosecuted; that Judge Fuller's ex parte meeting with the Marshals constituted judicial misconduct; and that then-United States Attorney Leura Canary failed to abide by her decision recuse herself from the case, depriving Mr. Scrushy of a disinterested prosecutor.

Analysis. The Eleventh Circuit (Judge Tjoflat, for Judge Cox and Southern District of Georgia Judge Bowen) affirmed the district court's denial of both motions. The Court rejected Mr. Scrushy's argument that Judge Fuller's ex parte meeting with the Marshals called his impartiality into question and required his recusal pursuant to § 455(a) because, in ruling on Mr. Scrushy's motion, Judge Fuller assumed that the e-mails were authentic. Similarly, the Eleventh Circuit found that § 455(b) did not require Judge Fuller's recusal. Mr. Scrushy maintained that Judge Fuller's knowledge of the e-mails' purported inauthenticity made him a "material witness in the adjudication" of that matter, but the Court reasoned that, since Judge Fuller ruled on Mr. Scrushy's motion under the assumption that the e-mails *were* authentic, their authenticity was not at issue and Judge Fuller was unlikely to be a material witness in any proceeding.

The Eleventh Circuit was also unpersuaded by the grounds Mr. Scrushy raised in appealing the denial of his motion for a new trial. It held that Mr. Scrushy waived the issue of selective prosecution by failing to timely raise it pursuant to Rule 12(b) and that Mr. Scrushy's asserted excuse for the delay—that he did not learn of the evidence until after his trial—was "feeble at best" because the information was available to Mr. Scrushy, in some form or another, years prior to the commencement of his trial. The Eleventh Circuit further held that the United States Attorney's "limited" post-recusal involvement in his case did not deprive Mr. Scrushy of a disinterested prosecutor because he failed to prove that this limited involvement "influenced any decisions made by the U.S. Attorney's office in prosecuting" him. Slip op. at 39. The Court summarily rejected Mr. Scrushy's grounds for relief associated with the juror e-mails and with a juror's romantic infatuation with the Government's case agent.

Castillo v. State of Fla., No. 12-13053 (July 22, 2013)

Issue. Under *United States v. Cronic*, is prejudice presumed from the failure of a defendant's counsel to object to a juror's participation in juror deliberations despite her absence for a substantial amount of trial testimony?

Held. No.

Background and procedural history. Ms. Castillo was convicted in Florida state court of three counts of attempted armed robbery and one count of armed robbery. Her conviction was affirmed on direct appeal. Ms. Castillo then unsuccessfully sought state collateral relief, arguing that her trial counsel rendered ineffective assistance by failing to object to a juror's participation in deliberations despite missing an entire day of trial testimony. She then asserted the same issue in a 28 U.S.C. § 2254 petition in federal district court. The district court granted the petition even though Ms. Castillo conceded that she could not show prejudice, finding that prejudice was presumed under the Supreme Court's decision in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039 (1984). The Government appealed.

Analysis. The Eleventh Circuit (Judge Carnes, for Judge Cox and Court of International Trade Judge Restani) noted at the outset that it was unclear if the juror actually missed a day of testimony, and if that juror actually participated in deliberations, but for the purposes of appellate review it resolved all factual ambiguities in Ms. Castillo's favor. The Court nonetheless reversed the district court's grant of habeas relief because it erred in finding that *Cronic* applied to this case. In *Cronic*, the Supreme Court identified three scenarios in which the *Strickland* test did not apply because prejudice could be presumed from an attorney's ineffective assistance: 1) there is a "complete denial of counsel" at a "critical stage" of trial; 2) counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"; or 3) under the circumstances, "the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair." Slip op. at 10, *quoting Cronic*, 466 U.S. at 659-61, 104 S. Ct. at 2047-48. The Eleventh Circuit previously interpreted *Cronic*'s presumption of prejudice to apply "to only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the

defendant was in effect denied any meaningful assistance at all." *Stano v. Dugger*, 921 F.2d 1125, 1153 (11th Cir. 1991) (en banc).

Here, no party asserted that the third *Cronic* exception applied, and the Court deemed the first *Cronic* exception inapplicable because counsel was present throughout the trial. The Court also found that the second exception was inapplicable because counsel did subject the prosecution's case to meaningful adversarial testing by filing a motion to suppress; questioning venire members; challenging prospective jurors for cause; using peremptory challenges; giving an opening statement; lodging numerous objections; moving for a mistrial several times on different grounds; cross-examining the state's witnesses; and delivering a closing argument urging acquittal. Since none of the *Cronic* exceptions applied, to prevail on an ineffective-assistance claim, Ms. Castillo would have to meet the *Strickland* standard, which she conceded she could not do.

United States v. Charles, No. 12-14080 (July 25, 2013)

Issue. Did the district court err in admitting a Customs and Border Protection officer's statements regarding the defendant's out-of-court statements, which had been translated from Creole into English by a translator?

Held. Yes, but the error was harmless.

Background and Procedural History. Ms. Charles, a Haitian national, appealed her conviction for knowingly using a fraudulently altered travel document in violation of 18 U.S.C. § 1546(a). Ms. Charles, who speaks Creole and not English, argued that her conviction must be reversed because the only evidence to support her conviction was the testimony of a Customs and Border Protection ("CBP") officer regarding the out-of-court statements made by an interpreter who translated Ms. Charles's Creole language statements into English during the CBP officer's interrogation of Ms. Charles. The CBP officer's interrogation of Ms. Charles occurred at Miami International Airport and the translator worked for an over-the-phone interpreter service under contract with the Department of Homeland Security. The Government did not call the interpreter to testify. Instead, the CBP officer who conducted the interrogation through the interpreter told the jury what the interpreter told him Ms. Charles had said. Ms. Charles did not object in the district court to the CBP officer's testimony as a violation of her rights under the Sixth Amendment's Confrontation Clause.

Analysis. The Eleventh Circuit (Judge Barkett for Judge Marcus and Middle District of Florida Judge Conway) affirmed the district court. Although admission of the defendant's statements was erroneous and a violation of the Sixth Amendment, the Court could not say that the error was plain because there was no precedent from the Supreme Court.

United States v. Vernon, No. 12-12767 (July 26, 2013)

Issues.

1. Was the evidence at trial sufficient to support the jury's verdicts of guilty on two of defendants' charged violations of anti-kickback laws?

2. Did the district court err in granting a third defendant's Fed. R. Crim. P. Rule 29 motion?

Held.

1. Yes.

2. Yes.

Background and Procedural History. These three consolidated appeals arose from a single prosecution involving health care fraud and violations of the Anti-Kickback laws regulating Alabama Medicaid. Chris Vernon and Jeff Vernon were executives of MedfusionRX, LLC ("Medfusion"), which was a specialty pharmacy that fills prescriptions for "factor" medication, a special and expensive medication used to treat hemophilia. In order to grow its "factor" medication customer base, Medfusion made sizable payments to individuals and businesses if they would refer their hemophiliac clients to their pharmacy. Mr. Brill worked for a business that received the kickback payments from Medfusion, and he was convicted of conspiracy to commit healthcare fraud by with others to increase the kickback payments he received. On a Rule 29(c) motion, Chris Vernon had successfully argued that the Anti-Kickback statute was limited to improper referrals by physicians, and that, since he was not a physician, he could not be convicted under the statute.

Jeff Vernon appealed his convictions on numerous grounds, including the district court's denial of his motion for a judgment of acquittal. Mr. Brill also appealed the district court's denial of his Rule 29 motion. The government appealed the district court's order setting aside the jury's guilty verdicts as to Chris Vernon and granting his Rule 29 motion.

Analysis. The Eleventh Circuit (Judge Hull, for Judge Pryor and Middle District of Florida Judge Schlesinger) affirmed the convictions of Jeff Vernon and Mr. Brill. As to Chris Vernon, the Eleventh Circuit vacated the district court's Rule 29 acquittal, reversed the alternative award of a new trial, and remanded for reinstatement of the jury's guilty verdicts and sentencing on those counts. The Court found that the evidence amply established that Chris Vernon "paid remuneration" to medical providers and rejected his argument that the Anti-Kickback statute was limited to improper referrals by doctors. The Eleventh Circuit also found there was sufficient evidence for a reasonable jury to conclude that Chris Vernon acted "willfully" as required by the Anti-Kickback Statute, rejecting his argument that the Government failed to prove that Medfusion made payments to induce medical providers to refer individual hemophiliac patients to Medfusion for "factor" medication.

Burgess v. Comm'r, Ala. Dep't. of Corr., No. 12-10444 (July 30, 2013)
***On appeal from the Northern District of Alabama

Issue. Did the district court err in crediting an Alabama state appellate court's finding that the petitioner was not mentally retarded?

Held. Yes.

Background and procedural history. After Mr. Burgess was convicted in Alabama state court for three murders, the state trial judge overrode the jury's recommendation of life in prison and sentenced him to death. Mr. Burgess unsuccessfully appealed his conviction and sentence before initiating state collateral relief proceedings pursuant to Ala. R. Crim. P. 32. At the time Mr. Burgess filed his Rule 32 petition, the Supreme Court of the United States had not yet granted certiorari in *Atkins v. Virginia*, 536 U.S. 304 (2002), so his petition did not reference that case, although it did express the need for expert evaluation of Mr. Burgess's mental disabilities.

Prior the Mr. Burgess's Rule 32 hearing, the Supreme Court granted certiorari in *Atkins*. Mr. Burgess unsuccessfully sought to amend the petition to specifically raise an Eighth Amendment claim that he could not be executed because he was mentally retarded, and he requested funds to retain a mental health expert to evaluate him. The state court denied both motions, finding that Mr. Burgess's Eighth Amendment claim was procedurally defaulted and declining to address the merits of this claim. The Alabama Court of Criminal Appeals reversed the trial court's procedural default ruling, finding that *Atkins* applied retroactively to cases on collateral review, but rejected Mr. Burgess's argument that he should be permitted to further develop the record of his mental retardation. Accordingly, the court denied Mr. Burgess's Eighth Amendment claim on the merits, and the Alabama Supreme Court denied certiorari.

