SUMMARIES OF RECENT CASE LAW
JANUARY 1, 2017—MARCH 31, 2017

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Buck v. Davis, 137 S. Ct. 759 (2017).

Issue: Was Fed. R. Civ. P. 60(b)(6) relief warranted by extraordinary circumstances where at Mr. Buck's capital-sentencing hearing his attorney elicited testimony by a court-appointed psychologist that Mr. Buck presented a higher risk of future dangerousness because he is black?

Held: Yes.

Background: Mr. Buck was charged in Texas state court with capital murder. A court-appointed psychologist prepared a written report finding an "[i]ncreased probability" that Mr. Buck would pose a danger in the future because of his race. 137 S. Ct. at 768. At the sentencing hearing, his attorney called the psychologist as a witness and elicited testimony that an offender's race is "know[n] to predict future dangerousness" and that "black people are over represented in the Criminal Justice System." *Id.* at 769 (comma and internal quotations omitted).

The case came before the Court on certiorari review of the Fifth Circuit's denial of a certificate of appealability for the district court's denial of his Fed. R. Civ. P. 60(b)(6) motion to reopen a prior habeas proceeding under 28 U.S.C. § 2254.

Analysis: The Supreme Court (Chief Justice Roberts) reversed. Rule 60(b)(6) allows relief from a prior judgment or order for "any . . . reason that justifies relief," apart from the reasons listed in subsections (b)(1) through (b)(5). *Id.* at 772. It is limited to "extraordinary circumstances," which the Court has said "will rarely occur in the habeas context." *Id.* (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535, 125 S. Ct. 2641, 2649 (2005)). Mr. Buck's lawyer's conduct was an extraordinary circumstance that made relief under Rule 60(b)(6) appropriate. *Id.* at 777–79. At the time of his prior habeas proceedings, Mr. Buck had been procedurally barred from litigating matters relating to the psychologist's testimony and his lawyer's effectiveness. But the Court's decisions in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), allow procedural default to be excused for cause and prejudice where the default occurred in a "state system[] that, as a practical matter, den[ies] criminal defendants 'a meaningful opportunity' to press ineffective assistance claims on direct appeal." *Id.* at 771.

Justices Thomas and Alito dissented.

Rippo v. Baker, 137 S. Ct. 905 (2017).

Issue: Must a party who alleges that a judge's refusal to recuse himself violated due process prove that the judge was actually biased?

Held: No.

Background: During trial, Mr. Rippo learned that the judge presiding over his case was the subject of a federal bribery investigation and that the district attorney's office

prosecuting Mr. Rippo might be part of the investigation The judge denied Mr. Rippo's motion under the Due Process Clause of the Fourteenth Amendment for him to recuse.

In state postconviction proceedings, the Nevada Supreme Court denied relief, holding that "Rippo was not entitled to discovery or an evidentiary hearing [in a postconviction proceeding] because his allegations 'd[id] not support the assertion that the trial judge was actually biased in this case.'" 137 S. Ct. at 906–07 (quoting *Rippo v. State*, 368 P.3d 729, 744 (2016)).

Analysis: The Supreme Court (per curiam) summarily reversed. *Id.* at 907. The Court held that the Nevada Supreme Court "applied the wrong legal standard. . . . [T]he Due Process Clause may sometimes demand recusal even when a judge '"ha[s] no actual bias."'" *Id.* (quoting *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825, 106 S. Ct. 1580, 1587 (1986)). The proper question where a litigant alleges that a judge's failure to recuse violates due process is "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Id.*

Beckles v. United States, 137 S. Ct. 886 (2017).

Issue: Is the residual clause of U.S.S.G. § 4B1.2's definition of "crime of violence" void for vagueness based on the holding in *Johnson v. United States,* 135 S. Ct. 2551 (2015), that an identical statutory provision was unconstitutionally vague?

Held: No.

Background: Mr. Beckles was sentenced as a career offender under U.S.S.G. § 4B1.1 based in part on a holding that his prior conviction for possession of a sawed-off shotgun was a "crime of violence" under § 4B1.2(a)(2)'s "residual clause." In proceedings under 28 U.S.C. § 2255, he argued that the Guidelines' residual clause is void for vagueness under *Johnson*. The Eleventh Circuit upheld his sentence.

Analysis: The Supreme Court (Justice Thomas) affirmed. The Court has held that vague "laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses" violate due process. 137 S. Ct. at 892. Because the Guidelines are advisory rather than mandatory, the Court concluded that they "do not fix the permissible range of sentences . . . , they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." *Id.* Therefore, "the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)'s residual clause is not void for vagueness." *Id.* at 895.

Justice Kennedy wrote a brief concurrence stating that "cases may arise in which the [Guidelines'] formulation of a sentencing provision leads to a sentence, or a pattern of sentencing, challenged as so arbitrary that it implicates constitutional concerns" on some basis other than vagueness. *Id.* at 897 (Kennedy, J., concurring).

Justice Ginsburg concurred only in the judgment because possession of a sawed-off shotgun was specifically enumerated as a crime of violence in the commentary to § 4B1.2.

