SUMMARIES OF RECENT CASELAW
JULY 1, 2014 — SEPTEMBER 30, 2014

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PUBLISHED OPINIONS

United States v. Charles, No. 13-11863 (July 7, 2014)

Issue. Did the district court err by applying a two-level increase to the defendant's guideline sentencing range for trafficking in unauthorized access devices under U.S.S.G. § 2B1.1(b)(11)(B), where the defendant was also subject to a two-year, consecutive term of imprisonment for aggravated identity theft?

Holding. Yes.

Background and procedural history. Mr. Charles pleaded guilty to one count of aggravated identity theft and one count of conspiring to use unauthorized access devices. Aggravated identity theft carries a mandatory, consecutive two-year prison term. In calculating the guideline range for the conspiracy charge, the district court applied U.S.S.G. § 2B1.1(b)(11)(B), which increases the offense level by two levels for trafficking of unauthorized devices.

Analysis. The Eleventh Circuit (Judge Hull, for Judge Cox and Ninth Circuit Judge Farris) vacated the sentence and remanded for resentencing. Application note 2 to § 2B1.6 (aggravated identity theft) explains that if a sentence is imposed for aggravated identity theft in conjunction with a sentence for an underlying offense, the court must not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. Mr. Charles was sentenced for aggravated identity theft and for the underlying offense of conspiring to use unauthorized access devices. Because the § 2B1.1(b)(11)(B) specific offense characteristic was based on the trafficking, or transfer, of an access device, the district court's application of that section, in calculating the guideline range for the underlying offense, ran afoul of § 2B1.6 note 2.

United States v. Muzio, No. 10-13325 (July 8, 2014)

Issues. Does the Court of Appeals have jurisdiction to hear an appeal from a judgment that imposes a term of imprisonment and that indicates that restitution will later be ordered, but defers determination of the specific amount?

Held. Yes.

Background and procedural history. Mr. Muzio was convicted of one count of conspiring to commit wire fraud, two counts of wire fraud, six counts of securities fraud, and two counts of making false statements to federal agents. The district court entered a judgment on July 1, 2010, sentencing Mr. Muzio to 163 months in prison. The judgment indicated that restitution would be ordered, but deferred determination of the amount for 90 days. The district court referred the matter to a magistrate judge, who recommended that Mr. Muzio pay $631,976.06 in restitution. On November 3, 2010—127 days after the sentencing hearing—the district court adopted the magistrate's recommendation and directed the government to prepare a proposed final judgment.

The government never prepared a proposed final judgment and, consequently, no amended final judgment was ever entered.

Analysis. The Eleventh Circuit (Judge Wilson, with N.D. Ala. Judge Coogler concurring in judgment) held that a judgment imposing a term of imprisonment is sufficiently final to support an appeal. Prior to the Supreme Court's decision in *Dolan v. United States*, 560 U.S. 605, 130 S. Ct. 2533 (2010), the law of the circuit was that a criminal judgment was not final until the district court ordered restitution or 90 days passed and the district court lost the power to order restitution. In *Dolan*, the Supreme Court held that a district court retains the power to order restitution even if it misses the 90-day statutory deadline. Thus, after *Dolan*, the prior circuit rule creates the possibility, in circumstances where the court does not enter a restitution amount, that defendants may be denied their right to appeal indefinitely because the court never loses the power to enter restitution. The Court, relying on dicta from *Dolan* and *Corey v. United States*, 375 U.S. 169, 84 S. Ct. 298 (1963), held that a judgment that imposes a term of imprisonment, regardless of whether it reflects a restitution amount, is "freighted with sufficiently substantial indicia of finality to support an appeal."

Judge Tjoflat dissented, finding the majority's conclusion at odds with the general rule that federal courts of appeal have jurisdiction to review only final decisions of the lower courts. The sentencing process was not concluded in this case because the district court never entered a final judgment that included the restitution amount. No final judgment was ever entered and thus there was no jurisdiction to hear the appeal.

Stoufflet v. United States, No. 13-10874 (July 8, 2014)

Issue. May a federal prisoner collaterally attack the voluntariness of his guilty plea in a § 2255 motion after he presented the same issue on direct appeal by objecting to his appointed counsel's *Anders* brief?

Held. No.

Background and procedural history. On direct appeal, Mr. Stoufflet's attorney moved to withdraw and filed an *Anders* brief. Mr. Stoufflet filed an objection to his attorney's motion, attacking the voluntariness of his guilty plea. His appeal was dismissed. Mr. Stoufflet then filed a motion to vacate his conviction under 28 U.S.C. § 2255, arguing again that his guilty plea was not voluntary.

Analysis. The Eleventh Circuit (Judge Pryor for S.D. Ga. Judge Wood and S.D. Ga. Judge Edenfield) held that the prisoner was procedurally barred from relitigating the voluntariness of his plea and affirmed the denial of his § 2255 motion. The Court relied on the long-standing rule that a prisoner is procedurally barred from raising arguments in a § 2255 motion that he has already raised and that have been rejected on direct appeal.

Hittson v. GDCP Warden, No. 12-16103 (July 9, 2014)

Issue. Was Mr. Hittson prejudiced by evidence erroneously admitted by the trial court in violation of his Fifth and Sixth Amendment rights, which consisted of a psychologist's testimony about statements Mr. Hittson made during a court-ordered mental-health examination?

Held. No.

Background and procedural history. Mr. Hittson is a Georgia state prisoner on death row. The district court found that Mr. Hittson was entitled to habeas relief from his death sentence because the trial court erroneously allowed the State's psychologist to testify to statements made by Mr. Hittson during a court-ordered mental-health examination, in violation of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to effective assistance of counsel. The district court found that the Georgia Supreme Court unreasonably applied *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866 (1981), in finding that the trial court's admission of the psychologist's testimony did not deny Mr. Hittson his Fifth and Sixth Amendment rights. On appeal, the state conceded that the testimony violated Mr. Hittson's constitutional rights, but argued that the admission of the testimony was harmless error under *Brecht v. Abrahamson*, 507 U.S. 617, 638, 113 S. Ct. 1710, 1722 (1993).

Analysis. The Eleventh Circuit (JudgeTjoflat, for Chief Judge Carnes) reversed. To obtain relief under AEDPA's deferential standard, Mr. Hittson must show that there was no reasonable basis for the state court to deny relief. Under *Brecht*, habeas petitioners must establish that constitutional errors resulted in actual prejudice, meaning the error had a substantial and injurious effect or influence in determining the jury's verdict. Because the constitutional error here resulted in improper admission of evidence, the court measured the impact of the improperly-admitted evidence (the psychologist's testimony) on the jury in light of the body of evidence before them at the time. The Court concluded that the psychologist's testimony did not meaningfully influence the jury in light of the overwhelming evidence that supported the jury's finding of an aggravated factor, which permitted them to impose the death penalty. The Court therefore reversed the district court's grant of habeas relief. The Court also affirmed the district court's denial of relief on the ground of ineffective assistance of counsel.

Judge Wilson dissented and would have affirmed the district court's grant of habeas relief on the basis that the violation of Mr. Hittson's constitutional rights had a substantial and injurious effect of influence on the jury's determination to sentence him to death. Judge Wilson noted that the state court, on collateral review, erred by applying the *Brecht* standard for harmless error. The *Brecht* standard applies only to federal courts on collateral review, whereas state courts should apply the more petitioner-friendly standard of harmless error set out in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824 (1967). Mr. Hittson, therefore, was entitled to have his claim considered by the State of Georgia under the *Chapman* analysis.

Bowers v. United States Parole Commission, No. 12-16560 (July 9, 2014)

Issues. Whether, on remand from the Eleventh Circuit, the district court interpreted the mandate too narrowly and abused its discretion by denying Mr. Bowers's motion for discovery and leave to amend his 28 U.S.C. § 2241 petition?

Held. Yes.

Background and procedural history. Mr. Bowers is serving a life sentence for the 1973 murder of a United States Park Ranger. On May 17, 2005, the Parole Commission told Mr. Bowers that he had been granted mandatory parole. However, a Parole Commissioner, acting on her own, wrote to the Attorney General and requested that the Attorney General ask the Parole Commission

to review its decision. The Attorney General made the request, the Parole Commission reopened the case, and the Commission reversed its decision and voted to deny Mr. Bowers's parole.

Mr. Bowers filed a 28 U.S.C. § 2241 petition, challenging the Parole Commission's decisions to reopen his parole determination. He claimed that the Parole Commissioner's actions were improper and that the decision was affected by political pressure from the Attorney General. The district court denied the petition, but in *Bowers v. Keller*, 651 F.3d 1277 (11th Cir. 2011), the Eleventh Circuit reversed, holding that the Parole Commission had failed to act independently and without bias and returned the case to its May 17, 2005 posture. While on remand, the district court denied Mr. Bowers's motions for discovery and for leave to amend his petition. He appealed those denials.

Analysis. The Eleventh Circuit (Judge Wilson, for Judge Dubina and S.D. Fla. Judge Middlebrooks) reversed the district court's denials of the motions for discovery and for leave to amend and affirmed all other grounds.