Mr. Burgess then filed a 28 U.S.C. § 2254 petition in the Northern District of Alabama. Despite the fact that Mr. Burgess submitted an affidavit from a neuropsychologist who concluded "to a reasonable degree of psychological certainty that Mr. Alonzo Burgess is a mentally retarded person," and the evidence in the record that Mr. Burgess had asked for and been refused funds to establish his mental retardation in earlier proceedings, the district court rejected his request for a hearing and denied the petition in full, finding that Mr. Burgess had "failed, without explanation, to develop and present [the neuropsychologist's affidavit] in the first instance to the state court." Mr. Burgess appealed to the Eleventh Circuit.

Analysis. The Eleventh Circuit (Judge Barkett, for Judges Wilson and Martin) reversed the district court. Since the Alabama court considered the merits of this issue, Mr. Burgess could only receive federal habeas relief if the state court's decision was based on an "unreasonable" factual finding, but the Eleventh Circuit determined that Mr. Burgess met that burden here. It held that the state court's factual finding that Mr. Burgess was not mentally retarded was unreasonable because it was based upon a series of factual findings either directly contradicted by the record or unsupported by the record.

The Court also held that the district court's decision to deny Mr. Burgess an evidentiary hearing was an abuse of its discretion and based on a "clearly erroneous" factual finding that Mr. Burgess had "failed, without explanation, to develop and present [expert testimony] in the first instance to the state court." Slip op. at 24. Since an evidentiary hearing could have enabled Mr. Burgess to prove his petition's factual allegations, he was entitled to one, and the Eleventh Circuit reversed and remanded with instructions that the district court convene such a hearing.

Lee v. Ala. Dep't of Corr., No. 12-14421 (Aug. 1, 2013)

Issues.

1. Did Mr. Lee's trial counsel render ineffective assistance?

2. Did the Alabama appellate court render a decision "contrary to" or an "unreasonable application of" a "clearly established federal law" by concluding that the state trial judge's overriding the jury's recommended sentence of life in prison did not violate *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002)?

3. Is a state court's plain-error ruling an adjudication "on the merits" that may be afforded deference pursuant to the Antiterrorism and Effective Death Penalty Act of 1996?

4. Did the State's peremptory challenges violate *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986)?

Held.

1. No.

2. No.

3. Yes.

4. No.

Background and procedural history. In 1998, Mr. Lee shot three employees of a pawn shop during an attempted robbery, killing two and seriously injuring the third. He was tried in Alabama state court, and the jury returned unanimous verdicts of guilty on multiple counts of capital murder and attempted murder. During the mitigation phase, the jury voted 7-5 to recommend a sentence of life in prison. The state court judge overrode the jury's recommendation and sentenced Mr. Lee to death.

Mr. Lee's convictions and sentence were affirmed on direct appeal. Among the arguments rejected by the Alabama Court of Criminal Appeals were Mr. Lee's claimed *Batson* and *Ring* violations. Both the Alabama Supreme Court and the United States Supreme Court denied certiorari review. Mr. Lee then sought collateral review in state court pursuant to Ala. R. Crim. P. 32, alleging that his trial counsel rendered ineffective assistance by failing to investigate and present additional mitigating evidence. The trial court denied Mr. Lee's Rule 32 petition, finding that he failed to demonstrate prejudice, and the Alabama Court of Criminal Appeals affirmed. Mr. Lee then filed a 28 U.S.C. § 2254 petition in federal district court, reasserting his ineffective-assistance, *Ring*, and *Batson* claims. The district court denied Mr. Lee's petition but granted a certificate of appealability on those three issues.

Analysis. The Eleventh Circuit (Judge Hull, for Judges Tjoflat and Dubina) affirmed. The Court rejected Mr. Lee's ineffective-assistance claim because he failed to satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), as evidenced by the state trial judge's finding that the omitted mitigation evidence would not have affected the sentence it imposed on Mr. Lee and Mr. Lee's own failure to articulate how the evidence affected his actions at the time of the murders.

The Court was also unconvinced by Mr. Lee's challenge to the state trial judge's override of the jury's recommended sentence. In *Ring*, the Supreme Court held that aggravating factors that are prerequisites to the imposition of the death penalty must be found by a jury. The Eleventh Circuit characterized this holding as "narrow," and refused to extend it to prevent the aggravating circumstances from "being implicit in the jury's verdict." Slip op. at 52. Accordingly, the Court held that the state court's decision not to grant relief on this ground was not "contrary to, or an unreasonable application of" *Ring,* which the Antiterrorism and Effective Death Penalty Act of 1996 designates as the pertinent standard of review in § 2254 cases. *Id*.

The Eleventh Circuit also rejected Mr. Lee's *Batson* claim. The Alabama appellate court had reviewed this claim for plain error, and the Eleventh Circuit held that AEDPA deference applied even to plain-error rulings, deciding this issue of first impression by analogy to precedents holding that a state court rejection of a claim under the state's heightened fact pleading rule constitute adjudications "on the merits" for AEDPA purposes. The Court wrote that a contrary rule would "contravene the comity and federalism principles that underlie AEDPA if we were to ignore the state appellate court's work and review [Mr.] Lee's *Batson* claim *de novo*." Slip op. at 80. Turning to the merits of the *Batson* claim, the Eleventh Circuit rejected Mr. Lee's argument that the Alabama appellate court erred by failing to show it actually considered every relevant argument he raised by mentioning it in the court's opinion. *See, e.g., Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770 (2011). The Eleventh Circuit rejected Mr. Lee's remaining *Batson* arguments, including that the peremptory strikes were pretextual. In so doing, the Court noted that Mr. Lee drew a 75% African American jury out of a 60.3% African American venire*,* and finding that the state demonstrated race-neutral reasons for the strikes.

United States v. Fries, No. 11-15724 (Aug. 6, 2013)

Issues.

1. Was sufficient evidence introduced at trial to support Mr. Fries's 18 U.S.C. § 922(a)(5) conviction for transferring a firearm to an out-of-state resident when neither buyer nor seller was a licensed firearm dealer?

2. Did the district court err in denying Mr. Fries's motion for a new trial on the ground that the jury instructions shifted the burden of proof away from the Government as to the licensure status of the buyer?

Held.

1. Yes.

2. Yes.

Background and Procedural History. In December 2009, agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) went to the Tallahassee Gun and Knife Show to conduct an undercover investigation of illegal gun sales in Florida. Special Agent Visnovske posed as a Georgia resident who was in Florida visiting his brother to get Mr. Fries to violate 18 U.S.C. § 922(a)(5), which proscribes the knowing sale of a weapon to a nonresident if neither the buyer nor the seller was a licensed dealer at the time of the transaction. Mr. Fries refused to sell to Agent Visnovske upon learning he was a Georgia resident stating that it would be illegal. Special Agent Williams overheard the conversation and stated that he was from Florida and would like to buy the firearm. Without asking whether either agent possessed a federal firearms license (FFL), Mr. Fries sold Agent Williams the gun. Agents Vinovske and Williams tried to get Mr. Fries to sell Agent Vinovske a gun again in April 2010 when visiting the Tallahassee gun show. Mr. Fries agreed to sell Agent Vinovske the gun this time for $1,200 in cash. Agent Visnovkse handed Mr. Fries the cash and took possession of the firearm in front of Mr. Fries. At no time during this transaction did Mr. Fries ask for identification or a FFL. Mr. Fries was subsequently indicted and for selling a firearm without a license, in violation of 18 U.S.C. §§ 922(a)(1)(A), 932(a)(1)(D); and for selling, while not being a licensed dealer, a firearm to a nonresident, who was also not a licensed firearms dealer, in violation of 18 U.S.C. §§ 922(a)(5) and 924(a)(1)(D).

The case was tried in front of a jury on July 27, 2011. The jury returned a verdict of not guilty as to Count I and guilty as to Count II. The district court sentenced Mr. Fries to two years' probation.

Mr. Fries asked the district court to modify the applicable Eleventh Circuit Pattern Jury Instruction to include the defense that a person "may be a resident of more than one state if he maintains a home in more than one state." The court did not issue the proposed instruction, but nevertheless Mr. Fries did not object to the jury instructions. He claims that he did not object to this set because it did not require the government to prove that the buyer of the firearm did not possess an FFL.

Mr. Fries filed a notice of appeal, but soon thereafter his attorney filed a motion to withdraw as counsel and an *Anders* brief, contending that a review of the record revealed no arguable issue of merit upon which he could proceed in good faith. The Eleventh Circuit denied the motion. Mr. Fries then argued that because there is insufficient evidence to support a finding that Agent Visnovske did not have an FFL when Fries sold him the firearm at issue in Count II, his conviction should be reversed. Mr. Fries argued in the alternative that because the trial judge instructed the jury that transferee's licensure status was an exception to criminal liability under § 922(a)(5) rather than an essential element of the crime, the jury instructions erroneously relieved the government of its burden to prove beyond a reasonable doubt that the person to whom Mr. Fries allegedly sold the Kimber firearm charged in Count II of the indictment (Agent Visnovske) did not possess an FFL.

Analysis.

Issue 1. To prove that a defendant violated § 922(a)(5), the government must offer evidence of four essential elements: (1) the defendant was not a licensed firearms importer, manufacturer, dealer, or collector; (2) the defendant transferred, sold, traded, gave, transported, or delivered a firearm to another person; (3) the person to whom the defendant transferred the firearm was not a licensed

importer, manufacturer, dealer, or collector; and (4) the defendant knew or had reasonable cause to believe that the person to whom the firearm was transferred did not reside in the defendant's state of residence. Citing the Eleventh Circuit Pattern Jury Instructions and the plain language of the statute, the Court found that the statute clearly requires the government to prove, as an essential element of the offense, that neither the defendant nor the nonresident to whom the defendant allegedly transferred the weapon possessed an FFL at the time of the transfer.

The Government conceded that the record contained no direct evidence of Agent Visnovske's licensure status, but contended that a jury could have found that Agent Visnovske was unlicensed from testimony between Mr. Fries and various ATF agents in which Mr. Fries demonstrated knowledge that it would be illegal to sell a gun to a nonresident of Florida unless that person held an FFL. Because of this and the fact that Mr. Fries tried to circumvent the law, the Government argued that this proved Agent Visnovske was actually unlicensed at the time of the sale.

The Eleventh Circuit was unpersuaded by this argument, finding that because Mr. Fries lacked personal knowledge of Agent Visnovske's licensure status, his subjective belief that he was executing a transaction with an unlicensed person does not bear upon the objective state as they actually were at the time of the sale. Because there was no evidence that Agent Visnovske was unlicensed at the time of the sale, Mr. Fries's conviction could not stand.