Justice Sotomayor concurred in the judgment for the same reason as Justice Ginsburg. She disagreed with the Court's holding that the Guidelines are not subject to vagueness challenges, because "[t]he Guidelines anchor every sentence" and "are, "'in a real sense[,] the basis for the sentence.'"" *Id.* (Sotomayor, J., concurring in the judgment).

Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).

Issue: Does the exclusion of evidence of a juror's racial bias in support of a defendant's motion for a new trial violate the Sixth Amendment right to trial by a fair and impartial jury?

Held: Yes.

Background: Mr. Peña-Rodriguez was convicted of Colorado state offenses, including unlawful sexual contact. He moved for a new trial based on two jurors' affidavits alleging that another juror made racially biased statements during the jury's deliberations. The affidavits stated that the juror said he thought Mr. Peña-Rodriguez "did it because he's Mexican and Mexican men take whatever they want" and that "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." 137 S. Ct. at 862. The trial court denied the motion for a new trial, holding that the matters alleged in the affidavits were inadmissible under a Colorado rule of evidence barring juror testimony about jury deliberations. The Colorado Supreme Court affirmed.

Analysis: The Supreme Court (Justice Kennedy) reversed the exclusion of the jurors' testimony and remanded for further proceedings on the motion for a new trial. The Court held, in cases of "juror bias so extreme that, almost by definition, the jury trial right has been abridged," *id.* at 866 (quoting *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014)), "the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee," *id.* at 869. "[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant," a rule barring juror testimony about that statement violates the Sixth Amendment. *Id.*

Justice Thomas filed a dissenting opinion, and Justice Alito filed a dissenting opinion that Chief Justice Roberts and Justice Thomas joined.

Manuel v. City of Joliet, 137 S. Ct. 911 (2017).

Issue: Does the Fourth Amendment apply to a claim of unlawful pretrial detention even after the start of the legal process?

Held: Yes.

Background: During a traffic stop, police searched Mr. Manuel and found a vitamin bottle containing pills. Although a field test was negative, officers arrested Mr.

Manuel. A second test of the pills also was negative, but an evidence technician reported that it was positive for ecstasy, and an officer wrote in a report that he "knew the pills to be ecstasy." 137 S. Ct. at 915. Based on those false assertions, Mr. Manuel was jailed and charged with possession of a controlled substance. A judge subsequently found probable cause for Mr. Manuel's continued detention based on the same allegations. A state police laboratory later tested the pills and found no evidence of a controlled substance. More than a month later, the charge was dismissed and Mr. Manuel was released from jail.

Mr. Manuel filed a civil suit under 42 U.S.C. § 1983. A federal district court dismissed the suit, holding that it was untimely because it was filed more than two years after Mr. Manuel's arrest and because his detention after the judge's probable-cause finding, which ended less than two years before the suit was filed, could not support a claim of a Fourth Amendment violation. The Seventh Circuit affirmed.

Analysis: The Supreme Court (Justice Kagan) reversed the Seventh Circuit's holding that the Fourth Amendment is not implicated by pretrial detention after the start of legal process. Mr. Manuel's pretrial detention was a seizure, and it was unreasonable because it was based on police falsehoods rather than probable cause. A majority of the Court previously recognized the validity of § 1983 claim based on the Fourth Amendment, even after a judicial finding of probable cause, where the finding was supported only by "policeman's unfounded charges." *Id.* at 918 (citing *Albright v. Oliver,* 510 U.S. 266, 271, 114 S. Ct. 807, 811 (1994) (plurality opinion); 510 U.S. at 290, 114 S. Ct. at 821 (Souter, J., concurring in judgment)). Therefore, the Fourth Amendment is violated not only "when the police hold someone without any reason before the formal onset of a criminal proceeding" but also "when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements." *Id.*

Justice Thomas filed a dissenting opinion, and Justice Alito filed a dissenting opinion that Justice Thomas joined.

PUBLISHED OPINIONS

United States v. Garcia-Martinez, 845 F.3d 1126 (11th Cir. 2017).

Issue: Does Florida burglary of a dwelling, which includes curtilage among the protected premises, qualify as an enumerated crime of violence under U.S.S.G. § 2L1.2?

Held: No.

Background: The district court determined that Mr. Garcia-Martinez's prior Florida conviction for second-degree burglary of a dwelling was a crime of violence under § 2L1.2 and increased his base offense level accordingly.

Analysis: The Eleventh Circuit (Chief Judge Ed Carnes for Judge Anderson and S.D. Fla. Judge Rosenberg) held that Florida burglary of a dwelling is not an enumerated crime of violence under § 2L1.2, vacated the sentence, and remanded for resentencing.

The commentary to § 2L1.2 of the 2014 Sentencing Guidelines, under which Mr. Garcia-Martinez was sentenced, enumerates burglary of a dwelling as a crime of violence, and his second-degree burglary conviction was specifically for burglary of a dwelling. *Id.* at 1128–29. However, Florida law defines "dwelling" more broadly than the generic definition ascribed to the enumerated offense. The generic definition of "dwelling" is "a building or portion thereof, a tent, a mobile home, a vehicle or other enclosed space which is used or intended for use as a human habitation, home or residence." *Id.* at 1132. Florida law, by contrast, includes curtilage in the definition of "dwelling." Because entry into curtilage is not a separate element from entry into the structure of a dwelling, the district court erred by employing the "modified categorical approach" to determine that Mr. Garcia-Martinez's conviction was not for entry into curtilage. *Id.* at 1134.

