**SUMMARIES OF RECENT CASELAW**
OCTOBER 1, 2014—DECEMBER 31, 2014

**TABLE OF CONTENTS**[1]



[1] Appeals taken from the Northern District of Alabama are marked with an asterisk.

*Warger v. Shauers*, No. 13-517 (December 9, 2014)

**Issue.** Does Fed. R. Evid. 606(b), known as the anti-impeachment rule, bar a party from introducing evidence of statements made by jurors during deliberations for the purpose of proving that a juror lied on voir dire and in support of the party's motion for new trial?

**Held.** Yes.

**Background and procedural history.** Gregory Warger sued Randy Shauers in federal court for negligence for injuries suffered in a motor vehicle accident. After the jury returned a verdict for Shauers, one of the jurors contacted Warger's attorney, claiming that Regina Whipple, the jury foreperson, had revealed during deliberations that her daughter had been at fault in a fatal motor vehicle accident, and that a lawsuit would have ruined her daughter's life. Armed with an affidavit from the juror, Warger moved for a new trial, arguing that Whipple had deliberately lied during voir dire about her impartiality and ability to award damages. The district court denied Warger's motion, holding that Fed. R. Evid. 606(b), which bars evidence "about any statement made . . . during the jury's deliberations," barred the affidavit, and that none of the Rule's three exceptions were applicable. The Eighth Circuit affirmed. The Supreme Court granted certiorari.

**Analysis.** The Supreme Court (Justice Sotomayor) unanimously affirmed. The Court held that Rule 606(b) applies to juror testimony during a proceeding in which a party seeks a new trial on the ground that a juror lied during voir dire. This reading accords with the plain meaning of the rule, which applies to an inquiry into the validity of the verdict. The Court also held that Rule 606(b)(2)(a)'s exception for evidence of extraneous prejudicial information improperly brought to the jury's attention did not apply. Information is only extraneous if it derives from a source external to the jury. It does not include internal matters or the general body of experiences that jurors are understood to bring with them to the jury room. Finally, the Court saw no need for constitutional avoidance. Though the Constitution guarantees both criminal and civil litigants a right to an impartial jury, that right is sufficiently protected even if jurors lie in voir dire in a way that conceals bias because the parties can bring evidence of bias to the court's attention before the verdict is rendered and employ nonjuror evidence even after the verdict is rendered. The Court noted that there may be cases of juror bias so extreme that they rise to the level of denying an individual the right to a jury trial, but the Court did not consider that question here.

*Heien v. North Carolina*, No. 13-604 (December 15, 2014)

**Issue.** Can a police officer's reasonable mistake of law give rise to the reasonable suspicion necessary to uphold a seizure under the Fourth Amendment?

**Held.** Yes.

**Background.** Sergeant Matt Darisse pulled over Mr. Heien's Ford Escort after noticing that the right brake light was broken. With Mr. Heien's consent, Sergeant Darisse searched the car and found a sandwich bag that contained cocaine. The State charged Mr. Heien with attempted trafficking in cocaine. Mr. Heien moved to suppress the evidence seized from the car, contending that the stop and search had violated the Fourth Amendment. The trial court denied the motion, finding that the faulty brake light had given Sergeant Darisse reasonable suspicion to initiate the stop. The North Carolina Court of Appeals reversed, concluding that the initial stop was not valid because driving with only one working brake light was not actually a violation of North Carolina law. The North Carolina Supreme Court reversed, finding that the stop was valid because Sergeant Darisse could reasonably, even if mistakenly, read the vehicle code to require that both brake lights be in good working order. The Supreme Court granted certiorari.

**Analysis.** The Supreme Court (Chief Justice Roberts, for Justices Scalia, Kennedy, Thomas, Ginsberg, Breyer, Alito, and Kagan) affirmed. The Court noted that it has repeatedly affirmed that the ultimate touchstone of the Fourth Amendment is reasonableness. The Court, in prior cases, has recognized that mistakes of fact can be reasonable. The Court concluded that mistakes of law are no less compatible with the concept of reasonable suspicion than are mistakes of fact. In this case, the Court had little difficulty concluding that the officer's error of law was reasonable. Although the statute at issue refers to "a stop lamp," suggesting the need for only one working brake light, another provision requires that all vehicles "have all originally equipped rear lamps or the equivalent in good working order," arguably indicating that if a vehicle has multiple originally equipped rear stop lamps, all must be functional.

Justice Kagan filed a concurring opinion, in which Justice Ginsburg joined, emphasizing that the Fourth Amendment will tolerate only objectively reasonable mistakes of law. Justice Kagan also explained that the inquiry the Court permits today is more demanding than the one courts undertake before awarding qualified immunity. The law at issue must be so doubtful in construction that a reasonable judge could agree with the officer's view.

Justice Sotomayor dissented and would have held that determining whether a search or seizure is reasonable requires evaluating an officer's understanding of the facts against the actual state of the law.

*Cole v. Warden, Ga. State Prison*, No. 13-12635 (October 6, 2014)

**Issue.** Did Mr. Cole's one-year limitations period under 28 U.S.C. § 2254(d) begin to run in September 2007, which he represents to be the date on which he discovered the alleged *Boykin* violations at his plea proceeding?