Issue 2. The Government argued that any error in not submitting evidence of Agent Visnovske's lincesure status was harmless because, had Mr. Fries objected at trial, the Government could have proven that Visnovske was unlicensed. The Eleventh Circuit rejected this argument stating that on appeal, it is not important to what could have happened, but instead they are confined to the record that was given. The Court further explained that in every criminal case, the Government must be put to its proof, and though the failure to make a contemporaneous objection or motion at trial may affect an appellant's standard of review, permitting a conviction to stand where there is not any evidence that supports an essential element of the crime charged would do great damage to the justice system. The Government's argument that the error was harmless does not cure the key defect in this case.

Bishop v. Warden, Ga. Dep't. of Corr., No. 10-15442 (Aug. 8, 2013)

Issues.

1. Did the district court err in finding that the petitioner's trial counsel did not render ineffective assistance for declining to call reluctant law enforcement witnesses at trial, for not introducing additional evidence of the co-defendant's bad character, and for not requesting funds for a blood spatter expert in the hopes of further incriminating the co-defendant?

2. Did the district court err in finding that the Government did not commit a *Brady* violation by arguing to the jury that the petitioner's co-defendant would "have his day in court" before his own jury but failing to disclose that the co-defendant had entered into a plea agreement?

Held.

1. No.

2. No.

Background and procedural history. Mr. Bishop was convicted in Georgia state court of malice murder and armed robbery. Despite his defense counsel's extensive mitigation case, Mr. Bishop was sentenced to death. Mr. Bishop's motion for a new trial and direct appeal of his conviction and sentence were unsuccessful. He then sought state habeas relief. The state court conducted an evidentiary hearing and denied Mr. Bishop's petition in full, and the Georgia Supreme Court denied his application for a certificate of appealability. Mr. Bishop next filed a habeas petition in federal district court, which also denied all of his claims for relief. The district court granted a certificate of appealability on three ineffective assistance of counsel claims, and the Eleventh Circuit expanded the certificate to include Mr. Bishop's *Brady* claim. Mr. Bishop presented these issues as follows.

Ineffective assistance of counsel claims. 1) Mr. Bishop argued that his trial counsel should have introduced the testimony of the lead law enforcement officers who investigated his case, both of whom told Mr. Bishop's counsel "off the record" that they thought Mr. Bishop was remorseful and truthful with them, and one of the two officers did not believe that Mr. Bishop should receive the death penalty. 2) Mr. Bishop maintained that his trial counsel should have presented more evidence of his co-defendant's bad character, criminal history, and past incidents of violence, particularly his history as a drug dealer and his violent behavior towards multiple girlfriends. 3) Finally, Mr. Bishop argued that his trial counsel should have requested funds for a forensic blood spatter expert, who he claimed could have testified as to his co-defendant's involvement in the murder.

Brady claim. At several points in Mr. Bishop's trial, the prosecutor stated that his co-defendant would "have his day in court" before his own jury. Mr. Bishop argued that this statement was false and misleading because the co-defendant had already been offered a plea to a life sentence, and the Government failed to disclose this agreement to Mr. Bishop's trial counsel.

Analysis. The Eleventh Circuit (Judge Marcus, for Judges Barkett and Martin) affirmed the district court in full. Noting at the outset that, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, to prevail Mr. Bishop had to demonstrate that the state habeas court's *Strickland* determination was "unreasonable." Slip op. at 15, *citing* 28 U.S.C. § 2254(d)(1). The Court found that even assuming Mr. Bishop could establish the deficient performance prong of the *Strickland*, he could not demonstrate that the state court's determination of prejudice was unreasonable. The law enforcement officers would have been unwilling defense witnesses at best and there was no guarantee their testimony would not have done more harm than good. Moreover, even if the officers had testified as Mr. Bishop hoped, their testimony would not have undermined Mr. Bishop's culpability for the murder. The Court also rejected Mr. Bishop's second alleged instance of ineffective assistance, finding that additional information on the co-defendant's criminal history and violent behavior would have been cumulative and, in any case, would not have been exculpatory to Mr. Bishop. Similarly, the Eleventh Circuit denied relief on the third ineffective-assistance claim,

finding that the asserted, additional evidence of the co-defendant's culpability—which was not in dispute—did not prejudice Mr. Bishop.

Finally, the Eleventh Circuit held that Mr. Bishop's *Brady* claim was procedurally barred because he did not raise it at trial or on direct appeal. Mr. Bishop acknowledged the procedural bar but argued that the "cause and prejudice" exception applied. "Cause" in the procedural default context exists if the petitioner "can show that some objective factor [such as the prosecutor's suppression of evidence] external to the defense impeded counsel's efforts to comply with the State's procedural rule." Slip op. at 27, *quoting Murray v. Carrier*, 477 U.S. 478, 488 (1986). Mr. Bishop could not establish "cause" because he could not prove that the prosecutor violated *Brady*. The co-defendant did not formally enter into the plea agreement until well after Mr. Bishop's trial, and there was no evidence that the deal was consummated earlier.

United States v. Curbelo, No. 10-14665 (Aug. 9, 2013)

Issues.

1. Did the placement of an unauthorized GPS tracking device on the defendant's car violate the Fourth Amendment?

2. Did the defendant's counsel render ineffective assistance by failing to move to suppress evidence gleaned from the GPS tracking device?

3. Was there sufficient evidence to support a sentencing enhancement for conspiracy to possess more than 1,000 marijuana plants?

4. Did the district court violate the Sixth Amendment Confrontation Clause by admitting translated cell phone call transcripts without the translator available?

5. Does Fed. R. Crim. P. 32.2(b)(5) permit money forfeiture allegations to be submitted to the jury?

Held.

1. No.

2. No.

3. Yes.

4. No.

5. No.

Background and Procedural History. Soon after going to work for Jose Diaz, Mr. Curbelo became involved with Mr. Diaz's longstanding indoor marijuana growing operation. Mr. Curbelo and his cousin bought a house under Mr. Curbelo's name and began the growing process; however, eventually Mr. Diaz became dissatisfied with Mr. Curbelo's product yield and put him in charge of another house.

Mr. Diaz's operation was ultimately investigated by the DEA, and agents put GPS tracking devices on vehicles used by Mr. Diaz and another person of interest, without a warrant. The DEA also conducted GPS tracking of cell phones used by unspecified members of the organization and intercepted Mr. Diaz's cell phone calls with authorization. During the trial, the Government played recordings of the wiretaps of Mr. Diaz's cell phone, but as most of the conversations were in Spanish, the Government provided the jury an English translation of the transcript but did not identify who prepared the transcript. Rather, the Government tried to establish the accuracy of the transcripts through the testimony of the bilingual Mr. Diaz. Mr. Curbelo's counsel objected to the translation as hearsay and a violation of the Confrontation Clause because the original translator was not available for cross-examination. The district court overruled both the objections and allowed the jury to view the translated transcripts.

Mr. Diaz testified against Mr. Curbelo at trial, claiming that Mr. Curbelo had participated in a total of six marijuana harvests and each harvest yielded 190 plants, with the exception of the final harvest, which yielded between 240-250 plants. Mr. Diaz also testified that Mr. Curbelo helped process some plants at a different grow house and provided seedlings for that same house.

A jury convicted Mr. Curbelo of conspiracy to manufacture and possess marijuana with the intent to distribute as well as the substantive crime of manufacturing and possessing marijuana with the intent to distribute. The court sentenced Mr. Curbelo to concurrent 120-month sentences on each count and imposed a joint and several forfeiture judgment against Mr. Curbelo and his co-defendants for $850,000. Mr. Curbelo appealed.

Analysis. The Eleventh Circuit (Tenth Circuit Judge Baldock, for Judges Dubina and Jordan) affirmed for the following reasons.

<u>GPS tracking device</u>. The Supreme Court held in *United States v. Jones*, 132 S. Ct. 945, 948 (2012), that "the attachment of a [GPS] tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movement on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment." But *Jones* was decided more than a year after Mr. Curbelo's trial, and he did not file a motion to suppress the GPS-tracking evidence. The Eleventh Circuit reiterated that under Rule 12(e) "[a] defendant who fails to make a timely suppression motion cannot raise that claim for the first time on appeal." *United States v. Lall,* 607 F.3d 1277, 1288 (11th Cir. 2010). Mr. Curbelo argued that he should still be able to argue the issue under the holding in *Griffith v. Kentucky*, 479 U.S. 314 (1987), which states that any new rule for criminal prosecutions should be retroactively applied; however, the Court noted that *Griffith* applies only to "defendants who preserved their objections throughout the trial and appeals process." *See United States v. Verbitskaya*, 406 F.3d 1324, 1340 n.18 (11th Cir. 2005).

<u>Ineffective assistance of counsel</u>. The Eleventh Circuit did not reach this issue, finding that the record was insufficiently developed. For example, the record did not show that the DEA ever

tracked Mr. Curbelo's personal telephone or vehicle, casting doubt on whether Mr. Curbelo's former counsel had any basis for filing a motion to suppress.

Sentencing enhancement. During the trial, the jury had to find and establish *each and every element* of Mr. Curbelo's crime *beyond a reasonable doubt* in order to impose the sentence enhancement for the number of marijuana plants. If, however, the jury could only come to a conclusion by a preponderance of the evidence, then the court could sentence Mr. Curbelo to 20 years or less. In this instance, the Court now had to review the *jury's* fact-finding rather than the district court's and then determine whether viewing the evidence in the light most favorable to the non-moving party, "a reasonable trier of fact could find that the evidence established guilt *beyond a reasonable doubt*." *United States v. Williams*, 527 F. 3d 1235, 1244 (11th Cir. 2008) (emphasis added). Because there were actual numbers given for each of the harvests (through Mr. Diaz's testimony) and the Court believed the other elements of the crimes were easily proven, the Court determined that a jury could have come to the conclusion of guilty beyond a reasonable doubt. Moreover, even though the jury verdict form was somewhat irregular, the fact that it resulted in holding Mr. Curbelo to a higher burden of proof resulted in no unfair burden or error.

