USEFUL POINTS OF FEDERAL LAW

Introduction

In 1976 I began collecting on 3x5 cards what I've labeled, here, as Useful Points of Law.. Eventually I gave up the cards in favor of the computer. When I became the Federal Public Defender in late 1998, I started collecting federal cases. What follows is that collection I began in 1998. I've put it online in hopes the information will be of value to the members of our North Florida panel and the lawyers within our office.

The majority of the points come from the 11th Circuit and the United States Supreme Court. There are, though, some from other jurisdictions as I sometimes include them when I run across a decision I think is helpful. What I've included represents points of law that I think I might be able to use to defend a client, that address an issue that I need to know, or that states an established principle for which I might someday need a citation.

Please know that this document is no longer up to date. The last couple of years I haven't had time to keep it up. Still, I continue to use it as a starting point and the vast majority of caselaw remains valid. Be forewarned, too, there is no guarantee as to accuracy. I''m sure there are errors in the spelling of some of the case names and in the citations. Then, too, there isn't any warranty as to the content of the summary. You should read the case before relying upon it.

Some of the oldest citations are to the Florida Law Weekly Federal. There are also some citations to the federal reporter. Most of the citations amount to the name of the case, the appellate case number, and the date the opinion issued.

You'll see there is table of contents. It doesn't bear much of a resemblance to what West does, but the organization makes sense to me. I'm hopeful it will make sense to you. You can also search the summaries by using a particular word.

Please call me or email me if you have questions or if you want to report any errors.

Randy Murrell
(850) 942-8818
Randolph_Murrell@fd.org

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ADAM WALSH ACT

Adam Walsh Act - Court Rejected Constitutional Challenges
U.S. v. Madera, Case No. 6:06cr202-Orl-18KRS (M.D. Fla. 1/16/07)(Sharp, J.)

ADMINISTRATIVE LAW

Administrative Law: Congressional Modification of Regulatory Scheme
Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions - it does not, one might say, hide elephants in mouse holes.
Gonzalez v. Oregon, Case No. 04-623 (S.Ct. 1/17/06)
Administrative Law: When Regulation Parrots the Statute
The existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation, but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.
Gonzalez v. Oregon, Case No. 04-623 (S.Ct. 1/17/06)
Administrative Law: Chevron Deference
An interpretation of an ambiguous statute may also receive substantial deference. Deference in Accord with Chevron, however, is warranted only when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.
Gonzalez v. Oregon, Case No. 04-623 (S.Ct. 1/17/06)
Administrative Law: Agency's Implementation of a Statute
When a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A permissible construction of a statute is a reasonable one, and an agency's interpretation of an unclear statute is reasonable so long as it ins not arbitrary, capricious, or clearly contrary to the law.
Cook v. Wiley, 13 FLW Fed C611 (11th Cir. 4/14/00)

AIDING AND ABETTING

Aiding & Abetting: Mere Presence Insufficient
Mere presence is insufficient to prove aiding and abetting.
U.S. v. Diaz-Boyzo, Case No. 04-15629 (11th Cir. 12/14/05)
Aiding & Abetting: Government Agent
While a defendant cannot be convicted of aiding a government agent as there is no principal offense for the defendant to aid when the government agent lacks the intent to commit a crime, it is still possible under 18 USC § 2(b) for the defendant to be held liable for the acts of an undercover agent where he causes those acts that would be an offense if the defendant had done the acts himself.
U.S. v. Hornaday, 392 F.3d 1306 (11th Cir. 12/13/04)

Aiding & Abetting: No Need to Allege It in the Indictment
A defendant can be convicted of aiding and abetting the commission of a crime even if the indictment does not make that specific allegation and does not cite 18 USC § 2.
U.S. v. Hornaday, 392 F.3d 1306 (11th Cir. 12/13/04)
Aiding & Abetting: Requirements
The government must demonstrate that a codefendant committed a substantive offense, that the defendant associated himself with the criminal venture, and that he committed some act in furtherance of the crime.
U.S. v. Gonzalez, 12 FLW Fed C1174 (11th Cir. 8/13/99)
Aiding & Abetting - Must Be An Underlying Crime
Defendant couldn't be convicted on theory he aided an undercover officer in the crime of possessing with an intent to distribute.
U.S. v. Edwards, 12 FLWFed C492 (11th Cir. 2/11/99)

APPEALS

Harmless Error

Appeals: Harmless Error - Direct Appeal as Compared to Habeas
The test for whether a federal constitutional was harmless depends on the procedural posture of the case. on direct appeal, the harmless standard is the one prescribed in Chapman, 386 U.S. 18: "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.
In a collateral proceeding, the test is different. For reasons of finality, comity, and federalism, habeas petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice. Under this test, relief is proper only if the federal court has grave doubt about whether a trial error of federal law has a substantial and injurious effect or influence in determining the jury's verdict.
Davis v. Ayala, Case No. 13-1428 (S. Ct. 6/18/15)
Appeals: Harmless Error - Non-Constitutional Error
See: U.S. v. Baker, Case No. 00-13083 (11th Cir. 12/13/06)
Appeals: Harmless Error - Statutory v. Constitutional Error (Sentencing)
Standard for determining whether a statutory error is harmless is less demanding than the standard for proving constitutional error was harmless, as government need not prove beyond a reasonable doubt that error did not contribute to defendant's ultimate sentence, but need only show that viewing the proceedings in their entirety the error did not affect the sentence, or had very slight effect.
U.S. v. Mejia-Giovani, Case No. 04-16138 (11th Cir. 7/15/05)
Appeal: Harmless Error - Jury Instructions and Omission of Element
Despite an eloquent dissent by Justice Scalia, the court held that a jury instruction that omits an element of the offense is subject to harmless error analysis. Case includes a thorough discussion of the theory of harmless error.
Neder v. U.S., 527 U.S. 1, 119 S. Ct. 1827 (2/23/99)
Appeal: Harmless Error Test

In cases of non-constitutional error the test is the federal harmless error statute, 28 USC s. 2111 which requires that the court ignore "errors or defects which do not affect the substantial rights of the parties." Thus, there can be a reversal only if the error had "substantial and injurious effect or influence in determining the jury's verdict." In cases of constitutional *Chapman* governs, which means that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."
U.S. v. Guzman, 12 FLWFed C486 (11th Cir. 2/12/99); U.S. v. Novaton, 271 F.3d 968 n. 3(11th Cir. 2001)

Miscellaneous

Appeals: Miscellaneous – Court of Appeals Discretion to Remand to a Different Judge
U.S. v. Hunter, Case No. 15-12640 (11th Cir. 8/26/16)
Appeals: Miscelleaneous – Notice of Appeal – Time Limit Not Jurisdictional
At least in civil cases and presumably in criminal cases, too.
Hamer v. Neighborhood Housing Services of Chicago, No. 16-658 (S. Ct. 10/17/17)
Appeals: Miscellaneous - Second Notice of Appeal for Amended Judgment
Following the entry of the judgment, the defendant filed his notice of appeal. Subsequently, the trial court entered a amended judgment to reflect the decision it made regarding restitution. Court of appeals held that the notice of appeal was insufficient to invoke appellate review of the restitution amount.
Manrique v. U.S., Case No. 15-7250 (S. Ct. 10/11/16)
Appeals: Miscellaneous - Prior Decision Isn't Precedent If it Didn't Address Argument
See: Waters v Churchill, 511 US. 661, 678 (1994); Will v. Michigan Dept. of State Police, 491 U.S. 58, 63 n 4 (1989), Webster v. Fall, 266 U.S. 507, 510 (1925); Archer Daniels Midland Co. v. Aon Risk Servs., Inc. 187 F.R.D. 578 (D.Minn. 1999)
Appeals: Miscellaneous - Prior Panel Precedent Rule
But while our prior precedent rule requires us to follow the holding of an earlier decision, it does not require us to follow the language of the accompanying decision that is unnecessary to the decision, i.e., we are not required to follow dicta. See, e.g., McNely v. Ocala Star-Baner Corp., 99. F.3d 1068, 1077 (11th Cir. 1996 ("we are not required to follow dicta contained in our own precedents:); Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller, 957 F.2d 1575, 1578 (11th Cir. 1992) (what is said in a prior opinion about a question not presented there is dicta, and dicta is not binding precedent, so a later panel is "free to give that question fresh consideration"), see also McDonald's Corp. v. Robertson, 147 F.3d 1301, 1315 (11th Cir. 1998)(Carnes, J. concurring)(explaining why "dicta in our opinions is not binding on anyone for any purpose").
U.S. v. Hunter, 172 F.3d 1307, 1310 (11th Cir. 1999) (Carnes, J. concurring)
Appeals: Miscellaneous - Prior Panel Precedent Rule
A prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting en banc. The court has "categorically rejected" an overlooked reason or argument exception to the panel-precedent rule.
In re: Lambrix, 776 F.3d 789, 794 (11th Cir. 2015); U.S. v. Seabrooks, Case No. 15-10380 (11th Cir. 10/19/16)

Appeals: Miscellaneous - Court Won't Ordinarily Revisit Jury's Determination of Credibility
The jury has exclusive province over the credibility of witnesses and the court of appeals may ot revisit the question unless it is incredible as a matter of law.
U.S. v. Feliciano, 747 F.3d 1284 (11th Cir. 2012)
Appeals: Miscellaneous - Appeal from Judgment that Has Not Resolved Restitution
Court has jurisdiction to consider an appeal from a judgment, which has not yet determined the amount of restitution.
U.S. v. Muzio, Case No. 10-13325 (11th Cir. 7/8/14)
Appeals: Miscellaneous - Inconsistent Precedent
Where there are two or more inconsistent circuit decisions, the court must follow the earliest one.
U.S. v. Puentes-Hurtado, Case No. 13-12770 (11th Cir. 7/22/15)
Appeals: Miscellaneous - Abuse of Discretion Defined
A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes fin dings of fact that are clearly erroneous.
U.S. v. Siegelman, Case No. 12-14373 (11th Cir. 5/20/15)
Appeals: Miscellaneous - Motion for New Trial - (When Not Yet Sentenced on Some Counts)
Where defendant had been convicted and sentenced on some counts, but was still awaiting sentencing on others, the court of appeals lacked jurisdiction to review an order denying a new trial on the counts of which the defendant had been sentenced.
U.S. v. Myrie, cAse No. 13-13106 (11th Cir. 1/21/15)
Appeals: Miscellaneous - District Court Loses Jurisdiction Once Notice of Appeal is Filed
The filing of a notice of appeal is an event of jurisdictional significance - it confers jurisdiction on the court of appeals and divests the district court of its control over the aspects of the case involved in the appeal. In this instance, the defendant filed a motion to dismiss the indictment pursuant to Rule 12(b)(3)(B) and the court of appeals held that the district court lacked jurisdiction to rule on the motion.
U.S. v. Diveroli, Case No. 13-10248 (11th Cir. 9/10/13)
Appeals: Miscellaneous - Victims Don't Have Standing to Appeal Defendant's Sentence
U.S. v. France, Case No. 11-12716 (11th Cir. 8/3/12**)**
Appeals: Miscellaneous - Mootness
A defendant wishing to continue his appeal after the expiration of his sentence must suffer some continuing injury or collateral consequence sufficient to satisfy Article III's requirement of a justiciable case or controversy. When a defendant challenges his underlying conviction, the existence of collateral consequences is generally presumed. The same is not true if he challenges only his sentence. The exception for "capable of repetition, but evading review" applies only when he challenged action is in its duration too short to be fully litigated and there is a reasonable expectation htat eh same complaining party will be subject to the same action again.
U.S. v. Juvenile Male, 564 U,S, 932 (2011); Turner v. Rodgers, 546 U.S. 431 (2011)
Appeals: Miscellaneous - Appellate Courts Don't Decide Facts
As everyone knows, appellate courts may not make fact findings.
Primera Iglesia Bautista Hispana of Boca Raton, Inc. V. Broward Cnty., 450 F.3d 1295, 1306-07 (11th Cir. 2006)
Appeals: Miscellaneous - GVR

The Supreme Court's authority to issue a GVR order (grant, vacate, and remand) is properly issued when intervening developments reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the matter.
Wellons v. Hall, Case No. 09-5731 (S. Ct. 1/19/10)
Appeals: Miscellaneous - Prior Precedent Panel Rule
"We may disregard the holding of a prior opinion only where the holding is overruled by the Court sitting en banc or by the Supreme Court. To constitute an overruling for the purposes of this prior panel precedent rule, the Supreme Court decision must be clearly on point. In addition to being squarely on point, the doctrine of adherence to prior precedent also mandates that the intervening Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel.
U.S. v. Kaley, Case No. 07-13010 (11th Cir. 8/18/09)
Appeals: Miscellaneous - Stare Decisis
"The doctrine of stare decisis is of course 'essential to the respect accorded to the judgements of the Court and to the stability of the law,' but it does not compel us to follow a past decision when its rationale no longer withstands 'careful analysis.'"
Arizona v. Gant, Case No. 07-542 (S. Ct. 4/21/09)
Appeals: Miscellaneous - Reassignment to New Judge Upon Remand
Court of appeals has the authority to order reassignment of a criminal judge to another district judge as part of its supervisory authority over district courts. In this case, the Court of Appeals ordered the case reassigned because the trial judge had "demonstrated great difficulty in putting aside his prior conclusions of the merits of [the] prosecution."
U.S. v. Gupta, Case No. 08-12248 (11th Cir. 6/23/09)
Appeals: Appeal Court Can't Order an Increase in Sentence When Claim Not Raised by Government
A U.S. Court of Appeals, acting on its own initiative, cannot order an increase in a defendant's sentence.
Greenlaw v. U.S., Case No. 07-330 (S. Ct. 6/23/08)
Appeals: Miscellaneous - Prior Panel Precedent Cannot Be Rejected on the Basis of Arguments Not Considered
U.S. v. Johnson, Case No. 07-13497 (11th Cir. 5/30/08)
Appeals: Miscellaneous - Authority to Supplement Record
The Court's inherent equitable powers allow it to supplement the record with information not reviewed by the district court, although the power is rarely exercised. It does not extend to cases involving plain error.
U.S. v. Brown, Case No. 05-16128 (11th Cir. 4/29/08)
Appeals: Miscellaneous - Death of the Defendant
If the defendant dies while his appeal is pending, the appeal will be remanded to the district court with an order to vacate the judgment and dismiss the indictment.
U.S. v. Koblan, Case No. 05-13038 (11th Cir. 2/15/07)
Appeals: Miscellaneous - Reassignment of Case to a New Trial Judge
See: U.S. v. Martin, Case No. 05-16645 (11th Cir. 7/11/06)
Appeals: Miscellaneous - Interlocutory Appeals (Collateral Order Doctrine)

Under the collateral order doctrine, the court of appeals has jurisdiction over an interlocutory order if it (1) conclusively determines the disputed questions, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.
U.S. v. Wilk, Case No. 05-12694 (11th Cir. 6/20/06); U.S. v. Shalhoub, Case No. 16-10533 (11th C ir. 4/28/17)
Appeals: Miscellaneous - Supervised Release (Revocation: Challenge to Original Sentence)
A defendant may not challenge for the first time on appeal from the revocation of supervised release, his sentence for the underlying offense.
U.S. v. White, Case No. 04-13442 (11th Cir. 7/14/05)
Appeals: Miscellaneous -Briefs Read Liberally In Deciding What Issues Have Been Raised
"Our principle that 'briefs are read liberally with respect to ascertaining what issues are raised on appeal' is longstanding."
U.S. v. Smith, 402 F.3d 1303 (11th Cir. 3/18/05)
Appeals: Miscellaneous - Trial Judges Presumed to Know the Law and Presumed to Apply It Correctly
U.S. v. $242,484.00 (Stanford), 389 F.3d 1149 (11th Cir. 11/2/04)
Appeals: Miscellaneous - Evidentiary Rulings
To prevail the defendant must show: (1) that the claim was preserved or amounted to plain error; (2) the district court abused its discretion; and (3) that the error affected a substantial right.
U.S. v. Stephens, 365 F.3d 967 (11th Cir. 4/6/04); U.S. v. Frazier, 387 F.3d 1244 (11th Cir. 10/15/04); U.S. v. Drury, 396 F.3d 1303 (11th Cir. 1/18/05)
Appeals: Miscellaneous - Interlocutory Review Under Collateral Order Doctrine
The collateral order doctrine is a narrow exception to the normal application of the final judgement rule limiting appeals to final orders. To fall within the limited class of collateral orders that are deemed final, the order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable. In this instance, the trial court's decision denying the defendant bail while his post-conviction claim was pending met the requirements of the doctrine. Court went on to note, though, that the defendant still needed a certificate of appealability.
Pagan v. U.S., 353 F.3d 1343 (11th Cir. 12/23/03)
Appeals: Miscellaneous - Certiorari to the U.S. Supreme Court - Time Limits
Under Supreme Court Rule 13(3), the date of the issuance of the mandate is irrelevant for determining when a certiorari petition can be filed. Instead, the time runs from the date of entry of the judgement or order sought to be reviewed.
Close v. U.S., 336 F.3d 1283 (11th Cir. 7/8/03)
Appeals: Miscellaneous - COA Required for appeal of denial of a 60(b) Motion
Gonzalez v. Secretary for the Dept. of Corrections, 317 F.3d 1308 (11th Cir. 1/10/03)
Appeals: Miscellaneous - Incomplete Transcript
If the same attorney represents an appellant at trial and on appeal, a new trial may be granted only if the defendant can show that the failure to record and preserve a specific portion of the trial visits a hardship on him and prejudices his appeal. But if a new attorney represents the appellant on appeal, a new trial is necessary if there is a substantial and significant omission from the trial transcript.
U.S. v. Charles, 313 F.3d 1278 (11th Cir. 12/3/02)
Appeals: Miscellaneous - Can't Appeal Pre-Trial Ruling Re: Evidence Never Introduced

In advance of trial, the trial court ruled that certain collateral crime evidence was admissible if the defendant testified. When the defendant decided not to testify for fear of the evidence coming in during rebuttal, the Court held that the issue was not reviewable.
U.S. v. Hall, 312 F.3d 1250 (11th Cir. 11/20/02)
Appeals: Miscellaneous - Example of Plea Negotiations During Pendency of Appeal
See: U.S. v. Sigma International, 300 F.3d 1278 (11th Cir. 8/6/02)
Appeals: Miscellaneous - Statue Establishes What the Defendant can Appeal
18 USC 3742
See: U.S. v. Ruiz, Case No. 01-595 (6/24/02)
Appeals: Miscellaneous - Sufficiency of the Evidence (Failure to Move for a JOA)
When a defendant does not move the district court for a judgment of acquittal at the close of the evidence, the court may reverse the conviction only to prevent a manifest miscarriage of justice.
U.S. vs. Baker, 290 F.3d 1276 (11th Cir. 5/8/02)
Appeals: Miscellaneous - Factual Determinations of Trial Court
In evaluating the factual version of events, the appellate court should defer to the trial court's determination unless the trial court's understanding of the facts appears to be unbelievable.
U.S. vs. Ramirez-Chilel, 289 F.3d 744 (11th Cir 4/25/02); U.S. v. Thompson, Case No. 04-12218 (11th Cir. 9/1/05); U.S. v. Williams, Case No. 12-15313 (11th Cir. 10/2/13)
Appeals: Miscellaneous - Law of the Case
Under the law of the case doctrine, an issue decided at one stage of the case is binding at later stages of the same case.
Toole v. Baxter Health Care Cooperation, 235 F.3d 1307 (11th Cir. 12/14/00)
Appeal: Miscellaneous - Split Views
In this telling case, Judges Anderson, Tjoflat, Barkett, Birch and Wilson found that ineffective assistance had been provided in this publicized federal death penalty case, while judges Edmondson, Cox, Dubina, Black, Hull, and Marcus voted to uphold the sentence.
Chandler v. U.S., 218 F.3d 1305 (2000)
Appeal: Miscellaneous - New Decisions by Supreme Court Apply to Cases on Direct Appeal
When the Supreme Court applies a new rule of federal law, that rule must be given full retoroactive effect in all cases still open on direct review.
Jones v. U.S., 224 F.3d 1251 (11th Cir. 8/29/00)
Appeal: Miscellaneous - Jurisdictional Issues Must Be Resolved Before the Merits
U.S. v. Phillips, 225 F.3d 1198 (11th Cir. 8/30/2000)
Appeal: Miscellaneous - Out of Time
When the district courts conclude that tan out-of-time appeal in a criminal case is warranted as the remedy in a 2255 proceeding they should effect that remedy in the following way: (1) the criminal judgment from which the out of time appeal is to be permitted should be vacated; (2) the same sentence should be imposed; (3) upon reimposition of that sentence, the defendant should be advised of all the rights associated with an appeal from any criminal sentence; and (4) the defendant should also be advised that the time for filing a notice of appeal from that re-imposed sentence is ten days.
U.S. v. Phillips, 225 F.3d 1198 (11th Cir. 8/30/2000)
Appeal: Miscellaneous - Reliance Upon Weather Records
The court in a footnote relied, in making its decision, information outside the record regarding the time the sun rose. The records came from the United States Naval Observatory.
U.S. v. Bervaldi, 226 F.3d 1256 (11th Cir. 9/14/00), n. 9

Appeal: Miscellaneous - Reference to Polls in Appellate Brief
See: Ramdass v. Angelone, 530 U.S. 156, 120 S. Ct. 2113 (6/12/00)
Appeal: Miscellaneous - Death of the Defendant' Victory
"The death of a criminal defendant during the pendency of his direct appeal renders his conviction and sentence void ab initio, i.e., it is as if the defendant had never been indicted and convicted.
U.S. v. One Parcel of Real Estate, 214 F.3d 1291 (11th Cir. 2000)
Appeal: Miscellaneous - Persuasive Authority of Unpublished Decisions
Although an unpublished opinion is not binding, it is persuasive authority.
U.S. v. Futrell, 209 F.3d 1286 (11th Cir. 4/20/00)
Appeal: Miscellaneous - Example of Reliance on Newspaper Articles
In an effort to show that luggage was often handled so roughly that no one could claim they had an expectation of privacy, Justice Souter cited a number of newspaper articles.
Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (4/18/00)
Appeal: Miscellaneous - Anders
A brief filed pursuant to Anders v. California is not the only way to comply with Due Process in appeals lacking in merit.
Warden v.Robbins, 528 U.S. 259, 120 S. Ct. 746 (1/19/00)
Appeal: Miscellaneous - Appellate Court Can't Revisit Issues of Credibility
U.S. v. Chastain, 128 F.3d 1338 (11th Cir. 12/30/99)
Appeal: Miscellaneous - No Right to Self Representation on Appeal
Faretta v. California which held that a criminal defendant has a constitutional right to conduct his own defense at trial when he voluntarily and intelligently elects fo proceed without counsel, does not require a state to recognize a constitutional right to self-representation on direct appeal from a criminal conviction.
Martinez v. court of Appeal of California, 528 U.S. 152, 120 S. Ct. 684 (1/12/00)
Appeal: Miscellaneous - Reconciliation of Intracircuit Conflict (First Opinion Controls)
When there is no method for reconciling an intracircuit conflict of authority, the earliest panel opinion resolving the issue in question binds this circuit until the court resolves the issue en banc.
Tompkins v. Moore, 193 F.3d 1327 (11th Cir. 10/29/99)
Appeal: Miscellaneous - Stare Decisis
It is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.
Tompkins v. Moore, 193 F.3d 1327 (11th Cir. 10/29/99)
Appeal: Miscellaneous - Time Limits (Unique Circumstances Exception)
See: Hollins v. Department of Corrections, 191 F.3d 1324 (11th Cir. 10/5/99)U.S. v. Diaz, 190 F.3d 1247 (11th Cir. 10/15/99), (Cook, J. dissenting opinion)
Appeal: Miscellaneous - Certificate of Appealability for State Habeas and Federal Collateral Appeals
State habeas and federal collateral review petitioners should always request a certificate of appealability from the district court regardless of whether a constitutional issue is at stake.
Krevsky v. U.S., 186 F.3d 237 (8/2/99)
Appeal: Miscellaneous - Equally Divided Circuit Court
Means that the lower court's decision is affirmed.

U.S. v. Cerceda, 172 F.3d 806 (11th Cir. 4/16/99)
Appeal: Miscellaneous - Unwilling to Sift Through Record Unguided By Counsel
"We were both unable and unwilling to 'sift through these pages by ourselves, unguided by an advocate'"
U. S. v. Adkinson, 158 F.3d 1147 (10/26/98)
Appeal: Miscellaneous - Precedent of 5th Circuit
All decisions of the 5th Circuit Court Appeals prior to October 1, 1981 are binding precedent on the 11th Circuit.
Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc); U.S. v. Rhodes, 177 F.3d 963, n. 3 (6/4/99); Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1981)
Appeal: Miscellaneous - Precedent of 5th Circuit
All decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981 are binding precedent for the 11th Circuit.
Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1981)
Appeal: Miscellaneous - Sufficiency of Evidence Test
"We review the sufficiency of the evidence de novo, but we view all facts and make all reasonable inferences in favor of the Government. The test for whether the evidence is "sufficient" is whether a reasonable fact finder could conclude that the defendant was guilty beyond a reasonable doubt."
U.S. v. Burston, 12FLW FedC239 (11th Cir. 1998), Tarver v. Hopper, 12 FLW Fed C597 (11th Cir. 3/11/99); McDaniel v. Brown, Case No. 08-559 (S. Ct. 1/11/10)

Plain Error

Appeals: Plain Error - Difference Between Waiver and Forfeiture
When a defendant forfeits an argument in the district court, the court of appeals can review it for plain error. But when a defendant waives an argument in the district court, it cannot be reviewed.
U.S. v. Phillips, 834 f3d 1167 (11th Cir. 2016)F U.S. v. Gonzalez, 834 F3d 1206 (11th Cir. 2016)
Appeals: Plain Error - Does It Even Exist With Regard to Evidentiary Errors?
See Judge Tjoflat's concurring opinion in U.S. v. Smith, Case No. 03-13639 (11th Cir. 8/11/06)
Appeals: Plain Error - Standard for the Third-Prong (Prejudice) Same As Harmless Error
See: U.S. v. Baker, Case No. 00-13083 (11th Cir. 12/13/06)
Appeals: Plain Error - Change in Law
Where the law at the time of the trial was settled and clearly contrary to the law at the time of the appeal, it is enough that an error be plain at the time of appellate consideration.
U.S. v. Wims, 245 F.3d 1269 (11th Cir. 3/28/01)
Appeal: Plain Error - Defined
Plain error must be of such magnitude that it would probably change the outcome of the trial.
U.S. v. Diaz, 190 F.3d 1247 (11th Cir. 10/15/99); U.S. v. Hernandez-Fraire, 208 F.3d 945 (11th Cir. 4/6/2000); U.S. v. Camacho, 233 F.3d 1308 (11th Cir. 11/21/00)
Appeal: Plain Error - Defined
Plain error is error that is both obvious and prejudicial.
U.S. v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 1777-78 (1993); Jones v. U.S., 527 U.S. 373, 119 S. Ct. 2090 (6/21/99); Molina-Martinez v. U.S., Case No. 14-8913 (S. Ct. 1/12/16)

Standard of Review

Appeals: Standard of Review - Plain Error (Judge's Comment That He Would Have Imposed an Even Longer Sentence and Erroneous Guideline Calculation)
Where erroneous guideline calculation let to a range of 168 to 210 months, the maximum penalty was 120 months, the arguably correct guideline range was 70 to 87 months, and the district judge said at sentencing that he thought the defendant deserved more than the statutory maximum, the unobjected to guideline error did not amount to plain error.
U.S. v. Pantle, Case No. 09-13728 (11th Cir. 4/411)
Appeals: Standard of Review - Abuse of Discretion
The relevant question when reviewing for abuse of discretion is not whether we would have come to the same decision if deciding the issue in the first instance. The relevant inquiry, rather, is whether the district court's decision was tenable, or, we might say, "in the ballpark" of permissible outcomes.
U.S. v. Irey, 612 F3d 1160, 1189 (11th Cir. 2010)
Appeals: Standard of Review - Plain Error
Supreme Court rejected Second Circuit's interpretation of plain error which had held that it must recognize plain error if there was any possibility, however remote, that a jury convicted the defendant exclusively on the basis of actions taken before the enactment of the statute which made those actions criminal.
U.S. v. Marcus, Case No. 08-1341 (S. Ct. 5/24/10)
Appeals: Standard of Review - Error in Jury Instructions
Error in jury instructions does not constitute grounds for reversal unless a reasonable likelihood exists that it affected the defendant's substantial rights.
U.S. v. Williams, Case No. 07-11707 (11th Cir. 8/29/08)
Appeals: Standard of Review: Deference Doesn't Mean Abdication
"There is, however, a difference between deference and abdication. We do review the sentence, and in doing so we evaluate whether the sentence imposed serves the purposes reflected in § 3553(a)."
U.S. v. Crisp, Case No. 05-12304 (11th Cir. 7/7/06) U.S. v. Crisp, Case No. 05-12304 (11th Cir. 7/7/06)
Appeals: Standard of Review: De Novo Review Of Guideline Departures
"Under the PROTECT Act, when a sentence is outside the guideline range, we review de novo the district court's application of the Guidelines to the facts to decide whether the departure was based on factor that 1) advanced the objectives of federal sentencing policy; 2) was authorized under 18 USC 3553(b) and 3) was justified by the facts of the case."
U.S. v. Blas, 360 F.3d 1268 (11th Cir. 2/19/04)
Appeals: Guidelines: Standard of Review - "Due Deference"
18 USC § 3742(e) requires the court of appeals to give "due deference" to a district court's application of the sentencing guidelines to a given set of facts. The court defined "due deference" as a sliding scale of sorts that is dependent upon the circumstances of the case. Where a determination turns primarily on the evaluation of the facts (such as a witness's credibility, intonation, and demeanor) that are more accessible to the district court, the standard is that of "clear error." Similarly, a case involving application of a fairly well-understood legal standard to a complex factual scenario will be considered primarily factual and will also be reviewed for

clear error. Most other cases, in contrast, will be reviewed de novo. Here, where the question was one of grouping, the court applied a de novo standard of review.
U.S. v. Williams, 340 F.3d 1231 (11th Cir. 2003)

Appeals: Standard of Review - Vouching

Because vouching is a mixed question of law and fact, plenary review is proper.
U.S. vs. Cano, 289 F.3d 1354 (11th Cir. 5/3/02)

Appeals: Standard of Review - Deferential Review Regarding Guideline Consolidation Issue

Deferential review is appropriate when Court of Appeals reviews trial court sentencing guideline determination as to whether an offender's prior convictions were consolidated for sentencing.
Buford v. United States, 532 U.S. 59, 121 S. Ct. 1276 (3/20/2001)

Appeal: Standard of Review - Abuse of Discretion Standard vs. De Novo

"Under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how an abuse of discretion standard differs from a de novo standard of review."
U.S. v. Cunningham, 194 F.3d 1186 (11th Cir. 11/2/99)

Appeal: Standard of Review - Motion to Suppress

The findings of fact are reviewed under the clearly erroneous standard. The court's application of the law is reviewed de novo.
U.S. v. Zapata, 180 F.3d 1237 (11th Cir. 7/13/99)

Appeal: Standard of Review - Sufficiency of the Evidence

"We review de novo the sufficiency of the evidence to support a conviction, viewing the evidence in the light most favorable to the government and drawing all reasonable inferences and credibility choices in favor of the jury's verdict."
U.S. v. Fischer, 168 F.3d 1273, 1276 n. 7 (11th Cir. 1999); U.S. v. Steele, 178 F.3d 1230 (11th Cir. 6/25/99)

Appeal: Standard of Review- Determinations of Probable Cause and Founded Suspicion

Generally determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.
Ornelas v. U.S., 517 U.S. 690, 116 S. Ct. 1657, 1663 (1996);U.S. v. Arvizu, 534 U.S. 266, 122 S. Ct. 744 (1/15/02)

Appeal: Standard of Review - "Clear Error" Is Really "Abuse of Discretion"

"Clear error" is a term of art derived from Rule 52(a) of the Federal Rules of Civil Procedure, and applies when reviewing questions of fact. When in cases like this one, where the court we reviewing determinations of probable cause or reasonable suspicion the better term is abuse of discretion.
Ornelas v. U.S., 517 U.S. 690, 116 S. Ct. 1657, 1663 (1996)

Appeal: Standard of Review - Recusal

Trial judge's decision denying recusal is reviewed under the abuse of discretion standard.
U.S. v. Bailey, 175 F.3d 966 (11th Cir. 5/14/99)

Appeal: Standard of Review - Meaning of Clearly Erroneous Standard

Anderson v. City of Bessemer City, 470 U.S. 574-75, 105 S. Ct. 1504 (1985)

Appeal: Standard of Review - Interpretation of Sentencing Guidelines

De Novo.
U.S. v. Maurice 69 F.3d 1553, 1556 (11th Cir. 1995)

Appeal: Standards of Review - Sentencing Guidelines (Defendant's Role in Offense)
"Clear error" which is the same as "clearly erroneous."
U.S. v. Burgess, 175 F.3d 1261 (11th Cir. n. 2 5/18/99)
Appeal: Standard of Review - Sentencing Guidelines
De novo for application and interpretation of guidelines, but clear error for factual findings.
U.S. v. Harness, 180 F.3d 1232, 1234 (11th Cir. 1999)
Appeal: Standard of Review - Ineffective Assistance of Counsel
It is a mixed question of law and fact, and the court reviews the issue de novo.
Tarver v. Hopper, 169 F.3d 710 (11th Cir. 3/11/99)
Appeal: Standard of Review - Procedural Bar
De Novo.
Tarver v. Hopper, 169 F.3d 710 (11th Cir. 3/11/99)
Appeal: Standard of Review - Brady Violation
An alleged Brady violation presents a mixed question of law and fact, which the court reviews de novo.
Tarver v. Hopper, 169 F.3d 710 (11th Cir. 3/11/99); Turner v. U.S., Case No. 15-1504 (S. Ct. 6/22/17)
Appeal: Standard of Review - Habeas Corpus
A district court's factual findings in a habeas corpus proceeding are reviewed for clear error.
Tarver v. Hopper, 169 F.3d 710 (11th Cir. 3/11/99)
Appeal: Standard of Review - Guideline Departures
The review for abuse of discretion involves a three part inquiry. First, we deferentially review the district court's determination of whether the facts of a case take it outside the heartland of the applicable guideline. Next, we determine whether the departure factor upon which the district court relied "has been categorically proscribed, is encouraged, encouraged but taken into consideration within the applicable guideline, discouraged, or not addressed by the sentencing guidelines commission. Finally, we review deferentially the remaining factual issues, including whether the factor relied on by the court to depart upward is present to such a degree as to warrant an upward departure.
U.S. v. Burston, 12FLW FedC239 (11th Cir. 1998)
Appeals: Standard of Review - Evidentiary Rulings (Abuse of Discretion)
A trial court abuses its discretion in making an evidentiary ruling if it misapplies the law or makes findings of fact that are clearly erroneous.
U.S. v. Frazier, 387 F.3d 1244 (11th Cir. 10/15/04) (Tjoflat concurring opinion)
Appeals: Standard of Review: Abuse of Discretion - Use of Wrong Legal Standard
A district court abuses its discretion if, in making the decision at issue, it applies the incorrect legal standard.
U.S. v. Jordan, 316 F.3d 1215 (11th Cir. 1/6/03)

Waiver

Appeals: Waiver - New Supreme Court Decision After Initial Brief
Where there is an intervening decision of the Supreme Court on an issue that overrules a either a decision of the court of appeals or the Supreme Court that was on the books when the appellant's opening brief was filed, and that provides the appellant with a new claim or theory, the appellant

is allowed to raise that new claim or theory in a supplemental or substitute brief provided that he files a motion to do si in a timely fashion after the new decision issued.
U.S. v. Durham, Case No. 14-12198 (11th Cir. 8/5/15)

Appeals: Waiver - Agreement

Plea agreement waiving appeal will be upheld.
U.S. v. Rubbo, 396 F.3d 1330 (11th Cir. 1/21/05); U.S. v. Bascomb, Case No. 05-13932 (11th Cir. 6/14/06)

Appeals: Waiver - Agreement (Booker)

Where defendant agreed to waive any appeal of his sentence unless the penalty exceeded the statutory maximum, the court construed the agreement to, in fact, mean the statutory maximum in the traditional sense and not as defined in Booker and Blakely decisions.
U.S. v. Rubbo, 396 F.3d 1330 (11th Cir. 1/21/05)

Appeals: Waiver - Even Decisions Based on New Law are Waived if Not Raised in Initial Brief

Although Blakely decision had not yet issues at the time the initial briefs were filed, the Court rejected rehearing motion in which the defendant raised a Blakely violation. Despite argument that the procedure violated the holding in Griffith v. Kentucky, 479 U.S. 314 (1987), the Court held the issue was waived because it was not raised in the initial brief. Judges Tjoflat, Wilson, and Barkett dissented.
U.S. v. Levy, 391 F.3d 1327 (11th Cir. 12/3/04) (en banc); U.S. v. Vanorden, 414 F.3d 1321 (11th Cir. 6/30/05); U.S. v. Smith, Case No. 03-15299 (11th Cir. 7/18/05)

Appeals: Waiver - Unenforceable if It Produces a Miscarriage of Justice

In this instance, a challenge to a condition of supervised release did not amount to a miscarriage of justice.
U.S. V. Andis, 333 F.3d 886 (8th Cir. 6/27/03)(en banc)

APPRENDI

Apprendi: Consecutive Sentences

When a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions, Sixth Amendment does not require jury determination of any fact declared necessary to he imposition of consecutive, in lieu of concurrent sentences.
Oregan v. Ice, Case No. 07-901 (S. Ct. 1/14/09)

Apprendi: Almendarez-Torres - Jury Need Not Determine Whether a Prior Offense Meets Guideline Requirements for Enhancement

Defendant, who was charged with an immigration offense, argued that the determination of whether his prior offense was, as defined by the Guidelines, "an alien smuggling offense" that qualified him for the 16 level enhancement under 2L1.2(b)(1)(A)(vii), must be made by a jury. The court rejected the argument.
U.S. v. Gallegos-Aguero, Case No. 04-14242 (11th Cir. 5/18/05)

Apprendi: Doesn't Apply to Drug Quantity or Type Unless Maximum Penalty Altered

"[I]n Sanchez, we held that drug type and quantity are not required to be alleged in the indictment, submitted to the jury, and proved beyond a reasonable doubt, as long as the statutory maximum punishment is not exceeded.

U.S. v. Clay, Case No. 03-12263 (11th Cir. 7/15/04)

Apprendi: Challenge to Career Offender Enhancement Based on Govt's Failure to Charge the Prior Convictions in the Indictment

Almendarez-Torres still controls.

U.S. v. Marsielle, Case No. 03-12961 (11th Cir. 7/21/04); U.S. v. Overstreet, Case No. 11-16031 (11th Cir. 3/28/13)

Apprendi: Prior Conviction That Transforms a Misdemeanor to a Felony

In an unlawful reentry case, the court held that a misdemeanor that transforms a subsequent misdemeanor into a felony is governed by the principles in Apprendi and, therefore, must be alleged in the indictment and proved beyond a reasonable doubt to a jury.

U.S. v. Rodriguez-Gonzalez**,** Case No. 02-50594 (9th Cir. 2/19/04)

Apprendi: Foreseeability and Scope of Conduct

In a drug conspiracy the jury, in determining drug quantity, must find whether the quantity was foreseeable and within the scope of the defendant's agreed upon conduct.

U.S. v. Banuelos, 322 F.3d 700 (9th Cir. 2003)

Apprendi: Marijuana Cases - Best Possible Is Five Years

Where the indictment in a marijuana case fails to allege any particular quantity, it is the 5 years provided for under § 841(b)(1)(D) that provides the maximum penalty. The one year provided for under § 841(b)(4) requires the defendant to make an affirmative showing on "no remuneration."

U.S. v. Campbell, 317 F.3d 597 (6th Cir. 2003)

Apprendi: Maritime Drug Law Enforcement Act - Statute Constitutional

In a challenge to the Maritime Drug Law Enforcement Act based on the principles in Apprendi, a statute that parallels the federal drug statute, the Court found the statute did not, on its face, violate the fifth and sixth amendments.

U.S. v. Tinoco, Case No. 01-11012 (11th Cir. 9/4/02)

Apprendi: Mandatory Minimums Fall Outside Apprendi

Upholding the earlier decision in McMillian, the Court held that those circumstances that establish only a mandatory minimum and that do not increase the mandatory minimum are sentencing factors that need not be alleged in the indictment nor proven beyond a reasonable doubt before a jury.

Harris v. United States, 122 S. Ct. 2406 (2002); U.S. v. Woodruff, 296 F.3d 1041 (11th Cir. 2002); U.S. v. O'Neal, Case No. 03-10559 (11th Cir. 3/19/04)(drug min. man.)

Apprendi: Cotton

Omission from indictment of facts that increase the sentence is not a jurisdictional defect. Where there is no objection, it is subject to plain error review. In this case, the error fell short of being plain error.

U.S. v. Cotton, 122 S.Ct. 1781 (2002)

Apprendi: Indictment - 2255 Claim

The failure to allege the drug quantity in the indictment is not a jurisdictional defect. Furthermore, such a claim is barred by Teague's non/retroactivity standard. Failure to raise the claim on direct appeal meant that the defendant was procedurally barred from raising the claim in his initial 2255 motion.

McCoy v. U.S., 266 F.3d 1245, 1249 (11th Cir. 2001); Hamm v. United States, 269 F.3d 1247 (11th Cir. 2001); U.S. v. Cromartie, 267 F.3d 1293 (11th Cir. 2001)

Apprendi: Almendarez Torres

No yet.
U.S. vs. Thomas, 242 F.3d 1028, 1035 (11th Cir. 2001); U.S. v. Geer, Case No. 03-20566 (S.D. Fla. 6/2/04)

Apprendi: Mandatory Minimums

Eleventh Circuit says Apprendi doesn't apply.
U.S. v. Rodriguez, 15 FLW Fed C231 (11th Cir. 1/15/02); U.S. v. Allen, 302 F.3d 1260 (11th Cir. 2003); Spero v. U.S., Case No. 03-14586 (11th Cir. 7/8/04)

Apprendi: Guilty Pleas

Court found the plea colloquy "technically inadequate" because with an indictment that omitted any mention of drug quantity, there was no mention of drug quantity. Nevertheless, because the factual basis included mention of the quantity, because the judge mentioned that the defendants could receive up to a life sentence, and because the judge told the defendants that the sentence would be determined based upon the quantity of drugs found at sentencing, the court concluded that the defendants' "substantial rights were not substantially affected" and found that any error was harmless.
U.S. v. Sanchez, 14 FLW Fed C415 (11th Cir. 2/26/01)

Apprendi: Indictment

Where defendants objected to the indictment because it failed to include the quantity of drugs, the court found the error to be harmless, seemingly only because the sentence did not exceed the statutory maximum for the minimum quantity of drugs.
U.S. v. Sanchez, 14 FLW Fed C415 (11th Cir. 2/26/01)

Apprendi: Harmless Error - Time for Objection

Objections, so long as they are made at sentencing are timely.
U.S. v. Candelario, 14 FLW Fed C398 (11th Cir. 2/5/01)

Apprendi: Harmless Error & Plain Error

Unless a constitutional objection is made, the standard of review is plain error. Harmless error analysis must be conducted otherwise.
U.S. v. Candelario, 14 FLW Fed C398 (11th Cir. 2/5/01); U.S. v. Anderson, 15 FLW Fed C517 (11th Cir. 5/1/02)

Apprendi: Longer Prison Sentence Establishes Prejudice

At least for purposes of an ineffective assistance of counsel claim, an error that resulted in a 6 to 21 month increase in additional time in prison was prejudicial.
Glover v. U.S., 14 FLW Fed S41 (1/0/01)

Apprendi: Failure to Allege Drug Quantity in Indictment

Where the indictment failed to allege drug quantity, the defendant's sentence could not have exceeded twenty years. Because the defendant's sentence was less than that, no prejudice was shown.
U.S. v. Shepard, 235 F.3d 1295 (11th Cir. 2000)

Apprendi: Illegal Reentry

See U.S. v. Guadamuz-Solis, 14 FLW FedC151 (11th Cir. 12/1/2000)

Apprendi: Stacking

United States v. Smith, 240 F.3d 927 (11th Cir. 2001)

Apprendi: Nealy

232 F.3d 825 (11th Cir. 11/7/00)

Apprendi: Sentences Below the Statutory Maximum

Where the term of imprisonment is within the statutory maximum, there is no error, plain or otherwise.
U.S. v. Gerrow, 14 FLW Fed C141 (11th Cir. 11/8/00); U.S. v. Rodriguez, 15 FLW Fed C231 (11th Cir. 1/15/02)

Apprendi: Inapplicable to Firearm Mandatory Sentence

Those offenses prosecuted under 924(c), that provide for mandatory sentences if a gun is carried, brandished, or discharged are not affected by Apprendi. The maximum sentence for each is life, and Apprendi is inapplicable to mandatory minimums.
U.S. v. Pounds, 14 FLW Fed C64 (11th Cir. 10/20/00)

Apprendi: Not Retroactive

Relying on the principle that before a new rule can be retroactive, the Supreme Court must say it is, the Court held that, at least as of now, Apprendi isn't retroactive.
In re: Joshua, 13 Flw Fed C1081 (11th Cir. 8/30/00)

Apprendi: Drug Cases, Resentencing, Career Offender

Court held that Apprendi applies to drug cases. Although, harmless error was never discussed, the Court apparently held that so long as the objection is made, a defendant who is convicted without a finding by the jury as to the quantity must be sentenced to the penalty reserved for the smallest quantity of drug.
U.S. v. Rogers, 228 F.3d 1318 (11th Cir. 2000)

Apprendi: Plain Error

Where there was overwhelming evidence that the defendant possessed at least 5 grams of cocaine and where the defendant has not indicated that he had difficulty disputing issues of either kind or quantity of drugs because lack of notice from indictment, appellate court should not exercise its plain-error discretion to correct error.
U.S. v. Swatzie, 14 FLW Fed C13 (11th Cir. 9/27/00); U.S. v. Pease, 14 FLW Fed C370 (11th Cir. 1/30/01); U.S. v. Ardley, 15 FLW Fed C95 (11th Cir. 11/20/01); U.S. v. Anderson, 15 Flw Fed C517 (11th Cir. 5/1/02)

ARMED CAREER CRIMINAL ACT

ACCA: Proof of Separate Convictions and Shepard Documents

Over the dissenting opinion of Judge Newsom, the court held the state prosecutor's recitation of facts in support of a gulity plea, though unconfirmed by the defendant, was sufficient to establish the prior conviction was a crime of violence. Judge Newsome's dissent includes a thorough analysis of the use of Shepard documents to show the prior offenses occurred on separate occasions.
United States v. Dudley, No. 19-10267 (11th Cir. July 22, 2021)

ACCA: Shular

Court concluded Florida's drug offenses, even though lacking a mens rea requirement, qualified as ACCA predicates.
Shular v. United States, 140 S. Ct. 779 (2020); U.S. v. Smith, Case No. 19-12686 (11th Cir. Dec. 21, 2020)

ACCA: Florida Battery of a Law Enforcement Officer

Court still hasn't decided whether the statute is divisible three ways: touching/striking/infliciton of bodily harm, though the Government has usually conceded it is divisible only two ways.
Santos v. U.S., Case No. 17-14291 (11th Cir. Dec. 10,2020)

ACCA: Reckless Conduct Can't Support Predicate

Georgia's aggravated assault offense doesn't qualify as a violent felony because it includes reckless conduct.
U.S. v. Moss, Case No. 17-10473 (11th Cir. April 4, 2019); U.S. v. Carter, No. 17-15495 (11th Cir. 8/3/21)

ACCA: Cateorical Appoach Applies to "Drug Trafficking Crimes"

Orvalles v. U.S., Case No. 17-10172 (11th Cir. 10/4/18) (Pryor, J. dissenting)

ACCA: Categorial Approach Applies to Both the Elements and Residual Clauses

Orvalles v. U.S., Case No. 17-10172 (11th Cir. 10/4/18) (Pryor, J. dissenting)

ACCA: Alabama's First Degree Sexual Abuse

Does not qualify as a violent felony.
U. S. v. Davis, No. 16-10789 (11th Cir. 11/7/17)

ACCA: Violent Force Requirement

Good succinct description.
U. S. v. Davis, No. 16-10789 (11th Cir. 11/7/17)

ACCA: Criticism of Analysis

"This is an ACCA "violent felony" issue case. So here we do down the rabbit hole again to a realm where we must close our eyes as judges to what we know as men and women. It is a pretend place in which a crime that the defendant committed violently is transformed into a non-violent one ecaue other defendnats at other times may have been convicted or future defendants could be convicte, of violating the same statute without violence. Curiouser and curioser it has all become, as the holding in this case shows. Still, we are required to follow the rabbit."
U. S. v. Davis, No. 16-10789 (11th Cir. 11/7/17)

ACCA: Separate Offenses – Drug Conspiracy and Substantive Offense?

Depending on the facts, a drug conspiracy and a substantive drug offense committed during the same time span may be separate offenses for purposes of the ACCA.
U.S. v. Longoria, No. 16-17645 (11th Cir. 11/1/17)

ACCA: Indivisible: Listing of Multiple Ways to Commit Offense in the Indictment

Indicates the offense is invisible.
Francisco v. U.S., No. 15-13223 (11th Cir. 3/12/18)

ACCA: Categorical and Modified Categorical Approach

Good succinct description.
Francisco v. U.S., No. 15-13223 (11th Cir. 3/12/18); U. S. v. Davis, No. 16-10789 (11th Cir. 11/7/17)

ACCA: Moncriefe Presumption

Good succinct description.
Francisco v. U.S., No. 15-13223 (11th Cir. 3/12/18); U. S. v. Davis, No. 16-10789 (11th Cir. 11/7/17)

ACCA: Shepard Documents

Good succinct description.
Francisco v. U.S., No. 15-13223 (11th Cir. 3/12/18)

ACCA: Descamps

Good succinct description.

Francisco v. U.S., No. 15-13223 (11th Cir. 3/12/18); U. S. v. Davis, No. 16-10789 (11th Cir. 11/7/17)

ACCA: State Drug Trafficking Offenses that Include Possession

Court denied rehearing of the decision in U.S. v. White, 837 F.3d 1225 (11th Cir. 2016), which had held that Alabama's drug trafficking statute that included possession qualified as an ACCA predicate. Includes a dissent by Judges Martin and Jill Pryor.

U.S. v. White, Case No. 14-14044 (11th Cir. Aug. 24, 2017)

ACCA: Florida Robbery is a Violent Felony

U.S. v. Fritts, Case No. 15-15699 (11th Cir. 11/8/16)

ACCA: Georgia Burglary is Divisible

Despite a convincing decision by Judge Jill Pryor, the court found Georgia's burglary statute to be divisible and, using the modified categorical approach, determined that the defendant had been convicted of a crime of violence. Between the majority opinion and the dissent, the opinion includes a careful explanation of divisibility. Majority opinion, in a footnote, discounts the value of the pattern instructions, saying that, in this case involving a plea, "we rely on the indictments, not pattern jury instructions never given.

U.S. v. Gundy, Case No. 14-12113 (11th Cir. 11/23/16)

ACCA: Florida Burglary is Indivisible and Not a Crime of Violence

U.S. v. Esprit, Case No. 14-13066 (11th Cir. 11/21/16)

ACCA: Shepard Documents - Different Occasions

Informations that listed different victims, different items stolen, and different case numbers were not sufficient to establish that the offenses occurred on different occasions.

U.S. v. McCloud, 818 F.3d 591 (11th Cir. 2016)

ACCA: Florida Burglary Probably Not Divisible

"We do not have any binding precedent holding that the Florida burglary statute is divisible under Descamps."

In re: Parker, Case No. 13814 (11th Cir. 7/7/16)

ACCA: Florida Robbery is a Violent Felony

United States v. Seabrooks, Case No. 15-10380 (11th Cir. 10/16/16); U.S. v. Fritts, Case No. 15-15699 (11th Cir. 11/8/16)

ACCA: Govt Failure to Object to Court's Reliance on Certain Predicates

If the government fails to object to the district court's decision to rely on fewer than all ACCA-qualifying convictions, it waives any argument that a sentencing court's imposisition of an ACCA enhancement is justified on the basis of an ACCA-qualifying conviction that th district court could have but did not rely on at sentencing. Holding applies to both direct appeal and post-conviction appeals.

McCarthan v. Warden, FCC Coleman, 811 F.3d 1237, n. 8 (11th Cir. 2016)

ACCA: Separate Convictions - Meaningful Opportunity to Desist

McCarthan v. Warden FCC Coleman, 811 F.3d 1237 (11th Cir. 2016)

ACCA: PSR and Court Should Identify Predicate Convictions

McCarthan v. Warden FCC Coleman, 811 F.3d 1237 (11th Cir. 2016)

ACCA: Violent Felony Definition Virtually Identical to Crime of Violence Definition

The definitions in the ACCA and the career offender provision are virtually identical.

McCarthan v. Warden FCC Coleman, 811 F.3d 1237 (11th Cir. 2016); Gilbert v. United States, 640 F.3d 1293, 1309, n. 16 (11th Cir. 2011)

ACCA: South Carolina Burglary Statute is Non-Generic and Indivisible

U.S. v. Lockett, Case No. 14-15084 (11th Cir. 1/21/16)
ACCA: Divisibility - Statute Listing Alternative Means
A statute that lists what, according to state law, amounts to alternative means of committing the offense rather than alternative elements, is indivisible and subject only to the categorical approach.
Mathis v. U.S., Case No. 15-6092 (S. Ct. 6/23/16)
ACC: Alabama's Third-Degree Burglary is Indivisible and Not a Violent Felony
U.S. v. Howard, Case No. 12-15756 (11th Cir. 2/19/14)
ACC: Georgia's Felony Obstruction is a Violent Felony
Because O.C.G.A. § 16-10-24(b) only applies to those who obstruct a law enforcement officer by offering or doing violence to the officer's person, it qualifies as a violent felony.
U.S. v. Brown, Case No. 14-11502 (11th Cir. 11/20/15)
ACC: Residual Clause Unconstitutionally Vague
Johnson v. United States, Case No. 13-7120 (S. Ct. 11/5/14)
ACC: Florida Drug Conviction
Neither the Armed Career Criminal Act's "serious drug offense," nor the Guidelines's "controlled substance offense" require that the defendant know the substance he was distributing or intending to distribute was a controlled substance. Accordingly, Fla. Stat. § 893.13(1)(c)(e) serves as a predicate offense for both.
U.S. v. Smith, 775 F.3d 1262 (11th Cir. 2014)
ACC: Johnson Plain Error
See: United States v. Hornyak, Caes No. 14-50299 (5th Cir. 10/3015)
ACC: Separate Offenses
The government must prove that prior offenses occurred on different occasions using only Shepard documents.
U.S. v. Kirk, 767 F.3d 1136 (11th Cir. 2014)
ACC: Fla. Burglary
Though Florida's burglary statute is non-generic in that it includes curtilage and includes "remaining in," it still qualifies as a violent felony under the residual clause, because it presents a serious potential risk of physical injury to another.
U.S. v. Kirk, 767 F.3d 1136 (11th Cir. 2014)
ACC: Proof that Offenses are Separate
Court must rely on Shepard-approved documents to prove that offenses occurred at separate times.
U.S. v. Weeks, Case No. 12-11104 (11th Cir. 1/31/13)
ACC: Modified Categorical Approach Applies Only When Prior Conviction is Based on a Divisible Statute
Because California's burglary statute, which made it a crime to enter with intent to commit larceny or any other felony, was not divisible, Court held that defendant's conviction could not be used as a prior crime of violence to support finding that the defendant was an armed career criminal. Only divisible statutes enable a sentencing court to conclude that a jury (or a judge at a plea hearing) has convicted the defendant of every element of a generic crime. Justice Alito, in his dissent, argues that there is uncertainty as to what amounts to a divisible statute.
Descamps v. U.S., 133 S. Ct. 2276 (2013.); U.S. v. Almanza-Arenas, Case No. 09-71415 (9th Cir. Dec. 28, 2015 (noting circuit split)

ACC: Plea Colloquy Established that Conviction for Battery on a Pregnant Victim was a Crime of Violence
The plea colloquy which showed that the defendant had entered a guilty plea and the defense lawyer stated that the probable cause affidavit, which alleged a violent act, established a factual basis, sufficed to establish that the defendant's prior conviction of battery on a pregnant victim (aggravated battery) was sufficient to establish that the offense was a crime of violence.
U.S. v. Diaz-Calderone, Case No. 12-12013 (11th Cir. 5/23/13)
ACC: Florida's Fleeing and Eluding
Even the third degree felony of fleeing and eluding, Fla. Stat. § 316.1935(2), is a violent felony for purposes of the Armed Career Criminal Act. Overruled U.S. v. Harrison, 558 F.3d 1280 (11th Cir. 2009).
U.S. v. Petite, 703 F.3d 1290 (11th Cir. 2013)
ACC: False Imprisonment is a Violent Felony
Florida's crime of false imprisonment produces a "serious potential risk of physical injury to another" and is, therefore, a violent felony for purposes of the armed career criminal statute.
U.S. v. Schneider, 681 F.3d 1273 (11th Cir. 2012)
ACC: Failure to Object to Facts in PSR
A claim that the trial court's reliance on the police report was an insufficient basis to establish the facts preserved the claim that the government had failed to establish the requisite predicate for the career offender classification.
U.S. v. Schneider, 681 F.3d 1273 (11th Cir. 2012); U.S. v. Bennett, 472 F.3d 625 (11th Cir. 2006)
ACC: Alabama's Second Degree Rape and Second Degree Sodomy are not Violent Felonies
Neither Alabama's second degree rape or second degree sodomy offenses require at least some level of physical force. They are strict liability offenses, as well. Accordingly, because they do not involve purposeful, violet, and aggressive conduct, they can not serve as predicate offenses for the Armed Career Criminal Act.
U.S. v. Owens, Case No. 09-13118 (11th Cir. 2/27/12)
ACC: Limitation of Begay's Requirement that the Crime be "Purposeful, Violent, and Aggressive"
Begay's "purposeful, violent, and aggressive" language has been limited to crimes involving strict liability, negligence, and recklessness crimes. Other kinds of crimes fall within the residual clause if they categorically pose a serious risk of physical injury that is similar to the risk posed by one of the enumerated crimes.
U.S. v. Welch, Case No. 10-14649 (11th Cir. 6/13/12);U.S. v. Petite, Case No. 11-4996 (11th Cir. 1/3/13)
ACC: Robbery is a Violent Felony
The crime of robbery as set out in Fla. Stat. §812.13(1) is a violent felony.
U.S. v. Welch, 683 F.3d 1304 (11th Cir. 2012); U.S. v. Seabrooks, Case No. 15-10380 (11th Cir. 10/19/16)
ACC: False Imprisonment is a Violent Felony
Florida's false imprisonment offense qualifies as a violent felony under the Armed Career Criminal Act.
U.S. v. Schneider, case No. 10-15863 (11th Cir. 5/24/12)
ACC: Indiana Fleeing Statute

Indiana statute making it a crime to knowingly or intentionally flee from a law enforcement officer was a violent felony for purposes of the Armed Career Criminal Act.
Sykes v. U.S., Case No. 09-11311 (S. Ct. 6/9/11)

ACC: Sentence Length of Predicate Offense

The "maximum term of imprisonment" for defendant's prior state drug offense is the maximum sentence applicable to his offense when he was convicted of it.
McNeill v. U.S., Case No. 10-5258 (S. Ct. 6/11/08)

ACC: Florida Guilty Plea and Withhold of Adjudication Counts as a Prior Conviction

While it is the state law that determines whether a prior case counts as a conviction, the court of appeals held that, under relevant Florida precedent, a guilty plea that results in probation and the withholding of adjudication counts as a conviction for purposes of the Armed Career Criminal Act.
U.S. v. Santiago, 601 F3d 1241 (11th Cir. 2010); U.S. v. Jones, Case No. 08-16999 (11th Cir. 4/2/10)

ACC: Application of Shepard Restrictions to Determination of Whether Prior Offenses Were Temporally Distinct

U.S. v. Proch, 637 F.3d 1262 (11th Cir. 2011)

ACC: Resisting Arrest with Violence is a Violent Felony

Resisting arrest with violence, Fla. Stat. § 843.01, is a violent felony for purposes of the Armed Career Criminal Act.
U.S. v. Nix, Case No. 09-15335 (11th Cir. 12/30/10)

ACC: Alabama's Third-Degree Burglary Not a Violent Felony

Because Alabama's third-degree burglary statute, Ala Code ' 13A-5-6(a)(3); 13A-7-7(b), covers vehicles, aircraft, and watercraft, it is not a generic burglary offense and does not, therefore, amount to a violent felony. In this case, though, the indictment stated that the defendant had entered a building so the defendant's armed career criminal classification was upheld.
U.S. v. Ranier, 616 F.3d 1212 (11th Cir. 2010), overuled in part by U.S. v. Howard, 742 F.3d 1334 (11th Cir. 2014)

ACC: Florida's Statutory Rape Not a Violent Felony

Florida's statutory rape, Fla. Stat. § 800.04(3), is not a crime of violence for purposes of the Armed Career Criminal Statute. While the Court concluded that the offense was one that presents a serious potential risk of physical injury, it also concluded that it didn't involve purposeful, violent, and aggressive conduct.
U.S. v. Harris, 608 F.3d 1222 (11th Cir. 2010)

ACC: Battery on a Law Enforcement Officer Isn't a Violent Felony

Johnson v. United States, 559 U.S. 133 (2010); U.S. v. Williams, 609 F.3d 1168 (11th Cir. 2010)

ACC: To Qualify as a Violent Offense, Non-Enumerated Felony Must Be Purposely Violent

In the wake of Begay, courts must determine not only whether a non-enumerated state crime poses a serious potential risk of harm, but also whether it is similar in kind to the ACCA's enumerated crimes, i.e. whether it involves purposeful, violent, and aggressive conduct.
U.S. v. Lee, Case No. 08-14724 (11th Cir. 10/26/09)

ACC: Walk-Away Escape Not a Violent Felony

U.S. v. Lee, Case No. 08-14724 (11th Cir. 10/26/09)

ACC: Shepard May Apply to Evidence Showing Predicate Offenses Did Not Occur Simultaneously

U.S. v. Canty, Case No. 08-10659 (11th Cir. 6/11/09)
ACC: Failure to Report Not a Violent Felony
Chambers v. United States, Case No. 06-11206 (S. Ct. 1/13/09)
ACC: No Relief for Defendant Sentenced as Armed Career Criminal Conviction Based on Carrying a Concealed Weapon
Although recognizing that "Begay provides good reason to conclude that Hunter was erroneously sentences as an armed career criminal," the Court of Appeals denied the defendant a certificate of appealability because, in the view of the Court, he did not make a substantial showing of a denial of a constitutional right.
Hunter v. U.S., Case No. 07-13701 (11th Cir. 2/24/09)
ACC: Shepard and Showing That Offenses were Unrelated Offenses
The Pennsylvania Supreme Court, while concluding that the sentencing judge did not violate Apprendi by determining that prior convictions were separate offenses for purposes of Pennsylvania's three-strikes law, still held that the showing that the offenses were separate had to me done with the sort of records required by Shepard v. United States, 544 U.S. 13 (2005).
Commonwealth v. Gordon, Case NO. 46 EAP 2006 (Pa. S. Ct. 12/28/07)
ACC: DUI Not a Violent Felony
Begay v. U.S., 553 U.S. 137 (2008)
ACC: Shepard Rule Extends Only When There is an Ambiguous Statute
There was no error in using a docket sheet to show that the defendant had been convicted of aggravated burglary as there was no question about aggravated burglary being a crime of violence.
U.S. v. Brown, Case No. 05-16128 (11th Cir. 4/29/08)
ACC: Possession of a Short Barreled Shotgun Isn't a Violent Felony
Although six other circuit courts disagree, the Sixth Circuit Court of Appeals has held that possession of a sawed-off shotgun isn't a violent felony for purposes of the Armed Career Criminal Act.
US. v. Amos, 501 F.3d 524 (6th Cir. 2007)
ACC: Fla's Attempted Burglary a "Violent Felony"
James v. United States, Case No. 05-9264 (S. Ct. 4/18/07)
ACC: Govt. Can't Appeal Finding that Evidence was Insufficient to Prove Defendant's Prior Juvenile Adjudications Were Sufficient to Support ACC Sentence
The Fifth Amendment Double Jeopardy Clause bars the government from appealing a district judge's determination that evidence of the defendant's prior juvenile adjudications was insufficient to prove the defendant met the criteria for ACC sentencing.
U.S. v. Blanton, Case No. 05-40302 (9th Cir. 2/12/07)
ACC: Burglary as a Predicate - Florida's Curtilage Provision
Even if Florida's burglary offense fails as a generic burglary because it defines a burglary to include entry into the curtilage, it still automatically qualifies as a predicate offense under the armed career criminal statute. It does so because of the alternate prong of the statute that includes those offenses that "otherwise involves conduct that presents a serious potential risk of physical injury to another."
U.S. v. Matthews, Case No. 05-13447 (11th Cir. 10/12/06)
ACC: Shepard: Failure to Object to Facts in PSR
When the defendant objected to the probation officer's use of police reports in establishing the facts of the prior burglary conviction, but failed to object to the facts themselves, the court

concluded the trial court could rely on those facts to determine whether the burglary was the sort of generic burglary contemplated by the statute.
U.S. v. Bennett, Case No. 05-15376 (11th Cir. 12/13/06)

ACC: Generic Burglary

Section 924(e) identifies burglary as a violent felony, but only in its generic sense: an unlawful entry into a building or other structure with the intent to commit a crime.
U.S. v. Bennett, Case No. 05-15376 (11th Cir. 12/13/06)

ACC: Shepard - Information Isn't Determinative When Plea is to a Lesser Offense

The judgment for the defendant's prior Florida conviction stated only that the defendant had been convicted of "burglary" and that it was a 3rd degree felony. Looking at the information, which charged burglary of a dwelling, the district court concluded that the prior conviction must have, at least, been for a burglary of a structure, which would have supported the ACC finding, as opposed to burglary of a conveyance, which would not have been a qualifying offense. The Court of Appeals found that the information wasn't sufficient to show the defendant had been convicted of burglary of a structure.
U.S. v. Day, 465 F.3d 1262 (11th Cir. 2006)

ACC: Georgia's Attempted Burglary Qualifies as a "Crime of Violence"

U.S. v. Wade, Case No. 05-12518 (11th Cir. 8/4/06)

ACC: Determination of Nature of Predicate Convictions

In determining whether a prior conviction that is derived from a guilty plea counts as a predicate violent felony, the court is generally limited to examining statutory definitions, the charging document, the written plea agreement, the transcript of the plea colloquy , and any explicit factual finding by the trial judge to which the defendant assented.
Shepard v. U.S. Case No. 03-9168 (U.S. 3/7/05); Gonzalez v. Duenas-Alvarez, Case No. 05-1629 (S. Ct. 1/17/07); U. S. V. Rosales-Bruno, 676 F.3d 1017, 1022-1023 (11th Cir. 2012)

ACC: Use of Juvenile Convictions Permissible

Although the 9th Circuit has decided in U.S. v. Tighe, 266 F.3d 1187 (9th Cir 2001) that juvenile convictions, because they don't require a jury trial, can't be used to support the Armed Career Criminal designation, the Court, aligning itself with the majority of other courts that have considered the claim, held that prior nonjury juvenile adjudications in which the defendant was afforded all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for Apprendi purposes.
U.S. v. Burge, 407 F.3d 1183 (11th Cir. 2005); U.S. v. Matthews, Case No. 05-1655 (1st Cir. 8/7/07)

ACC: Attempt to Commit a Violent Felony Counts as a Predicate Offense

U.S. v. Rainey, Case No. 03-14817

ACC: Theft From the Person is a Violent Crime

For purposes of establishing the predicate offenses under the armed career criminal act, the court held that theft from a person was violent offense.
U.S. v. Howze, 343 F3d 919 (7th Cir. 2003)

ACC: No Time Limit on Predicate Convictions

U.S. v. Lujan, 9 F.3d 890 (10th Cir. 1993)

ACC: Maximum Sentence

Although the statute refers only to a mandatory minimum 15 years, the courts have construed 18 U.S.C. 924(e) to carry a maximum penalty of life.
United States v. Brame, 997 F.2d 1426 (11th Cir. 1993)

ACC: Any Burglary of a Structure Qualifies
Unlike the sentencing guidelines, 18 U.S.C. 924(e) counts a burglary of a structure as a violent felony.
U.S. v. Kriens, 270 F.3d 597 (8th Cir. 2001)
ACC: Examination of Facts of Predicate Convictions
While the facts underlying the predicate convictions may not be examined to determine if the offense is a burglary, those facts may be examined to determine if the offenses occurred at different times.
U.S. v. Richardson, 230 F.3d 1297 (11th Cir. 2000)
ACC: Miscellaneous Failed Defenses
Ex post facto claim about prior felonies arising prior to enactment of armed career criminal legislation, cruel and unusual punishment claim, and claim that evidence wasn't sufficient to establish that firearm traveled in interstate commerce all failed.
U.S. v. Reynolds 13 FLW Fed C745 (11th Cir. 6/20/2000)
ACC: Subsequent Vacation of Predicate Offense
Where subsequent to the defendants sentence as an armed career offender one of his state convictions that had been used as a predicate offense had been vacated, the defendant was able to attack his sentence via a habeas corpus petition.
United States v. Walker, 13 FLW Fed C279 (11th Cir. 12/17/99)
ACC: Predicate Drug Offenses
The Court rejected the trial court's departure bases upon the finding that although the defendant's prior convictions fell within the statutory definition of serious drug offenses, the priors involved very small quantity of drugs, and therefore, were very minor crimes. Note, though, that while rejected by the 11th there are several circuits that have allowed a departure because a particular defendant's history differed from those of most career criminals. (n. 7) U.S. v. Simmons, 12 FLW Fed C717 (11th Cir. 4/14/99),
U.S. v. Rucker, 12FLW Fed C727 (11th Cir. 1999)
ACC: Restoration of Civil Rights
For the restoration of civil rights to exclude the defendant from the armed career criminal statute, it must include the right to possess a firearm
U.S. v. Palazzi, 11 FLW Fed C74 (11th Cir. 6/24/97)
ACC: Predicate Offense Must Occur Prior to Gun Offense
In the situation here, where both the predicate offense crime and conviction occurred prior to the sentencing for the 922(g) offense (possession of a firearm by a convicted felon), but subsequent to the commission of the firearm offense, it couldn't be counted. The court of course remanded the case for resentencing and gave the trial court an opportunity to take a closer look at what was initially thought to be two offenses arising out of the same episode.
U. S. v. Richardson, 12 FLW Fed C532 (11th Cir. 2/11/99)
ACC: Convictions Must Arise Out of Separate Episodes
The three predicate convictions must arise out of separate and distinct criminal episodes.
U. S. v. Richardson, 12 FLW Fed C532 (11th Cir. 2/11/99). See also: U. S. v. Pope, 132 F.3d 684, 689 (11th Cir. 1998), U. S. v. Greene, 810 F.2d 999, 1000 (11th Cir. 1986); U.S. v. Proch, 637 F.3d 1262 (11th Cir. 2011)
ACC: Easy Enough To Establish Separate Episodes
Defendant who after committing an armed robbery fled from officers, who were in hot pursuit, broke into and hid in a backyard storage shed. The Court found the two crimes, burglary and

robbery, fulfilled the 18 USC 924(e)(1) requirement that the offenses be "committed on occasions different from one another."
U.S. v Lee, 13 Flw Fed C593 (11th Cir. 4/13/00); U.S. v. Long, 320 F.3d 795 (8th Cir. 2003); U.S. v. Spears, Case No. 04-13297 (11th Cir. 3/30/06)

ACC: Firearm Enhancement for Stolen Gun

The finding for enhancement purposes that the Defendant possessed a firearm "in connection with a crime of violence," was satisfied by proof that the gun was stolen during a burglary. There is, though, conflict with several circuits having held that the requirement is satisfied when the firearm serves a purpose related to the crime.
U.S. v. Young, 11 FLW Fed C54 (11th Cir. 6/20/97)

ACC: Coupled with Career Offender and a 924(C) Conviction

For those who are career offenders, the table at §4B1.1(c)(3) provides the guideline range for all offenses, i.e., it is not a matter of adding the additional 5 years to the range derived from the table. In arriving a the "otherwise applicable range" in §4B1.1(c)(2)(A), the range to be compared with the range from the table, it is a matter of calculating the range using Chapter Two of the Guidelines and then adding the 60 months. It is not a matter of adding 60 months to the range determined by the career offender guideline.
U.S. v. Winbush, 264 F.Supp.2d 1013 (N.D.Fla. 2003) (Hinkle, J.)

ARREST

Arrest: Arrest for Unpaid Child Support

The Fourth Amendment permits an officer to make an arrest on the basis of a civil writ of bodily attachment for unpaid child support.
U.S. v. Phillips, Case No. 14-14660 (11th Cir. 8/23/16)

Arrest: Excessive Force Violates Fourth Amendment

The Fourth Amendment's guarantee against unreasonable searches and seizures includes the right to be free from the use of excessive force in the course of an arrest. In order to determine whether the amount of force uses was proper, a court must ask whether the officer's conduct is reasonable in light of the facts confronting the officer.
Saunders v. Duke, Case No. 12-11401 (11th Cir. 9/8/14)

Arrest: Arrest By Officers From Outside Jurisdiction

When Georgia officers crossed into Florida to make a hot-pursuit arrest, they violated Florida law. The district court, though, properly denied the defendant's motion to suppress the drugs found at the time of the arrest. The violation of state law was irrelevant for purposes of federal law. What mattered was whether there was probable cause for the arrest.
U.S. v. Goings, 573 F.3d 1141 (11th Cir. 2009)

Arrest: Differentiating Between an Arrest and a Stop

Four nonexclusive factors used in differentiating between a Terry stop and an arrest are: (1) the law enforcement purpose served by the detention; (2) the diligence with which the officers pursued the investigation; (3) the scope and intrusiveness of the investigation; and (4) the duration of the detention.
U.S. v. Stanley, Case No. 05-16299 (11th Cir. 12/20/06)

Arrest: Probable Cause

For probable cause to exist, an arrest must be objectively reasonable based on the totality of the circumstances. This standard is met when the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed an offense. The officer's own subjective opinions or beliefs about probable cause are irrelevant, because it is an objective standard.
U.S. v. Stanley, Case No. 05-16299 (11th Cir. 12/20/06)

Arrest: Probable Cause: Three Men In a Car With Drugs

Based at least in part on the fact that the quantity of drugs and the presence of cash suggested drug dealing and the fact that no one owned up to being responsible for the drugs, the Court found there was probable cause to arrest all three individuals.
Maryland v. Pringle, Case No. 02-809 (S. Ct. 12/15/03)

Arrest: Valid Stop May Become So Intrusive As to Become an Arrest

U.S. v. Dunn, Case No. 02-14182 (11th Cir. 9/19/03**)**

Arrest: Must Be Probable Cause

U.S. v. Dunn, Case No. 02-14182 (11th Cir. 9/19/03**)**

Arrest: Removal From Home - Must Be Probable Cause or a Warrant

"We have never sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes absent probable cause or judicial authorization." (In a footnote: "We have, however, left open the possibility that 'under circumscribed procedures a court might validly authorize a seizure on less than probable cause when the object is fingerprinting."
Kaupp v. Texas, Case No. 02-5636 (S. Ct. 5/5/03)

Arrest: Test for A Seizure of the Person

A seizure of the person within the meaning of the Fourth Amendment and Fourteenth Amendments occurs when taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. The test is an objective one.
Kaupp v. Texas, Case No. 02-5636 (S. Ct. 5/5/03)

Arrest: Presence In Apt. Where Drugs Found Did Not Provide Probable Cause

Where drugs were found in a desk drawer there was no probable cause to arrest the girlfriend of the owner of the apartment. Although she was spending the night, she had told the officer she did not live there, her drivers license had another address, and she had unpacked suitcases.
Holmes v. Kucynda, Case No. 02-11408 (11th Cir. 2/13/03)

Arrests: Lawful Arrest for Wrong Reason

When an officer makes an arrest, which is properly supported by probable cause to arrest for a certain offense, neither his subjective reliance on an offense for which no probable cause exists nor his verbal announcement of the wrong offense vitiates the arrest.
Lee v. Ferraro, 15 FLWFed C329 (11th Cir 3/5/02)

Arrests: For Offenses Not Punishable by Incarceration

Where Texas law authorized an arrest for a violation of seatbelt laws, such an arrest did not violate the Fourth Amendment even though a conviction for that offense provided only for a fine.
Atwater v. City of Lago Vista, 532 U.S. 318 (2001); Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002)

Arrests: Statutory Authority

21 U.S.C. 878 provides for warrantless arrests.

U.S. v. Santa, 14 FLW FedC269 (11th Cir. 12/28/2000)
Arrest: Warrant - Exigent Circumstances
An in home arrest may not be justified on the basis of exigent circumstances which were either non existent or created by the government itself.
U.S. v. Santa, 14 FLW FedC269 (11th Cir. 12/28/2000)
Arrest Warrant - Face of Warrant Contains Different Address
Doesn't make any difference.
U.S. v. Bervaldi, 13 FLW Fed C1137 (11th Cir. 9/14/00)
Arrest: Warrant - Entry
Payton requires a two part inquiry to determine if entry pursuant to an arrest warrant complies with the Fourth Amendment. First, there must be a reasonable belief that the location to be searched is the suspect's dwelling, and second, the police must have reason to believe that the suspect is within the dwelling.
U.S. v. Bervaldi, 13 FLW Fed C1137 (11th Cir. 9/14/00); Kirk v. Louisiana, Case No. 01-8419 (6/24/02); U.S. v. Williams, Case No. 16-16444 (11th Cir. 9/20/17)

ARSON

Arson: Consecutive Sentences for Arson and Use of Fire
Consecutive sentences for arson, 18 USC 844(i) and using a fire to commit a federal felony, 18 USC 1341, 1342 did not violate double jeopardy and was permissible.
U.S. v. Gardner, 211 F.3d 1049 (7th Cir. 2000)
Arson: Destruction of Property by Arson or Exploives - : Rental Property Satisfies Commerce Clause Requirement
U.S. v. Dascenzo, 12 FLW Fed C22 (11th Cir. 8/31/99)

ASSIMILATED CRIMES ACT

Assimilated Crimes: Punishment for Violation of Supervised Release May Exceed State Maximum Penalty
Although the Assimilated Crimes Act requires "like punishment," the trial court has the authority to send the defendant back to prison for a violation of supervised release even though he has already served the maximum sentence under state law.
U.S. v. English, Case No. 09-12788 (11th Cir. 12/16/09)
Assimilated Crimes: "like punishment"
Although the assimilated crimes act requires "like punishment,"it does not require a federal court to implement state policies regarding eligibility for early release and alternative forms of confinement that conflict with federal sentencing policies. Accordingly, the provisions under Alabama law that allowed for home detention in lieu of serving the sentence and for release after serving only a small portion of the sentence were not available to the defendant.
U.S. v. Pate, Case No. 02-13408 (11th Cir. 2/21/03)

ATTEMPTS

Attempts: Elements
To a convict a defendant of an attempt to commit a crime, the government must prove (1) the defendant was acting with the kind of culpability otherwise required for the commission of the crime for which he is charged with attempting; and (2) the defendant was engaged in conduct that constitutes a substantial step toward the commission of the crime.
U.S. v. Root, Case No. 01-14945 (11th Cir. 7/10/02)

ATTORNEY CLIENT RELATIONSHIP

Attorney-Client: Withdrawal - Appointed or Retained Counsel
Where a defendant is represented by appointed counsel, he does not have a right to new counsel absent good cause. Good cause exists where there is a fundamental problem, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which could lead to an unjust verdict. A defendant, however, may discharge retained counsel for any reason without regard to whether he will later request appointed counsel.
U.S. v. Jimenez-Antunez, Case No. 15-10224 (11th Cir. 4/25/16)
Attorney/Client: Dispute Over Strategy Does Not Create a Conflict of Interest
See Judge Martin's concurring opinion in
Howell v. Secretary, Fla. Dept. of Corrections, Case No. 13-10766 (11th Cir. 9/13/13)
Attorney/Client: Court May Decline Waiver If There is a Conflict of Interest
U.S. v. Campbell, Case No. 06-13548 (11th Cir. 7/13/07)
Attorney/Client: Conflict of One Lawyer in the Firm Disqualifies Entire Firm
U.S. v. Campbell, Case No. 06-13548 (11th Cir. 7/13/07)
Attorney/Client: Erroneous Deprivation of Counsel - Structural Error
Erroneous deprivation of the right to counsel of choice with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error. Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation fo the witnesses, and style of witness examination and jury. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.
U.S. v. Gonazlez-Lopez, Case No. 05-352 (S. Ct. 6/26/06)
Attorney/Client: Court May Insist Defense Lawyers Be Retained for Duration of the Case
Although recognizing that it is appropriate to allow defense counsel to withdraw when the defendant's changes financial circumstances makes payment for services impossible, the court found the district court had the right to insist that lawyers who are retained agree to represent the client throughout the resolution of the case.
U.S. v. Parker, Case No. 04-5175 (2d Cir. 2/21/06)
Attorney/Client: Requiring Lawyer to Testify About Whether Client Was Informed of Court Date
Trial court properly granted a motion to quash a grand jury subpoena directed to defense counsel. The lawyer's client had earlier failed to appear for trial and government served the subpoena upon defense counsel for the purpose of eliciting testimony about whether the lawyer had

advised the client of the trial date. While the information sought did not involve privileged communication, Rule 17(c)(2) grants district courts discretion to quash grand jury subpoenas which are "unreasonable or oppressive." The court found that the need for the information in the case was not great enough to outweigh the possible estrangement between lawyer and client.
In re Grand Jury Subpoena, Case No. 04-35312 (9th Cir. 10/13/05)

Attorney/Client: Tactical Decisions

An attorney undoubtedly has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy. That obligation, however, does not require counsel to obtain the defendant's consent to every tactical decision.
U.S. v. Nixon, Case No. 03-931 (S. Ct. 12/13/04);Gonzalez v. U.S., Case No. 06-11612 (S. Ct. 5/12/08)

Attorney/Client: Privilege Does Not Extend to Notification of the Court Date

U.S. v. Inella, 821 F.2d 1566 (11th Cir. 1987), U.S. v. Gray, 876 F.2d 1411 (11th Cir. 1989)

Attorney/Client: Prevailing Fee

In 2002, the prevailing market rate for attorney's in northwest Florida was $225/hr, up from $150/hr in 1992. In a footnote the court mentions that Cliff Davis mistakenly relied upon the prosecutors representation that the trial wouldn't take any longer than two months and (foolishly) charged only $50,000 , while another lawyer charged $375,000 for a codefendant. Barry Beroset, came off better with an agreement that called for $5,000 per week after the first 10 weeks. The trial lasted 21 weeks.
U.S. v. Adkinson, District Court Case No. 3:91cr03052/RV (2/11/03)

Attorney/Client: Faretta Inquiry

See U.S. v. Kimball, 15 FLW Fed C577 (11th Cir. 5/14/02); U.S. v. Stanley, Case No. 12-11126 (11th Cir. 1/6/14)

Attorney/Client: Right to Represent oneself - Timely Request

Court may deny request if the jury is already impaneled.
U.S. v. Young, 15 FLW Fed C464 (11th Cir. 4/11/02)

Attorney/Client: Decision to Request a Mistrial

The decision to refrain from asking the court for a mistrial is a tactical decision entrusted to defense counsel, binding the defendant even when the defendant expresses a contrary wish to his lawyer.
U.S. v. Burke, 257 F.3d 1321 (11th 2001)

Attorney/Client: Decisions that Belong to the Defendant

Four decisions clearly belong to the defendant: whether to plead guilty, waive a jury, testify in his or her own behalf, and the decision as to whether to take an appeal.
U.S. v. Burke, 257 F.3d 1321 (11th Cir. 2001)

Attorney/Client: Attorney's Obligation to Advise of Appeal Rights

Counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.
Warden v. Flores-Ortega, 120 S.Ct. 1029 (2000); Thompson v. U.S., Case No. 05-16970 (11th Cir. 3/20/07)("Simply asserting the view than an appeal would not be successful does not constitute 'consultation' in any meaningful sense"); Devine v. United States, Case No. 07-11206 (11th Cir. 3/20/08)

Attorney/Client: Authority of Attorney to Waive Client's Rights

What suffices for waiver depends on the nature of the right at issue. Lawyers generally have the authority to decide what trial arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. In this case the court found that the lawyer could waive the clients right to a speedy trial under the Interstate Agreement on Detainers Act.
New York v. Hill, 13 FLW Fed S35 (1/11/00)
Attorney/Client: Disqualification of Defense Counsel
Relying largely on the opinion in Wheat v. U.S. 108 S.Ct. 1692 (1988), the Court upheld the disqualification of defense counsel on the basis that there was evidence that implicated the lawyer in criminal activity with the defendant.
U.S. v. Register, 182 F.3d 820 (11th Cir. 1999)

ATTORNEY'S FEES

Attorney's Fees: Hobbs Act
For those lawyers who win when the prosecution was "vexatious, frivolous, or in bad faith."
U.S. v. Gilbert, 13 FLW Fed C311 (11th Cir. 12/28/99)

BLAKELY V. WASHINGTON

Blakely: Harmless Error
Blakely errors may be harmless.
Washington v. Recuenco, Case No. 05-83 (S. Ct. 4/16/06)
Blakely: Claim Won't Be Considered if not Raised in Initial Brief
Court would not consider the Blakely issue raised for the first time in petition for rehearing.
U.S. v. Levy, Case No. 01-17133 (11th Cir. 8/3/04)
Blakely: Doesn't Undermine Existing Law on Mandatory Minimum Sentences
Spero v. U.S., Case No. 03-14586 (11th Cir. 7/8/04)
Blakely: Not Retroactive
In Re: Dean, Cae No. 04-13244 (11th Cir. 7/9/04)
Blakely: Reese
United States v. Reese, 382 F.3d 1308 (11thCir. 2004)
Blakely
"In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' Bishop, supra, § 87, at 55, and the judge exceeds his proper authority."
Blakely v. Washington, 124 S. Ct. 2531 (2004).

BOOKER

Appellate Review

Booker: Appellate Review - "The Heartland"
It matters whether the reason for the variance is a fact that takes the present case outside the heartland of cases covered by the individual guideline. The Supreme Court instructed in Kimbrough that decisions to vary may attract greatest respect when the sentencing judge finds a particular case outside the heartland to which the Commission intends individual guidelines to apply. The Court stated by conrast, closer review may be in order when the sentencing judge varies from the Guidelines solely on the judge's view that the Guidelines range fails to properly reflect § 3553(a) consideration even in a mine-run case.
United States v. Irey, 612 F.3d 1160 (2010)
Booker: Appellate Review - Substantive Unreasonableness
"Out of the hundreds of sentences we have reviewed up to this point in the five years since the Booker decision, those are the only four we have found to be substantively unreasonable."
U.S. v. Irey, Case No. 612 F.3d 1160 (2010)
Booker: Appellate Review - Role of 3553(a)
Section 3553(a) plays a critical role in appellate review of sentences, just as it does in the initial sentencing decision. Booker instructs that not only must district courts apply the § 3553(a) factors in making their sentencing decisions, but courts of appeals must also apply those same factors in determining whether a sentence is reasonable.
U.S. v. Irey,) 612 F.3d 1160 (2010)
Booker: Appellate Review - Procedural or Substantive Unreasonableness
A sentence may be reviewed for procedural or substantive unreasonableness. Gall recognized a number of grounds for significant procedural error: failing to properly calculate the guideline range, treating the guidelines as mandatory, failing to consider the 3553(a) factors, selecting a sentence on clearly erroneous facts, or failing to adequately explain the chosen sentence.
U.S. v. Ellisor, 522Case No. 05-14459 (11th Cir. 4/7/08)
Booker: Appellate Review - Acknowledging Gall
U.S. v. Livesay, Case No. 06-11303 (11th Cir. 4/23/08)
Booker: Appellate Review - 11th Circuit Doesn't Extent Presumption of Reasonableness to Guidelines Sentence
"We do not in this circuit presume reasonable a sentence within the properly calculated Guidelines range."
U.S. v. Campbell, 491 F.3d 1306 (11th Cir. 2007)
Booker: Appellate Review - Court of Appeals May Adopt a Presumption of Reasonableness
A court of appeals may apply a presumption of reasonableness to a sentence imposed within a properly calculated United States Sentencing Guidelines range.
Rita v. U.S., Case No. 06-5754 (S.Ct. 6/21/07)
Booker: Appellate Review - Reasonable Even With Guidelines Error
The Court ducked the question of whether an error had been made in the Guidelines calculations, concluding that even if an error had occurred the sentence was reasonable.
U.S. v. Keene, Case No. 06-`2076 (11th Cir. 11/30/06)
Booker: Appellate Review - Court May Review Guidelines Sentence for Reasonableness

U.S. v. Martinez, Case No. 05-12706 (11th Cir. 1/9/06); U.S. v. Fernandez, Case No. 05-1596 (2nd Cir. 4/3/06)

Booker: Appellate Review - Reasonableness Standard Same as "Plainly Unreasonable"

The reasonableness standard of Booker is essentially the same as the plainly unreasonable standard of § 3742(e)(4).

U.S. v. Sweeting, Case No. 05-11062 (11th Cir. 1/26/06)

Booker: Appellate Review - Harmless Error (Statutory vs. Constitutional Error)

In statutory error cases, if one can say with fair assurance that the sentence was not substantially swayed by the error the sentence is due to be affirmed even though there was error. Constitutional error cases, on the other hand, require application of the beyond a reasonable doubt test, instead of the fair assurance test, to determine whether the government has established error.

U.S. v. Cain, Case No. 04-15754 (11th Cir. 12/29/05)

Booker: Appellate Review - Harmless Error (Sentence At Top of Guidelines Range & Harmless Error)

By itself, a sentence at the top of the Guidelines range does not the district court's constitutional error was harmless beyond a reasonable doubt.

U.S. v. Cain, Case No. 04-15754 (11th Cir. 12/29/05)

Booker: Appellate Review - Harmless Error (Mid-Range Sentence Doesn't Establish That Error Is Harmless)

See: U.S. v. Glover, Case No. 04-16745 (11th Cir. 11/29/05)

Booker: Appellate Review - Constitutional Error vs. Statutory Error

See: U.S. v. York, Case No. 04-12354 (11th Cir. 10/27/05)

Booker: Appellate Review - Guidelines Sentence Always "Reasonable"?

If the judge imposes a sentence within the Guidelines range is presumed to be reasonable., though the defendant can try at the sentencing hearing to rebut the presumption by showing that a guidelines sentence is unreasonable in the particular circumstances of the case. Thus, the sentencing judge may not rest on the guidelines alone, but must, if asked by either party, consider whether the guidelines sentence actually conforms in the circumstances, to the statutory factors. He cannot treat all sentences that would fall within the guidelines sentencing range as reasonable per se.

U.S. v. Cunningham, Case No. 05-1774 (7th Cir. 11/14/05)

Booker: Appellate Review - Harmless Error (Judge's Announcement He Would Have Imposed Same Sentence)

Where in a sentencing that took place prior to the Booker decision, but after Blakely, the judge announced that he would have imposed the same sentence regardless of whether the guidelines required him to do so, the error that arose because the mandatory nature of the guidelines was harmless.

U.S. v. Petho, Case No. 04-15412 (11th Cir. 5/18/05); U.S. v. Mathenia, Case No. 04-15250 (11th Cir. 5/23/05); U.S. v. Robles, Case No. 04-13598 (11th Cir. 5/10/05)

Booker: Appellate Review - Application of 5K1.1 Sentence Reduction Didn't Eliminate the Booker Error

U.S. v. Davis, Case No. 04-14585 (11th Cir. 5/4/05)

Booker: Appellate Review - Reasonable Sentence Includes a Correct Application of the Guidelines

Booker's requirement that the sentencing court consult the Guidelines "at a minimum obliges the district court to calculate correctly the sentencing range prescribed by the Guidelines."
U.S. v. Crawford, Case No. 03-15136 (11th Cir. 5/2/05)

Booker: Appellate Review - Plain Error (Sentence at Bottom of the Guideline Range)

A sentence at the bottom of the Guideline range is insufficient to show a reasonable probability that the defendant would have received a lesser sentence if the Guidelines were applied in an advisory fashion and, therefore, fails to establish that there is plain error.
U.S. v. Fields, Case No. 04-12486 (11th Cir. 5/16/05)

Booker: Appellate Review - Plain Error (Judges Remarks Demonstrated Existence of Plain Error)

Because the judge made statements that showed he believed the sentence was excessively harsh, the court concluded that the error met the plain error test and remanded the case for resentencing.
U.S. v. Shelton, Case No. 04-12602 (11th Cir. 2/25/05); U.S. v. Martinez, Case No. 05-10382 (11th Cir. 4/29/05); U.S. v. Dacus, case No. 04-15319 (11th Cir. 5/3/05); U.S. v. Thompson, Case No. 04-12218 (11th Cir. 9/1/05)

Booker: Appellate Review - Plain Error

If the defendant fails to raise an objection in the trial court, any Booker error is subject to plain error review. Unless the defendant can show that it was likely that the court would have imposed a lesser sentence, he cannot show his substantial rights were affected by the error and the conviction must be affirmed.
U.S. v. Rodriguez, Case No. 04-12676 (11th Cir. 2/4/05) on request for rehearing en banc (4/19/05); U.S. v. Duncan, Case No. 03-15315 (11th Cir. 2/24/05)

Booker: Appellate Review - Harmless Error

Where the defendant had raised at sentencing an objection to judicial fact finding to enhance his sentence, court concluded there had been a 6th Amendment violation and remanded the case for resentencing.
U.S. v. Reese, 397 F.3d 1337 (11th Cir. 2005)

Booker: Appellate Review - Appeal Waiver Sufficient to Defeat Booker Claim

See U.S. v. Rubbo, 396 F.3d 1330 (11th Cir. 2005); U.S. v. Grinard-Henry, case No. 04-12677 (11th Cir. 2/11/05); U.S. v. Frye, Case No. 03-16377 (11th Cir. 3/11/05)

Booker: Appellate Review - No 6th Amendment Violation Where Defendant Admits Facts

So long as the defendant admits the facts that support the enhancement of his sentence, there is no violation of the 6th Amendment.
U.S. v. Frye, Case No. 03-16377 (11th Cir. 2/20/05)

Booker: Appellate Review - Successive Habeas Corpus Petitions

Court rejected defendant's successive habeas corpus petition because Supreme Court has not specifically held that Booker should be applied retroactively.
In Re: Anderson, Case No. 05-10045-F (11th Cir. 1/21/05)

Crack/Powder Disparity

Booker: Crack/Powder - 1:1 Ratio Should be Used & Judges Should Explain Long Sentences Based on Existing Guidelines

U.S. v. Brewer, Case No. 09-3909 (8th Cir. Oct. 21, 2010)(Concurring and Dissenting Opinion)

Booker: Crack/Powder - Final Word (Kimbrough)

"[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence "greater than necessary" to achieve §3553(a)'s purposes, even in a mine-run case."
Kimbrough v. United States, 128 S. Ct. 558, 575 (2007)

Booker: Crack/Powder

"It has taken many years, but the court finally has concluded that it is authorized to hold, and does hold, that a district court, in sentencing a defendant, may properly take into account the fact that the 100-to-1 ratio embedded in the Sentencing Guidelines for crack-to-powdered cocaine offenses bears no meaningful relationship to a defendant's culpability."
U.S. v. Pickett, Case No. 05-3179 (D.C. Cir. 2/13/07); U.S. v. Willis, Case No. 04-CR-190 (E.D.Wis. Mar. 28, 2007)

Booker: Crack/Powder Disparity - Judge Barkett's Take

"Congress did not create an exception to §3553(a) for crack offenses, nor did the Supreme Court in Booker. Sentencing courts must arrive at a sentence that is 'reasonable,' whether sentencing a crack offense or any other offense."
U.S. v. Williams, Case No. 05-13205 (11th Cir. 12/13/06)(Barkett, J, dissenting from the denial of rehearing en banc)

Booker: Crack/Powder Disparity

Can't justify a variance on the basis of the crack/powder disparity.
U.S. v. Williams, 456 F.3d 1353 (11th Cir. 2006), reh den 20 FLW Fed C177 (Dec. 13, 2006)

Booker: Crack/Powder Disparity - Judge's Personal Disagreement With Guidelines

At least with regard to the crack and powder disparity, the Court of Appeals has concluded, that "allowing a district court's personal disagreement with the Guidelines to play a role in the § 3553(a) analysis would 'subvert Congress' clearly expressed will' and 'certainly does not promote respect for the law, provide just punishment for the offense of conviction, or result in a sentence reflective of the offense's seriousness as deemed by Congress.'"
U.S. v. Pope, 461 F.3d 1331 (11th Cir. 2006)(Judge Rodgers)

Booker: Crack/Powder Disparity - District Court Obligated to Follow Guidelines

"Here, Pope's argument that the district court was free to disregard the 100:1 ratio calculating his Guidelines range or as part of its 18 U.S.C. § 3553(a) analysis is without merit. Simply put, the district court remains obligated to calculate the correct Guidelines range, and as part of that obligation, the court may not disregard individual Guidelines or construe them in a manner inconsistent with Congress's intent as expressed in the Guidelines, even if the ultimate range based on those Guidelines is advisory in nature."
U.S. v. Pope, 461 F.3d 1331 (11th Cir. 2006)(Judge Rodgers)

Booker: Powder/Crack Disparity - Court Erred in Concluding It Could Impose a Variance

U.S. v. Gunter, Case No. 05-29521 (11th Cir. 9/11/06)

Booker: Crack/Powder Disparity - Below Guidelines Sentence Based on Crack/Powder Disparity Unreasonable

Court found the imposition of a sentence below the Guidelines range, based on the conclusion that the crack/powder differential is unjust, fell short of the reasonableness standard of review.
U.S. v. Eura, Case No. 05-4437 (4th Cir. 2/24/06); U.S. v. Pho, 433 F.3d 53 (1st Cir. 2006); U.S. v. Pope, Case No. 05-1152 (11th Cir. 8/22/06)

Booker: Crack/Powder Cocaine Disparity

Sentencing within the Guidelines based on the crack-powder disparity is not inherently unreasonable.
U.S. v. Cawthron, Case No. 05-1892 (8th Cir. 11/28/05)
Booker: Crack/Powder Cocaine Disparity
See Douglas Berman's blog, Sentencing Law and Policy, 9/28/05

Ex Post Facto

Booker: Ex Post Facto
The Ex Post Facto Clause is violated if a district court uses a newer version of the guidelines that results in a harsher sentence.
Peugh v. U.S., Case No. 12-62 (S. Ct. 6/10/13)

Miscellaneous

Booker: Miscellaneous - White Collar Crimes and Greed
General deterrence is an important factor in white-collar cases where the motivation is greed.
U.S. v. Hayes, Case No. 11-13678 (11th Cir. 8/12/14)
Booker: Miscellaneous - General Description of Variance Procedure
Peugh v. U.S., Case No. 12-62 (S. Ct. 6/10/13)
Booker: Miscellaneous - Judge Martin Questions Whether Analysis for Upward and Downward Variances is the Same
Noting that there seem to be no instances where the court has rejected an upward variance and many where the court has rejected downward variances, Judge Martin wrote that "absent correction, I fear this Court's different approach for reviewing up and down sentence variances may erode public trust in our work." She noted, as well, that in considering sentences above the guideline range, the court has looked only at whether the district court seemed to consider the 3553(a) factors and not whether the district court might have disregarded one of the factors or weighed factors in an unreasonable way, which contrasts with the approach used in analyzing sentences above the guideline range where the court showed no such deference and scrutinized each 3553(a) factor.
U.S. v. Early, Case No. 10-15537 (11th Cir. 7/11/12) (Martin, J. concurring)
Booker: Miscellaneous - Parsimony Principle
The parsimony principle requires that the sentencing court "when handing down a sentence by stingy enough to avoid one that is too long, but also that it be generous enough to avoid one that is too short.
U.S. v. Alcindor, Case No. 07-14602 (11th Cir. 6/14/11)
Booker: Miscellaneous - Even if the Case is a Typical One, Defendant Can Challenge the Wisdom of the Guideline
Under the new model the defendant can also simply concede that his case is typical and challenge the wisdom of the Commission's judgment regarding the appropriate punishment in heartland cases.
United States v. Rodriguez, 406 F.3d 1261, 1287 (11th Cir. 2005) (Tjoflat, J., dissenting from the denial of a rehearing en banc)

Booker: Miscellaneous - Sentences that Are Too Harsh Can Fail to Promote Respect for the Law
Promoting respect for the law turns on perception of the punishment; respect for the rule of law may be compromised if the offender or community believes that an offender's punishment was too harsh or lenient based on the facts of the case or if it leads to unwarranted disparity.
United States v. Irey, Case No. 08-10997 (11th Cir. 7/29/10)(Tjoflat, J. dissenting opinion) n. 35
Booker: Miscellaneous - Court Still Considers Policy Statements of Guidelines
Court, noting that the policy statements of the guidelines while "no way binding," all pointed "away from a below-the-guidelines sentence," and singled out the district court's reliance upon the defendants age of 50 years, good works, and mental and emotional conditions.
United States v. Irey, Case No. 08-10997 (11th Cir. 7/29/10)
Booker: Miscellaneous - Parsimony Principle
The district court must be guided by the parsimony principle - that the sentence be sufficient, but not greater than necessary, to comply with the purposes of criminal punishment as expressed in § 3553(a)(2). The Court of Appeals, though, in a footnote went on to say that the term "parsimony principle" is an "inadequate catch word" and that they would prefer to "deal with result-neutral terms."
U.S. v. Irey, Case No. 08-10997 (11th Cir. 7/29/10)
Booker: Miscellaneous - Equal Treatment
It is worth noting that equal treatment consists not only of treating like things alike, but also of treating unlike things differently according to their differences.
U.S. v. Irey, Case No. 08-10997 (11th Cir. 7/29/10)
Booker: Miscellaneous - 30-Year Sentence for Child Exploitation Enterprise Not Unreasonable
U.S. v. Wayerski, Case No. 09-11380 (11th Cir. 10/26/10)
Booker: Miscellaneous - General Summary of 3553(a) Factors
"Pursuant to § 3553(a) the sentencing 'court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.' See 18 U.S.C. § 3553(a)(2). These purposes include, inter alia, promoting the respect for the law, deterring criminal conduct, and protecting the public from further crimes of the defendant. 18 U.S.C. § 3553(a)(2). The sentencing court must also consider the following factors in determining a particular sentence: the nature and circumstances of the offense and the history and characteristics of the defendant, the kinds of sentences available, the Guidelines range, the pertinent policy statements of the Sentencing Commission, the need to avoid unwarranted sentence disparities, and the need to provide restitution to the victims."
U.S. v. Gonzalez, 550 F.3d 1319 (11th Cir. 2008)
Booker: Miscellaneous - False Uniformity
We must not lose sight of the fact that sentence uniformity is a two-sided coin. It does not simply mean that ensuring that similarly situated defendants are sentenced similarly. It also entails the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated. That is we must avoid a false uniformity. Even when a charged crime is the same, the manner in which it was committed, the degree of culpability, and the background of the defendant are often very different. In other words, sometimes deviations from the Guidelines - and not its mechanical application - are actually needed to achieve true sentencing uniformity.

U.S. v. Docampo, Case No. 08-10698, n. 9 (11th Cir. 6/15/09)(Barkett, J. concurring in part and dissenting in part)

Booker: Miscellaneous - "Sufficient, But Not Greater Than Necessary"

When we ask if the district court has imposes a sentence sufficient, but not greater than necessary, we essentially post two separate questions: (1) Is the sentence enough punishment? And (2) Is the sentence too much punishment? Appellate courts have had no difficulty finding unreasonableness when asking the former. We should likewise be willing to find that, in a case that warrants it, a within-Guidelines sentence is greater than necessary to serve the objectives of sentencing.

U.S. v. Docampo, Case No. 08-10698 (11th Cir. 6/15/09)(Barkett, J. concurring in part and dissenting in part)

Booker: Miscellaneous - Example of Reliance on the Inadequacy of the Guideline

U.S. v. Williams, Case No. 07-12526 (11th Cir. 3/20/08)

Booker: Miscellaneous - Unjustified Reliance on a Single 3553(a) Factor

A district court's unjustified reliance on a single §3553(a) factor may be a symptom of an unreasonable sentence, but such a sentence is not necessarily unreasonable.

U.S. v. Williams, Case No. 07-12526 (11th Cir. 3/20/08)

Booker: Miscellaneous - Factors That Could Not Justify a Departure May Justify a Variance

U.S. v. Williams, 517 F.3d 801 (5th Cir. 2008)

Booker: Miscellaneous - Mandate (Sufficient, but Not Greater Than Necessary)

It is worth noting that a district court's job is not to impose a "reasonable" sentence. Rather, a district court's mandate is to impose "a sentence sufficient, but not greater than necessary, to comply with the purposes" of section 3553(a)(2). Reasonableness is the appellate standard of review in judging whether a district court has accomplished its task.

U.S. v. Foreman, 436 F.3d 638, 644 n.1 (6th Cir. 2006)

Booker: Miscellaneous - Convenient Listing of the 3553(a) Factors

United States v. Talley, 431 F.3d 784, 786 (11th Cir. 2005); U.S. v. Williams, Case No. 07-12526 (11th Cir. 3/20/08)

Booker: Miscellaneous - Cunningham

California's determinate sentencing law, which assigned to the trial judge, not the jury, the authority to find the facts that exposed the defendant to an elevated "upper term" sentence violated the right to a jury trial.

Cunningham v. California, Case No. 05-6551 (S.Ct. 1/22/07)

Booker: Miscellaneous - §3553 Concerned Only With "Unwarranted" Disparities

U.S. v. Owens, 464 F.3d 1252, 1256 (11th Cir. 2006)

Booker: Miscellaneous - 18 U.S.C. § 3582(a):

"The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

Booker: Miscellaneous - Sentencing Facts (Higher Standard of Proof for Extraordinary Enhancement?)

Abandoning an earlier position, the Third Circuit held that regardless of the degree of enhancement, facts need be proven only by a preponderance of the evidence.

U.S. v. Grier, Case No. 05-1698 (3d Cir. 6/6/06), U.S. v. Fisher, Case No. 06-1795 (3d Cir. 9/10/07)but see: U.S. v. Staten, Case No.05-30055 6/7/06)

Booker: Miscellaneous - Sentence Based on Acquitted Conduct

At least one district court has concluded that acquitted conduct cannot, pursuant to Booker, be used as relevant conduct.

U.S. v. Ibanga, Case No. 2:04cr227 (E.D. Va. 10/5/06)

Booker: Miscellaneous - Acquitted Conduct

Nothing in Booker prohibits the sentencing judge from considering acquitted conduct.

U.S. v. Faust, Case No. 05-11329 (11th Cir. 7/21/06)

Booker: Miscellaneous - Listing of 3553 Factors

U.S. v. Martin, Case No. 05-16645 (11th Cir. 7/11/06)

Booker: Miscellaneous - Safety-Valve (Acquittal of Firearm Charge Didn't Require Safety-Valve)

The district court erred in concluding that an acquittal of the charge of possession of a firearm precluded it from denying the defendant a safety-valve reduction.

U.S. v. Poyato, Case No. 05-13135 (11th Cir. 7/10/06)

Booker: Miscellaneous **– Safety Valve**

Booker decision didn't alter application of the Safety Valve.

U.S. v. Brehm, Case No. 05-13426 (11th Cir. 3/17/06)

Booker: Miscellaneous – Almendarez-Torres - Determination of the Factual Nature of the Prior Conviction

Both the determination of the existence of the prior conviction as well as the factual nature of the prior conviction are fact findings. There is no reason the Constitution would permit a judge to decide whether the person the conviction documents the describe was the defendant but forbid the judge from deciding what type of crime those same documents describe.

U.S. v. Greer, Case No. 05-11295 (11th Cir. 2/24/06); U.S. v. Gibson, Case No. 04-14776 (11th Cir. 1/4/06)

Booker: Miscellaneous – Almendarez-Torres

Almendarez-Torres remains as controlling precedent.

U.S. v. Orduno-Mireles, Case No. 04-12630 (11th Cir. 4/6/05); U.S. v. Burge, Case No. 04-13468 (11th Cir. 5/2/05); U.S. v. Cantellano, Case No. 05-11143 (11th Cir. 11/15/05); U.S. v. Greer, Case No. 05-11295 (11th Cir. 2/24/06); U.S. v. Gibson, Case No. 04-14776 (11th Cir. 1/4/06)

Booker: Miscellaneous - The Decision

Federal Guidelines violate the Sixth Amendment. Courts are to consider them along with other criteria set forth in 18 U.S.C. 3553(a) , but the Guidelines are not binding.

U.S. v. Booker, Case No. 04-104 (U.S. 1/12/05)

Procedure

Booker: Procedure - District Court Can't Ignore Facts

A district court cannot write out of the record undisputed facts by simply ignoring them. The failure to mention facts may well reflect the district court's judgment that those facts are not important, but the importance of facts in light of 3553(a) factors is not itself a question of fact but instead an issue of law.

U.S. v. Irey, Case No. 08-10997 (11th Cir. 7/29/10)
Booker: Procedure - Explanation of Sentence
Based on the language of the Supreme Court sentencing cases, I believe that, for atypical or non-simple cases, it is not enough for a district court to simply state that it has "considered the §3553(a) factors." Our previous holdings do not free the district court from the requirement that it adequately explain its reasoning nor free us from our obligation to ensure that all the § 3553(a) factors were truly considered.
U.S. v. Docampo, Case No. 08-10698 (11th Cir. 6/15/09)(Barkett, J. concurring in part and dissenting in part)
Booker: Procedure - Gall
A district judge must consider the extent of any departure from the Guidelines and must explain the appropriateness of an unusually lenient or harsh sentence with sufficient justification. An appellate court may take the degree of variance into account and consider the extent of a deviation from the Guidelines, but it may not require extraordinary circumstances or employ a rigid mathematical formula using a departure's percentage as a standard for determining the strength of the justification required for a specific sentence.
Gall v. United States, Case No. 06-7949 (S. Ct. 12/10/07)
Booker: Procedure: Court Must Adequately Explain Variance
Must be sufficiently explained so as to allow meaningful appellate review.
U.S. v. Livesay, Case No. 06-11303 (11th Cir. 4/23/08)
Booker: Procedure - Acknowledging Gall
U.S. v. Livesay, Case No. 06-11303 (11th Cir. 4/23/08)
Booker: Procedure - Cursory Explanation for Upward Variance OK
The Court didn't require much of an explanation to justify an above Guidelines sentence.
U.S. v. Pereira, Case No. 05-5969 (2d Cir. 10/13/06)
Booker: Procedure - Well Settled Basics
Three rules are well settled: (1) courts can make findings on the basis of the preponderance of he evidence standard; (2) courts must consult and correctly calculate the Guidelines; and (3) the district court must consider the correctly calculated Guidelines and the § 3553 factors in determining the reasonableness of the sentence.
U.S. v. Pope, 461 F.3d 1331 (11th Cir. 2006)(Judge Rodgers)
Booker: Procedure - Consider 3553 Factors After Reducing the Sentence for Substantial Assistance
The court should first reduce the sentence pursuant to the 5K1.1 motion and, then, consider the 3553(a) factors in arriving at the sentence.
U.S. v. McVay, 447 F.3d 1348 (11th Cir. 2006); but see U.S. v. Williams, Case No. 06-2532 (8th Cir. 1/29/07), which holds that a sentencing court can't use § 3553 factors to further reduce a sentence already reduced by 5K1.1.
Booker: Procedure - Guideline Calculation Error Even When Accompanied by Statement as to Why the Defendant Deserved the Maximum Still Required a Remand
U.S. v. Scott, Case No. 05-12511 (11th Cir. 3/10/06)
Booker: Procedure - Judge Must Give Reasons for Variance
The district court must give reasons if it imposes a sentence other than the one suggested by the Guidelines.
U.S. v. Gibson, Case No. 04-14776 (11th Cir. 1/4/06)

Booker: Procedure - Court Not Obligated to State That It Has Considered Each of The §3553(a) Factors
See: U.S. v. Talley, Case No. 05-11353 (11th Cir. 12/2/05); U.S. v. Owens, Case No. 06-11448 (11th Cir. 9/15/06), U.S. v. Docampo, Case No. 08-10698 (11th Cir. 6/15/09)(Barkett, J. concurring in part and dissenting in part)
Booker: Procedure - Court Must Consult the Guidelines and Calculate Guidelines Score Correctly
Even though the Guidelines are not mandatory, the court must consult them and correctly calculate the Guideline score.
U.S. v. Munoz, Case No. 03-16216 (11th Cir. 11/23/05); U.S. v. Gibson, Case No. 04-14776 (11th Cir. 1/4/06)
Booker: Procedure - Must Sentencing Judge Explain Sentence?
Where the defendant argued for a below-the-guidelines sentence on the basis of the defendant's minimal participation in the drug transactions and on the basis of the defendant's long standing mental health problems, and where the judge seemed to rely upon the defendant's failure to cooperate, the Court vacated the conviction because of the sentencing court's failure to address the defendant's arguments. The sentencing judges perfunctory statement that he had considered all the relevant factors didn't suffice.
U.S. v. Cunningham, Case No. 05-1774 (7th Cir. 11/14/05)
Booker: Procedure - Court Still Obligated to Consider Departures
The application of the guidelines is not complete until the departures, if any, are appropriately considered.
U.S. v. Jordi, 418 F.3d 1212, 1215 (11th Cir. 2005); but see: U.S. v. Mohamed, Case No. 05-50253 (9th Cir. 8/11/06) & U.S. v. Arnaout, 431 F.3d 994 (7th Cir. 2005)

Role of the Guidelines

Booker: Role of the Guidelines - Guidelines Are Not to be Presumed Reasonable
"The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.
Nelson v. U.S., Case No. 08-5657 (S. Ct. 1/26/09)

Booker: Role of the Guidelines
First, the Supreme Court, in holding that the Guidelines are advisory has made clear that a district court must treat the Guidelines as the starting and the initial benchmark, it must give them respectful consideration, and it must take them into account. However, the Supreme Court has also declared that the Guidelines now serve as one factor among several courts must consider in determining the appropriate sentence, and a district court may not presume the Guidelines range is reasonable.
U.S. v. Docampo, Case No. 08-10698 (11th Cir. 6/15/09)(Barkett, J. concurring in part and dissenting in part)
Booker: Role of the Guidelines - No Presumption in Trial Court
"[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."
Rita v. U.S., Case No. 06-5754 (11th Cir. 6/21/07)

Booker: Role of the Guidelines - Makes No Difference If Factor Already Addressed by the Guidelines
"If Booker means anything at all, it must mean that the court was permitted to give further weight to a factor covered by a specific guidelines adjustment, especially where (as is true here) that factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present."
U.S. v. Wallace, 458 F.3d 606, 613 (7th Cir. 2006); United States v. Amedeo, 487 F.3d 823, 833 (11th Cir. 2007).
Booker: Role of the Guidelines
"[T]he district court's Booker sentencing discretion presupposes no thumb on the scale in favor of a guidelines sentence."
U.S. v. Wachowiak, Case No. 06-1643 (7th Cir. 8/1/07); U.S. v. Carter, 530 F.3d 565 (7th Cir. 2008)
Booker: Role of the Guidelines
"The district court may determine on a case-by-case the relative weight to give the Guidelines range in light of the other section 3553(a) factors."
U.S. v. Lozano, Case No. 06-11136 (11th Cir. 7/9/07), United States v. Hunt, 459 F.3d 1180, 1182 (11th Cir. 2006)

Variance - Downward

Booker Variance - Mental Retardation (A Condition, Not a Number)
Intellectual disability is a condition, not a number.
Hall v. Florida, Case No. 12-10882 (S. Ct. 5/27/14)
Booker: Variance - Mental Retardation
"As for deterrence, those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale. They have a 'diminished ability' to process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . which makes it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.' Retributive values are also ill-served by executing those with intellectual disability. The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment."
Hall v. Florida, Case No. 12-10882 (S. Ct. 5/27/14)
Booker: Variance - Drug Addiction
U. S. v. Hendrickson, 25 F.Supp.3d 1166 (N.D. Iowa 2014)
Booker: Variance - Production of Child Porn
U.S. v. Price, Case No. 12-1630 (7th Cir. 12/5/14)
Booker: Variance - Sex Offender Registration - Collateral Consequences
See Berman blog, Sentencing Law and Policy, 8/12/14
Booker: Variance - Downward (Reduced Risk of Recidvisim Because of Client's Age)
U.S. v. Payton, Case No. 13-1242 (6th Cir. 6/12/14)
Booker: Variance - Downward (Time-Served in Health Care Fraud Case Unreasonable)

In a health care fraud case where there was a 3 million dollar loss and the guideline range was 57-71 months, the appeals court found the sentence of "time-served" to be unreasonable and remanded for resentencing.
U.S. v. Kuhlman, Case No. 11-15959 (11th Cir. 3/8/13)
Booker: Variance - Downward - District Courts May Vary Downward Based on the Case or Based Upon Policy Disagreement
Peugh v. U.S., Case No.12-62 (S. Ct. 6/10/13)(Thomas Dissent)
Booker: Variance - Downward (Fraud Guideline Flawed)
See Judge Underwood's concurring opinion in U.S. v. Corsey, 2013 WL 3796393 (2nd Cir. 7/24/13)
Booker: Variance - Downward (Mental Illness)
District Judge Myron Thompson's discussion of why leniency should be shows to those suffering from mental illness even if they don't qualify for a depature.
United States v. Ferguson, Case No. 2:12cr187 -MHT, 2013 WL 627145 (M.D. Ala. Feb. 20, 2013).
Booker: Variance - Downward (Career Offender)
District Judge Mark Bennett's criticism.
United States v. Newhouse, ___ F. Supp. 2d ___, 2013 WL 346432, *17 (N.D. Iowa Jan. 30, 2013)
Booker: Downward - Variance Young Age
See Miller v. Alabama, Case No. 10-9647 (S. Ct. 3/10/12)
Booker: Variance - Downward Departure - Recidivism Decreases With Age
U.S. v. Early, Case No. 10-15537 (11th Cir. 7/11/12), n. 3 (Martin, J. concurring)
Booker: Variance - Downward (Loss Amount Not Always Good Measure of Culpability)
The fraud guidelines have been heavily criticized because they no longer provide a reasonable starting point for sentencing. See Brief for Wash.Legal Found. and Criminal Law Scholars as Amici Curiae Supporting Petitioner at 20-21, Rubashkin v. U.S., __ U.S. __, 2012 WL 1119792 (2012) (No. 11-1203). Adjustments based on the amount of loss lead to astronomical sentences that have little connection to criminality. Frank O. Bowman, III, *Nothing is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System,* 24 Fed.Sent'g Rep. 356, 360 (2012) (stating that the guidelines for white-collar crimes are universally recognized as "so high as to be practically worthless."
(Bright, J. dissenting)
U.S. v. John Anthony Spencer, Case No. 11-3463 (8th Cir. 11/7/12)
Booker: Variance - Downward (Good Works)
U.S. v. Howe, 543 F.3d 128, 132 (3d Cir. 2008); U.S. v. Thurston, 544 F.3d 22, 26 (1st Cir. 2008)
Booker: Variance - Downward (Loss Calculation Overstated Culpability)
U.S. v. Prosperi, No. 10-1739 (1st Cir. 7/13/12)
Booker: Variance - Downward (Post-Sentence Rehabilitation)
May be used as a basis for a below-Guidelines sentence.
Pepper v. U.S., 131 S. Ct 1229 (2011); U.S. v. Smith, Case 638 F.ed 1351 (11th Cir. 2011)
Booker: Variance - Downward (Long Opinion That Discusses Everything Re: Disadvantaged)
District Judge Weinstein's epic and extraordinarily researched account of reasons for variances based on poverty and race and the consequences of long prison sentences.

U.S. v. Bannister, 786 F.Supp.2d 617 (E.D.N.Y. 3/24/11)
Booker: Variance - Downward (Child Porn: Substantial Departure was Substantively Unreasonable)
In an ugly child abuse case, the Court of Appeals held that the downward variance from 30 years to 17 ½ years was substantively unreasonable, and held that no sentence less than 30 years would be reasonable.
United States v. Irey, Case No. 08-10997 (11th Cir. 7/29/10)
Booker: Variance - Downward (Drug Courier)
In a case that was remanded because of the absence of facts in the record supporting the sentencing judge's conclusion that the defendant's participation amounted to more than a single incident involving the transportation of drug money, the court noted the disproportional nature of the sentence: "If the government's position is that 293 months is barely good enough for a one-time courier, we wonder what it thinks the appropriate sentence would be for someone who is a large-scale supplier of drugs?"
U.S. v. Saenz, Case No. 09-3647 (7th Cir. 10/13/10)
Booker: Variance - Downward (Child Porn: Substantial Downward Departure Affirmed)
The court of appeals affirmed a 5-year sentence with guidelines of 235 to 293 months. Court of appeals acknowledged that the Sentencing Commission did not exemplify the Commission's exercise of its characteristic institutional role in promulgating the child pornography guidelines.
U.S. v. Grober, Case No. 09-2120 (3rd Cir. Oct 26, 2010)
Booker: Variance - Downward (Sentence of Probation Was Unreasonable in Corporate Fraud Case)
Court of Appeals found that in light of the defendant's role, a sentence of probation was unreasonable. The guideline range was 78 to 97 months.
U.S. v. Livesay, Case No. 08-14712 (11th Cir. 11/16/09)
Booker: Variance - Downward (Disparity Between Codefendants)
May support a below guidelines sentence.
U.S. v. Castaing-Sosa, Case No. 07-15490 (11th Cir. 6/19/08)
Booker: Variance - Downward (Career Offender)
Court, while concluding that a variance based upon the crack/powder disparity would not be permitted in the case of a career offender charged with a substantive drug offense, held the district court could have granted a downward variance because the defendants were charged with conspiracy only. The Court reached the decision by noting that the Congressional directive found at 28 U.S.C. § 994(h) lists only substantive drug offenses and not conspiracies.
U.S. v. Knox, 573 F.3d 441 (7th Cir. 2009), but see: U.S. v. Welton, Case No. 08-3799 (11th Cir. 10/02/09)
Booker: Variance - Downward (Fast Track)
Court held a variance was justified on the basis of the disparity between fast-track districts.
U.S. v. Rodriguez, 527 F.3d 221 (1st Cir. 2008); but see: U.S. v. Vega-Castillo, Case No.07-12141 (11th Cir. 8/19/08)
Booker: Variance - Downward (Child Porn)
Probation when there was a guideline range of 46-57 months.
U.S. v. Rowan, Case No. 05-30536 (5th Cir. June 9, 2008); U.S. v. Duhon, Case No. 05-30387 (5th Cir. 8/18/08); U.S. v. Jose Ontiveros, No 07-CR-333 (E.D. Wisc. 7/24/08); U.S. v. Huckins, 529 F.3d 1312 (10th Cir. 2008)
Booker: Variance - Downward (Impermissible Consideration)

A variance may be unreasonable if based on an impermissible consideration.
U.S. v. Livesay, Case No. 06-11303 (11th Cir. 4/23/08)
Booker: Variance - Downward (Consideration of Co-Defendant Sentencing Disparity is Permissible)
U.S. v. Smart, 518 F.3d 800 (10th Cir. 2008) *see also* Sentencing Memo in U.S. v. Dakota Harris, 4:06cr48
Booker: Variance - Downward (Probation in Pornography Case Not Justified)
The Court of appeals found a sentence of probation unreasonable in a child pornography case where the guideline range was 97-120 months. Court, pursuant to Gall, found it appropriate to consider the degree of variance from the Guidelines. Case includes a listing of cases where a below-Guidelines sentence was upheld in child pornography cases, a detailed analysis of the 3553(a) factors, and a through discussion of the harm caused by child pornography.
U.S. v. Pugh, Case No. 07-10183 (11th Cir. 1/31/08)
Booker: Variance - Downward (Family Circumstances)
Defendant's 14-year old daughter found a firearm the defendant, who was a convicted felon, had taken from an ex-boyfriend because he was an alcoholic. The daughter shot and killed herself. Instead of the 37-46 months recommended by the Guideline the judge sentenced the defendant to probation. The court of appeals upheld the sentence largely because of the defendant's 9 year old son who suffered from numerous disabilities that required the defendant's day-to-day presence and who would have suffered a setback in his overall development had he been separated from the defendant. The court added that the defendant has already been punished by the loss of her daughter and that there was no need to incarcerate the defendant to protect the public.
U.S. v. Lehmann, 513 F.3d 805 (8th Cir. 2008)
Booker: Variance - Downward (Pornography)
While finding the defendant's crime was "thoroughly disgusting and antisocial in every way, shape, and fashion," the guideline range of 135-168 months was "not reflective of what [the defendant] did, and the court sentenced the defendant to 66 months.
U.S. v. Grossman, 513 F.3d 592 (6th Cir. 2008); U.S. v. McBride, Case No. 06-16544 (11th Cir. 12/28/07); U.S. v. Strayer, 2010 WL 2560466 (D. Neb. 6/24/10)
Booker: Variance - Downward (Lack of Prior Lengthy Incarceration)
"Generally, a lesser period of imprisonment is required to deter a defendant not previously subject to lengthy incarceration than is necessary to deter a defendant who has already served serious time yet continues to re-offend."
U.S. v. Qualls, 373 F.Supp. 2d 873, 877 (E.D. Wis. 2005)
Booker: Variance - Downward (Career Offender)
Saying that "I believe that Section 4 enhancements often produce grossly unjust results," Judge Presnell found that the defendant was a low level drug dealer and imposed a sentence of 204 months in lieu of a sentence within the 30 years to life range called for by the career offender guideline.
U.S. v. Williams, Case No. 6:04cr111-Orl-31JGG (M.D. Fla. 3/1/07)(Presnell, J.)
Booker: Variance - Downward (Rehabilitation)
Court upheld a below-Guidelines sentence of 60 months based on the defendant's post-offense rehabilitation. Guidelines range was 188-235 months.
U.S. v. Clay, 483 F.3d 739 (11th Cir. 2007)
Booker: Variance - Downward (No Need for Unusual Circumstances)

In a case rejecting an upward variance, the court of appeals recognized that unusual circumstances are no longer needed and that all that is needed is an adequate statement of the judges reasons, consistent with § 3553(a).
U.S. v. Castro-Suarez, 425 F.3d 430, 436 (7th Cir. 2005), U.S. v. Cull, 446 F.Supp.2d 961, 966 (D. Wis. 2006)

Booker: Variance - Downward (Disparity Between State Penalties)

As a general rule, court may not justify a below-Guidelines sentence on the basis of the disparity between a Guidelines sentence and what the defendant would have received in state court.
U.S. v. Clark, Case No. 05-4274 (4thCir. 1/12/06)

Booker: Variance - Downward (Disagreement With Career Offender Guidelines)

Where the district judge seemingly based his decision solely on a difference over the policy of the Career Offender Guidelines, the 6th Circuit reversed a downward variance.
U.S. v. Funk, Case No. 05-3708 (6th Cir. 2/22/07)

Booker: Variance - Downward (Distinction Between Case-Specific Factors and Categorical Rejection of Congress' Sentencing Policy)

"The decisions of this Court principally distinguish between varying from an advisory Guidelines range based on a case-specific, individualized application of the 18 U.S.C. § 3553(a) factors and varying from an advisory Guidelines range based on a categorical rejection of Congress's clearly expressed sentencing policy as embedded in the Guidelines and its statutes. The latter amounts to error, while the former falls with in the scope of the district court's discretion intended by Booker.
U.S. v. Williams, Case No. 05-13205 (11th Cir. 12/13/06)(Black, J. concurring in the denial of rehearing en banc).

Booker: Variance - Downward (Kidney Dialysis and Sole Caretaker)

Court upheld a downward variance to probation from 18-24 months where defendant had to undergo kidney dialysis three times a week and was the sole caretaker for his son who suffered from fetal alcohol syndrome.
U.S. v. Wadena, 470 F.3d 735 (8th Cir. 2006)

Booker: Variance - Downward (Absence of Fast-Track Program Doesn't Violate Equal Protection)

U.S. v. Campos-Diaz, Case No. 05-16082 (11th Cir. 12/19/06)

Booker: Variance - Downward (Example: Variance in Career Criminal Crack Cocaine Case)

Where the defendant's case involved a small quantity of crack cocaine (22.6 g) and his priors involved the sale of small amounts of crack ($50's worth), the district court imposed a sentence of 140 months rather that the 360 to life called for by the Sentencing Guidelines.
U.S. v. Gibson, 442 F.Supp.2d 1279 (S.D. Fla. 2006)

Booker: Variance - Downward (Disparity Created by Fast-Track Rule Didn't Support A Variance)

U.S. v. Castro, Case No. 05-16405 (11th Cir. 7/12/06); U.S. v. Arevalo-Juarez, Case No. 05-16313 (11th Cir. 9/15/06); U.S. v. Llanos-Agostadero, Case No. 06-14382 (11th Cir. 5/15/07); U .S. v. Gomez-Herrera, Case No. 07-10153 (5th Cir. 4/3/08)

Booker: Variance - Downward (Acquittal of Individual Most Responsible Wasn't a Legitimate Consideration)

U.S. v. Martin, Case No. 05-16645 (11th Cir. 7/11/06)

Booker: Variance - Downward (Deterrence an Especially Important Consideration in White Collar Crime)
U.S. v. Martin, Case No. 05-16645 (11th Cir. 7/11/06)
Booker: Variance - Downward (Aberrant Conduct Already Factored Into Criminal History Category I ?)
"While the district court emphasized Martin's lack of a criminal record and viewed his fraudulent conduct as an aberration in his otherwise outstanding life, Martin's criminal history category of I already takes into account his lack of a criminal record.
U.S. v. Martin, Case No. 05-16645 (11th Cir. 7/11/06)
Booker: Variance - Downward (7 Day Sentence in Multi-Million Dollar Securities Fraud Case Not Reasonable)
See: U.S. v. Martin, Case No. 05-16645 (11th Cir. 7/11/06)
Booker: Variance - Downward (Unjustified Reliance on a 3553 Factor)
Unjustified reliance on a 3553 factor is a symptom of an unreasonable sentence.
U.S. v. Crisp, Case No. 05-12304 (11th Cir. 7/7/06); U.S. v. Arevalo-Juarez, Case No. 05-16313 (11th Cir. 9/15/06)
Booker: Variance - Downward (Extraordinary Reduction Requires Extraordinary Reasons)
See: U.S. v. Crisp, 454 F.3d 1285 (11th Cir. 2006), U.S. v. Martin, Case No. 05-16645 (11th Cir. 7/11/06)
Booker: Variance - Downward (Sentence Didn't Reflect the Seriousness of the Offense)
Where the sentencing range was reduced from 24-30 months to 12-15 months for substantial assistance, a further reduction to 5 hours of incarceration for a bank fraud involving nearly $500,000 did not reflect the seriousness of the offense and was overturned.
U.S. v. Crisp, Case No. 05-12304 (11th Cir. 7/7/06)
Booker: Variance - Downward (Lengthy Sentence Would Disrupt Family, Crack/Powder Disparity)
Although the Guidelines called for a sentence between 6 and 7 years, court imposed a sentence of 36 months relying on the fact that a lengthy sentence would disrupt an otherwise successful family, the disparity between crack and powder cocaine, and that a longer sentence would "contribute to the disrespect in which many observes hold the federal drug and sentencing laws."
U.S. v. Hamilton, Case No. 6:05cr157 (M.D. Fla. 3/16/06), 19 Fla. L. Weekly Fed D564
Booker: Variance - Downward (3553(a) Concerns Over Disparity Pertains to Differences Across Districts)
Moreover, the § 3553(a) concern with sentence disparity is not one that focuses on differences among defendants in an individual case, but rather is concerned with unjustified difference across judges or districts.
U.S. v. Pisman, Case No. 05-1625 (7th Cir. 4/7/06)
Booker: Variance - Downward (Cooperation Falling Short of Substantial Assistance)
"A sentencing judge may take 'non-5K cooperation" into account when considering the § 3553(a) factors."
U.S. v. Fernandez, 443 F.3d 19, 33 (2d Cir. 2006)
Booker: Variance - Downward (Median Sentence 2X National Average Fails Guidelines Goal of Uniformity)

"As to whether such a huge disparity between this District's median sentence for drug-trafficking offenses and th national median for such offenses is acceptable, the goals of federal sentencing purportedly include imposition of sentences that are 'sufficient, but not grater than necessary," and 'avoid[ance of] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *See* 18 U.S.C. § 3553(a). In my view, a District's median sentence that is twice the national median simply does not comport with these goals. It is, instead, an unacceptable disparity."
U.S. v. Saenz, Case No. 03-4089-MWB (N.D. Iowa 3/23/06) (Bennet, J.)
Booker: Variance - Downward (Example of Below-Guidelines Sentence Being Upheld)
Relying on the authority of Booker, the district court imposed a sentence of 90 months in lieu of the Guidelines sentence of 188-235 months. Defendant was a career offender charged with sale of $350 worth of crack cocaine. The district court found the 90 month sentence to be "sufficient, but not greater than necessary" to punish, deter, and rehabilitate the defendant. The Court of Appeals upheld the sentence, noting that "this is not a case where the district court imposes a non-Guidelines sentence based solely on its disagreement with the Guidelines."
U.S. v. Williams, 435 F.3d 1350 (11th Cir. 2006)

Variance - Upward

Booker: Variance - Upward (36 Year Criminal History)
Despite a guideline range of 78-97 months and a government recommendation of a sentence at the low end of the guidelines, the court varied upward and imposed a sentence of 210 months. Noting that the sentence was still well below the maximum possible and relying largely upon the defendant's 36 year criminal history, the court of appeals found the sentence to be reasonable.
U.S. v. Early, Case No. 10-15537 (11th Cir. 7/11/12)
Booker: Variance - Upward (Based on Factors Considered in Guidelines Scoring)
Apparently it is permissible to base a variance on factors already considered by the Guidelines.
U.S. v. Amadeo, Case No. 05-11806 (11th Cir. 5/24/07)
Booker: Variance - Upward (Drug Distribution Case)
The court of appeals upheld an upward variance in a cocaine distribution case of 120 months where the Guidelines range was 37-46 months. The defendant's drug distribution apparently included a minor, with whom the defendant had sexual contact and who died from drug use. The district court considered these fact, as well as the fact that the defendant had distributed the cocaine to other minors and that the defendant had abused the attorney-client relationship he had with, apparently, the minor.
U.S. v. Amadeo, Case No. 05-11806 (11th Cir. 5/24/07)
Booker: Variance - Upward (No Advance Notice Need Be Given Prior to Upward Variance)
U.S. v. Irizarry, 485 f3d 1208 (11th Cir. 2006)
Booker: Variance - Upward - (140 Year Sentence Not Unreasonable)
In a case involving charges of producing child pornography, court held a 140 year sentence was not unreasonable.
U.S. v. Johnson, Case No. 05-14889 (11th Cir. 6/13/06)
Booker: Variance - Upward (Above Guidelines Sentence Not Unreasonable)

Where the Guidelines range was 15-21 months, a 28 month sentence based upon the district court's finding that the defendant's actions in committing the crime of producing false identification documents presented a national security risk was not unreasonable. The 28 month sentence was the result of a 5K1 motion, otherwise the sentence would have been 42 months.
U.S. v. Valnor, Case No. 05-15701 (11th Cir. June 6, 2006)

Booker: Variance - Upward (Pre-Booker Plea Agreement Didn't Prohibit Above-Range Sentence)

Despite wording in a pre-Booker plea agreement that "the parties acknowledge that the Sentencing Guidelines apply" and that the "District Court's discretion in sentencing is limited only by statutory provisions and the Sentencing Guidelines," the above-range sentence imposed after the Booker decision was upheld.
U.S. v. Eldick, Case No. 05-13006 (11th Cir. 3/22/06)

Weight Due Guidelines

Booker: Weight - Guidelines Not Due Any Special Deference

There is no across-the-board rule that establishes the degree of deference due the Sentencing Guidelines. Instead there should be a case-by-case determination as to what role the Guidelines will play in any particular case. United States v. Hunt, 459 F.3d 1180 (11th Cir. 2006); U.S. v. Cull, 446 F.Supp2d 961, 963 (D.Wis. 2006); contra: U.S. v. Hankton, Case No. 03-2345 (7th Cir. 9/7/06)

Booker: Weight – Guidelines Range is Now A "Suggestion" That Must Be Weighed Against Other Circumstances

See Judge Tjoflat's specially concurring opinion in U.S. v. Glover, Case No. 04-16745 (11th Cir. 11/29/05)

BUREAU OF PRISONS

Bureau of Prisons: Authority to Make Federal Sentences and State Sentences to Run Concurrently

Section 3621(b) of Title 18 of the United States Code gives the Bureau of Prisons the authority to order that a prisoner serve his federal sentence in any suitable prison facility "whether maintained by the Federal Government or otherwise." The Bureau may, therefore order that a prisoner serve his federal sentence in a state prison. Thus, when a person subject to a federal sentence is serving a state sentence, the Bureau may designate the state prison sentence as the place of imprisonment for the federal offense - effectively making the two sentences concurrent - or decline to do so - effectively making them concurrent.
Setser v. U.S., Case No. 10-7387 (S. Ct. 1/30/11) (Govt. explanation)

Bureau of Prisons: Limitation of Half-Way House Placement Invalidated

The BOP's categorical limitation on placement in a half-way house or community corrections facility to the lesser of either the last 6 months of a sentence or the last 10% of a sentence unreasonably limits the grant of authority in 18 U.S.C. §3621(b). That allows the Bureau to determine, after consideration of certain delineated factors, where in the system, including half-way houses and community correction centers, a defendant should serve his sentence.

Woodall v. Federal Bureau of Prisons, Case No. 05-3657 (3d Cir. 12/15/05), but see: Muniz v. Sabol, Case No. 06-2692 (1st Cir. 2/26/08)

Bureau of Prisons: No Drug Program for Felons in Possession of a Firearm

The decision to exclude those convicted of being a felon in possession of a firearm from the one year sentence reduction for participation in drug treatment, under 18 USC 3621(e)(2)(B) was reasonably based on the Bureau's conclusion that the offense amounted to a violent offense.

Cook v. Wiley, 13 FLW Fed C611 (11th Cir. 4/14/00)

Bureau of Prisons: Reduction of Sentence for Drug Treatment

Under 18 USC 3621(e)(2)(B) the decision to reduce, by up to one year, the sentence being served by an inmate who participates in the drug treatment program, is a matter solely within the discretion of the Bureau.

Cook v. Wiley, 13 FLW Fed C611 (11th Cir. 4/14/00)

Bureau of Prisons: Program Statement

In contrast to a substantive rule promulgated by an agency, a BOP program statement is "an interpretative statement of position circulated within the agency that serves to provide administrative guidance in applying a then existing published rule."

Cook v. Wiley, 13 FLW Fed C611 (11th Cir. 4/14/00)

Bureau of Prisons: No Drug Program for Firearm Offenders

The BOP's recent policy of excluding those convicted of possession, carrying, or use of a firearm, was consistent with their policy of extending the program, which results in a reduction of the sentence by a year, to only those convicted of "nonviolent offenses."

Bowen v. Hood, 98-36190 (9th Cir. 2/4/00)

CARJACKING

Carjacking: Intent - Judged from Standpoint of Victim

Whether the defendant possessed the requisite intent to seriously harm or kill the driver is to be judged objectively from the visible conduct of the actor and what one in the position of the victim might reasonably conclude.

U.S. v. Fulford, 14 FLW Fed C1206 (11th Cir. 8/23/01)

Carjacking: Intent - Judged Objectively

The defendant's intent "to cause death or serious bodily harm" is to be judged objectively from the visible conduct of the actor and what one in the position of the victim might reasonably conclude.

U.S. v. Fulford, 14 FLW Fed C1327 (10/2/01)

Carjacking: Includes Taking Car from Parking Lot

Where robber took keys from restaurant employee, and then took car from the parking lot the crime amounted to carjacking.

U.S. v. Blount, 12 FLW Fed C974 (11th Cir. 6/22/99)

Carjacking: Conditional Intent to Harm Doesn't Require Much

Wielding guns, pointing them at victims, and telling them no one would get hurt if they did what they were told, was enough.