The Court held the district court abused its discretion by reading the mandate so narrowly as to preclude discovery into whether the Parole Commission acted independently and without bias in reaching its 2011 decision denying parole. The absence of an express instruction in the mandate to the district court to determine whether discovery would be necessary should not be read to preclude discovery or to disallow amendment to the petition. The Court also noted that, although its previous opinion stated that the Court affirmed the denial of habeas relief as to Mr. Bowers's remaining claims, the law of the case doctrine does not apply when the issue in question was outside the scope of the prior appeal.

United States v. Estrella, No. 12-15815 (July 10, 2014)

Issue. Is a conviction under Fla. Stat. § 790.19 for wantonly or maliciously throwing, hurling, or projecting a missile, stone, or other hard substance at an occupied vehicle a crime of violence under U.S.S.G. § 2L1.2?

Held. No.

Background and procedural history. Mr. Estrella pleaded guilty to illegally re-entering the United States after being deported. At sentencing, the district court found that Mr. Estrella's prior conviction under Fla. Stat. § 790.19 qualified as a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii), and imposed a 16-level enhancement to Mr. Estrella's offense level.

Analysis. The Eleventh Circuit (Judge Martin, for Judge Hill and M.D. Ala. Judge Fuller) vacated and remanded for resentencing. The Court applied the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143 (1990), to determine whether Mr. Estrella's prior conviction was a crime of violence. Under the categorical approach, the Court asks whether the conviction has as an element the use, attempted use, or threatened use of physical force against the person of another. The Court first concluded that Fla. Stat. § 790.19 is divisible because it criminalizes targeting different types of structures—buildings, boats, trains, railways cars, etc. The Court thus invoked the modified categorical approach, and asked whether Mr. Estrella's specific conviction for targeting an occupied vehicle satisfies the crime-of-violence element that requires using force against a person. The Court concluded that directing physical force against an occupied vehicle, without more, does not permit application of the U.S.S.G. § 2L1.2 crime-of-violence

enhancement. Where an element would permit conviction whenever the defendant targets property that happens to be occupied, that element covers conduct broader that the crimes against persons to which the U.S.S.G. § 2L1.2 crime-of-violence enhancement is supposed to apply.

DeBruce v. Comm'r, Ala. Dep't of Corr., No. 11-11535 (July 15, 2015)

Issues.

1. Was Mr. DeBurce denied effective assistance of counsel during the guilt phase of his trial because his attorney failed to cross-examine state witness LuJuan McCants, a co-participant in the robbery who identified Mr. DeBruce as the shooter at trial?
2. Was Mr. DeBruce denied effective assistance of counsel during the penalty phase of his trial because his attorney failed to investigate and present evidence about Mr. DeBruce's mental capacity and background?

Held.

1. No.
2. Yes.

Background and procedural history. Mr. DeBruce, a state prisoner, was convicted of fatally shooting a customer during the robbery of an AutoZone store. Mr. DeBruce's attorney, Mr. Mathis, took on the case within three to four weeks of trial. He did not hire an investigator because he did not have funds to pay for one. During the guilt phase, Mr. Mathis did not cross-examine a key state witness, Mr. McCants, with the discrepancies between his interrogation statements and his trial testimony. But he did impeach McCants with his plea agreement and advanced, via the testimony of Mr. DeBruce's sister, the defense theory that Mr. McCants was actually the shooter.

To prepare for the penalty phase, Mr. Mathis spoke to two people, Mr. DeBruce and his mother. He presented one witness, Mr. DeBruce's mother, who made a passing reference to her son's treatment for a mental disorder and explained that he had an impoverished but unremarkable childhood. At a state collateral hearing, Mr. DeBruce presented evidence that he argued the jury would have heard had Mathis conducted a reasonably adequate mitigation investigation: two psychologists testified that Mr. DeBruce suffers from brain damage, has a borderline intelligence, suffers lingering emotional damage and social impairment as a result of being raised in a violent community, and suffers from blackout episodes and seizures. Mr. DeBruce argued that his attorney should have been alerted to the need for additional mitigation investigation because a pretrial report created by a social worker at his attorney's request noted that Mr. DeBruce had attempted suicide on four occasions, dropped out of school at age 16, had low-average intelligence, and had a history of substance abuse problems.

Analysis. The Eleventh Circuit (Judge Wilson, with Judge Martin concurring in judgment) affirmed in part and reversed in part. The Court reviewed the record under AEDPA's deferential standard. The Court found adequate evidence in the record to conclude that counsel's guilt phase performance was strategic and reasonable, and therefore found that the state court did not unreasonably apply *Strickland* in denying Mr. DeBruce's claim that his attorney was ineffective for failing to cross-examine McCants.

The Court found, however, that the Alabama court unreasonably applied *Strickland* by finding

that Attorney Mathis acted strategically in failing to conduct a mitigation investigation. No lawyer reasonably could have made a strategic decision to forego pursuit of mitigation evidence based on the results of the social worker's pre-trial report. The Court also held that it was an unreasonable application of *Strickland* to find that Mr. DeBruce was not prejudiced by his counsel's performance. Because of trial counsel's deficient performance, the jury was given almost no reason to spare his life. The omitted mitigating evidence, when compared to what little was introduced at trial, undermines confidence in the outcome of Mr. DeBruce's sentencing. He therefore suffered prejudice.

Judge Tjoflat dissented in part and would have denied habeas relief based upon Mr. DeBruce's failure to develop the record regarding what investigation his attorney did conduct into mitigation.

Jeanty v. Warden, FCI Miami, No. 13-14931 (July 22, 2014)

Issue. May a federal prisoner challenge the validity of his sentence using 28 U.S.C. § 2241, where he asserts that the trial court violated *Alleyne v. United States*, 133 S. Ct. 2151 (2013), by failing to submit to the jury the question of whether he had a prior conviction that qualified him for a ten-year mandatory minimum sentence?

Held. No.

Background and procedural history. Mr. Jeanty is a federal prisoner. Following his conviction, he brought an unsuccessful challenge to his conviction and sentence under 28 U.S.C. § 2255. He then filed a petition under 28 U.S.C. § 2241, arguing that the trial court violated *Alleyne v. United States*, 133 S. Ct. 2151 (2013), by failing to submit to the jury the question of whether he had a prior conviction that qualified him for a ten-year mandatory minimum sentence. The district court dismissed the petition, finding that the *Alleyne* challenge did not qualify for review under 28 U.S.C § 2255(e)'s savings clause.

Analysis. The Eleventh Circuit (Chief Judge Carnes, for Judges Wilson and Kravitch) affirmed. Though federal prisoners bringing a collateral attack on their convictions or sentences must typically proceed under 28 U.S.C. § 2255, that statute contains a "savings clause" permitting federal prisoners to bring collateral attack under 28 U.S.C. § 2241 if § 2255 is inadequate or ineffective to test the legality of the prisoner's detention. To proceed under § 2255(e)'s savings clause and bring a § 2241 petition, a petitioner must satisfy five requirements: (1) throughout the petitioner's sentencing, direct appeal, and first § 2255 proceeding, this Court's precedent had specifically and squarely foreclosed the claim raised in the § 2241 petition; (2) after the petitioner's first § 2255 proceeding, the Supreme Court overturned that binding precedent; (3) that Supreme Court decision applies retroactively on collateral review; (4) as a result of that Supreme Court decision, the petitioner's current sentence exceeds the statutory maximum; and (5) the savings clause of § 2255(e) reaches his claim. Mr. Jeanty's petition did not meet the third requirement because *Alleyne* does not apply retroactively on collateral review. Additionally, mandatory minimum notwithstanding, Mr. Jeanty's current sentence of 10 years does not exceed the statutory maximum of 40 years, and therefore he does not meet the fourth requirement.

United States v. Watkins, No. 12-12549 (July 28, 2014)

Issues.

1. In *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515 (2006), the Supreme Court held that a warrantless search of a shared dwelling, conducted over the express refusal of consent by a physically present resident, cannot be found reasonable as to that resident on the basis of consent given by another resident. Did the district court err in concluding that the search of defendant's computer was valid under *Randolph*, when subsequent to the defendant's consent to a limited search of the computer, the defendant's wife gave consent to a full search of the computer, while in the presence of and without objection from the defendant?
2. In reviewing the magistrate judge's denial of the motion to suppress, did the district court abuse its discretion in adopting the magistrate judge's findings without reopening the suppression hearing to make its own credibility determinations?

Held.

1. No.
2. No.

Background and procedural history. Mr. Watkins was convicted of receiving child pornography in violation of 18 U.S.C. § 2252. Prior to trial, he moved to suppress the child pornography found on his computers. At a suppression hearing, a magistrate judge found that Mr. Watkins and his wife both had authority to consent to a search of the computers. Mr. Watkins initially consented to an unlimited search of the computers, but because police misled Mr. Watkins about the purpose and scope of the search, the magistrate judge found that his initial consent justified only a limited search of the computers that did not encompass the search for child pornography. Subsequently, Mrs. Watkins, in the presence of Mr. Watkins, gave full consent for an unlimited search of the same computers. Mr. Watkins did not register any objection or reservation while the police sought and obtained Mrs. Watkins's consent. Based on Mrs. Watkins's consent, the magistrate judge recommended that the motion to suppress be denied.

