SUMMARIES OF RECENT CASE LAW
APRIL 1, 2020–JUNE 30, 2020

DECISIONS OF THE SUPREME COURT OF THE UNITED STATES

Kansas v. Glover, 140 S. Ct. 1183 (2020) (Where a police database reveals that a vehicle's registered owner has a suspended driver's license, that information is sufficient to establish reasonable suspicion to stop the vehicle, in the absence of "information negating an inference that the owner is the driver.")

Ramos v. Louisiana, 140 S. Ct.1390 (2020) (The Sixth Amendment right to a jury trial, as incorporated against the states, requires a unanimous verdict to convict a defendant of a serious offense.)

United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020) (The Ninth Circuit "departed so drastically from the principle of party presentation as to constitute an abuse of discretion," where it asked three *amici* to argue an issue never raised by Ms. Sineneng-Smith—and vacated her conviction on that issue.)

Kelly v. United States, 140 S. Ct. 1565 (2020) (The Court overturned the convictions of several people involved in the "Bridgegate" scandal, who had been charged with wire fraud and fraud on a federally funded entity, 18 U.S.C. §§ 1343, 666. These statutes criminalize fraudulent schemes to obtain government money or property, and the realignment of toll lanes, which had been done to cause traffic jams, was an exercise of regulatory power that did not fall within the statutes.)

Banister v. Davis, 140 S. Ct. 1698 (2020) (A Rule 59(e) motion to amend the judgment in a habeas case is not a second or successive habeas petition. This clarifies that a timely Rule 59 motion tolls the time to file a notice of appeal until the district court rules on the Rule 59 motion.)

Andrus v. Texas, 140 S. Ct. 1875 (2020) (The Court summarily reversed the Texas appellate court's denial of post-conviction relief, holding that Mr. Andrus had established that his counsel performed deficiently in failing to investigate and present mitigation evidence at his capital sentencing. And, finding that it was "unclear" whether the Texas appellate court had "adequately conducted [the] weighty and record-intensive analysis" of whether he was prejudiced by his counsel's performance, the Court remanded to the state court for it to assess prejudice in the first instance. Justice Alito, joined by Justices Thomas and Gorsuch, dissented, asserting that the Texas appellate court's conclusory statement that Mr. Andrus had not shown prejudice was sufficient.)

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

PUBLISHED OPINIONS

United States v. Maher, 955 F.3d 880 (11th Cir. 2020) (The Court held that it need not address whether one object of a multi-object conspiracy was timely indicted because there was a conviction with a special-verdict form finding the defendant guilty of the other objects of the conspiracy that he did not challenge. The Court also held that an offense of retaining government money in violation of 18 U.S.C. § 641 is a continuing offense with the statute of limitations commencing on the last day someone retains the money.)

United States v. Caniff, 955 F.3d 1183 (11th Cir. 2020) (The Court *sua sponte* vacated its prior opinion affirming Mr. Caniff's conviction under 18 U.S.C § 2251(d)(1), and instead reversed the conviction, holding that private, person-to-person text messages asking a person believed to be a minor to send sexually explicit photos of herself is not "making" a "notice" to receive child pornography.)

United States v. Gomez, 955 F.3d 1250 (11th Cir. 2020) (The standard of review for challenges to a district court's decision to run a federal sentence consecutively to a state sentence is abuse of discretion.)

Barnett v. Macarthur, 956 F.3d 1291 (11th Cir. 2020) (Although officers do not have an affirmative duty to continually reassess whether a DUI

arrestee is intoxicated, where officers obtain information that shows beyond a reasonable doubt that the arrestee is not intoxicated, probable cause supporting a warrantless arrest no longer exists and the Fourth Amendment requires that the arrestee be released.)

United States v. Russell, 957 F.3d 1249 (11th Cir. 2020) (The Court vacated a conviction for possessing a firearm as an illegal alien, 18 U.S.C. § 922(g)(5), because the trial court plainly erred in excluding as irrelevant Mr. Russell's immigration file. In light of *Rehaif*, Mr. Russell's immigration applications were relevant to his knowledge of his status as an alien unlawfully in the United States. Judge Branch dissented, reasoning that he could not establish prejudice because the record established Mr. Russell's knowledge of his status.).

Andrews v. Warden, 958 F.3d 1072 (11th Cir. 2020) (Mr. Andrews, who had been on supervised release, was convicted of distributing crack cocaine and was sentenced to 24 months on the revocation and life on the new offense. President Obama commuted "the total sentence [that Mr. Andrew's] was now serving" to a term of 188 months. The Court held that the language of the commutation foreclosed Mr. Andrews's argument that BOP should have included the 37 months he had served on an earlier supervised release revocation in calculating his release date.)