Confrontation Clause. The Eleventh Circuit explained that the transcript in question is not subject to the Confrontation Clause because it is not "testimonial hearsay." Furthermore, because the translator did not certify the accuracy of the transcripts in any way, there is no hearsay on the party of the translator other than the literal translations the translator made. The Court wrote that the "Confrontation Clause only applies to testimonial statements that are used to establish 'the truth of the matter asserted." *Crawford v. Washington,* 541 U.S. 36, 59 n.9 (2004). Here, the transcripts did not contain any express "assertion" by the translator. The translator's only assertion is his or her *implicit* statement that the translation was accurate. "That is, when the translator created the transcripts, he or she represented that each English word, phrase, or concept corresponded to the original Spanish word, phrase or concept." Slip op. at 22. The Court reasoned that this was consistent with Confrontation Clause assertions, and the translation was made in contemplation of trial and the government conceded at oral argument the transcript was testimonial. The Court clarified that transcripts can only be testimonial "to the extent they reflect the translator's statement (implicit here) that the English translation accurately reflects the Spanish conversation." Slip op. at 25. The Court distinguished earlier precedent, noting that in the instant case the transcript was authenticated by a co-conspirator rather than by a judge's statement, observing that "the Government did not introduce the transcript on the weight of the translator's certification, but on Diaz's testimony." Slip op. at 26.

Forfeiture and Rule 32.2(b)(5). The Eleventh Circuit held that the fact that money is left out of the text of Fed. R. Crim. P. 32.2(b)(5) is not an accident and cannot be read into the rule. Rather, it is a negative implication put there deliberately to explain that juries are not allowed to determine money judgments in these cases. The Court "remain[s] persuaded that the court, not a jury, should determine the amount of a money judgment forfeiture." Slip op. at 35.

Spencer v. United States, No. 10-10676 (Aug. 15, 2013)

Issue. Can a petitioner who unsuccessfully challenged the career offender enhancement at both sentencing and on direct appeal use a timely-filed first motion under 28 U.S.C. § 2255 to pursue the same issue when an intervening case from the Supreme Court, with retroactive application, vindicates his argument?

Held. Yes.

Background and Procedural History. Twenty-one year-old Kevin Spencer was sentenced to 151 months in prison for distributing 5.5 grams of crack cocaine because he was determined to be a career offender. Mr. Spencer unsuccessfully argued that his prior Florida state conviction for third degree felony abuse of a minor did not satisfy the guideline's "crime of violence" definition because the crime only required intent to cause mental injury or reasonable likelihood of mental injury. Two weeks after Mr. Spencer's sentencing, the Supreme Court decided *Begay v. United States*, which narrowed the crime-of-violence definition to "crimes that are roughly similar, in kind as well as in degree of risk posed," to those specifically enumerated in the statute (burglary, arson, extortion, and use of explosives). Mr. Spencer moved to set aside or correct his sentence under 28 U.S.C. § 2255 based on *Begay* but the district court denied his motion.

Analysis. The Eleventh Circuit (District of Maine Judge Hornby, for Judges Jordan and Kravitch) granted a certificate of appealability, vacated the district court's denial of the § 2255 motion, and remanded for re-sentencing. Mr. Spencer argued that his prior conviction for third-degree felony child abuse did not satisfy the first prong of the guideline's "crime of violence" definition, which requires physical force as an element of the crime. Moreover, the crime is also similar to any of the enumerated offenses.

Mr. Spencer argued that his habeas petition was timely because § 2255(f)(3) provides a one-year limitation period for filing a motion which runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." After surveying Supreme Court and sister circuit precedent, the Eleventh Circuit agreed, holding that a § 2255 petition is timely filed where 1) a new Supreme Court decision has been given retroactive effect, 2) the petitioner has preserved the issue of career offender categorization at both original sentencing and appeal, and 3) the petitioner files the petition within one year of the new Supreme Court decision.

As to whether or not Mr. Spencer's Florida offense constituted an actual "crime of violence" within the meaning of the guideline, the Eleventh Circuit held that it did not because it was not the same kind of aggressive conduct that is similar in kind to burglary, arson, extortion, and the use of explosives as required by *Begay*. The Court noted that in some instances this sort of crime would qualify for the sentence enhancement, but the Florida law was a strict liability crime. As such, the crime cannot be said to involve any purposeful, violent, or aggressive conduct and a general guilty plea does not differentiate between pleading guilty to *mental* harm and *physical* harm.

United States v. Madden, No. 11-14302 (Aug. 16, 2013)

Issues.

1. What standard of review is appropriate for an unobjected-to constructive amendment of a defendant's indictment?

2. Did the district court err in constructively amending the indictment?

Holding.

1. Plain-error review.

2. Yes.

Background and Procedural History. Mr. Madden was arrested in December of 2010 for robbing a stash house. He was indicted for, *inter alia*, using and carrying a firearm during a crime of violence, and for possessing a firearm in furtherance of a drug trafficking crime. The district court initially instructed the jury that, to convict on this count, it must find "that the defendant knowingly used and carried a firearm during and in relation to a crime of violence ... and did knowingly possess a firearm in the furtherance of a drug trafficking offense." Slip op. at 2. However, a few moments later the court charged the jury on Count 2 by saying "The superseding indictment alleges that the defendant knowingly carried a firearm during and in relation to a drug trafficking offense or possessed a firearm in furtherance of a drug trafficking offense[.]" Slip op. at 3. After the district court instructed the jury, the court asked Mr. Madden's attorney if she had any objections to the jury instructions, and the attorney did not object.

Mr. Madden appealed, arguing that the district court's jury instruction violated the Fifth Amendment by constructively amending the indictment.

Analysis. The Eleventh Circuit (Judge Cox, for Judges Dubina and Jordan) held that plain-error review applied the district court's unobjected-to constructive amendment of Mr. Madden's indictment. The Court reversed Mr. Madden's conviction and remanded because it held that he successfully established plain error. Adding the phrase "during and in relation to" broadened the possible bases for conviction beyond those set forth in the indictment, which was in error, and the error affected Mr. Madden's substantial rights.

The Eleventh Circuit noted that, although *United States v. Carroll*, 582 F. 2d 942 (5th Cir. 1978), held that constructive amendment of an indictment was *per se* reversible error, the Supreme Court subsequently limited that holding in *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770 (1993), which provides that an appellate court's authority to correct a forfeited error is "always discretionary." Slip op. at 11. Accordingly, plain-error review applies even to the constructive amendment of a defendant's indictment.

The Court then applied the plain-error standard to Mr. Madden's claim. The plain-error test has four prongs: there must be (1) an error (2) that is plain and (3) that has affected the defendant's substantial rights; and if the first three prongs are met, then a court may exercise its discretion to

correct the error if (4) the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732, 113 S. Ct. at 1777. It held that the first two prongs were easily satisfied. Addressing the third issue of whether the plain error has affected the defendant's substantial right, the Court explained that the error must be prejudicial, or an error that "affected the outcome of the district court proceedings." *Olano,* at 507 U.S. at 734, 113 S. Ct. at 1778. Here, the error prejudiced Mr. Madden and there is ample room to conclude that Mr. Madden may have been convicted on a charge not originally in the indictment. "In the end, because we cannot say 'with certainty' that with the constructive amendment, Madden was convicted solely on the charge made in the indictment . . . we hold that the amendment prejudiced him." Slip op. at 17 (citations omitted). As to the fourth prong, the Eleventh Circuit deemed it "self-evident" that the district court's error "seriously affects the fairness, integrity, and public reputation of judicial proceedings." *Id*.

United States v. Yates, No. 11-16093 (Aug. 16, 2013)

Issues.

1. Is a fish a "tangible object" within the meaning of 18 U.S.C. § 1519?

2. Is a party's right to present a defense prejudiced by a court disallowing the party to call an expert witness where the party failed to give notice pursuant to Fed. R. Crim. P. 16?

Held.

1. Yes.

2. No.

Background and procedural history. Mr. Yates and his crew were aboard the *Miss Katie* fishing in federal waters in the Gulf of Mexico. Officer John Jones, a field officer with the Florida Fish and Wildlife Conservation Commission, encountered the *Miss Katie* and noticed the boat was actively engaged in commercial fish harvesting. Officer Jones boarded the boat to inspect it for gear, fishery, and boating-safety compliance. Officer Jones noticed several red grouper that appeared to be less than the minimum size limit for red grouper at the time (20 inches). He began to measure all the fish with their mouths closed and their tails pinched and sorted the fish into two piles. He placed the fish that were too small into a wooden box, and instructed Mr. Yates and his crew to leave the fish alone until *Miss Katie* returned to port and the Fisheries Service would seize the fish. Once Officer Jones left the boat, Mr. Yates instructed his crew to throw the undersized fish overboard and put the other fish in the box.

At trial, Mr. Yates disputed whether the undersized fish were actually undersized because Officer Jones had only measured the fish with their mouth closed. The day before the trial, the court held a *Daubert* hearing to determine the qualifications of the two fish-measuring experts, Dr. Richard Cody for the government, and William Ward for Mr. Yates. The district court took Dr. Cody's testimony under advisement but did not decide whether he could testify as an expert on

measuring grouper and ruled that Mr. Ward could offer testimony about a grouper's measurement with an open mouth as opposed to a closed mouth and about fish shrinkage when placed on ice.

During trial, the Government did not call Dr. Cody, and, after the Government rested, counsel for Mr. Yates announced for the first time he was planning to call Dr. Cody as his first witness. The Government objected, and the court sustained the objection, ruling that Mr. Yates was precluded from calling Dr. Cody in his case-in-chief because he had not put the Government on notice pursuant to Fed. R. Crim. P. 16.

At the close of the trial, Mr. Yates was found guilty of all counts: (1) knowingly disposing of undersized fish in order to prevent the government from taking lawful custody and control of them in violation of 18 U.S.C. 2232(a) and (2) destroying or concealing a "tangible object with the intent to impede, obstruct, or influence the government's investigation into harvesting undersized grouper in violation of 18 U.S.C. 1519." He was sentenced to 30 days in prison followed by 36 months of supervised release.

Analysis. The Eleventh Circuit (Judge Dubina, Judge Jordan, and Tenth Circuit Judge Baldock) quickly dispelled the question of whether a fish is a tangible object by briefly citing case law and referencing the dictionary. The Court found the text of the statute plain, and interpreted the term "tangible object" to carry its ordinary and natural meaning.