Mr. Watkins moved the district court for reconsideration of the magistrate judge's recommendation and to reopen the suppression hearing. The district court held oral argument to consider the magistrate judge's determination about the scope of Mrs. Watkins's consent, but did not reopen the hearing or make its own credibility determinations. The district court ultimately adopted the finding in the Report and Recommendation that she had consented to a full search of the computers.

Analysis. The Eleventh Circuit (Seventh Circuit Judge Ripple, for Judges Tjoflat and Wilson) affirmed. *Randolph* creates a narrow exception to the general rule that the consent of a person who possesses common authority over premises or effects is valid against an absent, non-consenting person with whom that authority is shared. To obtain *Randolph's* protections, a defendant must object to the search while present with the co-possessor. Because Mr. Watkins did not object at any time while police obtained Mrs. Watkins's full, independent consent, *Randolph* does not apply.

The district court did not abuse its discretion by denying Mr. Watkins's motion to re-open the suppression hearing. The district court conducted an independent review of the entire record, including the complete transcript of the evidentiary hearing, before it adopted the magistrate

judge's report. Having conducted a thorough *de novo* review, the district court was entitled to adopt the magistrate judge's credibility determinations and credit the magistrate judge's findings.

Taylor v. Sec'y, Fla. Dep't of Corr., No. 12-12112 (July 28, 2014)

Issues.

1. Did the trial court err in excluding defense evidence in violation of Mr. Taylor's due process right to present evidence in his defense?
2. Did trial counsel provide ineffective assistance at the guilt phase of trial by calling Mr. Taylor to testify and having him reenact the murder without preparation?

Held.

1. No.
2. No.

Background and procedural history. Mr. Taylor, a state prisoner, was convicted of first-degree murder and sexual battery of a woman and sentenced to death. In this federal habeas proceeding, under 28 U.S.C. § 2254, Mr. Taylor asserted that the trial court erred by excluding testimony that the victim occasionally used and purchased crack cocaine. According to Taylor, that evidence would have corroborated his defense that the victim consented to have sex with him in exchange for cash or crack. Mr. Taylor also claimed that his trial counsel provided ineffective assistance by calling him to testify without preparation, and then directing him to physically reenact the murder in front of the jury.

Analysis. The Eleventh Circuit (Judge Marcus, for Judges Pryor and Jordan) affirmed the denial of Mr. Taylor's petition. The Court reviewed Mr. Taylor's claims through AEDPA's deferential lens. As to Mr. Taylor's first claim, the Court held that the proffered evidence was not relevant enough to "fatally infect" the trial and justify habeas relief. As to the second claim, the Court held that the state court reasonably determined that counsel did not render deficient performance. The attorney's decision to call Mr. Taylor to the stand, even without rehearsing the testimony, falls squarely within the wide range of performance that is constitutionally acceptable under *Strickland*. The attorney's options were circumscribed by the fact that Mr. Taylor had twice confessed in detail to the murder. Furthermore, the only way to establish that the victim consented to the sexual encounter was through Mr. Taylor's testimony.

Mendoza v. Sec'y, Fla. Dep't of Corr., No. 13-14968 (July 31, 2014)

Issue. Did Mr. Mendoza's trial counsel render ineffective assistance of counsel in the investigation and presentation of mitigation evidence during the penalty phase of trial?

Held. No.

Background and procedural history. Mr. Mendoza is a Florida inmate on death row. During the penalty phase of his trial, counsel's strategy was to establish that one of Mr. Mendoza's co-defendants was the gunman who actually shot the victim and to persuade the jury, based on proportionality, that Mr. Mendoza should not be punished more than his co-defendants, who

received life sentences. Counsel called Mr. Mendoza's mother, who testified at length about Mr. Mendoza's tumultuous and tragic childhood as a Cuban refugee. Counsel also presented Mr. Mendoza's medical records from Cuba, which were consistent with his mother's testimony and documented his childhood mental health problems. Counsel also called a psychologist, Dr. Toomer, to testify about Mr. Mendoza's numerous mental health problems.

Mr. Mendoza filed a motion for postconviction relief in state court, alleging that he was denied effective assistance of counsel because his attorney failed to investigate and present mitigating evidence during the penalty phase of trial. At a hearing on the matter, numerous doctors and experts explained and expanded upon Mr. Mendoza's mental health problems. The state court found that Mr. Mendoza's post-conviction evidence was cumulative and that he had failed to show that his attorney's performance was deficient.

Analysis. The Eleventh Circuit (Judge Hull, for Judges Tjoflat and Jordan) affirmed the denial of Mr. Mendoza's § 2254 petition. Applying AEDPA's deferential standard, the Court held that the state court's decision was not an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts.

Wright v. Sec'y, Fla. Dep't of Corr., No. 13-11832 (August 4, 2014)

Issues.

1. Did the prosecution violate *Brady v. Maryland*, 373 U.S. 83, 83, S. Ct. 1194 (1963), by failing to turn over certain items to the defense prior to trial?
2. Was trial counsel constitutionally ineffective by failing to call a witness to testify that the vase the prosecution alleged was stolen from the murdered victim was actually a family heirloom that belonged to the defendant?
3. Were Mr. Wright's due process rights violated when the Florida Supreme Court reversed the trial court's findings as to one of the four statutory aggravating circumstances, but affirmed Mr. Wright's death sentence without undertaking a harmless error analysis?

Held.

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

Background and procedural history. In 1983, a jury convicted Mr. Wright of first-degree murder, sexual battery with force likely to cause serious personal injury, burglary of a dwelling, and grand theft of the second degree. The evidence showed that Mr. Wright entered the home of his 75-year-old neighbor, stole her money, raped her brutally, and then stabbed her in the face and neck twelve times. During the penalty phase of the trial, the jury returned an advisory 9-3 verdict in favor of the death penalty. The state trial court found no statutory mitigating circumstances and four statutory aggravating circumstances: (1) the murder was committed during the commission of a rape and burglary; (2) the murder was committed for the avowed purpose of preventing Mr. Wright's arrest; (3) the murder was especially heinous; and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justifications. The court sentenced Mr. Wright to death for the murder. On direct appeal, the Florida Supreme

Court reversed the trial court as to one of the four aggravating circumstances, but did not remand for resentencing or state that the error was harmless beyond reasonable doubt.

In state post-conviction proceedings, Mr. Wright raised two *Brady* claims related to a state witness, Charles Westberry. Mr. Westberry testified at trial that Mr. Wright had confessed the murder to him. Mr. Wright, by post-conviction motion, asserted that the prosecution had failed to reveal to the defense that, in exchange for Mr. Westberry's testimony, it had verbally agreed not to prosecute several scrap metal thefts. In addition, the prosecution failed to turn over notes that the prosecutor had given to Mr. Westberry in preparation for his testimony. Mr. Wright also asserted that the prosecution failed to turn over three statements from witnesses that tended to inculpate another suspect for the same murder. Mr. Wright also asserted in post-conviction proceedings that he was denied effective assistance of counsel because his attorney failed to call a witness to testify that the vase that the prosecution alleged was stolen from the murdered victim was actually a family heirloom that belonged to the defendant. Finally, he argued that the Florida Supreme Court violated *Sochor v. Florida*, 305 U.S. 527, 112 S. Ct. 2114 (1992) by failing to conduct a harmless error analysis after it reversed one of the trial court's aggravating factors.

Analysis. The Eleventh Circuit (Judge Hull, for Chief Judge Carnes and Judge Wilson) affirmed. The Court applied AEDPA's deferential standard, under which a federal court can only grant habeas relief if the state court's adjudication was contrary to or involved an unreasonable application of clearly established federal law, or was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. The Court held that ample evidence supported the state court's factual finding that no immunity agreement existed between the prosecution and Mr. Westberry regarding the scrap metal thefts. It held that the prosecutor's notes, provided to Mr. Westberry, contained only a summary of his prior statements and were not *Brady* material. The Court held that the state court reasonably concluded that the additional witness statements were not exculpatory and that it was merely speculative that they could have led to exculpatory information. The Court held that the state court reasonably concluded that Mr. Wright did not suffer prejudice from his attorney's performance at trial. Finally, the Court held that because the Florida Supreme Court affirmed Mr. Wright's death sentence in 1985, it did not misapply clearly established federal law by not conducting a harmless error analysis because *Sochor* had not yet been decided.

Madison v. Comm'r, Ala. Dep't of Corr., No. 13-12348 (August 4, 2014)

Issue. Applying *Batson's* third prong, did the district court clearly err by finding that petitioner had not proved purposeful racial discrimination?

Held. No.

Background and procedural history. Mr. Madison is an Alabama prisoner on death row. In this federal habeas petition, brought under 28 U.S.C. § 2254, Mr. Madison asserted that the prosecutor engaged in racially discriminatory jury selection in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). The Eleventh Circuit previously considered Mr. Madison's claim, and held that the Alabama Court of Criminal Appeals had reached a decision contrary to clearly established federal law on this issue because that court increased Mr. Madison's burden of proof beyond what *Batson* requires. The Eleventh Circuit, applying *de novo* review, found that Mr. Madison had established a *prima facie* case of discrimination and remanded to the district court to complete the

Batson analysis. On remand, the district court held an evidentiary hearing and found that the prosecution had provided adequate race-neutral explanations for each strike and that Mr. Madison had failed to prove purposeful discrimination or pretext on the part of the prosecution. Mr. Madison appealed.