United States v. Stein, 846 F.3d 1135 (11th Cir. 2017).

Issue: Did the district court err in calculating the actual-loss amounts for Guidelines and restitution purposes by presuming that all the investors relied on fraudulent representations and by failing to consider whether intervening events affected the loss amount?

Held: Yes.

Background: Mr. Stein was convicted of mail, wire, and securities fraud. His fraudulent conduct involved producing and disseminating press releases falsely reporting business sales with the intent of driving up the business's stock value. One investor testified at trial that he relied on a false press release, and a second investor provided a victim impact statement at sentencing saying the same. The government represented at sentencing that it also had several other investors' victim impact

statements that they relied on press releases generally, though not necessarily Mr. Stein's false statements, in buying stock in the business. The district court accepted the government's contention that the 2,415 investors bought stock in the business during the fraudulent period were all victims for purposes of actual-loss calculations. The court found that the total actual loss was the difference between the cost of those investors' stock purchases and the value of their shares at the end of the fraudulent period. The government calculated that difference to be $13,186,025.85, and over Mr. Stein's objections the court accepted that figure as the actual-loss amount for purposes of both U.S.S.G. § 2B1.1 and restitution calculations.

Analysis: The Eleventh Circuit (Judge Jill Pryor for Judge William Pryor and N.D. Ga. Judge Story) affirmed Mr. Stein's conviction, but it vacated his sentence and remanded the case for the district court to recalculate the actual-loss amount. The Court held that for the actual-loss calculation for Guidelines and restitution purposes, the government must show that the criminal conduct was both a "but for" cause and a proximate cause of the loss.

In Mr. Stein's case, proving "but for" causation required showing that investors relied on the fraudulent conduct, though reliance may be proved by circumstantial evidence. But because the government provided neither direct nor circumstantial evidence that 2,415 investors relied on Mr. Stein's fraud, the district court erred in basing its calculation on all of those investors' losses. The district court also had insufficient evidence of proximate causation to support its actual-loss calculation because it did not consider evidence that market forces independent of Mr. Stein's fraud were responsible for some of investors' losses.

United States v. Golden, --- F.3d ---, 2017 WL 343523 (11th Cir. Jan. 24, 2017).

Issue: Is a Florida conviction for aggravated assault a crime of violence under the elements clause of U.S.S.G. § 4B1.2(a)(1)?

Held: Yes.

Background: Mr. Golden appealed the district court's holding that his prior conviction for aggravated assault in Florida is a crime of violence under § 4B1.2(a)(1)'s elements clause.

Analysis: The Eleventh Circuit (per curiam, Judges Jordan and Jill Pryor and N.D. Ala. Judge Proctor) affirmed. The Court concluded that it was bound by *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013), which held that Florida aggravated assault is a "violent felony" under the elements clause of the Armed Career Criminal Act, which "is identical to the elements clause of § 4B1.2(a)(1)." Slip op. at 2. Although "some members of our court have questioned the continuing validity of *Turner* in light of cases like *Descamps v. United States*," *Turner* remains binding precedent. *Id.*

Judge Jill Pryor wrote separately to urge en banc rehearing to reconsider *Turner*. *Id.* at 4 (Jill Pryor, J., concurring in result). She asserted that *Turner* was wrongly decided "because it failed to consider the least of the acts Florida criminalizes in its

aggravated assault statute" and incorrectly assumed that the offense requires intentional conduct. *Id.* at 5.

United States v. Scheels, 846 F.3d 1341 (11th Cir. 2017).

Issue: Did the district court err by imposing a sentencing enhancement for possessing child pornography containing "sadistic or masochistic conduct," where such conduct was not directed at the child victim?

Held: No.

Background: Mr. Scheels pleaded guilty to one count of production of child pornography and one count of receipt of child pornography. The sentencing court imposed a four-level enhancement under U.S.S.G. § 2G2.1(b)(4), which applies where a defendant's "offense involved material that portrays sadistic or masochistic conduct or other depictions of violence." Mr. Scheels objected to this enhancement, arguing that because the "sadistic or masochistic conduct" was directed at him, not at the child victim, the enhancement should not apply.

Analysis: The Eleventh Circuit (per curiam, Chief Judge Ed Carnes and Judges Julie Carnes and Jill Pryor) affirmed. The Court held that offense conduct under the guidelines includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" and the facts in this case included "inducing or commanding a minor to participate in sadistic or masochistic conduct during the course of sexual activity." *Scheels*, 846 F.3d at 1342 (quotation omitted). The Court distinguished the cases cited by Mr. Scheels as dicta from other circuits that conflicted with the plain text of the guidelines.

United States v. Votrobek, 847 F.3d 1335 (11th Cir. 2017).

Issues:

1. Did defendant's conviction violate the Double Jeopardy clause on the basis that his conduct was part of a criminal conspiracy for which he had already been tried and acquitted?

2. Did the district court abuse its discretion by denying defendant's request to hold a *Franks* hearing?

3. Did the district court abuse its discretion by denying defendant's request to provide an entrapment-by-estoppel jury instruction?