As to whether disallowing Dr. Cody from testifying in Mr. Yates's case-in-chief was too harsh of a sanction and an infringement on Mr. Yates' constitutional right to present a defense, the Eleventh Circuit held that it need not reach this question because Mr. Yates failed to show the preclusion prejudiced his right to present a defense. Although Mr. Yates argued that he hoped Dr. Cody's testimony would corroborate Mr. Ward's, the record indicated that Dr. Cody's testimony would have been *less* favorable to Mr. Yates than that of Mr. Ward. Precluding Dr. Cody's testimony, therefore did not amount to prejudice of a substantial right.

United States v. McQueen, No. 12-10840 (Aug. 22, 2013)

Issues.

1. Was there sufficient evidence to support the defendants' convictions for obstruction of justice?

2. Did the district court deliver erroneous jury instructions?

3. Did the Government improperly bolster a witness's testimony?

4. Was there sufficient evidence to support one defendant's conspiracy conviction?

5. Was the district court's downward variance of more than 90% of the low end of the defendants' guideline ranges substantively unreasonable?

Held.

1. Yes.

2. No.

3. No.

4. Yes.

5. Yes.

Background and procedural history. The defendants were correctional officers at a Florida prison. They assaulted and abused inmates, both directly (with broomsticks and other blunt instruments) and by forcing them to fight one another for sport. Much of the abuse was inflicted on the prison's "youthful offender" inmates who were 21 years of age and younger. Two of the four defendants were found guilty, a third was acquitted, and the fourth was not convicted due to a hung jury. That defendant subsequently pleaded guilty to a misdemeanor charge that carried a one-year statutory maximum term of imprisonment. In light of this, the district court expressed discomfort with sentencing the other two defendants to the much longer sentences yielded by their respective guideline calculations. The court therefore varied downward more than 90% from the low end of each defendant's guideline range and sentenced one defendant to one year in prison (because he was the superior officer at the time of the inmate abuse) and the other to one month in prison. The defendant who pleaded guilty following a mistrial was also sentenced to one year in prison. The two defendants who received downward variances appealed, alleging what the Eleventh Circuit characterized as a "batter of claimed errors," and the Government cross-appealed the downward variances, claiming that they were substantively unreasonable.

Analysis. The Eleventh Circuit (Judge Marcus, for Judge Barkett and Middle District of Florida Judge Conway) affirmed in part and reversed in part, rejecting all of the defendants' arguments but agreeing with the Government that the sentences were substantively unreasonable. The Court reasoned as follows:

Obstruction of justice. The Court rejected the defendants' argument that the obstruction of justice statute, 18 U.S.C. § 1519, required the Government to prove that the defendants acted with the intent to obstruct a federal investigation, and that since the Government did not prove their knowledge of a federal investigation, the Government failed to carry its burden of proof. Instead, the Court interpreted the statute's reference to "the investigation...of any matter...within the jurisdiction of any department or agency of the United States" to be a jurisdictional element, for which no mens rea was required. The Court noted that every other court of appeals to address this issue has reached the same conclusion, which is supported by the statute's legislative history as well.

Conspiracy. The Court summarily ruled that sufficient evidence existed to support one of the defendant's conviction for conspiracy.

Jury instructions. The Court summarily rejected this argument.

Improper bolstering of a witness's credibility. The Court ruled that any error was harmless.

Substantive unreasonableness. The Eleventh Circuit found that the district court focused exclusively on one statutory sentencing factor—the need to avoid disparities in sentencing—to the exclusion of others and therefore imposed a substantively unreasonable sentence.

United States v. Bush, No. 12-12624 (Aug. 27, 2013)

Issues.

1. Did the district court err in denying the defendant's motion to suppress?

2. Did the district court err in *sua sponte* delivering an *Allen* charge to the jury after just four hours of deliberations and no express notification of deadlock?

Held.

1. No.

2. No.

Background and procedural history. Mr. Bush was convicted of multiple counts stemming from his involvement in a drug-trafficking scheme. The evidence against Mr. Bush was obtained through a search of his home, effectuated by a warrant based on information provided by law enforcement's warrantless installation of a GPS tracking device on his rental cars; a canine's "free air" sniff of the front door of Mr. Bush's home; surveillance of known drug offenders enter and exit Mr. Bush's home; a search of Mr. Bush's trash that revealed evidence of drug trafficking; and Mr. Bush's previous drug convictions. The district court denied Mr. Bush's motion to suppress, which argued that absent the warrantless GPS tracking information the law enforcement officers would have lacked probable cause to obtain the search warrant. The court determined that the good faith exception applied because at that time Eleventh Circuit precedent did not foreclose placement of the GPS tracker on a suspect's vehicle and, in the alternative, ruled that even if the challenged evidence was suppressed, the evidence obtained from the trash pull was sufficient probable cause for the search of Mr. Bush's home.

At the outset of Mr. Bush's trial, the court told the jury that they would go until 5:00 p.m. every day of what it expected to be a two-day trial. The jury retired to deliberate shortly after 2:00 p.m. on the second day of trial and, less than 90 minutes later, sent a note expressing confusion about one count in the indictment. The court answered the question, and the jury came back with another, similar question less than one hour later. An individual juror was allowed to ask the judge another related question about ten minutes later. Within the hour, one of the jurors took a break to place a call related to her "child or something." Mr. Bush's attorney asked the court if it would provide the jurors dinner. The court replied that the jury had not asked for it, but had asked if they could leave and return in the morning. Mr. Bush's attorney stated that she was available to return the following day, and the court demurred. Following a short break of less than 30 minutes, the court announced its intention to *sua sponte* deliver an *Allen* charge. The Government agreed, and Mr. Bush's attorney

objected. The court delivered the *Allen* charge and the jury returned a verdict of guilty on all counts 47 minutes later, at 7:08 p.m.

Analysis. The Eleventh Circuit (per curiam, before Chief Judge Carnes and Judges Hull and Fay) held that the district court properly denied Mr. Bush's motion to suppress because, under the independent-source doctrine, there was sufficient probable cause notwithstanding the GPS tracking information and the canine air sniff.

The Court also rejected Mr. Bush's challenge to the *Allen* charge. Mr. Bush argued that the *Allen* charge was erroneous because 1) it was premature, coming only four hours after deliberations commenced and without official word from the jury that it was deadlocked, and 2) the charge was inherently coercive under the totality of the circumstances. The Court rejected the first argument, citing voluminous precedent affirming *Allen* charges delivered after four or fewer hours of deliberations, and determining that, even though the jury did not expressly state that it was deadlocked, its numerous questions about one count in a short time span did indicate that, at a minimum, it was "having difficulty reaching a verdict." Slip op. at 24. As to whether the *Allen* charge was inherently coercive, the Eleventh Circuit "recognize[d], in hindsight, [that] it might have been better for the district court to let the jury go home and return the next day." *Id*. at 25. Even so, the Court determined that the totality of circumstances did not support Mr. Bush's argument that the *Allen* charge was inherently coercive, noting that the jurors did not request dinner, that there is no indication that the juror's child-care issue was unresolved, and that the district court did let the jury take a break. The Court also surveyed precedent affirming *Allen* charges in even more extreme circumstances.

United States v. Mondestin, No. 12-11119 (Aug. 28, 2013)

Issue. Did the district court abuse its discretion when it responded to the jury's question with language describing a *Pinkerton* theory of liability when the court previously declined to give a *Pinkerton* instruction in its initial charge to the jury?

Held. Yes.

Background and procedural history. The defendants appealed their convictions for conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951; Hobbs Act robbery; using, carrying, brandishing, or discharging a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A); and making false statements of material fact to investigators in violation of 18 U.S.C. § 1001(a)(2).

Analysis: On appeal, the Government argued that there was no prejudice because the defendants would have argued their case the same way even if they had known the district court intended to give a *Pinkerton* instruction. The Eleventh Circuit (per curiam, before Judges Tjoflat and Wilson, and Northern District of Alabama Judge Coogler) rejected the governments' argument and held that since the defendants were not given an opportunity to argue their case with knowledge of which theory the district court would include in its instruction to the jury that their Count Three convictions must be reversed. The Court distinguished the present case from *United States v. Lopez*, 590 F.3d 1238, 1247

(11th Cir. 2009), where the instruction did not present such a "substantial" change, clarifying the meaning of a term the court had previously left undefined. 590 F. 3d at 1252-53. In the present case, the district court's response provided an entirely new theory under which the jury could find the defendants guilty of the offense charged. The Court also cited the potential for confusing the jury as justification for overturing the defendants' Count Three convictions.

McNabb v. Comm'r, Ala. Dep't. of Corr., No. 12-13535 (Aug. 28, 2013)

Issues.

1. Whether the district court abused its discretion in dismissing Mr. McNabb's habeas petition before the parties had filed additional briefs addressing the merits of his claims?

2. Whether the district court erred in denying relief on Mr. McNabb's claims alleging that his counsel were ineffective for failing to investigate adequately and present mitigation evidence regarding his background?

3. Whether the district court erred in dismissing Mr. McNabb's challenge to Alabama's lethal injection protocol as unconstitutional because it determined that Mr. McNabb's manner of execution claim would be more properly raised in a 42 U.S.C. § 1983 action?

4. Whether the district court erred in conducting a deferential review of Mr. McNabb's ineffective assistance of counsel claims?

Held.

1. No.

2. No.

3. No.

4. No.

Background and procedural history: Mr. McNabb was convicted of murdering a police officer and attempted murder of a second police officer, in violation of Alabama Code § 13A-5-40(a)(5), (17). The jury recommended by a vote of ten to two that he be sentenced to death. The trial court followed the jury's instruction and sentenced Mr. McNabb to death. On direct appeal, the Alabama Court of Criminal Appeals affirmed Mr. McNabb's convictions but remanded the case to the trial court with instructions that the trial court make corrections to its sentencing order. On return from remand, the Alabama appellate court affirmed Mr. McNabb's conviction and sentence.

While Mr. McNabb's case was pending in the Alabama appellate court on his application for rehearing, the United States Supreme Court issued its decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002). The Alabama appellate court denied Mr. McNabb's application for rehearing, finding that his death sentence did not violate *Ring*. The Alabama Supreme Court affirmed, and the

United States Supreme Court denied his petition for *certiorari*. Mr. McNabb next filed a Ala. R. Crim. P. 32 petition for post-conviction relief, which the state court summarily dismissed his petition. The Alabama Court of Criminal Appeals affirmed, and the Alabama Supreme Court denied the petition for *certiorari*. Mr. McNabb thereafter filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, which the district court denied. But the district court granted Mr. McNabb's request for a COA on the issues in his Rule 59(e) motion.