United States v. Evans, 958 F.3d 1102 (11th Cir. 2020) (The search of a home by officers responding to a report of gunshots was valid under the emergency-aid exception. The officers were informed that Mr. Evans had threatened to kill himself, he was uncooperative, and the officers were reasonably mistaken in believing that a dog whimpering in the home could be a person in distress, despite Mr. Evans's girlfriend explaining that it was only a dog.)

United States v. McLellan, 958 F.3d 1110 (11th Cir. 2020) (The Court declined to review Mr. McLellan's challenge to his ACCA enhancement, because the district court stated that it would have imposed the same total sentence, even absent the enhancement, by running sentences consecutively. The Court further rejected Mr. McLellan's *Rehaif*-based challenge to his § 922(g) conviction, because the failure to allege his knowledge of status in the indictment was non-jurisdictional, and he could not establish plain error in light of his multiple felonies for which he had served several years in prison.)

Hollis v. United States, 958 F.3d 1120 (11th Cir. 2020) (Mr. Hollis's counsel was not ineffective for failing to argue that his prior Alabama convictions for distribution of cocaine and Georgia conviction for trafficking in cocaine could not serve as predicate convictions under the ACCA or career offender guideline because the argument is meritless.)

Welch v. United States, 958 F.3d 1093 (11th Cir. 2020) (Mr. Welch's pre-1997 Florida robbery conviction qualifies as a violent felony under the ACCA's elements clause. Judge Rosenbaum concurred, recognizing that *United States v. Fritts* compelled this result, but argued that *Fritts* was wrongly decided because it failed to look to the actual state of the law in certain districts in Florida).

United States v. Benjamin, 958 F.3d 1124 (11th Cir. 2020) (Expert testimony that a woman died because she ingested furanyl fentanyl and would not have died if she had not ingested it, combined with evidence that Mr. Benjamin distributed the substance to her, was sufficient to establish that his distribution was the but-for cause of death for purposes of an enhanced sentence under 21 U.S.C. § 841(b). Also, the district court had subject matter jurisdiction over charges that Mr. Benjamin violated federal drug laws, so his argument that furanyl fentanyl was not a criminalized analogue at the time of the offense did not implicate the court's jurisdiction.)

United States v. Bates, 960 F.3d 1278 (11th Cir. 2020) (The district court did not abuse its discretion in excluding non-insanity psychiatric evidence in an assault case. In the vast majority of cases, psychiatric evidence is inadmissible to negate *mens rea* in general-intent offenses, but it could be used where the government is required to prove a heightened *mens rea* element, like when self-defense is raised and the government must show that the defendant knew that the victim was a federal agent. Also, federal assault, 18 U.S.C. § 111(b), is a crime of violence under § 924(c)'s elements clause.)

United States v. Andres, 960 F.3d 1310 (11th Cir. 2020) (The district court did not abuse its discretion in denying defendant's motion to suppress as untimely, because neither a tactical decision nor inadvertence establishes good cause. Mr. Andres failed to establish that the court plainly erred in admitting the challenged evidence, because the collective knowledge of the officers on the scene established probable cause to

support a traffic stop. The district court did not err by denying defendant a sentence reduction for acceptance of responsibility where the defendant argued his innocence at trial.)

United States v. McGregor, 960 F.3d 1319 (11th Cir. 2020) (The district court did not abuse its discretion by admitting evidence of a firearm in an access-device fraud case. The firearm was found alongside personal identifying information (PII) and belonged to Mr. McGregor, and thus was relevant and highly probative as to his possession of the PII. The prejudicial effect of the firearm was also limited because the government did not inform the jury that it was illegal for Mr. McGregor to possess the firearm or that he had prior convictions.).

United States v. Yarbrough, 961 F.3d 1157 (11th Cir. 2020) (N.D. Ala. No. 4:17-cr-00131-KOB-HNJ-1) (The Court reversed the grant of a suppression motion, finding that a warrantless search of Mr. Yarbrough's home was a valid protective sweep. The officer had reasonable suspicion that dangerous persons remained inside the home based on: anonymous tips alleging possible drug activity, the presence of two vehicles and three men in the yard when the officers arrived on scene, and Mr. Yarbrough's wife running to the bathroom when officers initially called out to her.).

