SUMMARIES OF RECENT CASELAW

OCTOBER 1, 2013 – DECEMBER 31, 2013

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DECISIONS OF THE UNITED STATES SUPREME COURT

Kansas v. Cheever, No. 12-609 (Dec. 11, 2013)

Issue. Does the Fifth Amendment bar the prosecution from offering evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence that he lacked the requisite mental state to commit a crime?

Held. No.

Background and procedural history. Mr. Cheever and friends were cooking and smoking methamphetamine when law enforcement arrived to arrest him on an unrelated warrant. Mr. Cheever shot and killed a sheriff while attempting to elude arrest. The State of Kansas indicted him for murder, but dismissed the case without prejudice after the Kansas Supreme Court ruled the state's death penalty scheme unconstitutional. The United States subsequently indicted Mr. Cheever under the Federal Death Penalty Act, 18 U.S.C. § 3591 *et seq*. The district judge ordered a psychiatric evaluation of Mr. Cheever after he filed notice that he intended to pursue an intoxication defense. The federal case proceeded to trial but was then dismissed without prejudice when the defense counsel became unable to continue. In the interim, the U.S. Supreme Court had reversed the Kansas Supreme Court and held that the Kansas death penalty scheme was constitutional. The State of Kansas then indicted Mr. Baxter once again for murder.

Mr. Baxter presented a voluntary-intoxication defense at his state trial, arguing that his methamphetamine use made it impossible for him to have committed premeditated murder. He called an expert witness in support of this theory of defense. The state court judge allowed the prosecutor, over Mr. Cheever's Fifth Amendment objection, to call as a rebuttal witness the psychiatrist who had performed Mr. Cheever's evaluation in the federal case. The jury adjudged Mr. Cheever guilty, and the judge agreed with jurors' recommendation that he be sentenced to death.

Mr. Cheever appealed to the Kansas Supreme Court, which reversed, relying on the U.S. Supreme Court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981), which held that admission of a court-ordered psychiatric examination violated the defendant's Fifth Amendment rights when the defendant neither requested the examination nor put his mental capacity in dispute at trial. The Kansas Supreme Court recognized that *Buchanan v. Kentucky*, 483 U.S. 402 (1987), held that the state could offer such evidence for the limited purpose of rebutting a mental-status defense, but found the case distinguishable since voluntary intoxication is not a "mental disease or defect" under Kansas law.

Analysis. The Supreme Court (Justice Sotomayor for a unanimous Court) reversed. The Court disavowed the Kansas Supreme Court's attempted distinction of *Buchanan* because the ruling in that case was that the prosecution may present psychiatric evidence gleaned from a court-ordered examination in rebuttal where the defendant asserts that he lacked the requisite mental state to commit an offense. "Mental status" is a broader term than "mental disease or defect," and a defendant does not necessarily assert a "mental disease or defect" in presenting a defense based on

"mental status." Accordingly, the Court found that this case was governed by *Buchanan*, which it expressly reaffirmed.

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

PUBLISHED OPINIONS

United States v. Troya, No. 09-12716 (Oct. 2, 2013)

Issues.

1. Did the district court err in admitting into evidence at trial four uncharged acts of misconduct involving firearms and drug trafficking under Fed. R. Evid. 404(b)?

2. Did the district court wrongly exclude expert testimony from a forensic psychologist to rebut the Government's assertion that the defendant's future dangerousness was an aggravating factor?

3. Did the district court err in admitting testimony based on the defendant's statements to a Government psychologist in violation of Fed. R. Crim. P. 12.2(c)(4) and the Fifth Amendment?

Held.

1. No.

2. Yes; however, it was harmless error.

3. No.

Background and Procedural History. Mr. Troya and his co-defendant, Mr. Sanchez, were tried in federal district court and sentenced to death for the murder of two young children and to life imprisonment for the murder of the childrens' parents.

In a pretrial notice, the Government listed Mr. Troya's "future dangerousness" as an aggravating factor and intended to use it as justification for seeking the death penalty. However, prior to the penalty phase of trial, the Government withdrew the future dangerousness argument as an aggravating factor after reviewing the testimony of expert witness Dr. Cunningham. When Mr. Troya attempted to call Dr. Cunningham as a rebuttal witness and as a source of mitigating evidence, the Government argued that because it had withdraw its notice of intent to argue "future dangerousness" as an aggravating factor, there was nothing for Mr. Troya to rebut and that Dr.

Cunningham's testimony "was not mitigation evidence because its substance and purpose were not specific to Troya." Slip. op. at 10-11.

Mr. Sanchez provided notice of all the mental health experts he intended to rely on during the penalty phase and the court granted the Government's request pursuant to Fed. R. Crim. P. 12.2 to have Mr. Sanchez evaluated by a Government expert. At trial, Mr. Sanchez presented two mental health experts who testified to Mr. Sanchez's past abuse, emotional problems, family situation, provided risk assessment reports, and identified risk factors relating to Mr. Sanchez. In rebuttal, the government presented testimony of Dr. Brannon, who contradicted the testimony of Mr. Sanchez's experts.

Over the defendants' objections, the court also admitted, pursuant to Fed. R. Evid. 404(b), evidence of prior bad acts.

Analysis. The Eleventh Circuit (Judge Wilson for Judges Tjoflat and Marcus) affirmed, based on the following.

Exclusion of testimony regarding future dangerousness. Mr. Troya argued that he was denied the ability to rebut the allegation of future dangerousness put at issue by the Government. Defendants are allowed to present evidence to rebut any allegation of future dangerousness, even if it is *merely implied* by evidence presented at trial rather than explicitly argued when the Government puts it at issue. *See Kelly v. South Carolina*, 534 U.S. 246, 252-57 (2002). The Eleventh Circuit noted that "through the introduction of extensive evidence, the government expended much effort to establish that Troya was a tremendously dangerous individual." Slip op. at 15. The Court held that Mr. Troya had a right to rebut the evidence with Dr. Cunningham's testimony, and also a right to admit the testimony as non-statutory mitigating evidence under 18 U.S.C. § 3592(a)(8), and the failure to allow the evidence was an abuse of discretion on the part of the district court.

However, the Court went on to determine that the error was harmless beyond a reasonable doubt because there was not a "reasonable possibility" that the inclusion of Dr. Cunningham's testimony would have changed the verdict. The Court based this determination on its finding that Dr. Cunningham's testimony would not have changed the outcome because it would have been limited to establishing facts irrelevant to Mr. Troya's guilt.

Admission of Government's rebuttal evidence. The Court wrote that if the defendant opens the door to psychiatric testimony, he waives his Fifth Amendment protection against self-incrimination. The Eleventh Circuit also rejected Mr. Sanchez's argument that the Government's expert exceeded the scope of his evidentiary showing.

Other issues. The Eleventh Circuit affirmed the district court's admission of prior bad acts evidence under Rule 404(b) and found that the nine other issues raised were meritless.

United States v. Williams, No. 12-15313 (Oct. 2, 2013)

Issues.

1. Was the firearm introduced at trial obtained during an unlawful search?

2. Did the district court err by sustaining the Government's *Batson* objection during jury selection?

3. Was there sufficient evidence on whether the firearm was possessed in furtherance of a drug-trafficking crime?

Held.

1. No.

2. No.

3. Yes.

Background and Procedural History. Mr. Williams was charged with possession of a firearm by a convicted felon, possession with intent to distribute crack cocaine, and possession of a firearm in furtherance of a drug trafficking crime. After unsuccessfully moving to suppress the fruits of a search of his home and his person, Mr. Williams proceeded to trial. During jury selection, the Government raised several *Batson* challenges on the theory that Mr. Williams, an African-American, was using his peremptory strikes to discriminate against prospective Caucasian or Hispanic jurors. As to one prospective juror, a Mr. McCarthy, Mr. Williams's race-neutral explanation was that Mr. McCarthy was an Air Force Reserve officer who had previously been a victim of a crime. The district court sustained the *Batson* challenge as to Mr. McCarthy, and he served on the jury.

Mr. Williams's Rule 29 motion and renewed motion were denied, and the jury adjudged him guilty.