U.S. v. Blount, 12 FLW Fed C974 (11th Cir. 6/22/99)

Carjacking: Includes Conditional Intent to Harm

The carjacking statute, 18 USC 2119, which requires an intent to cause death or serious bodily harm, covers those who intent to do so only if necessary.
Holloway v. U.S., 12 FLW Fed S134 (3/2/99)

CERTIORARI

Certiorari: Requirement for Finality of State Court's Decision
Although in a criminal prosecution, finality is generally defined by a judgment of conviction and imposition of a sentence, and there are four categories where the court will exercise its jurisdiction where there's no been a judgment. In this case, where the state sought review of the Florida Supreme Court's determination that the evidence should have been suppressed, the court concluded the case did not fall in one of the four categories that would have allowed the court to accept jurisdiction. The case includes a list of the categories and a discussion of them.
Florida v. Thomas, 14 FLWFed S315 (6/4/01)

CITATION FORM

Citation Form (internal citations and quotation marks omitted)
Meeks v. Moore, 13 FLW Fed C774 (11th Cir. 6/27/00)

CLOSING ARGUMENTS

Closing Arguments: Pecuniary Interests of Jury as Taxpayers
It is improper for a prosecutor to invoke the individual pecuniary interests fo the jury as taxpayers.
U.S. v. Sosa, Case No. 13-13171 (11th Cir. 2/215)
Closing Arguments: Improper for Prosecutor to Argue Victims of Child Porn are Our Daughters
By telling the jury that the victims of the child pornography are "our daughters and granddaughters, neighbors, and friend," the prosecutor crossed the line between "demarcating permissible oratorical flourish from impermissible comment.
U.S. v. McGarity, Case No. 09-12070 (11th Cir. 2/6/12)*
Closing Arguments: Prosecutors Prohibited From Shifting Burden
U.S. v. Bernal-Beniez, Case No. 08-10308 (11th Cir. 1/25/10)
Closing Arguments: Prosecutors Assumption of Facts
Improper when there is no basis in the record.
Land v. Allen, Case No. 08-15254 (11th Cir. 7/10/09)
Closing Arguments: Objection Not Always Necessary
At least in the civil arena, where the interest of substantial justice is at stake, improper argument may be the basis for a new trial even if no objection has been raised.
Christopher v. State, Case No. 04-16319 (11th Cir. 5/26/06)
Closing Arguments: Vouching

Vouching amounts to the prosecutor indicating a personal belief in the witness' credibility. In deciding the issue the court looks for whether (1) the prosecutor placed the prestige of the government behind the witness by making explicit personal assurances of the witness' credibility, or (2) the prosecutor implicitly vouched for the witness' credibility by implying that evidence not formally presented to the jury supports the witness' testimony.
U.S. vs. Cano, 15 FLWC521 (11th Cir. 5/3/02), U.S. v. Bernal-Beniez, Case No. 08-10308 (11th Cir. 1/25/10)

Closing Arguments: Defendant's Advantage of Having Heard Testimony

Prosecutor's comments in closing argument that defendant had been present during testimony of all witnesses and could tailor his testimony based on what he heard did not violate constitutional guarantees. May still be a question if there are prior consistent statements.
Portuondo v. Agard, 13 FLW Fed S145 (3/6/00)

Closing Arguments: Improper to Argue Conviction Will Solve Larger Societal Issues

"I am concerned that this message by the Government had a prejudicial or an inflammatory effect (1) by appealing to the jurors' personal interest in living in a drug-free community, and (2) implying that they could achieve that goal by returning a verdict of guilt against a stranger from the distant enclave of Miami. Compare U.S. v. Beasley, 2 F.3d 1551, 1559-60 (11th Cir. 1993)(prosecutor's comments linking the jury to the war on drugs, such as through statement that the jury had "a place in that war," were held to be "an appeal by the prosecutor for the jury to act as 'the conscience of the community,' " and resulted in finding "that the comments were 'calculated to inflame' ")
U.S. v. Diaz, 13 FLW Fed C1 (11th Cir. 10/15/99), (Cook, J. dissenting opinion)

Closing Arguments: Prosecutor's Claims of What Witness Would Have Said Improper

Court found prosecutor's argument that included a claim that a witness that was not called would have said noting more than what was already in evidence to be improper.
U.S. v. Hands, 12 FLW Fed C1194 (8/18/99)

Closing Arguments: Prosecutor's Vituperative Attack Upon Accused Improper

Where ten of the fourteen pages of the prosecutor's closing statement transcript contained multiple repetitions of the words "monster," "vicious," wicked," and "maniac," the court found the argument to be improper.
U.S. v. Hands, 12 FLW Fed C1194 (8/18/99)

COMITY

Comity: Same Crime Punishable by State and Federal Government

The Constitution's grant of power to Congress to define and punish piracies and felonies committed on high seas does not preclude state's from punishing an act that also violates the state's laws. The same act or omission can offend the laws of both the state and federal government, and both governments may prosecute the individual responsible for the act or omission.
State v. Stepansky, 25 FLWS297 (4/20/00)

Comity: Admiralty

The general rule on preemption in admiralty is that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not actually conflict with federal law or interfere with the uniform working of the maritime legal system.
State v. Stepansky, 25 FLWS297 (4/20/00)

COMPASIONATE RELEASE

Compassionte Release: Bryant
The only circumstances that can rise to the level of extraordinary and compelling reasons for compassionate relase are those described in §1B1.3 of the Sentencing Guidelnies.
Bryant v. United States, 996 F.3d 908 (11th Cir. 2021); United States v. Giron, No 20-14018 (11th Cir. Oct. 13, 2021)

CONFESSIONS AND STATEMENTS

Coercion

Confessions: Coercion - Custodial Interrogation Entails Inherently Compelling Pressures
"Indeed, the pressure of custodial interrogation is so immense that it 'can induce a frightening ly high percentage of people to confess to crimes they never committed.'"
J.D.B. v. North Carolina, Case No. 09-11121 (S. Ct. 3/23/11)
Confessions: Coercion - Officer's Statement That Defendant Would Not Be Charged
Officer's statement to the defendant that charges would not be filed elicited statement and that statement was, therefore, involuntary and should have been suppressed.
U.S. v. Lall, Case No. 09-10794 (11th Cir. 5/28/10)
Confessions: Coercion - Threat To Arrest Someone Where There Is Probable Cause to Arrest That Person
See Newland v. Hilton, 527 F.3d 1162 (11th Cir. 2008)
Confessions: Coercion - Promises of Leniency
Court found statements of agents that included writing on pieces of paper that the defendant could get 6 years if he cooperated and that he was probably looking at 60 if he didn't exceeded the "limited assurance" of lighter punishment that is permissible, and upheld decision to exclude the resulting statements of the defendant.
U.S. v. Lopez, Case No. 04-1223 (10th Cir. 2/21/06)
Confessions: Coercion - Must Come From Government
Government coercion is a necessary predicate to finding involuntariness under the Fifth Amendment. Absent police conduct casually related to the confession, there is no basis for concluding that any state actor has deprived a criminal defendant of due process of law.
U.S. v. Thompson, Case No. 04-12218 (11th Cir. 9/1/05)
Confessions: Coercion - Misleading Information From Officer
While the defendant was asking the officer questions about the pros and cons of having the assistance of a lawyer, the officer told him (1) that one of the "disadvantages" of having a lawyer would be that the lawyer would tell him not to answer "incriminating questions" and that

"honesty wouldn't hurt him."The court concluded that, because of the officers statements, the defendant's waiver of his Miranda rights was not knowingly and voluntarily.
Hart v. Attorney General of Florida, Case No. 01-15571 (11th Cir. 3/5/03)
Confessions: Coercion - Promises or Inducements
Render a statement involuntary.
Bram v. U.S., 18 S.Ct. 183, 187 (1897); Shotwell Manufacturing Co. v. U.S., 83 S.Ct. 448, 453 (1963); Rowe v. Griffin, 676 F.2d 524, 527 (11th Cir. 1982)
Confessions: Coercion - Public Employee & Threat of Loss of Employment
A public employee may not be coerced into surrendering his Fifth Amendment privilege by threat of being fired or subjected to other sanctions.
U.S. v. Vangates, 15 FLW Fed C444 (11th Cir. 4/8/02)
Confessions: Coercion - Limitations on Use of Coerced Confessions
The protection against the use of coerced statements includes the same limitations on derivative use extended to statements made with a grant of immunity.
Chavez v. Martinez, Case No. 01-1444 (S. Ct. 5/27/03)

Immunity

Confessions: Immunity - Compliance W/Subpoena Doesn't' Immunity
See: U.S. v. Vangates, 15 FLW Fed C444 (11th Cir. 4/8/02)
Confessions: Immunity - "Wholly Independent Source"
Where the government compels testimony by granting immunity, the Government, in a subsequent prosecution, has the burden of establishing that the evidence it proposes to use is derived from a source wholly independent of the compelled testimony.
Kastigar v. U.S., 406 U.S. 441 (1972); Chavez v. Martinez, Case No. 01-1444 (S. Ct. 5/27/03)
Confessions: Immunity - Burden on Government to Prove Other Source of Evidence
Under 18 USC 6002, there is an affirmative duty that requires the government to show, not merely that the inculpatory evidence is not tainted by the prior testimony, but to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.
U.S. v. Hubbell, 13 FLW Fed S383 (6/5/00)
Confessions: Immunity - Derivative Information
It has long been settled that the protection of the 5th Amendment encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence.
U.S. v. Hubbell, 13 FLW Fed S383 (6/5/00)

Miranda Warnings

Confessions: Miranda Warnings - Only For Interrogation
Miranda warnings need be given only for purposes of interrogation. Here, the officer's effort to collect a DNA sample did not require Miranda warnings.
Everett v. Secretary, Fla. Dept. of Corr., Case No. 14-11857 (11th Cir. 2/27/15)
Confessions: Miranda Warnings - Custody (Analysis Involved More Than a Determination of Freedom of Movement)

The freedom-of-movement test identifies only a necessary and not a sufficient condition for Miranda custody.
Howes v. Fields, Case No. 10-680 (S. Ct. 2/21/12)
Confessions: Miranda Warnings - Custody Determination (Prisoners)
While there is no categorical rule with respect to the questioning of prisoners, the court concluded that the interview in this case, which lasted 5-7 hours, was well past the point in time where the prisoner ordinarily went to bed, involved armed deputies who used a very sharp tone, but who was told he was free to return to his cell, was not physically restrained or threatened, was questioned in a conference room, and was offered food and water, was not custodial and did not require Miranda warnings.
Howes v. Fields, Case No. 10-680 (S. Ct. 2/21/12)
Confessions: Miranda Warnings - Custody Determination (Juveniles)
"It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the Miranda custody analysis."
J.D.B. v. North Carolina, Case No. 09-11121 (S. Ct. 6/16/11)
Confessions: Miranda Warnings - Custody Determination Analysis
The determination of whether the individual was in custody and entitled to Miranda warnings is an objective determination. Subjective views harbored by either the interrogating officers or the person being questioned are irrelevant. The test, in other words, involves no consideration of the actual mindset of the particular suspect subjected to police questioning.
J.D.B. v. North Carolina, Case No. 09-11121 (S. Ct. 6/16/11)
Confessions: Miranda Warnings - Two Step?
Detectives decided not to give the defendant his Miranda warnings while interrogating him about the disappearance of a murder victim. During that interview, the defendant denied any knowledge of the victim's disappearance. Six of seven hours later, the detectives had the defendant brought back to the police station. When the defendant advised that he wanted to talk, the officers advised him of his Miranda rights and the defendant confessed to the murder. In holding the confession to be admissible, the Court concluded the confession was not the product of the two-step process that the Court had in prohibited in Missouri v. Seibert, 542 U.S. 600 (2004).
Warden v. Dixon, Case No. 10-1540 (S. Ct. 11/7/10)
Confessions: Miranda Warnings - Distinction Between Being Seized and Being In Custody
Officers briefly detained the defendant while they were looking for a drug suspect and told the defendant that he was not the individual for whom the officers were searching. Court concluded that while defendant may have been seized he was not in custody and that, therefore, officers had no obligation to advise the defendant of his Miranda warnings.
U.S. v. Luna-Encinas, Case No. 08-12574 (11th Cir. 4/13/10)
Confessions: Miranda Warnings: Waiver Caused by Deceit or Trickery
Trickery or deceit is only prohibited to the extent it deprives the suspect of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.
U.S. v. Farley, Case No. 08-15882 (11th Cir. 6/2/10)
Confessions: Miranda Warnings: Defendant Must Invoke Right to Remain Silent

Defendant's three hours or so of silence interrupted only by a few one word answers coupled with his refusal to sign the Miranda form did not amount to an invocation of his right to remain silent. To invoke the right, the defendant must state that he does not want to talk,
Berghuis v. Thomkins, Case No. 08-1470 (S. Ct. 6/1/10)

Confessions: Miranda Warnings: Clearly Informed of Right to Assistance of a Lawyer

Warning given by Tampa Police Office that the defendant had the right to talk to a lawyer before answering questions fulfilled the Miranda requirement that an individual subjected to custodial questioning be advised that he has a right to consult with a lawyer and to have that lawyer present during interrogation.
Florida v. Powell, Case No. 08-1175 (S. Ct. 12/7/09)

Confessions: Miranda Warnings: Failure to Scrupulously Honor

Police failed to scrupulously honor the defendant's invocation of his right to remain silent, when, upon the statement of the codefendant/boyfriend, the police put the two of them together and questioned the two of them.
U.S. v. Lafferty, Case No. 06-1901 (3rd Cir. 9/28/07)

Confessions: Miranda Warnings: Incomplete Warning

Where office provided an incomplete statement of Miranda rights, leaving out the information that the statement could be used against the individual in court and that if he could not afford a lawyer one would be appointed for him, the statement should have been suppressed.
U.S. v. Stanley, Case No. 05-16299 (11th Cir. 12/20/06)

Confessions: Miranda Warnings - Must Be Given Even to Those Who Know Their Rights

U.S. v. Stanley, Case No. 05-16299 (11th Cir. 12/20/06)

Confessions: Miranda Warnings - Determination Outside Presence of the Jury

A defendant alleging a Miranda violation is entitled to a determination outside the presence of the jury.
U.S. v. Arbolaez, Case No. 05-11217 (11th Cir. 6/1/06)

Confessions: Miranda Warnings - Sentencing

Statements obtained from the defendant in violation of the requirements of the Miranda decision are admissible at sentencing.
U.S. v. Nichols, Case No. 04-5020 (4th Cir. 2/28/06)

Confessions: Miranda Warnings - Public Safety Exception

Upon entry into a house in a domestic disturbance investigation and seeing firearms lying in plain view, the officer asked the defendant "What are those doing here?" The defendant's response that he was trying to hide them led to his conviction for being a felon in possession of a firearm. Concluding that the situation was "potentially volatile" and that the question was prompted by the officers concern that the defendant was attempting to access the firearms, the Court felt that the failure to provide Miranda warnings before asking about the guns fell within the "narrow public safety exception."
U.S. v. Martinez, Case No. 04-30098 (9th Cir. 5/16/05)

Confessions: Miranda Warnings - Standard for Proving Waiver of Miranda Rights

The prosecution bears the burden of proving, by a preponderance of the evidence, the Miranda waiver.
Colorado v. Connelly, 479 U.S. 157, 169 (1986)

Confessions: Miranda Warnings - No Need to Repeat 20 Hours Later

A police officers prior Miranda warnings will suffice to permit the officer to question the defendant later so long as the suspect understood them when they were first given and nothing

that happened in the interim "would render the defendant unable to consider fully and properly the effect of an exercise of waiver of those rights." In this case, which the court concluded was "close" a 20 hour break in the questioning did not require the officer to give the warnings again.
U.S. v. Pruden, Case No. 04-1863 (3d Cir. 2/23/05)

Confessions: Miranda Warnings - Custody (Objective Determination)

The determination of custody depends on the objective circumstances of the interrogation, not on the subjective views of the officers or the person being questioned.
Yarborough v. Alvarado, Case No. 02-1684 (S. Ct. 3/1/04); U.S. v. Brown, Case No. 04-10325 (11th Cir. 3/13/06); Howes v. Fields, Case No. 10-680 (S. Ct. 2/21/12)

Confessions: Miranda Warnings - Patane Is An Invitation to Flout Miranda

"There is no way to read this case except as an unjustifiable invitation to law enforcement to flout Miranda when there may be physical evidence to be gained.
U.S. v. Patane, Case No. 02-1183 (S. Ct. 6/28/04)(Souter, J. dissenting opinion)

Confessions: Miranda Warnings - Failure to Warn Not, By Itself, A Constitutional Violation

Police do not violate a suspect's constitutional rights (or the Miranda rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by Miranda. Potential violations occur, if at all only upon the admission of unwarned statements into evidence at trial.
U.S. v. Patane, Case No. 02-1183 (S. Ct. 6/28/04)

Confessions: Miranda Warnings - Court Cannot Suppress Physical Fruits of Unwarned But Voluntary Statements

"The Miranda rule is a prophylactic employed to protect against the violations of the Self-Incrimination Clause. The Self-Incrimination Clause, however is not implicated by admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the Miranda rule in this context. And just as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the Miranda rule. The Miranda rule is not a code of police conduct, and police do not violate the Constitution (or even the Miranda rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule articulated in cases such as Wong Sun does not apply."
U.S. v. Patane, Case No. 02-1183 (S. Ct. 6/28/04)

Confessions: Miranda Warnings - Sequential Confessions (Question Is Whether The Warnings Are Effective)

In a sequential confession case, i.e. where there are multiple statements and the Miranda warning isn't given until just before the last statement, clarity is served if the later confession is approached by asking whether in the circumstances the Miranda warnings given could reasonably be found effective. If yes, a court can take up the standard issues of voluntary waiver and voluntary statement; if no, the subsequent statement is inadmissible for want of adequate Miranda warnings, because the earlier and later statements are realistically seen as parts of a single, unwarned sequence of questioning.. "The Wong Sun fruits doctrine" isn't applicable.
Missouri v. Seibert, Case No. 02-1371 (S. Ct. June 28, 2004); U.S. v. Gonzalez-Lauzan, Case No. 04-12536 (11th Cir. 1/30/06); U.S. v. Stanley, Case No. 05-16299 (11th Cir. 12/20/06)

Confessions: Miranda Warnings - Subsequent Warnings Following Intentional Omission

Where police adopted a policy, which was even promoted by some national trainers, of deliberately omitting Miranda warnings and, then, after obtaining a statement, giving the

warnings before eliciting a second statement, the procedure violated the requirements of Miranda.
Missouri v. Seibert, Case No. 02-1371 (S. Ct. June 28, 2004).

Confessions: Miranda Warnings: Second Confession Product of First Confession Elicited Without Miranda Warnings

Where police officers, before having given the defendant Miranda warnings, deliberately elicited inculpatory information from defendant who had been indicted, and defendant subsequently reiterated the inculpatory statements after he had been taken to the jail and advised of his Miranda rights, the trial court erred in holding the absence of an interrogation foreclosed the defendant's claim that his jailhouse statements should have been suppressed as fruits of the statement taken earlier.
Fellers v. U.S., Case No. 02-6320 (S.Ct. 1/26/04)

Confessions: Miranda Warnings - Terry Stop

Under some circumstances, Miranda warnings must be given during a Terry-stop. The question, though, is not, of course, whether a suspect would feel free to leave. Instead, the question is whether a stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination. Put another way, suspects subjected to restraints comparable to those associated with formal arrest must be advised of their Miranda rights.
U.S. v. Acosta, Case No. 02-16167 (11th Cir. 3/25/04); U.S. v. Martinez, Case No. 05-4275 (8th Cir. 9/11/06); U.S. v. Stanley, Case No. 05-16299 (11th Cir. 12/20/06)

Confessions: Miranda Warnings - Not Always Conclusive Re: Waiver

Although a signed Miranda waiver from is usually strong proof that a suspect voluntarily waived his rights, it is not conclusive on this issue.
Hart v. Attorney General, Case No. 01-15571 (11th Cir. 3/5/03)

Confessions: Miranda Warnings - Border Zone

"We add that when a suspect is detained in a border zone, whether interrogation is 'custodial' should be interpreted in light of the strong governmental interests in controlling the borders. Interrogation at the border constitutes one notable exception to the constitutional protection of Miranda. Because of the overriding power and responsibility of the sovereign to police national borders, the 5th Amendment's guarantee against self incrimination is not offended by routine questioning of those seeking entry to the United States."
U.S. v. McDowell, 250 F.3d 1354 (11th Cir. 2001)

Confessions: Miranda Warnings - Four Hour Non Custodial Interrogation?

"To the extent McDowell argues that the duration (approximately 4 hours) converted this inquiry into a custodial interrogation, we are unpersuaded. . .there is no fixed limit to the length of questioning."
U.S. v. McDowell, 250 F.3d 1354 (11th Cir. 2001)

Confessions: Miranda Warning - "In Custody"

"Whether McDowell was in custody prior to his formal arrest depends upon whether under the totality of the circumstances, a reasonable man in his position would feel a restraint on his freedom of movement. . .to such extent that he would not feel free to leave. The test is objective: the actual, subjective beliefs of the defendant and the interviewing officer on whether the defendant was free to leave are irrelevant. More specifically, the Supreme Court has stated that whether a suspect is in custody turns on whether restrictions on the suspect's freedom of movement are of the degree associated with formal arrest."

U.S. v. McDowell, 250 F.3d 1354 (11th Cir. 2001); U.S. v. Brown, 441 F.3d 1330 (11th Cir. 2006); Howes v. Fields, 132 S. Ct. 1181 (S. Ct. 2012)

Confessions: Miranda Warning: Even If Not Technically Arrested

Even if a person has not been arrested, advice of Miranda rights is required if there is a restraint on freedom of movement of the degree associated with a formal arrest. The test is objective: the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.

U.S. v. Muegge, 225 F.3d 1267 (11th Cir. 2000)

Confessions: Miranda is a Constitutional Rule

Miranda announced a constitutional rule that may not be overruled by an Act of Congress.

Dickerson v. United States, 13 FLW Fed S489 (6/26/2000)

Miscellaneous

Confessions: Statements to Pretrial Services Officer

While 18 U.S.C. § 3153 prohibit the admissibility of statements made by the defendant during a pretrial interview, such statements may be used for impeachment purposes.

U.S. v. Griffith, 385 F.3d 124 (2d Cir. 2004); U.S. v. Perez, 473 F.3d 1147 (11th Cir. 2006)

Confessions: Garrity Rights

In Garrity v. New Jersey, 385 U.S. 493 (1967), the Supreme Court held that Fifth Amendment protections apply to public employees who, under threat of job loss, are required to make incriminating statements. In this instance, the trial court correctly admitted incident required incident reports completed by a prison lieutenant and statements made by the officer.

U.S. v. Smith, Case No. 13-15476 (11th Cir. 4/29/16)

Confessions: Miscellaneous - Request for Counsel (Only Interrogation Must Cease)

See: Everett v. Secretary, Fla. Dept. of Corrections, Case No. 14-11857 (11th Cir. 2/27/15)

Confessions: Miscellaneous - Use of Pre-Arrest Silence

Where the defendant has voluntarily gone to the police station and without receiving Miranda warnings answered some questions, but said nothing when asked about shell casings found at the scene of the murder, the prosecutor, at trial, was free to argue that the defendant's silence was proof of his guilt.

Salinas v. Texas, 133 S. Ct. 2174 (2013)

Confessions: Miscellaneous - Fourth Amendment Violation Did Not Support Suppression of Statement

Where officers unlawfully entered the defendant's residence to arrest him, but had probable cause to arrest him and, then, advised him of his Miranda Warnings when he arrived at the police station, the subsequently made statement was admissible.

U.S. v. Slaughter, 708 F3d 1208 (11th Cir. 2013)

Confessions: Miscellaneous - Property Seized as Result of Involuntary Confessions

Must be suppressed.

U.S. v. Lall, Case No. 09-10794 (11th Cir. 5/28/10)

Confessions: Miscellaneous - Period of Release That Will Terminate Application of Edwards is 14 Days

For the defendant who requests counsel and who is then released from custody, the presumption that uncounseled responses to further police questioning are involuntarily expires fourteen days after the defendant's release.
Maryland v. Shatzer, Case No. 08-680 (S. Ct. 2/24/10)

Confessions - Police Questioning After Initial Appearance

Overruling the decision in Michigan v. Jackson, 384 U.S. 436 (1986), the Court held that the appointment of counsel at an initial appearance or arraignment did not amount to an invocation of the right of counsel and that law enforcement officials were free to approach and question the defendant.
Montejo v. Louisiana, 556 U.S. 778 (2009)

Confessions: Miscellaneous - Prompt Presentment

A district court with a suppression claim must find whether the defendant confessed within six hours of arrest unless a longer delay was reasonable considering the means of transportation and the distance to be traveled to the nearest available magistrate. If the confession came within that period it is admissible, subject to the other Rules of Evidence, so long as it was made voluntarily and the weight to be given it is left to the jury. If the confession occurred before the appearance before the magistrate and beyond six hours, however, the court must decide whether delaying that long was unreasonable under the McNabb-Mallory cases, and if it was, the confession is to be suppressed.
Corley v. U.S., Case No. 07-10441 (S. Ct. 4/6/09)

Confessions: Miscellaneous - Right to Counsel (During Interrogation: Offense Specific - Different Sovereigns)

A defendant's Sixth Amendment right to counsel with respect to certain federal charged had attached before those charges had been filed when state law enforcement officers interrogated him about analogous state charges that were pending at the time of the interrogation. Contrary to an existing decision of the Fifth Circuit, the Court rejected the argument that the two cases were different for Sixth Amendment purposes because one was brought by the state and one by the federal government.
U.S. v. Mills, Case No. 04-0750 (2d Cir. 6/21/05), but see: U.S. v. Alvarado, Case No. 04-4969 (4th Cir. 3/13/06)

Confessions: Miscellaneous - Right to Remain Silent - Reasonable Cause to Apprehend Danger

The Fifth Amendment privilege extends only to witnesses who have reasonable cause to apprehend danger from a direct answer. The inquiry is for the court: the witness's assertion does not by itself establish the risk of incrimination. A danger of imaginary and unsubstantial character will not suffice.
Ohio v. Reiner, 14FLW FedS129 (3/19/2001)

Confessions: Miscellaneous - Fifth Amendment Privilege Extends to Innocent

The privilege protects the innocent as well as the guilty, and one who maintains his or her innocence can still exercise the right.
Ohio v. Reiner, 14FLW FedS129 (3/19/2001)

Confessions: Miscellaneous - Burden of Showing Admissibility

The burden of showing admissibility rests on the prosecution.
Brown v. Illinois, 422 U.S. 590, 604 (1975); J.D.B. v. North Carolina, Case No. 09-11121 (S. Ct. 3/23/11)

Confessions: Miscellaneous - Standard for Proving Voluntariness

The prosecution bears the burden of proving, by a preponderance of the evidence, the voluntariness of the statement.
Lego v. Twomey, 404 U.S. 477, 489 (1972)

Confessions: Miscellaneous - Right to Counsel (Doesn't Extend to Factually Related Crimes)

Even though an individual is represented by counsel on a particular charge, the police remain free to question that individual about factually related crimes. Here, the defendant was indicted for a burglary of a home he shared with his wife and daughter. As the wife and daughter were missing he was a suspect in their disappearance. The police subsequently questioned the defendant and he confessed to the murder of the wife and daughter. The court found there was no 6th Amendment violation.
Texas v. Cobb, 14 FLWS161 (4/2/01)

Confessions: Miscellaneous - Prosecution for Failure to Identify Oneself is Valid

Arrest and conviction based on the defendant's failure to identify himself during valid Terry stop did not violate Fourth or Fifth Amendments. Exception may exist if individual would somehow incriminate himself by providing his name. There is a requirement, too, that the request for the individual's identity be reasonably related to the circumstances that justified the initial stop.
Hibel v. Sixth Judicial District Court of Nevada, Humboldt County, Case No. 03-5554 (S. Ct. 6/21/2004)

Confessions: Miscellaneous - Deliberate Elicitation

See: Fellers v. U.S., Case No. 02-6320 (S.Ct. 1/26/04)

Confessions: Miscellaneous - Announcement of Wish to Remain Silent

When a person undergoing custodial interrogation wishes to remain silent, the questioning must end." Equivocal or ambiguous requests to end questioning, though, do not require that the officers end the questioning.
U.S. v. Acosta, Case No. 02-16167 (11th Cir. 3/25/04)

Confessions: Miscellaneous - Psychiatric Interviews

See Estelle v. Smith, 451 U.S. 454 (1981) and Penry v. Johnson, 14 FLW Fed S316 (3/27/01)

Confessions: Miscellaneous - Won't Support Conviction if Uncorroborated

Smith v. U.S., 75 S.Ct. 194 (1954); Opper v. U.S. 75 S.Ct. 164 (1954); U.S. v. Dickerson, 163 F.3d 639 (D.C. Cir. 1999); U.S. v. Jackson, 103 F.3d 561, 566 (7th Cir. 1996); U.S. v. Kerley, 838 F.2d 932 (7th Cir. 19880; U.S. v. Todd 657 F.2d 212 (8th Cir. 1981); U.S. v. Micieli, 594 F.2d 102 (5th Cir. 1979)

Confessions: Miscellaneous - Inadmissible Unless Corroborated?

See: U.S. v. Singleterry, 29 F.3d 733, 737 (1st Cir. 1994); U.S. v. Valdez, 880 F.2nd 1230, 1233 (11th Cir. 1989) Memo in U.S. v. Nea.ly 4:99cr45-WS

Confessions: Miscellaneous - 5th Amendment and Edwards (Reinitiating Questioning)

Once the accused has requested to see a lawyer only the accused can reinitiate the questioning.
U.S. v. Gonzalez, 183 F.3d 1315 (11th Cir. 1999)

Confessions: Miscellaneous - Compelled Obedience to Regulatory Requirement

The fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident does not clothe such required conduct with the testimonial privilege.
U.S. v. Hubbell, 13 FLW Fed S383 (6/5/00)

Testimonial

Confessions: "Testimonial" Isn't Always the Same as Incriminating
Compelling a suspect to put on a shirt, provide a blood sample, a hand writing exemplar, or to make a recording of his voice may prove to be incriminating, but because it isn't "testimonial" in nature, is not protected by the 5th amendment.
U.S. v. Hubbell, 13 FLW Fed S383 (6/5/00); Everett v. Secretary, Fla. Dept. of Corr., Case No. 14-11857 (11th C Ir. 2/27/15)
Confessions: Act of Production May Be Testimonial
The act of producing documents in response to a subpoena may have a compelled testimonial aspect. By "producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic. Moreover, when the custodian of documents responds to a subpoena, he may be compelled to to take the witness stand and answer questions designed to determine whether he has produced everything demanded by the subpoena. The answers to those questions, as well as the act of production itself, may certainly communicate information about the existence, custody, and autheticity of the documents. Whether the constitutional privilege protects the answers to such questions, or protects the act of production itself, is a question that is distinct from the question whether the unprotected contents of the documents themselves are incriminating.
U.S. v. Hubbell, 13 FLW Fed S383 (6/5/00)

Waiver

Confessions: Sixth Amendment Waiver
If police initiate interrogation after a defendant's assertion, at his arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid.
Michigan v. Jackson, 106 S.Ct. 1404, 1411 (1986); Everett v. Secretary, Fla. Dept. of Corr., Cae No. 14-11857 (11th Cir. 2/27/15)
Confessions: Can't Testify About Subject and Invoke Fifth Regarding Details
"It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details. The privilege is waived for the matters to which the witness testifies, and the scope of the waiver is determined by the scope of the relevant cross-examination. "
Mitchell v. United States, 119 S.Ct., 1311-1312 (1999)

CONFLICTS OF INTEREST

Conflicts of Interest - Lawyers Can't Be Expected to Denigrate Own Performance
Counsel cannot reasonably be expected to make an argument that denigrates their own performance and threatens their professional reputation and livelihood.
Christenson v. Roper, Case No. 14-6873 (S. Ct. 1/20/15)
Conflicts of Interest - Cross-Examination of Fellow Employee of Public Defender's Office

Court held in this death penalty case that there was no showing of prejudice sufficient for habeas purposes where assistant public defender was faced with having to cross-examine a member of the office staff. The staff member had been called to establish chain of custody of letter sent by the defendant to the public defender's office.
Schwab v. Crosby, Case No. 05-14253 (6/15/06 11th Cir. 2006)
Conflicts: Reasonable, but Factually Inaccurately Belief of Client Damaged Attorney-Client Relationship
A criminal defendant's objectively reasonable, but factually inaccurate, belief that his counsel were revealing confidential communications to another suspect and to prosecutors gave rise to an irreconcilable conflict with his attorneys that deprived him of his Sixth Amendment right to counsel.
Plumlee v. Dep Papa, No. 04-15101 (9th Cir. 10/18/05)
Conflicts: Expert Testimony
Claims of ineffective assistance on the basis of a conflict are not a matter subject to expert testimony.
Freund v. Butterworth, 165 F.3d 839 (11th Cir. 1999)
Conflicts: Standard on Appeal
In order to establish a violation of the Sixth Amendment, a defendant who raised no objection in trial must demonstrate that an actual conflict of interest adversely affected his lawyers performance.
U.S. v. Novaton, 271 F.3d 968 (11th Cir. 2001)

CONSPIRACY

Conspiracy: Burden of Proving Withdrawal
Allocating to a defendant the burden of proving withdrawal does not violate the Due Process Clause.
Smith v. U.S., Case NO. 11-8976 (S. Ct. 1/9/13)
Conspiracy: Proof of Willfulness
Government must prove defendant knew his actions were unlawful for an offense charged pursuant to 18 U.S.C. § 846.
U.S. v. Tobin, Case No. 09-13944 (11th Cir. 4/12/12)
Conspiracy: Conduct Occurring Before Defendant Entered Conspiracy
A defendant cannot be held accountable for conduct that occurred prior to his entry into the conspiracy.
U.S. v. Westry, Case No. 06-13847 (11th Cir. 4/16/08)
Conspiracy: Jury Instructions - Multiple Conspiracies
Generally, a multiple conspiracy instruction is required where the indictment charges several defendants with one overall conspiracy, but the proof at trial indicates that a jury could reasonably conclude that some of the defendants were only involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment.
U.S. v. Woodard, Case No. 04-12056 (11th Cir. 8/8/06)
Conspiracy: Multi-Object Conspiracy - Evidence of One Sufficient

A guilty verdict in a multi-object conspiracy will be upheld if the evidence is sufficient to support a conviction of any of the alleged objects.
U.S. v. Woodard, Case No. 04-12056 (11th Cir. 8/8/06); U.S. v. Medina, Case No. 05-14864 (11th Cir. 5/11/07)

Conspiracy: No Rule of Consistency

At least in the 11th Circuit, a conviction for conspiracy can still stand even if all the other alleged conspirators are acquitted.
U.S. v. Johnson, Case No. 04-10514 (11th Cir. 2/27/06)

Conspiracy: Sufficiency - Conspiracy to Import Drugs Into the United States

Although there was evidence that the defendant guarded the drugs or may have been a participant in a plan to distribute drugs in South America or even conspired with an informant to import drugs into the United States, there was no evidence that the defendant conspired with anyone other than the government informant to import drugs into the United States from Ecuador. The trial court, therefore, should have granted a judgment of acquittal.
U.S. v. Arbane, Case No. 04-15727 (11th Cir. 4/21/06)

Conspiracy: Presence Combined with Flight

Flight combined with mere presence is insufficient to prove participation in a conspiracy.
US. v. Pantoja-Soto, 739 F.2d 1520 (11th Cir. 1984), but see U.S. v. Miranda, Case No. 04-15920 (11th Cir. 9/14/05)

Conspiracy: Proof of Defendant's Involvement - Presence Where Drugs Present

Although mere presence at the scene of a crime is insufficient to prove that the defendant was a member of the conspiracy, it may be sufficient where large quantities of drugs are present as a prudent smuggler is not likely to suffer the presence of unaffiliated bystanders.
U.S. v. Miranda, Case No. 04-15920 (11th Cir. 9/14/05)

Conspiracy: Proof of Defendant's Involvement

Proof of the defendant's participation in a conspiracy may be proved by direct or circumstantial evidence, including inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme.
U.S. v. Miranda, Case No. 04-15920 (11th Cir. 9/14/05)

Conspiracy: Money Laundering Conspiracy Doesn't Require an Overt Act

For, among other reasons, the fact that the money laundering conspiracy provision, 18 U.S.C. 1956(h) tracks the language of the drug conspiracy statute, the Court upheld the Eleventh Circuit's decision that the crime does not require the commission of an overt act.
Whitfield v. U.S., Case No. 03-1293 (U.S. 1/11/05)

Conspiracy: Knowledge and Drug Conspiracies

"In a drug conspiracy, in which the object of the conspiracy is clearly illegal and there are various clandestine functions to perform, the conspirators can be charged with knowledge that others are preforming these different functions [those functions necessary to carry out the objectives of the conspiracy]."
U.S. v. Chandler, Case No. 03-10725, n. 28 (11th Cir. 7/19/04)

Conspiracy: Agreement And Knowing Participation

"The Government must prove the existence of an *agreement* to achieve an unlawful objective and the defendant's *knowing* participation in that agreement.
U.S. v. Chandler, Case No. 03-10725 (11th Cir. 7/19/04)(emphasis in original)

Conspiracy: Withdrawal

Withdrawal from a conspiracy, which constitutes a valid defense to subsequent crimes committed by the remaining conspirators, requires proof that (1) the defendant took affirmative steps to defeat the objectives of the conspiracy, and (2) that the defendant either made a reasonable effort to communicate those acts to his co-conspirators or disclosed the scheme to law enforcement authorities. In this case, the defendant participated with others in one robbery, ended his personal involvement in the conspiracy, but was still penalized in the sentencing calculations for three other robberies that the others committed *after* he ended his involvement.
U.S. v. Pringle, Case No. 01-14602 (11th Cir. 11/14/03); U.S. v. Arias, Case No. 03-12185 n. 18 (11th Cir. 2005); U.S. v. Bergman, Case No. 14-14990 (11th Cir. 3/24/17)

Conspiracy: Jury Verdict - Must Be Unanimous Agreement on Overt Acts

The failure of the jury to unanimously agree on which overt act constituted the scheme to deprive, deprived the defendant of his right to a unanimous verdict.
U.S. v. Bobo, Case No. 02-11-11 (11th Cir. 8/26/03)

Conspiracy: Indictment - Overt Acts Must Support the Conspiracy Charge

The overt acts alleged in the indictment must support the charge of conspiracy, not simply describe the alleged scheme to defraud.
U.S. v. Bobo, Case No. 02-11-11 (11th Cir. 8/26/03)

Conspiracy: Guidelines: Grouping (Multiple Victims Alleged in Single Count)

Where the defendant was charged with conspiring to commit hostage taking and involved three victims, the sentencing court properly divided the conspiracy count into three separate groups under 3D1.2 because there were three distinct victims.
U.S. v. Torrealba, Case No. 02-13307 (11th Cir. 7/29/03)

Conspiracy: Guidelines - Multiple Offenses Within One Count (Grouping)

There are two provisions of the sentencing guidelines that allow a sentencing court to divide a count into several groups for sentencing. These are USSG 3D1.2 and 1B1.2(d). Under 3D1.2, "a sentencing court may treat a conspiracy count as if it were several counts, each one charging conspiracy to commit one of the substantive offenses, when a defendant is convicted of conspiring to commit several substantive offenses and also convicted of committing one or more of the underlying substantive offenses." USSG 1B1.2(d) similarly provides that "a conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit."
U.S. v. Torrealba, Case No. 02-13307 (11th Cir. 7/29/03)

Conspiracy: Doesn't End When Object Becomes Impossible to Achieve

The initial conspirators were arrested and the truck with the drugs seized. They decided to cooperate and, pursuant to that cooperation, called others to come and get the truck and drugs. Those that were called and came to get the truck, could still be convicted of participating in the conspiracy even if they had not joined it until after the arrest of the original conspirators.
U.S. v. Recio, Case No. 01-1184 (S. Ct. 1/21/03)

Conspiracy: Defendant Must Know the Essential Nature of the Conspiracy

While the Government need not prove that the defendant knew every detail of that he participated in every stage of he conspiracy, the government must prove that he knew the essential nature of the conspiracy.
U.S. v. Charles , Case No. 01-12498 (11th Cir. 12/3/02); U.S. v. Chandler, Case No. 03-10725 (11th Cir. 7/19/04)

Conspiracy: Double Jeopardy - "Fraud" and "Any Offense"

Eighth Circuit holds, contrary to others, that a conviction for conspiracy to commit fraud and a conviction for conspiracy to commit another related offense, doesn't violate double jeopardy.
U.S. v. Ervasti, 201 F.3d 1029 (8th Cir. 2000)

Conspiracy: Knowledge Plus Intent to Further the Plan

In addition to knowledge of the intent to distribute the cocaine, a conspiracy conviction requires that the defendant actively participate in furthering the plan.
U.S. v. Gil, 13 FLW Fed C419 (11th Cir. 3/3/2000)

Conspiracy: Overt Act Unnecessary in Robbery

Recognizing a split of authority among the circuits, the court held that the government is not required to allege or prove an overt act in a robbery conspiracy, 18 USC 1951.
U.S. v. Pistone, 12 FLW Fed C917 (11th Cir. 6/3/99)

Conspiracy: Vicarious Liability

The basic theory of conspiracy is vicarious liability, and once a defendant becomes associated with a conspiracy, he is responsible for all acts of it.
U.S. v. Adkinson, 12 FLW Fed C187 (10/26/98)

Conspiracy: "Slight Evidence to Connect Defendant"

"We take this opportunity to reaffirm that the Constitution requires substantial evidence to support any criminal conviction. The oft-repeated phrase that 'once the existence of a conspiracy is established, only slight evidence is necessary to connect a particular defendant to the conspiracy refers to the extent of the defendant's connection to the conspiracy, not to the quantum of evidence required to prove that connection. Thus the threshold which the evidence must cross in order to establish the defendant as a conspirator is not 'minimal' as the government suggests, but remains substantial."
U.S. v. Adkinson, 12 FLW Fed C187 (10/26/98)

Conspiracy: Acts of Covering Up Crime Not Proof Concealment Part of Conspiracy

Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators.
U.S. v. Adkinson, 12 FLW Fed C187 (10/26/98)

Conspiracy: General Requirements

In order to sustain a conviction under 18 USC 371, the government must prove (1) the existence of an agreement to achieve an unlawful objective; (2) the defendants' knowing and voluntary participation in the agreement; and (3) the commission of an act in furtherance of the agreement. The government must prove an agreement between at lest two conspirators to pursue jointly an illegal objective. The government must also prove beyond a reasonable doubt that each defendant had a deliberate, knowing, specific intent to join the conspiracy.
U.S. v. Adkinson, 12 FLW Fed C187 (10/26/98), U.S. v. Calderon, 12FLW Fed C609 (11th Cir. 3/12/99)U.S. v. Calderon, 12FLW Fed C609 (11th Cir. 3/12/99); U.S. v. Charles , Case No. 01-12498 (11th Cir. 12/3/02)

Conspiracy: Danger of Merely Providing Procedural Advantage to Government

Even when appropriately invoked, the looseness and pliability of the conspiracy doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case....a Court should not strain to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.

U.S. v. Adkinson, 12 FLW Fed C187 (10/26/98)
Conspiracy : Elements of Conspiracy to Distribute Narcotics
"To sustain a conviction for conspiring to distribute narcotics the government must prove that 1) an agreement existed between two or more persons to distribute the drugs; 2) that the defendant at issue knew of the conspiratorial goal; and 3) that he knowingly joined or participated in the illegal venture**."**
U.S. v. Matthews, 168 f3d 535 (11th Cir. 1999); *opinion amended on denial of rehearing,* U.S. v. Moore, 181 F.3d 1205 (11th Cir. 1999); United States v. Toler, 144 F.3d 1423 (11th Cir. 1998)
Conspiracy: Wheel Type
For a wheel conspiracy to exist those who form the spokes must be aware of each other and must do something in furtherance of some single illegal enterprise.
Blumenthal v. U.S., 332 U.S. 539, 556-57 (1947); Kotteakos v. U.S. 66 S.Ct. 1239 (1946), U.S. v. Huff, Case No. 08-16272 (11th Cir. 6/25/10)
Conspiracy: Single vs. Multiple Individual Conspiracies
If at trial the government produces evidence that each defendant had a conspiratorial relationship with a single outside person, but fails to show that the defendants also were aware of and conspired with each other, the government has proved only multiple individual conspiracies rather than one agreement encompassing all of the defendants.
Kotteakos v. U.S. 66 S.Ct. 1239 (1946), U.S. v. Matthews, 168 F.3d 1287 (11th Cir 1999); U.S. v. Suarez, 313 F.3d 1287 (11th Cir. 2002); United States v. Glinton, 154 F.3d 1245, 1251 (11th Cir. 1998); U.S. v. Chandler, Case No. 03-10725 (11th Cir. 7/19/04); U.S. v. Edouard, Case No. 05-15808 (11th Cir. 5/11/07),U.S. v. Richardson, Case No. 06-12610 (11th Cir. 7/3/08)
Conspiracy: Proof of Participation May Be Established By Facts of Crime
U.S. v. Alvarez, 837 F.2d 1024 (11th Cir. 1988); U. Duren v. Hopper, 12 FLW Fed C263 (11th Cir. 11/20/98); U.S. v. Bain, 736 F.2d 1480 (11th Cir. 1984)
Conspiracy: Jury Instruction - "Buyer-Seller" Instruction
Although recognizing an instruction to the effect that a buyer - seller relationship is not tantamount to a conspiracy would be appropriate in some cases, the court held the circumstances in this case did not justify such an instruction.
U. S. v. Gomez, 164 F.3d 1354 (11th Cir. 1999)

CONSTITUTIONAL LAW

Commerce Clause

Constitutional Law: Commerce Clause - Hobbs Act Robbery
Robbery of drug dealer met satisfied Hobbs Actg's commerce element.
Taylor v. U.S., Case No. 14-6166 (U.S. 6/20/16)
Constitutional Law: Commerce Clause - 18 USC 1028
The government must prove only a minimal nexus with interstate commerce in a § 1028(a) prosecution to satisfy the "in or affects interstate or foreign commerce" requirement of § 1028(c)(3)(A).
U.S. v. Klopf, Case No. 04-10663 (11th Cir. 9/7/05)

Constitutional Law: Commerce Clause - Non-Economic, Purely Intrastate Criminal Activity
"Because it is a non-economic, purely intrastate criminal activity, we may consider only its isolated effects, not the aggregate effect of such activity that occurs nationwide."
U.S. v. Smith, Case No. 03-13639 (11th Cir. 3/18/05)
Constitutional Law: Commerce Clause - Congressional Findings
"'The existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of the Commerce Clause legislation.' "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'"
U.S. v. Smith, Case No. 03-13639 (11th Cir. 3/18/05)
Constitutional Law: Commerce Clause - Church Burnings
Overturning the panel's decision, the Court, en banc, held that the Commerce Clause permits Congress to prosecute, under 18 U.S.C. 247, the defendant who traveled by car on interstate highways through four states for the purpose of burning churches. Unlike the initial opinion and the arguments of the dissent, the Court did not consider the issue of the role the churches played in interstate commerce.
U.S. v. Ballinger, Cse No. 01-14872 (11th Cir. 1/10/05)
Constitutional Law: Commerce Clause - Felon in Possession
Requisite nexus to interstate commerce was demonstrated by government when the ATF agent testified that the pistol was manufactured in California and had moved in interstate commerce to Georgia.
U.S. v. Scott, 263 F.3d 1270 (11th Cir. 2001)
Constitutional Law: Commerce Clause - Arson
Arson of owner-occupied private residence is not subject to federal prosecution under 18 USC 844(i) which makes it a federal crime to maliciously damage or destroy, by means of fire or an explosive, any building used in interstate or foreign commerce. An owner-occupied residence not used for commercial purpose does not qualify as property used in commerce or commerce-affecting activity.
Jones v. U.S., 13 FLW Fed S356 (5/22/01)
Constitutional Law: Commerce Clause - Limitations
There are three broad categories of activities that Congress can regulate pursuant to the Commerce Clause: the use of channels of interstate commerce; the instrumentalities of interstate commerce or persons and things in interstate commerce; and activities having a substantial relation to interstate commerce. U.S. v. Lopez, 115 S.Ct. 1624 (1995); U.S. v. Dascenzo, 12 FLW Fed C22 (11th Cir. 8/31/98); U.S. v. Morrison, 13 FLW Fed S287 (5/15/00)
Constitutional Law: Commerce Clause - Domestic Violence and Firearms
Congress did not exceed its authority under the Commerce Clause in enacting section 922(g)(8) which renders it unlawful for any person who is subject to protective order that prohibits domestic violence to possess in or affecting commerce any firearm
U.S. v. Cunningham, 161 F3d 1343 (11th Cir. 1998)

Confrontation

Constitutional Law: Confrontation - Limited to Trial

"The Supreme Court has never extended the reach of the Confrontation Clause beyond the confines of a trial.
U.S. v. Campbell, Case No. 12-13647 (11th Cir. 2/20/14)
Constitutional Law: Confrontation - Statements Made to Those Who Are Not Law Enforcement Officers
Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, there is not a categorical rule excluding them from the reach of the Sixth Amendment. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers.
Ohio v. Clark, Case No. 13-1352 9 (S. Ct. 6/16/15)
Constitutional Law: Confrontation - Primary Purpose
A statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. Wher no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.
Ohio v. Clark, Case No. 13-1352 (S. Ct. 6/16/15)
Constitutional Law: Confrontation - Child's Statements to Teachers
Without having the three-year old child testify, the State of Ohio introduced statements of the child to his teachers that the defendant had inflicted the injuries observed by the teachers. the Court held that the introduction of the statements did not violate the Confrontation Clause. Niether the child nor his teachers had the primary purpose of assisting in the prosecution of the defendant and were not testimonial.
Ohio v. Clark, Case No. 13-1352 (S. Ct. 6/18/15); U.S. v. Barker, Case No. 14-51117 (5th Cir. 4/13/16)
Constitutional Law: Confrontation - Officer's Testimony Relating Statements of Interpreter
Although it turned out not to be plain error, the court held the defendant's right of confrontation was violated when the trial court allowed an officer to testify about what was said by the interpreter when the interpreter translated the defendant's out-of-court statements.
U.S. v. Charles, Case No. 12-14080 (11th Cir. 7/25/13)
Constitutional Law: Confrontation - Autopsy Reports
In this North Florida case, the court of appeals concluded that the introduction of autopsy reports and testimony about the content of the reports violated the confrontation clause and ordered a new trial for the physician convicted of health care fraud and violating the Controlled Substances Act.
U.S. v. Ignasiak, Case No. 09-10596 (11th Cir. 1/19/12)
Constitutional Law: Confrontation - Testimony of Analyst Who Did Not Perform Testing
Confrontation clause was violated where the prosecution was allowed to introduce a forensic laboratory report regarding the defendant's blood-alcohol level through the in-court testimony of a scientist who did not sign the certification or perform or observe the testing.
Bullcoming v. New Mexico, Case No. 09-10876 (S. Ct. 6/23/11)
Constitutional Law: Confrontation - Purpose of Questioning (Ongoing Emergency)
Court held that responses to police questioning by a robbery victim who had been shot did not violate the confrontation clause because the primary purpose of the questioning was "to enable police assistance to meet an ongoing emergency." Justice Scalia dissented saying the decision left Confrontation Clause jurisprudence "in shambles" and that courts will have to conduct

"'open-ended balancing tests' and 'amorphous, if not entirely subjective,' inquiries into the totality of the circumstances bearing on reliability," whenever "the prosecution cries emergency."
Michigan v. Perry, Case No. 09-150 (S. Ct. 2/8/11)

Constitutional Law: Confrontation - Lab Reports Prepared for Trial

Admission into evidence at trial of certificate of state laboratory analysis stating that material seized by police was cocaine violated right of confrontation.
Diaz v. Massachusetts, No. 07-591 (S. Ct. 6/25/09)

Constitutional Law: Confrontation - Forfeiture by Wrongdoing

Forfeiture by wrongdoing exception to the Confrontation Clause applies only when a defendant engaged in conduct designed to prevent the witness from testifying.
Giles v. California, Case No. 07-6053 (S. Ct. 6/25/08)

Constitutional Law: Confrontation - Bruton (Interlocking Confession)

What the "interlocking" nature of the codefendant's confession pertains to is not its *harmfulness* but rather its *reliability*: If it confirms essentially the same facts as the defendant's own confession it is more likely to be true.
Grossman v. McDonough, Case No. 05-11150 (11th Cir. 10/16/06)

Constitutional Law: Confrontation - "Testimonial" (Business and Public Records)

While there is some dispute over the issue, the Second Circuit held that business and public records are, bu their nature, not testimonial for purposes of the Sixth Amendment. Here, noting that New York medical examiners were independent from law enforcement and required to prepare the report regardless of whether there was a criminal prosecution, the court held that the admission of the autopsy report did not violate the confrontation clause.
U.S. v. Feliz, Case No. 02-1665 (2d Cir. 10/25/06)

Constitutional Law: Confrontation - "Testimonial"

Court found statements made during 911 call were not testimonial. Statements made on the scene following the arrival of officers, however, were testimonial.
Davis v. Washington, Case No. 05-5224 (S. Ct. 6/19/06)

Constitutional Law: Confrontation - Crawford (Not Retroactive)

Crawford did not announce a watershed rule of criminal procedure, and it therefore does not apply retroactively to cases on collateral review.
Epsy v. Massac, Case No. 04-16416 (11th Cir. 4/3/06)

Constitutional Law: Confrontation - Crawford (Statements of Co-Conspirators)

Recorded statements of co-conspirator in conversation with the informant were not testimonial and, therefore, the admission of the statements did not violate the confrontation clause.
U.S. v. Underwood, Case No. 04-15740 (11th Cir. 4/25/06)

Constitutional Law: Confrontation - Crawford (Conversation)

The telephone conversation between mother and son with family members present was not testimonial.
U.S. v. Brown, Case No. 04-10325 (11th Cir. 3/13/06);U.S. v. U.S. Infrasrtructure, Inc., Case No. 07-14648 (11th Cir. 7/29/09)

Constitutional Law: Confrontation - Sentencing

The right of confrontation set out in Crawford does not apply to sentencing hearings.
U.S. v. Cantellano, Case No. 05-11143 (11th Cir. 11/15/05)

Constitutional Law: Confrontation -Testimonial Evidence

Testimonial evidence is not admissible without confrontation unless the testifier is unavailable and the defendant has had an opportunity for cross-examination.

U.S. v. Cantellano, Case No. 05-11143 (11th Cir. 11/15/05)
Constitutional Law: Confrontation - Immigration (Warrant of Deportation)
"A warrant of deportation does not implicate adversarial concerns in the same way or to the same degree as testimonial evidence. A warrant of deportation is recorded routinely and not in preparation for a criminal trial. It records facts about where, when, and how a deortee left the country. Because a warrant of deportation does not raise the concerns regarding testimonial evidence stated in Crawford, we conclude that a warrant of deportation si not-testimonial and therefore is not subject to confrontation.
U.S. v. Cantellano, Case No. 05-11143 (11th Cir. 11/15/05)
Constitutional Law: Confrontation - Two-Way Video Teleconference
Trial testimony of government witness by two-way live video teleconference from Australia violated defendants' Sixth Amendment right to confrontation.
U.S. v. Pusztai, Case No. 02-13654 (11th Cir. 2/13/06)(en banc)
Constitutional Law: Confrontation - Crawford (Expectation of Declarant)
The key to answering the question of whether an out-of-court statement qualifies as "testimonial" for purposes of the confrontation clause is whether "a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime."
U.S. v. Summers, Case No. 04-2121 (10th Cir. 7/21/05)
Constitutional Law: Confrontation - Crawford (Breath Test Affidavit)
In a Florida case, the court found the "breath test affidavit" a document prepared for trial to show the breathalyzer had been tested was found to violate Crawford.
Shiver v. State, Case No. 1D03-0636 (1st DCA Mar. 8, 2005)
Constitutional Law: Confrontation- Crawford v. Washington
"Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. . . In this case, the State admitted Sylvia's testimony statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. . . Where testimonial statements are at issue, the only indicium of reliability to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."
Crawford v. Washington, Case No. 02-9410 (S. Ct. 3/8/04)
Constitutional Law: Confrontation - Satellite Transmission of Testimony
Florida Supreme Court decision that testimony of witness be a two way, closed circuit satellite transmission did not violate the right of confrontation.
Harrell v. Butterworth, 14 FLW FedC710 (11th Cir. 5/16/01)

Double Jeopardy

Constitutional Law: Double Jeopardy - Issue Preclusion
Bravo-Fernandez v. U.S., Case No. 15-537 (S. Ct. 11/29/16)
Constitutional Law: Double Jeopardy

Defendant could not be prosecuted for the same offense by both the United States and Puerto Rico as both sovereigns derived their prosecutorial powers from "the same ultimate source."
Commonwealth of Puerto Rico v. Sanchez, Case No. 15-108 (S. Ct. 6/9/16)

Constitutional Law: Double Jeopardy - Jeopardy Attaches Once the Jury is Sworn

Martinez v. Illinois, Case No. 13-5967 (11th Cir. 5/27/14)

Constitutional Law: Double Jeopardy - Informal Report of Jury

Where jury reported it had decided against charges of capital murder and first degree murder, but was deadlocked on manslaughter, returned to deliberate, the jury reported back saying it was deadlocked, and the judge declared a mistrial, all without the return of a formal verdict, the State of Arkansas was free to retry the defendant on the murder charges.
Blueford v. Arkansas, Case No. 10-1320 (S. Ct. 5/24/12)

Constitutional Law: Double Jeopardy - Waiver By Pleading Guilty

A defendant does not waive his double jeopardy claim by pleading guilty if he does not need to go outside the record of the plea hearing to do so.
U. S. v. Smith, Case No. 07-13202 (11th Cir. 6/30/08); U.S. v. Bonilla, Case No. 08-12127 (11th Cir. 8/18/09)

Constitutional Law: Double Jeopardy - Retrial Following Hung Jury Does Not Amount to Double Jeopardy

While an apparent inconsistency between the jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the acquittals' preclusive force under the Double Jeopardy Clause, the jury's failure to reach a verdict is not an event which terminates jeopardy.
Yeager v. U.S., Case No. 08-67 (S. Ct. 3/23/09)

Constitutional Law: Double Jeopardy - Waiver v. Failure to Assert Claim

There is a distinction between the waiver of a double jeopardy claim that comes with the intentional relinquishment of the right and the failure to raise the claim. In the latter instance, the double jeopardy may be reviewed on appeal under the plain error standard.
U.S. v. Lewis, Case No. 06-11876 (11th Cir. 7/17/07)

Constitutional Law: Double Jeopardy - Failure to Appear and Committing a Crime While On Release

Court held that a defendant who fails to appear may be charged with and sentenced for two offenses: Failure to Appear (18 USC § 3146) and Committing a Crime While on Release (18 USC 3147)
U.S. v. Fitzgerald, Case No. 04-4820 (4th Cir. 1/13/06)

Constitutional Law: Double Jeopardy - Mid-Trial Judgment of Acquittal

If after a facially unqualified mid-trial dismissal of one count, the trial has proceeded to the defendant's introduction of evidence, the acquittal must be treated as final, unless the availability of reconsideration has been plainly established by pre-existing rule or case authority expressly applicable to mid-trial rulings on the sufficiency of the evidence.
Smith v. Massachusetts, Case nol 03-8661 (U.S. 2/22/05)

Constitutional Law: Double Jeopardy - Guidelines Consideration and Prosecution OK

The consideration of relevant conduct in determining a sentence does not constitute punishment for that conduct under the double jeopardy clause. That reasoning applies to both mandatory relevant conduct sentencing and upward departures.
U.S. v. Gallego 96-1739(L) (2d Cir. 9/2/99), U.S. v. Gibbs 97-1374 (3d Cir. 8/26/99)

Constitutional Law: Double Jeopardy - Convictions for Related Offenses Arising Out of a Single Incident
While the Double Jeopardy Clause does not bar cumulative punishments stemming from a single incident, absent some authorization from Congress, the Blockburger rule applies.
U.S. v. Stewart, 65 F.3d 918 (11th Cir. 1995); U.S. v. Frazier, 89 F.3d 1501 (11th Cir. 1996); U.S. v. Mendez, 117 F.3d 480 (11th Cir. 1997)
Constitutional Law: Double Jeopardy - Administrative Penalties for Prisoner
Imposition of prison disciplinary sanctions for prisoner's involvement in riot did not constitute punishment for double jeopardy purposes.
U.S. v. Mayes, 12FLW Fed. C231 (11th Cir 10/29/98)

Due Process

Constittional Law: Due Process – Right to a Hearing
N.Y. moratorium on evictions based on Covid-19.
Chrysafis v. Marks, Bi, 21A8, 2021 U.S. LEXIS 3635 (Aug. 12, 2021)
Constitutional Law: Due Process - Defense Access to Mental Health Expert
Though the opinion includes a discussion about the limits of the decision in Ake v. Oklahoma, 470 U.S. 68 (1985), the access to a mental health expert provided by the Alabama trial court failed to help the defense evaluate other mental health reports, did not help the defense in developing strategy or prepare for trial and, therefore, fell short of the assistance required by due process.
McWilliams v. Dunn, Case No. 16-5294 (S. Ct. 6/19/17)
Constitutional Law: Due Process - Prosecutor's Failure to Disclose Material Evidence
Prosecutor's failure to disclose material evidence in this death penalty case required a new trial.
Weary v. Cain, Case No. 14-10008 (S. Ct. 3/7/16)
Constitutional Law: Due Process - Burden of Proving Withdrawal From a Conspiracy
Allocating to a defendant the burden of proving withdrawal does not violate the Due Process Clause.
Smith v. U.S., Case No. 11-8976 (S. Ct. 1/9/13)
Constitutional Law: Due Process - Compulsory Process Rights
The court of appeals rejected the defendant's claim that the government violated his due process or compulsory process rights by deporting aliens who may have testified favorably for him. In reaching that conclusion, the court fund that the defendant had failed to show that there was a reasonable basis to believe that the testimony would be material and favorable to him, and that the government had acted in bad faith in repatriating the aliens.
U.S. v. Suarez, Case No. 08-13675 (11th Cir. 3/31/10)
Constitutional Law: Due Process - Liberty Interest Requires Fair Procedures
When a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication.
Swarthout v. Cooke, Case No. 10-333 (S. Ct. 1/24/11)
Constitutional Law: Due Process - Vagueness (Absent First Amendment Claim, As Applied)
When a vagueness challenge does not involve the First Amendment, the analysis must be as applied to the facts of the case.

U.S. v. Wayerski, Case No. 09-11380 (11th Cir. 10/26/10)
Constitutional Law: Due Process - Opportunity to Be Heard Upon Deprivation of Liberty or Property
The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner upon the deprivation of liberty or property.
U.S. v. Kaley, Case No. 07-13010 (11th Cir. 8/18/09)
Constitutional Law: Due Process - Overbreadth Must Be Substantial
A statute's overbreadth must be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.
U.S. v. Rodriquez, Case No. 06-1646 (S. Ct. 5/19/08)
Constitutional Law: Due Process - Fair Warning
The Fifth Amendment's Due Process Clause harbors within its scope the notion of fair warning: a statute cannot be enforced if it is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.
U.S. v. Hunt, Case No. 06-16641 (11th Cir. 2008); U.S. v. Wayerski, Case No. 09-11380 (11th Cir. 10/26/10); United States v. Eckhardt, Case No. 05-12211 (11th Cir. 10/4/06) ; Holder v. Humanitarian Law Project, Case No. 08-1498 (S. Ct. 6/21/20); McDonald v. U.S., Case No. 15-474 (11th Cir. 4/27/16)
Constitutional Law: Due Process - Florida's Sex Offender Registration Requirements
Court concluded Florida's sex offender registration/notification statute and DNA collection statute did not violate rights of due process, equal protection, travel, separation of powers, and freedom from ex post facto legislation.
Doe v. Moore, Case No. 04-10279 (11th Cir. 6/6/05)
Constitutional Law: Due Process - Rational Basis - Easy Test to Pass
Almost every statute subject to the very deferential rational basis standard is found to be constitutional.
Doe v. Moore, Case No. 04-10279 (11th Cir. 6/6/05)
Constitutional Law: Due Process - Substantive Due Process (Fundamental Rights)
The substantive component protects fundamental rights that are so implicit in the concept of ordered liberty that neither liberty nor justice would exist if they were sacrificed. Fundamental rights protected by substantive due process are protected from certain state actions regardless of the procedures the state uses. When a state enacts legislation that infringes fundamental rights, courts will review the law under a strict scrutiny test and uphold it only when it is narrowly tailored to serve a compelling state interest. The Supreme Court has recognized that fundamental rights include those guaranteed by the Bill of Rights as well as certain liberty and privacy interests implicit in the due process clause and the penumbra of constitutional rights.
Doe v. Moore, Case No. 04-10279 (11th Cir. 6/6/05)
Constitutional Law: Due Process - Defendant's Right to Present Evidence
See: U.S. v. Hurn, Case No. 03-13366 (11th Cir. 5/7/04)
Constitutional Law: Due Process - Right to Present a Defense
U.S. v. Frazier, Case No. 01-14680 (11th Cir. 10/15/04)
Constitutional Law: Due Process - Substantive vs. Procedural
The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." The most familiar function of this Clause is to guarantee procedural fairness in the context of any deprivation of life, liberty, or property by the State. The Due Process Clause's substantive component, however, provides

"heightened protection against government interference with certain fundamental rights and liberty interests."
Williams v. Attorney General of Alabama, Case No. 02-16135 (11th Cir. 7/28/04); Lofton v. Secretary of the Dept. of Children and Family Services, Case No. 01-16723 (11th Cir. 7/21/04)

Constitutional Law: Due Process (Destruction of Evidence)

Even when the destruction occurs during pending discovery and even if the evidence destroyed is the defendant's "only hope for exoneration," the failure to preserve potentially useful evidence does not violate due process unless the defendant can show bad faith on the part of the police.
Illinois v. Fisher, Case No. 03-374 (S.Ct. 2/23/04)

Constitutional Law: Due Process (Substantive - homosexual sexual relationships)

Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the substantive right to liberty under the Due Process Clause**.**
Lawrence v. Texas, Case No. 02-102 (S. Ct. 6/26/03)

Constitutional Law : Due Process (Substantive - Sex Offender Registration)

Still an open question as to whether Connecticut's Sex Offender Registration law violates due process)
Connecticut Dept. of Public Safety v. Doe, 123 S. Ct. 1160 (2003)

Constitutional Law: Due Process (Sex Offender Registration)

Connecticut's procedures did not violate procedural due process.
Connecticut Dept. of Public Safety v. Doe, 123 S. Ct. 1160 (2003)

Constitutional Law: Due Process - Element vs. Sentencing Factor

For a discussion by the Eleventh Circuit, see:
U.S. v. Tinoco, Case No. 01-11012 (11th Cir. 9/4/02)

Constitutional Law: Due Process - Deprivation of Property (Balancing of Factors)

Although not followed in this case involving the delivery of notice to a prisoner regarding a forfeiture proceeding, the court mentioned in passing, the balancing of three factors: (1) the private interest that will affected by the official action, (2) a cost-benefit analysis of the risks of an erroneous deprivation versus the probable value of additional safeguards, and (3) the government's interest, including the function involved and any fiscal and administrative burdens associated with using different procedural safeguards.
Dusenbery v. U.S., 15 FLW FedS48 (1/8/02); City of Los Angeles v. David, Case No. 02-1212 (S. Ct. 5/19/03)

Constitutional Law: Due Process - Rational Basis

The analysis involves two steps. First, identify a legitimate government purpose. Second, determine whether the legislation furthers the purpose.
U.S. vs. Ferreira, 275 f3d 1020 (11th Cir. 2001); Doe v. Moore, Case No. 04-10279 (11th Cir. 6/6/05)

Constitutional Law: Due Process - Substantive Due Process & Incarceration of Indigents for Failure to Pay

It violates substantive due process to incarcerate for a probation violation those who fail to pay fines or restitution despite a good faith effort to pay.
Bearden v. Georgia, 103 S.Ct. 2064 (1983)

Constitutional Law: Due Process - Prosecution's Use of Conflicting Theories

There is a lot of cases raising concerns about the due process implications of separate prosecutions for the same crime under contradictory theories of inconsistent factual premises.
U.S. v. Dickerson, 14 FLW Fed C633 (11th Cir. 4/16/01)

Constitutional Law: Due Process - Giglio Claim of Perjured Testimony
A successful Giglio challenge requires that the defendant establish that the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material. The materiality element is satisfied if the false testimony could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.
U.S. v. Dickerson, 14 FLW Fed C633 (11th Cir. 4/16/01); Ventura v. Attorney General, Case No. 04-14564 (11th Cir. 8/9/05)
Constitutional Law: Due Process - Government's Destruction of Evidence
Seventh Circuit declined to adopt the Ninth's test for determining the appropriate sanction when the government destroys evidence.
U.S. v. Aldaco, 201 F.3d 979 (7th Cir. 2000)
Constitutional Law: Due Process - Facial Validity of A Statute Challenged as Vague
The Court declared the Chicago gang loitering statute unconstitutional.
Chicago v. Morales, 12 FLW Fed S331 (6/10/99)
Constitutional Law: Due Process - Substantive
See Judge Scalia' dissent in Chicago v. Morales, 12 FLW Fed S331 (6/10/99)
Constitutional Law: Due Process - Presentation of False Evidence by the Prosecution
Deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. As a result, due process is violated when the prosecutor, although not soliciting false evidence from a Government witness allows it to stand.
U.S. v. Noriega, 11 FLW Fed C103 (11th Cir. 7/7/97)
Constitutional Law: Due Process - Ex Post Facto - Judicial Alteration
A judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence, must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue. In this instance, Tennessee's application of its decision abolishing the year and a day rule did not deny the defendant's 14th amendment due process guarantees.
Rogers v. Tennessee, 14 FLW FedS229 (5/14/01)
Constitutional Law: Due Process (Element or Sentencing Factor)
In a case involving the charge of an inmate possessing a weapon, the question of whether the inmate intended the object to be used as a weapon was, contrary to the conclusion of the trial court, not an issue for sentencing, but an element of the crime.
U.S. v. Allen, 12 FLW Fed C1301 (11th Cir. 9/29/99)
Constitutional Law: Due Process & Outrageous Government Conduct
U.S. v. Haimowitz, 725 F.2d 1561, 1577 (11th Cir. 1984). U.S. v. Twigg 588 F.3d 373 (8th Cir. 1978) See memo in U.S. v. Nealy, 4:99cr45-WS; U.S. v. Augustin, Case No. 09-15985 (11th Cir. 11/1/11)
Constitutional Law: Due Process -Element or Sentencing Factor
Any factor that increases the maximum sentence must be charged in the indictment, proven at trial, and found by the jury.
Apprendi v. New Jersey, 13 FLW Fed S457 (6/26/2000)

Equal Protection

Constitutional Law: Equal Protection - Basics
The Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike. Yet because of the need for legislators to draw distinctions among groups, a classification that neither burdens a fundamental right nor targets a suspect class will be analyzed using rational basis scrutiny, which means that it will be upheld provided that it bears a rational relation to some legitimate end. Although this is a deferential form of review, a court must still identify legitimate state interests and find a relationship between the classification adopted and the object to be attained.
Lofton v. Secretary of the Dept. of Children and Family Services, Case No. 01-16723 (11th Cir. 7/21/04)(Barkett, J. dissenting opinion).

Ex Post Facto

Constitutional law: Ex Post Facto - Guidelines
District courts may not use newer guidelines to impose harsher sentences.
Peugh v. U.S., Case No. 12-62 (S. Ct. 6/10/13)
Constitutional Law: Ex Post Facto - SORNA
The Sex Offender Registration and Notification Act, even though it applies to those convicted of the sex offense prior to its enactment, does not violate the ex post facto clause.
U.S. v. W.B.H., Case No. 09-13435 (11th Cir. 12/13/11)
Constitutional Law: Ex Post Facto: Booker
Booker decision isn't retroactive.
U.S. v. Varela, Case No. 04-111725 (11th Cir. 2/17/05)
Constitutional Law: Ex Post Facto: Sex Offender Registration
Didn't violate Ex Post Facto Clause.
Smith v. Doe, Case No. 01-729 (S. Ct. 3/5/03)
Constitutional Law: Ex Post Facto: Test for "Civil" Legislation
First step asks whether the legislature intended a civil or criminal consequence. If it is intended to be civil, the courts look behind the classification to the law's substance, focusing on the laws purpose and effects.
Smith v. Doe, Case No. 01-729 (S. Ct. 3/5/03)
Constitutional Law: Ex Post Facto: Conspiracy - Special Rule
Since conspiracy is a continuous crime, a statute increasing the penalty for a conspiracy beginning before the date of enactment but continuing afterwards does not violate the ex post facto clause.
U.S. v. Hersh, Case No. 00-14592 (11th Cir. 7/17/02)
Constitutional Law: Ex Post Facto: Court's Decision Overruling Parole Board's Interpretation
Where Georgia parole board had declined to implement statute limiting parole because of attorney general opinion it violated the Georgia Constitution, and there were lower state court decisions consistent with that opinion, decision of the Georgia Supreme Court to the contrary could be applied retroactively to those convicted prior to the court's decision, but after the legislature's enactment of the statute.
Metheny v. Hammonds, 13 FLW Fed C810 (11th Cir. 7/7/00)

Constitutional Law: Ex Post Facto: Unforeseeable State Court Construction of a Statute
Unforseeable state court construction of a criminal statute applied retroactively can violate the Due Process Clause.
Metheny v. Hammonds, 13 FLW Fed C810 (11th Cir. 7/7/00)
Constitutional Law: Ex Post Facto: Parole Board's Rules Are "Laws"
Parole Board's rules, at least for ex post facto reasons, are "laws" because they were the product of a legislative delegation of power and thus had the force and effect of law.
Metheny v. Hammonds, 13 FLW Fed C810 (11th Cir. 7/7/00)
Constitutional Law: Ex Post Facto: Change in Proof Requirements
Amendment to Texas statute which authorized conviction of certain sexual offenses on victim's testimony alone, as compared to previous statute which required victim's testimony plus other corroborating evidence to convict offender, may not be applied in trial for offenses committed before the amendment's effective date without violating prohibition against ex post facto laws**.**
Carmell v. Texas, 13 FLW Fed S267 (5/1/00)

Miscellaneous

Constitutional Law: Alleyne and Harmless Error
Though the trial court did not require the jury to make a finding regarding the quantity of cocaine necessary to justify the mandatory minimum, the error was harmless as the defendant had stipulated to the quantity of cocaine.
U.S. v. Malone, Case No. 12-15091 (11th Cir. 6/26/14)
Constitutional Law: Relationship Between State and Federal Jurisdiction
We will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiciton.
Loughrin v. U.S., Case No. 13-316 (6/23/15)
Constitutional Law: Sixth Amendment - Alleyne Inapplicable to Prior Convictions
U.S. v. Harris, Case No. 12-14482 (11th Cir. 1/28/14); U.S. v. Smith, Case No. 13-15227 (11th Cir. 12/22/14)
Constitutional Law: Eighth Amendment - Mandatory Life Sentence Due to 851 Enhancement
Mandatory life sentence based on an 851 enhancement that relied upon two predicate offenses that the defendant committed when he was 17 years old did not amount to a violation of the Eight Amendment's prohibition against cruel and unusual punishment**.**
U.S. v. Hoffman, Case No. 12-11529 (11th Cir. 2/26/13)
Constitutional Law: Sixth Amendment (Mandatory Minimum)
With an exception for prior convictions, Government must allege and prove before the fact finder those facts that support a mandatory minimum sentence.
Alleyne v. U.S., 133 S. Ct. 2151 (2013)
Constitutional Law: Pre-Arrest Silence
Where the defendant voluntarily went to the police station and, in the absence of Miranda warnings, answered some questions, but said nothing when asked about shell casings found at the scene of the murder, the prosecutor was free to argue that the defendant's silence was evidence of his guilt.
Salinas v. Texas, Case No. 12-246 (6/17/13)

Constitutional Law: Agencies - Interpretation of a Statutory Ambiguity
An agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under Chevron v. U.S.A. Inc. v. Natural Resources Defense Counsel, Inc, Case No. 11-1547 (S. Ct. 5/20/13)
Constitutional Law: Necessary and Proper Clause - SORNA
The authority extended to Congress through the necessary and proper clause allowed it to enact SORNA legislation that applied to the defendant who had been convicted while in the military of a sex offense and had completed his sentence prior to the enactment of the legislation.
U.S. v. Kebodeaux, Case No. 12-418 (S. Ct. 6/24/13)
Constitutional Law: Miscellaneous - Fifth Amendment and Act of Production
An individual may claim an act of production privilege to decline to produce documents, the contents of which are not privileged, where the act of production is, itself, (1) compelled, (2) testimonial, and (3) incriminating.
In Re: Grand Jury Proceedings, Case No. 4-10 (11th Cir. 2/7/13)
Constitutional Law: Miscellaneous - Stolen Valor Act
Court found the Stolen Valor Act, which punished false statements about military decorations, violated First Amendment.
U.S. v. Alvarez, Case No. 11-210 (S. Ct. 6/28/12)
Constitutional Law: Miscellaneous - Mandatory Life Sentences for Juveniles
Violate the 8th Amendment.
Miller v. Alabama, Case No. 10-9647 (S. Ct. 6/25/12)
Constitutional Law: Miscellaneous - Maritime Drug Law Enforcement Act Unconstitutional
The Maritime Drug Law Enforcement Act, 46 U.S.C. ' 70503(a), 70506, exceeds the power of Congress to "define and punish . . . Offences against the Laws of Nations." U.S. Const. Art. I, § 8, cl. 10 because drug trafficking is not an "Offence [] against the Law of Nations."
U.S. v. Bellaizac-Hurtado, Case No. 11-14049 (11th Cir. 2012)
Constitutional Law: Miscellaneous -Fifth Amendment - Act of Production Can Be Testimonial
An act of production can be testimonial when the act coveys some explicit or implicit statement of fact that certain materials exist, are in the subpoenaed individual's possession or control, or are authentic. The touchstone of whether an act of production is testimonial is whether the government compels the individual to use "the contents of his own mind" to explicitly or implicitly communicate some statement of fact.
In re: Grand Jury Subpoena, Case Nos. 11-12268 & 11-15421 (11th Cir. 2/23/12)
Constitutional Law: Miscellaneous - Confinement of Juvenile for Life for a Non-Homocide Offense Violated Eighth Amendment
Confinement of 16-year old for life for the offense of armed burglary violated the Eighth Amendment's prohibition of cruel and unusual punishment.
Graham v. Florida, Case No. 08-7412 (S. Ct. 5/17/10)
Constitutional Law: Miscellaneous - Necessary and Proper Clause - Civil Commitment of Dangerous Mentally Ill Sex Offenders
Court upheld 18 U.S.C. §4248, which allows for civil commitment of mentally ill sex offenders who are dangerous. The Court held it was an appropriate exercise of the Necessary and Proper Clause, At. I, §8, cl. 18.
U.S. v. Comstock, Case No. 08-1224 (S. Ct. 5/17/10)

Constitutional Law: Miscellaneous: Second Amendment Applicable to States
McDonald v. City of Chicago, Case No. 08-1521 (S. Ct. 6/28/10)
Constitutional law: Miscellaneous: 30-Year Mandatory Minimum Sentence for Crossing State Lines Doesn't Violate Eighth Amendment
The 30-year mandatory minimum for violating 18 U.S.C. §2241(c) (crossing state lines to entice a minor into sexual activity) did not violate the Eight Amendment.
U.S. v. Farley, Case No. 08-15882 (11th Cir. 6/2/10)
Constitutional Law: Miscellaneous - Second Amendment (Possession by an Individual Convicted of Domestic Violence
The law prohibiting someone convicted of a misdemeanor domestic violence offense is a presumptively lawful long standing prohibition and, therefore, does not conflict the Second Amendment right to possess a firearm.
U.S. v. White, Case No. 08-16010 (11th Cir. 1/11/10)
Constitutional Law: Miscellaneous - Second Amendment
Second Amendment protects individual right to possess a firearm unconnected with service in a militia and to use that arm for traditionally lawful purposes, such as self-defense within the home.
District of Columbia v. Heller, Case No. 07-290 (S. Ct. 6/26/08)
Constitutional Law: Miscellaneous - Ex Post Facto (Fair Warning)
The Ex Post Facto Clause operates not to protect an individual's right to less punishment, but rather as a means of assuring than an individual will receive fair warning of criminal statutes and the punishments they carry.
U.S. v. Bordon, No. 04-10654 (11th Cir. 8/25/05)
Constitutional Law: Miscellaneous - Indigent's Right To Retain Expert Witnesses
At least according to the Eleventh Circuit, "it is unclear whether the Sixth Amendment guarantees a defendant the right to a no-psychiatric expert who is crucial to prove his onel defense: self-defense."
In re: Conklin, Case No. 05-13817 (11th Cir. 7/12/05) n. 2.
Constitutional Law: Miscellaneous - Right to Counsel (Appeal)
Due process and equal protection clauses require appointment of counsel for defendants, who entered pleas of guilty or no contest, who seek access to first-tier review in Michigan Court of Appeals.
Halbert . Michigan, Case No. 03-10198 (S. Ct. 6/23/05)
Constitutional Law: Miscellaneous - Privacy
When "the makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . they conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men."
Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J, dissenting, overruled by Berger v. State of New York, 388 U.S. 41 (1967); Williams v. Attorney General of Alabama, Case No. 02-16135 (11th Cir. 7/28/04)(Barkett, J., dissenting)
Constitutional Law: Miscellaneous - Nondelegation Doctrine
Court upheld traffic "laws"promulgated by the Secretary of the Interior for a national seashore.
U.S. Brown, Case No. 03-14265 (11th Cir. 3/31/04)
Constitutional Law: Miscellaneous - General Verdict With Possible Impermissible Basis

In a Florida case involving a conviction for attempted felony murder when the conviction arose after the Florida Supreme Court had ruled it was not a valid theory, the Eleventh Circuit held that the U.S. Supreme Court has not yet clearly established that a conviction based upon two different theories of law, one of which was invalid, violated due process. Accordingly, the Court rejected the defendant's 2255 claim.
Clark v.Crosby, 335 F.3d 1303 (11th Cir. 2003)
Constitutional Law: Miscellaneous - Compelled Self Incrimination and Prison Rehab Programs
Where sex offender treatment program required the prisoner to admit to all prior sexual activities or face certain penalties, the court held that the actions of the prison did not amount to compelled self incrimination.
McKuene v. Lile, 15 FLW Fed S333 (6/10/02)
Constitutional Law: Miscellaneous - Selective Prosecution
In order to establish a selective prosecution claim, the defendant is required to show that the prosecution had a discriminatory effect, i.e., that similarly situated individuals were not prosecuted, and that the difference in treatment or selectivity of prosecution was motivated by a discriminatory purpose.
U.S. v. Smith, 231 F.3d 800 (11th Cir. 2000); U.S. v. Brantley, Case No. 13-12776 (11th Cir. 10/9/15)
Constitutional Law: Miscellaneous - Civil Statute Punitive?
In reviewing Washington's civil commitment act for sexual offenders, the Court held that legislation that is otherwise civil in nature cannot be deemed criminal in a specific instance because of the way it is applied to a particular prisoner. The Court held that the inquiry was limited to a review of the language of the statute.
Seling v. Young, 14 FLW Fed S61 (1/17/01)
Constitutional Law: Miscellaneous - Harmless Error (Structural Error)
See: McIntyre v. Williams, 13 FLW Fed C795 (11th Cir. 6/30/00)
Constitutional Law: Miscellaneous - 8th Amendment Excessive Fines Clause and Forfeiture
By looking at the ridicules fines under the federal drug offenses and federal sentencing guidelines, the court held that the forfeiture of real property valued at $70,000 for a series of drug sales prosecuted in state court that involved $3,250 worth of drugs did not violate the Eighth Amendments Excessive Fines clause.
U.S. v. 817 N.E. 29th Drive, Wilton Manors, Florida, 12 FLW Fed C861 (11th Cir. 5/21/99)
Constitutional Law: Miscellaneous - Separation of Powers (Congress and the Courts)
See Nichols v. Hopper, 12 FLW Fed C741 (11th Cir. 1999)
Constitutional Law: Miscellaneous - Bruton Violation
For an example of one that led to a new trial see:
U.S. v. Ramirez-Perez, 12FLWFedC472 (11th Cir 2/2/99)
Constitutional Law: Miscellaneous - First Amendment (Facial Validity of Statute)
In making a facial challenge to the validity of a statute, the accused bears the burden of proving the law could never be constitutionally applied.
U.S. v. Acheson, 13 FLW Fed C119 (11th Cir. 11/12/99); U.S. v. Salerno, 481 U.S. 739, 745 (1987)
Constitutional Law: Miscellaneous -Harmless Error (Element Omitted From Instructions)

Despite an eloquent dissent by Justice Scalia, the court held that a jury instruction that omits an element of the offense is subject to harmless error analysis. Case includes a thorough discussion of the theory of harmless error.
Neder v. U.S., 119 S.Ct. 1827 (1999)
Constitutional Law: Miscellaneous - Court's Policy is to Avoid Close Calls
"It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional questions."
Ashwander v. TVA, 297 U.S. 288, 346-348 (1936) (Brandeis, Jl, concurring); Richardson v. U.S., 12 FLW Fed S295 (6/1/99)
Constitutional Law: Miscellaneous - Ex Post Facto (In General)
The heart of the Ex Post Facto clause bars application of a law that changes the punishment and inflicts a greater punishment than the law annexed to the crime, when committed.
Johnson v. United States, 13 FLW Fed S308 (5/15/00)
Constitutional Law: Miscellaneous - Congressional Acts Must Flow From Grant of Power
Every law enacted by Congress most flow from a specific constitutional grant of power.
Johnson v. United States, 13 FLW Fed S308 (5/15/00)

Retroactivity of New Law

Constitutional Law: Retroactivity - Hall Not Retroactive
The decision in Hall v. Florida, 134 S. Ct. 1986 (2014), allowing evidence of adaptive deficits within a broader range of IQ test scores, is not retroactive.
Kilgore v. Secretary, Florida Dept. of Corrections, No. 13-11825 (11th Cir. 11/16/15)
Constitutional Law: Retroactivity - Juvenile Mandatory Life Sentences
The decision in Miller v. Alabama that prohibited mandatory life sentences for juveniles applies retroactively. New sentencing hearing not required if parole is provided.
Montgomery v. Louisiana, Case No. 14-280 (S. Ct. 1/25/16)
Constitutional Law: Retroactivity - States Must Give Effect to New Substantive Rules
When a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.
Montgomery v. Louisiana, Case No. 14-280 (S. Ct. 1/25/16)
Constitutional Law: Retroactivity - New Substantive Rules
New substantive rules include, for example, decisions that narrow the scope of a criminal statute by interpreting its terms and constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. Although the rule about substantive rules is sometimes characterized as a Teague exception, such a rule is simply not subject to the Teague retroactivity bar. The principle that this type of substantive rule applies retroactively is independent of Teague - it arises from the Constitution.
Mays v. U.S., Case No. 14-13477 (11th Cir. 3/29/16)
Constitutional Law: Retroactivity - Begay Represents a Substantive Change in the Law
Bryant v. Warden, FCC Coleman, 738 F.3d 1253 (11th Cir. 2013)
Constitutional Law: Retroactivity - Graham v. Florida and Life Sentences for Juveniles
Writing in regard to an order denying rehearing en banc in one of Chet's cases, Judge Pryor, in response to the dissents filed by three of the judges, wrote that the decision in Graham v. Florida, 130 S. Ct. 2011 (2010), that prohibited the automatic imposition of a life sentence on a juvenile

for murder was neither a substantive rule nor a watershed rule of procedure implicating fundamental fairness and accuracy and, therefore, not retroactive.
In re: Morgan, case No. 13-11175 (11th Cir. 6/10/13)
Constitutional Law: Retroactivity - 11th Circuit's Pipeline Rule and Reply Brief or Request for Supplemental Briefing
At least in the 11th Circuit, even if the law changes after the filing of the initial brief, the issue is deemed waived if the claim is not raised in the initial brief. Here, the 11th Circuit concluded that law did not violate the pipeline rule in Griffith v. Kentucky, 479 U.S. 314 (1987).
Constitutional Law: Retroactivity - Teague
For a concise summary of Teague, see:
Danforth v. Minnesota, Case No. 06-8273 (S. Ct. 2/20/08)
Constitutional Law: Retroactivity - Crawford
Crawford did not announce a watershed rule of criminal procedure, and it therefore does not apply retroactively to cases on collateral review.
Whorton v. Bockting, No. 05-595 (S. Ct. 2/28/07) Epsy v. Massac, Case No. 04-16416 (11th Cir. 4/3/06)
Constitutional Law: Retroactivity - Second Exception - "Watershed"
In finding that the ruling in Mills v. Maryland (invalidating a death penalty sentencing scheme that required the jury to find mitigating circumstances unanimously) did not apply retroactively, the Court noted that the second exception to Teague's bar on retroactive application of procedural rules (watershed rules of criminal procedure implicating the fundamental fairness and accuracy of criminal proceedings) the Court wrote "it should come as no surprise that we have yet to find a new rule that falls under the second Teague exception."
Beard v. Banks, Case No. 02-1603 (6/24/04)
Constitutional Law: Retroactivity - Substantive Rules
New substantive rules generally apply retroactively.
Schriro v. Summerlin, Case No. 03-526 (S. Ct. 6/24/04)
Constitutional Law: Retroactivity -New Rule and Pending Cases
When a decision of the Supreme Court results in a "new rule," that rule applies to all criminal cases still pending on direct review.
Schriro v. Summerlin, Case No. 03-526 (S. Ct. 6/24/04)
Constitutional Law: Retroactivity -Procedural Rules
New rules of procedure generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. That a new procedural rule is "fundamental" in some abstract sense is not enough; the rule must be one "without which the likelihood of an accurate conviction is *seriously* diminished. That class of rules is extremely narrow, and it is unlikely that any has yet to emerge.
Schriro v. Summerlin, 124 S. Ct. 2519 (2004)
Constitutional Law: Retroactivity -Clarification of Law
Where the Florida Supreme Court, rather than creating a new rule of law, may have simply clarified what the law regarding pocket knives meant all along, the Court held that it was error to

rely on the principles regarding retroactive application of new interpretations of the law and remanded the case back to the Florida Supreme Court to determine whether the defendant's 2 ½ to 3 inch pocket knife qualified as a weapon for purposes of Florida's armed burglary statute.
Bunkley v. Florida, Case No. 02-8636 (S. Ct. 5/27/03); see also Fiore v. White, 531 U.S. 225 (2001)

Constitutional Law: Retroactivity - S.C. Decisions Re: Substantive Law Retroactive

Decisions of the Supreme Court construing substantive federal criminal statutes must be given retroactive effect.
U.S. v. Peter, Case No. 01-16982 (11th Cir. 10/28/02)

Constitutional Law: Retroactivity - Structural Error?

The standard for determining whether an error is structural is not coextensive with Teague's watershed rules exception.
Tyler v. Warden, 14 FLW Fed S453 (6/28/01)

Constitutional Law: Retroactivity "Watershed Rules"

The exception under Teague for "watershed rules of criminal procedure requires that infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.
Tyler v. Warden, 14 FLW Fed S453 (6/28/01)

Constitutional Law: Retroactivity - Teague Limited to Procedural Rules

Teague's bar does not apply when the Supreme Court decides a new substantive rule of criminal procedure as opposed to a new procedural rule. In this case the Court recognized that the Supreme Court decision in Richardson v U.S., 526 U.S. 813 (1999), in which the S.Ct. concluded that a jury has to agree unanimously about which specific acts make up the continuing series of violations of a continuing criminal enterprise charge.
Ross v. U.S., 15 FLW Fed CC471 (11th Cir. 4/19/02)

Constitutional Law: Retroactivity (Teague)

New rules of constitutional law are not a proper ground for relief in collateral proceedings.
Housel v. Head, 14 FLW C336 (11th Cir. 1/18/01)

Constitutional Law: Retroactivity - Decided by Lower Courts

Unlike second or successive motions, retroactivity need not be established by the Supreme Court if the claim is raised in the first petition.
United States v. Lopez, __ F.3d __, 2000 WL 388092 *3 (5th Cir. April 16, 2001)

Speech

Constitutional Law: Speech - Secret Docketing Procedures

The press and the public's qualified First Amendment right to access criminal proceedings extends to the proceedings' docket sheets. When sealing proceedings or documents, acourt must articulate the overriding interest along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. The court must also provide members of the public and the press who are present with notice and an opportunity to be heard on proposed closure.
U.S. v. Ochoa-Vasquez, Case No. 03-14400 (11th cir. 10/20/05)

Constitutional Law: Speech - Cross Burning

Because it was limited to a from of intimidation that was most likely to inspire fear of bodily harm, the state of Virginia did not violate the First Amendment when they created the crime of cross burning with intent to intimidate. However, because the statute provided that the burning of a cross created a prima facie showing of an intent to intimidate, the Court found the statute violated the First Amendment. That provision invalidated the statute because it ignored the fact that not all cross burnings were conducted for the purpose of intimidation.
Virginia v. Black, Case No. 01-1107 (S. Ct. 4/7/03)
Constitutional Law: Speech - Child Pornography Statute
Those portions of the statute**,** 18 USC 2256, prohibiting virtual images or images that appear to involve minors and any sexually explicit image promoted a depicting minors was found to be unconstitutionally overbroad.
Ashcroft v. The Free Speech Coalition, 15 FLW S187 (4/16/02)
Constitutional Law: Speech - Prior Restraint (Failure to Limit Time for Consideration)
In this case, which involved a federal regulation requiring a permit before anyone could make public expressions of views in a federal park, the Court struck down the regulation because the regulation failed to include a provision that, other than requiring the decision be made "without unreasonable delay," failed to confine the time in which the government could decide whether to issue the permit.
U.S. v. Morris, 13 FLW Fed C685 (11th Cir. 5/25/00)
Constitutional Law: Speech - Prior Restraint Defined
A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs. Although they are not unconstitutional per se, there is a strong presumption against their constitutionality.
U.S. v. Morris, 13 FLW Fed C685 (11th Cir. 5/25/00)
U.S. v. Morris, 13 FLW Fed C685 (11th Cir. 5/25/00)
Constitutional Law: Speech Facial - Challenge to Prior Restraints
The Supreme Court and the 11th Circuit permit facial challenges to prior restraints on speech without requiring the plaintiff to show that there are no conceivable set of facts where the application of the particular government regulation might or would be consitutional.
U.S. v. Morris, 13 FLW Fed C685 (11th Cir. 5/25/00)

Statutory Challenges

Constitutional Law: Statutory Challenges - Alabama Ban on Sale of Sexual Devices
Upheld.
Bailey v. Pryor, 14 FLW C372 (11th Cir. 1/31/01)
Constitutional Law: Statutory Challenges - Deferential Reasonableness Standard
A standard other than that of strict scrutiny and rational relationship, that of a deferential reasonableness standard, applies when a prison regulation infringes an inmates constitutional interests.
Bailey v. Pryor, 14 FLW Fed C51 (11th Cir. 10/12/00)
Constitutional Law: Statutory Challenges - Rational Relationship
If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the law so long as it bears a rational relationship to some legitimate end. Almost every statute subject to the very deferential rational basis scrutiny standard is found to be constitional.
Bailey v. Pryor, 14 FLW Fed C51 (11th Cir. 10/12/00)

Constitutional Law: Statutory Challenges - Strict Scrutiny
Statutes that infringe fundamental rights, or make distinctions based upon suspect classifications such as race or national origin, are subject to strict scrutiny, which requires that the statute be narrowly tailored to achieve a compelling government interest. Most statutes reviewed under the very stringent strict scrutiny standard are found to be unconstitutional.
Bailey v. Pryor, 14 FLW Fed C51 (11th Cir. 10/12/00)
Constitutional Law: Statutory Challenges - Two Constructions
"Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter."
Jones v. U.S., 13 FLW Fed S356 (5/22/00)
Constitutional Law: Statutory Challenges - Facial Challenge to Statute
The general rule in this circuit is that for a facial challenge to be successful, a plaintiff must establish that no set of circumstances exists under which the law would be valid.
U.S. v. Morris, 13 FLW Fed C685 (11th Cir. 5/25/00); Bailey v. Pryor, 14 FLW Fed C51 (11th Cir. 10/12/00)
Constitutional Law: Statutory Challenges - Vagueness
A statute will be held void for vagueness if it does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement.
U.S. v. Acheson, 13 FLW Fed C119 (11th Cir. 11/12/99); U.S. v. Marte, Case No. 02-16722 (11th Cir. 1/13/2004)
Constitutional Law: Statutory Challenges - Overbreadth
The overbreadth doctrine protects the public from the chilling effect such a statute has on protected speech; the court will strike down the statute even though in the case before th court the governmental entity enforced the statute against those engaged in unprotected activities.
U.S. v. Acheson, 13 FLW Fed C119 (11th Cir. 11/12/99)

CONTEMPT

Contempt: Court Erred in Holding Defendant in Contempt for Not Decrypting Hard Drives
Trial court erred for two reasons when it held the defendant in contempt for not decrypting hard drives from his computer. It erred in concluding that Doe's act of decryption and production did not constitute testimony. It also erred, when in granting the defendant immunity, it allowed the Government derivative use of the evidence.
In re: Grand Jury Subpoena Duces Tecum, Case Nos. 11-12268 & 11-15421 (11th Cir. 2/23/12); but see U.S. v. Apple MacPro Comput, No. 15-3537 (3d Cir. 3/20/17)
Contempt: Class A Felony?
There is a debate about the classification and the maximum penalty for contempt.
See: U.S. v. Love, Case No. 05-11141 (11th Cir. 5/18/06); U.S. v. Cohn, Case No. 07-13479 (11th Cir. 9/30/09)
Contempt: Elements

To support a § 401(3) conviction the government must prove (1) that the court entered a lawful order of reasonable specificity; (2) the order was violated; and (3) the violation was willful.
U.S. v. Bernardine, 237 F.3d 1279 (11th Cir. 2001); Romero v. Drummond, Case No. 06-13058 (11th Cir. 3/14/07)

CONTINUANCE

Continuance: Denial Can Undermine Right to Counsel
U.S. v. Valladares, Case No. 07-14592 (11th Cir. 10/9/08)
Continuance: Proper Remedy for Surprise
The remedy for coping with surprise is a request for a continuance.
U.S. v. Battle, 12 FLW Fed C789 (11th Cir. 4/28/99)

CONTINUING CRIMINAL ENTERPRISE

A jury has to agree unanimously about which specific acts make up the continuing series of violations of a continuing criminal enterprise charge.
Richardson v U.S., 526 U.S. 813 (1999)

CORAM NOBIS

Coram Nobis - For Those No Longer in Custody
A writ of error coram nobis is a remedy available to vacate a conviction when the petitioner ha served his sentence and is no longer in custody, as is required for post-conviction relief under 28 USC 2255.
U.S. v. Peter, 310 F.3d 709 (11th Cir. 2002); Gonzalez v. U.S., No 19-11182 (11th Cir. 11/20/20)
Coram Nobis
See: Alikhani v. United States, 13 FLW Fed C349 (11th Cir. 1/11/00)

COURT REPORTERS

Court Reporters: Should Transcribe Audio Tapes Played During Trial
"Optimally, the transcribed testimony of he trial would include a full account of the court proceedings, including a verbatim transcription of all audiotaped and videotaped evidence presented to the jury." In cases of translated testimony, the court reporter should make a notation of the particular page and line of the translated transcript being played.
U.S. v. Charles , Case No. 01-12498 (11th Cir. 12/3/02)

COURTS

Courts: District Court Obligation to Follow Circuit Court Precedent
A district court in this circuit is bound b y this court's decisions.
Fox v. Acadia State Bank, 937 F.2d 1566, 1570 (11th Cir. 1991)
Courts: Delegation of Authority - Issuance of Subpoena
While a court may not delegate a judicial function, 18 USC § 3603(10) authorizes a probation officer to perform any duty the court may designate. Consequently the district judge in marking the box, on the petition for revocation of supervised release, labeled "The Court orders the issuance of a summons" lawfully granted the probation officer the authority to issue a summons. Therefore, the issuance of the summons by the probation officer was tantamount to an order of the court, and the defendant's failure to appear was punishable by contempt of court.
U.S. v. Bernardine, 14 FLW Fed (11th Cir. 1/8/01)
Courts: Supervisory Power
Courts have some limited supervisory powers to formulate rules not specifically required by the Constitution or the Congress.
U.S. v. Hastings, 461 U.S. 499, 505 (1983)

CRIMINAL INTENT

Criminal Intent: Willful Blindness
"Under both the statute and binding precedent in this Circuit, the knowledge element of a violation of a criminal statute can be proved by demonstrating either actual knowledge or deliberate ignorance."
U.S. v. Prather, 13 FLW Fed C440 (11th Cir. 3/7/00)

DEATH PENALTY

Aggravating Circumstances

Death Penalty: Aggravating Circumstances - Pecuniary Gain (Murder Must Be Committed in Expectation of Pecuniary Gain)
The murder itself must be committed in expectation of pecuniary gain.
U.S. v. Brown, Case No. 04-10325 (11th Cir. 3/13/06)
Death Penalty: Aggravating Circumstances - Excessively Vague Non-Statutory Aggravating Factors
Although the error was harmless, a majority of the justices found two non-statutory aggravating factors, the victim's young age, slight stature, background, and unfamiliarity with San Angelo, Texas, and the victim's personal characteristics and the effect of the offense on her family sufficiently vague to allow the jury to count essentially the same circumstance as two aggravating factors.
Jones v. U.S., 12 FLW Fed S403 (6/21/99)
Death Penalty: Aggravating Circumstances - Overbroad If ....

the sentencing jury "fairly could conclude that an aggravating circumstance appliew to every defendant eligible for the death penalty.
Arave v. Creech, 507 U.S. 463, 474 (1993); Jones v. U.S., 12 FLW Fed S403 (6/21/99)
Death Penalty: Aggravating Circumstances - Core Meaning Suffices
As long as an aggravating factor has a core meaning that criminal juries should be capable of understanding, it will pass constitutional muster.
Tuilaepa v. California, 512 U.S. 967, 973 (1994)
Death Penalty: Aggravating Circumstances - Notice Factors Need Not Include Mention of Evidence
When the government provides its notice of intent to seek the death penalty and, as required, lists the aggravating factors it seeks to prove, there is no requirement that it include the circumstances supporting the aggravating factors.
U.S. v. Battle, 12 FLW Fed C789 (11th Cir. 4/28/99)
Death Penalty: Aggravating Circumstances - Non-Statutory (Delegation of Powers Arg)
Delegation to president for establishing non-statutory aggravators OK under the Uniform Code of Military Justice.
Loving v. U.S., 116 S.Ct. 1737 (1996)
Death Penalty: Aggravating Circumstances - Substantial Planning Not Too Vague
U.S. v. Flores, 63 F.3d 1342 , 1373 (5th Cir. 1995)
Death Penalty: Aggravating Circumstances - HCD (Defendant Intended the Abuse)
U.S. v. Hall, 152 F.3d 381, 415 (5th Cir. 1998)
Death Penalty: Aggravating Circumstances - Instruction for HCD
Not unduly vague.
U.S. v. Hall, 152 F.3d 381, 414 (5th Cir. 1998)
Death Penalty: Aggravating Circumstances - HCD Not Too Vague
U. S. v. Webster, 162 F.3d 308 (5th Cir. 1998)

Evidence

Death Penalty: Evidence - Ruled of Evidence Don't Apply to Penalty Phase
U.S. v. Brown, Case No. 04-10325 (11th Cir. 3/13/06)
Death Penalty: Evidence - Penalty Phase (Victim's Husband's Opposition to Death)
Where the issue was raised as a Brady claim, the court held there was no Brady violation when the government failed to disclose that the husband of the victim did not want the death penalty imposed. The Court found that information to be irrelevant.
U.S. v. Brown, Case No. 04-10325 (11th Cir. 3/13/06)
Death Penalty: Evidence of Offenses for Which Defendant Not Convicted
Admissible.
U.S. v. Hall, 152 F.3d 381, 403 (5th Cir. 1998); U.S. v. Webster, 162 F.3d 308, 320 (5th Cir. 1998)
Death Penalty: Evidence - Hearsay Evidence in Penalty Phase
Probably didn't violate confrontation clause.
U.S. v. Hall, 152 F.3d 381, 405 (5th Cir. 1998)

Jury And Jury Instructions

Death Penalty: Jury - Instructions (No Requirement to Instruct Jury that Mitigating Circumstances Need Not Be Proven Beyond a Reasonable Doubt
No Eighth Amendment requirement that jurors be instructed that mitigating circumstances need only be proved to the satisfaction of the individual juror and not beyond a reasonable doubt.
Kansas v. Carr, No. 14-449 (S. Ct. 1/20/16)

Death Penalty: Jury - Selection (Death-Qualification)
In a case where 11 days were devoted to death-qualifying the jury that was reviewed with the deferential standard required by AEDPA, the Court largely deferred to the trial court's largely unsupported conclusion that the juror could not impartially apply the law with regard to the death penalty and upheld the sentence of death.
Uttecht v. Brown, Case No. 06-413 (S. Ct. 6/4/07)

Death Penalty: Jury - Instructions (Absence of Mitigation Does Not Mean Death is Appropriate)
The jury need not find a mitigation circumstance to impose a life sentence.
U.S. v. Brown, Case No. 04-10325 (11th Cir. 3/13/06)

Death Penalty: Jury - Death Qualification and Bifurcated Jury
Court rejected argument.
U.S. v. Brown, Case No. 04-10325 (11th Cir. 3/13/06)

Death Penalty: Jury - Error to Give Instruction Re: Lesser Sentence
When the defendant was charged with kidnapping with death resulting to the victim, 18 USC 1201 (a)(2), the district court erred in instructing the jury that they could recommend, in addition to a sentence of life or death, that the defendant be "sentence to some other lesser sentence. Only option are life or death.
Jones v. U.S., 12 FLW Fed S403 (6/21/99)

Death Penalty: Jury: No Need to Instruct Jury on Consequences of a Hung Penalty Phase Jury
Jones v. U.S., 12 FLW Fed S403 (6/21/99)

Death Penalty: Jury Can't be Affirmatively Misled About Sentencing Role
Romano v. Oklahoma, 512 U.S. 1, 9 (1994)

Death Penalty: Jury - Jury Instructions (Weighing of Aggs and Mits)
Court not required to instruct the jury that they must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors.
U.S. v. Flores, 63 F.3d 1342, 1376 (5th Cir. 1995)

Death Penalty: Jury - Jury Instructions (Alternative of Life in Prison (CCE))
Because the defendant was prosecuted under the continuing criminal enterprise statute there was, in theory, as possibility he could receive a sentence of less than life. Consequently, there was no error in not instructing the jury about the only alternative to death being life imprisonment. At the same time, though, the court went on to say that if in the penalty phase,"the court knows that a twenty-year sentence is highly unlikely, it should, it its discretion, preclude the govenment from arguing that the defendant may be free to murder again in two decades.
U.S. v. Flores, 63 F.3d 1342, 1369 (5th Cir. 1995)

Death Penalty: Jury - Jury Instructions (Alternative of Life in Prison)

When a defendant is legally ineligible for parole and the government uses the defendant's future dangerousness as an aggravator, due process requires that the jury be informed if he is not executed, the defendant will spend the rest of his life in prison.
Simmons v. South Carolina, 114 S.Ct. 2187 (1994); Ramdass v. Angelone, 13 FLW Fed S412 (6/12/00)

Death Penalty: Jury - Jury Selection (Voir Dire Procedure)

"As a whole, the court's plan to question the venire as a group, to allow individual sequestered questioning of jurors who came forward and to permit each side an additional three hours of virtually unrestricted questioning was not an abuse of discretion.
U.S. v. Flores, 63 F.3d 1342 (5th Cir. 1995)

Limits

Death Penalty: Limits - Child Rape

The Eighth Amendment prohibits death penalty for offense of rape of a child where the crime did not result in the death of the victim.
Kennedy v. Louisiana, Case No. 07-343 (S. Ct. 6/25/08)

Death Penalty: Limits - Defendant's Under Age of 18

Execution of those who committed their crimes when they were less than 18 violates the Eighth Amendment's prohibition against cruel and unusual punishment.
Roper v. Simmons, Case No. 03-633 (U.S. 3/1/05)

Death Penalty: Limits - Mental Retardation

"Nothing in our opinion [Atkins v Virginia, 536 U.S. 304 (2002)] suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered."
Tennard v. Dretke, Case No. 02-10038 (S. Ct. 6/24/04)

Miscellaneous

Death Penalty: Miscelleaneous – Ineffective Assistance (Client's Instruction Not to Present Mitigating Evidence and Not to Investigate)

Krawczuk v. Secretary, Fla. Dept. of Corrections, No. 15-15068 (11th Cir. 10/18/17)

Death Penalty: Miscellaneous - Texas Intellectual Disability Test

Fell short of what is required by Atkins v. Virginia, 536 U.S. 304 (2002) and Hall v. Florida,

Death Penalty: Miscellaneous - Double-Edged Sword of Drug and Alcohol Abuse

The court has frequently noted the double-edged nature of drug and alcohol abuse.
Hardwick v. Secretary, Florida Dept. of Corr., Case No. 97-2319 (11th Cir. 9/18/15)

Death Penalty: Miscellaneous - Flynn Effect

Some question of whether the Flynn effect, the claim that IQs have increased over time, is legit.
Ledford v. Warden, Case No. 14-15650 (11th Cir. 3/21/16)

Death Penalty: Miscellaneous - Severance of Penalty Proceedings for Two Defendants

Eight Amendment did not require separate penalty phase proceedings for the two defendants.
Kansas v. Carr, Case No. 14-449 (S. Ct. 1/20/16)

Death Penalty: Miscellaneous - Need for Capital Habeas Unit

Between 1996 and the date fo the opinion 34 of Florida's 397 death row prisoners missed the deadline for filing a 2254 motion. Court suggests one way to combat the problem would be the creation of a capital habeas unit in a Florida federal public defender office. Decision includes the observation that it would not be an abuse of discretion to appoint federal habeas counsel to assist a state prisoner in exhausting his state postconviction remedies before the filing of a 2254 petition.
Lugo v. Secretary, Fla. Dept. of Corrections, Case No. 11-13439 (11th Cir. 4/24/14)
Death Penalty: Miscellaneous -Mental Retardation - Atkins Claim
Where the state court failed to provide the defendant a post-conviction hearing or the funds to develop his claim and the evidence from the trial was that the defendant had an IQ of 75 and may have scored higher on another test, the state court decision was based on an unreasonable determination of the fact in light of the evidence presented. Accordingly, the defendant was entitled to have his Adkins claim considered on the merits in federal court.
Brumfield v. Cain, Case No. 13-1433 (S. Ct. 3/30/15)
Death Penalty: Miscellaneous - Lethal Injection
Court rejected challenge to Oklahoma's method of lethal injection because (1) the prisoners failed to identify a known and available alternative method of execution that entailed a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims and (2) the district court did not commit clear error when it found that prisoners failed to establish that the State's use of a massive dose of midazolam in its execution protocol entailed a substantial risk of great pain.
Glossip v. Gross, Case No. 14-7955 (S. Ct. 4/29/15); Grayson v. Warden, Case No. 2:12cv00316 (11th Cir. 9/1/17)
Death Penalty: Miscellaneous - Florida Statute Unconstitutional
Court found the Florida statute failed the Sixth Amendment requirement that the jury and not the judge find each fact necessary to impose a sentence of death.
Hurst v. Florida, Case No. 14-7505 (S. Ct. 10/13/15)
Death Penalty: Miscellaneous - Lethal Injection - Stay
Court refused to stay execution on the basis of the Glossip case pending before the Supreme Court, holding that grants of certiorari do not themselves change law, and they must not be used by courts as a basis for granting a stay of execution that would otherwise be denied.
Gissendaner . Commissioner, Ga. Dept. of Corr., Case No. 15-10797 (11th Cir. 3/2/15)
Death Penalty: Miscellaneous - Lethal Injection - Baze
Court held that the Supreme Court decision in Baze foreclosed claim that Georgia's lethal injection method of execution created an objectively intolerable risk of harm tha would prevent prison officials from pleading they were subjectively blameless for purposes of the Eighth Amendment.
Gissendaner v. Commissioner, Ga. Dept. of Corr., Case No. 15-10797 (11th Cir. 10797 (11th Cir. 3/2/15)
Death Penalty: Miscellaneous - Lethal Injection Claim
Like all § 1983 claims a challenge to the method of execution is subject to the statue of limitations governing personal injury actions in the state where the challenge is brought. Here, the court concluded that changes to Georgia's lethal injection protocol within the 2 years prior to the filing of the § 1983 claim were not "substantial, " and found that the claims were barred by the statute of limitations.

Gissendaner v. Commissioner, Ga. Dept. of Corr., Case No. 15-10797 (11th Cir. 15-10797 (11th Cir. 3/2/15)

Death Penalty: Miscellaneous - Hall v. Florida Has Not Been Made Retroactive to Cases on Collateral Review

In re Hill, Case No. 15-10192 (11th Cir. 1/26/15)

Death Penalty: Miscellaneous -Mental Retardation - Florida's Test That Relies Upon IQ Score of 70

Florida's law that defines intellectual disability as an IQ score of 70 or less and forecloses all further exploration of the issue, creates an unacceptable risk that persons with intellectual disability will be executed and is, therefore, unconstitutional.

Hall v. Florida, Case No. 12-10882 (S. Ct. 5/27/14)

Death Penalty: Miscellaneous - Summary of Relevant Provisions of the Federal Death Penalty Act

See: U.S. v. LeCroy, Case No. 04-15597 (11th Cir. 3/2/06)

Death Penalty: Miscellaneous - Notice of Intent to Seek Death Penalty - Given a Reasonable Time Prior to Trial

The giving of the notice six months prior to trial is reasonable even if it comes after a number of trial continuances.

U.S. v. Wilk, Case No. 05-12694 (11th Cir. 6/20/06)

Death Penalty: Miscellaneous - Need for a Continuance

It is routine for trial dates to change in murder cases, and even more so in capital cases.

U.S. v. Wilk, Case No. 05-12694 (11th Cir. 6/20/06)

Death Penalty: Miscellaneous - Mitigation and Aggravation in Equipoise

Kansas capital sentencing system, which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise is constitutional.

Kansas v. Marsh, Case No. 04-1170 (S.Ct. 4/25/06)

Death Penalty: Miscellaneous - Indictment (Non-Statutory Factors)

There is no requirement that non-statutory aggravating circumstances must be listed in the indictment.

U.S. v. Brown, Case No. 04-10325 (11th Cir. 3/13/06)

Death Penalty: Miscellaneous - Indictment (Must allege One of the Statutory Factors)

At least one of the statutory aggravating factors must be listed in the indictment. It's not entirely clear whether all of them must be.

U.S. v. Brown, Case No. 04-10325 (11th Cir. 3/13/06)

Death Penalty: Miscellaneous -General Scheme

Once a defendant has been found guilty of a death-eligible crime, there are several findings a jury must make before it may consider the death penalty. First, the statute says that it must find the existence of one of four statutorily proscribed mens rea requirements. Next, if the mens rea requirement is satisfied, the jury also must find the existence of one of sixteen statutorily proscribed aggravating factors. Only after those considerations have been satisfied is the defendant death-eligible. Then, the jury must decide whether all of the statutory and non-statutory aggravating factors sufficiently outweigh the mitigating factors to justify a sentence of death, or, if there are no mitigating factors, whether he aggravating factors alone are sufficient to justify death.

U.S. v. Brown, Case No. 04-10325 (11th Cir. 3/13/06)

Death Penalty: Miscellaneous - Denial of Defense Request for Experts

Court upheld trial court's decision denying defense request for appointment of two experts: one on future dangerousness and a forensic social worker. Court has appointed a mitigation specialist. David Bruck had filed an affidavit.
U.S. v. Brown, Case No. 04-10325 (11th Cir. 3/13/06)

Death Penalty: Miscellaneous Product of Geography?

Three percent of the Nation's counties account for 50% of the Nation's death sentences.
Ring v. Arizona, 122 S. Ct. 2428 (2002)(Breyer, J. concurring opinion)

Death Penalty: Miscellaneous - Ring v. Arizona

The jury must determine any fact on which the legislature conditions an increase in their maximum punishment.
Ring v. Arizona, 122 S. Ct. 2428 (2002), Sattazahn v. Pennsylvania, Case No. 01-7574 (S. Ct. 1/14/03)

Death Penalty: Miscellaneous - Clemency (Due Process)

Some minimal procedural safeguards apply to clemency proceedings even where the power to grant clemency is solely entrusted in the executive.
Parker v. The State Board of Pardons and Paroles, 15 FLW Fed C133 (11th Cir. 12/11/01)

Death Penalty: Miscellaneous - Deterrent?

See: Ring v. Arizona, 122 S. Ct. 2428 (2002)(Breyer, J. concurring opinion)

Death Penalty: Miscellaneous - Double Jeopardy (Sentence of Death Upon Retrial)

In this Pennsylvania case, the jury could not unanimously agree to either a life or death sentence. Pursuant to Pennsylvania law, the trial judge dismissed the jury as hung and imposed a life sentence. Upon winning a new trial, the second jury voted for death. No violation of double jeopardy in that the first verdict did not amount to an acquittal.
Sattazahn v. Pennsylvania, Case No. 01-7574 (S. Ct. 1/14/03)

Death Penalty: Miscellaneous - Hung Jury Means a Life Sentence

While upholding the penalty, the Supreme Court held the opinion in U.S. v. Jones, 132 F3d 232 (5th Cir. 1998) erroneously concluded that a hung penalty phase jury meant only that there would have to be a new sentencing proceeding. What is means is that the defendant must be sentenced to life.
Jones v. U.S., 12 FLW Fed S403 (6/21/99)

Death Penalty: Miscellaneous - Delegation of Means of Execution to the States

is a constitutional delegation of federal power.
U.S. v. Battle, 12 FLW Fed C789 (11th Cir. 4/28/99)

Death Penalty: Miscellaneous - Victim Impact (Deterrence)

Court, in a case involving the murder of a prison guard, properly admitted testimony from prison guards that since the murder the inmates had felt free to make verbal threats, and that, in the opinion, of the guards the execution would help restore order to the prison.
U.S. v. Battle, 12 FLW Fed C789 (11th Cir. 4/28/99)

Death Penalty: Miscellaneous - Ineffective Assistance of Counsel

A fairly rare example of someone winning a new sentencing hearing because of ineffective assistance of counsel.
Collier v. Turpin, 12 FLW Fed C657 (11th Cir. 3/29/99)

Death Penalty: Miscellaneous - Racial Disparity

Statistical evidence that 66% of federal death penalty cases involved black defendants did not present stark enough picture to show that defendant was singled out for selective prosecution.
U. S. v. Webster, 162 F.3d 308 (5th Cir. 1998)

Death Penalty: Miscellaneous - State's Mental Health Exam Conducted Prior to Trial
The court held that the court had the inherent authority to order an exam, and that it could take place prior to the trial.
U.S. v. Hall, 152 F.3d 381, 398 (5th Cir. 1998)
Death Penalty: Miscellaneous - State's Mental Health Expert Exam of Defendant
Although there is no statutory authority the trial court has the inherent power to order an examination.
U.S. v. Webster, 162 F.3d 308, 338 (5th Cir. 1998)
Death Penalty: Miscellaneous - Closing Argument (Future Murders if Not a Death Sentence)
In this Alabama case the Court found "no impropriety" in the state prosecutor's argument that the jury would be responsible for future murders by the defendant or others like him if they didn't vote for death. The Court concluded that the jury reasonably interpreted the remarks as referring to either specific or general deterrence.
Duren v. Hopper, 12 FLW Fed C263 (11th Cir. 11/20/98), see also: Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985)
Death Penalty: Miscellaneous - Ake v. Oklahoma and Need for Experts
The court upheld the Alabama court's decision refusing to appoint a psychologist for the defense. The pretrial motion "merely listed several statutory mitigating factors and baldly asserted a need for the requested medical experts to assist in determining whether mitigators existed. Neither in the motion nor at the hearing on the motion was the judge given any factual support for the possibility that one or more of such mitigating circumstances might exist."
Duren v. Hopper, 161 F.3d 655 (11th Cir. 11/20/98)

Mitigation

Death Penalty: Mitigation - Evidence of Innocence
Where alibi evidence could have been presented during the guilt phase, the trial court did not err in excluding that alibi evidence from the penalty phase.
Oregon v. Guzek, Case No. 04-928 (11th Cir. 2/22/06)
Death Penalty: Mitigation - Obligation to Investigate Mitigating Circumstances
A capital defendant's instructions not to present mitigating evidence at the penalty phase of his trial do not release defense counsel from the constitutional and professional obligation to conduct an investigation into potential mitigation evidence.
Summerlin v. Schriro Case No. 98-99002 (9th Cir. 10/17/05)(en banc)
Death Penalty: Mitigation - Obligation to Investigate Mitigating Circumstances
Even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of the trial.
Rompilla v. Berd, Case No. 04-5462 (S.Ct. 6/20/05)

DEFENSES

Defenses: Entrapment-by-Estoppel
In contrast to a public a uthority defense, which potentially protects a defendant who knowingly engages in acts that he recognizes to be in violation of the law, an entrapment-by-estoppel defense applies to a defendant who reasonably relies on the assurance of a government official that specified conduct will not violate the law.
U.S. v. Alvarado, Case No. 13-14843 (11th Cir. 12/11/15)
Defenses: Public Authority
A defendant may assert a public authority affirmative defense when he has knowingly acted in violation of a federal criminal law, but has done so in reasonable reliance on the authorization of a governmental official.
U.S. v. Alvarado, Case No. 13-14843 (11th Cir. 12/11/15)
Defenses: Reliance on Advice of Counsel
To qualify for an instruction on good faith reliance upon advice of counsel, a defendant must show (1) that he fully disclosed to his attorney all material facts that are relevant to the advice for which he consulted the attorney; and (2) thereafter, he relied in good faith on advice given by his attorney.
U.S. v. Alcindor, Case No. 07-14602 (11th Cir. 6/14/11); U.S. v. Tobin, Case No. 09-13944 (11th Cir. 4/12/12)

DETENTION

Detention: Child Pornography
Even possession of child pornography is a crime of violence for purposes of 18 U.S.C. § 3142(f) and 3143 as 18 U.S.C. § 3156(a)(4)(C) defines a crime of violence as any offense under Chapter 110.
Detention: Following Entry of Guilty Plea
Looks like the requirement of detention in many cases following the entry of a guilty plea, hold even if adjudiation is withheld.
U.S. v. Wills, No. 19-40019-03-DDC, 2020 U.S. Dist. LEXIS 66095 (D. Kan. April 15, 2020)
Detention: Right to Call Adverse Govt Witness at Detention Hearing
The judge has discretion to allow the defense to call an adverse govt. witness to negate the determination of whether there is a substantial probability the defendant committed the offense.
U.S. v. Gaviria, 828 F.2d 667 (11th Cir. 1987)
Detention: Illegal Aliens Facing Criminal Charges
ICE can't detain illegal aliens who have been released under the Bail Reform Act.
U.S. v. Trujillo-Alvarez, 900 F.Supp.2d 1167 (D.Or. 10/29/12); U.S. v. Blas, 2013 WL 5317228 (S.D.Ala. 9/20/13)
Detention: Release Pending Sentencing - Exceptional Circumstances & 18 U.S.C. § 3145(c)
Following a guilty plea or a guilty verdict, 18 U.S.C. § 3143 seemingly requires the court to remand someone to custody whose offense is a crime of violence, which includes such things as child porn, and drug offenses. Section 3145(c) of Title 18, however, allows the defendants

release "if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate."
U.S. v. Christman, 596 F.3d 870 (6th Cir. 2010); U.S. v. Meister, 744 F.3d 1236 (11th Cir. 2013)

Detention: Defendant's Testimony at Detention Hearing Inadmissible at Trial

In those cases where there is a presumption of dangerousness, if the defendant testifies at the detention hearing, his testimony is not admissible at trial thanks to the judicial grant of use-fruits immunity.
U.S. v. Perry, 788 F.2d 100 (3d Cir. 1986)

Detention: Search and Drug Testing as a Condition of Pretrial Release

The Fourth Amendment does not permit warrantless drug testing or home searches as a condition of pretrial release.
U.S. v. Scott, Case No. 04-10090 (9th Cir. 9/9/05)

Detention: Limited

In U.S. v. Salerno, 481 U.S. 739 we stressed that the Bail Reform Act "was not a scattershot attempt to incapacitate those who are merely suspected of serious offenses, and held that due process allowed some pretrial detention because the Act confined it to a sphere of real need when the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community.
Moore v. Kim, Case No. 01-1491 (S. Ct. 4/29/03) (Sutter, J., concurring and dissenting)

Detention: Poss. of Firearm by Convicted Felon - Crime of Violence?
Eleventh Circuit says it isn't. D.C. Circuit says it isn't.

See: U.S. v. Johnson, Case No. 04-16502 (11th Cir. 2/14/05);U.S. v. Singleton, 182 F.3d 7 (D.C. Cir. 1999); U.S. v. Shirley, 189 F.Supp.2d 966 (W.D. Missouri 2002); U.S. v. McCrimon, Case No. 4:03-CR-57-SPM (N.D.Fl. 10/27/03)

Detention: Possession of a Destructive Device is a Crime of Violence

Possession of a destructive device is an offense that is a "crime of violence" and for which a detention hearing is authorized.
U.S. v. Jay, Case No. 03-M-3114, 02. (M.D. Fla 11/26/03)

Detention: Offense of Possession of a Short-Barreled Shotgun is a Crime of Violence

Possession of a short-barreled shotgun is an offense that is a crime of violence and for which a detention hearing is authorized.
U.S. v. Sloan, 820 F. Supp 1133 (S.D. Ind. 1993)

Detention: Only in Limited Circumstances (Those listed in 3142(f))

"The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious crimes. See 18 U.S.C. § 3142(f) (detention hearings available if case involves crimes of violence, offenses for which the sentence is lime imprisonment or death, serious drug offenses, or certain repeat offenders)."
United States v. Salerno, 481 U.S. 739, 747, 107 S. Ct. 2095, 2101 (1987); United States v. Ploof, 851 F.2d 7, 11 (1st Cir. 1988); United States v. Dillard, 214 F.3d 88, 91 (2d Cir. 2002); United States v. Himler, 797 F.2d 156, 160 (3d Cir. 1986); United States v. Byrd, 969 F. 2d 106, 109 (5th Cir. 1992); United States v. Singleton, 182 F.3d 7, 9 (D.C. Cir. 1999); see also motion & memo in Dennis Maxey's case 4:02cr41-RH; U.S. v. Jay, Case No. 03-M-3114, 02. (M.D. Fla 11/26/03); U.S. v. Giordano, 370 F.Supp.2d 1256 (S.D. Fla 2005); but see: U.S. v. Megahed, Case No. 8:07cr342 (M.D. Fla. 10/25/07)

Detention: Defendant's Right to Call Adverse Witness at Detention Hearing

Defendant has only a conditional right to call adverse witnesses at a detention hearing.

U.S. v. Gaviria, 828 F.2d 667 (11th Cir. 1987)
Detention: Government's Use of Proffer OK
U.S. v. Gaviria, 828 F.2d 667 (11th Cir. 1987)
Detention: Presumption of Flight & Danger - Burden of Persuasion Remains With Govt.
The presumption places upon the accused only the burden of coming forward with evidence to rebut it. The government retains the burden of persuasion. Even, though, the presumption is rebutted, it remains a factor for the judge to consider.
U.S. v. Martir, 782 F.2d 1141 (2nd Cir. 1986)
Detention: Proffer - Judge's Responsibility for Assessing
The judge retains the responsibility for assessing the reliability and accuracy of the government's information, whether presented by proffer or by direct proof.
U.S. v. Martir, 782 F.2d 1141 (2nd Cir. 1986)
Detention: Hearing Isn't a Mini-Trial nor Discovery Mechanism for the Defendant
U.S. v. Martir, 782 F.2d 1141 (2nd Cir. 1986)
Detention: Failure to Challenge Accuracy of Govt. Proffer
The defendant's failure to question the reliability of the govt. proffer, in the eyes of the appellate court justified the trial court's acceptance of the proffer as accurate.
U.S. v. Martir, 782 F.2d 1141 (2nd Cir. 1986)

DISCOVERY

Brady & Giglio

Discovery: Prosecutor's Failure to Disclose Material Evidence
Court concluded that prosecutor's failure to disclose material evidence violated Due Process.
Weary v. Cain, Case No. 14-10008 (S. Ct. 3/7/16)
Discovery: Brady & Giglio - New Trial Awarded for Failure to Disclose Monetary Payment
State habeas petitioner won a new trial based on a Giglio violation when the State failed to disclose a $500 reward paid to a State witness.
Guzman v. Secretary, Dept. Of Corrections, Case No. 10-11442 (11th Cir. 10/27/11)
Diccovery: Brady & Giglio - Information in Possession of State Investigators
Knowledge of information that state investigators obtain is not imputed for Brady purposes to federal investigators who conduct a separate investigation when the separate investigative teams do not collaborate extensively.
U.S. v. Naranjo, Case No. 08-13814 (11th Cir. 3/2/11)
Discovery: Brady & Giglio - Prosecutor's Obligation to Investigate Perjury by Govt. Witness
A prosecutor's obligation to reveal perjury by one of its witnesses includes a duty to investigate allegations of perjury.
Morris v. Yist, Case No. 05-99002 (9th Cir. 5/9/06)
Discovery: Brady - Giglio
In order to prevail under Giglio the defendant must show (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2)

such use was material - i.e., that there is any reasonable likelihood that the false testimony could have affected the judgment.
Davis v. Terry, Case No. 04-13371 (11t Cir. 9/26/06)
Discovery: Brady - Duty to Disclose Exists Even in the Absence of a Request
Maharaj v. Secretary for the Dept. of Corrections, Case No. 04-14669 (11th Cir. 12/15/05)
Discovery: Brady - Brady Applicable to Information Relevant to Motion to Suppress?
Doesn't seem to be a consensus.
U.S. v. Stott 245 F.3d 890 (7th Cir. 2001). Ninth Circuit says that under some circumstance it is, U.S. v.Barton, 995 F.2d 931, 934 (9th cir. 1993); Fifth says it is Smith v. Black, 904 F.2d 950, 965-96 vacated on other grounds 503 U.S. 930 (1992), and Fourth assumes it applies: U.S. v. Williams, 10 F.3d 1070, 1077 (4th Cir. 1993)
Discovery: Brady - Work Product
"Neither the Supreme Court nor this court has decided whether Brady requires a prosecutor to turn over his work product."
Williamson v. Moore, 13 FLW Fed C950 (11th Cir. 8/8/2000)
Discovery: Brady - New Trial Only If Reasonable Probability Outcome Would Be Different
If there is to be a new trial the defendant must convince the appellate court that there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.
Strickler v. Greene, 12 FLW Fed S361 (6/17/99)
Discovery: Brady - Cause for Failure to Raise Claim in State Court
Petitioner demonstrated cause for failing to raise Brady claim prior to federal habeas proceedings because petitioner reasonably relied on prosecution's open file policy as fulfilling the prosecutions duty to disclose exculpatory evidence, and state confirmed petitioner's reliance on open file policy by asserting during state habeas proceedings that petitioner had already received everything known to the government.
Strickler v. Greene, 12 FLW Fed S361 (6/17/99); Mincey v. Head, 13 FLW Fed C473 (11th Cir. 3/16/00)
Discovery: Brady - Giglio Exceptions
While even mere advice by a prosecutor concerning the future prosecution of a key government witness concerning the future prosecution of a key government witness may require disclosure, a promise to speak "a word" on the witness's behalf does not need to be disclosed, nor does a prosecutor's statement that he would "take care" of the witness.
Tarver v. Hopper, 12 FLW Fed C597 (11th Cir. 3/11/99)
Discovery: Brady - Agreements Between Government and Witnesses
Government must disclose agreements that might motivate a witness to testify.
Giglio v. U.S. 405 U.S. 150 (1972), Tarver v. Hopper, 12 FLW Fed C597 (11th Cir. 3/11/99)
Discovery: Brady - In General
Kyles v. Whitley 115 S.Ct. 1535 (1995); Strickler v. Greene, 12 FLW Fed S361 (6/17/99); Young v. State, 24 FLW S277 (6/10/99); Mincey v. Head, 13 FLW Fed C473 (11th Cir. 3/16/00); Carr v. Schofield, Case No. 02-11488 (11th Cir. 3/31/04); Davis v. Terry, Case No. 04-13371 (11t Cir. 9/26/06)
Discovery: Brady - Materiality of Undisclosed Evidence

First, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. Thus, undisclosed evidence can require a new trial even if it is more likely than not that a jury seeing the new evidence would still convict. Second, a defendant need not show there was insufficient evidence to convict in view of the suppressed evidence. Third, there is not harmless error review of Bagley errors. Fourth, materiality is to be determined collectively not item by item.
U.S. v. Scheer, 12FLW Fed C543 (11th Cir. 2/25/99); Maharaj v. Secretary for the Dept. of Corrections, Case No. 04-14669 (11th Cir. 12/15/05)

Discovery: Brady - Covers Both Exculpatory and Impeachment Evidence

In the case of impeachment evidence, a constitutional error may derive from the government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross examination.
U.S. v. Scheer, 12FLW Fed C543 (11th Cir. 2/25/99)

Jencks Act

Discovery: Jencks Act - "Substantially Verbatim"

As used in the Jencks Act, "substantially verbatim" means using the nearly exact wording or phrasing the witness uttered during the interview; if only some of the exact wording is used, it is not Jencks material. Whether a 301, raw notes, or other government document contains sufficiently extensive verbatim recitation to come within the Act is a matter of fact to be determined by the trial court.
U.S. v. Jordan, 316 F.3d 1215 (11th Cir. 2003)

Discovery: Jencks Act - Defense Obligation to Disclose Statements of Defense Witnesses

See Fed. R. Cr. P. 26.2 and U.S. v. Nobles, 422 U.S. 225 (1975)

Discovery: Jencks Act - Possession of a Federal Prosecutorial Agency

A statement is in the possession of the United States for Jencks Act purposes if it is in the possession of a federal prosecutorial agency.
U.S. v. Naranjo, Case No. 08-13814 (11th Cir. 3/2/11)

Discovery: Jencks Act - "Substantially Verbatim"

For purposes of the Jencks Act, a statement is "substantially verbatim" if it uses the nearly exact wording or phrasing that the witness uttered during the interview. If only some of the exact wording is used, it is not Jencks material. Phrases or isolated sentences identical to the language used by the witness, don't qualify. Whether a 302, raw notes, or other government document contains sufficiently extensive verbatim recitation to come within the Act is a matter of fact to be decided by the trial court.
U.S. v. Jordan, 316 F.3d 1215 (11th Cir. 2003); U.S. v. Merrill, 685 F.3d 1002 (11th Cir. 2012)

Discovery: Jencks Act - Statements Must be Requested by Defense

The general rule for Jencks Act materials is that a defendant is required to request disclosure following the witness's direct testimony.
U.S. v. Schier, Case No. 05-11838 (1th Cir. 1/31/06)

Discovery: Jencks Act - Disclosure Prior to Trial Is Customary In Some Districts

"In some cases, if the prosecutor trusts defense counsel and, moreover, is satisfied that an earlier production of a Jencks statement will not lead to mischief, such as witness intimidation, the

prosecutor may turn it over before the witness is to testify. Indeed, it is customary in many jurisdictions for the government to produce Jencks material prior to trial."
U.S. v. Jordan, 316 F.3d 1215 (11th Cir. 2003)

Discovery: Jencks Act - FBI 302 Report & Jencks Act

An interviewer's raw notes, and anything prepared from those notes (such as an FBI 302), are not Jencks Act statements of the witness unless they are substantially verbatim and were contemporaneously recorded, or were signed or otherwise ratified by the witness. If, however, the agent is called as a witness, these statements - depending on the scope of the agent's testimony on direct examination - may constitute Jencks material.
U.S. v. Jordan, Case No. 00-15828 (11th Cir. 1/6/03); U.S. v. Merrill, Case No. 11-11432 (11th Cir. 6/27/12)

Discovery: Jencks Act - Statement

A Jencks Act statement is either (1) "a written statement signed or otherwise adopted or approved by the witness," or (2) "a 'substantially verbatim recital' of an oral statement made by a witness." When an agent takes notes while interviewing a witness, those notes are not statements "unless the witness 'signed, read, or heard the entire document read.'"
U.S. v. Flores, 63 F.3d 1342 (5th DCA 1995); U.S. v. Valera, 845 F.2d 923 (11th Cir. 1988); U.S. v. Cole, 634 F.2d 866 (5th Cir. 1981)

Miscellaneous

Discovery: Miscellaneous – Right to Discover Identit of Informant to Challenge Search Warrant

No right to it in the 11th Circuit. U.S. v. Cartwright, 183 F.Supp.3d 1348 (M.D. Ga. 2016), but see U.S. v. Kiser, 716 F.2d 1268 (9th Cir. 1983)

Discovery: Miscellaneous - Right to Discover Identity and Whereabouts of Informant

See Rovario v. U.S., 353 U.S. 53 (1957); U.S. v. McDonald, 935 F.2d 1212 (11th Cir. 1991)

Discovery: Miscellaneous - Right of Press to Access Judicial Proceedings Does Not Include Discovery Material

Romero v. Drummond, Case No. 06-13058 (11th Cir. 3/14/07)

Discovery: Miscellaneous - Voluminous Materials & Discovery

"The defendant's complain that the Government's discovery was so voluminous that it hindered their pretrial preparation. The discovery was indeed voluminous - because the Government gave the defense access to far more information and materials than the law required. . . . If they had insufficient time to sort things out, they should have asked for a continuance.
U.S. v. Jordan, Case No. 00-15828 (11th Cir. 1/6/03)

Discovery: Miscellaneous - Government's Obligation to Disclose Identity of Informants

See: U.S. v. Rutherford, 175 F.3d 899 (11th Cir. 1999); U. S. v. Harrington, 951 F.2d 876 (8th Cir. 1991); U.S. v. Rodney, Case No. 92-3035, 1993 U.S. App. LEXIS 20030 (6th Cir. 7/26/03)(unpub.)

Discovery: Miscellaneous - Government's Knowing Use of False Testimony

A conviction obtained by the knowing use of false testimony, including testimony that reflects on the credibility of a witness, will be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury, or where the prosecutor's failure to respond to a discovery request misled the defense and created a reasonable probability that, had

the evidence been disclosed to the defense, the result of the proceedings would have been different.
Carr v. Schofield, Case No. 02-11488 (11th Cir. 3/31/04)
Discovery: Miscellaneous - Government's Obligation to Make Copies
While the Rule 16 does not require the Government to make copies of discovery materials, the district court has the discretion to require the government to do so, especially where the defendant is indigent.
U.S. v. Jordan, Case No. 00-15828 (11th Cir. 1/6/03)
Discovery: Miscellaneous - Historical Explanation for Limited Nature of Federal Discovery
See: U.S. v. Ruiz, Case No. 01-595 (6/24/02)
Discovery: Miscellaneous - State Public Records
Florida's Public Records Act is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited to their designated purposes. "There is no statutory exemption from disclosure of an 'on going federal prosecution.' "
Woolling v. Lamar, 764 so2d 765 (5th DCA 2000)`
Discovery: Miscellaneous - State Public Records (Claim of Exemption Requires Specificity)
If a state agency, including the state attorney, claims an exemption, the agency must identify with specificity either the reasons why the records were believed to be exempt, or the statutory basis for any exemption. The burden is on the agency to demonstrate entitlement to an exemption. If an exemption is claimed, there should be an in camera inspection of the records.
Weeks v. Golden, 25FLWD996 (1st DCA 4/20/00)
Discovery: Miscellaneous - Confidential Informants
If disclosure is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.
U.S. v. Rutherford, 175 F3d 899 (11th Cir. 1999); Rovario v. U.S., 353 U.S. 53 (1957)

Rule 16

Discovery: Rule 16 - Not Applicable to Sentencing
"Rule 16 does not authorize a new round of discovery before sentencing."
U.S. v. Neal, 611 F.3d 399 (7th Cir. 2010)
Discovery: Rule 16 - Statements of the Defendant Used in Response to Cross-Examination
During the course of trial, the Government used undisclosed statements of the defendant during its redirect of an officer. Court held the Government's failure to disclose statements made by the defendant to law enforcement officers did not amount to a violation of Rule 16 because Government "did not intend to use them at trial." Rule 16 requires disclosure of statements only if the Government intends to use them at trial.
U.S. v. Perez-Oliveros, Case No. 06-12757 (11th Cir. 2/22/07)
Discovery: Rule 16 - Reports Made by State or Local Law Enforcement Officers
While concluding that reports made by state or local law enforcement officers are "documents" as described by Rule 16(a)(1)(E), the Court of Appeals concluded that another section of Rule 16, (a)(2), which excludes "internal government documents made by an attorney for the government or other government agent in connection with investigation or prosecuting the case" exempted the reports from disclosure. The opinion includes a strong dissent and citation to a couple of old district court decisions that have concluded otherwise.

U.S. v. Fort, 472 F.3d 1106 (9th Cir. 2007)
Discovery: Rule 16 - Statements Made by Defendant to Those Other Than Law Enforcement
Statements by the defendant to those other than law enforcement officers in response to interrogation don't need to be provided under Rule 16.
U.S. v. Taylor, Case No. 04-10667 (11th Cir. 7/19/05)
Discovery: Rule 16 - Doesn't Apply to Rebuttal Testimony
Rebuttal witnesses, including experts, are an exception to all witness disclosure requirements.
U.S. v. Frazier, Case No. 01-14680 (11th Cir. 10/15/04)
Discovery: Rule 16 - Brady May or May Not Cover Same Material
While some courts have held that the government's requirement, under Rule 16(a) to disclose tangible objects and documents that are material to the preparation of the defendant's defense, is the equivalent to the holding in Brady, the issue isn't settled.
U.S. v. Jordan, Case No. 00-15828 (11th Cir. 1/6/03)
Discovery: Rule 16 - Documents and Items Material to the Preparation of the Defense
The government need not disclose those documents and tangible items that are material to the preparation of the defendant's defense unless the defendant demonstrates that those items are material to his defense. A general description of the item will not suffice, nor will a conclusory argument that the requested item is material to the defense. Rather, the defendant must make a specific request for the item together with an explanation of how it will be helpful to the defense.
U.S. v. Jordan, Case No. 00-15828 (11th Cir. 1/6/03)
Discovery: Rule 16 - Materials Possessed by Agency Closely Connected to Prosecutor
While Rule 16(a) only applies to materials within the "possession, custody, or control of the government" requirement includes materials in the hands of a governmental investigatory agency closely connected to the prosecutor.
U.S. v. Jordan, Case No. 00-15828 (11th Cir. 1/6/03)

DIVISIBILITY

Florida's drug trafficking statute, Fla. Stat. § 893.135, is divisible.
Spaho v. U.S. Attorney General, Case No. 15-112299 (11th Cir. 9/19/16)
Drugs & Narcotics - Florida's Drug Trafficking Statute is Indivisible
Cintron v. U.S. Atty. Gen, Case No. 15-12344 (11th Cir. 2/20/18)

DRUGS & NARCOTICS

Conspiracy

Drugs & Narctoics: 851 Requirements Not Jurisdictional
U.S. v. Difalco, Case No. 15-14763 (11th Cir. 9/20/16)
Drugs & Narcotics: Conspiracy - Drug Quantity Must be Reasonably Foreseeable

In determining a defendant's penalty under 21 USC 841(b) for a violation of 21 USC 846, the drug quantity must be reasonably foreseeable to the defendant where the effect of the quantity is to require the imposition of the statutory minimum sentence.
U.S. v. O'Neal, Case No. 03-10559 (11th Cir. 3/19/04)
Drugs & Narcotics: Conspiracy - Buyer/Seller Relationship
A buyer seller relationship does not a conspiracy make.
U.S. v. Mercer, 165 F.3d 1331 (11th Cir. 1999); U.S. v. Thompson, Case No. 04-12218 (11th Cir. 9/1/05)

Drugs

Drugs & Narcotics: Drugs - Cocaine Base, As Used in Statute, Not Limited to Crack
The term "cocaine base," as used in 18 U.S.C. § 841, includes all forms of cocaine base and is not limited to "crack cocaine."
DePierre v. U.S., Case NO. 09-1533 (S. Ct. 6/9/11)
Drugs & Narcotics : Drugs - GHB & 1,4-Butanediol
The chemical structure of 1,4-butanediol is substantially similar to gamma hydroxybutyric acid (GHB) so that it is considered a controlled substance analogue.
U.S. v. Brown, Case No. 03-15459 (7/8/05)
Drugs & Narcotics: Drugs - Analogue Act (GBL)
Analogue Act as applied to gamma-butyrolactone, GBL, is not unconstitutionally vague. Defendants had constitutional notice that GBL was a controlled substance analogue of GHB.
U.S. vs. Fisher, 289 F.3d 1329 (11th Cir. 2002)
Drugs & Narcotics: Drugs - LSD - Weight
In its typical form, where the LSD is sprayed on some carrier medium, the weight of the medium is not used to determine the base offense level. Rather, each dose is treated as equal to .4 milligrams. In the case of liquid LSD, the full weight of the liquid is not to be included. Rather it is the weight of the pure LSD alone that should be used to calculate the offense level.
U.S. v. Camacho, 261 F.3d 1071 (11th Cir. 2001)
Drugs & Narcotics: Drugs - D-Meth and L-Meth
D-methamphetamine produces the physiological effects desired by the drug's users, L-methamphetamine has little or no physiological effect, is not made intentionally but results from a botched attempt to produce D-methamphetamine, and is utterly worthless.
Jones v. U.S., 13 FLW Fed C1063 (11th Cir. 8/29/00)
Drugs & Narcotics: Drugs - Crack Cocaine - Melting Point or Water Solubility?
Although there is apparently an argument about the designation of a substance as crack cocaine based on melting point or water solubility, the court rejected it.
U.S. v. Charles, No. 98-2046 (1st Cir. 5/24/00)
Drugs & Narcotics: Drugs - All Cocaine Base Isn't Crack
The guidelines have defined cocaine base as "crack," but not all cocaine base is crack. There is, at least, one form of cocaine base that is liquid and that should be treated as plain 'ol cocaine. May be other forms.
U.S. v. Adams, 125 F.3d 586 (7th Cir. 1997); U.S. v. Garrett 97-2070 (9/1/99)
Drugs & Narcotics: Drugs - 11th Cir. Says Guidelines Definition of "Cocaine Base" Isn't Vague

The guidelines definition of "crack is not unconstitutionally vague, nor is it sufficiently ambiguous to invoke the rule of lenity.
U.S. v. Williams, 876 F.2d 1521, 1525 (11th Cir. 1989); U.S. v. Sloan, 97 F.3d 1378, 1382 n. 8 (11th Cir. 1996); U.S. v. Rutherford, 12 FLW Fed C848 (11th Cir. 5/13/99)

Indictment

Drugs & Narcotics: Indictment - Possession of Two Separate Quantities at Different Locations on the Same Day
Court held that where the defendant possessed two separate quantities of crack cocaine at two different locations on the same day, the government properly charged the offense in a single count.
U.S. v. Clay, Case No. 02-15369 (11th Cir. 1/7/03)
Drugs & Narcotics: Indictment - Conspiracy Involving Different Drugs
See: Black v. U.S., Case No. 03-113388 (11th Cir. 6/16/04); Edward v. U.S. 523 U.S. 511 (1998); United States v. Riley, 142 F.3d 1254 (11th Cir. 1998)

Miscellaneous

Drugs & Narcotics - Florida's Drug Trafficking Statute is Indivisible
Cintron v. U.S. Atty. Gen, Case No. 15-12344 (11th Cir. 2/20/18)
Drugs & Narcotics - Conviction Based on Number of Plants - Possession by Co-Conspirators Sufficient
"The evidence did not need to show Defendant *himself* possessed 1,000 or more marijuana plants with intent to distribute. Instead, the Government needed to prove Defendant joined a conspiracy that had the object of manufacturing or possession with intent to distribute more than 1,000 plants.
U.S. v. Curbelo, Case No. 10-14665 (11th Cir. 8/9/13)
Drugs & Narcotics: Miscellaneous - Florida's Controlled Substance Offense Counts as Predicate for Armed Career Criminal Act and Career Offender Provision
Neither the definition of "serious drug offense" under the career offender act nor the definition of a "controlled substance offense" requires that the defendant know he was distributing or intending to distribute a controlled substance. Accordingly, Fla. Stat. §893.13(1)(c)(e) counts as a predicate offense.
U.S. v. Smith, 775 F.3d 1262 (11th Cir. 2014)
Drugs & Narcotics: Miscellaneous - Multiple Drugs in Single Count - Verdict Form
Defendant is entitled to a special verdict form if multiple drugs are charged in a single count and carry different penalties.
U.S. v. Danner, 344 Fed. Appx. 495 (11th Cir. 2009)
Drugs & Narcotics - Miscellaneous - Criticism of Govt Use of Mandatory Minimum to Coerce a Plea
U.S. v. Kpa, 976 F.Supp2d 417 (E.D. N.Y. 10/9/13) (Gleeson)
Drugs & Narcotics - Miscellaneous - Death Caused by Distribution
At least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under hte

penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for-cause of the death or injury.
Burrage, v. U.S., Case No. 12-7515 (S. Ct. 1/27/14)
Drugs & Narcotics - Miscellaneous - Govt. Need Not Prove Defendant Had Knowledge of the Drug Type
Although the jury must determine the quantity and type of drug involved, nothing in the statute, the Construction, or Apprendi requires the Government to prove that the defendant had knowledge of the particular drug type or quantity for which a sentence is enhanced under § 841(b). Unlike § 841(a), § 841(b)'s penalty scheme imposes no mens rea requirement.
U.S. v. Sanders, Case No. 10-13667 (11th Cir. 2/2/12)
Drugs & Narcotics: Miscellaneous - Physicians (Govt. Doesn't Have to Prove Physician Knew He Was Acting Illegally)
18 U.S.C. §841 requires only that the Government prove defendant acted "knowingly," not "willfully."
U.S. v. Tobin, Case No. 09-13944 (11th Cir. 4/12/12)
Drugs & Narcotics: Miscellaneous - Physicians ("Usual Course of Professional Practice)
A jury must determine from an objective standpoint whether a prescription is made in the usual course of professional practice.
U.S. v. Tobin, Case No. 09-13944 (11th Cir. 4/12/12)
Drugs & Narcotics: Miscellaneous - Sentencing - Inquiry Regarding Predicate Offense/s
Assuming the Government complies with its obligation to file an information pursuant to 21 U.S.C. §851(a) advising the defendant of the prior convictions the Government intends to rely upon to enhance the sentence, the sentencing court fulfills its obligation if it substantially complies with its obligation to ask the defendant if it has been convicted of the predicate offense or offenses.
U.S. v. James, Case No. 10-10399 (11th Cir. 6/9/11)
Drugs & Narcotics: Miscellaneous - Florida's Drug Crimes Unconstitutional
Shelton v. Secretary Dept. Of Corrections, Case No. 6:07cv839 (M.D.Fla. 7/27/11)(Scriven, J.)
Drugs & Narcotics: Miscellaneous - Enhanced Penalty for Death
18 U.S.C. §841(b)(1)(C) requires only that death resulted form the use of a controlled substance dispensed by the defendant. The Government need not show proximate cause between the conduct of the defendant and the defendant's death.
U.S. v. Webb, Case No. 10-10574 (11th Cir. 9/12/11)`
Drugs & Narcotics: Miscellaneous - Fair Sentencing Act
Because the Fair Sentencing Act became law in August of 2010, after the defendant committed his crime, it was inapplicable to him.
U.S. v. Gomes, Case No. 10-11225 (11th Cir. 10/1/10)
Drugs & Narcotics : Miscellaneous - Use of Telephone to Facilitate Felony Drug Distribution
Using a telephone to make a misdemeanor drug purchase does not "facilitate" felony drug distribution in violation of 18 U.S.C. §843(b).
Abuelhawa v. U.S., Case No. 08-192 (S. Ct. 5/26/09)
Drugs & Narcotics: Miscellaneous - 851(a)(1) Notice of Prior Convictions

While the statutory requirement is strictly construed, in this instance where the notice was filed prior to the entry of the guilty plea and a second one was filed after the plea correcting a minor error in the initial document, the initial notice was sufficient to comply with the statute.
U.S. v. Ramirez, Case No. 06-16404 (11th Cir. 9/11/07)

Drugs & Narcotics: Miscellaneous - Pharmacist Dispensing Drugs

"if the drug-dispensing pharmacist knows that a customer not only lacks a valid prescription but also will not use the drugs for legitimate medical purposes, then section 841 applies in full flower and treats the dispenser like a pusher."
U.S. v. Limberopoulos, 26 F.3d 245 (1st Cir. 1994); U.S. v. Steele, 12 FLW Fed (11th Cir. 6/25/99)

Drugs & Narcotics: Miscellaneous - Sharing With Friends Doesn't Equal Distribution

See: U.S. v. Hardy, 895 F.3d 1331 (11th Cir. 1990); U.S. v. Dekle, 165 F.3d 826 (11th Cir. 1999)

Drugs & Narcotics: Miscellaneous - Intent to Share With Friends' Intent to Distribute

United States v. Washington, 41 F.3d 917 (4th Cir. 1994); United States v. Layne, 192 F.3d 556 (6th Cir. 1999)

Drugs & Narcotics: Miscellaneous - Drug Testing of Students

Requirement that all students participating in extra-curricular activities agree to urinalysis testing did not violate 4th Amendment.
Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, Cse No. 01-332 (6/27/02)

Drugs & Narcotics: Miscellaneous - Racial Disparity in Enforcement of Drug Laws

In the state of Florida blacks are 13.4 times more likely to be arrested and imprisoned for drug offenses than whites even though whites make up over 85% of the population and use and traffic in drugs five times more than blacks.
See the District Court opinion, from south Florida of: U.S. v. Cofield, 108 F.Supp.2d 1374, 14 FLW D19 (8/14/00)

Drugs & Narcotics: Miscellaneous - Government Need Prove Only a Controlled Substance

The government is not required to prove the particular substance involved, only that the substance is a controlled substance.
U.S. v. Rutherford, 12 FLW Fed C848 (11th Cir. 5/13/99)

Drugs & Narcotics: Miscellaneous - Continuing Criminal Enterprise ("Series of Violations")

The "series of violations" required by the statute are elements of the offense. Consequently, specific incidents of criminal activity must be alleged and proven.
Richardson v. U.S., 12 FLW Fed S295 (6/1/99)

Possession

Drugs & Narcotics: Possession - Boxes in Car

On the basis of a tip, officers searched a ship arriving from Haiti. In the course of their surveillance, officers observed one individual place boxes in defendant's car. When the defendant attempted to drive away, officers stopped him, searched his car, and found 111 bricks of cocaine. Court of appeals vacated the conviction, stressing that federal drug statutes require that the defendant know he was in possession of a controlled substance.