Analysis. The Eleventh Circuit (Judge Martin, for Judges Wilson and Jordan) affirmed. The Court reviewed the district court's findings for clear error and concluded that there are two plausible views of the evidence, both of which have some support. The district court's choice between them, therefore, could not be clearly erroneous.

Troy v. Sec'y, Fla. Dept. of Corr. et al., No. 13-10516 (Aug. 15, 2014)

Issue. Did the district court err in ruling that the Florida Supreme Court properly rejected the movant's argument that the Eighth and Fourteenth Amendments required the state trial court to permit him to offer certain mitigation evidence?

Holding. No.

Background and procedural history. Mr. Troy was convicted of first degree murder and multiple other violent offenses and sentenced to death in Florida state court. During the penalty phase of trial, the court excluded one of Mr. Troy's witnesses, Florida Corrections Officer Michael Galemore, who would have testified as to the nature of custody and the availability of illegal drugs for persons serving life sentences in Florida. The court reasoned that because Mr. Galemore had never met Mr. Troy and did not know where Mr. Troy would be incarcerated, his testimony was not appropriate mitigation evidence.

Mr. Troy argued on direct appeal to the Florida Supreme Court that the exclusion of Mr. Galemore's testimony violated his Eighth and Fourteenth Amendment Rights to present mitigation evidence relating to his potential for rehabilitation during a sentence of life in prison and to rebut the Government's implication on cross-examination that he would continue to use drugs while in prison. The Florida Supreme Court rejected this argument, as did the federal district court in denying Mr. Troy's 28 U.S.C. § 2254 petition. The Eleventh Circuit granted Mr. Troy a Certificate of Appealability.

Analysis. The Eleventh Circuit (Judge Marcus for Judge Pryor) affirmed. The Court held that the Florida Supreme Court's rejection of Mr. Troy's claim that the exclusion of Mr. Galemore's testimony violated the Eighth and Fourteenth Amendment was neither "contrary to" nor an "unreasonable application" of "clearly established Federal law, as determined by the Supreme Court of the United States." *See* § 2254(d). The Court wrote that no Supreme Court authority required the consideration of the sort of evidence that Mr. Galemore's testimony would have conveyed. It acknowledged the line of authority holding that the Eighth and Fourteenth Amendments require that the sentencing judge be allowed to consider the defendant's proffer of "any aspect of a defendant's character or record and any of the circumstances of the offense" but noted that the Supreme Court also cautioned that this holding did not "limit the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense." *Lockett v. Ohio*, 438 U.S. 586, 604 n.12 (1978); *see also Skipper v. South Carolina*, 476 U.S. 1 (1986). The Court determined that Mr. Galemore's testimony was of this character because he had never met Mr. Troy, had no knowledge of his

character or conduct, and did not know which Florida correctional facility Mr. Troy would be sent to in the event he received a life sentence. And any testimony that Mr. Galemore could have offered about Mr. Troy's access to drugs would have been purely speculative.

The Court further held that even if there was any constitutional error, it was harmless because Mr. Troy was allowed to and did present substantial mitigating evidence that the jury evidently accorded less weight than the aggravating evidence.

Judge Martin concurred in the judgment only and filed a separate opinion.

United States v. Barsoum, No. 13-10710 (August 15, 2014)

Issues.

1. Did the district court abuse its discretion by denying a *Franks* hearing, under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978)?
2. Was there a material variance between the indictment and the evidence at trial because the indictment charged a single conspiracy yet multiple conspiracies were proved at trial?
3. Did the district court err by estimating the amount of pills for which Mr. Barsoum was responsible?
4. Did the district court abuse its discretion by not declaring a mistrial after the prosecutor stated, in the presence of the jury, that the government had proven the existence of a conspiracy?
5. Did the district court err in denying a motion for new trial based upon newly discovered evidence?

Held.

1. No.
2. No.
3. No.
4. No.
5. No.

Background and procedural history. A jury convicted Mr. Barsoum of one count of conspiring to dispense Oxycodone not for a legitimate medical purpose and five counts of distributing Oxycodone outside the course of professional practice. The evidence showed that Mr. Barsoum began working at St. George's pharmacy in 2006, where his cousin Mr. Wahba had already established a pill racket. Mr. Barsoum started accepting and filling falsified prescriptions from an associate, Pat Stevens. In 2007, Mr. Barsoum opened his own pharmacy, Trinity Pharmacy, where he began accepting and filling falsified prescriptions from an Oxycodone addict and dealer named Christopher Scott, while continuing to fill prescriptions for Mr. Stevens. Mr. Barsoum then opened another pharmacy, Platinum Pharmacy, where he continued distributing to Mr. Stevens, who by then had begun cooperating with the DEA in a series of undercover, controlled buys. In a search of Platinum Pharmacy, the DEA seized over sixty prescriptions that were signed by a Dr. Belsole and accounted for over 11,000 Oxycodone pills.

Before trial, Mr. Barsoum requested a hearing under *Franks v. Deleware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), alleging that the special agent who swore out the probable cause affidavit supporting the search warrant application recklessly omitted information. The district court denied the request. During trial, the prosecutor, in response to an objection and in the presence of the jury,

stated, "Your Honor, at this—at this time I think we pretty squarely established a conspiracy, an agreement between these individuals." Mr. Barsoum moved for a mistrial on the basis of this statement. The court denied the motion but did give a lengthy curative instruction.

At the close of evidence, Mr. Barsoum moved for an acquittal, arguing that the government had charged one conspiracy in the indictment, but proved at least four separate conspiracies at trial. The district court denied the motion. At sentencing, the district court found Mr. Barsoum responsible for 56,000 Oxycodone pills—16,000 pills from the scheme with Scott; 11,000 pills from the Belsole prescriptions; 24,000 pills from the scheme with Stevens; and 5,000 pills from DEA controlled buys using Stevens. Mr. Barsoum argued that the finding was based upon various estimates and not supported by a preponderance of the evidence. Following his conviction, Mr. Barsoum moved for a new trial on the basis of newly discovered evidence, which consisted of conversations Scott and Stevens had in prison that tended to show that Mr. Barsoum's participation in the conspiracy was involuntary. The district court denied the motion.

Analysis. The Eleventh Circuit (S.D. Fla. Chief Judge Moore, for Judge Tjoflat and M.D. Fla. Judge Schlesinger) affirmed. The Court reviewed the denial of a *Franks* hearing for abuse of discretion and held that the district court did not abuse its discretion because Mr. Barsoum failed to make a substantial preliminary showing of deliberate falsity and omission. Regarding the material variance argument, the Court held that there was sufficient evidence to infer the existence of single conspiracy—all of the coconspirators shared the common goal of filling unauthorized prescriptions for large amounts of Oxycodone at Mr. Barsoum's pharmacies, each sub-scheme was part and parcel of Mr. Barsoum's overarching conspiracy, Mr. Barsoum was the gatekeeper and hub of each scheme, and there was an overlap of participants and schemes.

The Court reviewed the district court's drug-quantity findings only for clear error. The Court held that a sentencing court may estimate drug quantities, including by basing its calculation on evidence showing the average frequency and amount of a defendant's drug sales over a given time period. Even where a witness gives two inconsistent accounts regarding the drug quantity, the district court may credit the account it finds to be credible. The Court therefore affirmed the district court's calculation of drug quantity.

The Court further held that the district court did not abuse its discretion by not declaring a mistrial based upon the prosecutor's improper statements about the existence of a conspiracy. The court gave a lengthy curative instruction, and the prosecutor's statements were not so highly prejudicial that it could not be cured by instruction. Finally, the court held that the district court did not abuse its discretion by denying the motion for new trial. The Court reasoned that the district court was in the best position to assess the new testimony offered and had acted within its discretion in determining that the new evidence was either impeachment evidence or cumulative of other evidence presented at trial.

United States v. Payne, No. 13-15699 (August 15, 2014)

Issue. Did the district court err under *Alleyne v. United States*, 133 S. Ct. 2151 (2013), by sentencing Mr. Payne to a mandatory minimum sentence based on its own finding that a firearm had been brandished during the robbery, instead of Mr. Payne's admission or a jury's finding of that fact?

Held. Yes, but the error was harmless.

Background and procedural history. Mr. Payne pleaded guilty to one count of bank robbery, 18 U.S.C. § 2113(a), (d), and one count of possession of a firearm during a crime of violence, 18 U.S.C. § 924(c)(1)(A). During the plea hearing, Mr. Payne admitted that he was the getaway driver in an armed robbery of the People's Bank and Trust. His accomplices entered the bank carrying a shotgun, revolver, pistol, and duct tape. Mr. Payne admitted that he knowingly participated in the armed robbery, but that he could not admit to what happened inside because he was the getaway driver. Mr. Payne's PSR concluded that he was subject to an 84-month mandatory minimum sentence because one of Mr. Payne's accomplices brandished a firearm by pointing it at a teller in the bank. Mr. Payne objected under *Alleyne*, 133 S. Ct. 2151 (2013), which held that any fact that increases a mandatory minimum sentence for a crime must be admitted by the defendant or submitted to a jury and found beyond a reasonable doubt. The district court, in light of Mr. Payne's objection, heard evidence to determine whether a firearm had been brandished during the robbery. Based on its own finding that a firearm was brandished, the district court applied the mandatory minimum sentence.