Analysis. The Eleventh Circuit (Judge Hull, for Judge Martin and Northern District of Florida Judge Hinkle) affirmed. The Eleventh Circuit determined that it need not decide the *Batson* issue because, even if the district court misapplied *Batson*, the denial of a peremptory strike is not per se reversible error because there is no constitutional right to peremptory challenges. *See Rivera v. Illinois*, 556 U.S. 148, 152, 129 S. Ct. 1446, 1450 (2009). Mr. Williams could not demonstrate that he was prejudiced by the alleged error because it was harmless.

The Court also rejected Mr. Williams's challenge to the district court's denial of his motion to suppress and to the sufficiency of the evidence.

United States v. Lang, No. 12-13608 (Oct. 3, 2013)
***appeal from the Northern District of Alabama

Issue. Is an indictment for separate 31 U.S.C. § 5324(a)(3) currency structuring offenses defective for failure to state an offense where none of the counts charged the use of more than one check in an amount less than $10,000?

Held: Yes.

Background and Procedural History: Mr. Lang was indicted on 85 counts of violating 31 U.S.C. § 5324(a)(3). The Government's theory was that Mr. Lang received from one source 21 payments exceeding $10,000 over a period of eight months, had those larger payments broken down into multiple checks of less than $10,000 and then cashed those checks separately to evade the Department of the Treasury's $10,000 daily reporting requirement. The jury acquitted him of 15 of those counts and convicted him of the other 70. Mr. Lang raised several issues on appeal, including the sufficiency of the indictment. He argued that the indictment did not, by any reasonable construction, charge an offense for which he was convicted.

Analysis: The Eleventh Circuit (Chief Judge Carnes, for Judge Tjoflat and Southern District of Florida Judge Marra) reversed, finding that the indictment did not provide the necessary factual allegations. The Court found that there was no reasonable construction under which the indictment charged all of the elements of the offense. The Court came to this conclusion based upon the fact that the indictment consisted of 85 counts, each of which separately alleged that a single check in an amount less than $10,000 was structured. This was insufficient because the statute requires that there must be at least two checks together for a structuring charge to stand. The Court concluded by stating, "where no count in the indictment charges a crime, the defendant is entitled to have the judgement vacated and the case remanded with instructions that the indictment is dismissed." Slip op. at 8.

United States v. Hargrove, No. 12-13231 (Oct. 15, 2013)

Issues.

1. Is a defendant, who is subject to a statutory mandatory minimum, eligible for 18 U.S.C. § 3582(c)(2) relief when he was sentenced above that minimum pursuant to an upward departure and a subsequent, retroactively-applicable guideline amendment lowers the high end of his guidelines range?

2. Did the district court error in concluding it lacked the authority to consider the defendant's motion?

Held.

1. Yes.

2. Yes.

Background and Procedural History. In 2010, Mr. Hargrove was convicted of four counts of distributing crack cocaine. Because Mr. Hargrove had a prior felony drug conviction, he faced a mandatory 120-month statutory minimum and a guidelines range of 120 to 125 months. The district court departed upward under USSG §4A1.3, increasing his guidelines range to 210 to 262 months and sentenced Mr. Hargrove to 240 months. In 2012, Mr. Hargrove moved to reduce his sentence under 18 U.S.C. § 3582(c)(2) pursuant to USSG Amendment 750. The district court denied the motion because Mr. Hargrove's guidelines range was based on statutory mandatory minimums.

Analysis. The Eleventh Circuit (Judge Kravitch, for Judges Pryor and Tjoflat) vacated the denial of Mr. Hargrove's motion and remanded. The Court held that Amendment 750 lowered Mr. Hargrove's applicable guidelines range and that the district court erroneously concluded that it lacked the authority to reduce Mr. Hargrove's sentence under § 3582(c)(2) because his sentence was not exclusively based on a statutory mandatory minimum. The Eleventh Circuit concluded that Amendment 750 lowered his applicable guideline range by reducing the high-end from 125 months to 120 months and expressed no view on whether Mr. Hargrove should receive a sentence reduction.

United States v. McKinley, No. 12-14655 (Oct. 15, 2013)

Issue. In light of *Alleyne v. United States*, 133 S. Ct. 2151 (2013), which was decided after the defendant's sentencing hearing, did the district court plainly err by imposing a seven-year mandatory minimum sentence based on facts not found by the jury?

Held. No.

Background and procedural history. The grand jury indicted Mr. McKinley for interfering with commerce by violence by robbing a gas station at gunpoint and for using and carrying a firearm during and in relation to a crime of violence, an offense that implicates a five-year mandatory minimum sentence. However, the indictment cited 18 U.S.C. § 924(c)(1)(A)(ii), the statutory provision that prescribes a seven-year mandatory minimum sentence for brandishing a firearm during and in relation to a crime of violence.

After a jury trial, Mr. McKinley was convicted of both charges. At sentencing, the district court advised Mr. McKinley of his convictions and the possible punishment stating, "I can give you a five-year mandatory minimum consecutive [sentence] if I think you just carried [the firearm] or used it. If I think that you brandished it, then I can give you a seven-year mandatory minimum." The court ultimately found that Mr. McKinley did brandish the firearm, imposed the seven-year mandatory minimum sentence, and varied upward for a sentence of 209 months in prison.

Analysis. The Eleventh Circuit (per curiam, before Judges Tjoflat, Pryor, and Black) affirmed. The Court noted that after sentencing and while this appeal was pending, the Supreme Court decided *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013). In *Alleyne*, the Supreme Court held that any fact that increases a defendant's mandatory minimum sentence is an element of the offense that must

be submitted to the jury and proven beyond a reasonable doubt, overruling *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406 (2002), which allowed such findings of fact to be made by the sentencing judge. Here, the district court did indeed judicially recognize the fact that Mr. McKinley "brandished a firearm." However, the Eleventh Circuit held that because Mr. McKinley failed to raise a constitutional objection in the district court, challenging the issue for the first time on appeal subjected him to plain error review. And since *Alleyne* had not yet been decided at the time of Mr. McKinley's sentencing, the district court could not have plainly erred, particularly in light of the overwhelming evidence that Mr. McKinley brandished the gun.

The Court also rejected Mr. McKinley's challenges to an obstruction-of-justice enhancement and to the upward variance.

United States v. Elliot, No. 12-10553 (Oct. 18, 2013)
***appeal from the Northern District of Alabama

Issues.

1. Is an eyewitness identification unduly suggestive if there is a substantial likelihood that the witness's identification was not based on her own recollection but instead on the internet, printed flyers, and the viewing of surveillance videos?

2. Do youthful offender adjudications from the State of Alabama count as prior felony convictions for the purposes of applying the USSG §4B1.1 career-offender enhancement?

Held.

1. No.

2. Yes.

Background and Procedural History. Mr. Elliot was charged with two counts of robbery and one count of brandishing a firearm during and in relation to a crime of violence. At trial, Mr. Elliot unsuccessfully objected to the testimony from a putative eyewitness, who chose his image from a photographic lineup. The jury adjudged Mr. Elliot guilty on all counts.

At sentencing, the district court imposed a sentence of life in prison after applying the §4B1.1 career-offender enhancement, based in part on an offense that was adjudicated under the State of Alabama's youthful offender statute. Mr. Elliot's sentence in that youthful offender adjudication was three years of probation, and he eventually served a term of imprisonment after violating the terms of his probation. The district court rejected Mr. Elliot's argument that his youthful offender adjudication does not constitute a conviction within the meaning of §4B1.1 because, under the Alabama youthful offender scheme, at no point does the youthful offender receive a "conviction."

Analysis. The Eleventh Circuit (per curiam, before Judges Pryor, Black, and International Trade Judge Restani) affirmed. Section 4B1.1(a) provides that a defendant is a career offender if (1) he

was at least 18 years old at the time of the charged offense, (2) his charged offense was a felony that is either a crime of violence or a controlled substance offense, and (3) he has at least two prior felony convictions for crimes of violence or controlled substances. The sentencing guidelines defines a "prior felony conviction" as:

> [A] prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. *A conviction for an offense committed at age eighteen or older is an adult conviction.* A conviction for an offense 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 was convicted.