U.S. v. Louis, Case No. 16-11349 (11th Cir. 7/10/17)
Drugs & Narcotics: Possession - Constructive Possession
Jury instruction that states that constructive possession of a thing occurs if a person exercises ownership, dominion, or control over the area where the contraband is found was erroneous because it negates the intentionality requirement.
U.S. v. Cochran, Case No. 11-11923 (11th Cir. 6/14/12)
Drugs & Narcotics: Possession - Knowledge of Drugs Found in Vehicle
Knowledge can be inferred when the defendant exercises control over a vehicle in which an illegal substance is concealed, but when the substance is hidden in a secret compartment, there must also be circumstances evidencing a consciousness of guilt on the part of the defendant.
U.S. v. Almanzar, Case No. 10-11481 (11th Cir. 3/4/11)
Drugs & Narcotics: Possession - Constructive Possession (Residence)
A person who owns or exercises dominion and control over a residence may be deemed to be in constructive possession of the contraband.
U.S. v. Thompson, Case No. 05-15052 (11th Cir. 12/27/07)
Drugs & Narcotics: Possession - Constructive Possession (Presence and Knowledge Not Enough)
A defendant's mere presence in the area of he contraband or awareness of its location is not sufficient to establish possession.
U.S. v. Thompson, 473 F.3d 1137 (11th Cir. 2007)
Drugs & Narcotics: Possession - Physical Possession' Actual Possession?
See: U.S. v. Batimana, 627 F.2d 1366, 1370 (9th Cir. 1980)(Fletcher, J. concurring); Campbell v. State, 577 So.2d 932 (Fla. 1991); Hamilton v. State, 732 So.2d 493 (2d DCA 1999)
Drugs & Narcotics: Possession - Drugs in Plain View My Be Sufficient to Establish Knowledge
Fact that drugs were in plain view, coupled with defendant's arrest 9 months earlier for a drug offense, and evidence that "linked" the defendant to "a crack house" a short distance from where the stop took place was sufficient to support he defendant's conviction.
U.S. v. Wilson, 12 FLW Fed C1186 (11th Cir. 8/12/99)
Drugs & Narcotics: Possession - Defendant's Mere Presence in Car Insufficient
The defendant's presence in a car containing drugs is not, by itself, sufficient to prove that defendant knew of the presence of the drugs.
U.S. v. Stanley, 24 F.3d 1314, 1320 (11th Cir. 1994); but see: U.S. v. Wilson, 12 FLW Fed C1186 (11th Cir. 8/12/99); U.S. v. Diaz-Boyzo, Case No. 04-15629 (11th Cir. 12/14/05)
Drugs & Narcotics: Possession - Inspection Isn't Possession
U.S. v. Edwards, 12 FLWFed C492 (11th Cir. 2/11/99)
Drugs & Narcotics: Possession - Actual/Constructive Possession (Definitions)
U.S. v. Edwards, 166 F.3d 1362 (11th Cir. 1999); U.S. v. Cooper, 203 F.3d 1279 (11th Cir. 2000)

Sentencing

Drugs & Narcotics: Sentencing - Mandatory Minimums and Scope of the Agreement
Does the determination of drug quantity for purposes of the mandatory minimum limited by the scope of the agreement? See U. S. v. O'Neal, 362 F.3d 1310 (11th Cir. 2004), vacated on other grounds by Sapp v. U.S., 543 U.S. 1107 (2005); U.S. v. Jones, 965 F.2d 1507, 1517 (8th Cir. 1992); U. S. v. Irvin, 2 F.3d 72 (4th Cir. 1993)

Drugs & Narcotics: Sentencing - 851 (Predicate Part of Instant Offense?)
See: U.S. v. Cheney, 2007 U.S. Dist. LEXIS 55256 (N.D. Iowa 7/27/07)
Drugs & Narcotics: Sentencing - Fair Sentencing Act (Applies to Resentencings)
The Fir Sentencing Act, which increased the threshold amounts for mandatory minimum sentences, applies to those who are resentenced after August 3, 2010, regardless of when they committed the crime.
U.S. v. Hinds, Case No. 11-16048 (11th Cir. 4/9/13)
Drugs & Narcotics: Sentencing - 851 Information (Service on the Defendant)
Where the defendant had actual knowledge of the existence of the 851 information, but the Government apparently did not serve either the defendant or defense counsel with it, the trial court could not impose the enhanced sentence. Case includes a complicated series of facts where the AUSA handed the information to the judge who failed to hand it to the clerk, and the judge inquired of the defendant whether he knew of the consequences that flowed from the filing of the information. Critically, though, the document was apparently not handed to the defense lawyer and never electronically filed.
U.S. v. Ladson, Case No. 10-10151 (11th Cir. 6/24/11)
Drugs & Narcotics: Sentencing: Mandatory Minimum - Quantity Must Be Reasonably Foreseeable
In a drug conspiracy case, the mandatory minimum is based on the quantity reasonably foreseeable to the defendant.
U.S. v. Bacon, 598 F.3d 772 (11th Cir. 2010)
Drugs & Narcotics: Sentencing: Misdemeanor Counts as a Predicate?
A drug offense classified as a misdemeanor by state law, but which carries a penalty greater than one year counts as a "felony drug offense" as that term is used in 21 U.S.C. §841(b)(1)(A).
Burgess v. U.S., Case No. 06-11429 (S. Ct. 3/24/08)
Drugs & Narcotics: Sentencing - Foreseeability Determines Mandatory Minimum
The application of the mandatory minimum is determined by the test of foreseeability. It is a matter that may be determined by the trial court on the basis of the greater weight of the evidence.
United States v. O'Neal, 362 F.3d 1310, 1315-16 (11th Cir. 2004)
Drugs & Narcotics : Sentencing - Mandatory Life Sentence (Conspiracy: Timing)
Where the amount of crack cocaine sold after the defendant's second felony drug conviction was less than 50 grams, the mandatory life sentence was still applicable because the conspiracy that started before the second conviction and ended after it involved more than 50 grams.
U.S. v. Williams, Case No. 06-10302 (11th Cir. 11/13/06)
Drugs & Narcotics: Sentencing - Adjudication Withheld Still Supports 841 Enhancement
"We conclude that state offense in which the defendant pleads nolo contendere and adjudication is withheld pending completion of probation constitutes a "prior conviction" for purposes of the enhancement provision of 21 U.S.C. § 841. Every circuit that has considered this issue has reached the same conclusion."
U.S. v. Fernandez, 58 F.3d 593, 600 (11th Cir. 1995)
Drugs & Narcotics: Sentencing - Enhancement For Prior Drug Felonies (Distinct Acts Within Single Conspiracy)
If the multiple convictions arise from acts distinct in time, even though they may have been part of a larger conspiracy, they are separate criminal episodes for purposes of the sentencing enhancement.

U.S. v. Pace, 981 F.2d 1123, 1132 (10th Cir. 1992); U.S. v. Hughes, 924 F.2d 1354, 1361-1362 (6th Cir. 1990); U.S. v. Geer, Case No. 03-20566 (S.D. Fla. 6/2/04)

Drugs & Narcotics: Sentencing - Enhancement For Prior Drug Felonies (Must Be Separate Incidents)

The enhancement provisions under 21 USC 841 require that the two prior convictions be separate and distinct acts.

U.S. v. Anderson, 76 F.3d 685 (6th Cir. 1996)

Drugs & Narcotics: Sentencing - Mandatory Life Sentence Inapplicable to Conspiracy?

Although an argument can be made to that effect, the court said "no."

U.S. v. Walker, 14 FLW Fed C12 (11th Cir. 9/26/00)

Drugs & Narcotics: Sentencing: Mandatory Minimum Based On Drugs For Offense of Conviction

Mandatory minimum sentences are to be based only on the quantity of drugs involved in the offense of conviction.

United States v. Santos, 195 F.3d 549 (10th Cir. 1999)

Drugs & Narcotics: Sentencing - Meth (Methods for Calculating Quantity)

Guidelines provide two different ways for calculation, for guideline purposes, the quantity of methamphetamine. One method is based on the actual weight of the meth contained in the mixture, the other is based on the weight of the entire mixture containing a detectable amount of meth. Court says use of different methods OK.

U.S. v. Fairchild, 98-2311 (8th Cir. 9/7/99); U.S. v. Kessler, 321 F.3d 699 (8th Cir. 2003)

Drugs & Narcotics: Sentencing: Unconstitutional Priors and Mandatory Minimums

Under 21 USC s. 851(e) can't attack predicate convictions as unconstitutional if they occurred more than 5 years prior to the filing of the "information," the document alleging the priors.

U.S. v. Layne, 97-5097 (6th Cir. 9/16/99)

Drugs & Narcotics: Sentencing - Mandatory Minimum (Relevant Conduct Consideration)

Only those drugs involved in the charged conduct should be used to determine whether the mandatory minimum applies.

U.S. v. Darmand, 3 F.3d 1578, 1581 (2nd Cir. 1993);, U.S. v. Estrada, 42 F.3d 28 (4th Cir. 1994); U.S. v. Winston, 37 F.3d 235 (6th Cir. 1994); U.S. v. Harris 39 F.3d 1262 (4th Cir. 1994); U.S. v. Santos, 98-1344 (10th Cir. 9/8/99)

Drugs & Narcotics: Sentencing - Notice Requirements for Enhancement Under 851(a)(1)

The government's failure to file a timely notice precludes enhancement even if the defendant knew before trial he was subject to enhancement because of his prior convictions, and even if the defendant doesn't challenge the validity of those convictions. Likewise it is error to impose an enhanced sentence if the notice fails to specifically list the prior convictions.

U.S. v. Rutherford, 12 FLW Fed C848 (11th Cir. 5/13/99); U.S. v. Gonzalez, 12 FLW Fed C1174 (11th Cir. 8/13/99)

Drugs & Narcotics: Sentencing - Moisture in Cocaine Counts

U.S. v. McGrady, 97 F.3d 1042 (8th Cir. 1996); U.S. v. Floeal 163 F.3d 956 (6th Cir. 1998); U.S. v. Hill 79 F.3d 1477 (6th Cir. 1994); U.S. v. Thomas 11 F.3d 956 (6th Cir. 1993)

Drugs & Narcotics: Sentencing - 100 to 1 Ratio of Powdered Cocaine to Crack Cocaine

Even though the 10 year minimum applies to both crimes involving 50 grams of crack 5,000 grams of powdered cocaine, and thereby results in these long sentences being disproportionally handed out to blacks, there is no violation of the Equal Protection Clause.

U.S. v. Matthews, 12FLW Fed C535 (11th Cir 3/1/99); U.S. v. Wilson, 12 FLW Fed C1186 (11th Cir. 8/12/99)

ENTRAPMENT

Entrapment: Predisposition - Absence of Evidence Showing Defendant Visited Illicit Websites
In a case where the defendant was charged with soliciting a minor to engage in sexual activity, the trial court erred in excluding testimony from investigating officer who examined defendant's computer that there was no evidence the defendant hd visited "websites dedicated to sex with minors."
U.S. v. Ruggerson, Case No. 14-15536 (11th Cir. 5/12/16)
Entrapment: Predisposition
The Government need not produce evidence of predisposition prior to its investigation. Predisposition may be demonstrated by the defendant's ready commission fo the charged crime.
U.S. v. Kamensky, Case No. 12-13474 (2/14/13)
Entrapment: Irresistible Temptation?
See U.S. v. Sistrunk, Case No. 09-12798 (11th Cir. 10/7/10)
Entrapment: Defense Applicable to Charge of Possession of a Firearm By Convicted Felon
U.S. v. Sistrunk, Case No. 09-12798 (11th Cir. 10/7/10)
Entrapment: Sentencing Entrapment and Apprendi
Case suggests that given the holding in Apprendi, sentencing entrapment might be a viable defense.
U.S. vs. Ryan, 15 FLW Fed C538 (11th Cir. 5/2/02)
Entrapment: In General
A successful entrapment defense consists of two elements: 1) government inducement of the crime, and 2) lack of predisposition on the part of the defendant. The defense bears the initial burden of production as to government inducement. Once the defendant meets his burden, the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime.
U.S. vs. Ryan, 15 FLW Fed C538 (11th Cir. 5/2/02); U.S. v. Orisnord, Case No. 05-14659 (11th Cir. 4/11/07); U.S. v. Padron, Case No. 07-11228 (11th Cir. 5/13/08); U.S. v. Sistrunk, Case No. 09-12798 (11th Cir. 10/7/10); U.S. v. Rutgerson, Case No. 14-5536 (11th Cir. 5/12/16)
Entrapment: By Estoppel
Entrapment by estoppel is an affirmative defense that provides a narrow exception to the general that igonrance of the law is no defense. To assert this defense successfully, a defendant must actually rely on a point of law misrepresented by an official of the state; and such reliance must be objectively reasonable - given the identity of the official, the point of law represented, and the substance of the misrepresentation.
U.S. v. Eaton, 12 FLW Fed C1015 (11th Cir. 7/7/99); U.S. v. Funches, 135 F.3d 1405, 1407 (11th Cir. 1998); U.S. v. Thompson, 25 F.3d 1558, 1564 (11th Cir. 1994)

ESCAPE

Escape: From Fenceless Facility
As the prison camp at Eglin did not have a fence around it, the defendant was entitled to the 4 level decrease in the offense level provided in USSG 2P1.1(b)(3).
U.S. v. Agudelo, 768 F.Supp. 339 (N.D. Fla. 1991)
Escape: Defendant Planned to Return Within 96 Hours
Although the defendant was caught before he returned, the judge was of the view that the defendant intended to return within 96 hours and granted him a 7 level downward departure, consistent with USSG 2P1.1(b)(2) that provides a 7 level downward adjustment when the defendant actually returns in 96 hours.
U.S. v. Birchfield, 709 F.Supp. 1064 (M.D. Ala. 1989)

ETHICS

Ethics: Responsibility to Disclose Adverse Authority
Judge Kovachevich points out obligation.
Temples v. Crow, 13 FLW Fed D74 (10/20/99)

EVIDENCE

Character Evidence

Evidence: Character Evidence - Questions Assuming Guilt
The Government may not ask a reputation or an opinion character witness questions that assume the defendant is guilty of the charged crimes.
U.S. v. Hough, Case No. 14-12156 (11th Cir. 9/9/15)
Evidence: Character Evidence - Cross-Examination Re: Specific Instances of Conduct
Once a witness provides character evidence on direct examination, the opposing party can cross-examine the witness on relevant specific instances of conduct.
U.S. v. Hough, Case No. 14-12156 (11th Cir. 9/9/15)
Evidence: Character Evidence - Hypothetical Questions Assuming Guilt
In an opinion that probably conflicts with decisions in other circuits, the court held that the prosecutor could legitimately ask a character witness hypothetical questions assuming guilt. While the court held that such questioning was permissible in cases of witnesses such as the one in this case who offered their opinion of the defendant's character, the court held that such questioning would not have been permissible had the witness testified about the defendant's reputation.
U.S. v. Kellogg, Case No. 05-1893 (3rd Cir. 12/7/07)
Evidence: Character Evidence - Questioning Character Witness About Conduct Relevant to the Trait in Question
District court erred when it allowed the government to ask defense character witnesses who had testified to the defendant's reputation for truthfullness about whether they knew the defendant

had sent a neighbor a note saying that the two of them could keep each other company when their respective spouses were at work.
U.S. v. Ndiaye, Case No. 04-11283 (11th Cir. 1/6/06)
Evidence: Character Evidence - Testimony About Credibility of Another Witness
The Federal Rules of Evidence preclude a witness from testifying as to the credibility of another witness. Rule 608(a) restricts a party from attacking or supporting a witness' credibility save through evidence referring only to character for truthfulness or untruthfulness.
U.S. v. Henderson, Case No. 04-11545 (11thCir. 5/23/05)
Evidence: Character Evidence - Truthful Character
Pointing out inconsistencies in a witnesses testimony and arguing the witnesses testimony is not credible isn't the same thing as attacking the witnesses truthful character. Accordingly, despite the government's challenge to the defendant's trial testimony, evidence of the defendant's reputation for truthfulness was not admissible pursuant to Rule 608.
U.S. v. Drury, Case No. 02-12924 (11th Cir. 1/18/05)
Evidence: Character Evidence - Officer's Opinion of Informant
Once defense began attacking the credibility of the informant, the prosecution was apparently free to ask the police officer: "What is your opinion as to the informant's character for truthfulness?"
U.S. v. Marshall 173 F.3d 1312 (11th Cir. 1999); 12FLW Fed C753 (11th Cir. 4/26/99)
Evidence: Character Evidence - Specific Prior Acts
"Federal Rule of Evidence 405 generally prohibits the use of specific prior acts as proof of character to show action in conformity with a character trait evidenced by the behavior. Evidence of prior conduct may, however, be used as circumstantial evidence of a non-character issue, such as motive, intent, opportunity, knowledge, or other issues material to the charge. Where impeachment is concerned, Rule 608(b) provides that the trial court may in its discretion permit questioning about a witness' prior bad acts on cross-examination, if the acts bear on the witness' character for truthfulness. If the witness denies the conduct, such acts may not be proved by extrinsic evidence and the questioning party must take the witness' answer, unless the evidence would be otherwise admissible as bearing on a material issue of the case."
U.S. v. Matthews, 12FLW Fed C535 (11th Cir 3/1/99)
Evidence: Character Evidence - CrossX for Specific Instances of Misconduct
Once a defendant calls a character witness, Federal Rule of Evidence 405(a) allows the government to cross-examine that witness regarding their knowledge of specific instances of the defendant's misconduct. In order to help the jury evaluate the quality of the character testimony. The government may not, however, pose hypothetical questions that assume the guilt of the accused in the case being tried.
U.S. v. Guzman, 167 F.3d 1350 (11th Cir. 1999)

Collateral Crimes

Evidence: Collateral Crimes - Nolo Plea
Except in those states that require a showing by the preponderance of the evidence that facts exist to support a plea of nolo contendere, a judgment based on a nolo contendere plea does not meet the requirements of Rule 404(b).
U.S. v. Green, Case No. 14-12830 (11th Cir. 11/30/16)

Evidence: Collateral Crimes - Part of Same Scheme
Rule 404(b) is the wrong place to begin the analysis when the evidence of the uncharged conduct is part of the same scheme or series of transactions and uses the same modus opreandi. Such evidence is admissible as intrinsic evidence outside the scope of the Rule if it is linked in time and circustancew with the charged crime and concerns the context, motive or setup of the crime; or forms an integral part of the crime; or is necessary to complete the story of the crime.
U.S. v. Ford, Case No. 14-10381 (11th Cir. 4/28/15)
Evidence: Collateral Crime - 404(b) (Propensity Can't Serve as Necessary Link)
U.S. v. Smith, 725 F.3d 340 (3rd Cir. 2013)
Evidence: Collateral Crime - Bank Robbery
Although ultimately concluding evidence of other bank robberies were admissible, the court of appeals applied a reasonably stringent test in determining whether the collateral crime evidence was admissible.
U.S. v. Whatley, Case No. 11-14151 (11th Cir. 6/3/13)
Evidence: Collateral Crime - 22-Year-Old-Drug Conviction Is Too Old
While stating that "virtually any prior drug offense is probative of the intent to engage in a drug conspiracy," the court concluded the 22-year-old conviction for a street-level sale of 1.4 grams of marijuana was too old to be admitted in a case involving a charge of conspiring to traffic in 153 kilograms of cocaine. The error, though, was harmless.
U.S. v. Sanders, 668 F.3d 1298 (11th Cir. 2012)
Evidence: Collateral Crime - Rule 404(b) Applies to Impeachment Evidence
U.S. v. Bradley, Case No. 06-14934 (11th Cir. 6/29/11)
Evidence: Collateral Crime - Evidence of Modus Operandi Must Be A Signature Crime
When extrinsic offense evidence is introduced to prove identity the likeness of the offenses is the crucial consideration. The physical similarity much be such that it marks the offenses as the handiwork of the accused. In other words, the evidence must demonstrate a modus operandi. The extrinsic act must be a signature crime, and the defendant must have used a modus operandi that is uniquely his. The signature trait requirement is imposed to insure that the government is not relying on an inference based on mere character - that a defendant has a propensity for criminal behavior. Evidence cannot be used to prove identity simply because the defendant has at times committed the same commonplace variety of criminal act.
U.S. V. Phanknikone, 605 F.3d 1099 (11th Cir. 2010)
Evidence: Collateral Crime - Can Be Admissible to Explain Chain of Events
Evidence not part of the crime charged, but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime or forms an integral and natural part of an account of the crime.
U.S. v. Mock, Case No. 06-15861 (11th Cir. 4/14/08)
Evidence: Collateral Crimes - 12 Years Is on the Outer Edge of Proximity
U.S. v. Jones, Case No. 07-20402-CR, 2008 U.S. Dist. LEXIS 34735 (S.D. Fla. April 25, 2008)
Evidence: Collateral Crimes - Relevancy of Collateral Crime to Show Intent Outweighed by Unfair Prejudice if Intent Not at Issue
It follows that if intent is undisputed by the defendant, the evidence of a collateral crime to prove intent is of negligible probative weight compared to its inherent prejudice and is therefore uniformly inadmissible.
U.S. v. Baker, Case No. 00-13083 (11th Cir. 12/13/06)
Evidence: Collateral Crimes - Conspiracy (Prior Drug Offenses Always Relevant?)

Recognizing that "circuit precedent regards virtually any prior drug offense as probative of the intent to engage in a drug conspiracy," the Court held that a conviction for selling drugs nine years earlier was admissible under 404(b). The essence of it is that a defendant's "plea of not guilty, without an accompanying affirmative removal, [makes] his intent a material issue in a drug conspiracy case." Judge Tjoflat, in a specially concurring opinion, joined in the opinion because of circuit precedent, but argued that existing precedent was erroneous.
U.S. v. Matthews, 431 F.3d 1296 (11th Cir. 12/6/05); U.S. v. Jones, Case No. 07-20402-CR, 2008 U.S. Dist. LEXIS 34735 (S.D. Fla. April 25, 2008); U.S. v. Smith, Case No. 12-11042 (11th Cir. 12/23/13) (rule includes simple possession)

Evidence: Collateral Crimes - 404(b) Notice Requirement

Government's failure to give the required advance notice of evidence of defendant's prior drug activity resulted in the award of a new trial.
U.S. v. Carrasco, Case No. 03-10304 (11th Cir. 8/26/04)

Evidence: Collateral Crimes - Prior Felon In Possession of a Firearm Charge Relevant to New Firearm Charge

Although the logic is less than convincing, the court held that the defendant's prior conviction for being a felon in possession of a firearm was admissible under Rule 404(b) because it demonstrated that the possession was not a mistake or accident (never mind that the defendant simply claimed he didn't know it was there.) Case includes a wonderful dissent by a visiting judge that concluded that the Court's prior cases have "substantially eroded Rule 404(b)'s prohibition of assaults on a defendant's character to show propensity to commit a crime of the type charged." and that rendered the defendant's trial "fundamentally unfair."
U.S. v. Jernigan
, 341 F.3d 1273 (11th Cir. 2003)

Evidence: Collateral Crimes - Past Drug Use Admissible to Prove Distribution

See: Barrow Tarlow, "Rico Report," The Challenger, Aug. 2003, p. 66.

Evidence: Collateral Crimes - Test for Admissibility

First, the evidence must be relevant to an issue other than the defendant's character. Second, as part of the relevance analysis, there must be sufficient proof so that a jury could find that the defendant committed the extrinsic act. Third, the evidence must possess probative value that is not substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of Rule 403.
U.S. v. Giordano, 261 F.3d 1134 (11th Cir. 2001); U.S. v. Lafond, Case No. 14-12574 (11th Cir. 4/20/15)

Evidence: Collateral Crimes - Single Criminal Episode

The policy's underlying Rule 404(b) are inapplicable when some of the offenses committed as part of a single criminal episode become "other acts" merely because a defendant is not indicted for all of his actions.
U.S. vs. Thomas, __ FLW Fed C453 (11th Cir. 3/16/01)

Evidence: Collateral Crimes - Drug Sales Prove Possession of Firearm

"The fact that Thomas was engaged in selling crack from his home it is relevant evidence from which to infer that he knowingly possessed rifles found in the closet of the home and in his truck parked in the driveway of the home... The known correlation between drug dealing and weapons . . . tended to prove that the guns found in the room were knowingly in his possession.
U.S. vs. Thomas, 242 F.3d 1028 (11th Cir. 2001)

Evidence: Collateral Crimes - Either Before or After the Offense
It is well settled in this circuit that the principles governing what is commonly referred to as other crime's evidence are the same whether the conduct occurs before or after the offense charged, and regardless of whether the activity might give rise to criminal liability.
U.S. v. Dickerson, 14 FLW Fed C633 (11th Cir. 4/16/01)
Evidence: Collateral Crimes - Wife Beating Inadmissible in Drug Case!!!
While the court had to struggle with the issue, and ultimately also had to rely on the claim that any relevance was outweighed by the unfair prejudicial value, the court held that evidence of the defendant's abuse of his wife was inadmissible.
U.S. v. Hands, 184 F.3d 1322 (11th Cir. 1999); U.S. v. Harriston, Case No. 01-12416 (11th Cir. 4/28/03)(prior murder conviction)
Evidence: Collateral Crimes - 13 Year Old Firearm Conviction Admissible in Drug Case
Proof that the defendant had been convicted 13 years earlier of criminal possession of a firearm was, according to the court, admissible in this drug conspiracy/home invasion robbery case because it made "it more likely that Gonzalez in fact possessed a gun."
U.S. v. Gonzalez, 183 F3d 1315 (11th Cir. 8/13/99)
Evidence: Collateral Crimes - Limitation on Prior Bad Acts
Some thought here that if intent is not at issue, prior possession with intent to distribute crimes may not be admissible.
U.S. v. Spence, 125 F.3d 1192, 1194 (8th Cir 1997); see also: U.S. v. Jenkins, 7 F.3d 803 (8th Cir. 1993); but see U.S. v. Crowder, 141 F.3d 1202 (DC Cir. 1998)
Evidence: Collateral Crimes - Arrest by Itself Insufficient
Although the evidence of prior offense would have been admissible had there been evidence that the defendants had committed the offense, evidence of the arrest by itself wasn't sufficient and should have been excluded.
U.S. v. Marshall, 12 FLW Fed C752 (11th Cir. 1999)
Evidence: Collateral Crimes - Prior Bad Acts to Prove Intent
Intent may be proven, pursuant to Rule 404(b), by evidence of prior bad acts in which the same intent was required. Here, had there been some evidence that the defendants had committed the prior crime of possession of cocaine with intent to distribute, that crime even though unrelated to the current offense of possession of cocaine with intent to distribute would have been admissible.
U.S. v. Marshall, 12 FLW Fed C752 (11th Cir. 1999)

Constitutional Considerations

Evidence: Constitutional Considerations - Testimony from Mental Health Expert Who Examined Defendant Pursuant to a Court Order
Where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence.
Kansas v. Cheever, Case No. 12-609 (S. Ct. 12/11/13)
Evidence: Constitutional Considerations - Williams and Definition of "Testimonial"
The four dissenting Justices and Justice Thomas in his concurring opinion all disagreed with Justice Alito's plurality understanding of what amounted to testimonial statements.

Williams v. Illinois, Case No. 10-8505 (S. Ct. 6/18/12), as recognized in Part III of Justice Kagan's dissent.

Evidence: Constitutional Considerations - Confrontation (Opinion and Expert Testimony - Hearsay Regarding DNA Testing)

In a splintered opinion, the court held that expert testimony about DNA testing performed by someone else, relied upon by the expert in reaching an opinion, did not violate the confrontation clause.

Williams v. Illinois, Case No. 10-8505 (S. Ct. 6/18/12)

Evidence: Constitutional Considerations - Cross-Examining Informant About Exposure to Mandatory Minimum Sentence

Although recognizing that the trial court could have prohibited defense counsel from asking about the maximum penalty had there not been a mandatory minimum, the court held that the trial court's refusal to allow defense counsel to cross-examine the government informant about the mandatory minimum sentence he was facing amounted to a violation of the Sixth Amendment right of confrontation. The court went on, though, to find the error harmless.

U.S. v. Larson, Case No. 05-30076 (9th Cir. 8/1/07) (en banc)

Evidence: Constitutional Considerations - Bruton (Inapplicable if the Declarant Testifies)

There is no Confrontation Clause problem when the confessing co-defendant is subject to cross-examination at trial.

U.S. v. Arias-Izquierdo, Case No. 04-12034 (11th Cir. 5/22/06)

Evidence: Constitutional Considerations - Bruton (Example of Favorable Outcome)

See: U.S. v. Doherty, 14 FLW Fed C178 (11th Cir. 10/27/00); U.S. v. Turner, Case No. 05-14388 (11th Cir. 1/11/07)

Evidence: Constitutional Considerations - Confrontation ("Testimonial")

Court found statements made during 911 call were not testimonial. Statements made on the scene following the arrival of officers, however, were testimonial.

Davis v. Washington, Case No. 05-5224 (S. Ct. 6/19/06)

Evidence: Constitutional Considerations - Confrontation (Testimonial Evidence)

Testimonial evidence is not admissible without confrontation unless the testifier is unavailable and the defendant has had an opportunity for cross-examination.

U.S. v. Cantellano, Case No. 05-11143 (11th Cir. 11/15/05)

Evidence: Constitutional Considerations - Confrontation (Immigration - Warrant of Deportation)

"A warrant of deportation does not implicate adversarial concerns in the same way or to the same degree as testimonial evidence. A warrant of deportation is recorded routinely and not in preparation for a criminal trial. It records facts about where, when, and how a deortee left the country. Because a warrant of deportation does not raise the concerns regarding testimonial evidence stated in Crawford, we conclude that a warrant of deportation si not-testimonial and therefore is not subject to confrontation.

U.S. v. Cantellano, Case No. 05-11143 (11th Cir. 11/15/05)

Evidence: Constitutional Considerations - Confessions (Bruton: Redaction Adequate)

U.S. v. Taylor, 12 FLW Fed C1231 (11th Cir. 8/31/99)

Evidence - Constitutional Considerations - Confessions (Bruton: Redaction Inadequate)

U.S. v. Gonzalez, 12 FLW Fed C1174 (11th Cir. 8/13/99). See also: Gray v. Maryland, 118 S.Ct. 1151 (1998)

Evidence: Constitutional Considerations - Waiver Not Testimonial

The government, over the defense objection, introduced evidence that the Defendant in this bank fraud case refused to sign a waiver allowing a particular bank to release his financial records. The court held the waiver was admissible, as it did not implicate any fifth amendment rights because the wavier was not testimonial in nature.
U.S. v. Hunerlach, 13 FLW Fed C247 (11th Cir. 12/7/99)

Hearsay

Evidence: Hearsay – Personal Knowledge
Though it can be a fine line, personal knowledge is not hearsay, even when the information comes from others.
U.S. v. Vosburgh, 602F.3d 512, 539, n. 27 (3d Cir. 2010)
Evidence: Hearsay - Party to Recorded Statement
Court rejected argument that, in a recorded statement between the defendant an informant, the informant's part of the conversation should have been excluded as hearsay. It did so because (a) generally, an out-of-court statement offered admitted to show its effect on the hearer is not hearsay, and (b) out-of-court declarations that are more in the nature of an order or a request and aren't capable of being true and false are not hearsay.
U.S. v. Rivera, Case N o. 13-13125 (11th Cir. 3/12/15)
Evidence: Hearsay - Rule 807 (Residual - Trustworthiness of Declarant)
The fundamental question is not the trustworthiness of the witness reciting the statements in court, but the declarant who originally made the statements.
Rivers v. U.S., Case No. 12-15208 (11th Cir. 2/5/15)
Evidence: Hearsay - Overview Witnessed Disfavored
It is generally viewed as improper for a party to open its case with an overview witness who summarizes evidence that has not yet been presented to the jury.
U.S. v. Ransfer, Case No. 12-12956, n. 18 (11th Cir. 1/28/14)
Evidence: Hearsay - Only Conceivable Explanation Would Be Statement of Others
Statements can be hearsay even thought they do not explicitly paraphrase the words of others because the only conceivable explanation for how the witness discovered this information is through listening to the statements of others.
U.S. v. Ransfer, Case No. 12-12956 (11th Cir. 1/28/14)
Evidence: Hearsay - Exceptions (Statement of a Party Opponent)
Under the circumstances, statements made by the prosecutor in earlier trial did not amount to a statement by a party opponent.
U.S. v. Kendrick, Case No. 11-12620 (11th Cir. 6/1/12)
Evidence: Hearsay - Not Introduced to Prove the Matter Asserted
Evidence that statement made to defendant by a third party to the effect that there was no fraud at the hospital was offered, not to prove there was no fraud, but that defendant did not know of the fraud.
U.S. v. Alvarez, Case No. 08-17178 (11th Cir. 10/19/10)
Evidence: Hearsay - Exceptions (Immigration - A-File Falls Within Public Records Exception)
U.S. v. Caraballo, Case No. 09-10428 (11th Cir. 1/27/10)
Evidence: Hearsay - Exceptions (Business Records - Not Testimonial)

Business and public records are generally admissible absent confrontation not because they qualify as an exception to the hearsay rules, but because - having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial - they are not testimonial.
Diaz v. Massachusetts, No. 07-591 (S. Ct. 6/25/09)
Evidence: Hearsay - Exceptions (Statement Against Penal Interest)
Statements against penal interest even to a confidant qualify for the exception.
U.S. v. Westry, Case No. 06-13847 (11th Cir. 4/16/08)
Evidence: Hearsay - Statements of Lawyer to Third Party (Party Admission)
Although some courts have held to the contrary, the Court of Appeals held that the statements of defense counsel to third parties in which the lawyer admitted his client's guilt did not qualify as an exception to the hearsay rule as a party admission (Fed. R. Evid. 801(d)(2)(D)). The Court concluded that such evidence should only be admitted in rare cases and when absolutely necessary to avoid impairing the attorney/client relationship.
U.S. v. Jung, No. 05-3718 (7th Cir. 1/18/07)
Evidence: Hearsay - Business Records (Summary Prepared for Litigation)
The Court held the government's typed summary of handwritten business records was inadmissable hearsay as it was prepared solely for the trial. While Rule 1006 provides for the admission of a summary of business records there are certain requirements that must be met, including copies of the original records from which the summary is prepared.
U.S. v. Arias-Izquierdo, Case No. 04-12034 (11th Cir. 5/22/06)
Evidence: Hearsay - Admissible at Sentencing Hearing
Reliable hearsay can be considered at sentencing.
U.S. v. Chau, Case No. 05-10640 (11th Cir. 9/27/05)
Evidence: Hearsay - Statement of Co-Conspirator
Holding that the initial conspiracy had been completed when the statements were made and that there was no basis to conclude there had been a subsidiary conspiracy, the court held that the trial court had erred in admitting hearsay statements under Rule 801(d)(2)(E) as statements of a co-conspirator.
U.S. v. Magluta, No. 03-10694 (11th Cir. 7/27/05)
Evidence: Hearsay - Exceptions (Prior Consistent Statement- Only for Specific Allegation)
Prior consistent statements are treated as admissible non-hearsay only if they are offered to rebut a specific allegation of recent fabrication, not to rehabilitate credibility that has been generally called into question.
U.S. v. Drury, Case No. 02-12929 (11th Cir. 1/18/05)
Evidence: Hearsay - Exceptions (Statements Against Penal Interest)
There is a three requirements for admitting a statement pursuant to Fed.R.Evid**.** 804(b)(3): the declarant must be unavailable; (2) the statement must be against the declarant's penal interest; and (3) corroborating circumstances must clearly indicate the trustworthiness of the statement.
U.S. v. Nelson, 341 F.3d 1273 (11th Cir. 2003)
Evidence: Hearsay - Exceptions (FDLE Report as Admission of a Party-Opponent)
Citing decisions from federal courts, the Court held that, pursuant to 90.803(18)(d), an FDLE ballistics report was admissible against the State as an admission by an agent of a party-opponent.
Garland v. State, 834 So.2d 265 (Fla 4th DCA 2002)
Evidence: Hearsay - Exception (Prior Consistent Statement)

Federal courts have consistently held that the hearsay exclusions in Rule 801(d)(1)(B) do not limit the circumstances in which a prior consistent statement may be admissible to rehabilitate a witness.
Monday v. State, 26 FLW D2179 (1st DCA 9/6/01)

Evidence: Hearsay - Indirect or Implied

Where a witness does not state the content of the out of court statement, but implies it, the statement is hearsay.
Harris v. Wainwright, 760 F.2d 1148, 1149-1153 (11th Cir. 1985); Hutchins v. Wainwright, 715 F.2d 512, 516 (11th Cir. 1983). See RPM brief in U.S. v. Nathaniel Bailey, U.S. v. Baker, Case No. 00-13083 (11th Cir. 12/13/06)

Evidence: Hearsay - Explanation of Officer's Actions

While evidence truly used to explain why officers undertook a particular course of conduct is not hearsay, it may still be hearsay if, in fact, there was no need to explain the officers conduct. U.S. v. Arbolaez, Case No. 05-11217 (11th Cir. 6/1/06); U.S. v. Hawkins, 905 F.2d 1489 (11th Cir. 1990); United States v. Sallins, 993 F.2d 344 (3d Cir. 1993); U.S. v. Vitale, 596 F.2d 688 (5th Cir. 1979); U.S. v. Fountain, 2 F.3d 656 (6th Cir. 1993); U.S. v. Becker, 230 F.3d 1224, U.S. v. Blake, 107 F.3d 651 (8th Cir. 1997); See RPM brief in U.S. v. Nathaniel Bailey

Evidence: Hearsay - 804(b)(6) (Defendant Misconduct)

If a hearsay statement is to be admitted on the basis of the defendant's misconduct that lead to the unavailability of a witness, the standard of proof is that of a preponderance of the evidence.
U.S. v. Zlatogur, 15 FLW Fed C31 (11th Cir. 10/31/01)

Evidence: Hearsay - Statements of Co-Conspirators

When seeking to offer a co-conspirator's statement into evidence under Rule 801(d)(2)(E), the government must first establish the following by a preponderance of the evidence: (1) that a conspiracy existed; (2) that the conspiracy included the declarant and the defendant against whom the statement is offered; and (3) that the statement to be introduced was made during the course and in furtherance of the conspiracy. When determining whether the above elements have been satisfied, the district court may rely on information provided by the co-conspiractor's proffered statement as well as independent external evidence.
U.S. v. Dickerson, 14 FLW Fed C633 (11th Cir. 4/16/01); U.S. v. Siegelman, Case No. 07-13163 (11th Cir. 5/11/11)(on remand from Supreme Court)

Evidence: Hearsay - Prior Consistent Statement (made following arrest)

Statements made after arrests are not automatically and necessarily contaminated by motive to fabricate, and are, therefore, not automatically excluded as prior consistent statements.
U.S. v. Prieto, 14 FLW Fed C129 (11th Cir. 11/6/00)

Evidence: Hearsay - Prior Consistent Statement

Rule 801(d)(1)(B) provides in pertinent part, that a prior consistent statement by a witness is not hearsay if (1) the declarant testities at the trial or hearing and is subject to cross examination concerning this statement, and (2) the statement is consistent with the declarant's testimony and is offered to rebutt an expressed or implied charge against the declarant of recent fabrication or improper influence or motive. To be admissible, the prior consistent statements must have been made before the alleged influence or motive to fabricate arose.
U.S. v. Prieto, 14 FLW Fed C129 (11th Cir. 11/6/00); U.S. v. Vance, Case No. 06-13035 (11th Cir. 8/3/07)

Evidence: Hearsay - Lab Analysis of Controlled Substances

When made on a routine basis, laboratory analyses of controlled substances are admissible as business records under Federal Rule of Evidence 803(6)
United States v. Baker, 855 F.2d 1352, 1359 (8th Cir. 1988)
Evidence: Hearsay - Hospital Drug Tests Admissible As Business Record
United States v. Garnett, 122 F.3d 1016, 1018-19 (11th Cir. 1997)
Evidence: Hearsay - Rule 807 (Admissible if Particularly Trustworthy)
Rule 807 permits admission of hearsay if it is particularly trustworthy; it bears on a material fact; it is the most probative evidence addressing that fact, its admission is consistent with the rules of evidence an advances the interests of justice; and its proffer follows adequate notice to the adverse party. In deciding whether the evidence is admissible, the court has considerable discretion.
U.S. v. Rodriguez, 13 FLW Fed C828 (11th Cir. 7/14/00)
Evidence: Hearsay - State of Mind (Statement of Belief)
Per rule 803(3) "a statement..of belief to prove the fact ... believed" fails to qualify under the existing state of mind exception to the hearsay rule.
U.S. v. Cunningham, 13 FLW Fed C77 (11th Cir. 11/2/99)
Evidence: Hearsay - Exculpatory Statement of Accused
A defendant cannot introduce an exculpatory statement made at the time of his arrest without subjecting himself to cross examination.
U.S. v. Cunningham, 13 FLW Fed C77 (11th Cir. 11/2/99); U.S. v. Willis, 759 F.2d 1486 (11th Cir. 1985)
Evidence: Hearsay - Admissibility of CoDefendant's Statements Against Penal Interest
The entire court concluded the statements, here, were admitted in violation of the confrontation clause. A plurality seemed to say that such statements could never be admitted. Good language about the unreliability of statements of codefendants.
Lilly v. Virginia, 12 FLW Fed S315 (6/10/99)
Evidence: Hearsay - Exculpatory Portion of Statement Hearsay
When the government, on direct, questioned the witness about the inculpatory portion of the defendant's statement but did not include any mention of the exculpatory portion of the statement, the trial court properly prevented defense counsel's efforts during cross examination to elicit the exculpatory portion of a written statement. The inculpatory portion was an admission against interest, while the exculpatory portion was hearsay and outside the scope of direct examination. Furthermore, Rule 106, because it addresses only written or recorded statements was inadmissible because the statement was never introduced. The court went on to explain, though, that had counsel couched his questions in terms of what the defendant said counsel could have, under Rule 612, introduced any portions of the written statement inconsistent with the witnesses claims because the witness has read the statement prior to testifying, and the statement, thus, would have been a writing used to refresh the witness' testimony.
U.S. v. Ramirez-Perez, 12FLWFedC472 (11th Cir 2/2/99)

Impeachment

Evidence: Impeachment - Cumulative Impeachment Evidence is Relevant

"We of course do not suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence."
Turner v. U.S., Case No. 15-1503 (S. Ct. 6/22/17)
Evidence: Impeachment - Can't Ask Cooperators About Number of Years of Potential Sentence
Can only ask if they are facing a "more severe penalty."
U.S. v. Rushin, 844 F.3d 933 (11th Cir. 2016)
Evidence: Impeachment - Timing of Introduction of Extrinsic Evidence
Rule 613(b) of the Federal Rules of Evidence do not require that extrinsic evidence of an inconsistent statement be presented while the witness is still on the stand. Here, the district court properly allowed the Government to play a tape recording of an inconsistent statement to be played during rebuttal.
U.S. v. Feliciano Case No. 12-15341 (11th Cir. 6/12/14)
Evidence: Impeachment - Calling Witness Only for the Purpose of Impeachment
Amounts to bad faith.
U.S. v. Chahla, Case No. 13-12717 (11th Cir. 5/21/14)
Evidence: Impeachment - Prior Convictions (Underlying Facts)
Facts underlying the conviction are generally inadmissible.
U.S. v. Lopez-Medina, 596 F.3d 716, 737-738 (10th Cir. 2010)
Evidence: Impeachment - Statements Elicited in Violation of Right to Counsel
Defendant's statement to an informant, concededly elicited in violation of the Sixth Amendment, was admissible to impeach defendant's inconsistent testimony at trial.
Kansas v. Ventris, Case No. 07-1356 (S. Ct. 4/29/09)
Evidence: Impeachment - Prior Convictions
Rule 609(a)(1) permits the introduction of the number and the nature of the prior conviction.
U.S. v. Burston, 159 F.3d 1328 (11th Cir. 1998)
Evidence: Impeachment - Admissibility of Criminal Record of Hearsay Declarant
Because Rule 806 allows the declarant of a hearsay statement to be impeached just as if he or she had testified, the Court held that the defendant's criminal record was admissible once the defense had introduced the defendant's hearsay statements.
U.S. v. Noble, 754 F.2d 1324 (7th Cir. 1985), U.S. v. Lawson, 608 F.2d 1129 (6th Cir. 1979)
Evidence: Impeachment - Cross Examination Regarding Plea Agreements
When a witness testifies pursuant to a plea agreement, he is subject to cross-examination about the benefits he expects to receive as well as his obligations under its terms.
U.S. v. Edwards, 13 FLW Fed C678 (11th Cir. 5/19/00)

Miscellaneous

Evidence: Miscellaneous - Statements of Counsel Not Evidence
U.s. v. Kendrick, Case No. 11-12620 (11th Cir. 6/1/12)
Evidence: Miscellaneous - Due Process Does Not Always Require Pretrial Screening of Out-Of-Court Identification Testimony
The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.
Perry v. New Hampshire, Case No. 09-8974 (S. Ct 11/2/11)

Evidence: Miscellaneous - Admissibility of Out-of-Court Identification (Suggestive?)
The Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a substantial likelihood of misidentification. Reliability of the eyewitness identfication is the linchpin of the evaluation. Where the indicators of a winess' a bilty to makie an accurate identification are outweighed by the corrupting effect of law enforcemetn suggestion, the identification should be suppressed. Otherwise, the evidence should be submitted to the jury.
Perry v. New Hampshire, Case No. 10-8974 (S. Ct. 11/2/11)
Evidence: Miscellaneous - Can't Ask Witness if Another Witness is Lying
While Rule 608(a) witness to testiry about a witness's general character for truthfulness or untruthfullness, it does not allow a witness to give an opinion about another witness's truthfulness on a particular occasion. then, too, the duty to make credibility determinations is the province of the jury and ignores the fact that two witnesses whose testimony is at odds does not necessarily mean one or the other is lying.
U.S. v. Rivera, Case No. 13-13125 (11th Cir. 3/12/15)
U.S. v. Schmitz, Case No. 09-14452 (11th Cir. 3/4/11); U.S. v. Rivera, Case No. 13-13125 (11th Cir. 3/12/15)
Evidence: Miscellaneous: Undue Prejudice Did Not Outweigh Relevancy of Child Porn Images
U.S. v. Alfaro-Moncada, Case No. 08-16442 (11th Cir. 5/27/10)
Evidence: Miscellaneous: Court Not Witness Should Instruct on the Law
The law (unless foreign) that a jury applies is the law given to it by the judge in his instructions, not the legal opinion offered by a witness, including an expert witness. District judges, rather than witnesses, must explain to juries the meaning of statutes and regulations.
United States v. Chube II, 538 F.3d 693, 701 (7th Cir. 2008); Nationwide Transport Finance v. Cass Information Systems, Inc., 523 F.3d 1051, 1058 (9th Cir. Nos. 08-1839, 08-1860 9 2008); Bammerlin v. Navistar Int'l Transportation Corp., 30 F.3d 898, 901 (7th Cir. 1994).
Evidence: Miscellaneous - Testimony from Pretrial Services Officer
Information obtained in he course of performing pretrial services is for the limited purpose of the bail determination and is otherwise confidential. Some courts, however, have allowed the information to be admitted for purposes of impeachment. In this case, though, the district court erred in allowing the government to call the pretrial officer as a witness during the defendant's trial for the purpose of identifying the defendant's cell phone number and identifying the defendant's voice from a recording.
U.S. v. Perez, Case No. 05-12971 (11th Cir. 12/28/07)
Evidence: Miscellaneous - Admissibility of Exculpatory Portion of Defendant's Statement
Where the government introduced a portion of the defendant's post-arrest statement, the trial court erred in preventing defense counsel from eliciting during cross-examination the exculpatory portion of that same statement. Rule 106 applies to oral testimony in light of Rule 611(a)'s requirement that the district court exercise reasonable control over witness interrogation and the presentation of evidence to make them effective vehicles "for the ascertainment of truth."
U.S. v. Baker, Case No. 00-13083 (11th Cir. 12/13/06)
Evidence: Miscellaneous - Admissibility of Resolution of Administrative Complaint (Rule 408)
Court held that Rule 408 of the Federal Rules of Evidence applied to criminal cases and that, therefore, evidence of the defendant's admissions made to resolve a state administrative

complaint should have been excluded from evidence. Rule 408 states that "evidence of . . . furnishing . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount."
U.S. v. Arias, Case No. 03-12185 (11th Cir. 2005)

Evidence: Miscellaneous - Credibility of Other Witnesses

The Federal Rules of Evidence preclude a witness from testifying as to the credibility of another witness. Rule 608(a) restricts a party from attacking or supporting a witness' credibility save through evidence referring only to character for truthfulness or untruthfulness.
U.S. v. Henderson, Case No. 04-11545 (11thCir. 5/23/05)

Evidence: Miscellaneous - Transcripts of Tape Recordings

See: U.S. v. Holton, 116 F.3d 1536 (D.C. Cir. 1997)

Evidence: Miscellaneous - Authentication

Under Rule 901(a) of the Federal Rules of Evidence documents must be properly authenticated as a condition precedent to their admissibility "by evidence sufficient to support a finding that the matter in question is what its proponent claims." A document may be authenticated by "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."
U.S. v. Siddiqui, 14 FLD FedC285 (11th Cir. 12/15/2000)

Evidence: Miscellaneous - Summary

There are 3 kinds of summaries: 1) primary evidence summaries of voluminous documents under FRE 1006; 2) inadmissible pedagogical devices based upon admitted evidence; 3) secondary evidence summaries that are a combination of 1& 2 and are admitted in addition to the underlying evidence; jury is instructed that the summary is not independent evidence and only as valid as the evidence it summarizes.
U.S. v. Bray, 139 F.3d 1104, 1109-1112 (6th Cir. 1998)

Evidence: Miscellaneous - Summary Charts

Summary charts are permitted generally by Federal Rule of Evidence 1006, and the decision whether to use them lies within the district court's discretion. Nevertheless, this circuit has noted that summary charts are to be used with caution, due to their potential for abuse.
U.S. v. Richardson, 14 FLWFedC147 (11th Cir. 11/3/00); U.S. v. Naranjo, Case No. 08-13814 (11th Cir. 3/2/11);U.S. v. Ford, Case No. 14-10381 (11th Cir. 4/28/15)

Evidence: Miscellaneous - Reputation Testimony vs. Opinion Testimony

See: United States v. Watson, 669 F.2d 1374, 1382 (11th Cir. 1982)

Evidence: Miscellaneous - "Would You Lie In Front of Sentencing Judge?"

Question to informant by prosecutor of "Would you lie in front of this judge who is going to sentence you?" amounts to improper vouching in that it "places the enormous prestige of the federal judiciary behind the witness by implying that the judge knew the truth and would know if Stafford was dishonest in his testimony." "It casts the court as an active, albeit silent, partner in the prosecutorial enterprise."
U.S. v. Diaz, 190 f3d 1247 (11th Cir. 10/15/99), (Cook, J. dissenting opinion)

Evidence: Miscellaneous - Testimony Derived From Substantial Assistance Agreements

It's admissible.
U.S. v. Lowrey, 12 FLWFed C495 (11th Cir. 2/3/99)

Evidence: Miscellaneous - Rule of Completeness Limited to Writings or Recordings

Rule 106 did not apply where, although there was a written statement, the officer testified only as to what was said, and the government did not introduce the written statement. This was the case despite the fact that the officer testified only to the inculpatory portion of statement, omitting any mention of the exculpatory portions.
U.S. v. Ramirez-Perez, 12FLWFedC472 (11th Cir 2/2/99)
Evidence: Miscellaneous - Rule of Completeness (Document Nearly In Evidence)
Rule 106 does apply in limited circumstances even when no document is admitted into evidence: when a document is used in such away that it is "tantamount" to introduction of the document itself, the principle behind Rule 106 should apply because the same concerns about fairness and completeness are present. In the example cited the document had not been introduced but the witness had read from it.
U.S. v. Ramirez-Perez, 12FLWFedC472 (11th Cir 2/2/99)

Objections

Evidence: Objections - Objection Necessary Following Denial of Motion in Limine
The overruling of a motion in limine does not suffice for preservation of an objection on appeal.
U.S. v. Brown, Case No. 12273 (11th Cir. 12/23/11)
Evidence: Objections - Proffer
Under Federal Rule of Evidence 103(a)(2), the objecting party must make an offer of proof to the court, or else show that the substance of the excluded evidence was apparent from the context of the proceeding, to preserve an objection to a ruling excluding evidence.
U.S. v. Henderson, Case No. 04-11545 (11thCir. 5/23/05);U.S. v. Graham, Case No. 18-15229 (11th Cir. Dec. 4, 2020)
Evidence: Objections - Challenge to Admissibility of Prior Convictions
Where government obtained a ruling prior to trial that prior conviction could be used to impeach the defendant, and defense counsel, to lessen the impact, asked about the conviction rather than letting the government raise it, the defendant's objection to the court's decision was waived.
Suzukiohler v. U.S. 13 FLW Fed S323 (5/22/00)
Evidence: Objections - Continuing Objections to Evidence Subject to Rule 403
As a general rule continuing objections are inappropriate when the claim is that the unfair prejudicial value of the admitted evidence outweighs its relevancy.
U.S. v. McVeigh, 153 F.3d 1166 (10th Cir. 1988)
Evidence: Objections - Must Give the Court a Chance to Correct Error
It's the reasoning behind the contemporary objection rule.
U.S. v. Burgess, 12 FLW Fed C834 (11th Cir. n. 2 5/18/99)

Opinion and Expert Testimony

Evidence: Opinion and Expert Testimony - Lay Opinion Testimony
Informant's testimony about the meaning of what the defendant said to her in a recorded conversation was admissible under Rule 701 because it was rationally based on her perception, first-hand knowledge, and observation and because it was helpful to the jury in understanding the facts at issue.
U.S. v. Rivera, Case No. 13-13125 (11th Cir. 3/12/15)
Evidence: Opinion and Expert Testimony - Lay Opinion Testimony

The determination of its admissibility is based upon the nature of the testimony, not whethe rth ewitness could be qualified as an expert. The rule not does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own personal experiences.
U.S. v. Moran, Case No. 12-16056 (11th Cir. 2/17/15)

Evidence: Opinion and Expert Testimony - Explanation of How Cell Towers Work

Where witness explained how cell phone towers record "pings" from each cell phone number and how he mapped the cell phone tower locations for each phone call, court concluded he did not offer an opinion and was not subject to the requirements of Rule 701.
U.S. v. Ransfer, 749 F.3d 914 (11th Cir. 2014)

Evidence: Opinion and Expert Testimony - Defendant's State of Mind

Court rejected defense argument that testimony of FBI agent amounted to impermissible expert testimony about the defendant's criminal intent. Acknowledging that it was a "very fine line," the court concluded that the expert testified as to what an observer perceiving the defendant's actions would take to be his intentions - not what the defendant's actual state of mind was.
U.S. v. Augustin, Case No. 09-15985 (11th Cir. 11/1/11)

Evidence: Opinion and Expert Testimony - Hearsay Regarding DNA Testing

In a splintered opinion, the court held that expert testimony about DNA testing performed by someone else, relied upon by the expert in reaching an opinion, did not violate the confrontation clause.
Williams v. Illinois, Case No. 10-8505 (S. Ct. 6/18/12)

Evidence: Opinion and Expert Testimony - Eyewitness Identification

Judge Barkett dissents to an order denying a petition for rehearing en banc on the issue of whether the Court can review for abuse of discretion the exclusion of expert testimony regarding the reliability of eyewitness identification. Includes observations of why errors occur in eye witness testimony.
U.S. v. Owens, Case No. 10-15877 (11th Cir. 6/8/12)

Evidence: Opinion and Expert Testimony - Lay Opinion Testimony

See in general: U.S. v. Jayyousi, Case No. 08-10494. Barkett, J. concurring and dissenting; U.S. v. Alcindor, Case No. 07-14602 (11th Cir. 6/14/11)

Evidence: Expert Testimony - Daubert (Distinction Between Qualifications and Methodology)

See U.S. v. Sarras, Case No. 08-11757 (11th Cir. 6/16/09)

Evidence: Expert Testimony - Psychiatrist's Testimony That Personality Disorder Explained Defendant's Lack of Intent

A psychiatrist's opinion that a defendant had a narcissistic personality disorder that could explain how he could have believed he was not obligated to obey the tax laws should have been admitted at trial to rebut the government's proof that he had the requisite intent to aid other in filing false tax returns.
U.S. v. Cohen, 510 F.3d 1114 (9th Cir. 2007)

Evidence: Opinion Testimony - Lay Opinion Regarding Defendant's Fraudulent Intent

May be admissible if an adequate foundation is established.
U.S. v. Tsekhanovich, Case No. 05-4809 (2d Cir. 10/24/07)

Evidence: Opinion Testimony - Financial Analysts Review of Records

While the FBI financial analysts expertise in the use of computer software may have made him more efficient in reviewing the records, the analysts review of the records was not expert testimony and did not fall under Rule 702.

U.S. v. Hamaker, Case No. 03-12554 (11th Cir. 7/14/06)
Evidence: Opinion Testimony - Operations of Narcotics Dealers
The operations of narcotics dealers are a proper subject for expert testimony under Rule 702.
U.S. v. Garcia, Case No. 04-14763 (11th Cir. 5/3/06)
Evidence: Opinion Testimony - Agent's "Lay Opinion" About Drug Dealers M.O.
Testimony from agents, who purportedly gave their lay opinion, about the modus operandi of drug dealers to explain the roles of the defendants and that persons picking up "a high value narcotics shipment 'knew what was in there'" was inadmissible. The testimony violated Fed. R. Evid. 701's prohibition against offering opinion testimony of lay witnesses based on "scientific, technical, or other specialized knowledge."
U.S. v. Dulcio, 441 F.3d 1269 (11th Cir. 2006)
Evidence: Opinion Testimony - Agent's Opinion About Knowledge of Presence of Drugs
Because any error was harmless, the Court declined to reach the question of the admissibility of an agent's testimony that those who pick up shipments of drugs generally do have knowledge of the contents of the shipment. The Court, though, noted a conflict in the circuits. The Court mentioned, too, that in addition to the argument presented that the testimony usurped the function of the jury (Fed. R. Evid. 704(b)), other possible objections might have been made to the qualification of the expert (Fed. R. Evid. 702), the reliability of the testimony, or to the experience upon which the expert rests the opinion.
U.S. v. Dulcio, 441 f.3d 1269 (11th Cir. 2006)
Evidence: Opinion Testimony - Expert's Testimony About Whether Hair or Seminal Fluid Would be Transferred Inadmissable Absent Study Showing How Often Such Transfers Occur
"While the expert's statement that the recovery or hair or seminal fluid 'would be expected' expresses an intrinsically probabilistic or quantitative idea, the probablity it expresses is unclear, imprecise and ill-defined. And the basis for that probabilistic opinion is left unstated. Without knowing how frequently hair or seminal fluid is transferred during sexual conduct in similar cases - whether derived from reliable studies or based on some quantification derived from his own experience - it would be very difficult indeed for the district court (or for that matter the jury) to make even an informed assessment, let alone to verify that the recovery of hair or fluid evidence in this case 'would be expected.' Nor could the district court tell from Tressel's testimony whether his opinions had been subjected to peer review or, even the percentage of cases in which is opinion had been erroneous. Simply put, Tressel did not offer any hard information concerning the rates of transfer of hair or fluids during sexual conduct."
Accordingly, the district court properly excluded the testimony.
U.S. v. Frazier, Case No. 01-14680 (11th Cir. 10/15/04)
Evidence: Opinion Testimony - Daubert Hearing Not Required in Every Instance
Some expert testimony will be so clearly admissible that a district court need not conduct a Daubert hearing in every case.
U.S. v. Frazier, 387 F.3d 1244, 1264 (11th Cir. 2004)
Evidence: Opinion Testimony - Can Be Excluded Because Relevance Outweighed by Unfair Prejudice
Because of the powerful and potentially misleading effect of expert evidence, sometimes expert opinions that otherwise meet the admissibility requirements may still be excluded on the basis of

Rule 403, i.e. the probative value is substantially outweighed by its potential to confuse or mislead the jury.
U.S. v. Frazier, 387 F.3d 1244 (11th Cir. 2004)

Evidence: Opinion Testimony Evaluating Reliability

To determine reliability the court should ask: (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) particular scientific technique; and (4) whether the technique is generally accepted in the scientific community.
U.S. v. Frazier, Case No. 01-14680 (11th Cir. 10/15/04); U.S. v. Azmat, Case No. 14-13703 (11th Cir. 11/10/15)

Evidence: Opinion Testimony - Being an Expert Doesn't Necessarily Render Testimony Reliable

"'[O]ur caselaw plainly establishes that one may be considered an expert, but still offer unreliable testimony.' Quite simply, under rule 702 the *reliability* criterion remains a discrete, independent, and important requirement for admissibility."
U.S. v. Frazier, Case No. 01-14680 (11th Cir. 10/15/04)

Evidence: Opinion Testimony - Rule 702 Test

Trial courts must consider whether: (1) the experts if qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact issue..
U.S. v. Frazier, Case No. 01-14680 (11th Cir. 10/15/04)

Evidence: Opinion Testimony - Lay Opinion Testimony (Under Old 701) (Discovery)

In a case tried prior to the 2000 Amendment that now excludes testimony based on "scientific, technical, or other specialized knowledge within the scope of rule 702, the court held that because the officer's description of a boat as a "go-fast" was based on in part on his personal observation of the boat and in part on his past experiences, his testimony qualified as a lay opinion and was not subject to the discovery requirements found in Federal Rule of Civil Procedure 16(1)(1)(E). By way of contrast testimony from another officer about the value of the seized cocaine based on his past experience as a drug squad member was expert testimony and should have been disclosed.
U.S. v. Tinoco, Case No. 01-11012 (11th Cir. 9/4/02)

Evidence: Opinion Testimony - Expert's Reliance Upon Hearsay

Government DEA testimony who had been found by the court to be an expert in the field of drug evaluation, but had no personal knowledge regarding the value of crack cocaine in Bermuda, was properly permitted to give an opinion about the value of the cocaine had it been sold in Bermuda. He had called a DEA official in New York who had called a law enforcement officer in Bermuda. In providing the testimony the witness relied upon what the Bermuda officer said as it was relayed by the New York DEA agent. The Court found the testimony to fall withing Rule 703, which allows an expert to rely on evidence otherwise inadmissible so long as it is of a type reasonably relied upon experts in the field.
U.S. v. Brown, Case No. 01-10323 (11th Cir. 7/31/02)

Evidence: Opinion Testimony - "Perception of the Witness"

A police officer interpreted what amounted to hieroglyphics that was, in reality, a symbol code. The court held that the opinion did not come under Rule 702 because, in doing nothing more

than delivering a jury argument from the witness stand, the witness' opinion was not based on "scientific, technical or otherwise specialized knowledge." Likewise, the court held the testimony was not admissible under Rule 701 (lay opinion, because it was not "based on the perception of the witness, " as required by the rule.
U.S. vs. Cano, 15 FLWC521 (11th Cir. 5/3/02)
Evidence: Opinion Testimony - Hearsay (Reasonably Relied Upon Information)
Under Rule 703, hearsay testimony by experts is permitted if it is based upon the type of evidence reasonably relied upon by experts in the particular field.
U.S. v. Floyd, 15 FLW Fed C304 (11th Cir. 2002)
Evidence: Opinion Testimony - Vague Line Between Lay and Expert Opinion
Court held that the officer's testimony regarding meaning of conversation of drug conspirators caught on tape was admissible under Rule 701 that allows a lay witness to provide testimony in opinion form. On other occasions court has treated such testimony under Rule702 regarding expert testimony. The difference being that there's no need for a predicate under 701. In the footnote, the court discussed the 2000 amendment to Rule 701 and concluded that there was an "open question" as to whether the amendment would alter the holding here.
U.S. v. Novaton, 271 F.3d 968 (11th Cir. 2001)
Evidence: Opinion Testimony - Identification of Defendant from Surveillance Photos
Lay opinion testimony from defendant's employer and his probation officer, identifying the defendant in bank surveillance photographs was admissible in bank robbery prosecution.
U.S. v.Pierce, 136 F.3d 770 (11th Cir. 1998)
Evidence: Opinion Testimony - Daubert Applies to Everything!
Analysis applied in this instance to a financial analyst.
U.S. v. Majors, 13 FLW Fed C161 (11th Cir. 11/19/99); U.S. v. Frazier, Case No. 01-14680 (11th Cir. 10/15/04)(technical expert testimony)
Evidence: Opinion Testimony - Insanity
Although under Fed.R.Ev. 704(b) a mental health expert **cannot** testify about the ultimate issue of whether the defendant was insane at the time of the offense, he can, at least, testify about whether the defendant was suffering from a mental illness at the time of the offense.
U.S. v. Dixon, No. 98-10371 (5th Cir. 8/16/99)
Evidence: Opinion Testimony - Admissible If It Assists Trier of Fact
Properly qualified expert witnesses may testify regarding their specialized knowledge in a given field if it would assist the trier of fact to understand the evidence or to determine a fact in issue.
U.S. v. Paul, 12 FLW Fed C832 (5/13/99); U.S. v. Frazier, Case No. 01-14680 (11th Cir. 10/15/04)
Evidence: Opinion Testimony - Daubert Applies to All Expert Testimony
U.S. v. Paul, 12 FLW Fed C832 (5/13/99)
Evidence: Opinion Testimony - Lay Witnesses
Under Rule 701, the opinion of a lay witness is admissible only if it is based on first-hand knowledge or observation, as in opinions that a car was speeding or that someone one was drunk. Here, the trial court erred in allowing a police officer to testify that he believed the drugs came from a particular source.
U.S. v. Marshall, 12 FLW Fed C752 (11th Cir. 1999)

Privileges

Evidence: Privilege - Attorney/Client Privilege Does Not Extend to Notification of the Court Date
U.S. v. Inella, 821 F.2d 1566 (11th Cir. 1987), U.S. v. Gray, 876 F.2d 1411 (11th Cir. 1989)
Evidence: Privilege - Marital (Cohabitation Required)
Only communications that take place during a valid marriage between couples still cohabitating pursuant to that marriage are protected by the privilege.
Singleton v. U.S. 14 FLW Fed C1069 (11th Cir. 8/8/01)
Evidence: Privileges - Marital (Two Kinds)
There are two recognized types of marital privilege. The marital confidential communications privilege and the spousal testimonial privilege.
Singleton v. U.S. 260 F.3D 1295 (11th Cir. 2001)

Relevancy

Evidence: Relevancy - Evidence of Good Conduct Inadmissible to Negate Criminal Intent?
Defendant, who was charged with defrauding school children by selling tickets for a Christmas show he allegedly never intended to present, attempted to introduce evidence of similar shows he had presented in the past. The court of appeals upheld the district court's decision excluding the evidence, holding that evidence of good conduct was inadmissable to negate criminal intent.
U.S. v. Ellisor, 522 F.3d 1225 (11th Cir. 2008)
Evidence: Relevancy - Detailed Account of Compliance With Wiretap Requirements
A prosecution's witness's account to jurors fo the various bureaucratic hurdles that had to be overcome before a wiretap could be approved for a defendant's phone was irrelevant and improperly bolstered the prosecution's case against the defendant. The effect of the testimony was to drive home to the jury that numerous law enforcement offices and agents believed the defendants were guilty.
U.S. v. Cunningham, Case No. 05-1515 (7th Cir. 8/29/06)
Evidence: Relevancy - Drug Dealings of Informant
Trial court erred in excluding testimony regarding the drug dealings of the informant. The evidence was relevant, not because it was an attack on the informant's character, but to show that the informant could have obtained the drugs from someone other than the defendant.
U.S. v. Stephens, Case No. 02-14656 (11th Cir. 4/6/04)
Evidence: Relevancy - Threatening Communications (Recipient's Reaction Relevant)
The recipient's belief that the statements are a threat is relevant in the inquiry of whether a reasonable person would perceive the statements as a threat.
U.S. v. Alaboud, Case No. 02-12980 (11th Cir. 10/20/03)
Evidence: Relevancy - Value of Drugs
In a case involving over 1,800 kilograms of cocaine, the officer's testimony that the value of the cocaine was somewhere between $12,000 to $29,000 per kilogram, such testimony was relevant to show the knowing participation of those on the boat in the conspiracy. ("It is highly improbable that drug smugglers would allow an outsider on board a vessel filled with millions of dollars worth of contraband."
U.S. v. Tinoco, Case No. 01-11012 (11th Cir. 9/4/02)
Evidence: Relevancy - Damaging Law Enforcement Vernacular

Despite an argument that the term "go-fast" used to describe a ship found carrying a shipment of cocaine, was "nothing more than workplace vernacular used by members of the Coast Guard, such terminology passed the "low" standard for relevancy and fell outside of the "extraordinary remedy" involved in excluding relevant evidence because of its unfair prejudice, because it (1) used to show the significance of certain methods to the drug distribution business and (2) because it pointed to the defendants knowing participation in the drug conspiracy ???????
U.S. v. Tinoco, Case No. 01-11012 (11th Cir. 9/4/02)

Evidence: Relevancy - Gratuitous References to Race

In a racketeering trial involving the Outlaws Motorcycle Club, it was error, albeit harmless, to allow the government to introduce into evidence a portion of the Club's constitution that included a whites-only provision.
U.S. v. Bowman, Case No. 01-14305 (11th Cir. 8/20/02)

Evidence: Relevancy - Witness Background Information

Reasonable background information about a witness is always admissible, precisely because it allows the jury to make better informed judgments about the credibility of a witness and the reliability of that witness' observations.
U.S. v. McVeigh, 153 F.3d 1166, 1202 (10th Cir. 1988)

Evidence: Relevancy - Defendant's Prior Incarceration

The Court held that the unfair prejudicial effect of references to the fact that the Defendant was, at one time, in the work release center outweighed the relevancy of that information, particularly given the defendant's willingness to agree to refer to the institution as a "Residential Program."
U.S. v. Neill, 97-30383 (9th Cir. 12/2/98)

Evidence: Relevancy - Prejudicial Information Explaining Actions Taken by Officer

While an officer's statement of what another told him, introduced for purposes of explaining why the officer undertook a particular course of action, is not hearsay, it is subject to exclusion if the jury is likely to accept the what is said as the truth.
United States v. Becker, 230 F.3d 1224, 1228 (10th Cir. 2000).

Scientific Evidence

Evidence: Scientific - Not Uniquely Immune from Manipulation

"Nor is it evident that what respondent calls 'neutral scientific testing' is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of hte National Academy of Sciences, '[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments where the laboratory administrator reports to the head of the agency. . . . And '[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.' A forensic analyst responding to a request from a law enforcement official may feel pressure - or have an incentive - to alter the evidence in a manner favorable to the prosecution."
Diaz v. Massachusetts, No. 07-591 (S. Ct. 6/25/09)

Evidence: Scientific - Polygraph

While recognizing that there is precedent for allowing polygraph results to impeach or corroborate the testimony of a witness, the court, in this instance, upheld the trial court's decision to exclude polygraph test results.
U.S. v. Henderson, Case No. 04-11545 (11thCir. 5/23/05)
Evidence: Scientific - Fingerprints
Fingerprint analysis met the requirements of Daubert.
U.S. v. Abreu, Case No. 04-14376 (11th Cir. 4/20/05)
Evidence: Scientific - Daubert Analysis
Thorough analysis of Daubert in support of exclusion of expert testimony in this civil breast implant product liability case.
Allison v. McGhan Medical Corporation, 12 FLW Fed C1178 (11th Cir. 8/18/99)
Evidence: Scientific - Profiling of Child M olesters
Met Daubert test.
U.S. v. Romero 98-2358 (7th Cir. 8/31/1999)
Evidence: Scientific - Handwriting
See: U.S. v. Paul, 12 FLW Fed C832 (5/13/99)
Evidence: Scientific - Daubert Factors Mere Suggestions
"A trial court may consider one or more of the specific factors that Daubert mentioned when doing so will help determine that testimony's reliability. But as the Court stated in Daubert, the test of reliability is 'flexible,' and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case."
Kumho Tire Co., LTD v. Carmichael, 12 FLW Fed S141 (3/23/99); U.S. v. Paul, 12 FLW Fed C832 (5/13/99)
Evidence: Scientific - Daubert Applies to Engineers and Other Technical Experts
"Daubert's general holding - setting forth the trial judge's general 'gatekeeping' obligation - applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.
Kumho Tire Co., LTD v. Carmichael, 12 FLW Fed S141 (3/23/99)

EXPUNGEMENT

Expungement: Inherent Right of the Court?
See: U.S. v. Sanaolalla, 2002 US App. LEXIS 114 (9th Cir. 12/17/01)(unpublished); U.S. v. Robinson, 1996 U.S. LEXIS 8245 (6th Cir. 3/8/96)(unpublished); U.S. v. Wiley, 89 F.Supp2d 909 (S.D. Ohio 1999).

EXTRADITION

Extradition: In General
In re: the Extradition of Steven Lee Batchelder, case No. 4:06mj136 (N.D. Fla. 6/25/07) (Sherrill)
Extradition: Sufficiency of Evidence
See: Afanasjev v. Hurlburt, Case No. 04-13309 (11th Cir. 7/29/05)
Extradition: Admission of Evidence in Violation of Agreement

Where statements made to law enforcement officials were admitted into extradition hearing despite earlier agreement that statements would not be used against the defendant, the court held the admission violated the defendant's due process right to a fundamentally fair hearing.
Valenzuela v. United States, 15 FLW Fed C394 (11th Cir. 3/25/02)

Extradition: Habeas Review

Habeas corpus review of a Magistrate Judge's decision regarding extradition is limited to deciding whether the Magistrate had jurisdiction, whether the offense charged is within the treaty, and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was a reasonable ground to believe the accused guilty.
Valenzuela v. United States, 15 FLW Fed C394 (11th Cir. 3/25/02)

FIREARMS

924(c)

Firearm: 924(c) - Court Free to Consider Mandatory Minimum in Arriving at Sentence for Underlying Offense

Dean v. U.S., 137 S. Ct. 1170 (2017)

Firearms: 924(c) - Armed Bank Robbery is a Crime of Violence

In re: Hines, Case No. 16-12454 (11th Cir. 6/8/16)

Firearms: 924(c) - Aiding and Abetting Hobbs Act Robbery is a Crime of Violence

In re: Colon, Case No. 16-13264 (11th Cir. 6/24/16); (Judge Martin in her dissent isn't so sure)

Firearms: 924(c) - Carjacking is a Crime of Violence

In re: Smith, Case No. 16-13661 (11th Cir. 7/18/16)

Firearms: 924(c) - Manslaughter Isn't Crime of Violence

U.S. v. Benally, No. 14-10452 (9th Cir. Aug. 1, 2016)

Firearms: 924(c) - Aiding and Abetting

The Government makes its case for aiding and abetting in a 924(c) offense by proving that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission.
Rosemond v. U.S., Case No. 12-895 (11th Cir. 3/5/14)

Firearms: 924(c) - Alleyne & Plea (Brandishing)

Defendant entered guilty pleas to bank robbery and use of a firearm in furtherance of a crime of violence. Indictment said nothing about brandishing the firearm, and the defendant was the get-away-driver. When he entered his guilty plea, the judge told him that he would get no less than 84 months for the gun charge. At sentencing the defendant objected to the 84 month sentence, arguing that the indictment said nothing about brandishing the gun and that he did not admit to doing so during the plea colloquy. The court of appeals found it was error to sentence the defendant to 84 months, because the government had never proved it to a jury, nor admitted it in the plea colloquy, but also found the error to be harmless. The court of appeals held, too, that omission of a brandishing allegation in the indictment did not deprive the court of jurisdiction and that the defendant waived the defect by pleading guilty.
U.S. v. Payne, Case No. 13-15699 (11th Cir. 8/15/14); U.S. v. King, Case No. 12-16268 (11th Cir. 6/9/14) (harmless error)

Firearms: 924(c)- Presence of Gun, By Itself, Doesn't Prove Charge
The presence of a gun during a drug trafficking offense is not sufficient by itself to sustain a 924(c) conviction.
U.S. v. Timmons, 283 F.3d 1246 (11th Cir. 2002); U.S. v. Williams, Case No. 12-15313 (11th Cir. 10/2/13)
Firearms: 924(c) - Brandished or Discharged
Government must allege and prove defendant brandished or discharged the firearm before the mandatory minimum provisions in 18 U.S.C. §924(c)(1)(A) apply.
Alleyne v. U.S., 133 S. Ct. 2151 (2013)
Firearms: 924(c) - That the Firearm Was a Machine Gun Must Be Proved to the Jury
The statutory provision that the firearm used be a machine gun, which results in a 30-year consecutive sentence, is an element **o**f the offense, and, therefore, must be proved beyond a reasonable doubt to the jury.
U.S. v. O'Brien, Case No. 08-1569 (S. Ct. 2/23/10)
Firearms: 924(c) - Consecutive Sentences (Armed Career Criminal and Possession of Firearm in Furtherance of a Drug Trafficking Offense)
18 U.S.C. §924(c)(1)(A) provides that the mandatory minimum sentences of §924 apply "except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of the law."Accordingly, the court of appeals held it was error to run a 10 year sentence for discharging a firearm during a crime of violence to the 15 year armed career criminal sentence. U.S. v. Whitley, 529 F.3d 150 (2d Cir. 2008), ; Abbott v. U.S., 562 U.S. 8 (2010)**Firearms: 924(c) Accidental Discharge Suffices**
Section 924(c) is a sentencing enhancement, not an element of the offense. Consequently, even an accidental discharge of a firearm will suffice for the enhancement at § 924(c)(1)(A)(iii).
Firearms: 924(c) - Silencer
Court held that despite the requirement of a 30 year consecutive sentence (1) the determination of whether the gun had a silencer is a sentencing factor to be determined by the court, and (2) that the defendant need not have knowledge of the presence of the silencer. The court, while recognizing that if it found sentencing factor manipulation the mandatory minimum would not apply, rejected the defendant's claim of sentencing manipulation because it concluded that the silencer may have been the appropriate tool for the intended murder. In U.S. v. Harris, 397 F.3d 404, 413-414 (6th Cir. 2005), the 6th Circuit held to the contrary, that firearm characteristics must be proven to the jury beyond a reasonable doubt.
U.S. v. Ciszkowski, Case No. 06-12592 (11th Cir. 7/20/07)
Firearms: 924(c) - Trading Drugs for Guns Isn't "Use" Under 924(c)
In the claim filed pursuant to 21 USC § 2255 where the defendant, who had entered a guilty plea, was seeking to overcome his failure to file the motion within the requisite one year by showing actual innocence, the court concluded that trading guns for drugs doesn't constitute the requisite "use" of a firearm under 18 U.S.C. § 924(c). The court remanded the case to the trial court noting that drug charge had been dismissed as part of the plea agreement, the case was remanded noting that the defendant would, in the district court, be required to show his actual innocence of any more serious charges the government had dismissed and that the government would be permitted to introduce any additional evidence of the defendant's guilt. (Defendant pled to one drug charge along with the gun charge. Does this ruling mean that if he was guilty of the other drug offenses that he can't prevail on the gun charge?)

U.S. v. Montano, Case No. 03-11950 (11th Cir. 2/4/04)*, but is "possession"* U.S. v. Miranda, 666 F.3d 1280 (11th Cir. 2012)

Firearms: 924(c) - Aiding and Abetting?

Although, 924(c) requires personal possession, you can still earn a conviction on a theory of aiding and abetting.

U.S. v. Bazemore, 138 F.3d 947 (11th Cir. 1998); U.S. v. Rutledge, 138 F.3d 1358 (11th Cir. 1998); U.S. v. DePace, 120 F.3d 233 (11th Cir. 1997).

Firearms: 924(c) - Firearm Carried By Codefendant Is Sufficient

Although the defendant did not carry a firearm during the bank robbery, the fact that the codefendant carried one was sufficient to support a conviction for the offense of carrying a firearm in connection with a crime of violence, 18 USC 924(c).

U.S. v. Williams, Case No. 02-11783 (11th Cir. 6/24/03)

Firearms: 924(c) - Witnesses Observation Sufficient

Witnesses observation of what appeared to be a firearm was good enough to prove the crime of using a firearm in the commission of a violent felony, 18 USC 924(c). The government was not obligated to prove the object was capable of firing a projectile, nor introduce the gun into evidence.

Firearms: 924(c) - "In Relation to a Crime of Violence or Drug Trafficking Crime"

To be convicted under USC § 924(c) the gun must facilitate or have the potential of facilitating the crime of violence or drug trafficking crime. The gun's presence or involvement cannot be the result of accident or coincidence.

U.S. v. Novaton, 271 F.3d 968 (11th Cir. 2001); United States v. Timmons, 15 FLW Fed C313 (11th Cir. 2/26/02); U.S. v. Suarez, Case No. 00-15294 (11th Cir. 12/3/02) U.S. v. Woodruff, Case No. 01-16067 (11th Cir. 7/3/02)

Firearms: 924(c) - "Machine gun" is an Element of the Crime

18 USC 924(c) uses the word "machine gun" (and similar words) to state an element of a separate, aggravated crime.

Castillo v. United States, 13 FLW Fed S375 (6/5/00)

Firearms: 924(c) - Type of Firearm Under 924(c)(1) Is a Sentencing Factor

U.S. v. Riley, 13 FLW Fed C680 (11th Cir. 3/16/00)

Firearms: 924(c) - "Carry" (Sufficiency of Evidence)

Presence of a firearm on the dash of a car in which the Defendant was a front seat passenger, was sufficient to support a conviction for use of a firearm in the commission of a felony.

U.S. v. Wilson, 183 F.3d 1291 C1186 (11th Cir. 8/12/99)

Firearms: 924(c) - "Carry" (Gun Need Not Be Readily Accessible)

Carrying the gun in a car, whether the gun is readily accessible or not, is sufficient to qualify as "carrying" under the statute that makes it a crime to carry or use a gun in the commission of a felony.

U.S. v. Wilson, 183 F.3d 1291 FLW Fed C1186 (11th Cir. 8/12/99)

Firearms: 924(c) - Firearm Need Not be Introduced Into Evidence

U.S. v. Wilson, 183 F.3d 1291 (11th Cir. 8/12/99)

Firearms: 924(c) - Drug Trafficking & "Use"

In order to constitute "use" under 924(c) there has to be some active employment of the firearm.. This active employment could take the form of such conduct as brandishing, displaying, bartering, striking with, firing, or attempting to fire.

Bailey v. U.S., 116 S. Ct. 501 (1995), U.S. v. Mount, 161 F.3d 675 (11th Cir. 1998)

Firearms: 924(c) - Drug Trafficking & "Carry"

The Supreme Court adopted a broad reading of the "carry" requirement of 924(c) so that it would include transporting firearms in glove compartments or in the trunks of cars. There must, though, be some "transportation of the firearm during and in relation to the (trafficking) offense." In this instance, where an unloaded gun was found near the drugs in the home of the defendant, the evidence was insufficient to support a conviction.

U.S. v. Mount, 161 F.3d 675 (11th Cir. 1998); see also: Muscarello v. U.S. 118 S.Ct. 1911 (1998)

False Statement

Firearms: False Statement - Misrepresentation

A person who buys a gun on someone else's behalf while falsely claiming it is for himself, violates the statute even if the true buyer could have legally purchased the gun.

Abramski v. U.S., Case No. 12-1493 (S. Ct. 1/22/14)

Firearms: False Statement - Straw Purchase (Makes No Difference If Defendant Pays)

Fact that the defendant used his own money to buy the firearms was not relevant because there was no requirement that ineligible purchaser must supply money up front in order for straw purchase to occur.

U.S. v Ortiz, Case No. 01-13961 (11th Cir. 1/14/03)

Interstate Commerce Requirement

Firearms: Interstate Commerce - Proof (Inscription on Gun)

While relying on the fact that the defendant failed to raise the issue in the trial court and suggesting the government in the future should proceed otherwise, the court upheld a conviction for possession of a firearm by a convicted felon where the government met its proof of the interstate commerce requirement by simply pointing out that, inscribed on the barrel of the gun, were the words "Colt Manufacturing Company, Hartford, Ct."

U.S. v. Clay, Case No. 02-15369 (11th Cir. 1/7/03)

Firearms: Interstate Commerce - ATF Agent Testimony Re: Interstate Commerce Isn't Hearsay

At least, here, where the expert's opinion wasn't based exclusively on his conversation with a technical advisor, the testimony from an ATF agent that the ammunition had traveled in interstate commerce was not hearsay.

U.S. v. Floyd, 281 F3d 1346 (11th Cir. 2002)

Firearms: Interstate Commerce - Expert Can Establish Commerce Clause Nexus

Requisite nexus to interstate commerce was demonstrated by government when the ATF agent testified that the pistol was manufactured in California and had moved in interstate commerce to Georgia.

U.S. v. Scott, 14 FLW FedC1244 (11th Cir. 8/27/01)

Miscellaneous

Firearms: Proof that What Defendant Possessed was a Firearm

Lay testimony that defendant possessed is a firearm. The Government need not introduce the firearm or have expert testimony that the object was capable of firing a projectile.
U.S. v. King, Case No. 12-16268 (11th Cir. 6/9/14)

Firearms: Possession by Person Convicted of a Domestic Violence Offense - Predicate Offense Need Not Have Domestic Relationship as an Element

As long as the prior misdemeanor crime of domestic violence does, in fact, involve domestic violence, there is no requirement that the existence of a domestic relationship be an element of the offense. The nature of the relationship, though, would, in the federal prosecution, have to be proven beyond a reasonable doubt.
U.S. v. Hayes, Case No. 07-608 (S. Ct. 2/24/09)

Firearms: Defenses - Innocent Transitory Possession

Court did not explicitly rule out the defense in finding that the facts didn't support it.
U.S. v. Palma, Case No. 06-14884 (11th Cir. 1/4/08)

Firearms: Second Amendment

Second Amendment protects individual right to possess a firearm unconnected with service in a militia and to use that arm for traditionally lawful purposes, such as self-defense within the home.
District of Columbia v. Heller, Case No. 07-290 (S. Ct. 6/26/08)

Firearms: Carrying An Explosive During a Felony - Statute Does Not Require Any Relationship Between the Explosive and the Felony Being Committed

18 U.S.C. §844(h) does not require that there be any connection between the explosive and the crime being committed.
U.S. b. Ressam, Case No. 07-455 (S. Ct. 5/19/08)

Firearms: Possession of a Firearm By Someone Having a Domestic Violence Conviction (Nature of Predicate Offense)

Although nine other Circuits have held to the contrary, the court, here, held that the predicate offense must have, as an element, a domestic relationship between the offender and the victim. Accordingly, the defendant's Florida conviction for battery failed to justify the conviction for possession of a firearm after having been convicted of a crime of domestic violence.
U.S. v. Hayes, Case No. 06-4087 (4th Cir. 4/16/07)

Firearms: Second Amendment Invalidates D.C. Gun Laws

The Second Amendment protects the private right to bear arms and, accordingly, the Washington, D.C. gun laws that places restrictions on gun ownership were unconstitutional.
Parker v. District of Columbia, Case No. 04-7041 (D.C. Cir. 3/9/07)

Firearms: Miscellaneous - Multiple § 924(c) Charges and Sentences for Multiple, But Related Offenses?

The defendant robbed a bank using a firearm, fled from the bank in one car, abandoned that car, and then, using the same firearm, hijacked a car to make good his escape. Among the charges for which the defendant was indicted was two §924(c) charges (use of a firearm in a violent felony). The Court, recognizing that some courts have not allowed multiple convictions and sentences when the underlying crimes were committed simultaneously, found that the robbery and car-jacking were distinct offenses and upheld the convictions and consecutive sentences for the §924(c) offenses.
U.S. v. Rahim, Case No. 05-11087 (11th Cir. 11/29/05)

Firearms: Miscellaneous - Drug User in Possession of a Firearm (18 USC § 922(g)(3))

The federal statute that makes it illegal for a drug user to possess a firearm, 18 USC § 922(g)(3), requires proof of contemporaneous and repeated drug use over an extended period of time, but this showing may be based on an inference drawn from evidence of a pattern of drug possession or use.
U.S. v. Patterson, 431 F.3d 832 (5th Cir. 2005)
Firearms: Miscellaneous - Return of Seized Firearms to Convicted Felon
Even though the defendant has proposed that the firearms be kept by a relative, the court held that the defendant, because he was a convicted felon, was not entitled to have firearms seized at the time of the arrest returned to him.
U.S. v. Howell, No. 04-13343 (11th Cir. 9/15/05)
Firearms: Miscellaneous - Destructive Device-(Sufficiency of Evidence)
Thirteen inch cardboard tube filled with explosive powder wasn't a "destructive device," because it wasn't designed for use as a weapon.
U.S. v. Hammond, Case No. 02-15956 (11th Cir. 5/25/04)
Firearms: Miscellaneous - Domestic Violence Convictions Arising Prior to Enactment of Law
For an explanation as to why domestic violence convictions that occurred prior to Sept. 30, 1996, the enactment of the Omnibus Consolidated Appropriations Act of 1997 that prohibits those convicted of domestic violence convictions from possessing a firearm, can support a violation of that statute, see:
National Association of Government Employees, Inc. v. Barrett, 968 F.Supp. 1564 (N.D. Ga. 1997), *aff'd* 155 F.3d 1276 (11th Cir. 1998)10/1/96 - 3/31/97
Firearms: Miscellaneous - Possession of Multiple Firearms
Multiple weapons were not separately possessed for purpose of a federal firearms provision where the weapons were seized from different although closely proximate areas of the same building at the same time.
U.S. v. Grinkiewicz, 873 F.2d 253 (11th Cir. 1989); U.S. v. Smith, 591 F.2d 1105 (11th Cir. 1979)
Firearms: Miscellaneous - Prohibited Person ("Under Indictment")
For purposes of being a "prohibited person" the phrase "under indictment" also applies to a person charged by way of information.
U.S. v. Gevedon, No. 99-1897 (7th Cir. 5/25/00)
Firearms: Miscellaneous - Definition of "Business of Dealing" as Used in 18 USC § 924(a)(1)(D)
Three transaction involving eight guns qualified.
U.S. v. Perkins, 633 F.2d 856 (8th Cir. 1981) See also: U.S. v. Schumann, 861 F.2d 1234 (11th Cir. 1988); U.S. v. Day, 476 F.2d 562 (6th Cir. 1973); U.S. v. Shirling, 572 F.2d 532 (5th Cir. 1978)

Possession by a Convicted Felon [922(g)]

Firearms: Rehaif – Plain Error
In felon-in-possession cases, a Rehaif error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon. When a defendant advances such an argument or representation on appeal, the cort mst determine whether the

defendant has carried the burden of showing a reasonable probablit tha thte outcome of the district court proceeding would have been different.
Greer v. U.S., No. 19-8709 (S. Ct. 6/14/21)
Firearms: Poss by a Convicted Felon – Stacking (Resentencing Afer First Step Act)
Where case was remanded for resentencing, the First Step Act's limits on stacking applied.
U.S. v. Henry, Case No. 19-2445, 2020 WL 7414637 (6th Cir. Dec. 18, 2020)
Firearms: Poss. by a Convicted Felon - Rehaif (Domestic Violence Conviction)
Govt had to prove defendant knew he had been convcited of a misdemeanor under state law; that to be convicted of it, he must must have knowingly or recklessly engaged in at least the slightest offense touching; and the victim was a current or former spouse. The Govt. was not required to negate what amounts to Florida's affirmative defenses. The error in omitting the element of knowledge from the indictment failure ot include it in the stipulated facts was plain, but, under the circumstances, di dnot affect the defendant's substantial rights. Opinion inlcudes a dissent by Judge Martin who contended the govt was obligated to prove the defendant knew his status prohibited his possession of a firearm.
U.S. v. Johnson, Case No. 19-10915 (11th Cir. 12/2/20)
Firearms: Poss. By Convicted Felon - Stipulation re Prior Convictions
Stipulation should be that defendant has a prior felony conviction, not that he has prior felony convictions.
U.S. v. Green, Case No. 14-12830 (11th Cir. 11/30/16)
Firearms: Poss. By Convicted Felon - Misdemeanor Crime of Domestic Violence
Reckless conduct can qualify as a misdemeanor crime of violence for purposes of 18 U.S.C. § 922(g)(9).
Voisine v. U.S., Case No. 14-10154 (S. Ct. 2/29/26)
Firearms: Poss. By Convicted Felon - Fla. Guilty Plea, but Withheld Adjudication
Given that Florida law holds that when adjudication is withheld after the entry of a guilty plea, there is not "conviction," the non-conviction cannot support the federal offense of possession of a firearm by a convicted felon.
U.S. v. Clarke, Case No. 13-15874 (11th Cir. 5/11/16)
Firearms: Poss. By Someone Convicted of a Domestic Violence Offense
The defendant's conviction of a Tennessee statute that made it a crime to "intentionally or knowingly case bodily injury" to the mother of his child qualified as "a misdemeanor crime of domestic violence" for purposes of 18 U.S.C. §922(g).
U.S. v. Castleman, 134 S. Ct. 1405 (S. Ct. 2014)
Firearms: Poss. By a Convicted Felon - Court May Allow Transfer
A court may allow someone who has been convicted of the offense of possession of a firearm by a convicted felon to transfer his guns to either a firearms dealer (for future sale on the open market) or to some other third party as long as the transfer would not allow the felon to later control the guns.
Henderson v. U.S., Case No. 13-1487 (S. Ct. 5/18/15)
Firearms: Poss. By a Convicted Felon - By Person Committed to a Mental Institution
For definition of "committed to a mental institution" see:
U.S. v. McIlwain, Case No. 14-10735 (11th Cir. 11/25/14)
Firearms: Poss. By a Convicted Felon - Restoration of Right to Vote

Restoration of right to vote, by itself, does not provide a defense to the charge of possession of a firearm by a convicted felon.
U.S. v. Thompson, Case No. 11-15122 (11th Cir. 12/11/12)
Firearms: Poss. By a Convicted Felon - Constructive Possession
Jury instruction that told jury that "ownership, dominion, or control over" the area where the contraband is found was enough to establish constructive possession was erroneous because it negates the "intentionality requirement."
U.S. v. Cochran, Case No. 11-11923 (11th Cir. 6/14/12)
Firearms: Poss. By a Convicted Felon - Constructive Possession
To show constructive possession the Government must show that the defendant (1) was aware or knew of the firearms presence and (2) had the ability and intent to later exercise dominion and control over the firearm. The Government's burden may also be satisfied by a showing that the defendant intended to exercise dominion and control through another.
U.S. v. Perez, 661 F.3d 568 (11th Cir. 2011)
Firearms: Poss. By a Convicted Felon - No Second Amendment Defense
U.S. v. Rozier, Case No. 08-17061 (11th Cir. 3/4/10)
Firearms: Poss. By a Convicted Felon - Domestic Violence Injunction
The protective order need not have the precise language set out in 18 U.S.C. §922(g)(8). Validity of the underlying order is irrelevant.
U.S. v. Dubose, Case No. 09-11400 (11th Cir. 3/1/10)
Firearms: Poss by a Convicted Felon - Domestic Violence Predicate - Statute Need Not Require Domestic Violence
It is enough to qualify as a crime of domestic violence if the offense has as an element the use of force and it was committed against a spouse.
U.S. v. Griffith, Case No. 05-12448 (11th Cir. 7/17/06)
Firearms: Poss. by a Convicted Felon - Georgia Battery Statute Qualified as a Domestic Violence Conviction
Georgia's battery statute sufficed as a predicate offense under 18 U.S.C. 922(g)(9)'s requirement that the offense "has, as an element, the use or attempted use of physical force." The Georgia crime requires "physical contact of an insulting or provoking nature." Wonder if Florida's statute falls short?
U.S. v. Griffith, Case No. 05-12448 (11th Cir. 7/17/06)
Firearms: Poss. by a Convicted Felon - Bullet in Pocket and Hidden Firearm Justified Two Separate Charges
Where officers found a firearm hidden in a trash can by the defendant and upon taking him to jail later found a bullet in his pocket, the government correctly charged the defendant with two separate offenses. Court based its decision on the fact that the bullet and the guns were found at separate times and in what amounted to separate locations.
U.S. v. Goodine, Case No. 04-4320 (4th Cir. 3/15/05)
Firearms: Poss. by a Convicted Felon - Bifurcation Rejected
The court rejected the defendant's argument that the jury should consider whether the defendant was a convicted felon in a second and separate proceeding. The court concluded that proof of the prior conviction did not present any risk of prejudice as is was an essential element of the offense.
U.S. v. Amante, Case No. 05-3067 (2d Cir. 8/9/05)
Firearms: Poss. by a Convicted Felon - Only U.S. Convictions

The phrase "convicted in any court" as used in 18 U.S.C. 922(g), encompasses only domestic, not foreign convictions and, accordingly, the defendant's conviction for an offense in Japan did not support the conviction.
Small v. U.S., Case No. 03-750 (U.S. 4/26/05)

Firearms: Poss. By a Convicted Felon - Proof of Prior Conviction (Similarity of Names Not Sufficient)

A certified copy of a judgment showing a felony conviction for a person of merely the same name wasn't enough to prove beyond a reasonable doubt that the defendant had a prior conviction for purposes of the charge of being a felon in possession of a firearm.
U.S. v. Jackson, 368 F.3d 59 (2d Cir. 2004)

Firearms: Poss. By Convicted Felon - Possession is Tantamount to Control

For purposes of the offense of being a felon in possession of a firearm, it is enough that the defendant momentarily holds the gun. The law does not recognize a distinction between fleeting or momentary possession and control.
U.S. v. Hendricks, 319 F.3d 993 (7th Cir. 2003)

Firearms: Poss. By Convicted Felon - No Relief From Firearm Prohibition (Catch 22)

Although federal law provides that one convicted of a felony can, once again, lawfully possess a firearm if the Secretary of the Treasury is satisfied that certain preconditions, including the passing of an ATF inquiry, have been met, Congress has refused to provide funding to ATF for the purpose of conducting the required investigation. While there is authority for the courts to review the Treasury Secretary's decision, the absence of funding means there is no decision to review.
U.S. v. Bean, Case No 01-704 (S.Ct. 12/10/02)

Firearms: Poss. By Convicted Felon - Example of Case Involving Only Ammunition

U.S. v. Floyd, 281 F3d 1346 (11th Cir. 2002)

Firearms: Possession by a Convicted Felon - Adjudication Withheld

The fact that adjudication was withheld on the underlying felony may be an absolute defense even if the defendant entered a guilty plea.
U.S. vs. Chubbuck, 14 FLW Fed C759 (11th Cir. 6/1/01)

Firearms: Possession By a Convicted Felon - Defense of Necessity

Necessity, or justification, is a defense. There are four elements: (1) that the defendant was under unlawful and present imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) that the defendant had no reasonable legal alternative to violating the law, and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.
U.S. v. Deleveaux, 13 Flw Fed C447 (11th Cir. 3/9/00); U.S. v. Bell, 13 FLW Fed C743 (11th Cir. 6/16/00); U.S. v. Rice, 13 FLW Fed C744 (6/16/00)

Firearms: Possession by Convicted Felon - When Right To Possess Firearm is Automatically Restored

If the prior conviction occurred in states such as Michigan, where the right to possess a firearm is automatically restored upon completion of the sentence, the "convicted felon" who possesses a firearm does not violate federal law.
U.S. v. Tait, 13 FLW C396 (11th Cir. 2/4/00)

Firearms: Poss. by Conv. Felon - Knowledge of Prior Conviction Unnecessary

It was not necessary that the defendant knew he had been convicted of a felony to convict for being a felon in possession of a firearm.
U.S. v. Jackson, 120 F.3d 1226 (11th Cir. 1997)
Firearms: Possession by a Convicted Felon - When Adjudication of Guilt Was Withheld
If adjudication of guilt was withheld, the offense doesn't count as a prior felony.
United States v. Willis, 106 F.3d 966 (11th Cir. 1997)

Prohibited Firearms

Firearms: Prohibited Firearms - Knowledge (26 U.S.C. ' 5801-5872)
To support a conviction under 26 U.S.C. 5861(d) the government need not prove that the defendant knew that the firearm was not registered but must prove beyond a reasonable doubt the defendant knew of the features of the firearms that brought it within the scope of the National Firearms Act, 26 U.S.C. ' 5801-5872. In the opinion the court recognizes that the pattern instructions for the Eleventh Circuit are inadequate.
U.S. v. Moore, 14 FLW Fed C801 (11th Cir. 6/6/01)
Firearms: Prohibited Firearms - Silencer (Knowledge)
Although the court is obligated to instruct the jury that the defendant knew what he possessed was silencer, the government is not required to prove that the defendant knew the silencer had no serial number.
U.S. v. Ruiz, 14 FLW Fed C795 (11th Cir. 6/8/01); U.S. v. Moore, 14 FLW Fed C801 (11th Cir. 6/6/01)
Firearms: Prohibited Firearms Assault Weapons (Norinco Weapons)
18 USC 921(a)(3) does not encompass all Norinco weapons, only all models of Norinco Avtomat Kalashinkovs.
United States v. Jamieson, 202 F.3d 1293 (11th Cir. 2000)
Firearms: Prohibited Firearms - Short Barrel Shotgun (Must Defendant Know Length Violates the Law?)
See: U.S. v. Reyna, 130 F.3d 104 (5th Cir. 1997); U.S. v. Owens, 103 F.3d 953, 956 (11th Cir. 1997)
Firearms: Prohibited Firearms - Disassembled Short Barreled Rifle Still a Firearm
Where the defendant had a fully assembled rifle, but within the same small apartment, a short barrel that could easily and quickly be substituted for the legal barrel, the court upheld the conviction for possession of a short barreled rifle.
U.S. v. Kent, 12 FLW Fed C777 (11th Cir. 5/4/99)

EXTRADITION

FIRST STEP ACT

First Step Act: Court Need Not Consider § 3553(a) factors

U.S. v. Potts, 997 F.3d 1142 (2021); U.S. v. Gonzalez, 9 F.4th 1327 (11th Cir. 2021)
First Step Act: Those Serving VOSR Sentences
Those serving VOSR sentences are eligible for relief.
U.S. v. Gonzalez, 9 F.4th 1327 (11th Cir. 2021)
First Step Act: Less Than Five Grams of Crack
Those convicted of offenses under 841(b)(1)(C) offenses are ineligible.
Terry v. U.S., Case No. 20-5904 (S. Ct. 614/21)
First Step Act: Five Kilograms or More of Powder Cocaine
Those defendants with a single count conpiracy involving the same threshold amounts are eligible for a reduced sentence under the First Step Act.

UNITED STATES V. TAYLOR, CASE NO. 19-12872 (11TH CIR. 12/9/20)FORFEITURE

Forfeiture: Seizure of Assets
In that 18 U.S.C. § 1345 allows Government to seize untainted assets, the Government's action in seizing those assets when it prevented the defendant from hiring a lawyer violated the Sixth Amendment.
Luis v. U.S., Case No. 14-419 (S. Ct. 3/30/16)**Forfeiture: Forfeiture and Restitution ?**
When the Government sought forfeiture of the $117,659 that the defendant unlawfully obtained from the Social Security Administration and also sought restitution to the Social Security Administration, the trial court denied the forfeiture and ordered the defendant to pay restitution. Because forfeiture and restitution serve distinct purposes, the court of appeals vacated the order and directed the trial court to order both restitution and forfeiture.
U.S. v. Hernandez, 803 F.3d 1341 (11th Cir. 2015); U.S. v. Joseph, 743 F.3d 1350 (11th Cir. 2014)(though, defendant may be entitled to a credit against his restitution obligation when the victim has received the value of forfeited property from DOJ)
Forfeiture: Comingled Funds
See Rothstein v. U.S., Case No. 11-10676 (6/11/13 11th Cir.)
Forfeiture: Pretrial Hearing Regarding Seizure of Assets
Where the defendant is entitled to a pretrial hearing regarding the restraint of his assets, the scope of the hearing is limited to the issue of "traceability." The scope of the hearing does not provide the defendant with an opportunity to challenge the evidentiary support for the underlying charges.
U.S. v. Kaley, Case No. 10-15048 (11th Cir. 4/26/12)
Forfeiture: Eighth Amendment Prohibition Against Excessive Fines
Where jeweler was suspected of selling jewelry to drug dealers that were structured to avoid sales in excess of $10,000, he was convicted in a sting operation of selling $22,000 worth of jewelry. The court held that the forfeiture of the jewelers entire 1.8 million dollars inventory did not violate the Eight Amendment's prohibition against excess fines. Government argued that the forfeiture was justified because the inventory provided an "air of legitimacy" to the scheme.
U.S. v. Chaplin's, Inc., Case No. 10-10832 (11th Cir. 7/13/11)
Forfeiture: Right to Pretrial Hearing Re: Pretrial Seizure of Assets
See: U.S. v. Kaley, Case No. 07-13010 (11th Cir. 8/18/09)
Forfeiture: Substitute Assets - Florida's Homestead Exemption

The substitute property provision of 21 U.S.C. 853(p), does not exempt Florida's homestead exemption and tenancy by the entireties laws. Thus, the defendant's home, which he owned jointly with his wife, was subject to forfeiture as a substitute asset.
U.S v. Fleet, Case No. 06-12454 (11th Cir. 9/5/07)

Forfeiture: Innocent Owner

Unlike civil forfeiture statutes, the criminal forfeiture statutes contain no provision for an innocent owner defense for third parties. Instead, under 21 USC § 853(n)(6), third party petitioners can establish their interest in forfeited property by proving either (1) at the time of the acts giving rise to the forfeiture of the property, the third party held some interest in the property superior to the interest of the defendant, or (2) the third party was a bona fide purchaser for value who purchased an interest in the property without cause to believe that the property was subject to forfeiture.
U.S. v. Soreide, Case No. 05-12559 (11th Cir. 8/24/06)

Forfeiture: Civil - Large Amount of Cash

Possession of roughly $250,000 in cash without much of an explanation supported civil forfeiture.
U.S. v. Stanford, Case No. 01-16485 (11th Cir. 11/2/04)

Forfeiture: Rule 36 Can't Be Used to Include Forfeiture

Where the judgment failed to include forfeiture, the trial court erred when it amended the judgment pursuant to Rule 36 to include forfeiture. Rule 36 is limited to the correction of clerical errors.
U.S. v. Pease, Case No. 00-13237 (11th Cir. 5/22/03)

Forfeiture: Third Party Claims

21 USC 853(n)(6) provides only two avenues of relief for a third party trying to recover in a criminal forfeiture action: (1) a legal right, title, or interest in the property vested in the third party or (2) a showing that the third party is a bona fide purchaser. Recognizing that the courts of appeals are split, the 11th sided with the majority view that unsecured or general creditors cannot be considered bona fide purchasers. In this case, the third party's claim that he gave the money to the defendant so that the defendant could purchase a car for him failed to fall under either exception. There remained the option of seeking relief, not from the court, but from the Attorney General.
U.S. v. Watkins, Case No. 02-10434 (11th Cir. 2/7/03)

Forfeiture: Third Party Claims - Procedure

Once a final judgement is entered against the defendant, any person claiming an interest in the property may commence an ancillary proceeding in the district court by petitioning the court pursuant to 21 USC 853(n((2) to enter an order declaring that his or her interest is superior to the defendant's interest.
U.S. v. Pease, 331 F.3d 809 (11th Cir. 2003); U.S. v. Davenport, Case No. 11-10743 (11th Cir. 2/3/12)

Forfeiture: Dog Alert on Cash

"The probative value of dog alerts to the small of narcotics on currency has been called into question of late. Testimony indicates that as much as 80% of money in circulation may carry residue of narcotics.
U.S. v. $242,484, 318 F.3d 1240, *vacated and reh. en banc granted* (11th Cir. 1/23/2004), but see: U.S. v. Stanford, Case No. 01-16485 (11th Cir. 11/2/04)

Forfeiture: Procedure in Criminal Cases

See: U.S. v. McCorkle 143 F.Supp. 2d 1311 (M.D. Fla 2000); U.S. v. Pease, 331 F.3d 809 (11th Cir. 2003)

Forfeiture: Florida's Homestead Exemption Irrelevant

Florida's Homestead Exemption law is not a bar to either civil or criminal forfeiture under the federal statutes.

U.S. v. Lot 5, 23 F.3d 359 (11th cir. 1994)

Forfeiture: POF Must Be Entered At Time of Sentencing

Pursuant to FRCrP 32, the preliminary forfeiture order sets forth the amount of any money judgment or directing the forfeiture of specific property. The entry of the order authorizes the government to seize the property and begin proceedings that comply "with any statutes governing third-party rights." At the conclusion of any ancillary proceedings, which allows the district court to consider any petitions filed by third parties, a final order is entered. If no third-party files a timely claim the preliminary order becomes the final order of forfeiture. In this case the PFO wasn't entered until six months after sentencing. Because that order was entered after the seven days provided by Rule 35 for modifying a judgement, the Court lacked jurisdiction to enter the PFO and the Court vacated the forfeiture order.

U.S. v. Petrie, 302 F.3d 1280 (11th Cir. 2002)

Forfeiture: Appeal

At least in this instance, the district court's preliminary order of forfeiture was final and immediately appealable.

U.S. v. Gross, 13 FLW Fed C929 (11th Cir. 8/2/2000)

Forfeiture: Spouse's Interest In Property

No innocent owner exception to criminal forfeiture. Only claims that will prevent forfeiture are those of a superior ownership interest, of which a spouse's interest is not, and a bona fide purchaser.

United States v. Kennedy, 201 F.3d 1324 (11th Cir. 2000)

Forfeiture: Criminal vs. Civil

United States v. Kennedy, 201 F.3d 1324 (11th Cir. 2000)

Forfeiture: Licenses

The Court is free to order the forfeiture of licenses, such as in this case, the defendant's medical license, regardless of whatever state procedures might exist.

U.S. v. Dicter, 13 FLW Fed C309 (11th Cir. 12/23/99)

Forfeiture: Specificity in Identification of Property in the Indictment

See: U.S. v. Diaz, 13 FLW Fed C1 (11th Cir. 10/15/99)

Forfeiture: Pre-Trial Seizure and Right to a Hearing

The Eleventh Circuit, recognizing that it is the only circuit that has held that due process does not require a hearing prior to trial when there is a pre-trial seizure, says it might reconsider the matter in the appropriate case.

U.S. v. Register, 12 FLW Fed C1103 (7/29/99**)**

Forfeiture: Lis Pendens Doesn't Qualify for a Pre-Trial Hearing

Although it recognized the affect the filing of a notice of lis pendens has upon property, the court held that such a filing did not amount to a seizure and there was no need for a pre-trial hearing.

U.S. v. Register, 12 FLW Fed C1103 (7/29/99**)**

Forfeiture: Forfeiture of $70,000 Property for $3,250 in Drug Sales Not Excessive

By looking at the ridiculous fines under the federal drug offenses and federal sentencing guidelines, the court held that the forfeiture of real property valued at $70,000 for a series of drug sales prosecuted in state court that involved $3,250 worth of drugs did not violate the Eighth Amendments Excessive Fines clause.
U.S. v. 817 N.E. 29th Drive, Wilton Manors, Florida, 175 F.3d 1304 (11th Cir. 1999)
Forfeiture: Real Property - Extent of Forfeiture Determined by Deed or Local Records?
Where the defendant's home, which was the subject of the forfeiture, sat on what was described in the local land records as two separate parcels, but which were conveyed in a separate deed, the court rejected both devices in deter
mining the amount of property that could be forfeited. Instead, the court opted for a case by case analysis based upon "the character of the land on which the criminal activity took place."
U.S. v. 817 N.E. 29th Drive, Wilton Manors, Florida, 12 FLW Fed C861 (11th Cir. 5/21/99)

FRAUD & THEFT

Bank Fraud

Fraud & Theft: Bank Fraud - Includes Effort to Defraud Bank Depositer
Shaw v. U.S., Case No. 15-5991 (S. Ct. 10/4/16)
Fraud & Theft: Bank Fraud -Govt. Need Not Prove Defendant Intended to Defraud Bank
The passing of forged checks qualified as bank fraud.
Luughrin v. U.S., Case No. 13-316 (S. Ct. 6/23/14)
Fraud & Theft: Bank Fraud - Kiting Checks Among Accounts at One Bank' Fraud
The scope of the federal bank fraud statute, 19 U.S.C. § 1344, is broad enough to include a check kiting scheme that involves accounts at a single bank.
U.S. v. Jiminez, Case No. 05-4098 (3d Cir. 1/14/08)
Fraud & Theft: Bank Fraud - Must Intend to Defraud Bank
Recognizing a split in authority, the court held that in prosecutions under 18 USC 1344 the Government must prove that the defendant intended to defraud the bank or place the bank in jeopardy of a loss rather than simply defrauding a bank customer who has money in the bank.
U.S. v. Thomas, Case No. 01-4283 (3d Cir. 12/31/02)
Fraud & Theft: Bank Fraud - Failure to Prove Bank Federally Insured
The government's failure to prove the bank was federally insured resulted in the conviction of bank fraud being vacated.
U.S. v. Dennis, 14 FLW Fed C316 (11th Cir. 1/8/01)
Fraud & Theft: Bank Fraud - More Than Fundamental Dishonesty
"We have recently rejected the idea that the federal fraud statutes encompass almost any situation. Not just any departure from fundamental honesty constitutes bank fraud under section 1341.
U.S. v. Adkinson, 12 FLW Fed C187 n. 22 (10/26/98)
Fraud & Theft: Bank Fraud - Elements
The government must show the defendant (1)knowingly (2) executed or attempted to execute (3) a scheme or artifice (4) to defraud the institution. A scheme is executed by the movement of

money, funds or other assets from the institution, and this movement of the money from the financial institution completes the execution of the scheme.
U.S. v. Adkinson, 12 FLW Fed C187 (10/26/98)
Fraud & Theft: Bank Fraud - Elements
To convict under 18 USC 1344(1), the government must prove (1) that the defendant intentionally participated in a scheme or artifice to defraud another of money or property; and (2) that the intended victim of the scheme or artifice was a federally insured financial institution. To convict under 18 USC 1344(2), the government mst prove (1) that the defendant participated in the scheme by means of material false pretenses, representations or promises; and (3) that the defendant acted knowingly.
U.S. v. McCarrick, Case No. 01-15065 (11th Cir. 6/18/02)
Fraud & Theft: Bank Fraud - Sufficiency of Evidence
Where evidence, at best, showed only that defendant failed to use money as intended, government failed to establish fraudulent intent at the time the defendant completed loan application and the trial court should have granted a judgment of acquittal.
U.S. v. McCarrick, Case No. 01-15065 (11th Cir. 6/18/02)
Fraud & Theft: Theft - Dealing in Stolen Bank Property - 18 USC 2113(c)
If money is from a robbery, as opposed to a theft, no crime has been committed.
Carter v. U.S., 13 FLW Fed S389 (6/12/00)
Fraud & Theft: Theft - Banks - Intent to Permanently Deprive
Arguable is an element of 18 USC 2113(b).
Carter v. U.S., 13 FLW Fed S389 (6/12/00)

Health Care Fraud

Fraud & Theft: Health Care Fraud - Vague Claims About Fraud Insufficient to Prove Guilt
Government agent's testimony that it was a general practice to provide patients with cheaper compound medications and to bill Medicare for more expensive manufactured medications was inadequate to support a conviction for health care fraud when government failed to produce evidence that a specific patient received a compound medication when Medicare was billed for a manufactured medication.
U.S. v. Medina, Case No. 05-14864 (11th Cir. 5/11/07)
Fraud & Theft: Health Care Fraud - Defendant Must Know Submitted Claim is False
In a health care fraud case, the defendant must be shown to have known that the claims submitted were false. In this case, at least some of the charges of health care fraud were not proven because the kick-backs that were paid did not involve false or fraudulent representations to Medicare.
U.S. v. Medina, Case No. 05-14864 (11th Cir. 5/11/07)
Fraud and Theft: Overview of Medicare Program
See United States v. Jarrell, 15 FLW Fed C397 (11th Cir. 3/22/02)

Honest Services Fraud

Fraud & Theft: Honest Services Fraud - "Official Act"

"Official act" as defined in 18 U.S.C. §201(a)(3), does not, standing alone, include setting up a meeting, calling another public official, or hosting an event.
McDonnell v. U.S., Case No. 15-474 (S. Ct. 4/27/16)
Fraud & Theft: Honest Services Fraud - Jury Instructions
See U.S. v. Aunspaugh, Case No. 12-13132 (11th Cir. 7/8/15)
Fraud & Theft: Honest Services Fraud - Covers Only Bribery and Kickbacks
"To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-McNally case law.
Skilling v. United States, Case No. 08-1394 (S. Ct. 6/24/10); U.S. v. Siegelman, Case No. 07-13163 (11th Cir. 5/11/11)(on remand from Supreme Court); U.S. v. Nelson, Case No. 12-11066 (11th Cir. 3/13/13)
Fraud and Theft: Honest Services Fraud - Need for an Explicit Promise
The Supreme Court has not yet considered whether the federal funds bribery, conspiracy, or honsest services mail fraud statutes require an explicit promise from the official to perform an official act.
U.S. v. Siegelman, 640 F.3d 1159 (11th Cir. 2011)(on remand from Supreme Court)

Mail Fraud and Wire Fraud

Fraud & theft: Mail Fraud and Wire Fraud – Deception Doesn't Always Equal Fraud
A jury cannot convict a defendant of wire fraud based on misrepresentations amounting to a deceit. Even if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if the jury, nevertheless, believes that the alleged victims received exactly what they paid for.
U.S. v. Takhalov, 827 F.3d 1307 (11th Cir. 2016)
Fraud & Theft: Wire Fraud - Use of Interstate Doesn't By Itself Establish Nexus
United States v. Biyklioglu, Case No. 14-31003 (5th Cir. 6/5/16)
Fraud & Theft: Mail Fraud - Defendant's Lack of Involvement in the Mailing
The defendant's lack of involvement in a specific mailing and the circumstances prompting it are immaterial so long as there is sufficient evidence that he was a knowing participant in the broader fraudulent scheme, which involved the use of the mails.
U.S. v. Siegelman, 640 F3d 1159 (11th Cir. 2009)(on remand from the Supreme Court)
Fraud & Theft: Wire Fraud - Does Not Require Financial Loss or That the Defendant Benefitted
Wire fraud does not require the government to prove actual financial loss or that the defendant benefitted from the scheme.
U.S. v. Williams, Case No. 06-15318 527 F.3d 1235 (11th Cir. 2008)
Fraud & Theft: Wire Fraud - Separate Payments of One Lump Sum Won't Support Separate Charges
U.S. v. Evans, 877 F.2d 943 (11th Cir. 1989)
Fraud & Theft: Wire Fraud: Each Wire Transmission a Separate Offense
U.S. v. Williams, Case No. 06-15318 (11th Cir. 5/16/08)
Fraud & Theft: Mail Fraud - Each Letter a Separate Offense
U.S. v. Williams, Case No. 06-15318 (11th Cir. 5/16/08)
Fraud & Theft: Mail Fraud - Pattern Instruction Inadequate

Mail fraud requires the government to prove that the defendant created a scheme "reasonably calculated to deceive persons of ordinary prudence and comprehension." The pattern instruction is inadequate because it "scheme to defraud" as "any plan or course of action intended to deceive or cheat someone out of money or property by means of false or fraudulent pretenses, representations, or promises," and says nothing about deceiving persons of ordinary prudence or comprehension.
U.S. v. Giradot, Case No. 05-13809 (11th Cir. 3/26/08)
Fraud & Theft: Mail Fraud - Honest Services
The scope of conduct covered by the honest services mail fraud statute is extremely broad. The term "honest services" is not defined in the statute, but when a political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interest.
U.S. v. Walker, Case No. 05-16756 (11th Cir. 7/6/07)
Fraud & Theft: Mail & Wire Fraud - Use of Mails After Money Obtained
If the scheme continues, mailings made after the receipt of the money can support a conviction. Letters designed to conceal the fraud by lulling a victim into inaction constitute a continuation of the scheme.
U.S. v. Evans, Case No. 05-10624 (11th Cir. 12/26/06)
Fraud & Theft: Mail & Wire Fraud - Fruition Ends Offense
Once the crime has reached "fruition," further mail and wire transmissions cannot be in furtherance of he scheme.
U.S. v. Evans, Case No. 05-10624 (11th Cir. 12/26/06); U.S. v. Alcindor, Case No. 07-14602 (11th Cir. 6/14/11)
Fraud & Theft: Wire Fraud - Transmission Need Not Be Essential to the Scheme
The transmission itself need not be essential to the success of the scheme to defraud. An interstate wire transmission is "for the purpose of executing" the scheme if is "incident to an essential part of the scheme" or "a step in the plot."
U.S. v. Hasson, 333 F.3d 1264 (11th Cir. 2003); U.S. v. Alcindor,643 F.3d 807 (11th Cir. 2011)
Fraud & Theft: Wire Fraud - Transmitted Info Need Not Include Misrepresentations
To violate the wire fraud statute, it is not necessary that the transmitted information include any misrepresentation.
U.S. v. Hasson, Case No. 00-13180 (11th Cir. 6/12/03)
Fraud & Theft: Wire Fraud - Conspiracy (Use of Wires Must Be Foreseeable)
To prove a conspiracy to commit wire fraud, the government need not demonstrate an agreement specifically to use the interstate wires to further the scheme to defraud; it is enough to prove that the defendant knowingly and voluntarily agreed to participate in a scheme to defraud and the use of the interstate wires in furtherance of the scheme was reasonably foreseeable.
U.S. v. Hasson, Case No. 00-13180 (11th Cir. 6/12/03)
Fraud & Theft: Wire Fraud - "Honest Services" and the Private Sector
For private sector defendant to have violated victim's intangible right to honest services, in violation of the wire fraud statute, it is not enough to prove defendant's breach of loyalty alone; rather, breach of loyalty by pirave sector defendant must contravene by inherently harning the purpose of parties' relationship.
U.S. v. Devegter, 13 FLW C346 (11th Cir. 12/29/99)
Fraud & Theft: Mail Fraud - Elements

Mail fraud conviction requires proof of a scheme to defraud, the use of the mails in furtherance of the scheme, and causation of the use of the mails.
U.S. v. Adkinson, 12 FLW Fed C187 (10/26/98)

Fraud & Theft: Mail Fraud - Reasonable Expectation Fraud Would Involve the Mail

In this workers compensation fraud involving a postal worker, the court upheld a mail fraud conviction against the defendant's claim that she didn't know the mail would be involved, on the rather flimsy claim that because the nature of the workers comp form the defendant would reasonably known that it would be mailed from her place of work to the dept. of labor in another city.
U.S. v. Rhodes, 12 FLW Fed C923 (11th Cir 6/4/99)

Fraud & Theft: Mail Fraud - Public Officials (Sentencing: Guidelines: §2B1.1 Rather Than §2C1.1)

Municipal officers who were convicted of mail fraud after they were caught stealing public funds should have been sentenced under the federal guidelines for theft (2B1.1) rather than those governing public corruption (2C1.1). The court concluded that sentencing the embezzlement scheme as if it was honest-services fraud would be inconsistent with the way the court has narrowed the scope of the federal statutes prohibiting honest-services fraud.
U.S. v. Orsburn, Case No. 07-2584 (7th Cir. 5/8/08)

Fraud & Theft: Mail Fraud - Promotion (Use of Money)

A defendant may not be convicted of promotion money laundering where the proceeds of some relatively minor fraudulent transactions are used to pay the operating expenses fo an otherwise legitimate business enterprise. On the other hand, when the business as a whole is illegitimate, even individual expenditures that are not intrinsically unlawful can support a promotion money laundering charge.
U.S. v. Martinelli, Case No. 04-13977 (11th Cir. 7/10/06)

Fraud & Theft: Mail Fraud - Jury Instructions (Entitlement to "Puffing" Instruction)

See: U.S. v. Martinelli, Case No. 04-13977 (11th Cir. 7/10/06)

Fraud & Theft: Mail Fraud - Jury Instructions (Defining Related Offenses)

Before someone may be convicted of money laundering, the jury must find that the laundered funds were proceeds the specified unlawful activity alleged in the indictment. Despite a convincing dissent, the court held it was not error to fail to define for the jury the specified unlawful activity, mail fraud.
U.S. v. Martinelli, Case No. 04-13977 (11th Cir. 7/10/06)

Fraud & Theft: Mail Fraud - Sufficiency (Nature of Scheme)

To prove the crime of mail fraud the Government must establish that the defendant intended to create a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension. It must show that the defendant took some action in furtherance of his scheme in the form of a material misrepresentation made to the would-be victim that a reasonable person would have acted on.
U.S. v. Gray, Case No. 02-15462 (11th Cir. 4/30/04)

Fraud & Theft: Wire Fraud - Intangible Rights

Court held that the intangible property of confidential business information could properly be the subject of a wire fraud prosecution.
U.S. v. Poirier, Case No. 01-15989 (11th Cir. 2/13/03)

Fraud & Theft: Mail Fraud - Misrepresentation Must Be Material But Need Not Be Believable

A mail fraud conviction does require that the misrepresented facts be material - of a type that a regular person would regard as important in making a particular decision. However, there is no requirement that the misrepresented facts be believable - a defendant is subject to mail fraud liability even though he uses the mail to further a scheme based on ridiculous facts, as long as the subject matter of the misrepresentation is important.
U.S. v. Yeager, Case No. 02-11265 (11th Cir. 5/29/2003)
Fraud & Theft: Mail Fraud - Routine or Innocent Mailing Sufficient
See: Schumck v. U.S., 109 S. Ct. 1443 (1989); U.S. v. Adkinson, 158 f.3d 1147 (11th Cir. 1998); U.S. v. Mills, 138 F.3d 928 (11th cir. 1998); U.S. v. Waymer, 55 F.3d 564 (11th Cir. 1995)
Fraud & Theft: Mail Fraud - Property
18 U.S.C. 1341 prohibits the use of the mail and furtherance of any scheme for obtaining money or property through fraud. The Supreme Court found that Louisiana licenses to operate video poker machinery did not qualify as "property." The court found that equating the issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities. The opinion went on to say that unless Congress conveys its purpose clearly, the court will not read a statute to have significantly changed the federal-state balance in the prosecution of crimes.
Cleveland v. United States, 14FLWFedS3 (11/7/00); U.S. v. Peter, Case No. 01-16982 (11th Cir. 10/28/02)
Fraud & Theft: Mail Fraud - Mailing Need Not Be an Essential Element of the Scheme
To satisfy the mailing requirement the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be incident to an essential part of the scheme or a step in the plot.
U.S. v. Waymer, 55 F.3d 564 (11th Cir. 1995)
Fraud & Theft: Mail Fraud - More Than Puffing and Failed Business Efforts
U.S. v. Majors, 13 FLW Fed C161 (11th Cir. 11/19/99)

Miscellaneous

Fraud & Theft: Charges of Conspiracy to Defraud the U.S. and Health Care Fraud Did Not Violate Double Jeopardy
Convictions for conspiracy to defraud the United States (18 U.S.C. § 371) and conspiracy to commit health care fraud (18 U.S.C. § 1349) did not amount to double jeopardy.
U.S. v. Gonzalez, Case No. 13-15878 (11th Cir. 8/23/16)
Fraud & Theft: 18 U.S.C. § 666 - Theft of Program Funds ($10,000 Requirement: Nexus)
There must be a nexus between the $10,000 received from the federal government and their ultimate use to satisfy the requirement of § 666. In other words, to constitutionally cabin § 666, courts must evaluate a federal program's "structure, operation, and purpose" to determine if the federal receipts qualify as benefits.
U.S. v. McClean, Case No. 14-10061 (11th Cir. 9/24/15)
Fraud & Theft: Puffing Isn't a Crime
"Puffing" or "sellers talk" is not a crime under federal fraud statutes.
U.S. v. Rodriguez, Case No. 11-15911 (11th Cir. 10/16/13); U.S. v. Weimert, Case No. 15-2453 (7th Cir. 4/8/16)
Fraud and Theft: Miscellaneous - 18 U.S. C. § 666 Threshold - Salary

In determining whether the $10,000 threshold is met, salaries are excluded. In this case, though, the trial court properly included the salary paid to a victim advocate because the funds fore her salary "wer not salary payments from the federal government to Brooks County."
U.S.. v. Chafin, Case No. 14-10160 (11th Cir. 10/28/15)
Fraud and Theft: Miscellaneous - Mortgage Fraud Restitution (Successor Lender)
Restitution to a successor lender must typically equal the sum that lender paid to acquire the mortgage equal the sum that lender paid to acquire the mortgage less the principal payments it received and the amount recouped in the short sale. In simple terms, how much is paid mnus ow much it made.
U.S. v. Martin, Case No. 14-11019 (11th Cir. 9/30/15)
Fraud and Theft: Miscellaneous - Misapplication of Funds
The court vacated the 18 U.S.C. § 666 conviction of a director for the Hillsborough County Head Start Program, holding that his judgment of acquittal should of been granted. Evidence of an undisclosed conflict of interest is insufficient, standing alone, to sustain a conviction for "intentionally misapplying" funds within the meaning of § 666.
U.S. V. Jimenez, Case No. 11-15039 (11th Cir. 1/25/13)
Fraud and Theft: Miscellaneous - Bribery (Politics - More Than a Campaign Contribution)
The Government is obligated to prove more than a campaign contribution followed by an act favorable to the donor.
U.S. v. Siegelman, Case No. 07-13163 (11th Cir. 5/11/11)(on remand from Supreme Court)
Fraud and Theft: Miscellaneous - Bribery ("Anything of Value")
The additional freedom gained by individual on pretrial release because of payments he gave his probation office was something of value and sufficed for meeting the requirement of 18 U.S.C. 666 that there be something of "value" received.
U.S. v. Townsend, Case No. 09-12797 (11th Cir. 1/13/11)
Fraud and Theft: Miscellaneous - Bribery (No Requirement of Quid Pro Quo)
While the requirement of corrupt intent under 18 U.S.C. §666 narrows the conduct that falls within the statute, there is no requirement that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed quid pro quo.
U.S. v. McNair, Case NO. 07-11476 (11th Cir. 5/12/10)
Fraud and Theft: Miscellaneous - Bribery - Offer Must be Explicit but Not Express
the acceptance of the campaign donation must be in return for a specific official action - a quid pro quo. No generalized expectation of some future favorable action will do. The official must agree to take or forego some specific action in order for the doing of I to be criminal under Section 666. But there is no requirement be memorialized in a writing or overheard by a third party. Since the agreement is for some specific action or inaction, the agreement must be explicit, but there is no requirement that it be express.
U.S. v. Siegelman, Case No. 07-13163 (11th Cir. 3/6/09)
Fraud and Theft: Miscellaneous -Use of Unauthorized Access Devices - Elements
To convict a defendant for use of unauthorized access devices, in violation of 18 USC 1029(a), the government must prove that 1) the defendant knowingly used one or more unauthorized access devices; (2) with intent to defraud; (3) to obtain things having an aggregate value of $1,000 or more during a one year period; and (4) said use affected interstate or foreign commerce."

U.S. v. Klopf, Case No. 04-10663 (11th Cir. 9/7/05)
Fraud and Theft: Miscellaneous - Use of Unauthorized Access Devices - Sufficiency
Where defendant used identifying information of individuals with better credit than he had to open credit card accounts and then kept the accounts current, he was still guilty of using unauthorized access devices in violation of 18 USC 1029(a)(2).
U.S. v. Klopf, Case No. 04-10663 (11th Cir. 9/7/05)
Fraud and Theft: Miscellaneous - Intent to Defraud (Definition)
Intent to defraud has often been defined as the specific intent to deceive or cheat, for the purpose of either causing some financial loss to another, or bringing about some financial gain to one's self.
U.S. v. Klopf, Case No. 04-10663 (11th Cir. 9/7/05)
Fraud & Theft: Miscellaneous - False Statement (Contracts)
18 USC 1001 makes it a crime to make a false statement concerning any matter within the jurisdiction of the executive branch of the federal government. Court vacated the convictions in this case because (1) the alleged false statement was in a contract and a contract, like a check drawn on a bank, does not involve factual assertions and, therefore, cannot be true or false and (2) because, although, the private construction company to which the alleged false statement was made was under contract with a federal agency, the statements concerned the compliance of the defendant with the terms of a contract he had with the private company, a contract over which the government agency had no supervisory power.
U.S. v. Blankenship, Case No. 01-17064 (11th Cir. 8/26/04)
Fraud and Theft: Miscellaneous - Illegitimate Conduct Not Necessarily Unlawful Conduct
"Illegitimate conduct, however, is not the same thing as unlawful conduct. Not all conduct that strikes a court as sharp dealing or unethical conduct is a 'scheme or artifice to defraud.'"
U.S. v. Chandler, Case No. 03-10725 (11th Cir. 7/19/04)
Fraud and Theft: Miscellaneous - Breach of Contract Not a Crime
Breach of a contract, even a fraudulent breach of a contract, is not a crime; nor does use of the mails make it a crime.
U.S. v. Chandler, 388 F.3d 796 (11th Cir. 2004)
Fraud and Theft: Miscellaneous – Not All Misrepresentation or Omissions' Scheme to Defraud
A scheme to defraud requires proof of material misrepresentations, or the omission or concealment of material facts. That is, not all misrepresentations or omissions constitute a scheme to defraud; the misrepresentation or omission must be material and it must be one on which a person of ordinary prudence would rely. A material misrepresentation is one having a natural tendency to influence, or capable of influencing, the decision maker to whom it is addressed. A person of ordinary prudence would not rely on all misrepresentations. Puffery, for example, is not part of a scheme to defraud because a person of ordinary prudence would not rely on it; nor would a person of ordinary prudence engaged in an arms-length purchase rely on the seller's representations regarding the market value of the property when the market value can be, and should be, easily verified by consulting other sources.
U.S. v. Hasson, Case No. 00-13180 (11th Cir. 6/12/03)
Fraud and Theft: Miscellaneous - Student Loans and Pell Grant Funds
Under 20 USC 1097(a) it is a crime for a school administrator to knowingly and willfully fail to make Pell Grant refunds to the Department of Education when a student withdraws or drops out

of school. Under the court's interpretation, the government need not show conversion, i.e. an intent to convert the funds to one's own use.
U.S. v. Weaver, 15 FLW FedC50 (11th Cir. 11/13/01)
Fraud: Miscellaneous - Tax Fraud (Statute of Limitations)
The statute of limitation for willful evasion of payment begins to run from the last affirmative act of evasion, even if the act ocurs past six years from the date which the tax is due.
U.S. v. Hunerlach, 13 FLW Fed C247 (11th Cir. 12/7/99)
Fraud: Miscellaneous - False Statement (Materiality)
A false statement is material if it has a natural tendency to influence, or is capable of influencing the decision of the decision making body to which it was addressed. Because the issue is whether a statement has a tendency to influence of is capable of influencing a decision, and not whehter the statement exerted actual influence, a false statement can be material even if the decision maker did not actually rely on the statement.
U.S. v. Neder, 13 FLW Fed C240 (11th Cir. 12/10/99), *on remand from S.Ct.*
Fraud: Miscellaneous - Materiality an Issue for Jury
Materiality is an element for the jury in cases of tax fraud, mail fraud, wire fraud, and bank fraud.
Neder v. U.S., 12 FLW Fed S323 (2/23/99)

Theft From U.S.

Fraud Theft: Theft From U.S. - 18 U.S.C. § 666 (Recipient of Federal Benefits)
FSU business professor was convicted of embezzling funds from the Student Investment Fund (SIF), a non-profit cooperation established by FSU for charitable and educational purposes. All the money came from private donors and not from FSU. The court of appeals held that the SIF did not qualify as an organization, government, or agency that received federal money and held that the trial court should have granted the defendant's motion for a judgment of acquittal.
U.S. v. Doran, Case No. 16-10927 (11th Cir. 4/26/17)
Fraud & Theft: Theft From U.S. - 18 U.S.C. §371 (Conspiracy to Defraud the U.S. (Govt. Must Be the Target)
In this case, the defendant was charged with conspiring to defraud the U.S., not with conspiring to "commit any offense against the United States." Accordingly, the defendant should have been acquitted of the offense when he fraudulently obtained a Florida commercial driver's license from the Florida Department of Motor Vehicles, as there was no evidence the defendant knew he was defrauding the United States Department of Transportation.
U.S. v. Mendez, Case No. 07-13443 (11th Cir. 5/21/08)
Fraud and Theft: Theft From U.S. - 18 USC 666 Valid Exercise of Spending Clause
The court found 18 USC 666, which prohibits theft or bribery from programs receiving federal funds, to be constitutional. Congress in enacting the legislation did so under the authority of the Necessary and Proper Clause - as a means protect its ability to exercise its authority under the Spending Clause.
U.S. v. Ward, Case No. 00-14144 (11th Cir. 9/12/02)
Fraud: Theft From U.S. - Hospitals Qualify as Recipients of Federal Benefits for Bribery and Fraud Statute

18 USC 666 (b) prohibits defrauding organizations that receive in excess of $10,000 a year in federal benefits. Hospitals, because they receive benefits under Medicare, fall within that statute.
Fischer v. U.S., 13 FLW Fed S315 (5/15/00)

GRAND JURY

Grand Jury: Production of Foreign Financial Records Falls Within Required Records Exception to the Fifth Amendment
In Re: Grand Jury Proceedings, Case No. 4-10 (11th Cir. 2/7/13)
Grand Jury: Grand Jury Subpoena Power Can't Be Used by U.S. Attorney as Part of Its Investigative Process
The grand jury subpoena power may not be used by the United States's Attorney's Office as part of its own investigative process. But the United States Attorney is allowed considerable leeway in attempting to prepare for a grand jury investigation and must regularly interview witnesses prior to appearance before the grand jury to ensure that grand jurors are not burdened with duplicate information.
U.S. v. Merrill, Case No. 11-11432 (11th Cir. 6/27/12)
Grand Jury: Witnesses Right to Review His or Her Testimony
Grand jury witnesses have a right to review transcripts of their own testimony in private at the U.S. attorney's office. A witnesses's interest in reviewing his or her testimony outweighs the government's interest in preserving grand jury secrecy.
In re Grand Jury, Case No. 06-3078 (D.C. Cir. 6/22/07)
Grand Jury: Exception to Secrecy Requirement
Rule 6(e) of the Federal Rules of Criminal Procedure codifies the long standing tradition that grand jury proceedings be kept secret. District courts, however, have inherent power beyond the literal wording of Rule 6(e)(3) to disclose grand jury material and the Rule is but declaratory of that authority.
U.S. v. Aisenberg, Case No. 03-10857 (11th Cir. 2/6/04)
Grand Jury: Government Has No Obligation to Present Exculpatory Evidence
The government is under no duty to bring exculpatory evidence to the grand jury's attention.
U.S. v. Waldon, Case No. 03-10673 (11th Cir. 3/25/04)
Grand Jury: Government's Reliance on Hearsay
Although some courts have expressed criticism of the practice of relying solely on hearsay testimony, there is nothing to prohibit the government, as they did in this case, to relying upon agents reading testimony from prior proceedings.
U.S. v. Waldon, Case No. 03-10673 (11th Cir. 3/25/04)
Grand Jury: Prosecutorial Misconduct
The standard for dismissing an indictment based on prosecutorial misconduct has thus been articulated as whether the misconduct "substantially influenced the grand jury's decision to indict," or whether we have "grave doubt that the [grand jury's] decision to indict was free from the substantial influence of [the prosecutor's misconduct.]
U.S. v. Sigma International, Inc., 13 FLW Fed C203 (11th Cir. 11/30/99), vacated 251 F.3d 1358; U.S. v. Cavallo, Case No. 12-15660 (11th Cir. 6/22/15)

Grand Jury: Prosecutor Can't Set Schedule or Limit Time
A prosecutor may not set the grand jury's schedule for it, nor may a prosecutor suggest that the grand jury has a limited amount of time in which to reach a decision.
U.S. v. Sigma International, Inc., 13 FLW Fed C203 (11th Cir. 11/30/99)**;** vacated 251 F.3d 1358
Grand Jury: Prosecutor May Not Tell Jury What Inferences May Be Drawn
A prosecutor's job is to present evidence of criminal activity to a grand jury. In so doing, the prosecutor may also explain why a piece of evidence is legally significant, but he may not tell the jury what inferences it should draw from the evidence. Factual questions are for the grand jury to determine on its own.
U.S. v. Sigma International, Inc., 13 FLW Fed C203 (11th Cir. 11/30/99)**;** vacated 251 F.3d 1358
Grand Jury: Prosecutor May Not Introduce Evidence of Irrelevant Crimes
U.S. v. Sigma International, Inc., 13 FLW Fed C203 (11th Cir. 11/30/99)**;** vacated 251 F.3d 1358

GUIDELINES

Adjustments

Abuse of Trust (§3B1.3)

Guidelines: Adjustments - Abuse of Trust (Firearms Dealer)
A firearms dealer who sells a firearm to a convicted felon is not subject to an upward adjustment for abuse of trust. Firearms dealers are closely regulated and do not exercise the substantial discretion necessary for the adjustment. Decision includes cites to many kinds of cases where the adjustment was not warranted.
U.S. v. Louis, Case No. 08-10916 (11th Cir. 2/27/09)
Guidelines: Adjustments - Abuse of Trust (Statutory Reporting Requirements Don't Establish Abuse of Trust)
Where statutory reporting requirements are the only connection between the defendant and the government agency that is the victim, this connection is insufficient to show a fiduciary relationship necessary for the abuse-of-trust adjustment.
U.S. v. Williams, Case No. 06-15318 (11th Cir. 5/16/08)
Guidelines: Adjustments - Abuse of Trust (Requires Something More Than Ordinary Reliance on Defendant's Integrity and Honesty)
For the abuse-of-trust adjustment to apply in the fraud context, there must be a showing that the victim placed a special trust in the defendant beyond ordinary reliance on the defendant's integrity and honesty that underlies eery fraud scenario.
U.S. v. Williams, Case No. 06-15318 (11th Cir. 5/16/08)
Guidelines: Adjustments - Abuse of Trust (Pastor)

In a scam with religious overtones and with the defendant in the position of a pastor promoting religious themes, the court still found that the defendant, who was not the pastor of a particular church, was not eligible for the enhancement.
U.S. V. Hall, Case No. 01-14746 (11th Cir. 11/10/03)
Guidelines: Adjustments - Abuse of Trust (Attorney and Trader)
Neither the defendant's status as an attorney nor the fact that he portrayed himself as a trader and had complete discretion over victim's funds was sufficient to justify an enhancement for abuse of trust where there was no showing of a bona fide trust relationship between the defendant and the victims of the investment fraud scheme.
U.S. v. Morris, 15 FLW Fed C405 (11th Cir. 3/28/02)
Guidelines: Adjustments - Abuse of Trust (Armored Car Security Guard)
Armored guard security guard who stole money he was transporting didn't occupy a position of public or private trust, and the trial court shouldn't have enhanced his offense level for abuse of trust.
U.S. v. Ward, 13 FLW Fed C993 (11th Cir. 8/15/00)
Guidelines: Adjustments - Abuse of Trust (Post Office Employees)
Note that the commentary provides that the enhancement applies "to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States Mail."
U.S. v. Ward, 13 FLW Fed C993 (11th Cir. 8/15/00)

Acceptance of Responsibility (§3E1.1)

Guidelines: Adjustments-Acceptance of Responsibility (3rd Level – Not Entirely Govt's Decision)
Given the commentary added in 2013, judicial review is available to determine whether the Government has improperly failed to move for the additonal one-level decrease. Court, however, declined to decide whether the defendant's pursuit of a motion to suppress was a valid reason.
U.S. v. Johnson, 980 F.3d 1364 (11th Cir. 2020)
Guidelines: Adjustments - Acceptance of Responsibility (Conditioned on Defendant's Waiver of Appeal???)
Prosecutors may rely on a defendant's refusal to waive his or her appeal rights as a basis for not filing the motion for the third point for acceptance of responsibility.
U.S. v. Newson, Case No. 06-41115 (5th Cir. 1/22/08), or for exercise of right to trial to preserve issue for appeal, U.S. v. Espinoza-Cano, 456 F.3d 1126 (9th Cir. 2006), or for frivolously contesting drug type and weight, U.S. v. Beatty, 538 F.3d 8 (1st Cir. 2008), or for pursuing suppression motion on appeal, U.S. v. Johnson, 581 F.3d 994 (9th Cir. 2009)(case includes a good dissent)
Guidelines: Adjustments - Acceptance of Responsibility (Defendant's Additional Discovery Response Justified Govt's Decision Denying the 3rd Level Reduction)
Where after the defendant timely notified the government of his intention to plead guilty, but then requested that the drugs be re-weighed, the Government was justified in refusing to file for the additional third-level adjustment for acceptance of responsibility.
U.S. v. Blanco, Case No. 05-4087 (10th Cir. 10/24/06), *see also* U.S. v. Espinoza-Cano, 456 F.3d 1126 (9th Cir. 2006)
Guidelines: Adjustments - Acceptance of Responsibility (Pre-Indictment Criminal Activity)

Trial court erroneously denied the defendant acceptance of responsibility where, before he knew he was to be indicted in federal court, but after being charged in state court for the same conduct, he committed a subsequent offense.
U.S. v. Wade, Case No. 05-12518 (11th Cir. 8/4/06)
Guidelines: Adjustments - Acceptance of Responsibility (Admission of Relevant Conduct)
A defendant will not get credit for acceptance of responsibility if he falsely denies relevant conduct. Nonetheless, he need not admit relevant conduct to get credit for acceptance of responsibility if he isn't asked or if he chooses to remain silent.
U.S. v. Moriarty, 429 F.3d 1012 (11th Cir. 2005)
Guidelines: Adjustments - Acceptance of Responsibility (Criminal Conduct During Pretrial Release)
Defendant's crimes of DUI and possession of heroin while he was on pretrial release, were sufficient reason to deny the defendant acceptance of responsibility.
U.S. v. McLaughlin, 378 F3d 35(1st Cir. 2004)
Guidelines: Adjustments - Acceptance of Responsibility (Plea Only After Trial Begins)
Doesn't necessarily disqualify someone from acceptance of responsibility.
U.S. v. Gutman, 95 F.Supp. 2d 1337 (S.D. Fla. 2000)
Guidelines: Adjustments - Acceptance of Responsibility (Requires Admission of Mens Rea)
If the offense requires a particular mens rea, admission to merely the act and not the required mental state falls short of acceptance of responsibility.
U.S. v. Hendricks, 319 F.3d 993 (7th Cir. 2003)
Guidelines: Adjustments - Acceptance of Responsibility (Need Not Admit to Crime in Open Court)
So long as the defendant "has shown some sign of remorse," he may exercise his right to remain silent and not admit to the crime in open court.
U.S. v. Rodriguez, 959 F.2d 193, 197 (11th Cir. 1992)
Guidelines: Adjustments - Acceptance of Responsibility (Must Accept Responsibility for All of the Charges)
A defendant who is unwilling to accept responsibility for some of the charges against him has not really "come clean" and faced up to the full measure of his criminal culpability. Acceptance of responsibility is all or nothing. A defendant who fails to accept responsibility for all of the crimes he has committed and with which he was been charged is entitled to nothing under § 3E1.1.
U.S. vs. Thomas, 242 F.3d 1028 (11th Cir. 2001)
Guidelines: Adjustments - Acceptance of Responsibility (3 Levels Even With Trial)
Judge gave the defendant, who went to trial, a two level decrease, but because the defendant made a complete and timely confession at the time of his arrest, the judge should have decreased the offense level by one more.
U.S. v. Mateo-Mendez, No. 99-50394 (9th Cir. 6/21/00)
Guidelines: Adjustments - Acceptance of Responsibility (Trial)
Judges may not refuse to find acceptance of responsibility per se simply because a defendant elected to go to trial.
U.S. v. Thayer, 204 F.3d 1352 (11th Cir. 2000)
Guidelines: Adjustments - Acceptance of Responsibility (Additional Crimes Prior to Indictment)
Acceptance of responsibility cannot be denied on the basis of crimes committed before

indictment for the offense of conviction.
United States v. Jeter, 191 F.3d 637 (6th Cir. 1999)
Guidelines: Adjustments - Acceptance of Responsibility (Confession Earned Extra Point)
Despite recanting and forcing the defendant to go to trial, an issue that is relevant to whether the threshold 2 point award is made, the issue of the 3rd point was unaffected by the defendant's post arrest conduct, and what mattered was that the defendant upon his arrest had confessed.
U.S. v. Gracidas-Ulibarry 98-50610 (9th Cir. 9/27/1999)
Guidelines: Adjustments - Acceptance of Responsibility (Continued Use of Drugs)
In this drug conspiracy case, the defendant's continued use of drugs constituted a continuation of the offense of which the defendant was indicted, and justified a denial of his claim of acceptance of responsibility.
U.S. v. Matthews, 168 F.3d 1234 (11th Cir. 1999)
Guidelines: Adjustments - Acceptance of Responsibility (Determination is Within Court's Discretion)
Whether to grant a downward adjustment based on acceptance of responsibility is a matter committed to the district court's discretion. The decision will be affirmed on appeal unless clearly erroneous.
U.S. v. Burston, 12FLW FedC239 (11th Cir. 1998)
Guidelines: Adjustments -Acceptance of Responsibility (Relevant Conduct)
A sentencing court may deny the two point reduction when the defendant denies relevant conduct which the court finds to be true because that denial is inconsistent with the acceptance of responsibility.
U.S. v. Burston, 12FLW FedC239 (11th Cir. 1998)

Miscellaneous

Guidelines: Adjustments - Miscellaneous (Violation of a Prior Judicial Order)
Where in a mail and wire fraud case, the defendant had been the recipient of a temporary injunction that prohibited the conduct that led to the fraud charges, the two level increase pursuant to USSG § 2B1.1(b)(8)(C) was inapplicable because, although the order had been delivered to the defendant's lawyer, the defendant was unaware of it.
U.S. v. Mathauda, Case No. 11-13558 (11th Cir. 1/21/14)
Guidelines: Adjustments - Miscellaneous (Basis Can't Be Based on Speculation)
A district court's factual findings used to support a sentencing enhancement must be based on reliable and specific information and cannot be based on speculation.
U.S. v. Newman, Case No. 09-14557 (11th Cir. 8/17/10)
Guidelines: Adjustments - Miscellaneous (Burden of Proof)
A defendant bears the burden of proving by a preponderance of the evidence, the factual basis for Guideline sections that would reduce the offense level.
U.S. v. Askew, 193 F.3d 1181 (11th Cir. 1999)

Obstruction of Justice (§3C1)

Guidelines: Adjustments - Obstruction of Justice (False Statement on Financial Affidav.)
Defendant obstructed justice when he lied on financial affidavit so he could get a court appointed lawyer. Opinion recognizes a split among the circuits.
U.S. v. Iverson, Case No. 16-51034 (5th Cir. 10/31/17)

Guidelines: Adjustments - Obstruction of Justice (False Statements Made to Pretrial Officer)
The adjustment for obstruction of justice was justified based upon the defendant's false statement about his identity that he made to the pretrial officer.
U.S. v. Doe, Case No. 09-15869 (11th Cir. 10/26/11)
Guidelines: Adjustments - Obstruction of Justice (Perjury)
Perjury, for purposes of applying this enhancement is "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory." While it's preferable for the court to make specific findings, a general finding will often suffice.
U.S. v. Singh, 15 FLW FedC579 (11th Cir. 5/15/02)
Guidelines: Adjustments - Obstruction of Justice (Indirect Threats)
Indirect threats made to third parties constitute obstruction under § 3C1.1 even without a showing that they were communicated to the target of the threats.
U.S. v. Bradford, 15 FLW FedC195 (11th Cir. 1/4/02)
Guidelines: Adjustments - Obstruction of Justice (False Info in PSI)
The threshold of materiality is very low. In this instance the failure to tell the court about a misdemeanor conviction that didn't alter the score sheet met the test of materiality in that it was conceivable the conviction might have altered the sentence within the guideline range.
U.S. v. Odedina, 980 F.2d 705 (11th Cir. 1993). For an equally distressing outcome see also: U.S. v. Dedeker, 961 F.2d 164 (11th Cir. 1992). For a more positive approach see: U.S. v. Yell, 18 F.3d 581 (8t Cir. 1994) and U.S. v. Cardona-Rivers, 64 F.3d 361 (8th Cir. 1995)
Guidelines: Adjustments - Obstruction of Justice (False Answers in Indigency Determination)
Court held that false answers to the magistrate judge regarding ownership of real estate justified an enhancement of the base offense level for obstruction of justice.
U.S. v. Hitt, 164 F.3d 1370 (11th Cir. 1999)U.S. v. Clavijo, 165 F.3d 1341 (11th Cir. 1999)
Guidelines: Adjustments - Obstruction of Justice (Conduct Must Affect Case Before Court)
Acts that amount to obstruction of justice in an unrelated case cannot be used to support the adjustment.
U.S. v. Banks, 347 F.3d 1266 (11th Cir. 2003)
Guidelines: Adjustments - Obstruction of Justice (Not All Rejected Testimony Rises to the Level of Obstruction of Justice)
Despite the fact that the defendant's testimony at his motion to suppress hearing about whether he had consented to the search of his residence was rejected by the district court in favor of the testimony of a law enforcement officer, the circuit court upheld the district court's conclusion that the defendant's was not the "type of willful testimony . . . that would warrant an obstruction enhancement."
U.S. v. Sanders, 341 F.3d 809 (8th cir. 2003)
Guidelines: Adjustments - Obstruction of Justice (False Testimony of Defense Witnesses)
At trial the defendant presented the testimony of his mother, which the district judge found to be untruthful. Prior to sentencing he presented an affidavit from another witness that the judge also found to be untruthful. The district court upheld an enhancement pursuant to 3C1.1 for obstruction of justice by enlisting his mother and the other individual to lie on his behalf.
U.S. v. Gary, 341 F.3d 829 (8th Cir. 2003); U.S. v. Bradberry, Case No. 06-11757 (11th Cir. 10/11/06)

Guidelines: Adjustments - Obstruction of Justice (Hindrance)
As note 5(a) of 3C1.1 requires that the defendant's conduct must have "actually resulted" in a hindrance, the court, in this case where the defendant provided a false name and identification at the time of his arrest, held that "the government must demonstrate how it fruitlessly spent investigation or prosecutorial resources due to [the defendant's] untruthfulness."
U.S. v. Banks, Case No. 02-16866 (11th Cir. 10/20/03)
Guidelines: Adjustments - Obstruction of Justice (False Name and Identification)
Noting that the commentary to section 3C1.1 provides that simply making a false statement under oath to a law enforcement officer does not warrant the application of the obstruction of justice provision, the court held that the defendants conduct of providing a false name and identification did not support the enhancement absent a finding that the conduct resulted in a significant hindrance to the investigation or prosecution of the offense.
U.S. v. Banks, 347 F.3d 1266 (11th Cir. 2003)
Guidelines: Adjustments - Obstruction of Justice (Findings of Fact)
In this instance, the court made no finding "describing how the investigation or prosecution of the offense of conviction would have been helped or hindered by the defendant giving truthful identification at the time of arrest and during pretrial periods thereafter." The court went on to say that "we hold that it is not enough for the sentencing court to adopt the uncontested portions of the PSR, hear the defendants objections and the arguments of counsel, and recite its agreement with the arguments of the prosecutor and the recommendation of the PSR.
U.S. v. Banks, Case No. 02-16866 (11th Cir. 10/20/03)
Guidelines: Adjustments - Obstruction of Justice (Prior to Investigation?)
There is no requirement that the defendant's obstructive acts occur subsequent to the formal commencement of an investigation.
U.S. v. Garcia, U.S. v. Garcia, 208 F.3d 1258 (11th Cir. 2000), vacated on other grounds 531 U.S. 1062 (2001); U.S. v. Wayerski, Case No. 09-11380 (11th Cir. 10/26/10); U.S. v. McGarity, Case No. 09-12070 (11th Cir. 2/6/12)*
Guidelines: Adjustments - Obstruction of Justice (Intent of Defendant)
The key to a finding of obstruction of justice is the intention of the actor, not the actual success of his obstructive acts.
U.S. v. Garcia, 208 F.3d 1258 (11th Cir. 2000), vacated on other grounds 531 U.S. 1062 (2001)
Guidelines: Adjustments - Obstruction of Justice (Failure to Appear)
Although recognizing that it may be that certain typical post-flight conduct is inherent in the crime of failure to appear, which would prohibit an upward adjustment on that basis, the defendant's conduct in this case far exceeded whatever that typical post-flight conduct, and an adjustment was appropriate.
U.S. v. Magluta, 13 FLW Fed C291 (11th Cir. 12/23/99)
Guidelines: Adjustments - Obstruction of Justice (Threats to Victim)
Although, prior to the indictment or investigation, the defendant threatened harm to the victim if he reported the crime, those threats still qualified for an adjustment for obstruction of justice.
U.S. v. Snyder, 98-2574 (7th Cir. 9/2/99)
Guidelines: Adjustments - Obstruction of Justice (Flight)
Flight from law enforcement officers, who, pursuant to a lawful arrest, have exercised custody over the defendant, may constitute obstruction of justice, even if such flight closely follows the defendant's arrest.