United States v. Jones, 962 F.3d 1290 (11th Cir. 2020) (A conviction for possession with intent to distribute 50 grams or more of crack under 21 U.S.C. § 841(a)(1) and (b)(1)(A), or 5 grams or more of crack under 21 U.S.C. § 841(a)(1) and (b)(1)(B), is a "covered offense" under § 404 of the First Step Act of 2018. Where a defendant's sentence was based on pre-Fair Sentencing Act statutory penalties, a district court has discretion to impose a reduced sentence for a § 404 covered offense unless the quantity finding that determined the defendant's original statutory sentencing range was a quantity for which "the . . . sentence would have necessarily remained the same had the Fair Sentencing Act been in effect . . . .").

United States v. Oliver, 962 F.3d 1311 (11th Cir. 2020) (Mr. Oliver's prior Georgia conviction for making terroristic threats qualified as an ACCA violent felony. Although the statute's divisibility was not clear based on Georgia case law, the indictment showed that the statute was divisible because it charged only one way to commit the offense, threatening to commit a crime of violence with the purpose of terrorizing another.).

United States v. Owen, 963 F.3d 1040 (11th Cir. 2020) (The Court affirmed the district court's orders directing that money from Mr. Owen's jail account be paid to the court and then paid to the U.S. Treasury to cover the fees of his appointed counsel. First, any error in the district court's seizure of funds from his jail account without notice was harmless, because the court gave him notice and an opportunity to be heard before the court directed the money to be paid to the Treasury. Second, the Court lacked jurisdiction under the CJA to address the merits of the district court's administrative determination that the funds were available for payment.)

United States v. Denson, 963 F.3d 1080 (11th Cir. 2020) (The First Step Act does not require district courts to hold a hearing with the defendant present before ruling on a motion for a reduced sentence under the Act. The Court further noted that the First Step Act provides a limited remedy, not a plenary re-sentencing, as it authorizes a sentence-reduction only on counts that are "covered offenses" and does not permit the sentencing court to change Guidelines calculations unaffected by the Fair Sentencing Act or reduce the sentence based on changes to the law beyond the Fair Sentencing Act.)

United States v. Caldwell, 963 F.3d 1067 (11th Cir. 2020) (The district court did not err in denying defendant's motion to suppress identification evidence obtained from an out-of-court show-up procedure, because, even if the identification was unduly suggestive, the court did not clearly err in finding that it was sufficiently reliable. And sufficient evidence supported Mr. Caldwell's bank robbery conviction: "sparse" evidence can satisfy the government's burden of production to prove a bank's FDIC-insured status, and it was sufficient that the government admitted a 17-year-old FDIC certificate and testimony that the certificate had never lapsed and remained in effect.)

United States v. Ross, 963 F.3d 1056 (11th Cir. 2020) (The Court, sitting *en banc*, overruled *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015), and held that "a suspect's alleged abandonment [of the object of a search or seizure] implicates only the merits of his Fourth Amendment challenge—not his Article III standing—and, accordingly, that if the government fails to argue abandonment, it waives the issue.")

United States v. Tigua, 963 F.3d 1138 (11th Cir. 2020) (Section 402 of the First Step Act, which made safety-valve relief available to those convicted under the MDLEA, applies only to those adjudicated guilty after Congress passed the Act.).

United States v. Singer, 963 F.3d 1144 (11th Cir. 2020) (As an issue of first impression, the Court held that to sustain a conviction for attempting to export devices to Cuba without a license, 50 U.S.C. § 1705, the government must establish that a defendant knew the facts that made exporting those devices illegal. The evidence of Mr. Singer's knowledge was sufficient, because it showed he had signed several forms giving notice of export license requirements, concealed the devices on his boat, and omitted mention of his intent to export devices when he applied for permission to travel to Cuba.)

United States v. Pon, 963 F.3d 1207 (11th Cir. 2020) (The Court held that, even if the district court erred in limiting the scope of Mr. Pon's surrebuttal, and even if that error violated his Sixth Amendment rights, the error was harmless in light of the overwhelming evidence. Judge Martin dissented from that holding, stating that the limit violated Mr. Pon's constitutional right to present a complete defense and was not harmless. She emphasized that the Court must be cautious when relying on harmless error, especially based on "overwhelming evidence.")