USSG §4B1.2, comment (n.1) (emphasis added).

The Alabama Youthful Offender Act states that, if a defendant is adjudicated as a youthful offender, such adjudication "shall not be deemed a conviction of a crime; provided, however, that if he is subsequently convicted of a crime, the prior adjudication as youthful offender shall be considered." Ala. Code § 15-19-1(b). However, the Eleventh Circuit determined the question at issue was not whether Mr. Elliot was convicted as an adult, but whether he was "convicted" within the meaning of the career offender guideline. The Court held that the word "conviction" was to be defined under federal law rather than state law and that it was "not bound by the fact that Alabama law does not consider a youthful offender adjudication to be a conviction." Slip op. at. 10.

The Court also summarily rejected Mr. Elliot's suggestive identification argument.

Parris v. Warden, No. 12-15517 (Oct. 24, 2013)

***appeal from the Northern District of Alabama

Issue. Did the district court err in dismissing the defendant's habeas corpus petition, alleging that the state court violated his Sixth Amendment rights to a speedy trial?

Held. No.

Background and procedural history. Mr. Parris filed a habeas corpus petition pursuant to 28 U.S.C. § 2254. He argued that his state conviction and sentence were invalid because his Sixth Amendment right to a speedy trial had been violated by the forty-month delay between his arrest in April 1997 and conviction in August 2000, resulting in "actual prejudice" to his defense. The district court dismissed the petition.

Analysis. The Eleventh Circuit (per curiam, before Judges Dubina, Wilson, and Jordan) affirmed. The Eleventh Circuit concluded that the state court's application of the factors outlined in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972), to determine whether Mr. Parris's speedy trial rights had been violated was neither contrary to nor an unreasonable application of clearly established federal law. Accordingly, the district court did not err in dismissing Mr. Parris's petition. In reaching this conclusion, the Eleventh Circuit evaluated the *Barker* factors including: (1) the length of delay;

(2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.

With respect to the first factor, the parties agreed that a forty-month delay between Mr. Parris's April 1997 arrest and August 2000 trial created a presumption of prejudice. In regard to the third factor, it was clear in the record that Mr. Parris asserted his Sixth Amendment right. The Court examined the remaining factors as follows:

Reason for delay. The Court held that the reasons stated by the prosecution for the cause of delay were legitimate. The state trial court was operating under a severe backlog of cases and, in order to deal with the overcrowded docket and crowded jail system, prioritized cases where defendants were incarcerated due to pending charges. The fact that Mr. Parris's trial was continued generally because he was incarcerated on another matter did not amount to a deliberate attempt by the state to hinder the defense.

Prejudice to the defendant. Per *Doggett v. United States*, 505 U.S. 647, 654, 112 S. Ct. 2686, 2692 (1992), a defendant can demonstrate actual prejudice by showing oppressive pretrial incarceration, anxiety and concern, or "the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence." First, the state court reasonably found that the unavailability of three potential defense witnesses did not adversely impact Mr. Parris's defense because the witnesses were offered solely to bolster his self-defense claim where the trial court already concluded that the victim was the first aggressor. Second, Mr. Parris provided no evidence to show that he would have been considered for parole between his unrelated conviction in January 1999 and his trial for attempted murder. Finally, Mr. Parris could not show that the state court's finding that the detainer did not impact his eligibility for parole or his ability to participate in programs within the prison system was based on an unreasonable determination of the facts in light of the evidence presented during the evidentiary hearing on his speedy-trial claim.

United States v. Robertson, No. 12-10046 (Nov. 12, 2013)

Issues.

1. Did the district court abuse its discretion in denying the defendant's motion to dismiss the indictment on the ground that it was premised on information from statements the defendant made under an oral grant of immunity?

2. Did the district court clearly err in sustaining the Government's three *Batson* challenges to the defendant's attempt to peremptorily strike the only three African-American members of the jury venire?

3. Is the element that a defendant act "for the purpose of . . . maintaining or increasing position in an enterprise," within the meaning of the violent crimes in aid of racketeering ("VICAR") statute, 18 U.S.C. § 1959(a)(1), satisfied by a showing that the defendant committed two murders because it was expected of him by reason of his membership in a white supremacist organization?

Held.

1. No.

2. No.

3. Yes.

Background and procedural history. In 2002, Mr. Robertson was indicted for bank robbery. While cooperating with the Government in hopes of a reduced sentence, Mr. Robertson made inculpatory statements regarding a pair of brutal murders of two homeless persons (one of whom was African-American) that he and other members of "Tampa Blood and Honour," a white supremacist group, committed in 1998. The written cooperation agreement promised immunity for all information pertaining to the bank robbery, not as to other crimes, but Mr. Robertson maintained that the prosecutor made an unrestricted, oral offer of immunity.

Several years later, the Government indicted Mr. Robertson for two counts of murder for the purpose of maintaining and increasing his position in an enterprise engaged in racketeering activity, in violation of 18 U.S.C. § 1959(a)(1), the violent crimes in aid of racketeering ("VICAR") statute. The district court denied Mr. Robertson's motion to dismiss the indictment because it credited testimony of the original prosecutor and defense attorney that there was no written or oral grant of immunity. At trial, the court sustained the Government's *Batson* objections to Mr. Robertson's attempt to peremptorily strike the only three African-American members of the jury venire. After the close of the Government's case-in-chief, the district court denied Mr. Robertson's motion for judgment of acquittal due to the Government's failure to present evidence that Mr. Robertson committed murder for the purposes of maintaining or increasing his position in the white supremacist group. The jury adjudged Mr. Robertson guilty on all counts.

Analysis. The Eleventh Circuit (Judge Dubina, for Judges Jordan and Cox) affirmed the district court.

VICAR issue. The VICAR statute provides that "[w]hoever . . . for the purpose of . . . maintaining or increasing position in an enterprise engaged in racketeering activity, murders . . . any individual in violation of the laws of any State or the United States . . . shall be punished by death or life imprisonment." 18 U.S.C. § 1959(a)(1). The statute does not define the "for the purpose of . . . maintaining or increasing position in an enterprise" element. The Eleventh Circuit joined the First, Second, and Fourth Circuits in ruling that this element is satisfied if the jury "could properly infer that [the defendant] committed [murder] because he knew it was expected of him by reason of his membership [in the enterprise] or that he committed [murder] in furtherance of that membership." Slip op. at 26, *quoting United States v. Whitten*, 610 F.3d 168, 178-79 (2d Cir. 2010). The Court therefore rejected Mr. Robertson's argument that the Government failed to prove he committed the two murders in order to maintain or increase his position with Tampa Blood and Honour, noting testimony that the group saw African-Americans and homeless persons as inferior people who should be eliminated and that Mr. Robertson and others bragged to the leader of the group about the murders.

Other issues. The Court rejected Mr. Robertson's challenge to the district court's *Batson* rulings and held that the district court did not abuse its discretion in denying Mr. Robertson's motion to dismiss because its decision to credit the testimony of the prosecutor and defense attorney in Mr. Robertson's bank robbery case over Mr. Robertson's testimony was not clearly erroneous---that is, it was not so "contrary to the laws of nature, or . . . so inconsistent or improbably on its face that no reasonable factfinder could accept it." Slip op. at 15, *quoting United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002).

United States v. Siler, No. 12-14211 (Nov. 13, 2013)

Issue. Must the Government allege and prove that a defendant's assault on a corrections officer includes "physical contact" in order for that defendant to be subject to the twenty-year statutory maximum custodial sentence authorized by 18 U.S.C. § 111(b)?

Held. No.

Background and procedural history. While incarcerated at a federal correctional facility, Mr. Siler choked a corrections officer with a homemade rope. Several other officers managed to save their colleague from choking to death.

The Government indicted Mr. Siler with attempted murder of a corrections officer, in violation of 18 U.S.C. § 1114(3), and with assault of a corrections officer with a deadly or dangerous weapon, in violation of 18 U.S.C. § 111. The jury acquitted Mr. Siler of the attempted murder charge, but convicted him on the § 111 charge. In so doing, the jury expressly found on the verdict form that Mr. Siler committed the assault with the use of a deadly or dangerous weapon.