U.S. v. Huerta, 98-20812 (5th Cir. 7/27/99)
Guidelines: Adjustments - Obstruction of Justice (Failure To Comply With Pretrial)
Defendant's failure to admit herself into a residential drug treatment program and her failure to report to her pretrial release officer obstructed justice in that a warrant had to be issued, the marshals had to take her into custody, and there had to be another first appearance and detention hearing thereby preventing the judges "from attending to other judicial business and therefore impeded the administration of justice in the Middle District of Florida"
U.S. v. Witherell, 12 FLW Fed C123 (11th Cir. 8/31/99)

Reckless Endangerment (§3C1.2)

Guidelines: Adjustments - Reckless Endangerment (Fleeing with Gun in Hand)
Though defendant may have been just trying to discard this handgun, court concluded that by pulling out his gun, the defendant risked causing one of the officers to shoot and possibly hit another officer or some other person and that the increase for reckless endangerment was appropriate.
U.S. v. Easter, 553 F.3d 519 (7th Cir. 2009)
Guidelines: Adjustments - Reckless Endangerment (Passenger)
District court erroneously assessed the two-level increase for reckless endangerment against the defendant, who as a passenger in a car that fled from the police.
U.S. v. Johnson, Case No. 11-13621 (11th Cir. 9/10/12)
Guidelines: Adjustments - Reckless Endangerment (Must Be Fleeing From Law Enforcement)
The reckless endangerment adjustment only applies if the defendant is fleeing from law enforcement. Here, where the defendant kidnaped his son and sailed into the Gulf of Mexico, the adjustment was inapplicable.
U.S. v. Martikainen, Case No. 10-13337 (11th Cir. 5/10/11)
Guidelines: Adjustments - Reckless Endangerment (Driving a Car at High Speeds)
Driving a car at high speed in an area where people are likely to be present amounts to reckless endangerment.
U.S. v. Washington, Case No. 05-10474 (11th Cir. 1/6/06)
Guidelines: Adjustments - Reckless Endangerment (Agent's Injury Suffered When Tackling Defendant)
Where defendant ran and the officer injured himself while tackling the defendant, the upward adjustment under 3C1.2 was inapplicable. It is the defendant's conduct, not that of the pursuing officers, which must recklessly create the substantial risk of death or serious bodily injury to others.
U.S. v. Wilson, Case No. 03-14408 (11th Cir. 12/7/04)
Guidelines: Adjustments - Reckless Endangerment (Assault of Officer and Reckless Endangerment)
There was no error in applying both the three level enhancement under section 3A1.2(b) for assaulting an officer during flight, and two level enhancement under section 3C1.2 for reckless endangerment during flight where defendant's assault of officer was separated temporally and spatially from his subsequent, reckless conduct in leading police officers on a high speed chase.
U.S. v. Allen, 12 FLW Fed C1301 (11th Cir. 9/29/99)
Guidelines: Adjustments - Reckless Endangerment (Passenger in Car During Flight)

Where the defendants were passengers of a car which, following a robbery, was involved in a high speed police pursuit, the trial court erroneously increased the offense level under the theory of reckless endangerment. Application Note Five under s. 3C1.2 provides that a defendant is responsible for his conduct or conduct which he aided and abetted.
U.S. v. Cook, 181 F.3d 1232 (11th Cir. 1999)

Restraint of Victim (§3A1.3)

Guidelines: Adjustments - Restraint of Victim
Despite the guideline comment that "physical restraint" means the "forcible restraint of the victim such as by being tied, bound, or locked up," the court concluded that holding someone at gunpoint qualified.
U.S. v. Gonzalez, 12 FLW Fed C1174 (11th Cir. 8/13/99)

Role in the Offense (§3B1.1 and §3B1.2)

Guidelines: Adjustments - Role in the Offense (Minor Role: Wire Fraud)
U.S. v. Martin, Case No. 14-11019 (11th Cir. 9/30/15)
Guidelines: Adjustments - Role in the Offense (General Discussion)
U.S. v. Figueroa, Case No. 11-2594 (7th Cir. 6/11/12)
Guidelines: Adjustments - Role in the Offense ("Participant")
Has to be one who is *criminally responsible* for the commission of the offense. Here, the court found the individual the defendant was supposedly supervising did not qualify as a "participant" and that the district court, therefore, erred in finding the defendant eligible for the adjustment.
U.S. v. Williams, Case No. 06-15318 (11th Cir. 5/16/08)
Guidelines: Adjustments - Role in the Offense (Middleman or Distributor)
The mere status of a middleman or a distributor does not support enhancement under Section 3B1.1 for being a supervisor, manager, or leader. Section 3B1.1 requires the exercise of some authority in the organization, the exertion of some degree of control, influence or leadership.
U.S. v. Ndiaye, Case No. 04-11283 (11th Cir. 1/6/06)
Guidelines: Adjustments - Role in the Offense (Determining Factors)
The factors that the sentencing court considers in determining whether the sentence should be enhanced on the basis of the defendant's role are: (1) exercise of decision-making authority, (2) nature of participation in the commission of the offense; (3) recruitment of accomplishes; (4) claimed right to a larger share of the fruits of the crime; (5) degree of participation in the planning or organizing of the offense; (6) nature and scope of the illegal activity; and (7) the degree of control and authority exercised over others.
United States v. Rendon, Case No. 02-16208 (11th Cir. 12/31/03)
Guidelines: Adjustments - Role in the Offense (Coexistence of Minor Role and Leadership Role)
While declining to decide the issue, the Eleventh Circuit recognized that other courts have found that a single individual could receive both an increase in his offense level for a leadership role and a decrease for a minor role.
U.S. v. Perry, Case No. 02-16776 (11th Cir. 8/5/03)
Guidelines: Adjustments - Role in the Offense (When Role in Multiple Offenses Differs)
Where defendant has a leadership role in RICO offense, but not in drug conspiracy, which along with other offenses, was before the court at the same time for sentencing, the leadership role of

the defendant in the RICO activities could be used to enhance the drug conspiracy which was the primary offense at the sentencing. It appears this ruling is unique to RICO cases.
U.S. v. Yeager, 13 FLW Fed C634 (11th Cir. 4/25/00)
Guidelines: Adjustments - Role in the Offense (Supervisory Role)
Assertion of control or influence over only one individual is enough to support a 3B1.1(c) enhancement.
U.S. v. Jiminez, 13 FLW Fed C1066 (11th Cir. 8/29/00)
Guidelines: Adjustments - Role in the Offense (Coexistence of Minor Role and Leadership Role)
While declining to decide the issue, the Eleventh Circuit recognized that other courts have found that a single individual could receive both an increase in his offense level for a leadership role and a decrease for a minor role.
U.S. v. Perry, Case No. 02-16776 (11th Cir. 8/5/03)
Guidelines: Adjustments - Role in the Offense (Drugs & Narcotics: Mitigating Role)
Middleman who initially came upon the transaction as a spectator, was entitled to a downward adjustment for a minor role.
U.S. v. Smith, 14 FLW Fed D75 (S.D. Fla. 11/9/00)
Guidelines: Adjustments - Role in the Offense (Drugs & Narcotics: Minimal Involvement - Drug Courier)
In the drug courier context, examples of some relevant factual considerations include: amount of drugs, fair market value of drugs, amount of money to be paid to the courier, equity interest in the drugs, role in planning the criminal scheme, and role in the distribution.
U.S. v. De Varon, 175 F.3d 930 (11th Cir. 1999)
Guidelines: Adjustments - Role in the Offense (Drugs & Narcotics - Minimal Involvement - Drug Courier)
The district court must measure the defendant's role against the relevant conduct for which she was held accountable at sentencing. In many cases this method of analysis will be dispositive. Second, the district court may also measure the defendant's role against the other participants, to the extent that they are discernable. (Note there is considerable debate about this approach as explained in Judge Barkett's dissenting opinion)
U.S. v. De Varon 175 F.3d 930, 939-47 (11th Cir. 1999); but see: U.S. v. Isaza-Zapata, 148 F.3d 236, 238-42 (3d Cr. 1998); U.S. v. Ryan, 289 F.3d 1339 (11th Cir. 2002); U.S. v. Boyd, 291 F.3d 1274 (11th Cir. 2002); U.S. v. Alvarez-Coria, 447 F.3d 1340, 1343 (11th Cir. 2006); U.S. v. Monzo, 825 F.3d 1343 (11th Cir. 2017)
Guidelines: Adjustments - Role in the Offense (Drugs and Narcotics - Managerial or Supervisory Rule Enhancement)
The management enhancement is appropriate for a defendant who arranges drug transactions, negotiates sales with others, and hires other to work for the conspiracy.
U.S. v. Matthews, 12FLW Fed C535 (11th Cir 3/1/99)
Guidelines: Adjustments - Role in the Offense (Drugs and Narcotics - Minor or Minimal Participation)
The district court, considering a drug distribution conspiracy, is justified in denying a downward adjustment for one who is a minimal or minor participant if he regularly sells or purchases drugs, or serves a liaison between other co-conspirators or arranges transactions.
U.S. v. Matthews, 12FLW Fed C535 (11th Cir 3/1/99)
Guidelines: Adjustments - Role in the Offense (Aggravating Role - Persons Not Assets)

Because USSG § 3B1.1(c) requires supervision of another participant, and not management over assets, the Court in this fraud case, held that the trial court had improperly increased the offense level. Least this be considered a victory, the Court went on to point out that in the comment section of the guideline, the committee points out that the court may depart upward for one who manages the assets.
U.S. v. Harness, 12 FLW Fed C1040 (11th Cir. 7/12/99)

Using a Minor to Commit a Crime (§3B1.4)

Guidelines: Adjustments - Use of a Minor
While the Court concluded that the defendant must take some affirmative step to involve a minor before §3B1.4 becomes applicable, there remains a question as to what amounts to an "affirmative step." Some courts have said something more than mere "partnership" is required, others have held that partnership is sufficient. Here, it didn't take much: the defendant drove the minor to the scene of the burglary, helped the minor enter the building, and acted as a look out while the minor was inside. Even, though, the minor solicited the defendant to commit the crime, the adjustment was upheld.
U.S. v. Taber, Case No. 07-10873 (11th Cir. 8/29/07)
Guidelines: Adjustments - Use of a Minor (More Than Committing Crime With?)
Most courts hold that before the enhancement found in 3B1.4 applies, that the defendant must somehow "use" the minor and do more than simply join a minor in the commission of a crime.
U.S. v. Butler, 207 F.3d 839, 847-849 (6th Cir. 2000); U.S. v. Parker, 241 F.3d 1114, 1120-1121 (9th Cir. 2001); U.S. v. Suitor, 253 F.3d 1206, 1210 (10th Cir. 2001); but see: U.S. v. Ramsey 237 F.3d 853, 859-862 (7th Cir. 2001)
Guidelines: Adjustments -Use of A Minor (Must Def. Be 21 Years Old?)
There is some debate as to whether the enhancement found at 3B1.4 is applicable to defendants younger than 21.
See: U.S. v. Murphy, 254 F.3d 511, 513 (4th Cir. 2001); U.S. v. Ramsey, 237 F.3d 853, 855-858 (7t Cir. 2001); U.S. v. Butler, 207 f.3d 839, 849-852 (6th Cir. 2000)

Vulnerable Victim or Hate Crime Motivation (§3A1.1)

Guidelines: Upward Adjustments - Vulnerable Victim (Repeated Solicitations)
The court concluded the district court did not err in imposing a two level enhancement pursuant to 3A1.1(b) (vulnerable victims), because the victims, in this mail fraud case involving donations to non-existent police and firefighter organizations, had repeatedly been successively solicited. The court found those who had repeatedly made donations to be "particularly susceptible."
U.S. v. Day, Case No. 04-10551 (11th Cir. 4/15/05); but see U.S. v. Branson, 200 Fed. Appx. 939 (11th Cir. 2006)
Guidelines: Adjustments - Vulnerable Victim (Rural Bank Tellers)
While bank tellers are not usually "vulnerable victims," court found them to be in this case because, as perceived by the defendant, they were in a remote location with little or no police protection.
U.S. v. Phillips, 15 FLW Fed C443 (11th Cir. 4/5/02)
Guidelines: - Vulnerable Victim (Defendant's Perception)
The focus is on the defendant's perception of the victim's vulnerability to the offense.
U.S. v. Phillips, 15 FLW Fed C443 (11th Cir. 4/5/02)

Guidelines: Adjustments - Vulnerable Victim (Cab Driver)
While stating that a sentence enhancement in every case where a defendant is convicted of committing a crime against a cab driver would not be appropriate, the court held that the two level enhancement pursuant to USSG 3A1.1(b) was appropriate in this carjacking case because the defendant targeted the taxi cab because he knew that cab drivers must respond to all dispatches and "thus are particularly vulnerable to carjackings."
U.S. v. Franks, 14 FLW Fed C626 (11th Cir. 4/18/01)
Guidelines: Adjustments - Vulnerable Victim and Age
There wasn't a double counting where the vulnerable victim enhancement was applied in the case of a child when the enhancement was based, not upon age, but upon the boys mental and emotional problems.
U.S. v. Romero, 98-2358 (7th Cir. 8/31/99)
Guidelines: Adjustments - Vulnerable Victim (Chance Selection of Victims)
While the guidelines require that the defendant select the victim, here, where there was a home invasion robbery, and there happened to be a 72 year old woman and an 11 year old boy in the home, the Court held that while the selection may have taken place after the entry, the defendant qualified for the two level enhancement.
U.S. v. Gonzalez, 12 FLW Fed C1174 (11th Cir. 8/13/99)

Appeals

Guidelines: Appeals – Court's Announcment It Would Have Imposed Same Sentence Anyway
Where the district states that it would have imposed the sae sentence regardless of any guideline-calculation error, any error is harmless if the sentence would be reasonable even if the district court's guideline calculation was erroneous.
U.S. v. Focia, Case No. 15-15643 (11th Cir. 9/6/17)
Guidelines: Appeals - Showing of an Incorrect Range Is Usually Plain Error
When a defendant is sentenced under an incorrect Guideline range - whether or not the defendant's ultimate sentence falls within the correct range - the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.
Molina-Martinez, v. U.S., 136 S. Ct. 1338 (2016)
Guidelines: Appeals - Lenient on Upward Variances, but Tougher Standard for Downward Variances?
See Judge Wilson's dissent in U.S. v. Rosales-Bruno, Case No. 12-15089 (11th Cir. 6/19/15)
Guidelines: Appeals - Preponderance Standard Not Toothless
The preponderance of the evidence standard is not toothless. The district court must ensure that the Government carries its burden b presenting reliable and specific evidence.
U.S. v. Almedina, Case No. 11-13846 (11th Cir. 7/13/12)
Guidelines: Appeals - "Clearly Erroneous: (Two Reasonable and Different Constructions)
When a fact pattern gives rise to two reasonable and different constructions, the factfinder's choice between them cannot be clearly erroneous.
U.S. v. Almedina, Case No. 11-13846 (11th Cir. 7/13/12)
Guidelines: Appeals - Misinterpretation or Misapplication Amounts to Abuse of Discretion
A court that misinterprets or misapplies the Guidelines inherently abuses its discretion.

U.S. v. McQueen, Case No. 10-14798 (11th Cir. 2/15/12); U.S. v. Register, Case No. 11-12773 (5/4/12)

Guidelines: Appeals - Review for Procedural and Substantive Error

Court first determines whether there is any procedural error - calculation error, treating guidelines as mandatory, failing to consider the 3553(a) factors, selecting a sentence based on clearly erroneous facts, failing to adequately explain the sentence, including the explanation for any deviance from the guideline range - and then the court determines whether the sentence was substantively reasonable under the totality of the circumstances.

U.S. v. Alcindor, Case No. 07-14602 (11th Cir. 6/14/11)

Guidelines: Appeals - Court of Appeals Expects a Sentence Within the Guideline Range to be Reasonable

"We ordinarily expect a sentence within the guideline range to be reasonable, and the appellant has the burden of establishing the sentence is unreasonable in light of the record and the §3553(a) factors."

U.S. v. Gonzalez, Case No. 08-10008 (12/12/08)

Guidelines: Appeals ("Substantive Unreasonableness" Defined)

The review for substantive unreasonableness involves examining the totality of the circumstances, including an inquiry into whether the statutory factors in §3553(a) support hte sentence in question.

U.S. v. Gonzalez, Case No. 08-10008 (12/12/08)

Guidelines: Appeals ("Procedurally Unreasonable" Defined)

A sentence may be procedurally unreasonable if the district court improperly calculated the guidelines range, treats the guidelines as mandatory rather than advisory, fails to consider the appropriate statutory factors, selects a sentence based on clearly erroneous facts, or fails to adequately explain the chosen sentence.

U.S. v. Gonzalez, Case No. 08-10008 (12/12/08), Peugh v. U.S., Case No. 12-62 (S. Ct. 2/26/13)

Guidelines: Appeals (Unnecessary to Remand if Procedural Error Did Not Affect the Sentence)

U.S. v. Livesay, Case No. 06-11303 (11th Cir. 4/23/08)

Guidelines : Appeals - Second Chance Upon Remand?

Where the government failed to establish the defendant's role as a supervisor, the court vacated the sentence but stated the government would be allowed to try to prove their claim with additional evidence. The trial judge would also be allowed to depart upward based upon the facts presented at the initial sentencing hearing.

U.S. v. Harness, 12 FLW Fed C1040, n. 2 (11th Cir. 7/12/99)

Guidelines: Appeals - Standard of Review

Abuse of discretion.

Koon v. U.S., 116 S.Ct. 2035, 2046-2047 (1996); U. S. v. Rosales-Bruno, Case No. 12-15089 (11th Cir. 6/19/15)

Guidelines: Appeals - Scope of Review

Two inquires: (1) whether the sentence was imposed in violation of the law or as a result of an incorrect application of the guidelines, and (2) whether the extent of the departure from the relevant guidelines range is reasonable.

U.S. v. Williams, 989 F.2d 1137 (11th Cir. 1993)

Changes

Guidelines: Changes Amendment 706 Does Not Apply to Career Offenders
U.S. v. Tellis, Case No. 12-12596 (11th Cir. 4/18/14)
Guidelines: Changes - §3582(c) Motions (Amendment 750: Drug Quantity)
Where court of appeals could not determine from the record whether the trial court found the drug quantity exceeded the new maximum quantity of 4.5 kilograms of cocaine base, the court remanded the case to the trial court to determine whether its initial finding was any more specific than "at least 1.5 kilograms." If it was not, the court of appeals directed the trial court to examine the entire record as it existed at the time of the sentencing to determine whether the quantity did or did not exceed 4.5 kilograms. If it cannot make that determination, the defendant is not eligible for a reduced sentence as the defendant bears the burden of establishing his eligibility for the reduced sentence.
U.S. v. Hamilton, Case No. 12-10899 (11th Cir. 4/23/13)
Guidelines: Changes - Successive 3582(c)(2) Motions
There is no prohibition against successive motions requesting a reduced sentence pursuant to changes in the Guideliens and 18 U.S.C. § 3582(c)(2).
U.S. v. Anderson, Case No. 13-12945 (11th Cir. 11/19/14); but see: U.S. v. Caraballo-Martinez, Case No. 16-11772 (11th Cir. 8/4/17)
Guidelines: Changes - Burden of Proving Amendment is Applicable Falls to the Defendant
In a case involving the application the new crack cocaine guidelines, where the judge made a finding at the original sentencing hearing that the government had established that there was a quantity at least equal to the relevant guideline threshold and the a quantity equal to the threshold amount would mean the defendant was eligible for a reduced sentence, the burden fell to the defendant to prove that the actual quantity still qualified him for the reduced sentence.
United States v. Hamilton, 715 F.3d 328 (11th Cir. 2013); U.S. v. Green, Case No. 12-12952 (11th Cir. 9/4/14)
Guidelines: Changes - Fair Sentencing Act and Amendment 750
Recitation of history.
U.S. v. Colon, 707 F.3d 1255 (11th Cir. 2013)
Guidelines: Changes - Booker Inapplicable to New Sentences Imposed Pursuant to 18 U.S.C. § 3582(c)(2)
When, as in the case of the crack cocaine amendment, a new lower sentence is authorized by the retroactive application of a guideline amendment, the district court is not free to impose as sentence outside the newly established guideline range.
Dillon v. U.S., Case No. 09-6338 (S. Ct. 6/17/10)
Guidelines: Changes - Selection of Guideline Offense Limited by Offense of Conviction
The 2003 Amendment 591 requires that the initial selection of the offense be based only on the staute or offense of conviction rather than on judicial findings of actual conduct not made by the jury. The amendment is listed in USSG § 1B1.10(a) as one that applies retroactively.
U.S. v. Moreno, No. 04-15950 (11th Cir. 8/26/05)
Guidelines: Changes Re-Sentencing Original Guidelines Apply
In April 2003, Congress passed the PROTECT Act. Section 3742(g) of the act, known as the Feeney Amendment, provides that when re-sentencing afer appellate remand, a district court should apply the Guidelines that were in place prior to the appeal.
U.S. v. Bordon, No. 04-10654 (11th Cir. 8/25/05)

Guidelines: Changes - Concurrent Or Consecutive Sentences
Amendments effective November 1, 2003, provide that subsection (b) of USSG 5G1.3, which mandates a concurrent sentence applies only to prior offenses that resulted in an increase in the offense level because they are "relevant conduct" resolving the conflict described in cases such as U.S. v. Garcia-Hernandez, 237 F.3d 105, 109 (2d Cir. 2000) and U.S. V. Fuentes, 107 F.3d 1515, 1524 (11th Cir. 1997). The amendments provide that when a new offense is committed while the defendant is on probation, parole, or supervised release that, while the Commission recommends a consecutive sentence, the court has the option of running the sentence concurrently. They provide for a downward departure to take into account the effect of "discharged terms of imprisonment" (5K2.23). Recognizing that in an extraordinary case a departure would be permitted, the amendments resolved a conflict as set forth in cases such as Ruggiano v Reish, 307 F.3d 121 (3d Cir. 2002) and U.S. v. Fermin, 252 F.3d 102 (2d Cir. 2001) by making it clear that the court may not give credit for time served on an undischarged term of imprisonment covered under subsection (c)
Federal Sentencing Guide, Vol. 14, No. 23 (11/17/03)
Guidelines: Changes - Clarifying Amendments (Retroactive?)
While 18 USC § 3582(c)(2) gives retroactive effect to certain amendments to the Guidelines must generally be explicitly listed in USSG § 1B1.10(c). However, if it is a clarifying amendment that has the effect of lowering the sentencing range, such an amendment should be applied retroactively. Clarifying amendments are those that do not effect a substantive change, but provide persuasive evidence of how the Sentencing Commission originally envisioned application of the relevant guideline.
U.S. v Armstrong, Case No. 02-14234 (11th Cir. 10/7/03)
Guidelines: Changes - 2001 Ecstasy Amendments Not Effective Until Published
The letter sent out by the Chair along with the Supplement advised that the increased penalties for ecstasy would be effective May 1, 2001. The amendments, however, were not published in the Federal Register until June 6, 2001. Court held that the amendment did not become effective until June 6. Accordingly, the trial court in sentencing a defendant whose offense occurred in May of 2001, erred in using the amended version of the Guidelines.
U.S. v. DeLeon, 330 F.3d 1033 (8th Cir. 2003)
Guidelines: Changes - Addition of Scope of Conduct to Conspiracy
On November 1, 1992, a clarifying amendment to section 1B1.3 became effective, making it clear that before the conduct of others in the conspiracy could be held against the defendant, for guideline purposes, the conduct must, not only reasonably foreseeable, but also withing the scope of the criminal activity that the defendant agreed to undertake.
U.S. v. Reese, 67 F.3d 902 (11th Cir. 1995)
Guidelines: Changes - Proposed
There are proposals for changes regarding post-offense and post sentence rehabilitation, upward departures based on conduct that was dismissed as part of a plea agreement, and downward departures based on single act of aberrant behavior.
Proposed Amendment 8, Feb. 10, 2000, available at www.ussc.gov.
Guidelines: Changes - For Those Already Sentenced
Under 18 USC s. 3582(c)(2), a district court has discretion to reduce the term of imprisonment of an already incarcerated defendant when that defendant was sentenced based on a sentencing range that
was subsequently lowered by the Sentencing Commission.

U.S. v. Bravo, 13 FLW C393 (11th Cir. 2/11/00)
Guidelines: Changes - Foreseeability of Co-Defendant's Behavior
Up until 1993 there was some debate about whether foreseeability of the codefendant's conduct limited the responsibility of the defendant. In 1993, however, there was a Supreme Court decision that held that Guideline Commentary was controlling. Because there was commentary to the effect that forseeability was a limit, that largely resolved the matter. In 1994 the Guidelines themselves were changed so that s 1B1.3(a)(1)(b) included the forseeability requirement.
U.S. v. Gallo, 195 F.3d 1278 (11th Cir. 11/17/99)
Guidelines: Changes - Application of New Robbery Death Threat' Ex Post Facto
Resisting the temptation to call the 11/1/97 change in the guidelines that provide for an additional two points for a robbery if it involves a death threat that is something less than "express" the court held that the trial courts award of two points for the statement "I have a gun" violated the guarantee against ex post facto laws.
U.S. v. Summers 12 FLW Fed C901 (11th Cir. 5/26/99)
Guideline: Changes - Use Most Recent Version Unless Defendant Disadvantaged
Apply the version of the guidelines in effect at the time of the sentencing, unless a more lenient punishment would result under the guidelines version in effect at the time of the crime
U.S. v. Wilson, 993 F. 3d 214, 216 (11th Cir. 1993); but see: U.S. v. Gunby 112 F.3d 1493, 1500 n. 9 (11th Cir. 1997); U.S. v. Steele, 12 FLW Fed (11th Cir. 6/25/99) which talk in terms of using the guidelines in existence at the time of the offense.
Guidelines: Changes - Clarification Amendments
Clarifications may be applied retroactively
Jones v. U.S., 95-02057 (6th Cir. 11/30/98)

Concurrent Or Consecutive Sentence

Guidelines: Concurrent Or Consecutive Sentences
Amendments effective November 1, 2003, provide that subsection (b) of USSG 5G1.3, which mandates a concurrent sentence applies only to prior offenses that resulted in an increase in the offense level because they are "relevant conduct" resolving the conflict described in cases such as U.S. v. Garcia-Hernandez, 237 F.3d 105, 109 (2d Cir. 2000) and U.S. V. Fuentes, 107 F.3d 1515, 1524 (11th Cir. 1997). The amendments provide that when a new offense is committed while the defendant is on probation, parole, or supervised release that, while the Commission recommends a consecutive sentence, the court has the option of running the sentence concurrently. They provide for a downward departure to take into account the effect of "discharged terms of imprisonment" (5K2.23). Recognizing that in an extraordinary case a departure would be permitted, the amendments resolved a conflict as set forth in cases such as Ruggiano v Reish, 307 F.3d 121 (3d Cir. 2002) and U.S. v. Fermin, 252 F.3d 102 (2d Cir. 2001) by making it clear that the court may not give credit for time served on an undischarged term of imprisonment covered under subsection (c)
Federal Sentencing Guide, Vol. 14, No. 23 (11/17/03)
Guidelines: Concurrent or Consecutive Sentences - Consecutive Sentences to Achieve Guideline Range

Although the 3rd Circuit in U.S. v. Velasquez, 304 F.3d 237, 246 (3d Cir. 2002), has held that USSG 5G1.2, does not always require the court to impose consecutive sentences to reach the guideline range, here, the Eleventh Circuit held that it does.
U.S. v. Pressley, Case No. 02-10674 (11th Cir. 9/16/03)
Guidelines: Concurrent or Consecutive Sentences - To Non-Existent State Sentence
Court has the authority to impose a consecutive sentence to a not yet imposed state sentence.
U.S. v. Sumlin, 317 F.3d 780 (8th Cir. 2002); U.S. v. Andrews, Case No. 02-16043 (11th Cir. 4/25/03)(recognizes a split among the circuits)
Guidelines: Concurrent Sentences or Consecutive Sentences - Sentence Consecutive to State VOP Sentence
The defendant was sentenced to for illegal reentry after having been convicted of an aggravated felony. The sentence was imposed consecutively to the state violation of probation sentence that had been imposed for the violation of the offense that served as the aggravated felony. Following Application Note 6 of USSG § 5G1.3, the Court upheld the District Court's decision to impose a consecutive sentence to the state violation of probation sentence. The court noted, but did not resolve, a split in authority as to whether application note 6 imposes "a mandatory obligation on the district courts.
U.S. v. Morales-Castillo, 314 F.33 561 (11th Cir. 2002)

Criminal History

Calculation

Guidelines: Criminal History - Calculation (Disorderly Intoxication)
While USSG §4A1.2(c)(2) provides that disturbing the peace should never be counted for purposes of criminal history, Florida's disorderly intoxication statute, Fla. Stat. § 856.011, is not sufficiently similar to disorderly conduct or disturbing the peace to be counted as such an offense, and the district court correctly counted the offense in arriving at the defendant's criminal history score.
U.S. v. Garcia-Sandobal, Case No. 11-12196 (11th Cir. 1/3/13)
Guidelines: Criminal History - Calculation (Uncounseled Conviction)
Court of appeals upheld trial court's decision to assess 1 criminal history point for an uncounseled DUI conviction. The court of appeals reasoned that, even if the period of probation may have been invalid, the assessment of a fine for the DUI offense was legitimate and the imposition of a fine, by itself, results in the assessment of a criminal history point.
U.S. v. Acuna-Reyna, Case No. 11-10428 (11th Cir. 4/25/12)
Guidelines: Criminal History - Calculation (No Points for Time Served)
Where the defendant was sentenced to 30 days imprisonment for two prior misdemeanor offenses, but received a sentence of "time served" based on time served on an unrelated offense, the court of appeals concluded the defendant had not, in fact, served any time for the offense and should not receive any criminal history points. (The misdemeanors were ones that are not counted unless the defendant received a sentence of at least 30 days.
U.S. v. Hall, 531 F.3d 414 (6th Cir. 2008)
Guidelines: Criminal History - Calculation (Can't Use Juvenile Offenses?)

At least according to the 9th Circuit, juvenile adjudications may not be used to increase a defendant's criminal history category unless the defendant received a jury trial on the adjudication.
U.S. v. Washington, Case No. 04-50431 (9th Cir. 9/6/06)
Guidelines: Criminal History - Calculation (Florida Cases Consolidated Because of a Single Scoresheet) Under Florida law, sentences are consolidated when they are imposed on the same day, by the same judge, using the same score sheet, and made to run concurrently."
U.S. v. Hernandez-Martinez, 382 F.3d 1304 (11th Cir. 2004), see also U.S. v. Poole, 2006 WL 2442035 (11th Cir. 8/24/06)(where cases were not consolidated because "Poole has not shown that the same score sheet was used.")
Guideline: Criminal History - Calculation (Consolidation Requires More Than Single Sent. Date)
Where on the same day defendant pleaded nolo contendere to two unrelated state offenses before the same judge and was sentenced to concurrent sentences, but there was no formal consolidation order, there were different docket numbers, and separate judgements, the cases were not consolidated for purposes of the criminal history calculations. "Notably, Martinez does not raise the issue of whether his sentences were consolidated under state law, and, therefore, we need consider this argument."
U.S. v. Hernandez-Martinez, 382 F.3d 1304 (11th Cir. 2004); U.S. v. Smith, Case No. 03-15299 (11th Cir. 9/27/04)
Guidelines: Criminal History - Calculation (Home Detention Isn't a "Sentence of Imprisonment")
A sentence of home detention is not, for purposes of calculating criminal history points under USSG 4A1.1(b), a sentence of imprisonment.
U.S. v. Gordon, 346 F.3d 135 (5th Cir. 2003)
Guidelines: Criminal History - Calculation (Part of Instant Offense)
Conviction for providing a false name to a police officer that occurred at the time the defendant was arrested for unlawfully reentering the U.S. was tantamount to "avoid[ing] detection or responsibility for the [federal] offense, and, therefore, pursuant to USSG ' 4A1.2(a)(1) and 1B1.3(a)(1), should not have been given any criminal history points.
U.S. v. White, 335 F.3d 1314 (11th Cir. 2003)
Guidelines: Criminal History - Calculation (Related Offenses: Intervening Arrest)
In determining whether cases are related, the first question is always whether the underlying offenses are separated by an intervening arrest.
U.S. v. Hunter, 323 F3d 1314 (11th Cir. 2003)
Guidelines: Criminal History - Calculation (Stale Outstanding VOP Warrant Counts As Being Under a Sentence)
The two points assessed for committing the offense while under any sentence including probation and escape status pursuant to USSG § 4A1.1(d) includes a probation violation warrant regardless of how long the warrant has been outstanding.
U.S. v. Davis, Case No. 02-12804 (11th Cir. 12/5/02)
Guidelines: Criminal History - Calculation (Time Served Doesn't Count Much)
State court sentences of twenty-seven months, imposed to run concurrently with previously completed federal sentence, which resulted in the defendant walking out of the courtroom a freeman, did not constitute imprisonment under the guidelines, and the defendant shouldn't have

been assessed three points. There is language in the opinion that suggests that any sentence of time served shouldn't be counted for anything more than a single point.
U.S. v. Butler, 14 FLW Fed C57 (11th Cir. 10/6/00)
Guidelines: Criminal History - Calculation (Not the Same As Relevant Conduct)
The broad definition of "common scheme or plan" in the relevant conduct provision isn't suitable for determining whether sentences are "related" for criminal history purposes.
U.S. v. Berry No. 99-2281 (8th Cir. 5/4/2000)
Guidelines: Criminal History - Calculation (Uncounseled Conviction)
"This Court does not allow a defendant to collaterally attack the constitutionality of a conviction for the first time ins a sentencing proceeding. When a defendant, facing sentencing, however, sufficiently asserts facts that show that an earlier conviction is presumptively void, the Constitution requires the sentencing court to review this earlier conviction before taking it into account. This court has suggested that presumptively void convictions are small in number and are perhaps limited to uncounseled convictions.
U.S. v. Cooper, 13 FLW Fed C394 (11th Cir. 2/14/00)
Guidelines: Criminal History - Calculation (10 Year Window Runs From Date of Sentence)
The ten year window necessary to disqualify a prior conviction runs, not from the date of conviction, but from the date of the sentence.
U.S. v. Robbio 98-1785 (1st Cir. 8/2/99)
Guidelines: Criminal History - Calculation (Exclusion of Prior Misdemeanor Offenses)
U.S. v. Martinez, 98-1650 (2d Cir. 7/15/99); United States v. Hardeman, 933 F.2d 278,281 (1991)
Guidelines: Criminal History - Calculation (Adjudication Withheld)
Those cases where adjudication of guilt is withheld should not be counted as a "prior sentence" under USSG §4A1.2.
U.S. v. Rockman, 993 F.2d 811 (11th Cir. 1993), but see U.S. v. Baptiste, 876 F.3d 1057 (11th Cir. 2017).
Guidelines: Criminal History - Calculation (Prior Sentences That Are Part of Relevant Conduct)
The test poses two questions: First, whether the prior sentence was used in setting the base offense level. If so, then it may not be used to enhance the criminal history category - lest there be double counting. If not, the district court must further inquire whether the prior sentence involved relevant conduct, since relevant conduct may never be used to determine the criminal history category.
U.S. v. Torres, 98-3006 (10th Cir. 7/7/99)

Career Offender

Guidelines: Criminal History – Career Offender (Florida Battery)
Florida's battery statute is divisible, at least between the phrase intentionally causing bodily harm and the phrase touching and striking. The court declined to decide whether the touching and striking phrase was, itself, divisible. It went on to hold that if Shepard documents show the conviction was for intentionally causing bodily harm the conviction is, categorically, a crime of violence.
United States v. Gandy, 917 F.3d 1333 (11th Cir. 2019)

Guidelines: Criminal History – Career Offender (Criminal History Category When Chapt Two Produces Higher Offense Level)
Court should use criminal history category VI even if the Chapter Two calculations produce the higher guideline range.
U.S. v. Gay, 240 F.3d 1222 (10th Cir. 2016)
Guidelines: Criminal History- Career Offender (Fla. Battery By Stangulation)
Is a crime of violence.
U.S. v. Dixon, Case No. 17-10503 (11th Cir. 10/23/17)
Guidelines: Criminal History - Career Offender (Johnson Decision Inapplicable)
The decision in Johnson v. United States, 135 S.Ct. 2551 (2015) is inapplicable to the United States Sentencing Guidelines, at least the non-mandatory version.
Beckles v. U.S., Case No. 15-8544 (S. Ct. 11/28/16)
Guidelines: Criminal History - Career Offender (Florida Drug Offenses)
Court affirmed earlier decision in U.S. v. Smith, 775 F.3d 1262 (11th Cir. 2014), holding that Florida controlled substance offenses still counted as predicate offenses for purposes of the career offender provision. Court also held that the Sentencing Commission did not exceed its congressional grant of authority in including such offenses.
U.S. v. Pridgeon, Case, 853 F.3d 1192 (11th Cir. 2017)
Guidelines: Criminal History - Career Offender (Fla.'s Vehicle Flight Offense is a Crime of Violence)
A conviction of Fla. Stat. §316,1935(1) is a crime of violence.
U.S. v. Travis, Case No. 13-10400 (11th Cir. 4/4/14)
Guidelines: Criminal History - Career Offender (Possession of a Sawed-Off Shotgun is a Crime of Violence)
Possession of an uregistered sawed-off shotgun qualifies as a "crime of violence" under the Sentencing Guidelines.
U.S. v. Hall, Case No. 12-11343 (11th Cir. 4/16/13)
Guidelines: Criminal History - Career Offender (Differences in Violent Crime Definition Between Career Offender Guideline and ACC)
The guidelines enhances punishment to protect "the person or property of another" from physical force, while the ACCA enhances punishment to protect against "physical injury to another" but not to property. The guidelines definition is broader in another way, to, in that the ACCA definition includes enumerated crimes - burglary, arson, extortion, and crimes involving the use of explosives - while the guidelines do not. Under the *ejusdem generis* canon of construction, where general words follow a specific enumeration of persons or things, he general words should be limited to persons or things similar to those specifically enumerated. I follows that a violent felony under the ACCA's residual clause must present a risk that is comparable to the risk posed by the enumerated crimes. against "physical injury to another" but not to property. The guidelines definition is no limited in that way because it does not contain any enumerated crimes.
U.S. v. Coronado-Cura, Case No. 12-12344 (11th Cir. 3/26/13)
Guidelines: Criminal History - Career Offender (Failure to Object to Facts in PSR)
"When determining whether an offense is a violent felony (or crime of violence) under the modified categorical approach, a district court can rely on the fact set forth in the PSI if they are undisputed and thereby deemed admitted."
Rozier, v. U.S., Case No. 11-13557 (11th Cir. 11/21/12)

Guidelines: Criminal History - Career Offender (Fla's BLEO)
Court notes that in Johnson v. U.S., 130 S. Ct. 1265 (2010), where the Supreme Court found that Florida's felony battery on a law enforcement officer was not a violent felony, that it did not reach the issue of whether the offense might qualify as a violent felony under the residual clause. Court went on to say that it could be a violent felony under the modified categorical approach.
Rozier v. U.S., Case No. 11-13557 (11th Cir. 11/21/12)
Guidelines: Criminal History - Career Offender (Georgia's False Imprisonment)
The crime of false imprisonment as established n Ga. Code § 16-5-41 is a crime of violence because it presents a level of risk similar to that of burglary of a dwelling.
U.S. v. Chitwood, 676 F.3d 971 (11th Cir. 2012)
Guidelines: Criminal History - Career Offender ("Purposeful, Violent, and Aggressive")
Begay's requirement that a crime of violence, if it is to be similar in kind to one of the enumerated offenses, applies only to strict liability, negligence, or recklessness crimes.
U.S. v. Chitwood, 676 F.3d 971 (11th Cir. 2012);
Guidelines: Criminal History - Career Offender (Alabama Offense of First Degree Assault May Not be a Crime of Violence
The Alabama Offense of First Degree Assault, Ala. Code § 14A-6-20(a) includes the possibility that the defendant acted recklessly rather than intentionally, so it seems unlikely it could be classified as a crime of violence.
U.S. v. Pantle, Case No. 09-13728 (11th Cir. 4/411)
Guidelines: Criminal History - Career Offender (New Jersey's Conspiracy to Commit Armed Robbery Not a Violent Offense)
New Jersey offense of conspiracy to commit armed robbery is not a violent offense because the statute does not require an overt act. Case includes a review of the analysis used to determine whether an offense amounts to a violent one.
U.S. v. Lee, Case No. 10-10926 (11th Cir. 2/2/11)
Guidelines: Criminal History - Career Offender (Florida's Trafficking Charge Not Necessarily a Controlled Substance Offense)
Because Florida's drug trafficking statute includes "purchase" the offense is not necessarily a controlled substance offense for purposes of the career offender guideline. Case includes a concurring opinion stressing the importance of the government securing the appropriate documents and the plea colloquy.
U.S. v. Shannon, 631 F3d 1187 (11th Cir. 2011)
Guidelines: Criminal History - Career Offender (Florida's Discharging a Firearm From a Vehicle Within 1,000 Feet of Another Person is a Crime of Violence)
Opinion includes the analysis used in determining whether a particular offense if a crime of violence and holds that three need not be a specific intent to harm if there is sufficiently reckless conduct.
U.S. v.Alexander, Case No. 08-17062 (11th Cir. 6/25/10)
Guidelines: Criminal History - Career Offender (Non-Overt Act Conspiracy Not a Crime of Violence)
The defendant's prior South Carolina conviction for conspiring to commit a strong arm robbery was not a crime of violence because it did not require an overt act.
U.S. v. Whitson, Case No. 09-10521 (11th Cir. 2/24/10)
Guidelines: Criminal History - Career Offender (Florida's Crime of Aggravated Fleeing and Eluding is a Crime of Violence)

Florida's crime of aggravated fleeing and eluding, Fla. Stat. 316.1953(3)(a) is a crime of violence.
U.S. v. Harris, Case No. 08-15909 (11th Cir. 11/3/09)
Guidelines: Criminal History - Career Offender (Florida's Crime of Carrying a Concealed Weapon Not a Crime of Violence)
U.S. v. Archer, Case No. 07-11488 (11th Cir. 6/26/08)
Guidelines: Criminal History - Career Offender (Variance for Drug Conspiracy Cases)
Court, while concluding that a variance based upon the crack/powder disparity would not be permitted in the case of a career offender charged with a substantive drug offense, held the district court could have granted a downward variance because the defendants were charged with conspiracy only. The Court reached the decision by noting that the Congressional directive found at 28 U.S.C. § 994(h) lists only substantive drug offenses and not conspiracies.
U.S. v. Knox, 573 F.3d 441 (7th Cir. 2009), but see: U.S. v. Welton, Case No. 08-3799 (7th Cir. 10/2/09)
Guidelines: Criminal History - Career Offender (Proof of Prior Conviction)
Government attempted to prove a prior conviction without judicial records, relying instead upon records from the Department of Corrections and the NCIC printout. Court, while holding that the government did not, necessarily have to rely on judicial records, held that the Government could not rely on the its recitation of the sources cited in the PSR without additional information regarding the reliability of those sources.
U.S. v. Bryant, 571 F.3d 147 (1st Cir. 2009)
Guidelines: Criminal History - Career Offender (Shepard: Burglary - Remaining In)
Missouri statute prohibiting burglary of a inhabitable structure, which included "remaining in" qualified as a predicate for career offender sentencing. The term "inhabitable structure" included ships, trailers, and airplanes. The Court concluded it was a crime of violence because it "otherwise involved conduct that presents a serious risk of physical injury to another."
U.S. v. Cantrell, 530 F.3d 684 (8th Cir. 2008)
Guidelines: Criminal History - Career Offender (Carrying a Concealed Firearm Not a Qualifying Offense)
U.S. v. Archer, Case No.07-11488 (11th Cir. 6/26/08)
Guidelines: Criminal History - Career Offender (Predicate Offenses: Battery of a Child Involving Bodily Fluids)
The Florida crime of battery on a child involving bodily fluids qualifies as a predicate offense because throwing is a physical act and "the impact of the fluids against eh child creates pressure and this minimal contact satisfies the requirement of force."
U.S. v. Young, Case No. 07-14780 (11th Cir. 5/19/08)
Guidelines: Criminal History - Career Offender (Escape May Not Be a Crime of Violence)
Contrary to the decisions of other circuits, the court held that a walk-away escape may not always be a crime of violence.
U.S. v. Piccolo, Case No. 04-10577 (9th Cir. 4/3/06)
Guidelines: Criminal History - Career Offender (Battery on a LEO is a Crime of Violence)
The Florida offense of Battery on a Law Enforcement Officer is a crime of violence for purposes of the career offender provision of the Guidelines.
U.S. v. Glover, Case No. 04-16745 (11th Cir. 11/29/05)
Guidelines: Criminal History - Career Offender ("Crime of Violence - DUI")

In a case involving the guidelines calculations for a firearm offense, the court construed the definition of violence found in USSG §4B1.2, the same provision used in career offender classification. In the decision the court found that while driving intoxicated qualified as a crime of violence, the particular state statute involved also covered an individual who was intoxicated, but passed out in a parking lot behind the wheel. Because the offense, in the view of the court, covered both violent and nonviolent conduct, the court remanded the case back to the trial court to see if it was possible to determine the nature of the defendant's prior conduct.
U.S. v. Moore, 420 F.3d 1218 (10th Cir. 2005)

Guidelines: Criminal History - Career Offender (Shepard: Facts Supporting Prior "Crime of Violence")

District Court, relying on "common experience" concluded that a prior state burglary conviction of the Midwestern Drug and Violent Crime task force" must have (1) involved an office where guns and drugs were likely stored; (2) that, thus, there was likely to be a guard inside; and that (3) therefore, the crime presented a serious potential risk to another. That in turn, led the district court, to find that the offense supported the Career Offender classification. The Court held that the judge's fact finding went beyond the sort of information permitted in Shepard v. U.S..
U.S. v. Washington, Case No. 03-4867 (4th Cir. 4/15/05)

Guidelines: Criminal History - Career Offender (Predicate Offense: Enticing a Minor to Engage in Sex)

Using a facility and means of interstate commerce to knowingly persuade, induce, entice or coerce a minor to engage in unlawful sexual activity (18 USC 2422(b)) is a crime of violence for purposes of Career Offender classification.
U.S. v. Searcy, No. 03-16282 (11th Cir. 7/28/05)

Guidelines: Criminal History - Career Offender (Multiple Offenses: All Are Instant Offenses)

When a defendant is being sentenced on two offenses, both are "instant offenses" under the career offender guideline in Chapter Four. The grouping rules do not require the court to treat only one of the instant offenses as the predicate offense, and the offense level that derives from the Chapter Four enhancement for either individual offense may supercede the offense level calculated using the guidelines in Chapter Two and Three for grouped offenses.
U.S. v. Marsielle, Case No. 03-12961 (11th Cir. 7/21/04)

Guidelines: Criminal History - Career Offender (Simultaneous Sentencing on Unrelated Cases: One or More Predicate Convictions?)

See: U.S. v. Martinez, Case No. 02-14267 (11thCir. 2/7/03)(opinion withdrawn);U.S. v. Delvecchio, 920 F.2d 810 (11th Cir. 1991)

Guidelines: Criminal History - Career Offender (Related Offenses)

Although the defendant had been sentenced in state court in a single proceeding for his three robberies, because different case numbers were assigned to the three cases and separate judgments were entered, the district court properly considered them separate for purposes of meeting the career offender requirement.
U.S. v. Martinez, Case No. 02-14267 (11th Cir. 2/7/03) *Vacated and set for oral argument*

Guidelines: Criminal History - Career Offender ("Crime of Violence": DUI With Serious Injury)

A DUI causing serious bodily injury is, for purposes of the Career Offender Guideline, a "crime of violence."

U.S. v. Rubio, Case No. 01-16451 (11th Cir. 1/7/03)
Guidelines: Criminal History - Career Offender (Departures Permissible)
Court may depart downward on the basis that criminal history is overstated
U.S. v. Webb, 139 F.3d 1390 (11th Cir. 1998)
Guidelines: Criminal History - Career Offender (Provisions Strictly Construed)
The career offender guidelines should be interpreted strictly in favor of the defendant.
U.S. v. Delvecchio, 920 F.2d 810 (11th Cir. 1991)
Guidelines: Criminal History - Career Offender (Crime of Violence: Escape)
Even a walk away escape qualifies as a crime of violence.
U.S. v. Gay, 251 F.3d 950 (11th Cir. 2001)
Guidelines: Criminal History - Career Offender (Ambiguity in Nature of Predicate Offenses: PC Affidav?)
Although ambiguity in the predicate offenses may be resolved by examining readily available court documents, there is a difference between those documents and readily available arrest documents such as a probable cause affidavit.
U.S. v. Hernandez, 145 F.3d 1433 (11th Cir. 1998)
Guidelines: Criminal History (Career Offender - Crime of Violence: Examination of Facts?)
A district court may only inquire into the conduct surrounding a conviction if ambiguities in the judgment make the crime of violence determination impossible from the face of the judgment, and then may only examine easily produced and evaluated court documents, including the judgment and conviction, charging papers, plea agreement, presentence report, and findings of the sentencing judge. If no ambiguities exist the guidelines prohibit the district court from reviewing the underlying facts of a conviction to determine whether it is a crime of violence for career offender purposes.
U.S. v. Gay, 251 F3d 950 (11th Cir. 2001)
Guidelines: Criminal History - Career Offender (Example of Two Predicate Offenses That Were Related)
Defendant's Career Offender Sentence was based upon two state sale of cocaine cases. On one day defendant sold an undercover agent a $50 piece of crack, and told the agend that he would pay for every customer referred by the agent. A week later the defendant sold a $50 piece of crack to a second agent sent by the first one. The transactions occurred within a 2 block area. They were related for federal sentencing purposes and shouldn't have been counted as two unrelated offenses.
U.S. v. Robinson, 187 F.3d 516, 519-530 (5th Cir. 1999)
Guidelines: Criminal History - Career Offender (Chapter Three Adjustments)
Other than acceptance of responsibility the adjustments found in chapter three, such as minor role, are inapplicable to those that qualify as career offenders.
U.S. v. Jackson, 98-1909 (7th Cir. 9/2/99)
Guidelines: Criminal History - Career Offender (Burglary of Structure Not a Crime of Violence)
At least as far as the 11th Circuit is concerned.
U.S. v. Spell, 44 F.3d 936 (11th Cir. 1995)
Guidelines: Criminal History - Career Offender (Predicate Crime of Violence)
"[T]he guidelines prohibit the sentencing court from reviewing the facts of a crime of violence for career offender purposes."

U.S. v. Gonzalez-Lopez, 911 F.2d 542, 548 (11th, Cir. 1990). See also: U.S. v. Simmons, 12 FLW Fed C717 (11th Cir. 4/14/99)

Guidelines: Criminal History - Career Offender (Predicate Offenses Include Adjudication Withheld)

U.S. v. Padia, 584 F.2d 85 (5th Cir. 1978); U.S. v. Garcia, 727 F.2d 1028 (11th Cir. 1984); Dickerson v. New Banker Institute, Inc., 460 U .S. 103, 103 S.Ct. 986 (1983); U.S. v. Bruscantini, 761 F.2d 640 (11th Cir. 1985); U.S. v. Jones, 910 F.2d 760 (11th Cir. 1990); United States v. Mejias, 47 F.3d 401 (11th Cir. 1995); U.S. v. Smith, 96 F.3d 1350 (11th Cir. 1996); U.S. v. Pierce, 60 F.3d 886 (1st Cir. 1995)

Guidelines: Criminal History - Career Offender (Fla's Lewd & Lascivious is a Crime of Violence)

Unbelievable!

U.S. v. Rutherford, 12 FLW Fed C848 (11th Cir. 5/13/99)

Guidelines: Criminal History - Career Offender (Qualifying Crime of Violence (Look to the Elements)

In determining whether a conviction qualifies as a crime of violence, a court should look only to the elements of the convicted offense, and not to the conduct underlying the conviction.

U.S. v. Rutherford, 12 FLW Fed C848 (11th Cir. 5/13/99)

Guidelines: Criminal History - Career Offender (Firearms: Crime of Violence or Drug offense - Connection)

For those who qualify as career offenders, the enhancement within that provision for possessing the firearm in connection with a crime of violence or a drug offense, is limited to ammunition or firearms charged in the indictment. This guideline provision addresses the firearm, while by way of contrast 2K2.1 addresses any firearm.

U.S. v. Duty, Case No. 02-11586 (11th Cir. 8/20/02)

Departures

Downward Departures

Aberrant Behavior (§5K2.20)

Guidelines: Departures - Downward Departure (Aberrant Behavior: In General)

See: U.S. v. Orrega, 363 F.3d 1093 (11th Cir. 2004); U.S. v. Devegter, Case No. 04-14075 (11th Cir. 2/16/06)

Guidelines: Departures - Downward Departure (Aberrant Behavior: False Testimony Disqualified)

Because the defendant testified "dishonestly" at trial, the court concluded the defendant could not credibly claim that his criminal conduct was a marked departure from the past and was unlikely to occur, and he was therefore not eligible for a downward departure based upon the claim of aberrant behavior.

U.S. v. Bradstreet, 135 F.3d 46 (1st Cir. 1998)

Guidelines: Departures: Downward Departure (Aberrant Behavior - Only a Possibility in the 11th Circuit)

While the Eleventh Circuit recognizes that a downward departure for a single act of aberrant behavior may be appropriate U.S. v.Withrow, 85 F.2d 527 (11th Cir. 1997), they haven't yet found a case where they thought it was appropriate.
U.S. v Bush, 126 F.3d 1308 (11th Cir. 1997); U.S. v. Onofre-Segarra, 126 F.3d 1298 (11th Cir. 1997). See also: Swartz, Kenneth "The Outlook for an Aberrant Behavior Downward Departure in the Eleventh Circuit Court of Appeals", Florida Defender, Spring 1999; U.S. v. Pickering, 178 F.3d 1168 (11th Cir.1999)
Guidelines: Departures - Downward Departure (Aberrant Behavior: Multiple Acts of Aberrant Behavior)
See: U.S. v. Pickering, 178 F.3d 1168 (11th Cir.1999)

Aliens
Guidelines: Departures - Downward Departure (Aliens: Illegal Reentry -Motive Irrelevant)
The defendant's motivation for reentering will not support a downward departure.
U.S. v. Saucedo-Patino, Case No. 03-10946 (11th Cir. 1/27/04)
Guidelines: Departures - Downward Departure (Aliens: Cultural Assimilation)
Is a basis for a downward departure.
United States v. Rodriguez-Montelongo, 263 F.3d 429 (5th Cir. 2001); U.S. v. Sanchez-Valencia, 148 F.3d 1273, 1274 (11th Cir. 1998); U.S. v. Lipman, 133 F.3d 726 (9th Cir. 1997)
Guidelines: Departures - Downward Departure (Aliens - Small Quantity of Drugs Involved in Enhancement Offense)
At least in the immigration setting, the court stated: "The amount of drugs involved in a drug conviction is not a factor the Sentencing Commission has prohibited or discouraged in a sentencing court from considering when determining whether to depart from the recommended sentence.". See, though, footnote 7, which seems to say that isn't the case for armed career criminals.
U.S. v. Alfaro-Zayas, 13 FLW Fed C225 (11th Cir. 12/2/99)
Guidelines: Departures - Downward Departure (Aliens: Consent to Deportation)
While recognizing a split of authority, the Court adopted the view that before consent to deportation may justify a downward departure, the defendant must "proffer a nonfrivolous defense to deportation."
U.S. v. Mignott, 12 FLW Fed C1199 (11th Cir. 8/16/99)
Guidelines: Departures - Downward Departure (Aliens: Cultural Assimilation)
A defendant's cultural assimilation is a permissible basis for a downward departure. In this case where the defendant had attended a public school in New York and had a wife and seven children that were U.S. citizens, the Court held that the defendant's close connections to this country and wish to remain here with his family could be extraordinary enough to warrant a departure - especially if the defendant was brought to this country as a child and is primarily motivated to be here with his family rather than for financial reasons.
U.S. v. Lipman, 133 R.3d 726 (9th Cir. 1998)

Criminal History (§4A1.3)
Guidelines: Departure - Downward Departure (Criminal History: Only on he Horizontal Axis

Section 4A1.3 departures must proceed on only the horizontal axis and not the vertical axis of the sentencing table. In the case of a career offender, the departure may not exceed one criminal history category.
U.S. v. Gibson, Case No. 04-14776 (11th Cir. 1/4/06)
Guidelines: Departure - Downward Departure (Criminal History: Career Offender -Series of Minor Drug Transactions)
Fact that those offenses that gave rise to career offender classification were minor drug transactions, it was error for the court to depart downward on the basis that the criminal history overstated the seriousness of the offense.
U.S. v. Govan, Case No. 01-16237 (11th Cir. 4/26/02)
Guidelines: Departure - Downward Departure (Criminal History: Timing Not Nature of Priors)
The departure based on overstated criminal history is based upon the pattern or timing of prior convictions, not upon the facts of the individual prior crimes.
U.S. v. Smith, 289 F.3d 696 (11th Cir. 2002); U.S. v. Adams, Case No. 01-13532 (11th Cir. 1/2/03), but see Judge Propst's dissenting opinion.
Guidelines: Departure - Downward Departure (Criminal History: Overstated Criminal History for Career Offenders)
Downward departures for an overstated criminal history, USSG § 4A1.3, may be granted to career offenders**.**
U.S. v. Smith, 289 F.3d 696 (11th Cir. 2002)
Guidelines: Departures: Downward Departure - (Criminal History: Unlikely to Commit Crimes in the Future)
The departure must be made pursuant to USSG § 4A1.3**.**
U.S. v. Smith, 15 FLW Fed C476 (11thCir 4/23/02)
Guidelines: Departures: Downward Departure (Criminal History: Minor Drug Convictions - Career Offender)
Although there is no generalized "street-level" drug selling exception to the career offender classification, the trial court would be able to depart based on an individualized consideration of factors relevant to an assessment of whether the requisite criminal history category VI significantly over-represents the seriousness of the defendant's criminal history under USSG 4A1.3. Such factors could include the amount of drugs involved in the prior offenses, the defendant's role in the offenses, the sentences previously imposed, and the amount of time previously served in comparison to the sentencing range called for by criminal history VI.
U.S. v. Mishoe, 241 F.3d 214 (2d Cir. 2001)
Guidelines: Departures - Downward Departure (Criminal History: Overstatement of Criminal History Inadequate)
Career offender who claimed his status as a career offender overstated his criminal history failed.
U.S. v. Tejada, 146 F.3d 84 (2d Cir. 1998); U.S. v. Pearce, 191 F.3d 488 (4th Cir. 1999); but see: United States v. Williams 78 F. Supp.2d 189 (S.D.N.Y. 1999)

Diminished Capacity (§5K2.13)
Guidelines: Departures - Downward Departure (Diminished Capacity: Link Between Mental Disorder and Offense)

Impulse control disorder, because it was so common among those that collect child pornography did not qualify the defendant in this child pornography case for a downward departure. Even if it had, the defendant failed to link the disorder to the offense.
U.S. v. Miller, 146 F.3d 1281 (11th Cir. 1998)
Guidelines: Departures - Downward Departure (Diminished Capacity - Due to Drug Use)
Apparently not a legitimate reason to depart.
5K2.13; United States v. Russell, 917 F.2d 512, 517 (11th Cir. 1990); U.S. v. Pickering, 178 F.3d 1168 (11th Cir.1999)
Guidelines: Departures - Downward Departure (Diminished Capacity - "Significantly Reduced Mental Capacity")
The application notes found at 5K2.13 define significantly reduced mental capacity to mean that the defendant has a significantly impaired ability to exercise the power of reason; or control behavior that the defendant knows is wrongful. If a departure is warranted the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.
U.S. v. Steele, 178 F.3d 1230 (11th Cir. 1999)

Extraordinary Rehabilitation
Guidelines: Departure: Downward Departure (Extraordinary Rehabilitation)
Prior to his arrest on federal charges the defendant had, at his own request, spent 85 hours over a 20 day period in a program aimed at treating his alcohol and drug addiction. His state probation officer indicated that he was doing well, his counselor reported that he had a sincere desire for treatment, and his family noted a marked improvement in his behavior and attitude. He qualified for a departure.
U.S. v. Newlon, 212 F3d 423, 424 (8th Cir. 2000); see RPM memo in U.S. v. Kathy Jo Haynes.

Family Responsibilities (§5H1.6)
Guidelines: Departures - Downward Departures (Family Responsibilities: Death of Custodial Parent)
The death of the defendant's common law husband left her son without a custodial parent. It was enough to justify a departure.
U.S. v. Aguirre, No. 99-50135 (9th Cir. 6/19/00)
Guidelines: Departures - Downward Departure (Family Responsibilities)
Although in this case the fact that the defendant was supporting three minor children did not justify a departure the Second Circuit has recognized that "where the family was uniquely dependent on the defendant's ability to maintain existing financial and emotional commitments," a departure was justified.
U.S. v. Faria, 161 F.3d 761, 762-763 (2nd Cir. 1998); U.S. v. Matthews, 12FLW Fed C535 (11th Cir 3/1/99); U.S. v. Pereira, 272 F.3d 76, 81-83 (1st Cir. 2001); U.S. v. Sweeting, 213 F.3d 95, 105 (3d Cir. 2000); U.S. v. Dominguez, 296 F.3d 192, 195-200 (3d Cir. 2002); U.S. v. Madrigal, 331 F.3d 258 (2d Cir 2003)
Guidelines: Departure - Downward Departure (Family Responsibilities)
Single mother of 5 children ages, 9 - 14, including one with Tourette'Syndrome who, in particular, needed a lot of attention, didn't qualify.

U.S. v. Sweeting, 99-3774 (3rd Cir. 5/3/2000); U.S. v. McClatchey, 316 F.3d 1122 (10th Cir. 2003); U.S. v. Devegter, Case No. 04-14075 (11th Cir. 2/16/06)

Fraud Cases

Guidelines: Departures - Downward Departure (Fraud Cases: No Loss)
Absence of a loss in this bribery case didn't justify a downward departure.
U.S. v. Devegter, Case No. 04-14075 (11th Cir. 2/16/06)

Guidelines: Departures - Downward Departure (Fraud Cases: Loss Amount Overstates Criminality)
While a downward departure under the fraud guidelines may be justified if the loss amount overstates the seriousness of the offense, the suggestion is that it applies only in those cases where there is no meaningful chance that the attempted crime would have succeeded to the extent indicated by the stated loss.
U.S. v. Crawford, Case No. 03-15136 (11th Cir. 5/2/05)

Guidelines: Departures - Downward Departure (Fraud Cases: Lack of Criminal Sophistication)
Lack of criminal sophistication does not justify a downward departure under the fraud guidelines.
U.S. v. Crawford, Case No. 03-15136 (11th Cir. 5/2/05)

Guidelines: Departures - Downward Departure (Fraud Cases - Loss Overstates Seriousness of the Offense)
See: United States v. Graham, 146 F.3d 6 (1st Cir. 1998); United States v. Monaco, 23 F.3d 793 (3rd Cir. 1994; United States v. Stuart, 22 F.3d 76 (3rd Cir. 1994).

Guidelines: Departures - Downward Departure (Fraud Cases - Loss Not Caused By Offense)
A downward departure was justified because the loss was occasioned by, not the defendant's actions, but a downturn in the economy.
U.S. v. Gregorio, 956 Fl2d 341 (1st Cir. 1992)

Health (§5H1.4)

Guidelines: Departures - Downward Departure (Health - Crohn's Disease)
In a tax case, the defendant submitted a letter from his gastroenterologist of 31 years stating that should Demerol not be available to the defendant with 6 to 12 hours, he would develop a bowel obstruction that could require urgent surgery. Additionally, the defendant suffered from a suppressed immune system as a result of continued steroid therapy necessary to treat Crohn's disease. The defendant's physician stated that confinement in a correctional facility would place the defendant at an unacceptable risk for serious infectious disease. The court of appeals affirmed a downward departure from 21 to 27 months to probation.
U.S. v. Martin, 363 F.3d 25 (1st Cir. 2004).

Guidelines: Departures - Downward Departure (Health: Serious Heart Problems)
Defendant with serious heart problems did not qualify for a downward departure under 5H1.4.
U.S. v. Johnson, 318 F.3d 821 (8th Cir. 2003)

Guidelines: Departures - Downward Departure - (Health: AIDS Didn't Suffice)
At least in this instance.
U.S. v. Owusu, 199 F.3d 329 (6th Cir. 2000)

Lack of Guidance & Disadvantaged Upbringing (§5H1.12)
Guidelines: Departures - Downward Departure (Disadvantaged Upbringing)
See: U.S. v. Pickering, 178 F.3d 1168 (11th Cir.1999)

Lesser Harms (§5K2.11)
Guidelines: Departures - Downward Departure (Lesser Harms - Pawned Firearm)
USSG 5K2.11 permits a sentencing court to depart downward from the otherwise applicable sentencing guideline range when the defendant's conduct does not "cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. Here, where the defendant pawned a family heirloom, a 20 gauge shotgun, and plead guilty to being a felon n possession of a firearm and making a false statement in an attempt to acquire a firearm, a downward departure was warranted. The harm the statutes seek to prevent is that of violent crimes and loss of human life. In that the defendant pawned the shotgun for financial reasons, it qualified under the lesser harms provision.
U.S. v. Lewis, 249 F3d 793 (8th Cir. 2001); but see: U.S. v. Bristow, 110 F.3d 754 (11th Cir. 1997) and U.S. v. Reynolds, 215 F.3d 1210 (11th Cir. 2000)

Miscellaneous
Guidelines: Departures - Downward Departure (Miscellaneous: Explanation)
When making a departure the court need not make an explicit reason for doing so. So long as the decision is supported by the record and the court clearly resolves any disputed factual issues, a simple statement of the court's conclusion is sufficient.
U.S. v. Gibson, Case No. 04-14776 (11th Cir. 1/4/06)
Guidelines: Departures - Downward Departure (Miscellaneous: Discretion Still Part of Sentencing Scheme)
It is easy to forget that the Sentencing Guidelines are merely that - guidelines. Any attempt to remove *all* judicial discretion would raise serious concerns about the separation of powers. Any sound legal basis, justified by the facts and not inconsistent with the sentencing statutes can be a proper ground for departure.
U.S. v. Mandhai, Case No. 02-15933 (11th Cir. 7/2/04)
Guidelines: Departures - Downward Departure (Miscellaneous: Discouraged Factors)
District courts may occasionally depart on the basis of discouraged factors. However, discouraged factors support departures only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.
U.S. v. Kim, Case No. 03-11016 (11th Cir. 3/30/04)
Guidelines: Departures - Downward Departure (Miscellaneous: Downward Departure Analysis)
Downward departure analysis involves three steps: First, the sentencing court must decide whether the facts of the case take it outside of the heartland. Secondly, the court must determine whether the proposed ground for departure was adequately taken into account by the Sentencing Commission in formulating the Guidelines. Within this second question, the court must look further and determine whether the ground is forbidden, encouraged, or discouraged. If forbidden, that, of course, ends the process. If encouraged and not taken into account, the ground will support a departure in an appropriate case. If discouraged or if encouraged but already taken into

account, the proposed ground may serve as a basis for departure only if it exists to a degree or in a form that makes the case different from the ordinary case in which the proposed ground is present. If the ground is not mentioned as a basis for departure, the court must decide whether the factor was adequately taken into consideration in formulating the guidelines. Third, if the factor takes the case out of the heartland, and the factor has not been adequately taken into account by the Guidelines, the sentencing court should decide whether the facts of the case exhibit the factor sufficiently to support a departure.
U.S. v. Pressley, Case No. 02-10674 (11th Cir. 9/16/03); U.S. v. Carpenter, Case no. 01-1503 (2d Cir. 2/25/03); U.S. v. Gibson, Case No. 04-14776 (11th Cir. 1/4/06)
Guidelines: Departures - Downward Departure (Miscellaneous: Late Request)
District court did not err in refusing to consider the merits of a motion for a downward departure when the motion was filed the day before sentencing.
U.S. v. Quintana, Case No. 01-13406 (6/20/02)
Guidelines: Departures - Downward Departure (Miscellaneous: Koon - Included Factor)
Inclusion of a factor in the Guidelines calculation does not proscribe departure based on consideration of the factor since a sentencing court may depart based on a considered factor if the factor is present to an exceptional degree or in some other way makes the case distinguishable from an ordinary case where the factor is present. This works for upward departures too.
U.S. v. Hersh, 297 F.3d 1233, 1252 n. 28 (11th Cir. 2002)
Guidelines: Departures - Downward Departures (Miscellaneous: Guided And Unguided)
Guided departures are those departures specifically provided for in the Guidelines. Unguided departures proceed under 5K2.0, which allows for a departure from the prescribed guideline range when there is a circumstance not adequately taken into account by the Guidelines.
U.S. v. Smith, 15 FLW Fed C476 (11thCir 4/23/02)
Guidelines: Departures - Downward Departure (Miscellaneous: Acquittal on Gun Charge Led to Higher Offense Level)
Had the defendant been convicted on the firearm charge, his offense level would have been 41. A 5 year consecutive sentence would have left him with a range of 420 months to life. Because he was acquitted though he was eligible and did receive an increase in the offense level pursuant to s. 2D1.1(b)(1), which left him with a life sentence. Note 2 to s. 2K2.4 authorized a downward departure.
U.S. v. Patterson, No. 97-3132 (6/1/2000)
Guidelines: Departures - Downward Departure (Miscellaneous: Court's Mistaken Belief It Lacks Authority)
Although we generally do not review the merits of a district court's refusal to grant a downward departure, we may conduct a de novo review of a defendant's claim that the district court mistakenly believed it lacked the authority to grant such a departure.
U.S. v. Mignott, 12 FLW Fed C1199 (11th Cir. 8/16/99)
Guidelines: Departures - Downward Departure (Miscellaneous: Appeal of Denial?)
A district court's discretionary refusal to depart downward is not appealable, unless the refusal was based on an erroneous belief that the court did not have the statutory authority to depart from the guideline range.
U.S. v. Harness, 12 FLW Fed C1040 (11th Cir. 7/12/99)
Guidelines: Departures - Downward Departure (Miscellaneous: Justified When ...)

Three questions must be answered before deciding whether a departure is justified: (1) did the Sentencing Commission forbid departure based on the particular circumstances; (2) if not, did the Commission encourage departure based on the particular circumstances; and (3) if not, did the commission discourage departure based on the particular circumstances?
U.S. v. Willis, 139 F.3d 811, 812 (11th Cir. 1998); U.S. v. Steele, 178 F.3d (11th Cir. 1999); U.S. v. Pickering, 178 F.3d 1168 (11th Cir. 1999); U.S. v. Melvin, 187 F.3d 1316 (11th Cir. 1999); U.S. v. Davis, 13 FLW Fed C415 (11th Cir. 9/18/99)

Guidelines: Departures - Downward Departure (Miscellaneous: Court Must Articulate Reasons)

"a district court granting a downward departure must articulate the specific mitigating circumstances upon which it relies and the reasons why these circumstances take a case out of the guidelines heartland."
U.S. v. Tomono, 143 F.3d 1401, 1403 (11th Cir. 1998); U.S. v. Steele, 12 FLW Fed (11th Cir. 6/25/99)

Guidelines: Departures - Downward Departure (Miscellaneous: Extent of Court's Discretion)

Unless a particular factor has been declared off limits by the Sentencing Commission (e.g. race, sex, national origin, creed, religion, socio-economic status, lack of youthful guidance, drug or alcohol dependence, or economic hardship) the factor may be a ground for a downward departure.
U.S. v. Koon, 518 U.S. 81m 135 L.Ed.2d 392, 116 S.Ct. 2035 (1995)

Other Reasons

Guidelines: Departures - Downward Departure (Other Reasons - Conditions of Confinement Prior to Sentencing)

While recognizing, in theory that the conditions of confinement prior to sentencing could support a departure, the court found that the defendant's circumstance, which involved 5 years in a 23-hour-a-day lockdown which had kept him inside for 5 years, didn't qualify.
U.S. v. Pressley, Case No. 02-10674 (11th Cir. 9/16/03)

Guidelines: Departures - Downward Departure (Other Reasons: Absence of Basis for Enhancement)

Can't depart downward because of the absence of a basis for enhancement. Assumption is that such a factor is adequately taken into account by the Guidelines.
U.S. v. Pressley, Case No. 02-10674 (11th Cir. 9/16/03)

Guidelines: Departure - Downward Departure (Other Reasons: Short Barreled Shotgun Possessed as a Curiosity)

Conceivably, a sentencing court may depart downward, on the basis of lesser harm, in a case involving the possession of a short barreled shotgun where, as in this case, the defendant possessed it only as a "curiosity."
United States v. Hadaway, 998 F.2d 917 (11th Cir. 1993)

Guidelines: Departure - Downward Departure (Other Reasons: Extraordinary Collateral Consequences)

In a case where the length of the sentence would have determined whether the defendant would be deported to Burma where the defendant feared for his safety, the district court lacked the authority to depart downward on the basis fo extraordinary collateral consequences.

U.S. v. Maung, Case No. 02-12945 (11th Cir. 2/10/03)

Guidelines: Departure - Downward Departure (Other Reasons: Erroneous Sentence of Home Detention)

Where after serving an initial sentence of imprisonment followed by home detention, the circuit court vacated that sentence and remanded for imposition of a longer prison sentence, the trial court could grant a downward departure to reflect at least a portion of the time the defendant had served on home detention.

Guidelines: Departures - Downward Departure (Other Reasons: Sentence Manipulation)

Court held that a series of undercover purchases of small quantities of drugs that ultimately qualified the defendant for harsher sentencing did not qualify for a downward departure.

U.S. v. Govan, 293 F.3d 1248 (11th Cir. 2002); U.S. v. Bohannon, Case No. 05-16492 (11th Cir. 2/1/07))

Guidelines: Departures - Downward Departure (Other Reasons: Artificially Low Price for Drugs)

A downward departure may be warranted where the government as a supplier sets artificially low prices for drugs.

U.S. vs. Ryan, 15 FLW Fed C538 (11th Cir. 5/2/02)

Guidelines: Departures - Downward Departure (Other Reasons: Child Porn for Only Personal Use Didn't Suffice)

U.S. v. Bradley, 13 Flw Fed C415 (11th Cir. 8/18/99)

Guidelines: Departures - Downward Departures (Other Reasons: Extreme Remorse May Justify Departure)

U.S. v. Fagan, 162 F.3d 1280, 1284-85 (10th Cir. 1998); U.S. v. Jaroszenko, 92 F.3d 486, 490-91 (7th Cir. 1996)

Guidelines: Departures - Downward Departure (Other Reasons: Substantial Assistance Absent Govt. Motion)

Court can't depart downward on a Koon theory.

U.S. v. Abuhouran, 161 So.2d 206, 210-17 (3d Cir. 1998); In re Sealed Case, 181 F.3d 128, 131-42 (D.C. Cir. 1999); U.S. v. Solis, 169 F.3d 224, 227 (5th cir. 1999)

Guidelines: Departures - Downward Departure (Other Reasons: Sentence Entrapment)

Cases in which the government has specifically induced defendants to commit more serious crimes in order to enhance their punishment.

U.S. v. Barth, 990 F.2d 422, 424 (8th Cir. 1993); U.S. v. Jones, 102 F.3d 804, 809 (6th Cir. 1996); U.S. v. Mason, No. 96-5119, 1997 WL 560062 (6th Cir. 9/5/97); U.S. v. Brown, No. 95-6683, 1997 WL 159372 (6th Cir. 4/3/97)

Guidelines: Departures - Downward Departure (Other Reasons: Aggregation of Factors)

The sentencing guidelines explicitly acknowledge that a combination or aggregation of factors could distinguish a case from the heartland of cases.

U.S. v. Coleman, 1999 WL 547996 (6th Cir. 7/28/99); U.S. v. Jones, 158 F.3d 492 (10th Cir. 1998); U.S. v. Whitaker, 152 F.3d 1238 (1st Cir. 1998); *But see:* U.S. v. Devegter, Case No. 04-14075 (11th Cir. 2/16/06)

Guidelines: Departures - Downward Departure (Other Reasons: Intent to Repay)

Defendant's intent to eventually pay withheld taxes to government could take case out of the heartland of tax evasion cases.

U.S. v. Bennick, 134 F.3d 10, 14 (1st Cir. 1998)

Guidelines: Departures - Downward Departure (Other Reasons: Agent's Sexual Misconduct)
Government investigatory misconduct that is unrelated or only tangentially related to the guilt of the defendant is an unmentioned departure factor and is not categorically proscribed from consideration. In this instance the Court remanded to determine whether or not an undercover agent's sexual misconduct was sufficient to take the case outside the "heartland."
U.S. v. Brennick, 134 F.3d 10 (1st Cir. 1998)
Guidelines: Departures - Downward Departure (Other Reasons: Disparity Between State Sentence)
Didn't qualify.
U.S. v. Willis, 139 F.3d 811 (11th Cir. 1998); U.S. v. Search 132 F>3d 1421 (11th Cir. 1998)
Guidelines: Departures - Downward Departure (Other Reasons: Disparity, Quantity of Drugs, and Deportation)
All were, in this case, inadequate reasons to depart.
U.S. v. Tejada, 146 F.3d 84 (2d Cir. 1998)
Guidelines: Departures - Downward Departure (Other Reasons: Preindictment Delay)
Although the Eleventh Circuit has not decided, every circuit that has considered it the issue has determined that preindictment delay may support a downward departure. There must, however, be some showing of prejudice or bad faith.
U.S. v. Stuart, Case No. 04-11018 (11th Cir. 9/14/04)
Guidelines: Departures - Downward Departure (Other Reasons: Others Not Charged)
The government's decision not to charge others who were involved in the offense was a factor the court could consider in deciding to depart downward.
U.S. v. Mandhai, Case No. 02-15933 (11th Cir. 7/2/04)
Guidelines: Departures - Downward Departure (Other Reasons: Penalty Doesn't Fit the Crime)
"We agree with the district court, however, that the 12 level increase to Nandhai's offense level required by the terrorism enhancement prevents the penalty from fitting the crime, base on the fact of this record. The totality of the circumstances in this record, along with other factors that might not have brought to the Court's attention because he granted a downward departure, may be sufficient to remove the case from the Guidelines "heartland."
U.S. v. Mandhai, Case No. 02-15933 (11th Cir. 7/2/04)
Guidelines: Departures - Downward Departure (Other Reasons: Extraordinary Restitution)
Extraordinary restitution, whether paid before or after adjudication of guilt may, in the unusual case, support a departure from the guidelines. Factors include the degree of voluntariness in paying the restitution, the efforts to which a defendant went to make restitution, the percentage of funds restored, the timing of the restitution, and whether the defendant's motive demonstrates sincere remorse and acceptance of responsibility.
U.S. v. Kim, Case No. 03-11016 (11th Cir. 3/30/04)
Guidelines: Departures - Downward Departure (Other Reasons: Lack of Profit Not a Reason to Depart)
Despite having made only $700 by knowingly selling drugs to an individual presenting forged prescriptions, that lack of profit was not a reason to depart from the guideline range of 151 to 188 months.
U.S. v. Steele, 12 FLW Fed (11th Cir. 6/25/99)

Guidelines: Departures - Downward Departure (Other Reasons: Loss of License Not a Reason to Depart)
Like the loss of a medical license the loss of a license to distribute drugs wasn't a reason to gibe this pharmacist a downward departure.
U.S. v. Steele, 12 FLW Fed (11th Cir. 6/25/99); U.S. v. Hoffer, 129 F.3d 1196 (11th Cir. 1997)
Guidelines: Departures - Downward Departure (Other Reasons: Post Offense Rehabilitation)
On the basis of helping other inmates earn their GEDs and by performing religious services for fellow inmates, the defendant was entitled to a minimal downward departure along the horizontal (criminal history) axis.
U.S. v. Pickering, 178 F.3d 1168 (11th Cir. 1999); U.S. v. Randolph 190 F.3d 720 (6th Cir. 1999); U.S. v. Stuart, Case No. 04-11018 (11th Cir. 9/14/04)
Guidelines: Departures - Downward Departure (Other Reasons: Post Offense Drug Rehabilitation)
Drug rehabilitation that occurs after the offense may justify a downward departure.
U.S. v. Maier, 975 F.2d 944, 948 (2nd Cir. 1992); U.S. v. Green, 152 F.3d 1202, 1207-1208 (9th Cir. 1998); U.S. v. Rhodes, 145 F.3d 1375, 1379-84 (D.C. Cir 1998) (Silberman, J., dissented); U.S. v. Core, 125 F>3d 74, 77-79 (2nd Cir. 1997); U.S. v. Sally, 116 F.3d 76, 79-82 (3rd Cir. 1997); U.S. v. Whitaker, 152 F.3d 1238, 1239 (10th Cir. 1998); U.S. v. Kaptizke, 130 F.3d 820, 823-24 (10th Cir. 1997)
Guidelines: Departures - Downward Departure (Other Reasons: Vulnerability to Abuse)
Because the district court, in part, relied on the nature of the defendant's crime, distribution of child pornography, to conclude that the defendant would be vulnerable to abuse in prison, the court held the departure to be improper.
U.S. v. Wilke, CA7, No. 98-1488, 9/16/98
Downward Departure: Departures - Downward Departure (Other Reasons: Disparity In Sentences of Others)
Although, not an impossibility, it isn't one likely to meet great success.
U.S. v. McMutuary, 217 F.3d 477 (7th Cir. 2000); U.S. v. Martin, 221 F.3d 52 (1st Cir. 2000); U.S. v. Banuelos-Rodriguez, 215 F.3d 969 (9th Cir. 2000); for a more favorable opinion see: U.S. v. Wright, 211 F.3d 233, 238-239 (5th Cir. 2000)

Post Sentencing Rehabilitative Efforts (§5K2.19)
Guidelines: Departures: Downward Departure (Post Sentencing Rehabilitation: Drug Treatment)
Upon resentencing following an appeal, the court may depart downward on the basis of drug rehabilitation that takes place in prison.
U.S. v. Maier, 975 F.2d 944, 948 (2nd Cir. 1992); U.S. v. Green, 152 F>3d 1202, 1207-1208 (9th Cir. 1998); U.S. v. Rhodes, 145 F.3d 1375, 1379-84 (D.C. Cir 1998) (Silberman, J., dissented); but see: U.S. v. Kaptizke, 130 F.3d 820, 823-24 (10th Cir. 1997); U.S. v. Sims, No. 98-2287 (8th Cir. 4/9/99) ***No longer valid law***
Guidelines: Departures: Downward Departure (Post Sentence Rehabilitation: Literary Awards)
Although defendant's receipt of literary awards for poetry, his work record, and his attainment of his GED didn't justify it, court recognized it was a possibility.

U.S. v. Rudolph, 97-2053 (6th Cir. 9/14/99) ***No longer valid law***

Substantial Assistance (§5K1.1)

Guidelines: Departures - Downward Departure (Substantial Assistance: Methodology)
Because § 5K1.1 is silent as to the methodology to e used in determining the extent of a substantial assistance departure, the government has discretion in recommending a methodology, and the district court has discretion in deciding what methodology to use once it grants a motion for departure.
U.S. v. Hayes, Case No. 11-113678 (11th Cir. 8/12/14)

Guidelines: Departures - Downward Departure (Substantial Assistance: Denial for Exercise of Right to Trial?)
See U.S. v. Paramo, 998 F.2d 1212 (3rd Cir. 1993); U.S. v. Dorsey, 554 F.3d 958 (11th Cir. 2009)

Guidelines: Departures - Downward Departure (Substantial Assistance: Limited to Certain Counts?)
Government can limit the effect of its substantial assistance motion to particular counts within the indictment.
U.S. v. McNeese, Case No. 08-10093 (11th Cir. 11/3/08)

Guidelines: Departures - Downward Departure (Substantial Assistance: Must be Reasonable)
U.S. v. Livesay, Case No. 06-11303 (11th Cir. 4/23/08)

Guidelines: Departures - Downward Departure (Substantial Assistance: Factors to Be Considered in Determining the Extent of the Departure
See: U.S. v. Martin, Case No. 05-16645 (11th Cir. 7/11/06)

Guidelines: Departures - Downward Departure (Substantial Assistance: Departure Begins With Mandatory Minimum)
The point of departure in cases involving mandatory minimums should be the mandatory minimum and not the lower guideline range.
U.S. v. Ault, Case No. 01-10669 (9th Cir. 3/3/03)

Guidelines: Departures - Downward Departure (Substantial Assistance: Govt. Can't Unilaterally Decide Defendant Breached Agreement)
The government cannot unilaterally determine that the defendant has breached the plea agreement and refuse to uphold its end of the bargain. An evidentiary hearing is required for the court to determine if a substantial breach of the plea agreement has occurred. Here, the court made such a finding but failed to provide sufficient findings.
U.S. v. Frazier No. 99-1441 (5/23/00)`

Guidelines: Departures - Downward Departure (Substantial Assistance: Assistance Only Relevant Factor In Deciding Extent of Departure)
In deciding the extent of the departure, the Court is limited to considering only the defendant's assistance. Here, defense counsel ran into trouble because he argued other reasons in support of his request for a departure greater than that recommended by the government.
U.S. v. Pearce, 191 F.3d 488 (4th Cir. 1999); U.S. v. Crisp, Case No. 05-12304 (11th Cir. 7/7/06), U.S. v. Martin, Case No. 05-16645 (11th Cir. 7/11/06); U.S. v. Livesay, Case No. 06-11303 (11th Cir. 4/23/08)

Guidelines: Departures - Downward Departure (Substantial Assistance: Limits)

There are two distinct limits on the court's discretion. First , the court may only consider the nature, extent, and significance of the defendant's assistance. Second, the extent of the departure must be reasonable.
U.S. v. Pearce, 98-4416 (4th Cir. 9/13/99)
Guidelines: Departures - Downward Departure (Substantial Assistance: 5K1.1 Doesn't, By Itself, Authorize Departure from Minimum)
The filing of a motion pursuant to Rule 5K1.1 of the Guidelines doesn't authorize the court to depart below the statutory minimums. If the court is going to depart below the statutory minimum, the government must also file the motion pursuant to 18 USC 3553(e).
Melendez v. U.S. 116 S.Ct. 2057 (1996)
Guidelines: Departures - Downward Departure (Substantial Assistance: Downward Departure - "Not Rationally Related")
Government's failure to file a 5K1.1 motion violated guarantees of due process in that the decision was not rationally related to any legitimate Government end. The Government's decided not to file the motion because the defendant possessed controlled substances in violation of the plea agreement, and was, therefore, based entirely upon a reason unrelated to the quality of assistance.
U.S. v. Anzalone, 148 F.3d 940 (8th Cir. 1998); U.S. v. Wilkerson, 179 F.3d 1083 (8th Cir. 1999)
Guidelines: Departures - Downward Departure (Substantial Assistance: Downward Departure - Mandatory Minimum Is Starting Point)
When granting a downward departure for substantial assistance, the starting point is not the guidelines range, but the mandatory minimum.
U.S. v. Head, 12 FLW Fed C973 (11th Cir. 6/25/99)
Guidelines: Departures - Substantial Assistance (Government's Bad Faith - Court May Review)
The court may examine a prosecutor's refusal to file a 5K1.1 motion under a plea agreement granting the prosecutor sole discretion to determine if the defendant's assistance was substantial.
U.S. v. Isaac, 141 F.3d 477 (3d Cir. 1998); U.S. v. Huang, 178 F.3d 184 (3rd Cir. 1999)**; but see**: U.S. v. Forney, 9 F.3d 1492 (11th Cir. 1993)
Guidelines: Departures - Downward Departure (Substantial Assistance: Government's Bad Faith - Refusal to Provide Opportunity)
If the court finds that the government in bad faith has barred defendant from opportunities to cooperate under circumstances where the government agreed to file a 5K1.1 motion, the court may order the government to file the motion even if a defendant did not, as a result, provide substantial assistance.
U.S. v. Laday, 56 F.3d 24 (5th Cir. 1995); U. S. v. Wilder, 15 F.3d 1292 (5th Cir. 1994); U. S. v. Ringling, 988 F.2d 504 (4th Cir. 1993)
Guidelines: Departures - Downward Departure (Substantial Assistance: Government's Bad Faith - Defendant's Trial)
The Government may not justify their failure to file a substantial assistance motion because the Defendant exercised his right to trial. U.S. v. Khoury, 62 F.3d 1138 (9th Cir. 1995); U.S. v. Paramo, 998 F.2d 1212 (3rd Cir. 1993); U.S. v. Easter, 981 F.2d 1549 (10th Cir. 1992).
Guidelines: Departures - Downward Departure (Substantial Assistance: Unconstitutional Motives)

Government's refusal to file substantial assistance motion may not be based on unconstitutional motives such as the defendant's race or religion, or upon reasons not rationally related to any legitimate Government end.
Wade v. U.S., 504 U.S. 181 (1992); U.S. v. Treleaven 35 F.3d 458 (9th Cir. 1994)

Guidelines: Departures - Downward Departure (Substantial Assistance: Government's Bad Faith - Right to a Hearing)

See: U.S. v. Mikaelian Lexis 2337 (9th Cir. 2/17/99 No. 97-50174); U.S. v. Knights 968 F.2d 1483 (2nd Cir. 1992); U.S. v. Lezine, LEXIS 1111 (7th Cir. 1/28/99 No. 97-2571)

Guidelines: Departures - Downward Departure (Substantial Assistance: 5K1.1 Up Until, 35(b) After Sentencing)

Section 5K1.1 is used at sentencing to reflect substantial assistance up until that moment. Rule 38(b) is used after sentencing to reflect substantial assistance rendered after sentencing. Split of authority with one circuit holding that 35(b) can be used to reward assistance prior to sentencing
U.S. v. Alvarez, 11 FLW Fed C53 (11th Cir. 6/20/97)

Guidelines: Departures - Downward Departure (Substantial Assistance: Court May Not Without Motion from Govt.)

A district court may depart downward for substantial assistance without a government motion where the circumstances take the case out of the heartland.
In re. Sealed Case, 181 F.3d 128 (D.C. 1999); U.S. v. Solis, 169 F.3d 224 (5th Cir. 1999)

Guidelines: Departures -Downward Departure (Substantial Assistance: Other Branches of Government)

Substantial Assistance under 5K2.0 is permitted where the defendant provides substantial assistance to branches of government other than those engaged in prosecutorial activities.
U.S. v. Sanchez, 927 F.2d 1093, 1093 (9th Cir. 1991); U. S. v. Khan, 920 F.2d 1100, 107 (2nd Cir. 19900: U.S. v. Bennett, 9 F. Supp. 2d 513, 525-526 (E.D. Pa. 1998); U. S. v Stofberg, 782 F.Supp. 17, 19 (E.D. N. Y. 1992)

Guidelines: Departures - Downward Departure (Substantial Assistance: Local Authorities)

A departure based on substantial assistance to *local authorities* is not covered by U.S.S.G. 5k1.1, thus, a court has the authority to depart downward without a motion from the government.
U.S. v. Kaye, 65 F.3d 240 (2d Cir. 1998)

Guidelines: Departures - Downward (Substantial Assistance: Decision to File 5K1.1 Rests With Government)

Determining whether a motion for reduction of sentence will be filed is reserved to the government.
U.S. v. Orozco, 12 FLW Fed C283 (11th Cir. Nov. 17, 1998)

Guidelines: Departures - Downward Departures (Substantial Assistance: Effect of Motion Filed Pursuant to 18 USC 3553(e))

Contrary to what seems to be the literal meaning of the provision found at 18 USC 3553(e), when the government files a motion pursuant only to that statute and not 5K1.1 of the Guidelines, the judge is not limited to a sentence within the guideline range. Instead, the statutory minimum mandatory is seen as the point of departure and the court may still impose a sentence that exceeds the guideline range.
U.S. v. Head, 178 F.3d 1205 (11th Cir. 1999)

Upward Departures

Criminal History

Guidelines: Departures - Upward Departures (Criminal History: Departure Limits)
Section 4A1.3 provides the sentencing court the discretion to move along the horizontal axis of the sentencing table when it believes the criminal history category is not appropriate; however, this section does not authorize the sentencing court to adjust the offense level when the court finds that the underlying conduct does not support the assigned offense level.
U.S. v. Alfaro-Zayas, 196 F.3d 1338 (11th Cir. 1999)

Guidelines: Departure - Upward Departures (Criminal History - Prior Conviction That's Part of Relevant Conduct)
The district court erred when it departed upward from defendant's criminal history category because of prior conviction that served as the basis for finding defendant's criminal history score inadequate was part of the "relevant conduct" of the instant offense which had already been included in the computation of the base offense level.
U.S. vs. Hunerlach, 14 FLW FedC1032 (11th Cir. 7/27/01)

Guidelines: Departures - Upward Departure (Criminal History: Conduct Subsequent To Offense)
All conduct that occurred prior to sentencing, that was not already considered as part of the offense of conviction, can be considered in determining the risk of recidivism, and in turn, can support a criminal history category departure.
U.S. v. Magluta, 13 FLW Fed C291 (11th Cir. 12/23/99)

Guidelines: Departures - Upward Departure (Criminal History: Can't Be Based On Related Acts)
If the criminal acts upon which the court wishes to depart are part of the same course of conduct or common scheme or plan as the offense of conviction, the court can't rely upon them to depart upward.
U.S. v. Magluta, 13 FLW Fed C291 (11th Cir. 12/23/99)

Guidelines: Departures - Upward Departure (Criminal History - Uncharged Conduct)
While there is apparently disagreement among the circuits, in this instance the court held that a departure could not be based upon conduct uncharged or dismissed in plea agreement.
U.S. v. Lawton, 98-30267 (9th Cir. 9/27/99)

Guidelines: Departures - Upward Departure (Criminal History: Dissimilar & Uncharged)
Recognizing conflict the first circuit holds that "in an appropriate case," there may be a departure. In this case the court relied upon a 17 year history of domestic abuse.
U.S. v. Brewster, 127 F.3d 22 (1st Cir. 1997)

Guidelines: Departures - Upward Departure (Criminal History: Recidivisim/Lack of Conviction)
Sentencing Guidelines section 4A1.3 permits a court to impose "a sentence departing from the otherwise applicable guideline range" if there is reliable evidence that indicates that the defendant's criminal history category does not adequately reflect his likelihood of recidivism or the seriousness of his prior criminal conduct. Among other things, the court may consider: (1) prior similar misconduct established by a civil adjudication, (2) whether the defendant was pending trial or sentencing on another charge at the time of the instant offense, and (3) prior similar adult criminal conduct not resulting in a criminal conviction.

U.S. v. Burston, 12FLW FedC239 (11th Cir. 1998)
Guidelines: Departures - Upward Departure (Criminal History - Prior Arrests)
While the court may not rely on a mere list of arrests in the PSI, it may rely on arrests if there are facts included in the PSI that support the conclusion that the defendant committed the offenses for which he was not convicted.
U.S. v. Burston, 12FLW FedC239 (11th Cir. 1998), U.S. v. Williams, 989 F.2d 1137 (11th Cir. 1993)
Guidelines: Departures - Upward Departure (Criminal History - Juvenile Offenses)
Juvenile offenses too remote to be counted may justify an upward departure if they are either similar to the instant offense or, even if dissimilar, "serious."
U.S. v. Williams, 989 F.2d 1137 (11th Cir. 1993); U.S. v. Jones, 289 F.3d 1260 (11th Cir. 2002)

Disruption of Government Function (§5K2.7)

Guidelines: Departures - Upward Departure (Disruption of Governmental Function - De Minimis Doesn't Count
In a case of a Georgia District Attorney who had a consensual sexual relationship with a criminal defendant and then lied about it, the Court concluded the upward adjustment for disruption of a governmental function (5K2.7) should not have been applied. The Court found that it was the relationship with the defendant and the subsequent indictment rather than the lying that undermined the public's perception of the integrity of the prosecutor's office: "once Ellis was indicted, it did not matter what he said, whether he pled guilty or stood trial, or even whether he was ultimately acquitted . . . "it defies common sense . . . to suggest that the incremental harm, if any, caused by his false statement was more than de minimis."
U.S. v. Ellis, Case No. 05-10150 (11th Cir. 8/5/05)
Guidelines: Departures - Upward Departures (Miscellaneous: Disruption of Governmental Function (5K2.7))
In a case of a Georgia District Attorney who had a consensual sexual relationship with a criminal defendant and then lied about it, the Court concluded the upward adjustment for disruption of a governmental function (5K2.7) should not have been applied. The Court found that it was the relationship with the defendant and the subsequent indictment rather than the lying that undermined the public's perception of the integrity of the prosecutor's office: "once Ellis was indicted, it did not matter what he said, whether he pled guilty or stood trial, or even whether he was ultimately acquitted . . . "it defies common sense . . . to suggest that the incremental harm, if any, caused by his false statement was more than de minimis."
U.S. v. Ellis, Case No. 05-10150 (11th Cir. 8/5/05)

Extreme Conduct (§5K2.8)

Guidelines: Upward Departure - Extreme Conduct
Firing a shotgun at point blank range after the victim had already been beaten and had surrendered his wallet justified an upward departure under 5K2.8.
U.S. v. Hawkins, 87 F.3d 722 (5th Cir. 1996)

Extreme Psychological Injury (§5K2.3)

Guidelines: Departures - Upward Departure (Extreme Psychological Injury of Indirect Victim?)

District Court erred in enhancing sentence for psychological distress suffered by relatives of the deceased in this manslaughter case. An adjustment may be based on the psychological suffered by indirect victims, but only if they have "some nexus or proximity to the offense."
U.S. v. Terry 142 F.3d 702, 711-12 (4th Cir. 1998). See also: U.S. v. Morrison, 153 F.3d 34, 35 (2d Cir. 1998); U.S. v. Haggard, 41 F.3d 1320, 1327-28 (9th Cir. 1994); U.s. v. Hoyungawa, 930 F.2d 744, 747 (9th Cir. 1991)

Guidelines: Departures - Upward Departure (Extreme Psychological Injury)

Robbery victims's testimony that two and a half years after the robbery that she did not feel safe at work, and had restricted her daily activities was adequate to support the two level increase.
U.S. v. Sawyer, 12 FLW Fed C1060 (11th Cir. 7/14/99)

Miscellaneous

Guidelines: Departures - Upward Departure (Miscellaneous: Notice)

The district court is required to give reasonable notice that it is contemplating an upward departure in the sentencing range. The notice must specifically identify the ground on which the district court is contemplating an upward departure. The notice must be given within a reasonable amount of time prior to the sentencing hearing.
U.S. vs. Hunerlach, 258 F.3d 1282 (11th Cir. 2001)

Guidelines: Departures - Upward Departures (Miscellaneous: Dismissed Conduct)

In a case of a Georgia District Attorney who had a consensual sexual relationship with a criminal defendant and then lied about it, the Court rejected the Government's claim that the sentencing judge could depart upward because of the conduct underlying the dismissed charges of civil rights violations. The original charges included civil rights violations and tampering with a witness, but the former prosecutor pled only to the charge of lying to the FBI. Recognizing that the "conduct provides a basis for departure only if it sheds further light on the true nature of the offense of conviction" the Court concluded: "an upward departure based on Ellis's (the former prosecutor) conduct toward Manning (the former defendant) and his subsequent indictment would do nothing to reflect the 'actual seriousness' of the offense to which he pled guilty; rather, it would reflect the seriousness of unproven allegations that, at least for sentencing purposes, are not meaningfully related to his false statement to the FBI."
U.S. v. Ellis, Case No. 05-10150 (11th Cir. 8/5/05)

Guidelines: Departures - Upward Departure (Miscellaneous: Terrorism - Note 4 of § 3A1.4)

Where defendant entered a guilty plea to attempted arson involving an abortion clinic, the court held that the trial judge could have departed upward because the defendant's intended crime was meant to intimidate or coerce a civilian population. There departure did not require the government to show the conduct transcended national boundaries.
U.S. v. Jordi, No. 04-14046 (11th Cir. 8/1/05)

Guidelines: Departures - Upward Departure (Miscellaneous: Fines)

Comment 4 of U.S.S.G. § 5E1.2. comment 4, provides that an upward departure in a fine amount may be appropriate where two times the amount of loss exceeds the maximum fine.
U.S. vs. Hunerlach, 14 FLW FedC1032 (11th Cir. 727/01)

Guidelines: Departures - Upward Departure (Miscellaneous - 924(c))

A conviction for use of a firearm in the commission of a felony, 924(c), ordinarily means that the guidelines enhancement provision for use of a firearm is inapplicable. However, it is conceivable

that a 924(c) conviction and the resulting mandatory consecutive sentence might result in a sentence that is less than that called for if only the enhancement provision is used; i.e. the defendant might be better off with a 924(c) conviction than if he had been acquitted or not charged with that offense. If that's the case the guidelines allow an upward departure.
U.S. v. Wright, No. 98-50489 (9th Cir. 6/19/00)

Guidelines: Departures - Upward Departure (Miscellaneous - Juvenile Offenses)

The court upheld the trial court's consideration of juvenile offenses as a ground for upward departure as they were evidence of the defendant's recidivist tendencies.
U.S. v. Barber, 98-1558 (6th Cir. 1/11/2000)

Guidelines: Departures - Upward Departure (Miscellaneous: Not Based on Criminal Propensity)

Although noting in a footnote that fraud cases that may involve loss calculations based on the anticipated outcome of the fraud, as opposed to the actual loss, the court stated: "We sentence people based on the crimes they commit not their criminal propensities."
U.S. v. Sigma International, Inc., 13 FLW Fed C203 (11th Cir. 11/30/99), vacated 251 F.3d 1358

Guidelines: Departures - Upward Departures (Miscellaneous: Upward Departure Justified When...)

See: U.S. v. Melvin 12 FLW Fed C1243 (11th Cir. 9/7/99); U.S. v. Simmons, Case No. 03-13199 (11thCir. 5/7/04)

Guidelines: Departures - Upward Departure (Miscellaneous: Fraud - Extensive Number of Indirect Victims)

Because those that suffered were not the ones from whom the funds came, and were not, therefore, victims as defined by USSG 2F1.1(b)(2), the large number of indirect victims justified an upward departure.
U.S. v. Melvin 12 FLW Fed C1243 (11th Cir. 9/7/99)

Guidelines: Departures - Upward Departure (Miscellaneous - Psychological Harm to Victim's Family

Although a departure for psychological injury to a victim is "not limited to the direct victim of the offense of conviction" and can also apply to indirect victims, an indirect victim is a victim "because of his relationship to the offense, not because of his relationship to the direct victim."
U.S. v. Terry, 142 F.3d 702 (4th Cir. 1998)

Guidelines: Departures - Upward Departure (Miscellaneous - Obstruction of Justice)

Defendant who submitted a false birth certificate for the court, while qualifying for an upward adjustment for obstruction of justice, broke some records, here, and qualified, additionally, for an upward depature.
U.S. v. Ventura, 146 F.3d 91 (2d Cir. 1998)

Guidelines: Departures - Upward Departure (Miscellaneous - Multiple Firearms)

In a case involving multiple offenders who had several guns, the court held that a departure was justified under 5K2.0.
U.S. v. Hawkins, 87 f.3d 722 (5th Cir. 1996), see also: U.S. v. Omar, 24 F.3d 1356, 1357 (11th Cir. 1994)

Guidelines: Departures - Upward Departure (Miscellaneous - Procedure)

A district court many not simply and inexplicably depart from the applicable guidelines range. When departing upward under the auspices of s. 4A1.3, the court must look first to the next criminal history category. If that category adequately reflects the defendant's past conduct, then

the court must state its findings and sentence the defendant within the range for the new category. If on the other hand, the court decides that this new category still inadequate to reflect the defendant's criminal history, the court must look to the next highest category and repeat its inquiry.
U.S. v. Williams, 989 F.2d 1137 (11th Cir. 1993)

Other Reasons
Guidelines: Departures - Upward Departures (Other Reasons: Extraordinary Vulnerability of Victim)
Even though the offense level had already been increased because of the involvement of vulnerable victims, an upward departure was justified because of the extraordinary vulnerability of the victims.
U.S. v. Hersh, Case No. 00-14592 (11th Cir. 7/17/02)

GROUPING

Guidelines: Grouping – Sexual Activity with Minor
Multiple act of sexual activity with the same minor were not grouped.
U.S. v. Nagel, Case No. 15-14087 (11th Cir. 9/1/16)
Guidelines: Grouping: Tax Fraud and Other Fraud Offenses
Fraud coutns and tax offense counts involving the proceeds of the fraud should not be grouped together.
U.S. v. Doxie, Case No. 15-11161 (11th Cir. 1/4/16)
Guidelines: Grouping - Bribery and Fraud
Offenses should not have been grouped pursuant to subsection (b) §3D1.2 because offenses were not part of s ingle course of conduct or essentially one composite harm to the same victim. Neither should they have been grouped pursuant to subsection (d): (1) just because both offenses were listed as offenses to be grouped did not necessarily mean they should be grouped together; (2) the offenses were not ongoing or continuous; and (3) the "aggregate harm" contemplated by the provision relates to tangible harms since as financial harm or drug quantity.
U.S. v. Keen, Case No. 09-16027 (11th Cir. 4/5/12)
Guidelines: Grouping - Failure to Appear and Initial Offense
When being sentenced for both failure to appear and the initial offense, the offenses should be grouped together and an enhancement used for the obstruction of justice. In this case the court erred by imposing consecutive sentences.
U.S. v. Magluta, 13 FLW Fed C291 (11th Cir. 12/23/99); *opinion modified* 13 FLW Fed 401 (2/17/00)
Guidelines: Grouping - Conspiracy (Multiple Victims Alleged in Single Count)
Where the defendant was charged with conspiring to commit hostage taking and involved three victims, the sentencing court properly divided the conspiracy count into three separate groups under 3D1.2 because there were three distinct victims.
U.S. v. Torrealba, Case No. 02-13307 (11th Cir. 7/29/03)
Guidelines: Grouping - Conspiracy (Multiple Offenses Within One Count)
There are two provisions of the sentencing guidelines that allow a sentencing court to divide a count into several groups for sentencing. These are USSG 3D1.2 and 1B1.2(d). Under 3D1.2, "a

sentencing court may treat a conspiracy count as if it were several counts, each one charging conspiracy to commit one of the substantive offenses, when a defendant is convicted of conspiring to commit several substantive offenses and also convicted of committing one or more of the underlying substantive offenses." USSG 1B1.2(d) similarly provides that "a conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit."
U.S. v. Torrealba, Case No. 02-13307 (11th Cir. 7/29/03)

Guidelines: Grouping - Conspiracy and Substantive Offense
A conspiracy and the substantive offense will typically be grouped together. The fact that there were two victims didn't alter the grouping.
U.S. v. Williams, Case No. 02-12234 (11th Cir. 8/5/03)

Guidelines: Grouping - 3D1.2(c) Does Not Require Complete Overlap The U.S. Sentencing Guidelines' requirement that counts be grouped together if one embodies "conduct that is treated as ... [an] adjustment to" the offense level applicable to the other count, Section 3D1.2(c), does not require that the adjustment account for all the conduct covered by the first count, the U.S. Court of Appeals for the First Circuit made clear June 12. The ruling will mean a shorter sentence for a police detective convicted of two related conspiracies.
United States v. Sedoma, Case No. 02-1236, (1st Cir. 6/12/03)

Guidelines: Grouping - Child Pornography
Court held that the nine counts of interstate transportation of child pornography by computer, in violation of 18 USC 2252(a)(1) should not be grouped for guideline purposes.
U.S. v. McIntosh, 13 FLW Fed C857 (11th Cir. 6/29/00)

Guidelines: Grouping - 3D1.2(a) Same Victim (Child Pornography Photos)
The defendant transported photos of minors engaged in sexually explicit conduct. On three separate occasions he transported photos via his computer. Court rejected his claim under 3D1.2 that the three offenses should be grouped because all of the offenses included the same victim, which the defendant described as society as a whole. Court held that the victims, though unnamed and unidentified, were those portrayed in the photo, and upheld the trial court's decision to score each of the offenses separately.
U.S. v. Tillmon, 13 FLW Fed C127 (11th Cir. 11/10/99)

Guidelines: Grouping - Grouping of 3D1.2(d) Listed Behavior Not Automatic
Section 3D1.2(d) lists kinds of offenses that ordinarily should be grouped, those in which the offense level is determined by some quantity, be it drugs or dollars. While, in this instance, both money laundering and fraud would be included in the § list, the Court recognizing that inclusion in the list doesn't automatically mean the offenses will be grouped, upheld the trial court's decision to score the offenses separately.
U.S. v. McClendon, 13 FLW Fed C105 (11th Cir. 10/6/99); U.S. v. Harper, 972 F.2d 321, 322 (11th Cir. 1995)

Interpretation (General Rules)

Guidelines: Interpretation - Separate Sections Ordinarily Applied Cumulatively
"This court presumes the Sentencing Commission intended to apply separate guideline sections cumulatively, unless specifically directed to do otherwise."

U.S. v. Allen, 12 FLW Fed C1301 (11th Cir. 9/29/99)
Guidelines: Interpretation - Disparate Inclusion or Exclusion of Language
It is generally presumed that the disparate inclusion or exclusion of language in intnetional and purposeful.
U.S. v. Perez, Case No. 02-16627 (11th Cir. 4/20/04)
Guidelines: Interpretation - Language Presumed to Have Same Meaning
Where the same language appears in two guidelines, it is generally presumed that the language bears the same meaning in both.
U.S. v. Perez, Case No. 02-16627 (11th Cir. 4/20/04)
Guidelines: Interpretation - Use of Past Tense Means Act Must Have Been Completed
See: U.S. v.Chastain, 198 F.3d 1338 (11th Cir. 1999), *but see:* U.S. v. Torrealba, Case No. 02-13307 (11th Cir. 7/29/03)
Guidelines: Interpretation - Use of Other Sections Within the Guidelines
Where the guidelines provide no indication as to a particular application the court looks to the language and purpose of the guidelines for instruction. Although definitions that appear in one section of the guidelines are not designed for general applicability, we may also look on a case by case basis to similar words, phrases or terms used in other sections for help in interpretation.
U.S. v. Saunders, Case No. 01-17032 (11th Cir. 1/23/03)
Guidelines: Interpretation - Title
The title of a guideline provision maybe useful only when it sheds light on some ambiguous word or phrase.
U.S. vs. Ferreira, 15 FLW FedC134 (12/11/01)

Miscellaneous

Guidelines: Miscellaneous – Harsh Sentences May Not Promote Respect
A sentence of imprisonment may work to promote not respect, but derision of the law if the law is viewed s merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.
Gall v. U.S., 552 U.S. 38 (2007) (quoting district court judge)
Guidelines: Miscellaneous – Credit for Undischrged Term of Imprisonment
Section 5G1.3(b)(1)
If the defendant is serving another sentence, which is part of the relevant conduct to the instant offense, the district court must reduce its sentence by the amount of time for which the defendnat is not entitled to credit.
United States v. Henry, No. 18-15251 (11th Cir. August 7, 2021)
Guidelines: Miscellaneous – Current Role of the Guidelines
U.S. v. Henry, No. 18-15251 (11th Cir. 6/21/21)
Guidelines: Miscellaneous – Text Trumps Commentary
U.S. v. Tejas, Case No. 16-16336 (11th Cir. 8/23/17)
Guidelines: Miscellaneous - Sentence that Relied in Part on Defendant's Inability to Pay Restitution was Unreasonable
U.s. v. Plate, Case No. 15-13928 (11th Cir. 10/5/16)
Guidelines: Miscellaneous - Absent Govt. Motion, Judges Vary in 20% of Cases
Molina-Martinez v. U.S., Case No. 14-8913 (S. Ct. 1/12/16)

Guidelines: Miscellaneous - Guidelines Still the Basis for the Sentence Even When Judge Imposes a Variance
Molina-Martinez v. U.S., Case No. 14-8913 (S. Ct. 1/12/16)
Guidelines: Miscellaneous - Goals of Guidelines: Uniformity and Proportionality
The goal of the Guidelines is to achieve "uniformity in sentencing . . . imposed by different federal courts for similar criminal conduct, as well as proportionality in sentencing through a system that im poses appropriately different sentences for criminal conduct of different severity.
Molina-Martinez, Case No. 14-8913 (S. Ct. 1/12/16)
Guidelines: Miscellaneous - Unsupported Factual Assertions Don't Count as Evidence
Recognizing that an attorney's factual assertions do not constitute evidence, the court held that the government's summary chart, which was not supported by the testimony of the victims our underlying data, could not support the guideline calculations.
U.S. v. Rodriguez, Case No. 11-15911 (11th Cir. 10/16/13)
Guidelines: Miscellaneous - Guideline Range Due No Greater Weight Than Other §3553(a) Factors
Nothing requires a sentencing court to give the advisory guidelines range as much weight as it gives any other §3553(a) factor or combination of factors.
U.S. v. Rosales-Bruno, Case No. 12-5089 (11th Cir. 6/19/15)
Guidelines: Miscellaneous - Deference to Sentencing Decisions Made by Trial Court
U.S. v. Bruno, Case No. 12-15089 (11th Cir. 6/19/15)
Guidelines: Miscellaneous - Criminal History (Throwing a Deadly Missile Not a Crime of Violence for Purposes of USSG §2L1.2
For purposes of the immigration guideline, a violation of Fla. Stat. § 700.19 is not necessarily a crime of violence.
U.S. v. Estrada, Case No. 14-10230 (11th Cir. 2/6/15)
Guidelines: Miscellaneous - Govt. Can't Always Present Omitted Proof on Remand
Often a remand for further findings is inappropriate when the issue was before the district court and the parties had an opportunity to introduce relevant evidence.
U.S. v. Washington, Case No. 14177 (11th Cir. 4/26/13)
Guidelines: Miscellaneous - Need to Object to Facts to Preserve Objection Based on Categorical Approach?
Where the defendant argued that, under the categorical approach required by the Shepard decision, the prior conviction was not a violent felony under the Armed Career Criminal Act, it may be that he has to also object to the facts set out in the PSR that show the offense to be a violent one.
U.S. v. Schneider, 681 F.3d 1273 (11th Cir. 2012)
Guidelines: Miscellaneous - Guidelines Must Be Considered Even When There is a Conditional Plea
The Guidelines require the district judge to give due consideration to the relevant sentencing range, een if the defendant and the prosecutor recommend a specific sentence as a condition of a guilty plea.
Freeman v. U.S., Case No. 09-10245 (S.Ct. 6/23/11)
Guidelines: Miscellaneous - Guidelines Can Be a Basis for Sentence Even If There is a Variance

"Even where the judge varies from the recommended range, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, the Guidelines are in a real sense a basis for the sentence."
Freeman v. U.S, Case No. 09-10245 (S. Ct. 6/23/11)

Guidelines: Miscellaneous - Starting Point

"The Guidelines provide a framework or starting point - a basis, in the commonsense meaning of the term - for the judge's exercise of discretion."
Freeman v. U.S., Case No. 09-10245 (S. Ct. 6/23/11)

Guidelines: Miscellaneous - Ex Post Facto

Ex post facto considerations apply to the Guidelines, so that the guideline applicable at the time of the offense should be applied if the more recent version of the guidelines establishes a harsher penalty.
U.S. v. Wetherald, Case No. 09-11687 (11th Cir. 3/28/11)

Guidelines: Miscellaneous - Appeals (Clarifying Amendments)

Case sets out the analysis used to determine whether an amendment is a clarifying amendment and recognizes that clarifying amendments apply to cases on direct appeal.
U.S. v. Jerchower, Case No. 09-13795 (11th Cir. 1/24/11)

Guidelines: Miscellaneous - Not Clear That the Guidelines Considered the Parsimony Principle

It is not clear that the Guidelines took into account the parsimony principle, and the way they operated created tension with the parsimony principle.
United States v. Irey, Case No. 08-10997 (11th Cir. 7/29/10)(Tjoflat, J. dissenting opinion)

Guidelines: Miscellaneous - Notice of Variance

Rule 32(h) of the Federal Rules of Criminal Procedure does not extend to variances. Accordingly, there is no requirement that the parties receive notice of the possibility of a variance above or below the guidelines range.
Irizarry v. U.S., Case No. 06-7517 (S. Ct. 6/12/08)

Guidelines: Miscellaneous - Appeal (Errors in Calculations)

An error in calculating the guidelines that alters the guideline range will rarely if ever qualify as harmless error.
U.S. v. Langford, Case No. 06-2774)

Guidelines: Miscellaneous - Conspiracy (Ex Post Facto Concerns)

A defendant who is convicted of a conspiracy that began before, but continued after, a Guidelines amendment became effective may be sentenced based on the amendment without triggering any ex post facto concerns.
U.S. v. Aviles, Case No. 05-14446 (11th Cir. 3/4/08)

Guidelines: Miscellaneous - Notice Regarding Upward Departure ?

The Seventh Circuit has decided that because the Guidelines are now advisory, there is no need for the district court to give notice that it is considering an above Guidelines sentence.
U.S. v. Walker, Case No. 05-1812 (7th Cir. 5/17/06); U.S. v. Irizarry, 458 F.3d 1208, 1212 (11th Cir. 2006); *contra* U.S. v. Anati, 457 F.3d 233, 235-237 (2d Cir. 2006)

Guidelines: Miscellaneous - Jury Verdict Not Controlling

Trial court erred in relying upon the jury's verdict in determining the loss amount. Regardless of the jury's verdict, the Guidelines require the trial court to make independent findings to establish the factual basis for its Guidelines calculations.

U.S. v. Hamaker, Case No. 03-12554 (11th Cir. 7/14/06); U.S. v. Faust, 456 F.3d 1342 (11th Cir. 2006)

Guidelines: Miscellaneous - Market Value - Offenses Involving Wildlife & Plants

Under the applicable guideline, 2Q2.1, the market value should include the value of the entire shipment where the customs documentation was fals and where the correctly documented wildlife or plants were part and parcel of a charged conspiracy to illegally smuggle udocumented CITES-protected wildlife & plants into the United States.

U.S. v. Norris, Case No. 04-15487 (11th Cir. 6/23/06)

Guidelines: Miscellaneous - Shepard Probably Applicable to Guideline Determinations

See: U.S. v. Aguilar-Ortiz, Case No. 05-12591, n. 3 (11th Cir. 5/31/06)

Guidelines: Miscellaneous - Which Manual to Use (Related Crimes Over Period of Time)

If related crimes are committed in a series, the date of the crime at the end of the series governs the date of the Manual to be used.

U.S. v. York, Case No. 04-12354 (11th Cir. 10/27/05)

Guidelines: Miscellaneous - Attempt

While 2X1.1(b)(1), directs a sentencing court to apply a three-level reduction to a sentence "unless the defendant completed all the facts the defendant believed necessary for the successful completion of the substantive offense", the reduction may be denied if the factual circumstances show that the offense was about to be complete but for an interruption beyond the defendant's control.

U.S. v. Lee, Case No. 04-12485 (11th Cir. 10/5/05)

Guidelines: Miscellaneous - Cross Referencing

The government, in ths fraud, case convinced the district court to use the cross-referencing provision in USSG 2B1.1(c)(3) and apply the guideline for obstruction of justice. The circuit court reversed holding that the cross-reference provision applies only if the elements of the other offense are established by conduct set forth in the indictment. The court noted, though, that the district court could depart upward on the basis of Note 15 to USSG 2B1.1, which provides that a departure may be appropriate when the primary objective of the offense was an "aggravating non-monetary obective."

U.S. v. Genao, 343 F.3d 578 (2d Cir. 2003)

Guidelines: Miscellaneous - Serious Bodily (Need Only Be Permanent - Not Severe)

"Serious bodily injury" as it is defined in USSG 1B1.1 encompasses injuries that may not be terribly severe but are permanent. Accordingly, scarring, although not life threatening, is often sufficient.

U.S. v. Torrealba, Case No. 02-13307 (11th Cir. 7/29/03)

Guidelines: Miscellaneous - Conspiracies to Commit Multiple Offenses

There are two provisions of the Sentencing Guidelines that allow a sentencing court to divide a count into several groups for sentencing. These are USSG 3D1.2 and 1B1.2(d). Under 3D1.2, a sentencing court may treat a conspiracy count as if it were several counts, each one charging conspiracy to commit one of the substantive offenses, when a defendant is convicted of conspiring to commit several substantive offenses and also convicted of committing one of the underlying substantive offenses. USG 1B1.2(d) similarly provides that a conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Guidelines: Miscellaneous - Consideration of Defendant's Character

"Contrary to widely held belief ,the Sentencing Reform Act did not abolish consideration of the character of the defendant in sentencing. In fact, ... the Act clearly ordered that the characteristics of the defendant were to be a central consideration n the fashioning of a just sentence."
U.S. v. Merritt, 988 F.2d 1298, 1307 (2d Cir. 1993)

Guidelines: Miscellaneous - Enhancements Based on Prior Convictions (Details of Offense)

Although under Taylor v. United States, a sentencing court has some authority to go beyond the elements of the prior conviction to see if it fulfills the requirement of the enhancement, that is only the case if there is some ambiguity in the statute. Here, the defendant, charged with illegally reentering the U.S., had previously been convicted for alien smuggling. An examination of the prior PSI showed that the offense had been committed for profit. There was, however, no requirement in the statute for the prior offense that it be committed for profit. Accordingly, there was no ambiguity in the statute, the sentencing court should not have gone beyond the nature of the prior conviction, and the defendant should not have received the 16 level enhancement associated with a prior alien smuggling offense for profit.
U.S. v. Krawczak, Case No. 02-13461 (11th Cir. 6/2/03); U.S. v. Breitweiser, Case No. 02-15095 (1/26/04)

Guidelines: Miscellaneous - Conspiracies (Scope of Conduct)

To determine a defendant's liability for the acts of others, the district court must first make individualized findings concerning the scope of the criminal activity undertaken by a particular defendant. Only after the district court makes individualized findings concerning the scope of criminal activity the defendant undertook is the court to determine reasonable forseeablity. the fact that the defendant knows about the larger operation, and has agreed to perform a particular act, does not amount to acquiescence in the acts of the criminal enterprise as a whole.
U.S. v. Hunter, 323 F3d 1314 (11th Cir. 2003); U.S. v. Moran, 778 F.3d 942 (11th Cir. 2015)

Guidelines: Miscellaneous - Resolution of Factual Disputes (Adoption of PSR Report Not Sufficient)

Where there was a factual dispute before the court at sentencing and the court, instead of directly resolving the conflict, simply adopted the Presentence Report as its finding, failed to satisfy its obligation under Rule 32(c)(1) to resolve disputed issues.
U.S. v. Guzman, 318 F.3d 1191 (10th Cir. 2003)

Guidelines: Miscellaneous - Finding of Fact (May Be Derived From A Variety of Sources)

The findings of fact of the sentencing court may be based on evidence heard during trial, facts admitted by a defendant's plea of guilty, undisputed statements in the presentence report, or evidence presented at the sentencing hearing.
U.S. v. Saunders, Case No. 01-17032 (11th Cir. 1/23/03)

Guidelines: Miscellaneous - Arguments of Counsel Won't Support Departure

The arguments of counsel are generally an insufficient basis upon which to depart from the guidelines.
U.S. v. Kapelushnik, 306 F.3d 1090, 1095 (11th Cir. 2002); U.S. v. Washington, Case No. 11-14177 (11th Cir. 4/26/13)

Guidelines: Miscellaneous - Conspiracy (Multi-Object)

Under USSG 1B1.2(d) which allows the court to calculate the guideline score as if the defendant had been convicted of each substantive offense in a multi-object conspiracy count, the court must find beyond a reasonable doubt that the defendant conspired to commit the particular object offense.

U.S. v. Vallejo, Case No. 00-15998 (11th Cir. 7/16/02); U.S. v. Venske, Case No. 01-10345 (11th Cir. 7/12/02)

Guidelines: Miscellaneous - Conspiracy (Dividing a Count into Separate Counts)

There are two provisions under the guidelines that permit a court to divide a count into several groups for sentencing. USSG 3D1.2 allows a court to treat a conspiracy count as if it were several counts when a defendant is convicted of conspiring to commit several substantive offenses and also convicted of committing one or more of the underlying substantive offenses. USSG 1B1.2(d) allows a court to treat a conspiracy count as if it were separate counts when the defendant is convicted of a multi-object conspiracy.

U.S. v. Hersh, Case No. 00-14592 (11th Cir. 7/17/02)

Guidelines: Miscellaneous - 105 Years' Life Sentence

Where the guideline range was 360 months to life, there was apparently nothing wrong with a 105 year sentence.

U.S. v. Hersh, Case No. 00-14592 (11th Cir. 7/17/02**)**

Guidelines: Miscellaneous - Findings of Fact

While Fed. R. Crim. P. 32(c)(1) requires the sentencing court to make findings of fact regarding disputed facts, the Court doesn't always require strict adherence to the rule.

United States v. Rodriguez De Varon, 175 F.3d 930, 939 (11th Cir. 1999); United States v. Villarino, 930 F.2d 1527 (11th Cir. 1991)

Guidlines: Miscellaneous - Defendant's Refusal To Cooperate

The defendant's refusal to cooperate cannot be used to increase the sentence within the sentencing guideline range.

United States v. Rivera, 196 F.3d 144 (2nd Cir 1999)

Guidelines: Miscellaneous - Resentencing for Insufficient Showing

Where sentencing enhancement has been set aside for insufficiency of the evidence and where the defense did not object to the lack of evidence in the district court, the practice of the Eleventh Circuit has been to remand the case and to allow the government to present further evidence.

U.S. v. Dunlap, 15 FLW Fed C232 (11th Cir. 1/18/02); but see U.S. v. Washington, Case No. 11-14177 (11th Cir. 4/26/13)

Guidelines: Miscellaneous - Fines (Burden of Showing Inability to Pay)

Under the Sentencing Guidelines the imposition of a fine is mandatory unless a defendant establishes that he is unable to pay and is not likely to become able to pay. U.S.S.G. § 5E1.12(a)

U.S. vs. Hunerlach, 14 FLW FedC1032 (11th Cir. 727/01)

Guidelines: Miscellaneous - Double Counting

Impermissible double counting occurs only when one part of the guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the guidelines. Double counting is permitted if the Sentencing Commission intended the result, and if the result is permissible because each section concerns conceptually separate notions related to sentencing. Absent a specific direction to the contrary, we presume that the Sentencing Commission intended to apply separate guideline sections cumulatively. The Sentencing Commission is authorized to provide for this double counting in a single part of the guidelines so long as there is a rational relationship between the enhancement and a legitimate governmental objective.

U.S. v. Naves, 252 F.3d 1166 (11th Cir. 2001); U.S. v. Jackson, 15 FLW Fed C153 (11th Cir. 12/21/01), U.S. v. Webb, Case No. 10-14743 (11th Cir. 1/5/12)

Guidelines: Miscellaneous - Govt's Burden When Def. Disputes Factual Basis for Sentence

When a defendant challenges one of the factual bases of his sentence the Government has the burden of establishing the disputed fact by a preponderance of the evidence.
U.S. v. Lawrence, 47 F.3d 1559, 1566 (11th Cir. 1995); U.S. v. Moriarty, Case No. 04-13683 (11th Cir. 11/1/05); U.S. v. Washington, Case No. 11-14177 (11th Cir. 4/26/13)

Guidelines: Miscellaneous - Double Counting

In a case involving the aggravated assault with a car, the court held that impermissible double counting had occurred in that precisely the same aspect of the defendant's conduct factored into his sentence in two separate ways.
United States v. Farrow, 98-4057 (6th Cir. 12/8/99)

Guidelines: Miscellaneous - Effect of Guideline Commentary

Must ordinarily be given controlling weight.
U.S. v. Gallo, 195 F.3d 1278 (11th Cir. 1999); U.S. v. Le, 14 FLW Fed C935 (11th Cir. 7/11/01)

Guidelines: Miscellaneous - Racketeering (Ambiguous Determination By Jury)

Where the jury in its verdict did not clearly spell out which predicate acts had been proven, the court should determine which acts were proven for sentencing purposes.
U.S. v. Digiorgio, 13 FLW Fed C139 (11th Cir. 8/23/99)

Guidelines: Miscellaneous - Date of Conspiracy Precedes Guidelines

Where the conspiracy began before the effective date of the guidelines, but continued after that date, it is still subject to the guidelines. A defendant must take affirmative steps prior to the effective date to terminate and disavow any participation in the conspiracy in order for the new guidelines not to apply to his sentencing.
U.S. v. Diaz, 13 FLW Fed C1 (11th Cir. 10/15/99)

Guidelines: Miscellaneous - Plea Colloquy Admission Not Tantamount to Stipulation

The defendant in entering a guilty plea to smuggling offenses involving foreign components used in fulfilling federal manufacturing contracts admitted to acts that, in the view of the judge, amounted to fraud, thereby allowing the judge to use the more onerous fraud sentencing guidelines. The Court, however, held that pursuant to USSG s. 1B1.2(a), the admissions did not meet the definition of "stipulation," and could not be used to justify the fraud guidelines. The Fifth and Seventh Circuits have held to the contrary.
U.S. v. Nathan, 98-6262 (3d Cir. 8/18/99)U.S. v. Dixon, No. 98-10371 (5th Cir. 8/16/99)

Guidelines: Miscellaneous - Palatable or Not Guidelines Control

"To analyze the situation correctly, we must start with the established premise that, whether palatable or not, the Guidelines control sentencing."
U.S. v. Sawyer, 12 FLW Fed C1060 (11th Cir. 7/14/99)

Guidelines: Miscellaneous - Double Counting

Impermissible double counting occurs only when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by the application of another part of the Guidelines.
U.S. v. Rodriguez-Matos, 12 FLW Fed C1287 (11th Cir. 9/17/99); United States v. Rendon, Case No. 02-16208 (11th Cir. 12/31/03); U.S. v. Olshan, Case No. 03-13032 (11th Cir. 6/3/04)

Guidelines: Miscellaneous - Government's Burden of Proof Upon Objection by Defense

When the defense objects to a factual allegation contained in the PSI, the government must establish that fact by a preponderance of the evidence.
U.S. v. Lawrence, 47 F.3d 1559, 1566 (11th Cir. 1995), U.S. v. Washington, Case No. 11-14177 (11th Cir. 4/26/13)

Guidelines: Miscellaneous - Crossing State Lines for Sex With Minor - Guidelines Offense Level
Correct analogy would be statutory rape.
U.S. v. Burgess, 12 FLW Fed C834 (11th Cir. n. 2 5/18/99)
Guidelines: Miscellaneous - Uncounseled Convictions
An uncounseled misdemeanor conviction valid under Scott v. Illinois, 99 S.Ct. 1158 (1979) , because no prison term was imposed, is also valid when used to enhance punishment for a subsequent conviction.
Nichols v. U.S. 114 S.Ct. 1921 (1994)
Guidelines: Miscellaneous - Uncharged but Stipulated to Offenses in Plea Agreement
Uncharged offenses stipulated to in the plea agreement are treated as if they were additional counts of conviction for sentencing purposes.
U.S. v. Moore, 6 F.3d 715, 718-719 (11th Cir. 1993)
Guidelines: Miscellaneous - Racketeering (Choosing the Appropriate Guideline)
Apparently under the racketeering statute, the guidelines call for using the guideline applicable to the predicate offense that produces the harshest result. In some instances the verdict, itself, does not establish which offense should be used. In making that decision the predicate offense is available to the court or only those which the court finds were proven beyond a reasonable doubt.
U.S. v. Farese, 14 FLW Fed C627 (11th Cir. 4/16/01)

Offense Conduct

Drugs & Narcotics

Guidelines: Offense Conduct – Drugs & Narcotics (Maintined Premises)
Courts rely on the totality of the circumstances to determine whether the defendant maintained a premises for the purpose of manufacturing or distributing a constolled substance.
U.S. v. George, Case no. 16-14812 (11th Cir. Oct. 6, 2017)
Guidelines: Offense Conduct – Drugs & Narcotics (Possession of a Dangerous Weapon - Presumption)
There is a strong presumption that a defendant aware of the weapon's presence will think of using it if his illegal activities are threatened. The firearm's potential use is critical.
U.S. v. George, Case no. 16-14812 (11th Cir. Oct. 6, 2017)
Guidelines: Offense Conduct – Drugs & Narcotics (Mixture)
"Mixture or Substance" does not include materals that ust be separated from the controlled substance before the controlled substance can be used.
Griffith v. U.S., Case No. 15-11877 (11th Cir. 9/26/17)
Guidelines: Offense Conduct - Drugs & Narcotics (Small Scale Dealing May Not Support Connection to Firearms)
The small scale of a defendant's drug transactions may dispel the usual assumption about the connection between firearms and drugs.
U.S. v. Folk, 754 F.3d 905, 911 (11th Cir. 2014)
Guidelines: Offense Conduct - Drugs & Narcotics (Estimating Historical Drug Quantity)

The sentencing court may base its calculation on evidence showing the average frequency and amount of a defendant's drug sales over a given time period.
U.S. v. Barsoum, Case No. 13-10710 (11th Cir. 8/15/14)
Guidelines: Offense Conduct - Drugs & Narcotics (Firearm Increase Based on Codefendant's Possession of a Firearm)
Although Judge Hinkle didn't seem to think so, codefendant must be charged as a coconspirator before the defendant is assessed a two-level increase for the condefendant's possession of the firearm.
U.S. v. Matthews, 168 F.3d 1234 (11th Cir. 1999), but see differing language in U.S. v. Lane, 340 Fed. Appx. 575 (11th Cir. 2009), U.S. v. Fields, 408 F.3d 1356 (11th Cir. 2005).
Guidelines: Offense Conduct - Drugs & Narcotics (Use of Vehicle and Case to Add to Drug Quantity)
Where there was no "plausible source of income available to the defendant apart from his admitted participation in the drug conspiracy," district court properly assumed the $17,500 in cash found at residence and a Chevrolet Tahoe, which was purchased for $15,000 in cash, represented drug proceeds. There was, therefore, a legitimate basis to attribute to the defendant an additional amount of drugs equal to the dollar amount of those assets.
U.S. v. Chavez, Case No. 08-12638 (11th Cir. 10/16/09)
Guidelines: Offense Conduct - Drugs & Narcotics (Quantity on Intended Crack Limited by Quantity of Baking Powder)
Where the defendant was in possession of powder and crack cocaine, the district court overestimated the amount of powder the defendant intended to convert to crack. The court of appeals concluded that defendant would have needed 33 ounces of baking powder to convert all of the powder to crack and the defendant had only 8 ounces of baking powder in his motel room.
U.S. v. Singleton, Case No. 07-13329 (11th Cir. 10/16/08)
Guidelines: Offense Conduct - Drugs & Narcotics (Foreseeability of Death)
When a conspirator is involved in distributing drugs to addicts, some of which are even administered intravenously, it is a reasonably foreseeable consequence that one or more of those addicts may overdose and die.
U.S. v. Westry, Case No. 06-13847 (11th Cir. 4/16/08)
Guidelines: Offense Conduct - Drugs & Narcotics (Def. Need Not Know Quantity or Nature of the Drug)
So long as the defendant is aware that he is in possession of a controlled substance, the quantity of whatever substance it turns out to be is used for establishing the Guidelines range even if the defendant was unaware of the amount and unaware of exactly what controlled substance he has. The same is true for purposes of establishing the quantity for any mandatory minimum sentence.
U.S. v. Alvarez-Doria, Case No. 05-15683 (11th Cir. 5/4/06); U.S. v. Hristov, Case No. 05-14122 (11th Cir. 10/4/06)
Guidelines: Offense Conduct - Drugs & Narcotics (50% Conversion Rate of Precursor Chemicals)
Court rejected a challenge to the Guidelines calculation that assumes a 50% yield of Methamphetamine from pseudoephedrine and ephedrine.
U.S. v. Martin, Case No. 04-6228 (6th Cir. 2/21/06)
Guidelines: Offense Conduct - Drugs & Narcotics (Meth: Limitation On Using Unusable Mixtures)

Only the amount of pure drug contained in an unusable solution, or the amount of usable drug that is likely to be produced after that unusable solution is fully processed may be included in calculating the drug quantity. The 1st and 10th Circuits have held to the contrary, while the 11th Circuit and 5 others have decided the case consistent with this opinion.
U.S. v. Stewart, Case No. 03-1857 (7th Cir. 3/16/04); U. S. v. Newsome, 998 F.2d 1571 (11th Cir. 1993); Griffith v. U.S., Case No. 15-11877 (11th Cir. 9/26/17)

Guidelines: Offense Conduct - Drugs & Narcotics (Meth: Substantial Risk to a Minor - Minor Need Not Be Identified)

When proving, pursuant to USSG 2D1.1(b)(5)(C), that the manufacture of methamphetamine created a substantial risk of harm to a minor, and that the defendant has, therefore, earned a six level increase in the offense level, the government need not identify the particular minor that was placed at risk. Here, where there was a 1:00 A.M. fire in a motel room, testimony that several unidentified minors were evacuated from rooms within the motel was sufficient.
U.S. v. Florence, Case No. 02-13414 (11th Cir. 6/16/03)

Guidelines: Offense Conduct - Drugs & Narcotics (Vague Estimates of Quantity)

Where the testimony was so vague that it failed to describe the duration or frequency of the transactions the court erred in assuming a certain of transactions had occurred.
U.S. v. Simpson, 228 F.3d 1294 (11th Cir. 2000)

Guidelines: Offense Conduct - Drugs & Narcotics (Meth: Alternate Methods for Calculating Quantity)

Guidelines provide two different ways for calculation, for guideline purposes, the quantity of methamphetamine. One method is based on the actual weight of the meth contained in the mixture, the other is based on the weight of the entire mixture containing a detectable amount of meth. Court says use of different methods OK.
U.S. v. Fairchild, 98-2311 (8th Cir. 9/7/99); U.S. v. Blaylock, 14 FLW Fed C676 (11th Cir. 5/2/01)[100% theoretical yield to the relevant precursor]

Guidelines: Offense Conduct - Drugs & Narcotics (Quantity Based Upon Inquiry About Price)

The district court attributed one kilogram of cocaine to the defendant because in an intercepted phone call made by him to his supplier he asked about the price of a kilogram of cocaine. Pointing out that this fell short of an attempt to purchase that quantity the Circuit Court held the district court had erred.
U.S. v. Gibbs 97-1374 (3d Cir. 8/26/99)

Guidelines: Offense Conduct - (Drugs & Narcotics: Calculation of D-methamphetamine (Phenylacetic Acid))

Court upheld a conversion ratio of 1:1.
U.S. V. Ramsdale, 12 FLW Fed C1022 (11th Cir. 7/6/99)

Guidelines: Offense Conduct - Drugs & Narcotics (Weight of Pills Includes Everything)

The court must use the total weight of the p ills distributed y the defendant - that is, the weight of the drug contained in the pill as well as the weight of the substance in which the drug is mixed - rather than just the weight of the drug itself.
U.S. v. Lazarchik, 924 F.2d 211 (11th Cir. 1991); U.S. v. Steele, 12 FLW Fed (11th Cir. 6/25/99)

Guidelines: Offense Conduct - Drugs & Narcotics (99% Sugar and 1% Cocaine)

Where the cocaine was essentially placed on top of what amounted to a mixture that consisted of 99% sugar that was packaged as it was to defraud a drug buyer, the mixture was not “marketable” and for purposes of the sentencing guidelines. Consequently only the actual weight of the

cocaine, as opposed to the weight of the entire mixture, should have been used in calculating the guideline score.
U.S. v. Jackson, 115 F.3d 843 (11th Cir. 2007))

Guidelines: Offense Conduct - Drugs & Narcotics (Firearms -Enhancement for Co-Conspirator Possession)

For a s.2D1.1(b)(1) firearms enhancement for co-conspirator possession to be applied, the government must prove by a preponderance of the evidence: (1) the possessor of the firearm was a co-conspirator, (2) the possession was in furtherance of the conspiracy, (3) the defendant was a member of he conspiracy at the time of possession, and (4) the co-conspirator possession was reasonably foreseeable by the defendant.
U.S. v. Gallo, 13 FLW Fed C158 (11th Cir. 11/17/99); U.S. v. Novaton, 271 F.3d 968 (11th Cir. 2001); U.S. v. Clay, Case No. 03-12263 (11th Cir. 7/15/04); U.S. v. Fields, 408 F.3d 1356 (11th Cir. 2005)

Guidelines: Offense Conduct - Drugs & Narcotics (Firearms - Gun Possessed by Co-Conspirator)

Under U.S.S.G. s. 2D1.1(b)(1), which provides for a two-point increase in drug trafficking cases where the defendant possessed a firearm, a defendant's sentence may be enhanced for possession by a co-conspirator if (1) the actual possessor is charged as a co-conspirator; (2) the co-conspirator possessed the firearm in furtherance of the conspiracy; and (3) the defendant who receives the enhancement was involved in the conspiracy at the time of the possession.
U.S. v. Matthews, 168 F.3d 1234 (11th Cir 1999), but in U.S. v. Ward, Case No. 06-5136 (6th Cir. 10/23/07) court held it wasn't necessary for the defendant to be *charged* with participating in a conspiracy.