Analysis. The Eleventh Circuit (per curiam, before Chief Judge Carnes and Judges Hull and Fay) affirmed. The Court held that the district court erred under *Alleyne* because it sentenced Mr. Payne to a mandatory minimum sentence based on its own conclusion about brandishing, instead of Mr. Payne's admission or a jury's finding concerning that fact. Nevertheless, the district court's error was harmless beyond a reasonable doubt because there was uncontroverted evidence supporting the finding. A teller testified that one of Mr. Payne's codefendants pointed a pistol at her during the robbery and that testimony was unrefuted. It is therefore clear beyond a reasonable doubt that a rational jury would have found that a firearm was brandished.

United States v. Therve, No. 13-11879 (August 20, 2014)

Issue. Did the district court abuse its discretion in declaring a mistrial where, after receiving an *Allen* charge, the jury sent the district court a note disclosing that they had been 11 to 1 in favor of not guilty from the beginning and that they could not reach a unanimous decision?

Held. No.

Background and procedural history. Mr. Therve was tried twice on an indictment charging bribery of a public official, in violation of 18 U.S.C. §§ 2 & 201(b)(1)(C). At the first trial, the district court declared a mistrial after the jury was unable to agree on a unanimous verdict, with all but one juror in favor of finding Mr. Therve not guilty. Before declaring a mistrial, the district court disclosed to the parties that the jury had sent out a note stating that they had been 11 to 1 in favor of not guilty from the beginning. At the second trial, Mr. Therve was convicted. Mr. Therve appealed, arguing that the district court abused its discretion in declaring a mistrial at his first trial.

Analysis. The Eleventh Circuit (per curiam, before Judges Jordan, Rosenbaum, and Anderson) affirmed. Though the better practice is for the district court to disclose to the parties only that the jury considers itself deadlocked, not the specific numerical division, the district court exercised appropriate discretion in declaring a mistrial. Under the doctrine of "manifest necessity," district courts are permitted to declare a mistrial where, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. A decision to declare a mistrial based on the trial court's belief that the jury is unable to reach a

verdict is the classic basis for a proper mistrial and generally is accorded great deference. Here, the trial judge reasonably concluded that continued deliberations would not be helpful, and possibly would have been coercive, where (1) the jury had deliberated to deadlock twice, including once after receiving an *Allen* charge; (2) despite two periods of deliberation, the jury said it has been split the same way since the beginning; (3) the judge believed the jury to be truthful in its assessment that it was hung; (4) the trial was short and straightforward; and (5) requiring the jury to deliberate after the second note following the *Allen* charge was coercive.

United States v. Hayes, No. 11-13678 (August 12, 2014)

Issue. Did the district court abuse its discretion by imposing a sentence of three years of probation on a business owner who doled out over $600,000 in bribes to a state official in exchange for government contracts, and whose company reaped over $5 million in profits as a result of the corrupt payments?

Held. Yes.

Background and procedural history. Mr. Hayes pleaded guilty to bribing an agency receiving federal funds, 18 U.S.C. § 666(a)(2), and conspiring to launder money, 18 U.S.C. § 1956(h). His undisputed guideline sentencing range was 135 to 168 months' imprisonment. Because Mr. Hayes provided substantial assistance to the government during their investigation of the bribery scheme, the government moved the court to depart downward under U.S.S.G. § 5K1.1, recommending that the court depart to a guideline range of 57-71 months' imprisonment and sentence Mr. Hayes to 60 months' imprisonment. The district court first granted the government's § 5K1.1 motion and departed beyond the government's recommendation to a guideline range of 41 to 51 months. The district court then sentenced Mr. Hayes to three years' probation, with six to twelve months' home confinement. The government appealed the substantive reasonableness of the sentence.

Analysis. The Eleventh Circuit (Judge Jordan for Judge Carnes) reversed. The Court characterized Mr. Hayes's crime as "bribery writ large." Because of the magnitude of the crime, a sentence of probation failed to promote respect for the law and failed to provide for general deterrence. A probationary sentence sends the message that would-be white-collar criminals stand to lose little more than a portion of their ill-gotten gains and practically none of their liberty.

Judge Tjoflat dissented. He fully agreed that Mr. Hayes's sentence was shockingly low and should not have been imposed. He dissented, however, because the court's error was invited by the government, which induced the court into procedural error by moving the court to lower Mr. Hayes's offense level and guideline range under U.S.S.G. § 5K1.1 and use that range, instead of Mr. Hayes's true guideline range, as the starting point for determining the defendant's sentence. Judge Tjofalt would have applied the invited error doctrine and allowed the sentence to stand.

United States v. Haynes, No. 12-12689 & 12-13244 (August 22, 2014)

Issue. On a direct appeal of resentencing, may the defendant raise new arguments unrelated to the errors corrected at the resentencing?

Held. No.

Background and procedural history. Mr. Haynes was prosecuted in two separate cases before the same district judge. In one hearing, he pleaded guilty to all of the counts charged in both cases. The first case charged possession with intent to distribute crack cocaine, possession of a firearm as a convicted felon, and possession of a firearm in furtherance of a drug-trafficking offense. The second case charged two counts of possession with intent to distribute crack cocaine. The district court sentenced Mr. Haynes as a career offender under the U.S. Sentencing Guidelines and also applied a statutory enhancement under the Armed Career Criminal Act (ACCA). On his first direct appeal, Mr. Haynes appealed only the application of the ACCA. The Eleventh Circuit affirmed. Mr. Haynes then filed a motion to vacate his sentence under 28 U.S.C. § 2255, arguing that he did not qualify for the ACCA enhancement and that he also did not qualify as a career offender under the Sentencing Guidelines. The district court granted the first claim, but found the second to be procedurally defaulted. The district court then resentenced Mr. Haynes, modifying only the counts related to the ACCA enhancement. Mr. Haynes appealed, arguing that the district court erred by resentencing him as a career offender.

Analysis. The Eleventh Circuit (Judge Pryor, for Judges Wilson and Rosenbaum) affirmed. The Court found that Mr. Haynes invited the resentencing error, assuming there was error, because at the resentencing he took the position that the resentencing court would only modify the sentences in his first case, and not the second. Mr. Haynes thereby invited the court to limit the resentencing proceedings to the first case and to the sentences affected by the partially-vacated sentence. The Court also noted that, even if Mr. Haynes had not invited the district court to limit its review, a resentencing court has discretion to limit resentencing to "appropriate" relief.

Fults v. GDCP Warden, No. 12-13563 (August 26, 2014)

Issues.

1. Was Mr. Fults's claim of juror bias procedurally defaulted because Mr. Fults did not raise the claim on direct appeal?
2. Was it is a misapplication of clearly established federal law to find that Mr. Fults was not mentally retarded and therefore eligible for the death penalty?

Held.

1. Yes.
2. No.

Background and procedural history. Mr. Fults is an inmate on Georgia's death row. In this federal habeas proceeding, brought under 28 U.S.C. § 2254, Mr. Fults first claims that one of the jurors at his trial was racially biased. The state court denied this claim as procedurally defaulted because it was not raised on direct appeal. Mr. Fults also argued that he is mentally retarded and ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002).

Analysis. The Eleventh Circuit (Judge Jordan, for Judges Marcus and Dubina) affirmed the denial of the § 2254 petition. Because Mr. Fults failed to allege any facts showing that the evidence of juror bias was unknown to him at the time of trial and could not have been discovered through ordinary diligence, it was not an error to conclude that his claim was procedurally barred under Georgia law. Regarding Mr. Fults's claim that he is mentally retarded and cannot be executed

under *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that Mr. Fults had not rebutted, by clear and convincing evidence, the presumption of correctness given to the state court's factual finding that he is not mentally retarded. Even though all of Mr. Fults's IQ tests were within the range of mental retardation, it was not an unreasonable application of *Atkins* for the state court to find that this evidence is not credible where one doctor testified that Mr. Fults was street smart, could make decisions and choices, and did not have to rely on another to support him, and where defense attorneys and investigators were able to communicate well with Mr. Fults, considered him to be bright, and did not have any concerns about his intelligence.

United States v. Godwin, No. 13-10184 (September 3, 2014)

Issues.

1. Did the district court abuse its discretion by excusing a member of the jury for cause before trial commenced on the basis that the juror would be too distracted by concern for her 14-month old son to focus on the trial?
2. Did the district court abuse its discretion by excusing a member of the jury during deliberations on the basis that the juror refused to apply the law as instructed?
3. Was the evidence sufficient to convict a defendant of racketeering and conspiracy to commit racketeering where he was not a "card carrying" member of the corrupt enterprise?

Holdings.