Held:

1. No.

2. No.

3. No.

Background: Jason Votrobek and Roland Castellanos were convicted of drug and money laundering offenses related to a "pill mill" business in Georgia. Mr. Votrobek had previously been tried and acquitted on federal drug conspiracy charges arising from similar activity in Florida.

Analysis: The Eleventh Circuit (District Judge Royal for Judges Wilson and Julie Carnes) affirmed.

To determine whether actions constitute one or two separate conspiracies, a court considers: "(1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events alleged as part of the conspiracy took place." *Votrobek*, 847 F.3d at 1340 (quoting *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978)). After considering these factors, the Court found that the time, place, participants and overt acts of the Georgia and Florida conspiracies were substantially different. Although the offenses in the indictments were virtually identical, the balance of the five factors indicated the existence of two separate conspiracies. Thus, Mr. Votrobek's convictions did not violate the Double Jeopardy clause.

Second, the Court found that Mr. Castellanos had failed to demonstrate that the wiretap affidavit contained intentionally false statements that were necessary to probable cause, as required to support a *Franks* hearing.

Finally, the Court rejected Mr. Castellanos' argument that he was entitled to a jury instruction regarding entrapment-by-estoppel at trial. This theory provides a limited exception to the rule that ignorance of the law is not a defense, enabling a defendant to argue that he reasonably relied on a misstatement by an agent of the federal government approving of the defendant's illegal conduct. The Court found that the alleged statements identified by Mr. Castellanos as support were made by state agents, whose statements could not support an entrapment-by-estoppel defense under federal law.

United States v. Vargas, 848 F.3d 971 (11th Cir. 2017)

Issue: Did a police officer's prolonging of a vehicle stop to find legal means to move a car from the scene violate the Fourth Amendment?

Held: No.

Background: After a police officer extended a traffic stop to safely and legally move the car from the location of the stop, he suspected illegal activity and asked for

consent to search the car. The driver consented to the search and the officer found cocaine and methamphetamine. Mr. Vargas, the car's passenger, moved to suppress the drugs by arguing that the consent was improper because it occurred after the prolonged stop. The district court denied the motion.

Analysis: The Eleventh Circuit (per curiam, Chief Judge Ed Carnes and Judges Tjoflat and William Pryor) affirmed the denial of the motion to suppress. The Court disagreed with Mr. Vargas's contention that the officer obtained consent after and because he prolonged the stop without legal justification. Rather, it determined, "[a]ll of [the officer's] actions were taken in the lawful discharge of his duties . . . ." 848 F.3d at 974.

Phillips v. United States, 849 F.3d 988 (11th Cir. 2017).

Issues:

1. Should a conviction be vacated in a 28 U.S.C. § 2255 proceeding when a government agent's perjured testimony was the only evidence that supported the conviction?

2. Should a conviction be vacated in a 28 U.S.C. § 2255 proceeding when a government agent's false statements provided some of the basis for a search warrant that yielded evidence used at trial, but probable cause to search remained after the agent's false statements were excised?

Held:

1. Yes.

2. No.

Background: While preparing for a hearing on Mr. Phillips's § 2255 motion, the government learned that an agent had testified falsely at trial and made false statements in support of a search warrant that was used to obtain evidence admitted against Mr. Phillips. Based on that discovery, the government joined the motion to vacate four of Mr. Phillips's five convictions. The district court vacated one conviction based on the agent's false testimony, but held that another was supported by "ample co-conspirator testimony, apart from [the agent's] perjured testimony" and should not be vacated. 849 F.3d at 992. The court also denied relief as to two counts supported by evidence obtained pursuant to the search warrant, concluding that "the search was supported by probable cause without [the agent's] false statements" and the evidence therefore still would have been admissible. *Id.*

Analysis: The Eleventh Circuit (Judge Dubina for Judge Marcus and 2d Cir. Judge Walker) affirmed in part, vacated in part, and remanded for resentencing. The Court found fault with the district court's conclusion that one of Mr. Phillips's convictions based on the agent's false testimony should stand. *Id.* Use of the perjured testimony

was a due-process violation under *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 766 (1972), and entitled Mr. Phillips to vacatur of the conviction based on it, because the falsehood was material to the conviction. *Id.* at 993.

The Court affirmed the district court's denial of Mr. Phillips's motion to vacate the convictions that were based on evidence obtained under the search warrant. *Id.* at 994. It held that the district court correctly reevaluated the basis for the warrant without the agent's false statements and correctly concluded that the factual support from other sources still established probable cause. *Id.*

Cadet v. Fla. Dep't of Corr., 853 F.3d 1216 (11th Cir. 2017).

Issue: Did habeas counsel's failure to timely file a 28 U.S.C. § 2254 petition, because the attorney incorrectly believed he could wait a year to file despite Mr. Cadet's repeated insistence that the filing deadline was imminent, constitute sufficient attorney misconduct to entitle Mr. Cadet to equitable tolling of § 2254's statute of limitations?

Held: No.