**Held.** No.

**Background.** In 1990, Mr. Cole, then 16 years' old, shot and killed Benjamin West during a robbery. He pleaded guilty to malice murder and armed robbery and was sentenced to two, concurrent life sentences. More than seventeen years later, on July 1, 2008, Mr. Cole filed a state habeas petition asserting that the judge who accepted his plea did so without first ensuring that Mr. Cole was knowingly, intelligently, and voluntarily waiving his constitutional rights, as required by *Boykin v. Alabama*, 395 U.S. 238 (1969). The state court dismissed the petition as untimely. On January 18, 2013, Mr. Cole filed a federal habeas petition under 28 U.S.C. § 2254 on the same basis. He asserted that he did not discover the violation of his *Boykin* rights until September 2007, when he overhead an inmate librarian discussing them. He also asserted that he was entitled to equitable tolling of the statute of limitations because he was only 16 years-old when he pleaded guilty and he has been incarcerated since that time. The district court dismissed Mr. Cole's petition as untimely.

**Analysis.** The Eleventh Circuit (Judge Fay, for M.D. Fla. Judge Hodges and S.D. Fla. Judge Huck) affirmed. While 28 U.S.C. § 2254(d)(1)(D) provides that the one-year limitations period may run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," that clock starts ticking when a person knows or should know the underlying vital facts of the claim, regardless of when their legal significance is actually discovered. The Court held that inquiry-notice analysis applied to Mr. Cole's contention that he was deprived of being informed of his *Boykin* rights at his plea proceeding. The Court noted that the record on appeal contained the written plea form that Mr. Cole signed, which states the *Boykin* rights. The Court reasoned that if Mr. Cole had any question about the rights he was relinquishing by pleading guilty, he could have consulted with is attorney at the time of his plea or before he signed the form. Consequently, Mr. Cole knew or should have known of his *Boykin* rights at the time of his plea. The statute of limitations began to run when his conviction became final, not when he learned the legal significance of the underlying facts of his *Boykin* claim. The Court further held that Mr. Cole failed to show that any extraordinary circumstance warranted equitable tolling of the statute of limitations.

*Spencer v. United States*, No. 10-10676 (en banc) (November 14, 2014)

**Issue.** Can a federal prisoner move to vacate his sentence in a collateral attack under 28 U.S.C. § 2255 on the basis that the sentencing court erroneously classified him as a career offender under the U.S. Sentencing Guidelines?

**Held.** No.

**Background.** Mr. Spencer pleaded guilty to distributing crack cocaine. Based on his prior convictions for selling cocaine and felony child abuse, the district court concluded that Mr. Spencer was a career offender under USSG § 4B1.1 and sentenced him to 151 months of imprisonment. At sentencing, Mr. Spencer argued that his prior conviction for felony child abuse is not a "crime of violence" and therefore not a predicate offense under § 4B1.1. The facts underlying that offense are that when he was 18, Mr. Spencer had sex with a 14-year-old victim. On direct appeal, the Eleventh Circuit rejected Mr. Spencer's argument that felony child abuse was not a crime of violence.

Two weeks after the Court affirmed Mr. Spencer's sentence, the Supreme Court decided *Begay v. United States*, 553 U.S. 137 (2008), which held that "violent felonies" under the Armed Career Criminal Act must involve purposeful, violent, or aggressive conduct similar to burglary, arson, or extortion. Because the definitions of "violent felony" under the ACCA and "crime of violence" under the Sentencing Guidelines are identical, *Begay* also limited the meaning of crime of violence for purposes of the career-offender enhancement.

Mr. Spencer moved to vacate his sentence under 28 U.S.C. § 2255, arguing that *Begay* applies retroactively to his sentence and makes clear that felony child abuse is not a crime of violence. The district court denied Mr. Spencer's motion, but granted a certificate of appealability on two issues: (1) whether Mr. Spencer's freestanding challenge to a career offender sentence is cognizable on collateral review; and (2) whether the district court, in light of *Begay*, erroneously sentenced Mr. Spencer as a career offender?

**Analysis.** The Eleventh Circuit (Judge William H. Pryor, for Chief Judge Ed Carnes and Judges Tjoflat, Hull, and Marcus) affirmed. As a preliminary matter, the Court held that the certificate of appealability was defective because, in violation of 28 U.S.C. § 2253(c), it did not specify what issues raised by the prisoner made a substantial showing of the denial of a constitutional right. The Court declined to vacate the certificate at this case, but noted that going forward a certificate of appealability must specify what constitutional issue jurists of reason would find debatable.

The Court next held that § 2255 does not provide a remedy for every alleged error in conviction and sentencing, but only for fundamental defects that inherently resulted in a complete miscarriage of justice. The Court held that a prisoner may challenge a sentencing error as a fundamental defect on collateral review only when he can prove that he is either actually innocent of his crime or that a prior conviction

used to enhance his sentence has been vacated.

Judge Wilson dissented, joined by Judges Martin, Jordan, and Rosenbaum. Judge Wilson would have reached the merits of Mr. Spencer's claim because an erroneous guideline determination that is likely to result in a person spending a considerable amount of additional time in prison constitutes a fundamental error resulting in a complete miscarriage of justice.