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

Background and procedural history. Two defendants—Maynard Godwin and Eric Ellis—were tried jointly before two separate juries. Each was convicted under the Racketeer Influenced and Corrupt Organizations Act ("RICO") for racketeering, in violation of 18 U.S.C. § 1962(c) and conspiracy to commit racketeering, in violation of 18 U.S.C. § 1962(d). The evidence showed that Mr. Godwin had formed a gang called "The Guardians." The Guardians stockpiled guns, dealt drugs, peddled stolen goods, and committed a slew of violent crimes. Mr. Ellis was not a member of the Guardians, but he knew they were a gang, knew Mr. Godwin was their leader, and personally participated in several crimes committed by Guardian members.

Before the trial commenced, the district court struck one of Mr. Godwin's jurors for cause, finding that she was too distraught over the prospect of leaving her 14-month old child in someone elses's care for the duration of the trial, which was expected to last four and a half weeks. After the jurors began deliberating, the district court removed a second juror, this time on the basis that the juror was refusing to follow the court's legal instructions.

Analysis. The Eleventh Circuit (Chief Judge Carnes for Judge Tjoflat and Sixth Circuit Judge Siler) affirmed.

Removal of jurors: The district court was well within its discretion to remove a distraught juror for cause on the basis that a distraught juror is unlikely to be an attentive juror. The court justifiably found that the juror would be affected by being away from her 14-month old child, and would be unable or unwilling to focus on the trial. The district court was also within its discretion to excuse

a deliberating juror for failure to follow the court's instructions on the law. Because the court explicitly applied the appropriate standard—whether there was a substantial possibility that the removed juror was merely espousing a view that there was insufficient evidence to convict rather than refusal to follow the court's instructions—the only question is whether the court clearly erred in finding that the juror was refusing to follow the instructions. There was no clear error here. Mr. Godwin's jury submitted two notes to the judge within an hour explaining that Juror 10 disagreed with the court's instructions on the law and upon questioning, eleven jurors (all except Juror 10) explained that Juror 10 refused to follow the court's instructions.

Sufficiency of evidence: To establish a substantive RICO crime, the government must prove, among other elements, that the defendant was associated with an enterprise and participated in the enterprise's affairs through a pattern of racketeering activity. To establish a RICO conspiracy, the government must prove an agreement to participate in the affairs of the enterprise through a pattern of racketeering activity. The Court held that it was not necessary to prove that the defendant was a bona-fide member of the enterprise in order to prove that the defendant was associated with it. RICO applies to insiders as well as outsiders who are merely associated with the enterprise by their conduct. *United States v. Watchmaker*, 761 F.2d 1459, 1476 (11th Cir. 1985). Mr. Ellis was associated with the Guardians because he knew that the Guardians were a gang and he helped Guardian members and associates commit various crimes. Furthermore, Mr. Ellis was a member of conspiracy because he agreed to participate in a pattern of racketeering activity through the Guardians, even though other members of the conspiracy committed other, unrelated acts.

United States v. Campbell, No. 12-11952 (September 3, 2014)

Issue. Did the district court err in calculating "loss amount" by using the total amount of money the defendant's nonprofit received, in the absence of evidence that each of the nonprofit's expenditures was illegitimate?

Held. No.

Background and procedural history. Mr. Campbell and several co-conspirators created a scheme to defraud the State of Alabama. Mr. Campbell secured over $7.3 million from the state, purportedly for his nonprofit organization. He and his co-conspirators did not use the money for legitimate purposes r, but instead treated the money as their own—paying for meals, clothing, cars, jewelry, and vacations. Based on this scheme, Mr. Campbell was convicted of multiple fraud offenses including wire fraud, mail fraud, and money laundering. At sentencing, the district court used U.S.S.G. § 2B1.1 to calculate Mr. Campbell's guideline sentencing range, which enhances a defendant's offense level according to the amount of loss attributable to the defendant's fraud. The court calculated the loss amount using the total amount of state money received by the nonprofit, $7.3 million, and subtracting the $1.4 million that was distributed to legitimate organizations. This resulted in a total loss of $5.9 million.

Analysis. The Eleventh Circuit (Judge Tjoflat, for Judge Carnes and Southern District of Florida Judge Marra) affirmed. The Court rejected the argument that the government had to prove the illegitimacy of each of the nonprofit's expenditures, item by item. The government proved that the nonprofit was a sham organization that served no legitimate purpose. Where a defendant's conduct was permeated with fraud, a district court does not err by treating the amount that was transferred

from the victim to the fraudulent enterprise as the starting point for calculating the victim's pecuniary harm.

United States v. Green, No. 12-12952 (September 4, 2014)

Issues. Whether, on a motion for a reduced sentence, 18 U.S.C. § 3582(c)(2), a district court may clarify the quantity of drugs for which it held a defendant accountable at an earlier sentencing hearing?

Held. Yes.

Background and procedural history. A jury convicted Mr. Green with one count of conspiracy to distribute crack and two counts of distribution of crack. At sentencing, the district court found that Mr. Green was responsible for "certainly well in excess of 10 kilograms" and "far above" 1.5 kilograms of crack, which was the minimum amount required for a base-offense level of 38. After Mr. Green's second motion for a sentence reduction, the district court denied the motion by clarifying that it actually held Mr. Green responsible for 32.1 kilograms of crack, which, even after the sentencing amendments, results in a base-offense level of 38.

On appeal, Mr. Green argued that the district court's findings of fact violate the Sixth Amendment as interpreted by *Apprendi* and conflict with its earlier finding of drug quantity.

Analysis. The Eleventh Circuit (Judge Pryor for S.D. Ga. Judges Wood and Edenfield) affirmed the district court's denial of the § 3582 motion. The Court held that the district court's factual finding in the context of a § 3582 motion does not implicate *Apprendi* because the finding cannot increase Mr. Green's sentence. The Court also noted that it has encouraged courts to make similar fact findings when considering eligibility for sentence reductions due to guidelines amendments. *See e.g.*, *United States v. Hamilton*, 715 F.3d 328, 337 (11th Cir. 2013).

Bates v. Sec'y, Fla. Dep't of Corr., No. 13-11882 (September 5, 2014)

Issues.

1. Was it an unreasonable application of federal law to find that counsel was not constitutionally ineffective for failing to object to an opening prayer at trial, delivered by the victim's minister?
2. Was it an unreasonable application of federal law to find that the defendant's due process rights were not violated when the trial court refused to instruct the jury, at sentencing, that the defendant had agreed to waive his eligibility for parole and that he had already been sentenced to two life terms plus fifteen years on his other counts of conviction?

Held.

1. No.
2. No.

Background and procedural history. Mr. Bates is a Florida inmate on death row who petitioned the court for federal habeas relief under 28 U.S.C. § 2254. Before jury selection at his trial, the judge asked all present, including the jury venire, to stand while the victim's minister opened the proceedings with prayer. Mr. Bates's trial counsel did not object to the prayer. The jury convicted

Mr. Bates of first-degree murder, kidnapping, armed robbery, and attempted sexual battery. At sentencing, the jury submitted a note to the judge asking, "Are we limited to the two recommendations of life with minimum 25 years or death penalty. Yes. No. Or can we recommend life without a possibility of parole. Yes. No." The trial court responded only by referring the jury to its prior written instructions, denying Mr. Bates's requests to inform the jury that he would waive parole and that he had already been sentenced to consecutive life terms plus fifteen years on his non-capital convictions.

Analysis. The Eleventh Circuit (Chief Judge Carnes and Judge Tjoflat) affirmed the denial of the § 2254 petition. As to the first issue, the Court asked whether the religious features of the trial substantially impaired the fairness of the proceeding—not whether, in the abstract, the religious events violated the Establishment Clause. The Court held that Mr. Bates's lawyer could not be held ineffective for failing to raise an Establishment Clause claim, because he could not show that the opening prayer made his trial unfair. As to the second issue, the Court held that because parole was a legal possibility for Mr. Bates under Florida law, however remote, it was not a violation of clearly established federal law to deny Mr. Bates's requested jury instructions. His circumstances fell outside of the narrow confines of *Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187 (1994), which holds that where the defendant's future dangerousness is at issue and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.

Judge Wilson concurred, finding that trial counsel was ineffective for failing to object to the opening prayer, but that it was not an unreasonable application of federal law to find otherwise.

Samak v. Warden, FCC Coleman, No. 13-12161 (September 10, 2014)

Issue. Did the district court err by dismissing Mr. Samak's habeas petition, brought under 28 U.S.C. § 2241, on the basis that Mr. Samak did not meet the requirements of 28 U.S.C. § 2255(e)?

Held. No.

Background and procedural history. Mr. Samak, having already brought one unsuccessful challenge to his conviction and sentence under 28 U.S.C. § 2255, brought a second attack under 28 U.S.C. § 2241. Mr. Samak argued that the district court erred in sentencing him to life imprisonment and that his counsel was ineffective for failing to advise him to enter into a plea agreement. The district court dismissed the petition because it concluded that Mr. Samak had failed to establish the necessary conditions for his claims to satisfy the savings clause of 28 U.S.C. § 2255(e) such that they might be considered in a § 2241 petition.