At sentencing, Mr. Siler argued that his indictment charged the assault count as a misdemeanor because it failed to allege physical contact, implicating a maximum possible custodial sentence of twelve months. Mr. Siler maintained that § 111 contains two offenses, misdemeanor assault and felony assault, and that the latter requires proof of physical contact. He argued that subsection (b) of the statute provided for, as its title suggests, an "Enhanced Penalty" that is implicated only if a defendant is adjudged guilty of felony assault under § 111(a) and is shown to have used a deadly or dangerous weapon. Since the Government did not allege or prove that Mr. Siler's assault included physical contact, Mr. Siler argued that he was necessarily convicted of only misdemeanor assault and that the § 111(b) was inapplicable.

The district court rejected Mr. Siler's reading of § 111, ruling that the jury's express finding that the assault involved a deadly or dangerous weapon implicated § 111(b), making his offense a felony that carries a twenty-year statutory maximum. The court varied upward and sentenced Mr. Siler twenty years in prison.

Analysis. The Eleventh Circuit (Judge Anderson, for Judge Edmondson and District of Maryland Judge Motz) affirmed. The Court held that § 111 actually established three distinct crimes and not, as Mr. Siler argued, two crimes and an enhancement. The three crimes are (1) misdemeanor assault, with a maximum of one year in prison, as set forth in § 111(a); (2) felony assault, with a maximum of eight years in prison, also set forth in § 111(a); and (3) assault with a deadly or dangerous weapon,

with a maximum of twenty years in prison, set forth in § 111(b). The Court explained that it was irrelevant if a defendant's crime would be a misdemeanor or a felony absent the use of the deadly or dangerous weapon. The fact of such a weapon's use means that a defendant commits a separate offense under § 111(b)---that is, the defendant commits "any acts described in [§ 111(a)] while using a deadly or dangerous weapon. Accordingly, physical contact is not a predicate act or an element of § 111(b), and the district court properly sentenced Mr. Siler because the jury found that he did commit one of the acts described in § 111(a) with the use of a deadly or dangerous weapon.

United States v. Garza-Mendez, No. 12-13643 (Nov. 15, 2013)

Issue. Did the district court err in not deferring, under the principle of comity, to a state court order that clarified the defendant's prior state sentence such that it was not an "aggravated felony" within the meaning of USSG §2L1.2(b)(1)(C)?

Held. No.

Background and procedural history. Mr. Garza-Mendez pleaded guilty to unlawful reentry into the United States by an aggravated felon. His Presentence Investigation Report applied the 8-level USSG §2L1.2(b)(1)(C) enhancement for previous conviction of an aggravated felony, contending that Mr. Garza-Mendez's 2007 conviction for family-violence battery in Georgia state court constituted such an "aggravated felony." Mr. Garza-Mendez objected, noting that a subsequent order from the Georgia court clarified that Mr. Garza-Mendez was actually sentenced to twelve months of probation—not incarceration—with the special condition that he serve just 30 hours in custody. A sentence of at least one year in custody is a prerequisite for an offense to be considered an "aggravated felony" within the meaning of the guideline. Mr. Garza-Mendez asked the district court to observe the principle of comity and defer to the Georgia court's clarification order.

The district court rejected Mr. Garza-Mendez's argument and applied the §2L1.2(b)(1)(C) enhancement. The court below also overruled Mr. Garza-Mendez's objections to the denial of the cultural assimilation departure and to the special condition of his supervised release requiring him to report from Mexico following his eventual deportation.

Analysis. The Eleventh Circuit (Judge Fay, for Court of International Trade Judge Goldberg) affirmed. The Court refused to adopt the Georgia court's clarifying order because (1) the judge who issued that order was not the sentencing judge, (2) the judge who issued the clarifying order "did nothing more than review" Mr. Garza-Mendez's 2007 sentence, and (3) the original, 2007 sentence stated that Mr. Garza-Mendez was sentenced to "12 months" of confinement. Slip op. at 6. The Eleventh Circuit emphasized this latter point and characterized the clarifying order as a suspension of the custodial sentence, which is not relevant to the consideration of whether a prior offense constitutes an "aggravated felony." *Id*. at 5-6, *citing United States v. Guzman-Bera*, 216 F.3d 1019, 1021 (11th Cir. 2000) (per curiam). The Court also referred to the Georgia clarification order as being "strategically timed" by Mr. Garza-Mendez's counsel, who sought it just a few months prior to his federal sentencing in the instant case. The Eleventh Circuit wrote that comity interests were not implicated in this case because the clarification order was an attempt by a state court to interpret

how a state conviction should be classified for federal sentencing purposes, which is a determination that a federal court owes no deference. *Id*. at 7-8.

The Eleventh Circuit also affirmed the district court's refusal to apply the cultural assimilation departure and its inclusion of the extraterritorial reporting special condition of Mr. Garza-Mendez's supervised release.

Dissent. Judge Martin dissented from the Court's holding as to the §2L1.2(b)(1)(C) enhancement. Under her reading of precedent, the Court was obliged to defer to the state court's clarifying order, and she criticized the majority for its "astonishing refusal" to do so. Slip op. at 19 (Martin, J. dissenting). Judge Martin observed that in the "vast majority" of criminal cases, deference to comity bars defendants from challenging the state court convictions that enhance their federal sentences. *Id*. at 20. She wrote that "[t]he Majority's refusal to credit the State Court's clarification of its own sentence is perplexing, especially given that, in my experience, we do not scrutinize State Court judgments in the same way when they result in a harsher sentence for criminal defendants." *Id*. (citing cases).

Judge Martin strongly disagreed with the Majority's characterization of the Georgia court's clarification order as the interpretation of a "state-sentence form as to federal law." *Id*. at 22. She noted that the clarifying order in no way attempted to apply federal law or to calculate Mr. Garza-Mendez's sentencing guideline range. Rather, "[a]ll that the order purports to do is clarify that Mr. Garza-Mendez's sentence for his family violence battery conviction was 12 months of probation, with the first 30 hours to be served in custody, rather than 12 months of incarceration." *Id*.

The judge further criticized the Majority for characterizing the clarifying order as "strategically timed" by Mr. Garza-Mendez's attorney "for the purpose of preventing an 8-level enhancement." *Id*. Judge Martin responded, "I see no reason at all why the State Court's order should be given any less deference because it was obtained by Mr. Garza-Mendez's attorney. Certainly we give no less deference to State Court sentencing orders obtained and presented by prosecutors." *Id*. at 22-23. She further pointed out that, because federal defendants are not permitted to collaterally attack a prior state conviction in federal court, Mr. Garza-Mendez had no recourse but to return to state court to do so, and concluded that "[i]t is hard to imagine why the Majority penalizes Mr. Garza-Mendez for going exactly to the place we tell criminal defendants to go when they wish to clarify their State Court judgments." *Id*. at 23. Judge Martin closed her dissent with the following: "Surely it is true that equal justice requires us to show deference and comity to State Court judgments in all situations, whether it serves to help or hurt a defendant in our Court." *Id*. at 23-24.

United States v. Sterling et al., No. 12-12255 (Nov. 21, 2013)

Issue. When does a trial "commence" within the meaning of Fed. R. Crim. P. 43?

Held. No later than the day of jury selection, irrespective of whether the defendant is physically present in the courtroom when prospective jurors enter.

Background and procedural history. Mr. Sterling and a co-defendant were indicted for armed

bank robbery and several firearm offenses. Mr. Sterling actively and lucidly participated at a pretrial hearing but, when his jury trial began, Mr. Sterling announced that he wanted nothing to do with the trial. Mr. Sterling agreed to meet with the judge, counsel, and the court reporter in an interview room. The judge advised Mr. Sterling that he had the right to present during jury selection and trial, but that if he were disruptive, he would be removed. Mr. Sterling responded with "nonsensical phrases." Slip op. at 5. The judge believed that Mr. Sterling understood what was taking place and told Mr. Sterling that if he persisted in his odd conduct he would be deemed to have waived his Fed. R. Crim. P. 43 right of presence.