Judge Martin dissented, joined by Judges Wilson and Jordan, and wrote separately to draw attention to Mr. Spencer's particular case. With the career offender enhancement, Mr. Spencer's guideline range was 151-188 months. Mr. Spencer was sentenced to 151 months of imprisonment. Today, without the career offender enhancement and with the benefit of the retroactive amendments to the drug quantity tables, Mr. Spencer's guideline range would be 24-30 months.

Judge Jordan dissented, joined by Judges Wilson, Martin, and Rosenbaum. Judge Jordan notes that there are strong reasons to believe that a career-offender error under the advisory Sentencing Guidelines results in a sentence that is contrary to "the laws of the United States," under § 2255: (1) it results in a procedurally unreasonable sentence that is reversible on direct appeal; and (2) incorrect application results in a violation of the Ex Post Facto Clause under *Peugh v. United States*, 133 S. Ct. 2072 (2013), because the Sentencing Guidelines have sufficient legal affect to attain the status of "law" under the Ex Post Facto Clause.

Judge Rosenbaum dissented, joined by Judges Wilson, Martin, and Jordan. Judge Rosenbaum believed that the Supreme Court decision in *Johnson v. United States*, 544 U.S. 295, 125 S. Ct. 1571 (2005), controlled and required the granting of Mr. Spencer's petition.

*United States v. Anderson*, No. 13-12945 (November 19, 2014)

**Issue.** Does the district court have jurisdiction to consider a defendant's second or successive motion for reduction of sentence under 18 U.S.C. § 3582(c)(2) that is based on the same Amendment to the Sentencing Guidelines as the first motion?

**Held.** Yes.

**Background.** Mr. Anderson was convicted of various federal drug offenses in 1990. At sentencing, the district court found that the offenses involved at least 15 kilograms of crack cocaine and, using the relevant drug quantity table, determined that Mr. Anderson's base offense level was 42 and his total offense level was 46. In 2006, Mr. Anderson moved for a sentence reduction based upon Amendment 505 of the Sentencing Guidelines. The district court found that Amendment 505 lowered Mr. Anderson's base offense level to 38 and his total offense level to 42, but denied the motion for reduction under the 18 U.S.C. § 3553(a) factors. In 2008, Mr. Anderson moved for a sentence reduction under Amendment 706. The district court determined that Amendment 706 did not affect Mr. Anderson's offense level and therefore denied the motion. In 2011, Mr. Anderson moved for a sentence reduction under Amendment 750. The district court denied the motion, finding that Amendment 750 did not reduce

Mr. Anderson's guideline range. Mr. Anderson appealed that denial and the Eleventh Circuit affirmed. In May 2013, Mr. Anderson filed a renewed motion for reduction of sentence based on Amendment 750. The district court denied the motion. On appeal, the government argued that the district court lacked jurisdiction to hear a second or successive motion based upon the same amendment.

**Analysis.** The Eleventh Circuit (M.D. Fla. Judge Schlesinger, for Judges Wilson and Rosenbaum) affirmed. The Court held that the district court had jurisdiction to hear Mr. Anderson's second motion. Relying on *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), the Court explained that courts should treat limitations on a statute's scope as nonjurisdictional unless Congress clearly articulates its intention to create a jurisdictional limitation. Because 18 U.S.C. § 3582(c)(1) does not contain a clearly expressed jurisdictional limitation on a district court's ability to hear successive motions based upon the same amendment, the Court did not read such a limitation into the statute. The Court nevertheless affirmed the denial of Mr. Anderson's motion because the alleged error—the district court's failure to use the marijuana equivalency table to calculate the base offense level—did not affect Mr. Anderson's based offense level.

*Tanzi v. Sec'y, Fla. Dep't of Corr.*, No. 13-12421 (November 19, 2014)

**Issue.** Was Mr. Tanzi entitled to federal habeas relief on his claim that he was denied effective assistance of counsel during the penalty phase of his capital trial because his attorney failed to offer evidence that Mr. Tanzi suffers from a genetic abnormality in that he has an XYY genotype?

**Held.** No.

**Background.** Mr. Tanzi is a Florida state prisoner on death row. He was sentenced to death based on a unanimous jury recommendation for the murder of Janet Acosta. The facts of the murder are that Mr. Tanzi kidnapped Ms. Acosta while she was reading a book in her car. He punched her in the face until he could get into her car, forced her to accompany him from Miami to the Florida Keys, and forced her to perform oral sex on him. Once in the Keys, Mr. Tanzi strangled Ms. Acosta with rope until she died and disposed of her body in a wooded, secluded area. Mr. Tanzi pleaded guilty to first-degree murder, carjacking, kidnapping, and armed robbery.