Background: Mr. Cadet's attorney filed a § 2254 petition almost one year after the end of state postconviction proceedings. When the State responded that the statute of limitations expired before the filing date, the attorney recognized his mistake and argued for equitable tolling of § 2254's statute of limitations based on his own miscalculation and inaccurate assurances to Mr. Cadet. The district court found that equitable tolling was not warranted because the attorney's error was "an act of negligence '*during* the attorney-client relationship,' not a constructive abandonment of that relationship," and dismissed the petition. 853 F.3d at 1221.

Analysis: The Eleventh Circuit (Ed Carnes, Chief Judge, for Judge Fay) affirmed. An attorney's mistake in calculating a filing deadline, "even when caused by the failure to do rudimentary legal research, does not justify equitable tolling." *Id.* (citing *Lawrence v. Florida*, 549 U.S. 327, 336–37, 127 S. Ct. 1079, 1085 (2007)). To equitably toll the statute of limitations, a prisoner must show (1) reasonable diligence on his own part and (2) "either abandonment of the attorney-client relationship . . . *or* some other professional misconduct *or* some other extraordinary circumstance . . . ." *Id.* at 1225, 1227. Professional misconduct by an attorney may "create an extraordinary circumstance that warrants equitable tolling" even if it does not rise to the level of "bad faith, dishonesty, divided loyalty, [or] mental impairment . . . ." *Id.* at 1222–23 (quoting *Holland v. Florida*, 560 U.S. 631, 649–51, 130 S. Ct. 2549, 2562–63 (2010)). Because Mr. Cadet's attorney was not serving someone else's interests over Mr. Cadet's, the mistakes he made did not amount to abandonment or another extraordinary circumstance. *Id.* at 1234.

Judge Wilson dissented.

United States v. Hughes, 849 F.3d 1008 (11th Cir. 2017).

Issue: May a prisoner obtain relief under 18 U.S.C. § 3582(c)(2) where he received a below-guidelines sentence based on a binding plea agreement under Fed. R. Crim. P. 11(c)(1)(C) that did not tie the sentence to a guidelines sentencing range?

Held: No.

Background: Mr. Hughes pleaded guilty to conspiracy to possess with intent to distribute methamphetamine and possession of a firearm by a felon. He entered into a binding plea agreement with the government under Fed. R. Crim. P. 11(c)(1)(C), which recommended a sentence of 180 months' imprisonment. The district court accepted the agreement and sentenced Mr. Hughes accordingly. He subsequently moved to reduce his sentence under § 3582(c)(2) based on a retroactively applicable guidelines amendment that reduced the base offense level for his drug offense. The district court denied relief, concluding that the sentence was not "'based on' a sentencing guidelines range" as § 3582(c)(2) requires, but on the plea agreement.

Analysis: The Eleventh Circuit (Judge William Pryor for Judge Jordan and 6th Cir. Judge Baldock) affirmed. The Court agreed with the district court's holding that under *Freeman v. United States*, 564 U.S. 522, 131 S. Ct. 2685 (2011), Mr. Hughes was not eligible for § 3582(c)(2) relief. Because Mr. Hughes's plea agreement "does not make any recommendation about a specific application of the Sentencing Guidelines, and the agreement does not calculate Hughes's range or discuss factors that must be used to determine that range," it "does not 'make clear' that the basis for the 180 month recommendation is a guidelines sentencing range." 849 F.3d at 1016. Consequently, his sentence is ineligible for reduction under § 3582(c)(2).

McCarthan v. Dir. of Goodwill Indus.-Suncoast, 851 F.3d 1076 (11th Cir. 2017).

Issue: Does 28 U.S.C. § 2255(h)'s bar of a second or successive § 2255 motion based on a change in non-constitutional case law entitle an inmate to petition for a writ of habeas corpus under 28 U.S.C. § 2241, where the inmate previously litigated a § 2255 motion?

Held: No.

Background: Mr. McCarthan was convicted of possessing a firearm as a convicted felon and sentenced under the Armed Career Criminal Act ("ACCA"). He later moved to vacate his sentence under § 2255, alleging ineffective assistance of counsel, and the motion was denied on its merits. After a Supreme Court decision cast doubt on the lawfulness of the ACCA-enhanced sentence, he challenged the sentence under § 2241. Notably, § 2255(e) provides that a federal inmate generally must bring a collateral challenge under § 2255, but subsection (e) contains a "saving clause" allowing a traditional habeas corpus action under § 2241 where "it . . . appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [an inmate's] detention."

The district court dismissed his petition, and an Eleventh Circuit panel affirmed. The Court then granted Mr. McCarthan's petition for rehearing en banc.