Analysis. The Eleventh Circuit (per curium, Judges Pryor, Martin, and Anderson) affirmed. To proceed under § 2255(e)'s savings clause and bring a § 2241 habeas petition, a federal prisoner must satisfy five requirements: (1) throughout the petitioner's sentencing, direct appeal, and first § 2255 proceeding, this Court's precedent had specifically and squarely foreclosed the claim raised in the § 2241 petition; (2) after the petitioner's first § 2255 proceeding, the Supreme Court overturned that binding precedent; (3) that Supreme Court decision applies retroactively on collateral review; (4) as a result of that Supreme Court decision, the petitioner's current sentence exceeds the statutory maximum; and (5) the savings clause of § 2255(e) reaches his claim. Mr. Samak failed to show that binding precedent foreclosed his claims at the time he was sentenced.

The district court properly dismissed the petition.

Judge Pryor concurred, but wrote separately to explain that the Court's rule, contrived in *Bryant v. Warden, FCC Coleman*, No. 12-11212 (May 5, 2014), is contrary to the text of the § 2255(e) savings clause. Judge Pryor would only permit prisoners to bring § 2241 claims that challenge the execution of the prisoner's sentence because only those claims cannot be adequately remedied under § 2255.

United States v. Kirk, No. 13-15103 (September 16, 2014)

Issues.

1. Does a prior conviction for burglary under Fla. Stat. 810.02(1)(b) qualify as a violent felony for purposes of the Armed Career Criminal Act?
2. Are prior offenses committed on different occasions from one another, where the charging documents show that the offenses were committed on three separate dates?
3. Is 18 U.S.C. § 922(g) a facially unconstitutional exercise of Congress's Commerce Clause power?

Held.

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

Background and procedural history. Mr. Kirk was convicted of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g). The sentencing court found that he had three prior convictions for violent felonies or serious drug offenses and therefore sentenced him under the ACCA. Mr. Kirk, on appeal, argued that his prior burglary offenses did not qualify as violent felonies because he was convicted under Fla. Stat. § 810.02(1)(b), which prohibits entering or remaining in a dwelling with intent to commit an offense therein. Mr. Kirk argued that remaining in a dwelling poses less of a risk of physical injury than entering a dwelling, and therefore should not qualify as a violent felony. Mr. Kirk also argued that the Government failed to prove that his prior burglary convictions were for offenses that were committed on different occasions from one another. Finally, Mr. Kirk argued that 18 U.S.C. § 922(g) is an unconstitutional exercise of Congress's Commerce Clause power as applied to purely intrastate conduct, such as mere possession of a firearm.

Analysis. The Eleventh Circuit (per curiam, Judges Hull, Marcus, and Anderson) affirmed. First, remaining in a dwelling to commit an offense qualifies as generic burglary under the ACCA's definition of violent felony. Second, the Government presented charging documents to show that Mr. Kirk's prior offenses occurred on three separate dates. This is sufficient proof because the Government used *Shepard*-approved documents to prove that the offenses arose from separate and temporally distinct criminal episodes. Finally, 18 U.S.C. § 922(g)'s jurisdictional element, requiring the minimum nexus that the firearm have been in interstate commerce at some time, is sufficient to bring the statute within the commerce powers of Congress.

Winthrop-Redin v. United States, No. 13-10107 (Sept. 23, 2014)

Issue. Did the district court err in denying the movant an evidentiary hearing on the issue of whether his counsel rendered ineffective assistance?

Holding. No.

Background and procedural history. Mr. Winthrop-Redin, a boat crew member in a drug-smuggling operation, pleaded guilty to conspiracy with intent to distribute five kilograms of cocaine. Two years after sentencing, Mr. Winthrop-Redin filed a *pro se* 28 U.S.C. § 2255 petition claiming that his plea was coerced by the ship's captain (later revealed to be a Government informant) and that his lawyer rendered ineffective assistance by instructing him to not report that threat to the district court. Mr. Winthrop-Redin supported his motion only with his own affidavit and did not list the specifics of the alleged threat. The district court denied habeas relief without an evidentiary hearing. The Eleventh Circuit granted a Certificate of Appealability.

Analysis. The Eleventh Circuit (Judge Marcus for Judges Hull and Black) affirmed, finding that because Mr. Winthrop-Redin "put forward only implausible and conclusory allegations," no evidentiary hearing was required. Slip op. at 2, *citing* § 2255(b) and *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002). Although Mr. Winthrop-Redin's motion described a threat allegedly rendered prior to his indictment, he did not give specifics as to the purported post-indictment threat by the ship captain. It was therefore not error to deny Mr. Winthrop-Redin an evidentiary hearing because his pleadings failed to "put forward specific and detailed factual assertions" that, if true, would entitle him to relief. Slip op. at 14 (internal citation omitted). The Court further noted that Mr. Winthrop-Redin waited two years before alerting the district court of the alleged threats, and highlighted Mr. Winthrop-Redin's sworn statements during his change-of-plea hearing that he was pleading guilty voluntarily, had not been threatened, and was satisfied with counsel. Mr. Winthrop-Redin also failed to specifically allege that he told his attorney he had been threatened with death unless he pleaded guilty.

United States v. Mathis, No. 13-13109 (September 24, 2014)

Issues. Whether a defendant's use of a cell phone to call and send text messages constitutes the use of a computer, as that term is defined in 18 U.S.C. § 1030(e)(1), and warrants imposition of an enhancement under U.S.S.G. § 2G2.1(b)(6)?

Held. Yes.

Background and procedural history. A jury convicted Mr. Mathis of several child exploitation offenses and the district court sentenced him to 480 months in prison. The evidence at trial showed that Mr. Mathis communicated with minors via text messages on his cell phone.

On appeal, Mr. Mathis raised numerous grounds, including whether the district court erred in applying a 2-level enhancement under USSG §2G2.1(b)(6). This section applies if the defendant, for the purpose of producing sexually explicit material, used "a computer or an interactive computer service to . . . persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct." The guidelines commentary instructs that the word "computer" has "the meaning given that term in 18 U.S.C. § 1030(e)(1)." §2G2.1 cmt. (n.1).

Analysis. The Eleventh Circuit (Judges Hull, Marcus, and Black, per curiam) affirmed Mr. Mathis's convictions and sentence and remanded only for a scrivener's error in the judgment.

As a matter of first impression, the Court held that a cell phone is a "computer" within the meaning of 18 U.S.C. § 1030(e)(1). The Court agreed with the Eighth Circuit's decision in *United States v. Kramer*, 631 F.3d 900 (8th Cir. 2011), that the language of § 1030(e)(1) is broad and encompasses any device that uses a data processor. The Court specifically agreed with the Eighth Circuit's observation that "each time an electronic processor performs any task—from powering on, to receiving keypad input, to displaying information—it performs logical, arithmetic, or storage functions. These functions are the essence of its operation." Slip op at 37 (quoting *Kramer*, 631 F.3d at 903). The Court's rejection of Mr. Mathis's remaining arguments was not notable.

Reed v. Sec'y, Fla. Dep't of Corr., No. 13-10900 (September 24, 2014)

Issue. Was it an unreasonable application of Supreme Court law for the state court to deny Mr. Reed's claim that his trial counsel rendered ineffective assistance by failing to investigate and call a witness at trial?

Held. No.

Background and procedural history. Mr. Reed is a state prisoner serving a 35-year term of imprisonment as a result of his convictions for two counts of vehicular homicide and two counts of leaving the scene of an accident that resulted in death. He filed a motion for post-conviction relief in state court, arguing that his trial counsel's failure to locate, interview, and call Jarvis Coleman as a witness amounted to ineffective assistance. Mr. Coleman would have testified, had he been called, that he didn't meet Mr. Reed the night of the incident. This would have impeached the testimony of the state's witness, Willie Richards, who testified at trial that Mr. Reed drove both him and Mr. Coleman around the night of the incident. The state court denied post-conviction relief and Mr. Reed filed a § 2254 petition for a writ of habeas corpus in federal court. The federal district court granted Mr. Reed's petition, finding that no reasonable lawyer would have failed to contact Mr. Coleman to find out what he knew and that Mr. Coleman's testimony established prejudice. The State appealed.

Analysis. The Eleventh Circuit (Judge Marcus for Judge Hull) reversed. Applying AEDPA's deferential standard of review, the Court held that it was not an unreasonable application of Supreme Court law for the state court to find that Mr. Reed had not been prejudiced by his attorney's failure to find and interview Mr. Coleman. First, there was reasonable basis in the record to find that Mr. Coleman was unavailable around the time of trial. Second, there was a reasonable basis to find that Mr. Coleman's testimony was not credible. Third, Mr. Coleman's testimony, even if credited, would not have directly exculpated Mr. Reed. Fourth, there was substantial remaining evidence implicating Mr. Reed.

Judge Hill dissented for the reasons stated by the district court.

United States v. Gonzalez-Flores, No. 13-15430 (July 18, 2014)

Issue. Did the district court plainly err during Mr. Gonzalez-Flores's guilty plea hearing by failing to record or have transcribed (1) the English-to-Spanish and Spanish to English communications between him and the court interpreter, or (2) the interpreter's identification, qualifications, or oath?