During the penalty phase, Mr. Tanzi presented a substantial case for mitigation. Mr. Tanzi had a long history of mental health problems and was sexually abused as a child. Mr. Tanzi did not present evidence of his XXY genotype, a genetic abnormality. The jury unanimously recommended the death penalty and the trial judge adopted that recommendation. Mr. Tanzi sought postconviction relief in state court, arguing that he was denied effective assistance of counsel because his attorney failed to investigate and failed to introduce evidence of Mr. Tanzi's genetic abnormality in mitigation. The state trial court denied his ineffective-assistance-of-counsel claim on the merits following an evidentiary hearing. The Florida Supreme

Court affirmed. Mr. Tanzi then filed this federal habeas claim. The district court denied habeas relief and Mr. Tanzi appealed.

**Analysis.** The Eleventh Circuit (Judge Martin, for Judges Marcus and William H. Pryor) affirmed. The Court reviewed Mr. Tanzi's claim under AEDPA's highly deferential standard. Because the Florida Supreme Court adjudicated the merits of Mr. Tanzi's claims in a reasoned opinion, the Court applied a two-step analysis. First, the Court determined what arguments or theories support the state court's decision. Second, the Court asked whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the Supreme Court. The Court found that the Florida Supreme Court's decision was a reasonable application of federal law. Notably, the Court explained that an outcome that is only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support. The Court thus agreed with the Florida Supreme Court that Mr. Tanzi failed to show prejudice, given that none of his postconviction evidence cast any doubt on the existence or strength of the aggravating circumstances that were found to exist by the sentencing judge and that supported the judge's decision to impose the death penalty.

The Court also denied Mr. Tanzi's claim that the prosecutor's late disclosure to defense counsel of Mr. Tanzi genetic abnormality was a *Brady* violation. The prosecution disclosed the abnormality three days before the penalty phase trial. The Court concluded that Mr. Tanzi could not show prejudice as a result of the late disclosure.

*United States v. McIlwain*, No. 14-10735 (November 25, 2014)

**Issue.** Does a formal involuntary commitment to a mental institution, under Ala. Code § 22-52-10.1, qualify as commitment to a mental institution for purposes of 18 U.S.C. § 922(g)(4), which criminalizes possession of a firearm by a person who has been committed to a mental institution?

**Held.** Yes.

**Background.** Mr. McIlwain was involuntarily committed to the custody of the Alabama State Department of Mental Health by a state probate court. He was afforded formal process, as required by Ala. Code § 22-52-1, and his commitment was a formal commitment under Ala. Code. § 22-52-7. After being released from the commitment, Mr. McIlwain was charged and convicted of possessing a firearm after having been committed to a mental institution, in violation of 18 U.S.C. § 922(g)(4). The district court denied Mr. McIlwain's motion to dismiss the indictment, which he brought on the basis that the prior commitment did not constitute a formal involuntary commitment because it occurred in a single day, did not provide adequate notice, and was only an emergency hospitalization.

**Analysis.** The Eleventh Circuit (Judge Hull, for Judges Marcus and Dubina) affirmed. The Court explained that the commitment was a formal involuntary commitment under Alabama law and therefore qualified as a commitment under 18 U.S.C. § 922(g)(4). The Court held that Mr. McIlwain could not collaterally attack the validity of the commitment order in a subsequent federal criminal proceeding.

*United States v. Brown*, No. 13-13670 (November 25, 2014)

**Issue.** Did the district court abuse its discretion by imposing a sentence of 240 months of imprisonment, an upward variance from the guideline range of 78 to 97 months?

**Held.** No.

**Background.** Mr. Brown pleaded guilty to eight counts of possession and receipt of child pornography. The district court found the guideline sentencing range to be 78 to 97 months of imprisonment. The government filed a motion for upward variance, which the district court granted. The court noted Mr. Brown has had an unhealthy obsession with young boys for most of his adult life, which seems to have become much more active in recent years. In addition to child pornography, Mr. Brown had an interest in dead children, murder, and cannibalism. While Mr. Brown had never crossed the line between fantasy and action, Mr. Brown had photographed a boy who attended his church and fantasized about eating him. The district court sentenced Mr. Brown to 240 months in prison. Mr. Brown appealed the sentence, arguing that it was substantively unreasonable because it was based on the unfounded assumption that Mr. Brown would physically harm a child in the future and placed undue weight on the need to protect the public.

**Analysis.** The Eleventh Circuit (per curiam; Judges Tjoflat, Jill A. Pryor, and Fay) affirmed. The Court reviewed the reasonableness of the sentence under a deferential abuse-of-discretion standard in accordance with *Gall v. United States*, 552 U.S. 38 (2007). The Court noted that the 240-month sentence was above the applicable guideline range, but well below the statutory maximum. The district court discussed four 18 U.S.C. § 3553(a) factors, including (1) Mr. Brown's long history of obsession with young boys; (2) the seriousness of child-pornography crimes; (3) the futility of deterrence; and (4) the self-evident danger to society posed by Mr. Brown, as demonstrated by his depraved online chats and interest in the abduction, sexual molestation, murder, and cannibalization of children. Although the district court commented that the need to protect the public was the most important factor in the case, the court also discussed other factors and it is within the court's discretion to afford one factor greater weight.

*Lebron v. Sec'y, Fla. Dep't of Children & Families*, No. 14-10322 (December 3, 2014)

**Issue.** Does a Florida Statute that mandates suspicionless drug testing of all applicants seeking Temporary Assistance for Needy Families ("TANF") benefits violate the Fourth Amendment's prohibition against unreasonable searches?