Analysis: The Eleventh Circuit (Judge Dubina, for Judges Tjoflat and Jordan) rejected all of Mr. McNabb's arguments as follows.

1. Dismissal of habeas petition - The Court ruled that the failure of the district court to give notice to the parties that it would decide the merits of the claims without briefing does not rise to the level of a due process violation. The Court cited rules 4-8 of the Rules Governing § 2254 Cases to point out that there is no provision in the habeas rules that contemplates a district court should grant the parties leave to file briefs addressing the merits of the claims that are contained in the habeas petition. *See e.g., Maynard v. Dixon*, 943 F. 2d 407, 411-12 (4th Cir. 1991).

2. Ineffective assistance of penalty phase counsel - The Court ruled that there was no reasonable probability that the presentation of further, mainly cumulative, evidence regarding Mr. McNabb's horrific home life would have changed the outcome of his sentence. Further, even if Mr. McNabb has articulated such a factual basis, the prejudice prong of *Strickland* was not met because the aggravating circumstances still outweighed the mitigating circumstances.

3. Lethal injection - The Court ruled the district court did not err in dismissing Mr. McNabb's lethal injection challenge in his federal habeas petition because "a § 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection procedures." *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009).

4. The district court's application of AEDPA standard of review - Mr. McNabb argued the district court should not have applied AEDPA's deferential standard of review in disposing of three of his claims: counsel's failure to secure the services of a mitigation expert, counsel's presentation of an ineffective closing argument in the penalty phase, and counsel's failure to procure an appropriate expert witness. The Court found that Mr. McNabb had thoroughly testified and that any further testimony by a mitigation expert would have been cumulative. The Court also found that trial counsel provided an effective closing argument highlighting many of Mr. McNabb's circumstances in an attempt to save his life. Finally, the Court found that Mr. McNabb failed to plead any specific facts to support his claim of ineffective counsel for failing to procure an appropriate expert witness and that the testimony would have been cumulative.

United States v. Edwards, No. 11-15953 (Sept. 6, 2013)

Issues.

1. Did the district court err by declining to consider the defendant's financial situation to determine the amount of restitution where he made numerous false misrepresentations in order to solicit funds by promising astronomical returns to his victims if they would enter a "high yield investment"?

2. Did the district court err by granting restitution to victims when the counts related to their injuries were dismissed at trial?

3. Did the district court err by ordering restitution to be paid to a victim for losses caused by an unrelated real estate investment scheme?

4. Did the district court lack sufficient evidence to order restitution to a subset of victims when the Government failed to comport with the 18 U.S.C. § 3664 procedures to substantiate restitution?

Held.

1. No.

2. No.

3. No.

4. Yes.

Background and procedural history. Mr. Edwards and Frontier Holdings Inc. were convicted of wire fraud, mail fraud, and money laundering, all offenses arising out of a high yield investment scheme. Mr. Edwards solicited funds from investors by promising astronomical returns and then used the funds for extravagant personal expenditures. At sentencing, the district court ordered Mr. Edwards to pay his victims $6,820,620.05 in restitution as proposed in the PSR pursuant to the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A. Mr. Edwards had objected to the PSR and moved the court to bar consideration of the alleged victims who did not testify at trial, in addition to all victims whose related counts were dismissed at trial. He further objected to the PSR's proposed transfer of a restitution award from a particular victim to a group of individuals who were victimized by that victim, a change urged by the PSR writer after coming to the conclusion the night before Mr. Edwards's sentencing that this named victim was actually a co-conspirator. Mr. Edwards also challenged a restitution award to an individual whose losses stemmed from what Mr. Edwards maintained was an unrelated real estate scheme.

The district court also denied Mr. Edwards's request that it take into account his financial situation when calculating restitution.

Analysis. The Eleventh Circuit (Judge Pryor, for Judge Cox and Western District of Louisiana Judge Walter) affirmed in part and vacated and remanded in part. The Eleventh Circuit noted at the outset that the district court has authority to order restitution only as authorized by statute, and the MVRA requires the district court to grant restitution to all victims once a defendant is convicted of "any offense… in which an identifiable victim or victims has suffered a… pecuniary loss." 18 U.S.C. § 3663A(c)(1)(B). The Court analyzed the four questions presented as follows.

Consideration of the defendant's financial situation. The MVRA establishes a two-step process for determining the amount and schedule of restitution payments. First, a district court determines "the full amount of each victim's losses… *without consideration* of the economic circumstances of the defendant." 18 U.S.C. § 3663A(f)(1)(A) (emphasis added). Second, after the district court establishes the total amount of restitution owed, the district court considers the defendant's financial resources to create a schedule for restitution payments. *See* 18 U.S.C. § 3663A(f)(2). At this second stage, the court should consider the defendant's finances, but even in so considering, *United States v. Jones*, 289 F.3d 1260, 1266 (11th Cir. 2002), provides that the defendant bears the burden of demonstrating his financial condition, and the court can rely on the PSR and need not make independent findings. Accordingly, the district court did not err in refusing to consider the financial situation of the defendant.

Restitution awards to victims where the pertinent counts were dismissed at trial. The Court, citing *United States v. Dickerson*, 370 F.3d 1339 (11th Cir. 2004), held that the lack of a conviction does not automatically preclude the district court from finding an injury sufficient to order restitution so long as the injury is related to an offense of which the defendant was convicted.

Restitution awards to victims of an unrelated real estate scheme. The Court held that the real estate transaction was sufficiently related to an offense resulting in convictions, citing its earlier holding in *Dickerson* that "when the crime of conviction includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense, the court may order restitution for acts of related conduct for which the defendant was not convicted." 370 F.3d at 1339. Like the offenses for which Mr. Edwards was convicted, he presented a false investment opportunity to these victims by misrepresenting that the money would be invested and by promising profitable returns, yet kept the funds for personal expenditures. Additionally, the course of misappropriation was nearly identical to the offenses resulting in Mr. Edwards's convictions, and he also transferred the money into his personal account-the same account that held the proceeds of his other fraudulent schemes.

Restitution awards to subset of victims. Mr. Edwards argued that the district court erred in ordering this restitution because the Government failed to provide any evidence that he harmed these individuals. After determining that a named victim was Mr. Edwards's co-conspirator, the writer of Mr. Edwards's PSR proposed a change in restitution from the named victim to the named victim's own alleged victims. After reviewing the procedures set forth in 18 U.S.C. § 3664, the Court held that these procedures were not followed in this case as to the subset of victims. The Court rejected the Government's argument that Mr. Edwards failed to preserve his defense against the transfer of restitution to the subset of victims by not objecting to the original proposed restitution to the named victim/apparent co-conspirator. Consequently, the Eleventh Circuit held that Mr. Edwards preserved this argument for appeal by objecting as soon as the restitution order was received. The Court vacated and remanded for a hearing to determine if the alleged victims were entitled to restitution.

United States v. Diveroli, No. 13-10248 (Sept. 10, 2013)

Issue. Does a district court have jurisdiction to rule on a Fed. R. Crim. P. 12(b)(3)(B) motion to dismiss the charging document while the defendant's direct appeal is pending?

Held. No.

Background and procedural history. Mr. Diveroli appealed his conviction and sentence for possessing a firearm as a convicted felon. During the briefing stage in the Eleventh Circuit, Mr. Diveroli moved in the district court to dismiss the Information pursuant to Rule 12(b)(3)(B). The district court ultimately denied the motion on the merits, and Mr. Diveroli appealed that decision to the Eleventh Circuit.

Analysis. The Eleventh Circuit (Judge Martin, for Chief Judge Carnes and Judge Barkett) held that the district court lacked jurisdiction to rule on the motion to dismiss and vacated and remanded with instructions to dismiss the motion for lack of jurisdiction. Mr. Diveroli argued that the Rule 12(b)(3)(B) exception clause abrogated the general rule that once a case is on appeal, the district court is divested of jurisdiction over it. Rule 12(b)(3)(B) provides that "at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense." The Court rejected this argument because when a case is on direct appeal, it is no longer "pending" in the district court within the meaning of Rule 12(b)(3)(B).

Muhammad v. Sec'y, Fla. Dep't. of Corr., No. 12-16243 (Sept. 23, 2013)

Issues.

1. Did the district court err in granting the petitioner's 28 U.S.C. § 2254 petition on the basis that his Confrontation Clause rights were violated at his Florida state court resentencing hearing?

2. Did the district court err in finding that the Florida state court did not violate Mr. Muhammad's rights under the ex post facto clause by applying a statutory aggravating factor that was enacted five years after Mr. Muhammad's crime?

Held.

1. Yes.

2. No.

Background and procedural history. Mr. Muhammad kidnaped and murdered two people in 1974. Mr. Muhammad's convictions and death sentences were affirmed on direct review, and his state collateral proceedings were unsuccessful. His federal habeas petition was denied, but the

Eleventh Circuit vacated his death sentence based on Eighth and Fourteenth Amendment defects in the original state sentencing.

At Mr. Muhammad's resentencing hearing, the state relied on a police officer, who was uninvolved in the original case, to testify as to the observations and findings of key witnesses. Mr. Muhammad objected to the numerous occurrences of hearsay in the police officer's testimony until ordered to stop by the state court judge. Mr. Muhammad was again sentenced to death, with the trial court finding numerous statutory aggravating factors applied, including that Mr. Muhammad "committed the murder in a cold, calculated, and premeditated manner"—a factor not enacted by the Florida Legislature until 1979, four years after Mr. Muhammad's crimes. Slip op. at 9, 11.

The Supreme Court of Florida rejected Mr. Muhammad's Confrontation Clause argument as to portions of the police officer's hearsay testimony. That court deemed the claim procedurally barred because Mr. Muhammad did not voice a contemporaneous objection, even though the testimony was elicited after the state trial judge's admonition to Mr. Muhammad to stop objecting on hearsay grounds. The Florida Supreme Court also rejected Mr. Muhammad's argument that application of the "cold, calculated, and premeditated" aggravating factor violated the federal Constitution's ex Post facto clause. After unsuccessfully seeking state collateral relief, Mr. Muhammad filed a habeas petition in federal district court, which denied relief on the ex post facto issue but granted it on the Confrontation Clause issue, holding that the Florida Supreme Court erred in finding that claim procedurally barred. The State appealed the latter ruling, and Mr. Muhammad cross-appealed the former.