Mr. Sterling remained in his cell throughout trial. He was able to view proceedings through a live, closed circuit video feed, and declined repeated offers to return to the courtroom. After the jury adjudged Mr. Sterling guilty on all counts, he moved for a new trial on the ground that he did not waive his right to be present at the commencement of trial. Whether or not Mr. Sterling was initially present was a meaningful consideration because in *Crosby v. United States*, 506 U.S. 255 (1993), the Supreme Court held that there can be no constructive Rule 43 waiver if the defendant is not present at the beginning of trial. The district court denied Mr. Sterling's motion.

Analysis. The Eleventh Circuit (Court of International Trade Judge Restani, for Judges Pryor and Anderson) held, in a case of first impression, that a trial "commences" within the meaning of Fed. R. Crim. P. 43 no later than the day of jury selection, regardless of whether the defendant is present at the time the prospective jurors enter the courtroom. The Court noted its earlier decision in *United States v. Bradford*, 237 F.3d 1306, 1310 (11th Cir. 2001), that a trial has commenced within the meaning of Rule 43 when the jury selection has begun, but found that *Bradford* left open the question of whether a trial "commences" at an even earlier juncture. The Eleventh Circuit concluded that it did, favorably citing the Seventh Circuit's holding in *United States v. Benabe*, 654 F.3d 753, 771-72 (7th Cir. 2011), that trial "commences" on the day of jury selection, but not necessarily when a prospective juror enters the courtroom.

Applying this reasoning to Mr. Sterling's case, the Court held that trial had commenced on the day of jury selection when Mr. Sterling met with the judge, counsel, and the court reporter in the interview room and that Mr. Sterling constructively waived his right to be present.

The Court also summarily rejected the co-defendant's challenge to the sufficiency of the evidence, and both defendants' challenge to the district court's admission into evidence, pursuant to Fed. R. Evid. 404(b), of a nearly identical bank robbery both men apparently committed in 1995.

United States v. Martinez, No. 11-13295 (Nov. 27, 2013)

Issues.

1. Was the indictment constitutionally deficient under *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536 (2003), because it did not allege that Ms. Martinez subjectively intended to convey a threat to injure others?

2. Is 18 U.S.C. § 875(c) unconstitutionally overbroad because it does not require subjective intent?

Held.

1. No.

2. No.

Background and procedural history. Ms. Martinez emailed and called a radio station with the false statement that her husband was about to open fire at an unidentified school in Broward County, Florida. Officials instituted a "Code Red" lockdown at all schools in Broward County, but no shooting occurred. Ms. Martinez was charged with violating 18 U.S.C. § 875 for knowingly transmitting a threatening communication.

Ms. Martinez moved to dismiss the indictment, arguing (1) that it was constitutionally deficient because it failed to allege that she intended to convey a threat to others and (2) that § 875(c) is unconstitutionally overbroad because it does not require that the Government prove that the speaker subjectively intended her statements to constitute a threat. The court denied her motion, and she pleaded guilty while reserving the right to appeal these issues.

Analysis. The Eleventh Circuit (per curiam, Chief Judge Carnes, Judge Black, and International Trade Judge Jane A. Restani) affirmed the district court's denial of Ms. Martinez's motion to dismiss. (Chief Judge Carnes also filed a separate concurrence in the result)

Ms. Martinez first argued that in *Black* the Supreme Court distinguished between true threats and protected speech based on the speaker's subjective intent and that her indictment was defective because it did not allege that she acted with the subjective intent to threaten. The Court disagreed with Ms. Martinez's construction of *Black*, holding that "*Black* does not require a subjective-intent analysis for all true threats" and that "[k]nowingly transmitting the threat makes the act criminal—not the specific intent to carry it out or the specific intent to cause fear in another." Slip op. at 12-13 (emphasis added). Accordingly, under § 875(c), the Government must simply prove that "a reasonable person would perceive the threat as real." Slip op. at 13.

The Court also held that Ms. Martinez's claim about § 875(c) being overbroad is "meritless." Slip op. at 14. The Court concluded that Ms. Martinez failed to demonstrate a realistic danger that § 875(c) will significantly compromise recognized First Amendment protections because the statute is limited to true threats and true threats are unprotected speech. Slip op. at 16-17.

Kearse v. Sec'y, Fla. Dep't. of Corr., et al., No. 12-16610 (Dec. 2, 2013)

Issue. Did the district court err in denying the petitioner habeas relief based on its finding that he failed to rebut, by clear and convincing evidence, the Florida state court's presumptively correct determination that the petitioner's verification page was not attached to his state court motion for postconviction relief when petitioner demonstrated that the state clerk of court docketed both documents together, and all parties agreed that the two documents were mailed together and date stamped together by the court?

Held. Yes.

Background and procedural history. Mr. Kearse was convicted in Florida state court of armed robbery and murder in 1991 and sentenced to death. After his sentence became final, Mr. Kearse filed in the state court a motion for postconviction relief, along with the one-page verification required by the Florida Rules of Criminal Procedure. The state court dismissed Mr. Kearse's motion for failure to attach the oath required by the Florida Rules of Criminal Procedure. Mr. Kearse dropped his appeal of that denial to allow the state court to consider a second motion for postconviction relief, which the state court and the Florida Supreme Court ultimately denied on the merits. Mr. Kearse then filed a successive postconviction relief motion that was denied, a judgment the Florida Supreme Court affirmed.

Mr. Kearse then filed a federal habeas petition pursuant to 28 U.S.C. § 2254. The district court dismissed it as untimely because it was not submitted within the one-year statute of limitations established by the Antiterrorism and Effective Death Penalty Act of 1996. Although 28 U.S.C. § 2244(d)(2) tolls the statute during the pendency of a "properly filed" application for state postconviction relief, the district court determined that there was no tolling because Mr. Kearse's first state motion was not "properly filed" because it was dismissed for failure to attach the required oath. Mr. Kearse appealed to the Eleventh Circuit, which vacated and remanded because the district court failed to give Mr. Kearse the opportunity to rebut the state court's presumptively correct determination. On remand, the district court found that Mr. Kearse could not rebut the presumption by clear and convincing evidence despite Mr. Kearse's presentation of the actual state court docket entry showing that the oath and verification were entered together as one single document, and the parties' agreement that the filing copy of Mr. Kearse's initial motion and verification were received by the state court in the same envelope and date stamped together.

Analysis. The Eleventh Circuit (Judge Wilson, for Chief Judge Carnes and Judge Marcus) vacated the district court's determination that Mr. Kearse's federal habeas petition was time-barred and remanded for adjudication on the merits. The Court found that Mr. Kearse's evidentiary submission did rebut the state court's determination by clear and convincing evidence, noting that "it is difficult to imagine stronger evidence than the state court record on appeal." Slip op. at 9.

Downs v. Sec'y, Fla. Dep't of Corr., et al., No. 12-14248 (Dec. 5, 2013)

Issues. Mr. Downs, a Florida death-row inmate, appeals the district court's denial of his 28 U.S.C. § 2254 petition. On appeal, the issues were whether the district court properly found that previous decisions by Florida state courts constitute reasonable application of clearly established laws as to:

1. Whether the State withheld exculpatory evidence prior to his trial?

2. Whether Mr. Downs's trial counsel labored under a conflict of interest due to a contingency-fee agreement?

3. Whether Mr. Downs's trial counsel rendered ineffective assistance by failing to call certain

witnesses during the guilt phase?

Held.

1. Yes.

2. Yes.

3. Yes.

Background and procedural history. The State of Florida charged that John Barfield hired Mr. Downs to kill Jerry Harris and that Mr. Downs then recruited Larry Johnson to assist him. Several months after the 1977 murder, Mr. Johnson led the police to Mr. Harris's body in exchange for full immunity from prosecution. Mr. Johnson told the police that Mr. Downs had shot Mr. Harris while he watched, and the State charged Mr. Downs with first-degree murder and conspiracy to commit murder. Prior to the trial, Mr. Downs retained attorney Richard Brown, agreeing to pay Mr. Brown a minimum fee of $5,000 and then $50 per hour with a $10,000 "bonus fee" if Mr. Downs was "acquitted of all felony charges arising from the death of Jerry Harris." After the State rested, Mr. Brown did not call any witnesses, and Mr. Downs was convicted on both counts. The state trial court then adopted the jury's recommendation that Mr. Downs receive a death sentence.