**Held.** Yes.

**Background.** Fla. Stat. § 414.00652 mandates suspicionless drug testing of all applicants seeking TANF benefits. Mr. Lebron sued the Secretary of the Florida Department of Children and Families ("State"), which administers TANF benefits, claiming that the statute violates the Fourth Amendment's prohibition against unreasonable searches, applied against the states through the Fourteenth Amendment. The district court granted summary judgment in favor of Mr. Lebron, declared § 414.0652 unconstitutional, and permanently enjoined its enforcement. The State appealed, arguing that it had three special needs that justified suspicionless searches of TANF applicants: (1) ensuring TANF applicants' job readiness; (2) promoting child-welfare and family stability; and (3) ensuring that public funds were used for their intended purposes.

**Analysis.** The Eleventh Circuit (Judge Marcus, for Judge Hull and N.D. Ga. Judge Totenberg) affirmed. The Court held that drug testing by urinalysis is undisputedly a Fourth Amendment search under *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602 (1989). The Fourth Amendment generally prohibits such searches without individualized suspicion, except in certain well-defined circumstances where the government has a special need that goes beyond the normal need for law enforcement. The Court held that the State had a legitimate public interest in encouraging employability, protecting children, and conserving public funds. But those general concerns, proffered only at a high level of abstraction and without empirical evidence, do not justify an exception to the Fourth Amendment. The Court noted that the State failed to establish a peculiar drug-use problem among TANF applicants and that, if anything, the State's evidence showed that rates of drug use in the TANF population are no greater than for those who receive other government benefits, or even for the general public.

*United States v. Cruanes*, No. 13-15057 (December 5, 2014)

The Eleventh Circuit (per curiam, Judges Tjoflat, Jill A. Pryor, and Fay) issued a writ of mandamus compelling the district court to issue a certificate stating that Mr. Cruanes's conviction was automatically set aside on December 1, 1983, under the now-repealed Youth Corrections Act, 18 U.S.C. § 5021(b). Mr. Cruanes had petitioned the district court for a writ of error coram nobis. The government conceded in oral argument that Mr. Cruanes was entitled to relief because the district court discharged Mr. Cruanes from custody effective December 1, 1983, but did not issue the requisite certificate stating that the conviction had been set aside.

*Wilson v. Warden, Ga. Diagnostic Prison*, No. 14-10681 (December 15, 2014)

**Issue.** Was it a reasonable application of federal law for the Georgia Supreme Court to deny Mr. Wilson's claim that his trial counsel was ineffective for failing to discover and introduce mitigating evidence at the sentencing phase of his capital trial?

**Held.** Yes.

**Background.** Mr. Wilson is a state prisoner on death row for the murder of Donavan Parks. At trial, he argued that he was merely present during the crime, but a jury found him guilty. During the penalty phase, defense counsel argued that the jury should not sentence Mr. Wilson to death because there was residual doubt about his guilt. Counsel also introduced mitigating testimony from Mr. Wilson's mother and Dr. Renee Kohanski, a forensic psychiatrist, who both testified that Mr. Wilson had a difficult childhood. The prosecution presented evidence of Mr. Wilson's extensive criminal history, violence, and gang activity, which included the fact that he had shot people on two prior occasions.

After being sentenced to death, Mr. Wilson filed a petition for a writ of habeas corpus is state court, arguing that his trial counsel was ineffective for failing to thoroughly investigate his background and present adequate mitigation evidence. At an evidentiary hearing, Mr. Wilson introduced lay testimony from former teachers, family members, friends, and social workers. He also introduced expert testimony from neuropsychologist Dr. Herrera and Dr. Kohanski. Mr. Wilson argued that the testimony would have explained his disruptive childhood behavior and portrayed him as someone who never stood a chance. The state trial court denied Mr. Wilson's petition, and the Supreme Court of Georgia summarily affirmed. Mr. Wilson then petitioned the federal district court for habeas relief.

**Analysis.** The Eleventh Circuit (Judge William H. Pryor, for Chief Judge Ed Carnes and Judge Jordan) affirmed. The Court held that the Supreme Court of Georgia could have reasonably concluded that Mr. Wilson's new mitigation evidence would not have changed the overall mix of evidence at his trial and that the new evidence was largely cumulative of the evidence that trial counsel did present to the jury. It therefore reasonably could have determined that Mr. Wilson failed to show prejudice. The Court could not say that the decision of the Supreme Court of Georgia was an unreasonable application of clearly established federal law.

*Velazco v. Dep't of Corr.*, No. 13-12525 (December 16, 2014)

**Issue.** Did the district court err by denying Mr. Velazco's petition for a writ of habeas corpus without holding an evidentiary hearing?

**Held.** No.

**Background.** Mr. Velazco, a Florida state prisoner, petitioned the federal district court for a writ of habeas corpus. The Florida state court, in a postconviction

proceeding, had previously denied his claim that his trial counsel had been ineffective. In the federal petition, Mr. Velazco argued that the Florida state court had unreasonably applied clearly established federal law when it denied his claim of ineffective assistance of counsel. The federal district court refused to hold an evidentiary hearing and denied the petition. On appeal, Mr. Velazco argued that he was entitled to an evidentiary hearing on his claim.