Analysis. The Eleventh Circuit (Judge Pryor, for Judge Marcus) affirmed the district court's denial of habeas relief on the ex post facto issue but reversed its grant of relief on the Confrontation Clause issue.

Supreme Court and Eleventh Circuit precedent provide that hearsay is admissible at a capital sentencing proceeding, but the defendant must be given the opportunity to rebut such evidence. Since Mr. Muhammad had the opportunity to rebut the evidence, his Confrontation Clause rights were not violated. And because the Eleventh Circuit rejected this claim on the merits, it did not reach a related issue of whether the Florida Supreme Court was correct in determining that Mr. Muhammad was procedurally barred from raising this issue due to his failure to expressly object to the testimony in question at his resentencing hearing.

Because the Florida Supreme Court reached the merits of the ex post facto issue, the Eleventh Circuit could not reverse the denial of habeas relief unless it found that the Florida Supreme Court rendered a decision "contrary to" or an "unreasonable application of" a "clearly established federal law, as determined by the Supreme Court of the United States." Slip op. at 27. The Florida Supreme Court relied on its own binding precedent in denying relief on this issue, and Mr. Muhammad did not cite a conflicting United States Supreme Court decision. The Eleventh Circuit also opined that Mr. Muhammad was not disadvantaged by the application of the new aggravating factor on resentencing because the facts the Florida trial court relied on were the same facts underlying the application of other aggravating factors.

Judge Wilson concurred in the panel's ruling on the ex post facto issue, but dissented from its reasoning on the Confrontation Clause issue, both as to the procedural bar and as to the merits.

United States v. Castro, No. 12-12927 (Sept. 26, 2013)

Issue. In light of *United States v. Davila*, were the district court's comments to the defendant regarding the potential peneological consequences of not going forward with his stated intent to plea guilty a Fed. R. Crim. P. 11(c)(1) violation requiring automatic vacatur?

Held. No.

Background and procedural history. Mr. Castro was indicted on multiple counts pertaining to his possession and distribution of illegal narcotics. On the morning of his change-of-plea proceeding Mr. Castro stated his wish to instead proceed to trial. After the district court told Mr. Castro that, if he did not go forward with his guilty plea, the Government may bring further charges that would enhance his eventual sentence, Mr. Castro pleaded guilty. Mr. Castro appealed, arguing that the district court plainly erred by violating the ban in Fed. R. Crim. P. 11(c)(1) against a district court advising a defendant of the penal consequences of rejecting a plea agreement. The Eleventh Circuit granted relief, but *sua sponte* vacated that opinion and granted rehearing in the wake of *United States v. Davila*, 569 U.S. ___, 133 S. Ct. 2139 (2013), in which the Supreme Court abrogated the Eleventh Circuit's rule that judicial participation in plea discussion results in automatic vacatur.

Analysis. The Eleventh Circuit (per curiam, before Judges Pryor, Martin, and Fay), applied *Davila*'s command to consider "the full record" to determine "whether it was reasonably probable that, but for the [single comment of the district court]," Mr Castro would have proceeded to trial, held that the record did not so establish. Applying plain error review, the Court noted that, even after the district court's comments, Mr. Castro signed another copy of the plea agreement which stated he had not been pressured to plead guilty, reiterated this fact during the plea colloquy, and never repudiated his admissions of guilt as to the charged offenses. Further, Mr. Castro's attempt to withdraw his guilty plea did not include the district court's comments among the numerous grounds he articulated, and he did not establish any prejudice that he suffered from being held to his guilty pleas.

Judge Martin concurred in the panel majority's judgment only and wrote separately to express her view that the district court did commit plain error, even though the error probably did not affect Mr. Castro's substantial rights—a matter the judge deemed to be a close question. Judge Martin also disagreed with the majority's interpretation of *Davila*'s scope.

SELECTED UNPUBLISHED OPINIONS

United States v. Seecharan, No. 12-15231 (July 18, 2013)

Issue. Did the district court impose a procedurally unreasonable sentence by finding that the defendant's extensive medical conditions could be addressed by the BOP?

Held. Yes.

Background and Procedural History. Mr. Seecharan pleaded guilty to conspiracy to commit bank fraud. His presentence investigation report noted that Mr. Seecharan "was involved in a life altering car accident" that required multiple surgeries and left him with chronic deformities, mobility problems, and pain. Slip op. at. 2. Mr. Seecharan underwent an inter-body fusion of his lumbar spine shortly before sentencing, with further surgeries likely in the future.

At sentencing, Mr. Seecharan requested a sentence requiring home confinement rather than incarceration, arguing that incarceration would prohibit him from receiving medical care in the most effective manner. Mr. Seecharan submitted extensive evidence from doctors stating that incarceration in a public facility would likely result in significant deterioration of the healing of his spine and would increase his risk of infection. The evidence further stated that Mr. Seecharan might require significant assistance "just to get out of bed based on the status of his back and lower extremities," and that the incarceration of Mr. Seecharan "would be detrimental to his health and lead to possible loss of limb(s) and possibly his life." Slip op. at. 2-3.

In response, a BOP official conveyed through the probation officer that the BOP could "handle anything" regarding an inmate's medical needs. The district court agreed and found that Mr. Seecharan's medical condition "did not justify a sentence of home confinement" because he could receive "necessary and effective medical care in prison." Slip op. at. 3-4. Mr. Seecharan appealed his sentence of 60 months in prison.

Analysis. The Eleventh Circuit (per curiam, before Judges Tjoflat, Pryor, and Kravitch) held that Mr. Seecharan's sentence was procedurally unreasonable because it was based on a clearly erroneous factual finding. A factual finding is clearly erroneous where the record lacks substantial evidence to support it. *See United States v. Robinson*, 493 F.3d 1322, 1330 (11th Cir. 2007). The Eleventh Circuit determined that there was nothing in the record to support the BOP's assertion that it could "handle anything" with regard to inmates' medical needs. This fact, in light of the evidence submitted by Mr. Seecharan, rendered the district court's finding that Mr. Seecharan would receive effective medical care while incarcerated clearly erroneous. Mr. Seecharan's sentence was vacated and remanded for resentencing.

United States v. Cooper, No. 12-12033 (Sept. 4, 2013)
***On appeal from the Northern District of Alabama

Issues.

1. Did the district court plainly err by not allowing the defendant an opportunity for allocution at sentencing?

2. Did the district court improperly characterize the defendant's 2006 Washington State third-degree rape conviction as a "crime of violence" under USSG §4B1.2, leading to an incorrectly-calculated guideline sentencing range?

Held.

1. Yes.

2. No.

Background and procedural history. Mr. Cooper was sentenced to 60 months in prison after pleading guilty to being a felon in possession of a firearm. At his sentencing hearing, the district court did not give Mr. Cooper an opportunity for allocution, and Mr. Cooper's counsel did not object. The court also overruled Mr. Cooper's objection to his Presentence Investigation Report's characterization of his 2006 Washington State third-degree rape conviction as a "crime of violence" within the meaning of USSG §4B1.2.

Analysis. The Eleventh Circuit (per curiam, before Judges Dubina, Marcus, and Wilson), reviewing for plain error, vacated Mr. Cooper's sentence and remanded to the district court to provide him an opportunity for allocution. Fed. R. Crim. P. 32(i)(4)(A)(ii) requires the district court to address a defendant personally in order to allow defendant to speak or present mitigating information. The Government conceded the district court's plain error.

Under de novo review, the Eleventh Circuit affirmed the district court's determination that Mr. Cooper's Washington State third-degree rape conviction constituted a "crime of violence." The Washington statute defines third-degree rape as non-consensual sexual intercourse where the victim's lack of consent was clearly expressed by the victim's words or conduct. The Court held that the statute prohibits "conduct that presents a serious potential risk of physical injury to another" within the meaning of the USSG §4B1.2(a)(2) residual clause. To qualify as a "crime of violence" under the residual clause, the offense must both 1) ordinarily pose a serious potential risk of physical injury, and 2) that injury must be similar in kind and degree to the risk posed by the generic forms of burglary of a dwelling, arson, extortion, or the use of explosives. The Eleventh Circuit held that the Washington statute's lack of consent element poses a serious risk of physical injury because a victim's express lack of consent towards his or her perpetrator "creates an atmosphere that fosters the potential for physical confrontation." Slip op. at 6, *citing United States v. Riley*, 183 F.3d 1155, 1158-59 (9th Cir. 1999). The Court acknowledged its binding precedent that statutory rape is not a crime of violence due to its lack of purposeful, violent, or aggressive conduct, but found the Washington statute distinguishable since it requires a victim's express lack of consent, which may in turn escalate the encounter into a violent or aggressive act, and thereby implicating the risks similar in kind to the risk posed by the §4B1.2 enumerated offenses.

United States v. Valdes, No. 11-15517 (Sept. 4, 2013)

Issue. Did the district court commit reversible error by failing to comply with 21 U.S.C. § 851(b) by not asking the defendant at sentencing whether he admitted the existence of his prior convictions, which were in turn used to enhance his sentence for the instant drug offenses?

Held. No.

Background and procedural history. Mr. Valdes was convicted of various drug offenses, conspiracy to commit and attempt to commit a Hobbs Act Robbery, using a firearm during and in relation to a crime of violence and a drug trafficking crime, and being a felon in possession of a firearm.

At a pretrial hearing, the Government informed the district court that it intended to file a 21 U.S.C. § 851 notice of its intent to seek an enhanced sentence. The § 851 enhancement would result in a 20-year mandatory minimum sentence on Mr. Valdes's drug charges in addition to a mandatory and consecutive five-year sentence for the carrying of a firearm during and in relation to a crime. After the Government made a record as to its intent to file the § 851 notice, the district court colloquied Mr. Valdes, asking if he had heard and understood that the § 851 notice would be filed, and that if, the enhancement was applied, he would face a combined 25-year mandatory minimum sentence. The court did not ask Mr. Valdes if he admitted or denied the prior convictions. Nor did the court comply with § 851(b)'s command to conduct this colloquy "after conviction" but "before pronouncement of sentence." Slip op. at 19, *quoting* § 851 (b). The Government filed the § 851(b) notice, and the probation officer included the enhancement in Mr. Valdes's Presentence Investigation Report. Mr. Valdes did not object to the § 851 enhancement's inclusion in the PSR, but at sentencing attempted to lodge an untimely objection, which the district court overruled.