Guidelines: Offense Conduct - Drugs & Narcotics (Firearms: Gun Found at Site of Transaction)

Once the prosecution has shown by a preponderance of the evidence that the firearm was present at the site of the charged conduct, the evidentiary burden shifts to the defendant to show that a connection between the firearm and the offense is clearly improbable.
U.S. v. Hansley, 54 F.3d 709, 716 (11th Cir.); s. 2D1.1 app. note 3 USSG; U.S. v. Diaz, 13 FLW Fed C1 (11th Cir. 10/15/99); U.S. v. Hall, 46 F.3d 62, 63 (11th Cir. 1995)

Guidelines: Offense Conduct - Drugs & Narcotics (Firearms - Gun Located 100 Miles Away)

The Defendant was arrested in his car out of which he had conducted a drug transaction, and in which drugs were found. Two days later, and 100 miles away, the police searched the defendant's residence and found lots of paraphernalia along with five guns. Because the paraphernalia found in the defendant's home "was part of the same course of conduct for which the defendant had been convicted, the Court found the firearms were possessed "during related relevant conduct, and upheld the enhancement under 2D1.1(b)(1).
U.S. v. Hunter, 12 FLW Fed C733 (11th Cir. 4/20/99)

Guidelines: Offense Conduct - Drugs & Narcotics (Accessory After the Fact: Reasonably Should Have Known Drug Quantity)

Where the defendant was convicted of being an accessory after the fact in a drug conspiracy case, the court held that the total amount of the drugs should be used to calculate the base offense level even though the defendant could not be said to have reasonably known of the quantity involved. Acknowledging a split in the circuits, the court held that its reading of USSG § 2X3.1

led it to conclude that the reasonable knowledge requirement under that provision extended only to specific offense characteristics and not the calculation of the base offense level.
U.S. v. Lang, 364 F.3d 1210 (10th Cir. 2004)
Guidelines: Offense Conduct - Drugs & Narcotics (Vague Estimates of Quantity)
Where the testimony was so vague that it failed to describe the duration or frequency of the transactions the court erred in assuming a certain of transactions had occurred.
U.S. v. Simpson, 14 FLW Fed C1 (11th Cir. 9/29/00)
Guidelines: Offense Conduct - Drugs & Narcotics (Drug Quantity: Reliance on Hearsay is OK)
U.S. v. Jackson, No. 98-6487 (10th Cir. 6/2/00)

Firearms

Guidelines: Offense Conduct – Firearms (Ammunition alone unlikely to support "In Connection With" Increase
U.S. v. Eaden, 914 F.3d 1004 (5th Cir. 2019)
Guidelines: Offense Conduct – Firearms ("In Connection With" Proximity Assumption Only Applies to Trafficking Offenses)
U.S. v. Bishop, 940 F.3d 1242 (11th Cir. 2019)
Guidelines: Offense Conduct – Firearms (Possession of a Small Quantity Less Likely to Support "In Connection With" Increase)
U.S. v. McKenzie, 410 Fed. Appx. 943 (6th Cir. 2011)
Guidelines – Offense Conduct – Firearms (Gun in Residence Along with Drugs)
That's about all it takes. In the trial court both the government and the defense objected to the increase.
U.S. v. Montenegro, No. 19-13542 (11th Cir. June 11, 2021)
Guidelines: Offense Conduct – Firearms (Number of Firearms: Can Count Firearms That Did Not Travel in Interstate Commerece)
USSG §2K2.1(b)(1)(A) increases the offense level based on the number of firearms involved in the offense. In this case one of the fireams was manufactured in-state and there was no evidence it had traveled in interstate commerce. Court held, nonetheless, that it could be counted for purposes of the guidelines as the defendant, who was a convicted felon, possessed it unlawfully.
U.S. v. Gill, Case No. 16-11307 (11th Cir. July 27, 2017)
Guidelines: Offense Conduct – Firearms (Fla. Agg Assault a Crime of Violence)
Though recognizing the debate, court held it was bound by precedent to conclude that Florida's aggravated assault qualifies as a crime of violence. Includes concurring opinion by Judge Jill Pryor setting out the argument to the contrary.
U.S. v. Golden, Case No. 15-15624 (11th Cir. 1/24/17)
Guidelines: Offense Conduct – Firearms (Possession in Connection with Drug Offense)
The small scale of a defendant's drug transactions may dispel the usual connection between firearms and drug dealing.
U.S. v. Folk, Case No. 12-15126 (11th Cir. 6/12/14)
Guidelines: Offense Conduct - Firearms (Trafficking Enhancment)
Though the Government failed to establish failed to show who ultimately received the firearms, the trial court correctly applied the four-level increase on the basis of USSG §2K2.1(b)(5) in that the Government did show that the defendant knew or had reason to believe that his conduct

would result in the transfer of a firearm to someone who intended to dispose of the firearm unlawfully.
U.S. v. Asante, Case No. 13-15651 (11th Cir. 4/6/15)
Guidelines: Offense Conduct - Firearms (924(c) scoring of Career Offenders)
For those who are career offenders, the table at §4B1.1(c)(3) provides the guideline range for all offenses, i.e. it is not a matter of adding the additional 5 years to the range derived from the table. In arriving at the "otherwise applicable range" in §4B1.1(c)(2) (A), the range to be compared with the range from the table, it is a matter of calculating the range using Chapter Two of the Guidelines and then adding the 60 months. It is not a matter of adding 60 months to the range determined by the career offender guideline.
U.S. v. Winbush, 264 F.Supp.2d 1013 (N.D. Fla. 2003) (Hinkle, J).
Guidelines: Offense Conduct - Firearms (Sale of Firearm Does Not' Another Felony Offense)
The Commentary to 2K2.1, note 14(C), explains that the sale of the stolen firearm does not amount to possession of the firearm in connection with *another felony offense* and the four-level increase pursuant to 2K2.1(b)(6) is not warranted.
U.S. v. English, 329 F.3d 615, 617 (8th Cir. 2003), U.S. v. Boumelhem, 339 F.3d 414, 427 (6th Cir. 2003)
Guidelines: Offense Conduct - Firearms (Statutory Rape' Crime of Violence)
U.S. v. Ivory, Case No. 06-10895 (11th Cir. 1/17/07)
Guidelines: Offense Conduct - Firearms (Unregistered Firearm' Crime of Violence)
Possession of an unregistered firearm in violation of 26 USC 5861(d) qualifies as a crime of violence for purposes of enhancing sentence under USSG 2K2.1(a)(4)(A).
U.S. v. Owens, Case No. 05-10753 (11th Cir. 5/4/06)
Guidelines: Offense Conduct - Firearms (Felony DUI is a Crime of Violence)
Although some circuits disagree, the Eleventh held that the Alabama offense of felony DUI was, pursuant to USSG §2K2.1(a)(2), was a crime of violence.
U.S. v. McGill, Case No. 05-10285 (11th Cir. June 1, 2006)
Guidelines: Offense Conduct - Firearms (Sporting Purposes - Pawning Gun for Someone Who Possessed the Gun for Sporting Purposes)
Defendant who pawned a gun his brother used only for sporting purposes, did not qualify for the lower offense level set out in §2K2.1(b)(2)**.**
U.S. v. Caldwell, Case No. 05-12640 (11th Cir. 12/5/05)
Guidelines: Offense Conduct - Firearms (Sporting Purposes - Shooting at Cans)
At least one court has held that "plinking" (shooting at cans) qualifies as sporting purposes under §2K2.1(b)(2), making the defendant eligible for the lower offense level. *See:* U.S. v. Bossinger, 12 F.3d 28, 29 (3d Cir. 1993).
U.S. v. Caldwell, Case No. 05-12640 (11th Cir. 12/5/05)
Guidelines: Offense Conduct - Firearms (Cross Reference: "Any Firearm")
The cross reference provision (§K2.1(c)(1))of the Guidelines applicable to firearms, provides for the use of §2X1.1 if the defendant used "any firearm" in connection with another offense. In that it says "*any* firearm,"the provision does not require that the firearm supporting the cross-reference be the one that is the subject of the indictment. In this instance, though, the shooting that occurred four days earlier could not be considered relevant conduct and, therefore, the cross-referencing provision was inapplicable.

U.S. v. Williams, Case No. 05-11318 (11th Cir. 11/30/05)
Guidelines: Offense Conduct - Firearms (Possession During Commission of a Crime -Co-Conspirator)
Court seemed to hold that fact that the conspiracy involved drug trafficking satisfied the requirement that the codefendant's possession of the firearm be foreseeable by the defendant before the two level enhancement in 2D1.1(b)(1) applies. The "close relationship" between the defendant and his co-conspirator increased the "probability" that the defendant would be able to foresee the firearm possession.
U.S. v. Fields, Case No. 04-12486 (11th Cir. 5/16/05)
Guidelines: Offense Conduct - Firearms (Fleeing and Eluding is a Violent Crime)
For purposes of establishing the higher offense level pursuant to 2K2.1(a)(4)(A), a prior conviction in Michigan for the felony of fleeing and eluding was a crime of violence.
U.S. v. Martin, cAse NO. 03-1855 (6th Cir. 7/29/04)
Guidelines: Offense Conduct - Firearms (Poss. By A Convicted Felon: Cross Reference - Different Gun)
Defendant was convicted of being a felon in possession of a firearm. There was evidence that, although the particular guns that supported the conviction were not connected, the defendant was engaged in drug trafficking. He was sentenced under the drug guidelines, though, pursuant to the cross-reference provision in 2K2.1(c), i.e., use of firearms in connection with another offense. The court held that provision was properly used despite the fact that the guns used to support the cross-referencing were not the guns that supported the conviction. Rejecting a due process challenge and a claim that the prior use and possession of the firearms were too remote in time, the court, noting that the guideline provision refers to possession of "*any* firearm or ammunition," found that the past use of firearms during drug trafficking was part of the same course of conduct as the offense of conviction.
U.S. v. Jardine, 364 F.3d 1200 (10th Cir. 2004)
Guidelines: Offense Conduct - Firearms (Short-Barreled Shotgun Was a Destructive Device)
In a case decided under the 2003 version of USSG 2K2.1, the court upheld a two level increase on the basis of 2K2.1(b)(3), i.e. that the offense involved a destructive device, because the short-barreled shotgun involved had a barrel with a bore of more than ½ inch in diameter.
U.S. v. Wynn, 365 F.3d 546 (6th Cir. 2002)
Guidelines: Offense Conduct - Firearms (2K2.1: Assault Weapon Offense Level Increase - Date of Manufac.)
Not all semiautomatic assault weapons are illegal. The "grandfather" provision of the 1994 assault weapons ban ensured that the ban did not apply to the possession or sale of such assault weapons otherwise lawfully possessed under federal law on the date of its enactment. *See* 18 USC 922(v)(2). Nonetheless, the higher offense level under USSG 2K2.1(a)(5) applies even to those guns manufactured before the enactment of the 1994 legislation. (The initial opinion, which this one replaces, held to the contrary.)
U.S. v. Vega, Case No. 03-13329 (11th Cir. 12/8/04)
Guidelines: Offense Conduct - Firearms (Enhancement for Guns Possessed by Co-conspirators)
"We hold that absent some specific connection between the firearms and the particular drug activity, the district court is not compelled to find that the §2D1.1(b)(1) enhancement applies."

U.S. v. Clay, Case No. 03-12263 (11th Cir. 7/15/04)
Guidelines: Firearms Offense Conduct: Firearms (Guns in the Closet Didn't Support Enhancement)
For an example of a defendant who had guns in the closest, was involved in a drug conspiracy, and who did not get the enhancement for possessing a firearm in connection with a drug trafficking offense see:
U.S. v. Clay, Case No. 03-12263 (11th Cir. 7/15/04)
Guidelines: Offense Conduct: Firearms (Adjustment for Having an Assault Weapon (2K2.1(a)(5))
The increase to offense level 18 is not supported by an assault weapon that was manufactured prior to the enactment of the assault weapons ban.
U.S. v. Vega, Case No. 03-13329 (11th Cir. 2004)
Guidelines: Offense Conduct: Firearms (924(c) Conviction and Enhancement)
Amendment 599, which clarifies when weapons enhancement may properly be applied to an underlying offense when the defendant has also been convicted for use or possession of a firearm pursuant to 18 USC 924(c)did not bar the district court from enhancing the defendant's conspiracy offense level for his co-conspirator's use of a firearm during robberies in which the defendant did not personally participate and that did not form the basis of his weapons conviction.
U.S. v. Pringle, 350 F.3d 1172 (11th cir. 2003)
Guidelines: Offense Conduct - Firearms (Scoring the 924(c) Case Where the Defendant is a Career Offender)
See: U.S. v. Winbush, 264 F.Supp.2d 1023 (N.D. Fla. 2003)
Guidelines: Offense Conduct - Firearms (Possession of a Machine Gun Qualifies as Violent Offense)
The defendant, being sentenced for being a felon in possession of a firearm, should have received a higher offense level under USSG 2K2.1(a)(4)(A), as his prior conviction of possession of a firearm qualified as a violent offense.
U.S. v. Golding, 329 F.3d 937 (7th Cir. 2003)
Guidelines: Offense Conduct - Firearms (924(c) Conviction and PFCF - Enhancement For Use of Firearm in Connection with Another Felony Offense)
Where a defendant is convicted of both using a firearm in relation to a drug trafficking offense (18 USC § 924(c)) and being a felon in possession of a firearm, he should not receive the four level enhancement pursuant to USSG § 2K2.1(b)(5) applicable to those convicted of the offense of being a felon in possession of a firearm who possessed the gun in connection with another felony**.**
U.S. v. Brown, 332 F.3d 1341 (11th Cir. 2003)
Guidelines: Offense Conduct - Firearms (Possession of Stolen Firearms -Double Counting?)
With the exception of those whose base offense level is determined on the basis of (a)(7), the two-level offense level increase for possessing a stolen firearm pursuant to 2K2.1(3) is applicable even though the offense is that of possession of stolen firearms.
U.S. v. Adams, 329 F.3d 802 (11th Cir. 2003)
Guidelines: Offense Conduct - Firearms (Career Offender: crime of violence or drug offense - connection)

For those who qualify as career offenders, the enhancement within that provision for possessing the firearm in connection with a crime of violence or a drug offense, is limited to ammunition or firearms charged in the indictment. This guideline provision addresses the firearm, while by way of contrast 2K2.1 addresses any firearm.
U.S. v. Duty, Case No. 02-11586 (11th Cir. 8/20/02)
Guidelines: Offense Conduct - Firearms (Enhancement for Possession "In connection With" Another Felony)
Doesn't take much.
U.S. v. Rhind, 289 F.3d 690 (11th Cir. 2002); U.S. v. Smith, 480 F.3d 1277 (11th Cir. 2007)
Guidelines: Offense Conduct -Firearms (Enhancement for Possession "In Connection With" Another Felony)
Court says it's reasonable to apply the enhancement where it's reasonable to assume the defendant possessed a firearm to prevent a theft of contraband and where an individual has a gun and narcotics on his person at the same time. The absence of evidence that the defendant arms himself with a preconceived plan to use the gun, however, is a consideration.
U.S. v. Jackson, 276 F3d 1236 (11th Circuit 2001)
Firearms: Offense Conduct - Firearms (Cross Reference: Conviction Isn't Necessary)
§ 2X1.1, when cross-references by § 2K2.1(c), does not require a conviction before a district court may use the guideline provision applicable to the conduct underlying the firearm offense.
U.S. v. O'Flanagan, 339 F.3d 1229 (8th Cir. 2003)
Guidelines: Offense Conduct - Firearms (Offense Level Increase for Crime of Violence or Drug Offense)
For purposes of determining the offense level under 2K2.1 a plea of nolo and the withholding of adjudication makes no difference. The case counts as a prior conviction.
U.S. v. Fernandez, 14 FLW Fed C243 (11th Cir. 12/11/2000)
Guidelines: Offense Conduct - Firearms ("Sports Enthusiast or Collector" Need Not Be the Defendant)
So long as the defendant's possession of the firearm is "associated with or related to" a lawful sporting or collection purposes, the defendant is, pursuant to 2K2.1(b)(2), entitled to a reduction in the offense level. Here the defendant's brother had borrowed the gun to go hunting, but when an altercation occurred, he took the gun and returned it to its owner. He qualified for the reduction.
U.S. v. Mojica, No. 99-4131 (10th Cir. 5/30/00)
Guidelines: Offense Conduct - Firearms (Transfer With Reason to Believe Guns Will Be Used in Felony)
Although a large number of guns were stolen and sold, where the defendant was not involved the selling of the guns, the evidence was insufficient to establish the enhancement found in 2K2.1(b)(5), that of transferring a firearm with reason to believe it would be used in another felony.
U.S. v. Askew, 193 f3d 1181 (11th Cir. 1999)
Guidelines: Offense Conduct - Firearms (Enhancement & 924(c) Conviction - Separate Guns)
If one gun is used as a basis for a 924(c) charge, and there's another gun available to use for enhancement under the drug guideline, 2D1.1(b)(1), that's just fine.

U.S. v. Gonzalez, 183 F.3d 1315 (11th Cir. 8/13/99); U.S. v. Chastain, 13 FLW Fed C298 (11th Cir. 12/30/99)

Guidelines: Offense Conduct - Firearms (Enhancement & 924(c) Conviction' Double Jeopardy)

If the defendant is convicted under of using a gun during a drug transaction under 924(c) he receives a mandatory consecutive sentence, but cannot have his sentence enhanced under USSG s. 2D1.1(b)(1). Such an enhancement would violate double jeopardy.

U.S. v. Mixon, 11 FLW Fed C69 (11th Cir. 6/20/97); U.S. v. Gonzalez, 12 FLW Fed C1174 (11th Cir. 8/13/99)

Guidelines: Offense Conduct - Firearms (2K2.1(a): Post Commission but Prior to Sentencing)

The phrase "one prior felony conviction of either a crime of violence or a controlled substance offense" includes offenses committed after the instant offense but prior to sentencing.

U.S. v. Laihben, 12 FLWFed C503 (11th Cir. 2/18/99)

Guidelines: Offense Conduct - Firearms (Drug Usage' Prohibited Person)

During PSI interview defendant admitted to a history of drug usage. That admission was used to establish the defendant as a "prohibited person" under 2K2.1, and justified a higher base offense level.

U.S. v. Jarman, 144 F.3d 912 (6th Cir. 1998)

Guidelines: Offense Conduct - Firearms (Use of Firearm in Connection With Another Felony)

Where the offense was that of stealing guns from a licensed dealer, an enhancement for using the guns "in connection with another felony offense" was appropriate even though the other felony was the state burglary charge in which the guns were stolen.

U.S. v. Armstead, 114 F.3d 504 (5th Cir. 1997)

Fraud & Theft

Guidelines: Offense Conduct - Fraud and Theft (Duplicating Stolen Social Security Numbers' Production of Unauthorized Access Devices?)

U.S. v. Cobb, Case No. 15-12817 (11th Cir. 11/30/16)

Guidelines: Offense Conduct - Fraud and Theft - Increase Because of Relocation of Scheme

The two-level enhancement set out in § 2B1(b)(10)(A) because the defendant participated in relocating the scheme requires more than going out of town to use debit cards.

U.S. v. Hines-Flagg, 789 F.3d 751 (11th Cir. 2015).

Guidelines: Offense Conduct - Fraud and Theft - Identity Theft (Production by Innocent Third Party)

Causing an innocent third party to produce an unauthorized access device supports the two-level enhancement for production fund at § 2B1.1(b)(11)(B).

U.S. v. Taylor, Case No. 14-13288 (11th Cir. 3/28/16)

Guidelines: Offense Conduct - Fraud and Theft - Loss (Government Benefit)

The net loss approach is used in calculation loss when the fraud involves government benefits.

U.S. v. Slaton, 810 F.3d 1308 (11th Cir. 2015)

Guidelines: Offense Conduct Fraud and Theft - Identity Theft (Increase Pursuant to USSG §2B1.1 for Use of Unauthorized Access Device)

Note 2 in the Commentary to USSG §2B1.6 (Aggravated Identity Theft) says there should not be a two-level increase under USSG §2B1.1(b)(11)(B) for production or trafficking an unauthorized access device.
U.S. v. Charles, Case No. 13-11863 (11th Cir. 7/7/14); but see U.S. v. Taylor, Case No. 14-13288 (11th Cir. 3/28/16)
Guidelines: Offense Conduct - Fraud and Theft (Loss Based Upon Actions of Others in a Conspiracy)
The defendant's sentence can only be enhanced by those reasonably foreseeable losses, caused by co-conspirators acting in furtherance of th epart of the conspiracy in which the defendant agreed to participate.
U.S. v. Issacson, Case No. 12-14703 (11th Cir. 5/22/14)
Guidelines: Offense Conduct - Fraud and Theft (Loss: Reduced By Value Received By Victim)
If the defendant returned any money to the victim or rendered legitimate services to the victim before the fraud was detected, the loss amount must be reduced by the fair market value of the returned money or the services rendered. This credit accounts for the fact that value may be rendered even amid fraudulent conduct.
U.S. v. Campbell, Case No. 12-11952 (11th Cir. 9/3/14)
Guidelines: Offense Conduct - Fraud and Theft (Loss is a Proxy for Culpability)
Under the Sentencing Guidelines' approach to economic crime, the amount of financial loss attributable to a defendant's crime serves as a proxy for "the seriousness of the offense and the defendant's relative culpability. If, in the sentencing court's assessment, that the calculation nder - or overestimates the seriousness of the offense, then the court may grant an upward or downward departure as needed.
U. S. v. Campbell, case No. 12-11952 (11th Cir. 9/3/14)
Guidelines: Offense Conduct - Fraud and Theft (Organized Scheme to Goods)
Trial court properly applied the two-level increase, pursuant to USSG §2B1.1(b)(14)(B) for an organized scheme to steal goods that are part of a cargo shipment**.**
U.S. v. Dimitrovski, Case No. 14-12417 (11th Cir. 4/2/15)
Guidelines: Offense Conduct - Fraud & Theft (Social Security Number Did Not Amount to an Authentication Feature)
Authentication features are those used to prevent counterfeiting. In this instance, the court questioned whether the social security number was used to prove the document was not a counterfiet.
U.S. v. Rodriguez-Cisneros, 916 F.Supp.2d 932 (D. Neb. 2013)
Guidelines: Offense Conduct - Fraud & Theft (Number of Victims: Value Received)
Where defendant was convicted of health care fraud, in which his company fraudulently provided portable oxygen to Medicare and Medicaid patients, the appeals court held that even those individuals who legitimately needed oxygen should be counted as victims. The court relied upon Application Note 3(F)(v), which provides that loss amounts should be calculated "with no credit provided for the value of those items or services" when the scheme involves "goods for which regulatory approval by government agency was required but not obtained."
U.S. v. Bane, Case No. 14158 (11th Cir. 6/28/13)
Guidelines: Offense Conduct - Fraud & Theft (Loss: Offset For Value Received)

Where defendant was convicted of health care fraud, in which his company fraudulently provided portable oxygen to Medicare and Medicaid patients, the court of appeals held that even though 80 to 90% of those receiving oxygen legitimately needed it, there should be no offset for those patients. Application Note 3(F)(v) provides that loss amounts should be calculated "with no credit provided for the value of those items or services" when the scheme involves "goods for which regulatory approval by government agency was required but not obtained."
U.S. v. Bane, Case No. 11-14158 (11th Cir. 6/28/13)

Guidelines: Offense Conduct - Fraud & Theft (Limitation on Increase for Means of Identification in Agg Identity Cases Inapplicable to Device-Making Equipment)

The commentary at USSG § 2B1.6 that eliminates the two-level increase for possession or use of means of identification in theft cases where there is also a charge of aggravated identity theft is inapplicable to the same increase based on the possession of device-making equipment.
U.S. v. Cruz, Case No. 11-12568 (11th Cir. 3/26/13)

Guidelines: Offense Conduct - Fraud & Theft (Number of Victims - Transfer or Sale of Identifying Information Does Not Equate to Use of that Information)

Application Note 4(E) of USSG 2B1.1 provides that a victim includes an individual whose means of identification is used unlawfully or without authority. Here, the defendant disclosed identifying information of 141 individuals, although, her confederates only used the identity of 12 of them to obtain fraudulent credit cards. The court of appeals, in holding that there were only 12 victims for purposes of the guideline calculations, concluded that the *transfer* of the information was not the equivalent of *using* the information.
U.S. v. Hall, Case No. 11-14698 (11th Cir. 1/16/13)

Guidelines: Offense Conduct - Fraud & Theft (Bribery: Loss Calculation)

The loss amount may be based on the amount of the bribe that a defendant received, but only if it was not possible to estimate the net value of the benefit garnered by the defendant's fraudulent conduct.
U.S. v. Huff, Case No. 08-16272 (11th Cir. 6/25/10)

Guidelines: Offense Conduct - Fraud & Theft (Loss: Intended - Reasonable Mathematical Limit of Scheme)

When a sentencing court is determining he proper punishment for a defendant's fraud, he court uses the reasonable mathematical limit of his scheme, rather than his concrete result. A criminal pays the price for the ambition of his acts, not their thoroughness.
U.S. v. Patterson, 595 F.3d 1324 (11th Cir. 2010)

Guidelines: Offense Conduct - Fraud & Theft (Sophisticated Means)

Whether a scheme is sophisticated must be viewed in light of the fraudulent conduct and differentiated, by assessing the intricacy or planning of the conduct, from similar offenses conducted by different defendants.
U.S. v. Hance, 501 F.3d 900, 909 (8th Cir. 2007)

Guidelines: Offense Conduct - Fraud & Theft (Loss - Individual Stores Owned By Same Corporation Don't Count as Separate Victims)

Although the defendant had traveled around the country shoplifting from some 407 Walgreens stores, the court erred in counting each store as a separate victim. There was testimony from a Walgreens' official that the individual stores did not sustain any part of the loss - the corporation took the entire loss.
U.S. v. Icaza, Case No. 06-2882 (8th Cir. 7/10/07)

Guidelines: Offense Conduct - Fraud & Theft (Loss - Can't Exceed Total Value of Stolen Items)
As the loss cannot exceed the total value of the stolen property, the court erred in this case involving stolen watches when it added the cost of repair of the recovered watches to the retail value of the watches.
U.S. v. Cedeno, Case No. 05-16616 (11th Cir. 12/6/06)
Guidelines: Offense Conduct -Fraud & Theft (Money Laundering - Interest)
Under §2S1.1, where one of the money laundering schemes was in investment int eh stock of a privately-held company, which stock appreciated significantly in value, the district court erred in including the appreciated value of the stock, rather than the initial investment amount, in calculating the total amount of laundered funds.
U.S. v. Paley, cAse No. 05-13422 (11th Cir. 3/15/06)
Guidelines: Offense Conduct - Fraud & Theft (Number of Victims - Temporary Loss)
It is conceivable that if someone suffers a loss for only a brief period of time before being reimbursed that they may not count as a victim under 2B1.1(b)(2)(A).
U.S. v. Lee, Case No. 04-12485 (11th Cir. 10/5/05)
Guidelines: Offense Conduct - Fraud & Theft (Reasonable Estimate of Loss/Speculation Over Facts)
A sentencing court need only make a reasonable estimate of loss, given the available information. A sentencing judge, however, may not speculate about the existence of a fact that would permit a more severe sentence.
U.S. v. Lee, Case No. 04-12485 (11th Cir. 10/5/05)
Guidelines: Offense Conduct - Fraud & Theft ("More Than Minimal Planning")
Under the now revised theft Guideline, "a presumption of more than minimal planning arises whenever repeated acts over a period of time are proved. The presumption can be rebutted, however, if it is clear that each instance was 'purely opportune'."
U.S. v. Crawford, Case No. 03-15136 (11th Cir. 5/2/05)
Guidelines: Offense Conduct - Fraud & Theft (Loss - Only Completed Loan Counted)
Defendant made fraudulent representations to obtain a $232,000 loan obtained approval for the loan. As the business deal for which the defendant was borrowing the loan fell through, he never obtained it. Upon finding a new business deal, the defendant resubmitted the loan application, but for a lower amount, $77,500. The Court rejected the use of intended loss, as held the loss should be determined only on the basis of the $77,500 loan.
U.S. v. Sanders, 343 F.3d 511 (5th Cir. 2003)
Guidelines: Offense Conduct - Fraud and Theft (Loss -Defendant's Gain Not Usually A Valid Measure)
The use of the defendant's gain is not the preferred method for calculating loss because it ordinarily underestimates the loss.
U.S. v. Bracciale, Case No. 03-12838 (11th Cir. 6/22/04)
Guidelines: Offense Conduct - Fraud and Theft (Loss - Can't Speculate)
The district court cannot merely speculate as to the proper amount of loss. Upon challenge, the government bears the burden of supporting its loss calculation with reliable and specific evidence.
U.S. v. Bracciale, Case No. 03-12838 (11th Cir. 6/22/04)
Guidelines: Offense Conduct - Fraud and Theft (Insurance Company is a Financial Institution)

At least under 2F1.1, the now repealed guideline that was applicable in cases of fraud, an insurance company is among the types of institutions included within the definition of "financial institution" that provides for an increase in the offense level.
U.S. v. Lauersen, 343 F.3d 604 (2d Cir. 2003)

Guidelines: Offense Conduct - Fraud and Theft (Calculation of Loss -Wholesale or Retail Value)

At least in this instance, where the theft was from a wholesale dealer and the where the goods were going to be resold at the wholesale level, the court, in arriving at the amount of the loss for guideline purposes, should have used the wholesale value.
U.S. v. Machado, Case No. 02-11288 (11th Cir. 6/10/03)

Guidelines: Offense Conduct - Fraud and Theft (Calculation of Loss: Opportunity Cost Loss)

Opportunity-cost loss may not be considered at sentencing: loss does not, for example, include interest the victim could have earned had the offense not occurred. In this case, though, where the crime involved the unauthorized distribution of a pharmaceutical, the court recast the loss as, not an opportunity cost, but the "theft" of the company's distribution privileges or the conversion of a restrictive distribution license into an unrestricted distribution license. Coincidentally, the loss occasioned by the theft of the distribution privilege equaled the opportunity cost loss.
U.S. v. Yeager, Case No. 02-11265 (11th Cir. 5/29/2003).

Guidelines: Offense Conduct - Fraud and Theft (In the Business of Receiving and Selling Stolen Property)

To qualify for the two level enhancement pursuant to 2B6.1(b)(2), the defendant has to be a fence.
U.S. v. Saunders, Case No. 01-17032 (11th Cir. 1/23/03)

Guidelines: Offense Conduct - Fraud and Theft (In the Business of Receiving and Selling Stolen Property)

For purposes of USSG 2B6.1(b)(1) the phrase "in the business" does not apply to the thief who sells goods that he has stolen. The plain meaning of the phrase is that the defendant himself, and not just his co-conspirator, must have received and sold stolen property.
U.S. v. Maung, 14 FLW Fed C1273 (11th Cir. 9/25/01)

Guidelines: Offense Conduct - Fraud & Theft (Disruption of Government Function)

Fifteen million dollar scheme involving Medicare benefits merited an four level enhancement for disruption of a government function, USSG 5K2.7, p.s.
U.S. v. Regueiro, 14 FLW Fed C388 (11th Cir. 2/6/01)

Guidelines: Offense Conduct - Fraud& Theft (No Intent to Inflict Financial Loss)

If the defendant doesn't intend to inflict a financial loss, such as someone who lies on a loan application, but intends to repay the loan, the loss is limited to only the actual amount of the loss.
U.S. v. Henderson, 19 F.3d 917, 927-28 (5thCir. 1994); United States v. Kopp, 951 F.2d 521 (3rd Cir. 1991); United States v. Wells; 127 F.3d 739 (8th Cir. 1997); U.S. v. Downs, 123 F.3d 637 (7th Cir. 1997).

Guidelines: Offense Conduct - Fraud & Theft (Loss Doesn't Include Value Received)

In calculating loss, the loss does not include benefits received by the victim.
U.s. v. Chaterji, 46 F.3d 1336 (4th DCA 1995); U.S. v. Sublett, 124 F.3d 693 (5th Cir. 1997); U.S. v. Parsons, 109 F.3d 1002 (4th Cir. 1997); U.S. v. Maurelly, 76 F.3d 1304 (3rd Cir. 1996); U.S. v. Barnes, 125 F.3d 1287 (9thCir. 1997)

Guidelines: Offense Conduct - Fraud & Theft (Fraud Charge Not Grouped With Money Laundering Charge)
Section 3D1.2(d) lists kinds of offenses that ordinarily should be grouped, those in which the offense level is determined by some quantity, be it drugs or dollars. While, in this instance, both money laundering and fraud would be included in the list, the Court recognizing that inclusion in the list doesn't automatically mean the offenses will be grouped, upheld the trial court's decision to score the offenses separately.
U.S. v. McClendon, 13 FLW Fed C105 (11th Cir. 10/6/99); U.S. v. Harper, 972 F.2d 321, 322 (11th Cir. 1995)
Guidelines: Offense Conduct - Fraud & Theft (Calculation of Loss)
It is the greater of either the actual loss or the intended loss.
U.S. v. Hedges, 12 FLW Fed C865 (11th Cir. 5/21/99); U.S. v. Grant, Case No. 04-12268 (11th Cir. 11/29/05)
Guidelines: Offense Conduct - Fraud & Theft (Defendant's Gain Not a Proxy for Victim's Loss)
Defendant who knowingly bought stolen parts from an aircraft manufacturer paid $86,000 for the parts. While it was permissible to use that amount to meet the $5,000 federal jurisdictional limit, the appropriate figure for guideline purposes should have been the price the manufacturer would have sold the parts, as it had intended, for scrap.
U.S. v. Ruhe 98-4731 (4th Cir. 8/31/99)
Guidelines: Offense Conduct - Fraud & Theft (Amount of Financial Loss - Estimates)
While estimates are permissible, courts must not speculate concerning the existence of a fact which would permit a more severe sentence under the guidelines.
U.S. v. Wilson, 993 F.2d 214, 218 (11th Cir. 1993); U.S. v. Cabrera, 12 FLW Fed C743 (11th Cir. 4/19/99)
Guidelines: Offense Conduct - Fraud & Theft (Amount of Financial Loss)
Under the Sentencing Guidelines Manual, a court may use, in calculating the base offense level, the loss that a defendant intended to inflict through fraudulent conduct, if that intended loss is greater than the actual loss, and if the loss can be determined.
U.S. v. Burston, 12FLW FedC239 (11th Cir. 1998)

Immigration Cases

Guidelines: Offense Conduct – Immigraton Cases (Fla. Felony Battery is a Crime of Violence)
Florida's felony battery, Fla. Stat. § 784.041, the offense of battery resulting in great bodily harm, is categorically a crime of violence. Decision includes the comment that the test "is not an invitation to apply legal imagination to the statute." Court did not reach the question of whether the battery staute is divisible. Long dissent.
U.S. v. Vail-Bailon, Case No. 15-10351 (11th Cir. 8/25/17) (en banc)
Guidelines: Offense Conduct – Immigration Cases (Fla. Burglary of a Dwelling Not a Crime of Violence)
Though the court concluded that the generic burglary of a dwelling used in the Sentencing Guidelines includes locations other than buildings or structures, the court concluded the statute was non-generic because it included curtilage and indivisible. The offense, therefore, cannot be a crime of violence and the modified categorical approach in inapplicable.

U.S. v. Garcia-Martinez, Case No. 14-15725 (11th Cir. 1/11/17)
Guidelines: Offense Conduct – Immigration Cases (Fla. Offense of Throwing a Deadly Missile Into Occupied Vehicle is Not a Crime of Violence)
In a decision that has a good analysis of the Descamps decision, the court concluded that a violation of Fla. Stat. §790.19 is not a crime of violence. The force required may be directed against a person or against property.
U.S. v. Estrella, 758 F.3d 1239 (11th Cir. 2014)
Guidelines: Offense Conduct - Immigration Cases (Florida's Drug Statute Is Not Necessarily an Aggravated Felony)
Fla. Stat. 893.1391)(a)(2), as modified by Fla. Stat. 893.101, which became effective May 13, 2002, does not qualify as a drug trafficking aggravated felony under the categorical approach because of the change in the statute that eliminated mens rea as an element of the state's case. Donawa v. U.S. Attorney General, 735 F.3d 1275 (11th Cir. 2013); Sarminetos v. Holder, 742 F.3d 624 (5th Cir. 2014)
Guidelines: Offense Conduct - Immigration Cases (Florida's Sexual Battery Offense is a Crime of Violence)
U.S. v. Contreras, Case No. 13-10928 (11th Cir. 1/2/14)
Guidelines: Offense Conduct - Immigration (Aggravated Felony' ACC Violent Felony)
Any crime that is an ACC violent felony is also a § 2L1.2(b)(1)(C) aggravated felony.
U.S. v. Coronado-Cura, Case No. 12-12344 (11th Cir. 3/26/13)
Guidelines: Offense Conduct - Immigration (Florida's False Imprisonment)
Florida's crime of false imprisonment did not qualify under USSG §2L1.2(b)(1)(A) as a "crime of violence."
U.S. v. Noriega, Case No. 10-12480 (11th Cir. 4/11/12)
Guidelines: Offense Conduct - Immigration (Florida's Lewd and Lascivious)
Qualifies as a violent offense.
U.S. v. Cortes-Salazar, Case No. 11-11428 (11th Cir. 5/30/12)
Guidelines: Offense Conduct - Immigration (Resisting Arrest With Violence)
A violation of Florida Statute 843.01, resisting arrest with violence, is a violent offense.
U.S. v. Romo-Villalobos, Case No. 10-15350 (11th Cir. 3/20/12)
Guidelines: Offense Conduct - Immigration (Abuse of a Minor is a Violent Offense)
Prior conviction under a North Carolina statute for sexual abuse of a minor qualified as a crime of violence and justified a 16-level increase in the offense level.
U.S. v. Ramirez-Garcia, Case No. 10-13279 (11th Cir. 7/12/11)
Guidelines: Offense Conduct - Alien Smuggling (Adjustment for Creating a Substantial Risk of Death or Serious Bodily Injury)
Transporting 21 individuals on a small boat without the adequate life jackets, like transporting individuals without enough seats or seatbelts in a car or truck amounts to recklessly creating a substantial risk of death or serious bodily injury and supports the enhancement set out in §2L1.1(b)(6).
U.S. v. Caraballo, Case No. 09-10428 (11th Cir. 1/27/10)
Guidelines: Offense Conduct - Crimes of Violence Need Not Also Be Aggravated Felonies
Robbery, while a crime of violence, turns out not to be an aggravated felony. There is not, however, any requirement that the "crime of violence" also be an aggravated felony for the 16-level increase pursuant to USSG §2L1.2(b)(1)(A)(ii).

U.S. v. Gonzalez, Case No. 08-10008 (11th Cir. 12/12/08)
Guidelines: Offense Conduct - Immigration (California Residential Burglary Not a Crime of Violence)
Using the analysis required by Shepard, the court concluded that because California law includes the act of remaining in as part of their burglary statue, the defendant's conviction for a residential burglary was not a crime of violence.
U.S. v. Gonzalez-Terrazas, 529 F.3d 293 (5th Cir. 2008)
Guidelines: Offense Conduct - Immigration (Possession of More Than 100 Lbs. of Marijuana Not a Drug Trafficking Offense)
Court held the trial court improperly increased the defendant's offense level by 16 because the defendant's North Carolina conviction for possession of at least 100 lbs. of marijuana did not qualify as a drug trafficking offense. The statute did not require an intent to distribute. The 11th circuit, in U.S. v. Madera-Madera, 333 F.3d 1228 (11th Cir. 2003), has held to the contrary, but the Court rejected the logic of that decision.
U.S. v. Lopez-Salas, No. 06-41637 (5th Cir. 1/2/08)
Guidelines: Offense Conduct - Immigration (Battery on Pregnant Woman is a Crimes of Violence)
Florida's offense of battery on a pregnant woman qualifies as a crime of violence for the 16 level upward adjustment pursuant to USSG §2L1.2(b))1)(A)(ii).
U.S. v. Llanos-Agostadero, 486 F.3d 1194 (11th Cir. 2007)
Guidelines: Offense Conduct - Immigration (Illegal Reentry: Prior Suspended Sentence)
At least according to the 9th Circuit a fully suspended sentence does not support the 12-level upward adjustment based on a prior conviction for a drug trafficking offense.
U.S. v. Alvarez-Hernandez, Case No. 06-10284 (9th Cir. 2/28/07)
Guidelines: Offense Conduct - Immigration (Solicitation Not Always Drug Trafficking)
The defendant's conviction for solicitation of the delivery of drugs did not qualify as drug trafficking for purposes of the 12 level enhancement pursuant to USSG § 2L1.2(b)(1)(B). The determination rests on the facts of any particular case and, in this instance, the defendant attempted to purchase a small amount consistent with personal consumption.
U.S. v. Aguilar-Ortiz, Case No. 05-12591 (11th Cir. 5/31/06)
Guidelines: Offense Conduct - Immigration (Documents Relating to Naturalization: Possession of False Documents - USSG 2L2.1)
Under the circumstances, domestic driver's licenses, military ID cards, and U.S. government ID cards were "documents" that justified an increase in the offense level pursuant to USSG 2L2.1(b)(2).
U.S. v. Singh, Case No. 02-16294 (11th Cir. 7/3/03)
Guidelines: Offense Conduct - Immigration (No Time Limit for "Crimes of Violence")
There is no time limit on the "crimes of violence" enhancement under USSG 2L1.2(b)(1) that produces the 16 level increase in the offense level.
U.S. v. Camacho-Ibarquen, Case No. 04-11155 (11th Cir. 6/2/05)
Guidelines: Offense Conduct - Immigration (Crime of Violence (DUI Causing Serious Injury)
Crimes such as Florida's DUI causing serious bodily injury are not crimes of violence in that they do not have a mens rea component and require only a showing of negligence. The phrase

"use . . . of physical force against the person or property of another" suggests a higher degree of intent than negligent or merely accidental conduct.
Leocal v. Ashcroft, Case No. 03-583 (S. Ct. 11/9/04)
Guidelines: Offense Conduct - Immigration (Statutory Rape a Crime of Violence)
U.S. v. Chavarriya-Mejia, Case No. 03-10753 (11th Cir. 4/29/04)
Guidelines: Offense Conduct - Immigration (Aggravated Felonies: VOP)
Where the defendant received probation for his grand theft conviction, and was not sentenced to prison in excess of a year until he illegally returned to the U.S. and violated his probation, the grand theft conviction should not have been used for enhancement purposes because the conviction was not an aggravated felony at the time the defendant was deported or reentered the U.S.
U.S. v. Guzman-Bera, 13 FLW Fed C773)11th Cir. 6/27/00)
Guidelines: Offense Conduct - Immigration (Aggravated Felonies: Length of Sentence)
Length of sentence imposed, rather than the amount of time served, determines whether crimes of theft or violence constitute aggravated felonies.
U.S. v. Maldonado-Ramirez, 13 FLW Fed C772 (11th Cir. 6/26/00)

Miscellaneous

Guidelines: Offense Conduct - Miscellaneous (Obstruction of Justice - Scope Isn't the Equivalent of Duration)
Given the distinction between the terms "scope" and "duration" in both the sentencing guidelines and precedent, the duration of the offense cannot alone support a finding that it was "otherwise extensive in scope" under § 2J1.2(b)(3)(C).
U.S. v. Newman, Case No. 09-14557 (11th Cir. 8/17/10)
Guidelines: Offense Conduct - Miscellaneous (Obstruction of Justice: Post-Trial Retaliation)
The 8-level adjustment under §2J1.2 (Obstruction of Justice) for threatening or causing injury applies even when there is no pending or future judicial proceeding that could be affected.
U.S. v. Calvert, Case No. 06-30643 (9th Cir. 1/14/08)
Guidelines: Offense Conduct - Miscellaneous (Perjury: Unnecessary Expenditure of Governmental or Court Resources)
While recognizing that the upward adjustment in USSG §2J1.3(b)(2) cannot be based upon investigative costs incurred prior to the perjury or expenses associated with the prosecution of the perjury charge, the Court held that the trial court had properly focused on the expenses incurred as a result of the defendant's false grand jury testimony.
U.S. v. Johnson, Case No. 06-13564 (11th Cir. 5/11/07)
Guidelines: Offense Conduct - Miscellaneous (Threat to Govt. Official: Intent to Carry Out Threat)
The 6 level enhancement pursuant to § 2A6.1(b)(1) is applicable only where serious conduct committed before or during the offense indicates an intent to carry out the threat. In this case an ambiguous statement made after the defendant was in custody did not support the increase.
U.S. v. Scott, Case No. 05-12511 (11th Cir. 3/10/06)
Guidelines: Offense Conduct - Miscellaneous (Threat to Govt. Official: Number of Threats)
Court upheld the two level enhancement pursuant to § 2A6.1(b)(2) for more than two threats even though there were just two letters. Court concluded one letter contained multiple threats.

U.S. v. Scott, Case No. 05-12511 (11th Cir. 3/10/06)
Guidelines: Offense Conduct - Miscellaneous (Failure to Appear - Enhancement Based on Offense for Which Defendant Failed to Appear)
An adjustment upward is made depending upon the seriousness of the offense for which the defendant failed to appear. In doing so it is not a matter, as was done here, of adding up all the potential penalties for the various crimes charged. Instead, when there are multiple offenses, the calculation should be based on the single count that carries the greatest maximum penalty.
U.S. v. Magluta, 13 FLW Fed C291 (11th Cir. 12/23/99): *opinion modified*, 13 FLW Fed C401 (2/17/00)
Guidelines: Offense Conduct - Miscellaneous (Kidnapping: Ransom Enhancement Pursuant to USSG 2A4.1(b)(1))
Despite language that a demand for ransom "was made," court added 6 level enhancement for demanding ransom pursuant to USSG 2A4.1(b)(1), in a hostage taking case under 18 USC 1203(a), where the evidence showed a ransom note was prepared but never delivered.
U.S. v. Torrealba, Case No. 02-13307 (11th Cir. 7/29/03)
Guidelines: Offense Conduct - Miscellaneous (Accessory After the Fact: Reasonably Should Have Known Drug Quantity)
Where the defendant was convicted of being an accessory after the fact in a drug conspiracy case, the court held that the total amount of the drugs should be used to calculate the base offense level even though the defendant could not be said to have reasonably known of the quantity involved. Acknowledging a split in the circuits, the court held that its reading of USSG § 2X3.1 led it to conclude that the reasonable knowledge requirement under that provision extended only to specific offense characteristics and not the calculation of the base offense level.
U.S. v. Lang, 364 F.3d 1210 (10th Cir. 2004)
Guidelines: Offense Conduct - Miscellaneous (Accessory After the Fact: Reasonably Should Have Known)
Note 10 to USSG 1B1.3 provides that in cases of accessory after the fact "the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was know, or reasonably should have been known by the defendant." Accordingly, in this attempted robbery case, the defendant whose involvement was limited to disposing of the shotgun used in the offense, suffered a guideline calculation that included enhancements for the fact that the victim sustained bodily injury and the fact that a carjacking was involved.
U.S. v. Martinez, 342 F.3d 1203 (10th Cir. 2003)
Guidelines: Offense Conduct - Miscellaneous (Attempted Robbery)
The court held that despite the fact that attempted bank robbery is included as a substantive offense in the robbery statute (18 USC 3), that the attempt guideline (USSG 2X1.1) should have been used instead of the robbery guideline (USSG 2B3.1). Other circuits, including the 11th, have held to the contrary.
U.S. v. Martinez, 342 F.3d 1203 (10th Cir. 2003)
Guidelines: Offense Conduct - Miscellaneous (Extortion: Actions of Co-Conspirators)
A two level upward adjustment pursuant to 2B3.2(b)(1) for a threat of bodily injury was warranted even though the threat was made by a co-conspirator. Pursuant to 1B1.3(a)(1)(B) co-conspirators are responsible for all reasonably foreseeable acts and omissions of others in furtherance of the jointly taken criminal activity.
U.S. v. Vallejo, Case No. 00-15998 (11th Cir. 7/16/02)

Guidelines: Offense Conduct - Miscellaneous (Burden of Proof)
The Government bears the burden of establishing by a preponderance of the evidence the facts necessary to support a sentencing enhancement.
U.S. v. Askew, 193 F3d 1181 (11th Cir. 1999)

Robbery
Guidelines: Offense Conduct - Robbery ("Brandished or Otherwise Used" Firearm)
A defendant "brandished" a firearm when he pointed, waved the gun about, or displayed it in a threatening manner. "Otherwise used" means the defendant used the firearm to make an explicit or im plicit threat against a specific person.
U.S. v. Johnson, Case No. 14-13874 (11th Cir. 10/5/15)
Guidelines: Offense Conduct - Robbery (Abduction)
The four-level enhancement provided by USSG § 2B3.1(b)(4)(A) for abduction was inapplicable where the defendant moved the victims within the bank.
U.S. v. Whatley, Case No. 11-14151 (11th Cir. 6/3/13)
Guidelines: Offense Conduct - Robbery (Physical Restraint Enhancement)
The defendant's actions in pretending to have a gun and directing a bank employee to move a few feet justified the two-level enhancement for physical restraint.
U.S. v. Victor, Case No. 12-12809 (11th Cir. 6/27/13)
Guidelines: Offense Conduct - Robbery (Threat of Harm' Threat of Death?)
The question was whether a note stating: "Give me all the money, and no one will get hurt!" qualified as a threat of death that justified a 2 level adjustment pursuant to 2B3.1(b)(2)(F). Court ducked the question, noting it was one of first impression in the circuit, and that in U.S. v. Thomas, 327 F.3d 253, 254-55 (3d Cir. 2003), the Third Circuit had concluded under similar circumstances that the adjustment was not justified.
U.S. v. Keene, Case No. 06-`2076 (11th Cir. 11/30/06)
Guidelines: Offense Conduct - Robbery (Miscellaneous: Accessory After the Fact - Reasonably Should Have Known)
Note 10 to USSG 1B1.3 provides that in cases of accessory after the fact "the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was know, or reasonably should have been known by the defendant." Accordingly, in this attempted robbery case, the defendant whose involvement was limited to disposing of the shotgun used in the offense, suffered a guideline calculation that included enhancements for the fact that the victim sustained bodily injury and the fact that a carjacking was involved.
U.S. v. Martinez, 342 F.3d 1203 (10th Cir. 2003)
Guidelines: Offense Conduct - Robbery (2B3.1(b)(2) -Reaching Into Waist Band Sufficed)
No error in imposing three-level enhancement for brandishing, displaying or possessing a dangerous weapon where unarmed defendant simulated possession of what appeared to be a dangerous weapon by reaching into his pants waist band during bank robbery, and where teller came to believe the defendant possessed a dangerous weapon.
U.S. v. Bates, 213 F.3d 1336 (11th Cir. 6/6/00)
Guidelines: Offense Conduct - Robbery (2B3.1(b)(2) -fake firearms count too)
U.S. v. Wooden, 169 F.3d 674 n. 2 (11th Cir. 3/8/99)
Guidelines: Offense Conduct - Robbery (2B3.1(b)(2) "Otherwise Used")

Pointing a gun a half inch from the carjacking victim's head amounted to "otherwise us[ing]" a firearm, and justified a six level enhancement."
U.S. v. Wooden, 169 F.3d 674 (11th Cir. 3/8/99); U.S. v. Nguyen 98-40066 (5th Cir. 9/22/99)
Guidelines: Offense Conduct - Robbery (2B3.1(b)(2) "Otherwise Used")
Pointing a gun at teller and yelling orders amounted to "otherwise used" and justified the six level enhancement.
U.S. v. LaFortune, 99-1059 (1st Cir. 9/15/99); but see: U.S. v. Gonzalez 40 F.3d 735 (5th Cir. 1994); U.S. v. Chastain, 13 FLW Fed C298 (11th Cir. 12/30/99)
Guidelines: Offense Conduct - Robbery (Discharge of Firearm - Security Guard)
Under the robbery guideline there is a 7 level upward adjustment for the discharge of a firearm during the robbery (§ 2B3.1(b)(2)(A)). In this case the security shot the defendant twice. Court held that the shooting by the security guard did not justify the adjustment.
U.S. v. Hill, Case No. 03-5138 (6th Cir. 8/20/04)
Guidelines: Offense Conduct - Robbery ("I have a gun" Qualifies as a Threat of Death)
See: United States v. Murphy, 306 F.3d 1087 (11thCir. 2002); U.S. v. Soto-Martinez, 317 F.3d 477 (5th Cir. 2003); U.S. v. Clark, 294 F.3d 791 (6th Cir. 2002, but see also Judge Moore's dissent in Clark and U.S. v. Jennings, 04-10343 (9th Cir. 3/2/06); U.S. v. Petho, Case No. 04-15412 (11th Cir. 5/18/05)
Guideline: Offense Conduct - Robbery (Enhancement for Money Left in Vault)
Although only $12,000 was taken, the defendant, under the theory that a defendant who only partially completes the offense will be held liable for the entire offense, was sentenced on the basis of $100,000, which included money left in the vault.
U.S. v. Chastain, 13 FLW Fed C298 (11th Cir. 12/30/99)
Guideline: Offense Conduct - Robbery (Enhancements for Acts of Codefendant)
The court held that the acts of the codefendant in kidnaping and carjacking were forseeable, and that, therefore, an enhancement for those acts was appropriate.
U.S. v. Cover, 13 FLW Fed C324 (1th Cir. 1/4/00)
Guidelines: Offense Conduct - Robbery (Enhancement for Kidnaping)
Moving the victim 50 or 60 feet within a parking lot qualified under s 2B3.1(b)(4)(A)
U.S. v. Hawkins, 87 F.3d 722 (5th Cir. 1996)
Guidelines: Offense Conduct - Robbery (Permanent or Life Threatening Injury)
Victim who was shot once with a pistol and once with a shotgun, and who suffered scaring but arguably no permanent impairment justified a six level upward adjustment pursuant to s. 2B3.1(b)(3)(C).
U.S. v. Hawkins, 87 F.3d 722 (5th Cir. 1996)
Guidelines: Offense Conduct - Robbery (Attempted)
The court held that despite the fact that attempted bank robbery is included as a substantive offense in the robbery statute (18 USC 3), that the attempt guideline (USSG 2X1.1) should have been used instead of the robbery guideline (USSG 2B3.1). Other circuits, including the 11th, have held to the contrary.
U.S. v. Martinez, 342 F.3d 1203 (10th Cir. 2003)

Sex Offenses

Guidelines: Offense Conduct – Sex Offenses (Relevant Conduct)

In solicitation case, the trial court erred in counting the solictation of a second child as relevant conduct. Section 1B1.3(a)(2) didn't apply becase the offense of exploitation of minors is excluded from §3D1.2(d)'s multile count grouping. Section 1B1.3(a)(1) didn't apply because it didn't occur during the soliciation of the first victim.
U.S. v. Schock, 862 F.3d 563 (6th Cir. 2017)
Guidelines: Offense Conduct – Sex Offenses (§4B1.5 "Pattern" Can Include Instant Offense
U.S. v. Fox, 926 F.3d 1275 (11th Cir. 2019)
Guidelines: Offense Conduct – Sex Offenses (Sex Trafficking – Unduly Influencing a Minor)
Though the defendant argued that the minors sought him out, the district court still properly applied the two-level enhancement provided for in USSG § 2G1.3(b)(2)(B), finding that because the defendant was more than ten-years older, he had failed to overcome the presumption.
U.S. v. Blake, Case No. 15-13395 (11th Cir. 8/21/17)
Guidelines: Offense Conduct - Sex Offenses (Pattern of Activity: Committed When Defendant was a Minor)
Offenses committed when defendant was a minor can still be used to support the five-level increase for engaging in a pattern of activity involving the sexual abuse or exploitation of a minor" pursuant to USSG § 2G2.2(b)(5).
U.S. v. Alberts, Case No. 16-11065 (11th Cir. 6/13/17)
Guidelines: Offense Conduct - Sex Offenses (Harm Caused to Victims)
Mozie v. U.S., Case No. 12-12538 (11th Cir. 5/22/14)
Guidelines: Offense Conduct - Sex Offenses (Two Level Enhancement for Distribution: Knowledge)
USSG §2G2.2(b)(3)(F) does not require the defendant to know that he made child pornography accessible to others. Decision recognizes a conflict among the circuits.
U.S. v. Creel, 783 F.3d 1357 (11th Cir. 2015)
Guidelines: Offense Conduct - Sex Offenses (Sentencing Commissions's 2013 Report)
Case includes a summary of the Sentencing Commission's criticism of the Guideline applicable to child pornography.
U.S. v. Cubero, Case No. 12-16337 (11th Cir. 6/11/14)
Guidelines: Offense Conduct - Sex Offenses (Production: Use of a Computer - Cell Phone)
The defendant's use of a cell phone to call and send text messages to the victims supported the two-level enhancement under §2G2.1(b)(6) for using "a computer or an interactive computer service to . . . persuade, induce . . . a minor to engage in sexually explicit conduct . . ."
U.S. v. Mathis, 767 F.3d 1264 (11th Cir. 2014)
Guidelines: Offense Conduct - Sex Offenses (Sex Trafficking of Minors §2G1.3: Use of a Computer)
Section 2G1.3, which applies to sex trafficking of minors, includes a two-level increase if the defendant used a computer. While the commentary states that the increase is applicable only if the defendant used the computer to communicate directly with the minor, the court of appeals concluded that the commentary the commentary was inconsistent with the plain language of the text of the guideline. Accordingly, it upheld the trial court's decision to apply the increase on the basis of the defendant's use of a cell phone to advertise the sexual services of the minor.
U.S. v. Hill, 783 F.3d 842 (11th Cir. 2015)

Guidelines: Offense Conduct - Sex Offenses (5-Level Increase for Distribution of Thing of Value: Trading for Porn)
When a defendant trades child pornography in exchange for other child pornography, he has engaged in "distribution fo the receipt, or expectation of receipt, of a thing of value" as provided in §2G2.2(b)(3)(B).
U.S. v. Bender, 290 F.3d 1279 (11th Cir. 2002)
Guidelines: Offense Conduct - Sex Offenses (5-level Increase for Pattern of Activity Involving Sexual Abuse of Minor)
The adjustment is not limited to relevant conduct. In this instance, the "pattern" included offenses that took place more than 30 years prior to the offense of conviction.
U.S. v. McGarity, 669 F.3d 1218 (11th Cir. 2012)
Guidelines: Offense Conduct - Sex Offenses (5-Level Increase for Distribution for a Thing of Value: Peer-to-Peer-File Sharing)
Court concluded that use of LimeWire did not, by itself, justify the five-level increase pursuant to USSG §2G2.2(b)(3)(B) for distribution of child pornography "for the receipt, or expectation of receipt, of a thing of value."
U.S. v. Vadnais, 667 F.3d 1206 (11th Cir. 1/13/12)
Guidelines: Offense Conduct - Sex Offenses (5-Level Increase for Distributing Child Porn to Minor - Govt. Must Prove Recipient is a Minor)
The 5-level enhancement pursuant to USSG § 2G2.2(b)(3) for distributing child porn to a minor requires the Government to establish that the recipient was a minor. It is not enough that the defendant thought he was distributing the porn to a minor.
U.S. v. Fulford, Case No. 10-12916 (11th Cir. 11/14/11)
Guidelines: Offense Conduct - Sex Offenses (2-Level Increase for Unduly Influencing a Minor: Amendment 732 Clarifying)
Change to USSG 2G1.3 Commentary, which made it clear that the 2-level increase for unduly influencing a minor pursuant to subsection (b)(2)(B) in inapplicable when the "minor" is a police officer is a clarifying amendment. Accordingly, those how have cases on appeal are entitled to have the new interpretation applied to their cases.
U.S. v. Jerchower, Case No. 09-13795 (11th Cir. 1/24/11).
Guidelines: Offense Conduct - Sex Offenses (2-Level Increase for "Sexual Contact")
Defendant who had been convicted of enticing a minor to engage in sexual activity in violation of 18 U.S.C. 2422(b) was, under the guidelines, properly assessed a 2-level increase pursuant to USSG §2G.1(b)(2)(A) provision. That provision applies if there was the "commission of a sexual act or sexual contact." The court of appeals concluded that the defendant's act of masturbating in front of his web camera amounted to "sexual contact."
U.S. v. Aldrich, Case No. 08-15556 (11th Cir. 4/27/09)
Guidelines: Offense Conduct - Sex Offenses (Influencing a Minor to Engage in Sexual Act)
Where the defendant was relying on an government agent posing as someone who could procure minors to engage in sexual conduct with him, the 2 level adjustment in §2G1.3(b)(3)(B) for influencing a minor to engage in a sexual act was still applicable.
U.S. v. Vance, Case No. 06-13035 (11th Cir. 8/3/07)
Guidelines: Offense Conduct - Sex Offenses (Child Pornography: Multiple Copies of the Same Image Should be Counted as One Image

In an opinion reversing a downward variance in a child pornography case that, otherwise has a lot of strong language about the harm done by the offense, there is a footnote that says, that for purposes of counting the number of images, multiple copies of the same image should only count as one.
U.S. v. Goff, Case No. 05-5524 (3d Cir. 8/31/07)
Guidelines: Offense Conduct - Sex Offenses (Allowing Others to Access Child Porn Files Through Kazaa Is Distribution)
Defendant's 2 level increase in his offense level pursuant to s. 2G2.2(b)(3)(F) was justified as the defendant allowed others to access his files via his Kazaa peer-to-peer file sharing system.
U.S. v. Carani, 492 F.3d 867 (7th Cir. 2007)
Guidelines: Offense Conduct - Sex Offenses (Use of File Sharing Program Does Not Justify 5-Level Increase for Distribution For Receipt of Something of Value)
File-sharing programs exist to promote free access to information on peer computers regardless of whether the person in turn shares his files. The files are free. Because the transaction contemplated in the Guidelines is one that is conducted for "valuable consideration," the mere use of a program that enables free access to files does not, by itself, support the five-level enhancement of USSG § 2G2.2(b)(3)(B). Court recognized conflict with the 8th Circuit.
U.S. v. Spriggs, Case No. 10-14919 (11th Cir. 1/10/12)
Offense Conduct - Sex Offenses (Cross-Reference For Intent to Take Pictures)
Where the defendant was convicted of using the internet to entice a minor into sexual activity (18 USC § 2422(b), the trial court correctly applied the cross section provision of USSG § 2G1.3(c)(1), which resulted in the defendant's offense level being calculated on the basis of USSG § 2G2.1, increasing the defendant's Guidelines range from 46 to 57 months to 135 to 168 months. USSG § 2G2.1 applies to "producing visual images" of sexual conduct by a minor and was applicable because there was evidence that the defendant, who had arranged for a sexual liaison with an officer who was posing as a minor, had a history of taking photos of his sexual exploits and was found with a camera as he was headed toward the rendevous.
U.S. v. Bohannon, Case No. 05-16492 (11th Cir. 2/1/07))
Guidelines: Offense Conduct - Sex Offenses (Influencing a Minor to Engage in Sexual Act)
Two level enhancement was permissible under USSG 2A3.2 for influencing a minor to engage in a sexual act even though there was no sexual act and the "minor" was a FBI agent posing as a minor.
U.S. v. Root, Case No. 01-14945 (11th Cir. 7/10/02), but see note 6 in U.S. v. Vance, Case No. 06-13035 (11th Cir. 8/3/07)
Guidelines: Offense Conduct - Sex Offenses (Increase In Offense Level Because of 10 or More Images and Also for At Least 300?)
Court rejected the double counting argument and held it was permissible to increase the offense level pursuant to § 2G2.4(b)(2) (for possessing 10 or more images of child pornography) and to also increase the offense level pursuant to § 2G2.4(b)(5)(C) (for possessing at least 300, but fewer than 600 images.)
U.S. v. Lebovitz, Case No. 04-10185 (11th Cir. 3/4/05)
Guidelines: Offense Conduct - Sex Offenses (Enticing Minor to Engage In Sexual Activity - Fictitious Victim)
Even, though, the "victim" was fictitious, the defendant received a 2 level enhancement pursuant to 2G1.1(b)(2)(B) on the basis of enticing a victim that was between the ages of 12 and 16. Court

held that the adjustment applies whether the minor "victim" is real, fictitious, or an undercover officer because the adjustment is directed at the defendant's intent, rather than any actual harm caused.
U.S. v. Murrell, Case No. 03-12582 (11th Cir. 5/4/04); U.S. v. Bohannon, Case No. 05-16492 (11th Cir. 2/1/07)), but see but see note 6 in U.S. v. Vance, Case No. 06-13035 (11th Cir. 8/3/07)
Guidelines: Offense Conduct - Sex Offenses ("Pattern of Activity" & § 2G2.2(b)(4))
The guideline for trafficking in child pornography, 2G2.2, includes a 5 level enhancement for engaging in a pattern of activity involving the abuse or exploitation of a minor. Court held that the defendant's conversations with three different undercover agents qualified him for the enhancement.
U.S. v. Morton, Case No. 02-16809 (11th Cir. 4/1/04)
Guidelines: Offense Conduct - Sex Offenses (Sexual Abuse of Minor (§2A3.2) - Misrepresenting Identity)
Under §2A3.2(b)(2)(A) there is a 2 level increase for misrepresenting identity to persuade the minor to engage in sexual activity. Court held that the misrepresentation of age might justify the 2 level increase.
U.S. v. Blas, Case No. 03-10877 (11th Cir. 2/19/04)
Guidelines: Offense Conduct - Sex Offenses (5 Year Old Prior Offense Considered Part of "Pattern of Activity")
Because 5 years earlier the defendant had been convicted of molesting his children, the district court properly applied the 5 level enhancement provided in USSG 2G2.2(b)(4) for engaging in a "pattern of activity involving the sexual abuse or exploitation of a minor."
U.S. v. Ashley, 342 F.3d 850 (8th Cir. 2003)
Guidelines: Offense Conduct - Sex Offenses (Enhancement for Victim Restraint Not Double Counting)
Because victim restraint is not an element of aggravated sexual abuse (18 USC 2241(a), the district court properly applied the enhancement in USSG 3A1.3 for restraint of the victi, when he held the victim down by her arms and nair and pinned her beneath h im during intercourse.
Us. v. Long Turkey, 342 F.3d 856 (8th Cir. 2003)
Guidelines: Offense Conduct - Sex Offenses (Child Pornography - Possession as Opposed to Receiving)
Where defendant pled guilty to possession of child pornography in violation of 18 USC § 2252A(a)(5)(B) and admitted to receiving the pornographic images, the district court erred in using the cross reference that led it from USSG 2G2.4 to USSG 2G2.2. The cross reference requires receipt with intent to traffic and absent some evidence that the defendant sent images as well, 2G2.2 should be used. (Note - oddly, enough, it seems that receiving will qualify the defendant for the greater offense of 18 USC 2252A(a)(2)(A), which seemingly would justify the use of USSG 2G2.2. The cross reference provision of USSG 2G2.4 apparently requires receipt with intent to traffic while the crime, itself, seems to require only receipt)
U.S. v. Sromalski, 318 F.3d 748 (7th Cir. 2003)
Guidelines: Offense Conduct - Sex Offenses (Child Pornography - "Causing" Minor to Engage)
Section 2G2.4(c)(1) provides for a cross reference to 2G2.1 if the offense involved "causing" a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. In analyzing the requirement the court rejected the First Circuit's requirement that

the defendant have physical contact with the child or take the photograph himself. The court held that the defendant's request to the child that she photograph herself with another girl sufficed. The defendant also argued that the cross reference provision, which uses the phrase "offense involved," was inapplicable to him because his request that the girl photograph herself was not an element of the offense of which he was convicted. The court declined to address the argument because it was first raised in the defendant's reply brief.
U.S. v. Whitesell, Case No. 02-12655 (11th Cir. 12/17/02)
Guidelines: Offense Conduct - Sex Offenses (Child Pornography - "Sadistic")
Under 2G2.2(b)(3) a photograph qualifies as sadistic if it depicts the subsection of a young child to a sexual act that would have to be painful."
U.S. v. Bender, 290 F.3d 1279 (11th Cir. 2002)
Guidelines: Offense Conduct - Sex Offenses (Counting of "Items" In Child Pornography)
In a prosecution pursuant to 18 USC 2252A(a)(5)(B) each computer file counted as an "item", and because there were ten or more "items" the defendant qualified for two level enhancement pursuant to USSG 2G2.4(b)(2)
U.S. v. Harper, 13 Flw Fed C864 (11th Cir. 7/20/2000)
Guidelines: Offense Conduct - Sex Offenses-(Grouping - Child Pornography)
Court held that the nine counts of interstate transportation of child pornography by computer, in violation of 18 USC 2252(a)(1) should not be grouped for guideline purposes.
U.S. v. McIntosh, 13 FLW Fed C857 (11th Cir. 6/29/00)
Guidelines: Offense Conduct - Sex Offenses (Child Pornography - Enhancement for Distribution)
Although there is a split of authority, the Eleventh, in this case, sided with the majority, and held that the five level upward adjustment for distribution, 2G2.2(b)(2), applies regardless of whether any benefit is derived by the defendant.
U.S. v. Probel, 13 FLW Fed C735 (6/13/00 11th Cir.)**;** U.S. v. Bender, 290 F.3d 1279 (11th Cir. 2002)
Guidelines: Offense Conduct - Sex Offenses (Grouping: Depiction of Minors - Victims Are Those In Photo??)
The defendant transported photos of minors engaged in sexually explicit conduct. On three separate occasions he transported photos via his computer. Court rejected his claim under 3D1.2 that the three offenses should be grouped because all of the offenses included the same victim, which the defendant described as society as a whole. Court held that the victims, though unnamed and unidentified, were those portrayed in the photo, and upheld the trial court's decision to score each of the offenses separately.
U.S. v. Tillmon, 13 FLW Fed C127 (11th Cir. 11/10/99)
Guidelines: Offense Conduct - Sex Offenses (Kidnaping by Psychological Means ???)
Defendant was convicted for transporting a minor with intent to engage in sexual activity. The guidelines were cross-referenced to USSG 2A3.1 for offenses involving sexual abuse. Defendant argued the cross referencing should not have occurred because he never used or threatened to use force to convince the victim to accompany him. Court held the use of "psychological force" was sufficient.
U.S. v. Romero 98-2358 (7th Cir. 8/31/1999)
Guidelines: Offense Conduct - Sex Offenses (Distribution of Child Pornography)

Where the defendant transferred child pornography over the internet to law enforcement authorities, thinking he was sending it to a 13 year old, the provision that applies when a defendant "used or attempted to use a person less than eighteen years of age to commit the offense..." was inapplicable, as was the five level increase applicable if the defendant "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." The defendant's prior acts of making obscene phone calls to young girls and of exposing himself failed to establish the requisite pattern.
U.S. v. Pahris, CA 8, No. 98-3228, 5/3/99

Relevant Conduct

Guidelines: Relevant Conduct – Soliciation of Minor
In solicitation case, the trial court erred in counting the solictation of a second child as relevant conduct. Section 1B1.3(a)(2) didn't apply becase the offense of exploitation of minors is excluded from §3D1.2(d)'s multile count grouping. Section 1B1.3(a)(1) didn't apply because it didn't occur during the soliciation of the first victim.
U.S. v. Schock, 862 F.3d 563 (6th Cir. 2017)

Guidelines: Relevant Conduct - Clear and Convincing Evidence?
Court declined to decide whether relevant conduct that dramatically increases a sentence must be proven by clear and convincing evidence.
U. S. v. Siegelman, Case No. 14373, n. 12 (11th Cir. 5/20/15)
Guidelines: Relevant Conduct - Common Scheme or Plan
In determining whether, for purposes of relevant conduct, there was a common scheme or plan, curtos consider whether there are distinctive similarities between the offense of conviction and the remote conduct that signal that they are part of a single course of conduct rather han isolated, unrelated events that happen only to be similar in kind.
U. S. v. Siegelman, Case No. 12-14373 (11th Cir. 5/20/15)
Guidelines: Relevant Conduct - Need for Trial Court to Make Factual Findings
A sentencing court should make explicit relevant-conduct findings in order to facilitate appellate review.
U.S. v. Siegelman, Case No. 12-14373 (11th Cir. 5/20/15)
Guidelines: Relevant Conduct - Possession by a Convicted Felon (Possession of Other Firearms)
Separate firearm possessions in 2002 and 2006 were part of the same course of conduct or common scheme or plan as defendant's possession of the firearm in 2004, so amounted to relevant conduct.
U.S. v. Phillips, 516 F.3d 479 (6th Cir. 2008)
Guidelines: Relevant Conduct - Must Be Criminal Conduct?
Although the 11th Circuit hasn't taken a position, a number of courts have concluded that if conduct is to be included as "relevant conduct" it must be criminal conduct.
U.S. v. Norris, 452 F.3d 1275 (11th Cir. 2006)
Guidelines: Relevant Conduct - Inclusion Based on Eligibility for Grouping
USSG §1B1.3(a)(2) allows, in some instances, for those offenses subject to grouping under §3D1.2(d), to be included in relevant conduct. Here, the government sought to include an assault

as relevant conduct under that provision. As, however, §3D1.2(d) specifically excludes assaults from grouping, the prior assault was not relevant conduct.
U.S. v. Williams, Case No. 05-11318 (11th Cir. 11/30/05)
Guidelines: Relevant Conduct - Accessory After the Fact (Reasonably Should Have Known)
Note 10 to USSG 1B1.3 provides that in cases of accessory after the fact "the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was know, or reasonably should have been known by the defendant." Accordingly, in this attempted robbery case, the defendant whose involvement was limited to disposing of the shotgun used in the offense, suffered a guideline calculation that included enhancements for the fact that the victim sustained bodily injury and the fact that a carjacking was involved.
U.S. v. Martinez, 342 F.3d 1203 (10th Cir. 2003)
Guidelines: Relevant Conduct - "During Commission of an Offense"
Because relevant conduct includes only those acts "that occurred *during the commission of the offense of conviction. . ."* the court remanded this case in which there was a question as to whether the defendant possessed sadistic "materials" at the same time he transmitted the child pornography that lead to his conviction.
U.S. v. Dunlap, 15 FLW Fed C232 (11th Cir. 1/18/02)
Guidelines: Relevant Conduct - Conduct Beyond Statute of Limitations
May still be considered.
U.S. v. Williams, No. 99-10295 (9th Cir. 6/29/00)
Guidelines: Relevant Conduct - Conspiracy (Intended Future Buys)
Statement of an accomplice that they would probably make a 15 kilo buy every three weeks was concrete enough.
U.S. v. Ramsdale, 12 FLW Fed C1022 (11th Cir. 7/6/99); U.S. v. Taffe, 36 F.3d 1047, 1050 (11th Cir. 1994)
Guidelines: Relevant Conduct - Conspiracy, Uncharged Drug Sale, & Quantity
In calculating Defendant's base offense level the weight of the drugs in an uncharged drug sale which was outside of charged conspiracy should not have been included in calculating the total quantity of drugs because it was totally unrelated to conspiracy for which defendant was convicted.
U. S. v. Gomez, 164 F.3d 1354 (11th Cir. 1999). See also: U.S. v. Maxwell, 34 F.3d 1006 (11th Cir. 1994). But see: U.S. v. Spence, 125 F.3d 1192 (8th Cir. 1997); U.S. v. Myers, 123 F.3d 350 (6th Cir. 1997); U.S. v. Geralds, 158 F.3d 977 (8th Cir. 1998); U.S. v. Montoya, 952 F.2d 226 (8th Cir. 1991); U.S. v. Lawrence, 915 F.2d 402 (8th Cir. 1990); U.S. v. Simpson, 14 FLW Fed C1 (11th Cir. 9/29/00)

Retroactive Application

Guidelines: Retroactive Application (Substantial Assistance)
In imposing a new sentence on the basis of Guideline Amendment 782, the court is not limited to a percentage reduction, but can use any method that results in a comparable reduction.
U.S. v. Marroquin-Medina, Case No. 15-12322 (11th Cir. 4/1/16)
Guidelines: Retroactive Application (Armed Career Criminals)

In those cases where the applicable offense level from armed career criminals is determined on the basis of the Chapter Two calculations, a prisoner may be eligible for a reduced sentence.
U.S. v. James, 548 F.3d 983 (11th Cir. 2008)

Guidelines: Retroactive Application (Crack Retro: Determination of Quantity)

In those cases where at the initial sentencing the judge found only that there was at least 1.5 kg or, for some other reason, failed to make a sufficiently precise determination as to drug quantity, the judge, upon receipt of a 3582 motion, may review the record and make a determination of the quantity. It is the defendant's burden to establish he is eligible and, if after reviewing the record, the judge cannot determine that the quantity is low enough to reduce the guideline range, the motion must be denied.
U.S. v. Hamilton, 715 F.3d 328 (11th Cir. 2013)

Guidelines: Retroactive Application - Limitation In Amendment 759 Prohibiting Crack Retro Reduction to Below-Guideline Sentences

Court rejected challenge to restriction of crack amendment to only substantial assistance below-guideline sentences. Neither an ex post facto argument nor a claim that the amendment violated the Administrative Procedures Act succeeded.
U.S. v. Colon, Case No. 12-12794 (11th Cir. 2/6/13)

Guidelines: Retroactive Application - Does Fair Sentencing Act Apply When Defendant Eligible for a §3582 Reduction?

Defendant was entitled to a reduction in his sentence based upon Amendment 750 to the crack guideline. Court of appeals, though, left unresolved whether the Fair Sentencing Act applied to the imposition of the new sentence. If it did, it would have had the effect of allowing the sentencing judge to impose a sentence below the mandatory minimum 10 years.
U.S. Liberse, Case No. 12-10243 (11th Cir. 2012)

Guidelines: Retroactive Application - §3582 Authorizes a Reduction Only When the Sentencing Range is Reduced

Where a retroactively applicable guideline amendment reduces a defendant's base offense level, but does not alter the sentencing range upon which his or her sentence was based, §3582(c)(2) does not authorize a reduction in sentence.
U.S. v. Berry, Case No. 12-11150 (11th Cir. 2012)

Guidelines: Retroactive Application - Court Must Consider Dangerousness

The court must always consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction to the defendant's term of imprisonment.
Freeman v. U.S., Case No. 09-10245 (S. Ct. 2/23/11)

Guidelines: Retroactive Application - Below Guideline Sentences Not Permitted

Below-Guidelines modifications in §3582(c)(2) proceedings are forbidden, except where the original sentence was itself a downward departure.
Freeman v. U.S., Case No. 09-10245 (S. Ct. 2/23/11)

Guidelines: Retroactive Application - Only the Alteration of the Range by the Amendment May be Considered

"The binding policy statement governing §3582(c)(2) motions place considerable limits on district court discretion. All Guidelines decisions from the original sentencing remain in place, save the sentencing range that was altered by retroactive amendment."
Freeman v. U.S., Case No. 09-10245 (S. Ct. 2/23/11)

Guidelines: Retroactive Application - Purpose

"Section 3582(c)(2) empowers district judges to correct sentences that depend on frameworks that later prove unjustified. There is no reason to deny §3582(c)(2) relief to defendants who linger in prison pursuant to sentences that would not have been imposed but for a since-rejected guideline range."
Freeman V. United States, 131 S. Ct. 2685 (2011)
Guidelines: Retroactive Application - Harsher Guidelines Could Not Be Applied Retroactively
See U.S. v. Alvarez, Case No. 08-17178 (11th Cir. 10/19/10)
Guidelines: Retroactive Application - Right to Notice of and to Contest Facts Relied Upon by the Court
Where the district court exercised its discretion to deny the defendant a reduced sentence on the basis of the crack cocaine amendment because of disciplinary problems mentioned in a report provided to the defendant, but not disclosed to the defendant, the Court vacated the order and remanded the case for reconsideration after the defendant was given notice and a chance to respond.
U.S. v. Jules, Case No. 08-13629 (11th Cir. 2/2/10)
Guidelines: Retroactive Application - By Adopting Facts in the PSR Court Found Drug Quantity Exceeded 4.5 KG
By adopting the factual findings in the PSR that were deemed admitted by the defendant because of the absence of any objection, the trial court found the drug quantity exceeded 4.5 kilograms and the defendant was, therefore, ineligible for a reduced sentence on the basis of the amendment to the crack cocaine guideline.
U.S. v. Davis, Case No. 08-16617 (11th Cir. 11/18/09)
Guidelines: Retroactive Applications - Booker Doesn't Apply
In this case involving the retroactive application of the crack cocaine amendment, the court of appeals rejected the argument that Booker and Kimbrough applied and held upheld the trial court ruling that it was limited to the two-level reduction authorized by the amended guideline.
U.S. v. Melvin, Case No. 08-13497 (11th Cir. 2/3/09)
Guidelines: Retroactive Application - In Considering Motions Filed Pursuant to Pursuant to 18 U.S.C. § 3582(c)(2) Motions, Court May Not Reconsider Other Sentencing Determinations
U.S. v. Williams, Case No. 08-11361 (11th Cir. 2/9/09)
Guidelines: Retroactive Application - No Right to Counsel for Hearings
U.S. v. Webb, Case No. 08-13405 (11th Cir. 4/13/09)
Guidelines: Retroactive Application - Crack Amendment (Substantial Assistance Beneficiaries whose Guideline Range Fell Below the Mandatory Minimum)
Court concluded the mandatory minimum, despite never being used, was the "guideline range." As it was not affected by Amendment 706, those defendants who were beneficiaries of substantial assistance motions, but whose guideline range fell below the mandatory minimum, were ineligible for a sentence reduction.
U.S. v. Williams, 549 F.3d 1337 (11th Cir. 2008)
Guidelines: Retroactive Application - Crack Amendment (4.5 Kilograms or More)
As the guideline range has not changed for those who trafficked in 4.5 kilograms or more, those who trafficked in those amounts are ineligible for a reduced sentence.
U.S. v. Jones, Case No. 08-13298 (11th Cir. 11/19/08); U.S. v. James, Case No. 08-12067 (11th Cir. 11/12/08)
Guidelines: Retroactive Application - Crack Amendment (Mandatory Minimums)

The crack cocaine amendment does not apply to those whose sentence is the mandatory minimum.
U.S. v. Peters, 524 F.3d 905 (8th Cir. 2008)
Guidelines: Retroactive Application - Crack Amendment (Career Offender)
The crack cocaine amendment does not apply to those sentenced as career offenders.
U.S. v. Tingle, 524 F.3d 839 (8th Cir. 2008); United States v. Moore, 541 F.3d 1323 (11th Cir. 2008)

Safety Valve

Guidelines: Safety Valve - Applies to Only Five Offenses
21 U.S.C. ‘ 841, 844, 846, 960, 963
U.S. v. Pertuz-Pertuz, Case No. 10-15800 (11th Cir. 5/11/2012)
Guidelines: Safety Valve - Applicable Only When the Guidelines Range Falls Below the Mandatory Minimum??
The Court of Appeals held that the district court’s conclusion that the safety valve provision did not allow the court to go below the mandatory minimum when the guidelines range was above the mandatory minimum fell short of the “clear error” required by Rule 35(a) and vacated the district court’s sentence reduction granted pursuant to that rule.
U.S. v. Lett, Case No. 06-12537 (11th Cir. April 6, 2007)
Guidelines: Safety Valve - Opportunity to Provide Information
Where the defendant had only notified the government the day before sentencing that he wanted to provide them with a truthful accounting of the offense and between that time and sentencing no interview took place, the Court of Appeals upheld the trial court’s denial of the safety valve. In doing so, the Court of Appeals held that a good faith intent is not sufficient and that the defendant had the burden to come forth with the information. It’s not clear what would have happened if the defendant has provided a written statement coupled with an offer to provide whatever additional information might have been needed.
U.S. v. Milkintas, Case No. 05-13256 (11th Cir. 11/30/06)
Guidelines: Safety Valve - Booker (Acquittal of Firearm Charge Didn’t Require Safety-Valve)
The district court erred in concluding that an acquittal of the charge of possession of a firearm precluded it from denying the defendant a safety-valve reduction.
U.S. v. Poyato, Case No. 05-13135 (11th Cir. 7/10/06)
Guidelines: Safety Valve - Probation Officer Doesn’t Qualify as “Government”
One of the prerequisites for earing the benefits of the safety valve requires the defendant to provide a truthful explanation of the crime to “the Government.” Here, the Court held that the defendant’s statement to the probation officer didn’t fulfill that obligation. In the view of the Court the “Government” means the prosecuting attorney.
U.S. v. Anton, Case No. 03-3455 (8th Cir. 8/16/04)
Guidelines: Safety Valve - Failure to Provide Info Re: Distribution
Where the quantity of plants, 273, made it clear the defendant was growing the marijuana for distribution purposes and the defendant refused to give law enforcement officers information about his distribution plans, the district court properly denied the defendant the benefit of the safety valve.

U.S. v. Johnson, Case No. 03-13595 (11th Cir. 7/11/04)
Guidelines: Safety Valve - Earlier False Statements OK
"Nothing in the statute suggests that a defendant who previously lied or withheld information from the government is automatically disqualified from safety-valve relief.
U.S. v. Brownlee, 13 FLW Fed C421 (11th Cir. 2/29/00)
Guidelines: Safety Valve - Information Need Not Be Helpful
The provision only requires the defendant to disclose all information and evidence concerning the offense. The information does not have to be of any use to the government. U.S. v. Figueroa, 98-4838 (11th Cir. 1/7/00)
Guidelines: Safety Valve - Past Lies Didn't Disqualify Defendant
Although the defendant repeatedly lied to the government did not render him ineligible for safety valve relief. The deadline for complying with the safety valve's information requirement is "not later than the time of the sentencing hearing, and the defendant's submission fulfilled that requirment.
U.S. v. Schreiber 98-1462 (2d Cir. 9/2/99)
Guidelines: Safety Valve - Refusal to Testify Didn't Disqualify Defendant
Although the defendant refused to testify at the codefendant's trial, because the requirement i for the defendant to provide the information to the government, not the court, the defendant should have received the benefit of the Safety Valve provision.
U.S. v. Carpenter, 142 F.3d 333 (6th Cir. 1998)
Guidelines: Safety Valve - Same Course of Conduct
In addition to disclosing information about the offense of conviction, the defendant also has to disclose information that were part of the same course of conduct or common scheme.
United States v. Miller, 151 F.3d 957 (9th Cir. 1998)
Guidelines: Safety Valve - Information Must Be Disclosed Prior to Hearing
Defendant who provided the information during the hearing didn't qualify.
U.S. v. Marin, 144 F.3d 1085 (7th Cir. 1998)
Guidelines: Safety Valve - Information Must be Disclosed to Prosecutor
Disclosing the information to the probation officer didn't suffice.
U.S. v. Contreas, 136 F.3d 1245 (9th Cir. 1998)
Guidelines: Safety Valve - Disqualification for Firearm Possession (Course of Conduct)
As long as the firearm possessed by the defendant was part of the same course of conduct as the offense of conviction, the defendant need not be in possession of a firearm during the offense to which he pled guilty in order to be disqualified under s. 5C1.2(2).
U.S. v. Chen, 127 F.3d 286 (2d Cir. 1997)
Guidelines: Safety Valve - Interplay with Acceptance of Responsibility
Court can award acceptance of responsibility and still find the defendant has failed to comply with the "tell all" requirement of the Safety Valve provision.
U.S. v. Yate, 12 FLW Fed C864 (11th Cir. 5/24/99)
Guidelines: Safety Valve - Codefendant's Firearm Possession
Doesn't prevent safety valve benefits.
U.S. v. Clavijo, 165 F.3d 1341 (11th Cir. 1999)
Guidelines: Safety Valve: Even If Below Level 26 Entitled to Waiver of Minimum Sent.
Although, those that fall below the base offense level of 26 are not entitled to a two level reduction of the offense level, they are still entitled to the waiver of the mandatory minimum.
U.S. v. Clavijo, 165 F.3d 1341 (11th Cir. 1999)

Guidelines: Safety Valve Pitfalls
Absent a cooperation agreement, the relevant conduct admitted to by the defendant can be used against the defendant in the guideline calculations.
U.S. v. Cruz, 156 F.3d 366 (2nd Cir. 1998)
Guidelines: Safety Valve: Burden of Proving Truthfulness
Belongs to the defendant.
United States v. Espinosa, 172 F.3d 795, 797 (11th Cir. 1999).
Guidelines: Safety Valve - Determination of Defendant's Truthfulness
Decision belongs to the Court and not the prosecutor.
United States v. Espinosa, 172 F.3d 795, 797 (11th Cir. 1999).

Variances

Guidelines: Variances – Lack of Criminal History
Lack of criminal history, though already taken into account, can justify a varaince.
U.S. v. Chase, 560 F.3d 828 (8th Cir. 2009)
Guidelines: Variances – Low Risk of Recidivism
U.S. v. Clay, 583 F.3d 739 (11th Cir. 2007); U.S. v. Cabrera, 567 F. Supp.2d 371 (D. Mass. 2008)

GUILTY PLEAS

Guilty Plea: Factual Basis in Codefendant's Case Irrelevant
An admission in codefendant's factual basis couldn't be used to establish court's jurisdiction in the defendant's case.
U.S. v. Gonzalez-Iguaran, Case No. 15-13659 (11th Cir. 5/12/16)
Guilty Plea: Lawyer Can't Override Client's Desire to Plead Not Guilty
Burt v. Titlow, Case No. 12-414 (S. Ct. 10/8/13)
Guilty Plea: Judge Must Accept if Defendant Concedes Elements
Trial judge had no authority to reject a guilty plea because he wanted to hear extra details about the criminal enterprise above and beyond defendant's admission of the elements of the offense.
State v. Nickle, Case No. 14-30204 (9th Cir. 3/21/16)
Guilty Plea: Waives Nonjurisdictional Defects
A guilty plea, since it admits all the elements of a formal criminal charge, waives all nonjurisdictional defects in the proceedings against a defendant.
U.S. v. Brown, Case No. 13-10023 (11th Cir. 5/28/14)
Guilty Plea: Defendant Entered Guilty Plea Not Knowing He Would Be Classified as an Armed Career Criminal
Where the indictment did not allege a violation of 18 U.S.C. §924(e), both the defense and the government were unaware that the defendant would be classified as an armed career criminal, and the plea colloquy failed to inform the defendant he would be classified as an armed career criminal, the district court erred in refusing to allow the defendant to withdraw his guilty plea.
U.S. v. Symington, 781 F.3d 1308 (11th Cir. 2015)

Guilty Plea: In Entering Guilty Plea Defendant Waived Right to Challenge Classification of Prior Conviction as an Aggravated Felony
Where the defendant entered a guilty plea to unlawfully reentering the U.S. following a conviction for an aggravated felony, but objected to that classification upon the entry of the plea, he, nonetheless, waived his right to challenge the classification at sentencing.
U.S. v. Garcia-Sandobal, Case No. 11-12196 (11th Cir. 1/3/13)
Guilty Plea: Scalia on Plea Negotiations
In the United States, we have plea bargaining a-plenty, but until today it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often - perhaps usually - results in a sentence well below what the law prescribes for the actual crime. But even so, we accept plea bargaining because many believe that without it our long and expensive process of criminal justice would grind to a halt.
Lafler v. Cooper, Case No. 10-209 (S. Ct. 3/21/12)
Guilty Plea: Prosecutors Free to Threaten a Longer Sentence for Going to Trial
It is entirely permissible for prosecutors to threaten a defendant with a harsher charge carrying a longer sentence if he proceeds to trial and to carry out the threat.
U.S. v. Alcindor, Case No. 07-14602 (11th Cir. 6/14/11)
Guilty Plea: Due Process Requires Govt. to Adhere to Promises
U.S. v. Al-Arian, Case No. 06-16008 (11th Cir. 1/25/08)
Guilty Plea: Agreement Not to Recommend a Particular Sentence
Where government urged consecutive sentences despite an agreement not to recommend a particular sentence, the Court held the plea agreement had not been violated.
U.S. v. Thomas, Case No. 06-15940 (11th Cir. 6/1/07)
Guilty Plea: Defendant Entitled to Specific Performance Once Agreement is Signed
Where the government attempted to renege on a plea agreement mid-way through the plea colloquy, the Court of Appeals held that it could not do so and held the defendant was entitled to specific performance.
U.S. v. Norris, Case No. 04-2073 (3d Cir. 3/10/06)
Guilty Plea: Judges Not Required to Explain Elements of Offense to the Defendant
Judges accepting a guilty plea are not required to explain the elements of the offense to the defendant. Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.
Bradshaw v. Stumpf, Case No. 04-637 (S. Ct. 6/13/05)
Guilty Plea: Heard by Magistrate
With the consent of the defendant, a magistrate may preside over the entry of a guilty plea and may even adjudicate the defendant guilty.
U.S. v. Woodard, Case No. 04-10290 (11th Cir. 10/18/04)
Guilty Plea: Uncounseled
The Sixth Amendment does not require the judge to advise an unrepresented defendant of the disadvantages of entering a plea without legal representation. The Sixth Amendment is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and the range of allowable punishments attendant upon the entry of a guilty plea.
Iowa v. Tovar, Case No. 02-1541 (S. Ct. 3/8/04)

Guilty Plea: Plea Agreement -Determination of Whether Govt. Violated Agreement
"We fully recognize that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled. Whether the government violated a plea agreement is judged according to the defendant's reasonable understanding at the time he entered the plea. Further, if the defendant's understanding is disputed by the government, we determine the terms of the plea agreement according to objective standards.
U.S. v. Levy, Case No. 01-17133 (11th Cir. 6/23/04); opinion withdraws, but see Motion to Strike in U.S. v. Thomas, 4:06cr42.
Guilty Plea: Appeal - Rule 11 Error Must Have Led to Plea
Before any relief may be granted in those cases where the plea colloquy falls short of meeting the requirements of FRCrP 11, the defendant must show that but for the error, he would not have entered the plea.
U.S. v. Benitez, Case No. 03-167 (11th Cir. 2004)
Guilty Plea: Waiver of Proffer Protections
Government's requirement that defendant waive protections of Fed. R. Evid. 410 and agree that any statements made during his proffer could be introduced into evidence not only as impeachment of the defendant's testimony but as rebuttal to any contradictory evidence introduced at trial.
U.S. v. Velez, 02-1766 (2d DCA 1/13/04)
Guilty Plea: Government's Failure to Honor Plea Agreement
In this case from Florida's Middle District the Government had agreed to a certain offense level absent the discovery of additional adverse information that rendered the offense level unwarranted. The Court held that the Government breached the agreement when it urged the court to consider "information wholly unrelated" to the offense and ordered a new sentencing.
U.S. v. Romano, 314 F3d 1279 (11th Cir. 2002); U.S. v. Hunter, Case No. 15-12640 (11th Cir. 8/26/16)
Guilty Plea: Government's Obligation to Disclose Exculpatory Information
With a plea agreement that required the government to disclose any information that established the "factual innocence of the defendant," the court held that the Government was under no obligation to disclose impeachment information regarding government informants or witnesses.
U.S. v. Ruiz, Case No. 01-595 (6/24/02)
Guilty Plea: Withdrawal
Whether a guilty plea may be withdrawn is dependant upon 1) whether close assistance of counsel was available; 2) whether the plea was knowing and voluntary; 3) whether judicial resources would be served; and 4) whether the government would be prejudice if the defendant were allowed to withdraw his plea.
U.S. v. Weaver, 15 FLW Fed C 50 (11th Cir. 11/13/01); U.S. v. Gonzalez, Case No. 1:05cr40 (N.D. Fla. 3/2/07)(Mickle)(Def. permitted to withdraw plea upon learning that govt. intended to ask court to hold her responsible for a greater number of marijuana plants)
Guilty Plea: Invocation of Right to Remain Silent During Plea Colloquy
"A defendant who withholds information by invoking the privilege against self-incrimination at a plea colloquy runs the risk the district court will find the factual basis inadequate. At least once the plea the plea has been accepted, statements or admissions made during the preceding plea colloquy are later admissible against the defendant . . .
Mitchell v. U.S., 119 S. Ct 1307, 1313 (1999)

Guilty Plea: Adequacy of Colloquy Re: Trial Rights
Even though the defendant had a significant criminal history, the district court's failure to advise him of his right to plead not guilty, his right to the assistance of counsel at trial, his right to confront and cross-examine adverse witnesses at trial, and his right against compelled self-incrimination amounted to plain error and the Court vacated the Defendant's conviction.
U.S. v. Hernandez-Fraire, 13 FLW C539 (11th Cir. 4/6/2000)
Guilty Plea: Adequacy of Colloquy Re: Nature of the Offense
See: U.S. v. Mosley, 12 FLW Fed C762 (11th Cir. 4/26/99); U.S. v. James, 13 FLW Fed C635 (11th Cir 4/27/00)
Guilty Plea: Doesn't Waive Right to Remain Silent
And it's improper for the sentencing judge to draw an adverse inference from the defendant's silence.
Mitchell v. U.S., 119 S. Ct 1307, 1313 (1999)
Guilty Pleas: Agreements to Forego Appeal OK
U.S. v. Howle, 166 F.3d 1166 (11th Cir. 1999)
Guilty Plea: Not Final Until Court Reviews PSR
Under the sentencing guidelines a court's acceptance or rejection of a plea is not final until after the court has had the opportunity to consider the presentence report.
U.S. v. Howle, 12FLWFedC475 (11th Cir. 2/5/99)

HABEAS CORPUS

Certificate of Appealability

Habeas Corpus: COA - May Be Expanded on Exceptional Occasions
Mays v. U.S. Case No. 14-13477 (11th Cir. 3/29/16)
Habeas Corpus: COA - Rule 60(b) or 59(e)
A defendant must obtain a certificate of appealability for an appeal of a denial of a Rule 60(b) or Rule 59(e) motion.
Hamilton v. Secretary, Florida Dept. of Corrections, Case No. 14-13535 (11th Cir. 7/15/15)
Habeas Corpus: COA - Expanded
The court will expand the issues addressed in the certificate of appealability when reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.
Dell v. U.S., Case No. 11-12904 (11th Cir. 2/27/13)
Habeas Corpus: COA - Not Jurisdictional
The requirement that the district court issue a certificate of appealabilty is not a jurisdictional requirement. Accordingly, a judge's failure to indicate the requisite constitutional issue in a COA does not deprive a court of appeals of subject-matter jurisdiction to adjudicate the habeas petitioner's appeal.
Gonzalez v. Thaler, case No. 10-895 (S. Ct. 1/10/12)
Habeas Corpus: COA - Armed Career Criminal Conviction Based on Carrying a Concealed Weapon

Although recognizing that "Begay provides good reason to conclude that Hunter was erroneously sentences as an armed career criminal," the Court of Appeals denied the defendant a certificate of appealability because, in the view of the Court, he did not make a substantial showing of a denial of a constitutional right.
Hunter v. U.S., Case No. 07-13701 (11th Cir. 2/24/09)

Habeas Corpus: COA - 2254 (Only Question is Whether It Is Debatable)

To secure habeas relief under 18 USC 2254, the petitioner must show the state court's finding was incorrect by clear and convincing evidence, and that the corresponding factual determination was objectively unreasonable. That, however, has nothing to do with the COA inquiry, which asks only whether the District Court's decision was debatable.
Miller-El v. Cockrell, Case No. 01-7662 (S.Ct. 2/25/05); Buck v. Davis, Case No. 15-8049 (S. Ct. 10/5/16)

Habeas Corpus: COA - Standard for Obtaining When Claim Rejected on Merits

Where a district court has rejected the constitutional claims on the merits the petitioner seeking a COA must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.
Eagle v. Linahan, 279 F.3d 926 (11th Cir. 2001); Banks v. Dretke, Case No. 02-8286 (S. Ct. 2/24/04)

Habeas Corpus: COA - Motion Panel's Denial Doesn't Bar Review

The motion panel's denial of an expansion of the COA didn't bind the panel hearing the case on the merits.
Jones v. U.S., 224 F.3D 1251 (11th Cir. 2000)

Habeas Corpus: COA - When the District Court Denies the Request of a COA

For a general description of what occurs and needs to be done see:
Jones v. U.S., 224 F.3d 1251 (11th Cir. 2000)

Habeas Corpus:COA - Expansion of Issues Set Forth in Certificate of Appealibility

The only way a habeas petitioner may raise on appeal issues outside those specified by the district court in the certificate is by having the court of appeals expand the certificate to include those issues.
Tompkins v. Moore 13 FLW Fed C39 (11th Cir. 10/29/99)

Habeas Corpus: Certificate of Appealability - Must Specify Issues

One of the differences between the old certificate of probable cause to appeal and the new certificate of appealability in the AEDPA is that the new provision requires specification of issues.
Tompkins v. Moore 13 FLW Fed C39 (11th Cir. 10/29/99)

Habeas Corpus: COA

When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.
Slack v. McDaniel, 529 U.S. 473 (2000) (4/26/00); Franklin v. Pryor, 13 FLW Fed C748 (11th Cir. 6/19/00)**;** Eagle v. Linahan, 14 FLW Fed C1387 (11th Cir. 10/12/01); Miller-El v. Cockrell, Case No. 01-7662 (S. Ct. 2/25/03)

Habeas Corpus: COA - Motion to Review Action of a Single Judge

If upon requesting a certificate of appealability from the circuit court, and it is rejected, there is a procedure whereby you can ask for further review.
U.S. v. Nyhuis, 13 FLW Fed C662, n. 1 (11th Cir. 5/17/00); Franklin v. Pryor, 215 F.3d 1196 (11th Cir. 2000)

Default

Habeas Corpus: Default - Martinez and Tervino Inapplicable to Errors of Appellate Counsel
The decisions in Martinez v. Ryan, 566 U.S. 1 (2012) and Trevino v. Thaler, 569 U.S. 413 (2013) apply, in some instances, to the ineffective assistance of post-conviction counsel, but not to the ineffective assistance of the lawyer handling the direct appeal.
Davila v. Davis, Case No. 16-6219 (S. Ct. 4/24/17)
Habeas Corpus: Default - Court Rejects 9th Circuit Interpretation
Concluding that the 9th Circuit "profoundly misapprehends what makes a state procedural bar 'adequate,'" the Supreme Court summarily reversed the 9th Circuit's finding that California's so-called "*Dixon* bar" was not an adequate impediment to federal collateral review.
Johnson v. Lee, Case No. 15-789 (S. Ct. 5/31/16)
Habeas Corpus: Default - Lawyers Failure to Correctly Calculate Deadline
Run-of-the-mill claims of excusable neglect by an attorney such as a simple miscalculation that leads a lawyer ot miss a filing deadline do not constitute the kind of extraordinary circumstnace that is necessary to merit equitable tolling.
Camren v. Attorney General, Case No. 13-15017 (11th Cir. 1/21/15)
Habeas Corpus: Default - Martinez v. Ryan Inapplicable Where Counsel Failed to Timely File a 2254 Petition
The Martinez court expressly limited its holding to attorney errors in initial review collateral proceedings, stating, "[T]he holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive petitions, and petitions for discretionary review in a State's appellate courts."Accordingly, the Martinez decision did not provide the defendant relief where the error was counsel's failure to file a timely 2254 motion.
Arthur v. Thomas, 739 F.3d 611 (11th Cir. 2014)
Habeas Corpus: Default - Martinez v. Ryan Applies Only to Ineffective Assistance of Trial Counsel That Post-Conviction Counsel Failed to Raise
Martinez is limited to claims of ineffective assistance of trial counsel that are otherwise barred due to the ineffective assistance of post-conviction counsel.
Gore v. Crews, Case No. 13-12834 (11th Cir. 6/27/13)
Habeas Corpus: Default - Martinez v. Ryan Extended Where It Was Virtually Impossible to Raise the Ineffective-Assistance-of-Trial Counsel Claim During the Direct Appeal
Trevino v. Thaler, Case No. 11-10189 (S. Ct. 2/25/13)
Habeas Corpus: Default - Abandonment by Lawyer
In this capital post-conviction case, where the lawyers left their law firm and, essentially, no one was representing the defendant, which resulted in the defendant missing the deadline for filing his state habeas petition, those circumstances provided the requisite "cause" for the procedural default.

Maples v. Thomas, Caes No. 10-63 (S. Ct. 1/18/12)
Habeas Corpus: Default - Actual Innocence (Predicate Offense for Career Offender Classification)
While the actual innocence exception has been applied to the crime of conviction and capital sentencing, the 11th Circuit has not determined whether it can be applied in noncapital sentencing. In this case, where the defendant argued that the Supreme Court decision in Salinas v. U.S., 547 U.S. 188 (2006) had made it clear that his possession of cannabis case could not be a predicate offense for career offender classification, the court construed it as a claim of "legal, not factual, innocence" and concluded that the actual innocence exception was inapplicable.
Stevens v. U.S., Case No. 11-0486 (11th Cir. 3/26/12)
Habeas Corpus: Default - Attorney Errors In Initial-Review Collateral Proceedings
Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel if (1) the claim of ineffective assistance of trail counsel was a substantial claim; (2) the cause consisted of there being no counsel or only ineffective counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the initial review proceeding in respect to the ineffective-assistance-of-trial-counsel claim; and (4) state law requires that an ineffective assistance of trial counsel claim be raised in an initial-review collateral proceeding.
Martinez v. Ryan, 566 U.S. 1 (S. Ct. 2012)
Habeas Corpus: Default - Attorney Errors
Absent a right to counsel in a collateral proceeding, an attorney's errors in the proceeding do not establish cause for a procedural default.
Martinez v. Ryan, Case No. 10-1001 (S. Ct. 3/20/12)
Habeas Corpus: Default - State's Failure to Raise Exhaustion
State's failure to raise exhaustion does not constitute a waiver under AEDPA, which requires express waiver of exhaustion requirement by state.
McNair v. Campbell, Case No. 04-11400 (11th Cir. 7/13/05)
Habeas Corpus: Default - Actual Innocence
In the claim filed pursuant to 21 USC § 2255, where the defendant, who had entered a guilty plea, was seeking to overcome his failure to file the motion within the requisite one year by showing actual innocence, the court concluded that trading guns for drugs doesn't constitute the requisite "use" of a firearm under 18 U.S.C. § 924(c). The court remanded the case to the trial court noting that drug charged had been dismissed as part of the plea agreement, the case was remanded noting that the defendant would, in the district court, be required to show his actual innocence of any more serious charges the government had dismissed and that the government would be permitted to introduce any additional evidence of the defendant's guilt. (Defendant pled to one drug charge along with the gun charge. Does this ruling mean that if he was guilty of the other drug offenses that he can't prevail on the gun charge?)
U.S. v. Montano, Case No. 03-11950 (11th Cir. 2/4/05)
Habeas Corpus: Default - Actual Innocence
"In 1997, Michael Haley was sentenced to serve 16 years and 6 months in prison for violating the Texas habitual offender law. Texas officials concede Haley did not violate this law. They agree that Haley is guilty only of theft, a crime with a 2-year maximum sentence. Yet, despite the fact that Haley served more than two years in prison for his crime, Texas officials came before our

Court opposing Haley's petition for relief. they wish to send Haley back to prison for a crime they agree he did not commit."
Dretke v. Haley, Case No. 02-1824 (S. Ct. 5/3/04)(Kennedy, J. dissenting opinion) (Court had declined to reach the issue of whether actual innocence exception applies to non-capital sentencing error)

Habeas Corpus: Default - Brady Claim

Petitioner succeeded in showing cause for failing to pursue his Brady claim in state court, but failed to establish the requisite prejudice.
Crawford v. Head, Case No. 01-10215 (11th Cir. 11/12/02)

Habeas Corpus: Default - Boerckel

At least in those cases where the Florida Supreme Court reviews the case as a matter of great public importance, the other issues considered by the district court, but not by the Supreme Court are not defaulted per Boerckel. Opinion specifically says it is not considering those cases that involve the Florida Supreme Court's conflict jurisdiction.
Tucker v. Dept. of Corrections, 301 F.3d 1281 (2002); but are in Georgia: Nelson v. Schofeld, Case No. 03-11496 (11th Cir. 5/25/04)(Georgia has since changed their rules: See Hills v. Washington, Case No. 04-14292 (11th Cir. 3/13/06)

Habeas Corpus: Default - Boerckel

The holding in Boerckel is that in order to exhaust state remedies as to a federal constitutional issue, a prisoner is required to file a petition for discretionary review in the state's highest court raising that issue, if discretionary review is part of the appellate procedure in the state. In Boerckel there was no circuit precedent one way or the other. In this case, which is from Alabama, there was 11th Circuit precedent that did not require the petitioner to seek the discretionary review. Nevertheless, the petitioner's reliance in this case upon that precedent was of no value. That was true even though this petitioner's time period for seeking discretionary review passed prior to the Boerckel decision. The court declined to say whether this ruling would apply to Florida cases.
Smith v. Jones, 14 FLW Fed C950 (11th Cir. 7/10/01)

Habeas Corpus: Default - Avoiding Procedural Default

If a petitioner has procedurally defaulted a federal habeas claim, he may be nevertheless heard on that claim if he can show "cause" for the procedural default and "prejudice" attributable thereto. To show cause, a petitioner must prove that some objective factor external to the defense impeded counsel's efforts to raise the claim previously. Once cause is proved, a petitioner must also prove prejudice. He must show not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. If a petitioner cannot show cause, he may still survive a procedural bar by proving that the failure to hear the merits of his claim would endorse a fundamental miscarriage of justice. To meet this standard, a petitioner must show that it is more likely than not that no reasonable juror would have convicted him of the underlying offense.
Johnson v. Nagle, 15 FLW FedC921 (11th Cir. 7/10/01); Crawford v. Head, Case No. 01-10215 (11th Cir. 11/12/02)

Habeas Corpus: Default - State Procedural Bar

Federal review of a petitioner's claim is barred by the procedural default doctrine if the last state court to review the claim states clearly and expressly that its judgment rests on a procedure bar, and that bar provides an adequate and independent state ground for denying relief.

Johnson v. Nagle, 15 FLW FedC921 (11th Cir. 7/10/01); Crawford v. Head, Case No. 01-10215 (11th Cir. 11/12/02); Parker v. Secretary for the Dept. of Corrections, Case No. 02-13292 (11th Cir. 5/20/03), Martinez v. Ryan, Case No. 10-1001 (S. Ct. 3/20/12)

Habeas Corpus: Default - Failure to Present Evidence in State Court

Must show cause and prejudice for failing to present evidence in state court.

Keeney v. Tomayo-Reyes, 112 S.Ct. 1715 (1992)

Habeas Corpus: Default - "Prejudice"

Assuming the cause prong of the Sykes test is met the defendant must also show prejudice, i.e. whether there is a reasonable probability that the result of the trial would have been different had the error not occurred.

Mincey v. Head, 13 FLW Fed C473 (11th Cir. 3/16/00)

Habeas Corpus: Default - District Court May Sua Sponte Raise Procedural Default

Magouirk v. Phillips, 144 F.3d 348 (5th Cir. 1998); Esslinger v. Davis, 44 F.3d 1515, 1523-29 (11th Cir. 1995)

Habeas Corpus: Default - 2254 (Grounds That Allow For Federal Review)

There are three situations in which an otherwise valid state ground will not bar federal claims: (1) where failure to consider a prisoner's claims will result in a "fundamental miscarriage of justice," (2) where the state procedural rule was not firmly established and regularly followed, and (3) where the prisoner had good cause for not following the state procedural rule and was prejudiced by not having done so."

Warden v. Carpenter, 13 FlW Fed S254 (4/25/00); Cade v. Haley, 13 FLW Fed C1015 (11th Cir. 8/17/00)

Habeas Corpus: Default - 2254 (Ineffective Assistance)

"Although we have not identified with precision exactly what constitutes "cause" to excuse a procedural default, we have acknowledged that in certain circumstances counsel's ineffectiveness in failing properly to preserve the claim for review in state court will suffice. Not just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution. In other words, ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim."

Warden v. Carpenter, 13 FlW Fed S254 (4/25/00); see also: U.S. v. Nyhuis, 13 FLW Fed C662 (11th Cir. 5/17/00)

Habeas Corpus: Default - State Ground Adequate to Bar Review

In this case, Missouri rules requiring written motion for a continuance and a showing of the expected testimony did not constitute a state ground adequate to bar a federal habeas review. The defendant's witnesses had been present, but left in the courthouse prior to being called. Upon discovering they were not in the courthouse, the defense asked for a continuance. The court remanded the case to the district court for consideration on the merits because (1) there was no evidence to support the trial judge's claim that the witnesses had intentionally abandoned the case; (2) there was no published Missouri decision directing flawless compliance with the Missouri rules in the unique circumstance of an unanticipated and unexplained disappearance of critical subpoenaed witnesses on the last day of trial; and (3) given the realities of trial the defendant substantially complied with the rules.

Lee v. Kemna, 15 FLW Fed S89 (1/22/02)

Evidentiary Hearing

Habeas Corpus: Evidentiary Hearing - Dueling Affidavits
The state court denied the defendant's post-conviction claim on the basis of conflicting affidavits. The district court affirmed the decision without granting an evidentiary hearing, and the court of appeals upheld the decision. Given the particular circumstances of the case, the court of appeals concluded that it could not say that the state court's credibility determination on the basis of the affidavits was objectively unreasonable.
Landers v. Attorney General, Case No. 13-11898 (11th Cir. 1/23/15); Rosin v. U.S. Case No. 14-10175 (11th Cir. 5/14/15)

Habeas Corpus: Evidentiary Hearing - Percentage of Cases in Which an Evidentiary Hearing is Granted
Even prior to the passage of AEDPA district courts held evidentiary hearings in only 1.17% of all federal habeas cases.
Schiriro v. Landrigan, Case No. 05-1575 (S. Ct. 5/14/07)

Habeas Corpus: Evidentiary Hearing - Failure to Develop Facts in State Court Proceeding
Defendants are entitled to an evidentiary hearing if they can show cause for failure to develop the facts in state-court proceedings an actual prejudice from that failure. In this instance the state's failure to disclose Brady material was sufficient cause. The defendant's reliance on the prosecution's full disclosure representation and assumption that the state would not "stoop to improper litigation conduct to advance prospects for gaining a conviction," did not alter this finding.
Banks v. Dretke, Case No. 02-8286 (S. Ct. 2/24/04)

Habeas Corpus: Evidentiary Hearing - Failure to Develop
Petitioner cannot be said to have "failed to develop" relevant facts if he diligently sought, but was denied, the opportunity to present evidence at each stage of his state proceedings.
Breedlove v. Moore, 15 FLW Fed C227 (11th Cir. 1/17/02)

Habeas Corpus: Evidentiary Hearing - Appointment of Counsel
The requirement under Rule 8 of the rules governing 2255 proceedings requires the judge to appoint counsel for purposes of an evidentiary hearing. That rule is not subject to harmless error analysis.
Shepherd v. U.S. 14 FLW Fed C787 (11th Cir. 6/6/01)

Habeas Corpus: Evidentiary Hearing - AEDPA - 2254 (Right to Hearing)
Under the opening clause of §2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel. If there is a lack of diligence, the only way to a federal evidentiary hearing is a showing that efforts to discover the facts would have been in vain, and there is a convincing claim of innocence. Absent this lack of diligence, these showings are unnecessary.
Williams v. Taylor, 13 FLW Fed S238 (4/18/00)

Habeas Corpus: Evidentiary Hearing - 2254 (Criteria for Determining When Needed)
For an discussion of the criteria for whecn a federal evidentiary hearing is necessary even if there has already been a state hearing see:
Cade v. Haley, 13 FLW Fed C1015 (11th Cir. 8/17/00); Jennings v. Crosby, Case No. 5:02cv174 (N.D. Fla. 9/29/05)(Hinkle, R)

Johnson

Habeas Corpus: Johnson – Second or Successive Petitions – Only One Chance?
The Eleventh Circuit has erroneously held that a prisoner is prohibited from filing a second request to file a successive petition based on the same grounds even if the first was erroeoudly decided.
Orvalles v. U.S., Case No. 17-10172 (11th Cir. 10/4/18) (Martin, J. dissenting)
Habeas Corpus: Johnson - Concurrent Sentence Defeated 2241 Motion
In order to meet the fourth prong of Bryant v. Warden, FCC, Coleman - Medium, 738 G.3d 1253 (11th Cir. 2013), the petitioner serving multiple concurrent sentences must demonstrate that his overall sentence exceeds the allowable statutory maximum for each of the counts of conviction.
Brown v. Warden, FCC, Coleman - Medium, Case No. 15-1135 (11th Cir. 4/1/16)
Habeas Corpus: Johnson - Pending Cert Petition in Beckles Insufficient Reason to Authorize Successive Petition
In re: Bradford, Case No. 16-14512 (11th Cir. 7/27/16)
Habeas Corpus: Johnson - Second or Successive Petition (New Application??)
Where an order was erroneous, a prisoner may in some cases be able to file a new application.
In re: Jackson, Case No. 16-13536. n. 5 (11th Cir. 6/24/16)
Habeas Corpus: Johnson - Concurrent Sentence Doctrine
Where defendant received a 327 month sentence for his ACCA conviction and a career offender 327 month concurrent sentence for a drug conspiracy case, the court distinguished the decision of In re: Williams and held tht the concurrent sentence doctrine did not apply. Court noted the contrast between the mandatory life sentence on the concurrent sentence in Williams. Noted, too, that in the instant case there was "a single Sentencing Guidelines range for the ACCA violation combined with the conspiracy crime." Court concluded that the "judge's sentencing decision was . . . no doubt informed by Davis's ACCA designation, which means Davis may have suffered adverse collateral consequendes if his ACCA sentence turns out to be unlawful.
In re: Fsbod, Case No. 16-13779 (11th Cir. 7/21/16)
Habeas Corpus: Johnson - Concurrent Sentence Doctrine
If a defendant is given concurrent sentences on several counts and the conviction on one count is found to be valid an appellate court need not consider the validity of the conviction on other counts.
In re: Williams, 826 F.3d 1351 (11th Cir. 2016)
Habeas Corpus: Johnson - Judge Martin's Criticism
Criticism of Matchett and argument that the Eleventh Circuit has "uniquely limited Johnson's reach.
In re: Clayton, Case No.16-14556 (11th Cir. 7/18/16) (Martin, J. concurring)
Habeas Corpus: Johnson - Second or Successive Petition - Conspiracy to Commit a Hobbs Act Robbery
Because it is possible a conspiracy to commit a Hobbs Act robbery is not a crime of violence, the court granted the defendant authorization to file a successive 2255 motion.
In re: Gomez, Case No. 16-14104 (11th Cir. 7/25/16)
Habeas Corpus: Johnson - Second or Successive Petition - 924(c)
Given the decision in In re Pinder, Case No. 16-12084 (11th Cir. 6/1/16), the court assumed a 924(c) claim could establish a prima facie case of a constitutional violation, but rejected the

claim, finding that a violation of 18 U.S.C. § 2119 (carjacking) was a crime of violence. Dissent isn't so sure.
In re: Smith, Case No. 16-13661 (11th Cir. 7/18/16)
Habeas Corpus: Johnson - Second or Successive Petitions - Second Request
28 U.S.C. § 2244(b)(1) and existing caselaw requires the court to dismiss a second request for authorization to file a second or successive petition when the court has earlier denied a request from the defendant based on the same grounds.
In re: Baptiste, Case No. 16-13959 (11th Cir. 7/13/16); In re: Bradford, Case No. 16-14512 (11th Cir. 7/27/16); but see Judge Rosenbaum's dissent in In re: Parker, Case No 16-13814 (11th Cir. 8/10/16), and Judge Martin's concurring opinion in In re: James R. Young, Case No. 16-17499 (11th Cir. 1/11/17) (saved at P\Murrell\Johnson\General Research).
Habeas Corpus: Johnson - Second or Successive Petitions - Conflicting Decisions Regarding Application of Descamps
See In re: Clayton, 829 F.3d 1254 (11th Cir. 2016)(J., Martin, Dissenting), n. 14
Habeas Corpus: Johnson - Second or Successive Petition - No Appeal from Denial
In re: Clayton, 829 F.3d 1254 (11th Cir. 2016) (J., Martin Dissenting)
Habeas Corpus: Johnson - Second or Successive Petition - Sentencing Guidelines
Court, citing the Matchett decision, denied request to file a successive petition because claim was based on guidelines.
In re: Clayton, 829 F.3d 1254 (11th Cir. 2016); In re: Burgest, Case No. 16-14597 (11th Cir. 7/21/16)
Habeas Corpus: Johnson - Second or Successive Petition - Prima Facie Showing
Contrary to the clear-unclear test in Rogers, court held that defendant must show that he was sentenced in part on the basis of the residual clause.
In re: Hires, Case Noo. 16-12744 (11th Cir. 6/15/16)
Habeas Corpus: Johnson - Second or Successive Petition - Descamps
Contrary to the decision in Rogers, court held that Descamps has no role to play if existing precedent holds defendant's prior convictions qualify under the elements clause.
In re: Hires, Case No. 16-12744 (11th Cir. 6/15/16)
Habeas Corpus: Johnson - Second or Successive Petition - Florida's Robbery and Aggravated Assault Statutes
Court determined that existing precedent established that Florida's robbery and aggravated assault statutes are violent felonies, and concluded that with those convictions and a convictiton for a drug offense, the defendant had failed to establish a prima facie case of a violation of a constitutional right.
In re: Hires: Case No. 16-12744 (11th Cir. 6/15/16)
Habeas Corpus: Johnson - Second or Successive Petition - "Clear-Unclear Test"
The absence of a statement from the trial court that it relied on the residual clause does not preclude the defendant from establishing a prima facie case fo a violation of a constitutional right. That determination is governed by the "clear-unclear test." That test hold that the court of appeals can deny the application only if (1) the trial court stated it was relying on the elements or enumerated offenses clauses and/or (2) under binding precedent it is clear that the prior convictions categorically qualify under either of the two clauses. Absent a finding by the trial court that it relied on one of the two clauses, Descamps applies, and if it is "unclear from binding precedent that the statue is divisible, the defendant has made out his prima facie case.

In re: Rogers, Case No. 16-12626 (11th Cir. 6/17/16); In re Parker, Case No. 16-13814 (11th Cir. 7/7/16)

Habeas Corpus: Johnson - Second or Successive Petition - Descamps

Given that the trial court may have relied upon the residual clause, the court could rely upon Descamps to determine whether the defendant established a prima facie case of a violation of a constitutional right. Because of that the defendants claim was not a standalone Descamps one.

In re Adams, Case No. 16-12619 (11th Cir. 6/15/16)

Habeas Corpus: Johnson - Second or Successive Petition - Absence of Statement by Trial Court That It Relied Upon the Residual Clause

Given the likelihood that the trial court relied on the residual clause based on the cases such as *James* that found the offense to be non-generic in addition to an objection alleging that the offense did not involve a serious potential risk of physical injury, the court of appeals concluded that the defendant had made a prima facie showing of a violation of a constitutional right.

In re: Adams, Case No. 16-12519 (11th Cir. 6/15/16)

Habeas Corpus: Johnson - Florida Burglary

Florida's burglary statute appears to be indivisible and it is likely that it cannot serve as a predicate for ACCA purposes.

In re: Adams, Case No. 16-12519 (11th Cir. 6/15/16); In re: Parker, Case No. 16-13814 (11th Cir. 7/7/16)

Habeas Corpus: Johnson -Descamps Retroactive

Because Descamps did not announce a new rule, but merely clarified existing precedent, it applies retroactively.

Mays v. U.S., Case No. 14-13477 (11th Cir. 3/29/16)

Habeas Corpus: Johnson - Descamps Retroactive?

Seventh Circuit says it's not.

Groves v. U.S., 755 F.3d 588 (7th Cir. 2014); see also: Abney v. Warden, 2015 U.S. App. 13157 (11th Cir. 7/29/15) (From NDFL)("Rather, the Descamps Court simply interpreted its 'prior decisions and the principles underlying them' to hold that 'sentencig courts may not apply the modified categorical approach when the crime [at issue] has a single, indivisible set of elements.'") *See* Gray v. U.S., 2015 U.S. App. LEXIS 11933, *6 (11th Cir. July 10, 2015) (" . . . nor have we decided yet whether Descamps applies retroactively on collateral review.")

Miscellaneous

Habeas Corpus: Miscellaneous – Court Must Review All Issues Raised

If a district court fails to address all the issues raised, the court of appeals will remand the case with directions to do so.

Senter v. U.S., Case No. 18-11627 (11th Cir. Nov. 13, 2020)

Habeas Corpus: Miscelleaneous – 2241 and Change in State Law

The revised New York law reduced one of the defendant's ACCA predicate offenses from a felony to a misdemeanor. The court held that the circumstances failed the Savings Clause test set out in Bryant v. Warden, FCC Coleman-Medium, 738 F.3d 1253 (11th Cir. 2013) and upheld the district court's decision denying relief.

Cortes-Morales, Case No. 13-13569 (11th Cir. 6/27/16)

Habeas Corpus: Miscellaneous - Rule 60(b) (Extraordinary Circumstances)

Defense counsel's decision to introduce testimony from a psychologist in a death penalty that the defendant, who was black, was statistically more likely to act violently. The "extraordinary circumstances" provision of Rule 60(b) includes the risk of injustice to the parties and the risk of undermining the public's confidence in the judicial process. The court held defense counsel's action justified relief pursuant to the rule.
Buck v. Davis, Case No. 15-8049 (S. Ct. 10/5/16)
Habeas Corpus: Miscellaneous - 2241 (Five-Part Test for Savings Clause in 924(e) case)
The Bryant test requires a showing that (1) binding precedent had specifically addressed the distinct prior state conviction that triggered the 924(e)issue and had squarely foreclosed the claim; (2) subsequently the Supreme Court overturned the Circuit precedent; (3) the new rule announced in the Supreme Court decision applies retroactively to collateral review; (4) as a result of the Supreme Court precedent the current sentence exceeds the statutory 10 year maximum; annd (5) the savings clause in 2255(e) reaches the pure 924(e) error.
McCarthan v. Warden FCC Coleman, Case No. 12-14989 (11th Cir. 1/20/16)
Habeas Corpus: Miscellaneous - Martinez and Rule 60(b)(6)
The change in the decisional law affected by Martinez is not an extraordinary circumstance sufficient to invoke Rule 60(b)(6).
Hamilton v. Secretary, Fla. Dept. of Corrections, Case No. 14-13535 (July 15, 2015).
Habeas Corpus - Miscellaneous - Johnson (Career Offenders)
Claims that predicate offenses are no longer valid for purposes of career offender sentencing are not cognizable in a § 2255 motion.
U.S. v. Matchett, 802 F.3d 1185 (11th Cir. 2015)
Habeas Corpus: Miscellaneous - Johnson (Successive § 2255 Motions)
Eleventh Circuit says Johnson claims are not cognizable in a successive § 2255 motion.
In re: Rivero, 797 F.3d 986 (11th Cir. 2015)
Habeas Corpus: Miscellaneous - Sentencing Errors
Section 2255 does not provide a remedy for all sentencing errors. The error may be remedied only if it constitutes a fundamental defect which inherently results in a complete miscarriage of justice. If a federal prisoner sentenced below the statutory maximum does not prove actual innocence of his crime or the vacatur of a prior conviction, the prisoner cannot satisfy the standard. Here, the court of appeals rejected a challenge to the defendant's sentence as a career offender based on the recognition that the defendant's conviction for third-degree felony child abuse was not a crime of violence given the holding in Begay.
Spencer v. U.S.,773 F.3d 1132 (11th Cir. 2014) (En Banc)
Habeas Corpus: Miscellaneous - 2241 to Armed Career Criminal Where Predicate Offense Was Possession of a Concealed Firearm
In light of the savings clause in 28 U.S.C. § 2255(e), which permits a prisoner to file a petition pursuant to 28 U.S.C. § 2241 when a 2255 motion is "inadequate or ineffective," the court held that the defendant could challenge his armed career criminal sentence of 235 months imprisonment where one of the predicate offenses was that of carrying a concealed firearm. Note that defendant had a burglary case that presumably would have counted, but the court ruled that the government had waived the argument by not making that claim at the sentencing hearing. Opinion includes Judge Martin's argument criticizing the court's "pinched view" of the relief available in which she contends relief should be extended to those whose sentences do not exceed the statutory maximum.

Bryant v. Warden, FCC Coleman, 738 F.3d 1253 (11th Cir. 2013); Mackey v. Warden, FCC Coleman, 738 F.3d 1253 (11thCir. 2013); Cortes-Morales v. Hastings, Case No. 13-13659 (11th Cir. 6/27/16)

Habeas Corpus: Miscellaneous - 2241 Available for Armed Career Criminals?

Court left undecided whether someone sentenced as an armed career criminal under the pre-Begay line of cases and has already lost a 2255 claim can challenge his sentence in a claim filed pursuant to 28 U.S.C. §2241.

Turner v. Warden Coleman FCI, Case No. 10-12094 (11th Cir. 2/22/13)

Habeas Corpus: Miscellaneous - Retroactivity - Career Offender Predicate

Court rejected claim that Johnson v. U.S., 130 S. Ct. 1265 (2010), concluding that felony battery was not a violent felony, should be applied retroactively.

Rozier v. U.S., Case No. 11-13557 (11th Cir. 11/21/12)

Habeas Corpus: Miscellaneous - Retroactivity (Lafler and Frye)

The Supreme Court's decisions in Missouri v. Frye and Lafler v. Cooper regarding the right to effective assistance of counsel in plea negotiations did not announce new rules and are, therefore, not retroactive.

In re: Perez, Case No. 12-12240 (11th Cir. 5/25/12)

Habeas Corpus: Miscellaneous - Actual Innocence in Sentencing Context

With the decision in U.S. v. Archer, 531 F.3d 1347 (11th Cir. 2008), the defendant sought relief from his career offender sentence where one of the predicate offenses had been carrying a concealed firearm. The court of appeals, however, ruled that he had procedurally defaulted the issue by not raising the issue on his direct appeal**.** Furthermore, because the defendant's claim was that of "legal, rather than factual, innocence, and it did not, therefore, fall within the actual innocence exception. In reaching its decision, the court of appeals did "not enter the debate regarding whether the actual innocence exception extends to the noncapital sentencing context," and left "for another day the question of whether this type of claim is cognizable under § 2255 in the first instance."

McKay v. U.S., 657 F.3d 1190 (2011)

Habeas Corpus: Miscellaneous - District Court Must Resolve All Claims for Relief

Rhode v. U.S., Case No. 08-15004 (S. Ct. 9/29/09)

Habeas Corpus: Miscellaneous - District Judge Has Discretion to Consider Arguments Not Presented to Magistrate Judge

When arguments are presented in the objections to the magistrate judge's report and recommendation, the district judge has broad discretion in determining whether to consider them.

Stephens v. Tolbert, Case No. 06-12831 (11th Cir. 12/5/06)

Habeas Corpus: Miscellaneous - Common Law Remedies

Federal courts may properly fill the interstices fo the federal postconviction remedial framework through remedies available at common law.

U.S. v. Holt, No. 04-15848 (11th Cir. 7/19/05)

Habeas Corpus: Miscellaneous - Rule 60(b)

Petitioner's Rule 60(b) motion which challenged only the district court's previous ruling on the AEDPA stautet of limitations was not the equivalent of a successive habeas petition because it didn't claim error in petitioner's state conviction. However, the motion failed to set forth "extraordinary circumstances" justifying relief as the only ground for reopening the judgment

was that the Supreme Court decision issued when petitioner's case was no longer pending showed error of the district court's statute of limitations ruling.
Gonzalez v. Crosby, Case No. 04-6432 (S. Ct. 6/23/05); Zakrzewski v. McDonough, Case No. 06-12804 (11th Cir. 7/3/07)

Habeas Corpus: Miscellaneous - Recharacterization of Motion as a 2255 Motion

A court may not recharacterize a motion as a 2255 motion unless the court informs the litigant of its intent to do so, and warns the litigant that the recharacterization will subject 2255 motions to the law's second or successive restrictions, and provides the litigant with an opportunity to withdraw or amend the filing.
Castro v. United States, Case No. 02-6683 (S. Ct. 12/15/03)

Habeas Corpus: Miscellaneous - Challenge to Sentence On Basis of Validity of Prior Convictions Used to Enhance Sentence

A defendant may challenge prior his sentence on the basis of unlawful convictions if those convictions are, in their own right, no longer open to collateral challenge only if the conviction is invalid because they were obtained in violation of Gideon v. Wainwright or in rare cases in which no channel of review was actually available to the defendant.
McCarthy v. U.S. Case No. 01-17021 (11th Cir. 2/6/03)

Habeas Corpus: Miscellaneous - Rule 60(b) Motion v. 2255 Motion

A 2255 motion asserts that the conviction was imposed in violation of the Constitution, that the court lacked jurisdiction to impose such a sentence, that the sentence exceeded the maximum, or is otherwise subject to collateral attack. A motion filed pursuant to Fed.R.Civ.P. 60(b) seeks to vacate a federal judgment based on matters that affected the integrity of the proceeding. It would contain argument that the court should relieve a party from final judgement due to those reasons listed in the rule (mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud . . .). In this case, the Court points out that if the motion had been a proper 60(b) motion it would have been an attack on the order denying the defendant's 2255 motion rather than an attack on the sentence itself.
Lazo v. United States, Case No. 02-12483 (11th Cir. 12/16/02)

Habeas Corpus: Miscellaneous -Right to Discovery

Only upon a showing of good cause.
Crawford v. Head, Case No. 01-10215 (11th Cir. 11/12/02); Evans v. U.S., Case No. 2:10cv45-FTM-29DNF (M.D.Fla. 10/4/12); Bowers v. U.S. Parole Commission, Case No. 12-16560 (11th Cir. 3/14/14)

Habeas Corpus: Miscellaneous - Summary Denial Inappropriate in Some Cases

Where there may be some merit to allegations of the motion, if supported by the record, and the record consists of voluminous files and transcripts, an adequate appellate review of the basis for the district court's decision requires something more than mere summary denial.
Broadwater v. U.S., 15 FLW Fed C621 (11th Cir. 6/3/02)

Habeas Corpus: Miscellaneous - Appeals (Harmless Error Standard)

In Brecht v. Abrahamson, 507 U.S. 619 (1993) the Supreme Court concluded that the appropriate standard for reviewing the harmlessness of a non-structural constitutional error on collateral review of a state court judgment is the standard enunciated in Kotteakos v. U.S., 328 U.S. 750 (1946). Under that standard, a defendant is entitled to habeas relief when an error results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict. In this case, however, the petitioner argued that, because it was a federal case and

not a state case that the standard in Chapman v. California, 386 U.S. 18 (1967) should apply. Court held that the Kotteakos standard was the correct one.
Ross v. U.S., 15 FLW Fed CC471 (11th Cir. 4/19/02); Mansfield v. Sec. Dept of Corrections, Case No. 09-12312 (11th Cir. 5/9/12)

Habeas Corpus: Miscellaneous - Success of Petitions - Exceptions

Where the initial petition is dismissed as premature or for non-exhaustion the subsequent petition is treated as an initial petition.
Duncan v. Walker, 14 FLW Fed S366 (3/26/01)

Habeas Corpus: Miscellaneous - Vacation of Predicate Conviction

"The court continues to leave the door (but with no promises) to a motion to revise an armed career criminal sentence if the defendant has first obtained an order vacating the predicate conviction through a state collateral proceeding or federal habeas review of the state judgment under 28 USC 2254.
Daniels v. U.S., 14 FLW Fed S185 (4/25/01) (Souter, J. dissenting opinion) Same is true of a 2254 motion: Lackawanna County District Attorney v. Coss, 14 FLW Fed S189 (4/25/01)

Habeas Corpus: Miscellaneous - Challenge to Prior Convictions

The court held that with the exception of a Gideon violation, a 2255 motion could not be used to challenge the validity of a prior conviction that qualified the defendant for sentencing under the armed career criminal act. In reaching this holding the court stated that "we recognize that there may be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own."
Daniels v. U.S., 14 FLW Fed S185 (4/25/01)

Habeas Corpus: Miscellaneous - During Pendency of Direct Appeal

A trial court lacks jurisdiction to consider a 2255 claim while a direct appeal is pending.
U.S. v. Dunham, 14 FLW Fed C394 (11th Cir. 2/7/01)

Habeas Corpus: Miscellaneous - Not for Challenging Fines or Restitution

Blaik v. U.S., 12 FLWFed C313 (11 Cir. 12/4/98)

Habeas Corpus: Miscellanous - Effective Date of Anti-Terroism Act

April 24, 1996.
Mills v. Singletary, 12 FLW Fed C287, n.6 (11th Cir. December 1, 1998)

Habeas Corpus: Miscellaneous - ACC (Subsequent Vacation of Predicate Offense)

Where subsequent to the defendants sentence as an armed career offender one of his state convictions that had been used as a predicate offense had been vacated, the defendant was able to attack his sentence via a habeas corpus petition.
United States v. Walker, 13 FLW Fed C279 (11th Cir. 12/17/99); Stewart v. U.S., 646 F.3d 856 (11th Cir. 2011)

Habeas Corpus: Miscellaneous - General Description of the Writ

Williams v. Taylor, 13 FLW Fed S225 (4/18/00)

Habeas Corpus: Miscellaneous - Ineffective Assistance of Counsel - In General

See: Mincey v. Head, 13 FLW Fed C473 (11th Cir. 3/16/00); Jennings v. Crosby, Case No. 5:02cv174 (N.D. Fla. 9/29/05)(Hinkle, R)

Habeas Corpus: Miscellaneous - Challenge of State Sentence Used for Enhancement

In order to meet the "in custody" requirement, the petitioner is deemed to be challenging the current sentence that has been enhanced by an expired conviction, rather than directly challenging the expired conviction.

Means v. State of Alabama, 13 FLW Fed C605 (11th Cir. 4/18/00); Unger v. Moore, 14 FLW Fed C1028 (11th Cir. 7/26/01)

Habeas Corpus: Miscellaneous - No Right to Counsel in Collateral Challenges

Defendants have no constitutional right to counsel when collaterally attacking their convictions; this is true even in capital cases.

High v. Head, 13 FLW Fed C617 (11th Cir. 4/19/00)

Habeas Corpus: Miscellaneous - Fourth Amendment Claims

Federal courts are precluded from conducing post-conviction review of Fourth Amendment claims where state courts have provided "an opportunity for full and fair litigation" of those claims.

Bradley v. Nagle, 13 FLW Fed C670 (11th Cir. 5/16/00)

Habeas Corpus: Miscellaneous - Direct Appeal Issues Can't Be Re-litigated In 2255 Claim

Once a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255.

U.S. v. Nyhuis, 13 FLW Fed C662 (11th Cir. 5/17/00)

State Cases

Habeas Corpus: State Cases State Court Rejection of Federal Claim Without Addressing It

When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits – but that presumption can in some limited circumstances be rebutted.

Bester v. Warden, State of Alabama, No. 13-15779 (11th Cir. 9/2/16)

Habeas Corpus: State Cases - Unreasonable Refusal to Extend

Though §22549d)(1) does not require an identical factual pattern before the reviewing court determines that a state unreasonably applied the governing legal rule unreasonably to the facts of a particular prisoner's case, the Supreme Court has never adopted an unreasonable-refusal-to-extent rule and does not require state courts to extend existing precedent or license federal courts to treat the failure to do so as error.

White v. Woodall, Case No. 12-794 (S. Ct. 4/23/14)

Habeas Corpus: State Cases - Harmless Error

A prisoner who seeks federal habeas corpus relief mst satisfy the Brecht test, and if the state court adjudicated his claim on the merits, the Brecht test subsumes the limitations imposed by AEDPA.

Davis v. Ayala, Case No. 13-1428 (11th Cir. 6/18/15)

Habeas Corpus: State Cases - Death Penalty (Mental Retardation: Atkins Claim - State's Failure to Provide an Evidentiary Hearing)

Where the state court failed to provide the defendant a post-conviction hearing or the funds to develop his claim and the evidence from the trial was that the defendant had an IQ of 75 and may have scored higher on another test, the state court decision was based on an unreasonable determination of the fact in light of the evidence presented. Accordingly, the defendant was entitled to have his Adkins claim considered on the merits in federal court.

Brumfield v. Cain, Case No. 13-1433 (S. Ct. 3/30/15)

Habeas Corpus: State Cases - AEDPA Does Not Require Identical Fact Pattern

The AEDPA does not requie state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced.
Meltonv. Secretary, Fla. Dept. of Corrections, Case No. 13-12967 (11th Cir. 3/3/15) (Martin, J. Dissenting, quoting from Panetti v. Quarterman, 551 U.S. 930 (2007))

Habeas Corpus: State Decisions - Clearly Established by Supreme Court Precedent

"Although an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent, it may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits it would, if presented to this Court, be accepted as correct."
Marshall v. Rodgers, Case No. 12-382 (S. Ct. 4/1/13)

Habeas Corpus: State Cases - Retroactive Application of Elimination of Diminished Capacity Defense

Noting that the Court had never held that due process prohibits retroactive application of a state supreme court opinion that addresses a particular issue for the first time and, based on a reasonable application of a state statute, rejects a consistent line of lower court decisions, the Court rejected the state defendant's habeas petition challenging the trial court's decision denying his request for an instruction on diminished capacity.
Metrish v. Lancaster, Case No. 12-547 (S. Ct. 5/20/13)

Corpus: State Cases - Failure to Object to Magistrate's Conclusions

Although accompanied by a recommendation that the rule be changed, the Court reaffirmed that the current rule is that despite a party's failure to object to a magistrate judge's conclusions on legal issues, or failure to address a legal issue, the rule established in Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992) (en banc), does not foreclose a party's ability to seek de novo review on appeal.
Dupree v. Warden of the State of Alabama, Case No. 11-12888 (May 7, 2013)

Habeas Corpus: State Cases - No Presumption of Correctness for Mixed Determinations of Law and Fact

Guzman v. Secretary, Dept. of Corrections, Case No. 10-11442 (11th Cir. 10/27/11)

Habeas Corpus: State Cases - AEDPA Discourages Submission of New Evidence

Although state prisoners may sometimes submit new evidence in federal court, AEDPA'S statutory scheme is designed to strongly discourage them from doing so.
Cullen v. Pinholster, Case No. 09-1088 (S. Ct. 4/4/11); French f. Warden Wilcox, Case No. 12-15385 (11th Cir. 6/23/150

Habeas Corpus: State Cases - Need Not Be a Written Opinion for the State Court to Have Adjudged Case on the Merits

Herrington v. Richter, Case No. 09-587 (S. Ct. 1/19/2011)

Habeas Corpus: State Cases - Federal Claims Presumed to Adjudicated on Merits

When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law principles to the contrary.
Warden v. Richter, Case No. 09-587 (S. Ct. 1/19/11)

Habeas Corpus: State Cases - Federal Court Not Always Bound By State Court Findings

District court was not "duty-bound" to accept state-court findings fairly supported by the record where the state court's procedures may not have provided the petitioner with a full, fair, and adequate hearing.
Jefferson v. Upton, Case No. 09-8852 (S. Ct. 5/24/10)
Habeas Corpus: State Cases - "Properly Filed"
An application is properly filed under §22244(d)(2) when it is delivered to and accepted by th appropriate court officer for placement into the official record. The term properly filed thus refers to application's compliance wit the applicable laws and rules governing filings. For example, the filing requirements typically include the form of the document, the time limits upon its delivery, the cort and office in which it must be lodged, and the requisite filing fee.
Thomson v. Secretary Department of Corrections, Case No. 08-10540 (11th Cir. 1/27/10)
Habeas Corpus: State Cases - Federal Review Not Always Barred By State Invocation of Procedural Rule
Federal Habeas review is not barred every time a state court invokes a procedural rule to limit its review of a state prisoner's claim. The adequacy of state procedural bars to the assertion of federal questions is not within the State's prerogative finally to decide; rather, adequacy is itself a federal question.
Cone v. Bell, Case No. 07-1114 (S. Ct. 12/9/08)
Habeas Corpus: State Cases - State's Failure to Grant Evidentiary Hearing on Post-Conviction Claim
A state court's failure to conduct an evidentiary hearing on a post-conviction motion does not constitute a cognizable claim for habeas relief.
Carroll v. Secretary, DOC, cAse No. 08-14317 (11th Cir. 7/17/09)
Habeas Corpus: State Cases - Narrow Interpretation of "Clearly Established" Federal Law
Federal courts are to treat federal law as clearly established only if there is Supreme Court caselaw involving facts at least closely related or similar to the case under consideration.
House v. Hatch, Case No. 05-2129 (10th Cir. 5/6/08), Thaler v. Haynes, Case No. 09-273 (S. Ct. 2/22/10)
Habeas Corpus: State Cases: Constitutional Error - Standard of Review
In 28 USC 2254 proceedings, a federal court must assess the prejudicial impact of constitutional error in a state-court criminal trial under Brecht's "substantial and injurious effect" standard, whether or not the state appellate court recognized the error and reviewed it for harmlessness under the "harmless beyond a reasonable doubt" standard set forth in Chapman v. California.
Fry v. Pliler, Case No. 06-5247 (S. Ct. 6/11/07)
Habeas Corpus: State Cases - Strickland
Under AEDPA, however, the question is not whether the defendant would have satisfied Strickland's test if his claim were being analyzed in the first instance. Rather the petitioner must show that the state court applied Strickland to the facts of his case in an objectively unreasonable manner or that the state court decided this case differently than the Supreme Court on materially indistinguishable facts and thus was contrary to the Strickland standard.
Jennings v. Crosby, Case No. 5:02cv174 (N.D. Fla. 9/29/05)(Hinkle, R)
Habeas Corpus: State Cases - Appeals (Giglio - Harmless Error)
While the Eleventh Circuit has held on several occasions that Giglio's "any reasonable likelihood" standard is the equivalent to the harmless error inquiry of Chapman v. California, 386 US. 18 (1967), it is not clearly established federal law as determined by the Supreme Court,

since no majority has ever held that the Giglio standard is the equivalent of the Chapman standard.
Ventura v. Attorney General, Case No. 04-14564 (11th Cir. 8/9/05)
Habeas Corpus: State Cases - Federal Claim Must Be Presented in State Court
Under 28 USC 1257(a) and its predecessors, the Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision.
Howell v. Mississippi, Case No. 03-9560 (S. Ct. 1/24/05); Preston v. Secretary, Florida Dept. of Corrections, Case No. 12-14706 911th Cir. 4/29/15)
Habeas Corpus: State Cases - Erroneous Instruction on Aggravating Circumstance
If there is to be federal review of an erroneous instruction on an aggravating circumstance in a state capital case, it isn't enough to show that the instruction was vague or erroneous. If the state can show that the state court reviewing the sentence had adopted a narrowing construction and applied it, the federal court, with the deference due state decisions, will not review the claim.
Bell v. Cone, Case No. 04-394 (S.Ct. 1/24/05)
Habeas Corpus: State Cases - Ineffective Assistance (Objectively Unreasonable Manner)
In addition to deference to counsel's performance mandated by Strickland, the AEDPA adds another layer of deference - this one to a state court's decision - when we are considering whether to grant federal habeas relief from a state court's decision. Rutherford must do more than satisfy te Strickland standard. He must also show that in rejecting his ineffective assistance of counsel claim the state court "applied Strickland to the facts of his case in an objectively unreasonable manner.
Rutherford v. Crosby, Case No. 03-13188 (1th Cir. 9/21/04)
Habeas Corpus: State Cases - Governed by Both 2241 and 2254
One year time limit challenging a parole revocation was limited by the one year time limit in 28 U.S.C. 2254.
Peoples v. Chatman, Case No. 03-12384 (11th Cir. 12/20/04)
Habeas Corpus: State Cases - Governed by Both 2241 and 2254
Even when a state prisoner challenges a parole decision, his habeas corpus petition is governed by both 28 USC 2254, and 28 USC 2241.
Thomas v. Crosby, Case No. 01-11314 (11th Cir. 5/26/04)
Habeas Corpus: State Cases - Presumption of Correctness & Ground for Relief
For the general statement about the presumption of correctness, the burden of rebutting it, and the basis for relief, see:
Carr v. Schofield, Case No. 02-11488 (11th Cir. 3/31/04)
Habeas Corpus: State Cases - Must Seek Even Discretionary Review In State Court
Although state prisoners are not required to pursue discretionary review if it would be considered to be "extraordinary," court concluded that, at least in Georgia, state prisoners must seek a certificate of probable cause to appeal the decision to the Georgia Supreme Court to comply with the exhaustion requirement.
Pope v. Rich, Case No. 03-13218 (11th Cir. 1/30/04)
Habeas Corpus: State Cases - "Firmly Established and Regularly Followed"
Only rules that are "firmly established and regularly followed" qualify for adequate state grounds for precluding substantive review of federal claims.
Moore v. Campbell, Case No. 02-11302 (11th Cir. 9/15/03)

Habeas Corpus: State Cases - Independent Determination of Law and Application of Law to Facts
A federal court reviewing a state prisoner's petition for habeas relief must make an independent federal determination in deciding questions involving constitutional law and the application of constitutional law to the facts under the totality of the circumstances of a particular case. Therefore, a trial court's determination as to whether a petitioner has been denied his Sixth Amendment right to effective counsel is not entitled to the presumption; we must make that determination anew.
Hardwick v. Crosby, Case No. 97-2319 (11th Cir. 1/31/03)
Habeas Corpus: State Cases - Facts Not Entitled to Presumption of Correctness Absent Adequate State Hearing
State-court factual findings are not entitled to a presumption of correctness where the petitioner did not receive a full, fair, and adequate hearing in the state court proceeding.
Hardwick v. Crosby, Case No. 97-2319 (11th Cir. 1/31/03)
Habeas Corpus: State Cases - Presumption of Correctness Not Insurmountable
"[O]ur court has recognized that the presumption of correctness generally applicable to federal habeas review of state court factual findings is not insurmountable or irrebuttable. Historical facts found by state courts in evaluating ineffectiveness claims are not presumed correct if they are clearly erroneous."
Hardwick v. Crosby, Case No. 97-2319 (11th Cir. 1/31/03)
Habeas Corpus: State Cases - Unreasonable Application
State court's conclusion that judge's comments were not sufficiently final to terminate jeopardy and preclude continued prosecution for first-degree murder was not objectively unreasonable application of clearly established Supreme Court law.
Price v. Vincent, Case No. 02-524 (S. Ct. 5/19/03); Guzman v. Secretary, Dept. Of Corrections, Case No. 10-11442 (11th Cir. 10/27/11)
Habeas Corpus: State Cases - Unreasonable Application (New Context)
While the Supreme Court in Williams considered whether an unreasonable application might include a situation where a state court unreasonably refuses to extend a legal principle to a new context, the Court declined to rule on the issue and the issue remains unsettled.
Hawkins v. Alabama, Case No. 01-16904 (11th cir. 1/27/03)
Habeas Corpus: State Cases - Failure to Develop Factual Basis for Claim
Subject to the very narrow exceptions set forth in 2254(e)(2), a petitioner who fails to develop the factual basis for a claim while in state court as a result of the petitioner's lack of diligence is barred from doing so in federal court.
Crawford v. Head, Case No. 01-10215 (11th Cir. 11/12/02)
Habeas Corpus: State Cases - Summary State Opinion Doesn't Diminish Deference
The summary nature of a state court's decision does not lessen the deference that it is due.
Hall v. Head, Case No. 01-15313 (11th Cir. 10/25/02); Peoples v. Campbell, Case No. 96-6882 (11th Cir. 7/21/04)
Habeas Corpus: State Cases - Summary Rejection Equal Deference
A state's summary, i.e. unexplained, rejection of a federal constitutional issue qualifies as an adjudication under § 2254(d) so that it is entitled to deference.
Wright v. Moore, 15 FLW Fed C219 (11th Cir. 1/10/02)
Habeas Corpus: State Cases - Factual Determinations

A state court's determinations of fact shall be presumed to be correct and the habeas petitioner shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
Parker v. Head, 244 F.3d 831 (11th Cir. 2001)

Habeas Corpus: State Cases - Mixed Questions of Fact and Law

The statutory presumption of correctness applies only to findings of fact made by the state court, not to mixed determinations of law and fact.
Parker v. Head, 244 F.3d 831 (11th Cir. 2001)

Habeas Corpus: State Cases - Unreasonable Application

Factual determinations by state courts re presumed to be correct, and petitioner can rebut this presumption only by clear and convincing evidence. This presumption, however, only applies to findings of fact, not to mixed determinations of law and fact. The presumption of correctness applies to trial and appellate state courts.
Jennings v. Crosby, Case No. 5:02cv174 (N.D. Fla. 9/29/05)(Hinkle, R)

Habeas Corpus: State Cases - AEDPA ("Contrary To")

A state court decision is contrary to clearly established federal law if either (1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached by the Supreme Court case.
Jennings v. Crosby, Case No. 5:02cv174 (N.D. Fla. 9/29/05)(Hinkle, R); Maharaj v. Secretary for the Dept. of Corrections, Case No. 04-14669 (11th Cir. 12/15/05); Gore v. Secretary for the Dept. of Corrections, Case No. 06-11522 (11th Cir. 7/20/07); Everett v. Secretary, Fla. Dept. of Corr., case No. 14-11857 (11th Cir. 2/27/15)

Habeas Corpus: State Cases - Appellate Review

As to the district court's findings of fact, they are reviewed under the clearly erroneous standard. Mixed questions of law and fact are review de novo, as are questions of law.
Parker v. Head, 244 F.3d 831 (11th Cir. 2001)

Habeas Corpus: State Cases - Tolling of Statute for Properly Filed State Claim

The district court erred in finding that the defendant's 2254 claim was not properly filed where it relied on finding that petitioner's claim was procedurally barred as proof that application was improperly filed; rather than considering where the Rule 3.850 motion met Florida's law and rules governing filings.
Hardy v. Secretary for the Department of Corrections, 14 FLW Fed C573 (11th Cir. 4/4/01); Delancy v. Florida Department of Corrections, 14 FLW Fed C592 (11th Cir. 4/6/01)

Habeas Corpus: State Cases - AEDPA ("Unreasonable Application")

When a state court decision unreasonably applies the law of this Court to the facts of a prisoner's case, a federal court applying §2254(d)(1) may conclude that the state-court decision falls within that provision's "unreasonable application" clause.... an unreasonable application of federal law is different from an incorrect application of federal law.
Williams v. Taylor, 13 FLW Fed S225 (4/18/00); Parker v. Head, 244 F.3d 831 (11th Cir. 2001); Bell v. Cone, 122 S. Ct. 1843 (2002);Jennings v. Crosby, Case No. 5:02cv174 (N.D. Fla. 9/29/05)(Hinkle, R); Schiriro v. Landrigan, Case No. 05-1575 (S. Ct. 5/14/07); Warden v. Richter, Case No. 09-587 (S. Ct. 1/19/11); Herrington v. Richter, Case No. 09-587 (S. Ct. 1/19/2011); Premo v. Moore, Case No. 09-658 (S. Ct. 1/19/11); Renico v. Lett, Case No. 09-338 (S. Ct. 5/3/10)

Habeas Corpus: State Cases - AEDPA ("Contrary")

"First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts fats that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours."
Williams v. Taylor, 13 FLW Fed S225 (4/18/00)
Habeas Corpus: State Cases - AEDPA (Conflict With Law Established by Supreme Court)
"If this Court has not broken sufficient legal ground to establish an asked-for-constitutional principal, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar."
Williams v. Taylor, 13 FLW Fed S225 (4/18/00)
Habeas Corpus: State Cases - "Contrary to...Or An Unreasonable Application"
"A state court acts contrary to clearly established federal law if it applies a legal rule that contradicts our prior holdings or if it reaches a different result from one of our cases despite confronting indistinguishable facts. The statue also authorizes federal habeas corpus relief if, under clearly established federal law, a state court has been unreasonable in applying the governing legal principle to the facts of the case. A state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which te principle should have controlled."
Ramdass v. Angelone, 13 FLW Fed S412 (6/12/00); Ventura v. Attorney General, Case No. 04-14564 (11th Cir. 8/9/05)

Successive Petitions

Habeas Corpus - Successive Petitions: No Appeal from Denial
In re: Clayton, No. 16-14556 (11th Cir. 7/18/16) (Martin, J. concurring)
Habeas Corpus - Successive Petitons: Second Request
A later request of a prisoner who previously filed a request for authorization to file a second or successive petition base on the same claim must be dismissed.
In re Baptiste, No. 16-13959, 2016 WL 3752118 (11th Cir. July 13, 2016); In re Parker, No. 16-13814, 2016 WL 4206373 (11th Cir. Aug. 8, 2016)
Habeas Corpus: Successive Petitions - Graham v. Florida
Court held that defendant could raise in a successive petition the categorical prohibition of life without parole for juveniles who did not commit a homicide that was established in Graham v. Florida.
In re: Moss, Case No. 12-16244-A (11th Cir. 1/2/13)
Habeas Corpus: Successive Petitions - Death Penalty (Mental Retardation)
Court determined a successive petition raising mental retardation claim was barred because, though there was additional evidence supporting his claim, the same claim had been presented and rejected in the initial 2254 petition. Even if the claim could be considered based on the discovery of new evidence, it would still be barred because the new evidence went only to the issue of the sentence, falling short of the requirement in 28 U.S.C. §2244(b)(2) that the new evidence was of such character that no fact finder would have found the defendant guilty of the offense.