**Analysis.** The Eleventh Circuit (Judge William H. Pryor, for Judge Jordan and W.D. La. Judge Walter) affirmed. The Court followed 28 U.S.C. § 2254's clear, emphatic rule that if a state court has adjudicated the claim on the merits, then a petitioner must satisfy § 2254(d)(1) based only on the record before that state court. The district court correctly examined only the state record.

*United States v. Baldwin*, No. 13-12973, *United States v. Belizaire*, No. 12-20763 (December 17, 2014)

**Issues.**

1. Did the district court constructively amend the indictment by instructing the jury to disregard discrepancies between the debit card numbers listed in Counts 11 and 16 of the indictment and those that were presented at trial?
2. Did the district court err by calculating the intended loss to include the total amount of fraudulent refunds requested from the IRS during the fraud conspiracy, and attributing that loss amount to all three defendants?

**Held.**

1. No.
2. No.

**Background.** Earnest Baldwin, Earl Baldwin, and Lineten Belizaire were convicted of various crimes arising out of a scheme to use personal identifying information to claim fraudulent tax refunds. They appealed various aspects of their convictions and sentences. Earl Baldwin argued that the district court constructively amended the indictment by instructing the jury to disregard discrepancies between the debit card numbers listed in Counts 11 and 16 and those that were presented at trial. Counts 11 and 16 charged Mr. Baldwin with using debit cards with the last four digits of 9000" and "9440," respectively, but the evidence offered at trial listed the accounts as ending in "9005" and "9449."

All three defendants challenged the district court's calculation of the intended loss amount. The court calculated the amount of intended loss to be $1,803,826, the total amount of fraudulent refunds requested from the IRS during the conspiracy.

**Analysis.** The Eleventh Circuit (Ct. Int'l Trade Judge Restani, for Chief Judge Ed Carnes and E.D. Pa. Judge Robreno) affirmed. The Court agreed with the district court that the discrepancies between the account numbers in the indictment and

those presented at trial were scrivener's errors that the jury could disregard. The indictment alleged that on May 22, 2012, Earl Baldwin used an account number ending in "9000" issued to "R.E.," and that on June 27, 2012, he used an account number ending in "9440," issued to "S.T." The only discrepancy between the indictment and the evidence was in the very last digit of the card numbers. The district court did not allow a shift in theory regarding the essential elements of the crime, such as allowing a conviction based on the use of a different means of identification or the use of a different individual's identity.

The Court affirmed the district court's calculation of intended loss and the attribution of that loss amount to all three defendants. A defendant may be held responsible for the reasonably foreseeable acts of his co-conspirators in furtherance of the conspiracy. In determining the scope of the criminal activity a particular defendant agreed to undertake, the district court may consider any explicit or implicit agreement fairly inferred from the conduct of the defendant and others. The evidence sufficiently established that all three defendants participated fully in the conspiracy, therefore the district court did not err in holding all three accountable for the total amount of the tax returns fraudulently filed in connection with the conspiracy.

*United States v. Smith*, No. 13-15227, consolidated with *United States v. Nunez*, Nos. 13-15133; 14-10075 (December 22, 2014)

**Issue.** Must a state drug offense include an element of *mens rea* regarding the illicit nature of the controlled substance in order to qualify as a serious drug offense under the Armed Career Criminal Act ("ACCA") or as a controlled substance offense under the Sentencing Guidelines' career offender enhancement?

**Held.** No.

**Background.** Both Mr. Smith and Mr. Nunez pleaded guilty to possession of a firearm by a convicted felon. Mr. Smith was sentenced under the ACCA and Mr. Nunez was sentenced as a career offender under the Sentencing Guidelines. In both cases, the sentencing court used a conviction under Fla. Stat. § 893.13(1) (prohibiting sale, manufacture, delivery, or possession with intent to sell, manufacture, or deliver, a controlled substance) as a predicate offense for the sentencing enhancement. Mr. Smith and Mr. Nunez argued that a conviction under Fla. Stat. § 893.13(1) could not qualify as a predicate offense under the ACCA or the career offender guidelines, respectively, because it did include an element of *mens rea* with respect to the illicit nature of the controlled substance.

**Analysis.** The Eleventh Circuit (Judge William H. Pryor, for Judge Jordan and W.D. La. Judge Walter) affirmed. The Court held that the definitions of "serious drug offense" and "controlled substance offense" did not contain an element of *mens rea* with respect to the illicit nature of the controlled substance. The Court distinguished these definitions from those considered in *Donawa v. United States Attorney General*, 735 F.3d 1275 (11th Cir. 2013), where the Court was asked to decide whether Fla.

Stat. 893.13(1)(a)(2) was a "drug trafficking aggravated felony" under the Immigration and Nationality Act. In *Donawa*, the Court held that the Florida statute was not a "drug trafficking aggravated felony," because the federal analogue included an element of *mens rea* with resepect to the illicit nature of the controlled substance and the Florida statute did not. The generic federal definitions of "serious drug offense" and "controlled substance offense," however, contain no such requirement.