Analysis. The Eleventh Circuit (per curiam, before Judges Hull, Wilson, and Anderson) affirmed. Although the Court acknowledged the district court's noncompliance with § 851(b), it held that the district court "effectively" conducted the required colloquy before trial, and noted that Mr. Valdes never contested his prior convictions, rendering the district court's failure to strictly comply with § 851(b) harmless error. Slip op. at 19.

United States v. Cedillo, No. 13-10933 (September 5, 2013)

Issue. Did the Government breach its plea agreement by recommending a 30-year term of supervised release where the plea agreement erroneously listed the statutory maximum term of supervised release as three years, but also provided that the Government made no commitment as to what sentence it would ultimately recommend?

Held. No.

Background and procedural history. Pursuant to a written plea agreement, Mr. Cedillo pleaded guilty to failing to register under the Sex Offender Registration and Notification Act. Under the terms of the agreement, the Government reserved the right to make any recommendation as to the quality and quantity of punishment. However, the plea agreement erroneously listed the maximum term of supervised release as three years. The district court repeated this incorrect characterization of the law at Mr. Cedillo's change-of-plea hearing. At sentencing, the court accepted the Government's recommendation of a 30-year term of supervised release. Mr. Cedillo appealed, arguing that the Government's supervised release recommendation constituted a breach of the plea agreement.

Analysis. On review for plain error, the Eleventh Circuit (per curiam, before Judges Tjoflat, Pryor, and Fay) rejected Mr. Cedillo's argument that the Government implicitly contracted to seek a supervised release term of not more than three years. Although the plea agreement incorrectly listed the statutory maximum, the Eleventh Circuit held that this was a mistake of and not a promise by the Government. And because the plea agreement explicitly provided that the Government reserved

the right to make any recommendation as to the term of punishment that should be imposed, Mr. Cedillo could not have reasonably understood that the Government agreed to recommend not more than a three-year term of supervised release.

United States v. Griffin, No. 12-15847 (Sept. 6, 2013)

Issue. Is the district court required to consider the 18 U.S.C. § 3553(a) sentencing factors when imposing a mandatory revocation of supervised release under 18 U.S.C. § 3583(g)?

Held. No.

Background and procedural history. After violating the terms of his supervised release, Mr. Griffin was subject to mandatory revocation pursuant to 18 U.S.C. § 3583(g). Proceeding pro se, he gave perjured testimony to the district court during his revocation hearing. The district court sentenced Mr. Griffin to the statutory maximum sentence, an upward variance from the high end of his guideline range. Mr. Griffin appealed, arguing that his sentence was unreasonable because the district court focused solely on the fact that he had lied under oath, while failing to consider any other 18 U.S.C. § 3553(a) sentencing factors.

Analysis. The Eleventh Circuit (per curiam, before Judges Carnes, Tjoflat, and Pryor) affirmed. A § 3583(g) mandatory revocation eliminates the requirement that the district court consider § 3553(a) factors. *See United States v. Brown*, 224 F.3d 1237, 1241 (11th Cir. 2000). The only statutory sentencing limitation for revocation pursuant to § 3583(g) is that the sentence not "exceed the maximum term of imprisonment authorized," which in this case was 60 months. Accordingly, it was not unreasonable for the district court to focus on Mr. Griffin's perjury and to not consider the statutory sentencing factors.

United States v. Sanders, No. 12-16092 (Sept. 6, 2013)

Issue. May state court "youthful offender" convictions constitute predicate offenses for the USSG §4B1.2 career offender enhancement?

Held. Yes.

Background and procedural history. Mr. Sanders was sentenced as a career offender pursuant to USSG §4B1.2 based upon two prior felony convictions committed when he was seventeen years old that the State of Florida characterized as "youthful offender" offenses. This appeal followed.

Analysis. The Eleventh Circuit (per curiam, before Chief Judge Carnes and Judges Barkett and Martin) rejected Mr. Sanders's argument that his two previous convictions were incorrectly counted as predicate offenses for his career offender status because they were classified as youthful offender convictions. Generally, pursuant to USSG §4B1.2 a "prior felony conviction" is defined [for purposes of sentencing enhancement] as a "prior adult federal or state conviction for an offense

punishable by death or imprisonment for a term exceeding one year." A conviction committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant is convicted. In *United States v. Wilks*, 464 F.3d 1240, 1242 (11th Cir. 2006), the Eleventh Circuit ruled that even if a defendant is convicted as a youthful offender, the conviction can count as a predicate offense in certain circumstances. To make this determination, the court looks to (1) the nature of the proceedings, (2) the sentence received, and (3) the actual time served. The Court held that Mr. Griffin's two prior youthful offender convictions were adult convictions notwithstanding the state's classification because (1) Mr. Griffin was certified to the adult court system before being convicted of both offenses, (2) he violated the terms of his probation, which resulted in (3) Mr. Griffin's being serving more than fourteen months in a Florida state prison.

United States v. Morgan, No. 12-12497 (Sept. 23, 2013)

Issue. Did the district court erroneously apply the two-level USSG §3B1.3 enhancement for abuse of a position of trust where the defendant engaged in only an arms-length, commercial relationship with the victims of her investment fraud?

Held. Yes.

Background and procedural history. A jury found Ms. Morgan guilty of numerous charges pertaining to an investment fraud scheme. The district court sentenced her to 420 months in prison. Ms. Morgan appealed, arguing, *inter alia*, that the district court erroneously applied the §3B1.3 enhancement for abuse of a position of trust.

Analysis. The Eleventh Circuit (per curiam, before Judges Barkett and Marcus and Southern District of Florida Judge Huck) summarily affirmed Ms. Morgan's convictions, but vacated her sentence due to the district court's erroneous application of the §3B1.3 enhancement.

The §3B1.3 enhancement is applied if "the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." To warrant this enhancement, the Government must establish that: 1) "the defendant held a place of private or public trust," 2) the victim conferred the trust, and 3) the defendant "abused that position in a way that significantly facilitated the commission or concealment of the offense." *United States v. Walker*, 490 F.3d 1282, 1300 (11th Cir. 2007). Here, the Government failed to prove that Ms. Morgan had any association with the defrauded investors, much less a "bona fide relationship of private trust." Slip op. at 4. The Eleventh Circuit wrote held that the enhancement "requires more than a showing of an arms-length transaction of commercial relationship that one would find in any investment fraud cause, which we find to be the situation here." *Id*. at 2-3.

Farina v. Sec'y, Fla. Dep't of Corr., No. 12-13260 (Sept. 30, 2013)

Issue. Did the petitioner's counsel render ineffective assistance by failing to challenge, on direct appeal, the state court prosecutor's use of religious authority in a capital sentencing proceeding?

Held. Yes.

Background and procedural history. Mr. Farina and his brother were convicted in Florida state court of first-degree murder, three counts of attempted murder, armed robbery, burglary, and conspiracy to commit murder. The jury recommended the death penalty for Mr. Farina. His conviction was vacated on direct appeal because a qualified prospective juror had been erroneously excused for cause, and Mr. Farina received a new penalty proceeding before a new jury.

During this new penalty proceeding, the prosecutor repeatedly invoked religious authority, asking a prospective juror during voir dire if the death penalty was in conflict with his Christian beliefs and engaging another in a discussion of Christian salvation, commenting that a saved person "goes to be with the Lord in Heaven regardless of how they [sic] die"; cross-examining a minister who testified for the defense about whether or not Mr. Farina, a who had become a Christian since his incarceration, would go to Heaven regardless of whether he died of natural causes or was put to death by the State; having that same minister read Scripture aloud over the defense's objection; and quoting The Holy Bible during closing arguments and opining that Mr. Farina "brought this judgment upon" himself. Slip op. at 8-14, 24.

The second jury also recommended the death penalty, and the trial judge imposed that penalty, which the Florida Supreme Court affirmed on direct appeal. Mr. Farina then unsuccessfully sought state post-conviction and state habeas relief. In reviewing his state habeas petition, the Florida Supreme Court rejected, on the merits, Mr. Farina's claim that his appellate lawyer rendered ineffective assistance by failing to challenge the prosecutor's religious references on direct appeal. Specifically, it held that any challenge to the voir dire questions was procedurally barred; that Mr. Farina's objection to the minister's cross-examination was not sufficiently specific to be preserved for appellate review; and that the prosecutor's closing argument used common terms that may or may not be religious, even though the prosecutor quoted the Book of Romans.

Mr. Farina next filed a 28 U.S.C. § 2254 petition in federal district court, which applied AEDPA deference and denied the petition, but granted a certificate of appealability on several issues. The Eleventh Circuit expanded the certificate to include other issues, including whether his appellate counsel rendered ineffective assistance by failing to challenge the prosecutor's injection of religious authority at Mr. Farina's second sentencing proceeding.

Analysis. The Eleventh Circuit (per curiam, before Judges Barkett, Martin, and Jordan) reversed the district court's denial of habeas relief, finding that Mr. Farina's appellate counsel rendered ineffective assistance by failing to raise the religious authority issue on direct appeal. The Court did not review the Florida Supreme Court's factual determinations with the typical AEDPA deference because it found, pursuant to § 2254(d)(2), that the Florida court made several unreasonable factual determinations belied by the record. For example, the Florida court wrongfully found that Mr. Farina did not allege specific errors at the voir dire stage, even though his petition did so and incorrectly concluded that it was Mr. Farina's minister witness who first introduced religion into the proceedings when, in fact, the prosecutor raised it at voir dire and referenced it throughout the trial, including references to the victim's Christian faith. Exercising plenary review, the Court held that the prosecutor's invocation of religious authority was prosecutorial misconduct and a calculated effort to indoctrinate the jury away from Mr. Farina's constitutional rights. Accordingly, the Eleventh

Circuit concluded that Mr. Farina's appellate counsel's failure to raise the religious issue on direct appeal was below the minimal level of performance demanded of appellate counsel and violated *Strickland* because it was obvious on the record, even on a casual reading of the transcript, and because it was well-established at the time of direct appeal that the invocation of religious authority in sentencing proceedings was inappropriate.

Because the Eleventh Circuit granted relief on the ineffective-assistance claim, it did not reach the other claims asserted in Mr. Farina's petition.