Analysis: On rehearing en banc, the Eleventh Circuit (Judge William Pryor, joined by Chief Judge Ed Carnes and Judges Tjoflat, Hull, Marcus, and Julie Carnes) affirmed the panel's decision and overruled its prior decision in *Wofford v. Scott*, 177 F.3d 1236 (11th Cir. 1999), which established the legal test that the panel applied and two decisions that granted relief based on *Wofford*: *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253 (11th Cir. 2013) and *Mackey v. Warden, FCC Coleman-Medium*, 739 F.3d 657 (11th Cir. 2014). *Id.*

In *Wofford*, the Court held that the saving clause may authorize a habeas claim that is "based upon a retroactively applicable Supreme Court decision overturning circuit precedent." *Id.* at 1083 (quoting *Wofford*, 177 F.3d at 1245). But the *McCarthan* majority repudiated the *Wofford* test, concluding that it did not faithfully "adhere to the text of section 2255(e) . . . ." *Id.* at 1080. In its place, the Court adopted the Tenth Circuit's interpretation of the saving clause: "[A] prisoner can proceed to § 2241 only if his initial § 2255 motion was *itself* inadequate or ineffective to the task of providing the petitioner with a *chance* to *test* his sentence or conviction." *Id.* at 1085 (quoting *Prost v. Anderson*, 636 F.3d 578, 587 (10th Cir. 2011) (Gorsuch, J.)). The fact that Mr. McCarthan's claim would have been "doomed under circuit precedent," *id.* at 1087, did not change the fact that his "claim that his sentence exceeds the statutory maximum is exactly the kind of claim that a [§ 2255] motion to vacate is designed to 'remedy,'" *id.* at 1086. In such circumstances, "a [§ 2255] motion to vacate remains an adequate and effective remedy for a prisoner to raise the claim and attempt to persuade the court to change its precedent, and failing that, to seek certiorari in the Supreme Court." *Id.* at 1099. Therefore, the Court held, the saving clause did not authorize his § 2241 claim.

The majority acknowledged that its holding would "not often" authorize habeas proceedings under § 2241. *Id.* at 1088. In dicta, it stated that a habeas petition could be proper where a § 2255 action is altogether unavailable or impracticable: where a claim "challenge[s] *the execution of* [a] sentence" rather than the sentence itself, *id.* at 1093 (emphasis added), or challenges a sentence by a "court [that] literally dissolves after sentencing and is no longer available" or "perhaps" by "multiple sentencing courts," *id.*

Judge Jordan concurred in the judgment, but disagreed with the majority's interpretation of the saving clause. "In my view, the 'saving clause' allows a federal prisoner to seek a writ of habeas corpus pursuant to 28 U.S.C. § 2241 if § 2255 relief is unavailable to him and a new (and governing) interpretation of the statute of conviction demonstrates that he never committed a crime." *Id.* at 1101–02 (Jordan, J., concurring in the judgment). But "[b]ecause Mr. McCarthan is not asserting such a claim of innocence," Judge Jordan agreed that he could not proceed under § 2241. *Id.* at 1111 (Jordan, J., concurring in the judgment).

Judge Wilson, joined by Judge Jill Pryor, dissented. He agreed with Judge Jordan that the saving clause embraces a claim of actual innocence, but asserted that it also

authorizes a § 2241 claim that a prisoner's sentence "exceeds the statutory maximum." *Id.* (Wilson, J., dissenting).

Judge Martin also dissented, and Judge Jill Pryor also joined her opinion. She contended that by interpreting the § 2255(h) limitation on second or successive motions to limit the scope of § 2255(e) as well, the majority "reads the savings clause right out of the statute." *Id.* at 1119 (Martin, J., dissenting). She advocated adopting the Sixth and Seventh Circuits' interpretation of the saving clause, under which a § 2241 habeas petition is allowed where an inmate can "show[] that, at some point after his first § 2255 proceeding, there was a retroactive decision from an authoritative federal court, which interpreted a statute in a way that now reveals a fundamental defect in that prisoner's conviction or sentence." *Id.* at 1116 (Martin, J., dissenting).

Judge Rosenbaum also dissented, expressing a position similar to Judge Martin's.

United States v. McCullough, 851 F.3d 1194 (11th Cir. 2017).

Issue: Does Fed. R. Crim. P. 25(b)(1), which bars the court from reassigning a case to a new judge after a verdict or finding of guilty unless the judge who presided at trial is absent or disabled, apply where a defendant pleaded guilty?

Held: No.

Background: After Mr. McCullough pleaded guilty to several offenses, his case was reassigned to another judge for sentencing. The new judge denied Mr. McCullough's motion under Rule 25(b)(1) to reassign the case to the previous judge, on the grounds that Rule 25 did not apply to defendants who pleaded guilty.

Analysis: The Eleventh Circuit (Judge William Pryor for Judge Jordan and Seventh Circuit Judge Ripple) affirmed. The Court reasoned that the text of Rule 25(b)(1) probhits reassignment only from "the judge who presided at trial." The Court was not persuaded by the argument that accepting a guilty plea is analogous to a "mini-bench trial." Although at least one other circuit had ruled in the alternative, the Court held that the plain text of this rule controlled the issue.

United States v. Bergman, 852 F.3d 1046 (11th Cir. 2017).

Issues:

1. Did the district court err in denying Mr. Bergman's motion for a judgment of acquittal, which argued that he withdrew from the conspiracy more than five years before the charge was filed?

2. Did the district court abuse its discretion in denying a motion to strike the entire jury panel after the magistrate judge questioned a juror, who reported potential bias, in a manner that the defendant argued would deter other jurors from honestly disclosing their potential biases?

Held:

1. No

2. No.

Background: Mr. Bergman and a co-defendant, Mr. Santaya, were tried together on charges that they participated in a Medicare-fraud conspiracy. Mr. Bergman was employed as a physician's assistant by a health-care business that billed Medicare over about seven years. Mr. Santaya was employed by the same business as a patient recruiter.