*Holland v. Florida*, No. 12-12404 (December 29, 2014)

**Issue.** Did the Florida Supreme Court unreasonably apply *Faretta v. California*, 422 U.S. 806 (1975), by determining that Mr. Holland could not knowingly and voluntarily waive his right to counsel because of his serious mental illness?

**Held.** No.

**Background.** Mr. Holland is a state prisoner on death row. Before his trial, Mr. Holland repeatedly requested to represent himself because he did not trust his court-appointed attorneys. The trial court denied the request, in part because Mr. Holland suffered from a serious brain injury for which he had previously been hospitalized, he demonstrated an inability to follow court orders and decorum required to be in a courtroom, and because he failed to demonstrate the legal knowledge and skill required to present his own case. The Florida Supreme Court affirmed the trial court. Mr. Holland then petitioned the federal district court for relief. The district court issued a writ of habeas corpus on the ground that the State of Florida violated Mr. Holland's right to represent himself, in violation of the Sixth Amendment and *Faretta*.

**Analysis.** The Eleventh Circuit (Judge Marcus, for Chief Judge Ed Carnes and Judge William H. Pryor) reversed. The Court held that the Florida Supreme Court's decision was consistent with the Supreme Court's instructions in *Faretta*, which explained that a court should inquire in to a defendant's age, mental status, and lack of knowledge and experience in criminal proceedings to determine whether their waiver of the assistance of counsel is knowing and voluntary. The Court noted that the Supreme Court itself concluded, in *Indiana v. Edwards*, 554 U.S. 164 (2008), that a state may deny a defendant the right to represent himself when he is not mentally competent to conduct a trial himself, even if he is competent to stand trial.

The Court also denied Mr. Holland's three other claims for relief, including his assertions that the Florida Supreme Court: (1) unreasonably applied the harmless error analysis of *Chapman v. California*, 386 U.S. 18 (1967), to certain evidentiary errors; (2) unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), in rejecting his claim that trial counsel was ineffective for failing to object to the prosecutor's improper comments; and (3) unreasonably applied *Edwards v. Arizona*, 451 U.S. 477 (1981) in finding his incriminating statements admissible.

## SELECTED UNPUBLISHED OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

*United States v. Hunter*, No. 13-15354 (October 16, 2014)*

The Eleventh Circuit (per curiam, before Judges Hull, Rosenbaum, and Anderson) held that the district court did not abuse its discretion by refusing to permit Mr. Hunter to withdraw his guilty plea. Under Fed. R. Crim. P. 11(d)(2)(B), a defendant seeking to withdraw a guilty plea prior to sentencing must show a fair and just reason for requesting the withdrawal. In light of the statements that Mr. Hunter made under oath at the plea hearing that his attorney had done a good job and spent sufficient time talking with him about the case, the Court did not find convincing Mr. Hunter's contentions that he did not have a working relationship with his attorney. Furthermore, the Court rejected Mr. Hunter's allegations that he was under duress to plead guilty because his mother and attorney had advised him to do so and because he had heard rumors that the judge was a tough sentencer. These allegations are indicative of the kinds of pressures and tradeoffs inherent in the difficult decision of whether to plead guilty, not improper pressure or coercion.

*United States v. Mooney*, No. 13-15016 (October 30, 2013)

The Eleventh Circuit (per curiam, before Judges Tjoflat, Hull, and Jordan) affirmed the district court's denial of Mr. Mooney's post-judgment motion for return of property—a laptop computer. Under Fed. R. Crim. P. 41(g), a person aggrieved by an unlawful search and seizure of property may move for the property's return. When invoked at the close of criminal proceedings, the court treats the motion as a civil action in equity. To establish the court's equitable jurisdiction, the property owner must show that he has clean hands with respect to the property. The Court held that Mr. Mooney was not entitled to relief because he could not show that he had clean hands with respect to the seized computer, which, even if unlawfully seized, undisputably contained evidence of his offenses, including contraband child pornography.

*United States v. Garcia*, No. 12-16572 (November 4, 2014)

The Eleventh Circuit (per curiam, Judges Tjoflat, Julie E. Carnes, and S.D. Ala. Judge Dubose) held that the district court erred at sentencing by collapsing two separate issues into one analysis: first, whether Mr. Garcia should receive a two-level enhancement for possessing a firearm under USSG § 2D1.1(b)(1), and second, whether Mr. Garcia was entitled to safety valve relief under 18 U.S.C. § 3553(f) and USSG § 5C1.2. In cases in which the defendant possessed a gun, the former requires the defendant show that it was clearly improbable that the gun was used in connection with the offense to avoid enhancement. The latter requires that the defendant show by a preponderance of the evidence that the firearm was not possessed in connection with the offense. Under the Eleventh Circuit's decision in

*United States v. Carillo-Ayala*, 713 F.3d 82 (11th Cir. 2013), these are two discrete inquiries that the sentencing court must analyze separately.