In re: Hill, Case No. 13-10702 (11th Cir. 4/22/13)
Habeas Corpus: Successive Petitions - ACCA Sentences
Where the defendant's predicate offenses no longer qualified, court still lacked jurisdiction to consider defendant's 2241 petition. Opinion includes a dissent from Judge Martin.
Williams v. Warden, Case No. 11-13306 (11th Cir. 4/11/13)
Habeas Corpus: Successive Petitions - Miller v. Alabama
Court concluded defendant could not raise the holding in Miller v. Alabama regarding life sentences for juveniles convicted of murder in a successive petition.
In re: Morgan, Case No. 13-11175 (11th Cir. 4/12/13)
Habeas Corpus: Successive Petitions - Life Sentences for Juveniles Convicted of Murder
Writing in regard to an order denying rehearing en banc in one of Chet's cases, Judge Pryor, in response to the dissents filed by three of the judges, wrote that the decision in Graham v. Florida, 130 S. Ct. 2011 (2010), that prohibited the automatic imposition of a life sentence on a juvenile for murder was neither a substantive rule nor a watershed rule of procedure implicating fundamental fairness and accuracy and, therefore, not retroactive.
In re: Morgan, case No. 13-11175 (11th Cir. 6/10/13)
Habeas Corpus: Successive Petitions - Vacated Conviction That Occurs After Initial 2255
Where essential predicate conviction for a career offender was vacated by the state court after the prisoner had litigated an initial 2255 petition, the prisoner's second petition raising the claim that he was not longer a career offender was not, for purposes of 2255, a successive petition.
Stewart v. U.S., Case No. 09-15821 (11th Cir. 7/14/11)
Habeas Corpus: Successive Petitions - 2241 Can't Be Used to Circumvent Limitations on Successive Petitions for Challenges to the Length of the Sentence
The "savings clause" of 28 U.S.C. § 2255(e), which allows for a 28 U.S.C. § 2241 petition to be "entertained" if it "appears that the remedy [afforded by 18 U.S.C. § 2255 is inadequate or ineffective to test the legality of [the defendant's] detention," does not authorize a federal prisoner to bring a § 2241 petition claim, which would otherwise be barred by the limitations on successive petitions that the sentencing guidelines were misapplied in a way that resulted in a longer sentence not exceeding the maximum. In this case, the court of appeals held that the defendant could not challenge his career offender sentence that relied on the crime of carrying a concealed firearm, an offense the court of appeals had subsequently decided was not a crime of violence.
Gilbert v. U.S., 640 F.3d 1293 (11th Cir. 2011)
Habeas Corpus: Successive Petitions - Not a Successive Petition if it Challenges a New Judgment
A habeas petition which challenges a new judgement cannot be considered a successive petition. Accordingly, the defendant's failure to raise a fair-warning claim in his initial petition did not prevent him from raising it in his petition challenging the judgement that issued after he prevailed on his first habeas petition.
Magwood v. Patterson, Case No. 09-158 (S. Ct. 6/24/10)
Habeas Corpus: Successive Petitions - Not a Successive Petition if Issue Didn't Exist Earlier
In a case involving the reinstatement of a sentence from which the North Carolina Parole Commission had granted an unconditional discharge, the Court held that the defendant's challenge to that reinstatement was not a successive petition for the purposes of the AEDPA. So

long as a subsequent petition raises an issue or issues that factually could not have been raised when the earlier petition was filed, it is not a successive petition.
In re Cabey, Case No. 04-277 (4th Cir. 11/15/05); Boyd v. U.S., Case No. 11-15643 (11th Cir. 6/8/14)

Habeas Corpus: Successive Petitions - Reasonable Likelihood of Success

Where as in this case, there was a new constitutional rule (the prohibition against executing the mentally retarded established in Atkins v. Virginia, the petitioner is still obligated to show that there is a reasonable likelihood of success. The standard has been explained that there must be "a sufficient showing of possible merit to warrant a fuller exploration by the district court." In this case there was conflicting testimony about whether the defendant was mentally retarded and the court granted the defendant's last minute request for a stay of execution.
In re: Holladay, Case No. 03-12676 (11th Cir. 5/26/03)

Habeas Corpus: Successive Petitions - Successful Claim That Lawyer Failed to Appeal

A successful motion to file an out-of-time notice of appeal is not to be counted as a first petition for purposes of subsequent collateral proceedings.
McIver v. United States, Case No. 01-10507 (11th Cir. 9/30/02)

Habeas Corpus: Successive Petitions - Vacation of Prior State Convictions

Where defendant went back and, in state court, successfully overturned two prior uncounseled convcitions that had been used to calculate his guideline score, he still could not raise the issue in a successive petition.
In Re: Dean, Case No. 03-13457 (11th Cir. 8/13/03)

Habeas Corpus: Successive Petitions - Only Two Possibilities

There are only two possibilities for obtain certification by the Court of Appeals for the filing of a second or successive habeas petition: (1) if the petitioner makes a showing of duly discovered evidence that establishes his or her innocence or (2) points to a new rule of constitutional law, recognized by the Supreme Court and made retroactively applicable to cases on collateral review.
U.S. v. Diaz-Clark, 292 F.3d 1310 (11th Cir. 2002)

Habeas Corpus: Successive Petitions - Requisite Showing

To obtain relief in a second of successive petition the rule on which a claim relies must be a "new rule" of constitutional law; the rule must have been "made retroactive to cases on collateral review by the Supreme Court"; and the claim must have been "previously unavailable."
Tyler v. Warden, 14 FLW Fed S453 (6/28/01); In re: Everett, Case No. 15-133371 (11th Cir. 8/13/15)

Habeas Corpus: Successive Petitions - "Miscarriage of Justice"

The miscarriage of justice exception is concerned with actual as compared to legal innocence. To be credible a claim of actual innocence requires petitioner to support his allegations of constitutional error with new reliable evidence that was not presented at trial. More specifically, the petitioner must demonstrate that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.
High v. Head, 13 FLW Fed C617 (11th Cir. 4/19/00)

Habeas Corpus: Successive Petition - "Cause"

In order to show cause for not raising a claim in an earlier petition, a petitioner must show some external impediment preventing counsel from construction or rasing the claim. Examples of objective factors external to the defense that constitute cause include interference by officials and

"a showing that the factual or legal basis for a claim was not reasonably available to counsel.
High v. Head, 13 FLW Fed C617 (11th Cir. 4/19/00)

Time Limits

Habeas Corpus: Time Limits - 2254 (Florida 3.800(c) Motion Tolls Time)
A motion to reduce or modify sentence, filed pursuant to Rule 3.800() of the Florida Rules of Criminal Procedure, tolls the running of the one-year time period which a defendant has to file his 2254 motion.
Rogers v. Secretary, Dept. of Corrections, Case No. 15-2880 (11th Cir. 5/2/17)
Habeas Corpus: Time Limits - 2254 (Not Tolled By Cert Petition)
The one-year limitations period is not tolled during the time a petition for a writ of certiorari to review the state court's denial of collateral relief is pending in the United States Supreme Court, or during the ninety-day period in which it could have been filed.
Coates v. Byrd, 211 F.3d 1225, 1227 (11th Cir. 2000)
Habeas Corpus: Time Limits - Equitable Tolling (Diligence)
Although the failure to timely file the 2254 petition was due to the miscalculation of the defendant's lawyer, the court declined to apply equitable tolling in a case where the petition was filed almost 4 years too late. His lawyer had failed to begin state post-conviction remedies before the 1 year 2254 limit and were actively litigating the case in state court during the 4 years. In the view of the court of appeals, the defendant was not entitled to equitable relief because he had not, on is own, diligently pursued the federal claim. Judge Barkett, citing the Justice Cantero's comments about the poor performance of lawyers, dissented and questioned whether "a death row inmate must bear the consequences of his lawyer's negligence."
Hutchinson v. Florida, Case No. 10-14978 (11th Cir. 4/19/12); Cadet v. Florida Dept. of Corrections, Case No. 12-14518 (11th Cir. 1/31/14); Cadet v. Florida Dept. of Corrections, Case No. 12-14518 (11th Cir. 2/24/17)
Habeas Corpus: Time Limits - Courts of Appeal May Raise Forfeited Timeliness Defense
Courts of appeals, like district courts, have the authority - though not the obligation - to raise a forfeited timeliness defense on their own initiative.
Wood v. Milyard, Case No. 10-9995 (S. Ct. 4/24/12)
Habeas Corpus: Time Limits - Judgment Becomes Final When Time for Seeking Review Expires
For a state prisoner who does not seek review in a State's highest court, the judgement becomes final on the date that the time for seeking such review expires.
Gonzalez v. Thaler, Case No. 10-895 (S. Ct. 1/10/12)
Habeas Corpus: Time Limits - Rule 35 Did Not Reset the Clock
The reduction of the defendant's sentence for substantial assistance pursuant to a Rule 35 motion did not rest the time clock for purposes of the 2255 time clock.
Murphy v. U.S., Case No. 07-14823 (11th Cir. 3/8/11)
Habeas Corpus: Time Limits - Equitable Tolling
AEDPA's one-year time limit is subject to equitable tolling. In this instance, the delay was caused by the defendant's grossly incompetent conduct of his lawyer and the time period was extended. "Garden-variety" negligence would not have given rise to equitable tolling.
Holland v. Florida, Case No. 09-5327 (S. Ct. 6/14/10)

Habeas Corpus: Time Limits - Untimely State Petition Does Not Toll Time Limits
Because prisoner's petition for state post-conviction relief was rejected as untimely by the Alabama courts, it was not "properly filed" under §2244(d)(2) and the prisoner was not entitled to tolling of the Anti-Terrorism and Effective Death Penatly Act's one-year statute of limitations.
Allen v. Siebert, Case No. 06-1680 (S. Ct. 11/5/07)
Habeas Corpus: Time Limits - No Equitable Tolling of 14-Day Extension
Rule 4 of the Appellate Rules applicable to civil appeals allows the court to reopen the time for filing an appeal under some circumstances. The rule provides for a 14 day extension of time. Here, the district court judge reopened the time for filing an appeal of the denial of the defendant's habeas petition, but erroneously told the defendant he had 17 days to file his notice. When the defendant filed his notice after the 14-day period, but within the 17 days, the court lacked jurisdiction to consider the appeal and the appeal was dismissed. In dissent, Justice Souter wrote: "It is intolerable for the judicial system to treat people this way, and there ins not even a technical justification for condoning this bait and switch."
Bowles. V. Russell, Case No. 06-5306 (S. Ct. 6/14/07)
Habeas Corpus: Time Limits - Cert Petition to U.S. Supreme Court Re: State Post-Conviction
A defendant's cert petition to the United States Supreme Court following the state courts denial of post-conviction relief does not toll the running of the 1-year limitation period of 18 USC § 2244(d).
Lawrence v. Florida, Case No. 05-8820 (S. Ct. Feb. 20, 2007)
Habeas Corpus: Time Limits - Prison Mail Box Rule
Even though more than a year had passed since the deadline, Court could not automatically reject the defendant's habeas appeal when he claimed he had delivered the notice of appeal to the prison authorities within the one year time limit. To do so, the district court would need to make a finding of fact as to whether the notice was delivered to the prison authorities.
Allen v. Culliver, Case No. 05-1432 (11th Cir. 12/6/06)
Habeas Corpus: Time Limits - Untimely State Post-Conviction Motion Didn't Toll Time
Federal period was not tolled for second post-conviction filed in state court because the motion was denied as untimely and, therefore, was not "properly filed."
Sweet v. Secretary Department of Corrections, Case No. 05-15199 (11th Cir. 10/23/06)
Habeas Corpus: Time Limits - Time To Appeal 3.800 Motion Tolled Limitation Period
Time during which petitioner could have sought an appeal of the denial of his Fla. R. Crim. P. 3.800 motion for correction of sentence tolled limitations period.
Cramer v. Secretary, Dept. of Corrections, Case No. 05-15948 (11th Cir. 8/28/06)
Habeas Corpus: Time Limits - Resentencing
Where petitioner was resentenced after conviction was affirmed on direct appeal, one-year limitations period was measured from date resentencing judgment, not original conviction, became final.
Robbins v. Sec. for Dept. of Corrections, Case No. 05-14992 (11th Cir. 4/3/07)
Habeas Corpus: Time Limits - Resentencing (Time Runs from Original Judgment)
When a petitioner who has been resentenced brings an application challenging only his original judgment of conviction, the one-year statute of limitations under AEPDA runs from the date the original judgment of conviction became final and not the date the resentencing judgment became final.
Rainey v. Secretary for the Dept. of Corrections, Case No. 04-13282 (11th Cir. 3/29/06)

Habeas Corpus: Time Limits - Rule 33 Motion for New Trial Doesn't Toll Time Limits
A Rule 33 motion for new trial based on newly discovered evidence is neither a continuation or extension of a direct appeal and does not serve to toll AEDPA's one-year time limitation period for filing a § 2255 motion.
Barnes v. United States, Case No. 05-10856 (11th Cir. 1/24/06)
Habeas Corpus: Time Limits - State Cases (Court May Sua Sponte Raise the Issue of Timeliness)
Even though the statute of limitations is an affirmative defense, the district court may review sua sponte the timeliness of the 2254 petition.
Jackson v. Moore, Case No. 0114933 (11th Cir. 6/7/02)
Habeas Corpus: Time Limits - State Petition, Even Though Dismissed as Too Late, Tolled One Year Time Limit
Defendant's Alabama post-conviction petitions, which were accepted by the courts but ultimately found to have been filed late, were properly filed within the meaning of the AEDPA's tolling provision, and, therefore, fell within the one year AEDPA time limit.
Siebert v. Campbell, Case No. 02-13685 (11th Cir. 6/23/03), decision rejected by Hurth v. Mitchem, Case No. 03-11471 (11th Cir. 2/16/05)
Habeas Corpus: Time Limits - One Year Time Limit Runs From Date Right Recognized
The one-year time limit of 18 USC 2255 based on a newly recognized right commences n the date on which the U.S. Supreme Court initially recognized the right asserted in the motion, not the date on which the right was made retroactive.
Dodd v. U.S., Case No. 04-5286 (S.Ct. 3/22/05)
Habeas Corpus: Time Limits - Government's Erroneous Concession of Timeliness
Although the Sixth Circuit has held to the contrary, the court held that a concession of timeliness by the state that is patently erroneous does not compromise the authority of the district court to dismiss sua sponte a habeas petition that is untimely under the AEDPA.
Day v. Crosby, Case No. 04-10778 (11th Cir. 11/29/05)
Habeas Corpus: Time Limits - Relation Back
Amended petition does not relate back, and thereby escape AEDPA's one-year time limit, when it asserts a new ground for relief supported by facts that differ both in time and type from those alleged in the original petition.
Mayle v. Felix, Case No. 04-563 (11th Cir. 6/23/05)
Habeas Corpus: Time Limits - Vacation of Predicate Offense
In those cases where a prisoner attacks his enhanced federal sentence because he has successfully vacated the offense that served as the predicate, the one year time limit in 28 USC 2255, begins to run when a petitioner receives notice that the order vacating the prior conviction. There remains a requirement that defendant promptly challenge his state conviction (within 1 year of the federal judgment).
Johnson v. U.S. , Case No. 03-9685 (U.S. 1/18/05); Rivers v. U.S. Case No. 03-11734 (11th Cir. 7/14/05)
Habeas Corpus: Time Limits - Untimely State Petition Doesn't Toll AEDPA's Time Limit
A state post conviction pleading rejected by the state court as untimely is not "properly filed" application for state post conviction or other collateral review that tolls AEDPA's limitations period under 28 USC 2244(d)(2).
Pace v. DiGuglielmo, Case No. 03-9627 (U.S. 4/27/05)
Habeas Corpus: Time Limits - Appeal

Appeals in 2255 proceedings are treated as civil in nature and are governed by Fed. R. App. P. 4(a)(1)(B), which allows 60 days for filing the notice of appeal where the government is a party.
Butcher v. U.S., Case No. 02-17033 (11th Cir. 5/5/04)

Habeas Corpus: Time Limits - Recognition of New Right

Begins to run, not on the date the a court finds the decision to be retroactive, but on the date the Supreme Court finds the right to exist. There is a split among the circuits.
Dodd v. U.S., Case No. 02-16134 (11th Cir. 4/16/04)

Habeas Corpus: Time Limits- Resentencing Date Irrelevant

The trial court properly found that the date of the petitioner's resentencing was irrelevant for purposes of determining when the Anitterroism and Effective Death Penalty Act's one-year limitations period for federal writs of habeas corpus had commenced because petitioner was challenging only the validity of his underlying conviction.
Boone v. Secretary, Dept of Corrections, Case No. 03-16381 (11th Cir. 6/4/2004)

Habeas Corpus: Time Limits - Federal Cases (Clock Starts Running When Cert Time Expires)

For purposes of starting the clock on 2255's one year time limit when there is an unsuccessful direct appeal but no cert petition filed, the judgement becomes final when the time expires for filing a petition for cert.
Clay v. United States, 537 U.S. 522 (S. Ct. 2003)

Habeas Corpus: Time Limits - 3.800 Motion Tolled Time Limit

See: Ford v. Moore, Case No. O1-10317 (11th Cir. 7/2/02)

Habeas Corpus: Time Limits - Ninety Day Cert

The one year time period under the AEDPA does not begin to run until the 90 day period to seek certiorari has expired.
Kaufmann v. U.S., 15 FLW FedC311 (11th 2/21/02); Bond v. Moore, Case No. 00-16544 (11th Cir. 10/10/02)

Habeas Corpus: Time Limits - Begins Running Day After Order

U.S. v. Marcello, 212 F.3d 1005 (7th Cir. 2000)

Habeas Corpus: Time Limits - Federal Petition Does Not Toll Time Limits

In 2254 cases where the petition is dismissed for a failure to exhaust state remedies, the time in which the 2254 claim has been pending does not toll the running of the one year time limit. Given the time in which it may take the district court to dismiss the initial 2254 petition and the time to exhaust the state remedies, many a petitioner is going to be out of luck. In Judge Souter's concurring opinion he suggests that the district court may retain jurisdiction over the case while the petitioner returns to state court to exhaust his remedies and suggests that such a situation might justify reliance upon equitable tolling.
Duncan v. Walker, 14 FLW Fed S366 (3/26/01)

Habeas Corpus: Time Limits - Cert Petition

The time period for filing a 2255 motion begins to run when the Supreme Court either denies certiorari or issues a decision on the merits.
Washington v. U.S., 243 F.3d 1299 (11th Cir 2001)

Habeas Corpus: Time Limits - Objections to Report and Recommendation

The 10 day time period does not include holidays and weekends.
U.S. v. Ramey, 1998 U.S. App. LEXIS 1895 (4th Cir. 1998); Kent v. Johnson, 821 F.2d 1220 (6th Cir. 1987)

Habeas Corpus: Time Limits - Effective Date of AEDPA

The one year time period of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) could not be applied retroactively, so Section 2254 petition for writ of habeas corpus that was filed two months after effective date, 4/24/96, of the Act was timely filed for because it was filed within a reasonable time, within one year from the Act's effective date.
Wilcox v. Florida Dept. of Corrections, 158 F.3d 1209 (11th Cir. 1998)

Habeas Corpus: Time Limits - Tolling of Federal Time "Properly Filed" State Motion

Following the denial of the defendant's first 3.850 he filed "successive motions" which were rejected by the Fla. Courts because they were prohibited by the rule. The filing of those "successive motions" did not toll the running of the AEDPA one year period as they were not "properly filed."
Weekly v. Moore, 13 FLW Fed C414 (11t Cir. 2/24/00); Nyland v. Moore, 13 FLW Fed C823 (11th Cir. 6/30/00)

Habeas Corpus: Time Limits - Filing State Post-Conviction Claim Tolls AEDPA

The state petition must meet state filing deadlines to toll the AEDPA statute of limitation. The federal court must defer to the state court's determination as to whether the petitioner met the state filing deadlines.
Webster v Moore, 13 FLW Fed C322 (11th Cir. 1/4/00)

Habeas Corpus: Time Limits - AEDPA Dosen't Violate Constitution

One year limitation period for filing federal habeas corpus petition established by 28 USC 2244(d), as a general matter, does not render collateral relief ineffective or inadequate to test the legality of detention, and therefore is not an unconstitutional suspension of the writ of habeas corpus.
Wyzykowski v. Department of Corrections, 226 F.3d 1213 (11th Cir. 2000)

Habeas Corpus: Time Limits - Actual Innocence Exception to Time Limits?

Maybe.
Wyzykowski v. Department of Corrections, 226 F.3d 1213 (11th Cir. 2000), Dretke v. Haley, Case No. 02-1824 (S. Ct. 5/3/04)

Habeas Corpus: Time Limits - Amendment

Even though the initial timely filed petition alleged ineffective assistance of counsel, additional claims regarding ineffective assistance of counsel were, not for purposes of the one year deadline considered amendments to the initial petition. They were, therefore, because they were filed after the passage of a year, untimely, and the court refused to consider them.
Davenport v. U.S., 217 F.3d 1341 (11th 2000)

Habeas Corpus: Time Limits - Omitted Signature

Where initial petition was timely, but was dismissed because it lacked a signature, the refiling of the same petition, with a signature, should have been treated as an amendment to the original petition, and was, thus, timely.
Mederos v. U.S., 13 FLW Fed C858 (11th Cir. 7/17/00)

Habeas Corpus: Time Limits - Equitable Tolling

Section 28 USC 2244 is a statute of limitations, not equitable tolling. Therefore, it permits equitable tolling "when a movant untimely files because of extraordinary circumstances that are beyond his control and unavoidable even with diligence.
Steed v. Head, 13 FLW Fed C900 (7/26/00); Helton v. Secretary for the Department of Corrections, 14 FLW Fed C186 (11th Cir. 11/21/00); Knight v. Schofield, 15 FLW FedC620 (11th Cir. 5/31/02); Drew v. Dept. of Corrections, Case No. 99-4176 (11th Cir. 7/18/02)(Barkett, J. dissenting opinion)

Habeas Corpus: Time Limits - Time for Filing Cert Petition in U.S. Supreme Court
Section 28 USC 2244(d)(2) does not permit the tolling of the statute of limitations for the period of time a defendant could have petitioned the U.S. Supreme Court of cert review fo the denial of state habeas corpus relief.
Steed v. Head, 13 FLW Fed C900 (7/26/00)
Habeas Corpus: Time Limits - Relation Back to Previously Dismissed 2254 Petition
A 2254 petition cannot, for purposes of avoiding the one year time limit, relate back to the filing date of a previously filed petition that was dismissed without prejudice.
Nyland v. Moore, 13 FLW Fed C823 (11th Cir. 6/30/00)
Habeas Corpus: Time Limits - State Post-Conviction Claims
The clock starts ticking as of the issuance of the mandate, and does not include the 90 days in which the petitioner can file for certiorari in the U.S. Supreme Court.
Coates v. Byrd, 13 FLW Fed C658 (11th Cir. 5/11/00)Johnson v. United States, 13 FLW Fed S308 (5/15/00)
Habeas Corpus: Time Limits - Equitable Extension of Time Limits
Although the court has the authority to toll the time limits for filing for equitable reasons, the fact that it took longer than a week for the U.S. mail to deliver the motion to Miami from Atlanta, didn't justify an equitable tolling of the time limits. "...counsel could have avoided by mailing the motion earlier or by using a private delivery service or even a private courier."
Sandvik v. U .S., 12 FLW Fed C941 (11th Cir. 6/15/99)

HOBBS ACT

Hobbs Act: Variety of Factors Qualified Home Invasion Robbery
The fact that one of the robbers flew from one state to another, that there were interstate phone calls, and that some of the property was taken across state lines all helped to turn this home invasion robbery into a Hobbs Act violation.
U.S. v. Carcione, 15 FLW Fed C47 (11th Cir. 11/13/01)
Hobbs Act: Standard - Substantive vs. Attempt or Conspiracy
In the case of a substantive Hobbs Act offense, the impact on commerce does not need to be substantial; all that is required is a minimal impact. Where a defendant is charged with attempt or conspiracy to violate the Hobbs Act, the interstate nexus maybe demonstrated by evidence of potential impact on interstate commerce or by evidence of actual, diminimas impact.
U.S. v. Le, 14 FLW Fed C935 (11th Cir. 7/11/01)
Hobbs Act: Interstate Phone Calls or Transportation
The use of interstate or foreign transportation and communication facilities to carry out a scheme of robbery or extortion may constitute - in conjunction with other facts - a sufficient basis for a Hobbs Act prosecution.
U.S. v. Le, 14 FLW Fed C935 (11th Cir. 7/11/01)
Hobbs Act: Home Invasion Robbery
Where the money sought in a home invasion robbery was supposed to have come from the victim's business, the robbery qualified for Hobbs Act prosecution.
U.S. v. Le, 14 FLW Fed C935 (11th Cir. 7/11/01); U.S. v. Carcione, 15 FLW Fed C47 (11/13/01)
Hobbs Act: Robbery of Motel Qualified

Five robberies of motels in Miami, that netted $2,000 qualified.
U.S. v. Rodriguez, 13 FLW Fed C829 (11th Cir. 7/14/00)
Hobbs Act: Bribery of Court Clerk in State DUI Cases Justified Hobbs Act Prosecution
Incredibly thin justification.
U.S. v. Castleberry, 11 FLW Fed. C82 (11th Cir. 6/23/97)
Hobbs Act: Economic Affect Need Not Be Adverse
Despite a convincing dissent to the contrary.
U.S. v. Kaplan, 12 FLW Fed C728 (11th Cir.
Hobbs Act: Covers Transfer of Proceeds Across State Lines
U.S. v. Kaplan, 12 FLW Fed C728 (11th Cir. 4/9/99)
Hobbs Act: Covers Inchoate Offenses
U.S. v. Kaplan, 12 FLW Fed C728 (11th Cir. 4/9/99)
Hobbs Act: Robbery of Gas Station Qualified
Emphasizing that the effect on commerce need by only "minimal" robbery of an Amoco gas station of $300 met the jurisdictional requirements of the Hobbs Act, 18 USC 1951.
U.S. v. Guerra, 12FLWFedC411 (11th Cir. 1/14/99), as did a Church's Fried Chicken, 14 FLW Fed C1073 (11th Cir. 8/7/01)

HYDE AMENDMENT

Hyde Amendment: North Florida Example
District Court abused discretion in denying Hyde Amendment applications for reasonable attorney's fees and other litigation expenses incurred in criminal trial. Prosecuting defendants in defiance of controlling authority constitutes vexatious, frivolous and bad faith prosecutions.
U.S. vs. Adkinson, 14 FLW Fed C651 (11th Cir. 4/19/01)

IDENTITY THEFT

Identity Theft: Production Enhancement When Defendant Charged with Add. Identity Theft
The section of the Guidelines applicable to aggravated identity theft, § 2B1.6, does not prohibit the two-level enhancement for production, pursuant to §2B1.1(b)(11)(B)(I), as § 2B1.6 addresses only "transfer, possession, or use" of a means of identification.
U.S. v. Taylor, Case No. 14-13288 (11th Cir. 3/28/16)
Identity Theft: Tax Refunds -Enough to Show Identity Belonged to a Real Person
"A jury reasonably could conclude that the appellants knew that the cards were issued to real people, because the federal government is unlikely to issue tax returns unless it has verified that the person requesting the retrun is a real person."
U.S. v. Pierre, Cas No. 14-10589 (11th Cir. 6/14/16)
Identity Theft: Increase Pursuant to USSG §2B1.1 for Use of Unauthorized Access Device
Note 2 in the Commentary to USSG §2B1.6 (Aggravated Identity Theft) says there should not be a two-level increase under USSG §2B1.1(b)(11)(B) for production or trafficking trafficking an unauthorized access device.

U.S. v. Charles, Case No. 13-11863 (11th Cir. 7/7/14)
Identity Theft: Use of Name
Though there is a conflict with the Fourth Circuit, the court held that the use of a name, including a signature, supports a conviction for aggravated identity theft.
U.S. v. Wilson, Case No. 13-14846 (11th Cir. 6/5/15)
Identity Theft: What if Other Person Consents?
In U.S. v. Spears, 729 F.3d 753 (7th Cir. 2013), the court held that the crime of aggravated identity theft requires the government to show the person whose name is used did not consent.
but see: U.S. v. Otuya, 720 F.3d 183 (4th Cir. 2013)
Identity Theft: Need Not Be a Living Person
The aggravated identity theft statute, 18 U.S.C. § 1028A applies to the theft of the identity of any actual person, regardless of whether that person is still alive.
U.S. v. Auniga-Arteaga, Case No. 11-11673 (11th Cir. 5/21/12)
Identity Theft - Forging a Check Amounted to Aggravated Identity Theft
U.S. v. Lewis, 443 Fed. Appx. 493 (11th Cir. 2011)
Identity Theft - Circumstances Surrounding Application for Passport Was Sufficient to Show Defendant Knew Identity Belonged to a Real Person
The Defendant's dogged willingness to rely upon a birth certificate and drivers license in attempting to get a passport were sufficient to establish that he knew the identity he was using belonged to a real person.
U.S. v. Doe, Case No. 09-15869 (11th Cir. 10/26/11)
Identity Theft - Circumstances Were Sufficient to Show Defendant Knew Identity Belonged to a Real Person
The defendant's willingness to rely on the social security card in obtaining a passport, drivers licenses, and efforts at obtaining credit was sufficient to show she knew the social security number belonged to an actual person.
U.S. v. Holmes, Case No. 09-14035 (11th Cir. 2/4/10); U.S. v. Gomez-Castro, Case No. 09-12557 (11th Cir. 5/13/10); U.S. v. Baldwin, Case No. 13-12973 (11th Cir. 12/17/14)
Identity Theft - Government Must Prove Defendant Knew Identity Belonged to a Real Person
See: U.S. v. Gomez, Case No. 09-11031 (11th Cir. 8/23/09); Flores-Gigueroa v. U.S., 129 S. Ct. 1886 (2009)

IMMIGRATION AND ALIENS

Aggravated Felony

Immigration: Aggravated Felony - Bond Hearing
Though there is a circuit split, the court held that those immigrants facing removal for an aggravated felony must receive a bond hearing within a reasonable time.
Sopo v. Att'y Gen., Case No. 14-11421 (11th Cir. 6/5/16)
Immigration: Aggravated Felony - Extortionate Extension of Credit
Extortionate extension of credit (18 U.S.C. § 892(a)) is a violent felony.

Accardo v. U.S. Attorney General, Case No. 09-15446 (11th Cir. 3/10/11)
Immigration: Aggravated Felony - Recklessness is Not the Equivalent of Use of Physical Force
Arizona's assault statute included bodily injury caused by recklessness. Court found that recklessness did not fulfill the requirement established in Leocal v. Ashcroft, 541 U.S. 1 (2004) that to qualify as a crime of violence, the offense must include the "use of physical force," and that, therefore, the defendant's conviction for aggravated assault was not an aggravated felony.
U.S. v. Garcia, Case No. 09-10534 (11th Cir. 5/21/10)
Immigration: Aggravated Felony - Arizona's Aggravated Assault Not Necessarily a Crime of Violence
Because Arizona's crime of aggravated assault included a simple assault on a law enforcement officer, the court found it was not necessarily an aggravated felony.
U.S. v. Garcia, Case No. 09-10534 (11th Cir. 5/21/10)
Immigration: Aggravated Felony - Generic Aggravated Assault
A generic aggravated assault amounts to: a criminal assault accompanied by he aggravating factors of either the intent to cause serious bodily injury to the victim or the use of a deadly weapon.
U.S. v. Garcia, Case No. 09-10534 (11th Cir. 5/21/10)
Immigration: Aggravated Felony - Label State Attaches to the Offense Isn't Determinative
That Arizona had labeled the statute of which the defendant had been convicted as "aggravated assault" was not determinative of the issue of whether it was an aggravated felony.
U.S. v. Garcia, Case No. 09-10534 (11th Cir. 5/21/10)
Immigration: Aggravated Felony - Withhold of Adjudication Qualifies
U.S. v. Anderson, 328 F.3d 1326 (11th Cir. 2003)
Immigration: Aggravated Felony - Fact Specific Not Categorical
The determination of whether the prior offense was one involving Aan offense that . . . involves fraud or deciet in which the loss to the victim or victims exceeds $10,000" (8 U.S.C. § 1101(a)(43)(M)(i)) is dependent upon the facts of the prior offense.
Nijhawan v. Holder, Case No. 08-495 (S. Ct. 4/27/09)
Immigration: Aggravated Felony - Misdemeanor Under Controlled Substances Act
Conduct made a felony under state law but a misdemeanor under the Controlled Substances Act is not an aggravated felony for purposes of the Immigration and Nationality Act.
Lopez v. Gonzalez, Case No. 05-547 (S. Ct. 10/3/06)
Immigration: Aggravated Felony - Crime of Violence (Reckless?)
The definition of "crime of violence" in 18 USC 16 does not cover offenses with a recklessness mental state unless they recklessly risk the use of intentional force.
Tran v. Gonzalez, Case No. 02-3879 (3d Cir. 7/12/05), Bejarano-Urrutia v. Gonzalez, Case No. 04-2270 (4th Cir. 7/5/05)
Immigration: Aggravated Felony (Guidelines: Crime of Violence - Use of Force Must Be Intentional)
Under USSG 2L1.2(b)(1)(A), the enhancement for a crime of violence applies only to those crimes where the use of force is intentional. Accordingly a prior conviction for a Texas offense that amounted to injuring someone while driving intoxicated did not qualify for the enhancement.
U.S. v. Vargas-Duran, Case No. 02-20116 (5th Cir. 1/8/04)
Immigration: Aggravated Felony (Guidelines: Crime of Violence)

To qualify as a "crime of violence' under USSG 2L1.2(b)(1)(A)(ii) it is enough that the offense be one of the enumerated ones. The alternative of being convicted of an offense involving the use or threatened use of physical force is, just that, an alternate way of qualifying for the increase in the offense level.
U.S. v. Fuentes-Rivera, Case No. 02-14222 (11th Cir. 3/4/03)
Immigration: Aggravated Felony - Misdemeanor Child Molestation Qualified Despite the fact that the defendant was convicted in the State of Washington for a misdemeanor offense, attempted child molestation, the offense still qualified as an aggravated felony.
U.S. vs. Marin-Navarette, 14 FLW FedC548 (11th Cir. 3/23/01)
Immigration: Aggravated Felony - Lewd and Lascivious
For purposes of 18 U.S.C. 1326, a violation of section 800.04 of the Florida Statutes amounts to "sexual abuse of a minor," and is, therefore, an aggravated felony.
U.S. vs. Padilla-Reyes, 14FLWFed602 (11th Cir. 4/11/01); U.S. v. Cortes-Salazar, Case No. 11-11428 (11th Cir. 5/30/12)
Immigration: Aggravated Felony - Look to Facts
In determining whether a New York misdemeanor conviction was an aggravated felony, qualifying as a crime of violence, the court examined the facts of the case.
U.S. v. Drummond, 240 F.3d 1333 (11th Cir. 2001)
Immigration: Aggravated Felony - Includes Misdemeanors
"Aggravated felony" includes misdemeanors for which the penalty actually imposed equaled one year. Here, a shoplifting conviction qualified.
U.S. v. Christopher, 14 FLW Fed C348 (11th Cir. 1/22/01)
Immigration: Aggravated Felony - Guidelines (Sentence Imposed Upon Revocation of Probation)
In determining whether the sentence on the offense that qualifies the defendant for the 16 level enhancement under § 2L1.2(b)(1)(A)(i) meets the 13 month requirement, the length of the sentence imposed for a violation of probation is counted.
U.S. v. Compian-Torres, Casse no. 02-50211 (5th Cir. 2/18/03)

Deportation

Immigration: Deportation - Collateral Challenge to Deportation Order
A defendant charged with illegally reentering the country can collaterally challenge the validity of the deportation order. To succeed, however, the defendant must show that: (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceeding at which the order was issued improperly deprived the alien of an opportunity for judicial review; and (3) the entry of the order was fundamentally unfair.
U.S. v. Zelaya, Case No. 01-13015 (11th Cir. 6/11/02)
Immigration: Deportation - Speedy Trial Act Not Ordinarily Applicable
Because INS detentions preceding deportation are civil in nature, they do not trigger the Speedy Trial Act. It is conceivable, however, that if the detention is used by the government, not to effectuate deportation, but as mere ruses to detain a defendant for later criminal prosecution that some protection might be derived from the speedy trial act.
U.S. v. Noel, 14 FLW Fed C83 (11th Cir. 10/25/00); U.S. v. Drummond, 14 FLW Fed C404 (2/8/01)

Immigration: Deportation - Deportation Delays
Although there is a 90 day period in which deportation is to take place, the Supreme Court has held that 6 months is a presumptively reasonable period for the government to act. Even then, the individual must show that there is no significant likelihood of removal in the reasonably foreseeable future before the courts will grant relief.
Akinwale v. Ashcroft, 287 F.3d 1050 (11th Cir. 4/4/02)
Immigration: Deportation - District Court Can't Order as a Condition of Release
U.S. v. Romeo, 122 F.3d 941, 943-944 (11th Cir. 1997)
Immigration: Deportation - Cubans
Changing course after a remand from the Supreme Court, the Court held that the government could not detain the petitioner, an inadmissible alien who was a native and citizen of Cuba, more than six months beyond the 90-day removal period where removal of petitioner to Cuba was not reasonably foreseeable. The earlier decision, made a distinction between resident aliens and inadmissable aliens, and had held that the petitioner could be detained indefinitely by INS upon the completion of his prison sentence.
Benitez v. Wallis, Case No. 02-14324 (11th Cir. 3/11/05)
Immigration: Deportation - Time from Arrest to Deportation
Excluding the time from the detention to the receipt of the charging documents, which in this case lasted five weeks, removal proceedings are completed in an average time of 47 days and a median of 30.
Moore v. Kim, Case No. 01-1491 (S. Ct. 4/29/03)

Harboring or Transporting Aliens

Immigration: Harboring or Transporting Aliens - Sufficiency of Evidence
In the factually unique circumstance of a baseball agent assisting Cuban baseball players to sign with major league baseball teams, the Court of Appeals found the evidence insufficient to support a conviction for harboring or transporting aliens.
U.S. v. Dominguez, Case No. 07-13405 (11th Cir. 10/31/11)
Immigration: Harboring or Transporting Aliens - Encouraging Aliens to Enter U.S. (Encourage Means Helping)
With a strong dissent by Judge Barkett, the court of appeals held that to encourage or induce aliens to enter the United States in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) includes helping them enter. In this case, transporting the alients from the Bahamas in a boat amounted to a violation of the statute even though the defendant had nothing to do with making the arrangements for the aliens to come to the United States.
U.S. v. Lopez, Case No. 08-13605 (11th Cir. 12/22/09)
Immigration: Harboring or Transporting Aliens - "Brings To" Ends When the Initial Transporter Ends His Work
For purposes of such statutes as 18 USC 1324(a)(B)(ii) (Bringing an undocumented alien to the U.S. for financial gain) or 18 USC 1324(a)(!)(A)(ii) (transporting an undocumented alined within the United States) the phrase "brings to" describes the conduct of only the individual or individuals or transported the defendant into the United States. It doesn't apply to someone who transports an alien only within the United States.
U.S. v. Lopez, Case No. 05-50415 (9th Cir. 5/7/07)

Immigration: Harboring - Sufficiency (Encouraging and Inducing Alien to Live in the United States)
Where the defendant assisted an illegal alien in obtaining a fraudulent social security number, the court concluded that act was sufficient to support a conviction for encouraging and inducing an alien to reside in the United States (8 U.S.C. § 1324(a)(1)(A)(iv).
U.S. v. Ndiaye, Case No. 04-11283 (11th Cir. 1/6/06)
Immigration: Harboring - Transporting Illegal Aliens ("Reckless Disregard")
8 U.S.C. 1324 makes it a crime to transport an alien within the United States if the defendant knows the individual is an alien or does so "in reckless disregard" of the fact that the alien is in the United States illegally. This case includes a definition of the phrase "reckless disregard."
U.S. v. Zlatogur, 15 FLW Fed C31 (11th Cir. 10/31/01)

Illegal Reentry

Immigration: Illegal Reentry - Guilty Plea to Having Been Convicted of an Aggravated Felony Waived Right to Challenge Classification of the Aggravated Felony at Sentencing
Where defendant entered a guilty plea to having unlawfully reentering the U.S. following a conviction of an aggravated felony, 8 U.S.C. § 1326(b)(1), but objected to the classification of his prior conviction as an aggravated felony, the court of appeals held that the entry of the guilty plea amounted to a waiver of any right to challenge the aggravated-felony classification.
U.S. v. Garcia-Sandobal, Case No. 11-12196 (11th Cir. 1/3/13)
Immigration: Illegal Reentry - Statute of Limitations
Statute of limitations does not begin to run until the alien is "found in" the United States. Te question is not whether it was possible for the authorities to determine the alien was in the country illegally.
U.S. v. Garcia, Case No. 09-10534 (11th Cir. 5/21/10)
Immigration: Illegal Reentry - Indictment (Sufficiency)
The indictment alleging attempted reentry under 8 U.S.C. 1326(a) need not specifically allege a particular overt act or any other component of the offense. It is enough for the indictment to point to the relevant criminal statue and allege that the alien intentionally attempted reentry, couple with the specific time and place of the reentry.
U.S. v. Resendiz-Ponce, Case No. 05-998 (S.Ct. 1/9/07)
Immigration: Illegal Reentry - "Found" By Immigration Authorities
An alien is "found" in the United States when the government either knows of or, with the exercise of diligence typical of law enforcement authorities could have discovered the illegality of the defendant's presence. Here, the defendant confessed he was in the country illegally, but the authorities didn't get around to arresting him until 4 months later, after which time he had been convicted of a new offense, which increased his criminal history score. The Court held that the defendant was "found" once he confessed and that, therefore, the criminal history score should have been reduced.
U.S. v. Scott, Case 447 F.3d 1365 (11th Cir. 2006)
Immigration: Illegal Reentry - 18 USC 1326 Doesn't Violate Due Process
Deported alien's conviction for attempting to reenter United States without express consent to reapply for admission did not violate due process because statute under which defendant was convicted, 8 USC 1326, plainly required defendant, who had been deported, to obtain Attorney

General's express consent to reapply for admission "prior to his reembarkation" in the Dominican Republic to come to United States and no provision of 8 CFR 212.2 authorized defendant's conduct of coming to port of entry and attempting to enter United States without requesting permission to reapply for admission to United States, nor is the regulation unconstitutionally vague.
U.S. v. Marte, Case No. 02-16722 (11th Cir. 1/13/2004)
Immigration: Illegal Reentry - "Found In" United States & Statute of Limitations
For the statute of limitation to begin running in an unlawful entry case (18 USC 1326), the defendant must be found in the United States by Federal immigration and not state authorities**.**
State v. Clarke, Case No. 02-13405 (11th Cir. 11/22/02)

Miscellaneous

Immigration: Miscellaneous - 18 U.S.C. § 1425(a) - Fraudulently Procuring Citizenship
To prove a violation of 18 U.S.C. § 1425(a), falsely securing the naturalization of any person, the Government must establish that an illegal act by the defendant played some role in her acquisition of citizenship. When the illegal act is a false statement, that means demonstrating that the defendant lied about facts that would have mattered to an immigration official, because they would have justified denying naturalization or would predictably have led to ohter facts warranting that result.
Maslenjak v. U.S., Case No. 16-309 (S. Ct. 6/22/17)
Immigration: Miscellaneous - Possession of a Fraudulent Immigration Document
Where the defendant applied for a visa he falsely denied that he had been convicted of a crime. Had he been truthful, he could have been denied a visa, though it would be a matter of discretion. The court rejected his argument that to violate 18 U.S.C. § 1436(a), the exclusion would have been statutorily ineligible for a visa.
U.S. v. Pirela, Case No. 14-13767 (11th Cir. 12/22/15)
Immigration: Aggravated Felony Conviction Prevents Discretionary Relief
The Immigration and Nationality Act, 8 U.S. C. § 1101, *et seq.* provies that a noncitizen who has been convicted of an aggravated felony may be deported. The INA also prohibits the Attorney General from granting discretionary relief to an aggravated felon, no matter how compelling his case.
Moncreiffe v. Holder, Case No. 11-702 (S. Ct. 4/23/13)
Immigration: Collateral Estoppel
Where defendant was acquitted necessarily on basis of whether defendant was an illegal alien, Government was collaterally estopped in a subsequent case from convicting the defendant on charge of illegal reentry.
U.S. v. Valdiviez-Garcia, Case No. 11-10105 (11th Cir. 2/6/12)
Immigration: Miscellaneous - Cuban Wet Foot/Dry Foot Policy in Setting of Alien Smuggling
See U.S. v. Dominguez, case No. 07-13405 (11th Cir. 10/31/11)
Immigration: Miscellaneous - No Jury Required to Determine Whether Offense Meets Guideline Requirements for Enhancement
Defendant, who was charged with an immigration offense, argued that the determination of whether his prior offense was, as defined by the Guidelines, "an alien smuggling offense" that

qualified him for the 16 level enhancement under 2L1.2(b)(1)(A)(vii), must be made by a jury. The court rejected the argument.
U.S. v. Gallegos-Aguero, Case No. 04-14242 (11th Cir. 5/18/05)
Immigration: Miscellaneous - Detention When Home Country Won't Accept Alien
Where two Cuban nationals who were inadmissible aliens were detained well beyond six months after their removal orders became final, government brought forth nothing to indicate that substantial likelihood of removal subsists, and district court in each alien's case determined that removal to Cuba is not reasonably foreseeable, habeas petitions challenging continued detention beyond 90-day removal period should have been granted.
Clark v. Martinez, Case No. 03-878 (U.S. 1/12/05)
Immigration: Miscellaneous - Hostage Taking Act - Equal Protection
Strict scrutiny applies to state classification of aliens. Congressional classifications based on alienage, however, are subject to a rational basis review.
U.S. v. Ferreira, 15 FLW Fed C134 (12/11/01)
Immigration: Miscellaneous - Child Citizenship Act of 2000
Under the Act, effective 2/27/01, an immigrant child, who is a lawful permanent resident, is automatically naturalized when either of his parents becomes a citizen as long as the child is in the legal custody of the parent. 8 USC 1431**.**
U.S. v. Arbelo, 288 F.3d 1262 (11th Cir. 4/15/02)

IMMUNITY

Immunity: For Defense Witness?
In exceptional cases, the fact-finding process may be so distorted through the prosecution's decisions to grant immunity to its own witness while denying immunity to a witness with directly contradictory testimony that the defendant's due process right to a fair trial is violated.
U.S. v. Merrill, Case No. 11-11432 (11th Cir. 6/27/12)
Immunity: Derivative
Grants of immunity pursuant to 18 U.S.C. ' 6002 and 6003 include derivative use immunity. Accordingly, the court erred in limiting the defendant's immunity to the act of production while allowing the government the derivative use of the items that would have been discovered.
In re: Grand Jury Subpoena Duces Tecum, Case Nos. 11-112268 & 11-15421 (11th Cir. 2/23/12)
Immunity: Kastigar
When presented with a Kasitgar challenge, a court's task is to determine whether any of the evidence used against the defendant was in any way derived from his compelled immunized testimony. The Government has the burden of proving that all of the evidence it obtained and used against the defendant, including the testimony of other witnesses was untainted at every step of the investigation by immunized testimony.
U.S. v. Alcindor, Case No. 07-14602 (11th Cir. 6/14/11)

INDICTMENT

Indictment: Constructive Amendment Can Be Harmless Error

A conviction based on a constructive amendment of the indictment is subject to harmless error analysis.
U.S. v. Madden, Case No. 11-14302 (11th Cir. 8/16/13)
Indictment: Omission of an Element is Not a Jurisdictional Defect
An indictment's omission of an element of the crime does not create a jurisdictional defect.
U.S. v. Brown, Case No. 13-10023 (11th Cir. 5/28/14)
Indictment: Armed Career Criminal
Example of case where the government charged the offense as a 922(g) offense, but the defendant, after declining offer to withdraw plea, was sentenced as an armed career criminal. Notes that Almandarez-Torres is still the law.
U.S. v. Gandy, Case No. 11-5407 (11th Cir. 2/27/13)
Indictment: Must Include Facts Informing Defendant of the Specific Offense
Even when an indictment tracks the language of the statute, it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. In this case, the indictment was defective in that, in charging obstruction of justice under § 1512(c), the Government failed to allege which official proceeding was obstructed and failed to otherwise provide sufficient notice to the defendant of the factual predicate for the charge.
U.S. v. McGarity, 669 F.3d 1218 (11th Cir. 2012)
Indictment: Constructive Amendment
A constructive amendment to the indictment occurs where the jury instructions so modify the elements of the offense charged that the defendant may have been convicted on a ground not alleged by the grand jury's indictment.
U.S. v. Sanders, Case No. 10-13667 (11th Cir. 2/2/12)
Indictment: Indictment that Alleges Multiple Theories of Prosecution in the Conjunctive
The Government, in its indictment, charged that the defendant possessed a firearm during and in relation to and in furtherance of a drug trafficking crime. After the trial court denied the motion for a judgment of acquittal based on the claim that the Government had failed to prove both allegations, the Court struck the former theory and chose not to instruct the jury on the theory. The court of appeals held that the Government, at trial, was not required to prove both allegations.
U.S. v. Haile, Case No. 10-15965 (11th Cir. 6/29/12); United States v. Gutierrez, 745 F.3d 463 (11th Cir. 2014)
Indictment: Bill of Particulars Can't Save a Defective Indictment
A bill of particulars cannot save an otherwise defective indictment. It is furnished by the Government, not by a grand jury**.**
U.S. v. McQueen, Case No. 11-20393 (11th Cir. 9/16/11)
Indictment: Possession Crimes - Possession of Same Firearm on Different Occasions
Double jeopardy principles have a particular application for crimes of possession. Generally, possession is a course of conduct; by prohibiting possession Congress intended to punish as one offense all of the acts of dominion which demonstrate a continuing possessory interest in a firearm.
U.S. v. Jones, 601 F.3d 1247 (11th Cir. 2010)
Indictment: Sufficiency - Absence of Factual Allegations

Where the indictment in a federal funds fraud case merely tracked the wording of the statute, but failed to inform the defendant as to the facts and circumstances of the specific charges, the indictment was insufficient as a matter of law.
U.S. v. Schmitz, Case No. 09-14452 (11th Cir. 3/4/11)

Indictment: Sufficiency - Parroting Language of the Statute Sufficient?

While an indictment parroting the language of a federal criminal statute is often sufficient, there are crimes that must be charged with greater specificity.
U.S. v. Resendiz-Ponce, Case No. 05-998 (S.Ct. 1/9/07); U.S. v. Walker, Case No. 05-16756 (11th Cir. 7/6/07); U.S. v. Jordan, Case No. 06-12583 (11th Cir. 9/11/09)

Indictment: Superseding Indictments and Vindictiveness

A prosecutor may seek a superseding indictment at any time prior to trial on the merits, so long as the purpose is not to harass the defendant. As a general rule, as long as the prosecutor has probable cause to believe the accused has committed a crime, the courts have no authority to interfere with a prosecutor's decision to prosecute. However, a superseding indictment adding new charges that increase the potential penalty would violated due process if the prosecutor obtained the new charged out of vindictiveness. Vindictiveness in this context means the desire to punish a person for exercising his rights.
U.S. v. Barner, Case No. 04-13384 (11th Cir. 3/10/06); U.S. v. Jones, Case No. 08-16999 (11th Cir. 4/2/10)

Indictment: Sufficiency - Reference to Statute Cures Defects in Language of the Indictment

Reference to the statute on which the charge was based cures any defect in the language of the indictment.
U.S. v. Ndiaye, Case No. 04-11283 (11th Cir. 1/6/06); U.S. v. Wayerski, Case No. 09-11380 (11th Cir. 10/26/10)

Indictment: Multiple Charges That Fail to Differentiate One Charge From Another

A prosecution on an indictment that charges multiple counts of child sex abuse that are "carbon copies" of each other and that are not differentiated by a bill of particulars or the evidence presented at trial violates the Fourteenth Amendment's protection of Due Process.
Valentine v. Konteh, Case No. 03-4027 (6th Cir. 1/24/05)

Indictment: Poss. by a Convicted Felon - Bullet in Pocket and Hidden Firearm Justified Two Separate Charges

Where officers found a firearm hidden in a trash can by the defendant and upon taking him to jail later found a bullet in his pocket, the government correctly charged the defendant with two separate offenses. Court based its decision on the fact that the bullet and the guns were found at separate times and in what amounted to separate locations.
U.S. v. Goodine, Case No. 04-4320 (4th Cir. 3/15/05)

Indictment: Government Not Held to Specific Allegation

The defendant was charged, under 924(c), with using a firearm in connection with a robbery. Instead of simply alleging a "firearm," the Government, in the indictment, alleged a "handgun." Although government failed to prove the defendant carried a handgun during the robbery, the court found the "handgun" allegation to be surplusage and upheld the conviction on the basis of the rifle carried by the codefendant.
U.S. v. Williams, Case No. 02-11783 (11th Cir. 6/24/03)

Indictment: Listing of Aliases

If the government intends to introduce evidence of an alias and the use of that alias is necessary to identify the defendant in connection with the acts charged in the indictment, the inclusion of

the alias in the indictment is both relevant and permissible. Here it wasn't and the aliases should have been struck from the indictment.
U.S. v. Harriston, Case No. 01-12416 (11th Cir. 4/28/03)

Indictment: Multiple Drugs Listed in Single Conspiracy Count

Where the indictment alleged a conspiracy to distribute both marijuana and cocaine and the court did not instruct the jury that they had to find that the defendant distributed both cocaine and marijuana, the sentence should not have exceeded the maximum sentence for the less serious of the two offenses - 20 years for the marijuana. The error is not subject to harmless error review. Upon remand the government has a choice of consenting to the 20 year sentence or retrying the defendant.
U.S. v. Allen, 302 F.3d 1260 (11th Cir. 2002) ; but see U.S. v. Mackins, 315 F.3d 399 (4th Cir. 2003)

Indictment: Open Ended

Because the indictment alleged only that the conspiracy began "on or before" a certain date, and continued "on or after" a certain date, and then merely tracked the statute, providing no other specifics than the conspiracy was conducted "within the District of Arizona and elsewhere," the indictment should of been dismissed.
United States v. Cecil, 608 F.2d 1294 (9th Cir. 1979), but see: U.S. v. Ramos, 666 F.2d 469, 474 (11th Cir. 1982)

Indictment: Grand Jury Requirement

The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.
United States v. Cecil, 608 F.2d 1294 (9th Cir. 1979), U.S. v. McQueen, Case No. 20393 (11th Cir. 9/16/11)

Indictment: Multiplicity

Multiplicity is the charging of a single offense in more than one count. When the government charges a defendant in multiplicitous counts, two vices arise. First, the defendant may receive multiple sentences for the same offense. Second, a multiplicitous indictment may improperly prejudice a jury by suggesting that a defendant has committed several crimes - not one.
U.S. v. Smith, 231 F.3d 800 (11th Cir. 2000);U.S. v. Williams, Case No. 06-15318 (11th Cir. 5/16/08); U.S. v. Jones, Case No. 08-16999 (11th Cir. 4/2/10). U.S. v. Woods, 684 F.3d 1045 (11th Cir. 2012); U.S. v. Davis, Case No. 15-13241 (11th Cir. 4/20/17)

Indictment: Conspiracy to Distribute Different Drugs

See: Black v. U.S., Case No. 03-113388 (11th Cir. 6/16/04); Edward v. U.S. 523 U.S. 511 (1998); United States v. Riley, 142 F.3d 1254 (11th Cir. 1998)

Indictment: Failure to Challenge Apparent Defects' Waiver

A defense based on defects in the indictment that was clear from the fact of the indictment and that does not satisfy any of the exceptions set forth in the Rule are waived by failing to raise the issue in a pretrial motion.
U.S. v. Castro, Case No. 02-10731 (11th Cir. 3/18/03)

Indictment: Motion to Strike Aliases

Government failed to show that alleged aliases were relevant, and thus defendant was entitled to have the three aliases stricken from the caption and body of the indictment. Courts generally disapprove of including aliases in the indictment as an ordinary course and believe their use should be curbed. The rule most often followed is that aliases may be used when the Government

intends to introduce evidence of an alias and the use of that alias is necessary to identify the defendant in connection with the acts charged in the indictment.
U. S. v. Ramos, 839 F. Supp 781 (D. Kansas 1993)

Indictment: Failure to Charge an Offense is a Jurisdictional Defect

A claim that an indictment failed to charge an offense is a jurisdictional defect that is not waived by a guilty plea.
U.S. v. Peter, Case No. 01-16982 (11th Cir. 10/28/02)

Indictment: Variance

The standard for determining whether a variance is material is (1) did a variance occur and (2) did the defendant suffer prejudice.
U.S. v. Roberts, Case No. 02-10018 (11th Cir. 10/4/02); U.S. v. Landers, Case No. 10-10852 (11th Cir. 2/2/12)*

Indictment: "Knowingly"

Although indictment charging a robbery under the Hobbs Act failed to allege the crime was committed "knowingly," the allegation that the crime was committed "unlawfully" by threatening to use force, violence, etc. was good enough to withstand a motion to dismiss. There's a ninth circuit case that seems to hold to the contrary.
U.S. v. Woodruff, Case No. 01-16067 (11th Cir. 7/3/02)

Indictment: Sufficiency

"An indictment is sufficient if it (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enable the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense."
U.S. v. Steele, 12 FLW Fed C961 (11th Cir. 6/25/99); U.S. v. Ndiaye, Case No. 04-11283 (11th Cir. 1/6/06)

Indictment: Details of Offense

If a general description of the offense is given then it is also necessary to allege facts and circumstances which will inform the defendant of the specific offense with which he is being charged.
U.S. v. Steele, 12 FLW Fed C961 (11th Cir. 6/25/99); U.S. v. Bobo, Case No. 02-11-11 (11th Cir. 8/26/03)

Indictment: Time

Four month time period wasn't so broad as to expose the defendant to double jeopardy concerns.
U.S. v. Steele, 12 FLW Fed C961 (11th Cir. 6/25/99)

INEFFECTIVE ASSISTANCE OF COUNSEL

Ineffective Assistance of Counsel - No Absolute Duty to Investigate All Facts

No absolute duty exists to investigate particular facts or a certain line of defense. In reviewing a decision not to investigate, a court must determine whether the decision was reasonable.
Everett v. Secretary, Fla. Dept. of Corr. Case No. 14-11857 (11th Cir. 2/27/15)

Ineffective Assistance of Counsel - Failure to Ask for a Below-Guidelines Sentence

See Dell v. U.S., Case No. 11-12904 (11th Cir. 2/27/13)

Ineffective Assistance - Concession of Trial Counsel That Evidence Supports Conviction of Some Counts
Defense counsel, without consulting client in advance, conceded the client's guilt on one robbery charge, but argued the evidence was insufficient to support a conviction on the second robbery charge. Court of appeals, with much discussion about defense counsel's need to maintain credibility with the jury, rejected claim that the defense lawyer had provided ineffective assistance.
U.S. v. Darden, Case No. 10-15640 (11th Cir. 2/12/13)
Ineffective Assistance - Plea Negotiations
Defendants are entitled to effective assistance in making decisions regarding plea negotiations. Where defense counsel provides misleading or inadequate advice regarding the decision as to whether to accept a plea offer, the court may remedy the error.
Lafler v. Cooper, Case No. 10-209 (S. Ct. 3/21/12)
Ineffective Assistance - Failure to Convey Plea Offer
As a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. To show prejudice, the defendant must demonstrate a reasonable probability he would have accepted the plea and that the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it.
Missouri v. Frye, Case No. 10-444 (S. Ct. 3/21/12)
Ineffective Assistance - Immigration Advice
Counsel has an obligation to provide the client with accurate information about the immigration consequences of a guilty plea.
Padilla v. Kentucky, Case No. 08-651 (S. Ct. 10/13/09); Lee v. U.S., Case No. 16-327 (S. Ct. 6/23/17)
Ineffective Assistance: Failure to Pursue Motion to Suppress
Defense counsel's decision to recommend an early plea to the charges instead of pursuing a motion to suppress that defense counsel thought was futile, did not amount to ineffective assistance of counsel.
Premo v. Moore, Case No. 09-658 (S. Ct. 1/19/11)
Ineffective Assistance: Affirmative Misadvice About Jimmy Ryce Commitment
Defendant's lawyer, in a state court proceeding where the defendant entered a plea to aggravated stalking of a minor, told the defendant that the plea would not subject him to commitment under the Jimmy Ryce Act. The advice, though, was incorrect and the defendant was subsequently civilly committed under the Act. Court held the advice amounted to ineffective assistance and vacated the defendant's conviction.
Bauder v. Dept. of Corrections, cAse No. 10-10657 (11th Cir. 9/13/10)
Ineffective Assistance: Need Show Only a Probability Sufficient to Undermine Confidence in the Outcome
Petitioner claiming ineffective assistance of counsel is not required to show that counsel's deficient conduct more likely than not altered the outcome of the penalty proceeding, but only a probability sufficient to undermine the confidence in the outcome.
Porter v. McCullom, Case NO. 10537 (S. Ct. 11/30/09)
Ineffective Assistance: Trial Counsel's Reliance Upon Usual Course of Conduct

In considering the testimony of trial counsel even when counsel cannot remember what he or she had done or had not done in the case, the district court may rely upon counsel's testimony about the manner in which he or she routinely handle matters that recur in their work.
Dasher v. Attorney General, Case No. 08-10363 (11th Cir. 7/13/09)U.S. v. Moran, Case No. 08-16987 (11th Cir. 7/1/09)

Ineffective Assistance: Lawyers Admission of Ineffectiveness

Because the standard is an objective one, trial counsel's admission to deficient performance matters little.
Jennings v. McDonough, Case No. 05-16363 (11th Cir. 7/3/07)

Ineffective Assistance: Court Assumes Lawyers Efforts Reasonable

Where the record is incomplete or unclear about counsel's actions, the court will presume that the lawyer did what he or she should have done and will assume the lawyer exercised reasonable judgment.
Jennings v. McDonough, Case No. 05-16363 (11th Cir. 7/3/07); Herrington v. Richter, Case No. 09-587 (S. Ct. 1/19/2011)

Ineffective Assistance: Capital Client Who Doesn't Want Lawyer to Present Mitigation

Where the defendant seemingly did not want his lawyer to present mitigating evidence in the penalty phase of this capital case, the Court found the lawyer's failure to further investigate the case to be something less than ineffective assistance of counsel.
Schiriro v. Landrigan, Case No. 05-1575 (S. Ct. 5/14/07)

Ineffective Assistance: Standard Does Not Ask What Is Possible or Prudent

The court's review of counsel's performance should focus on "not what is possible or what is prudent or appropriate, but only on what is constitutionally compelled."
Osborne v. Terry, Case No. 04-16751 (11th Cir. 10/16/06)

Ineffective Assistance: Obligation to File an Appeal

Attorney has an obligation to consult with the client regarding the advantages and disadvantages of appealing and to make a reasonable effort to determine whether the client wishes to appeal.
Gomez-Diaz v. United States, Case No. 04-11105 (11th Cir. 12/20/05)

Ineffective Assistance: Failure to Advise Client of Risks of Proffer

The defense lawyer failed to provide the level of assistance demanded by the Sixth Amendment when he neglected to warn a youthful first-time offender that incriminating statements he made during a proffer session with law enforcement officials could be used against him if he pulled out of a plea bargain.
Davis v. Greiner, Case No. 04-4087 (2d Cir. 10/11/05)

Ineffective Assistance: Client's Consent to Admission of Guilt of One of Several Charges

While assuming that concession of guilt without consultation or consent from the defendant is constitutionally deficient performance, the court went on to reject the defendant's post-conviction petition, finding that there was no showing of prejudice.
U.S. v. Thomas, Case No. 03-56750 (8th Cir. 8/3/05)

Ineffective Assistance: Client's Consent to Admission of Guilt

At least in capital cases, counsel's failure to obtain the defendant's express consent to strategy of conceding guilt does not automatically rank as prejudicial ineffective assistance of counsel.
U.S. v. Nixon, Case No. 03-931 (S. Ct. 12/13/04)

Ineffective Assistance: Failure to Preserve Issue for Appeal - Prejudice Inquiry

Where, as in this case the deficient performance amounted to failing to preserve for appeal a particular issue, which in this case was a Batson claim, the appropriate prejudice inquiry asks

whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved.
Davis v. Secretary for the Dept. of Corrections, Case No. 01-16602 (1th Cir. 8/15/03)
Ineffective Assistance: Given Bad Set of Facts, Def. Unable to Show Prejudice
In this child-rape-murder case, the failure to investigate and present significant mitigation evidence, wasn't enough to show prejudice, i.e, facts were so bad the mitigation failed to undermine the confidence in the death sentence.
Crawford v. Head, Case No. 01-10215 (11th Cir. 11/12/02)
Ineffective Assistance: Compilation of Death Penalty Cases
Crawford v. Head, Case No. 01-10215 (11th Cir. 11/12/02)
Ineffective Assistance: State Habeas Analysis
Assuming the state court uses the principles of Strickland in the analysis, the standard used by the court is not contrary to clearly established federal law as set out in the Supreme Court precedent. The petitioner is, then, left only with the claim that ther has been an unreasonable application of clearly established federal law.
Crawford v. Head, Case No. 01-10215 (11th Cir. 11/12/02)
Ineffective Assistance: Standard
"As long as the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results, our confidence is undermined. Phrased another way, the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."
Brownlee v. Haley, Case No. 00-15858 (11th Cir. 9/16/02)
Ineffective Assistance: No Closing Argument
Where, in this case involving a bench trial, the court announced its verdict without allowing defense counsel to give a closing argument, or even announce a waiver or an objection, the court found the defendant had been denied effective assistance of counsel. Case was analyzed under Cronic.
Hunter v. Moore, Case no. 00-14576 (11th Cir. 9/4/02)
Ineffective Assistance: Cronic
For a recent Supreme Court summary in the decision in Cronic see Bell v. Cone, 15 FLW S295 (5/28/02)
Ineffective Assistance: Strickland
For a recent Supreme Court summary of Strickland see Bell v. Cone, 15 FLW S295 (5/28/02);
Stewart v. Secretary, Dept. of Corrections, Case No. 06-11684 (11th Cir. 1/31/07)
Ineffective Assistance: Conflict (Court Should Have Known)
In order to demonstrate a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant must establish that a conflict of interest adversely affected his counsel's performance.
Mickens v. Taylor, 15 FLWS161 (11/5/2001)
Ineffective Assistance: Claim Waives Attorney - Client Privilege
When a defendant has challenged his conviction by asserting an issue that makes privileged communications relevant, he waives the privilege and respect to those communications.
Johnson v. Alabama, 256 F.3d 1156, 1178 (11th Cir. 2001)
Ineffective Assistance: Conflict of Interest

To make a showing of ineffective assistance of counsel on the basis of a conflict the defendant must show that his lawyer had an actual conflict and that the conflict adversely effected the attorney's performance. To prove the later, the defendant must show that (a) the defense could have pursued a plausible alternative strategy, (b) that this alternative strategy was reasonable, and (c) that the alternative strategy was not followed because it conflicted with the attorney's external loyalties.
Reynolds v. Chapman, 14 FLW Fed C826 (11th Cir. 6/15/01)

Ineffective Assistance: Longer Prison Sentence Establishes Prejudice

An error on the part of the defendant's lawyer that resulted in a 6 to 21 month increase in additional time in prison was prejudicial for purposes of Strickland.
Glover v. U.S., 14 FLW Fed S41 (1/0/01)

Ineffective Assistance: Introduction of Records Without Testimony

"In Turpin the Georgia Supreme Court found counsel to be ineffective in the penalty phase because they introduced 2,500 pages of records from the defendant's stays at various psychiatric institutions and children's homes, without any testimony commenting on the contents, and merely urged the jury to use the records in their deliberations."
Holladay v. Haley, 13 FLW Fed C606 (11th Cir. 4/19/00)

Ineffective Assistance: Obligation to Perform Mitigation Investigation

Williams v. Taylor, 13 FLW Fed S225 (4/18/00)

Ineffective Assistance: Obligation to Perform Mitigation Investigation

In a case described by Judge Birch, as one in which "the majority places the acceptable level of attorney assistance so low as to risk undermining the public's confidence in the criminal justice system," the Court, in an en banc decision, reversed the panel decision, and held rejected an ineffective assistance of counsel claim. The mitigation investigation consisted essentially of asking the defendant's wife, the afternoon after the guilty verdict, to drive a couple of hours back home and try and find someone to "stand-up" for the defendant at the sentencing hearing that was scheduled for 9:00 A.M. the next day. Case includes a telling break down among the judges. Judges Anderson, Wilson, Tjoflat, Birch, and Barkett dissenting, and Edmondson, Cox, Dubina, Black, and Hull voting with the majority.
Chandler v. U.S., 13 FLW Fed C867 (11th Cir. 7/21/00); Crawford v. Head, Case No. 01-10215 (11th Cir. 11/12/02)

Ineffective Assistance: Standard

Must show that counsel's performance was "outside the wide range of professionally competent assistance, and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome."
Tompkins v. Moore 193 F.3d 1327 (11th Cir. 10/29/99)

Ineffective Assistance: Investigation of Mitigation in Death Penalty Case

See: Williams v. Head, 12FLW Fed C1205 (11th Cir. 8/26/99); Fortenberry v. Haley, Case No. 01-12553 (11th Cir. 7/17/02)

Ineffective Assistance: No Presumption of Ineffectiveness Based on Little Time to Prepare

In United States v. Cronic, 466 U.S. 648 (1984), defense counsel was given just twenty-five days to prepare for tiral, his principal practice was real estate wile the defendant was on trial for mail fraud and it was his first jury trial. Nonetheless, the limited time to prepare did not justify a presumption of ineffective assistance.

Conklin v. U.S., Case No. 02-15674 (11th Cir. 4/21/04)
Ineffective Assistance: Tactical Decision Based On Misunderstanding of Law
A tactical or strategic decision is unreasonable if it is based on a failure to understand the law.
Hardwick v. Crosby, Case No. 97-2319 (11th Cir. 1/31/03)
Ineffective Assistance: Whether Trial Counsel's Decision Was Reasonable Is A Question of Law
Whether counsel's decision is tactical is a question of fact, but whether this tactic was reasonable is a question of law and the appellate court owe neither the district court nor the state court any deference on this point.
Hardwick v. Crosby, Case No. 97-2319 (11th Cir. 1/31/03)
Ineffective Assistance: Claim Need Not Be Raised On Direct Appeal
The failure to raise an ineffective assistance claim on direct appeal does not bar the claim from being brought as a 2255 claim.
Massaro v. U.S., Case No. 01-1559 (S.Ct. 4/23/03)
Ineffective Assistance: Failure to Investigate Prior Record
Where defendant's lawyer had estimated that the sentence would be somewhere between 5 and 10 years, but because of prior convictions unknown to the lawyer the defendant was sentenced as a career offender to thirty years, the court found the defendant did not receive ineffective assistance of counsel. The court went on to say, though, that the "limited scope of this investigation is certainly not laudatory."
U.S. v. Pease, 14 FLW Fed C370 (11th Cir. 1/30/01)
Ineffective Assistance: New Low
In a case that shows just how little it takes to overcome an ineffective claim, the Court upheld this Alabama federal death sentence.
Chandler v. U.S., 218 F.3d 1305 (2000)
Ineffective Assistance: Failure to File a Notice of Appeal
To show prejudice when the claim is that the lawyer failed to file a notice of appeal, a defendant must demonstrate that there is a reasonable probability that but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed.
Warden v. Flores-Ortega, 13 FLW Fed S122 (2/23/00)
Ineffective Assistance: No Requirement for Corroboration of Defendant's Claims
Gallego v. U.S., 174 F.3d 1196 (11th Cir. 1999)
Ineffective Assistance: Death Penalty - Failure to Develop Mental Health Evidence
Despite trial lawyer's conclusion that, in hindsight, he should have developed mental health evidence, the court found that reasonably effective assistance had been given.
Mills v. Singletary, 161 F.3d 1273 (11th Cir.1998)

INITIAL APPEARANCE

Initial Appearance: Pretrial Services Report
Information obtained in he course of performing pretrial services is for the limited purpose of the bail determination and is otherwise confidential. Some courts, however, have allowed the information to be admitted for purposes of impeachment. In this case, though, the district court erred in allowing the government to call the pretrial officer as a witness during the defendant's

trial for the purpose of identifying the defendant's cell phone number and identifying the defendant's voice from a recording.
U.S. v. Perez, Case No. 05-12971 (11th Cir. 12/28/07)

JOHNSON

Johnson: Beeman (Legal Landscape Inadequate)
The existing caselaw wasn't enough to show court had relied on the residual clause rather than elements clause for a federal kidnapping offense.
Williams v. U.S., No. 19-10308 (11th Cir. Jan. 31, 2021)
Johnson: Reliance on Descamps to Determine Whether Prior Offense Conviction Qualifies as a Violent Felony
See Orvalles v. U.S., Case No. 17-10172 (11th Cir. 10/4/18) (Martin, J. dissenting)

Johnson: Florida Manslaughter
Eleventh Circuit as erroneously concluded that Florida's manslaughter statute qualifies as a violent felony.
Orvalles v. U.S., Case No. 17-10172 (11th Cir. 10/4/18) (Martin, J. dissenting)
Johnson: Madatory Sentencing Guidelines
Eleventh Circuit has erroneously concluded that Johnson is inapplicable to the mandatory sentencing guidelines.
Orvalles v. U.S., Case No. 17-10172 (11th Cir. 10/4/18) (Martin, J. dissenting)
Johnson: Florida Robbery
Eleventh Circuit has erroneously concluded that Florida's robbery statute qualifies as a violent felony for purposes of the ACCA.
Orvalles v. U.S., Case No. 17-10172 (11th Cir. 10/4/18) (Martin, J. dissenting)
Johnson: Florida Aggravated Assault
Eleventh Circuit has erroneously concluded that Florida's aggravated assault statute qualifies as a violent felony for purposes of the ACCA.
Orvalles v. U.S., Case No. 17-10172 (11th Cir. 10/4/18) (Martin, J. dissenting)
Johnson: Guidelines - Inapplicable to Mandatory guidelines
In re Griffin, 823 F.3d 1350 (11th Cir. 2016)
Johnson: Concurrent Sentence Doctrine
If a defendant had concurrent sentences on multiple counts of conviction and one count is found to be invalid, an appellate court need not consider the validity of the other counts unldes the defendant would suffer adverse collateral consequences from the unreviewed conviction. Here, where the defendant was sentenced to a mandatory life sentence due to an 851 enhancement, the court declined to address his ACCA sentence.
In re Williams:, 826 F.ed 1351 (11th Cir. 2016)
Johnson: Defendant's Burden to Show Reliance on Residual Clause
If defendant is to present a cognizable 2255 claim, he must affirmatively show the trial court relied upon the residual clause.

Beeman v. U.S., Case No. 16-16710 (11th Cir. 9/22/17); but see Orvalles v. U.S., Case No. 17-10172 (11th Cir. 10/4/18) (Martin, J. dissenting); Santos v. U.S., Case No. 17-14291 (11th Cir. Dec. 10, 2020)

Johnson: Florida's Felony Battery

Hearing the case en banc, the court concluded that Florida's felony battery statute, Fla. Stat. §784.041, qualified as a crime of violence under the Sentencing Guidelines for purposes of USSG § 2L1.2. Opinion includes a dissent from Judges Wilson, Martin, Jordan, Rosenbaum, and Jill Pryor.

U.S. v. Vail-Bailon, Case No. 15-10351 (11th Cir. 8/25/17)

Johnson - Fla. 1971 Conviction for Assault with Intent to Commit a Felony

No existing precedent regarding whether it qualifies under the ACCA's elements clause.

In re: Jackson, Case No. 16-13536 (11th Cir. 6/24/16)

Johnson - Equitable Tolling

See In re: Jackson, Case No. 16-13536 (11th Cir. 6/24/16)

Johnson - Defendant Must Show He Was Sentenced Under the Residual Clause

In re: Griffin, Case No. 16-12012-J (11th Cir. May 25, 2016); In re: Hines, Case No. 16-12454 (11th Cir. 6/8/16)

Johnson - Matchett - If Overturned

If the Supreme Court, in Beckles, overturns Matchett, those guideline cases based on the guideline's residual clause, will be able to file a 2255 claim.

In re: Anderson, Case No. 16-14125 (11th Cir. 7/22/16); In re: Bradford, Case No. 16-14512 (11th Cir. 7/27/16)

Johnson - Concurrent Sentence Doctrine

See In re: Clayton, Case No. 16-14556 (11th Cir. 7/18/16) (J., Martin Dissenting), n. 16 questioning application), In re Davis, Case No. 16-13779 (11th Cir. 7/21/16)

Johnson - Matchett - Only the 11th Circuit

"Every other court of appeals has either held or assumed that Johnson makes the language in §4B1.2(a)(2) of the Sentencing Guidelines unconstitutional. Dissent includes reason why the 11th Cir. has it wrong, and questions the procedure where the court of appeals "combs through" the PSR in deciding whether to grant a request to file a successive petition.

In re: Clayton, Case No. 16-14566 (11th Cir. 7/18/16) (J., Martin Dissenting)

Johnson: Still Inapplicable to Guidelines

Panel of Jordan, Rosenbaum, and Jill Pryor sets outs in some detail why they disagree with 11th Cir. precedent, but denies request for a successive 2255.

In re: Leonard Sapp, Case No. 16-13338-J (11th Cir. July 7, 2016);

Johnson: Inapplicable to Career Offender

U.S. v. Matchett, Case No. 14-10396 (11th Cir. 9/13/16)

Johnson: Defendant Entitled to a New Sentencing Hearing

Mays v. U.S., Case No. 14-13477 (11th Cir. 3/29/16)

Johnson: Retroactive for Initial 2255

Mays v. U.S., Case No. 14-13477 (11th Cir. 3/29/16)

Johnson: Descamps Retroactive

Because Descamps did not announce a new rule, but merely clarified existing precedent, it applies retroactively.

Mays v. U.S., Case No. 14-13477 (11th Cir. 3/29/16)

Johnson: Successive 2255 Motions

Court denied Johnson relief to defendant who has previously filed a 2255 motion.
In re: Rivero, Case No. 15-13089 (11th Cir. 8/12/15); Mays v. U.S., Case No. 14-13477 (11th Cir. 3/29/16)

Johnson: Successive 2255 - Armed Career Criminals

The decision in Rivero, which held that successive 2255 motions in career offender statutes were barred by the limitations of second or successive 2255 motions applies to those who were sentenced as armed career criminals.
In re: Franks, Case No. 15-15456-G (11th Cir. 1/6/16)

JUDGES

Judges: Recusal

Pennsylvania Supreme Court Judge violated defendant's right to due process when he participated in a decision denying the defendant's post-conviction claim when he had, some 30 years earlier, been the District Attorney of Philadelphia who authorized the State to seek the death penalty.
Williams v. Pennsylvania, Case No. 15-5040 (S. Ct. 6/9/16)

Judges: Participation in Plea Negotiations

The trial judges statement to the defendant about the consequences of rejecting a plea agreement violated Fed.R.Cr.P. 11(c)1, but, without a showing that the defendant would have proceeded to trial absent the remarks, the defendant was not entitled to have his judgement vacated.
U.S. v. Castro, Case No. 12-12927 (11th Cir. 9/26/13); U.S. v. Davila, Case No. 10-15310

Judges: Presumed to Ignore Inadmissible Evidence

In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.
Williams v. Illinois, Case No. 10-8505 (S. Ct. 6/18/12)

Judges: Participation in Plea Negotiations

Court's involvement in plea negotiations, resulted in convictions being vacated.
U.S. v. Tobin, Case No. 09-13944 (4/12/12)

Judges: District Judge Not Free to Reject Magistrate's Credibility Findings

In a case involving a motion to suppress heard by the magistrate judge, the court of appeals held that the district judge could not reject the magistrate judge's credibility determinations without rehearing the testimony.
U.S. v. Cofield, Case No. 14689 (11th Cir. 11/14/01)

Judges: Recusal on Basis of Campaign Contributions

Given the extent of the campaign contribution and the circumstances of the case, due process required recusal.
Caperton v. A.T. Massey Coal, Co., Case No. 08-22 (S. Ct. 6/8/09)

Judges: No Need for Defendant to Personally Consent to Magistrate Conduction Voir Dire

Gonzalez v. U.S., Case No. 06-11612 (S. Ct. 5/12/08)

Judges: Ex Parte Communication- Exception to Rule

Ex pare communications are justified in order to protect a continuing criminal investigation and the safety of persons placed at risk by those investigation.
US. v. Simms, Case No. 03-13233 (11th Cir. 9/27/04)

Judges: Ex Parte Communication
The Government bears the burden of showing that the defendant was not prejudiced by an ex parte communication, and the burden is a heavy one.
U.S.. v. Simms, Case No. 03-13233 (11th Cir. 9/27/04)
Judges: Judges: Impartiality in Conduct of Trial
See: U.S. v. Wright, Case No. 03-13359 (11thCir. 12/8/04)
Judges: Recess Appoints Valid
Evans v. Stephens, Case No. 02-16424 (11th Cir. 10/14/04)
Judges: Preservation of Recusal Issue
Must enter a conditional plea to preserve the issue. Mandamus is an alternative.
U.S. v. Patti, Case No. 02-13871 (11th Cir. 7/18/03)
Judges: Limited Authority of Magistrate to Participate in Trial
A magistrate judge exceeds his or her jurisdiction by presiding at a felony trial during a critical stage of the proceeding without the defendant's consent. Here, where magistrate judge agreed to accept jury verdict, but ended up responding to a jury question, all without the defendant's consent, magistrate exceeded his authority, and a new trial was required.
U.S. v. Desir, 57 F3d 1233 (11th Cir. 2001); U.S. v. Rodriguez, 15 FLW Fed C185 (11thCir. 1/02/02); See also: RPM brief in U.S. v. Lottie Tibbits
Judges: Immunity
Judges have absolute immunity from damage claims while they are acting in their judicial capacity, unless they acted int eh clear absence of all jurisdiction. While for state judges this immunity does not extend to injunctive relief, most courts, including, now, the Eleventh Circuit have held that federal judges are protected against claims seeking injunctive relief.
Bolin v. Story, 13 FLW Fed C1089 (11th Cir. 9/6/00)
Judges: Standard for Recusal
Pursuant to 28 USC 455(a) a judge shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned. It is an objective test, and the bias must be of a personal as distinguished from judicial nature.
Bolin v. Story, 13 FLW Fed C1089 (11th Cir. 9/6/00); In re: Moody, Case No. 13-12657 (11th Cir. 3/12/14)
Judges: Recusal - No Other Judge
In a case where the defendant had named as the defendants almost all of the Eleventh Circuit judges, the court declined to recuse itself, citing the "rule of necessity." The rule holds that a judge is not disqualified due to a personal interest if there is not other judge available to hear the case.
Bolin v. Story, 13 FLW Fed C1089 (11th Cir. 9/6/00)
Judges: May Comment on the Evidence
The judge may comment on the evidence, may question witnesses an elicit facts not yet adduced or clarify those presented, and may maintain the pace of the trial by interrupting or cutting off counsel as a matter of discretion.
U.S. v. Thayer, 13 FLW Fed C417 (11th Cir. 3/3/00)

JUDGMENT OF ACQUITTAL

Judgment of Acquittal: Midtrial Decision Can't be Changed
Judge cannot reverse midtrial judgment of acquittal after defense rested, but before closing arguments.
U.S. v. Alcindor, Case No. 07-14602 (6/14/11)
Judgment of Acquittal: Must Be Renewed at the Close of All the Evidence
U.S. v. Edwards, Case No. 06-11643 (11th Cir. 5/5/08)
Judgment of Acquittal: Defendant Entitled to Ruling at the Close of the Govt. Case
The defendant is entitled to have a ruling on his motion for a judgment of acquittal made at the close of the government's case.
U.S. v. Moore, Case No. 07-10237 (11th Cir. 10/26/07)

JURISDICTION

Jurisdiction: Determination is for the Jury if Entwined with a Substantive Element of Crime
U.S. v. McClean, Case No. 14-10061 (11th Cir. 9/24/15)
Jurisdiction: Parties Can't Stipulate to It
U. S. v. Gonzalez-Iguaran, Case No. 15-13659 (11th Cir. May 12, 2016)
Jurisdiction: Omission of an Element from Indictment
An indictment's omission of an element of the crime does not create a jurisdictional defect.
U.S. v. Brown, Case No. 13-10023 (11th Cir. 5/28/14)
Jurisdiction: Supreme Court - State Court's Interpretation of State Law
"This court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law."
Ohio v. Reiner, 14FLW FedS129 (3/19/2001)
Jurisdiction: Extraterritorial Prosecution
Depending on the nature of the crime, Congress may or may not have to provide, in the statute, for extraterritorial application of a criminal statute. In this instance, which involved the attempted smuggling of Cuban cigars into the U.S., and an arrest outside the territorial waters, the Court concluded that the absence of such intent in the statute did not prohibit prosecution.
U.S. v. Plummer, 13 FLW Fed C1019 (11th Cir. 8/11/00)
Jurisdiction: Drug Smuggling
Where the defendant, a citizen of Canada, performed his involvement in the drug deal from Canada, and was arrested only after he drove into the United States, the court held that 21 USC 963 may be applied extraterritorially and upheld the district court's denial of the defendant's motion to dismiss for lack of jurisdiction.
U.S. v. McAllister, 12FLWFed C256 (11/16/98)

JURY

Jury: Juror Testimony About Deliberations

Except for testimony concerning extraneous prejudicial information or improper outside influence, Rule 606(b)(1) prohibits a juror from providing testimony or othe revidence about anything that happened or occurred during deliberations, including a juror's mental proceses or the reasons the jury reached a particular verdict.
U.S. v. Cavallo, Case No. 12-15660 (11th Cir. 6/22/15)
Jury: Preferable That Jury Not Be Kept Late In the Evening
U.S. v. Bush, Case No. 12-12624 (11th Cir. 8/27/13)
Jury: Fair Cross Section Requirement
To establish a prima facie violation of the fair-cross-section requirement, the defendant must prove that "(1) a group qualifying as "distinctive" (2) is not fairly and reasonably represented in jury venires, and 93) "systematic exclusion" in the jury-selection process accounts for the underrepresentation.
Berghuis v. Smith, Case No. 08-1402 (S. Ct. 1/20/10)
Jury: Can't Use Juror Testimony to Impeach a Verdict
U.S. v. Siegelman, Case No. 07-13163 (11th Cir. 5/11/11)(on remand from Supreme Court)
Jury: Challenges to Venire Selection
Must be made pursuant to the Jury Selection and Service Act., 28 USC § 1867.
U.S. v. Dean, Case No. 06-13946 (11th Cir. 5/25/07)
Jury: Exposure to Extrinsic Evidence
The defendant has the burden to show that the jury has been exposed to extrinsic evidence or extrinsic contacts. One the defendant does so, prejudice is presumed and the burden shift to the government to rebut the presumption. A mistrial or new trial is required only if the extrinsic evidence known by the jury posed a reasonable possibility of prejudice to the defendant.
U.S. v. Ronda, Case No. 03-15640 (11th Cir. 7/13/06); U.S. v. Delancy, Case No. 06-13718 (11th Cir. 10/3/07); U.S. v. Siegelman, Case No. 07-13163 (11th Cir. 5/11/11)(on remand from Supreme Court)
Jury: Exposure to Extraneous Evidence is Presumptively Prejudicial
McNair v. Campbell, Case No. 04-11400 (11th Cir. 7/13/05); U.S. v. Tobin, Case No. 09-13944 (11th Cir. 4/12/12)
Jury: Jury Selection and Service Act - Exclusion of Police, Firemen, and Public Officers
The 1968 Jury Selection and Service Act, 28 USC 1863, requires the exclusion of "members of the fire or police departments of any State as well as public officers in the executive, legislative, or judicial branches of any state or subdivision of a state.
U.S. v. Henderson, Case No. 04-11545 (11thCir. 5/23/05)
Jury: Improper Conduct - Nursing Student Who Explained Evidence
Affidavits that at least suggested one of the jurors, who was a nursing student, relied on her expertise to explain some of the evidence to her fellow jurors, was inadequate in this state habeas case to overturn conviction.
Crawford v. Head, Case No. 01-10215 (11th Cir. 11/12/02)
Jury: Innominate Jury
The district court has the discretion to empanel an innominate jury upon a showing of a combination of several factors, including (1) the defendant's involvement in organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity

that enhances the possibility that jurors' names may become public and expose them to intimidation or harassment.
U.S. v. Bowman, Case No. 01-14305 (11th Cir. 8/20/02); U.S. v. Ochoa-Vasquez, Case No. 03-14400 (11th cir. 10/20/05); U.S. v. Lafond, Case No. 14-12574 (11th Cir. 4/20/15)

Jury: Improper Conduct

One affidavit based on information obtained by an investigator from the ex-fiancé of one of the jurors (Hart) alleged, among other things, that**:** Hart had purchased one of the defendant's products that had been fraudulently sold and was the subject of the case heard by the jury. In a second affidavit. In the second affidavit in which it was alleged that the information came from the jury foreman during an interview of the foreman by the investigator, who was supposedly writing a book about the trial, it was claimed that the bailiff had told the jurors that they would have no trouble convicting the defendants if they knew "what he knew." Because the court concluded the information was obtained in violation of a local rule prohibiting contact with jurors, the court upheld the district court's decision to exclude the claims from consideration.
U.S. v. Venske, Case No. 01-10345 (11th Cir. 7/12/02)

Jury: Improper Conduct

An affidavit based on information obtained by an investigator from the ex-fiancé of one of the jurors (Hart) alleged, among other things, that**:** (1) Hart "knew" from the first day of the trial that the defendants were guilty**;** (2) Hart and some of the other jurors passed notes during the trial making fun of some of the witnesses; (3) one of the jurors did not want to vote guilty, but Hart and some of the other jurors convinced her otherwise; (4) during the trial Hart spoke openly with non-jurors about the trial, expressing his belief that the defendants were guilty and his distaste for one of the defendant's lawyers. Court concluded all of these allegations were excluded from the court's consideration by Fed. R. Evid. 606(b) as they involved the jury's deliberative process and the mental impressions of juror Hart.
U.S. v. Venske, Case No. 01-10345 (11th Cir. 7/12/02)

Jury: False Answers

To obtain a new trial for juror misconduct during voir dire, a party must: 1) demonstrate that a juror failed to answer honestly a material question on voir dire, and ten 2) show that a direct response would have provided a valid basis for a challenge for cause.
U.S. v. Carpa, 15 FLW Fed C29 (11th Cir. 10/29/01)

Jury: Excusal of a Juror During Deliberations

Under FRCP 23(b) a juror maybe dismissed during deliberations for "a just cause." Just cause exists when a juror refuses to apply the law or follow the court's instruction. That, in turn, means that a juror should be dismissed only if the judge is convinced beyond a reasonable doubt that there is no substantial possibility that the juror is basing his or her decision on the sufficiency of the evidence.
U.S. v. Abbell, 15 FLW Fed C35 (11th Cir. 11/7/01); U.S. v. Polar, Case No. 03-11160 (11th Cir. 5/13/04)

Jury: Questions by Jurors

Every circuit to consider the practice of allowing jurors to ask questions has permitted it. The decision to allow juror questioning rests within the discretion of the trial judge. Section 40.50(3) of the Florida Statutes permits it as well.
U.S. v. Richardson, 14FLWFed C147 (11th Cir. 11/3/00)

Jury: Court's Obligation When, During Trial, There Are Allegations of Misconduct

Bottom line: court has lots of discretion.

U.S. v. Dominguez, 13 FLW Fed C1121 (11th Cir. 9/13/00)
Jury: Disqualification of Juror and Installation of Alternate During Deliberations
See: U.S. v. Register, 12 FLW Fed C1103 (7/29/99**)**

JURY INSTRUCTIONS

Jury Instruction: No Need to Instruct Jury About Problems in Cross-Racial Identification
Though, not to say they are never warranted.
U.S. v. King, Case No. 12-16268 (11th Cir. 6/9/14)
Jury Instruction: Successive Allen Charge
There is no *per se* rule against successive Allen charges. The court of appeals noted, though, that the risk of coercion increases as deliberations run longer.
U.S. v. Davis, Case No. 13-12436 (11th Cir. 3/5/15)
Jury Instruction: Requested Instruction - "Thumb on the Defendant's Side of the Scales"
Case has an example of a requested jury instruction that the court concluded was "a request for the district court to put its thumb on the defendant's side of the scales."
U.S. v. Davis, Case No. 13-12436 (11th Cir. 3/5/15)
Jury Instructions: Allen Charge - No Requirement That Jury Announce It Is Deadlocked
U.S. v. Bush, Case No. 12-12624 (11th Cir. 8/27/13)
Jury Instructions: Allen Charge - Unduly Coercive
See: U.S. v. Rey, 811 F.2d 1453, 1458-61 (11th Cir. 1987)
Jury Instructions: Court Not Witness Should Instruct on the Law
The law (unless foreign) that a jury applies is the law given to it by the judge in his instructions, not the legal opinion offered by a witness, including an expert witness. District judges, rather than witnesses, must explain to juries the meaning of statutes and regulations.
United States v. Chube II, 538 F.3d 693, 701 (7th Cir. 2008); Nationwide Transport Finance v. Cass Information Systems, Inc., 523 F.3d 1051, 1058 (9th Cir. Nos. 08-1839, 08-1860 9 2008); Bammerlin v. Navistar Int'l Transportation Corp., 30 F.3d 898, 901 (7th Cir. 1994).
Jury Instructions: Pattern Instructions Not Binding
Although generally considered a valuable resource, the Pattern Instructions are not binding; Eleventh Circuit case law takes precedence.
U.S. v. Dohan, 508 F.3d 989 (11th Cir. 2007); U.S. v. Gutierrez, Case No. 12-13809 (11th Cir. 1/16/14); U.S. v. Davis, Case No. 13-12436 (11th Cir. 3/5/15)
Jury Instruction: Allen Charge
An instruction which appears to give a jury no choice but to return a verdict is impermissibly coercive.
U.S. v. Jones, Case No. 06-15203 (11th Cir. 10/22/07)
Jury Instructions - Example of Claim That Instructions to the Grand Jury Violated 5th Amendment
See U.S. v. Knight, Case No. 05-145337 (11th Cir. 7/3/07)
Jury Instructions - Must Be Specific to Wording of the Indictment (Constructively Amending Indictment)
Where the trial judge, in a case involving a charge of lying to a government agent, instructed the jury that it can convict if it finds merely that the defendant knew his statement was false, when

the indictment specified a particular reason why the defendant knew the statement was false, constructively amended the indictment. In doing so, the instruction violated the defendant's Fifth Amendment right to a grand jury indictment.
U.S. v. Hoover, Case No. 05-30564 (5th Cir. 10/10/06); U.S. v. Moore, Case No. 07-10326 (11th Cir. 4/22/08)

Jury Instructions - Instructing on Related Offense

In an obstruction of justice case where the defendants were arguing that the police shooting of an individual was lawful and therefore there had been no obstruction of justice when the officers planted a gun next to the body of the deceased individual (an argument rejected by the court), there was an issue as to whether the trial judge should instructed the jury on Florida's fleeing felon law. The court declined to review the issue of whether the trial court's decision to read the fleeing felon statute into evidence and to publish it was required or permissible.
U.S. v. Ronda, Case No. 03-15640 (11th Cir. 7/13/06)

Jury Instructions - Defining Related Offenses

Before someone may be convicted of money laundering, the jury must find that the laundered funds were proceeds the specified unlawful activity alleged in the indictment. Despite a convincing dissent, the court held it was not error to fail to define for the jury the specified unlawful activity, mail fraud.
U.S. v. Martinelli, Case No. 04-13977 (11th Cir. 7/10/06)

Jury Instructions - Deliberate Ignorance

This Court has cautioned district courts against instruction juries on deliberate ignorance when the evidence only points to either actual knowledge or no knowledge on the part of the defendant. Such an instruction is appropriate only when there is evidence in the record showing the defendant purposely contrived to avoid learning the truth.
U.S. v. Ndiaye, Case No. 04-11283 (11th Cir. 1/6/06)

Jury Instructions - Consciousness of Wrongdoing

18 USC 1512(b), which is largely a witness tampering provision, requires "corrupt persuasion." In this case involving the conviction of the Arthur Anderson corporation in connection with its dealings with Enron, the court found that the instruction, because it failed to require consciousness of wrongdoing, was invalid and vacated the conviction.
Arthur Anderson, LLP v. U.S., Case No. 04-368 (S. Ct. 5/31/05)

Jury Instructions: Allen Charge

See: Allen v. U.S., 164 U.S. 492 (1896)

Jury Instructions: Obligation to Instruct Belongs to Court, Not the Lawyers

"The trial judge, of course, should have advised the jury that it could consider Payton's evidence under factor (k), and allowed counsel simply to argue the evidence's persuasive force instead of the meaning of the instruction itself. The judge is, after all, the one responsible for instructing the jury on the law, a responsibility that may not be abdicated to counsel.
Warden v. Payton, Case No. 03-1039 (S. Ct. 3/22/05)

Jury Instructions: Conflicting Information - Death Penalty

One portion of the jury instructions in this Texas death penalty case directed the jury to make their decision about life or death solely on the basis of the answer to two questions involving deliberateness and future dangerousness. Another instructed the jury to they could answer one of the questions falsely so as to give effect to the mitigation of the defendant's low IQ. Court found the instructions to be inadequate to fulfill the Eighth Amendment's requirement that the jury consider all mitigating evidence.

Smith v. Texas, Case No. 04-5323 (S. Ct. 11/15/2004)

Jury Instructions: Resistance to Arrest' Consciousness of Guilt

In some circumstances, the court may instruct that resistance to arrest may be evidence of consciousness of guilt.

U.S. v. Wright, Case No. 03-13359 (11thCir. 12/8/04)

Jury Instructions: Pattern Instructions Aren't Precedent

Pattern jury instructions are not precedent and cannot solely foreclose the construction of the necessary elements of a crime as stated in the statute.

U.S. v. Polar, Case No. 03-11160 (11th Cir. 5/13/04); U.S. v. Dean, Case No. 06-13946 (11th Cir. 5/25/07)

Jury Instructions: Permissible Inference Enhances Likelihood of Conviction

When the court instructed the jury, in a cross burning case, that "the burning of a cross, by itself, is sufficient evidence form which you may infer intent," the court recognized that the instruction, although only an inference, was likely to "skew jury deliberations toward conviction" in close cases.

Virginia v. Black, Case No. 01-1107 (S. Ct. 4/7/03)

Jury Instructions: Court, not Witnesses, Should Testify About Law

Opinion testimony, be it from "experts" or lay witnesses, regarding the law is generally not admissible. The court, not trial witnesses, should be the one instructing the jury about the law.

Adalman v. Baker, Watts & Co., 807 F.2d 359, 366 (4th Cir. 1986), see also Chiate v. Morris, 1992 WL 197591 (9th Cir. 1992)(unpublished opinion) and memo in U.S. v. Jefferson, 4:01cr13-RH.

Jury Instructions: Conflicting Provisions

Conflicting instructions given in this death penalty case prevented the jury from being able to consider and give effect to evidence of the defendant's mental retardation. Consequently, the court ordered a new trial.

Penry v. Johnson, 121 S. Ct. 1910 (2001)

Jury Instructions: Co-Defendant's Guilty Plea

For an argument that the standard instruction regarding a co-defendant's guilty plea tells the jury that the co-defendant's guilty plea could, to some degree, be used as evidence of the defendant's guilt.

U.S. v. Prieto, 14 FLW Fed C129 (11th Cir. 11/6/00)

Jury Instructions: Affirmative Defense

Eleventh Circuit may have established two different standards: (1) a defendant is entitled to an instruction on an affirmative defense when, taking he evidence in a the light most favorable to him, there existes evidence sufficient for a reasonable jury to find in his favor and (2) if there is any foundation in the evidence for the defense.

U.S. v. Alvarado, Case No. 13-14843 (11th Cir. 12/11/15)

Jury Instructions: Theory of Defense

A defendant is entitled to have the court instruct the jury on the theory of the defense, as long as it has some basis in the evidence and has legal support.

U.S. v. Nolan, 223 F.3d 1311 (11th Cir. 2000); U.S. v. Orr, 825 F.2d 1537, 1542 (11th Cir. 1987); U.S. v. Dean, Case No. 06-13946 (11th Cir. 5/25/07)

Jury Instructions: Lesser Included Offenses - Rational Possibility

If the offense is to be included as a lesser, the evidence at trial must be such that a jury could rationally find him guilty of the lesser, yet acquit him of the greater offense.

Carter v. U.S., 13 FLW Fed S389, n. 3 (6/12/00)

Jury Instructions: Lesser Included Offenses - Test

One offense is not necessarily included in another unless the elements of the lesser offense are a subset of the elements of the charged offense. The elements test requires a textual comparison of criminal statutes.

Carter v. U.S., 13 FLW Fed S389 (6/12/00), see also: Schmuck v. U.S., 498 U.S. 705 (1989)

Jury Instructions: Court Doesn't Have to Answer Questions Directly

Even in this capital case, the trial court, rather than answering a jury's question directly, could refer the jury back to the initial instruction.

Weeks v. Angelone, 13 FLW Fed S56 (1/19/00)

Jury Instructions: Lesser Included Offenses

The defendant is entitled to an instruction on a lesser included offense, if he can show that the charged offense encompasses all of the elements of the lesser offense, and that the evidence would permit the jury to rationally acquit the defendnat of the greater offense and convict him of the lesser offense.

U.S. v. Williams, 13 FLW Fed C231 (111th Cir. 12/8/99)

Jury Instructions: Broadening Basis for Conviction

When an erroneous jury instruction allows the jury to convict the defendant for something beyond what was charged in the indictment, the courts view it as a constructive amendment that "violates the Fifth Amendment by exposing the defendant to criminal charges not made in the indictment against him." U.S. v. Diaz, 13 FLW Fed C1 (11th Cir. 10/15/99); U.S. v. Keller, 916 F.2d 628, 633 (11th Cir. 1990); U.S. v. Edwards, Case No. 06-11643 (11th Cir. 5/5/08)

Jury Instructions: Willful Blindness

See: U.S. v. Ruhe 98-4731 (4th Cir. 8/31/99)

Jury Instruction: Appeal - Improper Instruction (Court Divines Jury's Reasoning)

Although the jury was instructed incorrectly in violation of the decision in Bailey v. U.S., 116 S.Ct. 501 (1995), leaving one legitimate path to a conviction and one based on the erroneous instruction, the court "determined with absolute certainty that the jury based its verdict on the ground on which it was properly instructed."

U.S. v. Wilson, 12 FLW Fed C1186 (11th Cir. 8/12/99)

Jury Instruction: Standard for Reversal

The Court will only reverse a conviction because of the district court's failure to give an instruction when the "rejected instruction was substantively correct, the actual charge to the jury did not substantially cover the proposed instruction, and the failure to give the request substantially impaired the defendant's ability to present an effective defense."

U.S. v. Martinez, 83 F.3d 371, 376 (11th Cir. 1996); U.S. v. Eaton, 12 FLW Fed C1015 (11th Cir. 7/7/99); U.S. v. Chastain, 13 FLW Fed C298 (11th Cir. 12/30/99), U.S. v. Giradot, Case No. 05-13809 (11th Cir. 3/26/08)

Jury Instructions: Jurors Must Be Accurately Instructed in the Law

U.S. v. Burgess, 175 F.3d 1261 (11th Cir. 1999)

Jury Instruction: Defendant's Failure to Testify

When the defendant does not testify the judge must give a "no adverse inference" jury instruction if the instruction is requested by the defendant.

U.S. v. Burgess, 12 FLW Fed C834 (11th Cir. n. 2 5/18/99)

JURY SELECTION

Jury Selection: Batson - Denial of Peremptory Challenge Subject to Harmless Error Analysis
When a district court erroneously sustains a Batson challenge and seats a juror who should not have been seated, the error is subject to harmless error analysis.
U.S. v. Williams, Case No. 12-15313 (11th Cir. 10/2/13)
Jury Selection: Batson - Prosecutor's Notes
In a death penalty habeas case, which resulted in a new trial based upon a Batson violation, the court found the prosecutor's notes designating those jurors who were black, was "strong evidence of discriminatory intent.
Adkins v. Holman, Case No. 11-12380 (11th Cir. 2/27/13)
Jury Selection: Change of Venue Based on Pretrial Publicity
"Prominence does not necessarily produce prejudice, and juror impartiality, we have reiterated, does not require ignorance."
Skilling v. United States, Case No. 08-1394 (S. Ct. 6/24/10)
Jury Selection: Voir Dire - Open Questions Produce More Meaningful Information
District court opted for open-ended questions because they would produce "more meaningful information."
Skilling v. United States, Case No. 08-1394 (S. Ct. 6/24/10)
Jury Selection: Challenge to Panel
With the defendant having failed to establish a 10% disparity between the percentage of balks in population eligible for jury service and percentage in the pool, various failures of the clerk, including the granting of virtually all deferral requests, which created a disproportionally white deferred juror pool, did not amount to a violaiton of the fair cross-section requirement of the 6th Amendment.
U.S. v. Carmichael, Case No. 07-11400 (11th Cir. 3/5/09)
Jury Selection: Voir Dire - Compound Questions
A defendant's Sixth Amendment right to an impartial jury was violated when the trial judge insisted on using compound questions during voir dire that asked jurors not to reveal a possible source of bias unless they, themselves, concluded it would have an impact on their ability to fairly assess the evidence.
U.S. v. Littlejohn, Case No. 05-3081 (D.C. Cir. 6/19/07)
Jury Selection: Batson - Additional Challenges When Opposing Party Prevails on Baston Challenge?
Court declined to create a bright-line rule about whether disqualified peremptory strikes should be replaced. It is a matter left to the district court's discretion.
U.S. v. Walker, Case No. 05-16756 (11th Cir. 7/6/07)
Jury Selection: Batson - Challenges to White Jurors??
Court upheld the government's Batson challenge when defense counsel used all 12 peremptory challenges against white males. The government used 6 peremptory challenges against minorities, but their challenges were upheld.
U.S. v. Walker, Case No. 05-16756 (11th Cir. 7/6/07)
Jury Selection: Batson - Challenge Must Be Made to Pretextual Reason
Once the prosecutor offers a nondiscriminatory reason for the peremptory challenge, the burden rests with the defense to demonstrate the reason given is a pretext.

U.S. v. Houston, Case No. 04-16524 (11th Cir. 7/19/06)

Jury Selection: Batson - Challenges on the Basis of Family Members Who Have Committed Crimes - Disparate Impact on Blacks

Defendant argued that excusing a juror solely on the basis of whether he or she had a family member who had been convicted of a crime had a disparate impact on blacks and unfairly allowed the government to excuse black jurors from the venire. Court rejected the challenge holding that disparate impact claims are not cognizable under either Equal Protection or Due Process.

U.S. v. Houston, Case No. 04-16524 (11th Cir. 7/19/06)

Jury Selection: Batson - Prima Facie Case

In determining whether the totality of the circumstances shows a pattern that creates an inference of discrimination, the court considers a number of factors: (1) whether the striker struck all of the relevant racial or ethnic group from the venire, or at least as many as the striker had strikes; (2) whether there is a substantial disparity between the percentage of jurors of a particular race or ethnicity struck and the percentage of their representation on the venire; and (3) whether there is a substantial disparity between the percentage of jurors of one race [or ethnicity] struck and the percentage of their representation on the jury.

U.S. v. Ochoa-Vasquez, Case No. 03-14400 (11th Cir. 10/20/05)

Jury Selection: Batson - Inconsistent Justification

If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step.

Miller-El v. Dretke, Case No. 03-9659 (S. Ct. 6/13/05), U.S. v. Houston, Case No. 04-16524 (11th Cir. 7/19/06)

Jury Selection: Batson - Inference of Discrimination Establishes Prima Facie Showing

A defendant establishes a prima facie case of discrimination under Batson by producing evidence sufficient to permit trial judge to draw an inference that discrimination has occurred. The party raising the objection need not show it is more likely than not that discrimination has occurred.

Johnson v. California, Case No. 04-6964 (S. Ct. 6/13/05)

Jury Selection: Batson - Presence of A Black Juror Isn't Dispositive

That one black served on the jury, while a significant fact that may be considered as circumstantial evidence, does not itself var a finding of racial discrimination.

Bui v. Haley, Case No. 00-15445 (11th Cir. 2/19/03)

Jury Selection: Batson - Prosecutor's Failure to Explain Every Challenge

On appeal, the failure of the prosecutor to explain every strike of black jurors will not necessarily prevent a prosecutor from successfully rebutting a prima facie case of race discrimination, where there is sufficient circumstantial evidence from which the court can deduce a race-neutral reason.

Bui v. Haley, Case No. 00-15445 (11th Cir. 2/19/03)

Jury Selection: Batson - Defendant Need Not Be of the Same Race of The Challenged Jurors

A criminal defendant can bring a challenge to the peremptory striking of jurors based on race whether or not he is of the same race as the jurors who are struck.

Bui v. Haley, Case No. 00-15445 (11th Cir. 2/19/03)

Jury Selection: Batson - Good Faith Assertions Aren't Enough

Prosecutor's assertions that his challenges were not racially motivated were not, by themselves, sufficient to rebut claim of racial motivation.

Bui v. Haley, Case No. 00-15445 (11th Cir. 2/19/03)

Jury Selection: Batson - Judge's Determination of Prosecutor's Credibility

"[T]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. At this stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. In that instance the issue comes down to whether the trial court finds the prosecutor's race neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor, by how reasonable, or how improbable the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.

Miller-El v. Cockrell, Case No. 01-7662 (S.Ct. 2/25/03)

Jury Selection: Batson - Prima Facie

The mere fact of striking a juror or a set of jurors of a particular race does not necessarily create an inference of racial discrimination. Instead, the number of persons struck takes meaning when only coupled with other information such as the racial composition of the venire, the race of others struck, or the voir dire of those who were struck compared to the answer of those who were not struck.

U.S. v. Novaton, 271 F.3d 968 (11th Cir. 2001)

Jury Selection: Batson - Prima Facie Showing

A pattern of strikes against black jurors might give rise to an inference of discrimination as could questions and statements during voir dire examination and in the exercise of challenges.

U.S. v. Allen-Brown, 14 FLW Fed C460 (11th Cir. 3/9/01)

Jury Selection: Inattentiveness is Valid Race Neutral Reason

A prospective juror's inattentiveness is a proper race-neutral reason for using a peremptory strike.

U.S. v. Cordoba-Mosquera, 13 FLW Fed C677 (11th Cir. 5/23/00)

Jury Selection: Prejudicial Revelations Made by Venire During Voir Dire

Where statements made by potential jurors at voir dire raise the specter of potential actual prejudice on the part of remaining panel member , specific and direct questioning is necessary to ferret out those jurors who would not be impartial.

U.S. v. Chastain, 13 FLW Fed C298 (11th Cir. 12/30/99)

Jury Selection: Exclusion of Defendant From Voir Dire Conducted at Bench

Although the trial court "likely did err" in excluding the defendant from that portion of the questioning of the jurors that took place at the bench, the court found the error to be harmless.

U.S. v. Cuchet, 13 FLW Fed C275 (11th Cir. 12/14/99)

Jury Selection: Absent Consent From the Defendant, Magistrate May Not Conduct

Although defense counsel stated he had no objection to the magistrate conducting voir dire, because there was no representation made by counsel that he had informed the defendant of his choice to have the district judge conduct voir dire, and no representation that the defendant personally did not object, the Court remanded the case for determination of whether the defendant had consented.

U.S. v. Maragh, 12 FLW Fed C1293 (11th Cir. 9/21/99)

Jury Selection: Despite Juror Bias No Need for Court to Excuse Juror for Cause

Despite the fact that the juror was related to a state witness, and that juror said she assumed her relatives testimony would be truthful because she knew her relative was honest, the Circuit Court held that because of the usual meaningless rehabilitation about being fair, the trial court did not abuse its discretion in denying the challenge for cause.

U.S. v. Rhodes, 12 FLW Fed C923 (11th Cir 6/4/99)

Jury Selection: Exercise of Peremptory Challenges Based on Race

In determining whether peremptory strikes have been applied in a discriminatory manner, claimant must make prima facie showing that challenges have been exercised on basis of race. If that showing is made, burden shifts to party exercising the challenge to articulate a race neutral explanation. Finally, the court must determine whether claimant has carried his burden of proving purposeful discrimination. Unless discriminatory intent is inherent in party's explanation, reason offered should be deemed race-neutral. The explanation need not be persuasive or even plausible. "It simply must be race-neutral and honest."

U. S. v. Webster, 162 F.3d 308, 349 U. S. v. Webster, 162 F.3d 308 (5th Cir. 1998) (5th Cir. 1998); Dudley v. Wal-Mart, 12 FLWFed C481 (llth Cir. 2/9/99); U.S. v. Allen-Brown, 14 FLW Fed C460 (11th Cir. 3/9/01); U.S. v. Novaton, 271 F.3d 968 (11th Cir. 2001); U.S. v. Brown, Case No. 01-10323 (11th Cir. 7/31/02); U.S. v. Houston, Case No. 04-16524 (11th Cir. 7/19/06)

Jury Selection: Batson - Even Inconsistency Passes the Test

"Wal-Mart says that the trial court allowed a juror to be struck who shared a similar trait with another juror who was not struck by Plaintiffs. This circumstance does not automatically prove discrimination or trial court error particularly where, as here, Wal-Mart did not raise this objection at the time of the Batson challenge."

Dudley v. Wal-Mart, 12 FLWFed C481 (llth Cir. 2/9/99)

Jury Selection: Discrimination Based on Gender

Prohibited, but has the same pathetic standard as does Batson.

J.E. B. v. Alabama, 114 S.Ct. 1419 (1994); U.S. v. Steele, 12 FLW Fed (11th Cir. 6/25/99)

Jury Selection: Discriminatory Strike - Excuse Doesn't Need to Make Sense

"a legitimate reason is not a reason that makes sense, but a reason that does not deny equal protection."

U.S. v. Tokars, 95 F.3d 1520 (11th Cir. 1990); U.S. v. Steele, 12 FLW Fed (11th Cir. 6/25/99)

MENS REA

Mens Rea: Requires Only Knowledge of the Facts

Mens rea requires only a knowledge of the facts that makes the defendant's conduct unlawful. It does not require that the defendant know his conduct to be unlawful.

U.S. v. Dominguez, Case No. 07-13405 (11th Cir. 10/31/11)

Mens Rea: Presumption

A presumption exists in favor of a mens rea requirement.

U.S. v. Dominguez, Case No. 07-13405 (11th Cir. 10/31/11)

Mens Rea: Presumption

The presumption of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct.

Carter v. U.S., 13 FLW Fed S389 (6/12/00)

MENTAL HEALTH

Mental Health – Statements Made During Court Ordered Mental Health Exam
Statements made during court-ordered mental health exam inadmissible at trial.
Estelle v. Smith, 451 U.S. 454 (1981)
Mental Health: Competency - Trial Court's Responsibility
The trial court must apply adequate procedures to ascertain whether the defendant is competent to proceed to trial or the entry of a guilty plea and must do se even in the absence of a demand by the defendant.
U.S. v. Wingo, Case No. 13-14435 (11th Cir. 6/16/15)
Mental Health: Insanity Defense Inapplicable If Mental State Caused In Part by Intoxication
Knott v. U.S., 894 F.2d 1119 (9th Cir. 1990)
Mental Health: Commitment of Those on Pretrial Release for a Competency or Sanity Eval
Absent a showing of a compelling governmental interest, courts may not commit someone on pretrial release to the custody of the Attorney General for an evaluation for competency or sanity at the time of the offense.
U.S. v. Newchurch, 807 F.2d 404 (5th Cir. 1986); United States v. Deters, 143 F.3d 577 (10th Cir. 1998); U.S. v. Krauth, 2010 WL 428969 (N.D. Iowa 2010); U.S. v. Weed, 184 F.Supp.2d 1166 (N.D. Okl. 2002); U.S. v. Borges, 91 F.Supp.2d 477 (D. Puerto Rico 2000); see also RPM Motion to Reconsider and Vacate Order of Commitment for Psychiatric Evaluation filed in U.S. v. LaMarche, Case No. 4:11cr61.
Mental Health: Forced Medication to Restore Competency
See U.S. v. Diaz, Case No. 09-15421 (11th Cir. 1/12/11)
Mental Health: Defendant May Be Competent To Proceed, But Not Well Enough to Represent Himself
Where a defendant is found competent to stand trial, but not well enough to represent himself, a court may require that the defendant be represented by counsel.
Indiana v. Edwards, Case No. 07-208 (S. Ct. 6/19/08)
Mental Health: Limiting Mental Health Testimony to Insanity Defense
Despite a convincing dissent by Justice Kennedy and a complicated parsing of the facts and law, the Court held that Arizona did not violate due process in restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mens rea of the crime charged.
Clark v. Arizona, Case No. 05-5966 (S. Ct. 6/29/06)
Mental Health: Arizona's Limited Insanity Test
Due process does not prohibit Arizona's use of insanity test stated solely in terms of capacity to tell whether an act charged as a crime was right or wrong. Such a test necessarily includes the second prong of the McNaughten test, that of understanding the nature of one's actions.
Clark v. Arizona, Case No. 05-5966 (S. Ct. 6/29/06)
Mental Health: Most Prisoners Are Sociopaths
U.S. v. Prevo, Case No. 04-15310 (11th Cir. 1/11/06)
Mental Health: Competency - Generally
See Battle v. U.S., Case No. 03-14908 (11th Cir. 8/10/05)
Mental Health: Govt. Doctors More Credible Because of Longer Observation

The trial court found the diagnosis of the government doctors more credible because, in part, those doctors testified that it was more difficult to diagnose schizophrenia in an out patient setting as the defense experts were required to do.
Battle v. U.S., Case No. 03-14908 (8/10/05)
Mental Health: Self Induced Incompetency
Court concluded that because the defendant brought about his incompetency by refusing to eat or drink, he forfeited his right to be tried while competent.
Moore v. Campbell, Case No. 02-11302 (11th Cir. 9/15/03)
Mental Health: Standard for Competency
The standard for mental competency to stand trial is "whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of understanding - and whether he has a rational as well as factual understanding of the proceedings against him. (quoting Dusky v. U.S. 80 S. Ct. 788, 789 (1960))
Moore v. Campbell, Case No. 02-11302 (11th Cir. 9/15/03); U.S. v. Bradley, Case No. 06-14934 (11th Cir. 6/29/11); U.S. v. Wingo, Case No. 13-14435 (11th Cir. 6/16/15)
Mental Health: Commitment After Being Found Incompetent
Under 18 USC 4241, once the Court finds the defendant incompetent to stand trial, the Court must commit the defendant to the custody of the Attorney General. Due process challenges were rejected, despite the fact that the issue was that of mental retardation.
U.S. v. Shawar, 865 F.2d 856 (7th Cir. 1989)
Mental Health: Insanity - "Convincing Clarity" Required for Jury Instruction
The defendant is entitled to a jury instruction on insanity when the evidence would allow a reasonable jury to find that insanity has been shown with convincing clarity.
U.S. v. Dixon, No. 98-10371 (5th Cir. 8/16/99)
Mental Health: Hospitalized NGBRI Individuals Entitled to Counsel
A person who has been hospitalized following his acquittal by reason of insanity has a right to counsel for the purpose of moving for a hearing to review his confinement.
U.S. v. Budell, No. 98-30012 (9th Cir. 8/17/99)
Mental Health: Insanity Defense and Subsequent Detention - In General
See: U.S. v. Wattleton, 269 F.3D 1184 (11th Cir. 2002)

MISCELLANEOUS

Miscellaneous – Motion to Continue
Though denying the defendant's motion, the decision includes language that stresses the importance of giving the defendant a fair opportunity to prepare.
U.S. v. Jeri, Case No. 16-11418 (11th Cir. 9/5/17)
Miscellaneous - Conviction Based on Defendant's Interpretation of the Law
Where the truth or falsity of a statement centers on an interpretative question of law, the government bears the burden of proving beyond a reasonable doubt that the defendant's statement is not true under a reasonable interpretation of the law.
U.S. v. Clay, Case No. 14-12373 (11th Cir. 8/11/16)
Miscellaneous - Interpreting Fragmented Court Opinions

When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of a majority of the judges, the holding of the court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds.
Marks v. U.S., 430 U.S. 188, 193 (1977); Lisk v. Lumber One Wood Preserving, LLC, 792 F.3d 1331 (11th Cir. 2015); Large v. Fremont County, 670 F.3d 1133 (10th Cir. 2012);

Miscellaneous - Dicta - Decision Can Hold Nothing Beyond the Facts of the Case

See: U.S. v. Birge, 830 F.3d 1229 (11th Cir. 2016)

Miscellaneous - Toll of Drunk Driving

In 2011 alcohol-impaired driving crashes killed 9,878 people, an average of one fatality every 53 minutes.
Missouri v. McNeely, Case No. 11-1425 (S. Ct. 2013)

Miscellaneous - Scienter

The fact that a statute does not specify any required mental state does not mean that none exists. Courts generally interpret criminal statutes to include broadly applicable scienter requirements even where the statute by its terms does not contain them.
Elonis v. U.S., Case No. 13-983 (S. Ct. 12/1/14)

Miscellaneous - Sovereign Citizen Claim

For an opinion that describes the conduct of those making the sovereign citizen claim and a listing of cases rejecting the claim see:
U.S. v. Benabe, 654 F.3d 753, 761-767 (7th Cir. 2011); U.S. v. Perkins, 2013 WL 3280716 (N.D. Ga. July 23, 2013)

Miscellaneous - Distinguishing Cases - "No One Questions"

Where in a prior case the court addressing the need for Miranda warnings, a prior decision had stated that "no one questions that Shatzer was in custody for Miranda purposes, the Court noted in this case that the "statement means only that the issue of custody was not contested before us."
Howes v. Fields, Case No. 10-680 (S. Ct. 2/21/12)

Miscellaneous: "Jurisdictional"

Recognizing the less than meticulous use of the term "jurisdictional" in the past, the Supreme Court has endeavored in recent years to bring some discipline to the use of the term and has pressed for a distinction between truly jurisdictional rules which govern a court's adjudicatory authority and nonjurisdicitonal claim processing rules, which do not. Subject matter jurisdiction can never be waived or forfeited. Objecitons may be resurrected at any point in the litigation. A rule is jurisdictional if the legislature clearly states that a threshold limitation on the statute's scope shall count as jurisdictional. But if Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional.
Gonzalez. v. Thaler, Case No. 10-985 (S. Ct. 1/10/12); Hamer v. Neighborhood Services of Chicago, No. 16-658 (S. Ct. 10/10/17)

Miscellaneous: Conviction Under an Invalid Law

An offense created by an unconstitutional law is not a crime. A conviction under such a law is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment. If a law is invalid as applied to the criminal defendant's conduct, the defendant is entitled to go free.
Bond v. U.S., Case No. 09-1227 (S. Ct. 6/16/11)

Miscellaneous: Individual Defendants Can Raise 10th Amendment Defense

Defendants can challenge the validity of statute on the grounds that by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States.

Bond v. U.S., Case No. 09-1227 (S. Ct. 2/22/11)
Miscellaneous: Children Lack the Capacity to Exercise Mature Judgment
"The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgement and possess only an incomplete ability to understand the world around them."
J.D.B. v. North Carolina, Case No. 09-11121 (S. Ct. 3/23/11)
Miscellaneous: Use of Defendant's Wealth Against Him
Use of a defendant's wealth to appeal to class bias can be highly improper and can deprive the defendant of a fair trial.
U.S. v. Bradley, Case No. 06-14934 (11th Cir. 6/29/11)
Miscellaneous: Using Interstate Commerce Facilities to Effect Murder-For-Hire - Abandonment Not a Defense
Abandonment is not a defense. The crime is completed once the telephone or other facility of interstate commerce is used in the scheme.
U.S. v. Preacher, Case No. 10-10492 (11th Cir. 1/28/11)
Miscellaneous: Unpublished Opinions Are Not Precedential
United States v. Irey, Case No. 08-10997 (11th Cir. 7/29/10) n. 34
Miscellaneous: Cell Phone Tower Information to Show Someone's Whereabouts
See: U.S. v. Sanchez, Case No. 06-15143 (11th Cir. 10/30/09)
Miscellaneous: State's Obligation to Refrain from Using Improper Methods to Obtain Conviction
"Although the State is obligated to 'prosecute with earnestness and vigor,' it 'is as much [its] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'"
Cone v. Bell, Case No. 07-1114 (S. Ct. 12/9/08)
Miscellaneous: Sarbanes-Oxley Act (False Statement Made in Police Report)
A provision in 18 U.S.C. §1519 that makes it a crime to knowingly make false entries in records with the intent to impede a federal investigation can apply to false statements made by a police officer in his police report. In holding, the court rejected an argument that the application of the Sarbanes-Oxley Act outside the context of white collar crime was a denial of the due process requirement of fair notice.
U.S. v. Hurt, Case No. 06-16641 (11th Cir. 5/5/08)
Miscellaneous: Foreign Sovereign Immunities Act - Application to Criminal Cases?
While it is clear the Act applies to civil actions, there is a split among the jurisdictions as to whether the Act affects the jurisdiction of federal court in criminal actions.
U.S. v. Campa, Case No. 03-11087 (11th Cir. 6/4/08)
Miscellaneous: Defense of Impossibility
All courts are in agreement that what is usually referred to as "factual impossibility is no defense to a charge of attempt.
U.S. v. Rodriquez, Case No. 06-1646 (S. Ct. 5/19/08)
Miscellaneous: Court's Obligation to Appoint an Interpreter
See: U.S. v. Edouard, Case No. 05-15808 (11th Cir. 5/11/07)
Miscellaneous: Shackling at Initial Appearance

Without deciding the issue before the court, the 9th Circuit states that there must be some specific justification to justify a district-wide policy of shackling all pretrial detainees at their initial appearance.
U.S. v. Howard, 429 F.3d 843 (9th Cir. 2006)
Miscellaneous: Post-Conviction Access to DNA Evidence
Conceivably, there is, pursuant to 42 U.S.C. §1983, there is a post-conviction right of access to biological evidence for DNA testing. Not in this case, though.
Grayson v. King, Case No. 05-15725 (11th Cir. 8/18/06)
Miscellaneous: All Writs Act (29 USC § 1651)
General discussion.
U.S. v. Machado, Case No. 05-11420 (11th Cir. 10/2/06)
Miscellaneous: Weight to Be Given to Supreme Court Dicta
"We have previously recognized that dicta from the Supreme Court is not something to be lightly cast aside."
Schwab v. Crosby, Case No. 05-14253 (6/15/06 11th Cir. 2006)
Miscellaneous: Corpus Delicti
It isn't entirely clear whether the corpus delecti rule exists in federal court.
See Fallada v. Dugger, 819 F.2d 1564, 1570 (11th Cir. 1987), Schwab v. Crosby, 451 F.3d 1308 (11th Cir. Case No. 05-14253 (6/15/06 11th Cir. 2006)
Miscellaneous : Duress - Burden of Proof
Jury instructions placing upon the defendant the burden to establish her duress defense by a preponderance of the evidence were consistent with the requirement that the government prove mental states specified in statutes and did not run afoul of the Due Process Clause.
Dixon v. U.S., Case No. 05-7053 (S. Ct. 4/25/06)
Miscellaneous: Judicial Estoppel
Where a party assumes a certain position in a legal proceeding, and success in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. this rule, known as judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument ot prevail in another phase.
Zedner v. U.S., Case No. 05-5992 (U.S. 6/5/06)
Miscellaneous: Shackling for Routine Court Appearances
A district wide policy of shackling pretrial detainees a their initial appearances must be supported by something more than a declaration by the chief deputy marshal that the policy is required by something more than a declaration by the chief deputy marshal that the policy is required by general safety concerns and budgetary constraints.
U.S. v. Howard, Case No. 03-50524 (9th Cir. 11/15/05)
Miscellaneous: Secret Docketing Procedures
The press and the public's qualified First Amendment right to access criminal proceedings extends to the proceedings' docket sheets. When sealing proceedings or documents, acourt must articulate the overriding interest along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. The court must also provide members of the public and the press who are present with notice and an opportunity to be heard on proposed closure.
U.S. v. Ochoa-Vasquez, Case No. 03-14400 (11th cir. 10/20/05)

Miscellaneous: Law of the Case
The law of the case doctrine bars relitigation of issues that were decided, either explicitly or by necessary implication, in an earlier appeal fo the same case.
U.S. v. Jordan, Case No. 04-15381 (11th Cir. 11/3/05); U.S. v. Anderson, Case No. 13-12945 (11th Cir. 11/19/14)
Miscellaneous: Collateral Estoppel
The doctrine of collateral estoppel is a narrow exception to the Government's right to prosecute a defendant in separate trials for related conduct. Collateral estoppel bars a subsequent prosecution only where a fact or issue necessarily determined in the defendant's favor in the former trial is an essential element of conviction at the second trial.
U.S. v. Magluta, No. 03-10694 (11th Cir. 7/27/05)
Miscellaneous: Return of Seized Firearms to Convicted Felon
Even though the defendant has proposed that the firearms be kept by a relative, the court held that the defendant, because he was a convicted felon, was not entitled to have firearms seized at the time of the arrest returned to him.
U.S. v. Howell, No. 04-13343 (11th Cir. 9/15/05)
Miscellaneous: Example of Court Finding Police Officers Testified Falsely
Concluding that inconsistencies in the testimony of police officers in a hearing on a motion to suppress "manifest[ed] the hollow sound of deception," rather than the "ring of truth" as argued by the government, and describing the officers demeanor as "nothing short of arrogant and smug indifference,"
Middle District of Florida District Court Judge Richard Lazzara granted the defendant's motion to suppress.
U.S. v. Rivers, Case No. 8:04-cr-602-T-26MSS (M.D. Fla. 2/16/05)
Miscellaneous: Existence of Prejudice That Can Sway Jurors
It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.
Miller-El v. Dretke, Case No. 03-9659 (S. Ct. 6/13/05) quoting from Strauder v. West Virginia, 100 U.S. 303, 309 (1880)
Miscellaneous: Definition of "Inference"
An "inference" is generally understood to be a conclusion reached by considering other facts and deducing a logical consequence from them.
Johnson v. California, Case No. 04-6964 (S. Ct. 6/13/05)
Miscellaneous: Witness That Testifies Adversely to His Own Case Is Probably Telling the Truth
". .. Absent some extraordinary circumstance, no reasonable jury would believe that a party was lying when he said something harmful to his own case."
Jordan v. Stephens, Case No. 02-16424 (11th Cir. 5/24/05)(Carnes, J., concurring)
Miscellaneous: Trial Court's Obligation to Make Factual Findings
"We do not insist that trial courts make factual findings directly addressing each issue that a litigant raises, but instead adhere to the proposition that findings should be construed liberally and found to be in consonance with the judgement, so long as that judgment is supported by evidence in the record."
U.S. v. Stanford, Case No. 01-16485 (11th Cir. 11/2/04)

Miscellaneous: Summary of Evidence by Prosecutor Isn't "Evidence"
See: U.S. v. Trainor, 376 F.3d 1325 (11th Cir. 2005)
Miscellaneous: Federal Preemption
In a case involving the state prosecution of commercial airline pilots for operating an aircraft while intoxicating, the court discussed the principles applicable to a challenge to a state prosecution on the basis of federal preemption.
Hughes v. Attorney General of Florida, Case No. 03-14122 (11th Cir. 7/21/04)
Miscellaneous: Example of Court Relying on Information Contained in Referenced Articles
"Further, although Maines cited several authorities for her assertion our review of her sources finds no support for the conclusion that the referenced articles "were almost all contraceptives." In the opinion, the Court goes on to say that the "district court's truth-seeking duties should have compelled it to go behind [the expert's] assertions and satisfy itself of their reliability . . ."
Williams v. Attorney General of Alabama, Case No. 02-16135 (11th Cir. 7/28/04)
Miscellaneous: Dictum Defined
Dictum is a term that has been variously defined as a statement that neither constitutes the holding of a case, nor arises from a part of the opinion that is necessary to the holding of the case.
Black v. U.S., Case No. 03-11338 (11thCir. 6/16/04)
Miscellaneous: Courts Have Recognized Credibility Questions Re: Informants
"Ths Court has long recognized the "serious questions of credibility informers pose."
Banks v. Dretke, Case No. 02-8286 (S. Ct. 2/24/04)
Miscellaneous: Presumption Public Officials Have Discharged Duties Properly
Ordinarily, we presume public officials, including prosecutors, "have properly discharged their official duties."
Banks v. Dretke, Case No. 02-8286 (S. Ct. 2/24/04)
Miscellaneous: Mental Retardation
In a footnote the court makes reference to the various classifications associated with particular IQ ranges.
In re: Holladay, Case No. 03-12676 (11th Cir. 5/26/03)
Miscellaneous: Aliens Make Up 25% of the Federal Prison Population
Moore v. Kim, Case No. 01-1491 (S. Ct. 4/29/03)
Miscellaneous: Federal Prosecutions' .4% of Total
As represented in a 1998 report, federal prosecutions represented only about 0.4% of the total number of criminal prosecutions in federal and state courts.
Apprendi v. New Jersey, 120 S. Ct 2348, 2395 (2000)(O'Connor, dissenting)
Miscellaneous: Government Kidnapping
Nothing wrong with tricking defendant into crossing into Ecuador from Columbia, where he was arrested by DEA and Ecuadorian police and delivered to the United States for trial. Offense was that of kidnaping two DEA agents from a hotel room in Columbia.
U.S. v. Duarte-Acero, Case No. 01-13457 (11th Cir. 7/12/02)
Miscellaneous: "Continuing Offense"
A continuing offense is one that is not complete upon the first act, but instead continues to be perpetrated over time. In this instance, the court concluded the bank fraud was not a continuing offense.
U.S. v. Mata, 14 FLW Fed C1302 (11th Cir. 9/27/01)

Miscellaneous: Exception Declares the Rule
In construing the evidence, the court relied upon what it described as an "ancient legal maxim" - "the exception also declares the rule."
U.S. v. Abbell, 271 F.3d 1286 (11th Cir. 2001)
Miscellaneous: Decisions of One Circuit Not Binding on Another
Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1208 (11th Cir. 1981)
Miscellaneous: Reliance on Defendant's Understanding of the Law
Defendant's view isn't of much significance.
Ramdass v. Angelone, 13 FLW Fed S412 (6/12/00), (Stevens, J. dissenting opinion)

MISCELLANEOUS OFFENSES

Miscellaneous Offenses: Transmitting a Threatening Communication - General Intent Offense
The crime of transmitting a threatening communication, 18 U.S.C. 875(c) is a general intent offense that requires the Government to show (1) the defendant transmitted a communication in interstate of foreign commerce, (2) the defendant transmitted the communication knowitingly, and (3) the communication would be construed by a reasonable person as a serious expression of an intent to inflict bodily harm or death.
U.S. v. Martinez, 736 F.3d 981 (11th Cir. 2013); 800 F.3d 1293 (11th Cir. 2015)
Miscellaneous Offenses: Unauthorized Use of an Access Device - Account Number
The use of an account number in an online transaction amounts to a violation of 18 U.S.C. § 1029. U.S. v. Williams, Case No. 13-13042 (11th Cir. 6/22/15)
Miscellaneous Offenses: Passing of a False or Fictitious Instrument
Passing entirely fake checks made using blank check stock and check-writing equipment amounts to a violation of 18 U.S.C. § **514.**
U.S. v. Williams, Case No. 13-13042 (11th Cir. 6/22/15)
Miscellaneous Offenses: Misprison of a Felony
To prove the offense, the Government must show (1) the principal committed and completed the alleged felony, (2) the defendant had full knowledge of that fact, (3) the defendant failed to notify authorities, (4) and the defendant took steps to conceal the crime.
U.S. v. Brantley, Case No. 13-12776 (11th Cir. 10/9/15) (Martin, J. dissent)
Miscellaneous Offenses: Assault of Govt. Employee (18 U.S. C. § 111) - Lesser Offense
Simple assault was not a lesser included offense because there was physical contact.
U.S. v. Gutierrez, Case No. 12-13809 (11th Cir. 1/16/14); U.S. v. Siler, Case No. 12-14211 (11th Cir. 11/13/13)
Miscellaneous Offenses: Theft of Govt. Funds (18 U.S.C. §666) - "Agent"
An "agent," for purposes of 18 U.S.C. §666(a)(1)(B)
Need be only an employee of the government receiving the federal funds.
U.S. v. Keen, Case No. 09-16027 (11th Cir. 5/5/12)
Miscellaneous Offenses: Obstructing Official Proceeding By Hiding Assets in a Forfeiture Proceeding

To prove the crime of obstructing an official proceeding by disposing of and hiding assets involved in a forfeiture proceeding (18 U.S.C. § 1512(C)(2), the Government must show the defendant knew of the forfeiture proceeding.
U.S. v. Friske, Case No. 09-14915 (11th Cir. 5/18/11)

Miscellaneous Offenses: Killing With Intent to Prevent Communication to Federal Law Enforcement Officer

To prove the crime of killing another person to prevent that person from communicating information about a federal crime to a federal law enforcement officer (18 U.S.C. § 1512(a)(1)(C), the Government must show that there was a reasonable likelihood that a relevant communication would have been made to a federal officer.
Fowler v. U.S., Case No. 10-5443 (S. Ct. 3/29/11);U.S. v. Chafin, Case No. 14-10160 (11th Cir. 10/28/15)

Miscellaneous Offense: Murder for Hire - Phone Call Made by Law Enforcement

Answering a telephone call made by our under the auspices of law enforcement suffices for purposes of establishing the use of an instrumentality of interstate commerce. The one exception would be if the law enforcement made the phone calls to contrive the interstate nexus.
U.S. v. Covington, Case No. 08-10513 (11th Cir. 4/22/09)

Miscellaneous Offenses: Failure to Pay Child Support

Government must prove the defendant knew the child lived out of state.
U.S. v. Fields, Case No. 06-13784 (11th Cir. 9/21/07)

Miscellaneous Offenses: Lacey Act - Regulations Sufficient

The court rejected the defense argument that the Lacey Act was intended to include only foreign statutes and held that the violation of any foreign regulation, whether or not enacted as a statute, will support a conviction under the Lacey Act.
U.S. v. McNab, Case No. 01-15148 (11th Cir. 5/29/03)

Miscellaneous Offenses: Harboring Illegal Aliens for Commercial Advantage

Knowing employment of illegal aliens coupled with low wages, failing to withhold federal taxes and social security payments, and failing to pay unemployment taxes sufficed to prove the crime.
U.S. v. Zheng, Case No. 01-15551 (11th Cir. 9/17/02)

Miscellaneous Offenses: Bribery of Public Officials - Can Include Those Working For Private Org.