Held. No.

Background and procedural history. Mr. Gonzalez-Flores pleaded guilty to one count of conspiring to distribute and possess with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. § 846. During his guilty plea hearing, the district court did not record or transcribe the Spanish-to-English and English-to Spanish exchanges between him and the court interpreter. Nor did the court record or transcribe the interpreter's identification, qualifications, or oath. Mr. Gonzalez-Flores argued that the absence of such record prevented new counsel on appeal from reviewing the record to determine the voluntariness of his plea.

Analysis. The Eleventh Circuit (per curiam, before Judges Tjoflat, Wilson, and Anderson) affirmed. Although following a trial a defendant has the right to a complete transcript, neither the Supreme Court nor the Eleventh Circuit has interpreted the Court Reporter Act, 28 U.S.C. § 753(b) to require a compete transcript in the context of plea hearings. Furthermore, the regulations promulgated under that Act provide that in the case of testimony made through an interpreter, it will be assumed that answers are made in a foreign language and interpreted, with only the English translations being recorded. In addition, no binding authority requires the district court to record the court interpreter's identification, qualifications, or oath, and the plain language of the Court Interpreters Act, 28 U.S.C. § 1827, likewise does not compel the inclusion of that information in the transcript.

United States v. Means, No. 13-14266 (July 18, 2014)

Issue. Does a sentencing court have jurisdiction to rescind a prisoner's obligation to make financial payments on the fine and special assessment imposed upon the prisoner, on the basis that the BOP has set a payment schedule that the prisoner cannot meet or that the BOP lacks authority to set such payment schedule?

Held. No.

Background and procedural history. A federal prisoner, proceeding *pro se*, moved the district court to rescind his obligation to make further financial payments on his criminal fine and special assessment. He argued that the BOP had set a payment schedule for the fine that he was unable to meet and that the BOP lacked authority to set such a payment schedule. The district court dismissed the petition.

Analysis. The Eleventh Circuit (per curiam, Judges Marcus, Wilson, and Rosenbaum) affirmed. A sentence imposing a fine is a final judgment. It may be modified or remitted upon the motion of the government under 18 U.S.C. § 3573, but the government made no such motion here. Mr. Means's motion could be construed as a collateral attack on the execution of his judgment, but

such an attack must be brought as a petition for habeas corpus under 28 U.S.C. § 2241. Such a petition must be brought in the district where the inmate is incarcerated. The district court would have been correct to dismiss Mr. Means's construed § 2241 petition, therefore, because he failed to file it in the district where he is currently incarcerated.

United States v. Douglas, No. 14-10439 (July 23, 2014)

Issue. Did the district court plainly err at trial by delivering an *Allen* charge?

Held. No.

Background and procedural history. On direct appeal, Ms. Douglas challenged the district court's decision to deliver an *Allen* charge to the jury. Ms. Douglas argued that the charge was coercive because it inducted the jury to deliver a split verdict, finding her guilty of only of one of the two counts.

Analysis. The Eleventh Circuit (per curiam, before Judges Marcus, Wilson, and Rosenbaum) affirmed. The Court, looking to the totality of the circumstances, held that the charge was not coercive. A split verdict does not necessarily indicate coercion. In this case, the district court gave the pattern *Allen* charge, which has been approved by the Eleventh Circuit, and did not make any additional comments that were partial or one-sided.

United States v. Lockett, No. 14-10144 (August 13, 2014)

Issue. On direct appeal, was the record sufficiently developed to hear Mr. Lockett's claim that he was denied effective assistance of counsel below?

Held. No.

Background and procedural history. Mr. Lockett pleaded guilty, pursuant to a written plea agreement, of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). On appeal, Mr. Lockett argued that his court-appointed trial counsel rendered ineffective assistance by advising him to sign a plea agreement that unnecessarily admitted that he used the firearm during an armed robbery. That fact (1) was not necessary for conviction under § 922(g)(1), (2) was used to enhance his sentence under USSG §§ 2K2.1(c), 2X1.1, and 2B3.1, and (3) all but assured his conviction for robbery in his still-pending state proceeding.

Analysis. The Eleventh Circuit (per curiam, Judges Tjoflat, Martin, and Jordan) affirmed. Although the case presented a close call, the Court applied its general rule favoring resolution of ineffectiveness claims in habeas proceedings. The record is not sufficiently developed at this stage to decide whether Mr. Lockett's counsel's performance was deficient or whether Mr. Lockett was prejudiced by deficient performance.

United States v. Baxter, No. 13-14104 (Aug. 21, 2014)

Issues.

1. Did the district court abuse its discretion in denying the defendant's motion to dismiss the two counts of his indictment charging him with being a felon in possession of a firearm, in light of the defendant's argument that his prior Alabama forgery convictions were void *ab initio*?
2. Did the district court err in denying the defendant's motion to dismiss in light of the defendant's argument that the district court incorrectly determined that his claim failed because he could not properly challenge the validity of his predicate convictions?

Held.

1. No.
2. No.

Background and procedural history. Mr. Baxter was indicted for one count of being an unlicensed firearm dealer in violation of 18 U.S.C. § 922(a)(1)(A), and two counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The indictment alleged that Mr. Baxter had three prior Alabama convictions of forgery. Prior to trial, Mr. Baxter moved to dismiss the felon-in-possession counts, arguing that his prior forgery convictions were void *ab initio* under Alabama state law. The district court denied his motion, finding that (1) Mr. Baxter was not asserting a facial defect in the indictment or the manner in which it was commenced, but rather challenging the sufficiency of the evidence; (2) even if Mr. Baxter could use a pretrial motion to test the sufficiency of the government's evidence, he could not raise a collateral attack on the validity of his prior felony convictions under *Lewis v. United States*, 445 U.S. 55, 100 (1980); and (3) under Alabama law, at least two of the forgery convictions did not appear to be invalid, and a state court had not yet set them aside. Mr. Baxter pled guilty to all three counts in the indictment, reserving the right to appeal the denial of the motion.

On appeal, Mr. Baxter argues that a motion to dismiss was the appropriate mechanism for the district court to resolve his challenge to the felon-in-possession counts, by relying on the Eleventh Circuit's decision in *United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982). He further argues that the district court incorrectly determined that his claim failed because he could not properly challenge the validity of his predicate convictions.

Analysis. The Eleventh Circuit (per curiam, Judges Pryor, Martin, and Jordan) affirmed Mr. Baxter's conviction. The Court held that the indictment sufficiently charged Mr. Baxter with being a felon in possession. The Court reasoned that the indictment presented the essential elements of the charged offense. Specifically, the indictment notified Mr. Baxter of the charges to be defended against, and also enabled him to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense. The Court held that its prior decision in *Zayas-Morales* is distinguishable because the stipulated facts in *Zayas-Morales* supported the procedural dismissal there, and no such stipulated facts existed in Mr. Baxter's case.

The Court also explained that a court ruling on a motion to dismiss may not look beyond the four corners of the indictment, nor may it properly dismiss an indictment for insufficient evidence. Furthermore, a district court may not dismiss an indictment on a determination of facts that should have been developed at trial. The Court reasoned Mr. Baxter's motion to dismiss the indictment

impermissibly asked the district court to both look beyond the indictment (by calling into question the validity of his prior convictions) and to dismiss for insufficient evidence (by arguing that the government could not prove beyond a reasonable doubt that Mr. Baxter was a convicted felon under Alabama law).

United States v. Mickens, No. 12-13265 (August 29, 2014)

Issue. Does the simultaneous arrival of 6-10 police cars in a parking lot where Mr. Mickens and others were standing amount to a seizure under the Fourth Amendment?

Held. No.

Background and procedural history. Mr. Mickens was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), after a police officer saw him remove a firearm from his waistband and throw it beneath a vehicle. Before the district court, Mr. Mickens moved to suppress the officer's testimony about him having the pistol on the basis that he had been seized without probable cause. At the time, Mr. Mickens was standing in a parking lot at the rear of a strip mall with between 15 and 30 other people. Between 6 and 10 police cars, responding to a civilian complaint, pulled into the lot. Within 10 to 20 seconds of driving into the lot, the officer saw Mr. Mickens pull a handgun and toss it underneath a nearby car.

Analysis. The Eleventh Circuit (per curiam, Chief Judge Carnes, Judges Jordan, Rosenbaum) affirmed. The Court considered the factors set out in *United States v. Perez*, 443 F.3d 772 (11th Cir. 2006), to determine whether Mr. Mickens had been seized. Those factors include whether the citizen's path is blocked or impeded; whether identification is retained; the suspect's age, education, and intelligence; the length of the suspect's detention and questioning; the number of police officer's present; the display of weapons; any physical touching of the suspect; and the language and tone of voice of the police. The Court held that only one factor favored Mr. Micken's position, the number of officers present. But all of the other factors weighed against him—there were multiple entrances to the parking lot, and therefore his path was not impeded; his identification had not been requested or retained; he had not been questioned for any period of time; and none of the officers had displayed their weapons. Accordingly, under the totality of the circumstances, the Court held that Mr. Mickens had not been seized.