*United States v. Murphy*, No. 14-11467 (November 13, 2014)

The Eleventh Circuit (per curiam, before Judges Hull, Marcus, and Rosenbaum) held that the district court did not abuse its discretion by accepting Ms. Murphy's guilty plea and later, at sentencing, deciding to reject the plea agreement. The district court informed Ms. Murphy at sentencing that it was rejecting her plea agreement because it found the negotiated sentencing inadequate to meet the purposes of statutory punishment or the Guidelines. The district court also gave Ms. Murphy the option of withdrawing her guilty plea or to go forward with sentencing without the benefit of the plea agreement, and Ms. Murphy opted for the latter. On this record, the Court found no abuse of discretion.

*United States v. Duhaney*, No. 14-10654 (December 8, 2014)

The Eleventh Circuit (per curiam, before Judges Hull, Julie E. Carnes, and Anderson) held that Mr. Duhaney's California conviction under Cal. Health & Safety Code § 11352(a) constituted a drug trafficking offense under USSG § 2L1.2(b)(1)(B). The Court concluded that by pleading guilty to an indictment that charged him conjunctively with the sale, import, and transport of cocaine base, Mr. Duhaney, under California law, admitted all the elements alleged conjunctively in the indictment. The Court rejected Mr. Duhaney's argument that multiple elements charged conjunctively is insufficient to carry the government's burden because prosecutors routinely charge offenses in the conjunctive, but are required only to prove one of the alleged statutory bases to obtain a conviction at trial. The Court held that by pleading to a charge alleged in the conjunctive, Mr. Duhaney admitted guilt as to each of the listed offenses.

*United States v. Antone-Herron*, No. 14-10915 (December 10, 2014)*

The Eleventh Circuit (per curiam, before Judges William H. Pryor, Rosenbaum, and Julie E. Carnes) held that it was not clear error to find that Mr. Antone-Herron's roommate had given consent to the police to search Mr. Antone-Herron's home. The roommate did not merely fail to object to the officer's entry into the home, but explicitly told the officers to "do what you gotta do," and then allowed the officers to enter the home without objection.

*United States v. Kellogg*, No. 14-11522 (December 15, 2014)

The Eleventh Circuit (per curiam, before Judges Marcus, William H. Pryor, and Rosenbaum) reversed the district court's imposition of a $40,000 fine on Mr. Kellogg. The Court found the record insufficient to conclude that the district court had a reasoned basis for imposing the fine, where the district court did not explain its reasoning and where the Presentence Investigation Report showed that Mr.

Kellogg has at least three dependent children; his family's monthly cash flow was negative; his net worth was negative; he was appointed counsel in the criminal case; and the probation officer did not recommend imposing a fine.

*United States v. Porter*, No. 13-15643 (December 17, 2014)*

The Eleventh Circuit (per curiam, before Judges William H. Pryor, Martin, and Jordan) held that it was plain error for the district court to fail to properly distinguish between armed bank robbery and the lesser included offense of bank robbery on the verdict form, but that the error did not affect Mr. Porter's substantial rights or seriously affect the integrity of the proceedings. The verdict form asked the jury to find Mr. Porter guilty or not guilty of "bank robbery, accompanied by force, violence and intimidation" or in the alternative of "the lesser included offense of bank robbery." This is an error because force is an element of both armed bank robbery and bank robbery, the relevant distinction is whether the offense involves the use of a dangerous weapon. The Court held that the error did not affect Mr. Porter's substantial rights because the verdict form and the jury instructions, taken as a whole, adequately instructed the jury of the difference between armed bank robbery and bank robbery and there was ample evidence presented at trial to support the jury's finding that Mr. Porter committed bank robbery.

*United States v. Gibson*, No. 14-12069 (December 18, 2014)

The Eleventh Circuit (per curiam, before Judges Marcus, Julie E. Carnes, and Fay) held that the district court erred by applying a six-level enhancement under USSG § 3A1.2(c)(1) for assaulting a law enforcement officer during the course of the offense or the immediate flight therefrom. The Court agreed with Mr. Gibson that the enhancement should not have applied to his case because his altercation with a police officer occurred the day after the offense, not during the course of the offense or the immediate flight therefrom. Immediate flight means flight that occurs instantly, without delay, or without loss of time. The Court held the error harmless, however, because the district court indicated that it would have imposed the same sentence without the six-level enhancement and, even without the enhancement, the ultimate sentence was substantively reasonable.

*United States v. Norris*, No. 14-11674 (December 31, 2014)*

The Eleventh Circuit (per curiam, before Judges Tjoflat, Jill A. Pryor, and Black) held that its holding in *United States v. Robinson*, 583 F.3d 1292 (11th Cir. 2009), that Ala. Code § 13A-12-213 (possession of marijuana for other than personal use) is a serious drug offense for purposes of the ACCA remains good law. The Court rejected Mr. Norris's argument that *Descamps v. United States*, 133 S. Ct. 2276 (2013), abrogated *Robinson*. The Court noted that viewing § 13A-12-213(a)(1) as a whole in light of Alabama courts' interpretation of the statute, § 13A-12-213(a)(1) is the only section under which possession with intent to distribute or manufacture

marijuana can be charged and that the section does not apply to any other form or non-personal use of marijuana.