To be a "public official" under 18 USC 201(a), an individual must possess some degree of official responsibility for carrying out a federal program or policy. the person need not be an employee of the federal government: the definition of "public official" is broad enough to cover persons working for private organizations. In this instance, though, the defendant lacked the requisite authority and the court vacated his conviction.
U.S. v. Evans, Case No. 01-15156 (11th Cir. 9/4/03)

Miscellaneous Offenses: Murder for Hire -Use of A Facility in a *Manner* That Implicates Interstate Commerce

In a murder for hire case, decided under the former version of 18 USC 1958(a),the court declined to decide whether the statute actually requires that the facility (cell phone in this case) be used in interstate commerce, since the defendant's call did travel out of state. The court concluded that the statue did not require the defendant placing the call know the call traveled out of state. (The current version of the statute makes it a crime to use "any facility of interstate commerce," and, thus, the phone call doesn't even have to travel out of state.)
U.S. v. Drury, Case No. 02-12929 (11th Cir. 1/18/05)

Miscellaneous Offenses: Hoax Threat to Use Weapon of Mass Destruction
18 USC 2332a(a)(3) inapplicable to hoax threats.
U.S. v. Evans, Case No. 05-14498 (11th Cir. 2/16/07)
Miscellaneous Offenses: False Identification Document: Jury Instructions
In this instance, largely because the defendant was also charged with using unauthorized access devices, the trial court was not obligated to instruct the jury that the government had to prove the unlawful conduct intended by the defendant.
U.S. v. Klopf, Case No. 04-10663 (11th Cir. 9/7/05)
Miscellaneous Offenses: False Identification Documents - 18 USC 1028(a)(3) (Elements)
To convict a defendant for possession with intent to use fie or mor false identification documents, in violation of 18 USC 1028(a)(3), the government must prove: (1) the defendant knowingly possessed five or more false identification documents; (2) the defendant had the willful intent to transfer the false identification documents unlawfully, and (3) the defendant's possession of the false identification documents was in or affecting interstate commerce.
U.S. v. Klopf, Case No. 04-10663 (11th Cir. 9/7/05)
Miscellaneous Offenses: Travel Act, 18 USC 1952 - Elements
For the elements of the offense of interstate transportation in aid of racketeering see:
U.S. v. James, 13 FLW Fed C635 (11th Cir 4/27/00)

MONEY LAUNDERING

Money Laundering: Purposeful Concealment
Structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; and a series of unusual financial moves culminating in the transaction have all sufficed to show the requisite purposeful concealment.
U.S. v. Naranjo, Case No. 08-13814 (11th Cir. 3/2/11)
Money Laundering: Money Used to Secure Legal Representation
District court correctly dismissed money laundering charge against a Miami lawyer whose fees were allegedly paid with proceeds of criminally derived property. The plain language of 18 U.S. C. §1957(f)(1) exempts criminally derived proceeds used to secure legal representation in criminal cases.
U.S. v. Velez, Case No. 09-10199 (11th Cir. 10/26/09)
Money Laundering: Depositing Check With Fictitious Payee Didn't Prove Intent to Conceal
A real estate swindler's disbursement of the proceeds of a fraudulently obtained settlement check into bank accounts held by himself and his accomplices in their own names did not amount to concealment of money laundering in violation of 18 U.S.C. §1956(a)(1)(B)(I). Although the check was made payable to a fictitious person, the court decided the traceablity of the endorsement that the defendant used to deposit the check kept the government's evidence from satisfying the element of the money-laundering statute that requires a transaction be "designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity."
U.S. v. Adefehinti, Case No. 04-3080 (D.C. Cir. 12/18/07)

Money Laundering: "Proceeds"
The term "proceeds" as it is used in 18 U.S.C. §1956(a)(1) means profits rather than receipts.
U.S. v. Santos, Case No. 06-1005 (6/2/08)
Money Laundering: Transportation
18 U.S.C. §1956 prohibits the transportation of money designed to conceal and disguise the source of the funds. To prove its case the government must show more than the defendant merely hid the money during transport.
Cuellar v. U.S., Case No. 06-1456 (S. Ct. 6/2/08)
Money Laundering: Fraud That Deprives Honest Services May Serve as Predicate
A mail fraud scheme that is executed by depriving someone of the honest services of another can be a predicate offense for money laundering.
U.S. v. Boscarino, Case No. 05-2657 (7th Cir. 2/8/06)
Money Laundering: Concealment - More Than The Transfer From One Account to Another
A money laundering concealment conviction pursuant to § 1956 requires evidence of something more than a simple transfer of funds between two accounts, each bearing the parties' correct name. There must be some evidence tha the funds are more concealed after the transaction is completed than before.
U.S. v. Johnson, Case No. 04-10514 (11th Cir. 2/27/06)
Money Laundering: Concealment
Merely engaging in a transaction with money whose nature had been concealed through other means is not in itself a crime. If transactions are engaged in for present personal benefit, and not to create the appearance of legitimate wealth, they do not violate the money laundering statute.
U.S. v. Johnson, Case No. 04-10514 (11th Cir. 2/27/06)
Money Laundering: Payments for Personal Benefit Out of Already Laundered Money
Although, acknowledging that payments for personal benefit out of previously laundered proceeds do not themselves constitute money laundering unless they are designed to conceal the nature or source of the money, the Court held the defendant's use of drug money to pay his lawyer's fee amounted to money laundering.
U.S. v. Magluta, No. 03-10694 (11th Cir. 7/27/05)
Money Laundering: Concealment - Sufficiency
Court found there was insufficient evidence to show the defendant knew his activities were designed for the requisite concealment purpose because he kept the money in accounts that had his name on it and because he could not reasonably have anticipated receiving any marginal increase in secrecy by moving he money from one account with his name on it to another account with his name on it in the same bank.
U.S. v. Blankenship, Case No. 01-17064 (11th Cir. 8/26/04)
Money Laundering: Conspiracy (Overt Act Not Required)
Where the defendant was charged with conspiracy to commit money laundering in violation of 18 USC § 1956(h), the court found that an overt act was not necessary for a conviction.
U.S. V. Hall, Case No. 01-14746 (11th Cir. 11/10/03); aff'd, Whitfield v. U.S., Case No. 03-1293 (U.S. 1/11/05)
Money Laundering: Not a Continuing Offense
As money laundering is not a continuing offense, the government could charge the defendant with a count of money laundering, not just for the initial deposit of the illegal funds, but for each subsequent transaction involving the illegal funds.

U.S. v. Martin, Case No. 02-10676 (11th Cir. 2/6/03)
Money Laundering: Value of Funds Under the Pre-2001 Guidelines
While the stolen check was in the amount of $350,050, the defendant, following the deposit of the check, conducted another 97 separate transactions, which gave rise to 97 counts of money laundering. In conducting the value of the funds for purposes of the pre-2001 guidelines, each transaction was properly added together so that the value of the funds equaled over one million dollar.
U.S. v. Martin, Case No. 02-10676 (11th Cir. 2/6/03)
Money Laundering: 2001 Guideline Amendment
Amendment 634 redefines the way in which the offense level associated with the crime of money laundering is calculated, so that the offense level for money laundering may now be dependent upon the offense level assigned to the underlying offense.
U.S. v. Descent, 15 FLW Fed 610 (11th Cir. 5/28/02)
Money Laundering: Promotion
Under 1956(a)(1)(A)(i) the government must prove, among other things, that the defendant conducted the financial transaction with the intent to promote the carrying on of the specified unlawful activity. In this home invasion robbery case, the act of selling the stolen jewelry qualified. In the words of the court, the "sale" was designed to promote the Hobbs Act conspiracy by turning jewelry into case - the ultimate objective of the conspiracy. Thus, the financial transaction was an act in furtherance of the ongoing conspiracy offense. The court declined to decide whether a "promotion" includes both past and future unlawful conduct, or future unlawful conduct only.
U.S. v. Carcione, 15 FLW Fed C47 (11th Cir. 11/13/01)
Money Laundering: Concealment of the Source
The court held that to meet the requirement of 18 USC 1956(a)(1)(B)(a) the court held it is enough that the defendant engages in a transaction from which the source of the money benefitted and which concealed that the source had provided the money. In this case, evidence that the defendant lawyer receive money from a drug smuggler and, then, in turn paid other defendants arguably in an effort to insure their silence, there was sufficient evidence to support a conviction.
U.S. v. Abbell, 15 FLW Fed C35 (11th Cir. 11/7/01)
Money Laundering: Co-mingled funds
The money laundering statute allows for conviction where the funds involved in the transaction are derived from a co-mingled account in which only part comes from specified unlawful activities. Furthermore, the quantity of unlawful money need only be "slight." If that wasn't bad enough, once the illegal monies are co-mingled, no passage of time will remove the taint.
U.S. v. Abbell, 15 FLW Fed C35 (11th Cir. 11/7/01)
Money Laundering: Sufficiency of Evidence (Legitimate Sources)
Despite the claim that the client that paid the lawyer had a legitimate business income, the fact that the client earned hundreds of millions of dollars from drug trafficking was seemingly, by itself, enough to convict the lawyer of money laundering.
U.S. v. Abbell, 15 FLW Fed C35 (11th Cir. 11/7/01)
Money Laundering: Transactions Outside U.S.
Even, though, the transactions occurred "wholly outside of the U.S." conviction still stood for the charge found at 18 USC 1956(a)(1)(B)(i).
U.S. v. Tarkoff, 14 FLW Fed C422 (11th Cir. 2/20/01)

Money Laundering: Conspiracy Provision Enacted After Substantive Provision
In this case, because the statute prohibiting the conspiracy to launder money was enacted in October 1992, more than a year after the enactment of the substantive offense, the defendant's conviction for conspiracy violated the prohibition against ex post facto laws.
U.S. v. Miranda, 14 FLW Fed C277 (11th Cir. 12/15/99)
Money Laundering: Underlying Criminal Activity Must Be Completed
Before the primary offense of money laundering can occur, the underlying criminal activity must be complete, generating proceeds to be laundered.
U.S. v. Majors, 13 FLW Fed C161, n. 13 (11th Cir. 11/19/99); U.S. v. Christo, 129 F.3d 575, 580 (11th Cir. 1997)
Money Laundering: Not a Continuing Offense
Can apparently charge each transaction.
U.S. v. Majors, 13 FLW Fed C161, n. 14 (11th Cir. 11/19/99); U.S. v. Kramer, 73 F.3d 1067, 1072 (11th Cir. 1996)
Money Laundering: Concealment - Not a Money Spending Statute
U.S. v. Majors, 13 FLW Fed C161 (11th Cir. 11/19/99)
Money Laundering: Elements of s. 1956(a)(1)(B)(i) [Concealment]
Government has to prove: (1) that the defendant conducted or attempted to conduct a financial transaction; (2) that the transaction involved the proceeds of a statutorily specified unlawful activity; (3) that the defendant knew the proceeds were from some form of illegal activity; and (4) that the defendant knew a purpose of the transaction was to conceal or disguise the nature, location, source, ownership or control of the proceeds.
U.S. v. Majors, 13 FLW Fed C161 (11th Cir. 11/19/99); U.S. v. Tarkoff, 14 FLW Fed C422 (11th Cir. 2/20/01)
Money Laundering: Elements of "Promotion"
the obtains a conviction on a substantive Section 1965(a)(1)(A)(i) promotion charge, the Government bears the burden of proving beyond a reasonable doubt that: (1) the defendant conducted or attempted to conduct a financial transaction; (2) the defendant knew the property involved in the transaction represented the proceeds of unlawful activity; (3) the property involved was in fact the proceeds of the specified unlawful activity; and (4) the defendant conducted the financial transaction "with the intent to promote the carrying on of the specified unlawful activity.
U.S. v. Calderon, 12FLW Fed C609 (11th Cir. 3/12/99); U.S. v. Williamson, Case No. 02-12765 (11th Cir. 7/30/03)
Money Laundering: Sufficiency of Evidence in Promotion Case
U.S. v. Calderon, 12FLW Fed C609 (11th Cir. 3/12/99)
Money Laundering: In General
See: U.S. v. Adkinson, 12 FLW Fed C187 (10/26/98)

NEW TRIAL

New Trial: Rule 33 Time Limit Isn't "Jurisdictional"

Rule 33 (Motion for New Trial) time limit of 7 days isn't jurisdictional. Accordingly, where the government failed to object in the trial court to a motion filed after 7 days, the government forfeited that defense.
Eberhart v. U.S., Case No. 04-9949 (S.Ct. 10/31/05)
New Trial: Court Should Conditionally Rule When Granting a JOA
Rule 29(a) of the Federal Rules of Criminal Procedure requires the trial court to conditionally rule on any motion for a new trial if it grants a motion for a judgment of acquittal.
U.S. v. Miranda, Case No. 04-15920 (11th Cir. 9/14/05)
New Trial: Weighing Evidence
In considering a motion for a new trial, the court may weigh the evidence and consider the credibility of witnesses. The Rule 29 and Rule 33 standards are not identical. In a proper case - a case in which the evidence of guilt although legally sufficient is thin and marked by uncertainties and discrepancies - there is room between the two standards for a district court to reweigh the evidence and re-evaluate the credibility of witnesses.
Butcher v. U.S., Case No. 02-17033 (11th Cir. 5/5/04)
New Trial: Time Limits Jurisdictional
Both the seven day time period, and the 3 year time period for a motion based on new evidence are jurisdictional requirements, and in order to extend the seven days, the district court must order an extension within the seven days.
U.S. v. Hill, 177 F.3d 1251, 1252 (11th Cir. 1999); U.S. v. Bramlett, 116 F.3d 1403, 1405 (11th Cir.1997); U.s. V. Renick, 15 FLW Fed C65 (11th Cir. 11/30/01)
New Trial: Newly Discovered Evidence
To qualify as newly discovered (1) the evidence must be discovered following the trial; (2) the movant must show due diligence to discover the evidence; (3) the evidence must not be merely cumulative; (4) the evidence must be material to issues before the court; and (5) the evidence must be of such a nature that a new trial would probably produce a new result.
U.S. v. Hall, 854 F.2d 1269, 1271 (11th Cir. 1988); U.S. v. Pope, 132 F.3d 684, 688 (11th Cir. 1998); U.S. v. Thompson, Case No. 04-12218 (11th Cir. 9/1/05)

OBSTRUCTION OF JUSTICE

Obstruction of Justice: False Testmony
False testimony can provide the basis for a conviction under 18 USC § 1503 so long as it had the "natural and probable effect" of interfering with the administration of justice, even, though, the defendant's conduct may not have actually obstructed justice.
U.S. v. Johnson, Case No. 06-13564 (11th Cir. 5/11/07)
Obstruction of Justice: Misleading Information *Likely* to Be Transferred to Federal Agent
Where the defense was that the police officers who were charged with planting evidence believed they were misleading a state investigation and were unaware the information would be handed over to federal agents, the court held that the evidence was sufficient to establish a federal nexus because the statute does not require a specific intent to mislead federal agents, instead requiring only that it be likely that the information will be transferred to a federal agent.
U.S. v. Ronda, Case No. 03-15640 (11th Cir. 7/13/06)
Obstruction of Justice: Existence of Judicial Proceeding

Although, here, the Eleventh Circuit rejects the Fifth Circuit's holding that there must be an ongoing judicial proceeding before some one can be convicted of obstructing justice, the government still must prove that the defendant's actions were intended to prevent or otherwise obstruct processes of a specific future judicial proceeding. Merely concealing the crime or lying, for example, to a law enforcement officer does not, in itself, amount to obstruction of justice.
U.S. v. Vaghela, 169 F.3d 729 (11th Cir. 1999)

PAROLE

Parole: Revocation of "Street Time" for Conviction Not Alleged in Warrant
The revocation of "street time" pursuant to 18 USC 4210 for the conviction of a new offense applies only to convictions alleged in the parole warrant.
Toomey v. Young, 449 F. Supp. 336 (D. Conn. 1978)
Parole: Addition of New Allegations After Expiration of Parole
Can't be done.
Toomey v. Young, 449 F. Supp. 336 (D. Conn. 1978)
Parole: Special Parole
Hasn't been available as a sentencing option since the late eighties. It differs from regular parole in that it (1) follows the term of imprisonment, while regular parole entails release before the end of the term; (2) it was imposed, and its length selected by the district judge rather than by the Parole Commission; and (3) when special parole is revoked, its full length becomes a term of imprisonment, which means that "street time" does not count toward completion of special parole.
Manso v. Federal Detention Center, Miami, 12 FLW Fed C1136, n. 1 (11th Cir. 7/29/99)

PERJURY

Perjury: Lie to Probation Officer Preparing the PSI
A lie that the defendant tells the probation officer who is preparing the presentence report falls under the exemption from the federal false statements statute for statements submitted to a judge if the probation officer is required by law to include the statement in the presentence report.
U.S. v. Horvath, Case No. 06-30447 (9th Cir. 7/10/07), but see: U.S. v. Manning, Case No. 07-5035 (10th Cir. 5/16/08)
Perjury: Two Witness Rule
See: U.S. v. Forrest, 623 F.2d 1107 (5th Cir. 1980)
Perjury: Materiality
The test for materiality is whether the false statement was capable of influencing or misleading a tribunal on any proper matter of inquiry.
U.S. v. Roberts, Case No. 02-10018 (11th Cir. 10/4/02); U.S. v. Boffil-Rivera, Case No. 08-16098 (11th Cir. 5/27/10)
Perjury: Literal Truth Defense
A perjury conviction under 18 USC 1621 cannot be based upon a statement, however misleading or incomplete, that is the literal truth.

U.S. v. Roberts, Case No. 02-10018 (11th Cir. 10/4/02)

PRETRIAL MOTIONS

Pretrial Motions: Press' Right of Access to Judicial Proceedings Includes Material Filed In Connection With Pretrial Motions
See Romero v. Drummond, Case No. 06-13058 (11th Cir. 3/14/07)
Pretrial Motions: Example of Motion to Dismiss Based on Facts
Despite the absence of a rule authorizing a motion to dismiss based upon the facts, this case is an example where the parties stipulated to the facts and then the defense moved to dismiss the indictment.
U.S. v. Evans, Case No. 06-10907 (11th Cir. 1/30/07)
Pretrial Motions: Continuance
For mention of those rare cases where the Court of Appeals concluded it was error to deny a motion to continue see:
U.S. v. Baker, Case No. 00-13083 (11th Cir. 12/13/06) but see U.S. v. Graham, Case No. 08-14736 (11th Cir. 6/14/11)
Pretrial Motions: Motion to Dismiss - Look Only to See if Elements Alleged
In reviewing a motion to dismiss an indictment we look only at whether the Government has alleged each of the elements of the statute.
U.S. v. Plummer, 13 FLW Fed C1019 (11th Cir. 8/11/00)
Pretrial Motions: Motion to Suppress - Sufficiency of Allegations
Where, in a case involving a motel room, the motion to suppress failed to allege that the unregistered occupant was a guest of the registered occupant, and the defense then failed to amend the motion even after the issue of expectation of privacy had been raised in the Government's response, the district court, because of the inadequacy of the factual allegations in the motion, properly denied the motion without an evidentiary hearing.
U.S. v. Cooper, 13 FLW Fed C394 (11th Cir. 2/14/00)
Pretrial Motions: Challenge to Sufficiency of the Evidence
Can't challenge sufficiency of the evidence in a pretrial motion.
U.S. v. Ayarza-Garcia, 819 F.2d 1043, 1048 (11th Cir. 1987); U.S. v. Jensen, 93 F.3d 667, 669 (9th Cir. 1996); U.S. v. Kaley, Case No. 10-15048 (11th Cir. 4/26/12)

PRISONER'S RIGHTS

Prisoners: Prison Disciplinary Hearings – Minimum Due Process Requirements
Mitchell v. Warden Constance Reese, Case No. 13-14111 (11th Cir. 9/13/16); Dean-Mitchell v. Warden, Case No. 13-14111 (11th Cir. 9/13/16)
Prisoner's Rights: Shackling of Pretrial Detainees
Pretrial defendants not entitled to an individualized shackling determination.
U.S. v. Lafond, 783 F.3d 1216 (11th Cir. 2015); but see: U.S. v. Sanchez-Gomez, Case No. 13-50561 (9th Cir. 5/31/17)
Prisoner's Rights: Prison Officials Can't Read Letter Intended for Lawyer

Nordstrom v. Ryann, Case No. 16-15277 (9th Cir. 5/18/17)
Prisoner's Rights: Obligation of Courts to Enforce Constitutional Rights
"Courts nevertheless must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners. Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."
Brown v. Plate, Case No. 09-123 (S. Ct. 5/23/11)
Prisoner's Rights: Human Dignity
"A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."
Brown v. Plata, Case No. 09-1233 (S. Ct. 5/23/11)
Prisoner's Rights: Exhaustion of Remedies
Prisoner challenging prison conditions in federal court cannot satisfy PLRA's exhaustion requirement by filing an untimely or otherwise procedurally defective administrative grievance or appeal.
Woodford v. Ngo, Case No. 05-416 (S. Ct. 6/22/06)
Prisoner's Rights: Most Prisoners Are Sociopaths
U.S. v. Prevo, Case No. 04-15310 (11th Cir. 1/11/06)
Prisoner's Rights: Access to Law Library
The Sixth Amendment does not provide a pro se defendant who is incarcerated with a right to have access to a law library.
Kane v. Espitia, Case No. 04-1538 (S. Ct. 10/31/05)
Prisoner's Rights: Use of 42 USC 1983 to Challenge Parole Procedures
While a prisoner in state custody cannot use a § 1983 action to challenge the fact or duration of his confinement, 1983 is available to state prisoners that wish to make procedural challenges tha twould not necessarily mean immediate or speedier release. In this case, involving two defendants, one was seeking a new "eligibility review" regarding his parole and the other was seeking a new "parole hearing." The Court held that both could proceed with their 1983 claims.
Wilkinson v. Dotson, Case No. 03-287 (U.S. 3/7/05)
Prisoner's Rights: Right to Vote
Florida is one of only seven states that permanently disenfranchise first-time convicted felons unless they receive clemency. Approximately 10.5% of voting-age African Americans in Florida are now disenfranchised as ex-felons, compared with 4.4% of the non-African American population.
Johnson v. Governor of the State of Florida, Case No. 02-14469 (11th Cir. 12/19/03)
Prisoner's Rights: Prison Conditions and Eighth Amendment
If prison conditions are merely restrictive and even harsh, they are part fo the penalty that criminal offenders pay for their offenses against society. Generally speaking, prison conditions rise to the level of an Eighth Amendment violation only when they involve the wanton and unnecessary infliction of pain.
Chandler v. Crosby, Case No. 03-12017 (11th Cir. 8/6/04)
Prisoner's Rights: Conviction May Bar Civil Action
A state prisoner may not bring a claim for damages under 42 USC 1983 if a judgment in favor of the plaintiff would *necessarily* imply the invalidity of his conviction. As an illegal arrest may still be followed by a valid conviction, though, this general rule doesn't always bar an action for an illegal arrest.

Hughes v. Lott, Case No. 02-11508 (11th Cir. 11/14/03)
Prisoner's Rights: Limitations on Visitation
Although not holding that the right to association is altogether terminated by incarceration, the court upheld limitations on contact visits for certain prisoners because those regulations bore a rational relation to legitimate penological interests.
Overton v. Bazzetta, Case No. 02-94 (S. Ct. 6/16/030
Prisoner's Rights: 922(g) Conviction Disqualifies Prisoner From Sentence Reduction
If the defendant is convicted of possession of a firearm by a convicted felon, 18 USC 922(g), he is disqualified from receiving the one year off for drug treatment as provided in 18 USC 3621(e)(2)(B).
Gunderson v. Hood, 268 F.3d 1149 (9th Cir. 2001). See also BOP PS5162.04
Prisoner's Rights: Mailbox Rule
Under the mailbox rule, burden is on prison authorities to prove date prisoner delivered his documents to be mailed and, absent evidence to the contrary in the form of prison logs or other records, the court will assume that the defendant's motion was delivered to prison authorities on the day he signed the motion.
Washington v. U.S., 14 FLWFed C459 (11th Cir. 3/9/01)
Prisoner's Rights: Strip Searches
Although, here, exceptions to the general rule were recognized for strip searches by medical personnel to detect lice and other communicable diseases, and by same sex corrections officials when the existence of a weapon at the time of the arrest provided the requisite reasonable suspicion, that general rule provides that the strip search of each new prisoner admitted to a jail violates the Fourth Amendment.
Skurstenis v. Jones, 14 FLW Fed C293 (11th Cir. 12/28/01)
Prisoner's Rights: Strip Searches (Evidentiary Purposes)
Must be at least a reasonable suspicion.
Jordan v. Stephens, Case No. 02-16424 (11th Cir. 5/24/05)
Prisoner's Rights: Administrative Rules- No Early Release for Drug Treatment
The Bureau of Prisons, in interpreting 18 USC 3621(e)(2)(B), which allows the reduction of a sentence by a year if the prisoner completes a drug treatment program, established a regulation that prohibited the early release of any one whose current offense was a felony that involved the carrying, possession, or use of a firearm. The Court, giving the requisite deference to the BOP, concluded the reugaltion was a permissible exercise of the BOP's discretion.
Lopez v. Davis, 14 FLW Fed S43 (1/10/01)
Prisoner's Rights: Limitations on Personal Injury Claims of Prisoners
While still in custody, prisoner's can bring a federal personal injury claims against the prison or detention center only if there is a showing of physical injury.
Harris v. Garner, 13 FLW Fed C755 (11th Cir. 6/27/00)
Prisoner's Rights: Right of Access to a Law Library
Prisons are not required to provide access to the law libraries. Law libraries are simply one way of assuring the constitutional right of access to the courts.
Akins v. U.S. 13 FLW Fed C07 (11th Cir. 2/24/00); Bounds v. Smith, 430 U.S. 817, 825 (1977)

PROBATION & SUPERVISED RELEASE

Conditions

Probation & Supervised Release: Conditions – Computer Restrictions in Child Solicitation Case
Court rejected the narrower approach set out in U.S. v. Holena, 906 F.3d 288 (2d Cir. 2018), and upheld requirement that defendant not have access to a computer without obtaining approval form probation officer.
U.S. v. Bobal, No. 19-10678 (11th Cir. 11/30/20)
Probation & Supervised Release: Conditions - Delegation of Judicial Responsibility to Probation Officer
Court found condition that defendant undergo mental health counseling "as deemed necessary by the probation officer"to be an improper delegation of judicial authority, but upheld conditions requiring defendant to obtain permission from probation officer before opening a checking account and to, as directed by probation officer, notify third parties of risks occasioned by the defendant's criminal history or personal history.
U.S. v. Nash, 438 F.3d 1302 (11th Cir. 2006)
Probation & Supervised Release: Conditions - Notice of Intent to Impose Unusual Conditions of Supervised Release
As Rule 32(c) affords requires the defendant to be given notice of all important options to be considered at sentencing, the court must give defendants notice, prior to sentencing, of any unusual conditions of supervised release. In this instance, the court should have given the defendant notice that it intended to limit his access to any internet services without prior approval of his probation officer.
U.S. v. Scott, 316 F.3d 733 (7th Cir. 2003)
Probation & Supervised Release: Conditions - Polygraph
The sentencing court ordered the defendant who had been convicted of a sex offense to submit to polygraph testing as a condition of his sex offender treatment program. As the defendant had not yet been asked any potentially incriminating questions, the court held that the defendant's objections were premature.
U.S. v. Taylor, Case No. 02-16210 (11th Cir. 7/25/03)
Probation & Supervised Release: Conditions - Special Conditions
A district court has discretion to order special conditions of supervised release so long as they are reasonably related to the broad purposes set forth in 18 USC s. 3553(a)(1) and (a)(2)(B)-(D). In this instance it was OK to order anger management counseling for someone involved in credit card fraud case.
U.S. v. Bull, 13 FLW Fed C741 (11th Cir. 6/12/00)
Probation & Supervised Release: Conditions - Excessively Vague Condition of Supervised Release
Condition of supervised release requiring defendant to refrain from "conduct or activities that would give reasonable cause to believe" that he had violated any criminal law was excessively vague.
U.S. v. Ridgeway, 319 F3d 1313 (11th Cir. 2003)

Probation & Supervised Release: Conditions - Mandatory Condition of Supervised Release
A district court may impose conditions of supervised release in accordance with the four classes of conditions found in USSG § 5D1.3. The first class of conditions is the list of mandatory conditions in USSG in USSG § 5D1.3(a).
U.S. v. Ridgeway, 319 F3d 1313 (11th Cir. 2003)
Probation & Supervised Release: Conditions - Deportation
Although there is a split of authority, the Court held that deportation could be made a condition of supervised release.
U.S. v. Alvarez, 11FLW Fed C53 (11th Cir. 6/20/97)

Hearing

Probation and Supervised Release: Hearing – Nolo Plea to Underlying Offense
Not entirely clear whether a nolo plea to a new offense will support a revocation.
U.S. v. Green, 873 F.3d 846 (11th Cir. 2017)
Probation & Supervised Release: Application of Exclusionary Rule
Exclusionary rule does not apply to revocations of probation or supervised release.
U.S. v. Herbert, 201 F.3d 1103, 1104 (9th Cir. 2000); U.S. v Armstrong, 187 F.3d 392, 393-95 (4th Cir. 1999), although some courts have held it could apply in cases of "police harassment." U.S. v. Montez, 952 F.2d 854, 858 (5th Cir. 1992); U.S. v. Charles, 531 F.3d 637, 640 (8th Cir. 2008); U.S. v. Alexander, 1997 WL 592807, *1 (6th Cir. 9/24/07)
Probation & Supervised Release: Requirement That Court Elicit Objections Following Sentencing
After imposing sentence, the district court should elicit fully-articulated objections to the court's findings of fact, conclusions of law, and the manner in which the sentence was imposed.
U.S. v. Campbell, Case No. 06-12578 (11th Cir. 1/3/07)
Probation & Supervised Release: Hearing - Hearsay Admissible to Prove New Offense?
Although adequate to prove urinalysis results, U.S. v. Penn, 721 F.2d 762 (11thCir. 1983), the introduction of hearsay regarding something like a new offense requires the court to balance the defendant's right of confrontation against whatever grounds the government might have for denying confrontation. Absent unusual circumstances, the hearsay should be inadmissible.
U.S. v. Frazier, 26 F.3d 110 (11th Cir. 1994); U.S. v. Bell, 785 F.2d 640 (8th Cir. 1986); U.S. v. Reynolds, 49 F.3d 423 (8th Cir. 1995)
Probation: Hearing - No Right to Allocution in VOSR Hearing
Although the better practice is to allow allocution, Federal Rule of Criminal Procedure 32.1 does not provide for the right of allocution in a sentencing for violation of supervised release.
U.S. v. Frazier, 15 FLW FedC310 (2/25/02)
Probation & Supervised Release: Hearing - Rules of Evidence Inapplicable
U.S. v. Frazier, 26 F.3d 110 (11th Cir. 1994)
Probation & Supervised Release : Hearing -Hearsay
In determining whether to admit hearsay the court must balance the defendant's right to confront adverse witnesses with the government's reasoning for denying it.
U.S. v. Martin, 984 F.2d 308, 310 (9th Cir. 1993); U.S. v. O'Meara, 33 F.3d 20, 20-21 (8th Cir. 1994); U. S. v. Zentgraf, 20 F.3d 906, 909 (8th Cir. 1994); U.S. v. Reynolds, 49 F.3d 423, 426 (8th Cir. 1995); U.S. v. Frazier, 26 F.3d 110, 114 (11th Cir. 1994)

Probation & Supervised Release: Hearing - Right to Remain Silent
The accused has the right to invoke the fifth amendment.
Minnesota v. Murphy, 465 U.S. 420, 440 (1964), but invocation may result in revocation.
U.S. v. Ross, 9 F.3d 1182 (7th Cir. 1993); *vacated on other grounds* 511 U.S. 1124 (1994).
Probation & Supervised Release: Hearing - Burden of Proof
To revoke probation the court must be reasonably satisfied that a probationer has violated his or her probation.
U.S. v. Goad, 44 F.3d 580, 585 (7th Cir. 1994).
Probation & Supervised Release: Hearing - Lengthy Colloquy Unnecessary for Admission
U.S. v. Pelensky, 129 F.3d 63 (2nd Cir. 1997)

Miscellaneous

Probation & Supervised Release: Early Termination
Court recognized the right to ask the court to terminate supervised release early and to appeal a denial of the request.
U.S. v. Trailer, Case No. 15-14583 (11th Cir. 6/30/16)
Probation & Supervised Release: Miscellaneous - Modification
Because 18 U.S.C. §3563(c) allows a court to "modify, reduce, or enlarge the conditions of a sentence of probation at anytime prior to the expiration or termination of the term of probation," the court of appeals upheld the modification of his probation to include a year of home confinement. The court modified the probation a few weeks after imposition of the original sentence, following the publication of newspaper article in which the defendant made light of the incident that led to his conviction. In reaching the conclusion, the court stated that it did not think a formal revocation of probation was necessary to modify the conditions.
U.S. v. Serrapio, Case No. 12-14897 (11th Cir. 6/18/14)
Probation & Supervised Release: Miscellaneous - Pretrial Detention Tolls Running of Supervised Release
Pretrial detention lasting 30 days or more tolls the period of supervised release, provided that a conviction ultimately results from the charges for which the individual is being held. In this case, where the defendant was turned over to state authorities after he served his prison sentence, it meant that the defendant's supervised release had not expired by the time of his revocation so that district court had jurisdiction over the violation of supervised release.
U.S. v. Johnson, Case No. 09-10351 (11th Cir. 9/2/09)
Probation & Supervised Release: Miscellaneous - Jurisdiction (Dependent Upon Issuance of a Warrant Based on Sworn Facts)
At least according to the 9th Circuit, if the district court's jurisdiction is dependent upon a warrant issued prior to the expiration of the period of supervision, the warrant issued by the court must be based on sworn testimony. In this case, because the warrant issued on the basis of an unsworn report filed by the probation officer, the Court held that the district court lacked jurisdiction to violate the defendant's supervised release.
U.S. v. Vargas-Amaya, 389 F.3d 901 (9th Cir. 2004)
Probation & Supervised Release: Miscellaneous - Supervised Release Begins Only Upon Release

Despite the obvious equity in construing the beginning of supervised release to have coincided with the expiration of the defendant's legal sentence, the Court held that even though the defendant had served, on top of the legal sentence, several years on some counts that had been vacated on appeal, the Court held that supervised release did not begin until the defendant was actually released from prison.
U.S. v. Johnson, 13 FLW Fed S131 (3/1/00)
Probation & Supervised Release: Miscellaneous - Probation Officer Can't Impose Occupational Restrictions
U.S. v. Dempsey, 12 FLW Fed C1048 (11th Cir. 7/14/99)
Probation & Supervised Release: Miscellaneous - Continues to Run After Deportation
See: U.S. v. Okoko, 03-12952 (11th Cir. 4/6/04); U.S. v. Osssa-Gallegos, Case No. 05-5824 (6th Cir. 6/21/07)(en banc)
Probation & Supervised Release: Miscellaneous - Extension (Hearing Required?)
Despite that fact that FRCrP 32.1(b) seems to say a hearing and appointment of counsel is required before the extension of probation, the limited authority holds to the contrary. (See Teddy Foster file 2002-0004)
U.S. v. Tackett, 1992 U.S. App. LEXIS 5803 (7th Cir. 3/31/92); U.S. v. Dyer, 620 F.Supp. 51 (E.D. Wisc. 1985)
Probation & Supervised Release: Miscellaneous - Failure to Pay & Probation Extension
Nothing wrong with extending probation for failure to pay restitution, even if the probationer has made a good faith effort to pay.
U.S. v. Ortiz, 733 F.2d 1416 (10th Cir. 1984)
Probation & Supervised Release: Miscellaneous - Running is Tolled While Serving a Sentence Greater Than 30 Days
"A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days."
18 USC 3624(e)
Probation & Supervised Release: Miscellaneous - Limited to One Year for a Misdemeanor
U.S. v. Rhodes, 12 FLW Fed C923 (11th Cir 6/4/99)

Sentencing

Probation & Supervised Release: Sentencing - When Initial Sentence Was Maximum
If the court imposes the statutory maximum penalty followed by supervised release, the court, upon a violation, may sentence the defendant to additional time.
U.S. v. Proctor, 127 F.3d 1311 (11th Cir. 1997)
Probation & Supervised Release: Sentencing - Longer Sentence for Treatment Purposes
Court may not impose a longer sentence upon a revocation of supervised release for purposes of treatment.
U.S. v. Vandergrift, Case No. 12-13154 (11th Cir. 6/18/14)
Probation & Supervised Release: Sentencing - Conditions Unrelated to Offense
Although, the defendant was being sentenced for possession of a firearm by a convicted felon, district court had authority to impose conditions intended to address defendant's past sexual misconduct, including the requirement that he register as a sex offender.

U.S. v. Moran, Case No. 08-16987 (11th Cir. 7/1/09)

Probation & Supervised Release: Sentencing - Unexpected Conditions of Supervised Release

Defendant who was being sentenced for a firearm offense had no basis to complain about lack of notice when court imposed special conditions meant to address the past sexual misconduct outlined in the PSR.

U.S. v. Moran, Case No. 08-16987 (11th Cir. 7/1/09)

Sentencing & Supervised Release: Sentencing - Allocution

Right to allocution extends to sentencings for violation of supervised release.

U.S. v. Carruth, Case No. 07-12060 (11th Cir. 5/22/08)

Probation & Supervised Release: Sentencing - Consecutive Sentences for Same Violation

Where the defendant faced a VOSR in two separate cases based upon a single act, there was nothing unreasonable about the trial court's decision to impose consecutive sentences.

U.S. v. Sweeting, Case No. 05-11062 (11th Cir. 1/26/06)

Probation & Supervised Release: Sentencing - Leaving Decision of Mental Health Counseling to Probation Officer

It was error for the court to delegate to the probation officer the authority to decide whether defendant would participate in mental health treatment.

U.S. v. Heath, Case No. 05-10175 (11th Cir. 8/12/05)

Probation & Supervised Release: Sentencing - Leaving Question of Drug Testing to Probation Officer

Court rejected an order that left to the probation officer the decision as to the number of urinalysis tests was invalid as an improper delegation of the court's sentencing authority.

U. S. v. Tulloch, Case No. 02-1749 (1st Cir. 8/12/04)

Probation & Supervised Release: Sentencing - S.R. Only for Those That Need It

"Supervised release departed from the parole system it replaced by giving district courts the freedom to provide post-release supervision for those, and only those, who needed it."

Johnson v. United States, 13 FLW Fed S308 (5/15/00)

Probation & Supervised Release: Sentencing - Longer Supervised Release for Drug Offenses?

There is a split among the jurisdictions as to whether 21 USC 841 authorizes longer periods of supervised release for drug offenses beyond that authorized by 18 USC 3583.

Longer: U.S. v. Garcia, 112 F3d 395, 398 (9th Cir 1997); U.S. v. Orozco-Rodriguez, 60 F.3d 705, 707-708 (10th Cir. 1995); U.S. v. Mora, 22 F.3d 409, 412 (2d Cir. 1994); U.S. v. LeMay, 952 F.2d 995, 998 (8th Cir. 1991). Limited: U.S. v. Good, 25 F.3d 218, 221 (4th Cir. 1994); U.S. v. Kelly, 974 F.2d 22, 24 (5th Cir. 1992).

Probation & Supervised Release: Sentencing - Supervised Release Even With Maximum Sentence

Court may include a sentence of supervised release even when imposing the maximum sentence.

U.S. v. Jenkins, 42 F.3d 1370, 1371 (11th Cir. 1995)

Probation & Supervised Release: Sentencing - Terms Must Run Concurrently

U.S. v. Magluta, 13 FLW Fed C291 (11th Cir. 12/23/99)

Violation

Probation & Supervised Release: Fair Sentencing Act Not Retroactive
Though the Fair Sentencing Act had reduce the offense from a Class B to a Class C felony between the initial sentencing and the VOSR, the penalties associated with a Class B felony determined the penalties for the violation.
U.S. v. Johnson, 786 F.3d 241 (2d Cir. 2015)

Probation & Supervised Release: Court Must Provide Reasons for Sentence Outside Guideline Range
The court's failure to state a reason for a sentence outside the guidelines, as required by 18 U.S.C. § 3553(c)(2) was plain error.
U.S. v. Parks, Case No. 15-11618 (11th Cir. 5/20/16)

Probation & Supervised Release: Failure to Pay Must Be Willful
But, insufficient efforts at seeking employment may amount to a willful failure to pay.
U.S. v. Roberts, 380 Fed. Appx. 917 (11th Cir. 5/28/10)

Probation & Supervised Release: Violation - Sworn Petition?
The petition alleging a violation of probation or supervised release need not be sworn.
U.S. v. Presley, Case No. 05-16778 (11th Cir. 5/31/07); U.S. v. Garcia-Avalino, 444 F.3d 444 (5th Cir. 2006), *contra*: U.S. v. Vargas-Amaya, 389 F.3d 901 (9th Cir. 2004); .

Probation & Supervised Release: Violation - Imposition of Sup. Release Following Sentence for Violation of Probation
The trial court correctly concluded it was required to impose a sentence of supervised release to follow the sentence of imprisonment for the violation of probation.
U.S. v. Mitsven, Case No. 05-12647 (11th Cir. 6/22/06)

Probation & Supervised Release: Violation - Length of Sentence Limited Upon Reimposition
Under 18 USC 3583(h) if the court revokes supervised release and sentences the defendant to a new prison term and an additional term of supervised release, the length of the supervised release cannot exceed the maximum supervised release term for the original conviction less any term of imprisonment. The "imprisonment" includes the prison term for the instant revocation as well as any prior revocations.
U.S. v. Brings Plenty, 188 F.3d 1051 (8th Cir. 9/1/99); U.S. v. Maxwell, 285 F.3d 336 (4th Cir. 2002)

Probation & Supervised Release: Violation - Reinstatement of Entire Period of Supervised Release?
See: U.S. v. Trenter, 99-30226 (9th Cir. 2/7/00)

Probation & Supervised Release: Violation - Multiple Revocations & Credit for Prior Sentences
If there are multiple violations of supervised release, the length of the sentence is limited by the aggregate of the new sentence and the prior sentences. If
under 18 USC 3483(e)(3) the maximum sentence for VOSR is 2 years, that 2 years is the total exposure regardless of the number of revocations. While that rule is clear from the 2005 version of the statute, in this instance the court interpreted the prior version of the statute in a way consistent with the new language.
U.S. v. Williams, No. 04-15732 (11th Cir. 9/19/05)

Probation & Supervised Release: Violation - Pre-Trial Detention Doesn't Toll Supervised Release

Pre-trial detention does not toll the running of supervised release. Consequently the court had no jurisdiction to revoke supervised release where warrant issued two weeks after supervised release expired.

United States v. Morales-Alejo, 193 F.3d 1102 (9th Cir. 1999)

Probation & Supervised Release: Violation - Detention Hearings

Rule 32.1 governs violations of supervised release. It provides that the defendant may be released pursuant to Rule 46(c). That rule, in turn, says that the burden of establishing that the defendant will not flee or pose a danger rests with the defendant. It says, too, that any release "shall be in accordance with 18 USC 3143, which, like the other provisions, addresses release pending sentencing or appeal. Subsection (a) of the statute provides that the court shall order the person detained unless the judge finds by "clear and convincing evidence that the person is not likely to flee or pose a danger." Subsection (a)(2) provides a tougher standard for those offenses listed in subparagraphs (A), (B), or (C) of 18 USC 3142(f) - crime of violence, offense with a maximum sentence of life or death, a federal controlled substance offense with a maximum term of 10 years or more. That tougher standards requires, in addition to the requisite clear and convincing evidence showing, that the government is not recommending incarceration on the violation charges.

U.S. v. Fernandez, 144 F.Supp.2d 114 (N.D. N.Y. 2001)

Probation & Supervised Release: Violation - Revocation After Supervised Release Has Expired

The court may revoke supervised release after the term has expired so long as it does so within "any period reasonably necessary for the adjudication of matters arising before its expiration," so long as a warrant or summons has issued prior during the period of supervision.

18 USC 3583(i)

Probation & Supervised Release: Violation - Nolo Plea Won't Support a Violation

See: United States v. Poellnitz, 372 F.3d 562 (3rd Cir. 2004); U.S. v. McGill, 2009 WL 961142 (11th Cir. April 9, 2009).

Probation & Supervised Release: Violation - Sentence For VOSR (No Credit For Prior Time on Supervised Release)

When a sentencing court imposes a new sentence for a violation of supervised release, the defendant does not get credit against the new supervised release for time previously served on supervised release. The new maximum is whatever is authorized by the statute minus the amount of incarceration received upon the violation of supervised release. That means, of course, that the judge is not limited to the period of supervised release initially imposed.

U.S. v. Pla, Case No. 02-16815 (11th Cir. 9/19/03)

Probation & Supervised Release: Violation - New Term and Credit for Prior Supervised Release

For those that were sentenced prior to September, they are not, when following a revocation and the imposition of a new period of supervised release, entitled to credit for the time previously spent on supervised release.

U.S. v Gresham, Case No. 02-11947 (11th Cir. 3/28/03)

Probation & Supervised Release: Violation - Initial Guideline Range Inapplicable

Under 18 USC § 6565(a)(2), the court is authorized to resentence a defendant upon a violation of probation without being restricted to the guideline range applicable at the time of the initial sentencing hearing; instead, a court must only comply with Subchapter A in sentencing the defendant.
U.S. v. Cook, 291 F.3d 1297 (11th Cir. 2002)

Probation & Supervised Release: Violation - Date of Violation Determines Guideline Version

With one exception, the version of the Sentencing Guidelines, as they existed at the time of the violation, are the ones to be used. That exception is the mandatory prison sentence for drug offenders that is found in 18 USC 3583(g). For those rare cases that involve an individual whose offense occurred prior to 12/31/88, when there was no requirement for a mandatory prison sentence, the application of (g) would amount to an ex post facto violation. U.S. v. Cofield, 233 F3d 405 (6th Cir. 2000); U.S. v. Schram, 9 F.3d 741 (9th Cir. 1993); U.S. v. Paskow, 11 F.3d 873 (9th Cir. 1993); Johnson v. U.S., 120 S.Ct. 1795 (2000)

Probation & Supervised Release: Violation - Longer Sentence for Rehabilitation

Although recognizing that it isn't appropriate when imposing the initial sentence, the Court held that a longer sentence could be imposed upon a revocation of supervised release for the purpose of participation in a drug rehabilitation program.
U.S. v. Brown, 13 FLW Fed C1069 (11th Cir. 8/18/00)

Probation & Supervised Release: Violation - Court Not Required to Follow Guidelines

Although the trial court must consider the guidelines, it is not bound by them because they are merely advisory.
U.S. v. Brown, 13 FLW Fed C1011 (11th Cir. 8/18/00)

Probation & Supervised Release: Violation - Additional Supervised Release Following Revocation

In 1994 Congress added 18 USC 3583(h) which explicitly gives the district courts the authority to impose a period of supervised release following imprisonment for revocation. In this case the Court construed the provisions that existed prior to the 1994 enactment to authorize the same thing.
Johnson v. United States, 13 FLW Fed S308 (5/15/00)

Probation & Supervised Release: Violation - Double Jeopardy and Violation Penalties

Treating post-revocation sanctions as part of the penalty for the initial offense avoids double jeopardy difficulties.
Johnson v. United States, 13 FLW Fed S308 (5/15/00)

Probation & Supervised Release: Violation - Revocation Isn't Mandated

Unless mandated by law, see 18USC 3583 and Chapter 7 of guidelines, the finding of a violation doesn't require a revocation.
U.S. v. Holland, 874 F.2d 147 (11th Cir. 1989); U.S. v. Whalen, 82 F.3d 528 (1st Cir. 1996)

Probation & Supervised Release: Violation - Guidelines Not Mandatory

U.S. v. Milano, 32 F.3d 1499, 1502-1503 (11th Cir. 1994)

Probation & Supervised Release: Violation - Inability to Pay Fines or Restitution

"If the probationer could not pay despite bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay."

Bearden v. Georgia, 461 U.S., 670, 672, 103 S.Ct.2064, 2073 (1983); U.S. v. Johnson, 983 F.2d 216 (11th Cir. 1993)

Probation & Supervised Release: Violation - Insufficient Efforts to Pay Fine

"A probationer's failure to make sufficient efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes society for his crime. In such a situation the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense."

Bearden v. Georgia, 461 U.S., 670, 668, 103 S.Ct.2064, 2070 (1983)

Probation & Supervised Release: Violation - Acts Committed Prior to Sentencing

Probation can't be revoked for acts committed prior to imposition of probation.

U.S. v. Twitty, 44 F.3d 410 (6th Cir. 1995)

Probation & Supervised Release: Violation - Positive Urine Test' Possession

Trial court did not err in concluding that a positive urinalysis test was tantamount to possession for purposes of a revocation pursuant to 18 USC 3565.

U. S. v. Granderson, 969 F.2d 980 (11th Cir. 1992)

Probation & Supervised Release: Violation - 1994 Change In Prison/Supervised Release Combination

Prior to 1994 18 USC 3583(e) apparently prohibited a judge from imposing, upon a violation of supervised release a split sentence of both prison and supervised release. It also apparently established a limit as to the amount of restraint, i.e. either a certain amount in prison or an equal amount of supervised release. As of 1994, though, 18 USC 3583(h) allows the judge to impose a split sentence upon a supervised release violation. In this case, in which the substantive offense occurred prior to 1994, but the violation occurred after 1994, the judge could impose a split sentence but the combined period of probation and incarceration could not exceed the "total amount of restraint" set forth in the pre-1994 statute.

U.S. v. Eske, 98-2524 (8/27/99)

PROSECUTORS

Prosecutors: Obligation to Exercise Discetion

"The rigors of the penal system are thought to be mitigated to some degree by the discretion of those who enforce the law. See, e.g., Jackson, The Federal Prosecutor, 31 J. Am. Inst.Crim. L. & Criminology 3, 6 (1940-1941). The clemency power is designed to serve the same function. Among its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider. These mechanisms hold out the promise that mercy is not foreign to our system. The law must serve the cause of justice."

Dretke v. Haley, 124 S. Ct. 1847, 1856 (2004)(Kennedy, J. dissenting opinion)

Prosecutors: AUSA Reprimanded For Improper Closing Argument

"The government informed us at oral argument that the prosecutor's superiors have reprimanded her for her conduct."

U.S. v. Hands, 12 FLW Fed C1194, n. 31 (8/18/99)

Prosecutors: Role is That of Seeking Justice

Obligation is "not that it shall win a case, but that justice shall be done."

Berger v. U.S., 295 U.S. 78, 88 (1935), Strickler v. Greene, 12 FLW Fed S361 (6/17/99)

Prosecutors: Immunity
Prosecutors have absolute immunity from damages for acts or omissions associated with the judicial process. They are not, however, immune to claims for injunctive relief.
Bolin v. Story, 13 FLW Fed C1089 (11th Cir. 9/6/00)

PUBLIC DEFENDERS

Public Defender: Freedom of Information Act and Privacy Act
Neither the Freedom of Information Act (5 U.S.C. § 552) nor the Privacy Act (5 U.S.C. § 552a) applies to the judiciary, and neither is applicable to requests for release to the public records and information pertaining to activities under the CJA and related statutes.
Section 510.20 of the Guide to Judiciary Policy, Vol. 7 A.
Public Defenders: Delay Caused By Failure to Fund Indigent Defense
Delay caused by a States's failure to fund counsel for an indigent's defense should be weighed against the State in determining whether there was a deprivation of a defendant's Sixth Amendment right to a speedy trial.
Boyer v. Louisiana, Case No. 11-9953 (S. Ct. 4/29/13), *order dismissing cert. as improvidently granted,* (Sotomayor, J. dissenting)
Public Defenders: Liability
Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken.
Wilson v. Layne, 12 FLW Fed S274 (5/24/99)

PUBLIC OFFICIALS

Public Officials: Public Officials Solicitation of a "Gratuity" - Definition of Public Official
"In order to be considered a public official a defendant need not be the final decision maker as to a federal program or policy. Rather, it appears to be sufficient that the defendant is in a position of providing information and making recommendations to decision as long as the defendant's input is given sufficient weight to influence the outcome of the decisions at issue." Here, Judge Hinkle was correct in finding Mr. Kenney, who was employed as an "acquisitions manager" for a private company that had a contract to serve the Air Force, to be a public official.
U.S. v. Kenney, 12 FLW Fed. C1220 (11th Cir. 8/26/99)

QUOTES

Quotes: Some Small Errors Can Seriously Affect Outcome of Case
"Some toxins can be deadly in small doses."
Buck v. Davis, Case No. 15-8049 (S. Ct. 10/5/16)
Quotes: Agreements Don't Always Age Well

"Sometimes a deal, like a tattoo, does not age well and what appeared attractive in the past seems unattractive in the future."
U.S. v. Melton, Case No. 15-15738 (11th Cir. 7/10/17)
Quotes: Reasonable Doubt Requirement Requires Vigilance
"The burden is on the government to prove all elements of a crime beyond a reasonable doubt. When a man's liberty is at stake, we must be vigilant with this burden."
U.S. v. Louis, Case No. 16-11349 (11th Cir. 7/10/17)
Quotes: No Border Guards at the Frontier of the Absurd
"Counsel's answers show that at the frontier of the absurd there are no border guards."
Zack v. Bondi, Case No. 09-12717 (11th Cir. 1/9/13) (Carnes, J. concurring)
Quotes: Remedy for False Speech
"The remedy for speech that is false is speech that is true."
United States v. Alvarez, Case No. 11-210 (S. Ct. 6/28/12)
Quotes: Increasingly Vague Criminal Laws
"We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive th ethe Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt."
U.S. v. Sykes, Case No. 09-11311 (S. Ct. 6/9/11)(Scalia, J., dissenting)
Quotes: Evil Hates the Light
The corrupt usually don't' advertise their corrupt ways, or as we noted in McNair, "the extent to which the parties . . . conceal their bribes is powerful evidence of their corrupt intent. 605 F.3d at 1197, *cf* John 3:20 (RSV) ("For every one who does evil hates the light, and does not come to the light, lest his deeds should be exposed."
U.S. v. White, Case No. 10-14654 (11th Cir. 11/29/11)
Quotes: Jury Most Often Gets It Right
Though popular culture sometimes asserts otherwise, the virtue of our jury system is that it most often gets it right.
U.S. v. Siegelman, Case No. 07-13163 (11th Cir. 5/10/11)
Quotes: Constitutional Violations Harm All of Us
For all I know, Bryant has received his just deserts. But he surely had not received them pursuant to the procedures our Constitution requires. And what has been taken away from him has been taken away from us all.
Michigan v. Perry, Case No. 09-150 (S. Ct. 2/8/11)(Scalia, J. dissenting)
Quotes: Casualties
Meanwhile, justice, respect for the rule of law, the principle of prosecutorial discretion, common sense and human decency continue to be the casualties of the sad case of Jamie Olis and other dubious prosecutions of corporate agency costs in the post-Enron era.
Tom Kirekendall, *Clear Thinking*, blog.kir.com (1/18/06)
Quotes: Hope and Long Sentences
Hope is the necessary condition of mankind, for we are all created in the image of God. A judge should be hesitant before sentencing so severely that he destroys all hope and takes away all

possibility of useful life. Punishment should not be more severe than that necessary to satisfy the goals of punishment.
U.S. v. Carvajal, 2005 WL 476125, *6 (S.D.N.Y. Feb. 22, 2005)

Quotes: Words

A "word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."
Towne v. Eisner, 245 U.S. 418, 425, 38 S. Ct. 158, 159 (1918)(Holmes, J.), as quoted in U.S. v. Rubbo, Case No. 04-10874 (11th Cir. 1/21/05)

Quotes- Technical Innocence

"Perhaps some would say that Haley's innocence is a mere technicality, but that would miss the point. In a society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail."
Dretke v. Haley, Case No. 02-1824 (S. Ct. 5/3/04)(Kennedy, J. dissenting opinion) (Court had declined to reach the issue of whether actual innocence exception applies to non-capital sentencing error)

Quotes: Traveling With Justice Breyer to Appendi-land

While I am, as always pleased to travel in Justice Breyer's company, the unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. those states that leave the ultimate life-or-death decision to the judge may continue to do so - - by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase. There is really no way in which Justice Breyer can travel with the happy band that reaches today's result unless he says yes to Apprendi. Concisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to Apprendi-land.
Ring v. Arizona, 122 S.Ct. 2428, 2445 (2002) (Scalia, J. concurring)

Quotes: Foolish Before?

In rejecting an argument that the current improved procedures reflected the inadequacy of those that were replaced. The court stated that the courts have "for strong policy reasons, resisted rules crediting the notion that 'because the world gets wiser as it gets older, therefore it was foolish before.'"
Dusenbery v. U.S., 15 FLW FedS48 (1/8/02)

Quotes: Scalia- "characteristically inventive"

Justice Ginsburg in referring to Justice Scalia's dissent says: 'The dissent here is characteristically inventive."
Lee v. Kemna, 15 FLW Fed S89 (1/22/02)

Quotes: Rigid Interpretation of Statutory Language

Where statutory language is ambiguous, I believe these priorities are misplaced. Language, dictionaries, and canons, unilluminated by purpose, can lead courts into blind alleys, producing rigid interpretations that can harm those whom the statute affects. If generalized, the approach, bit by bit, will divorce law from the needs, lives, and values of those whom it is meant to serve - a most unfortunate result for people who live their lives by law's light.
Duncan v. Walker, 14 FLW Fed S366 (3/26/01) (Breyer dissenting opinion)

Quotes: Telling the Truth

". . . A man's conduct is often controlled by his conscience. . .To many people telling the truth and coming clean satisfies a basic spiritual need of one who has transgressed and provides a measure of relief."
U.S. v. Prieto, 14 FLW Fed C129 (11th Cir. 11/6/00)
Quotes: No Constitutional Bar to Bad or Foolish Laws
"The Court does not invalidate bad or foolish policies, only unconstitutional ones . . .
Bailey v. Pryor, 14 FLW Fed C51 (11th Cir. 10/12/00)
Quotes: Worthy Endeavor
Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is particularly abhorrent.
Von Moltke v. Gillies, 332 U.S. 708, 725-726 (1948)
Quotes: Tea Bag
"He's been in and out of hot water so much that when I look at him I think of a tea bag."
Reference by defense counsel to his client in the parole revocation case of:
Del Genio v. U.S. Bureau of Prisons, 644 F.2d 585, 586 n. 1 (7th Cir. 1980)
Quotes: Evidence Rules Designed to Promote the Truth Finding Process
"Thus the provisions of Federal Rule of Evidence 102, that '[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.' A judge's job, accordingly, is to curb the tactics of the trial battle in favor of weighing evidence calmly and getting to the most sensible understanding of whatever gave rise to the controversy before the court. The question is not which side gains a tactical advantage, but which rule assists in uncovering the truth."
Suzukiohler v. U.S., 13 FLW Fed S323 (5/22/00) (Souter, J. dissenting opinon)
Quotes: Reasonable Meaning of a Word
"Of course the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny. The Court's assigned meaning would surely fail that test, even late in the evening."
Johnson v. United States, 13 FLW Fed S308 (5/15/00) (Justice Scalia's dissenting opinion)
Quotes: Creative Reading of Statutes
"That is virtuoso lexicography, but it shows only that English is rich enough to give even textualists room for creative readings." (Justice Souter's comments regarding Justice Scalia's dissent.)
Johnson v. United States, 13 FLW Fed S308, n. 7 (5/15/00)
Quotes: "Apples and Aardvarks"
"Indeed, at least the proverbial apples and oranges are both plants. In this instance, Appellant is asking us to allow him to draw an inference between apples and aardvarks, and this we will not do."
U.S. v. Eaton, 12 FLW Fed C1015, n. 7 (11th Cir. 7/7/99)
Quotes: Just Because the Court Says It's So Doesn't Make It So

"It was as if the district court had said the sky is pink - the fact that it was said by the district court did not make it true. Such dicta, although confusing for the defendant, had no effect on the terms of a previously approved plea agreement."
U.S. v. Howle, 12FLWFedC475 (11th Cir. 2/5/99)
Quotes: Law Applies to the Good and the Evil
"Under our system of justice, however, even those who have committed horrible crimes are entitled to the benefit of the law. The defining characteristic of our rule of law is that it applies to those who are evil as well as those who are saintly, to criminals as well as the law-abiding, to murderers, kidnappers, and robbers, as well as to the rest of us."
Allen v. Warden, 12 FLW Fed C257, C260 (11th Cir. 11/24/98)
Quotes: The Advantages of Being Brief
See: U.S. v. Battle, 163 F.3d 1 (11th Cir. 1998)

RACKETEERING

Racketeering - Conspiracy
To establish a RICO conspiracy, the Government had to prove that the Defendants "objectively manifested, through words or actions, an agreement to participate in . . . the affairs of [an] enterprise through the commission fo two or more predicate acts. Specifically the Defendants must have agreed to participate in (1) an enterprise; (2) that was engaged in or affected interstate commerce; and (3) that engaged in a pattern of racketeering activity.
U.S. v. Pipkins, Case No. 02-14306 (11th Cir. 8/2/04)
Racketeering - Guidelines and Predicate Acts
As the predicate act determined which guideline to use, and there was only a general verdict, the trial court was obligated to find which predicate acts had been proven.????
U.S. v. Digiorgio, 12 FLW Fed C1225 (11th Cir. 8/23/99)

RESEARCH

Research
For an example of where legislative history can be located see: U.S. v. Kloess, 14 FLWFedC714 (11th Cir. 5/18/01)

RETURN OF PROPERTY

Return of Property: Money Damages
Although there is a split among the circuits, the 11th Circuit has decided that sovereign immunity protects the government from money damages sought under Rule 41(e).
U.S. v. Remirez, 14 FLW Fed C1065 (11th Cir. 8/10/01)
Return of Property: Defendant Presumed to have a Right to Return

When a Rule 41(e) motion is filed after criminal proceedings have terminated, the person from whom the property was seized is presumed to have a right to its return, then the government must demonstrate that it has a legitimate reason to retain the property.
U.S. v. Ramirez, 14 FLW Fed C1065 (11th Cir. 8/10/01); see also RPM memo in U.S. v. Gomes, 4:01cr35.

Return of Property: Sixty Day Period for Appeals

An appeal regarding a Rule 41 motion for return of property is considered to be a civil action, so the sixty period for appeals governs rather than the 10 day period for appeals in criminal cases.
U.S. v. Remirez, 14 FLW Fed C1065 (11th Cir. 8/10/01)

Return of Property: 8 Years Later

Under Rule 41(e) of the Federal Rules of Criminal Procedure the court had equitable jurisdiction to consider returning the defendant's seized property even though all criminal proceedings against the defendant had ended and even though 8 years had passed since the property was seized.
U.S. V. Martinez, 241 F.3d 1329 (11th Cir. 2001); but see Dusenberry v. U.S., 15 FLW Fed S48 (1/8/02)

RICO

Rico: Proof of Conspiracy

Agreement to participate in a Rico conspiracy can be proved in one or two ways: 1) by showing an agreement on an overall objection; or 2) by showing that a defendant agreed personally to commit to predicate acts and therefore to participate in the single objective conspiracy.
U.S. v. Abbell, 15 FLW Fed C35 (11th Cir. 11/7/01); U.S. v. Harriston, Case No. 01-12416 (11th Cir. 4/28/03)

Rico: "Enterprise"

The definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes, that is, the pattern of racketeeering activity requisite to the RICO violation.
U.S. v. Golden Industries, Inc., 13 FLW Fed C900 (11th Cir. 7/27/00)

RIGHT TO COUNSEL

Right to Counsel: Edwards - Passage of 14 Days

The passage of 14 days was adequate time to allow the defendant time to have rationally reflected and decided to withdraw he request for counsel.
Everett v. Secretary Fla. Dept. of Corrections, Case No. 14-11857 (11th Cir. 2/27/15)

Right to Counsel - Civil Contempt

No automatic right to counsel in civil contempt hearing for individual who is subject to a child support order. Court did not address proceedings where child support was owed to the State, nor complex cases.
Turner v. Rodgers, Case No. 10-10 (S. Ct. 3/23/11)

Right to Counsel: Waiver by Uncooperative Defendant
It is possible for a valid waiver of counsel to occur when an uncooperative defendant rejects the only counsel to which he is constitutionally entitled, understanding his only alternative is self-representation with its many attendant dangers.
U.S. v. Garey, Case No. 05-14631 (11th Cir. 8/20/08); Jones v. Walker, Case No. 04-13562 (11th Cir. 8/20/08)
Right to Counsel: Attaches as of First Appearance
Sixth Amendment right to counsel applies at first appearance before a judicial officer at which a defendant is told of formal accusation against him and restrictions are imposed on his liberty.
Rothgery v. Gillespie County, Texas, Case No. 07-440 (S. Ct. 6/23/08)
Right to Counsel: Unequivocal Request to Proceed Pro Se
Although the defendant repeatedly sought to dismiss the lawyer appointed to represent him, he never "clearly and unequivocally" asserted his desire to waive counsel and proceed pro se. Accordingly, the trial court erred when it dismissed the defendant's lawyer and did not appoint a replacement.
Jones v. Walker, Case No. 04-13562 (11th Cir. 8/22/07)
Right to Counsel: During Interrogation - Offense Specific (Different Sovereigns)
A defendant's Sixth Amendment right to counsel with respect to certain federal charged had attached before those charges had been filed when state law enforcement officers interrogated him about analogous state charges that were pending at the time of the interrogation. Contrary to an existing decision of the Fifth Circuit, the Court rejected the argument that the two cases were different for Sixth Amendment purposes because one was brought by the state and one by the federal government.
U.S. v. Mills, Case No. 04-0750 (2d Cir. 6/21/05), but see U.S. v. Harris, Case No. 07-13473 (11th Cir. 5/8/08)
Right to Counsel: Attaches Once Judicial Proceedings Have Been Initiated
The Sixth Amendment right to counsel is triggered at or after the time that judicial proceedings have been initiated whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.
Brewer v. Williams, 430 U.S. 387, 398 (1977), Fellers v. U.S., Case No. 02-6320 (S.Ct. 1/26/04)
Right to Counsel: Jail Sentence for VOP
If there is a possibility the defendant might go to jail for a violation of probation, the Sixth Amendment guarantees him a lawyer.
Alabama v. Shelton, 122 S. Ct. 1764 (2002)

ROBBERY

Robbery: Hobbs Act - Robbery of a Drug Dealer
Robbery of a drug dealer met the Commerce Clause element of the Hobbs Act.
Taylor v. United States, Case No. 14-6166 (U.S. 6/20/16)
Robbery: Hobbs Act - Interstate Nexus ("Stash House")
Robbery of drugs from a house used to store drugs fulfilled the interstate nexus requirement of the Hobbs Act.
U.S. v. Orisnord, Case No. 05-14659 (11th Cir. 4/11/07)

Robbery: Taking By Intimidation From the Person or Presence of Another
Robbers who hit and jumped the bank counter with some force making a loud noise and who snatched the money out of the till within an arm's length away from a cashier, did enough to support a conviction on the basis of a taking accomplished by threats or intimidation and from the person or presence of another.
U.S. v. Kelley, Case No. 04-13002 (11th Cir. 6/16/05)
Robbery: Guidelines - Threat of Death
"You have ten seconds to hand me all the money in your top drawer. I have a gun." qualified for the enhancement under 2B3.1(b)(2)(F). This particular subsection was modified in 1997 and made it easier to earn this adjustment. Some existing 11th Circuit caselaw reflects the prior version.
U.S. v. Murphy, Case No. 01-15842 (11th Cir. 9/17/02)
Robbery: Guidelines - Enhancement for a Fake Bomb
Court authorized a four level enhancement for a fake bomb on the theory that "objects which appear to be dangerous weapons should be treated for sentencing purposes as if they actually were dangerous weapons."
U.S. v. Miller, 13 Flw Fed C449 (11th Cir. 3/13/00)
Robbery: U.S. Property - Defendant Need Not to Property Belongs to U.S.
In the case of an assault with intent to rob persons in possession of property belonging to the U.S., 18 USC s. 2114(a) the government is not required to prove the defendant knew the property belonged to the United States.
U.S. v. Smithen 13 FLW Fed C729 (11th Cir. 6/6/00)
Robbery: Bank Theft Not a Lesser of Bank Robbery
A defendant charged with violating 18 USC s 2113(a), which punishes whoever takes anything of value from a bank by force and violence, or by intimidation, is prohibited as a matter of law from obtaining lesser included offense instruction on offense described in section 2113(b), which punishes whoever takes and carries away with intent to steal anything of value exceeding $1000 from a bank.
Carter v. U.S., 13 FLW Fed S389 (6/12/00)
Robbery: Armed Bank Robbery [18 USC §2113(d)]
Seems to require active employment of the gun as opposed to merely carrying it.
U.S. v. Villard, 1999 WL 545260 (8th Cir. 7/28/99); U.S. v. Smith, 103 F.3d 600 (7th Cir. 1996)**;**
U.S. v. Perry, 991 F.2d 304 (19930
Robbery: Guidelines: Psychological Injury
Although USSG s. 5K2.3 allows for a departure for extreme psychological injury, psychological injury does not, by itself, warrant an increase in the sentencing level.
U.S. v. Sawyer, 11 FLW Fed C51 (11th Cir. 6/20/97)
Robbery: Guidelines - Upward Adjustment for Abduction
Moving the victim 50 or 60 feet within a parking lot qualified for a four level adjustment under s 2B3.1(b)(4)(A)
U.S. v. Hawkins, 87 F.3d 722 (5th Cir. 1996)
Robbery: Hobbs Act - Robbery of Gas Station Qualified
Emphasizing that the effect on commerce need by only "minimal" robbery of an Amoco gas station of $300 met the jurisdictional requirements of the Hobbs Act, 18 USC 1951.
U.S. v. Guerra, 12FLWFedC411 (11th Cir. 1/14/99); U.S. v. Woodruff, Case No. 01-16067 (11th Cir. 7/3/02); U.S. v. Ransfer, Case No. 12-12956 (11th Cir. 1/28/14)

RULES OF PROCEDURE

Rules of Procedure: No Motion for Summary Judgment
A motion for acquittal under Rule 29 is the proper avenue for contesting the sufficiency of the evidence in criminal cases because there is no explicit authority to grant pre-trial judgment as a matter of law on the merits under the Federal Rules of Criminal Procedure. (Note that the 6th Circuit seems to think otherwise). The court noted, though, that in a bench trial the ocurt may accept proffers of evidence and may enter a judgment of acquittal based on the proffers.
U.S. v. Salman, Case No. 03-23382 (11th Cir. 7/29/04)

SEARCH & SEIZURE

Abandonment

Search & Seizure: Abandonment - General Principles
See the District Court opinion, from south Florida of: U.S. v. Cofield, 108 F.Supp.2d 1374 (S.D.Fla. 2000); U.S. v. Johnson, Case No. 14-12075 911th Cir. 12/1/15); Pineda v. Warden, Calhoun State Prison, Case No. 14-137772 (11th Cir. 9/21/15)

Autos

Search & Seizure: Autos - Automobile Exception Inapplicable to Car in Driveway
See U.S. v. Beene, Case No. 14-30476 (5th Cir. 3/8/16)
Search & Seizure: Autos - Good Faith Reliance on Pre-Jones GPS Rulings
Court declined to suppress evidence where officers, without having obtained a warrant, attached a GPS device to the defendant's car because the officers had done so prior to the decision in Jones and had reasonably relied upon earlier decisions.
U.S. v. Ransfer, Case No. 12-12956 (11th Cir. 1/28/14)U.S. v. Smith, Case No. 12-11042 (11th Cir. 12/23/13)
Search & Seizure: Autos - GPS Tracking Device
The Government's installation of a GPS device on a target's vehicle, and its use of the device to monitor the vehicle's movement, at least over a four-week period, constitutes a search. Here the search was invalid because it was not supported by a warrant.
U.S. v. Jones, Case No. 10-1259 (S. Ct. 1/23/12)
Search & Seizure: Auto - Probable Cause (Officer's Motives Irrelevant)
When determining whether an officer has probable cause to believe that a traffic violation occurred, the "officer's motive in making the traffic stop does not invalidate what is otherwise objectively justifiable behavior under the Fourth Amendment.
U.S. v. Harris, Case No. 07-13473 (11th Cir. 5/8/08)
Search & Seizure: Auto - Stop of Car' Seizure of Passenger

When law enforcement officers stop a car, they, for Fourth Amendment purposes, also seize the passenger. Thus, when the stop is unlawful, the passenger can claim whatever was discovered is the product of the unlawful detention and is subject to being suppressed.
Brendlin v. California, Case No. 06-8120 (S.Ct. 6/18/07)
Search & Seizure: Autos - Warrantless Probable Cause Searches
Only two questions need to be asked: (1) whether the car is operational and (2) whether there is probable cause.
U.S. v. Watts, Case No. 02-16835 (11th Cir. 5/8/03)
Search & Seizure: Autos - Search Incident to Arrest
Upon arresting someone in a car, law enforcement officials may search the interior of the car.
New York v. Belton, 69 L.Ed.2d 768 (1980)
Search & Seizure: Autos - No Exigency Requirement
Least there be any doubt about it, the automobile exception to the warrant requirement has no separate exigency requirement.
Maryland v. Dyson, 12 FLW Fed S414 (6/21/99)
Search & Seizure: Autos - Search of Passenger's Belongings
If there is probable cause to search the car, the officer can search any belongings left by the passenger in the car, so long as they are capable of concealing the object of the search.
Wyoming v. Houghton, 526 U.S. 295, 119 S. Ct. 1297 (1999)

Consent

Search & Seizure: Deception by Law Enforcement
Defendant reported burglaries at his residence and police, appearing on the pretext of responding to the burglary report, conducted a search as part of a credit card fraud scheme. Court held that the deception did not vitiate the defendant's consent to allow the officers entry into his residence. Case includes a dissent by Judge Martin and examples of when deception vitiated consent.
U.S. v. Spivey, Case NO. 15023 (11th Cir. 6/28/17)
Search & Seizure: Wife's Authority to Consent to Search of Husband's Computer
Consent to search the defendant's computer was valid when given by wife of defendant, who called the police upon discovering child pornography on husband's computer that she also used.
U.S. v. Thomas, Case No. 14-14680 (11th Cir. 4/1/16)
Search & Seizure: Consent - Wife's Consent and Defendant's More Limited Consent
Officers told defendant they were only interested in searching computer for evidence regarding the murder of a teenager with whom the defendant was acquainted, and with the understanding that the offices would not be searching for evidence of child porn, he gave the officers consent to search the computer. Independently, the defendant's wife consented to a general search of the computer. She did so in the presence of the defendant who did not voice any objection. When the defendant was charged with possessing child porn on the basis of images found during the search, the trial court denied the defendant's motion to suppress. The court of appeals affirmed, concluding that the defendant had failed to establish the exception under Georgia v. Randolph, 547 U.S. 103 (2006).
U.S. v. Watkins, Case No. 12-12549 (11th Cir. 7/28/14)
Search & Seizure: Consent - Burden of Proving Consent Belongs to Government

The government bears the burden of proving both the existence of consent and that the consent was not a function of acquiescence to a claim of lawful authority but rather was given freely and voluntarily.
U.S. v. Yeary, Case No. 11-13427 (11th Cir. 1/22/14)
Search & Seizure: Consent - Having to Agree to Warrantless Searches As a Condition of Pretrial Release Did Not Render Consent Involuntary
Opinion cites other examples, too.
U.S. v. Yeary, Case No. 11-13427)11th Cir. 1/22/14)
Search & Seizure: Consent - Consent to Search Sufficiently Attenuated From Unlawful Entry
Although officers entered residence with guns drawn, they holstered them shortly after entering, explained their presence, left the house entirely while the defendant got dressed, reentered only after the defendant led them back inside, and exited again when the defendant wanted to smoke a cigarette. The officers did not handcuff the defendant and the encounter was conversational. The officer told the defendant he was not under arrest and was under no obligation to speak to the officers. The amount of time that passed between the entry and the consent to search wasn't clearly established, but could have been as little as 15 minutes. Nonetheless, the court of appeals concluded that the consent given by the defendant to search his computer was sufficiently attenuated from what may have been an unlawful entry.
U.S. v. Smith, 688 F.3d 730 (11th Cir. 2012)
Search & Seizure: Consent - Police Announcement It Would Take a While to Get a Search Warrant
Where the defendant initially denied a request for permission to search his apartment, but shortly thereafter gave his permission after being advised the officers would have to get a search warrant and it could take a while, the court found the consent to be voluntary.
U.S. v. Welch, Case No. 10-14649 (11th Cir. 6/13/12)
Search & Seizure: Consent - Officer Reasonably Believed Motel Manager Had Authority to Consent to Search of Defendant's Motel Room
Under the circumstances, the police officer reasonably believed the motel manager had authority to consent to the search of the defendant's motel room.
U.S. v. Mercer, Case No. 06-13258 (11th Cir. 8/28/08)
Search & Seizure: Consent - Third Party (Consent Dissipates Upon Discovery of Circumstances Suggesting Lack of Authority to Consent)
Law enforcement officers should not have continued to rely on a woman's permission to search luggage after they searched the first bag and found it contained only her boyfriend's clothes and effects. The discovery of mens' clothing dissipated the apparent authority to consent, and the Fourth Amendment required the officers either to obtain a warrant or to clarify the girlfriend's authority over the bags.
U.S. v. Purcell, Case No. 07-5517 (6th Cir. 5/29/08)
Search & Seizure: Consent - Given By Informant
Although the defendant willingly admitted an informant into his house, the informant lacked the authority to allow officers to enter the residence.
Callahan v. Millard County, Case No. 06-4135 (10th Cir. 7/16/07)
Search & Seizure: Consent - Dissipation of Taint of Police Illegal Conduct
Where the police arguably entered the residence illegally and secured the consent to search from the defendant's girlfriend, the search was valid because any taint from the illegal entry had

dissipated. The officers advised the girlfriend of her right to deny consent, the officers entered the house because of a legitimate concern for their safety, and it was the consent of a third party, not the defendant.
U.S. v. Delancy, Case No. 06-13718 (11th Cir. 10/3/07)
Search & Seizure: Consent - Third Party (Landlord)
Landlord can't consent to search of property leased to tenant.
Chapman v. U.S., 365 U.S. 610 (1961)
Search & Seizure: Consent - Third Party (Co-Occupant Present and Objecting)
If co-occupants are present and one consents to the search and the other objects, officers do not have consent to enter the residence.
Georgia v. Randolph, Case No. 04-1067 (S.Ct. 3/22/06); U.S. v. Thomas, Case No. 14-14680)11th Cir. 4/1/16)
Search & Seizure: Consent - Third Party (Apparent Authority)
Consent is sufficient when given by a person who reasonably appears to have common authority but who, in fact, has not property interest in the property searched.
Illinois v. Rodriguez, 497 U.S. 177 (1990); U.S. v. Yeary, Case No. 11-13427 (11th Cir. 1/22/14); U.S. v. Barber, Case No. 13-149335 (11th Cir. 2/3/15)
Search & Seizure: Consent - Invalid if the Product of an Illegal Detention
US. v. Simms, Case No. 03-13233 (11th Cir. 9/27/04)
Search & Seizure: Consent - Third Party Consent (Spouse)
A spouse who jointly owns and occupies the marital home with the defendant may consent to a search of it with the same effect as if the defendant himself had done so. Here the husband and wife were estranged and the wife, who gave consent to search, had been out of the residence for some time. The court, though, found that she had not abandoned the residence, but had been driven away by the husband's abusive conduct. Accordingly, the court held she still had the authority to consent to the search.
U.S. v. Backus, Case No. 03-10691 (11th Cir. 11/5/03)
Search & Seizure: Consent - Third Party Consent
The law is settled that permission to conduct a consensual search of property owned or occupied by a prospective defendant may be obtained from another person who possesses common authority over or other sufficient relationship to the premises.
U.S. v. Backus, Case No. 03-10691 (11th Cir. 11/5/03)
Search & Seizure: Consent - Third Party Consent
See: "Third Part Consents to Police Entry," Fla. Bar Journal, November 2003, p. 24.; Georgia v. Randolph, Case No. 04-1067 (S.Ct. 3/22/06)
Search & Seizure: Consent - Bus
Circumstances involved when police boarded a Greyhound bus and sought consent from already boarded passengers was not so coercive as to render consent invalid.
U.S. v. Drayton, Case No 02-631 (6/17/02)
Search & Seizure: Consent - Taint of Initial Illegality
If the ensuing search occurs after an initial illegality, such as an illegal entry or an illegal arrest, the court must first determine whether the consent to search was voluntary and then, whether the consent was tainted by the initial illegality.
U.S. vs. Ramirez-Chilel, 15 FLW Fed C491 (11th Cir 4/25/02); U.S. v. Lopez-Garcia, Case No. 08-12662 (11th Cir. 4/21/09)
Search & Seizure: Consent - Failure to Object

The government may not show consent to enter from the defendant's failure to object to the entry.
U.S. vs. Ramirez-Chilel, 15 FLW Fed C491 (11th Cir 4/25/02)

Search & Seizure: Consent - Acquiescence to Authority

A suspect does not consent to a search of his residence when his consent to the entry into his residence is prompted by a show of official authority.
U.S. vs. Ramirez-Chilel, 289 F.3d 744 (11th Cir. 2002)

Search & Seizure: Consent - Following Illegality

The voluntariness of consent is only a threshold requirement; a voluntary consent to search does not remove the taint of an illegal seizure. Rather, the focus is on causation: "whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiency distinguishable to be purged of the primary taint.
U.S. v. Santa, 236 F.3d 662 (11th Cir. 2000); U.S. v. Chanthassouxat, Case No. 01-17158 (11th Cir. 8/22/03); U.S. v. Perkins, Case No. 02-15891 (11th Cir. 10/22/03); U.S. v. Lopez-Garcia, Case No. 08-12662 (11th Cir. 4/21/09)

Search & Seizure: Consent - Acquiescence

Subject's statement "You've got the badge, I guess you can," was acquiescence, not consent.
United States v. Worley, 193 F.3d 380 (6th Cir. 1999)

Search & Seizure: Consent - Extent of Search Absent Express Limitations

"When an individual provides a general consent to search, without expressly limiting the terms of his consent, the search is constrained by the bounds of reasonableness: what a police officer could reasonably interpret the consent to encompass....What would the typical reasonable person have understood by the exchange between the officer and suspect...we must consider what the parties knew to be the object of the search." Here, consent to search the car for drugs allowed the officer to peel back the door panels.
U.S. v. Zapata, 12 FLW Fed C1038 (11th Cir. 7/13/99); U.S. v. Stanley, 472 F.3d 1298 (11th Cir. 2006)

Search & Seizure: Consent - Ability to Understand English

"In determining whether an individual has sufficient comprehension of English to provide voluntary consent, the courts examine his ability to interact intelligently with the police."
U.S. v. Zapata, 12 FLW Fed C1038 (11th Cir. 7/13/99); see also: U.S. v. Galvan-Muro, 141 F.3d 904, 907 (8th Cir. 1998)

Search & Seizure: Consent - Failure to Inform of Right to Refuse Consent

"The mere fact that Philllips (the officer) did not inform Lorenzo of his right to refuse consent, given the lack of any coercive behavior on Phillip's part, is insufficient to render Lorenzo's consent involuntary."
U.S. v. Zapata, 12 FLW Fed C1038 (11th Cir. 7/13/99); see also Ohio v. Robinette, 519 U.S. 33, 39 (1966); U.S. v. Jones, 475 F.2d 723, 730 (5th Cir. 1973)

Search & Seizure: Consent - Voluntariness Analysis

The voluntariness of consent analysis is conducted with reference to the totality of the circumstances and there are a number of factors for a court to consider in conducting its inquiry: the person's youth, his lack of education, evidence of the person's low intelligence, the existence of advice as to the nature of the constitutional right implicated, the length of detention preceding

the request to consent, the nature of the prior questioning, the environment, and whether any physical punishment was involved.
U.S. v. Zapata, 12 FLW Fed C1038 (11th Cir. 7/13/99); see also: Schenckloth v. Bustamonte, 412 U.S. 218, 222 (1973); U.S. v. Garcia, 890 F.2d 355, 360 (11th Cir. 1989); U.S. v. Ramirez-Chilel, 15 FLW Fed C491 (11th Cir. 4/25/02); U.S. v. Acosta, Case No. 02-16167 (11th Cir. 3/25/04)

Exigent Circumstances Exception to Warrant Requirement

Search & Seizure: Exigent Circumstances - Emergency Aid
Report of a bullet hole in a shared apartment wall that had been made at least 39 hours earlier did not justify a warrantless entry into the adjoining apartment.
U.S. v. Timmann, Case No. 11-15832 (11th Cir. 12/18/13)
Search & Seizure: Exigent Circumstances - Destruction of Evidence
Where police went to residence looking for drug suspect, knocked on the door, announced their presence, heard what they believed to be sounds indicating that evidence was being destroyed, their action in breaking open the door did not violate the Fourth Amendment.
Kentucky v. King, Case No. 09-1271 (S. Ct. 5/16/11)
Search & Seizure: Exigent Circumstances - Emergency Aid
Test is not subjective, but instead asks if there was an objectively reasonable baiss for believing that medical assistance was needed.
Michigan v. Fisher, Case No. 09-91 (S. Ct. 12/7/09)
Search & Seizure: Exigent Circumstances - Threat of Injury
Where police arrived at the residence on the basis of a report of a loud party and saw a fracas inside which included someone throwing a punch and an adult holding a juvenile forcefully against a refrigerator, the circumstances created the sort of exigent circumstance that justified entry into the residence. Accordingly, the contraband discovered by the police upon entering was legally discovered.
Brigham City, Utah v. Stuart, Case No. 05-502 (S. Ct. 5/22/06)
Search & Seizure: Exigent Circumstances - Following Illegal Police Actions
Police, with the assistance of the motel clerk, had illegally entered the defendant's motel room and observed drugs. Subsequently, officers knocked on the door and when they heard scurrying sounds and suspected the destruction of the drugs, they forcibly entered the room. Recognizing a split among the circuits, the Court of Appeals considered the propriety of actions and investigative techniques that preceded the exigency and found the search to be unlawful.
U.S. v. Coles, Case No. 04-2134 (3d Cir. 2/9/06)
Search & Seizure: Exigent Circumstances - Entry into Home to Investigate Domestic Disturbance
Court upheld legality of officer's entry into home. He was in the front yard talking to the crying wife. Upon hearing angry yelling from inside the house the officer entered the house. The entry subsequently led to the discovery of firearms within the house. Court concluded the entry was justified on the basis of the emergency exception.
U.S. v. Martinez, Case No. 04-30098 (9th Cir. 5/16/05)
Search & Seizure: Exigent Circumstances - Must Be Probable Cause
When exigent circumstances demand an immediate response, particularly where there is a danger to human life; protection fo the public becomes paramount and can justify a limited warrantless

intrusion into the home. The government bears the burden of proving that the exception applies and must establish both an exigency and probable cause. In emergencies, probable cause exists where law enforcement officials reasonable believe that someone is in danger.
U.S. v. Davis, Case No. 02-12804 (11th Cir. 12/5/02)
Search & Seizure: Exigent Circumstances -Inability to Maintain Surveillance
An inability to maintain effective surveillance will not, by itself, suffice to overcome the warrant requirement.
U.S. v. Santa, 14 FLW FedC269 (11th Cir. 12/28/2000)
Search & Seizure: Exigent Circumstances - In General
The general requirement that a search warrant be obtained is not lightly to be dispensed with, and the burden is on those seeking an exemption from the requirement. The exigency exception only applies when the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action. Recognized situations in which exigent circumstances exist include: danger of flight or escape; danger of harm to police officers or the general public; risk of loss, destruction, removal, or concealment of evidence; and hot pursuit.
U.S. v. Santa, 236 F.3d 662 (11th Cir. 2000); U.S. v. Timmann, 741 F.3d 1170, 1178 (11th Cir. 2013)

Expectation of Privacy

Search & Seizure: Expectation of Privacy - Reduced Expectation of Privacy for Those on Pretrial Intervention
Castillo v. U.S., No. 13-11757 (11th Cir. 3/15/16)
Search & Seizure: Expectation of Privacy - Cab
See: U.S. v. Harris, Case No. 07-13473 (11th Cir. 5/8/08)
Search & Seizure: Expectation of Privacy - Perimeter Fence
A perimeter fence around property does not create a constitutionally protected interest in all open fields on the property.
U.S. v. Taylor, Case No. 05-10648 (11th Cir. 7/28/06)
Search & Seizure: Expectation of Privacy - Outdoor Activities (Open Fields)
There is no reasonable expectation of privacy for activities conducted out of doors, in open fields, except in the areas shielded from view and immediately surrounding the home.
U.S. v. Taylor, Case No. 05-10648 (11th Cir. 7/28/06)
Search & Seizure: Expectation of Privacy - Property Adjacent to Home
The private property immediately adjacent to a home is entitled to the same protection against unreasonable searches and seizures as the home itself.
U.S. v. Taylor, Case No. 05-10648 (11th Cir. 7/28/06)
Search & Seizure: Expectation of Privacy - Concealed Video or Audio Recording Device in Motel Room
The use of video/audio device placed in the defendant's hotel room to record only while informer was present did not violate the Fourth Amendment. Court notes, however, that the room was rented by the informant for the defendant and that the recording device was concealed in the room by an agent who used the informant's key to gain entrance before the defendant occupied the room. The ruling would have been to the contrary had the device been installed while the defendant had an expectation of privacy at the time the recording device was installed, if the

recording took place in the absence of the informant, or if placement of the device allowed for the recording of evidence that the informant could not have seen or heard while he was present. The 11th Circuit, in U.S. v. Yonn, 702 11th Cir. 1983 has reached a similar conclusion. The First Circuit, in U.S. v. Padilla, 520 F.2d 526 (1st Cir. 1975) had held to the contrary.
U.S. v. Lee, Case No. 01-1629 (3d Cir. 2/20/04)
Search & Seizure: Expectation of Privacy - Common Areas of Apartment Building
At least in this case, where the lock on the door of the building was not functioning and anyone could enter. The tenants of the large, multi-unit apartment building did not have a reasonable expectation of privacy in the common areas of the building.
U.S. v. Miravalles, 15 FLW Fed C262 (11th Cir. 1/29/02)
Search & Seizure: Expectation of Privacy -Physical Manipulation of Luggage
Border patrol agent's physical manipulation of bus passenger's carry-on bag violated 4th Amendment's proscription against unreasonable searches. Bus passenger exhibited expectation of privacy by using opaque bag and placing it directly above his seat.
Bond v. United States, 13 FLW Fed S247 (4/17/00)
Search & Seizure: Expectation of Privacy - Possession of Key To Motel Room
Conceivably, possession of the key to the motel room, without more, might not establish an expectation of privacy in the motel room.
U.S. v. Cooper, 13 FLW Fed C394, n. 7 (11th Cir. 2/14/00)
Search & Seizure: Expectation of Privacy - Guests for Commercial Purposes?
"We note that the Supreme Court has qualified the holding of Olson to some extent. In Minnesota v. Carter, the Court held that in order to establish a reasonable expectation of privacy in a third-party's home, an individual must demonstrate she is a guest on the premises for a personal occasion, rather than for strictly a commercial purpose. Because the evidence in this case suggests Defendants were using the hotel room predominantly to engage in narcotics trafficking, Defendants likely would lack standing even if they had been overnight guests of Gonzalez.
U.S. v. Cooper, 13 FLW Fed C394, n. 3 (11th Cir. 2/14/00)
Search & Seizure: Expectation of Privacy - Guests of Hotel Registrants
An open question in the 11th Circuit.
U.S. v. Cooper, 13 FLW Fed C394 (11th Cir. 2/14/00)
Search & Seizure: Expectation of Privacy - Dog Sniff of Property In A Public Place
A dog sniff of a person's property located in a public place is not a search within the meaning of the Fourth Amendment. That is so because the constitution does not provide any expectation of privacy "in the odors emanating from" such things as cars or luggage.
Hearn v. The Board of Public Education, 13 FLW Fed C25 (11th Cir 10/6/99)
Search & Seizure: Expectation of Privacy (Commercial Property)
Less than in an individual's home.
U.S. v.Chaves, 169 F3d 687 (11th Cir. 1999)
Search & Seizure: Expectation of Privacy (Social Guests)
Almost all social guests have an expectation of privacy.
U.S. v. Chaves, 169 F.3d 687 (11th 1999)
Search & Seizure: Expectation of Privacy Must Exist for 4th Amendment Claim
U.S. v. Chaves, 169 F.3d 687 (11th Cir. 1999)
Search & Seizure: Expectation of Privacy - Apartment Visitors

Where visitors to an apartment were only there a few hours, and were there to package cocaine, they did not enjoy the expectation of privacy that an overnight guest would have had, and so if the law enforcement officer that looked in through an opening in the blinds could be said to have conducted an illegal search, the visitors were in no position to object.
Minnesota v. Carter, 12FLWFedS19 (12/1/98)

Good Faith

Search & Seizure: Good Faith - Obvious Problem With Warrant
Where, because of a carelessly prepared warrant, it allowed officers to search a ahome for any item for any reason, no officer could have reasonably regarded the warrant as valid.
U.S. v. Dunn, No. 15-1475 (10th Cir. 12/12/17)
Search & Seizure: Good Faith - Reliance Upon Existing Case Law
Where officers, without a warrant, attached a GPS device to the defendant's car prior to the decision in Jones, court declined to suppress the resulting evidence because the offices had reasonably relied upon the case law that existed at the time.
U.S. v. Ransfer, Case No. 12-12956 (11th Cir. 1/28/14); U.S. v. Smith, Case No. 12-11042 (11th Cir. 12/23/13)
Search & Seizure: Good Faith - Mistaken Belief That Warrant Was Outstanding
While the Supreme Court has declined to address whether the exclusionary rule should be applied when police personnel, rather than court personnel are responsible for the error, the court of Appeals held that the negligence of an employee of the neighboring sheriff's office fell under the good faith exception.
U.S. v. Herring, Case No. 06-10795 (11th Cir. 7/17/05)
Search & Seizure: Good Faith - Traffic Stop Based on Mistake of Law
Court declined to extend the good faith exception to the exclusionary rule the search of a van based on an officer's mistake of law.
U.S. v. Chanthassouxat, Case No. 01-17158 (11th Cir. 8/22/03)

Incident to Arrest

Search & Seizure: Incident to Arrest - Attenuation (Existence of Warrant)
Though the stop was invalid, the existence of an outstanding warrant made the link between the stop and the discovery of the drugs based on an outstanding warrant too attenuated to justify suppression.
Utah v. Strieff, Case No. 14-1373 (U.S. 6/20/16)
Search & Seizure: Incident to Arrest - Gant Doesn't Apply to Searches That Took Place Prior to the Date of the Opinion
Although acknowledging a different view by the 9th Circuit, the Court declined to apply Gant to a pre-Gant search finding that the exclusionary rule should not be applied when the poice have reasonable relied upon clear and well-settled precedent.
U.S. v. Davis, Case No. 08-16654 (11th Cir. 3/11/10)
Search & Seizure: Incident to Arrest - Search of Vehicle

"Police may search a vehicle incident to a recent occupant's arrest only if the arresstee is within reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe the vehicle contains evidence of the offense of arrest."
Arizona v. Gant, 129 S. Ct. 1710 (2009)

Search & Seizure: Incident to Arrest - Belton - Search Prior to Arrest?

The search of a car incident to an arrest can take place prior to the arrest.
U.S. v. Powell, Case No. 05-3047 (D.C. Cir. 4/17/07), U.S. v. Smith, 389 F.3d 944 (9th Cir. 2004); U.S. v. Lugo, 170 F.3d 996 (10th Cir. 1999)

Search & Seizure: Incident to Arrest - Belton (On Shaky Ground?)

Scalia says Belton should be limited to reasonable searches for evidence.
Thornton v. U.S., Case No. 03-5165 (S. Ct. 5/24/04)

Search & Seizure: Incident to Arrest - Belton (Must Individual Still be in Car?)

Right to search the interior of a car incident to arrest is not dependent upon whether the occupant was in the car when approached by the officer. Only requirement is that the individual had been a "recent occupant."
Thornton v. U.S., Case No. 03-5165 (S. Ct. 5/24/04)

Search & Seizure: Incident to Arrest

Search incident to arrest is a limited exception; it places a temporal and spatial limitation on searches incident to arrest, excusing compliance with the warrant requirement only when the search 'is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. Thus, officers may only search areas within the arrestee's immediate control construed as the area from within which he might gain possession of a weapon or destructible evidence. As the Court stated, there is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs - or for that matter for searching through all the desk drawers or other closed or concealed areas in that room itself.
Holmes v. Kucynda, 321 F.3d 1069, 1082 (11th Cir. 2003)

Knock and Announce

Search & Seizure: Knock and Announce - Exigent Circumstances

Unverified tip from an anonymous informant that there were guns in the house was insufficient to support a no-knock entry.
Doran v. Eckold, 03-1810WM (8th Cir. 4/6/04)

Search & Seizure: Knock and Announce

Fifteen to twenty second delay before forcefully entering was sufficient. At least in a drug case, the issue isn't so much whether the occupant has time to answer the door. Instead, the theory is that as the execution of the warrant occurred during the day and because drugs were the object of the search, an exigent circumstance - the possibility of the destruction of the drugs - occurs as soon as the officers knock. There is a note that "in the case with no reason to suspect an immediate risk of frustration or futility in waiting at all, the reasonable wait time may well be longer when police make a forced entry . . ."
U.S. v. Banks, 540 U.S. 31 (2003)

Miscellaneous

Search & Seizure: Miscellaneous – Inevitable Discovery (Govt Burden of Proof)
Government's burded in prooving inevitable discovery is that of preponderance of the evidence.
U.S. v. Watkins, Case No. 18-14336 (11th Cir. Aug. 20, 2021)
Search & Seizure: Miscellaneous - Protective Sweep (Search of Outbuilding OK)
Search of an outbuilding, which was a separate structure twenty feet from the main building where the defendant was arrested, was justified as a protective sweep.
U.S. v. Williams, Case No. 16-16444 (11th Cir. 9/20/17)
Search & Seizure: Miscellaneous - DUI Breathalyzer and Blood Draws
Warrant not necessary of a breathalyzer test and nothing wrong with making it a misdemeanor offense to refuse to submit to a breathalyzer. Warrant is necessary before blood can be drawn to determine blood alcohol level. Can't make it a crime to refuse to submit to a blood test.
Birchfield v. North Dakota, Case No. 14-1468 (S. Ct. 6/23/16)
Search & Seizure: Miscellaneous - Degrading Nature of a Stop
See Utah v. Strieff, Case No. 14-1373 (S. Ct. 6/20/16) (Sotomayor, dissenting)
Search & Seizure: Miscellaneous - Two Wrongs Don't Make a Right
A basic principle lies at the heart of the Fourth Amendment: Two wrongs don't make a right.
Utah v. Strieff, Case No. 14-1373 (S. Ct. 6/20/16) (Sotomayor, dissenting)
Search & Seizure: Miscellaneous - Exceptions to "Fruit of the Poisonous Tree"
Independent source, inevitable discovery, and the attenuation doctrine.
Utah v. Strieff, Case No. 14-1373 (S. Ct. 6/20/16); U.S. v. Watkins, Case No. 18-14336 (Dec. 3, 2020)
Search & Seizure: Miscellaneous - Historical Cell Tower Information
Court order authorized by the Stored Communications Act compelling the production of a third-party telephone company's business records containing historical cell tower location information did not violate the defendant's Fourth Amendment rights.
U.S. v. Davis, Case No. 12-12928 (11th Cir. 5/5/15)
Search & Seizure: Miscellaneous - Law Enforcement Search After Private Party Search
A warrantless law-enforcement search conducted after a private search violates the Fourth Amendment only to the extent to which it is broader that the scope of the previously occurring private search.
U.S. v. Johnson, Case No. 14-12143 (11th Cir. 12/1/15)
Search & Seizure: Miscellaneous - Cell Phones
Cell phones can't be searched incident to arrest. Officers must generally obtain a warrant before searching a cell phone.
Riley v. U.S., Case No. 13-212 (S. Ct. 6/25/15)
Search & Seizure: Miscellaneous - Knock and Talk (What Part of the Property May Be Entered?)
Not clear whether, in executing a "knock and talk" procedure, officers are required to go to the front door or whether they are permitted to go to other entrances or portions of the property.
Carroll v. Carman, Case No. 14-212 (S. Ct. 11/10/14)
Search & Seizure: Miscellaneous - Criminal Raid Under Guise of Administrative Inspection

A criminal raid executed under the guise of an administrative inspection is constitutionally unreasonable.
Berry v. Leslie, Case No. 13-14092 (11th Cir. 9/16/14)
Search & Seizure: Miscellaneous - Use of Unlawfully Obtained Evidence at Sentencing
At a sentencing hearing, the court may use evidence seized in violation of a defendant's Fourth Amendment rights so long as the police did not intentionally violate the Fourth Amendment in order to increase the defendant's sentence.
U.S. v. Vasquez, 724 F.3d 15 (1st Cir. 2013)
Search & Seizure: Miscellaneous - DNA Samples
When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.
Maryland v. King, Case No. 12-207 (S. Ct. 6/3/13)
Search & Seizure: Miscellaneous - Curtilage
A home's curtilage is entitled to the same protection as the home. Four factors determine whether an area outside the home is considered to be curtilage: (1) the proximity of the area to the home; (2) the nature of the uses to which the area is put; (3) where there is an enclosure surrounding th area and the home; and (4) the steps the resident takes to protect the area from observation.
U.S. v. Noriega, Case No. 10-12480 (11th Cir. 4/11/12)
Search & Seizure: Miscellaneous - Consent Not Tainted by Unlawful Police Action
Where police conducted an unlawful sweep of the defendant's apartment, took him out to the balcony, but the defendant, as he stood unhandcuffed on the balcony, consented to the search of the apartment, the defendant's consent was not tainted by the unlawful entry.
U. S. V. Welch, Case No. 10-14649 (11th Cir. 6/13/12)
Search & Seizure: Miscellaneous - Limited Use of Suppression
Suppression motions are filed in approximately 7% of criminal cases; approximately 12% of suppression motions are successful.
J.D.B. v. North Carolina, Case No. 09-11121 (S. Ct. 3/23/11)(Breyer, J. dissenting)
Search & Seizure: Miscellaneous - Change in Law
When the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. Accordingly, the validity of the search in the case, which violated the new search-incident-to-arrest rule established in Gant, was upheld because the search took place before Gant was decided.
J.D.B. v. North Carolina, Case No. 09-11121 (S. Ct. 3/23/11)
Search & Seizure: Miscellaneous - Good Faith
"When the police exhibit deliberate reckless or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the costs. But when the police act with an objectively reasonable good-fait belief that their conduct is lawful, or when their conduct involves only simple isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way."
J.D.B. v. North Carolina, Case No. 09-11121 (S. Ct. 3/23/11)
Search & Seizure: Miscellaneous - Purpose of Exclusionary Rule

"Exclusion is not a personal constitutional right, not is it designed to redress the injury occasioned by an unconstitutional search. The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.
Davis v. U.S., Case No. 09-11328 (S. Ct. 6/16/11)
Search & Seizure: Miscellaneous - Shut Down of Servers' Seizure
U.S. v. Bradley, Case No. 06-14934 (11th Cir. 6/29/11)
Search & Seizure: Miscellaneous - Inventory of Arresstee's Personal Property
When police take custody of a bag, suitcase, box or any similar container following an individual's arrest, they may open it in order to itemize its contents pursuant to standard inventory procedures.
U.S. v. Farley, Case No. 08-15882 (11th Cir. 6/2/10)
Search & Seizure: Miscellaneous - Home Receives Greatest Fourth Amendment Protection
U.S. v. Alfaro-Moncada, Case No. 08-16442 (11th Cir. 5/27/10)
Search & Seizure: Miscellaneous - Suppression of Statement of Officer That Defendant Pointed a Gun at Him
Although losing in the Supreme Court on another issue, the defendant succeeded in the courts of Michigan getting a statement of the officer and (?) maybe, potential trial testimony, suppressed. The statement was that he (the officer) had seen the defendant point a gun at him. It was suppressed because the incident occurred after the police had unlawfully entered the defendant's home.
Michigan v. Fisher, Case No. 09-91 (S. Ct. 12/7/09)
Search & Seizure: Miscellaneous - Cost-Benefit Balancing Test for Application of Exclusionary Rule
See: U.S. v. Farias-Gonzalez, Case No. 08-10508 (11th Cir. 2/3/09)
Search & Seizure: Miscellaneous - Separate Boxes Within Shrink-Wrapped Pallet Amounted to One Box for Search Purposes
The shipment, by commercial carrier, consisted of a number of boxes shrink-wrapped on a single pallet. Where employees of the carrier opened one of the boxes and discovered marijuana, police were free to search the other boxes as, for Fourth Amendment purposes, the shipment of boxes was tantamount to a single box that had already been opened.
U.S. v. Garcia-Bercovich, Case No. 08-12061 (11th Cir. 9/10/09)
Search & Seizure: Miscellaneous - Identity-Related Evidence (A-File in Immigration Cases)
Can't be suppressed.
U.S. v. Lopez-Garcia, Case No. 08-12662 (11th Cir. 4/21/09); U.S. v. Farias-Gonzalez, Case No. 08-10508 (11th Cir. 2/3/09)
Search & Seizure: Miscellaneous - Unlawful Search By Foreign Officials in Their Own Countries
The general rule is that the evidence uncovered by searches by foreign officials in their own countries is admissible regardless of whether the search fell short of U.S. constitutional standards. There are, though, two exceptions: (1) a search that shocks the judicial conscience and (2) a search in which U.S. law enforcement officials participated in a substantial way or in which the foreign officials acted as agents for the U.S. officials.
U.S. v. Emmanuel, Case No. 07-10378 (11th Cir. 4/21/09)
Search & Seizure: Miscellaneous - Impoundment - Lack of Standardized Rules

While there is a split among the circuits, the Court held that the absence of standardized procedures to guide the discretion of an officer to impound a vehicle did not render the subsequent inventory of the vehicle unreasonable and did not require the suppression of the contraband discovered during the inventory search.
U.S. v. Smith, Case No. 06-3112 (3rd Cir. 4/9/08); U.S. v. Johnson, Case No. 13-15583 (11th Cir. 2/2/15); U.S. v. Johnson, 777 F.3d 1270 (11th Cir. 2015)

Search & Seizure: Miscellaneous - Inevitable Discovery (Active Pursuit Rule)

For the inevitable discovery rule to apply, the lawful means which made discovery inevitable must have been actively pursued prior to the occurrence of the illegal conduct.
U.S. v. Delancy, Case No. 06-13718 (11th Cir. 10/3/07); U.S. v. Virden, 488 F.3d 1317 (11th Cir. 2007); U.S. v. Johnson, Case No. 13-15583 (11th Cir. 2/2/15)

Search & Seizure: Miscellaneous - Identity of the Defendant

Where the defendant was illegally arrested and charged with unlawfully being in the United States after being deported, the Court held the defendant's identity was subject to being suppressed.
U.S. v. Olivares-Rangel, Case No. 04-2194 (10th Cir. 8/11/06)

Search & Seizure: Miscellaneous - Entry Upon Private Land to Knock on Door

The Fourth Amendment is not implicated by the police to knock on a citizen's door for legitimate police purposes unconnected with a search of the premises.
U.S. v. Taylor, Case No. 05-10648 (11th Cir. 7/28/06)

Search & Seizure: Miscellaneous - Hearing (Burden of Going Forward to Show Unlawful Arrest or Detention)

Once the defendant makes a showing that he was arrested without a warrant, the burden of going forward with the evidence rests with the government.
U.S. v. De La Fuente, 548 F.2d 528 (5th Cir. 1977)

Search & Seizure: Miscellaneous - Parolee May Be Searched Without Even a Reasonable Suspicion

Making a distinction between those on parole and those on probation, the court held that a California parolee who had agreed as a condition of his release to subject himself to searches by his parole officer or other law enforcement officers, lacked any reasonable expectation of privacy. Accordingly, a law enforcement officer's search of the parolee which was conducted without either probable cause or a reasonable suspicion did not violate the Fourth Amendment.
Samson v California, Case No. 04-9728 (S. Ct. 6/19/ 2006)

Search & Seizure: Miscellaneous - Reliability of Ordinary Witnesses

The courts have traditionally viewed information drawn from an ordinary witness or crime victim with considerably less skepticism than information derived form anonymous sources.
U.S. v. Martinelli, Case No. 04-13977 (11th Cir. 7/10/06)

Search & Seizure: Miscellaneous - Search of Visitor to Work Release Center

Defendant who had entered the grounds of a work release center to visit prisoner passed by signs warning that vehicles were subject to search. When officers approached her car and asked about any contraband, she told the officers she had decided to leave rather than have her car searched. The court upheld the subsequent search.
U.S. v. Prevo, Case No. 04-15310 (11th Cir. 1/11/06)

Search & Seizure: Miscellaneous - DNA Samples From Convicted Felon

Warrantless, suspicionless, extractions of DNA samples from convicted felons for inclusion in a data base does not violate the Fourth Amendment.

Nicholas v. Goord, Case No. 04-3887 (2d Cir. 11/28/05); U.S. v. Hook, Case No. 06-1362 (7th Cir. 12/13/06)

Search & Seizure: Miscellaneous - Search and Drug Testing as a Condition of Pretrial Release

The Fourth Amendment does not permit warrantless drug testing or home searches as a condition of pretrial release.

U.S. v. Scott, Case No. 04-10090 (9th Cir. 9/9/05)

Search & Seizure: Miscellaneous - Dog Sniff At Locked Bedroom Door

A drug-dog sniff outside a defendant's locked bedroom door, inside a home he shared with a resident who had consented to the police activity was not a search withing the meaning of the Fourth Amendment.

U.S. v. Brock, Case No. 03-2279 (7th Cir. 8/2/05)

Search & Seizure: Miscellaneous - Probationers

Relying on *United States v. Knights*, 534 U.S. 112 (2001), the court concluded that reasonable suspicion justified the search and seizure of the probationer's computer. Given the circumstances, the search was reasonable even though, unlike the circumstances in *Knights*, the terms of the defendant's probation did not require him to consent to searched.

U.S. v. Yuknavich, Case No. 04-10852 (11th cir. Aug. 11. 2005)

Search & Seizure: Miscellaneous - Search of Probationer's Residence

The court upheld a warrantless suspicionless search of the home of a probationer. The condition that the defendant submit to any search requested by his probation officer and that he consent to the admissibility of anything found in the search was upheld.

U.S. v. Barnett, Case No. 04-3636 (7th Cir. 7/18/05)

Search & Seizure: Miscellaneous - DNA Testing of Incarcerated Felons

Georgia state law compelling incarcerated felons to submit saliva samples for DNA profiling did not violate the Fourth Amendment.

Padgett v. Boulineau, Case no. 03-16527 (11th Cir. 3/4/2005)

Search & Seizure: Miscellaneous -Strip Searches (Evidentiary Purposes)

Must be at least a reasonable suspicion.

Jordan v. Stephens, Case No. 02-16424 (11th Cir. 5/24/05)

Search & Seizure: Miscellaneous - Dog Sniff During a Lawful Traffic Stop

Dog sniff conducted during a lawful traffic stop that reveals no information other than the location of a controlled substance does not violate the Fourth Amendment. (Case includes, in Justice Souter's dissent, a listing of cases showing that the dogs are not always accurate.)

Illinois v. Caballes, Case No. 03-923 (S. Ct. 1/24/05)

Search& Seizure: Miscellaneous - Inevitable Discovery

Evidence that results from an illegal search or seizure is nonetheless admissible if the information ultimately or inevitably would have been discovered by lawful means.

Jefferson v. Fountain, Case No. 02-16059 (11th Cir. 9/1/2004); U.S. v. Delancy, Case No. 06-13718 (11th Cir. 10/3/07)

Search & Seizure: Miscellaneous - State Searches Governed by Federal Law

The admissibility in federal court of the products of state searches and seizures is controlled by federal law.

U.S. v. Clay, Case No. 02-15369 (11th Cir. 1/7/03)

Search & Seizure: Miscellaneous - Roadblocks

Where the primary purpose of the roadblock was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime, the roadblock was valid. Accordingly, the resulting conviction for DUI that was based upon observations made upon the stop of the defendant's car was upheld.
Illinois v. Lidster, Case No. 02-1060 (S. Ct. 1/13/04)
Search & Seizure: Miscellaneous - Border Searches (No Requirement for Reasonable Suspicion)
The search of a station wagon's gas tank at the border between Mexico and the United States that involved removing and disassembling the gas tank did not require a reasonable suspicion. The intrusion is justified by the government's interest in protecting its border.
U.S. v. Flores-Montano, Case No. 02-1794 (S. Ct. 3/30/04)
Search & Seizure: Miscellaneous -Packages
Court held that sender who packaged cash in a Federal Express envelope lacked a reasonable expectation of privacy in that envelope and, accordingly upheld the search that occurred when Federal Express agents acceded to IRS request to search the package. Court reasoned that there was no expectation of privacy because the sender had signed an airbill that advised that cash should not be shipped and that Federal Express retained the authority to examine packages.
U.S. v. Young, 350 F.3d 1302 (11th Cir. 2003)
Search & Seizure: Miscellaneous - Strip Searches of the Newly Arrested
Arrestees who are detained in the general jail population can constitutionally be subjected to a strip search only if hte search is supported by reasonable suspicion that such a search will reveal weapons or contraband.
Jordan v. Loomis, Case No. 02-16424 (11th Cir. 11/18/03)U.S. v. Pringle, Case No. 01-14602 (11th Cir. 11/14/03)
Search & Seizure: Miscellaneous - Stop or Arrest Based on Mistake of Fact
A traffic stop based on an officer's incorrect but reasonable assessment of facts does not violate the Fourth Amendment. Thus, if an officer makes a traffic stop based on mistake of fact, the only question is whether the mistake of fact was reasonable.
U.S. v. Chanthassouxat, Case No. 01-17158 (11th Cir. 8/22/03)
Search & Seizure: Miscellaneous - Mistake of Law Renders Stop Unlawful
While an officers reasonable mistake of fact may provide the objective grounds for a reasonable suspicion stop or probable cause required to justify a traffic stop, an officer's mistake of law may not. In this instance, where the officer mistakenly believed it was unlawful to drive without an interior rear view mirror, it was a mistake of law, and the trial court should have granted the defendant's motion to suppress.
U.S. v. Chanthassouxat, Case No. 01-17158 (11th Cir. 8/22/03)
Search & Seizure: Independent Source Purges Taint of Unlawful Search
Under the independent source doctrine, the challenged evidence is admissible if it was obtained from a lawful source, independent of the illegal conduct.
U.S. v. Terzado-Madruga, 897 F.2d 1099, 1113 (11th Cir. 1990); U.S. v. Davis, Case No. 02-12804 (11th Cir. 12/5/02)
Search & Seizure: Miscellaneous - Hearing (Hearsay Admissible)
See U.S. v. Fischel, 686 F.2d 1082 (5th Cir. 1982)
Search & Seizure: Miscellaneous - Hearing (Government's Burden)

Government need establish the existence of a reasonable suspicion only by the preponderance of the evidence.
U.S. v. Atlas, 94 F.3d 447, 451 (8th Cir. 1996)
Search & Seizure: Miscellaneous - Nighttime Searches
Nighttime searches are deemed to be more intrusive than daytime searches, and the assemblage of law enforcement officers at ones door in the middle of the night has a tendency to be more coercive than during the day.
U.S. vs. Ramirez-Chilel, 15 FLW Fed C491 (11th Cir 4/25/02)
Search & Seizure: Miscellaneous - Appellate Court Can Consider All Evidence
In reviewing the trial court's ruling on a motion to suppress, the appellate court is not limited to the evidence introduced at the hearing on the motion to suppress.
U.S. vs. Ramirez-Chilel, 15 FLW Fed C491 (11th Cir 4/25/02)
Search & Seizure: Miscellaneous - Probationers
In the case of probationers having an order stating they must submit to searches, there is no need for a law enforcement officer to obtain a warrant to search the probationer's residence. There is, likewise, no need for probable cause, as, at least in this case, reasonable suspicion was adequate. The court declined to see whether something less would have sufficed.
U.S. v. Knights, 15 FLWFedS27 (11/6/01)
Search & Seizure: Miscellaneous - Thermal Imaging
Where government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, surveillance is Fourth Amendment "search" and is presumptively unreasonable without a warrant.
Kyllo v. U.S., 14 FLWFedS329 (6/11/01); less than probable cause?, see: U.S. v. Kattaria, Case No. 06-3903 (8th Cir. 10/5/07)
Search & Seizure: Miscellaneous - Fourth Amendment Applicable to State Hospital
Because the hospital was a state hospital, the members of its staff are government actors, subject to the strictures of the Fourth Amendment.
Ferguson v. City of Charleston, 14 FLW Fed S153 (10/4/2000)
Search & Seizure: Miscellaneous - Medical Testing
State hospital's performance of diagnostic tests to obtain evidence of patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure.
Ferguson v. City of Charleston, 14 FLW Fed S153 (10/4/2000)
Search & Seizure: Miscellaneous - Officers Accompanied by Press
Although it is a violation of the 4th amendment when officers execute a search warrant accompanied by the press, the exclusionary rule is inapplicable.
U.S. v. Hendrixson, 14 FLW Fed C253 (11th Cir. 11/29/00)
Search & Seizure: Miscellaneous - Dog's Sniff of Car
The fact that officers walk a narcotics detective around the exterior of each car at the checkpoint did not transform the seizure into a search.
City of Indianapolis v. James Edmond, 121 S. Ct. 447 (2000)
Search & Seizure: Miscellaneous - Exceptions to Requirement of Individualized Suspicion
While, ordinarily, a search or seizure in the absence of individualized suspicion is unreasonable, there are some limited exceptions: (1) if the program was designed to serve "special needs beyond the normal need for law enforcement," such as random drug testing of student athletes, drug tests for United States Customs Service employees seeking transfer or promotion to certain

positions, and drug and alcohol tests for railway employees involved in train accidents were found to be in violation of particular safety regulations the searches have been allowed; (2) they've also been allowed for certain administrative purposes so long as the searches are appropriately limited: administrative inspection of premises of "closely regulated" business; inspection of fire damaged premises to determine cause of blaze; and inspection to insure compliance with city housing code; (3) finally, suspicionless seizures of motorists at a fixed border patrol checkpoint, and at a sobriety checkpoint aimed at removing drunk drivers from the road have been permitted. There's also suggestion that a similar type roadblock could be used to verify driver's licenses and vehicle registrations.
City of Indianapolis v. James Edmond, 14 FLW FedS9 (10/3/00)
Search & Seizure: Miscellaneous - Execution of Arrest Warrant on Wrong House
Where the person who was the object of the arrest warrant has sold the residence one month prior to the execution of the arrest warrant, the discovery of the new owner's marijuana should not have been suppressed. In a discussion that includes the merits of AutoTrac the court held that the officers reasonably believed the subject of the warrant still lived at the residence.
U.S. v. Bervaldi, 13 FLW Fed C1137 (11th Cir. 9/14/00)
Search & Seizure: Miscellaneous - Interceptions of Communications (Recording)
Although recognizing a split of authority, the Second Circuit holds that the act of simply recording a conversation does not constitute an interception of oral communications as prohibited by 18 USC 2510.
Rias v. Mutual Central Alarm Service, 202 F.3d 553 (2nd Cir. 2000)
Search & Seizure: Miscellaneous - Homicide Crime Scene
There is no exception to the warrant requirement that is justified by the existence of a homicide crime scene. Here, where the officers searched the residence where the murder occurred for 16 hours, and in the course of the search opened and searched a brief case, the trial court should have suppressed the contents of the brief case.
Flippo v. West Virginia, 13 FLW Fed S1 (10/18/1999)
Search & Seizure: Miscellaneous - Fruit of the Poisonous Tree
Seizures of evidence resulting from an unlawful stop or detention must be suppressed.
Brown v. Illinois, 95 S.Ct. 2254 (1975); U.S. v. Bailey, 691 F.2d 1009, 1015 (11th Cir. 1982); U.S. v. Davis, 313 F.3d 1300, 1302-1303 (11th Cir. 2002); U.S. v. Perkins, 348 F.3d 965 (11th Cir. 2003),
Search & Seizure: Miscellaneous - Fruit of the Poisonous Tree
When the defendant has an outstanding warrant or commits a crime while being detained, such circumstances dissipate the taint of an illegal arrest or detention, and items seized subsequent t the discovery of the warrant or the commission of the new offense are admissible.
State v. Hill, 775 So.2d 1282 (La.. 1998); U.S. v. Green, 111 F.3d 515 (7th Cir. 1997)
Search & Seizure: Miscellaneous - Man's House is His Castle
Wilson v. Layne, 12 FLW Fed S274 (5/24/99)
Search & Seizure: Miscellaneous - Warrant Not Required for Seizure for Forfeiture
Florida v. White, 12 FLW Fed S236 (5/17/99)
Search & Seizure: Miscellaneous - Protective Sweep
Permitted only when the searching officer possess a reasonable belief based on specific and articuable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.

U.S. v. Chaves, 169 F3d 674 (11th Cir. 1999); U.S. v. Caraballo, Case No. 09-10428 (11th Cir. 1/27/10); U.S. v. Noriega, Case No. 10-12480 (11th Cir. 4/11/12); U.S. v. Neary, Case No. 11-13247 (11th Cir. 1/22/14)**;** U.S. v. W hite, Case No. 13-2130 (35d Cir. 4/14/14)

Probable Cause

Search & Seizure: Probable Cause - "Keeps" Drugs in Truck Failed to Establish Sufficiently Narrow Time Frame
Police officer lacked probable cause to believe a defendant had drugs in his car after a woman with whom he had an ongoing relationship alleged that he "deals" a lot of methamphetamine and "keeps" the drugs in a particular place in his car. The court noted that "the location of mobile, easily concealed, readily consumable, and highly incriminating narcotics could quickly go stale in the absence of information indicating an ongoing and continuing narcotics operation."
U.S. v. Kennedy, Case No. 04-2634 (8th Cir. 11/7/05)
Search & Seizure: Probable Cause - Dog Alert on Cash
"The probative value of dog alerts to the small of narcotics on currency has been called into question of late. Testimony indicates that as much as 80% of money in circulation may carry residue of narcotics.
U.S. v. $242,484, Case No. 01-16385 (11th Cir. 1/22/03)
Search & Seizure: Probable Cause - General Definitions
Ornelas v. U.S., 116 S. Ct. 1657, 1663 (1996)
Search & Seizure: Probable Cause - Officer May Draw on His Own Experience
A police officer may draw inferences based on his own experience in deciding whether probable cause exists.
U.S. v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585, 2589 (1975), Ornelas v. U.S., 116 S. Ct. 1657, 1663 (1996)
Search & Seizure: Probable Cause - Confidential Informant May Not Need Corroboration
The existence of probable cause may arise from information provided by a confidential informant even in the absence of corroboration.
U.S. v. Brundidge, 170 F.3d 1350 (11th Cir. 1999)

Warrants

Search & Seizure: Warrants – Based on Prior Illegality
[T]he exlusionary rule reaches not only the primary evidence obtained as a direxl result of an illegal search or seizure . . . but also evidence later discovered and found to be derivative of an illegality or'fruit of the poisonous tree.'" Segura v. United States, 468 U.S. 796, 804 (1984). "The question to be resolved when it is claimed that evidence subsequently obtained is'tainted' or is'fruit' of the prior illegality is whether the challenged evidence was'come at by exploitation of the [initial] illegality or by means sufficiently distinuishable to be purged of the primary taint.'" Id. at 804 (quoting from Wong Sun v. United States, 371 U.S. 471, 488 (1963).
Segura v. United States, 468 U.S. 796 (1984)
Search & Seizure: Warrants – Franks (Omissions)
Deliberate omissions from the affidavit will invalidate a warrant only where the omissions are so significant they negate the probable cause.

U.S. v. Colkley, 899 F.2d 298 (4th Cir. 2014)
Search & Seizure: Warrants – Facebook Warrant Overbroad
A warrant directed to Facebook that required disclosure of "virtually every kind of data that could be found" in the account was overbroad, though qualified under the good faith exception.
U.S. v. Blake, Case No. 15-13395 (11th Cir. 8/21/17)
Search & Seizure: Warrants - By Pass Order Requiring Apple to Assist FBI
Court held the bypass order was necessary to carry out the search warrant the district court had issued, the assistance sought was not specifically addressed by another statute, the bypass order was not inconsistent with Congress' intent, Apple was not too far removed form the underlying controversy, and the burden the order imposed on it was not unreasonable.
U.S. v. Blake, Case No. 15-13395 (11th Cir. 8/21/17)
Search & Seizure: Warrants - Stingray Mobile Phone Tracking
Warrant required before use of the Stingray device to locate defendant.
U.S. v. Ellis, No. 13-CR-00818 (N.D. Cal. 8/24/17)
Search & Seizure: Warrants - Search Warrant for Blood Sample for Blood-Alcohol Analysis
The natural metabolization of alcohol in the blood stream does not present a per se exigency that justifies an exception to the Fourth Amendment for nonconsensual blood testing in all drung-driving cases. While it may support a finding of exigency in a specific case, as it did in Schmerber, it does not do so categorically. Whether a blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.
Missouri v. McNeely, Case No. 11-1425 (S. Ct. 2013)
Search & Seizure: Warrants - Probable Cause Based Upon Fourth Amendment Violation
When police use evidence gathered in violation of the Fourth Amendment to secure a warrant there is a two part test: (1) the product of the violation is excised from the probable cause supporting the warrant and if the remaining information is sufficient to establish probable cause, the question is (2) whether the warrant would have been sought absent the wrongfully obtained information.
U.S. v. Albury, Case No. 12-15183 (11th Cir. 4/19/15)
Search & Seizure: Warrants - Trash Pulls
The Fourth Amendment does not prohibit the search of trash set out for collection that is outside the curtilage of the residence.
California v. Greenwood, 486 U.S. 35 (1988)
Search & Seizure: Warrants - Search of Residence Based on Drug Sale Made Elsewhere
Purchase of drugs made away from suspect's residence can supply probably cause to believe that drugs or related material can be found at the suspect's residence.
U.S. v. Spencer, 530 F.3d 1003 (D.C. Cir. 2008)
Search & Seizure: Warrants - Hot Pursuit Exception
United States v. Milan-Rodriguez, 759 F.2d 1158, 1564 (11th Cir. 1985); U.S. v. Williams, Case No. 12-15313 (11th Cir. 10/2/13)
Search & Seizure: Warrants - Description of Fourth Amendment's Warrant Requirement
Good for 1st paragraph of memo in support of motion challenging a warrantless search of a residence.
U.S. v. Timmann, Case No. 11-15832 (11th Cir. 12/18/13)
Search & Seizure: Warrants - Delay

Delay of 25 days in securing a warrant after seizing the defendants computer was not unreasonable given that seizure was by consent, that the officers had already seen child pornography on the computer, that the agents had allowed the defendant to download personal files, that agent had acted diligently in drafting the affidavit, and the content of the warrant application.
U.S. v. Laist, 702 F.3d 608 (11th Cir. 2012)
Search & Seizure: Warrants - Authority to Detain Occupants
A warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of he premises while the search is conducted.
Croom v. Balkwill, Case No. 09-16315 (11th Cir. 7/7/11)
Search & Seizure: Warrants - Probable Cause (Nexus Between Crime and Place to Be Searched
Probable cause to search a residence requires some nexus between the premises and the alleged crime.
U.S. v. Bradley, 644 F.3d 1213 (11th Cir. 2011)
Search & Seizure: Warrants - Business Records (Pervasive Fraud)
Where the Government has alleged a "pervasive fraud" the courts allow broadly worded warrants.
U.S. v. Bradley, 644 F.3d 1213 (11th Cir. 2011)
Search & Seizure: Warrants - Unreasonable Delay in Securing Warrant
Even a seizure based on probably cause is unconstitutional if the police act with unreasonable delay in securing a warrant. In this child porn case, where the police legitimately seized the defendant's hard drive from the defendant's computer, but waited 21 days to obtain a warrant, the delay was unreasonable and the court of appeals vacated the conviction.
U.S. v. Mitchell, 565 F.3d 1347 (11th Cir. 2009)
Search & Seizure: Warrants - Probable Cause (Inference to Establish a Nexus Between Suspected Criminal Activity and a Suspect's Home)
The Fourth Amendment allows law enforcement officers to rely on a common sense inference that criminals keep the instrumentalities and fruits of their offenses at their residences, not only in drug-trafficking cases, but in cases involving the investigations of other crimes as well. Opinion includes a dissent.
U.S. v. Williams, 544 F.3d 683 (6th Cir. 2008), but see U.S. v. McPhearson, 469 F.3d 518 (6th Cir. 2006); U.S. v. Sanchez, 555 F.3d 910 (10th Cir. 2009)
Search & Seizure: Warrants - Police Negligence
Where officer arrested the defendant based on a reasonable belief that there was an outstanding warrant, but that belief turned out to be wrong because of negligent bookkeeping error by another police employee, drugs and gun found during search incident to arrest were admissible. When police mistakes are the result of negligence, rather than systematic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply.
Herring v. U.S., Case No. 07-513 (S. Ct. 1/14/09)
Search & Seizure: Warrants - Probable Cause (Convicted Felons and Firearms Dealers Typically Store Their Guns at Home)
Court upheld the finding of probable cause that supported the issuance of the search warrant. Defendant, a convicted felon, was seen with firearms at gun shows and informant had reported defendant possessed over 300 firearms. Despite the absence of any evidence that the defendant

kept any guns at his residence, the agents representation in the affidavit that convicted felons and firearm dealers typically stored their guns at home, was sufficient to establish probable cause.
U.S. v. Anton, Case No. 07-13124 (11th Cir. 10/30/08)

Search & Seizure: Warrants - Telephonic - Failure to Create Written Version

Federal agents' failure to create the written version fo a warrant that is required by the federal rule on telephonic search warrants does not trigger the Fourth Amendment's exclusionary rule.
U.S. v. Cazares-Olivas, Case No. 07-2080 (7th Cir. 1/29/08)

Search & Seizure: Warrants - Unreasonable Manner of Execution Didn't Justify Suppression

Even assuming that the forceful, military manner in which a police SWAT team executed a search warrant violated the Fourth Amendment, the evidence that the police found during their search did not have to be suppressed as there was an insufficient causal connection between any constitutional violation and the officers' discovery of the evidence.
U.S. v. Ankeny, Case No. 05-30457 (9th Cir. 6/19/07)

Search & Seizure: Warrants - Likelihood of Finding Evidence at a Particular Location

Probable cause to support a search warrant exists when the totality of the circumstances allow a conclusion that there is a fair probability of finding contraband or evidence at a particular location.
U.S. v. Martinelli, 454 F.3d 1300 (11th Cir. 2006)**Search & Seizure: Warrants - Search of Arriving Vehicles**

A valid search warrant authorizing the search of vehicles on the subject property permits the search of arriving on the property during the course of the search, so long as those vehicles could reasonably contain items the officers are searching for.
U.S. v. Tamari, Case No. 05-10618 (11th Cir. 7/6/06)

Search & Seizure: Warrants - Out of District Warrants

District courts may issue out-of-district warrants under 18 USC 2703(a), using procedures described in Rule 41 subsections (d) and (e), in non-terrorism-related cases.
In re: Search Warrant, Case No. 6:05mc168-Orl-31JGG, 19 F:W Fed. D309 (M.D. Fla. 12/23/05)(Presnell, J.)

Search & Seizure: Warrants - Lost Warrant

When search warrant is lost after its execution and is missing at a suppression hearing, the Fourth Amendment does not prohibit the use of other evidence to establish the existence and the contents of the lost warrant.
U.S. v. Pratt, Case No. 04-15168 (11th Cir. 2/8/06)

Search & Seizure: Warrants - Anticipatory Warrant Need Not Include Triggering Event

U.S. v. Grubbs, Case No. 04-1414 (S.Ct. 3/21/06)

Search & Seizure: Warrants - Warrant Need Not Include Probable Cause

The Fourth Amendment does not require that the warrant set forth the magistrate's basis for finding probable cause.
U.S. v. Grubbs, Case No. 04-1414 (S.Ct. 3/21/06)

Search & Seizure: Warrants - Particularity Requirement

The particularity requirement specifies only two matters that must be particularly described in the warrant: the place to be searched and the person or thing to be seized.
U.S. v. Grubbs, Case No. 04-1414 (S.Ct. 3/21/06)

Search & Seizure: Warrants - Example of Use of Sneak and Peak Warrant

U.S. v. Miranda, Case No. 04-15920 (11th Cir. 9/14/05)

Search & Seizure: Warrants - Handcuffing During Execution of Warrant
At least as in this instance, where the search involved wanted gang members, where there were multiple occupants, and the weapons were the subject of the search, the 2 to 3 hour detention in handcuffs was reasonable.
Muehler v. Mena, Case No. 03-1423 (U.S. 3/22/05)
Search & Seizure: Warrants - Particularity Requirement
Warrant that, because of carelessness, had a description of the residence listed instead of the list of items the officers were authorized to seize violated the 4th Amendment's requirement that the place to be searched as well as the items to be seized must be stated with particularity. The civil equivalent of the good faith exception, that of qualified immunity, did not save the day for the officer.
Groh v. Ramirez., 124 S. Ct. 1284 (2004)
Search & Seizure: Warrants - Execution at Night
Although FRCrP 41 requires daytime service absent some kind of showing that there is reason to execute the warrant at night, 21 USC 879 authorizes nighttime execution. Despite some ambiguity in the wording of the statute, no special showing is needed to justify service at night.
Gooding v. U.S., 94 S. Ct. 1780 (1974); U.S. v. Williams, Case No. 16-16444 (11th Cir. 9/20/17)
Search & Seizure: Warrant - Judge Can't Rely on Past Experience With Affiant
"The judge's testimony that he would not expect [the officer] to give him a stale warrant because he had been signing warrants for [the officer] for years is troubling, suggesting that [the judge] potentially relied upon his past experience with [the officer] rather than the legal validity of the warrant."
U.S. v. Martin, Case No. 01-15691 (11th Cir. 7/18/02)
Search & Seizure: Warrant - Judge Must Reach Own Conclusion
Issuing judges should not substitute the police officer's assessment of the facts for the judge's own independent analysis of the situation.
U.S. v. Martin, Case No. 01-15691 (11th Cir. 7/18/02)
Search & Seizure: Warrants - Fine Points of Establishing Probable Cause
For a good general summary of what must be alleged to establish probable cause see:
U.S. v. Martin, Case No. 01-15691 (11th Cir. 7/18/02)
Search & Seizure: Warrants - Good Faith Applies in All But Four Circumstances
The good faith exception applies in all but four "limited" sets of circumstances: (1) where the judge issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false exept for his reckless disregard of the truth; (2) where the issuing judge wholly abandoned his judicial role in the manner condemned in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); (3) where the affidavit supporting the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where, depending upon the circumstances of the particular case, a warrant is so facially deficient - i.el, in the things to be seized - that the executing official cannot reasonably presume it to be valid.
U.S. v. Martin, 297 F.3d 1308 11th Cir. 2002)
; U.S. v. Robinson, Case No. 02-13686 (11th Cir. 7/9/2003)
Search & Seizure: Warrants - Good Faith (Court May Look Beyond the Affidavit)
A reviewing court may look outside the four corners of the affidavit in determining whether an officer acted in good faith when relying upon an invalid warrant.

U.S. v. Martin, Case No. 01-15691 (11th Cir. 7/18/02), but is limited to information conveyed to the judge that issued the warrant. U.S. v. Frazier, Case No. 04-5719 (6th Cir. 9/6/05); but see: U.S. v. Laughton, Case No. 03-1202 (6th Cir. 5/17/05), U.S. v. Luong, Case NO. 05-50090 (9th Cir. 12/12/06)

Search & Seizure: Warrants - Franks

For a general discussion see U.S. v.Novaton, 271 F.3d 968 (11th Cir. 2001)

Search & Seizure: Warrants - Telephone Warrant

Federal Rule of Criminal Procedure 41(c)(2)(A) provides for the issuance of a warrant without an affidavit based upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission.

U.S. v. Santa, 14 FLW FedC269 (11th Cir. 12/28/2000)

Search & Seizure: Warrants - Anticipatory Warrants

Anticipatory search warrants, i.e., warrants that become effective upon the happening of a future event, have repeatedly been upheld where they are supported by probable cause and the conditions precedent to the search are clearly set forth in the warrant or supporting affidavit.

U.S. v. Santa, 14 FLW FedC269 (11th Cir. 12/28/2000); U.S. v. Grubbs, Case No. 04-1414 (S.Ct. 3/21/06)

Search & Seizure: Warrants - Particularity Requirement (Financial Fraud)

Cases involving complex financial fraud justify a more flexible reading of the Fourth Amendment particularity requirement.

U.S. v. Travers, 14 FLW Fed C166 (11th Cir. 11/21/00)

Search & Seizure: Warrants - Overbroad

The requirement that warrants particularly describe the place to be searched and the things to be seized makes general searches under them impossible. A warrant which fails to sufficiently particularize the place to be searched or the things to be seized is unconstitutionally overbroad.

U.S. v. Travers, 233 F.3d 1327 (11th Cir. 2000)

Search & Seizure: Warrants - Staleness

Because the defendant was being investigated for drug trafficking, act which are "inherently protracted and continuous," the court found the warrants were not so stale as to defeat a finding of probable cause.

U.S. v. Magluta, 198 F.3d 1265 (11th Cir. 1999); U.S. v. Bervaldi, 226 F.3d 1256 (11th Cir. 2000)

Search & Seizure: Warrants - Entry of Individuals Accompanying Police

Wilson v. Layne, 12 FLW Fed S274 (5/24/99)

Search & Seizure: Warrants - Veracity of Affidavit

To attack the validity of a warrant affidavit, a defendant must make a preliminary showing that the affiant made intentional misstatements or omissions (or made misstatements with a reckless disregard for their truthfullness) that were essential to the finding of probable cause. Once the defendant makes such a showing, he is entitled to an evidentiary hearing on the matter; if he prevails at the hearing, the search warrant is to be voided and the fruits of the search must be excluded.

U.S. v. Burston, 12FLW FedC239 (11th Cir. 1998)

SENTENCING

Correction or Modification

Sentencing: Correction or Modification - Fair Sentencing Act
Court of appeals rejected effort to modify a drug mandatory minimum on the basis of the Fair Sentencing Act. The court concluded that there was no evidence that Congress intended the Fair Sentencing Act to apply to defendants who had been sentenced prior to the August 3, 2010 date of the Act's enactment.
U.S. v. Berry, Case No. 12-11150 (11th Cir. 2012)
Sentencing: Correction - "Clear Error"
The Court of Appeals held that the district court's conclusion that the safety valve provision did not allow the court to go below the mandatory minimum when the guidelines range was above the mandatory minimum fell short of the "clear error" required by Rule 35(a) and vacated the district court's sentence reduction granted pursuant to that rule.
U.S. v. Lett, Case No. 06-12537 (11th Cir. April 6, 2007)
Sentencing: Correction - No Inherent Power to Correct
The district court has no inherent power to correct an unlawful sentence. Although prior to 1987 an illegal sentence could have been corrected at any time, Rule 35 now allows the court to correct a sentence in only three circumstances: 1) if directed to do so on remand from an appellate court; 2) within one year of the original sentence if upon a substantial assistance motion filed by the government; or 3) within seven days after the imposition of the sentence.
U.S. v. Diaz-Clark, 15 FLW Fed C625 (11th Cir. 6/5/02)
Sentencing: Rule 35(c) Seven Day Requirement
The seven days starts to run as of the oral pronouncement of the sentence. In this case, the judge issued an order vacating the original sentence during that seven day time period, but imposed the new harsher sentence after the seven days had run. End result: original sentence remained in effect. The trial court no longer had jurisdiction to impose the second sentence.
U.S. v. Morrison, 13 FLW Fed C413 (11th Cir. 2/25/00); U.S. v. Vicol, 460 F.3d 693 (6th Cir. 2006)
Sentencing: Correction - Court May Start Over Again
Where trial court vacated sentence under Rule 35(c), because it used the wrong guideline, the trial court is free to revisit any of its earlier rulings even if such a modification falls outside that authorized by the Rule. According to the Court the sentence in that instance becomes void in its entirety.
U.S. v. Yost, 12 FLW Fed C1151 (11th Cir. 8/11/99)
Sentencing: Correction: Use of Wrong Guideline
Where, here , the trial court used the wrong guideline, it was entitled, under Rule 35(c) to correct the sentence within 7 days of its imposition.
U.S. v. Yost, 12 FLW Fed C1151 (11th Cir. 8/11/99)

Hearing

Sentencing: Hearing - Court Should Address Defendant Directly Regarding Allocution

U.S. v. Perez, Case No. 09-13409 (11th Cir. 10/26/11)
Sentencing: Hearing - Court's Reliance Upon Pre-Prepared Sentencing Opinion
"Wilson does not object to the district court's use of a written sentencing opinion to explain the reasons for her sentence. We note, however, that this practice is somewhat disconcerting. Indeed, the use ofa pre-prepared sentencing opinion in lieu of an oral recitation creates the worrisome impression that the district court's decision was etched in stone before the parties had the opportunity to be heard. If that were the case, the procedural safeguards enshrined in Federal Rule of Criminal Procedure 32(i) would be drained of meaning. Consequently, we expressly encourage judges who prepare opinions in advance to be particularly mindful of Rule 32(i)'s requirements. In addition, we observe that a final sentencing decision should not be reached until *after* the hearing has been completed.
U.S. v. Wilson, Case No. 08-1963 (6th Cir. 7/19/10)
Sentencing: Hearing - Requirement That Court Elicit Objections
After imposing sentence, the district court should elicit fully-articulated objections to the court's findings of fact, conclusions of law, and the manner in which the sentence was imposed.
U.S. v. Jones, 899 F.2d 1097 (11th Cir. 1990), *overruled on other grounds by* United States v. Morrill, 984 F.2d 1136 (11th Cir. 1993)
Sentencing: Hearing - Confrontation
The right of confrontation set out in Crawford does not apply to sentencing hearings.
U.S. v. Cantellano, Case No. 05-11143 (11th Cir. 11/15/05)
Sentencing: Hearing - Hearsay Admissible at Sentencing Hearing
Reliable hearsay can be considered at sentencing.
U.S. v. Chau, Case No. 05-10640 (11th Cir. 9/27/05);
Sentencing: Hearing - Three Strikes (Defendant's Right to Testify Re: Predicate Offense)
Where there was some debate as to whether one of the defendant's prior convictions qualified as a predicate offense, the district court's refusal to let the defendant testify about the circumstances of that offense violated due process.
Gill v. Ayers, 322 F.3d 678 (9th Cir. 3/6/03)
Sentencing: Hearing - Allocution
Failure to proved defendant an opportunity to address the court at sentencing amounted to plain error.
U.S. v. Prouty, Case No. 01-15273 (11th Cir. 8/27/02); U.S. v. Doyle, Case No. 14-12181 (11th Cir. 5/25/17)
Sentencing: Hearing - No Absolute Right to Present Witnesses
Decisions about whether to admit evidence or hear testimony, other than the defendant's statement are left to the court's discretion.
United States v. Claudio, 44 F.3d 10, 16 (1st Cir. 1995)
Sentencing: Hearing - Reliance Upon Hearsay
The sentencing judge may consider any information, including reliable hearsay, regardless of the information's admissibility at trial, provided there are sufficient indicia of reliability to support its probable accuracy.
U.S. v. Castellanos, 904 F.2d 1490, 1495 (11th Cir. 1990); U.S. v. Zlatogur, 15 FLW Fed C31 (11th Cir. 10/31/01)
Sentencing: Hearing - Reliance Upon Testimony From Another Trial
Although evidence and testimony that was presented at another trial may be used in a defendant's sentencing hearing, the Government's references to the evidence presented at the

trials of codefendants is insufficient when the defendant was not an opportunity to test its reliability or validity.
U.S. v. Lawrence, 47 F.3d 1559 (11th Cir. 1995)

Miscellaneous

Sentencing: Miscellaneous – Mitigation (Disadvantaged Background, Emotional and Mental Problems)
Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.
Penry v. Lynaugh, 492 U.S. 302 (1989)
Sentencing: Miscellaneous – Is a 685 Month Sentence Tantamount to a Life Sentence
Court discusses the issue in the context of the prohibition of a life sentence for juveniles in U.S. v. Mathurin, Case No. 14-12239 (11th Cir. 8/18/17)
Sentencing: Miscellaneous – Sentencing Factor Manipulation
Sentencing factor manipulation occurs when the government manipulates a sting operation to increase a defendant's potential sentence.The defendant bears the burden of establishing that the government's conduct is sufficiently reprehensible.
U.S. v. Samiosmakac, Case No. 14-15205 (11th Cir. 8/18/17)
Sentencing: Miscellaneous - BOP's Discretion to Award Credit for State Sentence
The Bureau of Prisons has discretion to award credit for a previously served state sentence by retroactively designating the state prison as "the place of commencement" of the federal sentence. Case includes, too, a discussion of comity and priority of sentences.
787 F.Supp.2d 350 (W.D. Penn. 2011)
Sentencing: Miscellaneous - Can't Impose a Longer Sentence for Purposes of Treatment
U.S. v. Tapia, 131 S. Ct. 2382 (2011); U.S. v. Vandergrift, 754 F.3d 1303 (11th Cir. 2014)
Sentencing: Use of Evidence Obtained in Violation of the Fourth Amendment
At a sentencing hearing, the court may use evidence seized in violation of a defendant's Fourth Amendment rights as long as the police did not intentionally violate the Fourth Amendment in order to increase the defendant's sentence.
United States v. Vasquez, 724 F.3d 15 (1st Cir. 2013)
Sentencing: Miscellaneous - Consideration of Lack of Remorse
While acknowledging that the sentencing court could not penalize the defendant for exercising his right to remain silent, the court went on to hold that a sentencing court was free to consider "a defendant's freely offered statements indicating a lack of remorse."
U.S. v. Stanley, Case No. 11126 (11th Cir. 1/6/14)
Sentencing: Miscellaneous - Apprendi Applies to Fines
U.S. v. Bane, Case No. 14158 (11th Cir. 6/28/13)
Sentencing: Miscellaneous - Can't Interrupt a Previously Imposed State Sentence
Where the defendant was serving a state sentence and appeared in federal court on the basis of a writ of habeas corpus ad prosequendum and received a consecutive federal sentence, the district court lacked the authority to order the defendant to immediately begin his federal sentence in a federal prison.

U.S. v. Smith, 812 F.Supp. 368 (E.D.N.Y. 1993)

Sentencing: Miscellaneous - Mandatory Life Sentences for Juveniles

Mandatory life sentences for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel of unusual punishments. It prevents those meting out punishment from considering a juvenile's lessened culpability and greater capacity for change and runs afoul of the requirement of individualized sentencing for defendants facing the most serious penalties.

Miller v. Alabama, Case No. 10-9646 (S. Ct. 2012)

Sentencing: Miscellaneous - Upon It's Enactment the Fair Sentencing Act Applied to Those Being Sentenced

Upon being enacted on August 3, 2010, the reduced mandatory minimum sentences established by the Fair Sentencing Act applied to those being sentenced as of that date, and was, therefore, applicable to those who had committed their crime prior to that date.

Dorsey v. United States, Case No. 11-5721 (S. Ct. 4/17/12)

Sentencing: Miscellaneous - Apprendi Applies to Fines

In a case involving the criminal conviction of a corporation, the Court held that Apprendi applies to fines.

Southern Union Company, case No. 11-94 (S. Ct. 6/21/12)

Sentencing: Miscellaneous - Credit for Time in Immigration Custody

Time spent solely in civil or administrative immigration custody pending deportation cannot be credited against a federal sentence as 18 U.S.C. § 3585 only allows credit for time spent in "official detention" on criminal charges. However, unlike ICE detainees solely awaiting removal, those being held in immigration custody in anticipation of a federal indictment for illegal re-entry are entitled to credit for their time held awaiting indictment.

De Paz-Salvador v. Holt, Case No. 3:10CV2668 2011 U.S. Dist. LEXIS 98003 (M.D.Penn. 8/31/11)

Sentencing: Miscellaneous - Presumption is That Sentences Will Run Concurrently

Pursuant to 18 U.S.C. §3584(a), if the district court imposes multiple terms of imprisonment at the same time, but fails to address the concurrent-vs-consecutive issue, the terms run concurrently and the Bureau of Prisons is not free to use its "place of imprisonment"authority to achieve a different result.

Setser v. U.S., Case No. 10-7387 (S. Ct. 3/28/12)

Sentencing: Miscellaneous - Consecutive to Anticipated State Sentence

A district court, in sentencing a defendant for a federal offense, has authority to order that the federal sentence be consecutive to an anticipated state sentence that has not yet been imposed.