Mr. Downs unsuccessfully filed appeals and post-conviction motions in the Florida state courts before petitioning a Florida district court for relief under 28 U.S.C. § 2254. The district court initially denied the petition as untimely, but the Eleventh Circuit remanded it for an evidentiary hearing on whether the untimeliness could be excused by equitable tolling. The district court ultimately denied all the § 2254 claims on the merits, but granted Mr. Downs a certificate of appealability (COA) on two issues: (1) whether Mr. Brown rendered ineffective assistance for failing to call two witnesses during the guilt phase and (2) whether the State withheld *Brady* evidence. The Eleventh Circuit granted Mr. Downs's motion to expand the COA to include (3) whether Mr. Brown had a conflict of interest due to the contingent-fee agreement and (4) whether Mr. Brown rendered ineffective assistance by failing to call Mr. Downs as a witnesses during the guilt phase.

Analysis. The Eleventh Circuit (Judge Hull for Judges Marcus and Wilson) affirmed the district court's denial of the § 2254 petition.

The Court first addressed the *Brady* claim, holding that the Florida state courts reasonably concluded that the State was not aware of the exculpatory information before Mr. Downs's trial and that no *Brady* violation occurred because Mr. Downs himself was aware of the existence of the exculpatory evidence. The Court also reinforced that *Brady* applies only when withheld information is favorable to the accused and that the mere identity of a witness is not exculpatory.

As to the claim that Mr. Brown rendered ineffective assistance by failing to call Mr. Downs and two other individuals as defense witnesses, the Court held that the Florida Supreme Court reasonably found no deficient performance and, therefore, it need not reach the issue of prejudice. Mr. Brown had asserted that he did not call Mr. Downs for two reasons: (1) he believed that Mr. Downs was present during the shooting and, if Mr. Downs told the truth, he would have been

convicted of first-degree murder and (2) he did not want Mr. Downs to perjure himself. The Court held that these reasons were reasonable under the facts and do not constitute deficient performance. As to the other two witnesses, Mr. Brown had asserted that he believed they would give false testimony and/or would be impeached. Mr. Brown also noted that, at that time in Florida, he retained the right to begin and end closing arguments if he did not call any witnesses. The Court concluded that his strategy as to these two witnesses was not unreasonable under the "then-prevailing professional norms." Slip op. at 50.

Finally, as to Mr. Downs's argument that Mr. Brown labored under a conflict of interest due to the contingency-fee arrangement, the Court determined that Mr. Downs failed to show an adverse effect because Mr. Brown had testified in the state court that the arrangement did not affect his representation of Mr. Downs in any way and that he did not consider the potential bonus in making strategic decisions. Therefore, the Court held that Mr. Downs failed to establish that the Florida courts unreasonably determined that the arrangement did not create an adverse effect.

United States v. Meister, No. 13-14629 (Dec. 17, 2013)

Issue. Does a district court have the authority, upon a showing of "exceptional reasons" within the meaning of 18 U.S.C. § 3145(c), to release a defendant being detained pursuant to 18 U.S.C. § 3143(a)(2)?

Held. Yes.

Background and procedural history. Mr. Meister was convicted of possession and distribution of child pornography. He moved for release pending sentencing pursuant to 18 U.S.C. § 3145(c), arguing that his terminal cancer and ongoing chemotherapy treatments were "exceptional reasons" why detention would be inappropriate. The district court denied Mr. Meister's motion, finding that it lacked subject-matter jurisdiction because it interpreted § 3145's reference to a "judicial officer" to exclude United States district judges.

Analysis. The Eleventh Circuit (per curiam, before Judges Hull, Wilson, and Pryor) reversed, holding in a case of first impression that a district court does have jurisdiction to grant a defendant release pending sentencing and appeal pursuant to § 3145(c). The Court, in determining that § 3145(c)'s reference to a "judicial officer" did include district judges, sided with all of its sister circuits to consider the issue.

United States v. Timmann, No. 11-60093 (Dec. 18, 2013)

Issues. Whether the district court erred in denying the defendant's motions to suppress (1) firearms and ammunition found in a search of his apartment, and (2) statements he made during three separate telephone calls with the police?

Held. (1) Yes and (2) No. The district court erred in denying the motions to suppress as to the firearms, ammunition, and statements in two phone calls because they were fruits of a warrantless

search that were not justified by exigent circumstances, but the district court did not err as to the defendant's statements during the other phone call because they were not a direct result of information gained during the warrantless search.

Background and procedural history. A woman, who lived in an apartment adjacent to Mr. Timmann's apartment, called the police after she returned home from a 10-day business trip and noticed several holes in the walls of her apartment. The officer who responded suspected that the holes were bullet holes, knocked on Mr. Timmann's door, and checked whether dispatch had received any calls regarding activity at the apartment complex. Finding that Mr. Timmann was not home and that no calls had been received, the officer left and said she may return for further investigation.

The officer returned the next day with another officer, and they reexamined the holes and found a bullet fragment in the carpet. They then obtained Mr. Timmann's cell phone number and a key to his apartment from a building manager. After twice calling Mr. Timmann without success, the officers entered Mr. Timmann's apartment with the key and, ultimately, kicked in the door to the bedroom that was adjacent to the woman's apartment. Inside they discovered numerous firearms and ammunition, lying in plain view. Upon completing a report, the officers discovered that Mr. Timmann had two prior felony convictions.

Thereafter, the police spoke with Mr. Timmann by telephone three times. In the first phone call, Mr. Timmann told an officer that a friend had given him a rifle and that he had accidently discharged it inside the apartment. At no point in this phone call did the officer tell Mr. Timmann that the police had found firearms and ammunition in the apartment. In the two later calls, the police officer informed Mr. Timmann that the police had searched his apartment and found the firearms and knew of his criminal history. Subsequently, officers obtained a search warrant and seized the firearms and ammunition, and Mr. Timmann was charged with possession of a firearm by a convicted felon.

The district court denied Mr. Timmann's motions to suppress the firearms, ammunition, and telephone statements he made during the last two phone calls. The court specifically found that the entry into the apartment and bedroom was justified by exigent circumstances, that the entry into the bedroom was further justified as a protective sweep, and that the second and third calls would only be suppressed if the search was unlawful. Because the district court judge would not accept a conditional plea, the parties proceeded to a bench trial in which Mr. Timmann was found guilty.

Analysis. The Eleventh Circuit (Judge Tjoflat for Judges Pryor and Fay) vacated Mr. Timmann's conviction and remanded for further proceedings. The Court first held that the district court erred in finding that the emergency-aid exception justified the officers' warrantless entry into the apartment. Considering the totality of the circumstances, the Court determined that it was not reasonable for the officers to believe that someone inside of Mr. Timmann's apartment was in danger or in need of immediate aid. The Court next held that the district court also erred in finding that the warrantless entry into the bedroom was justified as a protective sweep or an exigent situation. The Court held that "[i]n order to perform a protective sweep that comports with the requirements of the Fourth Amendment, the officers must in the first place be lawfully within the premises." Slip op. at 20. Finally, the Court held that Mr. Timmann's statements made in the first phone call need not

be suppressed because they were not made as "a direct result" of the unlawful search, but that his statements in the later calls were the results of the search. In a final footnote, the Court noted that it could not affirm Mr. Timmann's conviction on the basis of the first phone call because the Government did not introduce the call into evidence at the bench trial.

United States v. Smith, No. 12-11042 (Dec. 23, 2013)

Issue. Did the district court err in denying Mr. Smith's motions to suppress, where the evidence in question was seized from his home pursuant to a warrant that was partially supported by warrantless GPS surveillance?