United States v. Clotaire, 963 F.3d 1288 (11th Cir. 2020) (Because ATM surveillance videos are self-authenticating business records, still images of frames from those videos are too, and because images are not statements at all, they could not be testimonial statements that implicate the Confrontation Clause. As the government conceded, a federal agent's testimony about camera lens distortion of images was expert testimony, but the court did not plainly err in admitting the testimony because the witness had specialized knowledge. Also, the district court did not err by admitting Mr. Clotaire's mugshot photo for the jury to compare to surveillance videos, because Mr. Clotaire's defense that he was not the person on video created a demonstrable need for the government to prove identity with a photo taken nearer the time of the video; the photo did not suggest that Mr. Clotaire had a criminal history because a stipulation informed the jury that the photo was from his arrest in this case; and the photo was presented to the jury in a manner that was not overly stigmatizing or suggestive of criminality.)

UNPUBLISHED OPINIONS FROM THE NORTHERN DISTRICT OF ALABAMA

United States v. West, 806 F. App'x 892 (11th Cir. 2020) (N.D. Ala. No. 1:17-cr-00189-MHH-HNJ-1) (The district court erred in denying a motion to suppress evidence found during a warrantless vehicle search. Mr. West was stopped during business hours for running a red light, he engaged in no erratic behavior, and the officers observed no contraband. Under the totality of the circumstances, Mr. West's movement, opening his hand over an envelope of papers, did not constitute probable cause, to render the search a valid automobile search.).

United States v. Williams, 803 F. App'x 379 (11th Cir. 2020) (N.D. Ala. No. 5:18-cr-00442-SLB-GMB-1) (The district court did not err in denying Mr. Williams's request to withdraw his guilty plea, because he failed to prove his statements during the plea colloquy were false. Sufficient evidence supported his § 924(c) conviction, as testimony from five witnesses and surveillance footage of a bank robbery were enough to permit the jury to find that Mr. Williams carried a gun, even though the gun itself was not found.)

Pritchett v. United States, 808 F. App'x 980 (11th Cir. 2020) (N.D. Ala. Nos. 2:16-cv-08113-CLS; 2:05-cr-00135-CLS-JHE-1) (The Court affirmed the denial of Mr. Pritchett's § 2255 motion challenging his § 924(c) conviction on a ground not relied on by the district court: his pharmacy robbery conviction qualified as a crime of violence under the elements clause.)

United States v. Peebles, 810 F. App'x 727 (11th Cir. 2020) (N.D. Ala. No. 7:18-cr-00623-LSC-JEO-1) (The district court did not clearly err in finding that Mr. Peebles possessed marijuana with intent to distribute, such that the enhancement under U.S.S.G. § 2K2.1(b)(6)(B) applied, where he admitted to agents that he had sold marijuana and he possessed marijuana on two occasions, some of which was packaged for sale. The sentence imposed was also both procedurally and substantively reasonable.)

United States v. Starks, 811 F. App'x 584 (11th Cir. 2020) (N.D. Ala. No. 5:11-cr-00404-KOB-SGC-1) (A *pro se* litigant's motion to disqualify the prosecutors in his case was moot because his case had ended and the two prosecutors were no longer employed by the U.S. Attorney's Office. And the district court lacked jurisdiction to review any challenge to his

convictions because it would be an unauthorized successive § 2255 motion.)

United States v. Cropper, --- F. App'x ---, 2020 WL 2114268 (11th Cir. May 4, 2020) (N.D. Ala. No. 2:17-cr-00030-VEH-TMP-1) (Mr. Cropper could not establish plain error under *Rehaif*, because he could not show that any alleged error affected his substantial rights. Although Mr. Cropper had not served a prison sentence on his prior convictions, he stipulated at trial that he had been convicted of a felony offense, he acknowledged his prior felony during closing arguments, and an ATF task force member testified that he acknowledged that he was a felon during an interview shortly after his arrest.).

United States v. Portillo, --- F. App'x ---, 2020 WL 2299582 (11th Cir. May 8, 2020) (N.D. Ala. No. 7:17-cr-00201-LSC-HNJ-1) (Sufficient evidence supported Mr. Portillo's conviction for conspiracy to possess with intent to distribute a controlled substance after officers found three packages of cocaine hidden in the intake manifold of Mr. Portillo's truck. Though Mr. Portillo denied knowing the drugs were in the truck, the jury was free to discredit him).

United States v. McGowan, --- F. App'x ---, 2020 WL 3073875 (11th Cir. June 10, 2020) (N.D. Ala. No. 2:11-cr-00424-RDP-SGC-2) (The introduction of recorded phone calls regarding heroin from 2013 did not constructively amend an indictment alleging a cocaine conspiracy occurring between August 2011 and October 2011. The admission of the calls did not alter the essential elements of the offense because the date of an offense is not an essential element and the government did not offer the calls to prove the existence of a conspiracy in 2013.).