Setser v. U.S., Case No. 10-7387 (S. Ct. 3/28/12)

Sentencing: Miscellaneous - Need and Timing for Sentencing Memos

The parties should present their sentencing requests to the district court after the PSI, and any addendums to te PSR, are in final form and ready for submission to the court. Ideally, the request should be presented well in advance of the sentencing hearing in sentencing memoranda akin to the pretrial briefs parties routinely present to the district court in advance of a civil bench trial. In the sentencing memoranda, the parties should consider presenting the district court with findings of fact and conclusions of law similar to the findings of fact and conclusions of law parties in a civil case present the court prior to or following a bench trial. The memoranda would indicate the Guidelines sentencing range, the sentence the party requests, the primary § 3553(a)(2) purpose

the sentence is to serve, and why the sentence would be sufficient, but not greater than necessary to comply with the § 3553(a) purposes.
United States v. Irey, 612 F.3d 1160, 1241 (11th Cir. 2010) (Tjoflat, J. dissenting opinion)
Sentencing: Miscellaneous - District Court's Reliance on Incorrect Facts
Amounted to plain error.
U.S. v. Wilson, Case No. 08-1963 (6th Cir. 7/19/10)
Sentencing: Miscellaneous - Due Process Right to Receive Notice of Facts Relied Upon by the Court and to Be Sentenced Upon Accurate Information
The Eleventh Circuit has acknowledged that due process includes right to be sentenced on the basis of accurate information and the right to be given adequate notice of the facts upon which he sentencing court relies and an opportunity to contest that information.
U.S. v. Jules, Case No. 08-13629 (1th Cir. 2/2/10)
Sentencing: Miscellaneous - Leniency for Veterans
Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines.
Porter v. McCullom, Case No. 10537 (S. Ct. 11/30/09)
Sentencing: Miscellaneous - Disadvantaged Background May Mean Defendant Less Culpable
Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable.
Porter v. McCullom, Case No. 10537 (S. Ct. 11/30/09)
Sentencing: Miscellaneous - Unexpected Conditions of Supervised Release
Defendant who was being sentenced for a firearm offense had no basis to complain about lack of notice when court imposed special conditions meant to address the past sexual misconduct outlined in the PSR.
U.S. v. Moran, Case No. 08-16987 (11th Cir. 7/1/09)
Sentencing: Miscellaneous - Fourth Amendment (Evidence Seized During Unlawful Searches Admissible at Sentencing)
While there may be some question about the situation where officers seize evidence for the purpose of securing a longer sentence, the exclusionary rule applicable to unlawful searches does not generally apply to sentencing.
U.S. v. Lynch, 934 F.2d 1226, 1236-1237, & n. 15 (11th Cir. 1995), U.S. v. Acosta, 303 F.3d 78 (1st Cir. 2002)
Sentencing: Miscellaneous - Consecutive Sentences - Armed Career Criminal and Possession of Firearm in Furtherance of a Drug Trafficking Offense
18 U.S.C. §924(c)(1)(A) provides that the mandatory minimum sentences of §924 apply "except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of the law."Accordingly, the court of appeals held it was error to run a 10 year sentence for discharging a firearm during a crime of violence to the 15 year armed career criminal sentence. There is conflict among the circuits.
U.S. v. Whitley, 529 F.3d 150 (2d Cir. 2008)
Sentencing: Miscellaneous - Objection to Thoroughness of Explanation
A party who is dissatisfied with the thoroughness of a sentencing judge's explanation of a sentence must object during the sentencing hearing or plain-error review applies on appeal.
U.S. v. Vonner, Case No. 05-5295 (6th Cir. 2/7/09) (en banc)

Sentencing: Miscellaneous - Alternative Sentences Contingent Upon a Choice Made By the Defendant
Whatever authority federal district judges have to impose "alternative sentences," it does not include the authority to make a sentence contingent upon a choice made by the defendant. Here, the judge mistakenly imposed one sentence if the defendant agreed to be deported and a harsher sentence if she did not.
U.S. v. Desantiago-Esquivel, Case No. 07-1170 (8th Cir. 5/22/08)
Sentencing: Miscellaneous - Repeat-Offender Laws Penalize Only the Last Offense
"When a defendant is given a higher sentence under a recidivism statute - or for that matter, when a sentencing judge, under a guidelines regime or a discretionary sentencing system, increases a sentence based on the defendant's criminal history - 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's status as a recidivist.'"
U.S. v. Rodriquez, Case No. 06-1646 (S. Ct. 5/19/08)
Sentencing: Miscellaneous - Improper Consideration (Action of Immigration Officials)
The district court exceeded its statutory sentencing authority when it based the defendant's sentence for a violation of supervised release on its disapproval of actions of immigration officials in releasing the defendant on bond pending the outcome of his asylum proceedings.
U.S. v. Velasquez, Case No. 06-16637 (11th Cir. 4/21/08)
Sentencing: Miscellaneous - Court Erred by Ordering Sentence to Run Consecutively to Future State Sentence
U.S. v. Donoso, Case No. 07-0635 (2d Cir. 4/3/08)
Sentencing: Miscellaneous - Trial Court's Consideration of Letters Undisclosed to the Defendant
If confidential letters submitted to the sentencing judge cannot be summarized in a way that allows the defendant to rebut the credibility of their assertions, Rule 32(i)(1)(B) does not allow the judge to consider the letters. The decision relied, at least in part, on the conclusion that the defendant needed to know the identity of the letter writers so that he could reveal facts related to bias or the credibility of the writers. The defense lawyer had rejected the trial court's offer to disclose the letters to him, saying that he could not adequately rebut the claims without revealing the information to the client.
U.S. v. Hamad, Case No. 05-4196 (6th Cir. 7/19/07)
Sentencing: Miscellaneous - Deterrence Works Best in the Case of Intentional Acts
At least in the context of police errors and the Fourth Amendment, the Court concluded that "Deterrents work best where the targeted conduct results from conscious decision making, because only if the decision maker considers the possible results of her actions can she be deterred."
U.S. v. Herring, Case No. 06-10795 (11th Cir. 7/17/05)
Sentencing: Miscellaneous - Example of Importance of Corroboration of Defendant's Testimony at Sentencing
See: Abraham v. U.S., Case No. 06-20786 (S.D. Fla. 3/12/07)(Huck)
Sentencing: Miscellaneous - Motion to Correct Sentence
By its terms, Fed. R. Crim. P. 35(c) permits corrections of arithmetical, technical, or other clear errors. The rule is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a),

requiring remand when the sentence is imposed in violation of law, as a result of an incorrect application of the sentencing guidelines, or is unreasonable. The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines, Fed. R. Crim. P. 35 Advisory Committee's Note.
United States v. Abreu-Cabrera, 64 F.3d 67 (2d Cir. 1995)

Sentencing: Miscellaneous - 5 Hour Sentence Didn't Satisfy Incarceration Requirement

Although not directly deciding the issue, the Court suggests that a 5 hour sentence didn't amount to a real sentence, the kind that would satisfy the requirement that those convicted of a Class A or Class B felony receive a period of incarceration.
U.S. v. Crisp, Case No. 05-12304 (11th Cir. 7/7/06)

Sentencing: Miscellaneous - Statements Obtained in Violation of Miranda

Statements obtained from the defendant in violation of the requirements of the Miranda decision are admissible at sentencing.
U.S. v. Hernandez-Villanueva, 473 F.3d 118 (4th Cir. 2007)

Sentencing: Miscellaneous - General Sentence

A general sentence is an undivided sentence for more than one count that does not exceed the maximum possible aggregate sentence for all the counts, but does exceed the maximum allowable sentence on one of the counts. It's illegal.
U.S. v. Moriarty, Case No. 04-13683 (11th Cir. 11/1/05)

Sentencing: Miscellaneous - Mandatory Minimums (Facts Supporting the Sentence Must Be Found By Jury)

At least according to the Minnesota Supreme Court, the Sixth Amendment is violated when the facts supporting a mandatory minimum sentence are found by the sentencing judge rather than by a jury or admitted by the Defendant.
State v. Barker, Case No. A04-1453 (Minn. 11/17/05)

Sentencing: Miscellaneous - District Court Not Required to Address Each Factor in 18 USC 3553(a)

U.S. v. Scott, Case No. 05-11843 (11th Cir. 9/27/05)

Sentencing: Credit for Time Already Served

The Attorney General through the Bureau of Prisons, as opposed to the district courts, is authorized to compute sentence credit awards after sentencing. As a result, a federal prisoner dissatisfied with computation of his credit must pursue the administrative remedy available through the federal prison system before seeking review fo his sentence. A claim for credit for time served is brought under 28 USC 2241 after the exhaustion of administrative remedies.
U.S. v. Williams, No. 04-15732 (11th Cir. 9/19/05), U.S. v.Alexander, Case No. 08-17062 (11th Cir. 6/25/10)

Sentencing: Miscellaneous - Disadvantages in Life

"[S]ociety generally holds people less culpable for bad acts related to disadvantages in life."
Warden v. Payton, Case No. 03-1039 (S. Ct. 3/22/05)(Breyer, J. concurring)

Sentencing: Miscellaneous - Credit for Time During Mistaken Release

Defendant not entitled to credit for time he was mistakenly at liberty due to delay of several years in the commencement of sentence.
Little v. Holder, Case NO. 03-13134 (11th Cir. 1/18/05)

Sentencing: Miscellaneous - Mentally Retarded Less Culpable
Today our society views mentally retarded offenders as categorically less culpable than the average criminal.
Atkins v. Virginia, 536 U.S. 304, 316 (2002)
Sentencing: Miscellaneous - Concurrent Sentence With Yet-To-Be Imposed State Sentence
A district court judge has the authority to impose a sentence concurrently to a yet-to-be imposed state sentence.
U.S. v. McDaniel, 338 F.3d 1287 (11th Cir. 2003); Setser v. U.S., 132 S. Ct. 1463 (2012)
Sentencing: Miscellaneous - New More Generous Rule 35 Provisions Apply Retroactively
U.S. v. Moreno, Case No. 03-13662.
Sentencing: Miscellaneous - Oral Prevails Over the Written
When the orally imposed sentence differs from the written order of judgment, the oral sentence controls.
U.S. v. Ridgeway, Case No. 02-11751 (1/31/03)
Sentencing: Miscellaneous - Cruel & Unusual (Calif. Three Strikes)
Eighth Amendment does not prohibit California from sentencing repeat felon to prison for term of 25 years to life for stealing golf clubs.
Ewing v. California, Case No. 01-6978 (S. Ct. 3/5/03), Lockyer v. Andrade, Case No. 01-1127 (S. Ct. 3/5/03)
Sentencing: Miscellaneous - Incarceration Not for Rehabilitation
For purposes of determining the need for incarceration, Congress specified only those goals of punishment, general deterrents, and specific deterrents. Congress prohibited incarcerating an offender for purposes of rehabilitation. An individual's need to incarceration may be considered in prescribing the conditions of probation or supervised release.
U.S. v. Burgos, 15 FLW Fed C157 (11th Cir. 12/21/01)
Sentencing: Miscellaneous - Socio-Economic Status and Education Irrelevant
A defendant's socio and economic status is never relevant to sentencing and his education is relevant only if he misused special training in perpetrating his crime.
U.S. v. Burgos, 15 FLW Fed C157 (11th Cir. 12/21/01)
Sentencing: Miscellaneous - Sentencing Objectives
Congress codified four sentencing objectives courts must take into account in fashioning a sentence: Punishment, general deterrents, specific deterrents, and rehabilitation. If a district court gives weight to a factor relevant to these purposes then the opposed sentence necessarily exceeds the court's sentencing discretion. Here, where the court imposed a higher sentence in the guideline range because the defendant refused to cooperate in an unrelated case, the court exceeded its sentencing discretion.
U.S. v. Burgos, 15 FLW Fed C157 (11th Cir. 12/21/01)
Sentencing: Miscellaneous - Appeal of Sentence Waiver
An appeal of sentence waiver provision is enforceable if the waiver is made knowingly and voluntarily.
U.S. v. Weaver, 15 FLW FedC50 (11th Cir. 11/13/01)
Sentencing: Miscellaneous - Required Consecutive Sentence?
It may be that there is a conflict between the seemingly mandatory language of USSG 5G1.3(a) that requires consecutive sentences when the instant offense is committed while the defendant is serving another sentence, and 18 USC 3584. At any rate, in construing the two provisions, the court has held that 5G1.3(a) creates a "presumption" in favor of a consecutive sentence which

controls unless the court may properly depart downward under the procedures in 18 USC 3553(c)(2). ? ? ?
U.S. . Fossett, 881 F.2d 976 (11th Cir. 1989)
Sentencing: Miscellaneous - Drug Enhancement Notice (Date Notice Mailed)
The government met the notice requirement of 21 USC 851 by mailing the notice to the defendant's attorney the day before the trial began. ???
U.S. v. Novaton, 271 F.3d 968 (11th Cir. 2001)
Sentencing: Miscellaneous - Preservation of Sentencing Issues
"Normally, a litigant's failure to reserve the right to contest sentencing issues in his plea agreement precludes him from challenging the district court's decision to sentence him under a particular guideline provision."
U.S. v. Farese, 14 FLW Fed C627 (11th Cir. 4/16/01)
Sentencing: Miscellaneous - Judges Obligation to Make Findings of Reliability
While it may be advisable and in some instances necessary for a district court to make distinct findings regarding the reliability of hearsay statements used at sentencing, the absence of such findings does not necessarily require reversal or remand where the reliability of the statements is apparent from the record.
U.S. v. Gordon, 14 FLW Fed C78 (11th Cir. 10/23/00)
Sentencing: Miscellaneous - Police Reports Not Always Reliable
In the context of determining whether the defendant qualified for sentencing as an armed career offender: "We recognize, however, that the reliability of police reports is far from absolute."
U.S. v. Richardson, 14 FLW Fed C65 (11th Cir. 10/17/00)
Sentencing: Miscellaneous - General Sentence
A single sentence for multiple counts is a general sentence, and is per se illegal.
Jones v. U.S., 13 FLW Fed C1063 (11th Cir. 8/29/00)
Sentencing: Miscellaneous - More Time to Allow for Drug Rehab
Nothing improper about imposing a longer sentence to allow the individual to participate, while incarcerated, in a drug rehabilitation program.
U.S. v. Aguillard, 13 FLW Fed C846 (11th Cir. 7/5/00); U.S. v. Wiggins, 13 Flw Fed C930 (11th Cir. 8/2/2000); but see: U.S. v. Brown, 13 FLW Fed C1011 (11th Cir. 8/18/00)
Sentencing: Miscellaneous - Sentence Imposed When Orally Pronounced
There is a minority of jurisdictions that hold that the sentence is imposed when the judgment is entered. Here, though, the Court sided with the majority of jurisdictions and held that the sentence is imposed when it is orally pronounced. The ruling came in the context of a Rule 35 motion.
U.S. v. Aguirre, No. 99-50135 (9th Cir. 6/19/00)
Sentencing: Miscellaneous - In Absentia
Rule 43 says that if a defendant, having entered a plea, flees, he can be sentenced in absentia. That he did not review the PSI makes no difference.
U.S. v. Jordan, 216 F.3d 1248 (11th Cir. 2000)
Sentencing: Misc. - Consecutive Sentences for Arson and Use of Fire
Consecutive sentences for arson, 18 USC 844(i) and using a fire to commit a federal felony, 18 USC 1341, 1342 did not violate double jeopardy and was permissible.
U.S. v. Gardner, 211 F.3d 1049 (7th Cir. 2000)
Sentencing: Miscellaneous - Determining Terms of Sentence

As a general rule, in determining the terms of a sentence, it is the intent of the sentencing judge which controls and that intent is to be determined by reference to the entire record.
U.S. v. Bull, 13 FLW Fed C741 (11th Cir. 6/12/00)
Sentencing: Miscellaneous - 3 Strikes Doesn't Violate Separation of Powers
U.S. v. Kalluna 96-10527 (9th Cir. 9/30/99)
Sentencing: Miscellaneous - Proof of Prior Conviction
Although the defendant denied one of the prior convictions mentioned in the PSI, and there was no certified copy of the conviction, the court held that the probation officer's recitation of the notes made by the probation officer initially assigned to prepare the PSI was sufficient.
U.S. v. Wilson, 12 FLW Fed C1186 (11th Cir. 8/12/99)
Sentencing: Miscellaneous - Notice Requirements for Drug Enhancement Penalties
The government's failure to file a timely notice precludes enhancement even if the defendant knew before trial he was subject to enhancement because of his prior convictions, and even if the defendant doesn't challenge the validity of those convictions. Likewise it is error to impose an enhanced sentence if the notice fails to specifically list the prior convictions.
U.S. v. Rutherford, 175 F.3d 899 (11th Cir. 1999); U.S. v. Gonzalez, 12 FLW Fed C1174 (11th Cir. 8/13/99)
Sentencing: Miscellaneous Drug Quantities Suppressed Still Considered At Sentencing
U.S. v. Torres, 926 F.2d 321, 324-325 (3d Cir. 1991); U.S. v. Tauil-Hernandez, 88 F.3d 576, 581 (8th Cir. 1996), see Memo in Vaughn Moore's case.
Sentencing: Miscellaneous - Appeal (Court's Exercise of Discretion Not to Depart)
Although the circuit court has jurisdiction if the sentencing court erroneously decides it lacks the discretion to depart, the court lacks jurisdiction to review the sentencing court's decision not to depart. When nothing in the record indicates otherwise, the circuit court will conclude the sentencing court knew it had the discretion.
U.S. v. Chase, 12 FLW Fed C799 (11th Cir. 5/5/99)
Sentencing: Mandatory Minimums Criticized
"By mandating such high minimum sentences in 18 U.S.C. 924(c)(1), Congress has removed the carefully circumscribed discretion granted to district courts in the Sentencing Guidelines to consider possible mitigating circumstances. We feel a just system of punishment demands that some level of discretion be vested in judges to consider mitigating circumstances."
U.S. v. Harris, CA9, Nos 96-10416 & 96-10418, 9/9/98

PSI

Sentencing: PSR - Can Court Rely on Un-Obected to Facts?
See U.S. v. Roy, 2017 U.S. Dist. LEXIS 169425 (D. Mass. Oct. 13, 2017); U.S. v. Wynn, 579 F.3d 576 (6th Cir. 2009: but see U.S. v. Braun, 801 F.3d 1301 (11th Cir. 2015)
Sentencing: PSR - Objections to Facts from Non-Shepard Documents
A defendant makes a proper objection hwen he identifies the specific PSI paragraphs to which he objects and staets that the reason for his objection is that the source of those facts is a particular non-Shepard document.
U.S. v. McCloud, 818 F.3d 591 (11th Cir. 2016)
Sentencing: PSR - Court's Obligation to Resolve Disputed Portions of PSI
Court is not required to resolve only those disputes that affect the length of the sentence.

U.S. v. Saeteurn, Case No. 06-10401 (9th Cir. 10/15/07)
Sentencing: PSI - Requirement That Objections Be Made Within 14 Days
See: U.S. v. Edouard, Case No. 05-15808 (11th Cir. 5/11/07); U.S. v. Aguilar-Ibarra, Case No. 13-10307 (11th Cir. 1/22/14)
Sentencing: PSI - Failure to Object of Allegations of Fact
A failure to object to allegations of fact in a PSI admits those facts for purposes of sentencing.
U.S. v. Bennett, 472 F.3d 825 (11th Cir. 2006)
Sentencing: PSI - Court's Findings of Fact
A sentencing court's findings of fact may be based on undisputed statements in the PSI.
U.S. v. Bennett, Case No. 05-15376 (11th Cir. 12/13/06)
Sentencing: PSI - Rule 32 & Court's Obligation to Resolve Disputed Issues at Sentencing
Rule 32(i)(3) requires that the sentencing court rule on disputed matters and attach a copy of the court's determination to the PSR that goes to the Bureau of Prisons.
U.S. v. Spears, Case No. 04-13297 (11th Cir. 3/30/06)
Sentencing: PSI - Unobjected to Conclusions
While if the defendant objects to conclusory statements such statements are insufficient to support a finding at sentencing, absent an objection such statements will suffice.
U.S. v. Hedges, 12 FLW Fed C865 (11th Cir. 5/21/99)
Sentencing: PSI - Disclosure to Defense Attorney Insufficient
Because the statute 18 USC 3552 requires that the defendant has ten days to review the PSI the disclosure to defense counsel 22 days prior to sentencing failed to satisfy statutory requirements.
U.S. v. Davenport, 12 FLW Fed C23 (11th Cir 8/25/98)
Sentencing: PSI -Release of Information From Pre-Sentence Report
Although there is a presumption against the release of information from the pre-sentence report, it can be released under some circumstances - arguably, upon the showing of a compelling need. In this case, the court, upon a showing by a state prosecutor to use statements made by the defendant to impeach his upcoming defense of diminished intent.
U.S. v. Gomez, 323 F.3d 1305 (11th Cir. 2003)

Resentencing

Sentencing: Resentencing - Sentencing Package Doctrine
Trial court sentenced defendant to life for witness tampering (the murder of a police officer) and to a ten-year consecutive sentence for the use of a firearm in a crime of violence. When, on appeal, the conviction for witness tampering was overturned, the trial court resentenced the defendant to life for the firearm charge. The court of appeals upheld the sentence under the sentencing package doctrine that holds a district court is free to reconstruct the "sentencing package" to ensure that the overall sentence remains consistent with the guidelines, the § 3553(a) factors, and the court's view concerning the proper sentence in light of all the circumstances.
U.S. v. Fowler, 749 F.3d 1010 (11th Cir. 2014); Dean v. U.S., 137 S. Ct. 1170 (2017).
Sentencing: Resentencing - Govt. Limited to Evidence Presented at Inital Sentencing
Where the government had an opportunity to litigate the loss amount and restitution and did not appeal the district court's ruling at the time that it was foreclosed from presenting additional evidence, the Government was limited to the same evidence at the resentencing hearing.
U.S. v. Isaacson, Case No. 12-14703 (11th Cir. 5/22/14)

Sentencing: Resentencing - Limited by Initial Guidelines
18 USC § 3742(g) provides that at resentencing the district court cannot impose a sentence outside the Guidelines range unless the initial sentence was outside the Guidelines range and included a written statement of reasons required by section 3553(c). In this case, however, the Court held that because the initial sentence was imposed before the enactment of 18 USC § 3742(g), the Court was free to impose an above-Guidelines sentence.
U.S. v. Amadeo, Case No. 05-11806 (11th Cir. 5/24/07)
Sentencing: Resentencing - Mandate Rule
The mandate rule is simply an application of the law of the case doctrine to a specific set of facts. It applies to findings made under the Sentencing Guidelines. there are three exceptions to the rule: (1) a subsequent trial produces substantially different evidence; (2) controlling authority has since made a contrary decision of law applicable to that issue; or (3) the prior appellate decision was clearly erroneous and would work manifest injustice.
U.S. v. Amadeo, Case No. 05-11806 (11th Cir. 5/24/07)
Sentencing: Resentencing - Remedy for Out-of-Time Appeal (Sentencing Hearing)
When the court grants a 2255 motion based upon the trial lawyer's failure to honor the defendant's request for an appeal, and pursuant to the procedures outlined in U.S. v. Phillips, 225 F.3d 1198 (11th Cir. 2000), resentences the defendant, the court does not have to hold a new sentencing hearing.
U.S. v. Parrish, Case No. 05-10940 (11th Cir. 9/28/05)
Sentencing: Resentecing - New Sentencing (Ordinarily De Novo)
As a general matter, when a sentence is remanded on appeal, the sentencing process commences again de novo.
U.S. v. Grant, Case No. 03-13406 (11th Cir. 1/27/05)
Sentencing: Re-Sentencing - Original Guidelines Apply
In April 2003, Congress passed the PROTECT Act. Section 3742(g) of the act, known as the Feeney Amendment, provides that when re-sentencing afer appellate remand, a district court should apply the Guidelines that were in place prior to the appeal.
U.S. v. Bordon, No. 04-10654 (11th Cir. 8/25/05)
Sentencing: Resentencing
When a criminal sentence is vacated, a district court is generally free to reconstruct the sentence using any of the sentencing components.
U.S. v. Davis, 329 F.3d 1250 (11th Cir. 2003)
Sentencing: Resentencing - Remand
Multiple count convictions present the trial judge with the need for a sentencing scheme which takes into consideration the total offense characteristics of a defendant's behavior. When the scheme is disrupted because it has incorporated an illegal sentence, it is appropriate that the entire case be remanded for resentencing.
U.S. v. Klopf, Case No. 04-10663 (11th Cir. 9/7/05)

Restitution and Fines

Sentencing: Restitution – 90 Day Rule

18 U.S.C. § 3664(d)(5) requires the Court to enter a restitution order within 90 days. The 90-day requirement is inapplicable if the court has stated it will impose restitution and only the amount is at issue.
U.S. v. Rodriguez, 751 F.3d 1244 (11th Cir. 2014)

Sentencing: Restitution – Federal Order Preempts State Law
Pursuant to 18 U.S.C. § 3613, the only exceptions to a restituion order are: wearing apparrell and school books, fuel, provisions and personal effects, boks and tools of a trade, business, or profession, unemployment benefits, cetain annuity and pension payments, wokers compensation benefits, judgments for support of minor children, certain service-connected disablity payments, and assistance under the Job Traning Partnership Act. Florida's homestead exmption protection, for example, offers no protection.
See: Wang v. Want, 2007 U.S. Dist, LEXIS 62545, 2007 WL 2460727 (M.D. Fla. Aug. 24, 2007)
Sentencing: Restitution - Mandatory Victims Restitution Act ("Offenses Against Property"
The Mandatory Victims Restitution Act specifies four types of crimes that trigger mandatory restitution: (1) crimes of violence as defined in 18 U.S.C. § 16; (2) offenses against property, including those committed by fraud or deceit; (3) offenses related to tampering with consumer products; and (4) offense relating to theft of medical products. Here, after a lengthy discussion of what qualifies as " offenses against property," the court concluded that the offense of conspiracy to accept gratuities in violation of 18 U.S.C. § 215.
U.S. v. Collins, Case No. 15-12805 (11th Cir. 4/26/17)
Sentencing: Restitution - Survives Bankruptcy
In re: Robinson, 764 F.3d 554 (6th Cir. 2014)
Sentencing: Restitution - Post-Conviction Challenge (Coram Nobis)
Probably won't work.
U.S. v. Wilkozek, 822 F.3d 364 (7th Cir. 2016)
Sentencing: Restitution - Modification of Restitution Amount
The court may modify the amount of restitution only if one of the circumstances set out in 18 U.S.C. § 3664(o) applies.
U.S. v. Puentes, 803 F.3d 597 (11th Cir. 2015)
Sentencing: Restitution - Joint and Several Liability
The Mandatory Victims Restitution Act, 18 U.S.C. § 3664, contemplates joint and several liability in cases involving multiple defendants. The court may make each defendant liable for the full amount or may apportion the loss based on each defendants contribution to the victim's loss.
U.S. v. Puentes, Case No. 14-13587 (11th Cir. 10/5/15)
Sentencing: Restitution - Court Cannot Eliminate Restitution Because of Substantial Assistance
U.S. v. Puentes, Case No. 14-13587 (11th Cir. 10/5/15)
Sentencing: Restituion - Fraudulent Loans
The Mandatory Victims Restitution Act of 1996 requires that in the case of a fraudulently obtained loan, the sentencing court must reduce the amount of the money the victim received when it sells the collateral, not th value of the collateral when the victim received it.
Roberts v. U.S., Case No. 12-9012 (S. Ct. 5/5/14)

Sentencing: Restitution - Mortgage Fraud (Successor Lender)
Restitution to a successor lender must typically equal the sum that lender paid to acquire the mortgage equal the sum that lender paid to acquire the mortgage less the principal payments it received and the amount recouped in the short sale. In simple terms, how much is paid mnus ow much it made.
U.S. v. Martin, Case No. 14-11019 (11th Cir. 9/30/15)
Sentencing: Restitution - Mortgage Fraud
Where the loss arises out of a fraudulent mortgage transaction, the Guidelines require that if the property has been pledged as collateral for the loan has been sold, the amount recovered from that sale shall be deducted from the amount of the loan. If the property has not been sold by the time of the sentencing, one looks to the most recent tax assessment to determine fair market value and then subtract that fair maket value from the loan balance.
U.S. v. Carvallo, Case No. 12-15660 (11th Cir. 6/22/15)
Sentencing: Restitution - Offset for Value Received
to ensure that a victim is compensated only for its actual loss, the court must deduct, as an offset, any value that the victim may have derived from the fraudulent scheme.
U.S. v. Carvallo, Case No. 12-15660 (11th Cir. 6/22/15)
Sentencing: Restitution - Not Intended to Be a Windfall for Victim
U.S. v. Moran, 778 F.3d 942 (11th Cir. Case No. 12-16056 (11th Cir. 2/17/15)
Sentencing: Restitution - Conduct for Which Defendant Not Convicted
When the crime of conviction includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense, a court may order restitution for acts of related conduct for which the defendant was not convicted.
U.S. v. Edwards, Case No. 11-15953 (11th Cir. 9/6/13)
Sentencing: Restitution - Specific Finding That Victim Was Harmed
In ordering restitution, a district court must make specific findings that the alleged victim was harmed by the defendant.
U.S. v. Edwards, Case No. 11-15953 (11th Cir. 9/6/13)
Sentencing: Restitution - Related Conduct
In determining, when the crime of conviction includes a scheme, conspiracy, or pattern of criminal activity as an element, whether conduct is "related" and supports an order of restitution, courts consider whether the victim and purpose of each scheme were the same, whether the schemes involved the same *modus operandi*, and whether the schemes involved common participants.
U.S. v. Edwards, Case No. 11-15953 (11th Cir. 9/6/13)
Sentencing: Restitution - Offset for Value Received
In a health care fraud case where the defendant was convicted of fraudulently providing portable oxygen to Medicare and Medicaid patients, but some 80 to 90% legitimately needed the oxygen, the district court erred in ordering the defendant to pay restitution for those who legitimately needed the oxygen.
U.S. v. Bane, Case No. 14158 (11th Cir. 6/28/13)
Sentencing: Restitution - Conspiracy
Where an offense has as an element a scheme, conspiracy, or pattern of criminal activity, restitution may include losses that are directly caused by the defendant's conduct as part of the scheme, conspiracy, or pattern.

U.S. v. Spencer, 700 F.3rd 317, 324 (8th Cir. 2012); U.S. v. Edwards, 728 F.3d 1286 (11th Cir. 2013)

Sentencing: Restitution - MVRA Includes Governments as Victim

Despite wording that appears to the contrary, the Mandatory Victims Restitution Ac of 1996 includes governments as "victims" for purposes of restitution.

U.S. v. Alvarez, Case No. 08-17178 (11th Cir. 10/19/10)

Sentencing: Restitution - Ninety Day Time Limit Doesn't Mean Much

A sentencing court that misses the 90-day deadline to establish restitution retains the power to order restitution - at least in cases such as this one where the court made prior to the deadline that it would order restitution.

Dolan v. U.S., Case No. 09-367 (S. Ct. 4/20/10); U.S. v. Rodriguez, h 751 F.3d 1244 (11th Cir. 2014)

Sentencing: Restitution - Higher Rate of Restitution Because of Participation in the IFRP

A prisoner may be required to pay restitution at a higher or faster rate that was specified by the sentencing court as a condition of participating in the Bureau of Prison's Inmate Financial Responsibility Program.

U.S. v. Lemoine, Case No. 06-50663 (9th Cir. 10/9/08)

Sentencing: Fines - Court's Failure to Provide Explanation Justifying Fine

Where the PSR concluded that the defendant lacked the ability to pay a fine, the court imposed a fine that was three times the maximum under the guidelines, and the defendant objected, the court of appeals vacated the sentence and remanded the case for resentencing.

U.S. v. Gonzalez, Case No. 06-15365 (11th Cir. 9/2/08)

Sentencing: Restitution - "Victim" Not Limited to Those Listed in Indictment

The CVRA does not limit the class of victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document. The statute instructs the district court to look at the offense itself only to determine the harmful effects the offense has on parties. Under the plain language of the statute a party my qualify as a victim even though it may not have been the target of the crime, as long as it suffers harm as a result of the crime's commission.

In re: Janis W. Stewart, Case No. 08-16753_G (12/19/08)

Sentencing: Restitution - Current Definition of Victim

The earlier version of Protection Act interpreted by Hughey and Cobbs did not provide a definition for "victim." The standard for causation defined in Hughey - "the loss caused by the specific conduct that is the basis of the offense of conviction" - is irreconcilable with the broad definition in the Restitution Act. The appropriate standard for causation is found in the Restitution Act itself: "directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered . . ." 18 U.S.C. § 3663A(a)(2). Accordingly, in this case, the district court properly ordered restitution to the police dept. and a condominium association where the defendant, who was charged with bank robbery, crashed into a police car and a gate into the condominium parking garage as he fled from the scene of the robbery.

U.S. v. Washington, 434 F.3d 1265 (11th Cir. 2006)

Sentencing: Restitution - Requirement to Pay Restitution Ordered in an Unrelated Case

A federal district court can order a defendant as a condition of supervised release to pay unsatisfied restitution that was ordered by another court in a prior criminal case. Although the "catch-all" provision of the federal supervised release statute does not allow a court to order

restitution in the first instance for a prior conviction, it does allow a court to require compliance with a previously ordered condition of release.
U.S. v. Love, Case No. 04-30944 (5th Cir. 11/29/05)
Sentencing: Restitution - Restitution for Grief Counseling for Bank Robbery Victims
Government conceded that court ordered restitution ordered for grief counseling received by victims of an attempted bank robbery was invalid as it was not provided for by the Mandatory Victims Restitution Act.
U.S. v. King, Case No. 04-14021 (11th Cir. 6/30/05)
Sentencing: Restitution - Post-Sentence Change in Circumstances
18 USC § 3664(k) provides a method for requesting a change in the restitution schedule.
Cani v. U.S., Case No. 02-12790 (11th Cir. 5/29/03)
Sentencing: Restitution - Court Must Set Payment Schedule
The court, not the probation office, must set the restitution schedule.
U.S. v. Prouty, Case No. 01-15273 (11th Cir. 8/27/02), U.S. v. Martinez, Case No. 02-14267 (11th Cir. 2/7/03)
Sentencing: Restitution - Court Must Advise Defendant of Possibility
When the defendant enters the plea, the court, under Rule 11, must explain the possibility that restitution may be ordered.
U.S. v. Morris, 15 FLW Fed C405 (11th Cir. 3/28/02)
Sentencing: Restitution - Factual Findings
Although the 3rd Circuit interprets the MVRA to require factual findings, the 11th Circuit does not require them.
U.S. vs. Jones, 15 FLW Fed C505 (11th Cir. 4/8/02)
Sentencing: Restitution - Restitution Order Must Be Entered Within 90 Days of Sentencing
U.S. v. Maung, 14 FLW Fed C1273 (11th Cir. 9/25/01)
Sentencing: Restitution - Ability to Pay Irrelevant
U.S. v. Futrell, 209 F.3d 1286 (11th Cir. 2000) (11th Cir. 2000); U.S. v. Edwards, Case No. 11-15953 (11th Cir. 9/6/13)
Sentencing: Restitution - Estimate OK
U.S. v. Futrell, 209 F.3d 1286 (11th Cir. 2000)
Sentencing: Restitution - MVRA (Date of Inception)
The Mandatory Victims Restitution Act applies to crimes committed on or after 4/24/96.
U.S. v. Futrell, 209 F.3d 1286 (11th Cir. 2000)
Sentencing: Restitution - No Consideration of Defendant's Resources
The Mandatory Victims Restitution Act which went into effect 4/24/1996 mandate that the district court order restitution in the full amount of the victim's loss without considering the defendant's financial resources.
U.S. v. Thayer, 13 FLW Fed C417 (11th Cir. 3/3/00)
Sentencing: Restitution - "Immediate Payment"
"Immediate Payment" did not mean "immediate payment in full." Instead, it meant payment to the extent that the defendant can make it in good faith, beginning immediately. In ordering the defendant to notify the probation office of changes in his ability to pay, the court gave the defendant the opportunity to explain is financial circumstances to his probation officer should the need arise.
U.S. v. McIntosh, 198 F.3d 995 (7th Cir. 2000)
Sentencing: Restitution - Procedure When It May Not Be Established by Sentencing

See: U.S. v. Vandeberg, No. 98-3009 (1/14/00)
Sentencing: Restitution: Acts of Co-Conspirators
Here, even though the defendant was in jail during part of the conspiracy, he was still responsible for those losses that occurred during that time, because of the rule that allows the court to order restitution for all loses resulting from the conspiracy.
U.S. v. Alas, 13 FLW Fed C175 (11th Cir. 11/24/99)
Sentencing: Restitution: Fair Market Value or Cost of Replacement?
Where actual cash value is difficult to determine, the cost of replacement is appropriate.
U.S. v. Shugart, 12 FLW Fed C899 (11th Cir. 5/27/99)
Sentencing: Restitution & Fines - Fines (Waiver)
The sentencing guidelines require the court to "impose a fine in all cases, except where the *defendant establishes* that he is unable to pay and is not likely to become able to pay any fine. [5E1.(2)(a)]. It is clear from section 5E1.2 that the burden is on the defendant to prove an inability to pay the fine. If the sentencing court concludes that a fine is appropriate, the Guidelines Manual lists several factors it should consider in determining the amount of the fine. Circuits are split on whether a court must make specific factual findings with respect to these factors. We have adopted the less rigid approach, and do not require the sentencing court to make specific findings of fact with respect to the Sentencing Guideline factors as long as "the record reflects the district court's consideration of the pertinent factors prior to imposing a fine."
U.S. v. Burston, 12FLW FedC239 (11th Cir. 1998)
Sentencing: Restitution - Can't Exceed Loss
U.S. v. Vaghela, 169 F.3d 729 (11th Cir. 1999)
Sentencing: Restitution - Burden of Proof
The government has the burden of proving restitution by a preponderance of the evidence.
U.S. v. Vaghela, 169 F.3d 729 (11th Cir. 1999) ; U.S. v. Futrell, 13 FLW Fed C601 (11th Cir. 4/20/00)

Three Strikes

Sentencing: Three Strikes - State Offense of Selling Within a 1000 Feet of School Did not Qualify as a Predicate
The defendant should not have been sentenced to a mandatory life sentence under the three strikes provision as his judgment of conviction for selling cocaine within a 1,000 feet of a school failed to allege the requisite drug quantity.
U.S. v. Sanchez, Case No. 06-15143 (11th Cir. 10/30/09)
Sentencing: Three Strikes - Defense Counsel Ineffective for Failing to Show Prior Walk-Away Escape Was Not a "Serious Felony"
Court found defense counsel was ineffective in that he/she did not argue that under the affirmative defense provision, that the defendant's walk-away escape was not a violent felony.
Abraham v. U.S., Case No. 06-20786 (S.D. Fla. 3/12/07)(Huck)
Sentencing: Three Strikes - Escape Automatically Qualifies as a "serous violent felony"
See: U.S. v. Abraham, Case No. 03-14201 (11th Cir. 9/30/04)
Sentencing: Three Strikes - Examination of Charging Document to Determine Predicate Offense

Under the three strikes statute a "serious violent felony" is one consisting of firearms used. The defendant, here, had been convicted of aggravated assault under the Florida statutes. Because some aggravated assaults do not involve the use firearms, it could not be determined from the judgment whether the aggravated assault conviction qualified as a predicate offense. The court held that given the ambiguity the sentencing court could look to the information.
U.S. v. Fulford, 267 F.3d 1241 (11th Cir. 2001)

SEVERANCE

Severance: Enticement and Failure to Register and a Sex Offender
Court held it was not an abuse of discretion for the trial court to deny request to sever the charges of enticing a minor to engage in sexual activity (18 U.S.C. § 2422(b)) and failing to register as a sex offender (18 U.S.C. § 2260A). In the view of the court of appeals, the prejudice was not so compelling as to deny the defendant a fair trial.
U.S. v. Slaughter, Case No. 11-15262 (11th Cir. 2/11/13)
Severance: Quality and Quantity of Evidence
While the court has never approved a severance based on the quantity of evidence, a severance may be based on the relative inequality of the evidence against defendants.
U.S. v. Tobin, Case No. 09-13944 (11th Cir. 4/12/12)
Severance: Prejudice
Discussion of the sort of showing of prejudice necessary for a severance.
U.S. v. Lopez, Case No. 09-12802 (11th Cir. 8/16/11)
Severance: Individualized Determination
A defendant may show that he suffered compelling prejudice by demonstrating that the jury was unable to sift through the evidence and make and individualized determination as to each defendant.
U.S. v. Alcindor, Case No. 07-14602 (11th Cir. 6/14/11); U.S. v. Lopez, Case No. 09-12802 (11th Cir. 8/16/11)
Severance: Four Types of Prejudicial Joinder That Can Require Severance
Although rarely granted, there are four types of prejudicial joinder that can require severance under Rule 14 of the Federal Rules of Criminal Procedure: (1) mutually antagonistic defenses; (2) where one defendant will exculpate the moving defendant, but will not testify in a joint trial; (3) where inculpatory evidence is admissible against one defendant, but not the other; and (4) where a spill over effect may prevent the jury from making an individualized determination as to each defendant.
U.S. v. Chavez, Case No. 08-12638 (11th Cir. 10/16/09)
Severance: Defendant Entitled to an Individualized Determination of Guilt
On appeal a defendant can show compelling prejudice by demonstrating that the jury was unable to sift through the evidence and make an individual determination as to each defendant.
U.S. v. Ramirez, Case No. 04-12040 (11th Cir. 9/30/05)
Severance: Possibility of Co-Defendant Testifying
The defendant's motion to sever his trial from a co-defendant to enable the co-defendant to give testimony exculpating him should not be denied solely because the co-defendant was not likely to testify unless his trial took place first.

Williams v. United States, No. 97-CF-421 (D.C. Cir. 10/13/05)

Severance: Two Circumstances Where Severance of Defendants is the Only Remedy

Where defendants have been properly joined a district court should grant severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. The latter circumstance occurs when (1) compelling evidence is admissible against one defendant, but not the other; (2) where the sheer number of defendants and charges along with the massive volume of evidence make it nearly impossible for the jury to assess the guilt or innocence of each defendant independently; and (3) where one defendant is being charged with a crime that, while related, is significantly different from those of the other defendants.

U.S. v. Blankenship, Case No. 01-17064 (11th Cir. 8/26/04);U.S. v. Hassoun, Case No. 04-60001-CR-Cooke (M.D. Fla. 3/12/07)

Severance: Rule 14-Testimony of Codefendant

Affidavit from codefendant alleged that the defendant did not conspire "with me or to my knowledge to anyone else" was deemed inadequate to support a severance as, in the view of the court, it contained no "specific and exonerative facts."

U.S. v. Novaton, 271 F.3d 968 (11th Cir. 2001)

Severance: Defendants

In reviewing an appeal involving the joinder of defendants, the evidence introduced at trial isn't relevant to the issue.

U.S. v. Liss, 14 FLW Fed C1268 (11th Cir. 9/21/01)

Severance: Determined Upon the Allegations of the Indictment?

Although the court has repeatedly said that whether joinder is proper under Rule 8 is to be determined by examining the allegations, the court, here, explained that's not what it meant. As it turns out it is enough that when faced with a Rule 8 motion, the prosecutor proffers evidence which will show the connection between the charges. In footnote 3, the court goes on to recognize the differing standards between Rule 8 and Rule 14.

U.S. v. Dominguez, 226 F.3d 1235 (11th 2000), See also RPM memo in: U.S. v. Jose Pimentel, 4:99cr77-RH

Severance: Codefendant's Exculpatory Testimony

"Where a defendant argues for severance on the ground that it will permit the exculpatory testimony of a co-defendant, he must show: (1) a bona fide need for the testimony; (2) the substance of the desired testimony; (3) the exculpatory nature and effect of the desired testimony; and (4) that the codefendant would indeed have testified at a separate trial."

U.S. v. Cobb, 185 F.3d 1193 (11th Cir. 1999); U.S. v. Green, Case No. 15-10270 (11th Cir. 4/7/16)

Severance: Similar Character

Rule 8 allows for joinder of offenses not only if they are based on the same act or connected acts, but also if the crimes are of a "similar character."

U.S. v. Werner, 620 F.2d 922 (2nd Cir. 1980); U.S. v. Lewis, 626 F.2d 940 (D.C. Cir. 1979); U.S. v. Kopituk, 690 F.2d 1289 (11th Cir. 1982)

SEX OFFENSES

Sex Offenses: Production (Primary Purpose of Sexual Activity)
Court of Appeals vacated conviction, concluding that a spontaneous decision to record the sexual activity as it was beginning did not meet the statutory requirement defendant persuaded the minor to engage in sexual activity for the purpose of producing child pornography.
United States v. McCauley, 983 F.3d 690 (4th Cir. 2020)
Sex Offenses: Failure to Regiseter - Lifetime Supervised Release Not Unreasonable
In upholding lifetime supervised release for a violation of supervised release for the offense of failing to register, the court noted that research showing the low levels of recidivism for sex offenders did not mean that the defendant was not at risk for committing new offenses, that the defendant could ask for early termination, and even appeal a denial of the request.
U.S. v. Trailer, Case No. 15-14583 (11th Cir. 6/30/16)
Sex Offenses: Failure to Register - Categorical Approach for Underlying Offense
In Texas, the determination of whether an individual is required to register, relies on the categorical approach. Here, where the underlying conviction involved a minor, but the the statute did not require that the victim be a minor, there was no requirement that the defendant register. Court held the defense lawyer was ineffective in letting his client enter a guilty plea to the charge of failing to register.
U.S. v. Shepard, No. 15-50991 (5th Cir. 1/26/18)
Sex Offenses: (Statute Prohibiting Sex Offenders from Accessing Social Media)
Court held that a North Carolina statute that made it a felony for those required to register as sex offenders to access commonplace social media websites like Facebook and Twitter violated the Free Speech Clause of the First Amendment.
Packingham v. North Carolina, 137 S. Ct. 1730 (2017)
Sex Offenses: Restitution for Future Counseling
Restitution pursuant to 18 U.S.C. § 2259 may include future therapy expenses.
U.S. v. Osman, Case No. 14-14124 (11th Cir. 4/12/17)
Sex Offenses: Enticing a Minor to Engage is Sexual Activity - Unanimity Instruction
Where defendant attempted to persuade the minor to engage in sexual activity and indictment alleged that the sexual activity violated multiple state offenses, the jury was not required to unanimously agree which statute was violated. Decision includes a dissent by Judge Jordan.
U.S. v. Jockisch, 857 F.3d 1122 (11th Cir. 2017)
Sex Offenses: SORNA - Move From Kansas to Phillippines
Plain text of SORNA did not require that defendant update his Kansas registration to reflect his departure from Kansas to a foreign country.
Nichols v. U.S., Case No. 15-5238 (S. Ct. 3/1/16)
Sex Offenses: Production of Child Pornography - Motive
The government is not required to prove that making explicit photographs was the sole or primary purpose for enticing a minor to engage in sexually explicit conduct. It is enough to show that it wa a purpose for doing so.
U.S. v. Miller, Case No. 15-13355 (11th Cir. 4/27/16)
Sex Offenses - Enticing a Minor to Engage in Sexual Activity - Underage Prostitute
Court rejected defendant's sufficiency of the evidence claim that he could not have "induced" an underage prostitute, "who holds herself out for sex."

U.S. v. Rutgerson, Case No. 14-15536 (11th Cir. 5/12/16)
Sex Offenses: Retroactive Application of Amendment's to Michigan's Sex Offender Registration Act Violated Ex Post Facto Clause
Does v. Snyder, Case No. 15-1536 (6th Cir. 8/25/16)
Sex Offenses: Production of Child Pornography - Secretly Recorded Images of Nude Minor
The phrase "lascivious exhibition of the genitals or pubic area" includes conduct of a minor which are surreptitiously taken and made lascivious bases upon the actions of the producer, not the child." In this case, the court upheld a conviction of a defendant who had recorded his step-daughter in the bathroom over a period of five months.
U.S. v. Holmes, Case No. 14-11137 (11th Cir. 2/25/16)
Sex Offenses: 18 U.S.C. §2252(a)(4) Ten-Year Mandatory Minimum for Possession of Child Porn Based on Prior Conviction
18 U.S.C. §2252(a)(4) establishes a ten-year mandatory minimum and increases the maximum penalty for possession of child pornography if the defendant has "a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." Court concluded "involving a minor or ward" modifies only "abusive sexual conduct."
Lockhart v. U.S., Case No. 14-8358 (S. Ct. 3/1/16)
Sex Offenses: Restitution in Child Porn Cases
Paroline v. U.S., 134 S. Ct. 1710 (2014)
Sex Offenses: Production of Child Porn - Defendant Need Not Take the Pictures
The Government is not required to prove that a defendant personally took explicit photos. It has to prove only that he persuaded or induced the minor to engage in sexually explicit conduct for the purpose of creating the image.
U.S. v. Mozie, Case No. 12-12538 (11th Cir. 5/22/14)
Sex Offenses: Production of Child Porn - Knowledge of Victim's Age
Knowledge of the victim's age is neither an element of §2251 nor an affirmative defense to a prosecution for it.
U.S. v. Ruggiero, Case No. 13-14773 (11th Cir. 6/30/15); U.S. v. Mozie, Case No. 12-12538 (11th Cir. 5/22/14)
Sex Offenses: Production of Child Porn - Mandatory Minimum ("Relating To")
The enhancement is supported by, among other things, a conviction of a state law relating to sexual abuse of a minor. The phrase "relating to" is interpreted so broadly that it has been supported by a Georgia conviction for discussing illicit sexual acts with a minor.
U.S. v. Mathis, 767 F.3d 1264 (11th Cir. 2014)
Sex Offenses: Production of Child Porn - Mandatory Minimum (Prior Conviction Need Not Be Found By Jury)
The mandatory minimum increase from 15 to 25 years based on a prior sex offense need not be alleged in the indictment or found by a jury.
U.S. v. Mathis, 767 F.3d 1264 (11th Cir. 2014)
Sex Offenses: SORNA - Necessary and Proper Clause (Completion of Sentence Prior to Enactment of SORNA)
The authority extended to Congress by the necessary and proper clause allowed it to apply SORNA to the defendant who had been convicted while in the military of a sex offense and had completed his sentence prior to the enactment of SORNA.

U.S. v. Kebodeaux, Case No. 12-418 (S. Ct. 6/24/13)
Sex Offenses: Failing to Register and 10-Year Mandatory Sentence for Those Committing Enumerated Offenses
The 10-year-mandatory sentence for failing to register as a sex offender for those committing certain enumerated felonies "involving a minor" is supported by a conviction of enticement under (18 U.S.C. § 2422(b)) even if the enticement offense is a sting operation that does not involve an actual minor.
U.S. v. Slaughter, Case No. 11-15262 (11th Cir. 2/11/13)
Sex Offenses: Child Porn Statute Not Unconstitutionally Vague
Court rejected argument that the statue was unconstitutionally vague because that statutory language was unclear as to whether one who merely views child porn on his computer has knowingly received or possessed the images.
U.S. v. Woods, Case No. 11665 (11th Cir. 2012)
Sex Offenses: Restitution to Those Portrayed in Child Pornography
Government must establish defendant's possession of child pornography was the proximate cause of harm suffered by child who was portrayed in child pornography. In this instance, testimony from "Amy's" attorney regarding the suffering of his client and her economic losses, presentation of a case-study report regarding Amy's lost earnings, and testimony from a physician regarding the nature of the harm suffered by victims of child pornography, failed to establish the requisite proximate cause. In remanding the case to the trial court, the court of appeals noted that it was "not clear whether any such restitution award may be joint and several amongst any other defendants held responsible for the victim's harm," and left the issue to the district judge.
U.S. v. McGarity, Case No. 09-12070 (11th Cir. 2/6/12)*, U.S. v. Laraneta, Case No. 12-1302 (7th Cir. 11/14/12)
Sex Offenses: Child Exploitation Enterprise - Life Sentence Didn't Violate Eighth Amendment
U.S. v. McGarity, Case No. 09-12070 (11th Cir. 2/6/12)*
Sex Offenses: Child Exploitation Enterprise - Jury Instruction (Unanimity Instruction)
Because each individual violation of § 2252A(g)(2) is an element, the court must instruct the jury that they must unanimously agree about which of three or more predicate acts the defendant committed.
U.S. v. McGarity, Case No. 09-12070 (11th Cir. 2/6/12)*
Sex Offenses: SORNA - Absence of Rule By the Attorney General (7/27/06 - 2/28/07)
The Sex Offender Registration and Notification Act became effective on July 27, 2006. Congress left to the Attorney General the question of whether the Act applied to those who had committed their sex offenses prior to the enactment of the law. The Attorney General entered an interim rule on July 28, 2007, stating that the Act did apply to those who had committed their sex offenses prior to July 27, 2006. The Court, however, read the Act in such a way that it concluded that it was inapplicable to those pre-Act offenders who failed to register during the 7 month period between its enactment and the Attorney General's promulgation of the interim rule. Left open was the question about the validity of the interim rule.
Reynolds v. U.S., Case No. 10-649 (S. Ct. 1/23/12)
Sex Offense: Enticing a Minor to Engage in Sexual Activity - "Persuades, Induces, Entices, or Coerces"

The term "induce" in 18 U.S.C. §2422 is not ambiguous and has a plain and ordinary meaning. "Induce" can be defined in two ways. It can be defined as "[t] lead or move by influence or persuasion; to prevail upon," or alternatively "[t]o stimulate te occurrence of; cause." In the view of the court, the latter option was intended by Congress.
U.S. v. Murrell, 368 F.3d 1283, 1287 (11th Cir. 2004); U.S. v. Daniels, 685 F.3d 1237 (11th Cir. 2012).

Sex Offense: Enticing a Minor to Engage in Sexual Activity - Govt Need Not Prove Def. Knew Victim was Under Age

In prosecutions for a violation of 18 U.S.C. § 2422(b), the Government is not required to prove the defendant knew the victim was under 18 years of age.
U.S. v. Daniels, Case No. 10-14794 (11th Cir. 7/2/12)

Sex Offenses: Production of Child Pornography Not Overbroad On Its Face

The offense of production of child pornography (18 U.S.C. § 1466A(a)(2) is not facially unconstitutionally overbroad.
U.S. v. Dean, 635 F.3d 1200 (11th Cir. 2011)

Sex Offenses: Enticing Minor to Engage in Sexual Activity - Conduct That Falls Short of an Attempt

Court analyzes what is necessary for an attempt and concludes defendant attempted to commit the offense of enticing a minor to engage in sexual activity in that he took a substantial step toward committing the offense.
U.S. v. Lee, 603 F.3d 904 (11th Cir. 2010)

Sex Offenses: SORNA - Travel Must Occur After Defendant Becomes Subject to SORNA

Carr v. U.S., 130 S. Ct. 2229 (2010), U.S. v. Beasley, Case No. 09-11528 (11th Cir. 3/28/11)

Sex Offenses: Child Pornography - Possession Doesn't Require Deliberate Saving of Images

An intentional viewer of child-pornography images sent to his computer may be convicted whether or not he acts to save the images to a hard drive, to edit them, or otherwise to exert more control over them. Evidence that a person has sought out child pornography on the internet and has a computer containing child-pornography images - whether in the hard drive, cache, or unallocated spaces - can count as circumstantial evidence that a person has knowingly received child pornography. Case includes footnotes explaining "cache" and "unallocated space."
U.S. v. Pruitt, 638 F.3d 763 (11th Cir. 2011), U.S. v. Woods, 684 F.3d 1045 (11th Cir. 2012)

Sex Offenses - Restitution to Victims of Child Pornography

Harm suffered by those portrayed in child pornography is the proximate cause of those who possess child pornography and, therefore, court's order directing restitution was upheld.
U.S. v. McDaniel, Case No. 09-15038 (11th Cir. 1/28/11)

Sex Offenses - Threat of Recidivism Posed By Pedophiles

This Court has stated that the threat of recidivism by a pedophile who has sexually abused children is appalling.
United States v. Irey, Case No. 08-10997 (11th Cir. 7/29/10)

Sex Offenses: Harm Caused By Sexual Abuse of Children

"Much has been said to describe and emphasize the grave harm that sexual abuse of children inflicts on its victims. Some of the best and most recent descriptions of that harm can be found in Kennedy v. Louisiana, 128 S. Ct. 2641 (2008)."

United States v. Irey, Case No. 08-10997 (11th Cir. 7/29/10); U.S. v. McDaniel, Case No. 09-15038 (11th Cir. 1/28/11)

Sex Offenses: Necessary and Proper Clause - Civil Commitment of Dangerous Mentally Ill Sex Offenders

Court upheld 18 U.S.C. §4248, which allows for civil commitment of mentally ill sex offenders who are dangerous. The Court held it was an appropriate exercise of the Necessary and Proper Clause, At. I, §8, cl. 18.

U.S. v. Comstock, Case No. 08-1224 (S. Ct. 5/17/10)

Sex Offenses: Child Exploitation Enterprise Statute Not Unconstitutionally Vague

Court rejected claim that the child exploitation statute, 18 U.S.C. 2252A(g), was so vague that it violated the due process clause of the Fifth Amendment.

U.S. v. Wayerski, Case No. 09-11380 (11th Cir. 10/26/10), U.S. v. McGarity, Case No. 09-12070 (11th Cir. 2/6/12)*

Sex Offenses: 30-Year Mandatory Minimum Sentence for Crossing State Lines Doesn't Violate Eighth Amendment

U.S. v. Farley, 607 F.3d 1294 (11th Cir. 2010)

Sex Offenses: Enticing Minor to Engage in Sexual Activity - No Need for a Real Child

A defendant can be convicted for attempted enticement under 18 U.S.C. §2422(b) even though there is no real child involved and all the communication has been with a law enforcement officer posing as a parent of the child.

U.S. v. Farley, Case No. 08-15882 (11th Cir. 6/2/10); U.S. v. Rothenberg, Case No. 08-17106 (11th Cir. 6/29/10), U.S. v. Lee, Case No. 08-17077 (11th Cir. 4/16/10)

Sex Offenses: Enticing Minor to Engage in Sexual Activity - No Need to Communicate Directly with Child

A defendant can be convicted for attempted enticement under 18 U.S.C. §2422(b) through an adult intermediary, even if he never communicated directly with anyone he believed to be a child.

U.S. v. Farley, Case No. 08-15882 (11th Cir. 6/2/10); U.S. v. Rothenberg, Case No. 08-17106 (11th Cir. 6/29/10), U.S. v. Lee, Case No. 08-17077 (11th Cir. 4/16/10)

Sex Offenses: Evidence - Undue Prejudice Did Not Outweigh Relevancy of Child Porn Images

U.S. v. Alfaro-Moncada, Case No. 08-16442 (11th Cir. 5/27/10)

Sex Offenses: Distribution on the Internet

See: U.S. v. Stephen Watt, 707 F.Supp.2d 149 (2010 U.S. Dist. LEXIS 41070 (D. Ma. 2010)

Sex Offenses: SORNA - Conviction for Transferring Obscene Material to Minor Qualified Defendant as Sex Offender

U.S. v. Dodge, Case No. 08-10802 (11th Cir. 3/5/10)

Sex Offenses: SORNA - State's Failure to Implement SORNA Requirements Not a Defense

Eleventh Circuit's decision in United States v. Brown foreclosed defendant's argument that SORNA did not apply to him when he resided in Alabama because Alabama had not yet implemented SORNA's administrative requirements. Given the defendant's admission that he know of his duty to register as a sex offender in Alabama, and given circumstances prompting a need for the defendant to inquire into his duty to register, there was no due process violation.

U.S. v. Griffey, Case No. 09-11696 (11th Cir. 12/15/09)

Sex Offenses: SORNA - 18 U.S.C. §1470 Not Subject to SORNA's Registration Requirement

Defendant who entered a guilty plea to a violation of 18 U.S.C. § 1470 for transferring obscene material to a minor, based on his having sent certain photos and video of himself over the internet, did ot engage in conduct that was, "by its nature a sex offense against a minor," and was not subject to SORNA's registration requirements.
U.S. v. Dodge, Case NO. 08-10802 (11th Cir. 1/14/09)
Sex Offenses: SORNA - Gap Period
SORNA was enacted on July 26, 2006. The Act delegated to the Attorney General the authority to determine whether the Act would be applied retroactively. On February 28,2007 the Attorney General enacted a rule stating that the statue applied to anyone convicted of a sex offense regardless of when the offense or conviction occurred. The defendant was convicted of a sex offense in New York in May of 2006 and subsequently moved to Florida, obtaining a driver's license in June of 2006. He was arrested for failing to register in October of 2006. The district court erroneously denied the defendant's motion to dismiss because the indictment alleged a failure to register during the gap between the enactment of the law and the enactment of the rule by the Attorney General.
U.S. v. Madera, Case No. 07-12176 (11th Cir. 5/23/08)
Sex Offenses: Child Pornography - Predicate Conviction In Support of Increased Penalty
In a prosecution for possession of child pornography, the increase in the maximum penalty to 20 years and the creation of a 10 year minimum mandatory sentence requires that the prior conviction occur prior to the conduct in the instant case.
U.S. v. King, Case No. 07-11808 (11th Cir. 12/14/07)
Sex Offenses: Pandering Statute, 18 U.S.C. § 2252A(a)(3)(B), Not Overbroad or Excessively Vague
U.S. v. Williams, Case No. 06-694 (S. Ct. 5/19/08)
Sex Offenses: Authority for Prohibiting Possession of Child Pornography
"We have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults.
U.S. v. Rodriquez, Case No. 06-1646 (S. Ct. 5/19/08)
Sex Offenses: Child Pornography - Withholding of Adjudication Doesn't Bar Increase in the Mandatory Minimum
Prior state child pornography case where adjudication was withheld counts for purposes of the increase in the mandatory minimum in 18 U.S.C. § 2252A(b)(1) and (b)(2).
U.S. v. Maupin, Case No. 07-13341 (11th Cir. 3/24/08)
Sex Offenses: Conviction for Both Receipt and Possession of Child Pornography Violates Double Jeopardy
U.S. v. Davenport, 519 F.3d 940 (9th Cir. 2008); United States v. Bobb, 577 F.3d 1366 (11th Cir. 2009)
Sex Offenses: Lifetime Ban on Use of Computers Invalid
Where the district court ordered, as a condition of lifetime supervised release, that defendant not have access to any computer equipment or possess any sexually explicit material, the conditions violated the requirement of 18 USC §3583(d) that the conditions involve no greater deprivation of liberty than necessary to achieve the goals of sentencing.
US. v. Voelker, Case No. 05-2858 (3d Cir. 6/5/07); U.S. v. Goddard, Case No. 07-50402 (9th Cir. 8/11/08); U.S. v. Carpenter, 803 F.3d 1224 (11th Cir. 2015) **Sex Offenses: Record Keeping Requirements of PROTECT Act Unconstitutional**

The PROTECT Act's record keeping requirements for "producers" of images of "actual sexually explicit conduct" are facially overbroad in breach of the First Amendment.
Connection Distributing Co. v. Keisler, Case No. 06-3822 (6th Cir. 10/23/07)

Sex Offenses: Enticing a Minor to Engage in Sexual Activity - Attempt

Sexually graphic conversation over the internet was sufficient to support a conviction under 18 U.S.C. §2422(b) even though the defendant failed to show at the appointed meeting place. The content of the internet conversation established the substantial step toward committing the offense.
U.S. v. Yost, 479 F.3d 815 (11th Cir. 2007);
U.S. v. Rothenberg, 610 F.3d 621 (11th Cir. 2010)

Sex Offenses: Enticing Minor to Engage in Prostitution - Intra State Activity (Commerce Clause)

Despite the fact that the defendant's efforts at enticing the minor to engage in prostitution were all in the state of Florida, the court found the government had met the interstate commerce element of 18 USC 2422(b).
U.S. v. Evans, 476 F.3d 1176 (11th Cir. 2007)

Sex Offenses: Child Pornography - Generally

See: U.S. v. Williams, Case No. 04-15128 (11th Cir. 4/6/06)

Sex Offenses: Downloading Images of Sexually Explicit Conduct of Minors

Downloading images of minors engaged in sexually explicit conduct from a computer billboard amounts to "receiving" such images, but does not constitute "transporting" such images in violation of 18 USC s. 2252(a)(1).
U.S. v. Mohrbacher, 98-10009 (9th Cir. 6/29/99)

Sex Offenses: Child Pornography - Jury Instructions (Virtual Pornography)

The standard instruction that includes language that allows the jury to convict in cases of child pornography if the "visual depiction . . . appears to be of a minor engaging in sexually explicit conduct is no longer valid thanks to the decision in Ashcroft v. Free Speech Coalition. In this instance the error failed the plain error test.
U.S. v. Richardson, Case No. 01-15834 (11th Cir. 9/4/02)

Sex Offenses: Mailing by Undercover Postal Inspector Met Interstate Nexus Requirement

Evidence established that undercover postal inspector used U.S. Postal Service to mail videotape from Pennsylvania to a postal inspector in Florida, before it was delivered to the defendant, and this was sufficient to satisfy jurisdictional requirement.
U.S. v. Acosta, No. 04-16480 (11th Cir. 8/24/05)

Sex Offenses: Florida's Sex Offender Registration Requirements Held Constitutional

Court concluded Florida's sex offender registration/notification statute and DNA collection statute did not violate rights of due process, equal protection, travel, separation of powers, and freedom from ex post facto legislation.
Doe v. Moore, Case No. 04-10279 (11th Cir. 6/6/05)

Sex Offenses: Child Pornography - Interstate Commerce Connection

Defendant's act of possession of child pornography was noneconomic and noncommercial in nature and connection to interstate commerce was tenuous at best, in that government established that defendant possessed pornography that was saved on computer disks that had traveled from out-of-state before they contained illegal images, but proved nothing more. The trial court should have granted a judgment of acquittal.

U.S. v. Maxwell, Case No. 03-14326 (11th Cir. 10/1/04), *reversed upon remand from S. Ct.*, (11th Cir. 4/20/06), U.S. v. Smith, 459 F.3d 1276 (11th Cir. 2006); U.S. v. Parton, 749 F.3d 1329 (11th Cir. 2014)

Sex Offenses: Abusive Sexual Contact With a Minor - Repeat Offender Enhancement (Looking Beyond Category of Prior Offense)

Where there was ambiguity as to the nature of the defendant's prior conviction, trial court properly examined the plea colloquy in determining that the prior conviction supported the enhancement.

U.S. v. Breitweiser, Case No. 02-15095 (1/26/04)

Sex Offenses: Child Pornography - Conditions of Supv. Release (No Internet)

Although recognizing that two circuits had held to the contrary, the court upheld a condition of supervised release that allowed the defendant, who had been convicted of a child pornography offense, to use the Internet only if he obtained his probation officer's prior approval.

U.S. v. Zinn, 321 F.3d 1084 (11th Cir. 2003), U.S. v. Rearden Case No. 02-50311 (9th Cir. 11/6/2003), but see: U.S. v. Mark, Case No. 04-3737 (8th Cir. 10/4/05)

Sex Offenses: Conditions of Sup. Release - Child Pornography (Polygraph)

Court upheld requirement that defendant convicted of child pornography offense submit to polygraph tests as a condition of probation. Court recognized that if questions were capable of eliciting incriminating information that defendant would have a valid issue, but held the issue could not be raised until such questions were asked.

U.S. v. Zinn, 321 F.3d 1084 (11th Cir. 2003)

Sex Offenses: Child Pornography Registration As Sex Offender

Under USSG 5D1.3(a)(7) a defendant convicted of receiving or distributing child pornography (18 USC 4042(c)(4) must register as a sex offender in any state that he resides. The court held, too, that any challenge to Florida's sexual offender registration act would have to come after the defendant was released from prison and began serving his supervised release.

U.S. v. Veal, 322 F.3d 1275 (11th Cir. 2003)

Sex Offenses: Conversations With Undercover Agent Sufficient For Conviction

Conversations the defendant had with an agent posing as a minor and the defendant's subsequent drive across state lines to meet the "child," sufficed to support convictions for 18 USC 2422(b) (attempting to persuade a minor to engage in criminal sexual activity) and 18 USC 2423(b) (traveling in interstate commerce for purpose of engaging in a criminal sexual act with minor).

U.S. v. Root, Case No. 01-14945 (11th Cir. 7/10/02)

Sex Offenses: Assault a Lesser Included Offense of Sexual Contact

U.S. v. Williams, 13 FLW Fed C231 (111th Cir. 12/8/99)

Sex Offenses: Crossing State Lines for Sex With Minor - Guidelines Offense Level

Correct analogy would be statutory rape.

U.S. v. Burgess, 12 FLW Fed C834 (11th Cir. n. 2 5/18/99)

SPEEDY TRIAL

Speedy Trial: Govt Request for Detention Hearing Tolled Speedy Trial

U.S. v. Hughes, Case No. 14-14181 (11th Cir. 11/4/16)

Speedy Trial: Trial Begins When Court Begins to Rule on Challenges

For purposes of the speedy trial act, the trial begins when the trial court starts to rule on opposed juror challenges based on the jury questionnaires.
U.S. v. Issacson, Case No. 12-14703 (11th Cir. 5/22/14)

Speedy Trial: Defense Can't Prospectively Waive Speedy Trial

Because the Speedy Trial Act is designed to advance not only a defendant's interest in a speedy trial, but also the public's interest at he same time, it does not permit a defendant to waive his rights under the Act prospectively.
U.S. v. Mathurin, Case No. 690 F.3d 1236 (11th Cir. 2012)

Speedy Trial: Govt. and Defense Can't Just Waive Speedy Trial

Even where the government and the defendant are willing to waive the protections of the Speedy Trial Act, they typically may not do so without formal findings from a court that the public interest would be served.
U.S. v. Mathurin, 690 F.3d 1236 (11th Cir. 2012)

Speedy Trial: Plea Negotiations

Time during which plea negotiations are being conducted is not automatically excludable from the Speedy Trial Act's thirty-day window for filing an information or indictment.
U.S. v. Mathurin, 690 F.3d 1236 (11th Cir. 2012)

Speedy Trial: When No Hearing Held, Request for Hearing Doesn't Alter 30-Day Rule

A trial court has only 30 days to rule on a motion it takes under advisement. In this case the defense had requested a hearing, but the court resolved the motion without holding a hearing. The court issued its decision, though, after more than 30 days had elapsed. The filing of the motion tolled the running of speedy trial for 30 days, but once that point in time was reached, speedy trial was no longer tolled and began running anew.
U.S. v. Jones, Case No. 08-16999 (11th Cir. 4/2/10)

Speedy Trial: Superseding Indictment

New charges added by a superseding indictment do not reset he speedy-trial timetable for offenses either charged in the original indictment or required under double jeopardy principles to be joined with such charges.
U.S. v. Jones, Case No. 08-16999 (11th Cir. 4/2/10)

Speedy Trial: Time Begins to Run Anew 30 Days After Court Takes Motion Under Advisement

18 U.S.C. § 3161(h)(1)(H); United States v. Jones, 601 F.3d 1247, 1255 (11th Cir. 2010); United States v. Davenport, 935 F.2d 1223, 1228 (11th Cir. 1991)

Speedy Trial: Time Granted to Prepare Motions

Time granted to the defendant to prepare motions is not automatically excluded from the Speedy Trial Act's 70-day time limit.
Bloate v. U.S., Case No. 08-728 (S. Ct. 3/8/10)

Speedy Trial: Systematic Breakdown in the Public Defender System Could be Charged to the State

While delays caused by assigned counsel are properly charged against the defendant, it is conceivable that a systematic breakdown in the public defender system could be charged to the state.
Vermont v. Brillon, Case No. 08-88 (S. Ct. 3/9/09)

Speedy Trial: Two Years of Post-Indictment Delay Resulted in Dismissal

Relying on Barker v. Wingo and the concept of constitutional speedy trial, the Court directed the district court to dismiss the indictment after a two year post-indictment delay. The delay was

occasioned by the arresting officer's "less than weak" efforts to contact and arrest the defendant following the return of the indictment. Because the first three of the Barker factors, (1) length of the delay, (2) the reason for the delay, and (3) the defendant's assertion of his speedy trial right, weighed heavily against the government, there was no need for the defendant to show prejudice.
U.S. v. Ingram, 446 F.3d 1332 (11th Cir. 2006)

Speedy Trial: Findings on Remand

The Speedy Trial Act's requirement for a finding that a continuance is justified by the ends of justice cannot be made after the fact by remanding the case back to the trial court.
Zedner v. U.S., Case No. 05-5992 (U.S. 6/5/06)

Speedy Trial: No Prospective Waiver

A defendant may not prospectively waive the application of the Speedy Trial Act.
Zedner v. U.S., Case No. 05-5992 (U.S. 6/5/06); U.S. v. Amar, Case No. 1312044 (11th Cir. 11/29/16)

Speedy Trial: Trial Could Be Set Within 30 Days of Issuance of Superseding Indictment

As the 30 day period in which trial cannot be scheduled runs from the first appearance and not the arraignment, the trial court did not err in scheduling the trial within 30 days of the issuance of a superseding indictment.
U.S. v. Schier, Case No. 05-11838 (1th Cir. 1/31/06)

Speedy Trial: Motion in Limine Tolls the Running

Where in response to the government's motion to introduce Rule 404(b) evidence, the defendant filed a Motion in Limine and the court did not rule on the motion until the trial, which was more than six months after the defendant filed the motion in limine, the court held that all of the time between the filing of the motion and the trial was excluded from the speedy trial calculation.
U.S. v. Nelson, 341 F.3d 1273 (11th Cir. 2003)

Speedy Trial: Tolling - Question of Whether An Evidentiary Hearing Is Necessary

Despite Judge Barkett's recognition, in her dissenting opinion, that the government may not manufacture the need for a hearing to avoid the operation of the Speedy Trial Act, the Court held that there was a need for an evidentiary hearing on the defendant's request for a bench trial on stipulated facts.
U.S. v. Dunn, Case No. 02-14182 (11th Cir. 9/19/03)

Speedy Trial: One Year Delay Presumptively Prejudicial

See: U.S. v. Dunn, Case No. 02-14182 (11th Cir. 9/19/03)

Speedy Trial: Motions Regarding Pretrial Release (Time Is Excluded)

The time between the filing of a motion for review of a detention order or any motion regarding pretrial detention and its resolution is excluded from the running of speedy trial.
U.S. v. Wirsing, 867 F.2d 1227, 1230-1231 (9th Cir. 1989); U.S. v. Severdija, 723 F.2d 791, 793 (11th Cir. 1984)

Speedy Trial: Motions Don't Have to Cause a "Delay"

Despite what seems to be the clear reading of the statute, the time between the filing of a motion and its resolution, regardless of whether they cause a "delay" in the trial, is excluded from the speedy trial time limit.
U.S. v. Miles, 290 F.3d 1341, 1350 (11th Cir. 2002); U.S. v. Tinklenberg, Case No. 09-1498 (S. Ct. 5/26/11)

Speedy Trial: Pretrial Motions

When the defendant files a pretrial motion he tolls the running of speedy trial from the day the motion is filed until is disposed of.

U.S. v. Williams, 314 F.3d 552 (11th Cir. 2002)
Speedy Trial: Date of Arrest Counts Sometimes
Speedy trial begins to run the day of the arrest unless, at least a preliminary hearing, and, maybe ? a first appearance is held that day.
U.S. v. Williams, 314 F.3d 552 (11th Cir. 2002)
Speedy Trial: Waiver of 60 Speedy Trial Right Not a Waiver of 30 Day Indictment Right?
"Because a defendant has rights both to speedy indictment and to speedy trial under the Act, waiving one right might not necessarily waive the other."
U.S. v. Williams, 314 F.3d 552, n. 3 (11th Cir. 2002)
Speedy Trial: Dismissal With Prejudice? (Length of Delay In Filing Indictment)
At least in theory the length of delay in the filing of the indictment can be enough by itself to justify dismissal with prejudice. In this case, the court found that a 68 day delay, while the court found the delay amounted to a "severe" violation, it wasn't enough to justify a dismissal under the circumstances in the case. The opinion includes citation to a six month delay that did not result in a dismissal with prejudice.
U.S. v. Williams, 314 F.3d 552 (11th Cir. 2002)
Speedy Trial: Tolling
The running of speedy trial is tolled for pretrial motions, certain other proceedings concerning the defendant per 18 USC § 3161(h)(1), and ends-of-justice continuances per 18 USC § 3161(h)(8)(A). Accordingly, in this case, the day of the defendant's initial appearance and the days that the preliminary hearing were held were not counted. Because, however, the magistrate failed to make an explicit ends-of-justice determination and because there was not sufficient evidence in the record to indicate that the magistrate considered the factors set forth in 18 U.S.C. § 3161(h)(8)(B) the two day postponement of the preliminary hearing that had been requested by both the government and defense counsel was counted.
U.S. v. Williams, 314 F.3d 552 (11th Cir. 2002)
Speedy Trial: Trial Set Less Than 30 Days From First Appearance
While 18 USC 3161(c)(2) prohibits the judge from setting trial within 30 days of the defendant's first court appearance, a defendant must show prejudice in order to receive a new trial for a violation of that provision.
U.S. v. Edwards, 13 FLW Fed C678 (11th Cir. 5/19/00)
Speedy Trial: Lawyer Can Waive Speedy Trial
Court found that the lawyer could, on the client's behalf, waive speedy trial under the Interstate Act on Detainers.
New York v. Hill, 13 FLW Fed S35 (1/11/00)
Speedy Trial: Request of Charging Jurisdiction Triggers IAD
"Resolution of the charges can be triggered by the charging jurisdiction, which may request temporary custody of the prisoner for that purpose. In such case, trial shall be commenced within one hundred twenty days fo the arrival fo the prisoner in the receiving state.
New York v. Hill, 13 FLW Fed S35 (1/11/00)
Speedy Trial: To Dismiss With or Without Prejudice?
For the rather vague test see the discussion in:
U.S. v. Brown, 183 F.3d 1306 (11th Cir. 1999); U.S. v. Williams, Case No. 02-10320 (11th Cir. 10/10/02); U.S. v. Jones, Case No. 08-16999 (11th Cir. 4/2/10)
Speedy Trial: Prosecution for Related Offenses

"... after an indictment is dismissed either with or without prejudice, a defendant may be prosecuted for offenses that are separate and distinct from the offenses charged in the dismissed indictment, even if those offenses all arose out of the same underlying facts."
U.S. v. Brown, 12 FLW Fed C1200 (8/13/99)

Speedy Trial: Description of What Passes for The Right To A Speedy Trial

U.S. v. Brown, 183 F.3d 1306 (11th Cir. 1999)

Speedy Trial: Constitutional Test

The four factors to be considered in determining whether a defendant has been deprived of his constitutional right to a speedy trial are: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right; and (4) the prejudice to the defendant.
U.S. v. Register, 12 FLW Fed C1103 (7/29/99); U.S. v. Dunn, Case No. 02-14182 (11th Cir. 9/19/03), U.S. V. Villarreal, Case No. 09-11348 (11th Cir. 8/13/10)

Speedy Trial: Seventy Days Tolled for Motions

Despite the wording of 18 USC 3161, which speaks in terms of delay, the running of speedy trial is tolled once the defense files a motion. If it is a motion that requires a hearing, it is tolled until such time as the hearing takes place. If it is a motion that doesn't require a hearing, speedy trial is tolled for either 30 days from the time the judge has all the submissions necessary to make a decision, or until the decision is made. The shorter of the two options controls.
U.S. v. Davenport, 935 F.2d 1223 (11th Cir. 1991)

Speedy Trial: 30 Days Begin Running Once in Federal Custody

Despite the use of the word "arrest" in the speedy trial statute, 18 USC s 3161(b), an arrest by state authorities doesn't count, and the 30 days in which the government is obligated to file an indictment doesn't start to run until the accused is in federal custody.
U.S. v. Shahryar, 719 F.2d 1522 (11th Cir. 1983)

Speedy Trial: Commences Upon Appearance Before Magistrate in District

The seventy day period within which the defendant must be brought to trial under the Speedy Trial Act commenced on the date the defendant first appeared before judicial officer in the district where the charge is pending, not in the district where arrested.
U.S. v. Wilkerson, 170 F.3d 1040 (11th Cir. 1999)

Speedy Trial: Begins to Run Only Upon Arrest

The time period for the Speedy Trial Act should begin to run only after an individual is accused either by an arrest and charge or by an indictment. Thus, in this case, where the defendant was charged with an immigration offense, speedy trial began running, not as of the date the defendant was arrested by immigration, but upon his arrest following the indictment.
U.S. v. Noel, 14 FLW Fed C83 (11th Cir. 10/25/00); U.S. v. Drummond, 14 FLW Fed C404 (11th Cir. 2/8/01)

Speedy Trial: Begins Upon Appearance Before Court That Will Hear Case

The 70 day time period begins, not just when the defendant first appears, but as pointed out by the statute, it begins on "the date the defendant has appeared before a judicial officer of the court in which the charge is pending."
U.S. v. Wilkerson, 170 F.3d 1040 (11th Cir. 1999)

Speedy Trial: IADA - Failure of Prison to Serve Prisoner

Because the prison officials failed to serve the detainer upon the prisoner or notify him of its existence, the prisoner, who knew he had been indicted had not filed a demand pursuant to the Interstate Agreement on Detainers Act. When he found out later that the detainer had been

lodged, he moved to dismiss, saying the 180 days had run. Court ruled the prisoner was out of luck; because the prisoner had not been served the time had not begun to run.
U.S. v. Pena-Corea, 12FLWFedC415 (11th Cir. 1/20/99)

STATUTE OF LIMITATIONS

Statute of Limitations: Conspiracy
Measured from the last alleged overt act.
U.S. v. Farias, Case No. 14-15804 (11th Cir. 9/1/16)
Statute of Limitations: Superseding Indictment
The filing of a valid indictment tolls the running of the statute of limitations for purposes of a superseding indictment if the new indictment does not broaden or substantially amend the original charges.
U.S. v. Farias, Case No. 14-15804 (11th Cir. Case No. 14-15804 9/1/16)
Statute of Limitations: May Not Be Raised for the First Time on Appeal
The statute of limitations defense in 18 U.S.C. § 3282(a) (the general federal criminal statute of limitations) may not be raised for the first time on appeal.
Musacchio v. U.S., Case No. 14-1095 (S. Ct. 1/25/16)
Statute of Limitations Date Crime Completed
At least for purposes of the theft statute, 18 U.S.C. §666, it is not the date the threshold dollar amount is reached and all the elements satisfied, but rather the date the defendant last received some of the funds.
U.S. v. Keen, Case No. 09-16027 (4/5/12)
Statute of Limitations: Purpose
Statutes of limitations play an important role in ensuring the reliability of evidence presented at trial: by preventing stale claims - and the accompanying lost evidence and witnesses with faded memories - adjudication becomes both more efficient and more reliable.
U.S. v. Trainor, Case No. 03-12655 (11th Cir. 7/19/04)
Statute of Limitations: Affirmative Defense Than Can Be Waived
Expiration of the statute of limitations in criminal cases does no divest the district court of subject matter jurisdiction, but rather constitutes an affirmative defense which the defendant can waive.
U.S. v. Najjar, 283 F.3d 1306 (11th Cir. 2002)
Statute of Limitations: Failure to Appear Doesn't Always Make One a Fugitive
Although 18 USC 3290 provides that the statute of limitations does not apply to those fleeing from justice, a failure to appear, particularly when there is no evidence that law enforcement attempted to find the defendant, may not always defeat a statute of limitations defense.
U.S. v. Sotelo-Salgado, 201 F.Supp. 2d 957 (S.D. Iowa 2002)

STATUTES

Statutes: Constrution – Constitutional Avoidance (Only if the Reading is Plausible)

In the absence of more than one plausible construction the canon of constitutional avoidance has no application.
Jennings v. Rodriguea, 138 S. Ct. 830, 842 (2018)
Statutes: Construction - Series-Qualifier Principle
Requires a modifier to apply to all items in a series when such an application would represent a natural construction.
Lockhart v. United States, Case No. 14-8358 (S. Ct. 3/1/16)
Statutes: Construction - Avoiding Intrusion Into Police Power of States
In concluding that the Chemical Weapons Convention Implementation Act of 1998 did not apply to a woman who had spread toxic chemicals in hopes they would cause her husband's paramour an uncomfortable rash, the Court required a clear indication that Congress meant to reach purely local crimes before interpreting the statute's expansive language in a way that intruded upon the police power of the States.
Bond v. U.S., Case No. 12-158 (S. Ct. 6/2/14)
Statutes: Construction - Context, Structure, and History
In construing the words within a statute, courts must do so, not in a vacuum, but with reference to the statutory context, structure, history, and purpose.
Abramski v. U.S., Case No. 12-1493 (S. Ct. 1/22/14); McDonnell v. U.S., Case No. 15-474 (S. Ct. 6/27/16)
Statutes: Construction - Ejusdem Generis
Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.
Yates v. U.S., Case No. 13-7451 (S. Ct. 2/25/15)
Construction- A Word Is Known By the Company It Keeps
The principle noscitur a sociis, a word in know by the company it keeps, avoids ascribing to one word a meaning so broad that it is inconsistent with its accompanying words.
Yates v. U.S., Case No. 13-7451 (2/25/15)
Statutes: Construction - Definition Depends Upon Context Not Just Dictionary Definition
In law, as in life, however, the same words, placed in different contexts, sometimes mean different things.
Yates v. U.S., case No. 13-7451 (2/25/15)
Statutes: Construction - Federal-State Balance in the Prosecution of Crime
Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes.
Fowler v. U.S., Case No. 10-5443 (S. Ct. 3/29/11)
Statutes: Construction - Deference to Guidelines Definitions?
"We have never held that, when interpreting a term in a criminal statute, deference is warranted to the Sentencing Commission's definition of hte same term in the Guidelines."
DePierre v. U.S., Case No. 09-1533 (S. Ct. 6/9/11)
Statutes: Construction - Language in One Section of a Statute, But Not in Another
Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.
Cullen v. Pinholster, Case No. 09-1088 (S. Ct. 4/4/11)
Statutes: Construction - Common Meaning of the Words When Legislation Was Passed

"It is axiomatic that, in interpreting statutes, we must interpret the words of a statute by taking the common meaning of the words at the time Congress enacted the statute."
U.S. v. Giaradot, Case No. 05-13809 (11th Cir. 2/2/09)

Statutes: Construction - "Outer Limits of Its Definitional Possibilities"

A word in a statute may or may not extend to the outer limits of its definitional possibilities.
Abuelhawa v. U.S., Case No. 08-192 (S. Ct. 5/26/09)

Statutes: Construction - Statements on the Floor

Don't count for much.
U.S. v. Hayes, Case No. 07-608 (S. Ct. 2/24/09)

Statutes: Construction - Practical Considerations

"Practical considerations strongly support our reading of §921(a)(33)A)'s language.
U.S. v. Hayes, Case No. 07-608 (S. Ct. 2/24/09)

Statutes: Construction - Rule of the Last Antecedent

The rule of last antecedent provides that a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.
U.S. v. Hayes, Case No. 07-608 (S. Ct. 2/24/09); Lockhart v. U.S., Case No. 14-8358 (S. Ct. 3/1/16)

Statutes: Construction - Meaning of the Words Within a Statute Must Be Consistent

The meaning of words within a statute cannot change with the statute's application.
U.S. v. Santos, 553 U.S. 507 (S. Ct. 2008)

Statutes: Construction: Examples Limited Scope of the Statute

Even assuming that DUI involved conduct that presented a serious potential risk of physical injury to another, it was too dissimilar to the listed example crimes for the court to conclude it was "violent felony" for purposes of the armed career criminal statute.
Begay v. U.S. Case No. 06-11543 (S. Ct. 4/16/08)

Statutes: Construction: Neighboring Words Help Define

Meanings are narrowed by the commonsense canon of *noscitur a sociis* - which counsels that a word is given more precise content by the neighboring words with which it is associated.
U.S. v. Rodriquez, Case No. 06-1646 (S. Ct. 5/19/08)

Statutes: Construction - Use of the Word "Willful" Doesn't Always Mean Specific Intent

Where the defendant was charged with willfully communicating a distress message to the coast guard when no help was needed, the court concluded the offense was one of general intent.
U.S. v. Haun, Case No. 06-14556 (11th Cir. 8/6/07)

Statutes: Construction - Inclusion of Particular Language in One Section, but Not Another

It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.
U.S. v. Griffith, 455 F.3d 1339 (11th Cir. 2006); U.S. v. Pirela, Case No. 14-13767 (11th Cir. 12/22/15)

Statutes: Construction - Common Law

Statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except where a statutory purpose to the contrary is evident. This presumption, however, is no bar to a construction that conflicts with the common-law rule if the statue speaks directly to the question addressed by the common law.
Pasquantino v. Hilts, Case No. 03-725 (U.S. 4/26/05)

Statutes: Common Law Terms
"We presume that when Congress drafts legislation incorporating common law terms it is aware of the well-established judicial construction of those terms."
U.S. v. Trainor, Case No. 03-12665 (11th Cir. 7/19/04)
Statutes: Regulations Must Be Construed in Light of Statute
When a regulation implements a statute, the regulation must be construed in light of the statue, but where a regulation conflicts with a statute, the statue controls.
U.S. v. Marte, 365 F.3d 1336 (11th Cir. 2004)
Statutes: Construction - Vague Alabama Traffic Statute - Ambiguity Can't Be Used Against the Defendant
The Court rejected the government's argument that an ambiguous Alabama traffic statute should be construed in such a way as to render the officer's stop of the defendant lawful. The court rejected the argument saying that it declined to use the vagueness of the statute against the defendant and that to do so would violate the fundamental principal that a criminal statute that is so vague that it does not give reasonable notice of what it prohibits violates due process.
U.S. v. Chanthassouxat, Case No. 01-17158 (11th Cir. 8/22/03)
Statutes: Construction - Two Statutes Encompassing Similar Conduct
The fact that congress has enacted two sections encompassing similar conduct but prescribing different penalties does not compel a conclusion that one statute was meant to limit, repeal, or affect enforcement of the other.
U.S. v. Zheng, 306 F.3d 1080, 1085 z911th Cir. 2002)
Statutes: Retroactivity
Congressional enactments will not be construed to have retroactive effect unless their language requires this result.
Immigration and Naturalization Service v. St. Cyr, 14 FLWFedS401 (6/25/01)
Statutes: Construction - Avoid Constitutional Problems
If an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, courts are obligated to construe the statute to avoid such problems.
Immigration and Naturalization Service v. St. Cyr, 14 FLWFedS401 (6/25/01)
Statutes: Construction - Outer Limits of Congressional Power
When a particular interpretation of a statute invokes the outer limits of Congress's power, we expect a clear indication that Congress intended that result.
Immigration and Naturalization Service v. St. Cyr, 14 FLWFedS401 (6/25/01)
Statutes: Statutory Exception - Element or Affirmative Defense?
To determine whether a statutorily created exception to a criminal offense is an element of the crime involves a three-part inquiry. First the court will examine the language and structure of the statute. Second, the court will look to the legislative history. Finally, the court will examine whether the government is "well situated" to prove the applicability of the exception.
U.S. v. Kloess, 14 FLWFedC714 (11th Cir. 5/18/01)
Statutes: Construction - Statute Means What It Says
Courts must presume that a legislature says in the statute what it means and means in a statute what it says.
U.S. v. Kloess, 251 F.3d 941 (11th Cir. 2001); U.S. v. Pirela, case No. 14-13767 (11th Cir. 12/22/15)
Statutes: Construction - Rule of Lenity

Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.
Cleveland v. United States, 121 S. Ct. 365 (2000); U.S. v. Blankenship, Case No. 01-17064 (11th Cir. 8/26/04); U.S. v. Santos, Case No. 06-1005 (6/2/08); U.S. v. Hayes, Case No. 07-608 (S. Ct. 2/24/09); Skilling v. United States, Case No. 08-1394 (S. Ct. 6/24/10)

Statutes: Parole Board's Rules, for Ex Post Facto, Are "Laws"

Parole Board's rules, at least for ex post facto reasons, are "laws" because they were the product of a legislative delegation of power and thus had the force and effect of law.
Metheny v. Hammonds, 13 FLW Fed C810 (11th Cir. 7/7/00)

Statutes: Construction - The Title

The title of the statute is of use in interpreting the meaning of that statute only if it sheds light on some ambiguous word or phrase within the text.
Carter v. U.S., 13 FLW Fed S389 (6/12/00); INS v. St. Cyr, 14 FLW S401 (6/25/01)

Statutes: Construction - Common Law Dependent Upon Terms

If the common law is going to be used in interpreting the meaning of a statute the statute must first employ the terms from the common law. Here, because the statute used the word "robbery" only in the heading, and larceny was omitted altogether, there was no need to rely upon the common law meaning of those terms.
Carter v. U.S., 13 FLW Fed S389 (6/12/00)

Statutes: Statutory Terms Shouldn't Be Treated as Surplusage

Judges should hesitate to treat statutory terms in any setting as surplusage.
Jones v. U.S., 529 U.S. 362, 404, 120 S.Ct. 1495, 1519 (2000); McDonnell v. U.S., Case No. 15-474 (S. Ct. 2016)

Statutes: Effective Date

The general rule is that when a statute has no effective date, absent a clear direction by Congress to the contrary, it takes effect on the date of its enactment.
Johnson v. United States, 13 FLW Fed S308 (5/15/00)

Statutes: Construction - Ordinary Contemporary Meaning

We give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import.
Williams v. Taylor, 529 U.S. 420 (2000)

Statutes: Construction - Meaning Given to Every Word

It is a cardinal principle of statutory construction that we must give effect if possible to every clause and word of a statute.
Williams v. Taylor, 529 U.S. 362, 404, 120 S.Ct. 1495, 1519 (2000); Fowler v. U.S., Case No. 10-5443 (S. Ct. 3/29/11); U.S. v. Pirela, Case No. 14-13767 (11th Cir. 12/22/15)

Statutes: Carjacking Statute Created Three Separate Crimes

In concluding the federal carjacking statute, 18 USC 2119, created three separate crimes with differing elements, the Court rejected the claim that there was only one offense with aggravating circumstances relevant only to sentencing. The "circumstances" were instead elements that must be plead and proven before the jury.
Jones v. U.S., 12 FLW Fed S152 (3/24/99)

Statutes: Construction - Intent of Congress

"[T]he language of the statute that Congress enacts provides 'the most reliable evidence of its intent.' For that reason, we typically begin the task of statutory construction by focusing on the words that the drafters have chosen. In interpreting the statute at issue, "[w]e consider not only

the bare meaning" of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'
Holloway v. U.S., 119 S.Ct. 966 (1999)
Statutes: Construction - *ejusdem generis*
Under the *ejusdem generis* canon of construction , "where general words follow specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated.
Allen v. Warden, 161 F.3d 667 (11th Cir. 1998)
Statutes: No Need to Review Legislative History Unless Statute Ambiguous
Review of the legislative history is not necessary unless a statute is inescapably ambiguous.
U.S. v. Orozco, 12 FLW Fed C283 (11th Cir. Nov. 17, 1998); U.S. v. Maung, 14FLW Fed C1273 (11th Cir. 2001); U.S. v. Hunt, Case No. 06-16641 (11th Cir. 2008)
Statutes: No Ambiguity Means No Need for Judicial Inquiry
It is well established that when the words of a statute are unambiguous the judicial inquiry is complete.
U.S. v. McNab, Case No. 01-15148 (11th Cir. 5/29/03)
Statutes: Rule of Lenity
When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.
Ladner v. U.S., 358 U.S. 169 (1958); Morris v. State, 23FLWS620 (Fla. Dec. 10, 1998) See: Bell v. U.S., 349 U.S. 81 (1955), and Justice Scalia's dissent in Holloway v. U.S., 12 FLW Fed S134 (3/2/99); U.S. v. Shugart, 12 FLW Fed C899 (11th Cir. 5/27/99); Jones v. U.S., 13 FLW Fed S357 (5/22/00)
Statutes: Rule of Lenity - Not a Doctrine of First Resort
"The Rule of lenity, however, is not a doctrine of first resort whenever a criminal defendant identifies a potential ambiguity in a statute and the rule 'is not invoked by a grammatical possibility.' Instead, the rule of lenity applies only when 'the traditional canons of statutory construction' fail to resolve an ambiguity."
U.S. v. Maldonado-Ramirez, 216 F3d. 940 (11th Cir. 2000); Burgess v. U.S., Case No. 06-11429 (S. Ct. 3/24/08); U.S. v. Hayes, Case No. 07-608 (S. Ct. 2/24/09)

STOP AND FRISK

Autos

Stop & Frisk: Autos - Reasonable Suspicion Sufficient for Routine Traffic Infraction?
See LaFave, Search and Seizure: A Treatise on the Fourth Amendment §9.3(a)
Stop & Frisk: Autos - Effect
Traffic stops can be annoying, frightening, and perhaps humiliating.
Hein v. North Carolina, Case No. 13-604 (S. Ct. 10/6/14) (Kagan, J. concurring)
Stop & Frisk: Autos - Mistake of Law
Reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition, but only if the statute is genuinely ambiguous.

Heien v. North Carolina, 135 S. Ct. 530 (2014)
Stop & Frisk: Autos - Traffic Stop Limited to Time Necessary to Resolve Stop
A police stop exceeding the time needed to handle the matter for which the stop was made violates the Constituiton's shield against unreasonable seizures.
Rodriguez v. U.S., 575 U.S. 348 (2015).
Stop & Frisk: Autos - Moving Car for Search
Where upon legitimately stopping the defendant, the officer, chose to move the defendant's car for the purpose of having a drug dog sniff the exterior of the car. The drugs subsequently found should have been suppressed as in moving the car, the officer exceeded what was permissible on the basis of the stop.
U.S. v. Virden, 488 F.3d 1317 (11th Cir. 2007)
Stop & Frisk: Auto - Stop of Car' Seizure of Passenger
When law enforcement officers stop a car, they, for Fourth Amendment purposes, also seize the passenger. Thus, when the stop is unlawful, the passenger can claim whatever was discovered is the product of the unlawful detention and is subject to being suppressed.
Brendlin v. California, 551 U.S. 249 (2007)
Stop & Frisk: Autos - Questions Unrelated to the Stop
Although there is some disagreement among courts on the issue, in this instance the 10th Circuit held that an officer who asks the detained driver whether there are any weapons or contraband in the vehicle during the course of a traffic stop do not violate the Fourth Amendment so long as the questioning does not overly prolong the detention.
U.S. v. Stewart, Case No. 05-4225 (10th Cir. 1/19/07), U.S. v. Mendez, Case No. 05-10205 (9th Cir. 2/23/07), U.S. v. Valenzuela, Case No. 06-1222 (10th Cir. 7/12/07)
Stop & Frisk: Autos - Questions Limited to Traffic Stop?
At least the 9th Circuit limits questioning to matters pertinent to the stop.
U.S. v. Mendez, Case No. 05-10205 (9th Cir. 10/30/06)
Stop & Frisk: Autos - Reasonable Suspicion Developed During Traffic Stop May Justify Further Detention
Reasonable suspicion developed prior to the conclusion of the traffic stop is relevant in assessing whether an officer had reasonable suspicion justifying further detention.
U.S. v. Sanchez, Case No. 05-20223-CR (S.D. Fla. 12/14/05)(Moreno, J.)
Stop & Frisk: Autos - Seventeen Minutes to Issue Warning OK
The passage of 17 minutes from the time of the stop, during which time the officer was preparing a written warning for speeding (78 mph in a 70 mph zone) and contacting United States Customs, was not so long a delay as to render the detention unlawful.
U.S. v. Hernandez, No. 04-11776 (11th Cir. 7/29/05)
Stop & Frisk: Autos - Detention Beyond Point When License Should Have Been Returned
Ordinarily, when a citation or warning has been issued and all record checks have been completed and come back clean, the legitimate investigative purposes of the traffic stop is fulfilled, and the drivers's license and other documents should be returned. If the stop is unjustifiably prolonged past that point, the valid stop may be found to have ended when the documents should have been returned rather than when they were actually returned.
US. v. Simms, 385 F.3d 1347 (11th Cir. 2004)
Stop & Frisk: Autos - Questions That Exceed the Scope of the Detention
There are two tests. The Tenth Circuit limits the questions to those that are justified by reasonable suspicion of criminal activity or reasonable safety concerns. The Fifth has a different

test - holding that questions unrelated to the reason for the initial stop are only unlawful if they extend the duration of the initial seizure. The Eleventh hasn't taken sides.
U.S. v. Boyce, Case No. 02-15183 (11th Cir. 11/28/03)

Stop & Frisk: Auto - Reasons to Prolong a Traffic Stop

An officer may only prolong a traffic stop in special circumstances. First, police officers conducting a traffic stop may prolong the detention to investigate the driver's license and the vehicle registration, and may do so by requesting a computer check. Similarly, out of interest for the officer's safety, we have found that officers may permissibly prolong a detention while waiting for the results of a criminal history check *that is part of the officer's routine traffic investigation.* In addition, an officer may prolong a traffic stop if he has articulable suspicion of other illegal activity.
U.S. v. Boyce, 351 F.3d 1102 (11th Cir. 2003)

Stop & Frisk: Auto - Officer May Detain and Order Passenger Back Into the Car

Court held that an officer could briefly detain and order passenger to reenter automobile to protect the officer's safety while the officer investigated a crime committed in his presence by two associates of the passenger.
U.S. v. Clark, Case No. 02-14383 (11th Cir. 7/16/03)

Stop & Frisk: Auto - List of Reasons Justifying Extended Traffic Stop

See: U.S. v. Pruitt, 174 F.3d 1215 (11th Cir. 1999)

Stop & Frisk: Auto - Traffic Stop and Delay for the Dogs

Because officer had all evidence necessary to prosecute speeding offense at the time of the stop, officer's questioning following the stop should have been directed to securing defendant's driver's license, registration, and insurance and defendants should have been free to go after such brief questioning was completed.
U.S. v. Pruitt, 174 F.3d 1215 (11th Cir. 1999)

Stop & Frisk: Auto - 45 Minute Terry Stop OK

Where there was a 45 minute wait for the dogs during which time the officers had difficulty confirming the existence of an outstanding warrant for someone with the same common name of the defendant but with a different DOB, the Court found the delay to be reasonable, and upheld the denial of the motion to suppress the subsequently seized drugs.
U.S. v. Simmons, 172 F.3d 775 (11th Cir. 4/14/99),

Stop & Frisk: Autos - Can't Search Incident to a Traffic Citation

Despite fact that Iowa law gave the officer the option of arresting the driver for a traffic infraction, when officer only gave the driver a citation, he was without authority to search the car incident to the issuance of the citation.
Knowles v. Iowa, 12 FLW Fed S27 (Dec. 8, 1998)

Stop & Frisk: Auto - Checks on Driver Following Traffic Stop

Following a valid stop, police are authorized to conduct "a variety of checks on the driver and his car, including questioning the driver about the traffic violation, requesting consent to search the car, and running a computer check for outstanding warrants."
U.S. v. Simmons, 12 FLW Fed C717 (11th Cir. 4/14/99),

Stop & Frisk: Auto - Officer's Motives Irrelevant

"...an officer's motive in making the traffic stop does not invalidate what is otherwise objectively justifiable under the Fourth Amendment."
U.S. v. Simmons, 172 F.3d 775 (11th Cir. 4/14/99), Whren v. U.S., 517 U.S. 806, 810, 116 S.Ct. 1769, 1772 (1996)

Consensual Encounter

Stop & Frisk: Consensual Encounter - Questioning Without More Isn't Necessarily a Seizure
U.S. v. Caraballo, Case No. 09-10428 (11th Cir. 1/27/10)
Stop & Frisk: Consensual Encounter - Based on Ethnicity
Court did not reach the issue of whether a consensual encounter based solely upon the ethnicity of the defendant violated the equal protection clause. Court concluded, though, that consensual encounter based upon ethnicity and other factors did not violate the equal protection clause.
U.S. v. Quintana, Case No. 08-12967 (11th Cir. 10/22/09)
Stop & Frisk: Consensual Encounter - Stop Requires Show of Authority
The test is whether the police exert a show of authority that communicates to reasonable person that his liberty is restrained, meaning he's not free to leave.
U.S. vs. Baker, 15 FLW Fed C541 (11th Cir. 5/8/02); U.S. v. Perez, 443 F.3d 772 (11th Cir. 2006); U.S. v. Stanley, 472 F.3d 1298 (11th Cir. 2006), Miller v. Hargret, 458 F.3d 1251 (11th Cir. 2006)
Stop & Frisk: Consensual Encounter: Not While Office Has Drivers License
U.S. v. Pruitt, 174 F.3d 1215 (11th Cir. 1999); U.S. v. McKneely, 6 F.3d 1447, 1451 (10th Cir. 1993)

Founded Suspicion

Stop & Frisk: Founded Suspicion - Nervousness Doesn't Count for Much
U.S. v. Griffin, 730 F.3d 1252 (11th Cir. 2013) (11th Cir. 8/20/13) *Order on Rehearing En Banc* (Barkett, J. dissent)
Stop & Frisk: Founded Suspicion - Anonymous 911 Call About Drunken Driver
Anonymous 911 call saying an apparent drunken driver had run the caller off the road that included details about where the incident had occurred and the make and license plate of the truck provided a founded suspicion that supported officer's decision to stop the truck.
Navarette v. California, Case No. 12-9490 (S. Ct. 1/21/14)
Stop & Frisk: Founded Suspicion - Admission to Having a Concealed Weapon Justifies Stop
The defendant's admission to police officer that he had a concealed weapon was sufficient to justify briefly stopping him before inquiring further about whether he had an affirmative defense in the form of a valid concealed-weapons permit.
U.S. v. Lewis, Case No. 10-13567 (11th Cir. 3/23/12)
Stop & Frisk: Founded Suspicion - Car Pulling Out of Housing Project Late at Night Within Seconds of Gunshot
There was founded suspicion to stop the car being driven by the defendant where the office saw the lone car hurriedly pulling out of what was a high-crime housing project in the middle of the night within seconds of the sound of a gunshot.
U.S. V. Williams, Case No. 10-10612 (11th Cir. 9/13/10)
Stop & Frisk: Founded Suspicion - Hand-to-Hand Drug Transaction
See U.S. v. Lopez-Garcia, Case No. 08-12662 (11th Cir. 4/21/09)

Stop & Frisk: Founded Suspicion - Totality of the Circumstances
"The Supreme Court has rejected this kind of 'divide-and-conquer analysis' and made clear that reasonable suspicion may exist even if each fact 'alone is susceptible of innocent explanation.'"
U.S. v. Bautista-Silva, Case No. 08-13803 (11th Cir. 5/11/09)
Stop & Frisk: Founded Suspicion - Anonymous Caller's Play-by-Play of Suspect's Actions
An anonymous caller's accurate description of an alleged criminal's movement as he was being followed were not the sort of "predictive details" that will demonstrate that a tip is sufficiently reliable to provide reasonable suspicion.
U.S. v. Reaves, Case No. 06-5073 (4th Cir. 1/8/08)
Stop & Frisk: Founded Suspicion - Minimal Circumstances
The officer had a founded suspicion to believe the occupants of a car were engaged in criminal activity because: (1) the driver gave what appeared to be a false explanation as to why he was speeding (said he was trying to get to a bathroom and had just driven past an exit); (2) there were empty food containers in the car; (3) the and the passenger gave different stories about the trip's length and purpose; (4) both the driver and passenger displayed abnormal nervousness; (5) purported nonstop travel from Houston to Atlanta when there was bad weather in Houston; (6) the passenger couldn't say where in Atlanta they were going; (5) they were traveling between two "main source cities for narcotics; (8) minimal luggage.
U.S. v. Hernandez, No. 04-11776 (11th Cir. 7/29/05)
Stop & Frisk: Founded Suspicion - May Be Based on Observation of Legal Activity
A reasonable suspicion of criminal activity may be formed by observing exclusively legal activity.
U.S. v. Acosta, Case No. 02-16167 (11th Cir. 3/25/04)
Stop & Frisk: Founded Suspicion - Collective Knowledge of Officers
A stop is permitted if under the totality of the circumstances, from the collective knowledge of the officers involved in the stop, they have an objectively reasonable suspicion that the suspect had engaged, or was about to engage in a crime.
U.S. v. Acosta, Case No. 02-16167 (11th Cir. 3/25/04)
Stop & Frisk: Founded Suspicion - Nervousness
The nervousness of one stopped for a traffic offense doesn't necessarily create a reasonable suspicion
U.S. v. Perkins, Case No. 02-15891 (11th Cir. 10/22/03); U.S. v. Sanchez, Case No. 05-20223-CR (S.D. Fla. 12/14/05)(Moreno, J.)
Stop & Frisk: Founded Suspicion - Refusal to Consent
Refusal to consent to a search doesn't create a reasonable suspicion.
U.S. v. Boyce, Case No. 02-15183 (11th Cir. 11/28/03)
Stop & Frisk: Founded Suspicion - Limits on What Amounts to Being Suspicious
The factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied.
U.S. v. Boyce, Case No. 02-15183 (11th Cir. 11/28/03)
Stop & Frisk: Founded Suspicion - Conflicting Answers About Traveling Plans
Conflicting answers about where one is traveling to or from may give rise to a suspicion of drug activity because most drivers know the answers to these questions and because the driver may be trying to hide the fact that he is going to or from a known drug-source state.
U.S. v. Boyce, Case No. 02-15183 (11th Cir. 11/28/03); U.S. v. Sanchez, Case No. 05-20223-CR (S.D. Fla. 12/14/05)(Moreno, J.)

Stop & Frisk: Founded Suspicion - Mistake of Law Renders Stop Unlawful
While an officers reasonable mistake of fact may provide the objective grounds for a reasonable suspicion stop or probable cause required to justify a traffic stop, an officer's mistake of law may not. In this instance, where the officer mistakenly believed it was unlawful to drive without an interior rear view mirror, it was a mistake of law, and the trial court should have granted the defendant's motion to suppress.
U.S. v. Chanthassouxat, Case No. 01-17158 (11th Cir. 8/22/03)
Stop & Frisk: Founded Suspicion - Flight
Despite a dissenting opinion that the flight was provoked and, therefore, did not give rise to a reasonable suspicion, the court found that "headlong" flight, flight that is fast and of some duration, was enough to establish a reasonable suspicion. The court gave little attention to the requirement that the flight occurred in an area that seemed to fall short of what existed in Illinois v. Wardlow.
U.S. v. Franklin, 323 F.3d 1298 (11th cir. 2003)
Stop & Frisk: Founded Suspicion - Reputation of Area in Proximity to Crime
The reputation of an area for criminal activity as well as an individuals proximity to illegal activity may be considered in determining whether there is a founded suspicion.
U.S. v. Hunter, 15 FLW Fed C607 (11th Cir. 5/21/02)
Stop & Frisk: Founded Suspicion - Innocent Conduct
A determination that reasonable suspicion exists need not rule out the possibility of innocent conduct.
U.S. v. Arvizu, 15 FLW Fed S81 (1/15/02)
Stop & Frisk: Founded Suspicion - Walking Away Upon Arrival of Officers
Defendants, who were at about 8:00 P.M. were standing ten feet away from a car in a high crime area of largely abandoned businesses, gave police a founded suspicion to believe they were engaged in criminal activity when they, upon seeing the police quickly walked to their car and drove away.
U.S. v. Gordon, 14 FLW Fed C78 (11th Cir. 10/23/00); U.S. v. Hunter, 15 FLW Fed C607 (11th Cir. 5/21/02)
Stop & Frisk: Founded Suspicion - Thin Grounds
For a case involving the stop of some suspected of being involved in a drug transaction with little justification, and that includes a recitation of the basic law see:
U.S. v. Powell, 13 FLW Fed C1001 (8/15/00 11th Cir.)
Stop & Frisk: Anonymous Tip Didn't Justify Stop and Frisk for Firearm
No firearm exception to founded suspicion requirement. Consequently, anonymous tip that merely provided a description, and accordingly, failed to establish a founded suspicion, didn't justify the stop and frisk.
Florida v. J.L., 529 U.S. 266 (S. Ct. 2000)
Stop & Frisk: Flight Provides Founded Suspicion
Flight, at least in a high crime area provides reasonable suspicion to detain someone.
Illinois v. Wardlow, 13 FLW Fed S20 (1/12/00)
Stop & Frisk: Founded Suspicion - Must Be Based On Objective Manifestation
U.S. v. Cortez, 101 S.Ct. 690, 449 U.S. 411, 417 (1981)
Stop & Frisk: Founded Suspicion - Not Limited to Officer's Observations
Adams v. Williams, 92 S.Ct. 151 (1972)
Stop & Frisk: Founded Suspicion - General Definition

Ornelas v. U.S., 116 S. Ct. 1657, 1663 (1996); U.S. v. Taia, 912 F.2d 1367, 1370 (11th Cir. 1990); Ornelas v. U.S., 116 S.Ct. 1657, 1661 (1996)

Stop & Frisk: Founded Suspicion -Unsupported Hunch Doesn't' a Founded Suspicion

U.S. v. Pruitt, 174 F.3d 1215 (11th Cir. 1999); U.S. v. Boyce, 351 F.3d 1102 (11th Cir. 2003); U.S. v. Perkins, Case No. 02-15891 (11th Cir. 10/22/03)

Frisk

Stop & Frisk: Frisk - Always Permitted in Cases of Burglary and Theft?

Some circuits have held that a frisk is always permitted in cases where the individual is reasonably suspected of theft and burglary. The Eleventh Circuit, though, has not decided the issue.

U.S. v. Giffin, Case No. 11-15558 (11th Cir. 10/2/12)

Stop & Frisk: Frisk - High Crime Area

"[W]e conclude that the facts known by Officer Edwards a the time permitted him to frisk Mr. Griffin consistent with the Fourth Amendment. First, Officer Edwards was alone at night in a high crime area, and had not been told anything specific about Mr. Griffin, other than that he had tried to steal some articles of clothing. Second, Mr. Griffin - who was in the vicinity of six to eight other persons acted evasively and refused to obey Edwards's command that he stop. Third, Officer Edwards had not finished investigating the alleged attempted theft.

U.S. v. Griffin, 696 F.ed 1354 (11th Cir. 2012)

Stop & Frisk: Frisk - Generous Application of Test

Court of appeals affirmed trial court's holding that following facts justified a frisk: (1) officer responded late at night to a noise complaint in a high-crime area; (2) the officers were out-numbered two-to-one; (3) none of the occupants could provide identification; and (4) the officer recognized the soon-to-be defendant as someone he had had trouble with in the past.

U.S. v. White, Case No. 08-16010 (11th Cir. 1/11/10)

Stop & Frisk: Frisk - Belief That Defendant Had Lots of Money In Car Justified Frisk ???

"Based on the nature of the officers' reasonable suspicion that Acosta was carrying a large amount of money in his car, the offices were justified in suspecting that he may have had a weapon to protect himself and money. It was reasonable for one of more officers to draw a gun momentarily as Acosta exited his car, and for the officers to frisk Acosta for weapons.

U.S. v. Acosta, Case No. 02-16167 (11th Cir. 3/25/04)

Stop & Frisk: Frisk - Discovery of Item That Might Be a Weapon

When conduction a Terry frisk the officer discovers an object that he reasonably believes to be a weapon, he can search the pocket of the detained individual.

U.S. v. Clay, Case No. 06-10088 (11th Cir. 4/3/07)

Length of Detention

Stop & Frisk: Length of Detention - Transporting Detainee for Show Up

Where there was a reasonable suspicion supporting the detention, the transport of the defendant to the bank for a show up was permissible.

U.S. v. Martinez, Case No. 05-4275 (8th Cir. 9/11/06)

Stop & Frisk: Length of Detention - 75 Minutes In Handcuffs OK

Despite the fact that the defendant was handcuffed and held in the back of a patrol car for 75 minutes, the Court, concluding that the defendant "was detained for only as long as it was necessary to complete (the) investigation....", upheld the detention.
U.S. v. Gil, 13 FLW Fed C419 (11th Cir. 3/3/2000); U.S. v. Acosta, Case No. 02-16167 (11th Cir. 3/25/04)

Stop & Frisk: Length of Detention (26 Minutes)

Seventeen to twenty six minutes spent attempting to verify the existence of an outstanding warrant wasn't too long.
U.S. v. Simmons, 172 F.3d 775 (11th Cir. 1999); U.S. v. Perkins, Case No. 02-15891 (11th Cir. 10/22/03); U.S. v. Vargas, Case No. 16-14714 (11th Cir. 2/6/17)

Miscellaneous

Stop & Frisk: Transportation Exceeds Parameters of a Terry Stop

Marshall v. Secretary, Florida Dept. of Corrections, Case No. 13-13775, n. 6 (11th Cir. 7/12/16) (Rosenabaum, J. Concurring)

Stop & Frisk: Inside a Person's Home

In the absence of exigent circumstances, an officer may not conduct the equivalent of a Terry stop inside a person's home.
Moore v. Pederson, Case No. 14-14201 (11th Cir. 10/15/15)

Stop & Frisk - No Minimum Time on Restraint

The restraint on one's freedom of movement does not have to endure for any minimum of time period before it becomes a seizure for Fourth Amendment purposes.
West v. Davis, Case No. 13-14805 (11th Cir. 9/8/14)

Stop & Frisk - Requires Some Exigency

"The opportunity to *Terry* stop a suspect, a law enforcement power justified by and limited to the exigent circumstances of the moment, cannot be put in the bank and saved for use on a rainy day, long after any claimed exigency has expired." In this instance, the court of appeals held that the trial court should have suppressed the defendant's statement because the stop that led to the statement was based on suspicious behavior that had occurred a week prior to the stop.
U.S. v. Balerio, Case No. 12-12235 (11th Cir. 6/20/13)

Stop & Frisk: Detention of Those Accompanying Individual Stopped

For safety reasons, police officers my, in some circumstances, briefly detain individuals about whom they had no individualized reasonable suspicion of criminal activity in the course of conducting a valid Terry stop as to other related individuals.
U.S. v. Lewis, Case No. 10-13567 (11th Cir. 3/23/12)

Stop & Frisk: Anonymous Tip

Despite lack of any sort of predictive quality, the anonymous tip in this case was sufficient when coupled with information officers knew about recent crimes.
U.S. v. Lindsey, Case No. 05-11273 (11th Cir. 3/27/07)

Stop & Frisk: Miscellaneous - In General (Reasonable Suspicion, Right To Stop, More than a Hunch, Objective Test)

U.S. v. Hernandez, Case No. 04-14995 (11th Cir. 7/11/06)

Stop & Frisk: Miscellaneous - Ordering Passengers From Bus Wasn't a Seizure

A drug interdiction officer did not violate the Fourth Amendment when he directed the passengers on an interstate bus to exit and claim their luggage, and then searched a suitcase of a passenger who claimed the bag was not his. The passengers were not "seized" for Fourth Amendment purposes because they would not have reasonably perceived that their liberty had been restrained.????
U.S. v. Ojeca-Ramos, Case NO. 04-5118 (10th Cir. 7/31/06)
Stop & Frisk: Miscellaneous - Questioning Doesn't Equal a Seizure
"We have 'held repeatedly that mere police questioning does not constitute a seizure."
Muehler v. Mena, Case No. 03-1423 (U.S. 3/22/05)
Stop & Frisk: Miscellaneous - Reasonable To Keep License For Brief Period of Time
During the stop of the suspect's car, it was reasonable for the officers to retain his license during the short period of time while the officers were conduction an identity check.
U.S. v. Acosta, Case No. 02-16167 (11th Cir. 3/25/04)
Stop & Frisk: Miscellaneous - Line Between an Arrest and a Stop
An investigatory stop does not necessarily become an arrest just because an officer draws his gun, or handcuffs the suspect, or orders the suspect to lie face down, or secures the suspect in a police car.
U.S. v. Acosta, Case No. 02-16167 (11th Cir. 3/25/04)
Stop & Frisk: Miscellaneous - Line Between an Arrest and a Stop
In drawing the line between a stop and an arrest, the court relies on four non-exclusive factors: the law enforcement purposes served by the detention, the diligence with which the police pursue the investigation, the scope and intrusiveness of the detention, and the duration of the detention.
U.S. v. Acosta, 363 F.3d 1141 (11th Cir. 2004) ;U.S. v. Perez, 443 F.3d 772 (11th Cir. 2006)
Stop & Frisk: Miscellaneous - Stop Based on Mistake of Fact
A traffic stop based on an officer's incorrect but reasonable assessment of facts does not violate the Fourth Amendment. Thus, if an officer makes a traffic stop based on mistake of fact, the on ly question is whether the mistake of fact was reasonable.
U.S. v. Chanthassouxat, Case No. 01-17158 (11th Cir. 8/22/03)
Stop & Frisk: Test for A Seizure of the Person
A seizure of the person within the meaning of the Fourth Amendment and Fourteenth Amendments occurs when taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. The test is an objective one.
Kaupp v. Texas, Case No. 02-5636 (S. Ct. 5/5/03); U.S. v. Perkins, Case No. 02-15891 (11th Cir. 10/22/03); Brendlin v. California, Case No. 06-8120 (S.Ct. 6/18/07)
Stop & Frisk: Miscellaneous - Roadblocks
Although a roadblock to verify driver's licenses and registrations would be permissible to serve a highway safety interest, and roadblocks for the purpose of intercepting illegal aliens, and a sobriety check point aimed at removing drunk drivers from the road are all permissible, the roadblock, here, with a primary purpose of interdicting unlawful drugs, violated the Fourth Amendment.
City of Indianapolis v. Edmond, 121 S.Ct 447 (2000)
Stop & Frisk: Miscellaneous - Results of Search Doesn't Justify Detention
U.S. v. Pruitt, 174 F.3d 1215 (11th Cir. 1999)
Stop & Frisk: Miscellaneous - Good Faith and Traffic Stops

"Lopez rightly points out that this Court should be leery of extending the good-faith exception to this appeal. Under the general rule established in Whren, a traffic infraction can justify a stop even where the police officer made the stop for a reason other than the occurrence of the traffic infraction. But if officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive. Accordingly, we hold that Flori's actions do not pass muster under the good-faith exception to the exclusionary rule."
U.S. v. Lopez-Valdez, 1999 WL 350627 (5th Cir. 6/1/99)

SUBPOENAS:

Subpoenas: Federal Public Defender Not a "Government Entity" for Purposes of Stored Wire and Electonic Communications

United States v. Amawi, 552 F.Supp.2d 679 (N.D. Ohio 2008)

SUFFICIENCY OF EVIDENCE

Sufficiency: Credibility Determinations Belong to the Jury
U.S. v. Ndiaye,434 F.3d 1270 (11th Cir. 2006) U.S. v. Moore, 525 f3d 1033 (11th Cir. 2008)
Sufficiency: Judgment of Acquittal - Bench Trial
A motion for a judgment of acquittal in unnecessary in a bench trial to preserve a claim regarding the sufficiency of the evidence.
U.S. v. Hurn, Case No. 03-13366 (11th Cir. 5/7/04)
Sufficiency: Constructive Possession
A defendant has constructive possession if he exercises ownership, dominion, or control over the firearm. A defendant *also* has constructive possession if he has the power and intention to exercise that dominion or control.
U.S. v. Gunn, Case No. 02-13256 (11th Cir. 2004)
Sufficiency: Some Limit on Jury's Ability to Infer Guilt from Circumstantial Evidence
"Although a jury has wide latitude to determine factual issues and to draw reasonable inferences form circumstantial evidence, this power is not without limits, and this Court cannot affirm a criminal conviction by an unlimited application of a jury's 'power to infer' not matter how attenuated the link between the evidence and the defendant's guilt on a necessary element of the offense of conviction."
U.S. v. McCarrick, Case No. 01-15065 (11th Cir. 6/18/02)
Sufficiency: Constructive Possession: Multiple Occupants of Motel Room & Conspiracy
Although, there were several occupants of the motel room, the defendant's use of the motel room, coupled with the discovery of $6,500 in cash on the defendant's person and a large quantity of drugs within the room was enough to support a conviction for substantive drug offense and a related conspiracy charge.

U.S. v. Cooper, 13 FLW Fed C394 (11th Cir. 2/14/00)
Sufficiency: Judgment of Acquittal
In considering a JOA motion the standard is the same used in reviewing a conviction on appeal, whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt.
U.S. v. Ward, 13 FLW Fed C229 (11th Cir. 12/8/99)
Sufficiency: No Need To Exclude Every Reasonable Hypothesis of Innocence
U.S. v. Majors, 13 FLW Fed C161 (11th Cir. 11/19/99); U.S. v. Abbell, 15 FLW Fed C35 (11th Cir. 11/7/01); U.S. v. Ndiaye, Case No. 04-11283 (11th Cir. 1/6/06)
Sufficiency: Defendant's False Testimony - Must Be Something More to Withstand JOA
It is only the defendant's false testimony in combination with other evidence of guilt that is sufficient to withstand a motion for a judgment of acquittal.
U.S. v. McCarrick, Case No. 01-15065 (11th Cir. 6/18/02), U.S. v. Williams, Case No. 03-15395 (11th Cir. 11/16/04)
Sufficiency: Defendant's False Testimony Might Be Viewed as Additional Evidence
"When a defendant chooses to testify, he runs the risk that if disbelieved the jury might conclude the opposite of his testimony is true."
U.S. v. Rudisill, 12 FLW Fed C1239 (11th Cir. 9/3/99), but see U.S. v. Williams, Case No. 03-15395 (11th Cir. 11/16/04)(Corrigan, J. concurring opinion)
Sufficiency: Confessions (Won't Support Conviction if Uncorroborated)
Smith v. U.S., 75 S.Ct. 194 (1954); Opper v. U.S. 75 S.Ct. 164 (1954); U.S> v. Dickerson, 163 F.3d 639 (D.C. Cir. 1999); U.S. v. Jackson, 103 F.3d 561, 566 (7th Cir. 1996); U.S. v. Kerley, 838 F.2d 932 (7th Cir. 19880; U.S. v. Todd 657 F.2d 212 (8th Cir. 1981); U.S. v. Micieli, 594 F.2d 102 (5th Cir. 1979)
Sufficiency: Witness Incredible as a Matter of Law
For testimony of a government witness to be incredible as a matter of law, it must be unbelievable on its face, and must relate to facts that the witness physically could not have possibly observed or events that could not have occurred under the laws of nature.
U.S. v. Calderon, 127 F.3d 1314, 1325 (11th Cir. 1997); U.S. v. Steele, 12 FLW Fed (11th Cir. 6/25/99)
Sufficiency: Standard
The evidence in a case is sufficient to support a conviction, if, after viewing the evidence in a the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
Jackson v. Virginia, 99 S.Ct. 2781 (1979); U.S. v. Mount, 161 F.3d 675 (11th Cir. 1998)

TAX FRAUD

Tax Fraud: Good Faith Exception
If someone simply fails to understand that he has a duty to pay income taxes under the Internal Revenue Code, he cannot be guilty of "willfully" evading those taxes.
U.S. v. Dean, Case No. 06-13946 (11th Cir. 5/25/07)
Tax Fraud: Conspiracy (Tax Purpose Must Be the Object)
The tax purpose must be the object of a Klein conspiracy, and not merely a foreseeable consequence of some other conspiratorial scheme. If impeding the IRS is only a collateral effect

of an agreement, rather than one of its purposes, then a conviction for a Klein conspiracy cannot stand.
U.S. v. Adkinson, 12 FLW Fed C187 (10/26/98)
Tax Fraud: Failure to Disclose Income Not Sufficient to Prove Conspiracy
The mere failure to disclose income would not be sufficient to show a section 371 conspiracy to defraud the United States.
U.S. v. Adkinson, 12 FLW Fed C187 (10/26/98)

TELECOMMUNICATIONS

Telecommunications: Cell Phone Microchips - Explained
U.S. v. Sepulveda, 11 FLW Fed C70 (11th Cir. 6/20/97)
Telecommunications: Cloning Explained
U.S. v. Cabrera, 12 FLW Fed C743 (11th Cir. 4/19/99)
Telecommunications: Calculation of Loss for Cloning Tools
When the government convicts an individual for possession of cloning "tool", and wishes to enhance the sentence based on the amount of use associated with the ESN/MIN combinations, the government must provide evidence specifically linking the amount of fraud loss to the defendant's cloning activities. Multiple unauthorized users often use the same ESN/MIN combinations simultaneously. Further, sellers provide rhe same ESN/MIN combinations to multiple buyers. Because the ESN/MIN combinations are a commodity that many individuals can utilize, the government must provide proof to attribute the unauthorized calls made with the ESN/MIN combinations to the defendant.
U.S. v. Cabrera, 12 FLW Fed C743 (11th Cir. 4/19/99)

TREATIES:

Treaties: Transfer - U.S. Parole Commission's Sentencing Determination
For the general process and an example of a challenge to the sentence calculation see:
Odill v. United States Parole Commission, Case No. 05-12717 (11th Cir. 1/10/07)
Treaties: Vienna Convention on Consular Relations
Court held that the suppression of the defendants statements was not an appropriate remedy for the failure of the trial court to advise a Mexican national of his right to assistance from the Mexican Consul.
Sanchez-Llamas v Oregon, 126 S.Ct. 2669 (2006)
Treaties: List of Treaties in Force
The U.S. State Department maintains a listing of all the treaties in force: Office of the Legal Advisor, U.S. Dep't of State, *Treaties in Force.*
Kastnerova v. U.S., Case No. 03-14119 (11th Cir. 4/8/04)
Treaties: International Covenant of Rights
The plain terms of the International Covenant on Civil and Political Rights govern the relationship between a State and the individuals within the State's territory. The treaty,

furthermore, does not create judicially enforceable rights. Thus, in this case the treaties failed to provide a remedy for the defendant.
U.S. v. Duarte-Acero, Case No. 01-13457 (11th Cir. 7/12/02)
Treaties: Article 36 of Vienna Convention
". . . even if Article 36 creates rights enforceable by individuals, . . . the remedies available for violation of Article 36 do not include the suppression of evidence or the dismissal of an indictment.
U.S. v. Cordoba-Mosquera, 13 FLW Fed C677 (11th Cir. 5/23/00); U.S. v. Duarte-Acero, Case No. 01-13457 (11th Cir. 7/12/02); but see Medellin v. Dretke, Case NO. 04-5928 (S. Ct. 5/23/05); Maharaj v. Secretary for the Dept. of Corrections, Case No. 04-14669 (11th Cir. 12/15/05)
Treaties: Transfer of Sentenced Persons - In General
Bishop v. Reno, 13 FLW Fed C625 (11th Cir. 4/24/00)
Treaties: ICCPR - Double Jeopardy
The provisions of the International Covenant on Civil and Political Rights did not bar criminal prosecution in the U.S. for the same crimes of which defendant had been convicted in Columbia. The provisions of the treaty govern the relationship between an individual and his state, not affairs between nations.
U.S. v. Duarte-Acero, 13 FLW Fed C577 (11th Cir. 4/13/00)
Treaties: Extradition - Specialty Doctrine
Doctrine of specialty does not restrict scope of proof of other crimes that may be considered in sentencing process if that evidence is germane to determination of punishment for extradited crime. Consequently, in determining relevant conduct under Sentencing Guidelines and in departing upward from Guideline range, sentencing court's consideration of defendant's marijuana dealings beyond those to which he pled guilty and defendant's murder of his marijuana distributor did not violate provision in extradition treaty that "a person extradited shall not be detained, tried, or punished or offense other than that for which extradition has been granted."
U.S. v. Garcia, 13 FLW Fed C574 (11th Cir. 4/10/2000)
Treaties: Defendant's Standing to Raise Treaty Violation
Criminal defendants lack standing to raise a violation of an international treaty that is not self executing.
State v. Stepansky, 25 FLWS297 (4/20/00)

TRIAL

Trial: Pre-Miranda Silence
Eleventh Circuit has held that comments on silence between arrest and the Miranda warnings does not violate due process and that such silence can be considered as evidence of guilt. There is a significant split in the circuits with some courts holding that even pre-arrest silence can't be considered as evidence of guilt.
U.S. v. Wilchcombe, Case No. 14-14991 (11th Cir. 10/4/16)
Trial: Exclusion of Public from Trial
There was room only for the venire during jury selection and others, including the defendant's family members were excluded from the courtroom during jury selection. There was no

objection from the defense. While the exclusion of the public was structural error, in the absence of an objection, the defendant has the burden of establishing prejudice. Here, the defendant failed to make that showing and his conviction was upheld.
Weaver v. Massachusetts, Case No. 16-240 (S. Ct. 6/22/17)
Trial: Defense Counsel's Temporary Absence was not Structural Error
U.S. v. Roy, Case No. 12-15093 (11th Cir. 4/26/17)
Trial: Rule 17(C) Subpoenas - Supervision Belongs to the Sound Discretion of District Court
Opinion includes a discussion of the history of the rule and the different court interpretations.
U.S. v. Llanez-Garcia, 735 F.3d 483 (6th Cir. 2013)
Trial: Transcripts - Challenge to Accuracy
"This circuit has established a procedure for challenging the accuracy of an English-language transcript of a conversation conducted in a foreign language. If the parties cannot agree on a stipulated transcript, then each side should produce its own version of a transcript or its own version of the disputed portions. When a defendant does not avail himself of this procedure, he waives his right to challenge the translation and the transcripts."
U.S. v. Curbelo, Case No. 10-14665 (11th Cir. 8/9/13)
Trial: Indigent Defendant's Right to Assistance from Expert
U.S. v. Feliciano, Case No. 12-15341 (11th Cir. 4/3/14)
Trial: Directive that Defendant Not to Discuss Testimony With Lawyer During Break in Trial
Where, after the defendant had begun testifying and the trial was about to break for the evening, the court directed the defendant no to discuss his testimony with anyone, though he could discuss his constitutional rights with his lawyer, the court of appeals held that the trial court violated the defendant's Sixth Amendment right to counsel and ordered a new trial.
U.S. v. Cavallo, Case No. 12-15660 (11th Cir. 6/22/15)
Trial: Example of Trial Based on Stipulated Facts
Done, in this instance, because the defendant wanted to appeal the denial of his motion to suppress, and the government wouldn't agree to a conditional plea.
U.S. v. Timmann, Case No. 11-15823 (11th Cir. 12/18/13); U.S. v. Timmann, Case No. 11-15832 (11th Cir. 12/18/13)
Trial: Defendant Who Flees During Trial
See U.S. v. Stanley, Case No. 12-11126 (11th Cir. 1/6/14)
Trial: Disruptive Defendant Who Refuses to Attend Trial
F.R.Cr.P. 43 allows defendant to voluntarily absent himself from trial as long "after the trial has begun." Court held that defendant's presence in the holding cell prior to jury selection and the exchange between the trial judge and the defendant at that time satisfied the rule's requirement.
U.S. v. Sterling, 738 F.3d 228 (11th Cir. 2013)
Trial: Comment on Pre-Arrest Silence
Where defendant was not arrested until two weeks after the murder and he testified at trial that he acted in self-defense, the prosecutor's questioning of the defendant as to why he had not reported the incident earlier and his argument that the failure to report the crime was evidence of guilt did not violate the Fifth Amendment.
Jenkins v. Anderson, 447 U.S. 231 (1980)
Trial: Comment on Defendant's Silence
Comment on defendant's silence during custodial interrogation violates the Fifth Amendment

Salinas v. Texas, Case No. 12-246 (S. Ct. 6/17/13) (Breyer, J. dissenting); U.S. v. Zitron, Case No. 14-10009 (11th Cir. 1/21/16)

Trial: Jury Not Required to Determine Voluntariness of Confession

The jury is not required to make an independent finding on whether a defendant's confession was voluntary.

U.S. v. Woods, 684 F.3d 1045 (11th Cir. 2012)

Trial: In-Court Identification Involve Suggestive Circumstances

"Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do."

Perry v. New Hampshire, Case No. 10-8974 (S. Ct. 11/2/11)

Trial: Right Not to Wear Jail Clothes

Where the defendant who was representing himself and prior to the trial date had told the court he would have street clothing, the trial court justifiably denied the defendant's request for a continuance when, on the day of trial, he did not have street clothes. Under the circumstances, the defendant's appearance in street clothes did not violate due process.

U.S. v. Graham, Case No. 08-14736 (11th Cir. 6/14/11)

Trial: Colloquy About Defendant's Decision Not to Testify

The district court does not normally engage in a colloquy with the defendant to ensure tha tthe decision not to testify was made knowingly and intelligently. Such a colloquy would improperly disturb the attorney-client relationship and would suggest the district court believed the defendant's choice improvident.

U.S. v. Ly, Case No. 09-12515 (11th Cir. 7/20/11)

Trial: Judges Right to Comment on Evidence, Question Witnesses, and Cut Off Counsel

Jude may do all of these things and commits error only when he strays from neutrality.

U.S. v. Alcincor, Case No. 07-14602 (11th Cir. 6/14/11)

Trial: Cross Examination of Informants

Importance of being able to cross examine an informant.

Childers v. Floyd, Case No. 08-15590 (11th Cir. 6/8/10)

Trial: Judge's Authority to Declare a Mistrial on Basis of Hung Jury

See Renico v. Lett, Case No. 09-338 (S. Ct. 5/3/10)

Trial: Questioning of Defendant About Omission From Statement Given to Police

Where the defendant invokes his or her Fifth Amendment right to remain silent after having given a statement, the prosecutor may not ask, at trial, about omissions from the statement. Here the defendant had told officers she had loaned the truck in which cocaine was found to someone whom she did not name, but subsequently invoked her right to remain silent. When at trial, she said she had loaned the truck to a relative of a friend, the prosecutor's questioning about the omission violated the defendant's Fifth Amendment right to remain silent.

U.S. v. Caruto, Case No. 07-50041 (9th Cir. 5/12/08)

Trial: Rule of Sequestration - Exception for Victim

See: U.S. v. Edwards, Case No. 06-11643 (11th Cir. 5/5/08)

Trial: Comment on Defendant's Silence in the Absence of Miranda Warnings

Due process is not violated by the use for impeachment purposes of a defendant's silence prior to arrest or after arrest if no Miranda warnings are given.

U.S. v. O'Keefe, Case No. 05-11924 (11th Cir. 8/22/06)

Trial: Continuance

For mention of those rare cases where the Court of Appeals concluded it was error to deny a motion to continue see:
U.S. v. Baker, Case No. 00-13083 (11th Cir. 12/13/06)
Trial: Comment on Defendant's Silence - Not Always a Due Process Violation
While use of the defendant's silence at the time of arrest and after receiving Miranda warnings in an effort to impeach him at trial violates the Due Process Clause, if the prosecution mentions the defendant's silence only in passing, and makes no specific inquiry or argument about the defendant's post-arrest silence, there is no due process violation.
U.S. v. Baker, Case No. 00-13083 (11th Cir. 12/13/06)
Trial: Mistrial
The law is settled that a mistrial requested by the defendant because of prosecutorial misconduct does not bar a retrial under double jeopardy principles, unless the prosecutor intentionally misbehaved for the specific purpose of goading the defendant into moving for the mistrial.
U.S. v. Jordan, Case No. 04-15381 (11th Cir. 11/3/05)
Trial: Shackles
The decision to use shackles to restrain a defendant at trial should rarely be employed as a security device. The Supreme Court has observed that no person should e tried while shackled except as a last resort.
U.S. v. Baker, Case No. 00-13083 (11th Cir. 12/13/06)
Trial: Shackles
The constitution forbids the use of visible shackles during the penalty phase in a death penalty case, as it forbids their use during the guilt phase, unless that use is justified by an essential state interest such as the interest in courtroom security specific th the defendant on trial.
Deck v. Missouri, Case No. 04-5293 (S. Ct. 5/23/05)
Trial: Comment on Defendant's Silence
A comment is deemed to be a reference to the defendant's silence if either (1) it was the prosecutor's manifest intention to refer to the defendant's silence, or (2) the remark was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's silence.
U.S. v. Guerra, Case No. 00-10744 (11th Cir. 6/11/02); U.S. v. Thompson, Case No. 04-12218 (11th Cir. 9/1/05)
Trial: Rebuttal - Sandbagging OK?
Judge is vested with considerable discretion.
U.S. v. Chrzanowski , 502 F.2d 573 (3d Cir. 1974); U.S. v. Sadler, 488 F.2d 434 (5th Cir. 1974); Wright & Miller Treatise FPP s 6164
Trial: Defendant's Voluntary Absence
For an example of where the defendant's absence due to illness was cause of new trial, see U.S. v. Novaton, 271 F.3d 968 (11th Cir. 2001)
Trial: Absence of Defendant - Contumacious Conduct
Consideration of relevant factors including the defendant's contumacious conduct, in certain curcumstances, may support a district court's decision to proceed with trial in a single-defendant case.
U.S. v. Bradford, 14 FLW Fed C311 (11th Cir. 1/9/01)
Trial: Absence of Defendant (Jury Selection Begins Trial)
For purposes of Rule 43, which allows the trial to proceed in the defendant's absence once the trial begins, the beginning of jury selection begins the trial.

U.S. v. Bradford, 14 FLW Fed C311 (11th Cir. 1/9/01)
Trial: Substitution of Judge During Trial
Isn't structural error, and is subject to harmless error analysis.
McIntyre v. Williams, 13 FLW Fed C795 (11th Cir. 6/30/00)
Trial: Shackling
No abuse in discretion in decision that shackling was appropriate during prisoners' trial and that leg irons were the least restrictive means of effective restraint.
U.S. v. Mayes, 12FLW Fed. C231 (11th Cir 10/29/98); U.S. v. Battle, 12 FLW Fed C789 (11th Cir. 4/28/99)
Trial: Expense of Providing Clothes to Client Standing Trial
Court held F. Lee Bailey should have been reimbursed for purchasing suit of clothes for client.
U.S. v. F. Lee Bailey, 175 F.3d 966 (11th Cir. 1999)
Trial: Cross Examination - Limitations
A defendant's confrontation rights are satisfied when the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of the witnesses and enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable. Once a defendant has engage in sufficient cross-examination to satisfy the Confrontation Clause, further questioning is within the trial court's discretion.
Mills v. Singletary, 12 FLW Fed C287 (11th Cir. December 1, 1998)

U.S. ATTORNEY

U.S. Attorney: Right to a Disinterested Prosecutor
See: U.S. v. Siegelman, Case NO. 12-14373 (11th Cir. 5/20/15)
U.S. Attorney: Court's Jurisdiction Limited by Prosecutor's Authority to Prosecute
While a district court lacks jurisdiction to entertain a criminal case if it appears the government lacks the power to prosecute the defendant, in this instance where the claim was that the appointment of the U.S. Attorney was not made as provided by the Appointments Clause of the Constitution, did not affect the government's authority to prosecute.
U.S. v. Suescun, 14 FLW Fed C323 (11th Cir. 1/8/01)

VENUE AND JURISDICTION

Venue: Pervasive Community Prejudice
In a case involving alleged unregistered intelligence agents and the shoot down of a U.S. civilian aircraft outside of Cuban and U.S. airspace, the Court held that the failure to change venue in the face of pervasive community prejudice, and extensive publicity before and during the trial did not require a new trial.
U.S. v. Campa, Case No. 01-17176 (11th Cir. 8/9/05)
Venue: Government's Burden of Proof
Government must show by a preponderance of the evidence that the crime occurred in the district where the defendant is being prosecuted.
U.S. v. Breitweiser, Case No. 02-15095 (11th Cir. 1/26/04)

Venue: Crimes Involving Use of Transportation
Under 18 USC § 3237, crimes involving transportation in interstate commerce may be prosecuted in any district through which the defendant travels.
U.S. v. Breitweiser, Case No. 02-15095 (11th Cir. 1/26/04)
Venue: Interstate Transportation
Any offense involving the use of transportation in interstate or foreign commerce is a continuing offense and, except as otherwise expressly provided by Congress, may be prosecuted in any district through which such commerce moves.
U.S. v. Breitweiser, Case No. 02-15095 (1/26/04)
Venue: Right to Be Tried in District Where Offense Committed - Waiver
The Sixth Amendment and FRCrP 18 guarantee the right to be tried in the district where the offense was committed. If the absence of proper venue is apparent from the face of the indictment, right is waived if an objection is not raised prior to trial.
U.S. v. Roberts, Case No. 02-10018 (11th Cir. 10/4/02); U.S. v. Breitweiser, Case No. 02-15095 (1/26/04); U.S. v. Greer, Case No. 05-11295 (11th Cir. 12/24/06)
Venue: Jurisdiction May Be Determined by Court
In this case, involving the Maritime Drug Law Enforcement Act, the Court found that the 1996 Amendment to the Act resolved any prior ambiguity and established that the trial court, rather than the jury, was responsible for determining whether the court had jurisdiction over the case. Court went on to hold that, despite an arguably poor effort on the part of the Coast Guard to determine whether the ship was registered in Columbia, the trial court properly found the Government had meet its burden of showing that the ship was a "vessel without nationality" and, thus, subject to the jurisdiction of the court.
U.S. v. Tinoco, Case No. 01-11012 (11th Cir. 9/4/02)
Venue: Maritime Drug Law Enforcement Act
Seizure of a ship, by the U.S. Coastguard, 475 miles west of the Columbian/Ecuadorian border in the Eastern Pacific Ocean, properly tried in the Middle District of Florida because, pursuant to the act, it was treated as a vessel without nationality and, thus, subject to the jurisdiction of the United States.
U.S. v. Tinoco, Case No. 01-11012 (11th Cir. 9/4/02); U.S. v. Rendon, Case No. 02-16208 (11th Cir. 12/31/03)
Venue: Kidnaping DEA Agents in Columbia
Nothing wrong with tricking defendant into crossing into Ecuador from Columbia, where he was arrested by DEA and Ecuadorian police and delivered to the United States for trial. Offense was that of kidnaping two DEA agents from a hotel room in Columbia.
U.S. v. Duarte-Acero, 296 F.3d 1277 (11th Cir. 2002)
Venue: Change Due to Publicity
To establish that pretrial publicity prejudiced the defendant without an actual showing of prejudice in the jury box, the defendant must show first that the pretrial publicity was sufficiently prejudicial and inflammatory and second that the prejudicial pretrial publicity saturated the community where the trial was being held.
Spivey v. Head, 13 FLW Fed C516 (3/28/00); Meeks v. Moore, 13 FLW Fed C774 (11th Cir. 6/27/00)
Venue: Firearm Possession (924(c)(1)

In this kidnaping offense that covered many states, the Court held that the defendant could be charged with possession of a firearm during a crime of violence in any of the districts despite the fact that the gun was possessed in only one district.
U.S. v. Rodriguez-Moreno, 12FLW Fed S175 (3/39/99)
Venue: Crime Occurring in Multiple Districts
"Title 18 of the United States Code, governing the jurisdiction and venue of the federal courts, provides that 'any offense begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.' 18 U.S.C. 3237(a).
U.S. v. Matthews, 12FLW Fed C535 (11th Cir 3/1/99)
Venue: Conspiracies
"Where a conspiracy is concerned, venue is thus proper in any district where "an overt act" was committed in furtherance of the conspiracy. The overt act need not be committed by a defendant in the case; the acts of accomplices and unindicted co-conspirators can also expose the defendant to jurisdiction. Moreover, the fact that a majority of a conspiracy's activity took place in a venue other than the one where the trial takes place does not destroy venue."
U.S. v. Matthews, 12FLW Fed C535 (11th Cir 3/1/99)

VERDICT

Verdict: Supported on One Ground But Not Another
The jury's verdict must be set aside if it could be supported on one ground and not another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict.
U.S. v. McNab, Case No. 01-15148 (11th Cir. 5/29/03)
Verdict: Logical Impossibility
Even where conviction on one count and acquittal on another count is a logical impossibility, the conviction will stand unless it was otherwise obtained in error.
U.S. v. Schlaen, Case No. 01-10683 (11th Cir. 8/8/02)
Verdict: Alternative Ways of Committing Crime Need Not Have Unanimous Support
"In that 'use and "carry' are alternative means of violating section 924(c)(1), 'jury unanimity is not required with respect to the 'use' and 'carry' elements' (authority omitted). In other words, a jury could legitimately convict a defendant even if some of the jurors thought that the defendant 'used,' but did not 'carry' a firearm, while the other jurors thought that the defendant 'carried,' but did not 'use' a firearm."
U.S. v. Wilson, 12 FLW Fed C1186, n. 6 (11th Cir. 8/12/99)

WIRETAPS

Wiretaps: "Necessity" Requirement
The "necessity requir3ment of 18 U.S.C. § 2518 ensures that law enforcement does not use electronic monitoring when less intrusive methods will suffice.
U.S. v. Perez, Case No. 09-13409 (11th Cir. 10/26/11)

Wiretaps: New Alias
The provision in the federal wiretap act that requires law enforcement agents to minimize the interception of communications not covered in a court order does not obligate them to halt surveillance and seek a new order each time a suspect takes on a new name.
U.S. v. Fernandez, Case No. 06-50595 (9th Cir. 5/27/08)
Wiretaps: Good Faith Exception for Search Warrants Doesn't Apply to Wiretap Warrants
The exclusionary remedy provided by Title III (18 USC '2510-20), unlike the judicially created rule for constitutional violations, is a creature of legislative action and, therefore, not subject to the good faith exception created in U.S. v. Leon, 468 U.S. 897 (1984).
U.S. v. Rice, Case No. 06-5245 (6th Cir. 3/2/07)
Wiretaps: Failure to Immediately Seal Recordings
There was no merit to the defendant's contention that the district court erred in admitting recordings of the two telephone conversations because recordings were not sealed in compliance with 18 USC 2518(a), which requires that recordings be sealed "immediately upon expiration" of the period of the order authorizing the interception of communications." "Within one or two days" is a reasonable, workable interpretation of the term "immediately upon" the order's expiration."
U.S. v. Matthews, Case No. 03-15528 (11th Cir. 12/6/05)
Wiretaps: Violation Provides No Basis for Suppression
"While the Wiretap Act clearly provides criminal and civil sanctions for the unlawful interception of electronic communications, the Act provides no basis for moving to suppress such communications."
U.S. v. Steiger, Case No. 01-5788 (11th Cir. 1/14/03)
Wiretaps: Hacking Into Another's Computer Didn't Violate Act
Where information provided in confidential source's emails to police was obtained through the use of a computer virus that allowed the source to access and download information stored on the defendant's personal computer, that conduct did not constitute an interception of electronic communications in violationof the Wiretap Act.
U.S. v. Steiger, Case No. 01-5788 (11th Cir. 1/14/03)

WITNESSES

Witnesses: Cross Examination of Informants
Importance of being able to cross examine an informant.
Childers v. Floyd, Case No. 08-15590 (11th Cir. 6/8/10)
Witnesses: Vague Promise of Favorable Treatment
"Rather than weakening the significance for credibility purposes of an agreement for favorable treatment, tentativeness may increase its relevancy. This is because a promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced - the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor.
U.S. v. Curtis, Case No. 02-16224 (8/11/04 11th Cir.)(quoting from Boone v. Paderick, 541 F.2d 447, 451 (4th Cir. 1976))
Witnesses: Detention of Material Witnesses

18 U.S.C. 3144 provides for the detention of material witnesses. In this case the court concluded it extends to grand jury witnesses.
U. S. v. Awadallah, Case No. 02-1269 (2d Cir. 11/7/03)

Witnesses: Substantial Assistance Witnesses Subject to Credibility Problems

In the context of conducting a harmless error analysis, the Court recognizes the credibility problems with those witnesses that benefit from their testimony.
U.S. v. Hands, 184 F.3d 1322 (11th Cir. 1999)

Witnesses: Impeachment - Prior Convictions

Rule 609 requires that evidence of prior convictions of a non-defendant witness be admitted if (1) the convictions are for crimes punishable by death or imprisonment in excess of one year, (2) the convictions are less than ten years old, and (3) the evidence is being used to attack the witness' credibility. The rule requires a district court to admit evidence of the nature and number of a non-defendant witness' prior felony convictions.
U.S. v. Burston, 12FLW FedC239 (11th Cir. 1998)