Analysis: The Eleventh Circuit (Judge Hull for Judge Martin and 10th Cir. Judge Ebel) affirmed both defendants' convictions and sentences. The Court, with Judge Martin dissenting, held that the district court did not err in holding that Mr. Bergman was not entitled to judgment of acquittal because whether he withdrew from the conspiracy outside of the five-year limitations period was a jury question. The Court noted that "[m]erely ending one's activity in a conspiracy does not constitute withdrawal," and a defendant must prove by a preponderance of the evidence "'that he undertook affirmative steps . . . to disavow or to defeat the conspiratorial objectives'" and communicated his withdrawal to co-conspirators or law enforcement. 852 F.3d at 1061–62 (emphasis omitted) (quoting *United States v. Finestone*, 816 F.2d 583, 589 (11th Cir. 1987)). Because conflicting evidence was presented as to whether he resigned over his disapproval of the fraud or simply to avoid being fired, the district court properly instructed the jury on the affirmative defense of withdrawal rather than holding for Mr. Bergman as a matter of law.

The Court held that the denial of Mr. Santaya's motion to strike the entire jury panel during voir dire was not an abuse of discretion. *Id.* at 1067. Mr. Santaya argued that the magistrate judge who presided over jury selection "berated" a juror with the tone of his questioning after the juror said "that she could not 'say for sure'" whether she would be able to set aside her personal prejudices from her experience as a victim of multiple credit card frauds. *Id.* at 1066–67. The Eleventh Circuit allowed that the magistrate judge's questioning may have "had some imperfections," but concluded that the questions "properly inquired into how [the juror's] past experiences would affect her decision-making" and "revealed that the juror could serve fairly." *Id.* at 1067.

Judge Martin dissented as to Mr. Bergman's statute-of-limitations argument, asserting that under the Court's holding in *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823 (11th Cir. 1999), he had proved as a matter of law that he withdrew from the conspiracy more than five years before he was charged.

SELECTED UNPUBLISHED OPINIONS

United States v. Player, --- Fed. App'x ---, 2017 WL 191927 (11th Cir. Jan. 18, 2017).

Issue: Did the district court abuse its discretion or plainly err by imposing a 24-month sentence after the defendant declined the court's offer of a 14-month sentence if the defendant would admit violating the terms of his supervised release without an evidentiary hearing ?

Held: No.

Background: Mr. Player's probation officer petitioned the court to revoke Mr. Player's term of supervised release based on an allegation that he had received stolen property. The district judge told Mr. Player that if he admitted to violating a condition of supervised release he would receive a 14-month prison sentence to be followed by three years' supervised release. The judge also said that if Mr. Player insisted on a hearing on the revocation petition the offer of a 14-month sentence would expire. Mr. Player elected to proceed to a hearing.

The district court found that he had violated his supervised release by receiving stolen property and sentenced him to 24 months' imprisonment.

Analysis: The Eleventh Circuit (per curiam, Judges Tjoflat, Hull, and Wilson) affirmed the revocation and Mr. Player's sentence. Slip op. at 10. The Court held that Mr. Player offered no meaningful support for his argument that the district court was required to renew its offer of a 14-month sentence, and neither did the district court record nor the Court's "independent review of the caselaw . . . ." *Id.* at 6–7. The Court also held that the 24-month, within-guidelines sentence was substantively reasonable. *Id.* at 10.

United States v. King, --- Fed. App'x ---, 2017 WL 281735 (11th Cir. Jan. 23, 2017).

Issue: Did district court clearly err in finding that Mr. King possessed a firearm "in connection with another felony offense" for purposes of sentence enhancement under U.S.S.G. § 2K2.1(b)(6)(B)?

Held: No.

Background: Mr. King pleaded guilty to two counts of possessing a firearm as a convicted felon. The district court found that Mr. King possessed one of the firearms "in connection with another felony offense," a sale of methamphetamine, which raised his base offense level by four points under U.S.S.G. § 2K2.1(b)(6)(B). The court overruled Mr. King's objection that because he sold the firearm and the methamphetamine in the same transaction, the firearm did not facilitate or have the potential to facilitate the sale.

Analysis: The Eleventh Circuit (per curiam, Judges Hull, Wilson, and Rosenbaum) affirmed. The Court noted that although § 2K2.1 does not define the phrase "in connection with," the commentary to the guideline "explains that the enhancement

applies 'if the firearm . . . facilitated, *or had the potential of facilitating*," the additional offense.'" Slip op. at 3 (emphasis in *King*). Because Eleventh Circuit precedent has held that "[a] firearm found in close proximity to drugs" has the potential to facilitate the drug offense, "without any requirement for additional evidence," the district court's finding was not clear error. *Id.* at 4–5. Even if the enhancement had been clear error, it nevertheless would have been harmless because the district court stated that it would have imposed the same sentence even without the enhancement, and such a sentence would have been substantively reasonable.

United States v. Gibson, --- Fed. App'x ---, 2017 WL 405624 (11th Cir. Jan. 31, 2017).

Issues:

1. Did the district court abuse its discretion under Fed. R. Evid. 404(b) by admitting evidence that Mr. Gibson gave an informant a sample of heroin in advance of crack cocaine sales?