Held. No. When law enforcement officers installed GPS trackers on Mr. Smith's vehicles without a warrant, they acted in reasonable reliance on then-binding Eleventh Circuit precedent and, therefore, the good-faith exception to the exclusionary rule applies.

Background and procedural history. Law enforcement obtained a search warrant for Mr. Smith's house based in part on information they gained from GPS trackers on several vehicles connected to Mr. Smith. Within the house, the officers discovered nearly $10,000, a firearm, a disposable cell phone, a small amount of marijuana, and digital media from his computer and camera. In a five-count indictment against Mr. Smith and two co-defendants, Mr. Smith was charged with (1) conspiracy to distribute cocaine, (2) possession of a firearm in furtherance of a drug crime, (3) possession of a firearm as a convicted felon, and (4 and 5) money laundering. Mr. Smith moved to suppress all evidence seized from his house on the basis that the government failed to demonstrate probable cause of criminal activity at the house or a nexus between the house and criminal activity. Notably, the motion did not address the GPS trackers. The court denied the motion, and Mr. Smith proceeded to trial.

The jury acquitted Mr. Smith of the charges for money laundering and carrying a firearm in furtherance of the drug crime, but found him guilty of conspiracy to distribute cocaine and being a felon in possession of a firearm. In his motion for a judgment of acquittal and a new trial, Mr. Smith objected for the first time to the Government's warrantless use of GPS surveillance based upon the then-recent case of *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010). The district court denied the motion without specifically addressing the use of GPS surveillance and sentenced Mr. Smith to 420 months in prison. While the appeal was pending, the Supreme Court held in *United States v. Jones*, 132 S. Ct. 945, 949 (2012),that for Fourth Amendment purposes officers conducted a search when they installed a GPS tracker on a vehicle.

Analysis. The Eleventh Circuit (Judge Marcus for Judge Tjoflat and Seventh Circuit Judge Ripple) found that the motion to suppress was properly denied and affirmed Mr. Smith's conviction and sentence. The Court held that the good-faith exception to the exclusionary rule should apply because "[w]hen law enforcement officers attached the trackers in this case, in January 2011, our precedent specifically authorized officers to install 'an electronic tracking device' on a suspect's vehicle upon a showing of reasonable suspicion." Slip op. at 16-17, *citing United States v. Michael*, 645 F.2d 252, 254 (5th Cir. 1981) (en banc). The Court also declined Mr. Smith's requests that it distinguish GPS

trackers from "electronic tracking devices" such as beepers at issue in *Michael* and noted that its decision in is line with *United States v. Andres*, 703 F.3d 828, 835 (5th Cir. 2013), *United States v. Sparks*, 711 F.3d 58, 64-66 (1st Cir. 2013), and *United States v. Pineda-Moreno*, 688 F.3d 1087, 1090 (9th Cir. 2012). The Court concluded its analysis with the observation that "about all that exclusion would deter in this case is conscientious police work." Slip op. at 28 (citations omitted). The Court also rejected Mr. Smith's numerous secondary arguments.

Bryant v. Warden, No. 12-11212 (Dec. 24, 2013)

Issue. Does the savings clause in 28 U.S.C. § 2255(e) permit a federal prisoner to bring a 28 U.S.C. § 2241 petition when he has established that his current 235-month sentence for an 18 U.S.C. § 922(g) conviction exceeds the 120-month statutory maximum custodial sentence?

Held. Yes.

Background and procedural history. In 2001, Mr. Bryant pleaded guilty to being a felon in possession of firearms and ammunition. At sentencing, the district court found that he had three (but only three) "violent felonies" within the meaning of the Armed Career Criminal Act (ACCA), which increased his statutory maximum sentence from 120 months to life in prison. In so doing, the district court, relying on *United States v. Hall*, 77 F.3d 398 (11th Cir. 1996), rejected Mr. Bryant's argument that his Florida concealed-firearm conviction was not an appropriate ACCA predicate. The court further held that this conviction, along with two prior drug convictions, were the sole ACCA predicates in Mr. Bryant's criminal history—a finding to which the Government did not object. Mr. Bryant was ultimately sentenced to 235 months in prison. The Eleventh Circuit affirmed on direct appeal in 2002, and Mr. Bryant unsuccessfully sought § 2255 relief in 2005.

After the Supreme Court decided *Begay v. United States*, 553 U.S. 137, 128 S. Ct. 1581 (2008), Mr. Bryant filed a habeas petition pursuant to 28 U.S.C. § 2241, arguing that § 2255 had been "inadequate or ineffective" to challenge the legality of his 235-month sentence because the previously-binding *Hall* precedent foreclosed his challenging the use of his concealed-firearm conviction as an ACCA predicate during his first § 2255 motion in 2005. Mr. Bryant maintained that, under *Begay* and Eleventh Circuit cases interpreting it, *Hall* was abrogated and, therefore, his concealed-firearm conviction did not qualify as the third "violent felony" required to enhance his sentence under the ACCA. Mr. Bryant further argued the savings clause in § 2255(e) permitted him to bring his § 2241 petition challenging his illegal sentence.

Analysis. The Eleventh Circuit (Judge Hull, for Judge Martin, who concurred in part and dissented in part, and Southern District of Georgia Judge Bowen) vacated and remanded with instructions that Mr. Bryant's sentence be reduced to the 120-month statutory maximum penalty.

The Court first noted that procedural default did not apply because it is an affirmative defense, not a jurisdictional bar, and the Government had waived it by failing to raise it earlier. The Eleventh Circuit then held that Mr. Bryant could avail himself of the § 2255(e) savings clause to challenge his sentence through a § 2241 petition. The § 2255(e) savings clause permits a federal prisoner to file a § 2241 habeas motion where a § 2255 motion was "inadequate or ineffective to test

the legality of his detention." The Court determined that Mr. Bryant met this standard because, at the time of his initial sentencing and throughout his § 2255 action in 2005, the Eleventh Circuit's binding precedent provided that a Florida concealed-firearm offense was a "violent felony" within the meaning of the ACCA. *See Hall*, 77 F.3d 398. *Hall* foreclosed any argument by Mr. Bryant that his prior Florida concealed-firearm offense was an inappropriate predicate for his sentencing enhancement. Subsequent to Mr. Bryant's unsuccessful § 2255 motion, the Eleventh Circuit, based on *Begay*, overturned *Hall*. *See United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008) (overturning *Hall* and specifically holding that the Florida concealed-firearm offense at issue in Mr. Bryant's case is not a "crime of violence" under the career offender guideline); *United States v. Canty*, 570 F.3d 1251 (11th Cir. 2009). Critically, since *Begay* was retroactively applicable, Mr. Bryant's concealed-firearm offense was not countable as an ACCA predicate, rendering his current sentence of life in prison in excess of the 120-month statutory maximum. (The Court noted that the Supreme Court's subsequent limitation of *Begay* in *Sykes v. United States*, 131 S. Ct. 2267 (2011), and its progeny was of no effect here because Mr. Bryant's concealed-firearm offense, like the one at issue in *Begay*, was a strict liability offense, unlike the prior conviction at issue in *Sykes*.)

The Eleventh Circuit rejected the Government's argument that, on remand, it could simply rely on another of Mr. Bryant's prior convictions that it now argued was an ACCA predicate because the Government had not challenged the district court's original determination that there were no other ACCA predicates.

Dissent. Judge Martin dissented in part because she reads the § 2255(e) savings clause more broadly and sharply disagrees with the majority's dicta that the relief Mr. Bryant is due would not be available to a petitioner whose sentence is below the statutory maximum. While she agreed that simply ordering the district court to resentence Mr. Bryant to the statutory maximum was the appropriate remedy in this case (because he had already served more than the 120-month maximum), Judge Martin would not hold that a remand for a clean resentencing without the ACCA enhancement is never warranted. She interprets the majority opinion as "depriv[ing] this Court of all power and flexibility to fashion any remedy other than to reduce a petitioner's sentence to the maximum term of imprisonment permitted by statute." Slip op. at 97 (Martin, J., dissenting). Judge Martin expressed concern that two particular cases currently before the Court that the majority had elected to hold over would be resolved in precisely this way—a simple reduction to the statutory maximum, rather than a resentencing without the taint of the undue ACCA enhancement—and opined that these cases illustrate "how important it is for us to leave future courts free to fashion the appropriate remedy in savings clause cases yet to come," and that "We do not administer justice by stopping every defendant whose sentence was so obviously tainted by an illegal ACCA enhancement from being resentenced simply because of our own mistake in defining the term 'violent felony' under the ACCA." *Id*. at 99-100. Judge Martin also reiterated her earlier criticism of Eleventh Circuit precedent that, in order to invoke the savings clause, a petitioner must establish that relief was foreclosed by binding circuit precedent at the time of trial, direct appeal, and the first § 2255 motion. No statutory authority creates such restrictions.

The majority responded that its "express holding that the habeas remedy is limited to a sentence reduction to the statutory maximum penalty is precisely what helps open the § 2255(e) portal for [Mr.] Bryant without running afoul of our en banc and other circuit precedent, the statutory

bar on successive habeas motions, and the finality interests that Congress incorporated into [the Antiterrorism and Effective Death Penalty Act's] provisions." Slip op. at 82. The majority relied on *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (en banc), which held that a federal prisoner cannot obtain a § 2241 writ through the § 2255(e) savings clause by alleging a guidelines-based sentencing error, to conclude that "[Mr.] Bryant is entitled to a grant of the writ only because his sentence exceeds the statutory maximum and only to that extent." *Id*. at 81-82 (emphasis in original).

SELECTED UNPUBLISHED OPINIONS

United States v. Rodriguez, No. 11-15911 (Oct. 16, 2013)

The Eleventh Circuit (Judge Martin, for Judge Hull and Southern District of Georgia Judge Bowen) held that the district court clearly erred by applying the 4-level USSG §2B1.1(b)(2)(B) enhancement for an offense involving more than 50 victims. At sentencing, the Government submitted uncontroverted evidence of just 42 victims and relied on a summary chart of 238 persons who did business with the defendant. The Government did not present any witnesses to verify or authenticate the summary chart. The district court nevertheless determined that this was sufficient to apply the enhancement, concluding that, out of 238 customers, surely there were 50 total victims. The Eleventh Circuit reversed and remanded because the enhancement was not supported by reliable and specific evidence. *See United States v. Sepulveda*, 115 F.3d 882, 890 (11th Cir. 1997) (district courts "must not speculate concerning the existence of a fact which would permit a more severe sentence under the guidelines.")

United States of America v. Ferrao, No. 12-16471 (Oct. 21, 2013)

The Eleventh Circuit (per curiam, before Judges Wilson, Martin, and Anderson) held that the district court erred in increasing the defendant's offense level by 24 levels based on two specific offense characteristics: USSG §§2B1.1(b)(1)(J) (amount of loss) and (b)(2)(C) (number of victims). The defendant timely objected to the loss amount and number of victims, but the district court overruled without requiring the Government to offer evidence. Instead, the court relied on the Government's "unsubstantiated representations." Slip op. at 3. With the erroneous enhancements, the defendant's guideline range was 135 to 168 months in prison; without them, it would have been 0 to 6 months in prison. The Eleventh Circuit vacated and remanded with instructions that the defendant be resentenced without the enhancements.

United States of America v. Pan, No. 13-11345 (Oct. 22, 2013)

The Eleventh Circuit (per curiam, before Judges Pryor, Fay, and Kravitch) affirmed the district court's denial of the defendant's motion for early termination of his supervised release, rejecting his argument that the district court violated the Due Process Clause by not giving the

defendant notice of the Government's and the probation office's opposition or affording him the opportunity to respond. The Court reasoned that Mr. Pan's motion "only included information that was available at the original sentencing proceeding, and nothing in the record indicates that the district court relied on new information in denying Pan's motion for early termination." Slip op. at. 6.

United States of America v. Espinoza, No. 12-16544 (Nov. 19, 2013)

The Eleventh Circuit (per curiam, before Chief Judge Carnes and Judges Marcus and Kravitch) held that the district court committed procedural error by imposing an upward variance, pursuant to 18 U.S.C. § 3553(a)(6), based on the need to avoid unwarranted sentencing disparities. The Court noted its earlier holdings that, in imposing an upward variance under § 3553(a)(6), the district court must (1) identify a specific defendant (2) with a similar record to the defendant being sentenced (3) who has been found guilty of similar criminal conduct. Here, the district court "failed to identify a valid § 3553(a)(6) comparator." Slip op. at 8. The Eleventh Circuit also found that the district court committed procedural error by imposing a USSG §5K2.21 upward departure based on clearly erroneous factual findings.

United States v. Boggan, No. 12-14296 (Dec. 17, 2013)
***appeal from the Northern District of Alabama

The Eleventh Circuit (Northern District of Georgia Judge Pannell, for Judges Hull and Hill) held that the defendant's prior conviction for third-degree burglary in Alabama constitutes a "violent felony" within the meaning of the Armed Career Criminal Act's residual clause. The Court determined that the Alabama third-degree burglary offense "presents a serious potential risk of physical injury to another, comparable to the risk posed by" the ACCA's enumerated crime of "generic burglary." Slip op. at 10 (internal citations and quotations omitted). The Court found that the Alabama statute was the "nearly direct analogue of 'generic' burglary." *Id*. at 10-13. *See United States v. Matthews*, 466 F.3d 1271, 1276 (11th Cir. 2006) (a conviction under Florida's third-degree burglary statute is an ACCA predicate offense pursuant to the residual clause).

United States v. Johnson, No. 13-11710 (Dec. 19, 2013)

The Eleventh Circuit (per curiam, before Judges Hull, Wilson, and Anderson) affirmed the district court's revocation of the defendant's supervised release. The defendant argued that the district court plainly erred by considering the 18 U.S.C. § 3553(a)(2)(A) "promoting respect for the law" and "punishment" factors. Since the § 3553(a)(2)(A) factors are not included in the subset of sentencing factors listed in 18 U.S.C. § 3583(e), the defendant argued that the court's consideration of them rendered his sentence substantively unreasonable. The Eleventh Circuit rejected this argument because (1) the record was not clear that the district court considered the § 3553(a)(2)(A) factors and, (2) even if it did, § 3583(e) "does not purport to be exhaustive and does not identify any impermissible factors." Slip op. at 12. The Court added that the preexisting circuit split on this issue precluded a finding that the district court plainly erred.

OTHER AUTHORITY

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States v. Blewett, Nos. 12-5226, 12-5582 (Dec. 3, 2013) (en banc)

Issue. Do the Fair Sentencing Act's (FSA) new mandatory minimums apply in sentence reduction proceedings under 18 U.S.C. § 3582(c)(2)?

Held. No.

Background and procedural history. Two Blewett cousins were sentenced under sentencing laws that utilized the 100-to-1 crack to powder cocaine ratio and sought retroactive application of the FSA under 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u). The district court denied the § 3582 motions, but a panel of the Sixth Circuit reversed the district court, holding that continued application of the racially discriminatory mandatory minimum crack sentences to defendants sentenced before passage of the FSA violates the Equal Protection Clause and that FSA mandatory minimums should apply retroactively in § 3582 proceedings. However, the Sixth Circuit then granted the Government's motion for *en banc* rehearing and vacated the panel decision pending an *en banc* argument and decision.

Analysis. A nine-judge majority of the Sixth Circuit held that "(1) the Fair Sentencing Act's new mandatory minimums do not apply to defendants sentenced before it took effect; (2) § 3582(c)(2) does not provide a vehicle for circumventing that interpretation; and (3) the Constitution does not provide a basis for blocking it." Slip op. at 3. Seven judges dissented and one concurred in the judgment with several reservations. Five of the seven dissenting judges stated that they would also hold that interpreting the FSA to deny relief does not even survive rational basis review under the equal protection component of the Fifth Amendment and two of those five would hold that denial of retroactive FSA relief also violates the Eighth Amendment. The judge who concurred in the judgment invited defendants to challenge their sentences on these constitutional grounds under § 2255 or § 2241. The Blewetts plan to file a petition for certiorari.