2. Did the district court plainly err in permitting the government to argue in closing that Mr. Gibson did not contest certain facts?

Held:

1. No.

2. No.

Background: Mr. Gibson was convicted after trial on charges of conspiring to distribute crack cocaine, attempting to distribute crack cocaine, and distributing crack cocaine. The government presented testimony, audio recordings, and drugs of a confidential informant's purchases of crack cocaine from Mr. Gibson. The government also introduced a cooperating co-conspirator's testimony that, at Mr. Gibson's direction, he gave a sample of heroin to the informant "to see what [the informant's] 'people' thought of its quality." Slip op. at 5.

Analysis: The Eleventh Circuit (per curiam, Chief Judge Ed Carnes and Judges Marcus and Fay) affirmed Mr. Gibson's conviction. The Court held that the admission of evidence that Mr. Gibson directed a co-conspirator to give the informant a sample of heroin was not an abuse of discretion. Although "the government may not introduce evidence that a defendant sold drugs in the past in order to prove that he probably sold drugs in the present," the Eleventh Circuit has held that "prosecutors can demonstrate a defendant's *intent to distribute drugs* in the present by demonstrating that the defendant distributed drugs in the past—even if the past distribution involved a different type of drug." *Id.* at 12.

The Court also rejected Mr. Gibson's argument that the government made improper burden-shifting statements in its closing argument, including that "the evidence is really unrefuted . . . in this case." *Id.* at 17–19. Without deciding whether allowing the prosecution's arguments was plain error, the Court held that it did not

affect Mr. Gibson's substantial rights because the district court properly instructed the jury regarding the burden of proof.

United States v. Toney, --- Fed. App'x ---, 2017 WL 526469 (11th Cir. Feb. 9, 2017).

Issue: Did the district court abuse its discretion by sentencing the defendant to a sentence at the high end of his guideline range?

Held: No.

Background: Mr. Toney pleaded guilty to being a felon in possession of a firearm. His guideline range was 30-37 months and the district court sentenced him to 37 months.

Analysis: The Eleventh Circuit (per curiam, Judges William Pryor, Jordan and Rosenbaum) affirmed. The Court rejected Mr. Toney's argument that the sentencing court had impermissibly focused only on his criminal history to the exclusion of other mitigating factors. It found that the sentencing court weighed the proper factors and did not rely on a single criteria to the detriment of others.

United States v. Hollman, --- Fed. App'x ---, 2017 WL 631651 (11th Cir. Feb. 16, 2017).

Issue: Did the district court abuse its discretion by denying a defendant's motion to withdraw his guilty plea on the basis that the defendant misunderstood his restitution obligations?

Held: No.

Background: Mr. Hollman pleaded guilty to conspiracy to defraud the United States. The plea agreement stated that he would jointly and severally pay $393,440 in restitution. Mr. Hollman filed a motion to withdraw his guilty plea, arguing that he believed he would share liability for restitution with four co-conspirators, when in fact only one other conspirator was convicted.

Analysis: The Eleventh Circuit (per curiam, Judges Wilson, Martin and Anderson) affirmed. The Court relied on the fact that Mr. Hollman had close assistance of counsel and had repeatedly stated that he had discussed the case and consequences of the agreement with counsel. The Court found that the plea was knowing and voluntary and that Mr. Hollman had not shown a fair and just reason to withdraw his plea.

United States v. Ray, --- Fed. App'x ---, 2017 WL 836050 (11th Cir. Mar. 3, 2017).

Issue: Did the district court's exclusion of evidence that a police officer, who found drugs in Mr. Ray's possession was terminated for "a pattern of stopping and questioning citizens" unlawfully deprive him of a fair trial or abuse the trial court's discretion?

Held: No.

Background: Mr. Ray was charged with possession with intent to distribute cocaine. At trial, the government presented evidence that Officer Beal found drugs in Mr. Ray's pocket. Mr. Ray sought to introduce evidence that Officer Beal was terminated from his position "a few months [after Mr. Ray's arrest] because of a pattern of stopping and questioning citizens without reasonable suspicion . . . ." Slip op. at 2. The district court excluded that evidence.

Analysis: The Eleventh Circuit (per curiam, Judges Hull, Marcus, and Wilson) affirmed the evidentiary ruling and Mr. Ray's conviction. Generally, the exclusion of a defendant's evidence deprives him of a fair trial if the evidence bears directly or "through a reasonable chain of inferences" on the existence of an element of the offense, impacts the credibility of a government witness, or "tends to place the story presented by the prosecution in a significantly different light . . . ." *Id.* at 3–4 (quoting *United States v. Hurn*, 368 F.3d 1359, 1363 (11th Cir. 2004)). The Court held that evidence of Officer Beal's conduct on other occasions did not fall into any of those categories, because the conduct involved unlawful stops, not planting or falsifying evidence; a different officer stopped Mr. Ray, and Officer Beal only searched him; and the government did not call Officer Beal as a witness. *Id.* at 4–5. The Court also held that the district court did not abuse its discretion, because the evidence either was irrelevant or "possessed minimal probative value that was substantially outweighed by the danger of unfair prejudice and confusion of the issues." *Id.* at 6.